

**THE PENAL IMPACT OF**  
**COMMUNITY PUNISHMENT**  
**IN ENGLAND AND WALES**

*A Conceptual and Empirical Study*

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## **Abstract**

This thesis examines two research questions: firstly, how does community punishment impact upon the lives of those subjected to it; and secondly, to what extent is that impact affected by the relationship between the offender and her Probation Service supervisor? It considers these questions in both conceptual and empirical terms by outlining, and then deploying, the analytical framework of *penal impact*, an approach to penal severity that uses pain as a metric by which to judge the suitability of punitive interventions. By evaluating sentence severity in terms of penal impact, one can examine both the types of pain that follow from a particular sentence, as well as their relative magnitude, building up a qualitative comparison of different impositions of community punishment.

However, because pain is an inherently subjective concept, the evaluation of penal impact requires empirical data. This study therefore explores the findings of interviews with nine offenders and 11 supervision officers within a single Probation Trust. The data drawn from these interviews indicate a broad range of pains that vary considerably in their intensity and incidence from offender to offender. The study explores the question of the extent to which these pains can be associated with the formal process of punishment, the extent to which they can be considered punitive in a retributive sense, and the means by which such pains can be compared between subjective experiences. It concludes that the penal impact of community punishment in England and Wales is considerable, and goes substantially beyond the relatively 'soft' image suggested by a narrow, liberty-based conception of sentence severity. The process of supervision has a substantial effect upon the pains felt – and therefore, upon the sentence's overall impact. The implications of these conclusions for sentencing policy in England and Wales are discussed, and avenues of further research are identified.

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## **Introduction**

State punishment – that is, the imposition of hardship on an individual in response to her wrongdoing<sup>1</sup> – occupies a difficult and often contentious position in modern liberal democracies. The criminal law represents the strongest form of (lawful) condemnation available to the State (Ashworth 2009: 1). Accordingly, in a liberal democracy<sup>2</sup> that values individual autonomy, the imposition of punishment that is unpleasant, difficult to endure, or in any event mandatory, upon State subjects requires *justification* (Duff 2001: xii-xv; Ashworth 2010: 74-76). Even where they can be justified, punitive interventions should be used only minimally, to protect subjects from the power of the State, and to maximise the freedoms enjoyed by citizens in everyday life (Ashworth 2009: 31-34). Furthermore, in an era of international, regional and national human rights law, the dignity of the State's (human) subjects – even those that break the law – is sacrosanct.

Counterbalancing these high principles, however, is the requirement that punishment should be *effective*. The effectiveness of punishment depends upon the aims being pursued by the criminal justice system. Since 'justice' is a highly contested concept, many penal aims have emerged over time.<sup>3</sup> Of these, one of the most important aspects of criminal punishment is its ability to inflict punishment as a symbol of public displeasure with the offender, a collection of approaches that we might call *punitiveness*.

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<sup>1</sup> In this case, breaches of the criminal law. Cf. McPherson 1967; Feinberg 1970.

<sup>2</sup> Or at least, some arrangement of State institutions that aspires (or claims to aspire) towards liberal democracy, which is after all an ideal type (Dalton 2014: 15-36). Precisely to avoid pedantic footnotes such as this, I proceed on the assumption that England and Wales should be treated as a liberal democracy for the purposes of evaluating the values inherent in its penal practices.

<sup>3</sup> Most modern conceptions of justice in the English legal context depend upon Rawls' (1971) account of 'justice as fairness', which uses the conceit of rational actors coming together in an 'original position' and without vested interests to determine the fairest distribution of wealth and freedoms. However, Rawls' liberal stance has been subject to substantial critique, not least from Sen (2009), who proposes a less transcendental notion of 'comparative' justice, in which fairness is achieved by incremental improvements.

## Introduction

Punitive attitudes are as old as criminal justice itself, at least in England and Wales. Historically, State-imposed punishment replaced the ancient Germanic (*lex Salica*) tradition of the blood-feud with a centralised system derived from the authority of the king (Wormald 1999: 39-40, 311-312). This satisfied several important political and cultural objectives, including: the need to establish an orderly society, with which the chaotic and violent tradition of blood-feud was antithetical; the emergence of Christian notions of mercy, peace and goodwill as public values, which were hard to reconcile with inter-familial violence; and, not least, the developing political power of the central monarchy over the regional power of clan and feudal lord (*ibid.*). However, the transition was not an absolute one. Even if only as a controlled release of private desires for vengeance in order to prevent society from collapsing into a tangle of vigilantism and vendetta, and notwithstanding other extant penal aims, State punishment has always retained the symbolism of revenge against wrongdoers (Harding 1983: 89).

This symbolism of revenge continues to pervade Anglo-Welsh penal politics, especially in the uncertain age of *late modernity* (Winter 2005). Confronted with shrinking levels of State provision of welfare and security, public concerns for personal and social stability have been channelled into a penal-political phenomenon known as 'populist punitiveness':<sup>4</sup> the practice of putting the perceived popularity of a policy ahead of its actual effectiveness at satisfying its stated goals (Roberts *et al* 2003). In particular, it has led to a 'law and order arms race' in British politics since the 1970s (Lacey 2008: 173). The public are thought to want an ever-tougher response to the problem of criminality, whether due to the perception of ever-rising crime or simply as a response to the insecurity of late-modern life (*ibid*: 20-29). Regardless of whether this representation

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<sup>4</sup> The reversed (and synonymous) formulation, 'penal populism', is also often used.

of public opinion is factually correct (*cf.* Maruna and King 2004), it dominates political discourse. Politicians perceive that only a 'tough' criminal justice system will satisfy the needs of the democratic electorate. Penal moderation becomes 'softness on crime', which amounts to political suicide (Lacey 2008: 173-181). Punishments become increasingly onerous, condemnatory and oppositional: the offender deserves to suffer for daring to disrupt social order (*cf.* Duff 2001: 20-21), and punishment is the means by which that suffering is to be delivered.

Against the backdrop of these tensions – liberalism versus democracy, minimal intervention versus toughness on crime – a distinct crisis of legitimacy has emerged in the field of *community punishment*: a group of sentencing options characterised by their location outside of prisons (*i.e.* in a 'community' context), whilst still involving some element of oversight by a State agent.<sup>5</sup> Compared with short sentences of imprisonment, their main alternative (*cf.* van Zyl Smit *et al* 2007), community punishments measure up unfavourably in terms of perceived penal severity. Their subjects receive only a partial deprivation of their general freedom, and remain within their everyday community context. Coupled with the historically benevolent, humanistic oversight of the Probation Service, it is hardly surprising that community punishment has acquired a reputation as a 'soft option', or that politicians have called for it to be 'toughened up' (*e.g.* Furness 2012, Winnett 2012; Ministry of Justice 2012: 3). Measured against the immediately apparent liberty deprivations of imprisonment, community punishment does not appear to be a particularly effective punishment, at least at first glance.

But to what extent is it the case that these interventions actually represent a 'soft option' in terms of effectively punishing offenders? This enquiry will critically consider this issue, by asking two core research

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<sup>5</sup> I justify this definition below, at **1.1**.

questions. Firstly, *what impact does community punishment have upon the lives of those subject to it?* Secondly, *to what extent is that impact affected by the relationship between the offender and her supervising probation officer?*

Approaching penal severity through these two questions offers a number of advantages. By rooting the enquiry in a socio-legal conception of severity (the impact of community punishment upon its subjects' lives), we can get closer to the effect of the orders imposed upon offenders as *social actors*. Doing so shifts our perspective of the consequences of criminal justice into a broader, more sociological context, through which the penal-populist legitimacy challenge to community punishment can be more comprehensively understood, and subjected to a fuller analysis.

By engaging with the 'soft option' critique on its own terms, we may evaluate it more effectively. What is 'softness', or for that matter 'toughness'? The existence of a populist punitive critique, no matter its accuracy, suggests that the abstract philosophical conception of liberal criminal justice has proven to some extent unconvincing. By moving towards a more nuanced understanding of what (community) punishment entails as a social phenomenon, and not just as a legal intervention, the case for minimum penal intervention can be more effectively made at the popular-political level, in a manner more readily comprehensible to the experience of the average democratic citizen.

Furthermore, by rooting the enquiry specifically in the relationship between the offender and her supervisor, we engage directly with the institutions of community punishment, at least as they existed at the time of this research.<sup>6</sup> Whilst part of the 'softness' critique lies not only in the

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<sup>6</sup> The empirical study that provides the subject-matter for this analysis was conducted between July 2013 and February 2014. In June 2014, the Probation Service was substantially reformed under the widespread privatisation of the *Transforming Rehabilitation* agenda. Given the temporal restriction of the findings to the previous State-run Probation Service, I limit my discussion to that institutional arrangement (see **1.2** and **1.3** generally).

relative liberty of offenders under community punishment, the humanistic, rehabilitation-oriented support of the Probation Service also undoubtedly contributes (*cf.* Canton 2007a). The relationship between offender and supervisor is the most direct interface between the subject and the State, the offender and the penal system, and so is the most important site of the offender's own experience of their punishment, as well as a highly visible site in which to demonstrate community punishment's effectiveness (or 'toughness', however constructed; Phillips 2014). Examining this specific site of punishment enables critical consideration of the extent to which rehabilitative benevolence precludes toughness on crime, and therefore to which the Probation Service's interventions require 'toughening up'.

The study is divided into three Parts. Part **I** sets out the conceptual groundwork for the study in three chapters. Chapter **One** defines the subject of the enquiry, community punishment, considering its conceptual meanings, exploring its history, and defining its modern content at law.

From this launching point we can discuss the effectiveness of community punishment *as* punishment. However, this study does not simply accept the populist punitive position. Rather it seeks to reconcile the democracy-side challenge of punitiveness with its liberal-side principles of individual autonomy and minimal intervention. Chapter **Two** explores this balancing act, through an examination of the penal theory of *retribution*. It argues that retribution is an appropriate theoretical lens through which to view the Anglo-Welsh penal system,<sup>7</sup> and explores some of the various retributive theories. Ultimately it adopts a communicative paradigm for the evaluation of (community) sentences in punitive terms.

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<sup>7</sup> A brief note on terminology: throughout this thesis I refer to England and Wales using the demonym 'Anglo-Welsh', instead of the usual 'English', unless I specifically refer to England alone. However, given that 'Welsh law' carries the specific connotation of only those laws decided by the Welsh Assembly under its devolved powers, I retain the traditional label of 'English law'.

From here, chapter **Three** constructs an analytical framework for the evaluation of the effectiveness of punishment. It considers the need to understand punishment as a process of pain delivery (Christie 1981: 19), before considering previous attempts to measure and compare penal severity. It argues for a qualitative understanding that recognises the pains of community punishment whilst accounting to some extent for their comparative intensities (an analytical framework I call 'penal impact'), and concludes that empirical research is necessary for an effective analysis on those terms.

I therefore undertook an empirical study to support this theoretical analysis. It is described in Part **II**, which is formed of two chapters. Chapter **Four** outlines the study's methodology: its research design, its aims, and its sampling and data collection methods. The strengths and limitations of the adopted approach are considered, in order to better understand what the data generated can (and cannot) tell us.

I discuss the study's findings in detail in chapter **Five**. A multitude of pains of community punishment were identified, and these are discussed in terms of their connection to the composition of the sample, participants' attitudes, and the relationship between the offender and their supervisor.

I then analyse these findings in Part **III**, using the findings of the study to answer the above research questions, over two chapters. Chapter **Six** addresses the task of synthesising the pains identified by the study into a cohesive model of penal impact. Doing so requires the exploration of two analytical issues. Firstly, to what extent can the identified pains be incorporated into the analytical framework, both in terms of their relation to the act of punishment, and in terms of their fit with retributive theory? Secondly, how can the relative severity of those (qualitative, subjective) pains be meaningfully compared and ranked hierarchically? I consider



what the findings tell us about the pains experienced by the participating offenders, as well as by offenders in general.

Finally, in chapter **Seven** I conclude by directly answering the research questions, considering the implications of those answers, and identifying potential avenues for further research that they suggest.

With this in mind, I now embark upon the conceptual definition of the subject of this enquiry. Firstly, what does 'community punishment' involve in contemporary England and Wales?

# **Part I: Developing the Concept of** **Penal Impact**

## **Chapter One: Community Punishment**

Community punishment is a common feature of many contemporary penal systems. It has been a part of the penal system in England and Wales for over a hundred years, although not always under that name. However, the concepts embodied by this type of sentence are complex, and require unpacking before any study into its impact. To that end, in this chapter I examine the conceptual boundaries of community punishment: its definition, its history, and its modern form in English law.

### **1.1 Defining Community Punishment**

The first step of this enquiry should be to define its subject, 'community punishment'. This label raises a number of complex issues that must be resolved before a definition can be at all satisfactory, both in terms of the issues surrounding the use of 'punishment' and 'community' to identify community punishment as such, and about what is meant by the term itself, as a whole.

Unfortunately a literal definition of community punishment ('any punishment occurring in the community') is insufficient. There are various sanctions, including fines, bind-overs, and discharges,<sup>1</sup> which take place in a community context (howsoever defined: see [1.1.2](#) below) but which are not classified as 'community punishment' under English law. Indeed, penologists speak of *non-custodial sentences* (Ashworth 2010: 318), or *alternatives to imprisonment* (e.g. van Zyl Smit *et al* 2007), although it is clear that both terms are conceptually broader than 'community penalties' (Ashworth 2010: 338-353; van Zyl Smit *et al* 2007: 34-36). So there must be more than a nexus to community if the definition of community punishment is to fit modern practice.

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<sup>1</sup> See Ashworth 2010: 320-338 for an overview.

The element that distinguishes community punishment from other non-custodial sentences is that it involves an element of *supervision* (cf. Mair 2007). Whereas a fine does not place any (direct) oversight on the offender, community punishment involves (limited) control of the offender's physical liberty by an agent of the State. This direct supervision therefore distinguishes community punishment from other non-custodial sentences, just as its location in the community distinguishes it from imprisonment. Moreover, it must be distinguished from the supervision of offenders who have been released from prison, which, not being directly (judicially) imposed as a response to criminal conviction, fulfils a different penal function and so ought not to be evaluated in the same breath.

Accordingly, I define community punishment as *any penal process imposed as a response to criminal guilt by a judicial authority, which does not require the offender to be (immediately) imprisoned, but which nevertheless imposes direct supervisory control over her within her pre-existing social context* (cf. Canton 2007b: 253).

### 1.1.1 Community Punishment

Why use the phrase 'community *punishment*' to describe this type of sentence? This particular formulation is unpopular amongst penal scholars, who prefer other terms, including: community sentences (Ashworth 2010: 338); community sanctions and measures (Committee of Ministers of the Council of Europe 1992);<sup>2</sup> and community penalties (e.g. Rex 2005; Bottoms 2008). I have chosen community *punishment* for two reasons.

The first is that 'punishment' emphasises the retributive approach used in this thesis. By referring to community punishment I indicate that these sentences are at the very least capable of punishing. Even though

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<sup>2</sup> 'Community sanctions and measures' incorporate both forms of non-custodial oversight imposed as sentences in their own right, and those imposed before the sentence is imposed or after it has been executed, such as early release and conditional bail.

punishment is not the only component of retributivism,<sup>3</sup> it is clearly essential, and so it is appropriate in the context of this study.

The second reason for adopting this formulation is that it emphasises the fact that community punishment is a social *process* as well as a legal sentencing option. Since I have committed to a study of the impact of community punishment, I must consider not only the legal consequences of the sentence, but also what follows afterwards in a broader sense. Whilst 'penalty' would also convey this breadth of scope, it arguably fails to incorporate the retributive element that 'punishment' entails (Feinberg 1970). Community *punishment* is therefore an effective label for present purposes.

#### 1.1.2 Community Punishment

Another essential question remains: what is a 'community'? This is a complex issue, since the concept has been used indiscriminately and interchangeably within a number of different public policy contexts (Crawford 1997: 148).

The real question (for present purposes) is what level of *involvement* is envisaged for the communities invoked? Generally speaking there are three levels of community involvement in community punishment, namely: as *location*; as *beneficiary*; and as *participant* (cf. Green 2014: 17-28). I address each in turn.

Treating 'community' as a spatial *location* is an established practice in Anglo-Welsh penal policy. The reference to 'punishment in the community' in penal policy has generally meant 'punishment outside of prison' (Brownlee 1998: 56; Crawford 1997: 51-52). Under such a model, communities are almost entirely passive. They serve only as the backdrop to community punishment, and have no say in how it is experienced by its subjects. This is politically attractive, since government agents can invoke

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<sup>3</sup> See **2.1** below.

the politically valuable concept of 'the community' in a rhetorical sense, whilst not having to worry overmuch about what the invoked communities have to say about the process (Everingham 2003).

However, this model is too simplistic to reflect either policy or practice. The first problem is that communities are *more* than spatial gatherings of individuals. Indeed, they may arise from a number of different contexts, including 'spatial, temporal, kinship, ethnic, institutional, and many other reference points' (Lacey and Zedner 1995: 302). Thus we may talk about 'the deaf community' or 'the LGBT community', for example (Worrall 1997: 46). Since communities do not necessarily require a spatial nexus to exist (more so in the days of online social networking than ever), a purely spatial conception of what a community is for determining its involvement in community punishment would be manifestly incomplete.

Moreover, it seems that communities are more significantly involved in contemporary Anglo-Welsh penal process than as mere locations. At the very least, communities are frequently seen as potential *beneficiaries* of community punishment: the punitive exercise is intended to advantage them, whether through the reduction of crime, reparation of the damage, or vindication of their complaints against the offender (McCulloch and McNeill 2007: 230-234). If the community is the intended 'consumer' of community punishment,<sup>4</sup> then it is sensible to consider what the community wants that process to achieve, and to take this into account in the implementation of those sentences. In this sense, the community is still passive in the actual imposition of community punishment, but it is active in informing its purposes.

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<sup>4</sup> This is a somewhat problematic way of conceptualising community punishment, as the economic roles of 'supply' and 'demand' sit uneasily within the criminal justice context: see McCulloch and McNeill (2007). Cf. Mair and Nee (1990: 52), who use the less problematic (but not *unproblematic*!) analogy that the offender is the 'raw material' of criminal justice, without specifying what that system is doing with (or to!) her, or for whose benefit.

There are also limited grounds for understanding communities as *participants* in modern Anglo-Welsh community punishment. This level of involvement requires communities to be actively engaged in the process of punishment, and capable of directly influencing its impact on offenders. The community effectively becomes a resource for penal practices; something that is far more accepted in other fields of the criminal justice system, as in community policing and Neighbourhood Watch schemes (Crawford 1997: 165-168).

In contemporary England and Wales the community participates in community punishment in two main ways: firstly, through the community justice elements of the process; and secondly, through the dialectical infliction of shame and stigma, which is central to the operation of (retributive) community punishment.<sup>5</sup>

Community *justice* typically refers to alternatives to conventional trial mechanisms that engage communities more directly in judicial and criminal justice decision-making (Harding 2007; Landau 2004). Whilst the argument has been made that community justice should be a major part of the Probation Service's work (Harding 2000),<sup>6</sup> it remains the case that community justice is only minimally present in the current operation of community punishment in England and Wales. It is primarily achieved through the involvement of communities in decision-making about which schemes offenders should be required to take part in under so-called 'community payback' initiatives (see 1.3.5 below). By structuring the work that offenders do around community choice (even if that choice is extremely limited: Bottoms 2008: 152), penal policy necessarily incorporates at least some community values into the processes of community punishment.

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<sup>5</sup> I shall return to the issue of shame and its uses as an instrument of penal policy in 3.1.4.

<sup>6</sup> As we shall see in **1.2**, the Probation Service plays a substantial (albeit declining) role in the administration of community punishment.

Beyond the policy level, community participation is evident in the very nature of community punishment as a protracted series of more or less visible activities undertaken by the offender. She may have to take time off work, or dedicate leisure time usually spent with friends and family to her punishment instead. The loss of time and autonomy are common experiences of both imprisonment and community punishment (*cf.* Durnescu 2011: 534-536), but they are experienced in fundamentally different ways. Whereas an imprisoned offender is necessarily obstructed from contact with society, community punishment forces those subjected to it to suffer these deprivations *within* a community context, within the (potential) visibility of friends, family, work colleagues, and fellow community members. The result is that community punishment is capable of stigmatising and shaming offenders in a qualitatively different way to the shame imposed by imprisonment, directly and immediately exposing the punishment to the offender's neighbours (*Ibid*: 537).<sup>7</sup>

What can this process be, except community participation? Without communities there would be no-one for offenders to feel stigmatised by, and therefore nothing to generate shame. We must conclude, therefore, that community values clearly do affect the experience of community punishment, because that process is characterised by the treatment of communities as both beneficiaries and participants, allowing them to inject their expectations and values into the punishment that the offender experiences.

However, this conclusion is subject to two major caveats. Firstly, the danger in invoking 'community values' is that we may miss

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<sup>7</sup> This is not to say that imprisonment is not a shameful state of affairs for the offender (or her family and friends). Her absence from the community must be accounted for, which exposes the offender to shame in a similar way to that experienced by a supervised (or otherwise community-punished) offender. However, the immediacy of community punishment makes the shame endured by the offender (and third parties) qualitatively *different* – perhaps more, perhaps less severe than her incarcerated counterpart, but clearly of a different ilk.



complexities and conflicts within communities (Crawford 1997: 161; *cf.* Maruna and King 2008, making the same point about 'public opinion'). Treating the values that are communicated by those members of the community that are willing to engage (for example by voting for specific community punishment schemes) as the views of the community can create the false impression of homogeneous shared values. This can encourage the State to pursue ends that the wider community does not desire (*cf.* Worrall 1997: 50-51).

This can be particularly significant when 'community values' are defined so as to set the community in opposition to the offender. In such a case, the offender may have little hope of reintegrating into the community that ostracises her through community punishment by defining her as a dangerous outsider (Crawford 1997: 159-161). This is likely to significantly increase the punishment's impact on the offender's life.

The second caveat is that it may be doubted whether some (spatial/geographic) communities, especially those associated with highly impoverished neighbourhoods, exist as cohesive social entities to any significant extent. The socio-economic processes of late modernity have increasingly alienated individuals from one another (Garland 2001; Winter 2005). As a result, conventional means of social control, including the community (Lacey and Zedner 1995: 305), have atrophied, potentially to the point of dissolution. Even where communities do still exist (if they ever did), they may lack sufficient internal decision-making processes to muster an effective contribution to punishment: that is, to inform the penal system of what their values and expectations are or to effectively take part in its activities (*ibid*: 307). The most crime-ridden communities often have too few resources to participate effectively in community punishment, meaning that those who are the most affected by community punishment decision-making are the least able to make their voice heard

(*cf.* Worrall 1997: 51). Community engagement in punishment is not a cost-free activity, and so these deprived communities will not be able to participate in community punishment without governmental support (Crawford 1997: 165-168; Rosenbaum 1988: 379). To the extent that communities are defined primarily in geo-spatial terms, the influence of communal values on community punishment is limited by the doubtful existence and empowerment of viable communities in modern Britain.

Nevertheless, we must understand the 'community' in community punishment as playing some role in all three capacities: as space, as beneficiary, and as (rather limited) participant, particularly in setting the values and aims of punishment within their sphere of influence. Understanding of the impact of community punishment therefore requires an account of social reality as well as abstract theory and law.

### **1.2 A Thematic History of Community Punishment in England and Wales**

Whilst the nature of community punishment is determined by the legal rules and social processes of modern criminal justice, we can never fully understand the present without some regard to the historical processes that have shaped it. In this section, I examine community punishment's development into its modern form. I do so not in terms of the actual dispositions that have become amalgamated into modern community punishment by the Criminal Justice Act 2003 (CJA03), but rather of the values embedded in those sentences, and the political and other processes that set them there. Readers looking for a more comprehensive history of community sentencing will find it in abundance elsewhere (*e.g.* Mair 1998; Vanstone 2004; Gelsthorpe and Morgan (eds.) 2007: Part 1; Vanstone 2008; Mair 2011; Mair and Burke 2012; and Raynor 2012: 931-949).

### 1.2.1 Prehistory: Humiliation and Power

Most conventional histories of community punishment in England and Wales start with the gradual evolution of charitable organisations such as the Church of England Temperance Society (CETS) into the Probation Service (*cf.* Vanstone 2004: 736-744). However, taking a broader understanding of the 'supervision' component of our definition, we can trace its origins to a far earlier period, in the form of public corporal and capital punishments.

The stocks might be the most recognisable of this early form of community punishment. These public displays served the purpose of humiliating the offender (Pamment and Ellis 2010: 18), but arguably, they performed the same essential function as public executions. Both punishments expressly underlined and reinforced the powers of the monarch, whilst also shaming the offender, exposing him to ridicule in order to underscore the moral legitimacy of State restriction of citizens' freedoms through the criminal law (Foucault 1977: 42-47; Nash and Kilday 2010: Ch. 2).

Community members were nevertheless important participants in the execution process. They could lobby the executioner to delay the deed in hope of a royal pardon, or riot in order to rescue the criminal from a perceived injustice (Foucault 1977: 57-65; Spierenburg 1984: 101). All three levels of community involvement were evident in public executions: they were located non-custodially, in full public view; intended for the benefit of the community (as consumers of a message about regal and legal power); and involved limited community participation.

Whilst it might be tempting to dismiss these distant ancestors of community punishment as the barbarous acts of an unenlightened age, with no relation to a system governed by the (modern) rule of law, the

reality is not so simple.<sup>8</sup> There was no single transformative moment between the age of public corporal and capital punishment and the modern era. Indeed, public flogging persisted until 1817 for women and 1830 for men (Emsley 2010: 262), and persisted well into the twentieth century behind prison walls.<sup>9</sup>

Moreover, a preoccupation with inflicting humiliation and suffering on the offender remains an undercurrent of public discourse around (community) punishment (Kahan 1998; Duff 2001: 20-21),<sup>10</sup> as does the desire for greater publicity and accessibility of punitive processes to public view. This has continued all the way into the modern penal system, to the point where Casey (2008: 2) suggests that the 'privatisation'<sup>11</sup> of the penal system contributes significantly to its lack of public support.

These seemingly antediluvian public punishments are still relevant to how modern community punishment is used, and therefore to how it is experienced. The public punishment model served to emphasise regal power, but also pursued the humiliation of the offender and deterrence of crime through the demonstration of the law's effectiveness (Foucault 1977: 42-54). Whilst the first aim is no longer relevant to the penal system or society, the second (e.g. Kahan 1998) and third (von Hirsch 1986: 48) cannot be dismissed so easily. This is so even though subsequent humanitarian and other interventions would lead to the gradual eradication of public (corporal and capital) punishment as history progressed (Foucault 1977: 7-16, 57-65; Emsley 2010: 261-307).

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<sup>8</sup> For example, the widespread capital and corporal punishment of the eighteenth century was still justified in terms of the rule of law, albeit one conceived of in a fundamentally different way from the post human-rights conception favoured today (Hay 1976). It would be anachronistic to assume that penal law shifted from a state of unconstrained penal excess to a civilised system, rather than moving through different conceptions of legitimate justice.

<sup>9</sup> Judicial corporal punishment was only banned entirely following a 1978 European Court of Human Rights intervention: *Tyrer v United Kingdom* (1980) 2 EHRR 1.

<sup>10</sup> For example, calls for the reintroduction of corporal punishment have been made well into the late-20<sup>th</sup> Century and beyond (Bottoms 1980: 2).

<sup>11</sup> I.e. the removal of criminal justice processes from the public eye, not the transfer of those processes to the private sector. Cf. Christie 1977. The origins of this kind of 'privatisation' are discussed in Garland 1990: 222.

### 1.2.2 1907-1972: Rehabilitation and Probation

By the early 1900s, punishment taking place out of the public eye in total institutions<sup>12</sup> had largely replaced corporal punishment, and had provided a site for executions. Few non-custodial punishments remained, excepting the 'bind over', whereby a sum of money would be held by the State before being returned to the offender (or, where she was willing, an unconvicted suspect) so long as they did not reoffend. These sanctions ceased to be seen as formally punitive, but instead as 'preventative justice'; a means of circumventing the need for the State to engage the expensive criminal justice and penal systems (Nellis 2007a: 8-29).<sup>13</sup>

Within this penal climate, Victorian civil society was growing increasingly concerned with the humanitarian (and religious) conditions of imprisoned offenders. This prompted charities, most notably CETS, to start undertaking missions of mercy to help prisoners to avoid reoffending by addressing the causes of criminality, especially alcoholism (Annison 2007: 146; Mair and Burke 2012: 8-17, 20-24). Overseas, similar initiatives were perceived as effective at reducing reoffending, especially in Massachusetts (Vanstone 2004; Mair and Burke 2012: 17-20). This led to the establishment of the Probation Service in England and Wales, absorbing charities such as CETS into the State,<sup>14</sup> to 'advise, assist and befriend' offenders, rehabilitating them and thereby reducing crime (Nellis 2007a: 29; Mair and Burke 2012: 25-43).

Over the following 65 years, the Probation Service established itself as a central agency in the criminal justice system (Mair and Burke 2012: 25-105). Although it underwent a series of transformative events in that

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<sup>12</sup> I.e. an institution in which a group of people are completely isolated from wider communities and society for a prolonged period, in which daily life is highly routinised: see Goffman (1991). Compare Foucault's (1977: 231) concept of a 'complete and austere institution'.

<sup>13</sup> The desire to prevent the engagement of the criminal justice system can be seen in efforts to 'divert' certain crimes and/or criminals into other, less intrusive system: see van Zyl Smit *et al* 2007: 14-16). It is also worth noting that bind-overs remain extremely widespread in English sentencing practice: see Ashworth 2010: 322.

<sup>14</sup> Under the Probation of Offenders Act 1907.

time, moving away from its evangelical Christian roots to a secular social work paradigm, certain key features emerged during this period. The first is that the Probation Service became invested with a clear set of values that defined its attitude to its work (Nellis 2007b: 238-240). Foremost amongst these values has always been a commitment to the rehabilitation of offenders, both as a means to reduce reoffending and as an inherently moral good (*cf.* Canton 2007a).

The second important point to draw from this period of history is that the Probation Service became intimately associated with community punishment processes, to the extent that the history of the latter is largely that of the former (*cf.* Mair and Burke 2012). Probation values increasingly suffused community-based penal practices.

### 1.2.3 1973-1991: 'Nothing Works' and the Criminal Justice Act 1991

The 1970s marked a transitional period in criminal justice policy. Up until that point, penal theory had been dominated by the treatment model, a rehabilitative theory that effectively treated crime as a disease to which there was a psycho-medical cure (McNeill 2006: 41-43). This had substantively replaced the concept of religious 'reform' with secular 'rehabilitation', and coincided with criminal justice experts' and professionals' support for the 'rehabilitative ideal' (Bottoms 1980: 1-2).

However, the treatment model was perceived as enabling undue coercion on the part of the State, holding offenders indeterminately until they were 'cured' (McNeill 2006: 40-42). In particular, it was accused of simplistically reducing crime to a problem arising from 'deficiencies of the individual and his upbringing' (American Friends Service Committee 1971: 12); of adopting a middle-class institutional mind-set that systematically discriminated against those from less advantaged backgrounds; and of failing to ensure proportionality between offence seriousness and sentence severity (Bottoms 1980: 2-4).

At the same time, several high-profile studies (Lipton *et al* 1975; Brody 1976; Greenberg 1977) seemed to prove that the treatment model failed to significantly reduce reoffending, compared to other approaches to criminal justice (Advisory Council on the Penal System (ACPS) 1977: [8], reproduced in Bottoms 1980: 2). The resultant phase, known as the 'fall of the rehabilitative ideal' (Raynor and Vanstone 2007: 62-68), was marked by the abandonment of rehabilitation as an official penal justification, summed up by the maxim that 'nothing works' (Martinson 1974; see Bottoms 1980: 4-7; ACPS 1977; Home Office 1977).

This distrust of the former rehabilitative orthodoxy did not lead the Probation Service to abandon its 'core values of hope and respect for persons' (McNeill 2006: 41; Raynor 2008: 74-75). Nevertheless, there was a significant change in penal policy, and the Probation Service found itself being forced to justify itself to a sceptical public. It did so, in part, by altering its working paradigms to emphasise the offender's own agency in the process of rehabilitation, thereby avoiding the charges of authoritarianism levelled against the treatment model (McNeill 2006: 42).

For their part, governments were still eager to use community punishment: it was cheaper than imprisonment and (at least) marginally more effective at reducing reoffending (Raynor and Vanstone 2007: 62-68; Bottoms 1980: 5-6). However, in order to protect their political interests in the penal system, they took increasing control over the nebulous association of Probation Boards, and eventually redefined probation as officially punitive in nature (Morgan 2007: 92; Mair 1998: 263).<sup>15</sup> The most significant step in this process was the passage of the Criminal Justice Act 1991 (CJA91), which cemented central governmental

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<sup>15</sup> By contrast, in the early 1980s, non-custodial punishments were still seen as 'diversion' (Bottoms 1980: 5). Indeed, this was the first time that a discrete category of 'community penalties' was conceived at the legislative level (Mair 1998: 263).

control over probation practice through the formal investiture of HM Inspectorate of Probation with executive investigative powers.

The 1991 Act largely restructured the criminal justice system in general around the principles of retribution. It arranged the available sentencing options according to the principle of proportionality by introducing sentencing thresholds that precluded the use of custodial and community sentences, respectively, where the offence was not serious enough to warrant their imposition (CJA91, ss. 1(2)(a), 6(1)). Although the 1991 Act provided an exception to the rule of proportionality in the interests of public safety for violent or sexual offenders (CJA91, s. 1(2)(b)), it otherwise substantially adopted the desert model of retribution developed by von Hirsch and Wasik (1988; *cf.* Lovegrove 2001: 126).

The transition from rehabilitation to retribution was perfectly sensible in the 'nothing works' climate (Baker 1998: 268). Both the political right and left were concerned with the authoritarian extremes to which the treatment model could be taken (Raynor 2008: 115), as well as being open in principle to the idea that punishing wrongdoing was inherently good (Bottoms 1980: 11). If efforts to reduce crime through changing individuals' behaviour were doomed to failure, then retributivism, with its emphasis on the punishment of socially agreed (moral) wrongs (Duff 2000: 412-413), provided the only logical alternative (Bottoms 1980: 10-11).<sup>16</sup>

Against this backdrop of substantial incorporation into the (punitive) penal system, the number of available community punishments multiplied beyond the six envisaged by the 1991 Act (CJA91, s. 6(4)), most of which would survive under new names in the CJA91's legislative successor (see Cavadino, Dignan and Mair 2013: 129-139).

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<sup>16</sup> At the time, non-traditional penal objectives such as reparation had not penetrated mainstream policy discourses to the extent that they currently do.



### 1.2.4 1991-2004: 'Prison Works', 'What Works' and Penal Pluralism

One consequence of the fall of the rehabilitative ideal was that the purposes of criminal justice became a contentious political issue rather than a settled theoretical orthodoxy (Lacey 2008: Ch. 4). During the 1990s, the New Labour movement revitalised the Labour Party and provided the first effective challenge to a decade and a half of Conservative government, winning a landslide victory in 1997. In part this success was due to the promise to be 'tough on crime, tough on the causes of crime' (Raynor and Vanstone 2007: 68). However, this only fed the emergent penal-populist tendencies in British politics, and exacerbated the 'law and order arms race' (Lacey 2008: 170-206).

Whilst this process had been ongoing since the fall of the rehabilitative ideal in the early 1970s, it was not until the 1990s that populist punitiveness came to dominate British politics. Indeed, whilst penal populism undoubtedly characterised New Labour's approach to criminal justice, its first manifestations emerged earlier. In 1993, the then-Home Secretary, Michael Howard, declared that 'prison works', stressing the risk that offenders posed to public safety. Whilst prison could not rehabilitate offenders effectively, it could at least remove them from the injured community and provide a (temporary) respite from further offending (Ashworth 2010: 284-286; Raynor 2008: 75-76).

This policy explicitly de-emphasised non-custodial sentencing, and forced community punishment to develop more (visibly) punitive aspects in order to compete effectively with the perceived public safety advantages of imprisonment (Mair 1998: 264). The most significant stage of this process occurred in 1995, when Howard removed all social work elements from probation training and emphasised probation officers' roles as offenders' punitive overseers, rather than as clients' advisers, assistants and friends (Goodman 2007: 300).

In the late 1990s, a counter-theory emerged: "What works?" (McGuire 1995; Knott 1995). This theory argued that the social causes of crime were highly individualistic, and could never be dealt with in the same way in all cases. Instead, a 'what works?' approach would examine the facts of individual cases more closely, in order to identify what would reduce reoffending in that situation (*cf.* Underdown 2007; Raynor 2012: 936-938).

However, in government practice 'what works?' became far more dogmatic, becoming the statement, 'we will do "what works"' (Mair 2008: 407). The plurality of methods envisaged at the outset was supplanted with the assumption that 'what worked' was a small set of cognitive-behavioural interventions modelling risks, needs, and responsivity. This effectively replaced one monolithic approach with another (Raynor 2012: 936), despite emerging doubts about cognitive-behaviourism's universal applicability (Mair 2008: 407; Walklate and Mythen 2011; see generally Mair (ed.) 2004). Simultaneously, State-organised research came under increasing pressure to validate that current government policy 'worked'. If research provided evidence that policies were not 'working', then it was spun in such a way as to highlight more agreeable results (Morgan and Hough 2008).

Populist punitiveness has largely continued into the 21<sup>st</sup> Century, to the detriment of community punishments, which successive governments consistently treat as if they need 'toughening up' in order to punish effectively (*e.g.* Ministry of Justice 2010: 9, 14, 17-18, 58; *cf.* Raynor 2008: 79-84). This disjuncture has been masked in research and practice by the deployment of 'what works' rhetoric (Raynor 2012: 938-944).

One feature of this prescriptive, politicised form of 'what works' is that it is theoretically underdeveloped, failing to consider the long-term effects of short-term pragmatism (Robinson and McNeill 2004). Evidence

of this unprincipled approach can be found in the wide-ranging reforms expressed in the CJA03. In particular, whereas the 2003 Act retains the basic hierarchy of the CJA91's sentencing thresholds, it rejects the broader structured retributivism of 1991. Instead, it prefers a 'smorgasbord' approach, whereby several penal aims<sup>17</sup> are blankly stated, without indicating which are most important, and in which circumstances (von Hirsch and Roberts 2004: 642).

Once again it should be stressed that much of the impact of the 'what works' approach, like 'nothing works' before it, has been at the policy level. Probation values have been largely unaffected, despite changes to practices in the intervening decades (McNeill 2006: 44-57). Indeed, despite widespread changes in executive values from rehabilitative to retributive under 'nothing works', to preventive under 'prison works' and to a more pragmatic stance under 'what works', probation officers remain stubbornly rehabilitative in their outlook.

In their seminal treatise on the sociology of knowledge, Berger and Luckmann (1967) noted that institutions depend upon privileged access to expert knowledge to justify their existence. That knowledge will necessarily contain certain ideological presuppositions, and will be passed from one generation to the next through education and (institutional) culture (Berger and Luckmann 1967: Part Two). As a result, rehabilitative, humanistic values have remained a crucial and entrenched feature of the Probation Service's institutional framework (*e.g.* Deering 2010), and the Service remains reticent about abandoning rehabilitation altogether.

Even if modes of training have changed over the years, research suggests that early-career and trainee members of the Service tend to hold rehabilitation-based ideals (Deering 2010; *cf.* Nash 2011), whilst

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<sup>17</sup> Namely, the punishment of offenders, the reduction of crime, the rehabilitation of offenders, public protection, and reparation of the victimised individuals and/or communities by the offender: CJA03, s. 142.

traditional (rehabilitative, benevolent) probation values pervade the process of 'professional socialisation' involved in the social induction of a trainee into the probation institution (Durnescu 2014). The institutional culture of the Service is also represented on a more formalised, political level by the National Association of Probation Officers (NAPO). NAPO is staunchly defensive of traditional probation values, and has stridently criticised any deviation from them on the part of the government (Canton 2007a; McKnight 2009).

### 1.2.5 NOMS and Privatisation: The Demise of Probation Values?

This being the case, arguably the only way in which probation values (and their impact upon offender experiences of community punishment) can be altered is by wholesale institutional reform of the Service. It is perhaps unsurprising, therefore, that this is exactly what has been attempted during the early years of the 21<sup>st</sup> Century.

In the 20<sup>th</sup> Century probation services were provided by Probation Boards, regional associations overseen only by HM Inspectorate of Probation (Morgan 2007: 92). However, in 2001 these were placed under a national directorate, the National Probation Service for England and Wales, which was responsible for coordinating national strategy with regional Board activity, allowing a further channel by which governments could attempt to control Probation Service activities and values (Hill 2007: 179-181).

This was swiftly followed in 2004 by the amalgamation of HM Prison Service with the National Probation Service, to create the National Offender Management Service, NOMS (Knott 2007: 175-177). Ostensibly, this move was intended to combine the bureaucracies of both Services to enhance their efficiency (Knott 2007; Carter 2003). However, whilst several Prisons Service spokespersons are evident in the highest echelons of the NOMS hierarchy, there was no comparable representative from the

Probation Service, suggesting that the reform was also used to attempt to bring probation values more in line with those of other penal institutions (McKnight 2009). In particular, the very name, NOMS, suggests that the aim of its probation services is 'offender management'. Whilst this term is inclusive of a number of penal approaches, including punishment, support, change and control (Grapes 2007: 190), the syntax of the phrase is very different to traditional probation 'advise, assist and befriend' doctrine. Rather than having 'supervisors' and 'clients', the criminal justice system now refers to the more bureaucratic and colder-sounding 'managers' and 'offenders' (Grapes 2007: 188; Canton and Hancock 2007: xxx-xxxi).

The transition to NOMS was not the last sally against traditional probation institutions. Following the emergence of a Conservative-led coalition government in 2010, the Probation Service found itself one of an ever-increasing number of public bodies facing the threat of privatisation. This first took the form of the 'contestation' of 'probation services' (Ministry of Justice 2012: 2-3), but subsequently morphed into the outright privatisation of the majority of the Service's current workload, under the '*Transforming Rehabilitation*' agenda (*TR*; Ministry of Justice 2013a, 2013b).

The projected role of the Probation Service itself has shifted radically during this highly controversial process, from an overseer and wholesaler of 'probation services' provided by the private and third sectors under the 'contestation' model (Ministry of Justice 2012), through to *TR*, under which the public sector is replaced altogether by the private and third sectors in cases where offenders present a low-to-medium risk of reoffending or of serious harm. These providers will be governed principally by a process of 'payment by results' that attempts to manipulate the profit motive of private sector contractors by paying them only if certain targets (for reducing reoffending) are met. This attempts to

mirror the model used in prisons privatisation, not to mention that in other recent privatisation efforts across the State (*cf.* Deering 2014: 9-11).

Meanwhile, public probation service provision is reconfigured into an (ironically-titled) 'National Probation Service for England and Wales'<sup>18</sup> that serves to supervise high-risk offenders, especially those requiring multi-agency supervision (Ministry of Justice 2013b: 20-22).

The wider privatisation agenda predates the 2010 coalition in government. It was presaged by provisions set out in the Offender Management Act 2007, and finds its origins in the 2003 Carter Report (Goode 2007). Indeed, in some cases, privatisation of the market is already complete: for example, electronic monitoring in England and Wales is managed entirely by the private sector (Hucklesby 2011: 60). However, for more 'traditional' probation services, such as unpaid work and supervision, the Probation Service (and in particular NAPO) strongly resisted attempts to privatise the probation 'market' (Travis 2011), on the basis that the quality of core services will be affected, as will traditional probation values (McKnight 2009). Both they, and their colleagues in academia (many of whom are themselves ex-probation officers<sup>19</sup>), have therefore tended to be rather pessimistic about the future of probation and its values in practice (*e.g.* Annison, Burke and Senior 2014; Fitzgibbon and Lea 2014, although *cf.* a more cautiously optimistic Deering 2014).

Ultimately, it remains to be seen whether probation values will be affected by the substantial privatisation of the probation services market. In particular, the strong cohesion provided by NAPO, which will survive *Transforming Rehabilitation* more or less intact, would provide a strong institutional support for these traditional approaches. If NAPO were to maintain its outspoken attitudes, and open its membership to the

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<sup>18</sup> Scotland and Northern Ireland retain their existing systems.

<sup>19</sup> An observation I borrow from Robinson and Svensson 2013: 103-104. This is not necessarily to suggest academic bias, of course, but more to recognise the unique arrangement between practitioners and theoreticians in the context of this political debate.

employees of private contractors of 'probation services', then it may be able to perpetuate traditional probation values despite the effective dissolution of the Probation Service. Moreover, those probation officers who remain after the *TR* transition across the economic sectors can continue to attempt to shape institutional values more informally by influencing the processes of 'professional socialisation' discussed above. However, neither of these conditions is at all guaranteed, and so it is unclear to what extent probation values will continue to influence the implementation of community punishment.

In sum, the historical development of criminal justice in England and Wales has seen numerous changes to the essential purposes to which community sentences are put: from the rehabilitative, to the retributive, and then the (predominately) preventative. All of these approaches are evident in the current law, which makes it difficult to predict how the law will affect offender experiences of community punishment. However, we can conclude that penal populist tendencies provide incentives for the imposition of longer, more demanding (community) sentences.

Mitigating this, however, is the resilience of probation values. The close proximity of the Probation Service to the actual processes of community punishment means that these values are likely to be especially influential, even in the post-privatisation landscape (at least, in the short term). The role of probation officers is therefore vital for any understanding of the impact of community punishment, since they are (at least, at the time of research) the face of the State in almost all modern community punishment, and (at the time of research) continue to espouse explicit probation values. The tension between punitiveness and rehabilitation will be critical to how the process is perceived by offenders, and thus to the (penal) impact of community punishment.

### **1.3 Community Punishment at Law in England and Wales**

However influenced by history, the potential penal roles that community punishment can play are substantially determined by the legal standards delimiting what impositions it can involve. Accordingly, I now turn to a brief overview of the legal framework for community sentencing in England and Wales.

Why limit the study to England and Wales? After all, community punishment has analogues across a number of different jurisdictions, many of which are similar enough in terms of their structure and institutions that a parallel enquiry could be made.

Ultimately, the limitation to a single UK jurisdiction is principally one of convenience. By limiting the scope of the enquiry to a single, more-or-less discrete system of rules and institutions we can gain a greater understanding of what about the legal phenomena in question (and their social consequences) is a result of the specific practices in question, without being clouded by the normative, socio-cultural, political, economic and other differences between jurisdictions. A full comparative study of the legal forms (and penal impact) of community punishment across the UK jurisdictions, within the Anglosphere, across Europe (*cf.* Shapland (ed.) 2008), or indeed elsewhere, is beyond the scope and resources of the current enquiry – although it may be a fruitful area of further research.

Furthermore, I limit this discussion to adults. Youth justice is a qualitatively distinct system, with separate normative constructions of the meanings of concepts such as 'community' and 'punishment', which tend to result in more paternalistic and welfare-oriented objectives than in the adult system (*cf.* Pamment and Ellis 2010). The normative component of community punishment is central to the way in which it is experienced by offenders, and so it would be overly reductive to take these two systems



together. Youth justice therefore falls beyond the scope of this study, although that is not to say that it does not deserve future study.

### 1.3.1 Community and Suspended Sentence Orders

For adults, community punishment is legislated by the Criminal Justice Act 2003, which incorporates a range of dispositions that preceded the Act as potential components (or 'requirements') of a 'community order', or 'suspended sentence order' (SSO). Although these two orders share different historical roots and developed separately, modern (Anglo-Welsh) penal law and practice treat them as being extremely similar. They are both administered by the Probation Service (and its post-privatisation successors), and can incorporate the same group of 'requirements' (CJA03, ss. 177, 190). They are both therefore likely to be experienced by offenders in very similar ways.

The most important difference between the two orders lies in the consequences of breach. Failure to comply with a community order has no *automatic* consequence: the case must be referred back to the court to decide how to deal with the breach. However, in the case of a SSO, requirements are imposed in lieu of serving a custodial sentence of 28-51 weeks (*ibid*, s. 189(1)). This prison sentence is not enforced so long as the offender complies with the requirements attached to suspension, and therefore if the offender breaches these, the court will (ordinarily) enforce the suspended sentence of imprisonment.<sup>20</sup>

The actual content of these orders, then, is determined by the requirements attached to them, of which fifteen are provided for in

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<sup>20</sup> For this reason Cavadino, Dignan and Mair (2013: 119) define the SSO as a 'semi-custodial' penalty. However, since the offender serving it is in materially the same position as one serving a community order unless and until she breaches, we may take the two together for present purposes. Whilst this threat of imprisonment is significant, and is likely to have some impact upon the offender's day-to-day life under the order (Durnescu 2011: 538), this difference is not so great as to preclude studying the two orders together, particularly given their considerable similarities in all other respects.

legislation at the time of writing.<sup>21</sup> Although hypothetically a judicial authority could impose every requirement simultaneously, it must take into account the practicability of the resultant order (CJA03, s. 148(2)(a)). This places an upper limit upon the extent to which the community punishment imposes upon the offender's life. Precisely because she is expected to undertake the punishment whilst continuing with her previous socio-economic commitments, there must be reasonable limits upon the contents of the order. Likewise, if a person's religious convictions prevent them from working on a Saturday, say, then it would be disproportionate to expect them to perform unpaid work at that time.

However, at the same time, the accommodation of personal circumstances is itself restricted in that the order must still reflect the seriousness of the crime (CJA03, s. 148(2)(b)). Whilst an order's contents must be calculated with a view towards the offender's rights and commitments, this can only go so far. There must still be an element of proportionality between the seriousness of the offence and the severity of the sentence. It seems likely that this more of an attempt to reassure the public that community punishments are capable of being punitive than a concern with retributive principles (Ashworth 2010: 89, 104-155; see also **2.2** below).

The content of the order, and the impact that it will have upon offenders, is therefore established by the combination of requirements attached to it. We should now turn to those requirements and identify the general experiences that offenders are likely to have of them.

### 1.3.2 The Requirements: Rehabilitation, Reparation and Incapacitation

The requirements that may be incorporated into a community order or SSO are detailed in ss. 199-215 CJA03. Whilst they may be put to various

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<sup>21</sup> Although two, the alcohol abstinence and monitoring requirement and the foreign travel prohibition requirement, have yet to come into force.

purposes by the sentencing authorities that impose them, they each have an essential content that tends to make them better suited to some penal aims than others. I have therefore organised the requirements into three categories: the *rehabilitative*, *reparative* and *preventative* requirements. This approach is somewhat arbitrary, since it treats the legal formulations of the requirements as substantive, despite the influence of various actors, including: sentencing authorities' intentions in formulating orders; the implementing State agents' actions and values; and the offender's own circumstances and attitudes. Furthermore, three requirements require further discussion due to the difficulty with which they fit into this taxonomy and their importance to the experiences of the offender undergoing community punishment. For now though, let us turn to the three broad categories of requirement in turn.

*Rehabilitative requirements* share a common interest in altering the offender's lifestyle in such a way as to remove identified criminogenic (that is, crime-causing) factors, reducing reoffending via psycho-medical or quasi-educational oversight. However, they do so in different ways. The *programme requirement* (s. 202 CJA03) requires an offender to complete a specified course, for example on anger management. By contrast, the *drug rehabilitation*, *alcohol treatment*, and *mental health treatment* requirements (ss. 207-212 CJA03) are all focussed on providing psychological and/or medical treatment of the specific recognised criminogenic factors that they respectively cover (*i.e.*, drug misuse, alcoholism, and mental health issues).

The alcohol treatment requirement will be supplemented by the *alcohol abstinence and monitoring requirement* (s. 212A CJA03, as amended by LASPO, the Legal Aid, Sentencing and Punishment of Offenders Act 2012). Under this requirement, the offender's alcohol intake is strictly limited (potentially to full abstinence), and is monitored by

periodic testing of alcohol concentration in the blood, urine, or sweat. The requirement is concerned specifically with crimes caused by alcohol consumption but *not* by alcohol dependency (ss. 212A(8)-(10) CJA03). The aim is not therefore to 'fix' an offender's addiction, but rather to prevent criminogenic patterns of behaviour associated with drunkenness, allowing alcohol treatment requirements to be directed towards (medically) diagnosed alcoholic offenders.

The second group, of *reparative requirements*, is comparatively small. Under the 2003 Act only one requirement fits comfortably into this category, where the principal purpose is to ensure that the harm inflicted by the crime upon its victim/s and/or the wider community has been undone as fully as possible by the offender. That is the *activity requirement* (s. 201 CJA03), which requires offenders to perform some course of action, which the Act explicitly states 'may consist of or include activities whose purpose is reparation, such as contact between offenders and persons affected by their offences' (s. 201(2) CJA03). Whilst the Act's use of the conditional 'may' allows for other functions to be undertaken as part of an activity requirement, in practice reparative purposes have dominated, especially in terms of repairing harm to individual victims.

Reparation towards wider communities is also a substantial part of the purview of the *unpaid work requirement* (ss. 199-200 CJA). However, the reparative component of unpaid work is relatively new, and remains highly contested, as I discuss at 1.3.5 below.

The final category in this taxonomy consists of the *preventative requirements*. It includes a broad range of disparate conditions that are united by a central preoccupation with the incapacitation of the offender; that is, with ensuring that she is rendered incapable of reoffending.

Incapacitation can be achieved in a number of ways under the 2003 Act, allowing the court to respond flexibly to different types of crime

and criminal by varying the level of restrictions that are placed upon the offender's liberty. A distinct hierarchy of levels of intrusiveness can be identified. At the lowest end is the *prohibited activity requirement*, which mandates the offender to abstain (either at certain times during the day or week, or indeed altogether) from certain specified actions (s. 203 CJA03).<sup>22</sup> Similarly, the *exclusion requirement* precludes her from going to indicated places (such as a public house or gang territory, say), either for certain periods of the day, or absolutely (s. 205 CJA03). These two requirements restrict the offender's liberty in a relatively limited fashion, from doing certain things or going to certain places.

A similar condition aimed exclusively at young adult offenders (*i.e.* those aged 18-25) is available in the form of the *attendance centre requirement* (s. 214 CJA03). This mandates the attendance of the offender at a specified centre that provides diversionary (but not necessarily rehabilitative or reparative) activities, such as sports. The explicit purpose of this provision is 'to occupy offenders for a certain number of hours *to keep them out of trouble*' (Explanatory Notes on the Criminal Justice Act 2003 (EN03): [540], emphasis added). This represents an intermediate limitation of liberty, since the offender is positively required to do something rather than merely to refrain from acting (Rex and von Hirsch 1998: 279-281).

The *residence requirement* (s. 206 CJA03), which requires offenders to reside (or continue to reside) in a certain place, imposes a still higher level of restriction. A similar restraint will (once implemented) be imposed by the *foreign travel prohibition requirement*, which will prevent offenders from leaving the country altogether, or from going to certain specified countries, either on certain days or for a continuous

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<sup>22</sup> The 2003 Act includes the example of possessing, using and/or carrying a firearm: s. 203(3).

period (*ibid.*). At this level of the preventative hierarchy the offender becomes increasingly confined in spatial terms.

The most restrictive condition that may be attached to a community order is the *curfew requirement*, which limits the offender's liberty to her own residence for certain hours of the day (s. 203 CJA03).<sup>23</sup> A lengthy curfew is almost analogous to incarceration (Roberts 2004), particularly where it is combined with an *electronic monitoring requirement* (which I discuss in 1.3.4). However, the offender is still able to enjoy family, friendship and other relationships outside of curfew hours, and so several of the 'pains of imprisonment' (Sykes 1958) are avoided by those subject to curfews, all else being equal (*cf.* Payne and Gainey 1998; Gainey and Payne 2000).

To sum up the discussion so far, there are three general categories of requirements that may be attached to a community order on the basis of the primary penal aim to which the requirements have been designed: the rehabilitative, reparative, and preventative. However, these categories are far from watertight, and many requirements are capable of serving multiple penal aims in practice.

For instance, recall that the alcohol abstinence and monitoring requirement is less concerned with stopping offenders from drinking to excess *per se* than it is with preventing recidivism in cases where drunkenness played a role in the crime. The argument could easily be made that this is more about prevention than rehabilitation. The penal system is not concerned that the offender has a drink problem, but rather that she is socially troublesome when drunk. However, if this does have the effect of helping the offender to become a less problematic drinker, by encouraging a more moderate and thoughtful attitude towards alcohol,

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<sup>23</sup> Under the CJA03 a curfew imposed in this context can last for up to 12 hours per day, although s. 71(2) LASPO will raise this to 16 hours when it comes into force.

then there is scope for some rehabilitation alongside the principal purpose of prevention. Likewise, the activity requirement, whilst making 'a particular aim' of reparation (EN03: [525]), could conceivably be used to rehabilitate by teaching the offender socially useful skills or behaviours.

Notwithstanding the arbitrariness of this taxonomy, it is clear that the requirements were designed with certain penal goals in mind. It follows that these aims will have some effect upon the way that they are implemented by judicial authorities and professionals such as those within the Probation Service, and therefore that they are of relevance to the experiences of offenders undergoing community punishment.

### 1.3.3 Supervision: Care or Management?

Let us now discuss the *supervision requirement* (s. 213 CJA03), which is rather difficult to position in my taxonomy. The supervision requirement embodies the probation officer's traditional role: regular one-to-one meetings with the offender (Canton 2011: 71-99), with the overall purpose of reducing reoffending through rehabilitation (s. 213(2) CJA03).

However, in practice, the rehabilitative purpose of the supervision requirement has been significantly limited in recent decades. As discussed above at 1.2.5, the last twenty years have seen increased interest in risk management as a means of crime prevention (Walklate and Mythen 2011), coupled with the development of an increasing concern with incapacitation in penal policy (Baker 1998: 270-271), both of which have impacted upon the role of supervision.

Even though I have argued that the Service continues to uphold generally rehabilitative professional values, those values only go so far. The work that the Probation Service is required to perform has drastically changed over time (Nash 2011), and those responsibilities that most allowed for a subjective application of probation values have declined in

favour of more objectively assessed and normatively impervious duties, such as risk assessment (Durnescu 2012).

In the field of community punishment, the change is symbolised by the removal of the word 'care' from the Service's mission statement in 2006 (Rumgay 2007), and the replacement of its historic motto ('advise, assist and befriend') with a four-tiered approach to offender management based upon punishing, helping, changing and controlling offenders (Grapes 2007: 190).

This is not to say that the supervision requirement as it currently exists is not concerned with rehabilitation to any extent: Rumgay (2007) may overstate her case when she argues that the Probation Service no longer 'cares' about offenders, given that it is required to 'help' most of them, and that rehabilitation can be measured in terms of the reduction of risk (*cf.* Canton 2007a). However, neither is rehabilitation the only goal being pursued by the modern Service: it is required to pursue reducing reoffending in more general terms, focussing upon risk and public protection as the ends of supervision, rather than rehabilitation in its own right.

Supervision is the most commonly imposed requirement in England and Wales, with 35% of community orders incorporating it. However, it is seldom imposed as the only requirement of an order (Ashworth 2010: 342), suggesting that supervision may be used by judicial authorities as a subsidiary tool to support the work of other requirements. If this generalisation is the case, then notwithstanding the stated rehabilitative purpose of supervision in the 2003 Act, the requirement is capable of playing *any* role, depending upon the individual offender and the order imposed upon her. The aims of supervision should therefore be understood as being contingent upon those of any other requirements imposed in the order.



1.3.4 Electronic Monitoring: Towards Custodial Communities?

Electronic monitoring (EM) is believed to have been partially inspired by a villainous contraption from a 1974 *Spiderman* comic, although there were isolated prototypes before that publication (Meyer 2004: 97-98). Despite these pop-cultural beginnings, however, it has become a controversial but entrenched tool of modern criminal justice (Ashworth 2010: 344-345), in England and Wales and overseas (Meyer 2004; Payne and Gainey 1998: 149). From the outset EM had been used to counter prison overcrowding (thereby reducing public expense) by ensuring a comparable level of surveillance and confinement without the need to remove the offender to a total institution (Meyer 2004; Payne and Gainey 1998: 149).

EM is not a separate form of punishment *per se*, but more a means of ensuring enforcement (Meyer 2004: 101). Accordingly, whilst EM is available as a distinct requirement in the 2003 Act (s. 215), it must be paired with one or more other conditions.<sup>24</sup> Typically, EM has been treated as an extension to the curfew and exclusion requirements, although the 2003 Act does not limit EM to them (ss. 177(3)-(4)). After all, EM cannot ensure compliance unless the requirement involves an element of spatial restriction, and even then can only go so far. It is one thing to check that an offender with an unpaid work requirement has attended the worksite, but quite another to compel her to work!

However it has been used, EM has attracted widespread criticism. The political left raised fears that it represents an Orwellian method of using 'electronic equipment to turn homes into prisons', and 'can widen the criminal justice net' (Lilly 1989: 89; *cf.* Roberts 2004).<sup>25</sup> From the

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<sup>24</sup> This is true at the time of writing (August 2014). However, once implemented, Sch. 16 of the Crime and Courts Act 2013 will make it possible for EM to be imposed by itself, and for no particular enforcement reason.

<sup>25</sup> The term 'net-widening' alludes to part of Cohen's (1985) 'dispersal of discipline' theory, whereby the penal system increasingly infiltrates everyday social processes, to the detriment of civil liberties. *Cf.* Garland (2001)'s 'culture of control' and Foucault (1977: 195-228)'s 'panopticism'.

right (and especially from populist and popular opinion) arose the concern that it is too 'soft on crime' (e.g. Slack 2010), despite evidence that offenders and magistrates view it as a serious punitive option (Payne and Gainey 1998; Mair and Mortimer 1996: 38-39). It is also significant that EM was one of the first areas within community punishment to be fully privatised (Hucklesby 2011: 60).

In terms of penal goals, EM most obviously fits into a preventative approach (although it does not *physically* incapacitate in the same way as incarceration, especially given the modern prevalence of telecommunications: Nellis 2006). However, it can also be used retributively (e.g. Criminal Justice Joint Inspectorate 2012: 5), since it involves the infliction of a number of distinct forms of suffering (Payne and Gainey 1998; Gainey and Payne 2000). Indeed, both offenders and judges consider it to be an effective punishment (Mair and Mortimer 1996: 24, 26-27).

Finally, some have suggested that EM is capable of effecting (or at least abetting) rehabilitation. This impact takes two forms: first, *passively*, EM does not remove offenders from the context of pro-social friends and family members,<sup>26</sup> and does not introduce them to the 'criminal fraternity' that may be found in prisons and who may be criminogenic factors in their fellow inmates' recidivism (Meyer 2004: 114; Mair and Nee 1990: 56; Mair and Mortimer 1996: 20-21). Second, EM may play a role in an offender's *active* abandonment of crime, by forcing her to confront her offence by confining her from other pursuits (Gainey and Payne 2000: 88).<sup>27</sup>

Despite this complicated web of potential pains and penal aims, EM must always be considered to be primarily preventative, or at least, as primarily *enabling* the incapacitation of the offender through surveillance.

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<sup>26</sup> Whom it is generally accepted have a positive impact upon efforts to rehabilitate offenders: see van Zyl Smit and Snacken 2009: 228.

<sup>27</sup> Cf. the use of imprisonment as a means of correcting the deviant souls of offender through enforced reflection (e.g. Foucault 1977: 135-169).

Subsidiary uses to which it may be put are somewhat more conjectural, whereas the experience of offenders subjected to it appears to be largely of confinement (Mair and Mortimer 1996; *cf.* Mair and Nee 1990). Any punitiveness, or indeed rehabilitation, arising from this is purely coincidental to EM's primary, quasi-custodial purpose. Its primary importance to this study is that it blurs the boundaries between community-based and custodial penalties (*cf.* Nellis 2009): at the upper end of the range of preventative requirements, offenders' experiences may come close to those they would experience under a custodial sentence.

### 1.3.5 Unpaid Work: The Uncertain Role of Retribution

Finally, let us turn to the unpaid work requirement, which has also been known as community service or community punishment (Goode 2007). This condition requires the offender to perform some form of labour under supervision (ss. 199-200 CJA03). The work done need not be manual, and is not (necessarily) expected to provide the offender with any useful skills. Examples of work given in the Explanatory Notes to the 2003 Act include 'environmental projects such as clearing canals, removing graffiti, painting and decorating community facilities, and working in homes for the elderly' (EN03: [523]). The task imposed is often selected from schemes recommended by the public (Ashworth 2010: 341-343; Carter 2009). There is therefore a strong reparative undercurrent to unpaid work, although concern with reparation is comparatively new. Traditionally, unpaid work was more straightforwardly punitive, to the extent that at one point it was known as a 'community *punishment* order' (Criminal Justice and Court Services Act 2000, s. 44 (*emphasis added*); *cf.* Harrison 2006).

The extent to which unpaid work remains retributive, however, is questionable. This is particularly reflected in the recent change of the public name of the requirement from 'unpaid work' to 'community *payback*' (Casey 2008: 55). This name change was explicitly motivated by

the populist purpose of increasing public confidence in community punishment and the penal system in general by increasing the visibility of unpaid work schemes (*ibid*; *Cf.* Thomas and Thompson 2010). The chief means by which this has been pursued was the controversial introduction of mandatory high-visibility orange tabards emblazoned with the words 'community payback' for all participating offenders (Bottoms 2008; Pamment and Ellis 2010). Criticisms of this approach included fears of vigilante violence (*e.g.* Hewitt 2008; *cf.* Brooker 2008), and indeed against non-offenders who also wear high-visibility work clothing (Wintour 2008). Others were concerned that the shaming of offenders would counteract efforts to reintegrate them into society (Pamment and Ellis 2010: 27).<sup>28</sup>

Certainly offenders are likely to experience a greater amount of stigmatisation under high-visibility payback schemes (*ibid*: 26-27), raising questions about the visibility agenda's compliance with the principle of *parsimony*, that is, that the State should use the minimum necessary level of intrusion into a citizen's life in pursuit of its (penal) aims (Ashworth 2010: 97-98). In particular, it is far from clear that forcing offenders to wear high-visibility outfits that have the (however unintended) effect of stigmatising them is the *only* way to publicise that they are undergoing punishment, when one can 'badg[e] the work, not the offender', identifying public works as the result of community punishment without highlighting offenders as such (Bottoms 2008: 151-152). The intrinsic focus on stigmatising the offender rather than punishing the crime appears to indicate a shift away from the explicitly limited punishment of retribution towards less principled and more populist punitiveness – a distinction I substantiate below, at 2.1.1. For now, it suffices to say that

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<sup>28</sup> It should be noted that Jack Straw, the Minister of Justice at the time of the implementation of community punishment, denied that stigmatisation was the purpose of the orders, but that it was rather about increasing public confidence through higher visibility (Lewis 2008). *Cf.* Foucault's (1977: 42-54, 109) description of public executions as a confirmation of the effectiveness of the law. Even if it is not intentional, stigma is an inevitable by-product of this approach (Pamment and Ellis 2010).

this increase in punitiveness is not linked to any concern with the seriousness of the offences against which unpaid work is applied, and that this incurs significant limitations upon its continuing retributive content.

On the other hand, certain remnants of the retributive content of unpaid work remains in modern practice. In particular, it is noteworthy that unpaid work is the most common requirement to be attached to a community order without other simultaneous conditions (Ashworth 2010: 342), suggesting continuity with its previous incarnation as a distinct (and distinctly retributive) punishment. However, it is also clear that judicial authorities are attracted to unpaid work for a number of additional reasons. These include some (limited) rehabilitative benefits, such as forcing offenders to keep to a schedule, and thereby compelling them to learn useful time-management skills (Goode 2007: 318).

The literature suggests that community payback imposes a significant level of suffering on those subjected to it due to the new element of increased public humiliation. However, this potential source of retribution has been attenuated by the inclusion of reparative, populist-punitive, and to a limited extent rehabilitative elements. The traditional role of retribution in the requirements that can be attached to a community order appears to be diminishing.

### 1.3.6 Summary

This section has demonstrated that community and suspended sentence orders are extremely flexible instruments that can be used to pursue a multitude of penal aims. Indeed, the impact these sentences can have upon offenders' lives differs substantially, ranging from restrictions of liberty similar to (but qualitatively distinct from) incarceration to the infliction of shame, alongside potential positive impacts, such as overcoming addiction and learning useful skills, behaviours and practices.

Whilst various pains of punishment can be identified across the spectrum of requirements available as sentencing options, the retributive component of the actual instruments of community punishment is, at most, minimal. Instead, the requirements show a tendency to pursue rehabilitation, reparation and incapacitation, although these tendencies are far from absolute in practice. Sentencing authorities may frame particular requirements in ways that alter the extent to which they pursue certain aims, for instance, whilst professional implementing bodies can influence the process through their values and practices.

By the same token, the actual outcome of those aims will also be affected by the offender herself: the social (and other) contexts within which she serves her sentence, and her attitudes towards and responses to the interventions of the penal State. Whilst the aims of policy-makers, legislators and sentencing authorities are therefore important in terms of setting the actual tasks imposed upon the offender by community punishment, they are not wholly determinative of the offender's ultimate experience, and therefore play only a partial role in determining those sentences' penal impact.

### **1.4 What is Community Punishment?**

In conclusion, I can make the following observations about the subject of this enquiry. Community punishment is a form of legal intervention and social process, which is characterised by its location within the offender's everyday social context, whilst imposing an element of direct supervisory control.

The location of these sentences in 'the community' exposes the punishment (and the punished) to the normative reactions of various groups and individuals, who may or may not be geographically proximate to the site of punishment. They participate in the process (subject to

socioeconomic capacity) through social shaming processes, as well as through limited involvement in decision-making and to some extent as beneficiaries of the process. This normatively charged reaction is important in that it will affect offenders' experiences of their punishments to some extent.

Community punishment has gone through a number of distinct guises throughout its history, from a primarily rehabilitative alternative to punishment, through incorporation into an explicitly retributive regime, and into a system dominated by concerns with risk management and public protection. Since the history of community punishment is to a significant extent the history of the Probation Service, this final transition has been met with institutional resistance and the maintenance of substantially rehabilitative probation values, which are also important to how the process is experienced by its subjects. The impact of the recent privatisation of 'probation services' under the *Transforming Rehabilitation* agenda is therefore likely to be significant, although the precise effect of this latest development upon the nature of community punishment (and therefore those sentences' penal impact) remains to be seen.

These historical developments have produced a penal system and community punishment regime that are inherently confused as to their overarching goals, having been constructed piecemeal in pursuit of a number of disconnected and more or less mutually exclusive penal and political ideologies (Garland 1985: 208). As a result, community punishment in England and Wales currently consists of a number of penalties that may be flexibly combined to suit a number of penal strategies and individual cases. In terms of their primary focus, these disposals (or 'requirements' in the parlance of the 2003 Act) demonstrate a strong preference for reductive and reparative aims, and provide little support (*prima facie*) for retribution.

## **Chapter Two: Retributivism**

In this chapter I outline the theoretical underpinnings of this thesis in retributive theory. I have made retribution an essential feature of penal impact, and must justify that decision. After all, in the last chapter I noted that community punishment in both its legal and historical context appears to derive little inspiration (or justification) from retributivism. Furthermore, penal policy more generally is increasingly dominated by populist punitiveness (which I distinguish from retribution on the basis of its lack of essential limiting principles) and risk management.

This chapter must therefore explain why retributivism is an appropriate lens through which to view modern Anglo-Welsh community punishment. Before I make that case, however, I must first describe retributivism's requirements for effective criminal justice. I therefore begin with a brief overview of the essential characteristics of the most influential retributive theories, and identify my own position in relation to them.

### **2.1 The Requirements of Retributivism**

#### **2.1.1 Essential Features of Retributivist Theories**

Retributivism is a belief that it is inherently morally desirable to punish individuals who commit crimes, and that this should therefore be the primary focus of the criminal justice and penal systems (Cavadino, Dignan and Mair 2013: 41). Whilst there are many different approaches to retribution, they share a belief that it is the role of the penal system to censure socially-agreed wrongdoings as a means of demonstrating moral condemnation of the offender's actions (Ashworth 2010: 88). This is underscored by a fundamental commitment to the political philosophy of *liberalism*.<sup>1</sup>

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<sup>1</sup> Liberalism is a broad church, and the extent to which liberal values are invoked varies between theories: for example, Duff's communicative approach (2001: 48-56) refers to a



Liberal political theory posits that individuals are *moral actors*; that is, that they are capable of choosing between options on an ethical basis (Duff 2001: 36). Kant (1785: 51-54) argues that this has significant implications for the organisation of society. He begins with the assumption that all (rational) human beings<sup>2</sup> are characterised by the capacity to make moral judgments. Kant calls this capacity '*dignity*', by which he means something that possesses an unquantifiable but definite moral value. Since its moral value is immeasurable, one should not treat a dignified subject as a means to an end, but only as an end in itself. Therefore every rational individual deserves respect for their dignity, which is their capacity to make ethical choices.<sup>3</sup> Society should be organised so as to allow every citizen to exercise this capacity, the *individual autonomy* to pursue their goals, so far as it is possible for them to do so without interfering with the capacity of other citizens to do the same (Ashworth 2009: 23-26).

However, the problem of individual autonomy is that individuals' pursuit of their autonomy may well bring them into conflict with one another. A liberal interpretation of (criminal) law conceives of it as a means of ensuring that autonomy is maximised despite this fact, by ensuring that individuals are free to do anything that would not impinge upon the autonomy of others (*cf.* Ashworth 2009: 23-27).

Retributivism supports liberal political philosophy in two ways: firstly, by ensuring individuals' equality of respect for autonomy;<sup>4</sup> and

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species of 'liberal communitarianism' that rejects traditional liberalism as failing to adequately recognise humans as social beings (*cf.* von Hirsch 1993).

<sup>2</sup> The existence of mental and physical disabilities may temporarily or permanently impair a person's capacity to make informed decisions. This fallibility is recognised in various defences at criminal law that prevent those not (fully) responsible for their actions from being punished as though they were: see Ashworth (2009): 138-146.

<sup>3</sup> Beyond the criminal law, the spread of human rights norms can also be associated with liberal concerns with human dignity: see, *e.g.*, art. 1 of the Universal Declaration of Human Rights 1948.

<sup>4</sup> The question of whether there is actual equality of autonomy in modern Anglo-Welsh society is contentious, given that equality of *opportunity* is manifestly absent. Relatively poor or otherwise marginalised citizens have less ability to exercise their power of choice in comparison to the wealthy and influential, and yet the (retributive) penal system does not

secondly, by recognising the offender's own human dignity (Markel 2001: 2194-2198).

Firstly, if society requires the restriction of individual autonomy in order to respect the dignity of other citizens, then a crime is effectively a claim to an (illegitimate) greater entitlement to autonomy than the rest of society. The crime is essentially an implicit statement that the offender's dignity is more valuable than that of her fellow-citizens, and that she need not concern herself with their rights and freedoms to the same extent as she does her own. A retributive punishment counteracts that claim (although not the harm done) by demonstrating both to the offender and wider society that she is as bound by law as any other citizen (Markel 2001: 2196-2197). Punishment is thus intrinsically of moral value, because it highlights the civic duty to respect every individual's human dignity and equality under the rule of law.

Secondly, the process of punishing offenders actively respects the dignity of the offender. This (somewhat counterintuitive) justification is a logical consequence of individual moral agency. To be an agent is to have the capacity of (rational) choice (Kant 1785: 51). Therefore, one has ownership over one's actions, and it follows that one is *responsible* for them as well. To punish the offender for her actions is to recognise that she is responsible for her conduct; in other words, to reaffirm that she is a moral agent, however deviant her behaviour (Markel 2001: 2194-2195).

From this second proposition in particular, retributivism draws three essential and interrelated principles, namely those of *offence-specificity*, *proportionality*, and *parsimony*. The first of these identifies the criminal offence, and not the offender herself, as the appropriate subject of the penal system. If the individual has dignity, then she ought to be

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treat this as problematic for the purpose of assigning criminal responsibility: see Hudson (1994); Lacey (1988): 18-22.

treated as an end in herself. This means that it would be improper for the State to attempt to force the offender to change her behaviour, which would amount to using her to achieve the State's aims. Certainly it may try to *convince* the offender to desist (*cf.* Duff 2000: 412-413), but she must be free to choose otherwise. Thus, retributivism dictates that punishment may only address the offence that was committed, and not perceived defects in the offender's character (Hudson 2003: 40-41).

That is not to deny that individual factors or social circumstances (such as drug dependency and anger management issues) may have encouraged their criminality. There is plenty of evidence that these factors can, and do, lead to criminality (*e.g.* Rock 2012). However, a retributive approach would reject the argument that attempting to address these issues should be the role of the penal system. Rather, they should be left to the social welfare and public (physical and mental) healthcare systems, amongst others. This division of labour would leave the penal system free to focus on the punishment of (criminal) wrongdoing, and avoid State assistance in dealing with the causes of criminality from becoming unduly coercive, and therefore illiberal.

However, it is possible to overstate this point. Many attempts to address criminogenic factors can also provide effective punishment of the offence. Indeed, Fergus McNeill (2011: 16-17) argues that desisting from crime involves considerable critical self-reflection and lifestyle changes, and that this is 'something that offenders often find harder than undergoing "mere" punishment'. I shall return to this point in **3.1**. For now, however, I should note that although retributivism demands a primary focus upon the offence as the source of justification for the imposition of punishment, that demand need not preclude other penal aims, such as rehabilitation or reparation. What differentiates retribution

from other theories under this head is therefore that its primary concern is with the *purpose*, rather than the *content*, of punishments.

Whilst a retributive penal system should be primarily concerned with the infliction of suffering upon offenders, the same reasons necessitate that that suffering be strictly limited. Criminal justice represents the strongest censure that the State can legitimately impose upon its citizens (Ashworth 2009: 1). At the same time, however, individuals' autonomy ought not to be restricted more than is absolutely necessary to preserve the dignity of others. Therefore it is vital to constrain the mechanism of punishment to prevent the State's undue interference with offenders' (human) dignity. Retributivism attempts to preclude this through the principles of *proportionality* and, I argue, *parsimony*.

Proportionality is summarised by the well-known maxim, 'let the punishment fit the crime'. Since retributive justice focusses upon the criminal act, it follows that the severity of the punishment should reflect that act's seriousness. English criminal and penal law provides a (more or less contestable: *cf.* Ashworth 2010: Ch. 4) hierarchy of offences in terms of their relative seriousness by prescribing the types and durations of sentences that judicial authorities may impose in response to them: the 'sentencing tariff' (Cavadino, Dignan and Mair 2013: 41). Every judge must consider the characteristics of the individual case and decide where on the tariff the offence lies, and therefore, what the appropriate sentence is (subject to any constraints set by statutory limits on sentence length, and with the assistance of sentencing guidelines). In this way, theoretical limits are placed on the level of punishment inflicted upon the offender, on the basis of the harm done by her offence, and of the extent of her culpability for it (von Hirsch and Jareborg 1991: 1-3).

By contrast, *parsimony* is an obligation to inflict the minimum degree of suffering necessary for the purposes of the sentence (Ashworth 2010: 97-98; Morris 1974: 59).<sup>5</sup> This can be justified under liberal theory, since it ensures the maximum preservation of the offender's autonomy by protecting her from any greater deprivation of autonomy than is necessary to recognise the blameworthiness of her deed and censure it.

To summarise, retributivism has a number of core characteristics. Its concern is wholly upon the impact of the criminal actions of the offender and her culpability for them. It is therefore entirely retrospective in its scope, and does not seek to address perceived defects in the offender (Hudson 2003: 38). It treats offenders as rational agents, who are responsible for their own actions, but who should be punished for them only in strict relation to the seriousness of their crimes and to the least extent necessary, in accordance with the principles of proportionality and parsimony.

### 2.1.2 Which Retributivism? *Lex Talionis*, Desert, and Communication

Despite being united by these common characteristics, retributivists are divided into a number of different schools and approaches. Like any sufficiently advanced field of study and public thought, the term 'retributivism' covers a multitude of disparate positions, of which I can only provide a brief summary. Nevertheless, there are three key approaches that I must discuss: the *lex talionis*; the desert model, most effectively expressed by von Hirsch; and Duff's communicative theory of punishment.

'*Lex Talionis*' (from the Latin, 'law of retaliation': Simpson and Weiner 1989a) is characterised by the phrase, 'an eye for an eye, a tooth

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<sup>5</sup> Morris did not conceive of parsimony as a retributive principle; rather, it was 'utilitarian and humanitarian' (Morris 1974: 61). However, the principle is perfectly compatible with a retributive account, since it ensures that no more than the minimum necessary suffering to punish the offender takes place: cf. Frase 2004: 88.

for a tooth' (*ibid.*),<sup>6</sup> suggesting an exact like-for-like retaliation against the offender. It is perhaps one of the most widely known instances of retributive theory (Hudson 2003: 38). Despite this fame, however, it is unpopular amongst modern scholars, who dismiss its like-for-like mutilations as incompatible with modern political and legal values (Cavadino, Dignan and Mair 2013: 41-42).

Such a model of punishment follows the principle of proportionality (if not parsimony), since the severity of the damage is inflicted on the offender in exact proportion to the harm that she perpetrated. It has therefore been suggested that the *lex talionis* contains important principles of relevance to the modern law. Indeed, Fish (2008) offers a revisionist account that argues that the barbarism of the *lex talionis* that modern scholars perceive never actually existed. In fact, it was the source of retribution's use of the principle of proportionality as a bastion against penal excess. The system prescribed in the Judeo-Christian Bible, Fish argues, was far more nuanced, allowing monetary compensation for all crimes except murder (*ibid.*: 58).

Regardless of how accurate the modern understanding of the *lex talionis* is, it has been rejected by the academic mainstream, as well as a significant proportion of the wider public: as another maxim puts it, 'an eye for an eye leaves the whole world blind' (*cf.* King 1987: 73). Despite attempts to reconcile the theory with modern practice (Fish 2008; Markel 2001: 2229-2232), it must therefore be dismissed in the study of modern English law. The *lex talionis*, as it is currently understood, is too simplistic to do justice effectively in all cases, and would not accord with current human rights norms that expressly limit the availability of extremely

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<sup>6</sup> The approach is derived from several Biblical passages. *E.g.* Leviticus 24: 19-20: 'And if a man cause a blemish to his neighbour; as he hath done, so shall it be done to him: Breach for breach, eye for eye, tooth for tooth' (emphasis added). However, the *lex talionis*'s essential conception of retaliation can be found as much as a millennium earlier in the Babylonian *Code of Hammurabi*: Fish 2008: 58-59.

severe forms of punishment (such as torturous, inhuman or degrading punishments, or capital punishment: see the European Convention on Human Rights and Fundamental Freedoms 1950, art. 3 and Protocols 6 and 13). Whilst revisionist accounts may be enlightening for the purpose of understanding the historical development of retribution, they are irrelevant to any modern discussion. Indeed, a more nuanced system, derived from *lex talionis* traditions of retaliation, in which proportionality is central but which is not restricted to precisely corresponding punishments already exists. We call it 'desert theory'.

In contrast to the obscurity into which the *lex talionis* has fallen, the desert model has so dominated retributivist discourse that Andrew Ashworth uses the terms more or less interchangeably (e.g. Ashworth 2010: 88). It has also had the clearest influence upon English law of any of the theories discussed here: as noted in 1.2.3, the Criminal Justice Act 1991 was largely influenced by prominent desert theorists such as Ashworth, Andreas von Hirsch, and Martin Wasik (cf. Lovegrove 2001: 126). Desert allows for a more flexible formulation of proportionality than the (modern stereotype of the) *lex talionis*, allowing fundamental values such as human rights norms to set the upper limits of the punitive spectrum. The severity of the punishment must still be comparable to the seriousness of the crime (Ashworth 2010: 88-89). Offence seriousness is calculated by the amount of *harm* inflicted by the offender and her *culpability* for it, taking into account her mental state and any partial defences that may reduce her responsibility (von Hirsch and Jareborg 1991: 2-3).

Desert theory justifies punishment primarily on the basis of the intuitively appealing proposition that offenders deserve to be punished (von Hirsch 1986: 52; cf. Kleinig 2011). However, it also operates under the understanding that civic morality requires buttressing by the criminal

justice system, without which 'victimising conduct would become so prevalent as to make life nasty and brutish, indeed' (von Hirsch 1986: 48). In other words, von Hirsch's desert theory involves an admission that (general) deterrence has some role to play in justifying the penal system: the mere existence of a general threat of penal intervention deters crime, which is part of the justification of that system on a desert-based account (*Ibid.*). However, the fundamental importance of proportionality under this model restricts the extent to which this underlying concern with deterrence affects sentencing decisions (Ashworth 2010: 89).

The final major theory of retributivism that merits discussion (at least, for present purposes) is the theory of communicative justice championed by Anthony Duff.<sup>7</sup> Whilst it has enough similarities to desert theory to still be considered retributive, communicative justice also incorporates several other distinct features (Ashworth 2010: 90). Whereas desert theory tends to emphasise the moral agency of offenders through their responsibility for criminal acts, Duff's approach focuses upon a different component of the liberal conception of autonomy: the offender's capacity to choose (and therefore to change) her own (future) behaviour. For Duff, retribution is not so much a moment of normative vengeance as of socio-moral communication. This means that punishment should seek to achieve four objectives: first, to make the offender realise that she has done wrong; second, to encourage her to accept society's censure of her wrong as justified; third, to ensure that she understands the harm she has done, and in doing so to desist from crime; and fourth, that she should be able to meaningfully reconcile with victims and wider society (Duff 2000: 412-413).

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<sup>7</sup> Other writers (e.g. Rex 2005; Bennett 2010) have also developed the theory, but Duff (esp. 2001) is the model's undisputed paragon.



The key distinguishing feature of these goals is that the offender is addressed more directly, on an individual basis, than by desert theory's more symbolically expressive approach, which uses criminal justice to speak to the polity as a whole. The effort is not made to *force* the offender to accept the wrongfulness of their conduct, but to *persuade* them – although of course the process of trial and punishment remains an inherently coercive one (*ibid*: 414-415). The offender's agency is highlighted, and through the inclusion of reconciliation and reparation as contingent goals of the communicative process all individuals involved (as offenders, victims, or merely citizens of the polity in question) are afforded equal respect under the law (Ward 2009: 117-118; *cf.* Duff 2003).

Despite this inclusion of consequentialist goals, communicative justice remains essentially retributive. Although Duff (2001: 30) himself doubts that communicativism can be called a purely retributive approach as a result of their inclusion, they are ultimately only aspirations, because the offender must choose to fulfil them herself (*cf.* Ward 2009: 117).

In other words, they should influence the *content* of the sentence imposed, but should not (directly) influence its overall *severity*, which is to be set according to the (retrospective) principle of proportionality (Duff 2001: 132-143). The determination of what proportionality means under a communicative justice model is substantially similar to that advocated by desert theorists: a consideration of harm and culpability (*ibid*; *cf.* Ashworth 2010: 88-90). As a result, Duff is committed to a primary focus in the determination of sentences upon acts rather than actors, and proportionality before the pursuit of prospective, consequential benefits.

Duff's model is compelling in its attempt to reconcile a humanistic respect for autonomy and human rights, with the effective punishment of wrongdoing (Ward 2009: 117-119). However, he is conscious of the gulf between his normative theory and contemporary penal practice (*e.g.* Duff

2003). Nevertheless, his account is capable of effectively evaluating the practices of the contemporary Anglo-Welsh penal system (Duff 2000: 415-416) and is therefore entirely appropriate as a theoretical framework for the purposes of the present study. In light of its fit with my research questions, and the normative advantages it brings, I therefore align my own position most closely to the communicative approach to retribution.

### 2.1.3 Censure as a Feature of Modern Retributive Theories

Modern retributive theories share one further feature that warrants examination, namely the central importance that those theories accord to punishment's ability to *censure*. Censure can be defined as the expression of moral condemnation for the offender's actions, and is a key part of the process of punishing offenders. In particular, it is one of the two essential requirements of a punishment in Feinberg's (1970) classic definition, the other being 'hard treatment'.

'Hard treatment' consists of those elements that make a criminal sanction difficult to endure, and therefore goes to the *content* of a sentence. By contrast, 'censure' (or, in Feinberg's rather archaic terminology, 'reprobation') goes to its *intent*, that is, to why the sentence has been imposed, and to why the hard treatment takes the precise form it does: 'Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties' (*ibid*: 74, original emphasis).

Both desert and communicative approaches to retribution incorporate censure as an additional requirement to proportionality: under a desert model, it is part of what the criminal act deserves (von Hirsch 1976, 1993); for proponents of Duff's communicative model, it is part of what is being communicated, and therefore justifies the imposition of hard treatment (Duff 2000: 419-421).<sup>8</sup>

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<sup>8</sup> Indeed, for Duff this is one way of avoiding the moral quagmire posed by the (liberal) State inflicting suffering upon offenders, for even if the proposition that wrongdoing deserves

Therefore, in order for a sentence to be truly retributive, it must not only inflict a proportionate level of hardship upon the offender (however that 'hardship' is conceptualised), but must do so in a way that is censorious of her actions. To illustrate what this means, let us consider Duff's (2001) communicative approach to censure in greater detail. Given the focus of the present study on community punishment, these sentencing options offer a particularly useful case study of how communicative censure operates.

Duff (2001: 99-105, 2003) clearly supports the use of community punishment *as* punishment, and therefore must argue that they provide some form of censure. Indeed, for Duff, a largely standardised level of reprobation is built into community punishment,<sup>9</sup> notwithstanding the Probation Service's (historically) benevolent, reform-oriented approach. For Duff (2001: 143), once a sentence fits broadly within the bounds of proportionality, the question becomes one of 'substantive fit': 'what mode of punishment is apt to communicate an appropriate understanding of the particular crime and its implications?' In this context, a 'mode of punishment' is the specific form of sentence imposed, such as imprisonment, or the individual requirements of community punishment. For him, all examples of a mode of punishment carry the same basic message, and therefore provide effective meanings that may or may not be appropriate punishments for certain crimes.

In particular, he classes community punishment as an example of communicative punishment *par excellence*, 'because they are suited to the aim of persuading offenders to face up to and repent for their crimes, to begin to reform themselves, and to make apologetic reparation to those

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punishment is problematic, 'there is surely nothing puzzling about the idea that wrongdoing deserves censure' (Duff 1998: 50).

<sup>9</sup> In particular, 'probation', which now manifests principally in the supervision requirement, and 'Community Service Orders', which now manifest in unpaid work requirements. See Duff 2001: 145.

they have offended' (*ibid*: 145). '[I]n her meetings with the offender, the probation officer tries to get him to think and talk about his crime and how he needs to change', whilst unpaid work ought to confront an offender with the consequences of crimes like his for the wider community (*ibid.*). More generally, however, community punishment displays the symbolic meaning that: (a) as with all criminal sanctions, the political community exercises authority over the offender (*cf.* Markel 2001: 2196-2198); but also specifically (b) that the offender's crime has 'put her trustworthiness as a citizen in doubt' (Duff 2001: 145).<sup>10</sup> She has a tenuous, but retrievable, relationship with the rest of the broader polity in which she lives. This is in stark contrast to other sentencing options: a fine characterises the offence as something that can be adequately compensated with money (*ibid*: 146-148), and imprisonment designates a crime as so serious that the offender deserves 'temporary exile' from her community (*ibid*: 148-152). In sum, community punishment offers a more restrained form of censure – the act was wrong but may be undone with sufficient hard work and sincere repentance. The message is condemnatory but optimistic. It offers hope for reintegration and recognition as a full fellow-citizen in the future, whilst still emphasising that what was done was wrong, and that only by cooperation with (and subservience to) the community's values can reconciliation be achieved.

This proposition is of particular importance to any study of community punishment in general, and probation supervision in particular. Given both the prevalence of strong rehabilitative and pro-social values in probation practice, as well as the rather attenuated presence of retributive requirements on the roster available under English penal law, we might, *prima facie*, question the applicability of retributivism in the context of

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<sup>10</sup> Specifically this is a point about probation, invoking the literal meaning of the concept, as 'a time of proving'. By contrast, unpaid work demonstrates that the offender owes something to the community as a result of her crime, 'by way of reparative apology' (Duff 2001: 145).

community penalties. Can one meaningfully punish even as one 'advises, assists and befriends'? Can hard treatment imposed for principally rehabilitative and risk-managerial purposes be said to have a 'penal' impact at all? The next section attempts to answer these questions at the theoretical level, justifying the application of retributive theories to community punishment.

## **2.2 Retribution and Community Punishment**

### 2.2.1 The Custody and Community Thresholds

Community punishment is only one facet of the penal system, and fits into the broader sentencing tariff, by which the range of dispositions available under English penal law is organised and compared to different offences. Sentencing authorities are guided in the exercise of their discretion by this framework, which sets legal limits around the use of certain types of sentence.<sup>11</sup>

As noted in the last chapter, the Criminal Justice Act 2003 retains the custody and community thresholds of its 1991 predecessor (CJA03, ss. 148(1), 152(2)). This leaves in place an explicitly retributive hierarchy of sentences (Lovegrove 2001), with custodial options for the most serious offences, community punishment for offences of moderate seriousness, and other non-custodial dispositions for the least serious crimes.<sup>12</sup> The link to offence seriousness has also been retained from the 1991 Act: a community order may not be imposed unless the criminal act 'was serious enough to warrant such a sentence' (CJA03, s. 148(1)). Likewise a custodial sentence is impermissible unless the offence 'was so serious that neither a fine alone nor community sentence can be justified' (s. 152(2)).

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<sup>11</sup> This discretion is not available for all crimes under English law, a common example of its absence being found in the mandatory life sentence for murder under the Murder (Abolition of Death Penalty) Act 1965.

<sup>12</sup> See Cavadino, Dignan and Mair (2013: 114) for a helpful diagrammatic summary.

The express retributive framework underlying the 1991 Act has been maintained in the 2003 system.

Padfield (2011) suggests that another motive of the sentencing hierarchy was to reduce the use of imprisonment by judges, although there is strong evidence that it has had the opposite effect in practice (Millie, Tombs and Hough 2007).<sup>13</sup> It appears that judges are often led by the threshold tests to think along (broadly) retributive lines when sentencing, or at least when considering the initial placement of the offender on the tariff (*ibid*: 251-260). This suggests that there are substantial grounds for treating community punishments as retributive enterprises, since their use as sentences is determined to a significant extent by broadly retributive criteria.

### 2.2.2 The Limits of the Retributive Model

However, there are two substantial drawbacks to the use of a retributive model to analyse the Anglo-Welsh penal system, and therefore, community punishment: firstly, the multiplicity of sentencing aims allowed under the 2003 Act; and secondly, the capacity for judicial authorities to use previous criminal history to define the seriousness of the crime (von Hirsch and Roberts 2004).

The 2003 Act provides a number of penal aims, without any means of choosing between them (CJA03, s.142). This absence leaves judges with no guidance as to the how to approach a case where two or more aims conflict (von Hirsch and Roberts 2004: 641). Absent such direction, judges must rely on their own individual interpretation of this penal 'smorgasbord' (*ibid*: 642) in order to evaluate each aim's relative value. Notwithstanding the impact that this can have upon consistent sentencing, and thus upon the overall fairness of the criminal justice system (Ashworth

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<sup>13</sup> Cf. Mills 2011: 8 at Figure 1 for illustration. Note in particular that the rate of imprisonment increases substantially after the inception of the Criminal Justice Act 1991.

2010: 255), this lack of clear prioritisation limits the extent to which any one theory (retribution included) can explain contemporary penal practice.

Furthermore, the 2003 Act allows judicial authorities to take account of an offender's previous convictions when calculating the seriousness of the offence (CJA03, s. 143). The use of previous convictions in the determination of sentencing has long been a contentious issue within the field of retributivism,<sup>14</sup> and the form that has been adopted in the 2003 Act is especially problematic.

It is hard to argue that previous convictions form a part of retributive sentencing as I have outlined it in this chapter. After all, taking account of the offender's criminal history encourages sentencers to go beyond the punishment of the individual act. Both dominant theories in retributivist discourse, communicative justice and desert theory, calculate the proportionality of a sentence against the harm that the offender's crime has caused and her culpability for it (von Hirsch and Jareborg 1991: 2-3). *Prima facie*, the fact that the offender may have committed the same act any number of times before has no real impact upon either. The harm of the specific acts that are the subject of the current offence is not affected unless the two crimes were part of the same concerted behaviour (in which case the two offences should be tried jointly). To use a simple (and admittedly rather facile) illustration, the theft of £100 costs the victim £100 whether or not the thief has stolen before.

So, a retributive justification for taking previous convictions into account must rest upon the culpability of the offender. One such argument runs that, having previously been confronted by the law over her misbehaviour, an offender's moral 'lapse' can no longer be excused as much as it could on the first occasion, and so she is more deserving of

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<sup>14</sup> The debate over previous convictions and retributivism has been summarised in a highly informative and wide-ranging collection edited by Roberts and von Hirsch (2010).

harsher punishment (von Hirsch 2010). Another posits that the offender may be taken to be more culpable for the subsequent offence since, having prior knowledge of the law, her contemptuous reoffending makes the substance of her implied claim to greater liberty than her neighbours more offensive and therefore deserving of greater punishment (Markel 2001: 2196-2197; Roberts 2010). Still another variation would have it that every previous conviction includes an implicit undertaking on the offender's part not to reoffend, and that her failure to do so merits additional punishment (Lee 2010).

Arguments in favour of justifying harsher punishment of recidivists on retributive grounds tend to take two forms: either they suggest that repeat offenders are entitled to *less mitigation* than the first-time offender, to whom we might offer the benefit of the doubt (e.g. von Hirsch 1986, 2010); or they suggest that repeat offending *aggravates* the latest offence, adding a 'recidivist premium' to their culpability, and therefore their deserved sentence's severity (Roberts 2010; cf. also Lee 2010, Bennett 2010).

However, the CJA03 has explicitly adopted the recidivist premium: 'the court must treat each [relevant] previous conviction as *an aggravating factor*' (s. 143(2) CJA03, emphasis added).<sup>15</sup> The explanatory notes also support this: 'Any previous convictions, where they are recent and relevant, should be regarded as an aggravating factor which should increase the severity of the sentence' (Explanatory Notes to the CJA03: [446]). Given the Anglo-Welsh focus of my overall research questions, in other words, it is sufficient to consider the shortcomings of the 'recidivist premium' approach.

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<sup>15</sup> A previous conviction is relevant if it is both sufficiently similar in nature and sufficiently recent: s. 143(2) CJA03.



Ultimately, there are two key objections to retributive acceptance of a recidivist premium. The first is that treating previous convictions at sentencing as aggravating the culpability of the offender fundamentally misunderstands the nature of criminal law. Tonry (2010: 104) sums the point up well: '[n]o citizen is obligated not to offend... [although t]he citizen who chooses to offend is morally vulnerable to prosecution, conviction and punishment'. The creation of criminal consequences for an offence does not create a moral duty for any subject of the State to obey the law. Rather it empowers the State to take specific actions as necessary consequences of (detected) criminal behaviour. For this reason, amongst other consequences, moral opponents of unfair laws may resort to *civil disobedience* without compromising their (internal) ethical logic.

More to the point, even if Tonry's (2010) position goes too far in dismissing the idea that criminal law imposes obligations on citizens, it is clear that it does not impose any greater *legal* obligation on offender not to *re-offend* than on any other citizen (*ibid*: 105). To do so would be to judge the actor and not the action (and the offender's responsibility for it, *i.e.* her culpability), and thus to step beyond the bounds of retributivism. Whilst offenders may be told by the judge not to reoffend, they have no legal powers to *compel* them to do so. It follows that conviction places offenders under no greater *legal* obligation to do so than any other citizen, and so they cannot be considered more culpable for subsequent 'moral lapses' (Ryberg 2010) than any other member of the polity (Tonry 2010: 103-105; von Hirsch 2010: 6-7). Since they do not have '[m]ore to apologise for' (Bennett 2010: 73), the metaphor underscoring the recidivist premium breaks down. Indeed, Duff (2001: 121) is dismissive of the possibility of previous convictions affecting future culpability:

'Some offenders, of course, will finish their sentences still unrepentant... Am I not committed to saying that we should then

extend their punishments in an attempt to induce repentance? But doing so would again bring my account into conflict with the principle of proportionality, and would turn punishment into an attempt to coerce offenders into submission rather than to appeal to them as autonomous moral agents.'

This concern with proportionality contributes to the second problem with a recidivist premium: that it is very difficult to measure, and therefore to set (upper) limits upon the amount of aggravation each prior offence implies for the present sentence. The legislation is rather unhelpful: s. 143(2) CJA03 simply states that previous convictions represent 'an aggravating factor', but not how aggravating, nor up to what point. Hypothetically, if an offender commits an infinite number of minor offences, is their present crime to be infinitely punished as a result?

Roberts (2010) argues that proportionality to the seriousness of the current crime will provide an upper limit, by setting the point at which the aggravated sentence becomes *grossly* disproportionate (*cf.* van Zyl Smit and Ashworth 2004). But even if the concept of gross disproportionality was not too vague to be particularly helpful for the purpose of identifying exactly when a sentence has become excessive (von Hirsch 2010: 6), its very invocation highlights the rather tortured analogy being deployed.

The argument of the (retributive) recidivist premium is that previous convictions aggravate because they heighten the offender's culpability for her latest offence; they cannot affect the harm inflicted, so that is the only way that they are relevant to the present act (and therefore to the retrospective perspective of retributive justice). But to do so is to accept the fact of the disproportionality, just not the degree. It is to argue that the sentence imposed would be disproportionate for the crime committed, *but for* the account taken of previous convictions. The sentence's retributive credentials can only be saved by the fact that the

punishment is not grossly disproportionate to the crime, but that is not the standard that is applied elsewhere under retributive criminal justice, and no reason is given as to why that standard *should* be deviated from.<sup>16</sup>

These two weaknesses ultimately mean that the recidivist premium – the *aggravation* of sentence severity on the basis of previous criminal history – is not an acceptable component of retributive sentencing theories.<sup>17</sup> Since English penal law proceeds on this basis, it must follow that sentencing decisions are made on non-retributive grounds to a significant extent. Notwithstanding the broadly retributive structure of the sentencing thresholds, these derogations render the application of a (purely) retributive theoretical framework to the Anglo-Welsh penal system extremely problematic (von Hirsch and Roberts 2004: 648-649).<sup>18</sup>

### 2.2.3 In Defence of a Retributive Model of Community Punishment

Despite these weaknesses, it is still appropriate to adopt a retributive theory of community punishment for the purpose of evaluating it against other sentences. There are three reasons why this is the case: first, the implicit prioritisation of retribution in the 2003 Act; second, the possibility for 'hybrid' theories allowing for subsidiary penal goals alongside retribution; and third, the potential for overlap between penal aims.

Firstly, notwithstanding the 'smorgasbord' of penal aims, the 2003 Act exhibits an ongoing preference for retribution above and beyond alternative penal aims. The continued existence of the sentencing thresholds as a means of organising the sentencing tariff, together with

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<sup>16</sup> This is not to say that gross disproportionality is a useless test for retributivists, nor that absolute adherence to mathematical proportionality is either possible or absolutely necessary. Rather the point is that, without wishing to abandon the application of exacting standards of proportionality in general, retributive exponents of recidivist premiums make an implausible (or at least unexplained) exception in order to incorporate previous convictions.

<sup>17</sup> Despite these fundamental problems, comparatively few retributivists deny a role for previous convictions at sentencing. Tonry (2010: 92) rejects this as a series of 'strained efforts to avoid being impolitic or controversial' in the face of the intuitive appeal of accounting for criminal history at sentencing, although it may also represent an attempt to provide more correspondence between such theories and social reality, making it easier for them to be put into action in policy and law.

<sup>18</sup> The point is not that accounting for previous sentences is somehow unethical, but only that it is not a *retributive*, and therefore weakens an exclusively retributive account of Anglo-Welsh criminal justice.

the highlighting of offence seriousness as the baseline for the determination of sentence severity, indicates that retribution has a much more important operational role in the criminal justice system than its competitors in s. 142 (Dingwall 2008: 402-403). This is also true in the more specific instance of community punishment, since proportionality between the offence seriousness and sentence severity is required in the formulation of the order by the judge (CJA03 s. 148(2)(b)).

Whilst the capacity of judges to have recourse to previous convictions undoubtedly undercuts the primacy of retribution, it must be recognised that the impact of s. 143 is limited. Recidivism is merely an aggravating factor, and although it is certainly more significant under the 2003 Act than its predecessors, it remains the case that the initial placement of an offence on the tariff relies upon the retributive criteria of harm and culpability (Dingwall 2008: 405-408). There is evidence that judges emphasise this initial placement in their decision-making, and that this process is substantially informed by retributive principles. They are then loath to substantially change the nature of the punishment, and instead prefer only to vary the amount or intensity imposed (Millie, Tombs and Hough 2007: 251-260), making retribution more important than its counterparts to the general severity of sentencing. In these circumstances, a retributive model is preferable to the alternatives: it goes further to describing the way in which sentencing decisions are made.

The second reason why a retributive penal outlook is compatible with the present study is that it is perfectly possible to adopt a 'hybrid' justification of the penal system that incorporates both retributive and consequentialist elements.<sup>19</sup> Indeed, many such theories have emerged over the last fifty years (see Frase 2013: 81-120).

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<sup>19</sup> See Hudson 2003: 17-37 for an overview of the consequentialist (or 'reductivist') aims: deterrence, rehabilitation, and incapacitation.

As an exemplar, we might take H. L. A. Hart's (1968) theory of 'side-constrained' consequentialism. Hart suggested that a penal system could be managed pluralistically, by defining one penal goal as the *general justifying aim*, but allowing another aim to act as a *side-constraint*: judicial authorities would be free to pursue (hypothetically) any general justifying aim unless and until it conflicted with the side-constraint (Hart 1968: 1-27). So, if retributivism were to act as a side-constraint, then one could pursue a consequential goal until doing so manifestly contravened the principles of proportionality and parsimony. This would mean that one pursued a 'pure' version of neither, of course: under such a model, retributive principles would not be invoked in every sentence, but instead would serve as a means of preventing broadly disproportionate sentences (Duff 2001: 11-14). Nevertheless, this would allow for substantive compliance with the principles of retribution.

This 'side-constraint' model is similar to the system governed by the 2003 Act. Under s. 142, judges can pursue any one (or more) of the 'smorgasbord' as a general justifying aim, but they are ultimately constrained by the (retributive) custody and community punishment threshold tests.

An even looser use of retributive principles – which also bears significant similarities to the CJA03 regime – is *limiting retributivism*, a theory associated with Norval Morris (1974) and developed by Richard Frase (2004, 2013). This model accepts that proportionality is important for the determination of sentence severity, but treats the concept much less prescriptively than desert theory would. For limiting retributivists, a sentence is proportionate to the seriousness of the offence if it is 'not undeserved' by the offender (Frase 2004: 86). Each offence can be satisfactorily dealt with by a potentially wide range of punishments that may well overlap with those available for other crimes (Morris 1982: 151).

Generally speaking, the principle of parsimony should operate to restrict sentences to the lowest severity necessary, unless a suitable consequentialist reason could be found to raise it (Morris 1974: 59). However, such a reason could not be used to exceed the maximum range of the sentence (Frase 2013: 57-62). In other words, retribution *limits* the role of other sentencing considerations; hence, 'limiting retributivism' (Frase 2004: 86).

Significantly, these hybrid approaches overlap considerably with Duff's communicative theory of retribution, with which I have aligned myself most strongly. For Duff, strict proportionality is neither possible nor necessary: one cannot convert a crime into mathematical units in order to compare even two very similar cases in practice, because each individual and every crime is unique. Rather, as in limiting retributivism, there should be 'substantive fit' (Duff 2001: 137-139) between the seriousness of the offence and the severity of the sentence, such that they are not disproportionate with one another (so-called 'negative' proportionality; *ibid*: 132-143).<sup>20</sup> The communicative message, along with the proportionality of the sentence, can then be fine-tuned by imposing particular 'modes' of punishment, which provide specific messages about the crime, the offender, and the castigating community (*ibid*: 141-155). Thus, retributive justice need not demand the absolute absence of other penal justifications.

Indeed, the mutual exclusivity of penal aims can be overplayed. Whilst retributivism and reductivism are often seen as being theoretically incommensurable, it is fair to say that there may be substantial room for penal aims to cohabitate in practice (Dingwall 2008: 402). In the two most

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<sup>20</sup> This is less exact than the strict proportionality advocated by, amongst others, desert theorists, but (somewhat) more demanding than a standard of gross disproportionality, since it rejects not only interventions that are manifestly problematic but also those that are less flagrantly 'not proportionate enough', according to standards set by the understanding of sentence severity in the penal system in question.

influential retributive theories (desert theory and communicative justice), there is room, respectively, for deterrence (Ashworth 2010: 88-89), or for rehabilitation and reparation (Duff 2003). The mere coexistence of a multitude of penal aims should not be seen as a barrier to a (more or less) monistic analysis, especially where the adopted penal objective has a greater role to play in the system than its alternatives, as is the case with retributivism in contemporary England and Wales.

In sum, retributivism is an applicable lens through which to evaluate community punishment. Despite the non-retributive elements of English sentencing law and of community punishment practice, it remains the case that community punishment is expected to punish offenders for offences of intermediate seriousness. It is therefore appropriate to consider its impact solely on those terms, especially for the purposes of answering my research questions.

### **2.3 Summary: Towards Penal Impact**

In this chapter, we have seen that retributivism makes a number of normative claims about what the penal system should concern itself with: it ought to punish offences, not offenders; it ought to be retrospective (although the extent to which it can look back past the offence being punished to an offender's antecedent history of criminality is contentious); it ought to ensure that offenders (and indeed, everyone involved in the process of criminal justice) are treated as rational agents capable of moral decision-making; and finally, it ought to communicate the community's displeasure about the committed crimes through the imposition of an adequate amount of censure. The principles of proportionality and parsimony should be observed, in order to limit the capacity of the State to interfere with the offender's autonomy.

## Chapter Two

A retributive theory of criminal justice is therefore an attempt to precisely calibrate the severity of punishments so as to symbolically challenge (and censure) offences. In doing so, it recognises those offenders as dignified citizens, worthy of respect and fair treatment, but responsible for their actions.

Despite the disconnect between a pure retributive theory and the realities of the Anglo-Welsh penal system, retributivism is nevertheless the best (or perhaps the least worst!) model for evaluating a penal system whose framework is determined by the calculation of an offence's seriousness and the proportionality of the punishment to it.

However, we are still some distance away from being able to meaningfully evaluate offenders' experiences of community punishment against this retributive backdrop. We have established that a (community) punishment will be effective if it imposes suffering in proportion to the offender's wrongdoing. But how might we evaluate those proportions? I explore this issue in the next chapter, which develops an analytical framework with which to evaluate the severity of (community) punishment's effect upon offenders' everyday lives. I call this framework 'penal impact'.



## **Chapter Three: Penal Impact**

Under the requirements imposed upon the penal system by the principles of parsimony and proportionality, punishment severity must be strictly limited in proportion with offence seriousness. But how do we determine that severity?<sup>1</sup> In this chapter, I discuss this problem and develop a solution to it: the concept of penal impact, which I define as *a measure of the severity of a sanction that takes account of both the ways in which the offender's life is affected, and the magnitude of those effects*. To develop this concept, I must consider how the severity of sanctions is measured, and examine mechanisms for consistently and effectively comparing sanctions. This, in turn, raises questions about the nature of knowledge and reality that deserve attention. I therefore turn to a discussion of the *social constructivist* epistemology on which this thesis is based, before developing the concept of penal impact and discussing what sources of information it requires in order to effectively determine the severity of Anglo-Welsh community punishment.

### **3.1 Measuring Penal Severity**

The purpose of a retributive penal system is to inflict punishment upon offenders, in proportion to their wrongdoing. But how do we know when punishment has been inflicted, and in what degree? The answer to that question depends on a considerable number of socio-political factors and contexts. For example, the concept and meaning of punishment can shift radically as social norms and values change. Foucault (1977) argues that just such a process has taken place over the course of the past 400 years: traditionally, punishment was a largely *corporal* process, involving torture,

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<sup>1</sup> For present purposes I bracket the closely related, but distinct, question of how to measure offence-seriousness. Recall, however, that whereas sentence severity can only be measured in terms of harm, offence seriousness also requires some consideration of culpability: von Hirsch and Jareborg 1991.

mutilation, and execution as a routine means of demonstrating the futility of disobeying the State's laws (Foucault 1977: 34). Foucault identifies two main elements of corporal punishment as an instrument of (public) punishment: 'it must mark the victim... to brand [him] with infamy,' and it 'must be spectacular, it must be seen by all almost as [the law's] triumph' (*ibid.*). As discussed (at 2.1.1), these elements are not entirely dissimilar from the (principal) aims of a modern retributive penal system, which are to censure acts that contravene socio-moral norms as a way of communicating to the offender that she is not entitled to hold herself above the law, or to value her desires more than those of others (Markel 2001: 2194-2198).

Foucault further contends that the modern (Western) model of punishment has shifted to focus on what might be called the *incorporeal*. Historically, the stocks and gallows were replaced with punishments such as transportation and imprisonment that isolated the offender so that she could be disciplined or corrected (Foucault 1977: 104-131). Foucault argues that, under this emerging disciplinary approach, '[t]o find the suitable punishment for a crime is to find the disadvantage whose idea is such that it robs for ever the idea of a crime of any attraction' (*ibid.*: 104). Punishment became *symbolic*. In a sense, it no longer mattered what acts actually comprised a censorious response, so long as the society in which they took place accorded them the status of punishment (*cf.* Kahan 1998).

In any event, we can say two things about punishment, as it is conceptualised in modern penal theory: that it is *condemnatory*, and that it is *unpleasant*. Punishment must be imposed in response to the offender's wrongdoing, and must involve something that the offender would not normally choose to do (*cf.* Simpson and Weiner (eds.) 1989b).

This may seem like an expansive definition. After all, an offender is as likely to want not to have to pay a fine as they are not to be executed.<sup>2</sup> However, the retributive theory underpinning this enquiry allows some further refinement. The inherent liberal values of retributivism impose two further conditions on the imposition of punishment under a retributive system: punishment must be both *adequate* and *constrained*.

The *adequacy* of a punishment means that the punishment somehow 'fits' the crime. In practice, the principle of proportionality serves this function. By linking the severity of a punishment to the seriousness of the offence we attempt to ensure that the punishment is neither overly lenient nor too extreme (Ashworth and Roberts 2012).

The additional proscription of grossly disproportionate sentencing, both in law (*cf.* van Zyl Smit and Ashworth 2004: 542-544), and as a matter of public morality, also serves this purpose. Especially in an age of media saturation in criminal justice affairs, public outrage is capable of effecting change where a sentence is perceived to be grossly lenient, and more rarely, where it is seen as absurdly excessive (*cf.* Cohen 2002).

Punishment is *constrained* by legal and socio-moral norms, both of which are susceptible to change in response to shifting socio-political and other conditions (Garland 1990: 199-209). Historical examples in English penal law include the abolition of capital and (judicial) corporal punishment (Murder (Abolition of Death Penalty) Act 1965; Criminal Justice Act 1967, s. 65). Whilst these acts undoubtedly constitute punishments, in that they are both condemnatory and unpleasant, public sensibilities and/or national and international (human rights) norms have come to consider the use of such punishments inherently objectionable. Certain forms of censure, in other words, have been deemed 'uncivilised'

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<sup>2</sup> Although we would expect offenders to prefer a fine to being executed, *both* are unpleasant, and given the option, a rational person would prefer to have neither sanction imposed, all else being equal.

(or 'inhumane') by the changing standards agreed by society as a whole (Elias 2000),<sup>3</sup> and so are no longer politically or socially acceptable components of the penal system.

In essence, whilst the severity of a sentence must be proportionate to the offence's seriousness, proportionality is tempered by the range of sentences that law and society have deemed morally and legally fair and just.<sup>4</sup> We do not kill murderers – we do not allow our penal system to inflict so severe a sentence – but murder is nevertheless one of the most severely punished crimes in English law, attracting a greater deprivation of rights and liberties than most other offences, all else being equal. Accordingly, proportionality dictates that less serious offences receive less severe punishment than murder, creating a sentencing tariff that is not necessarily directly relative to the *form* of the harm inflicted by the offence, but which nevertheless corresponds to offence-seriousness in other ways.

### 3.1.1 Pain as the Metric of Punishment

We therefore require a 'metric' of punishment: some basic unit by which we may determine sentence severity in both individual cases and in relation to other sentences on the tariff (so-called 'cardinal' and 'ordinal' proportionality, respectively: Ashworth 2010: 113-115). Without identifying the metric of a process, we cannot meaningfully evaluate it. Two offenders may both be subjected to parallel community penalties, for instance, but it may be that one, both, or neither of them were 'punished' effectively (*i.e.* proportionately) by the sentence. Understanding punishment in terms of its metric allows us to make determinations about issues such as these effectively and consistently. In my view, the most appropriate metric of punishment available is *pain*.

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<sup>3</sup> Norbert Elias's theory of civilisation as a process of social structuring, and its relevance to the penal system, is discussed by David Garland (1990: 213-225).

<sup>4</sup> The parsimony principle plays a similarly constraining role: recall 2.1.1.

Here I follow Christie (1981: 9), who sees pain as the base unit of criminal justice. However, he explicitly refuses to provide a particularly exacting definition of it, on the basis that pain is experienced subjectively: '[I]terature is full of heroes so great that pain becomes small, or cowards so small that everything becomes pain'. Certainly, this conception of 'pain' means more than physical suffering (*ibid*: 9-10), but it is difficult to say much more than that. It is an ethereal concept, experienced personally and impossible to perfectly describe to others.

Nevertheless, we can (and must) go further than Christie. Pain must, by its very nature, be *uncomfortable*; that is, difficult to endure. This element is truistic: if pain were not unpleasant, then it would not be pain (Simpson and Weiner (eds.) 1989c)! Furthermore, this enquiry is into a specific type of pain: the pain attending the punishment of criminal wrongdoing, and therefore does not include the pain attendant on, say, heartburn, or a friend's death.<sup>5</sup>

To further narrow down the conceptual boundaries of this type of pain, it may be helpful to identify the role that pain plays in the penal system, through an examination of some of the concepts involved in the infliction of punishment. I have defined 'punishment' as a *process* (at 1.1.1), taking place between the conviction of the offender, and the completion of the sentence imposed upon her. We have also seen that a punishment must be imposed in response to the offender's wrongdoing, and must involve something that the offender would not normally choose to do (*cf.* Simpson and Weiner (eds.) 1989b).

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<sup>5</sup> Ryberg (2010: 82) notes a 'challenge of delimitation' in this respect. It is difficult to identify whether some pains in any particular offender's life are the result of punishment, or incidental to it. For instance, a husband might leave his imprisoned wife following the physical estrangement of her incarceration (*ibid*: 82-83). There seems to be a causative connection between the punishment and their divorce, but does it follow that the divorce is a pain *of* her punishment? I return to this issue in **6.2**. For now, however, I proceed on the presumption that it is possible to identify at least some pains that are demonstrably associated with the processes of punishment.

There have been many attempts to define the metric of (retributive) punishment. In addition to pain, these include, *harm*, *suffering*, and *hard treatment*. Let us examine each of these in turn.

Von Hirsch and Jareborg (1991) define punishment in terms of *harm* in their attempt to provide a framework for measuring the proportionality of a sentence to the offence committed. This language makes sense in their context because their concern is primarily the seriousness of the offence (*ibid*: 35-38), which can be measured in terms of the level of *harm* inflicted by the crime and the offender's *culpability* for it (*ibid*: 2-3). The harm of an offence is what makes it socio-morally wrong,<sup>6</sup> and so it is convenient for them to use the same linguistic concept to describe the effects of the reciprocal punishment.

But this approach would be problematic in the current enquiry. Identifying 'harm' as the mode of punishment effectively assumes that the impact of the penal system on offenders will be negative, offering no opportunities for personal growth and re-integration. This is a simplistic – and pessimistic – interpretation, which masks the possibility that effective punishments may have both positive and negative impacts on offenders. Recall McNeill's (2011: 16-17, at 2.1.1) observation that the successful rehabilitation of offenders typically requires real behavioural and attitudinal change that can be extremely painful to undergo. Change – even change for the better – hurts, and such short-term harms belie the long-term benefits of rehabilitative engagements. Therefore harm offers only a partial description of the experience of punishment, and would make a poor metric for the purposes of answering this study's research questions.

An alternative term is *suffering*, which is superior to harm in that it implies a temporal dimension for any unpleasantness involved in the

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<sup>6</sup> Although not all crimes are indisputably moral wrongs: see Ormerod 2011: 3-15.

punishment. During her order, the offender is subjected to one or more periods of suffering during which pains are experienced. Each form of suffering is distinct, and can overlap. For example, suppose that an offender is unable to find employment due to her criminal record. During this period, her order also requires her to confront her alcoholism, which requires critical self-reflection, personal self-doubt, and the mental, and potentially physical, suffering associated with withdrawal. Each type of suffering is qualitatively different and temporally bounded, but not mutually exclusive of any other form of suffering whilst it is extant in the offender's life. She might experience many forms of suffering simultaneously, or she might not suffer in any meaningful sense at all. More likely, she will experience some forms of suffering at one point in time, and others at another.

'Suffering' therefore identifies the aggregate unpleasantness associated with a punishment, without denying that there may be other elements associated with the process that may benefit the offender, or indeed that the suffering itself may lead to positive change in the offender's life (*cf.* Christie 1981: 10-11).

However, Duff (2001: 20-27) warns that retributivists must be wary of referring to 'suffering', because it implies a certain level of emotiveness, an implicit argument that 'the guilty deserve to suffer' (*ibid.*: 20). Using this language risks some confusion (either in one's own argument or in its interpretation by another) between retribution, which is bound by the principles of proportionality and parsimony, and mere punitiveness, which is not. Such confusion is not inevitable, but one must take care to avoid it.

Moreover, critics of retributivism decry it precisely for using the language of 'suffering' as the purpose of punishment (Bagaric and Amarasekara 2000). Although consequentialist (and other) objections to

the retributive approach go far deeper than the semantic level, suffering remains an overly distortive phrase for the description of punishment. It carries emotive connotations that are difficult to purge, and which jeopardise effective, meaningful discourse.

For this reason, the more value-neutral concept of *hard treatment* is preferable to suffering as a description of the content of an effective punishment. Joel Feinberg (1970) coined this term to describe one of two elements of criminal sanctions, the other being *censure* (in his language, 'reprobation': recall [2.1.3](#)). Both of these elements are painful, but they inflict discomfort in different ways (Feinberg 1970: 74-75; cf. Duff 1986: 57-60). 'Hard treatment' is what the State actually does to the individual as part of their punishment: the act (and experience) of incarceration, or compulsory behaviour such as unpaid work, or deprivation of income. Suffering is almost certainly attendant upon it (Feinberg 1970: 74, 86), but is not a necessary component – indeed, the concept allows the offender to accrue considerable benefits in both the long- and short-terms.

Describing punishment in terms of hard treatment allows us to simultaneously avoid the potential emotiveness of 'suffering' and the incompleteness of 'harm' whilst also providing an inherent link to the actual requirements that the punishment imposes on the offender. We can still discuss the fact that an offender suffers or is harmed, but can also bracket that suffering and harm, and situate it within its wider penal context.

The problem with using hard treatment, or even suffering, as the *metric* of punishment is that they cannot describe retributive punishment without also referring to pain. If suffering is a period of continuous experience of one or more pains then it is only an amalgamation of individual painful experiences over time. It is possible to gather more specific detail by referring to pain, and so suffering cannot be considered



the base unit for the measurement of penal severity. As for hard treatment, it is even further removed from the evaluation of retributive punishment. It is not the experience of being incarcerated or forced to perform certain actions that is the reason why punishment is unpleasant; rather it is unpleasant because those requirements are in some sense *painful*. In neither case can we say whether or not punishment has occurred without recourse to the concept of pain. Therefore, pain is the *sine qua non* of punishment: the irreducible component of the punitive process.<sup>7</sup> As a result, it is also the most appropriate metric of punishment.

However, it is not enough to simply declare that pain is the metric of punishment. We know nothing, after all, about how pain is to be measured, given that it is a subjective phenomenon (Kolber 2009a; Tonry 1995: 157). In order to effectively judge the adequacy of the pain delivered by a sentence in retributive terms, we must first *conceptualise* that pain. The following three sections examine three broad attempts to do so, namely: as a *deprivation of rights*; as a *reduction in living standards*; and as empirically described *pains of punishment*.

### 3.1.2 Deprivation of Rights

One way of constructing various types of hard treatment is in terms of their effects upon the offender's rights.<sup>8</sup> Rights provide a useful means of comparing and contrasting various advantages and disadvantages of different types of hard treatment, because they allow any given punishment's effects to be discussed in terms of fundamental personal capacities that are of socio-politically agreed importance in liberal-democratic society. For example, the European Convention on Human

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<sup>7</sup> One important caveat to this statement is the fact that punishment is not necessarily the only way to resolve criminal conflicts. Even if all punishment ultimately relies upon pain infliction, that does not mean that pain infliction is the only option: Christie 1981: 11.

<sup>8</sup> The rights of third parties, such as family members, may also be affected by a punishment, and should be taken into account at the policy stage. See, e.g. van Zyl Smit and Snacken (2009): 233-235; Mair and Mortimer (1996): 20. I will focus mainly upon offenders' rights, because my research questions focus specifically on offenders' experiences.

Rights (ECHR) provides a number of civil and political rights that may be more or less affected by the penal system's intrusion into the offender's life, including, amongst others,<sup>9</sup> the right to life (art. 2 ECHR), the right to freedom from torture or inhuman or degrading treatment or punishment (art. 3), the right to freedom from slavery (art. 4), the right to (physical) liberty (art. 5), the right to a private and family life (art. 8), and the right to freedom of expression (art. 10).

Rights-based comparisons are useful because they can refer to the diverse ways in which a particular kind of hard treatment interferes with specific legal principles. For example, the most common comparison of different types of sanction is on the basis of the right to (physical) liberty, that is, to free movement and the ability to freely choose one's own conduct (*cf.* art. 5 ECHR).<sup>10</sup> Each of the three most well-known sentences in English law (fines, community punishment, and imprisonment) affects this right, but in very different ways. Imprisonment is extremely restrictive, in that it constrains offenders within a total institution (Goffman 1991) and involves almost constant surveillance. By contrast, community punishment leaves the offender generally at liberty, but requires them to perform certain activities against their will, under some degree of supervision. Finally, fines have no supervisory content and involve very little direct or formal restriction of the offender's liberty. However, the subject of the fine must surrender a portion of their money to the State, which will to at least some extent limit their ability to live their life as they want by limiting their future spending and consumption choices.

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<sup>9</sup> Consider, for instance, *Hirst v. UK (No. 2)* (2006) 42 EHRR 41, which relates to prisoners' voting rights pursuant to the right to fair and free elections in art. 3 of Protocol 1 to the ECHR.

<sup>10</sup> Art. 5(1)(a) ECHR explicitly allows for the detention of offenders following criminal conviction, providing that it is prescribed by law. However, we are not (at present) concerned with the *legality* of the intervention, but rather with the *degree* of interference it involves.

It is therefore possible to say, in terms of liberty restriction, that imprisonment is the most severe, community punishment is of middling severity, and fines are the least onerous, all else being equal. By comparing different forms of hard treatment and their effects upon different species of rights, one can draw up a scale of the most and least serious punishments, which could be hypothetically structured in accordance with social and individual decisions as to which rights are the most important (and whose restriction is therefore the most intrusive) to provide an effective means of comparing punishments (*cf.* Schiff 1997).

Moreover, this approach need not be restricted to civil and political rights, nor indeed to human rights at all: broader civil liberties or other claims to entitlement are also potential sites for consideration. In particular, socio-economic rights such as the right to work are directly affected by punishment:<sup>11</sup> to use the earlier example, imprisonment interferes completely with one's ability to work,<sup>12</sup> whereas fines have no effect on them. Community punishment appears to fall somewhere in between, although the specific requirements that are attached to a particular community order may vary in their effect on the offender's ability to maintain and/or seek employment (*e.g.* Durnescu 2011: 536-537; Mair and Nee 1990: 57-58).

However, there are two fundamental weaknesses associated with using a rights-based method, which I call the problems of the *law of the instrument* and of *assumed normative objectivity*.

The 'law of the instrument' (Kaplan 1964: 28) is the perceptual problem that any instrument suggests a certain methodology, even though that methodology may only be useful in certain situations. The popular

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<sup>11</sup> Socio-economic rights form the less-developed wing of international human rights law, and are expressed in the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). They include the rights: to work (arts. 6-7 ICESCR); to social security (art. 9); to food, water and shelter (art. 11); and to education (art. 13).

<sup>12</sup> At least, outside of prisons. Work is increasingly available within prisons, and is framed in terms of prisoners' fundamental rights (van Zyl Smit and Snacken 2009: 187-198).

expression of Kaplan's law is that if all one has is a hammer then all one's problems look like nails (Maslow 1966: 11), which is bad news if one's problems do not concern home improvement! Equally, if one measures a citizen's ability to live her own life by her ability to exercise rights, then all you see are rights issues. A right is essentially a claim for respect for one's interests in specific circumstances (Feinberg 1980), but not all things that may be affected by hard treatment may be expressible in such a way.

To illustrate this point, I borrow Feinberg's (1980) 'Nowhereville' thought experiment. Nowhereville is an imaginary society in which everybody lives without the support of legal rights. To an outsider, Nowhereville is very much like any rights-based society. The only difference is that the day-to-day life of the citizens of Nowhereville is not concerned with whether or not citizens have the right to behave as they do. In Nowhereville, nobody has the right to State protection of their life, but the State nevertheless provides it, and people are killed at about the same rate as in England and Wales – and as for the right to life, so for all other rights.

Clearly Nowhereville is a very artificial construct, and it was in any event not designed as a means of exploring the law of the instrument.<sup>13</sup> However, what it does show is that a rights-based approach includes certain presuppositions about what does and does not matter in understanding phenomena such as punishment. If something is not considered a right – if it cannot be expressed as a claim to entitlement for respect – then a rights-based model cannot detect it. Nowhereville offers the most extreme example of this, where nothing would be identified, because Nowhereville has no concept of rights whatsoever. However, a

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<sup>13</sup> Feinberg's (1980) argument is that without rights (or the duties arising from them), no Nowherevillian would be able to make a legal or moral complaint about the behaviour of another. To the extent that people do make such complaints, Feinberg alleges that Nowhereville *must* have rights, albeit by another name. My contention is that Feinberg's conclusion falls foul of the law of the instrument, construing what are not rights in practice in rights-based terms that may distort the representation of actual behaviours being evidenced.

Nowherevillian is as likely as anyone else to suffer as a result of the imposition of hard treatment by the State. A Nowherevillian scholar observing an offender undergoing community punishment would not say, 'That offender's right to liberty [or anything else] has been curtailed', but would describe the offender's suffering using some other theoretical framework.

Hard treatment is hypothetically capable of inflicting punishment in ways that exceed our definition of what a 'right' is. It follows that a rights-based approach runs the risk of excluding those ways from the analysis, either by ignoring phenomena that do not fit that model altogether, or by attempting to fit such anomalies imperfectly into one's current evaluative framework and misrepresenting their nature.

The second weakness of constructing pains in terms of rights is that (human) rights are ultimately a *legal (and moral) construct* to describe phenomena such as pain. They are not intrinsically valuable, but rather derive value from what they represent: the subject's human dignity. When one suffers as a result of the infringement of a right, one is not so much pained by the infringement of the right, but rather by the infringing act: for instance, being imprisoned or forced to remain indoors for a certain amount of time every day.

The problem is that one's perception of one's dignity is inherently subjective, and different facets of it will be more important to some people than they are to others. Obviously, there are limits to this subjectivity: it is reasonable to assume that individuals will usually value the rights to live and to be free from torture extremely highly! Nevertheless, we can equally comprehend that somebody who, say, is habitually housebound is likely to care less about their freedom of movement than a prolific wanderer would (all else being equal).

Speaking in terms of right deprivations therefore risks imposing a *assumed normative objectivity* as to the value of rights to the subject. Identifying certain rights as especially important inevitably involves some normative judgement as to the relative importance of each right under consideration. However, this judgement may differ from those of the rights-holders actually affected by the hard treatment. The more rights we take into consideration, the more arbitrary those normative judgements become, since there are more opportunities for subjective differences to emerge in the relative value attributed to the rights in question.

Schiff's (1997) Criminal Punishment Severity Scale (see [3.2.1](#)) avoids this problem by focussing entirely on the right to liberty and personal autonomy. Unfortunately, this leads to an overly simplistic model of what pain looks like: where it is only measured in terms of restrictions on physical liberty, then the most severe sanction is inevitably that which precludes enjoyment of that right most fully, even if more subjective suffering is experienced as a result of a different type of hard treatment in some cases. This may lead to an abstract depiction of the relative severity of sentences that does not effectively match experienced reality to at least some extent.

In conclusion, it is potentially useful to think in terms of deprivations of rights when comparing the severity of different types of hard treatment. They provide a useful (if partial) means of understanding the various ways in which an offender's life may be affected by their punishment, and can be used to create an (imperfect) aggregate model of which sentences are the 'most' and 'least' intrusive. However, such a model is unsuitable for the purposes of the current study. I am not concerned with the rights that an offender has, and how *they* are affected by community punishment, but with how the offender herself is affected. She might understand her experience in terms of rights ('I've got a right

to be with my family!') or she might not ('I hate that I can't see my family'), and a rights-based framework would run the risk of either overlooking or misinterpreting those instances where she did not.

### 3.1.3 Reduction of Living Standard

An alternative way of assessing the impact that a punishment has upon the offender subject to it is to adopt a living standard analysis. Instead of the more familiar legal method of considering rights when comparing types of hard treatment, this approach uses the socio-economic concept of the 'standard of living' (Sen 1987: 20-38). This concept focuses upon four levels of wellbeing that are relevant to the quality of the life experiences of people who do (or indeed do not) possess them.

These levels form a hierarchy of desired and necessary commodities, which Andreas von Hirsch and Nils Jareborg (1991: 17) label as *subsistence*, *minimal wellbeing*, *adequate wellbeing*, and *enhanced wellbeing*. Briefly, 'subsistence' is the level of bare survival, with only enough clothing, food, shelter, warmth and water to stay alive. Minimal wellbeing means that one is able to maintain a basic level of comfort and dignity. Adequate wellbeing denotes a state in which one is able to live at a higher level of comfort and dignity, and enhanced wellbeing at a still greater level (*ibid*: 18-19).

Both crimes and punishments can interfere with a given level of living standard: for example, one can be reduced from enhanced to average or even minimal wellbeing by theft or by a fine, whilst imprisonment and unpaid work can both undermine one's ability to live one's life in substantial dignity, since one's autonomy is undermined by those punishments' compulsory elements. Likewise, a homicide would interfere with even the 'subsistence' level, as would capital punishment.

von Hirsch and Jareborg (1991: 17-18) adopt these four categories subject to the recognition that there is a great deal of overlap between

them. In deciding where along this spectrum a crime (or punishment)<sup>14</sup> falls, they offer four non-exhaustive dimensions of potential impact upon the subject's standard of living: interferences with *physical integrity, material support and amenity, freedom from humiliation, and privacy/autonomy* (*ibid*: 19-21). Considering the impact that a crime has upon a victim in terms of these four dimensions gives an indication of how his standard of living is affected, and therefore upon the seriousness of the harm caused by the offence. From this, one can construct a 'harm-scale' based upon the (standardised) impact of the crime on the victim's standard of living (*ibid*: 28-35).

The advantage of a living-standard based approach is that it directly reflects the experiences of individuals, rather than the rights that are designed to help them claim protection of their interests. It can also reflect social differences more effectively than a rights-based approach: for example, wealth inequality, poverty and social exclusion may mean that not every offender lives in a state of 'enhanced wellbeing' prior to sentencing (*cf.* Kolber 2009a). This can allow for a more nuanced account of how severe a punishment may be on a case-by-case basis, providing a less arbitrary description of generalised severity.

However, a living-standard analysis of the severity of sentences suffers from much the same problems that undermined the rights-based approach. Focussing upon socio-economic standards of living may still overlook what is most important to some people, which may not be something that they require 'comfort and dignity' to pursue. The case is harder to make in this instance, however, since the four levels of wellbeing are not solely defined by economic ability, but also by one's social, political

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<sup>14</sup> Von Hirsch and Jareborg are ambivalent about the applicability of their argument to the calculation of sentence severity: they believe that it is a workable means of doing so, but admit that their model is focussed upon the impact of crime upon the victim, and therefore would need substantial reworking to fit the punitive context (von Hirsch and Jareborg 1991: 35-38). Nevertheless, it is still possible to discuss such an approach for measuring sentence severity in the abstract.



and other capacities as well (Sen 1987: 20-38). So, just as it is reasonable to assume that some rights are undeniably of general importance to all individuals, so it is likely that all rational individuals can be expected to crave at least a minimum standard of living. Further, it is likely that most would prefer to improve their living standards to higher levels, although we should expect the incidence and relative strength of those preferences to vary from person to person.

The more pressing problem comes in identifying when one has a greater than minimal standard of living. Defining what is an 'adequate', and indeed 'enhanced' level of wellbeing for the purposes of the analysis inevitably entails some normative presuppositions about what a 'good' living standard entails, a problem of arbitrariness to which von Hirsch and Jareborg (1991: 17-19) are alive. Consider the following hypothetical situation: an exclusion requirement may restrict an offender from visiting the city centre during the weekend. Habitually, this is when she does most of her socialising with her friends. She is not necessarily prevented from doing any of the activities that she would have done in the city centre: her friends can visit her at home instead of going out with her, and she can still consume alcohol if she has it in the house. Does this amount to the loss of an enhanced level of wellbeing? What if her friends preferred to keep going out without her; or if her fellow residents frowned heavily on her keeping alcohol in the house?

In short, it is not necessarily possible to predict, or to actually identify in all cases when the inability to perform certain activities will cross the threshold between levels of wellbeing for the purposes of this model.

Moreover, the risk of assumed normative objectivity, of presuming that certain factors are more important than offenders actually perceive them to be, would also be endemic in a living-standard approach. One

must standardise the importance of standards of living in order to provide a harm-scale from which individual levels of severity can be discerned. Once again, the focus here is better than a rights-based approach in that it is more closely focussed on the individual interests that the offender might wish to protect, rather than on the (legal or moral) constructs she would use to defend them. Nevertheless, this approach would still represent offenders' experiences only partially, because it inevitably generalises a diverse range of preferences as to which interests are most important to individual subjects. In so doing, it potentially misses vital information about experienced sentence severity.

In conclusion, for the purposes of answering my research questions, a living-standard analysis would be superior to a rights-based approach, but it is still inadequate. It comes closer to representing the interests that genuinely matter to individuals, and so provides a better basis for drawing conclusions about the impact that punishment would have upon those individuals' lives, by highlighting which interests would be most directly affected. However, it is still too standardising and abstract, assuming too much normative consensus as to the value of the components of its conception of good living standards. It is therefore of limited use for the study of the impact of community punishment on offenders' lives.

### 3.1.4 Pains of Punishment and Shaming

A third way to typify pain is to simply describe it in its own terms, rather than resorting to an abstract taxonomy. It does not so much attempt to formulate the pain involved in a punishment by reference to a single fundamental value (or system of values), as it does to recognise the incidence of pains retroactively. We may therefore describe it as a 'pains of punishment' approach, following the language of Gresham Sykes's study of the 'pains of imprisonment' (Sykes 1958; cf. Crewe 2011). This

approach has been applied in a diverse range of penal contexts, including various components of community punishment (e.g. Paine and Gainey 1998 (electronic monitoring); Durnescu 2011 (supervision)).

The pains of punishment model reflects a very different approach to measuring sentence severity. It is inductive, rather than deductive: instead of applying theoretical values to empirical findings, it builds its theory from the study of practical experience (Bryman 2012: 24-27). As a result it is difficult to talk about this approach without discussing its epistemological and other methodological characteristics, a discussion I defer until later (at 3.2.2).

For now, however, the implications of a pains of punishment approach for the measurement and understanding of a punishment's impact can be illustrated by reference to a specific pain of punishment, one which is greatly discussed in the literature and commonly identified by offenders themselves: shame.

The capacity for a punishment to inflict shame upon the offender is particularly interesting in this context because it has attracted a great deal of attention from both retributivists and proponents of rehabilitation. Duff (2001: 116-118), for instance, distinguishes between shame and moral persuasion for the purposes of his communicative theory of justice. One can be ashamed of one's conduct without being convinced that one should desist from that conduct in the future, if other factors make crime attractive despite any attendant shame. But shame is a characteristic of (community) punishment that is consistently recognised as being painful, both by theorists and offenders (*ibid*: 117; *cf.* Durnescu 2011: 537). So the shame does not (necessarily) contribute towards repentance or reintegration, but to the punishment of the offender.

This is not to say that shame cannot play a role in effective rehabilitation. The capacity of shame to motivate change is discussed by

John Braithwaite (1989), who argues for the use of 'reintegrative shaming'. Braithwaite observes that shame can be a powerful spur towards reintegration for offenders into the society that their crime has, at least symbolically, harmed. He adopts a 'family model' of crime and punishment that treats the relationship between criminals and society as between prodigal children and their families: a child will frequently offend against family values, but the punishment of those deviations does not suddenly expel the child from the family as a 'distinct and dangerous outsider' (Braithwaite 1989: 56, quoting Griffiths 1970: 376).

Shame is an ideal way to encourage reintegration, because it can deter one from committing acts of which one would feel ashamed, both from fear of how society would respond, and because one's conscience serves as a powerful internal block against perceived wrongdoing (Braithwaite 1989: 69-75). So, the criminal justice system ought to encourage offenders to feel ashamed, with the aim of engaging their consciences and encouraging desistance from crime and reintegration with the values and processes of society (*ibid*: 98-107).

Braithwaite nevertheless stresses that shaming must be constrained. Too much shaming can overshoot the desired inculcation of feelings of guilt and a desire to repair the damage done, and risks 'a counterproductive rupture of social integration' (*ibid*: 178). Such an intervention (which we might call 'disintegrative') overstates society's condemnation of the act, to the point where the offender feels unduly castigated for her actions, and perhaps that she will never be accepted back into that society again. Disintegrated offenders may perceive themselves as 'second-class citizens, lacking the full enjoyment of dominion' (Braithwaite and Pettit (1990): 92). Proponents of 'labelling theory', such as Becker (1963), Katz (1980), and Marx (1988) argue that individuals subject to such extreme shaming are confronted with an image

of themselves as outsiders, whose values intrinsically (and inexorably) differ from those of 'mainstream' society. This can lead them to form deviant subcultures that resist and attack conventional social norms, encouraging future deviance (including criminality) and damaging social cohesion (Rock 2012: 65-69).

An interesting dilemma for a 'pains of punishment' approach is the extent to which it should problematise the distinction between reintegrative and disintegrative shaming. After all, shame is an effective means of punishing offenders,<sup>15</sup> and one feature of retributivism is its purely retrospective approach to crime. Given that proportionality is the main index by which the severity of sentences should be drawn up under a retributive framework, does the (dis)integrative effect of shaming matter?

One prominent theorist who argued that it should not is Dan Kahan (1996, 1998; *cf.* Kahan 2006). His essential argument concerned the social meanings attached to punishments, especially to imprisonment and its alternatives. Under his analysis of general US public understandings of these punishments, Kahan (1996, 1998) identified a disconnect between imprisonment and other sentences: whereas the act of sending somebody to prison is 'an unambiguous sign of moral disapproval' on the part of the State (as representative of society), because of 'the sacred place of individual liberty in our society' (Kahan 1998: 697), both fines and community sentences fail to provide such a clear condemnatory message.

In the case of fines, Kahan alleges that they contain the same meaning to the average citizen as paying for a privilege, especially in the case of white-collar crime (*ibid*: 697-701). For community punishment, the tasks required of offenders (such as caring for the elderly or cleaning public parks) would be laudable if not performed in the penal context,

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<sup>15</sup> Indeed, Whitman (1998: 1062) refers to shame-inflicting sanctions as 'beautifully retributive'.

granting them, at best, an ambiguous punitive image (*ibid*: 701-704). This means that, as they currently stand, alternatives to imprisonment will never find support in democratic (US) society, as the general public (as Kahan understands it) will not accept that they provide a level of moral censure commensurate with incarceration.

Kahan's proposed solution to this problem was the introduction of intentionally shaming sentences, including: special license plates identifying drunk-drivers; forcing offenders to buy newspaper advertisements proclaiming their arrest; and public apology rituals (*ibid*: 704-705). He argues that conventional community punishments could continue to be used, as long as they incorporated shaming elements, despite the necessary increase in severity that this would cause (*ibid*: 706).<sup>16</sup>

However, Kahan's argument is fundamentally flawed. It adopts an overly pessimistic interpretation of social constructivism in its description of how meanings develop within societies. I shall turn to constructivism later (at **3.3**), as it is essential to my conception of penal impact. For now, though, it suffices to say that social construction is a process by which phenomena acquire meaning within groups and societies. The meaning that a phenomenon has will be determined by a number of factors, including personal experience, the evidence of 'experts' (that is, people who are recognised as having a special knowledge of the phenomenon in question), and the depiction of that phenomenon by media and other individuals. Ultimately, meaning is derived from the language used to describe and define the phenomenon, which will contain presuppositions,

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<sup>16</sup> Potentially Kahan suggests that merely changing the nomenclature from 'community punishments' to 'shaming punishments' would have some effect on the public acceptability of alternatives to imprisonment. The satirist Charlie Brooker (2008) suggested that the government was attempting to do just that by rebranding unpaid work: "'Community Payback' bibs? That's rubbish. At least come up with something catchy, like 'Scum Slave'", neatly encapsulating the objection from labelling theory.

including normative assessments, which are incorporated at the epistemological level (Foucault 1970).

Certainly this is reflected in the depiction of community punishment in Anglo-Welsh public discourse (and, to a lesser extent, public opinion) as a 'softer' option than incarceration (*cf.* Maruna and King 2004; Hayes 2013). Kahan is correct to the extent that depictions such as these must be recognised in a political environment in which public attitudes can contribute profoundly to policy development. They influence – and limit – the (penal) reforms that governments are willing to pursue (*ibid*: 83-85).

However, Kahan (1998) reaches this point in his analysis and stops. He concludes that public attitudes are opposed to any degree of substitution between imprisonment and community punishment. This may well be an adequate reflection of contemporary (US) public opinion, but he implicitly assumes: (a) that this will always be the case; and (b) that the State (and the Academy) is incapable of influencing this fact. This is odd for an apparent constructivist, as well as for a student of public opinion. Maruna and King (2004: 87-90) persuasively argue that 'public opinion' is dynamic, and contains such a variety of possibly conflicting attitudes that it is almost impossible to talk meaningfully about it in the singular.

Moreover, public attitudes are not immune to campaigns designed to change them. By demonstrating the effectiveness of community punishment as a retributive measure we could attempt to challenge prevailing attitudes and create an environment in which the semi-custodial penal system will find favour, rather than treating public opinion as an immutable obstacle to penal reform. This would surely be difficult, but Kahan treats changing public attitudes as a practical impossibility, even in the middle- to long-term. Indeed, that impossibility is the only reason he offered in support of shaming sentences (Kahan 2006: 2075). But this goes too far. Kahan is too simplistic, and too accepting of the assumption

that the public would reject the expansion of community punishment without increasing its punitiveness through shaming.

Having dismissed Kahan's argument that disintegrative shaming is politically necessary (however expedient), I return to the original question: should retributive justice limit itself only to the infliction of reintegrative shame? I argue that it should, both because of the communicative paradigm that I have adopted in this thesis, but also on more general terms.

For proponents of Duff's communicative model, it is clear that there are limited prospective goals for penal intervention, in the form of the 'three "R's" of punishment': repentance, reform and reconciliation (Duff 2001: 107). A communicative sentence should attempt to morally persuade the offender: that what she did was wrong (and thus that she should be ashamed of it); that she should not reoffend in the future; and that she should make amends to the affected community (*ibid*: 107-112). Whilst these aims should be pursued non-coercively (*ibid*: 121; Duff 2000: 414-415), the system should be set up in such a way as to encourage them to come to pass.

Disintegrative shaming inevitably confounds all three goals. By its very nature, social disintegration precludes reconciliation, and also makes repentance and reform less likely by encouraging the creation of deviant subcultures (Rock 2012: 65-71). Therefore, a communicative approach to retributive justice manifestly demands that shame be used only to the extent that it enables reintegration.

Moreover, even a non-communicative paradigm for retributive criminal justice ought to reject disintegrative shaming. Shame is not the only available pain of punishment. In order to achieve a proportionately severe sentence, therefore, we need not rely solely upon it. That being the case, we must consider whether or not to take account of the effects of



disintegrative shaming in broader terms: what are the consequences of imposing certain arrangements of pains?

On this analysis, retribution ought to restrict itself to the use of *reintegrative* shame only. Disintegration and the subsequent formation of deviant subcultures opposed to and unconstrained by 'mainstream' society could only increase further (criminal) disruptions of social order. By comparison, an approach including only reintegrative (or integration-neutral) instances of shaming would have no such negative effects. It is therefore rational for retributivists to have regard to the type of shame it engenders. Merely because a retributive penal system does not consider the future characteristics of offenders when determining the appropriate sentence to impose upon them does not mean that it must remain blind to the wider social consequences of penal intervention.

### 3.1.5 Conclusion: On the Ethics of Pain Manipulation

What has this discussion of Kahan and disintegrative shaming to do with the use of pain as the metric of punishment? In fact, a great deal. It has illustrated a contingent benefit of speaking about pain on its own terms, rather than through euphemistic taxonomies such as (human) rights or standards of living. Using pain as a metric of punishment allows not only a closer recognition of how hard treatment is actually experienced by offenders, but also recognises that those experiences have (potentially profound) social consequences, to which any ethical system of justice, criminal or otherwise, must be aware.

To sum up my argument so far, punishment should be understood in terms of *pain delivery* (Christie 1981). That pain is subjectively experienced, may be mental or physical, and may affect many facets of the subject's life. It is also the key to understanding what makes punishment severe, because it is the basic unit from which all unpleasantness in the penal system derives. Using pain rather than an

abstraction (such as deprivation of liberty) to understand punishment – treating it as something that must be inherently unpleasant – is desirable because it recognises the power dynamic at the heart of the punishment process, and encourages a frank discourse about where and how to limit the reach of the penal State (Christie 1981: 100-101).

As a result, retributive justice involves the fine calibration of painful experiences in line with the principles of proportionality, parsimony, and the communication of censure (*cf.* Duff 2001: 79-82). It is not only pain delivery, but *pain manipulation*.

I use this provocative term intentionally. Just as Christie (1981: 19) rejoiced at the ugly banality of the phrase 'pain delivery', I mean to highlight the possible interpretation of the calibration of pain as bordering on misanthropy. I must confront the fact that, although the bulk of retributivists would have no problem with the contention that (criminal) wrongdoing deserves *punishment* (although *cf.* Kleinig 2011), it does not follow that they would be at all comfortable with the proposal that wrongdoing deserves *pain*.

A recent debate in US criminology highlights the issue. Rallying against a sustained argument for the subjective interpretation of penal severity (Kolber 2009a, 2009b; Bronsteen, Buccafusco and Masur 2009, 2010), a number of objectivist retributivists have attempted to argue that experienced unpleasantness is not (particularly) relevant to the severity of punishment (Markel and Flanders 2010; Gray 2010; Markel, Flanders and Gray 2011). Generally, their argument is an extension of the liberal politics underpinning modern retributive theory: punishment is determined by the legislature as an objective, formal condemnation of criminal wrongdoing. The deprivation of liberties entailed represents a recognition of the offender's ownership of her criminal act, and therefore of her human dignity; and they represent a protection of the equality of the

State's citizens under the law, counteracting the illegitimate claim of the offender to greater liberties than her fellow-citizens and removing some of her illegitimate gains. This meaning, democratically agreed at a socio-political level, trumps the offender's individual experiences, at least for the purposes of sentencing, in order to ensure equal treatment under the rule of law (Markel, Flanders and Gray 2011: 612-615; *cf.* Markel 2001: 2194-2198).

I have already dismissed the level of abstraction involved in such an argument for its vulnerability to the law of the instrument and assumed normative objectivity (at 3.1.2). Furthermore, treating (US) democracy as perfectly, or even sufficiently, representative of public attitudes and opinions towards criminality is fundamentally naïve, given the possibility for misrepresentation, obfuscation, and indeed outright corruption endemic in modern democratic systems (Dalton 2014: 15-36).

More pressing for the ethics of pain manipulation, however, is the subtext of these objectivists' objection to the subjective interpretation of punishment as unpleasantness.<sup>17</sup> Their concern is that focussing upon pain as the metric of punishment:

risks denying offenders' dignity by emphasizing, to a potentially dangerous extent, how much and how precisely each offender should suffer, thus implicating the state in an enterprise dangerously approaching sadism (Markel and Flanders 2010: 915).

Retribution based around pain manipulation seems at first blush almost gleeful in its infliction of pain, doling it out in precise measure to force offenders to suffer for their crimes. How can a civilised society condone such behaviour?

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<sup>17</sup> I simplify slightly by taking Markel, Flanders and Gray together. Despite their 2011 collaboration, their approaches vary slightly. Whereas Markel and Flanders (2010) root their opposition to subjectivism in US liberal democratic values, Gray (2010) refers to more abstract Kantian liberal philosophy.

Markel and Flanders' (2010) objection, however, confuses sadism with *fidelity*. When I describe retributive punishment as pain manipulation, I do not attempt to justify the infliction of individually-calibrated suffering on offenders, but rather to recognise that which must be justified. Pain is an endemic feature of contemporary criminal justice, from the moment of arrest to the offender's circumstances after her sentence has completed. To hide from this behind the euphemism of liberty deprivation (or, for that matter, anything else) is not to prevent this pain from being inflicted by the State but to disguise it in a more palatable form. Indeed, Christie (1981: 100-101) prefers such an 'absolute' (rather than utilitarian) justification of punishment because:

If there were no purpose behind the pain, it would be more of a clear moral matter. The parties would have to think again and again whether pain was right.

This observation obviously refers to retribution, but it applies across all penal justifications, and that is Christie's point. To return to Markel and Flanders' (2010: 915) objection, criminal justice is *always* engaged in a programme of pain delivery 'dangerously approaching sadism'. It is up to us as citizens to recognise and confront this fact. That recognition is vital to any attempt to *justify* the system.

Talking retributively about pain therefore has the advantage of *fidelity* to the experiences of the subjects of the system. No just social order should inflict pain for the sake of pain, and even those penal theories not concerned with what I have called pain manipulation ought to be mindful of this fact, justifying pain where it can be and attempting to *minimise* or *eradicate* it where it cannot. On the theory I am advancing, pain can be justified where it is proportionate to the severity of the offence, parsimonious, and (therefore) serves the communicative endeavour. Otherwise it is unjustifiable, unjust, and immoral. One of the

reasons why this is desirable is that, at least in principle, this approach encourages a minimalistic penal system.<sup>18</sup>

### **3.2 Pain and Severity in Contrast: Comparing Impact**

Having examined the extent to which the pains of punishment can be conceptualised (as rights deprivations, living-standard reductions, or simply as empirical descriptions), the question remains as to the extent to which they can be used to meaningfully *compare* the impact of different sentences upon the lives of individual offenders. Whilst pain is the metric of punishment, in other words how is it to be measured in a way that allows effective comparisons between pains (and indeed, between sentences)? In the next section, I examine how each of the three approaches to conceptualising pain answer that question, and the extent to which they are useful for the measurement of penal impact.

In particular, I will focus on four separate research designs that exemplify each of the three approaches discussed thus far. The rights-based approach is represented by Mara Schiff's (1997) Criminal Punishment Severity Scale (CPSS); and the living-standard approach by von Hirsch and Jareborg's (1991) 'harm-scale'. The pains of punishment discourse is exemplified by two very different approaches: 'punishment equivalency' studies (e.g. Crouch 1993; Spelman 1995; and Wood and Grasmick 1999); and Durnescu's (2011) work on the 'pains of probation'. Methodologically, however, these four can be grouped into two separate approaches to the acquisition of data about penal severity: on the one hand, the quantitative, consisting of the first three theories; and on the other, the qualitative, which of the four incorporates only Durnescu (2011). Let us discuss them in terms of this distinction.

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<sup>18</sup> Although, as Cohen (1985: 239-245) notes, this does not always, or even often, translate into practice. What was true in 1985 has only become truer during the crises of late modernity, given the increasing populist punitiveness of legislative politics (Lacey 2008).

### 3.2.1 Quantifying Severity: The CPSS, Harm-Scale, and Punishment Equivalencies

The CPSS and harm-scale both emphasise an approach to pain that involves quantifying the suffering experienced by offenders for the purposes of ranking punishments against one another. In the case of the CPSS, Schiff (1997: 180) uses (physical) liberty as a metric with which to gauge sentence severity. Using the extent to which dispositions deprive this right as an index, she apportions 'sanction units' (Robinson 1987) to various forms of hard treatment; that is, she quantifies the extent of liberty deprivation that they entail. To do this, she identifies various aspects of physical liberty, and weighs their importance to the enjoyment of the right numerically. This produces a scale with which one can rank all available sentences from the most depriving to the least, creating an effective sentencing tariff that can then be used to make proportionality decisions. Although Schiff focuses on liberty as a 'sacred' right in society (*cf.* Kahan 1998: 697), there is no reason why other rights could not be incorporated into the analysis, provided that those rights are affected by the sentences available in one's jurisdiction.

Schiff (1997: 179) explicitly recognises that the CPSS is an attempt to develop the harm-scale approach advocated by von Hirsch and Jareborg (1991), shifting the paradigm from living-standard to the more familiar rights-based approach. Recall that von Hirsch and Jareborg (1991: 17-19) identify four overlapping levels of standard of living, based on the extent of 'comfort and decency' the subject is able to live in. When a crime occurs, the victim's standard of living may be affected,<sup>19</sup> and the punishment should reflect the level of that reduction.

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<sup>19</sup> von Hirsch and Jareborg (1991: 19) recognise that some 'victimless' crimes can have only a marginal effect on the victim's standard of living. In such a case only very minor punishment would be proportionate.

To ensure an effective mapping of offence seriousness to sentence severity, von Hirsch and Jareborg (1991: 28-30) advocate the creation of a percentile 'harm-scale' subdivided into five categories of 20 units each. Each category reflects a different level of intrusion into the subject's living-standard: 'lesser' where only marginal intrusion is made; 'lower-intermediate' where her enhanced wellbeing is affected; 'upper-intermediate' where her adequate wellbeing is impinged; 'serious' where her minimum wellbeing is restricted; and 'grave' where her very subsistence is affected (*ibid*: 28; recall [3.1.3](#)). A sentencing authority could identify which of these levels of gravity had been reached from the facts of the case, and then compare different offences in terms of severity on the 20-point scale inside each of those levels: so, homicide involves the loss of subsistence itself, and therefore falls into the 'grave' level of seriousness. Since it involves the highest degree of culpability for the inflicted deprivation of subsistence, murder should score more highly than other inhabitants of this category, such as manslaughter (von Hirsch and Jareborg 1991: 29-30). The use of a numerical scale also allows sentencing authorities to take account of the effects of aggravating and mitigating circumstances.

Both models have the benefit of being simple, and mathematically clear in their outcomes. A judge could calculate, for example, that a sentence of imprisonment might fall into a score of 18-25 on the CPSS, depending on its duration; whereas a community order might range from 8-19. She can therefore both make decisions as to which punishment is most appropriate in the circumstances of individual offences, and also identify a range wherein the severity of both sentences means that they are substitutable (in this case, between 18 and 19).

Despite its clarity and general consistency, these quantifying approaches are artificial, and cannot avoid some level of arbitrariness. If I

am the victim of, say, a bicycle theft, I do not think, 'I have suffered 42 crime units.' I think, 'I cannot get to work on time this morning, must spend money to replace my losses, and cannot be sure that I will be safe from theft in the future' – and even that is too bereft of emotion (and profanity)! Each loss will affect some individuals more than others. However, in order to be numerically comparable subjective differences in opinion must be downplayed, in favour of standardising the level of harm arising from a particular type of loss. This necessarily requires a level of arbitrary supposition about which score fits which punishment (Schiff 1995: 190; von Hirsch and Jareborg 1991: 21).

Whilst these approaches are useful for the purposes that they have been designed for (namely, constructing sentencing tariffs that can be used by sentencing authorities to make proportionality decisions), they do not assist in understanding the impact of (community) punishment on offenders' lives. We might be able to say that certain configurations of requirements are of an equivalent severity to a certain length of imprisonment, but this sheds little light on *why* that is the case. Critical detail is lost as a result of assumed normative objectivity (recall [3.1.2](#)).

For similar reasons, I must also reject the punishment equivalency approach, demonstrated by, amongst others, the US-based research of Crouch (1993), Spelman (1995), and Wood and Grasmick (1999). Punishment equivalency studies concentrate on providing empirical data about the offenders' preferences for one form of sentence over another. Typically, incarcerated offenders with previous experience of both non-custodial and custodial sentencing options are asked to decide which sentence they would prefer to receive:<sup>20</sup> a custodial disposition of x length,

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<sup>20</sup> Note that in the US the definition of 'alternative sanctions' is significantly different to that in the UK, and includes many options that would be considered custodial, such as the county jail and intermittent custody (Wood and Grasmick 1999: 28, at Table 2). Crouch (1993) is more directly comparable, since he restricts himself to a comparison of (US) probation and imprisonment. Still, we must remain cognizant of jurisdictional differences.



or an alternative sanction of  $y$  length. The aim is to determine at what point participants would prefer neither sentence, which would suggest an area of equivalency between the two interventions' severity that could be used to map 'a valid continuum of sentencing options' (Wood and Grasmick 1999: 16). For example, if participants consistently expressed no preference between four months' imprisonment and two years' unpaid work, say, then we should conclude that the two sentences were (sufficiently) equally severe at this point. Over time we would develop a series of overlapping ranges in which it is appropriate and proportionate to impose a sentence, allowing the construction of an effective, empirically grounded sentencing tariff that reflects the experienced reality of life as a punished offender.

This approach is flawed, however. Just as with the other quantifying approaches discussed thus far, punishment equivalencies tell us nothing about how the sentences under discussion are actually experienced. We know that the sentences have some impact on offenders' lives, but not what it affects or how it does so. For example, whilst these surveys demonstrate that offenders may prefer one sentence over the other in certain circumstances, they cannot explain *why* those preferences exist, or what factors drive a predisposition for (or against) community punishment as against incarceration.

Indeed, this reveals a critical assumption endemic in this approach: that an offender makes choices about their preferences for one punishment over another purely in terms of the perceived comparative onerousness of those sentences. However, evidence suggests that offenders making such comparisons held complex views about the purposes of punishment (Allen 1985), and it is not reasonable to assume that perceived severity would be the only basis on which offender preferences form. Hypothetically, for instance, an offender might feel

(however correctly) that she has better chances for training or education in prison, which would make a more onerous sentence worthwhile. None of the punishment equivalency studies' methodologies allow for the possibility that, whilst onerousness is undoubtedly important in offender decision-making about their preferences, it may not be the only factor, and may not be equally important in every offender's personal experience.

The punishment equivalency approach is not without merit, however. Its focus upon offenders' actual preferences is desirable, since it reduces to at least some extent the arbitrariness of the punitive weight assigned to particular interventions. Whilst some degree of generalisation is inevitable, given that each individual is likely to differ in their priorities from the other, at least one can base those weightings on empirical evidence from subjects of punishment. This reduces the extent to which the researcher imputes her own values onto participants, and therefore the potential bias in the results (*cf.* Spelman 1995: 109).

Moreover, like other quantitative models, this approach does provide a clear and simple guidance for the construction of sentencing tariffs. It makes sense to seek information about the effectiveness of the sentencing hierarchy from those who are subjected to it. But that is not what this research attempts to do; it examines the impact of community punishment *on offenders' everyday lives*. The methods of the punishment equivalency approach would fail to describe or explain the reasoning behind offenders' preferences, and so fail to completely describe what it is like to undergo community punishment in England and Wales.

### 3.2.2 Pains of Probation: Towards a Qualitative Understanding

I now turn to the qualitative approach in Durnescu's (2011) work on the pains of probation. Durnescu adopts the empirical approach of the punishment equivalency model, but follows it to its natural conclusions by

going behind *what* offender responses to (Romanian) probation are, in order to describe *why* they respond in that way.

Durnescu's purpose is to catalogue the negative experiences arising out of probation in and around Bucharest. He identifies six pains that were experienced commonly across his sample, namely: deprivation of autonomy and of time; financial costs; stigmatisation; being forced to recognise and recall their crime; and facing the threat of incarceration if they failed to comply with their order (Durnescu 2011: 534-538). This detailed description is valuable, as it not only demonstrates that specific offenders have identified an impact of their punishment upon their lives, but also allows for comparison between different respondents' experiences and the tracking of trends in observations and attitudes across the entire sample.

However, Durnescu makes no attempt to compare the *magnitude* of the pains inflicted upon his participants. He distinguishes certain pains as necessary and others as not, but that does not help us to catalogue how much of an impact those pains had on offenders' lives. As a result, any retributive analysis of penal phenomena using Durnescu's model would be rather shallow. One could identify the pains of community punishment, but would have no way of describing how severely they affect individual offenders' lives. One would have a compendium of pains, and not a (complete) image of the overall suffering. This approach would also fail to provide a complete answer to the question of what impact community punishment has upon the lives of offenders subject to it. It would therefore be inappropriate for this study.<sup>21</sup>

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<sup>21</sup> In fairness, Durnescu's (2011: 540) concern with the pains of probation is rehabilitative, not retributive. For him, pain is something to be catalogued in order to minimise rather than calibrate it.

### 3.2.3 Summary: Conceptualising Penal Impact

None of the existing approaches to measuring severity are ideally situated to answer the research questions of this thesis. Although purely quantitative approaches can provide a good overview of the magnitude of an impact that a punishment can make upon offenders, they fail to adequately describe *why* that magnitude of impact is experienced, and what it is like for the offender to experience it. Conversely, a qualitative approach risks presenting thick description of what it is like to experience a punishment in any number of ways, but without providing any information about how relatively significant each pain is in a way that can effectively be compared with other offenders' experiences. This is problematic from the perspective of my research, which aims to provide a full picture of how offenders experience community punishment. Doing so requires more than the quantitative approach can deliver, and it requires a much more tailored version of the qualitative approach, one which can take account of the relative importance of each pain and explore how that differs between individual offenders. In other words, any assessment of penal impact must take account not only of the different ways in which punishment affects offenders' lives, but also the relative magnitude of each effect.<sup>22</sup>

However, it is insufficient to simply say that penal impact will involve an analysis of both the types and magnitude of suffering that punishment imposes. Since penal impact requires knowledge about offenders' subjective experiences, it is necessary to consider how (and to what extent) that knowledge may be acquired. Such an understanding requires some consideration of the processes of *social construction*.

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<sup>22</sup> For the purposes of this research, such an appreciation of magnitude need not be numerical; indeed, as I argued at 3.2.1 above, quantification-based approaches are inevitably arbitrary to some extent.

### 3.3 Social Construction

Social constructivism<sup>23</sup> is an epistemological theory that posits that knowledge is influenced by social forces, which attribute meanings to things only in the context of wider socio-cultural, political and historical processes, including the attributions of other meanings to other things; a process that we may call *social construction* (Burr 2003: 2-5). The field is vast and complex, and I can only provide a brief account here.

In this section, I introduce the essential tenets of constructivism, as I use it for the purposes of laying the groundwork for penal impact. Principally this will include the work of two sets of authors on the subject: on the one hand, Michel Foucault,<sup>24</sup> and on the other, Peter Berger and Thomas Luckmann. Thereafter, I explore the role of public opinion and news media in developing the social construction of community punishment, before ultimately arguing that stakeholders hold the true primacy over how community punishment is constructed, and therefore over how offenders experience it.

#### 3.3.1 An Introduction to Social Construction

Constructivism is a specific approach to epistemology in the social sciences, which differs from other approaches, such as (logical) positivism (Ayer 1936) and (critical) realism (Bhaskar 2011). It differs from such approaches in its rejection of objective descriptions of phenomena: for example, I type this sentence on the keyboard and it appears on the screen. It is not so much that constructivists dispute the cause and effect of my typing and the words appearing on the screen, but they would suggest that my perception of that act (and consequence) is determined

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<sup>23</sup> The nomenclature used here is somewhat confused. Students of more or less the same concept have adopted two names for their study of it: social constructivists and social constructionists. The former tends to apply more to sociological discourse, and the latter more to psychology, but the two terms are often used interchangeably (cf. Burr 2003: 2). I use 'social constructivism' here, primarily for aesthetic reasons.

<sup>24</sup> Foucault never referred to himself as a social constructivist, but there is enough overlap between his views and the position I am about to describe to treat him as such for the limited purposes of this enquiry.

by a number of subjective understandings that we cannot ever wholly divorce from their contexts. For instance, for me to type a sentence on the keyboard, I must have a concept of what a sentence is, how to type it, and that there exists a keyboard for me to do it on. Moreover, I am so used to using my QWERTY keyboard that I am able to type the sentence whilst looking at the screen, to the extent that if the keys had been laid out differently, I would have written complete gibberish. The task is mundane to me, because I have been exposed to computers for the better part of two decades, but would seem nothing short of incredible if this were the first time I had ever seen a computer.<sup>25</sup> In short, the 'fact' that I have typed a sentence (which has swiftly ballooned into a paragraph!) on a keyboard and it has appeared on my screen (as it will appear, on paper, when you read it) is contingent on a number of details about me: my perspectives, experiences and knowledge.

Further, my purpose in writing is to communicate with the reader. But the assumption that such communication is possible also requires a number of preconceptions about you: that you can read and understand what I have written, in English; that we use the same rules of logic and reasoning, and that therefore you can understand my argument; and perhaps most importantly, that the letters and words I have used can adequately convey my thesis, in a style and tone befitting the purposes of doctoral examination and of broader academic discourse (as opposed, say, to the purpose of writing a letter to my grandmother). In short, constructivism argues that our purportedly objective knowledge of events as mundane as my typing on my computer's keyboard and producing words on my screen are contingent upon presuppositions about the world that are grounded in the specific moment in which I perform the act of

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<sup>25</sup> This problem is neatly encapsulated in the science-fiction author and futurist Arthur C. Clarke's (1999: 2) famous Third Law that 'any sufficiently advanced technology is indistinguishable from magic'.

typing (Gergen 1999: 1-4; Burr 2003: 2-4). Objects may exist independently of our perceptions of them, but our knowledge of those objects cannot. That knowledge is therefore *constructed* out of our experiences, within the contexts in which we acquire it.

What makes this construction 'social' is language. For a social constructivist, language is a *sign*, a symbolic action that is only meaningful when its meaning is shared. We might describe language as a taxonomy for knowledge. It enables us to talk meaningfully about subjects as diverse as grapefruits and spaceships, retribution and air-conditioning, potentially in the same breath. '[L]anguage provides us with a way of structuring our experience of the world and of ourselves' (Burr 2003: 47), and ultimately, the 'way' shapes the traveller:

'[T]hat which we take being a person to mean... is not part of some essential human nature which would be there whether we had language or not. These things become available to us, through language, as ways of structuring our experience' (*ibid*: 48).

Above at 3.1.2, I outlined the danger that having a pre-established taxonomy can lead to neglecting certain phenomena or distorting them to fit one's preconceived analytical framework. If language is taxonomy, then it follows that we can perceive only what language allows us to perceive, and so our sense of ourselves, our drives and our experiences is limited to what language can express. The decisions as to what language can express are at least partially out of our hands, because meaning is assigned to language not by individuals acting alone, but by communities of language-users (*cf.* Gergen 1999: 33-61; Burr 2003: 46-62). Knowledge is therefore a product of society, because language taxonomies (and the knowledge they contain) are influenced by the social processes affecting their users. This suggests a *sociology of knowledge*: that is, that

knowledge is shaped, adapted and maintained by social processes (Berger and Luckmann 1967).

By assigning meaning to phenomena, language constructs reality, and since linguistic meanings are socially determined, that construction is social. Foucault (1970; 1972) explains this process in terms of *discourse*. For him, discourse is 'the area between, and the interplay with, words and things' (Alasuutari 2004: 69). Discourses are processes that are both *dynamic* and *constitutive*: '...what they do is more than use... signs to designate things. It is this *more* that renders them irreducible to the language (*langue*) and to speech' (Foucault 1972: 49, original emphasis). A discourse is therefore the process by which meanings are assigned to things, but it is also the means by which things are reconceived to suit the meanings assigned to them. So, for instance, the transfer from bodily punishment to discipline in the penal system described in *Discipline and Punish* (Foucault 1977) meant not just a change in the practices of the penal system (the meanings ascribed to the action of incarcerating or executing someone), but also in wider society in terms of more general surveillance and control of citizens: 'discourses systematically form the objects of which they speak' (Alasuutari 2004: 70). In other words, discourses not only affect the subjects that they discuss, but also other fields of social life, the medium of language transferring conceptions and constructions across distinct fields of experienced reality. They are both constructive and dynamic, and highly interactive with one another.

Discourses can therefore be seen as the backdrop to everyday language use, as well as its aggregate impact upon the construction of social reality. They are both the product of communication and the foundation upon which it takes place (*cf.* Wykes 2001: 191-193): a feedback loop that changes the nature of social conceptions of reality over



time. Since we cannot understand reality except through our social context, they constitute 'reality' itself (Burr 2003: 2-5).

However, Foucault (1970) identifies one further level at which the processes of social and linguistic construction of reality take place: the 'episteme'. This level of construction constitutes 'the 'apparatus' which makes possible the separation, not of the true from the false, but of what may from what may not be characterised as scientific' (Foucault 1980: 197).<sup>26</sup> Perhaps the most effective way to think of the episteme is as the process of definition of the limits of discourses at any point in history. It defines the basic knowledge that one must have in order to contribute to a discourse, and changes in the knowledge included at that level can have the most profound influence on the social construction of reality.

Foucault's episteme bears some similarities to Thomas Kuhn's concept of a 'paradigm' (Kuhn 1996), although Kuhn limits himself specifically to the natural sciences, whilst Foucault (1972: Ch. 2.4) emphasises the universality of the episteme. However, Kuhn (1996) provides an excellent example of how epistemic changes affect social reality in his description of the 'discovery' of oxygen in the eighteenth century. Prior to this point, scientists conceptualised combustion and oxidation as the result of an airborne chemical known as phlogiston, which adhered to flammable substances and was lost in combustion. However, after the 'paradigm shift' whereby that theory was abandoned, the scientific community accepted that combustion and oxidation were processes that occurred due to the presence of airborne oxygen. In both periods, things were catching fire, but Kuhn (*Ibid.*) nevertheless argued that the change in paradigm from phlogiston to oxygen meant that the oxygenated scientists were now living in a new world, because their

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<sup>26</sup> Foucault's definition of 'scientific' is in meaning to 'logical': a concept that possesses coherent internal sense. He thought of the episteme as being omnipresent to the human (social) experience, rather than being confined to specific disciplines (Foucault 1972: Ch. 2.4)

precepts for the rest of the world had relied to at least some extent on a world with phlogiston, and not with oxygen. Foucault (1970) argued that exactly the same process of knowledge transformation profoundly affected social phenomena too.

Even as it controls discourse by determining what is and is not knowledge, the episteme is also influenced by the development of discourses, in the same way that discourses control and yet are altered by language. Consider the historical context of *Discipline and Punish*. In the late-seventeenth century, monarchy was the dominant theory of European political power and social organisation. This was the result of a *discourse* about proper political arrangement constructed around the Divine Right of Kings. However, it also had an impact upon the *episteme*, and so on penal discourse, which was represented as a way of securing – and symbolising – the monarch's power.

The demise of monarchical power as the basis for society and politics contributed to alterations in the discourse about the purpose of the penal system that have led to the conceptualisation of the thing, punishment, as an exercise in *discipline*, which in turn has had a profound impact upon the linguistic communities in which these alterations have taken place with the transition to a culture based upon risk-management, surveillance and social control (Foucault 1977; cf. Garland 2001). As a result, changes in the episteme can have a profound impact upon the social construction of reality. However, if discourse is the aggregation of meanings arising from the use of language, then the episteme is the aggregation of meanings arising from the interaction (and overlap) of discourses. It follows that changes in the episteme are difficult to purposefully initiate, and can rarely be directly affected or controlled at the level of individual decision-making. To (ab)use a concept from psychology,

if discourses are the conscious mind of society, then the episteme are its unconscious: powerful, ineffable, and invulnerable to direct manipulation.

To summarise, social constructivism entails an epistemological theory of knowledge as the product of social processes that, through the communal agreement of meaning, determine how phenomena such as community punishment are experienced. It is impossible to isolate knowledge from this social context, which imposes cultural and historical perspectives upon the meaning attributed to seemingly objective truths.

### 3.3.2 Social Construction of Community Punishment

Let us turn to the question of how community punishment is constructed by Anglo-Welsh society in the early 21<sup>st</sup> century, or rather, the trends that are noteworthy in their incidence and frequency within the plurality of discourses that take place within that society about that punishment. How can we find out about this process? We might focus upon how this linguistic concept is *defined* by the Anglo-Welsh polity, a process I undertook in **1.1**. However, to do so would be to ignore the broader discourse affecting the concept's use. We must consider these discourses in order to grasp how community punishment is constructed within society, if we are to understand that society's impact upon offenders' experiences of those sentences.

There are numerous sources of constructions of community punishment. Firstly, there are the sentence's statutory definitions (recall **1.3**), as well as the contributions of legal scholars on the subject. However, statutory and scholarly interpretations of penal phenomena are likely to have a rather limited effect upon offenders' personal experiences of community punishment. Furthermore, research suggests that the general public knows relatively little about the criminal justice system and its workings (e.g. Feilzer 2007; Maruna and King 2004: 85-87). They are

therefore unlikely to be particularly influenced by discourses that require considerable working knowledge of that system.

Public opinion is another potential source for an enquiry into the discourses that contribute to the social construction of community punishment. Certainly it has been a subject of considerable criminological interest (Maruna and King 2004). This may be a result of the political controversy that engulfed community punishment from the 1970s with the fall of the rehabilitative ideal (Bottoms 1980), in which it has become conventional political wisdom that:

'The public is mad as hell about crime and are not going to take it any more. If the general public had their way, they would string up every paedophile, rapist, burglar, drug dealer and car thief lounging around the luxury holiday camps that claim to be prisons and hang them from the highest tree' (Maruna and King 2004: 87).

However, public opinion is more ambivalent about the use of community punishment than the position summarised above suggests, being neither particularly hostile nor enthusiastic about its use, with more or less isolated socio-political groups holding harsher or more favourable opinions (*ibid*: 87-91). There seems to be a general assumption that community punishment offers a lower severity than imprisonment, and amounts to a 'softer' option, perhaps in part as a result of its origins as an alternative *to* formal punishment (recall 1.2.2 above). However, it seems that public support for populist punitiveness and 'soft on crime' sentiment declines as opinion-holders gain more information about community punishment and particular offenders' circumstances (*ibid.*). Proximity to the process, in other words, alters one's perception of punishment. It is reasonable to assume that offenders' experiences of punishment will therefore be different, at least to some extent, to general public attitudes,

meaning that public opinion is not a reliable indicator of how offenders construct the community punishments they are subjected to.

Another way to approach public discourse on community punishment is to seek out the channels by which those discourses take place. There are a number of such media available, particularly in the digital age. One can engage in discourse by discussing a concept by word of mouth, or otherwise communicating with a small group of individuals. By exchanging 'facts' based on their respective knowledge and experience, and debating the merits of particular outlooks, one is exposed to potential new perspectives that may affect how one constructs a phenomenon. For example, suppose I am due to start a community payback scheme tomorrow. I am nervous about the prospect of hard manual labour and worried that it will be an extremely unpleasant affair. However, I meet my friend, who reveals that she has undergone a similar scheme in the past, and found it to be very easy: a little tedious, but not particularly hard. If I value my friend's personal opinions over my own ignorance of the system, I am likely to find this account convincing. This is likely to have some impact on my attitude going into the community punishment, and so my experience of it will be constructed differently, both because my fearfulness has been allayed beforehand, and because this will affect my behaviour during the scheme.

However, short of empirical research it is difficult to acquire information about these small-scale discourses. Furthermore, their importance is likely to be significantly diminished by *mass media*, those institutions whose social role is to disseminate information to the public at large. Mass media tend to spread content for the purposes of either informing the viewer, in which case they may be called the *news media*, or distracting her, in which case they are *entertainment media* (cf. Herman and Chomsky 2002). An individual, whether they are a victim, offender, or

criminal justice official, or indeed have no (direct) knowledge of the penal system at all, is only personally aware of their own experiences, and those experiences of others to which they are observers, or which they are informed of (*cf.* Feilzer 2007: 293-294). In the absence of direct experience of the penal system, therefore, mass media constitute a major source of information about criminal justice for a large section of society.

There is little evidence that mass media are able to directly control or shape public attitudes about crime (*cf.* Ditton *et al* 2004). However, research suggests that mass media do play a more subtle role in the determination of public discourse: the bounds of what is and is not worthy of comment and criticism. This can have a profound effect both upon the type of criminal justice story reported in the news (or depicted by entertainment media), and upon the type of language that is used to describe it, which will inevitably include certain socio-political and normative biases (*e.g.* Wykes 2001; Fitzgibbon 2011: 17-44). The result is that even those who dismiss mass media narratives as inaccurate or even deceptive may share the attitudes towards a phenomenon that those media propagate, because those media sources are sufficiently commonplace to influence the language and concepts that are socially agreed to be meaningfully relevant to that phenomenon (Boda and Szabó 2011). It is therefore important to consider mass media accounts of community-based sentencing, because they are capable of indirectly affecting (and setting the limits around) public discourse, and individuals' constructions of the experience of community punishment.

To do so, however, one must first understand the role that mass media accounts of *crime* have upon public attitudes. Descriptions of crime in mass media are well-documented, and relatively homogenous. There are two major threads: misrepresentations of both the *scale* and the *character* of crime, as being more serious, violent, and more widespread

than criminological data suggest it actually is (Boda and Szabó 2011: 330). Crime is portrayed in particular as indiscriminate and random, so that 'it could happen to you' (Jewkes 2011: 45-69; Wardle 2008). Such crime is also presented as being prevalent, widespread, and ever more common – despite the fact that, in statistical terms, the rate of (recorded) crime has consistently fallen over the last 20 years (Greer and Reiner 2012: 250-255)!

Crimes that are likely to draw the attention of the reader are emphasised by news media in order to stimulate interest in their audience, which is particularly important when that interest will determine the commercial viability of the medium (Franklin 2008). Furthermore, crime provides an opportunity for media to provide both titillating human drama to their audiences, and to distribute moral guidance (Wardle 2008: 146-147; Wykes 2001: 203-204). The result is a sensationalistic and moralising account that emphasises more serious crimes and so advocates a punitive, law and order approach to criminal justice (Wardle 2008; Jewkes 2011).

Correspondingly, the media tend to react negatively to the concept of community punishment, which seems ill-equipped to punish the serious crimes depicted as routine from their propagated discourses. Although the hostility of this reaction is somewhat overstated in the literature (Hayes 2013), community punishment therefore suffers from a legitimacy deficit as an effective alternative punishment to imprisonment.

To conclude, it is difficult to predict how community punishment will be constructed by those confronted with it, since without empirical research, individual perspectives and experiences are largely inaccessible to academic analysis. However, from a consideration of mass media and public attitudes towards the sanctions, it appears that there is a strong thread within public discourse to the effect that community punishment is

inferior as a punitive measure, and constitutes a 'soft' response to crime. This has at least the capacity to colour the process by which offenders construct, and therefore experience, community punishment, for these discourses are widespread and saturate daily life. Subject to the fact that generalisation tends to overemphasise the reticence of 'the public' and 'the media', the responses of both groups demonstrate a significant degree of ambivalence and/or negativity towards community punishment.

### 3.3.3 Institutional Coteries of Knowledge: Beyond Public Opinion

The process by which the impact of community punishment is constructed by individuals and social groups is rather more complicated than the largely negative attitudes suggested by depictions of general public (and especially, mass media) discourse. This is because society cannot be considered homogenous, especially on such a normatively contentious subject as criminal justice. Different groups will offer different perceptions, experiences and knowledge about the concept, creating a web of inter-relating constructions that may be more influenced by one community than another.

In such an instance, how are we to go about collecting information about the construction of the impact of communities on the social construction of community punishment? If every construction by every individual is social, but relies upon different social factors in the construction, then how can we ever give more than anecdotal information about how community punishment is experienced?

Even though all constructions will be subjective and fashioned out of the individual's own unique perspective, they are nevertheless influenced by the interpretations presented by some social structures and processes more than others. Berger and Luckmann's (1967) theory of the sociology of knowledge illuminates this point.



This theory approaches knowledge as a social product, crafted by social processes that are carried out within an institutional framework (Collin 1997: 64). Specifically, Berger and Luckmann (1967) propose what we might call a sociology of ignorance. They treat knowledge similarly to labour and argue that it is distributed across society in a way that maximises social efficiency. To illustrate, they use a thought experiment involving a new society, composed of two people. Individually, each person would need to acquire all the knowledge necessary to survive and thrive in this new society. However, together, the two members are able to parcel out specific tasks to one another, such as growing food and constructing shelter. If we assumed that these were the only two tasks necessary in that society, then the two could live happily together even if one knew nothing about farming and the other was equally ignorant of building, since they could both provide enough of their services for themselves and each other, thereby meeting society's needs in terms of both knowledge and labour.

Berger and Luckmann (1967: 70-85) argue that, essentially, societies operate on a much more complex version of this hypothetical. They distinguish between knowledge that is necessary for everybody in society to live together, and specialist knowledge that can be delegated to particular sectors that perform specific roles (*ibid*: 89-96). The content of both of these categories will vary from society to society: in the modern UK, for instance, computers saturate our lives, and some knowledge of how to deal with them has become essential for everybody. By contrast, in a relatively technologically underdeveloped society where predation by animals is commonplace, some knowledge of wildlife and the dangers they represent would be far more important.

To retain knowledge, practices are handed down through traditions, which eventually ossify into *institutions*. To become a member of an

institution is to learn the knowledge of an institution, along with the perspectives contained therein (*ibid*: 85-89, 97-109). This process of learning, which Berger and Luckmann call *socialisation*, consists of the basic knowledge, primarily learnt in childhood, and additional knowledge that grants one access to and membership of an institution (*ibid*: 149-204).

There will never be enough time in one person's life to acquire all the knowledge necessary to understand how society works. However, by coming together to perform tasks for other social members, individuals can create a sum far greater than its parts, because each specialist coterie of knowledge fulfils the needs of others. When everybody knows something, it does not matter that nobody knows everything.

Moreover, as societies advance, the proportion of knowledge that people have relative to the whole will continually shrink as labour becomes more and more specialised. For instance, I own a clock, have water heated and moved around my house by pipes, and rely on asthma medication, and yet I know nothing about clock repair or plumbing. Over years of handling my prescriptions I have learnt something about asthma, and how the condition is diagnosed and treated, but I still have relatively little information about it compared to a doctor or pharmacist. In short, there are vast swathes of society and social knowledge of which I am more or less ignorant, but which nevertheless contribute to my wellbeing.

The institutions responsible for the administration of criminal justice have similar access to privileged knowledge. In particular, the Probation Service has been responsible for the implementation of community punishment for most of the last century, and continues to play a vital role not just in that administration, but also in maintaining knowledge about best practices for the effective imposition of community punishment. This knowledge is imprinted with the Service's values,

because they are the only ones who possess the knowledge of how to 'do' it (subject to the privatisation of their previously monopolised duties).

Given this focus upon specialised knowledge possession, it may be useful (if artificial) to think of offenders as constituting a separate institution (Berger and Luckmann 1967: 97-109). Since 'offender' status is earned by the typification of their acts as worthy of criminalisation, their social purpose is to be punished under criminal law, and they obtain knowledge of, *inter alia*, what it is like to suffer (as well as whether their punishments have achieved their suffering). In this sense, they are the most important stakeholders in the retributive process, since they possess the most accurate knowledge of how (and to what extent) punishment subjectively affects them (Spelman 1995: 105).

But the Probation Service is important to this analysis as well, because it operates as an institution in a critical way that offenders do not: it retains and passes on the knowledge that it attains to the next generation. After all, the 'institution of offenders' does not (systematically) preserve its members' knowledge of their own capacity to suffer for posterity, or at least only does so to a negligible extent. As a result, its knowledge is routinely lost – and as a result, it cannot truly be said to be an 'institution' in Berger and Luckmann's (1967) sense. Vital to Berger and Luckmann's (*ibid*: 110-146) analysis of institutions is the fact that those institutions require knowledge for *legitimation*. These institutions ultimately exist because society requires the tasks that the institution retains specialist knowledge about. But if an institution does not actually generate and retain that knowledge, then the type of social endeavour that the defunct institution embodies is extraneous. Therefore, an institution must justify itself (as a recipient of labour and other resources) by preserving the knowledge that it claims principal expertise over. The hypothetical institution of offenders does not do that. The knowledge it

gathers is ephemeral: it is lost whenever individuals leave the institution because it cannot be effectively shared (Christie 1981).

By contrast, the Probation Service exhibits a profound connection with the experience of community punishment by its subjects, both because it is primarily responsible for that process's administration, but also because its values have emphasised care and contact between probation staff and their clients (recall **1.2**). It passes this knowledge of offenders' experiences onto its own members, but it also disseminates it through rules and best practices to offenders. In theory, at the very least, the Probation Service plays a vital role in the construction of offenders' experiences of community punishment, and so it is essential that their involvement is taken into account in the current study.

But why should these specialised coteries of knowledge be afforded more importance than general public discourses? After all, mass-mediated constructions can have a significant impact even upon the relatively isolated pockets of knowledge in institutions such as the Probation Service. Here it is helpful to turn to Foucault's exploration of the relationship between knowledge and *power*.

Foucault (1980) suggests that the presentation of knowledge (as truth) is actually an exercise of power. For example, when I go to my doctor I ask her for her medical expertise (which consists of informing her of my health and receiving suggestions about how I can improve it) I am effectively accepting that the doctor has a better claim to 'the truth' about my health than me. In that relationship, the doctor has power over me.<sup>27</sup> That knowledge carries with it her own preconceptions, since it has been influenced by her own socio-cultural background (such as the views of the medical profession from which she has received her elite education). By

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<sup>27</sup> At least, in that context. Suppose that the doctor develops an interest in criminal justice, and enrolls on a course on which I am the teacher. Suddenly, our roles are reversed: I hold the expert knowledge that makes her (more or less) subservient to me for the purposes of that knowledge exchange. Foucauldian knowledge-power is socially dynamic.

accepting her knowledge, I am also accepting those preconceptions. Moreover, if I accept that her knowledge is sound, then I also accept her underlying reasoning and preconceptions about what the appropriate course of conduct should be.

Thus, expertise is the ability to exert power over others' decision-making and actions in matters over which you claim it. This power may not be total – I may violate my doctor's prescription, for example, either because I forget to follow her advice or because I feel I 'know better' (*cf.* Walklate and Mythen 2011) – but the mere fact that I recognise her as an expert makes compliance with her views more likely.

The Probation Service, as we have seen, is staunchly rehabilitative in its general outlook. By contrast, mass-media and 'public opinion' discourse tends to emphasise the punitive role of criminal justice (Maruna and King 2004, Boda and Szabó 2011). Given this disagreement, the institution of the Probation Service has a vested interest in maintaining its claim to expertise, since the prevailing discourse endangers its vision of an effective penal system, as well as its continuing existence as an institution! There may be attempts at reconciliation – recall Duff's (2001, 2003) contention that probation supervision represents an essential example of effective retribution. But these reconciliations will come from a vested interest in maintaining one's expertise – one's knowledge – and therefore one's power.

This is not to say that other institutions and general conceptions of community punishment are irrelevant, however. Ultimately, the individual remains the expert on what hurts her, and so it is up to her to determine how hurt she is on the basis of all the evidence before her, expert or otherwise, as well as on the basis of her own perceptions and experiences. This construction is the most important determinant of the impact community punishment has upon its subjects, although it is not the only

source of influence. It must therefore be recognised by penal impact, as an analytical framework for answering my research questions. I turn, therefore, to outlining that framework in overview.

### **3.4 What is Penal Impact?**

Penal impact is an analytical framework for measuring the severity of punishments, and focusses primarily upon the individual experiences of offenders. It accounts for the different types of pain arising from particular forms of hard treatment, whilst also providing a qualitative understanding of the magnitude of each pain as well. Penal impact is not necessarily useful in constructing a sentencing hierarchy, since it is essentially non-numerical and almost wholly subjective. However, it does provide an insight into how community punishment has impacted on the lives of those offenders it studies, developing a framework in which a richer understanding of the punitive process can be developed for the purposes of enlightening discourses in penal theory and policy.

Penal impact is necessarily constructivist in outlook, as a result of its focus on individuals' experiences of punishment. It prioritises the views and experiences of the stakeholders closest to the administration of community punishment – that is, the offenders and the Probation Service staff responsible for their punishment – over those of the general public or more specific groups and institutions, such as mass media, that are more remote from the social processes that constitute penal practice.

Wider society must exert some influence over offenders' and staff members' construction of community punishment – it is, after all, *social* construction. However, where it does, that influence will be demonstrated in the experiences and perceptions of offenders, and will therefore be detected by a consideration of offenders' viewpoints. These perspectives must be understood in the context of where they have come from and

### Chapter Three

what sources have affected their development. However, we can adequately understand the penal impact of community punishment in England and Wales without recourse to more than the offender, as the punishment's subject, and the probation officer, as its overseer.

## **Part II: A Study on the Impact of Community Punishment**



## **Chapter Four: Methodology**

The last three chapters have been dedicated to considering this study's research questions conceptually.<sup>1</sup> By examining the origins and forms of community punishment in the early 21<sup>st</sup> century, identifying and situating my perspective within a specific retributive outlook, and outlining the consequences of that outlook for understanding the subjective experience of sentence severity, I have reached a position from which to make some basic methodological observations.

The impact of community punishment is a social phenomenon, which is therefore influenced by the interactions of a number of stakeholders, most notably the offender and the supervising penal agent responsible for their oversight.<sup>2</sup> Understanding penal impact requires information about precisely that social interaction. It is therefore necessary to access the subjective experiences both of offenders and their supervisors, a task that requires empirical study. In this chapter, I describe how such a study was undertaken. I do so by setting out the aims of the empirical study and their relation to the overall thesis's research objectives, before critically examining and justifying the sampling and research methods brought to bear. I end the chapter with an overview of the inherent strengths and limitations of my approach, providing the necessary context for a proper reading of the data generated.

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<sup>1</sup> To reiterate, those research questions are: (1) what impact does community punishment have on the lives of those subjected to it; and (2) to what extent is that impact affected by the relationship between the offender and her supervisor?

<sup>2</sup> Under the Offender Management Model, Anglo-Welsh offenders subject to probation supervision have a 'supervision officer' (SO) who meets with them for regular one-on-one sessions (Grapes 2007: 188-190). In practice the SO is also the Offender Manager (OM), responsible for the overall implementation of the order. She may be a fully trained Probation Officer (PO) or a Probation Service Officer (PSO), a relatively junior position often held by aspiring probation officers whilst receiving formal training (Canton 2011: 202-204). Where the distinction between SOs and OMs, or between POs and PSOs, is unimportant I will simply use the catch-all term 'staff' to identify participating supervisors.

#### 4.1 Research Aims

My overall research questions are inherently empirical. That is, they are questions about the nature of social phenomena in practice, rather than in theory or principle, and so demand empirically investigated answers. Furthermore, these objectives suggest certain research methods as more effective means of answering them than others, in that they are concerned with offenders' personal *experiences* under community punishment.

The empirical study described in this chapter pursued a number of subsidiary objectives in order to help answer these broad questions. Firstly, it sought to identify the pains of community punishment experienced by offenders subject to orders including a supervision requirement. Secondly, it attempted to clarify how those pains related to the orders imposed, and in particular, to the process of supervision. Thirdly, it endeavoured to determine the severity of the pains experienced by those offenders, in order to create a composite picture of the given order's penal impact.

To achieve these secondary aims, I conducted a series of semi-structured qualitative interviews with offenders and their Probation Service supervisors, drawn from two Probation Centres within a single Probation Trust.

Before discussing how a sample of these two groups was constructed, and the specific methods applied to them, I need to justify some of the research design decisions embodied in the aims laid out above. Specifically, I must address: the emphasis on *pain* as a subject of data generation; the focus on offenders subject to probation *supervision*; and the inclusion of *probation officers* as participants in a study that principally examines the experiences of offenders.

4.1.1 The Pains of Community Punishment as a Subject of Inquiry

I have already defended the understanding of pain as the metric of retributive punishment (at 3.1.1). In determining the penal impact of community punishment it is therefore sensible to explore the impact that these sentences have on offenders' lives in terms of pain. However, that is not to say that this approach is without its limitations. Indeed, it would seem to focus wholly upon what might be called the negative characteristics of community punishment, at the expense of the positive effects that such penalties can have upon offenders' lives.<sup>3</sup> Whilst I am concerned with identifying the retributive content of community punishment, this study cannot ignore the rehabilitative history of community punishment, or of probation supervision. Whereas the former can potentially serve to increase the penal impact of a given punishment (by imposing restrictive or otherwise onerous requirements), the latter seems more likely, *prima facie*, to reduce it.

Ultimately, this study considers the impact of community punishment upon offenders' lives in terms of the specific pains that they suffer. However, my research questions compel me to consider those pains in terms of the extent to which they are affected by the supervisory relationship. This study therefore treats pains as experiences that can be exacerbated, ameliorated, or indeed wholly unaffected by supervision. The rehabilitative actions of probation supervision can be understood in that context: if, for instance, probation supervision deals with an offender's criminogenic needs by helping them to find a job, then that supervision ameliorates any pains associated with unemployment and jobseeking that the offender might otherwise have felt (*cf.* Canton 2011: 75-78). Whilst an approach focussing on pain does tend to accentuate the 'negative'

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<sup>3</sup> 'Negative' and 'positive' are used here in a purely functional, rather than normative, sense: pain is negative in that it takes something away from the offender by hard treatment, whereas a 'positive' intervention adds something to the offender's life. We should expect to see a mix of both positive and negative consequences in any penal intervention.

elements of community punishment (Durnescu 2011: 539-543), that is not to say that it will inevitably be blind to any pain reduction following from supervision.<sup>4</sup> Rather it allows a consideration of what negative experiences are extant in the lives of supervised offenders, and how they are affected, positively or negatively, by supervision.

### 4.1.2 Justifying Supervision as the Sampling Nexus

I must also justify focussing the study upon only those offenders subject to supervision requirements. Although the practice of community punishment has been synonymous with the work of the Probation Service (until the 2014 privatisation of key services: recall 1.2.5), in fact only about a third of all community and suspended sentence orders involve the Service's traditional activity, supervision (Ashworth 2010: 347). By limiting this study to cases involving supervision, I restrict the scope of enquiry to only this minority of orders.

The decision to focus on this requirement was primarily one of convenience, since it allowed for the identification of a clear gatekeeper to the offender, namely the supervision officer. However, given that the supervision requirement is also the least likely to be used alone, supervision acted as a useful sampling nexus: a point of overlap for many diverse experiences and a key point at which to gain access to potential offender participants serving a range of different requirements, thereby compensating somewhat for the limitations a supervisory focus entails.

### 4.1.3 Offenders and Probation Officers: The Subjects of Study

In a similar vein, I must also explain the inclusion in this research design of probation officers as participants. After all, the focus of this study, and indeed of the thesis as a whole, is on offenders' subjective experiences of community punishment, about which probation officers can necessarily only ever give second-hand testimony. Whilst the probation officer must

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<sup>4</sup> Nor can it assume that these interventions are only pain-reductive: McNeill 2011: 16-17.

understand their client's<sup>5</sup> situation, including any pains experienced during the supervisory process, in order to effectively engage with them, they cannot actually *know* the offender's pain in the same way that the offender herself does (Spelman 1995: 105).

Despite this, probation officers have been included in this study for three main reasons. The first is *triangulation*. Whilst the data generated by participating offenders will necessarily be the closest source to the subject of the study (their pains of community punishment), it does not necessarily follow that they will be the most illuminating source of that information in all cases. In particular, the interview testimony of offenders is liable to be fraught with inconsistencies and uncertainties. This is not to suggest that an offender is necessarily less trustworthy a source of information than the law-abiding, but only to recognise the complexities of any human interaction, including interviewing.

Interpreting interviews is a complex process: one cannot take everything one hears at face value. Even when they have no reason to lie, interviewees' recollections may be more or less subject to the vagaries of memory, misunderstanding the question, and conventions that may make certain responses impolite, or even taboo (Mason 2002: 78-79). Triangulation of the data – that is, critical comparison with other sources of information (Bauwens 2010) – can provide one avenue for identifying inconsistencies and tensions in participant statements, offering an opportunity to challenge the offender to explain them in a way that neither privileges their own testimony, nor the 'official' views of probation officers, as superior (Blagdon and Pemberton 2010: 277-279).

Secondly, probation officers provide valuable *context* for offender experiences. The probation officer is a point of contact between the

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<sup>5</sup> I use the somewhat obsolete social work terminology of 'client' as a synonym for 'offender', since it is useful as a way of indicating the specific offender supervised by a specific staff supervisor, as well as highlighting their relationship. On the distinction between 'offenders' and 'clients' in the history of Anglo-Welsh probation practice, see Canton 2011: 33-34.

criminal justice system and the individual offender, and therefore enjoys a considerable level of power to influence their clients' experiences of community punishment (Phillips 2014). Staff values and practices are important context to the pains that an offender experiences, insofar as they demonstrate the extent to which the supervision (or other aspects of community punishment) cause the pains experienced by the offender during (and after) the period of penal intervention.

Thirdly, probation officers' inclusion offers some (however limited) assistance in generalising offender experiences beyond the cases of the participating offenders themselves. Whilst their knowledge is second-hand, staff participants do have access to a broad range of clients, each of whom will have experienced different pains of community punishment (and communicated them to their supervisors to different extents). Giving officers the opportunity to comment upon the relationship between the pains experienced by a particular offender and their wider client base provides an opportunity to reduce (if not overcome) the limitation of the study's findings to the small sample size made necessary by its work-intensive methods (Mason 2002: 67).

In sum, the adoption of a research design aiming to explore the pains of community punishment (as experienced by offenders subject to supervision requirements) via semi-structured interviews with both offenders and supervising probation officers produced data that provides an effective description of the penal impact of community punishment in England and Wales. Let us therefore turn to how these research aims were pursued, through the construction of a meaningful sample and the generation of data from that sample through specific research methods.

## 4.2 Sample

### 4.2.1 Sample Construction: From Access Negotiation to Recruitment

#### *(a) THE PARTICIPATING TRUST*

The study took place within the area of a single English Probation Trust, which operated within an area corresponding to a regional police force and which is responsible for all probation officers operating within that geographical region (Canton 2011: 194-196). This particular Trust was responsible for a range of Centres located in a central county city and a variety of smaller towns scattered over a single county area.

The Trust was selected because the population of the area it operates within is largely similar to national averages in terms of racial, class and gender composition, and is therefore a useful microcosm of broader Anglo-Welsh society (ONS 2012, 2014). However, each Trust was comparatively independent and self-governing, within the confines of the National Offender Management Service, and as such these data will reflect, and be limited by, the strategic and operational decisions of the Trust at that time.

The vicissitudes of contemporary independent penal research in England and Wales meant that access negotiation<sup>6</sup> and preliminary recruitment were undertaken simultaneously. Whilst access negotiation began with the completion and submission of an online form through the Integrated Research Application System (IRAS),<sup>7</sup> this process required the provision of information regarding the Trust/s with which I wished to work. It was therefore practical to approach the Trust on a preliminary basis as to whether they would be willing and able to participate, pending the official approval of NOMS. Such consent was, in the event, forthcoming,

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<sup>6</sup> I use the term in the narrow, static sense of meaning, 'arranging formal permission to conduct the research project'. This is a simplification, and ignores the fact that access negotiation is both dynamic and an ongoing feature of empirical research, from the point of first contact to the final interaction with participants: Noaks and Wincup 2004: 55-73.

<sup>7</sup> Available online at <URL: <https://www.myresearchproject.org.uk/SignIn.aspx>> (accessed 10<sup>th</sup> August 2014). See IRAS 2014 for more information.

and once NOMS approval was granted, a liaison from the participating Trust placed me in contact with the participating Centres.

*(b) THE PARTICIPATING CENTRES: OC AND IC*

As noted above, the participating Trust was responsible for a number of Probation Centres spread across its geographical sphere of influence. These were located in a range of inner-city or smaller, semi-rural town areas, and each had different socio-economic and demographic constituencies. To reflect these institutional differences and avoid skewing data on the basis of factors common to only one area, two Centres were approached for the purposes of recruiting staff employed there as participants in the study. One was located in the centre of the county city, and the other in a smaller town; accordingly I adopted the code-names IC (Inner City) and OC (Outer County) for each Centre. In each Centre, a Senior Probation Officer (SPO), responsible for the management of a team of probation officers, was enlisted as a liaison.

There were a number of significant variations between the two Centres that merit discussion. Firstly, OC and IC differed considerably in terms of the respective scales of their operations. IC was responsible for far more cases overall than OC, although OC drew in cases from a wider (and more rural) geographical area. As a result, the managerial styles utilised by the SPO liaisons involved in the study differed considerably. In OC, the smaller, more streamlined office was able to comply with requests for organising participants and the space and time to conduct interviews far more rapidly, and the SPO was able to take a more hands-on role in circulating information about the study to potential staff participants on my behalf. Her philosophy was very much to set a clear deadline and then stick to it, which made the work of arranging and conducting interviews considerably easier for me! At IC, in contrast, the SPO was unable to provide such a high level of structural support as her Centre had to



operate on a more flexible basis. Her role in circulating information about the study to the staff and assisting in chasing up requests and communications was key, but the fieldwork was conducted here on a much more *ad hoc* basis, and required a considerably greater investment of time into arranging each interview.

Demographically, OC's case-load was more homogeneously white, whereas in IC there was a greater racial diversity. In terms of gender, OC supervised both male and female offenders within the same staff team, whereas in IC a specialist staff enclave working out of a charity-run Women's Centre was responsible for most female offenders.<sup>8</sup> This contributed considerably to the demographic limitations of the study (discussed at 4.4.1 below). In both Centres, offenders tended to follow general trends in terms of offender age, with older clients being less common (*cf.* Farrington 1986).

### *(c) RECRUITMENT OF STAFF AND OFFENDERS: OCO, ICS*

The study sought to recruit six staff and six offenders from each Centre, for a total of 24 participants. Of this, the study closed with a total of 11 staff and 9 offender participants, due to several withdrawals and a comparatively low availability of offenders in IC.

With the support of SPOs, SOs were invited to participate via email, in-Centre presentations, and face-to-face discussions in communal office areas. Information about the study was provided by presentation, as well as by a Participant Information Sheet (PIS), circulated by email (see Appendix C). Where volunteers were not forthcoming recommendations were accepted from the relevant SPO, and then approached regarding potential participation.

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<sup>8</sup> I decided to avoid recruiting participants from the Women's Centre on the basis that their experiences would be too qualitatively different from those supervised in ordinary probation centres to be directly comparable. Some discussion on the experience of supervision in a Women's Centre is available elsewhere (*e.g.* Durrance and Ablitt 2001), although this remains a fruitful area for further research.

Staff involvement was initially made contingent upon the suggestion of at least one offender as a potential participant from amongst their client base. They were specifically asked to suggest offenders who were likely to be willing and able to take part effectively, in order to avoid attrition, and who would enrich the sample in terms of the criteria discussed in section 4.2.2. I retained final discretion and approached the offender personally, explicitly ensuring them of my independence from both the Probation Service and the broader government to reassure them that I was not subservient to (or reconnoitring for) the host institution (*cf.* Noaks and Wincup 2004: 63-66).

Offenders were presented with the opportunity to attend a 'consent and information meeting' at their usual Centre, timed to coincide with a supervision session so that they could complete two tasks in one visit.<sup>9</sup> Assuming that they were willing to attend, they were presented with a written PIS (Appendix A). I went through this with each offender orally to enable the participation of those with low levels of literacy, and gave them the opportunity to ask questions. Once offenders were satisfied that they were informed about the study, they were presented with a consent form (Appendix B) and given the choice to: sign it there and then; take it away to consider whether or not they wished to participate; or decline to participate altogether.<sup>10</sup>

Having agreed to take part, offender-participants could choose to withdraw at any time up to the conclusion of data collection (on 31<sup>st</sup> January 2014) by informing me or their supervision officer. In practice,

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<sup>9</sup> For consent and information meetings, as well as attendance at both interview sessions, offenders were compensated for their travel costs. In addition, each interview session attended was rewarded with a £10 gift voucher as an incentive to participate, at the suggestion of the Trust liaison, who warned of the reluctance of offenders to participate in the Trust's own research.

<sup>10</sup> In some cases, multiple offenders were put forward by staff, approached and agreed to take part. Where this happened, the shortfall in staff numbers was resolved by recruiting additional staff (without asking them to suggest potential offender participants from their own client bases). When multiple staff recommendations were made, they were approached in the order in which they suited the sample criteria laid out at 4.2.2.

three offenders did withdraw, and all data provided by them up to that point were destroyed.

Upon signing up to the study, participants were assigned a code based upon: their Centre (OC or IC); the capacity in which they were involved in the study (Offender, 'O', or Staff, 'S'); and a number based upon the order in which they were recruited (codes assigned to withdrawing participants were reassigned). So, the first recruited offender from OC was code-named 'OCO1', whilst his supervisor was 'OCS1'.

### 4.2.2 Sample Criteria for Offender-Participants

Whilst it was important to ensure that both samples added to the utility of the study as a means of answering my research questions, the focus of the study upon offenders' lived experiences meant that it was appropriate to adopt a more structured approach to the recruitment of offenders. Staff were recruited on a convenience basis: they either volunteered to participate based upon information circulated by the SPO of the Centre, or agreed to take part after being approached by me individually.

In contrast, offender participants were recruited via a *purposive* sampling method in order to maximise the diversity of the small sample necessitated by the work intensive nature of qualitative research (Silverman 2010: 141-143). Under a purposive model, the sample is constructed so as to include as many relevant differences in offender-participants' experiences as possible. By maximising diversity and highlighting differences as well as similarities, such a sample improves the validity of the data generated by enabling one to explore the extent to which themes present in one set of circumstances are also extant elsewhere. This reduces the possibility that extraordinary circumstances in one case will skew the overall findings. Ultimately, however, a purposive sample is aspirational, to the extent that it aims to diversify the sample as much as possible within the constraints of which individuals are actually

willing and able to participate at the time. The sample that results is therefore by no means perfectly diversified; but it is more so than it would be if staff recommendations were uncritically accepted.

Three indices of difference were identified as relevant in this study: the *offence committed* by the offender; the *order and requirements* imposed upon her; and her *demographic* characteristics. Finally, I included certain *exclusionary qualifiers* that precluded participation.

(a) *THE OFFENCE COMMITTED*

Community punishment is available as a sentencing option for a wide range of criminal activities, ranging from violent and sexual offences, to property offences such as theft and criminal damage, to administrative crimes, such as driving offences. The sample sought to draw upon as wide a range of different offence types as possible, in order to explore the proportionality of the penal impact of community punishment in a diverse range of situations. In addition to the legal label attached to the crime, attention was paid to the individual facts of cases to identify a rough range of offence seriousness to allow consideration of (subjectively determined) differences within individual categories.

(b) *THE ORDER (AND REQUIREMENTS) IMPOSED*

The experience of a sentence will inevitably be determined not just by the offence committed, but also by the formal composition of that sentence: what the offender is required to do and when. Two distinctions should be made here. Firstly, offenders could be subject to either of the two relevant forms of community punishment: the community order or the suspended sentence order. Secondly, within that order, any number of requirements could be imposed upon the offender. The study sought to maximise diversity in both terms, drawing on as diverse a range of orders and requirements as was available, although as noted above (at [4.1.2](#)) each participating offender's order involved a supervision requirement.

### *(c) DEMOGRAPHICS: GENDER, ETHNICITY, AGE, AND RELIGION*

Since this study was intended as an exploratory overview of the penal impact of community punishment upon offenders generally, recruitment was not systematically based on demographic factors (gender, race, age, sexuality, religion, and other fundamental information about one's personal identity). However, some basic data on these matters was collected to situate the sample within its broader social and national contexts. Data on the demography of the offender sample was available from two sources: firstly, from the information recorded in participating offenders' case-files, which noted gender, ethnicity, age and religion; and secondly, from self-identification questions as to the participant's gender, ethnicity, and age asked at the start of the primary interview. In practice these two sources did not conflict.

### *(d) LIMITATIONS AND EXCLUSIONS: BARRIERS TO PARTICIPATION*

Since the study exclusively considers the adult criminal justice system, only offenders aged 18 years and over at the time of sentence were sampled. In addition, staff were asked not to recommend anyone who would require third-party assistance or care during the interviews (due to severe mental or physical health concerns, or to language barriers, *e.g.*) since the study was unable to fund this level of support.<sup>11</sup>

However, offenders who did not require support but whose needs were greater in terms of comprehending and processing questions and information to do with the study were accepted in principle, subject to the need for forewarning by the recommending staff so that allowances could be made.<sup>12</sup> In particular, the research methods selected allowed participants with low literacy levels to fully engage with the research. For

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<sup>11</sup> The systematic exclusion of those requiring third-party assistance necessarily limits the conclusions of this study. This group of offenders can be expected to experience community punishment qualitatively differently to those who do not require such assistance, and to experience a correspondingly different penal impact. Further research is needed here.

<sup>12</sup> In practice only one offender, who suffered from learning disabilities, fell into this category.

example, all textual information about the study was discussed orally and with the opportunity to ask questions before attempting to obtain consent to participate, and the offender's supervisor was asked to act as an intermediary for any questions that the offender might have after agreeing to take part that required writing to me between sessions.

### **4.3 Methods**

Having selected a viable sample of offenders and staff, I was in a position to begin to collect data. In this section the methods used to acquire those data are discussed. There were three distinct phases of data collection, which I shall describe in turn: case-file analysis; primary interviews; and group interviews. I end this section with a discussion of the analytic methods used to examine the data generated.

#### 4.3.1 Case-File Analysis

The Probation Service keeps extensive files on each offender for whose supervision they are responsible, compiled using the Offender Assessment System (OASys). The file is accrued from a range of resources, including police and prosecution case-files, victim reports, and periodic interviews with the offender to gauge (and review) her risks and criminogenic needs. It is often, though not always, completed by the same probation officer who compiled her pre-sentence report, and who will often eventually become her OM (Canton 2011: 88-93). The OM will also periodically conduct formal reviews of the offender's case, which are recorded as new case-files. The file contains, *inter alia*, an overview of the offence and a contextual overview of the offender's background in terms of: education; thinking and cognitive skills; mental and physical health; accommodation, work and finances; and relationships with family and friends. Whilst their primary objective is the provision of information to allow the assessment and management of the offender's risk of reoffending and of inflicting

serious harm (*ibid.*), they are therefore a useful source of preliminary information about offenders and their situations.

I used OASys case-files in two contexts. In the first instance, for the purposes of *recruitment*, the case-files of recommended offenders were used for the sole purpose of identifying their suitability for the study (following the criteria laid out above). Photocopies of case-files were provided by the Trust and stored in a secure locker until one of two outcomes arose: firstly, if the offender declined or was otherwise unable to participate, the file was returned to the Trust for immediate destruction. In the second instance, if the offender consented to taking part in the study, the file was used to write a series of anonymised notes, after which it was returned for destruction by the Trust.

Case-file notes consisted of three sections.<sup>13</sup> In the first, information was gathered about the offence and its punishment, in terms of the order (and requirements) imposed, the purposes of the sentence in the opinion of the judge in that case (if noted); and the risk (of reoffending and of serious harm to various identified groups) posed by the offender at the time of the review. In the second section, details about the offender and her background were recorded. Her demographic details (gender, ethnicity, age and religion) were recorded, as were anonymised details about her relationships (with family and friends), her work and finances, her accommodation, her mental and physical health, and other relevant information. In the final section, the preceding two sections were considered and used to identify specific questions to ask offenders and staff in the primary interviews.

These data served a primarily preparatory role, allowing me to interview offenders with some foreknowledge about their case. This enabled me to engage with participants from a position of (albeit limited)

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<sup>13</sup> Appendix E contains a blank template of this document.

understanding, thereby obviating the need to spend valuable time establishing background information in interviews. It also provided the opportunity to identify deviations from the 'official' record in the file, allowing apparent contradictions to be challenged, and an explanation to be given by the interviewee, rather than simply assuming the reason for it myself (cf. Bauwens 2010). The files also acted as a descriptive introduction to the interview transcripts during analysis, acting as an *aide-mémoire* to the facts of that case.

### 4.3.2 Primary Interviews

Equipped with background information from case-file analysis, the next stage of research was that of conducting the *primary interviews*, so-called because they acted as the main source of data generation in the study. Both staff and offender participants were invited to a sixty-minute semi-structured interview, during which they were asked to answer questions that differed somewhat depending upon which category they belonged to (Appendix F). In the case of offenders, questions were focussed within two major subject areas. In the first, they were asked to describe the impact of their order upon their day-to-day lives in terms of a number of potential contexts, including family; friendships; accommodation; employment (jobs or jobseeking); perceptions of others; and/or perception of oneself. In the second area, they were asked to describe their experience specifically of supervision (and of their supervisor).

By contrast staff were asked questions regarding their approach to supervision, including their reasons for joining the Service; their education and background; their attitudes and practices towards supervision; and their relationship with the values and expectations of the broader Probation Service, NOMS and the criminal justice system as a whole. Staff were also asked to identify issues that they considered salient to offender



supervision, both in general and in their participating client's case, and to discuss their impressions of the orders' impact on their clients' lives.

It should be stressed that, with the exception of some preliminary demographic self-identification questions that were routinely asked at the start of each interview, only some of the questions set out in the interview schedules were asked at every interview. This reflected the *semi-structured* nature of these engagements; the schedules adopted served as guidelines rather than templates to be mechanically repeated every time (Noaks and Wincup 2004: 79-81). The actual questions asked in each interview would depend upon: the areas that had been identified as particularly important to cover on the basis of case-file analysis; respondents' answers to questions; and the topics covered in interviews with other participants, depending upon which subjects were over- or underrepresented within the data generated thus far. The data collected were thus *responsive* to the contexts in which the interviews took place, and the knowledge and experiences of both the researcher and the researched (Rubin and Rubin 2012: 95-114).

Data were collected by either taking notes manually; or by supplementing an audio recording with paper notes, depending upon whether the participant was willing to consent to the use of a digital voice recorder. Where audio recordings were made,<sup>14</sup> the recording was stored as a digital file on a private, password-protected computer. As soon after the interview as possible, this recording was transcribed using a word-processor and the audio recording deleted. During the transcription process, interviews were fully anonymised: any reference to a person, place, or anything else that could be used to identify the participant was

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<sup>14</sup> In practice, every session except for two primary interviews with staff (OCS4 and OCS7) were digitally recorded.

replaced by an ambiguous code.<sup>15</sup> The written transcript was then transferred to a password-protected secure server at the University of Nottingham and a hard copy printed and securely retained. Participants were informed of this process before being asked whether they were prepared to consent to the use of the DVR to take an audio recording. A total of 18 primary interviews were taken. Those participants who attended are summarised in Table 4.1, at the end of the chapter.

### 4.3.3 Group Interviews

Whilst collecting transcripts of primary interviews, preliminary analysis of the data was undertaken, to draw out common experiences and ways of explaining those experiences between participants' responses. Once all interviews had been conducted in a Centre, group interviews were then undertaken with all participants of each category within that Centre (that is, all offenders or all staff). Given the power dynamic of the supervisor-offender relationship, the two groups were kept apart to ensure that participants felt comfortable expressing their opinions (Noaks and Wincup 2004: 84-85).<sup>16</sup> Group interviews lasted 90 minutes and served two primary purposes: first, *member validation*; and second, *additional data collection*.

Member validation is a technique that aims to ensure as close a degree of correspondence as possible between a study's results and the experiences of participants by providing them with the opportunity to comment upon the results gathered, identifying any misunderstandings (or indeed misrepresentations) in the data generated (Silverman 2006: 292-293). In this study, although member validation took place at quite

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<sup>15</sup> For example, the statement 'I went to [a public house called] the King's Head' would be coded as 'I went to [a public house]'.

<sup>16</sup> There was some variation in the number of attending participants at each group interview. Both offender groups consisted of one-third of the total sample for that Centre (*i.e.* two in OC and only one in IC), due to forewarned or unexplained non-attendance of the session. In OC, two additional staff participants joined the group without having attended primary interviews. OCS7 was unavailable for the group but was able to attend her primary interview.

an early stage in the process of analysing the data (as discussed at [4.2.4](#) below), it was still an opportunity to test my broad conclusions as to the relevant themes emerging from primary interviews, as well as to give participants an opportunity to comment.

In addition, group interviews provided the opportunity for additional data collection, for three reasons. Firstly, in the time that had elapsed between a participant's primary and group interviews, the situation in which the community punishment took place (and offenders' experiences of it) might have changed drastically, especially if the period between the two interviews was lengthy.<sup>17</sup> A second interview allowed for more nuanced understandings of how pains changed over time and in response to emerging events. Secondly, individuals tend to express themselves differently in group settings, compared to a one-to-one conversation. The groups therefore offered an opportunity for both the participants and for me to approach previously covered ground from a new direction (Noaks and Wincup 2004: 85). Thirdly, the groups offered an opportunity to follow up on questions arising from the data collected in primary interviews: to seek clarification on and develop issues identified as having been incompletely explored (*cf.* Rubin and Rubin 2012: 125).<sup>18</sup> In sum, group interviews encouraged greater fidelity and reflexivity towards participants' actual experiences.

### 4.3.4 Thematic Analysis: Processing the Data

At the close of interviewing, then, a total of 18 primary and four group interviews had been completed. Whilst some preliminary work had been done in preparation for the group interviews, the data generated by the

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<sup>17</sup> Since recruitment was not a distinct phase of research, but was carried out *ad hoc* as participants became available, some had a longer wait between interviews than others, ranging from three months to six days.

<sup>18</sup> The attendance of staff at group sessions who had not participated in primary interviews (and therefore had no specific clients' experience to discuss) offered an additional benefit, providing a more general perspective on the often quite personal themes discussed. This helped to provide some data suggesting (albeit tentatively) the extent to which the trends identified in the sample apply more generally.

study had yet to be analysed systematically. To analyse the data a *thematic analysis* model was adopted (Guest, MacQueen and Namey 2012: 11-16). Thematic analysis broadly consists of three phases: firstly, the construction of an *analytical framework* within which to analyse the collected data (*ibid*: 21-48), including the identification of an objective for the analysis and a theoretical structure within which to analyse the eventual data; secondly, the *identification of major themes* within the data generated that are relevant to the analytical aim of the research (*ibid*: 50-78); and thirdly, the *analysis of those themes* in the terms of the analytical framework.<sup>19</sup> Key themes were identified inductively, through a comprehensive reading of the transcripts. They were mapped in terms of their incidence (*i.e.* how many participants identified a particular theme), importance (the weight assigned to it by each participant), and context (the factors that surrounded and affected particular themes in each case).

In this way, a thorough understanding of the pains of community punishment (and especially of probation supervision) surrounding the participating offenders was developed, structured in terms of how those pains were affected by the supervisory relationships between participants. Those data are described in the next chapter.<sup>20</sup>

#### **4.4 What Can This Study Tell Us? Strengths and Limitations**

First, however, I must recognise how (and to what extent) the methods employed in this research directly affect the utility of the results for the critical discussion of penal severity and community punishment. I do so by discussing some of the inbuilt strengths and limitations of the

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<sup>19</sup> In this study, the first phase has been undertaken in the development of a theoretical framework in Chapter **Three** and the identification of research aims in section 4.1.1 above, whilst the second will be described in Chapter **Five**, and the third undertaken in Chapter **Six**.

<sup>20</sup> Chapter **Five** is substantially developed from a Research Report that was disseminated to all interested participants, as well as to both participating Centres and the Trust. Offender-participants were also issued with a certificate of participation, partly as a memento of their involvement but also as a means of evidencing their engagement with the research (for the purposes, *e.g.*, of seeking employment).

methodology I adopted, as well as practical difficulties that were encountered during data generation. I conclude on the effectiveness of this research design as a means of answering my research questions.

#### 4.4.1 Sampling: Of Gatekeeper-Participants, Offenders and Institutions

Access and recruitment are particularly difficult in the context of criminal justice, given the relative vulnerability of certain groups (especially offenders, as subjects of overt penal power) to abuse by the researcher or by others (Noaks and Wincup 2004: 37-52), not to mention the constant structural pressures on the willingness and ability of potential participants to engage with academic study (*cf.* Mair 2008: 404-408). The sampling method adopted attempts to counteract this by engaging directly with supervising officers to select the most diverse sample available under the circumstances. However, three limitations to this approach must be stressed from the start: the relative lack of *demographic sensitivity* of the data collected under the sampling criteria adopted; the dual role of staff as *gatekeeper-participants*; and the likelihood that the sampling method will reach a relatively confined group of offenders. Whilst the second and third of these issues can be more or less taken together, the first warrants individual examination.

Whilst the study sought to incorporate as broad a range of demographic backgrounds as possible, it did not attempt to account for such differences systematically.<sup>21</sup> Indeed, in practice, the offender sample collected was overwhelmingly white and male (although in terms of age, offenders showed a greater amount of variation: see **5.1**). As a result, female and black and minority ethnic (BME) viewpoints are under-represented by the sample, increasing the risk that the data generated will

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<sup>21</sup> I frame this discussion mainly in terms of offenders. A similar point should be borne in mind regarding the staff sample, although we should bear in mind Annison's (2007) observation that, empirically, more OM's are female than male.

overlook (or distort) critical differences in offender experiences arising out of marginalised demographic statuses.

For instance, whilst we must be careful to avoid stereotypes, women tend to bear a greater social responsibility for domestic work and childcare than men (Weeks 2011: 1-36, *e.g.*), which one might expect to have an impact upon their experience of community punishment. Would the (stereo)typical woman, vested with primary childcare responsibilities, particularly feel the impact of community punishment where it interfered with her maternal duties? Or might she especially value her liberty in this context, feeling the impact of the punishment less because she is at least still in the family home? Absent a greater representation of marginalised voices in the research, it is impossible to do more than indicate avenues for further study when faced with these questions.

We must also bear in mind the related issues with *gatekeeper-participants* and *offender engagement*. Both issues raise concerns that the sampling method adopted was incapable of reaching every part of the (offender) population – so-called *sampling bias*, which is a particular feature of non-random sampling methods (Agresti and Finlay 2009: 19). The reliance of the study on probation staff to identify potential offender participants, as well as the use of probation centres as the site for interviews, increased the risk of sampling bias by limiting the pool of potential offender participants, and therefore the offender experiences that could be incorporated into the sample.

In the case of incorporating staff as gatekeeper-participants, the problem is that staff may have a vested interest in recommending certain types of offender. Given the historical antipathy between probation values and successive governments' punitive and managerial aims, and the increasing emphasis of centralised government management of probation activities in terms of performance targets and inspections, Mair (2008:

406-407) identifies a particular reluctance on the part of probation staff to engage in research that they perceive as portraying them in a negative light. Given the opportunity to act as gatekeepers to offenders, the danger is therefore that supervisors only put forward those cases that portray their activities positively. In particular, it was probable that those offenders who were engaging well with their orders and were well on the way towards rehabilitation, as well as those who posed a lower risk (of reoffending or of serious harm: see Canton 2011: 129-145) to the public were suggested as potential participants far more commonly, and were therefore over-represented in the sample. Less cynically, staff were asked to propose potential offender participants precisely because they had unique insights into the likelihood that an offender would be willing and able to take part in the study: a group that would, once again, be likely to be engaging well with their orders and posing a lower risk to the public.

From the offender's perspective, getting access to them through the Service raised issues about the visibility of my independence from the participating Trust and the Probation Service as a whole. If I were perceived as a mere stooge of the Service, then offenders with adverse experiences of community punishment would be less likely to be willing to talk to me, on the grounds that I would not fairly represent their positions (Noaks and Wincup 2004: 56-59). This group would, once again, be likely to include those less willing to engage with their orders, with more compliance issues, and who presented a higher risk, and who were therefore subject to a more intensive level of probation intervention (Canton 2011: 74-83). In sum, pressures in both populations under study render the sampling method adopted vulnerable to sampling bias.

Although this limitation is to some extent inherent in the adopted research design, steps were taken to minimise its potential effect upon the validity and reliability of the study's findings. Staff were approached

explicitly with the aims of the study and informed repeatedly that the research was anonymous, and in any event not a review of their Centre's effectiveness at implementing and executing community orders. They were asked to select as wide a variety of cases as possible within the sampling criteria, and kept abreast of how the offender sample in each Centre was composed. Finally, staff themselves seemed alert to the potential for sampling bias, mentioning it in interviews and email correspondence, and several intimated that they were putting forward more 'difficult' clients. The establishment of rapport therefore helped obviate this risk to some extent.

Offenders, on the other hand, were reassured of my independence during the consent and information meeting stage, and were encouraged to bring both positive and negative experiences to the table should they choose to take part. This could not obviate the implications of my evident working relationship with staff or my use of Centre resources, but did help to alleviate the supposition that I was unduly supportive of the Service.

Moreover, whilst this limitation has perhaps the greatest effect on the validity of the data generated, its impact on the utility of the findings is reduced by the use of the supervision requirement as a sampling nexus. Recall (from [1.3.3](#)) that this requirement is closest to the traditional rehabilitation-oriented role of the Probation Service, and contains amongst the least (visibly) onerous requirements available under a community punishment, namely, to attend periodic one-to-one supervision sessions (s. 213 CJA03). As a result, the supervision requirement lies at the heart of the populist punitive sentiment that community punishment is 'soft on crime' (Newburn 2007).

This apparent 'softness' makes probation supervision a highly effective case study in the attempt to identify the true penal impact of community punishment. If we accept that supervision is (generally



speaking) the least onerous potential element of community punishment, then those cases that involve the supervision of effectively-engaged and compliant offenders, who are less likely to be under threat of enforcement action and therefore to feel the penal 'bite' of probation supervision, will demonstrate the least severe penal impact of community punishment (Canton 2011: 123-126). This minimum penal impact is ideally situated for evaluating the retributive credentials of community punishment as proportionate sentences, especially in the context of the 'soft on crime' populist punitive critique (*cf.* Flyvbjerg 2011: 305).

### 4.4.2 Methods: Interviewing as Deep, Narrow, Contextual and Constructed

Turning to the methods deployed, the use of qualitative interviews was motivated by the well-established ability of the semi-structured interview to provide *in-depth* and *contextualised* information about participants' subjective experiences and opinions (Mason 2002: 63-67).

The central strength of semi-structured interviewing is that it enables us to explore individuals' subjective experiences in a reflective and critical way (Byrne 2004: 182). This is particularly useful to a study that conceives of (community) punishment as a process of pain infliction (*cf.* Christie 1981), given that pain is ultimately a subjective phenomenon. What matters for this study's purposes is not that hard treatment has been inflicted but that pain has been *experienced*. Accordingly, this research method focusses more on the mental state of the participant (that is, her opinions, views and perceptions) than it does upon the corporeal reality she experiences (the processes by which community punishment is imposed and executed; Silverman 2006: 113-114).

A further strength of the research design is its high degree of *contextualisation*. By approaching the question of penal impact through offenders' experiences of their daily lives, it incorporates a variety of potential topics that may have more or less to do with the process of

community punishment than others. Case-files provided a large amount of contextual information (regarding, for instance, the effects of the order upon work, family and personal life) can be gathered about the offender and her situation, especially when supplemented by interviews with the participating offender's supervisor. Given the complexity of day-to-day life, any attempt to discern the penal impact of community punishment requires this context, in order to identify when pains are being felt and which pains, if any, are related to the phenomenon under study.

However, despite these strengths, semi-structured interviewing is as susceptible as any other methodology to weaknesses that will limit the data generated by it. In particular, it is important to emphasise the *narrowness* of scope of the data generated, as well as the *constructed* nature of qualitative interviewing.

Interviews are an inherently work-intensive approach to data generation, requiring substantial time and energy to arrange, prepare for, and indeed conduct. As a result, interview research tends to be reliant on relatively small samples when compared to quantitative (and some other qualitative) approaches (Mason 2002: 67). Qualitative interviewing may be effective at producing *in-depth* knowledge, but it nevertheless trades that depth for a relative narrowness of scope.

This is really an issue regarding the *generalisability* of data: the extent to which the experiences of the sample can be taken as representative of (and therefore used to make inferences about) those of the broader population (Silverman 2006: 303-310). However, it is not always necessary to acquire the level of statistical representativeness required in quantitative study, as certain research questions can be answered on the basis of few (or even only one) case (*ibid*). Indeed, in the past the natural and social sciences have both been advanced significantly by small, well-designed case studies (Flyvbjerg 2011: 304-305).

Nevertheless, these data do not purport to represent an entire class of people (offenders subject to community punishment, and/or the staff responsible for their supervision). They only represent the experiences of the participants. The findings should not be read as a universal understanding of *the* penal impact of community punishment, but rather as a detailed, exploratory examination of the penal impacts that have arisen in some implementations of those sentences imposed on the participating offenders. The pains attending community punishment at the societal level may well be broader than the results of this study, or may be dependent upon other factors, contexts and practices than those observed herein.

These cases do enable us to develop a broader understanding of sentence severity, however, one which can take more account of subjective factors and is therefore less vulnerable to the distortion and partiality that has characterised so many other approaches to sentence severity (recall **3.1**). In developing a novel approach to reconciling the subjectivity of pain with the objectivity required of consistent retributive sentencing, this study requires the depth of focus provided by a qualitative methodology. It will not provide a comprehensive overview, but it will provide an exploratory examination of the pertinent issues in the penal impact of community punishment.

A second limitation arises from the *constructed* nature of qualitative interview data. In comparison to other forms of research (and indeed other approaches to interviewing), the archetypal qualitative, semi-structured method is explicitly concerned with *generating* rather than *discovering* data (Mason 2002). This is to say that it recognises the active role that both the interviewee *and* the interviewer play in developing the data that are recorded in the interview transcript: the interviewee answers questions about her experiences, but those questions are formulated by

the interviewer, who also interprets the answers, and her expression of her opinion is likely to be affected by the context within which the questions were asked, such as the language used, her perceptions of the interviewer, and the impressions she has of the antecedent questions (Silverman 2006: 112).

This is usually thought of as one of the strengths of qualitative interviewing, since it does not subordinate the research participant to being a mere *subject*, from whom data are harvested before the researcher moves on (Noaks and Wincup 2004: 75-77). However, the particularly active role of the researcher (*i.e.* me) raises potential concerns in terms of *prejudice*. I use the word in its literal sense: I run the risk of interpreting the interviewee's comments in a biased way because of conceptions and expectations arising before the fact. This risk of skewing the data generated is most commonly associated with 'confirmation' bias, that is, seeing what one expects to see (Flyvbjerg 2011: 309-311).

Whilst the risk of confirmation bias in small-scale research is often overstated (*ibid.*), it cannot be ignored, and I have taken measures to minimise it. In particular, offering the opportunity for member validation ensures that it is the interviewees' perspectives, rather than my own interpretations thereof, which are privileged in the data. In the final instance, however, the capacity for confirmation bias inherent in small-*N* research is impossible to wholly eradicate, and this should be borne constantly in mind when reading the data generated.

The shadow-side of confirmation bias is that it raises questions about the impact of the researcher upon the data generated. Whilst my perspectives could be counterbalanced by data triangulation and member validation, the fact is that the data generated were constructed by me *in*, as well as *after*, interview sessions. The possibility that my conduct, and even my appearance, affected the data developed, cannot be discounted.

I have already identified some means that I took to attempt to ensure that my presence had no effect upon the data provided by participants, including my efforts to assert independence from the Probation Service when approaching potential offender participants. Beyond this, I also took a number of practical steps to attempt to be as encouraging of free and honest discussion on the participant's part. Firstly, I attempted to dress in a 'smart casual' way that conveyed respect, without being overly formal or intimidating. Secondly, I avoided discussing the broader aims of the research after recruitment (unless specifically asked by participants), to prevent participants from thinking that I was expecting them to respond to questions in certain ways.

Ultimately, however, it is impossible to entirely avoid the possibility that my personal characteristics impacted upon the behaviour of research participants, and therefore upon the data generated. The data must therefore be read as limited in this respect, as well.

### 4.4.3 Practical Limitations: Research in a Time of Crisis

The vicissitudes of research threw up two additional practical limitations attending the research methodology adopted: firstly, poor attendance of group interviews; and secondly, limited recruitment of offenders (and therefore of staff) in IC.

Both restrictions draw from a common root, which might be summed up in two words: *Transforming Rehabilitation*. The scale and scope of probation privatisation reforms, which commenced during the research period and significantly intensified towards its end, meant that staff were increasingly unable (if not unwilling) to continue to support the study as their roles as offender managers were placed under increasing stress, and their professional futures made increasingly uncertain. At the same time, the central bureaucracy of the Trust became less and less supportive in terms of supplying case-files expeditiously. Since IC was in

any event a larger and busier Centre than OC, and the SPO liaison exerted less direct control over her staff than her OC counterpart, this meant that it became increasingly impracticable to recruit new participants in IC. Given that data saturation appeared to have been reached, in that participants' statements at interview were more repetitive than productive of new themes and concepts, I decided to end the research at an earlier stage than initially anticipated. As a result, there was a numerical imbalance between IC and OC, as noted in *Table 4.1* above. Whilst I attempt in the next chapter to correct for the possibility of privileging the more rural Centre by ensuring that every participant's voice is heard at least once, I may have either over-represented OC in relation to IC, or overemphasised the opinions of IC participants, to at least some extent.

The consequence of the increasing unwillingness of the central Trust (and inability of the participating Centres) to support the research, coupled with the limited time-frame and funding of the study, led me to set a relatively tight conclusion date for the study. This limited window of opportunity meant only a three-week notice period of the time and date of the group interview. Whilst this was agreed with the support of participating staff, who scheduled mandatory meetings with offenders on the days in question, offender attendance at these second interactions was severely limited. Of the six OC offenders, four were expected to attend and only two actually did, whilst in IC two were confirmed attendees and only one was there on the day.

To some extent, this was to be expected, as high attrition rates and flexibility are stressed in the relevant research design literature (*e.g.* Ellis, Hartley and Walsh 2010: 159-166). Nevertheless, the poor attendance ultimately privileges the perspectives of the three attendees (OCO3, OCO5 and ICO3). I have attempted to restrict the impact of this as far as possible in my analysis, particularly throughout **6.4** below, by using other

offenders' comments to test the expressions of experience by those attending the group interviews. Meaningful comparisons could be made, but future research in this area must go further.

Ultimately, the events accompanying *Transforming Rehabilitation* were extraordinary, even in the unpredictable field of institutional reform in probation (*cf.* Mair 2008: 399), and affected my research far less than was possible. Nevertheless, they demonstrate a particular weakness of sampling through the probation officer as gatekeeper: reliance upon a further third party in order to reach the data. Whilst probation officers were an invaluable source of practical knowledge about the willingness and suitability of potential offender participants, in other words, the reliance upon them raised more issues than were expected due to the upheaval caused by 'market' restructuring.

#### 4.4.4 Strengths, Limitations and Utility: Conclusion

This study provided in-depth, participant-driven information about the pains experienced by specific offenders subject to community punishment. It took special account of the relationship between the offender and her supervisor, providing immediate data with which to build up a preliminary image of the penal impact of community punishment in England and Wales (between 2013 and 2014).

Like any research design, however, it was subject to a number of limitations, whether inherent to the methodology adopted, or arising out of practical circumstances in the field. Ultimately, both forms of limitation prevent these data from offering a perfectly representative or general image of the experiences of offenders as a population (or indeed of their supervisors). In subsequent chapters we must therefore bear in mind the limited range of demographic factors incorporated, the partial coverage of requirements, and the constructed nature of interview data.

However, these limitations do not invalidate the findings of the study entirely, or even substantially. Rather, they encourage a reading of this study as *exploratory*, an initial foray into a largely unmapped terrain that both provides a useful overview of its features, however rough, as well as pointing to avenues of further research that will further develop our understanding of the penal impact of community punishment.<sup>22</sup> Bearing this in mind, we may now turn to the results of the study. Firstly, however, I collect a summary of the sample and each participant's involvement in the methodology overleaf, in Table 4.2.

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<sup>22</sup> Some possibilities for further research are considered at **7.2** below.



*Table 4.1: Table of Participant Involvement at each Methodological Stage<sup>23</sup>*

<b>Participant</b>	<b>Supervisory Relationship?</b>	<b>Attended Primary Interview?</b>	<b>Attended Group Interview?</b>
<b>OCO1</b>	OCS1	Yes	No
<b>OCO2</b>	OCS5	Yes	Yes
<b>OCO3</b>	OCS1	Yes	No
<b>OCO4</b>	OCS4	Yes	No
<b>OCO5</b>	OCS5	Yes	Yes
<b>OCO6</b>	OCS3	Yes	No
<b>OCS1</b>	OCO1, OCO3	Yes	Yes
<b>OCS2</b>	-	No	Yes
<b>OCS3</b>	OCO6	Yes	Yes
<b>OCS4</b>	OCO4	Yes	Yes
<b>OCS5</b>	OCO2, OCO5	Yes	Yes
<b>OCS6</b>	-	No	Yes
<b>OCS7</b>	-	Yes	No
<b>ICO1</b>	ICS1	Yes	No
<b>ICO2</b>	ICS2	Yes	No
<b>ICO3</b>	ICS3	Yes	Yes
<b>ICS1</b>	ICO1	Yes	Yes
<b>ICS2</b>	ICO2	Yes	Yes
<b>ICS3</b>	ICO3	Yes	Yes
<b>ICS4</b>	-	Yes	Yes

<sup>23</sup> Thick-bordered boxes distinguish each of the four participant subgroups (OCO, OCS, ICO, and ICS). The 'supervisory relationship' column identifies the participating supervisor of an offender-participant, and any participating clients of a staff-participant.

## **Chapter Five: Results**

Given this study's aims (to identify the types and intensity of the pains of community punishment, and the extent to which they are influenced by the relationship between offenders and their supervision officers), it makes sense to discuss its results in terms of how the pains experienced by participating offenders were affected by the supervisory relationship. The study identified three clear groups of pains: firstly, those *intensified* by the supervisory relationship; secondly, those *reduced* by it; and thirdly, those *unaffected* by the supervisory process. Each of these three categories is described in sections **5.3**, **5.4**, and **5.5** below, respectively.

However, in order to fully understand these findings, they must first be situated within the context of the sample. In Section **5.1** I therefore discuss the characteristics of the sample generated by the methodology discussed in the last chapter. I then go on in **5.2** to discuss some attitudes of both staff and offender participants that influenced the way in which pains were experienced by individual participating offenders, and therefore affected the overall penal impact that those offenders' sentences inflicted.

### **5.1 Sample Characteristics**

As noted above (at **4.2**), offender participants were recruited purposively, so as to maximise the diversity of experiences included within the relatively small sample size, whilst staff were recruited on a convenience basis. However, it is still worth noting the actual diversity that was achieved in the sample groups, since it is reasonable to assume that certain characteristics are likely to contribute to the way in which social phenomena such as community punishment are experienced.

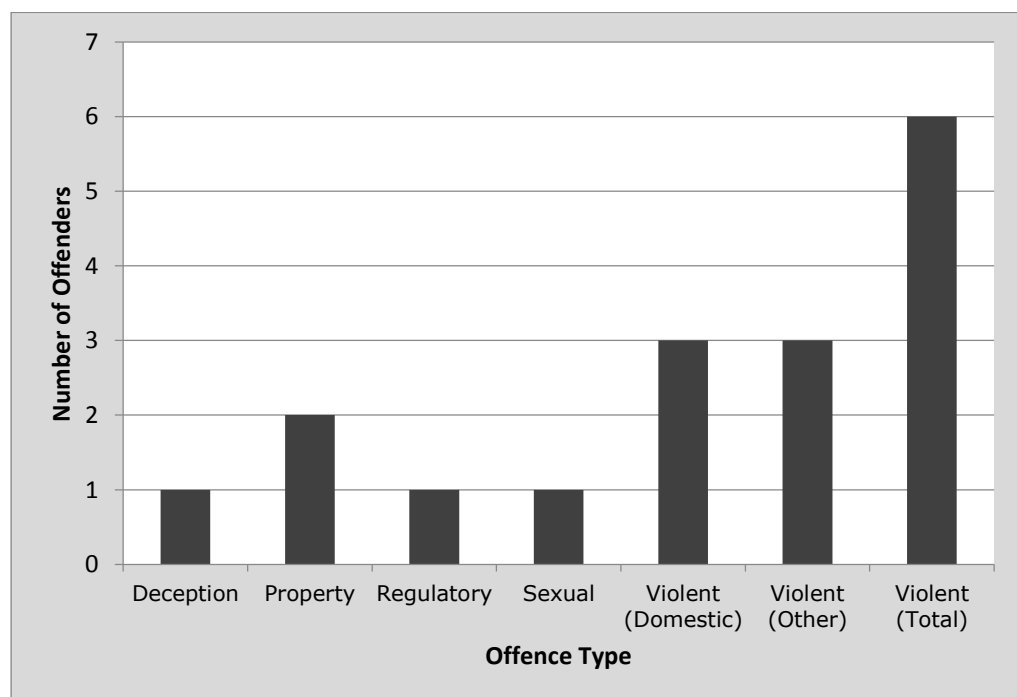
### 5.1.1 Offenders<sup>1</sup>

The nine offenders in the sample came from a broad range of backgrounds, and could be expected to experience their sentences differently as a result. Since they were selected using the criteria of the offence(s) committed, the order and requirements imposed, and their demographics (that is, their age, gender, and ethnicity), it makes sense to discuss the diversity of the offender sample in those terms as well.

#### (a) OFFENCES COMMITTED

The offences committed by the participating offenders were numerous. For the purposes of Figure 5.1, below, I use the following categories, which are of course arbitrary, to describe the offences committed without interfering with individual offenders' anonymity: *deception* offences, such as fraud; *property* offences, such as theft or criminal damage; *regulatory* offences, such as those surrounding parking or dangerous driving; *sexual* offences; and *violent* offences, with the latter group partitioned to distinguish between *domestic* and *other* violence.

Figure 5.1: Bar Chart of Participating Offenders by Offence Type



<sup>1</sup> A brief overview of the facts in each offender-participant's case is laid out in Appendix G.

Some offenders had committed multiple offences, and some crimes could fit multiple labels (for example, a robbery is both a Violent (Other) and Property offence). Additionally, the Violent (Total) bar has been added to demonstrate the extent to which violent offences dominated this sample – it combines the two sets of violent crimes, rather than listing different offences. As a result, Figure 5.1 contains more offences than offenders.

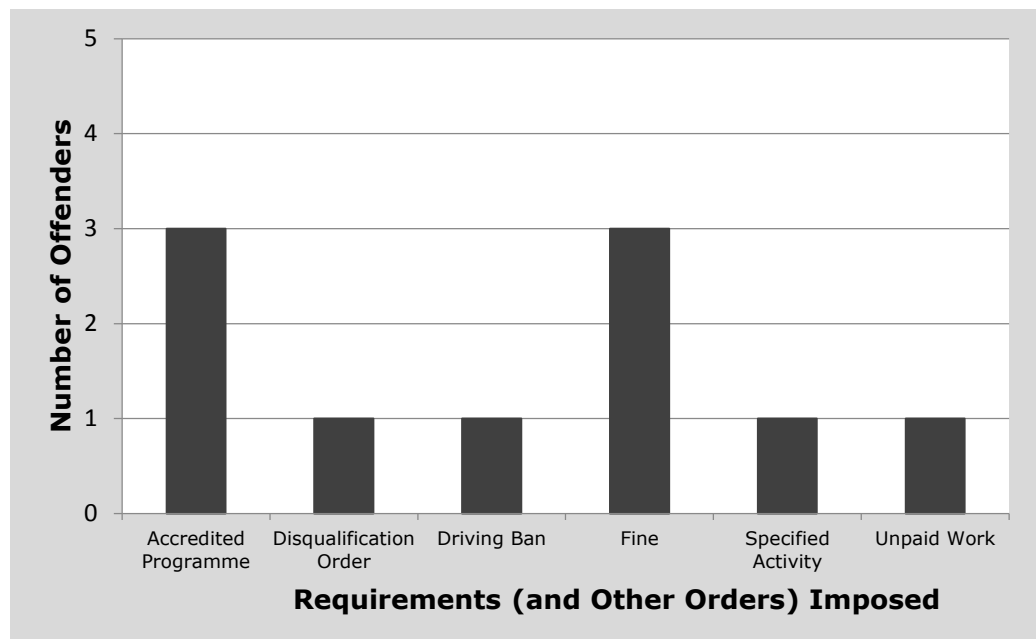
### *(b) ORDERS AND REQUIREMENTS IMPOSED*

As noted above (at **1.3**), community punishment takes two main forms in England and Wales: the community order and suspended sentence order (SSO). Due to the recruitment of offenders through their supervision officers, every offender was necessarily serving a *supervision requirement*. However, some offenders were also subject to: *accredited programme*; *specified activity*, and *unpaid work requirements*. Again, the relatively limited range of requirements recruited was a consequence of the selection of offenders, since the participating Centres both provided access only to supervisory teams with general responsibilities, whereas many of the excluded requirements fell under the remit of specialist probation officers who were therefore excluded from the sample in practice.

In addition to the requirements on the community punishment itself, many offenders were also serving additional orders that also impacted on their lives, including: fines; disqualification orders (prohibiting sex offenders from working with children); restraining and non-molestation orders (imposed to prevent domestic violence, child abuse, and similar family- or partner-based violence); and driving bans.

In total, four offenders were serving SSOs, and five community orders. The requirements imposed are laid out in Figure 5.2. Again, since offenders could receive multiple orders and requirements, it contains a higher number of orders than offenders.

Figure 5.2: Bar Chart of Participating Offenders' Requirements

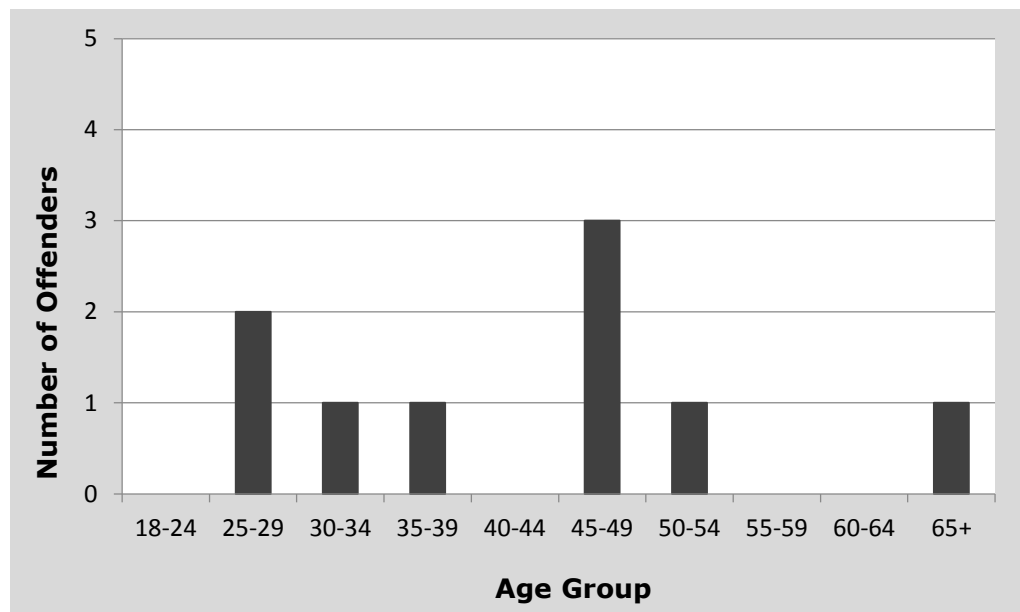
*(c) DEMOGRAPHICS: AGE, GENDER, AND ETHNICITY*

Demographic factors such as age, gender, ethnicity, sexual orientation, and religion affect both how somebody approaches the world and how other people respond to them. It follows that these factors will have a profound effect upon the impact experienced by offenders subject to community punishment. These factors were not systematically built into the study, but have been recorded to reflect the extent to which this sample is representative of the broader population.

Since this study only scratches the surface of the differences between different demographic groups of offenders, I decided only to record those factors that offenders would be most likely to be willing to talk about, namely *age*, *gender*, and *ethnicity*, using information from the offenders' case-files and their own self-identification at the start of primary interviews. This is not to say that other factors, especially sexual orientation, do not have any impact on the pains of community punishment. Rather, these differences deserve much more detailed consideration in studies that explicitly explore those differences.

In terms of offender age, it is generally understood that adults tend to commit more crimes early on in life, before becoming less and less likely to offend as they get beyond their mid-30s (e.g. Farrington 1986). Against that background, the offenders in this sample are somewhat unusual, in that they are generally older than we might expect. As Figure 5.3 shows, there was no clear pattern to their age distribution.

*Figure 5.3: Bar Chart of Participating Offenders by Age Group*



Participating offenders were overwhelmingly white and male. In fact, only two of the nine participants were female, and only one was non-white; seven were White (British), with the eighth self-defining as White (Other).

This can be explained in part by the locations of the participating centres. In the more rural OC, the number of Black and Minority Ethnic (BME) individuals remains very low, meaning that those within the criminal justice system in that area are largely white. By contrast, in IC most women offenders subject to community punishment were overseen in a specific Women's Centre, whose regime was so different to that of the Probation Centre in question that I decided to exclude it from the study.

### 5.1.2 Staff

Two aspects of diversity in the staff sample are worth discussing: the *training level* of participants, and their own demographic variations.

#### *(a) TRAINING AND JOB TITLE*

Whilst all staff responsible for supervision requirements are known as 'supervision officers', this role can be filled in practice by one of two types of probation officer: *Offender Managers* (OMs), and *Offender Manager Probation Service Officers* (OMPSOs).<sup>2</sup> As a result of their lower rank, OMPSOs tend to handle offenders who have committed less serious crimes, as well as those who pose a lower risk of re-offending and of serious harm. OMs, on the other hand, tend to deal with offences of intermediate seriousness. They may specialise in certain types of offences, or may work within specialist teams handling high-risk cases.

The study included a total of seven OMPSOs and four OMs. As a result, offenders tended to present a lower-than-average risk of reoffending and of committing serious harm.<sup>3</sup>

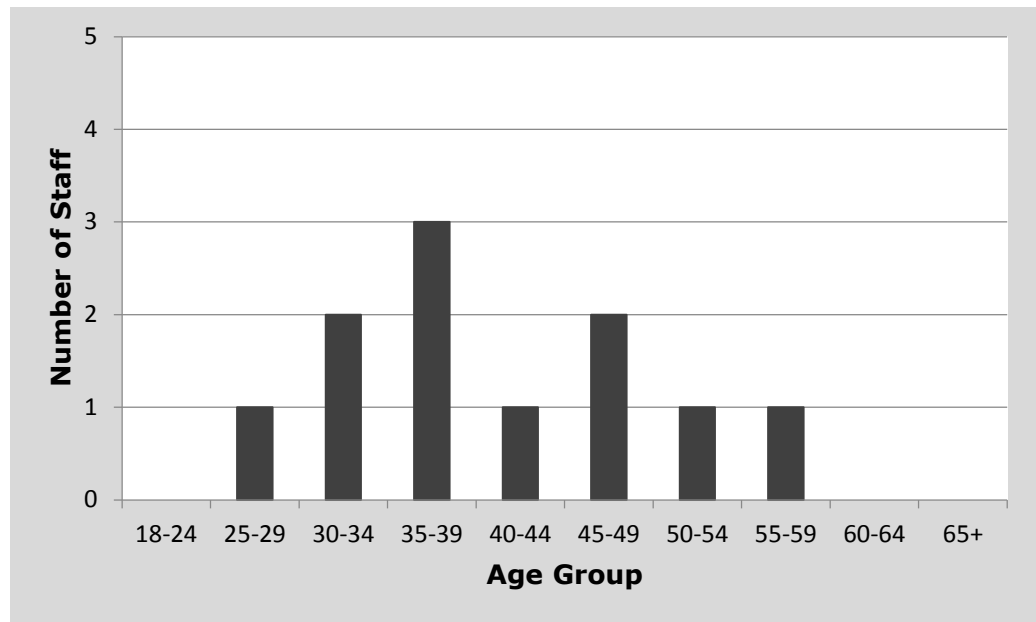
#### *(b) DEMOGRAPHICS: AGE, GENDER, AND ETHNICITY*

Once again, the demographics of participating staff were recorded at interviews, in terms of their age, gender and ethnicity. In terms of age, the sample was fairly evenly distributed, with the majority of participants being in their 30s or 40s (see Figure 5.4, below). Reflecting the high level of training expected of OMs, and even OMPSOs, no participants were under the age of 25. Those over the age of 50 were also relatively rare, reflecting the fact that both OMs and OMPSOs are relatively junior within the probation hierarchy, and could be expected to be promoted or to move on from their jobs for another reason as time goes by.

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<sup>2</sup> Recall n. 2 of Chapter **Four**. I have not distinguished between the level of training of OMPSOs, which, it must be recognised is a simplification that could be mitigated by further research.

<sup>3</sup> Throughout this chapter I use the shorthand 'risk' to refer to both concepts unless otherwise stated, since they are the two indexes of risk most commonly referred to by probation staff: Canton 2011: 131-132.

*Figure 5.4: Bar Chart of Participating Staff by Age Group*

In terms of gender, there was a reversal of the inequality between the sexes in the offender sample, with eight female and three male staff participants. This is largely in keeping with national trends in the gender of probation officers (Annison 2007).

The ethnicity of the staff sample, however, is once again very strongly skewed in favour of white ethnic groups: ten staff self-identified as White (British), whilst the other defined themselves as being of Caribbean descent. Once again, to some extent this is reflective of the largely white general population of the county (and indeed of England and Wales as a whole: ONS 2012), especially in rural areas, but it nevertheless limits the ethnic coverage of the sample.

## **5.2 Participant Attitudes and the Pains of Community Punishment**

Having explored the sample in detail and discussed the ways in which it does and does not reflect more general experiences of the impact of community punishment we can turn to the results of the study. Before looking specifically at the pains of community punishment, however, we should consider some of the values and opinions that participants – both



offenders and staff – expressed about the criminal justice process. These attitudes had a considerable effect upon how the offenders experienced the impact of their sentences, and I must therefore lay out the major differences in their approach to the process of undergoing community punishment before turning to the reported pains themselves.

In the case of offenders, participants' experiences of guilt and willingness to engage both profoundly influenced their opinions of their overall sentences as punishments, whilst staff varied in terms of the extent to which they believed that community punishment served the ends of rehabilitation, enforcement, and punishment.

### 5.2.1 Offenders: Responsibility, Engagement and Punishment

Amongst the offender sample, I identify three broad categories of approaches to guilt and engagement with their orders: the *fully engaged*, *partially engaged*, and *engagement resisting*. It is important to note that each individual offender fits into one of these groups to only some extent. The categories represent tendencies arising from similar circumstances rather than absolute boundaries. Nevertheless, these groups help to structure discussion of how the pains discussed below were experienced by each offender, and they therefore help to advance the analysis of the findings in the next Part of this enquiry.

*Fully engaged* offenders consisted of those who wholly accepted that they were guilty of the offence that they had committed, and engaged actively with their orders. In contrast, *partially engaged* offenders, whilst engaging with the letter of their orders, nevertheless attempted to minimise or otherwise downplay their wrongdoing. Finally, *engagement resisting* offenders neither effectively accepted responsibility for their wrongdoing nor were engaging particularly effectively with their orders.

(a) *FULLY ENGAGED OFFENDERS*

**OC05:** There's people out there who've not really thought about it, and they're all bloody idiots! They should've really thought about what they've done. Pull their fingers out their backside and try to change it. Like I've done. Like I've had to. There's no ifs or buts, you either change your life or carry on down as a criminal...

**OC02:** It is a punishment, and obviously, this is why we're here. It is a form of punishment to me. It was either this or going to prison. And obviously I didn't want to go to prison. I'm glad I've came here, 'cause it's given me a lot of insight into how to communicate properly to people...

Fully engaged offenders are the 'success stories' of the Probation Service: they have accepted their responsibility for their actions and actively complied with their order, recognising the need to reform and attempting to desist from crime. These offenders tended to accept that probation was mandatory, and were most willing to view it as an effective punishment. They often experienced more pains, and linked them more readily to the implementation of their sentences. They tended to view probation as simultaneously working in the pursuit of criminal justice and social welfare, balancing the needs of offenders against the importance of confronting them with their wrongdoing.

Four of the nine offenders in the sample fit into this broad category. Notably, all four of them had struggled with alcohol dependency at the time of their offence. This group also contained the only offender on an unpaid work requirement.

(b) *PARTIALLY ENGAGED OFFENDERS*

**IC02:** It's not like I've done anything big, is it? Just small stuff, you know? Easily paid for, innit, that? Obviously they're not, they're really wasting the judge's time, really...

**OCO4:** I'd say it's more helping me than a punishment, really... [n]ot like being on community service and working, is it? 'Cause that's like punishment, ain't it? This [supervision] is more like, "Sort your problems out", basically.

Partially engaged offenders are more modest successes for the Probation Service, in that they will often minimally comply with their order, and may pose a reduced risk by the end of their order. However, they tend to attempt to minimise their own guilt to some extent, either by comparing it with more serious offenders or by pointing to contextual factors that they perceive as reducing their blameworthiness.

Generally speaking, partially engaging offenders were willing to recognise painful processes going on in their lives, but were less willing to associate them with their orders than fully engaged offenders, or to view probation as an effective punishment. They tended to see the Probation Service as a quasi-welfare agency, although they would accept that attending their requirements was compulsory.

Three of the nine participating offenders fell into this group. All three were serving comparatively light community punishment, that is, with few requirements attached. Indeed, two of them (ICO3 and OCO4) were subject to a lone supervision requirement.

*(c) ENGAGEMENT RESISTING OFFENDERS*

**OCO1:** I'm assured [by his supervisor] that there was aforethought. I am insistent that there wasn't. It was a spur-of-the-action moment [*sic*]... Irrespective of how many times I say that to her, I still get told that there's subconscious thought there... I don't know what she wants me to say, but I'll say it eventually...

**OCO6:** I says to [one of my case workers] the other day, "Oh, I really ought to go and see [her supervisor], I've not seen her for a

while!" and she says, "[OCO6], you don't have a choice. You've got to!" "Oh, yeah, yeah, yeah!"

Engagement-resisting offenders are more problematic cases, in that they engage only very minimally with their orders, and downplay their accountability for their actions to the point where they reject guilt in any meaningful sense. This is not to say that they do not accept that they did what they did, but that they see their behaviour as being out of their hands at the time, and impossible to prevent by changing their behaviour in future – OCO1 because he committed his offence on a bizarre impulse, and OCO6 because she did not seem to believe that she could change by herself. They tended to see the Probation Service as a completely non-punitive organisation.

Two participants fall into this category. There was little connection between them in terms of the sentences received or the offences committed: one was a sex offender, the other had committed a driving offence. However, both had received more requirements under their orders than any of the partial engagers.

Nothing in this section should be taken as an evaluation of the Trust's effectiveness at reducing reoffending or protecting the public. Rather, they reflect the experiences and attitudes of the participating offenders at the time of their interviews, which took place at a variety of points throughout each offender's order. These three categories describe dynamic frames of mind, rather than unchangeable facts about the sample. We might expect that effective supervision could overcome offenders' resistance, and in that case, an engagement resistor or partial-engager might well become more responsive to the efforts of the Service.

#### 5.2.2 Staff: Rehabilitation, Enforcement, and Punishment

Staff attitudes towards community punishment tended to vary less than offenders'. This is, in part, because of the importance that the Probation

Service places on its probation values. These values were emphasised heavily when a new staff member entered the office, and remained frequent points of reference throughout an OM's career, encouraging a heavily institutionalised approach to offender management.

In particular, staff tended to view their role in an essentially *humanistic* way, continuing to identify their practice with the old motto: 'advise, assist, and befriend'. Commonly, they described their reasons for joining the Service as deriving from a wish to help people, especially those who had made bad choices or lived difficult lifestyles (e.g. OCS5, ICS3). They generally accepted that the two aims of the modern Probation Service – reducing reoffending and protecting the public – were essentially about preventing future crimes. They tended to pursue this objective primarily through the attempted rehabilitation of offenders. In particular, they stressed the importance of the offender's agency in reforming: it was pointless to force the offender to change if she did not want to. The offender had to be an active participant in the supervisory process.

With that said, participating staff were aware that times had changed, and that their role was increasingly concerned with the enforcement of orders and public protection. Most felt that there were tensions between the reform and enforcement roles, and that the latter was becoming more prominent, especially under the increasing pressure from above to meet performance targets. However, they continued to approach offenders not (primarily) as risks to be managed but as individuals, capable of making choices and able to change.

A particular concern that many staff voiced was the need to recognise victims, to represent their interests and needs in their work, and to prevent future victimisation (OCS3 was particularly emphatic on this point). This was a key motivation for fulfilling their enforcement role, but also shaped the way that they approached rehabilitation, since offenders

were seen as needing to recognise that there had been a victim, even in apparently 'victimless' crimes such as theft from a large corporation (an example mentioned by both ICS1 and OCS7).

Staff approaches to the question of whether their work with offenders was a punishment were more diverse. When asked whether they thought that probation (and, in particular, supervision) was a punishment, only one staff member (ICS3) said that it was absolutely not, although others were willing to view their role as supervisors as less punitive in cases where offenders had received more obvious punishments elsewhere in their order. Unpaid work, for instance, was seen as explicitly punitive, as was the imposition of a suspended sentence. The imposition of elements such as these by the courts allowed them to focus more upon rehabilitation and enforcement (ICS1).

Staff attitudes towards punishment varied to a greater extent. The majority of staff tended to believe that it was better to look forward to the future than to dwell on the past, and suggested that focussing too much on laying blame and being negative actually hampered their ability to engage with offenders. However, a minority saw punishment as a necessary, and even desirable, part of their work:

**OCS1:** [Probation work] is about recognising there are offenders. And with each offender there is at least one victim. So... [it's about] supporting the offenders, working with the offenders, and my role is managing that punishment... but also agreeing with that punishment in terms of the victim's perspective.

**ICS1:** As far as I'm concerned, any form of rehabilitation is normally a form of punishment, anyway.

For OCS1, punishment was an intrinsic part of victim- and community-focussed rehabilitation. ICS2 expressed a similar understanding, that offenders needed to understand that they had done

wrong before meaningful reform could begin to occur, making probation a potentially very punitive activity, notwithstanding its constructive elements:

**ICS2:** We've all grown up as human beings... You will be punished if you do wrong, one way or another... I'm a firm believer that if there is no punishment, there are no boundaries.

Ultimately, however, punishment was usually viewed as secondary to the principal aim of reforming offenders whilst enforcing orders.

Both sets of participant attitudes had a profound impact on the experience of the participating offenders' sentences, although they were not the only factor and did not wholly *determine* those experiences. Therefore, whilst I will refer back to these perspectives below, I move now to exploring the pains of community punishment, as they were experienced by participating offenders, and how they were affected by the supervisory relationship with staff.

That supervisory relationship appears to have profoundly affected the impact of community punishment in some cases, whether *enhancing* or *ameliorating* the number (and intensity) of experienced pains, whilst in other cases the effects of supervision were at most negligible. In the next three sections I discuss each of these three groups of pains in turn.

### **5.3 Pains Intensified by Supervision**

If community sentences are to be effective as punishments, then there needs to be some form of pain associated with the supervisory process, since pain is the most accurate metric for understanding the severity of punishment. In this section I discuss two categories of pains reported by participants that are directly linked to the way in which supervisory relationships work within the Probation Service.

As noted above, most staff and a number of offenders would agree that probation supervision, and community punishment more broadly, are effective in retributive terms. However, what is interesting is that these two groups justify that claim in very different ways. For offenders, what mattered were processes going on in their lives that caused discomfort – what I have called the *pains of rehabilitation*. For staff, on the other hand, punishment came from the fact that offenders were being compelled to fulfil the terms of their orders – an argument that I have called ‘*punishment through breach*’.

### 5.3.1 The Pains of Rehabilitation: Cruel to be Kind?

Given that it is ultimately concerned with helping rather than punishing the offender, rehabilitation can often give the impression of being a painless activity, or at least one in which every care is taken in the minimisation of pain (e.g. Durnescu 2011; recall McNeill 2011: 16-17). Nevertheless, a dominant theme in many offender (and staff) interviews was that, even if the intentions of staff were supportive, community punishment was far from painless. Offenders underwent a complex web of painful experiences during their sentences that could be linked back to the processes of rehabilitation. These pains were related strongly to offender perceptions of guilt, since this had a considerable effect upon the extent to which participants were willing to engage in rehabilitative processes. However, they were also driven by probation officers’ approaches to the rehabilitating offenders, which places a lot of emphasis upon offenders making those changes themselves, rather than being passive subjects of probation interventions.

In practice, ‘rehabilitation’ is essentially a process of change, and as OCS1 observed: ‘Change is painful, generally.’ For offenders, the change that is required is a change in their behaviour (or, still more intrusively, their attitudes), so that they no longer pose a risk to society



by reoffending. Obviously, the nature of what changes this actually requires varies enormously from case to case, and therefore the pains associated with the process of rehabilitation are likewise dependent on the individual. Despite this, certain themes were common across the experiences of the participating offenders, namely that rehabilitation was painful because of: *shame*; impacts on *lifestyle*; and issues relating to their overall *wellbeing*.

Many offenders reported feeling *shame* about their actions, even those who did not fully accept their guilt:

**ICO3:** When I did it at the time, I should have thought about the consequences. So it's only me to blame. And yeah, I do feel ashamed of what I did.

**OCO3:** I felt, obviously, shame. For what I had done, and that I was in a situation wherein [a case-worker for a housing charity] could help, and I figured that these people had already helped me, but I abused that help last time.

This shame was an intrinsic part of the rehabilitation process, motivating those who felt it to try and make the changes to their lives that would prevent reoffending:

**ICO1:** [The order has] actually made me take a step back and look at myself, and think, "Right, what's going on? What am I doing wrong here?" And it's actually made me pull... you know... let's just say, get my arse into gear!

**ICS1:** 'Cause quite often if you're trying to get someone to show remorse, or empathy, [they] often feel self-shame, ashamed of what they've done, if you know what I mean.

When experienced, shame was often one of the most significant pains, and contributed significantly to the overall sense that they had been

punished. However, not every offender felt ashamed of their actions, especially amongst the partially-engaged and engagement resistant.

Offenders also frequently noted difficulties in terms of the effects of the rehabilitative process on their *lifestyle*. This is unsurprising, since they were often required to change problematic aspects of their everyday lives that had contributed to their crime, such as problematic friendships, dependency on drugs or alcohol, and how they responded to provocation:

**OCO2:** I thought, "I'm not letting anybody stamp their authority on me," but obviously, that's the wrong way of doing things. Sometimes you've got to learn to walk away instead of... you know.

**ICS2:** [*Speaking as if to her client*] those friends belong to that lifestyle, and you've moved on from that.

Addressing these problems was a clear issue for a lot of offenders if they were to be successfully rehabilitated, but some lifestyle changes were less directly connected to changing their behaviour: for instance, OCO3 lamented that his partner's restraining order against him meant that he could not see his beloved pet dogs, whilst OCO2 commented that a similar order was automatically imposed preventing him from living with his family, and impeded his eventual reconciliation with his partner.

It is difficult to quantify how significant these pains were, since once again they are highly dependent upon individual factors. Offenders tended to recognise this, considering these issues as being of, at most, middling harshness in their own circumstances.

Finally, some offenders experienced difficulties relating to their *wellbeing* as a result of their orders. In these cases, the changes required of them by their order were so severe that they had the capacity to threaten the physical or mental security of offenders, at least in the short-

term. These tended to be isolated examples of more severe pain, and occurred across the spectrum of offender attitudes.

Perhaps the most extreme example was provided by OCO5, an alcohol-dependent who committed a domestic violent offence whilst under the influence of drink. Both his alcohol recovery case-worker (from a local charity) and his supervision officer recommended he reduce his drinking gradually, but he decided to go 'cold turkey', partly because of the disgust he felt about his offending. However, doing so put his body through serious withdrawal symptoms:

**OCO5:** ...I wouldn't wish it on me worst enemy. 'Cause it is the most... it felt like my body shut down. That's what it felt like. I was in agony. Couldn't breathe properly. And couldn't sleep. Always nervous, always thinking everyone was talking about me. Started playing with my mind. But after two weeks it was going away, if you know what I mean. It was still, like, sleepless nights, but not as much as it was at the beginning...

I return shortly to this point, in order to explore why his decision to become teetotal overnight is linked to the supervisory process, but for now we should note that, for him, the recovery process was fraught with both physical and mental pain.

Others also suffered mental difficulties. For instance, OCO3 felt vulnerable to depression as a result of being barred from seeing his family after his own alcohol-spurred offence:

**OCO3:** It's with me all the time. Because I've only got to walk into town, and I see couples walking round, and I'm not a couple anymore. I see fathers and mothers with their kids, and that hammers it home, that I don't have access to my daughter anymore. It will be with me for the rest of my life. Albeit it will

fade at some point. But I need it to be there to keep me on the track, to keep me focussed, so that I don't slip back.

This theme of struggling with depression as a motivation to reform was picked up by ICO3, who seemed more willing to accept his own (admittedly less onerous) order without seeing it as a punishment:

**ICO3:** I was in a rut for about four months. I got three quarters of the way out of the rut, then I got back into the rut, but this last three or four months I've been out of the rut, and I've been quite happy getting on with me life. All of a sudden I can see the edge of the rut again, but I've not fell in it yet, if you know what I mean. And it's been like that, up and down, for the last twelve months.

Indeed, in some cases, it seemed that fear of a threat to one's mental wellbeing could act as a bar to effective engagement with the order. OCO1, for instance, was an engagement-resistor. He had committed a sexual offence, but refused to accept his supervisor's argument that he should address the underlying psychological reasons behind his crime. On his account, it was an impulse OCO1 bitterly regrets, but was not a result of any deep-seated desire. OCS1, his supervisor, was well aware of his resistance to addressing the reasons for his offence, which also made it difficult for him to accept the label 'sex offender'. She also recognised that OCO1's acceptance of her logic would involve a good deal of pain and shame, which he was presently resisting. To her, this made his order quite a severe punishment, and:

**OCS1:** In terms of the victim's perspective and the victim's family, I think... [long pause]... it's justified [that he should be punished]. And also, the flipside of that is that [OCO1] needs time to come to terms with what he's done. Whether he will or not, is not in question. He needs to be afforded that opportunity.

Unfortunately, OCO1 was unable to attend the group interview, and so it is unclear whether or not he overcame his inability to confront the anguish his supervisor perceived.

Beyond supervision and accredited programmes, other requirements also raised potential threats to wellbeing. ICO1, for instance, was subject to an unpaid work requirement, and commented on being threatened and having rubbish thrown at him from cars as he undertook community service by the side of the road. The publicity of his punishment exposed him to a greater level of *stigma* (to which I return at [5.5.2](#)), especially due to his having to wear a high-visibility uniform.

Pains such as these were either *intrinsic* to the process of rehabilitation, or they accompanied the *decision-making* of both the offender and their supervisor in that instance. However, in each case, the experience of pain was directly linked to the relationship with the Probation Service, because staff tended to adopt specific *desistance*-based attitudes.

Desistance-based approaches to rehabilitation emphasises the offender's agency in the reform process. Under this paradigm, probation officers assist in the offender's own journey in coming to terms with the causes of her offending and, in the process, gradually 'desisting' from crime (Canton 2011: 115-119). The offender is at the heart of the process, having to actively choose to attempt reform and to engage in making changes in her own life.

All participating staff identified their practice with desistance-focussed values, with only minor variation. For them, the offender's willingness to change was vital:

**OCS5:** [Y]ou can't make people change. And even sometimes if people want to change they might not be in the right place at that time, or have the right skills to be able to make their changes. It's

more about guiding somebody rather than forcing a set of ideals on them. You know. Working with what you've got and what people want to achieve for themselves, and all that.

**ICS4:** I think supervision can help if that person wants the help, and you can force things on anyone, and they're not going to do it if they don't want to. I mean it's like a dentist's appointment. You keep making them, and keep changing them, because actually, I don't want to go to the dentist. And it might be a court order that they have supervision, but again, some people still won't do it.

Offenders, therefore, were assigned considerable *agency* in their own reform: they helped to set the agenda and determined if, and how, they were going to desist from crime. The choices they made in this capacity were not free, of course, since failure to comply with their orders would result in their being subject to enforcement action. But the offender nevertheless played a vital role in determining what issues would be addressed, in what ways, and how successful the Service's interventions would be at preventing further offending.

Adopting this desistance-focussed approach meant that the participating staff exposed offenders to a good deal of pressure in terms of how they achieved rehabilitation. Offenders could not be passive: they had to not only want to change their lives, but also actively work towards those changes. Their staff and other probation officers would assist in that process, but ultimately it began and ended with them.

As a result, the pains of rehabilitation could have a significant impact, whether or not the offender actively engaged with rehabilitation. As already mentioned, OCO5 went 'cold turkey', despite the advice of his case-worker and supervisor, because he saw that as the best way to escape his alcoholism. In doing so he exposed himself to specific (and

substantial) lifestyle pains that he would not have incurred under a more prescriptive approach to rehabilitation.

At the other end of the spectrum, however, OCO6 faced considerable pain because she was not prepared to actively engage in her own rehabilitation. She had been subjected to a fine and a suspended sentence order after a drink-driving offence. Being out of work, with limited State welfare support and subject to a hefty fine, she was living on the breadline at the time of our interview. Despite having very little money and often relying on food banks for basic nutrition, she was engaged in renovating her home, which she owned outright. As a recovering alcoholic and sufferer of depression, it was difficult for her to deal with the major changes she needed to make if she was to comply with the fine, and when one of her many case-workers suggested she sell her home to cover the fine and her debts, she grew angry:

**OCO6:** They sent me this letter, and they started off a conversation with... "If you sold your property..." [...] and if you don't do this, and this, and this... you know, I don't want to know that, I want to know *what you're doing* about this... (emphasis added).

This is not to say that OCO6 *should* sell her house, of course. Indeed it is clearly very important to her: she has stated that she sees her house as her children's inheritance. The point is that she would prefer to be given help by the official agencies working in her life (including the Probation Service) than to change things for herself, and so is subject to her severe financial problems, and faces enforcement action from the court over non-payment of her fine. These pains are exacerbated because she is not well-suited to the desistance model being applied to her by her supervisor.

Not all offenders saw rehabilitation as painful, however. In particular, partially engaging offenders tended to see community

punishments as relatively painless activities. This is not to say that they were enjoying pain-free lives, of course: several of them experienced the issues discussed here and in later sections just as intensely as the fully-engaged. For them, however, these pains were outside the ambit of the criminal justice system, and could not be associated with it.

ICO3, for example, repeatedly dismissed the idea that his community punishment was a punishment, although he did accept that he was dealing with numerous pains in the aftermath of his crime. However:

**ICO3:** *They* [the pains] came with what I did. That's my fault. Not the Justice Service's [*sic*]. I still don't think [my order] was a punishment. I brought it all on myself by what I did. (Original emphasis)

For ICO3, 'punishment' meant something directly imposed by the State, as opposed to pains inflicted by wider society and anyone else. He could not therefore connect the difficulties in his life with the activities of the Probation Service, and did not feel effectively punished by the State.

### 5.3.2 Punishment through Breach: Compliance and Liberty Deprivation

In contrast to the focus on the pains of rehabilitation in offenders' narratives, participating staff tended to justify the claim that community punishment was punitive with an argument that I have called 'punishment through breach.' The argument runs as follows: whilst staff recognised that the pains of rehabilitation often occurred, they did not generally see them as punishments. What made community punishment punitive was not that offenders were being asked to change, and that that change was painful, but that offenders were being *forced* to make the attempt. If they did not, then the enforcement side of the order could be activated to ensure compliance. If rehabilitation was the 'carrot' that motivated offenders to engage with their orders, then enforcement was the 'stick' that discouraged breaches.



For many staff, their punitive role was entirely contained within breach procedures for non-compliance, allowing them to focus wholly upon rehabilitation in the actual supervision sessions. ICS4 expresses this division of functions quite clearly:

**ICS4:** I think the punishment side comes from the enforcement side, basically. 'Cause the supervision side is mainly, the court have decided that you need supervision because you've got this issue, and also, you need some victim work, because you've committed offences against a member of the public. So yeah, we can do that. And then the punishment side is, actually, if you don't engage with us then back to court, and we make the order harder for you.

Breach proceedings involve a number of potential consequences for an offender. The matter is taken back to court, where the judge or magistrate may decide to impose compliance sessions (additional supervision sessions that mark the breach on the offender's record, and which explore why the offender did not comply with the order), to impose additional requirements to the order, or even send the offender to prison. However, supervisors tended to be fairly reluctant to initiate proceedings, since it could interfere with their attempts to keep the order running smoothly in the longer term:

**ICS1:** I'll obviously explain what can happen, and that it has to be more onerous, *etcetera etcetera*... but I don't necessarily tend to use breach as... a threat, if you like, because that's not building a professional relationship.

This was more or less the case across both Centres, although OCS4, for instance, was more willing to initiate breach proceedings even when this would damage her chances of meeting her targets. The key point is that staff tended to limit punishment to enforcement action in order to distance

their core role from being a direct part of the business of punishing offenders.

This staff attitude mirrors the famous aphorism that offenders who are incarcerated are sent to prisons *as* punishment, rather than *for* punishment. In other words, the punishment in imprisonment consists of the deprivations intrinsically involved in sending someone to prison, rather than anything that prison officers are required to do (*cf. Raymond v Honey* [1983] 1 AC 1 at 10, expressing this principle at law). Staff seemed to think broadly the same way about supervision.<sup>4</sup>

Staff were keen to downplay their own role in the imposition of punishment, although some were less willing to separate the functions out (as discussed above at [5.2.2](#)). Partly this should be understood as a result of the rehabilitation-focussed attitudes of probation officers, who were uncomfortable thinking of themselves as inflicting punishment. For example, OCS5 was uncomfortable with the idea of a punitive aspect to her own work:

**OCS5:** I know that's what we're supposed to be, increasingly. I... my personal feeling is that, I'm still very much working along the lines of the social worker sort of ethic, if you like.

However, there are reasons to be sceptical. For one, as we have already seen, it is not easy to see rehabilitation as a wholly positive, pain-free process. Requiring offenders to make changes as a response to wrongdoing can amount to a considerable punishment, even if it also leads to positive changes in the offender's own life, and probation officers ought to recognise this aspect of their work.

In addition, the 'punishment through breach' argument does not seem to map well onto the experiences of participating offenders, at least

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<sup>4</sup> The analogy does not hold up entirely for community punishments more generally, however, given that certain requirements, especially unpaid work, seemed to have a much more clearly punitive purpose (although recall [1.3.5](#)). It appears at first glance that some requirements could be imposed *as* punishment, and some *for* it.

at first glance, since very few of them were concerned about the prospect of breaching their order. Even when breach was a concern, it was only in the sense that they did not want to incur the possible consequences of breach. Nobody in the sample considered breach to be a genuine possibility in their own case,<sup>5</sup> with many pointing to the flexibility of their supervisors in arranging supervision sessions around their own timetables:

**OCO5:** But the breach thing? I don't believe it's gonna... it doesn't help. Although you do arrange the appointments too quickly, you can ring up and say, "Oh I feel shit today." "Oh, come in tomorrow then." Should really turn around and say, "I'm not being funny, but get a doctor's note, or you're back in court... first thing in the morning."

**OCO6:** [I]f I say I've got... because [her supervisor]'s appointment clashed with another one the other day, with [a charity], and [they] are the ones that are gonna help me get on her feet, and she was happy for me to go there, so no, she's been really flexible, if I've got other things...

Although flexibility was useful in the pursuit of rehabilitation, it did tend to undercut the idea that enforcement was an effective punishment. Indeed, several offenders (such as ICO3, OCO2, and OCO5) noted that they actually attended the Probation Centres far more often than they had to, to take advantages of services available there. For them, it could hardly be said that coming in to attend their orders was much of an imposition – indeed, it was something they looked forward to!

However, this conclusion needs a little moderation. Firstly, as ICS3 observed, part of the reason why participating offenders were generally unconcerned with breach is likely to be because of the way that the

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<sup>5</sup> Although, as it turned out, two of the nine participants *did* breach their orders towards the end of the research period, suggesting that this lack of concern was somewhat unrealistic.

sample was collected. The offenders who were most likely to want to talk to me were those who were engaging well with their orders and having fewer issues with their supervisors and with other requirements. They were therefore necessarily less likely to be worried about breach than the average offender. It is reasonable to assume that higher-risk offenders and offenders subject to more requirements *would* see breach as more of an issue, and for them, punishment through breach might well be a more convincing argument.

Secondly, offenders did recognise certain pains associated with the deprivation of liberty, in terms of being compelled to attend appointments and engage in required activities. Even though the pains that fit into this category – namely the *loss of freedom* and the *loss of time and money* – tended to be fairly minor in terms of how severely offenders felt affected by them, they were nevertheless a real and present part of many offenders' experiences of community punishment:

**ICO1:** I'd like to just get everything done. And out of the way. Then that way, I see it, is that I don't have that hanging over my head anymore, no more commitment there... right, moving forward. Let's just... get on with what I've got in front of me, rather than... 'cause I am moving forward with my life.

**OCO4:** I could do without the appointments, you know what I mean, because... it's only that they text me that I'm on probation<sup>6</sup> the day before I know I'm on it, 'cause I am useless with appointments...

Furthermore, there were exceptions to the trend that these factors generally had little impact on offenders' lives. Although for most the cost of attending probation sessions was negligible, for instance, the drain on time and money was particularly severe for OCO6, who was already facing

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<sup>6</sup> *I.e.* Due to come in for a supervision session.

money problems as a result of not receiving any benefits for a period of about six months. Indeed, she noted the possibility that, financially speaking, she would have been better off being sent to prison:

**OCO6:** But yeah, it's not a good state of affairs, that's for sure. If I'd have gone to prison I would've had regular meals, clothes washed, could've gone on a course, you know... not that I wanted to go there but I would've had a better standard of living in there, than I've had at the moment!

Several participating supervisors raised this very scenario as one in which probation might actually be a more severe punishment than imprisonment, although they accepted that it applied to relatively few of their own clients.

All in all, then, whilst the 'punishment through breach' argument itself seems to lack credibility on the basis of the testimony of participating offenders, it is not wholly without merit. The loss of liberty (freedom, time and money) involved in having to come in for supervision and to attend other requirements was far from the most onerous pain experienced by offenders, but it was present.

#### **5.4 Pains Reduced by Supervision**

The second broad group of pains related to community punishment were those whose severity was *reduced* by the relationship between the offender and their supervisor, of which there are two subtypes. The first of these are what I have called *penal welfare issues*: those pains that are associated with the needs of offenders, and which supervisors attempt to minimise in order to ensure that their clients do not reoffend. The second group are pains associated with the engagement of *external agencies* in offenders' lives, both within and outside the framework of the criminal justice system. As we shall see, in both cases the supervisory relationship

substantially reduces the intensity of offenders' pains, reflecting the more usual image of the Probation Service as a benevolent, pseudo-welfare institution.

### 5.4.1 Penal Welfare Issues: The 'Seven Pathways'

In England and Wales, penal (and probation) practice recognises that offences may be caused by both individual and social factors. In other words, the penal system assigns criminal responsibility to offenders as free-willed individuals, but also recognises that certain features of their social experiences may contribute towards criminal behaviours and attitudes. This is reflected in the attempt to manage the risk (of reoffending and of serious harm) posed by offenders. In particular, probation in England and Wales is concerned with offenders' risk of reoffending, as well as with the risk of serious harm to a number of defined types of people. Participating staff attempted to reduce these risks by focussing on offenders '*criminogenic needs*': those factors in their lives that make them more likely to offend. Often these are issues that are related to the stability of an offender's lifestyle and their ability to engage with broader society in a socially acceptable way. For this reason, I have labelled this group 'penal welfare issues', since they often touch upon issues of social welfare as well as of criminal justice.

The Probation Service recognises many of these penal welfare issues in what it calls the 'Seven Pathways' to reducing reoffending. OCS7 referred to this label, noting that they consisted of: accommodation; education, training, and employment; health; drugs and alcohol; finance, benefit and debt; children and families; and attitudes, thinking and behaviour.

Under the Seven Pathways model, supervisors work with their clients to identify issues under each of these headings and attempt to find

ways to help offenders deal with them in a way that allows them to re-engage with society in a non-disruptive and risk-free manner.

Offenders experienced a number of pains related to most of these headings. Specifically, they reported suffering issues associated with *accommodation, employment, wellbeing* (and in particular, *alcohol addiction*), *money worries*, and *family issues*. Whilst I have touched on many of these already, it is worth briefly exploring some of the issues of each of these categories in more detail.

In relation to *accommodation*, several offenders found themselves in unstable or problematic housing, or indeed out on the streets, following their offence. In some cases this was a direct consequence of a court order, as with ICO1, OCO2 and OCO5, all of whom were involved in domestic violence cases. OCO3, whilst living in a hostel run by a housing charity following a restraining order taken out by his spouse, committed a further offence that caused him to be evicted. He ended up being taken back by the charity, but found himself in a much less desirable flat:

**OCO3:** I have complained as to how things were. Because some of the conditions... just not being able to cook 'cause the cooker's filthy or disgusting, or not working, or the lights were going out. They [the co-tenants] were bringing bikes in, and stuff like that, dismantling mountain bikes and building them up into something else and selling them onto someone else. Bringing copper cable back and burning it on the back yard, and we had complaints from the neighbours. So it wasn't ideal. So it [the further offence] did limit my options.

However, some offenders experienced issues with accommodation that were not directly related to their offending. For instance, during his order, ICO2, a repeat shoplifter, got into an argument with his mother and was ejected from her house. He went to stay with a friend, but eventually

moved back into his mother's house. This, in turn, raised issues for his supervisor, who was concerned about their co-dependent relationship, and worried that he would lose his independence. Another example was OCO6, whose money troubles were discussed above: whilst she owns her house, she has had to re-mortgage it to pay her debts, and is now facing the prospect of having to sell it to pay off her fine.

Although several offenders experienced upheaval in their accommodation, they tended to view it as a pain of only low-to-medium severity. Few of them raised concerns with the loss of previous accommodation in and of itself, but were more concerned with how that would affect other things in their lives: access to their families, their ability to get on with their work (or to seek it), and so on. Partly this was down to the presence of a 'safety net' in the form of either Council or charity housing, but it remains the case that human interactions were generally more important to participants than possessions, or specific accommodation. The obvious exception, however, was ICO3, who left an unhealthy relationship and had no dependent children, and so had less to look back on. Still, the loss of his old life clearly hit him hard:

**ICO3:** [Y]ou think, "You know, I've lost everything!" And you've gone from a three-bedroomed house to a one-bedroom flat! You've got nothing in it, you know, you're thinking, at the end of the day, "Where's everything gone?" You just... your life's just gone ka-pop!

Since he suffered from depression, this also threatened his mental wellbeing; he admitted having suicidal thoughts at the time. Thus, we cannot wholly ignore the impact of accommodation upheaval in offenders' lives.



In another context, offenders who were in work often stressed the impact of their offending on their *employment*.<sup>7</sup> Three offenders were in work at the time of their conviction, with the other six either relying upon State welfare or having retired. Of the employed three, only one, ICO3, lost their job as a direct result of their crime (a fraud). ICO1 did lose his job, but both he and his supervisor believed that this was unrelated to his offending, whilst OCO2's employment continued to go from strength to strength. Except where the offence is directly related to the offender's job, it seems that community punishment has relatively little impact upon offenders' ability to maintain employment – a clear advantage in effective rehabilitation over imprisonment.

However, this is not to say that retaining employment was at all easy. Several offenders noted the impact of supervision as a larger drain on their *time* in the context of employment. For instance, OCO2 was concerned that he would need to attend supervision outside of business hours because of his increasingly demanding work schedule, whilst ICO1 felt that he was more able to comply with his order after losing his job, to the point where he was almost relieved to be unemployed!

**ICO1:** And of course, going to unpaid work after having been here all week... you just feel absolutely drained, as well, with coming here for the appointments... it's just trying to balance that work and, of course, getting this done as well. To be honest, yeah, it doesn't sound like a lot, but it felt like quite a bit of pressure. To stick to those commitments, 'cause, well, it's like, well, "I don't want to lose my job... but I don't want to not come here and get into more trouble!" So, it's... kind of difficult to balance but... I mean, when I became unemployed, yeah, it became a bit easier.

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<sup>7</sup> I discuss the experiences of job-seeking offenders below, at [5.5.2](#).

He also noted that his commitments under his order acted as a drain on his time job-seeking after he became jobless. In a similar vein, ICO2 stated that he would like to go to college to learn the skills he felt he needed to gain employment, but felt that he could not because of his commitments under his supervision requirement. Clearly, offenders felt that their time was difficult to manage on top of their work-life commitments. Whilst the loss of time associated with having to attend under their orders was not one of the most important issues, it nevertheless weighed on their lives, and cost them perceived opportunities, even though probation officers tried to be as flexible as possible.

*Wellbeing* was also an issue for several offenders. In particular, alcohol addiction (or misuse) was a factor in six of the nine cases involved in the study, whilst at least four participating offenders suffered from long-term mental or physical health issues that kept them from working. Whilst we have already touched upon wellbeing in our discussion of the pains of community penalties (recall [5.3.1](#)), we must recognise that offenders' lives were often far from happy or healthy before their orders started, or indeed whilst their sentences were implemented, whether these issues were related to their offending or not.

*Money worries* were less common, but had a very significant impact where they were experienced. Although community penalties themselves were not a significant drain on time and resources, that did not mean that income and debts were not big issues for some offenders more generally. In addition to having low income, limited or no savings and large amounts of debt (which contributed to the offences of ICO2 and ICO3), several unemployed offenders reported issues with their benefits. In particular, two (OCO3 and OCO6) were in the process of disputing the decision to move them from the more lucrative Employment and Support Allowance

(ESA) to Jobseeker's Allowance (JSA), the latter being contingent on proving that they were actively seeking work. In OCO6's case, this decision meant that she had had no source of income for about four months at the time of her interview, putting her in a position of abject poverty.

One last monetary concern with several offenders arose from the fact that they had been given fines. These were seen as very punitive sentences, and ICO1 was of the opinion that he would rather do more unpaid work, given his own limited finances:

**ICO1:** [...T]o be honest I'd much rather have had some more hours put on my community service than pay that fine. Because the way I see it is, well, look, I'm working for free here. I'm not gonna get paid for it so why not convert that into unpaid work?

OCO6's fine was also a major issue given her dire financial straits – we have already seen that she may be forced to sell her house to pay it off. Whilst few other offenders in the sample were in her financial position, money was clearly an issue in many cases.

The final penal welfare issue raised by offenders concerned the *family*. Community penalties could cause (or be imposed during or after) substantial upheaval in the family home, and many participants pointed to this as one of the most important pains in their lives at the time of the offence:

**OCO1:** [*Asked how the order had affected his life*] Apart from not being able to see the two girls that I love [his grandchildren], in no other way...

**OCO3:** [Being on probation] ...is obviously going to have a detrimental effect [on getting custody of his daughter...] So what I am doing now is fully engaging with the services, so that I can have somebody on my side who can testify that I'm turning

myself around. And changing my life, in order so that I can have access to my daughter, because she's the world to me.

Once again, family issues came in a variety of different forms: both of the offenders quoted above had been separated from their families by court orders, but others' family relationships were affected by other factors. ICO1's partner left him in response to his offending. So did ICO3's, although he noted that, if he had not committed the offence, the relationship probably still would not have lasted:

**ICO3:** We'd've been living together, just as a convenience. It wouldn't've been no more than that. I think within the last six months or so we would've split anyway. I was threatening all the time to leave.

Some offenders' family situations were unstable well before their convictions. OCO4 offers a good example: her children were put into care due to a long-running dispute with social services. She noted that this had had a knock-on effect on her relationship with her partner:

**OCO4:** All I want is me family back, and believe it or not, me and [her partner], I mean, we're trying all our frigging best, but we're arguing... 'cause we just want 'em back! I mean, we're that broken-hearted, it's like, "Phew! It's your fucking fault!" "Oh no, it's your fault!" "Your fault!" "Your..." – You know what I mean? And we get that upset, 'cause all I want is the children back, and to be safe.

Note that she committed her offence after being arrested following one such argument with her partner. She believed that her offence would be used against her in her ongoing attempt to have her children returned to her care, although she felt that the Probation Service's involvement would also offer some help, since it had allowed her to take anger management courses.

OCO2 offers a final interesting case with regard to family life, since his rehabilitation seems to have had a direct effect on his family. In dealing with the causes of his own domestic violence, he had to come to terms with the fact that his relationship with his partner was not healthy, and that this would either have to change, or they would need to separate, a prospect he did not relish:

**OCO2:** My partner was smacking me youngster, and she left marks on him, which I didn't like, 'cause I don't believe in that [...] There is other ways and means, but me partner don't see that. I was still on the IDAP then, when we had a big argument and obviously I lost it and started shouting, and I thought, "No, this is wrong," so I got the dog-lead and took the dog out for a walk, and had a walk round and chilled out, came back and says, "Look, this is how I think it's going to be." What I got was, "Don't tell me how to bring my fucking child up," and I says, "Look, it's not just your child, it's my child too." I says, "So we either sort this out amicably, or... you know, what's the point?" What's the point in trying to have a conversation?

It seems that, in extreme circumstances, a rehabilitative intervention can itself damage family relationships, where they were too destructive to be made healthy. For offenders in those circumstances, the pains of rehabilitation can be very serious indeed, since family relationships were routinely identified as one of the most severe pains experienced.

The picture that emerges from this overview will hardly be surprising to probation officers: offenders tend to suffer from a range of interconnected problems that arise and develop dynamically, both before and during their crime and punishment. It bears repeating that most of the issues raised above were not really caused by the imposition of community penalties, although several reflect the response of broader

society to the offender's conviction. Nevertheless, they were plainly present in offenders' lives whilst they served their penalties.

Pains such as these are interesting (from the perspective of punishment) in that the participating staff were working explicitly to attempt to reduce them. Whilst OCS7 was the only staff participant to mention the 'Seven Pathways', issues such as those covered in this section came up repeatedly in staff interviews.

There are two points to make here. Firstly, these pains, whilst they were reduced by supervisor interventions, were rarely completely eradicated, and were occasionally aggravated by other aspects of the punishment process. The needs of offenders were inevitably complex, and probation officers could not simply fix everything in a few months' (or even years') supervision sessions. As a result, even though offenders tended to describe the interventions of their supervisors positively, and to recognise that they were a great help in overcoming penal welfare issues in their lives, many of these pains continued to dominate offender experiences whilst they served their sentences.

Secondly, however, offenders tended to be optimistic about those issues that had not yet been dealt with in their supervision. Whether their goals were relatively clear and contained (such as getting into their own housing or acquiring a stable job) or were more ambitious and long-term (such as regaining custody of their children or reconciling with their partners) offenders tended to draw a great deal of *hope* from their time under probation supervision. This is important to stress, because after all, pain is a subjective experience. When somebody undergoes a period of difficulty, the overall experience is shaped not only by what happens to them, but also by their attitudes and expectations going in. It is easier to endure hard times if one expects to achieve something that one wants at

the end of it, and so this sense of hope went a long way towards reducing the pains of community penalties associated with penal welfare issues.

#### 5.4.2 External Agencies: A Different Kind of Support

Modern society contains a broad array of groups and organisations that operate out of the public, private, and voluntary sectors, and which can all have a profound impact on an individual's life. Those who live on the social margins are increasingly exposed to greater intervention and oversight from government agencies, charitable bodies, and other organisations, and offenders are no exception. Several participants noted how their lives were increasingly dominated by organisations other than the Probation Service, which often came from outside the criminal justice system, and how that could have a significant impact on their day-to-day lives.

Two features were common in cases where offenders commented on the role of external agencies in their lives: firstly, that the *quantity* of interventions by external agencies increased significantly following their conviction, whether because more agencies became involved in their case or because existing agencies stepped in more often; and secondly, that the *tone* of the interventions often became less respectful and more confrontational in nature.<sup>8</sup>

Whilst many offenders experienced an increase in the presence of external agencies in their lives following the offence, two offenders' experiences are especially worth discussing: OCO4 and OCO6. Let us briefly discuss each offender's case in turn.

In OCO4's case, the main external agency was social services, with whom she was in a bitter dispute over the care of her children. To OCO4, social welfare's involvement in her life had been characterised by injustice, wilful blindness and prejudice against her and her partner:

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<sup>8</sup> One key external agency was the police, who were often a lot more prepared to approach offenders who had previously been 'known' to them. However, police attitudes can be more effectively dealt with when discussing 'process pains', at 5.5.1 below.

**OCO4:** There're only one of them that come to t'house... and he were all for t'kids coming home, that's when they changed him, 'cause they didn't want them to come home – this fucking Head of Base, or whatever you call her. They put [another officer] on. Now, they've took her off and they've put this [further officer] on. They're swapping all the time! And none of the others have come to me house and really sat down and talked to me as a person. Every time it's summat, it's summat they're writing down and I'm thinking, "That ain't fucking true," 'cause they have twisted half of it, what's in these papers, and they have. And I'm not just saying it, swear on all me kids' lives that they've twisted half the stuff that isn't fucking true in there.

Although I have no basis on which to discuss how accurate OCO4's opinions about social services actually are, it remains the case that she clearly felt unfairly persecuted by a large, faceless bureaucracy that had taken away her children on the basis (as she saw it) of her and her partner's working-class background. She was angered by the perceived injustices, deeply pained by the loss of care for and contact with her children, and stung by the presumptuous attitudes of social workers in judging her when, as she saw it, they had never done an honest day's work in their lives:

**OCO4:** I used to work fucking hard, and all. I even said to social workers: that, what you're doing and what you do [*she leans forwards and jabs my notepad with her finger*], and I don't mean it horribly, is *schoolwork*! Compared to the stuff that I used to fucking do! Do you know what I mean? But your people are putting me down and I think to myself, "You lazy-ass cunts, you're going to sit there... [...] You're like school-kids at a school that sits there and picks on them and all, you're just as bad as t'rest of



them,” do you get me? And that's the way I see it. And it's god-damn *right*! That's not a *job*! (Original emphasis)

OCO4's case was unique in terms of the extreme distaste she had for the external agencies in her life, but she demonstrates an (albeit extreme) example of how confrontational relationships with third parties can become, and, in the face of large, government bureaucracies, how powerless that can make one feel.

If OCO4 is an example of how the tone of external agency interventions can sour as a result of conviction, OCO6 demonstrates neatly how frequent they can become. Her case involved a number of government and charitable support networks outside of the criminal justice system, including a housing charity, the Citizen's Advice Bureau, her Jobcentre, a private firm judging her fitness for work (and therefore whether or not she would receive the more generous ESA), a support group for alcoholism, and her GP, from whom she was receiving treatment for depression. She relies on food-banks for her meals, and owes substantial debts to utility companies. In short, her day-to-day life is dominated by meetings, and travelling to attend meetings:

**OCO6:** [I]t is a lot of support that I needed, and someone is always there, whereas before when I just had a support worker I'd tend not to ring and say, "Oh I feel like this" or "I feel like a drink" or... 'cause there's so many of them that I can't escape 'em! [Laughs]. Not that I'd want to...

She is also conscious that these groups have only become more involved in her life since she was sentenced, and she increasingly finds keeping up with everything exhausting:

**OCO6:** Yeah, it's stepped up since the court trial [...] and there's been a lot of coming and going, and it has kept me busy, and I've

felt sometimes that I've not had time to do things for myself so much...

OCO6 does not generally resent this growing interference in her life, however. She believes she needed – and still needs – this high level of support, even though it does stop her from pursuing her pastimes and distracts from her obligations to friends and family members.

What these two examples demonstrate is the sheer extent to which agencies can build up responsibility for caring for, monitoring or otherwise dealing with an individual's life. Whilst nobody in the sample had to deal with as many agencies as OCO6, or was in as combative a relationship with any of them as OCO4, external groups exerted some measure of control over most participating offenders in one form or another: for example, OCO2 and OCO5 had to deal with social services in their attempts to reconcile with their families, whilst OCO3's housing was reliant upon the support of a charity, which was prepared to remove him when he presented a perceived risk to co-tenants. This fragmentation of penal, welfare and quasi-welfare interventions threatened offenders' sense of *autonomous* control over their lives, and often meant a significant increase in the number of appointments that they had to attend, especially since, as ICS2 observed, these agencies were often unable to properly demonstrate to the Probation Service that they were satisfactorily enforcing the order without probation oversight, meaning that probation also had to step up its own intervention in the offender's life:

**ICS2:** You can refer to some alcohol project, and one stipulation, "Oh this is part of their order, can I please have a bi-monthly report?" And you can't get it. "'Cause we don't work like that at this agency," at the agency you're working with. And it's at the behest of that kind of person, to say, "Oh well, [ICS2], here's a report of who's doing this," or, "He's not turned up this time."

Where you tend to get that. [An alcohol abstinence charity] is very good wi' that. But some of the projects just don't... so you're having to bring them more to see you so that you're sure there's not going to be a further offence.

Once again, however, the pains of having to deal with increasingly frequent and/or more confrontational external agency interventions were substantially reduced by probation supervision. Offenders often felt that the Probation Service had a very different approach to its work than other agencies, and saw through to the 'real me':

**OCO4:** They're more helping me than anything, do you know what I mean? And they are. Probation is. But that social service, it seems as if... they're just picking on people.

**OCO3:** They've stepped in on my behalf with regard to housing. You know? I've been on a course. They've even helped me out with regard to food. [...] Or they'll step in on your account as with regard to benefits. 'Cause if you're going out on your own, with the benefit office, or you're even ringing up, you haven't got a voice, you haven't got any power, 'cause they'll just say... you know, every time I ring up, they'll give me a different bloody answer! [...] and because they've got a bit of weight behind them, "Blah blah blah, Probation Service," "Oh!" they'll sit up and listen at the other end.

In this sense, the probation officer acted as a lynchpin, a central contact who could discuss the situation with other agencies, chase them up, and fight the offender's corner in the face of bureaucracy. Once again, we must bear ICS3's comment in mind, that the offenders who were most likely to take part in this study would be those who engaged relatively well with probation work, and were therefore most likely to respond well to the Service's approach. Nevertheless, the positioning of a probation officer as

a central, accessible figure in the complex constellation of organisations intruding into offenders' daily lives was seen as a key benefit of probation supervision. Participating staff also recognised that it was often important:

**ICS2:** Unfortunately, services react different if you say, "It's [ICS2] from Probation," rather than, "[ICS2] from 2 Bottle Green Lane," that's phoning up to find out about something. So then they have that extra, additional support.

OCS4 echoed these concerns, saying that she made it a priority to check in with all external agencies involved in a given case at least every two weeks, to ensure that she knew what they were doing, and to check up anything that her client had brought up. In short, participating staff were well aware of the potential damage done by penal-welfare fragmentation and worked hard to reduce, if not completely overcome, the pains that followed for their clients.

When considering the pains ameliorated by the supervisory relationship, we must remember that they contributed to the overall severity of the pain inflicted upon the offender, notwithstanding probation officers' attempts to assist their clients in confronting the criminogenic instabilities in their own lives. Even if key criminal justice agents actively work to reduce the intensity and incidence of pains such as these, in other words, we must still take them into account for the purposes of understanding the penal impact of community punishment.

### **5.5 Pains Unaffected by Supervision**

The final type of pains experienced by offenders were those that were neither intensified nor reduced by the supervisory relationship, but which were wholly independent of it. Once again, there were two major sub-categories: *process pains*, which arose out of the experience of going through the criminal justice system; and *stigma*, which included pains

associated with how other people reacted to the fact that the offenders had been convicted. Whilst these pains tended to vary more between individual offenders in terms of how severely they impacted upon participants' lives, they are united in that they show that any understanding of the impact of community penalties needs to look beyond the boundaries of the Probation Service, and indeed, of the criminal justice system.

### 5.5.1 Process Pains: Before, During and After Trial

When does an offender become an 'offender'? The answer may seem obvious: one becomes an offender once one has committed an offence.<sup>9</sup> At the same time, however, 'offender' is a label that we apply to a group of people to justify the unpleasant conditions imposed upon them by the State. In that sense, the process of determining who is and is not an offender is much more complex. It starts with the commission of a crime (or, more broadly, with the criminalisation of the conduct at law), but is not finished until the jury or magistrate finds the defendant guilty, allowing the court, the criminal justice system, and indeed wider society, to label her as 'an offender.'

The point is that the criminal justice system requires far more of an offender than that they serve a sentence. As a result, processes of detection, arrest, prosecution, trial and appeal can, in themselves, contribute to the pains of punishment (*cf.* Feeley 1992: 199-243). This section discusses some of the pains experienced by offenders during the process leading up to conviction, and how they impact upon their day-to-day lives whilst serving the sentences eventually imposed upon them.

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<sup>9</sup> What is less clear under this definition is when one ceases to be an 'offender'. For this reason, some probation staff (such as OCS1 and OCS5) rejected this label, preferring the slightly more cumbersome label, 'a person who has committed an offence'.

(A) *BEFORE TRIAL: THE USUAL SUSPECTS AND PROCEDURAL FAIRNESS*

The process between a person committing a crime and being found guilty of it can be long and complex, involving a number of key decisions by actors as diverse as the victim/s, any witnesses, the police and the Crown Prosecution Service. Generally speaking, while offenders tended to see this process as separate from their sentences, and therefore did not consider any pains of this part of the criminal justice system as being especially relevant, there were two particular issues where they raised concerns: namely the willingness of police to pursue those with *criminal records*, and instances of perceived *unfairness*.

*Criminal records* play a key role in offender experiences of stigma, and so I will return to them below. For now, it is important to stress the role that offenders perceive they play in police willingness to accost and pursue investigations against those who are 'known' to them:

**OCO2:** If you've been done for speeding a few times, obviously you can be driving normally, go down a road, knock somebody over, they check your past history, and, "Well, you're bound to have been speeding!" So, you know, how do you prove it?

Offenders in this situation felt that they were condemned to being treated as 'the usual suspects' for the foreseeable future, making it more difficult to live a productive life in normal society with constant police interventions. OCO5's experience in particular is telling, as he was treated as a key suspect in an arson attack in which he was the victim:

**OCO5:** ...I could see what they was trying to do. Travelling boy... just been done for two counts of GBH. I wonder if he set fire to his house to get rid of his Missus? Why would I want to do that? I love the gal! I love me kids! I'm not gonna go up to me own bloody house... what I've got no insurance on... with all my stuff in, you know? [laughs]

However, this was not to say that every subsequent arrest was necessarily connected in the offender's mind to their criminal record. ICO3, for instance, had committed a fraud, and has since been subject to a series of serious domestic violence and rape allegations from his ex-partner, which he stridently denies. Asked if he thought that the police were more willing to believe that his ex-partner because of his fraud conviction, he said:

**ICO3:** No. I think I was treated that way because it was a domestic violence case. And they was making sure that I kept away. And I told them at the time that I'd had no intentions of going back, and I've never been back since. [...] But, yeah, I think domestic violence and the charge of fraud are two different things anyway. If I was charged originally with domestic violence, probably yes. But a fraud case, I don't think they've got the grounds to follow me. Yeah.

Nor, however, was this to say that ICO3 accepted their interventions. In this sense, he raised the issue of *procedural fairness* in the pre-trial process – that is, of being treated fairly and with respect during criminal investigations and prosecutions. For ICO3, his ex-partner's allegations were always laughable, despite their serious nature, and would have been easily rebutted by an analysis of the facts. However, despite this, the police continued to play into his ex-partner's hands:

**ICO3:** I get these accusations I'm coming across all the time. I've seen the police more times than me kids, you know what I mean, it's... it's just getting sillier and sillier. The only thing I... if I've got the power, it's about time somebody talked to her and said "You can't keep doing this." I have not seen her now since August, but I'm still getting it. You know, and it's about time the police, as much as they questioned me and talked to me, just go over there

and say, "Enough's enough." That's all I want. I'm trying to get on with me own life and every... I mean, this case'll be kicked out, and then in a month there'll be something else brought up, you know? Something has got to be put in place to stop this happening. She knows I'm one hurdle away from prison. And if she can find me guilty to send me down, then I'm out the way, she's got the kids to herself, and I think that's what the plan of attack is.

Again, this is not to comment on the veracity of ICO3's complaints against the police (or his ex-partner, for that matter), but it is clear that he feels that the police have treated him unfairly, and in particular, that they have lied to him to try to extract a confession from him:

**ICO3:** Then she [the police officer]'s accused that the daughter's wrote a 12-page thing about me in the last 12 months. The daughter has told the eldest that she's never wrote anything. So is it again the police that's trying to wind me up, to get answers out of me? You know, this is the frustrating thing about the police, to me. You know. I've gone in there, totally innocent, and they're trying to crack me and say, "Yeah, I've done it."

Similarly, ICO2 complained that the most serious charge against him was untrue, and that he had only committed some comparatively minor thefts, whilst OCO4 believed that the police were complicit in hiding evidence in order to secure her conviction:

**OCO4:** It were dead funny, when I went to court, 'cause it happened in t'middle of t'police station, that they pulled me pants down to me ankles. Now that's sexually abusive, and that's why the tape went missing. That's why they done it.

In instances such as these, perceived unfairness coloured offenders' perceptions of any resultant sentence. However, what is interesting is that



neither ICO2 nor OCO4 thought of their orders as particularly punitive (indeed, both fell into the partially engaged category). This may perhaps be explained by the relatively low number of requirements to which they had been exposed: ICO2 had an accredited programme and a supervision requirement, whereas OCO4 had a lone supervision requirement. In these cases, supervision involves a relatively minor deprivation of liberty, and focusses most explicitly on helping offenders to reform. There is less of an explicit 'hard edge' to their penalty, and so there is less hard treatment for them to feel has been imposed unfairly. It seems likely that someone who believed that they had been treated unfairly at the pre-trial stage, and who was subject to a more onerous order, would feel the pains of community penalties more severely than one who had no such concerns.

*(b) THE TRIAL AS A SITE OF PUNISHMENT*

Moving through the criminal justice process, many offenders identified the trial stage as an important site of pain infliction. In particular, several offenders commented that the sentencing decision by the judge, in which they were confronted with a list of the acts that they had committed and told how they would be punished for them, was a very humbling and difficult experience to go through. Indeed, they were motivated to comply with their orders specifically to avoid having to return to court:

**OCO6:** The worst thing is the court, definitely, that's the worst thing that gets me. Shaking. I could've cried when I came out...

**OCO5:** It was difficult being in court, 'cause I always thought... you see it on telly, they're all these sort of PR people who sit behind that judge table. But when you walk in, you see the seriousness of their faces. I used to be very confident, even when I was drinking all the time. Though that confidence was a fake one, I reckon. 'Cause the drink was taking over. So when I walked in there it... it proper put the nerves on me. Seeing some bloke

who decides... your fate, basically. They sit there and say that you're going to prison.

**OCO3:** [...] And even if it's how you're viewed by society after, the fact that the humiliation that you have to go through court, and have all these things read out about you. It's all there to remember and learn from. And valuable lessons. Because it serves to stop you from becoming complacent.

Once again, the level of the offender's engagement had a considerable impact upon their approach to the importance of the court and the sentencing judge, as representatives of the State and of the community. Fully engaged offenders tended to be much more respectful of the symbolic power of the court, and felt that their conviction was a lot more difficult to endure as a result. By contrast, those who were partially engaged were less in awe of the court, especially if they felt that their trial was unfair, or if they had been exposed to the criminal justice system many times before. As for the engagement-resisting offenders, it is more difficult to say: from her statement above, OCO6 was plainly moved by the trial procedure, whereas OCO1 was much less affected. Upon learning that he had been given a disqualification order (which prohibits him from working with children) despite being retired, he assumed that:

**OCO1:** They probably give it out to every offender. It's just a matter of course. I don't think it was aimed at me, specifically. I laughed, actually, when I read about it. Comical.

These comments demonstrate that the trial can substantially magnify the sense of shame that offenders feel, so long as they believe that the proceedings against them were conducted fairly and fully accept the truthfulness of their conviction for their offence. As a result, their punishment is considerably more painful, although they tend to also be more motivated to take advantage of the positive opportunities that their

community penalties offer them in terms of rehabilitation. The trial, however, is not the only source of shame for offenders – it can also be imposed on them by the outside world's response to the label of 'offender' being put upon them.

### 5.5.2 Stigma: The 'Offender' and the 'Real Me'

'Stigma' can be defined as a social disapproval of some characteristic or behaviour of an individual (Goffman 1968: 2-19). Offending is a classic example of stigmatised behaviour, in that crimes are prohibited by law precisely because they are socially unacceptable. As a result, offenders can expect to meet with many negative reactions to their criminality from broader society, above and beyond the formal punishment imposed by the State. We might expect these reactions to be much more immediate for those being punished in the community, given that they are not shielded from society by prison walls. The participants in this study were no exception, with the majority recognising that there was some form of stigma around being 'an offender', and to a lesser extent, being 'on probation'. We can distinguish between those exposed to stigma in general, and experiences of specific stigma in the job market.

Generally speaking, the fact that participating convicts were labelled as 'offenders' was seen as exposing them to potential public disapproval and distrust:

**ICO1:** I suppose you get a label, sort of like a stigma, as well, with having that criminal record. I mean, I know people aren't supposed to look at you and think, "Ooh, hang on, he's... he's done this and..." but people do, unfortunately. Or do label you and judge you before they even know you.

**ICO3:** I think a lot of people think once you've done it, there's always a chance of reoffending. It's like burglaries... Once he's

done something and he's got something, it's a habit then to go back and do it again.

However, whilst most offenders credited this possibility in the abstract, they raised two important limitations. Firstly, few offenders were prepared to say that there was a similar level of stigma associated with being specifically 'on probation', as opposed to simply being 'an offender':

**OCO3:** You know, if you're having a conversation, as I might with one of my friends, "Are you coming to so and so's," I say, "No, I've got to go to probation." I think that, again, is a very personal thing. I personally don't find that there's a stigma attached to it. I know, when I was on probation before, my partner would go, "Ooh, you can't say that you're going to probation," obviously because she didn't want you to know I'd been an offender or what have you. I think it's part and parcel of the whole thing.

**OCO5:** I mean, unless they ask what your offence is, they'll just view that it might be something minor, or first offence perhaps even, so they'll maybe view you as a lower level... offender. Well, you've still offended, 'cause otherwise you wouldn't be on probation. But they'll probably see you as a minor sort of offence.

Secondly, offenders tended to have few experiences of direct stigma in their own lives, and it was rarely very influential when they were subject to it. In particular, offenders placed a great deal of importance upon *who* it was that was seeing or treating them differently as a result of their offending. Friends and family tended to be far more important, but were also more likely to see the offender for who they 'really' were, rather than as simply 'an offender':

**ICO3:** I think it was [an issue for his friends] for the first two months, but a lot of people got on with it. There was a lot of questions asked of me, in the first two months. I mean one friend

of mine, he took me to one side at the local and said, "Right, I want the full story." And I gave him the full story. And he says, "I'm only giving you one chance to tell the truth." And I told him the truth, and he thanked me for it.

**ICO1:** I've had a lot of support, same with the family as well, I've had a lot of support from them. 'Cause, as I say, they knew me before it all happened...

By contrast, offenders experienced the most stigma from strangers, whose opinions they could generally discount as irrelevant and narrow-minded:

**OCO3:** And if people are always going to be looking at me over my shoulder then, so what? That's the price I've paid for what I've done. I don't expect everybody to open arms and welcome me back into the fold of human society without some sort of stigma. I've done something wrong. You've got to pay the price.

**OCO5:** I'm not conscious about people when I walk up here. 'Cause they've got their own minds. If they're small-minded like that then so be it, I don't mind it at all. But I'm a proud man. And if they want to act like wallies then it's up to them.

This is not to say that offenders were never hurt by stigma in general. ICO3, for instance, did admit to finding it embarrassing when his friends joked around about his offence:

**ICO3:** ...[T]he only thing I don't like is, say if I went into the local tonight, and they all come say, "Here's the gambler!" and "Watch your pockets!" and "Watch your wallet!" and all that, there's people in here that don't know me, all of a sudden thinking, "Well hold on, what's he been doing then?" And it all comes out. At the end of the day I think it's none of their business, what I've done.

He also commented that he felt that he had to monitor his conduct more carefully as a result to avoid getting into further trouble, leading him to lead a (somewhat) more constrained lifestyle:

**ICO3:** I mean, there's things you have to think about. You know, there was a scuffle in the pub the other week and you think, "No! I'm not getting involved!" because I know the consequences: police'll be round and they'll go, "Oh, you've got a record." So you have to think that way.

ICO1 also experienced a certain exceptional level of stigma from his friends, in the sense that it changed the way that they looked at him:

**ICO1:** As I say, if we do go out, say, downtown, with a bunch of friends... if anything does happen, I must admit it has happened where, you know, there's been a scuffle... and it always seems to be that they [his friends] turn around and look at me, and [laughs] it's sort of like, "Um... no! Move away, step back." Even though I've not, like, I've not, you know, gone to do anything, but they just... they don't want me to get into trouble again, of course...

He was quick to point out that he was not complaining – he saw his friends' monitoring of his behaviour as their way of supporting him, of making sure that he would not get back into trouble with the law. Nevertheless, he seemed to express a certain level of sadness about the fact that his friends would seemingly always look at him in a different way from then on, handling him in social situations as if he would always be quick to anger, that he would never be able to change that about himself – something which he has been trying hard to do over the course of his order. That sense of being handled – of having lost complete self-control in his relations with his friends – did not seem to be a major pain in ICO1's

life, particularly as he appreciated his friends' good intentions, but it was nevertheless hard to endure.

Moreover, it was not always the case that the opinions of strangers tended to be of little importance to offenders. In the case of the unpaid work requirement, for instance, the highly visible nature of 'Community Payback' work exposed ICO1 to additional levels of public shaming that were more difficult to dismiss:

**ICO1:** [I was working on a] busy main road, lots of traffic, of course you've got those jackets on, everybody can see you. I mean, fair enough, we all know that we're all there for the same reason, but however you get members of the public sometimes shouting out of their cars, you know, hurling abuse at you. And as much as you want to hurl it back you can't. Because if you do, you get breached. It wasn't so bad, say, with a quiet area, wasn't so bad at all, *because it just feels like you haven't got all the eyes of the world on you*. But I mean, I suppose in a way, the way I feel, that that could be classed as part of your punishment. Because of course, people know why you're there. It's not very nice but... if you've done it then, you know, I suppose in a way it's part of what you deserve. Plus also the public need to know why you're there. So that's why you've got 'COMMUNITY PAYBACK' plastered across the back of it. [emphasis added]

However, even offenders who did not serve unpaid work requirements could not wholly dismiss the opinions of others. In particular, those who were looking for work felt extremely stigmatised by their criminal records, and were at a major disadvantage compared to those with a clean sheet:

**OCO5:** [P]eople in society are not willing to help a person out, who's basically been convicted of a crime in court. And when they

read your notes, they're not really willing to work with you, 'cause they don't know what you've actually done until they've rang up and found out, basically. And they don't really want to waste time ringing up. So you don't ever get a look-in for a job.

**OCO3:** If you're an employer and you've got two people's CVs in front of you, and one guy's got a criminal record and one guy hasn't, who would you employ? And do you have to tell the other guy, "Oh, we didn't employ you 'cause you've got a criminal record"? They're not going to tell you that, are they?

The effect of this unwillingness to take on jobseekers with criminal records could be devastating. OCO5 described how, when previously he had run his own business, he had been willing to take people on despite their past misdeeds:

**OCO5:** And nine times out of ten the people who are working with you, they don't do anything wrong. They don't steal, 'cause you give 'em a good wage, they don't do nothing, they keep their 'eads down.

OCO3 agreed with this sentiment, commenting that for some people, being denied the chance of an honest living could make them turn back to crime:

**OCO3:** I suppose they'll view it that, "I ain't got many options." You know. The dole isn't enough to live on. And... "If nobody's going to give me a shot at work then, what's me alternatives? It's just crime, isn't it?"

Work can also be an important sign of independence, as ICO2 noted. He had the opportunity of gaining work with family members, but preferred to earn a job himself:

**ICO2:** But I've gone out my own way to see if I can look for work. Like, I've sent out application forms and, like, CVs and stuff.



'Cause I know, like, that's easy [that is, getting a job through his family] but I'd rather do it myself, innit?

ICO2 had had trouble finding work, however. He preferred not to dwell on whether or not it was due to his criminal record, and keep moving forward with his life.

Criminal records were not impossible to overcome, however. Several offenders had strategies for dealing with their criminal history. ICO1's approach was to simply be honest with his future employer:

**ICO1:** I will be working on the Tuesday, so say if I were to come here in the afternoon on the Tuesday, but I am working, they'd say, "Right, okay, take your hour's break now. Go get that done. And then come back." So they're gonna quite happily work around it for me. It does work sometimes being straight, upfront, and letting them know.

OCO2 was more restrained in revealing his conviction, since he was not moving between employers, and so would not be automatically asked to disclose his record (although he claimed he would reveal it if asked):

**OCO2:** I mean obviously if I was asked by my employer if I'd got any convictions, then obviously I'd be obliged to tell him. But he's not asked me, so... you know. What they don't know won't hurt them. If he did say, "Have you got any?" then I would tell him. I've got nothing to hide, so...

OCO5 was considering starting up his own business again as a way of getting round employers' resistance to hiring him. He also expressed an interest in providing mentoring for other ex-offenders, to help them on their way to getting out of crime. But even if they had ways of getting around the stigma of the workplace, it was clear that it was still a major bar to getting employment.

Clearly, *any* criminal justice intervention involves some level of pain infliction, regardless of the mode of punishment that ends up being used against offenders. These systematic pains must be taken into account in any estimation of the impact that community penalties have.

### **5.6 Conclusions: The Pains of Community Punishment**

These data provide a detailed picture of a number of discrete pains of community punishment, which are influenced in different ways and to different extents by the supervisory relationship between the offender and her supervisor, as well as by both staff and offender attitudes, and a range of other factors. Community punishment involves a number of (potentially) painful processes that begin with the commission of the crime, and which saturate the criminal justice and penal processes. In particular, community punishment is at its most painful when it causes offenders to feel shame, and where it interferes with their family lives. It is also most likely to inflict pain upon those who are fully-engaged with their order, although the engagement-resistant demonstrate their share of vulnerabilities to a variety of discomfoting experiences as well.

What we still lack, however, is a means of effectively discussing the overall *penal impact* of community punishment in these cases. To be sure, the pains in this chapter are numerous and extensive. But equally, not every offender felt every pain, nor to the same extent. In the next (and final) Part, I therefore apply the analytical framework I constructed in Part **I** to these results, in order to take us from a description of the pains of community punishment to an evaluation of its penal impact.

Before turning to this, however, I summarise the pains identified in sections **5.3-5.5** in Table 5.5, overleaf.

Table 5.5: Summary of Pains Identified by this Study

<b>Pains Intensified by Supervision</b>	<b>Pains Ameliorated by Supervision</b>	<b>Pains Unaffected by Supervision</b>
<b>Pains of Rehabilitation</b>	<b>Penal Welfare Issues</b>	<b>Process Pains</b>
Shame	Accommodation	Treatment as the "Usual Suspects"
	Employment	
Change of Lifestyle	Wellbeing (alcohol addiction)	Perceived Procedural Unfairness
Wellbeing (Mental and Physical Health)	Financial Issues	Confrontation at Trial
	Familial Disruption	
<b>Punishment through Breach</b>	<b>External Agencies</b>	<b>Stigma</b>
Loss of Time	Increased intrusion by external agents	Stigma from Friends and Family
Loss of Money		Stigma from Third Parties
Loss of Freedom	Increased hostility of EA engagements	Stigma and Employment

**Part III: Understanding the Penal**  
**Impact of Community Punishment in**  
**England and Wales**

## **Chapter Six: From Pains to Penal Impact**

### **6.1 Introduction: Analysing Penal Impact**

In Chapter **Three** I defined the concept of pain as something that is uncomfortable and attendant upon the process of State punishment, to the point that it is punishment's metric, its *sine qua non*. However, whilst the findings discussed in the last chapter demonstrate a myriad of pains associated with community punishment, they tell us relatively little about those sentences' *severity*, particularly from the perspective of retributive punishment. After all, any penalty is likely to involve the incidence of some pain or difficulty, even if only because it is mandatorily imposed upon the offender. At the same time, each pain was felt differently, in different circumstances and to a different extent by each offender. How, then, are we to make sense of these pains in a way that enables a meaningful understanding of the overall severity of community punishment whilst also retaining fidelity to the individual experiences of each case?

This chapter examines this problem by addressing two of its dimensions. The first is the challenge of *relation*; the question of which of the pains identified in the last chapter can be understood as part of the (retributive) punishment process, and to what extent. The second challenge is one of *ranking*; the difficulty of comparing the relative severity of subjectively-experienced and qualitatively-identified pains. Let us consider both issues in greater detail.

#### **6.1.1 Perception and Penalty: Relating Pains to Community Punishment**

The issue of *relation* is primarily one of what *counts as* punishment. After all, participating offenders' lives tended not to be pain-free at the point of penal intervention, whilst several other pains clearly originated from outside the criminal justice system, whether in the form of communal, individual, or external-institutional activity. The situation is especially

complicated when such external forces *respond* to the offender's conviction and/or punishment, as in the fairly ubiquitous and well-documented phenomenon of the reduced willingness of employers to hire offenders due to their criminal record (Graffam, Shinkfield and Hardcastle 2008). To what extent can pains arising in such circumstances be meaningfully separated from the process of 'punishment'? How far can the pains of punishment (especially in the community) be clearly distinguished from the pains of everyday life (Ryberg 2010: 82)?

There are really two dimensions to this issue. The first of these is *definitional*: to what extent are the pains of community punishment associated with it *as* punishment? To what extent can they contribute to its overall severity at all? The issue is not so much whether or not the pains hurt, but to what extent they are *relevant* to the criminal justice process. I address this matter in **6.2**.

The second dimension is more a matter of *justification*. Penal impact is explicitly retributive, and therefore requires not only that the pains of community punishment hurt, but that they satisfy certain aims. In particular, they must be *proportionate*, *parsimonious*, and *ensorious*. If one or more pains of punishment do not satisfy these conditions, then they cannot be justified under a retributive approach, and therefore must be distinguished for the purposes of identifying the extent to which the pains discussed in the last chapter may be justified at all.

The issues of proportionality and parsimony are largely concerned with the overall severity of pains, and therefore go more to the issue of ranking than of relation. However, censoriousness raises a challenge. Particularly given the benevolent, rehabilitation-focussed attitudes of staff participants, to what extent did the pains discussed above adequately convey reprobation of the participating offenders' crimes? I discuss this question in **6.3**.

### 6.1.2 Constructing a Normative, Non-Quantitative Hierarchy of Pains

The second issue in getting from a compendium of pains of community punishment to an understanding of those sentences' penal impact is the question of *ranking* the relative severity of pains. In my conceptual definition of penal impact, I noted that it requires not just a qualitative understanding of the *incidence* of pains, but also their *magnitude*. But, given the innately subjective nature of pain, and the qualitative methodology adopted, this is far easier said than done. Every offender experienced a unique array of different pains of community punishment, and to different extents. Furthermore, given the diversity of participating offenders' experiences, it is unlikely that every participant received exactly the same amount of punishment as the rest of the offender sample.

There are two questions to address under this head, in other words. Firstly, to what extent is it possible to compare the severity of the pains of community punishment *in* a particular offender's case? Secondly, how can we evaluate the *relative severity* of pains across different cases? I discuss these issues, paying particular attention to the data in the findings discussed above, in **6.4**.

### 6.1.3 Summary: Understanding Penal Impact

The analytical task in this chapter is therefore not so much concerned with the *identification* of what pain is, so much as with *how far* the pains identified above contribute to the (retributive) punishment of offenders. Where it distinguishes the pains of community punishment, it does not deny that those pains exist, but rather problematises their existence, since they do not correspond to the purposes of (retributive) criminal justice. The analysis requires a shift in perspective, away from the offender-supervisor relationship to the broader question of whether effective (retributive) justice has been done; from the descriptive to the evaluative.

By the end of this chapter, in other words, we should be able to identify which pains contribute to retributive suffering, and to what extent. Whilst this chapter does not, therefore, describe the penal impact of community punishment in England and Wales, it lays the groundwork for such a description to be made. It enables the development of a complex understanding of penal impact that substantially narrows the gap between penal theory and social experience in the conceptualisation of (community) punishment.

## **6.2 Pain, Remoteness and Intention: Which Pains Count?**

It would be a major cognitive leap to assume that all the reported pains experienced during (and indeed, before and after) the term of a community punishment necessarily contribute towards the sentence's penal impact. The problem of *causation* is reflected in the comparatively narrow way in which punishment is defined under the orthodox model, as embodied in the 'Hart-Benn-Flew' model (McPherson 1967). Under this definition, punishment is something that is: (a) unpleasant; (b) imposed for breach of legally-defined rules; (c) enacted upon an individual offender; (d) *intentionally administered by State agents*; which are (e) constituted by the same legal system whose rules have been breached (*ibid*; Flew 1954; Hart 1960).

In particular, the *intentionality* requirement significantly limits the relation of the pains of community punishment to those sentences' penal impact. It excludes both the punitive reactions of extra-institutional actors, such as broader society, communities, and other, non-criminal-justice aspects of the State such as welfare agencies. It also excludes any punishment that the offender inflicts upon herself (Ashworth 2010: 95; McPherson 1967: 22).



For orthodox purposes, this limitation makes sense in both theoretical and pragmatic terms. At the theoretical level, the authors of the orthodox approach were primarily concerned not with defining punishment for its own sake, but with *justifying* it as a State intervention (McPherson 1967: 21-22). They were thus not so much concerned with developing a detailed picture of a social phenomenon but rather with providing a neat, ideal-typical legal concept whose boundaries were more or less concrete, and which could serve as a basis on which to evaluate the penal system's conduct on its own terms.

Equally, the orthodox definition makes sense given its pragmatic focus on providing assistance to judges and policy-makers in constructing a general theory of punishment at the sentencing level. Particularly under retributive theory, judges must be able to treat like cases alike, and to be relatively certain about the punitive content of each available sentence. This requires a relatively closed definition of punishment, and it makes sense to establish the boundaries of such a definition around the conduct of penal agents, who, after all, are at least theoretically accountable to the sentencing authority. Understanding punishment in this sense enables sentencing authorities to be reasonably sure about the impact that a punishment will have on its target. On that basis they are able to punish reasonably consistently and to abide by core principles such as procedural fairness and equality before the law (Ashworth 2010: 96-100).

The problem for the current study, however, is that it is concerned neither with providing a definite understanding of punishment for the purposes of sentencing, nor the justification of punishment *per se*; it starts from the position that punishment is broadly justifiable on retributive terms. Rather it is concerned with providing a *representation* of how (community) punishment is experienced by those subjected to it, and on those terms, the orthodox account is inadequate. This is evident, firstly, in

the divergence in experience of the severity of individual pains, even when understood in the relatively objective terms of liberty deprivation. Compare ICO1's relative acceptance that the deprivation of his liberty in terms of having to attend supervision sessions is both painful and punitive with ICO3's utter rejection of either label, for instance:

**ICO1:** But with the supervisory order as well, it's still there, nagging in your head that, right, even though, let's say I could go for a job full-time, 40 hours a week... but then I know I've still got to come back here to come and see [ICS1].

**ICO3:** It's just not a punishment to me. My honest opinion. It's not a punishment. You know? I mean sometimes I can come here and it's twenty minutes. I have a ride in, on the way back I can do me shopping. So you know, at the end of the day I can say, 'Oh I'm due in, I'll go see [ICS3]... I'll go do my shopping on the way back.' So I've got a little bit of a routine there, you know?

Secondly, the orthodox definition in the Hart/Benn/Flew model is also insufficient in terms of the wide range of extra-penal pains that accompany the conviction of the offender and her sentence to a community punishment, as seen throughout this study's findings.

It is therefore reasonable to depart from the orthodox account of punishment in the present analysis, but to what extent? The rest of this section attempts to systematise the pains of community punishment in terms of their relation to the criminal justice system, and to provide a justification for the inclusion of extra-penal pains in an analysis of penal impact.

#### 6.2.1 Pains of Probation *Redux*: Internal Pains of Community Punishment

In the first instance, it is relatively straightforward to identify certain pains which are directly caused by community punishment. These are pains that have flowed directly from the imposition of a sentence of community

punishment, which directly relate to the practice of the responsible penal agents (here, the relevant probation officers), or which follow inevitably from the execution of the sentence imposed in some other way (such as being forced to leave the family home after a restraining or non-molestation order has been imposed). Since these pains are clearly part and parcel of the processes of punishment, I need spend little time on them here.

Clearly this category includes pains that were intensified by the supervisory relationship: the 'pains of rehabilitation', and those aspects of the loss of time, money and freedom associated with the 'punishment through breach' argument (recall **5.3**). Care must be taken, however, with the issue of offenders' feelings of *shame* about their offence – it should only be taken into account where it was caused by direct actions of the penal system.<sup>1</sup> OCO3, for instance, felt a profound sense of shame, but he saw it as distinct from the order, arising from a personal malaise with his own actions:

**OCO3:** Any amount of punishment that the authorities can dish out ain't anything [compared to] what I'm giving myself.

However, we may also incorporate a number of pains that were ameliorated by supervision. OCO2, OCO3 and OCO5 all lost their accommodation in their family homes as a result of judicial intervention associated with the sentence that they received, for instance. Furthermore, the intervention of external agencies, as in OCO6's case, is increasingly associated with penal functions as Probation Trusts work alongside private and voluntary organisations to provide, amongst others, alcohol and drug treatment facilities. Pains such as these are intrinsic to the broader sentence imposed in that they are directly connected by a

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<sup>1</sup> *E.g.*, through attempts at reintegrative shaming (Braithwaite 1989), or as a result of the requirement to wear a uniform proclaiming that one is performing 'Community Payback' as part of an unpaid work requirement (Pamment and Ellis 2010), as experienced by ICO1.

penal agent's conscious decision (not) to deploy specific requirements, or to involve a particular external agency in the implementation of the sentence.

However, other pains in that category cannot be simply labelled as intrinsically part of the punishment. For instance, OCO4's increasingly belligerent relationship with social services was purely a response of the agency in question to her conviction (and her actions after it), rather than an act in concert with the criminal justice system. Although social services' actions after her conviction were affected to some extent by her criminal record, those acts did not form part of the State's *penal* response. Their reaction was not an automatic consequence of criminal conviction, and so the pains associated with it cannot be considered intrinsic to community punishment. If I am to include pains such as these in the present analysis, I must provide some other justification.

#### 6.2.2 Baseline Pains: System and Process

The other category of pains that can be readily associated with community punishment under the Hart/Benn/Flew model are those that serve as *baseline pains* of the wider criminal justice system: basic features of the process of being detected, arrested, tried, found guilty, sentenced, and disposed of by the penal system.

Once again, context is everything – it does not automatically follow that the 'process pains' described at 5.5.1 above fall into this category. For instance, a common pain for several violent offenders (*e.g.*: OCO2, OCO3, and OCO5) attended upon their being 'known' to the police, and being subject to greater scrutiny in their lives during and after their community sentence. OCO5 (quoted above at p. 201), for instance, with his domestic violence offence, was arrested by the police following an arson attack on his own house. He believed that it was (partially) because of his offence.

Although OCO3 saw a different reason behind the police action in OCO5's case, he still linked it firmly to the allocation of offender status:

**OCO3:** I think they just like to let you know that you are in the system, and we'll keep you down in your place, right? Easy target, you see.

Both of these attitudes demonstrate that, in their cases, these offenders perceive the police as justifying an additional level of oversight and intrusion into their lives *because they are (ex-)offenders*. However, this can be contrasted with ICO3's experience of police attention following his wife's allegations that he had physically and sexually abused her during their relationship (discussed above at 5.5.1(a)). The police responded very quickly to these allegations, and he remains bitter about their willingness to believe her over him. However, he stressed that he did not believe that this had anything to do with his conviction:

**ICO3:** I think I was treated that way because it was a domestic violence case. And they was making sure that I kept away... If I was charged originally with domestic violence, probably yes [*it would have been the result of his record*]. But a fraud case, I don't think they've got the grounds to follow me.

For ICO3, then, the pains of police contact (which were considerable, to the extent that he is considering legal action) were distinct from the processes of community punishment. Though a process pain in the broader sense, it was distinct from his conviction and punishment, and could not therefore contribute to the penal impact of his sentence.<sup>2</sup>

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<sup>2</sup> Although the experiences of conviction and of subsequent punishment differ, I have taken them together for two reasons. Firstly, recall from **1.1** that I define community punishment as a *process*. This process starts with conviction, and may be influenced by events earlier in the criminal process, and it is appropriate to consider both together. Secondly, community and other reactions to conviction may have as great an impact upon the experience of community punishment by offenders. Whilst it is somewhat simplistic to take the two together, given that each will have multiple attendant pains, it is a useful simplification to enable a thorough-going analysis of the impact of community punishment on offenders' lives.

The situation is slightly complicated in that many of the baseline pains of criminal justice impacted upon offenders' lives prior to conviction (during their trial, for instance). Such pains can be associated with the penal impact of community punishment only where they either: (a) manifestly contributed to the offender's experience of their conviction and sentence, as, for instance, with OCO4's belief that the police had withheld footage of her assault on a police officer that showed that she was acting in self-defence (recall 5.5.1); or (b) where it is distinct from the conviction's pains, but was an inevitable part of getting to that conviction, as with the shame and fear associated with the judge rendering a sentencing decision, highlighted by, *e.g.*, ICO1 and OCO6 (*ibid.*). In effect, the causal chain is reversed prior to the point of conviction: was the pain part of the process leading to conviction, and/or did it impact upon the experience of a later pain?

### 6.2.3 The Social and the Individual: Pains of Non-Penal Responses

We can now turn to the more problematic pains associated with community punishment: those that were coterminous with the penal process, but which were either incidental to it (wholly in the realms of extra-penal agents' reactions to the conviction and sentence), or which were insufficiently predictable for sentencing authorities and probation officers to foresee when setting and executing the sentence. A good example of this latter effect is ICO1's experience of being stigmatised whilst wearing the high-visibility 'Community Payback' uniform required on his unpaid work requirement (described at 5.5.1 above). Whilst it is reasonable to impute some knowledge that ICO1 would be stigmatised on the part of the judicial and executive agents involved in making him wear this uniform (*cf.* Pamment and Ellis 2010), they could not necessarily predict the precise form that that stigma would take: the abuse (and refuse) hurled at him by passers-by, for instance. To what extent can

these precise pains be related to the penal impact of the punishment imposed?

Answering this question in the abstract is extremely difficult, in that each pain is connected to the criminal justice system by each offender to a different extent. Both OCO2 and OCO4 were separated from their family, for instance, but whilst OCO2's separation followed from his domestic violence offence and was overcome during the course of his order's completion, OCO4's children were in care long before her conviction and will likely be withheld from her custody after her order ends.

Despite these difficulties, in the rest of this section I make two arguments in favour of incorporating (some) extra-penal pains into the penal impact of community punishment, on the basis of this sample. The first is by analogy to the doctrine of oblique intent in criminal law, and argues that the Hart/Benn/Flew requirement that punishment result from some 'intentional' action by relevant State agents should be interpreted more broadly. The second makes reference to the special contextual relationship between the penal system and broader society inherent in a *community* punishment that rejects the orthodox account more radically. Both of these arguments demand that some extra-penal pains are included in the analysis of the penal impact of community penalties.

*(a) OBLIQUE INTENT AND EXTRA-PENAL PAIN*

The first argument to consider regarding the incorporation of extra-penal pains concerns the limits imposed by the Hart/Benn/Flew requirement that punishments be the *intentional* consequence of State actions. The problem with the narrow interpretation of this 'intentionality' requirement is that it does not match with the concept of intention that is applied at the level of the criminal law.

To what extent is this disjuncture problematic? After all, the criminal law conception of 'intention' is somewhat more formal than that of

the orthodox account of punishment, where the language is used as a general descriptor, rather than an extremely precise means of evaluating culpability for criminal wrongdoing.

Moreover, it is not clear, beyond the populist sentiment that the State should be held to the same standards to which it holds its citizens, that it is possible to (straightforwardly) apply the legal concept of intention in this situation. After all, criminal law (generally) addresses defendants as individuals, whereas 'the State' is little more than a socio-political fiction, a gestalt composed of multiple actors and institutions (*cf.* Bronsteen, Buccafusco and Masur 2010: 1493-1496). Furthermore, the State occupies a different socio-moral and legal space from its citizens, as is evidenced by the very existence of the penal system, which involves the imposition of sentences that would themselves amount to crimes if performed by an individual (Kolber 2009a: 1571). As a result, it is not at all clear that the State can be straightforwardly evaluated using the same criteria by which it judges its citizens.

However, that is not to say that the provisions of criminal law offer no guidance as to the interpretation of intentionality at the State level. Indeed, the doctrine of *oblique* intent provides just such a useful analogy. It allows for an exploration of the limitations of the intentionality requirement, by exploring what might be incorporated with a broader understanding of what the penal State may be taken to intend.

The general (criminal) legal definition of 'intention' holds that a rational agent intends an act where she committed it with the purpose that the relevant consequences should occur (*Moloney* [1985] AC 905). However, under the doctrine of 'oblique intent', she should also be taken to intend an outcome if: (a) it is a *virtually certain* consequence of her act; and (b) she knows that it is such (*Woollin* [1999] 1 AC 82). The archetypal example used to illustrate oblique intent is an offender who smuggles a



bomb onto an aeroplane to destroy a package on board: she does not (necessarily) intend, and may not even desire, the deaths of the crew and any passengers on board. Her purpose is only the destruction of property. However, because the detonation of a bomb on an aeroplane places them in considerable jeopardy, she may be taken to 'obliquely' intend any subsequent loss of life (*cf.* Pedain 2003).

Notwithstanding that the doctrine of oblique intent was composed with a different set of subjects in mind (citizens, not States) and a different context through which to identify 'intention' (what is criminal, not what is punishment), an analogy with this doctrine adds value to the Hart/Benn/Flew definition of punishment, given its shortcomings in terms of reflecting social reality. The limitation of (criminal) 'punishment' to only those acts committed by the State does not mesh with the everyday use of that word, not least because of its exclusion of the concepts of self-punishment and unintentional punishment (McPherson 1967: 22). It commits us to a too-narrow understanding of the penal system and its interactions with broader society, especially given that the first aim of this enquiry is to examine the impact that the imposition of community punishment has upon offenders.

One does not have to be a social constructivist to accept the notion that the criminal justice and penal systems are not self-contained black boxes, cut off from broader social, political and cultural forces. Systems and institutions overlap, inter-relate with and influence one another. Both crimes and punishments are defined by their social and other contexts, and leave imprints upon those contexts in turn. As a result, a full representation of community punishment must get beyond the restrictions inherent in the orthodox definition. Incorporating oblique intent into the Hart/Benn/Flew model's intentionality requirement (partially) overcomes this limitation whilst maintaining the orthodox account's benefits: its utility

in providing a (more) clear-cut means of defining punishment. It is a *liberal* compromise, in that it works within the existing structure of the orthodox definition.

The question now becomes, to what extent can the actions of extra-penal agents be obliquely intended by relevant State agents? There are really two groups of pains that a theory of obliquely intended consequences would bring into the analysis of penal impact: those that are virtually certain responses of extra-penal agents *in specific cases*; and those that are virtually certain to follow more *generally*.

In terms of specific cases, pains that would be incorporated include those that arise necessarily from factors relating to the commission of the offence. OCO3, for instance, was convicted of a violent offence whilst living in charitable accommodation. Part of the charity's provision of that housing to OCO3 was that he would lose that housing should he commit an offence on the premises. In his particular case, OCO3's conviction necessarily meant that he would be made homeless,<sup>3</sup> something that the court could have been made aware of through his pre-sentence report. Absent this awareness, however, the court was unable to take this extra pain into account, and therefore imposed a disproportionately harsh sentence.

By contrast, the study also revealed a number of pains that consistently follow from conviction at a more general level. One example I have suggested already is the difficulty offenders face in gaining employment after conviction (recall [6.1.1](#)). A related point is raised by ICO3 and OCO1, both of whom were functionally excluded from certain

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<sup>3</sup> In fact, OCO3 was able to gain new accommodation with the same charity, but of much lower quality and in less pleasant company. However, to the extent that the pains of his eviction at the time of the offence can be separated from the pains of his relocation, the latter would be beyond the scope of even oblique intent, since the court could not know at the time of sentencing what housing, if any, would be available and from which providers.

kinds of employment: OCO1 by a disqualification order; ICO3 by dint of his conviction for fraud.

In OCO1's case, the inability to work with children under the age of 18 is indisputably a direct consequence of his conviction. However, as he noted (above at 5.5.1) the order had no real effect upon him, since he was both retired, and increasingly physically disabled. These factors conspired to reduce the punitive effects associated with OCO1's order.

ICO3's employment exclusion, by contrast, was not mandated by law as a consequence of his conviction. Nevertheless, his conviction for fraud practically excludes him from any future work in financial services, an industry that relies upon its reputation for honest dealings with its clients' money. His difficulty in gaining work is virtually certain, and foreseeably so, just as if he had been employed in the legal or medical professions. In these cases, once again, it is reasonable to interpret the sentencing authority as (obliquely) intending the pains attending that exclusion. We must therefore take account of them in constructing the penal impact of that sentence.

In sum, a relatively narrow range of extra-penal pains would be incorporated into the definition of punishment if 'intention', in this context, included an oblique component. Indeed, a number of pains identified in the last chapter would be excluded, most notably including that shame felt by offenders, and any impact upon their family life that neither followed directly from conviction nor could be seen as virtually certain consequences of the sentence and/or its implementation. Notably, these two pains are consistently ranked amongst the most significant by offenders. It maintains a relatively constrained conception of punishment, one that distinguishes it from its broader social contexts, but which recognises that those contexts may affect it, and be affected in turn. It therefore offers a modest improvement upon the orthodox definition's

weaknesses, without compromising on its core strengths from the perspectives of both sentencers and policy-makers. However, a greater departure from the orthodox account is possible, and, I argue, necessary, on the basis of the special relationship between community punishment and its communal context.

*(b) A 'BOUQUET OF BARBED WIRE': PUNISHMENT AND THE COMMUNITY CONTEXT*

If the analogy to oblique intent is a liberal alteration of the orthodox definition of punishment, the contextual argument is far more radical, in the sense that it argues that the existing framework is inherently problematic and must be replaced. History has undoubtedly overtaken the orthodox model, which was composed at a time before discipline had dispersed, at least officially. Prior to the fall of the rehabilitative ideal and the notion of 'punishment in the community' (recall 1.2.3), most modern community punishments did not exist, and those that did were seen more as alternatives to formal conviction than punitive dispositions (Morgan 2007: 92). Thus 'punishment' consisted largely of incarceration in a total institution, which by its very definition was isolated from community influences (Goffman 1991) and relatively self-contained non-custodial dispositions such as fines and bind-overs, which did not require the same level of activity from offenders, or oversight by penal agents. Given this context, limiting punishment only to those intended consequences that followed from the actions of State agents made a great deal of sense, because the conditions of confinement were almost exclusively under State agents' control.

This is not to say that fines and imprisonment had no social impact in offenders' lives, or that they were not affected by socio-political and -cultural factors. Ex-prisoners face the same trouble gaining employment, for instance, as ex-probationers (if not more), and lack of disposable income following from a fine can be just as great an intrusion into an

offender's life as the loss of time flowing from a community order.<sup>4</sup> However, the nature of those relationships is very different, as a result of the unique *immediacy* of community punishment.

By 'immediacy', I mean the nature of a punishment's intrusion into the offender's everyday life. On the one hand, community punishment's intrusion, like other non-custodial sentences, is non-disruptive (at least *prima facie*). Unlike imprisonment, these dispositions' effects occur concurrently with the subject's everyday life: her ongoing commitments and activities.

On the other, however, community punishment is far more direct in its intrusion than fines, bind-overs, and the like. Instead of restraining the offender financially, and therefore indirectly impacting on her life to the extent that she is unable to afford that which she once could, community punishment directly requires her time and energy in the fulfilment of her order's requirements. In this respect it is much closer (although not necessarily equivalent) to imprisonment, which intrudes so directly as to remove the offender from her everyday life.

Community punishment therefore occupies a distinct position within the sentencing arsenal. Like imprisonment, it directly intrudes upon the offender's everyday life, but it does so without removing her from that social existence. The punishment is therefore unique in the exposure of direct (and more-or-less visible) punitive processes to an active *community context*. As a result, community punishment is exposed to a wide range of different contextual factors that alter the meaning and impact of the penal acts undertaken.

To return to ICO3's joblessness, for example, it is reasonable to say that his conviction for fraud would have rendered him incapable of finding

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<sup>4</sup> Indeed, the experience of offenders from my sample who had received fines indicates that the effect can often be more severe, a tendency I discuss at [6.4.2](#) below.

a job in the financial services industry, even if he had only received an unconditional discharge, or indeed if he had been imprisoned. However, the unique socio-penal situations of each of the punishments imposed exposes offenders to similar pains in different *magnitudes*. It is not (necessarily) so much that context determines the *incidence* of pains, but that it influences the extent to which those pains are felt. The Hart/Benn/Flew orthodoxy ignores this, and in so doing significantly misrepresents the experience of community punishment.

ICS2 masterfully summarises the range of potential forces at work:

**ICS2:** ...[L]ooking at people I supervise... I would say prison's a softer option. Because you get up in the morning, you know what you're doing, you have a regime. You have guarantees, which when you're in the community, you have no guarantees. Oh, except that you're gonna be breached if you don't comply with your order! But there's no guarantee that you'll actually get sent to prison[...] In the community you have to be at the behest of your taskmaster, who's the DWP,<sup>5</sup> be at the behest, because of your offending behaviour, of your other taskmaster, which is probation... be at the behest of your partner. Be at the behest... because you're a father. Be at the behest because you're the only child, or your parents are disabled and when you're not in prison you've got that responsibility. And be at the behest of yourself, because you're fragmented in so many different directions. 'Who am I?' And some of those directions never go away. You'll always have to sign on. If not you have to go to work. So you'll always be at the behest of those. Then you've got to work out with probation, 'When do I come, when don't I come? When I finish

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<sup>5</sup> The Department of Work and Pensions, responsible, *inter alia*, for the distribution of welfare (and especially, here, unemployment) benefits.

with work I just want to go home.' But no. You've committed a crime. So until it finishes, no you can't. So there's a whole lot of that bigger responsibility.

For ICS2, this combination of penal and social pressures determined how severe each form of punishment would be in an individual case. It was impossible to separate the punishment from its social context. Using a powerful, lyrical metaphor, she described the situation as follows:

**ICS2:** [O]nce you commit a crime, you've been handed a bouquet of barbed wire. Which part doesn't stick in the most? Where's the bluntest? Where's the part where it's gone in so much that it's no longer sharp, it's now blunt, so I'll keep going in there. And that may be... I keep being breached. Because the pain is not going to be as much. As if I don't go to DWP or don't go where they send me, because I'm going to be hungry. And if I'm going to be hungry, I'm going to commit another crime.

The radical critique of the orthodox account is therefore predicated upon the unique interrelation between the penal and the social in the imposition of community punishment. The offender receives her penal commitment on top of her pre-existing social duties. That *context* will influence the *content* of her order, by altering the circumstances in which that content is imposed, and in particular, by determining the ease with which she is able (and indeed willing) to comply.<sup>6</sup> The penal system cannot be isolated from its broader socio-economic context. Its impact is affected not only by the social circumstances of the offender (and her fellow-citizens' reactions to her offence and conviction), but also by social

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<sup>6</sup> These observations may well also hold true, in different contexts and to different extents, for other forms of punishment as well – just because an offender is incarcerated, after all, does not mean that her family cease to exist! But it is in the community context that the interrelation of the penal and the social most clearly demonstrate the descriptive deficit of the orthodox account of punishment.

welfare systems and economic policy that determine the ease with which she can acquire the necessities of life (Duff 2001: 197-201).

From this perspective, the objectivist aspirations underpinning the Hart/Benn/Flew model are at best outmoded by the highly visible and immediate nature of community punishment, and at worst are unhelpful distractions that fail to adequately describe the phenomenon of punishment, both within and outside the community.

But however satisfying this conclusion might be to a social constructivist, the question nevertheless remains as to what should be used to replace the orthodox definition. After all, despite the contingency of the definition of punishment upon socio-economic and community forces, it is not the case that it is impossible to define punishment in the abstract. My findings do not suggest that it is impossible to distinguish punishment from its broader socioeconomic context, since every participant made that distinction themselves. But where should the boundaries of punishment fall?

Ultimately, the Hart/Benn/Flew model is not entirely without merit. The constructivist objection is primarily to the 'intended consequence of State actor' requirement. The other essential characteristics (unpleasantness/in response to rule-breaking/targeted against an individual/constituted in the same body of law that has been breached) are largely unproblematic (at least for present purposes). Criminal punishment *does* follow only from breaches of the criminal law (to the extent that we can trust judicial verdicts), and *does* target individuals rather than groups. The real question is what connection must the unpleasantness have to the State, as the (gestalt) actor that defines criminal law, and reacts when that law is breached?

To answer this question, I adapt and expand upon the oblique intent modification I suggested in the last subsection, in order to construct



a taxonomy of relationships between pains and penal impact. First, there are those *direct* pains that are inherent to the process of convicting and punishing the offender. Second, there are those *oblique* pains that State agents can be virtually certain will follow from conviction and punishment. Thirdly, there are the *circumstantial* pains that result from the reactions of the offender herself and of other actors, forces and institutions in her everyday life to the conviction and punishment.

This circumstantial reaction can take two general forms. For one, extra-penal actors can respond to the conviction by taking an entirely new action. For example, as a result of his (domestic violence) offence, social services considered taking OCO5's children into care. Alternatively, the reaction may represent an alteration of the existing relationship between the offender and the extra-penal agent, as with OCO4's increasingly hostile relations with social services after her conviction, or the increasing intrusion of welfare services and charities into OCO6's life.

This approach therefore includes all the pains discussed in the last chapter, which restricted itself to pains arising from some reaction to the punishment. However, there are a variety of pains that can still be safely excluded from the ambit of punishment: those that predate the conviction and implementation of the sentence, and which are materially unaffected by the sentence and the reactions of wider society to it; and those that emerge during or after the sentence as a result of completely novel forces. To continue with the theme of access to children and intervention by social services, an offender who subsequently had a child taken into care for reasons unrelated to the sentence would not have that pain contribute to the construction of penal impact in their case.

It does not necessarily follow that the directly intended pains of punishment are the most significant or severe – this taxonomy is in no way hierarchical. Indeed, my findings indicate that the most significant

pains experienced by participating offenders tended to fall into the third, circumstantial category (see [6.4.2](#) below). Rather, the distinction between direct, oblique and circumstantial pains recognises that the sources of penal impact go far beyond those defined and prescribed by law. To the extent that this raises a problem for rule of law values such as legal certainty and penal minimalism, this is a recognition that current understandings of penal severity are out of kilter with offender experiences, and a call for further discourse.

This point deserves development. I have noted above (at **3.4**) that penal impact is of limited value to sentencers in comparing the severity of two cases, given its inherent subjectivity. However, we can identify the pains that follow from a sentence under this model of punishment, at least to some extent. Both direct and oblique pains can be identified with some certainty. It is only the circumstantial pains that cannot be predicted at the point of sentencing (notwithstanding the availability of pre-sentence reports), and cannot therefore be used to formulate the expected severity of the sentence.

Policy-makers, however, cannot be excused from taking account of the circumstantial pains of community punishment. That these exist is manifestly demonstrated by the findings of this study, notwithstanding the small sample size. Any difference in impact on the basis of these pains is a threat to the concept of equality before the law, and ought to be recognised as fully as possible. Although research-intensive, this information can be filled in gradually with a programme of further empirical study, which can be used to enhance sentencing guidelines and the information available to the judiciary, allowing them to make more accurate predictions about which pains will be felt in which circumstances; in effect moving more and more of the circumstantial pains into the oblique category for the purposes of sentencing.

Regardless of how it is adopted at the policy stage, however, understanding the State's role in exposing offenders to pains directly, obliquely and circumstantially allows for a more nuanced understanding of where pains arise from and how they contribute to overall sentence severity. It is therefore not only possible, but necessary, to take this broader departure from the orthodox account of punishment in our understanding of penal impact, since it provides a more nuanced representation of the social experience of sentence severity.

### **6.3 (Re)Probation: Returning to Retributivism**

When considering the question of which pains can be considered relevant for understanding penal impact, we must remember this study's fundamental basis in retributive theory. We require a clear understanding of the severity of punishment, because it must be *proportionate* to the seriousness of the offence committed. However, retribution requires more than just proportionate (and parsimonious) punishment. It also needs the *censure* of criminal acts: of explicit labelling of wrongdoing as such (and more than that, as *criminally* wrong; as a wrong against society as a whole: Ashworth 2009: 1), and of rejecting the crime on society's behalf:

Both penalties and punishments are authoritative deprivations for failures; but, apart from these common features, penalties have a miscellaneous character, whereas punishments have an important additional characteristic in common. That characteristic [...] is a certain expressive function: punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part of the punishing authority himself or of those 'in whose name' the punishment is inflicted. Punishment, in short, has a *symbolic*

*significance* largely missing from other kinds of penalties (Feinberg 1970: 74, emphasis in original).<sup>7</sup>

This raises a more fundamental challenge for identifying the penal impact of community *punishment*, both in this specific study and more generally. We have seen how, both at the level of institutional theory and that of practitioner attitudes, the Probation Service remains a humanistic, forward-looking, offender-focussed agency whose principal concern (however mitigated) is rehabilitation. In pursuit of this end, participating staff were reluctant to associate their own work with censure – there seemed to be relatively little place for reprobation in probation, in other words:

**ICS1:** It's about changing behaviour. There's a lot of evidence along the lines of: focus on the negatives has a negative impact on 'em. And you should also put an equal amount onto the positives of what they've done, and what they're doing well, their successes in life, really. And be able to have a bigger influence in behaviour change, and reducing reoffending, really.

Thus, the rehabilitative concerns of probation officers seem at first glance to trump the implementation of a basic component of retributive justice. Indeed, many offenders, regardless of attitude, tended to see probation in less than censorious terms:

**OCO4:** This [probation] is more like, "sort your problems out," basically, and help, towards them. Which is not a punishment, really. They're just giving me more help than what the social workers ever did, you know.

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<sup>7</sup> Feinberg's distinction between 'punishment' and 'penalty' may explain the orthodox label of 'community penalty' that is typically applied here (recall [1.1.1](#)): 'penalty' leaves the reprobative feature of community punishment ambiguous, allowing non-retributivists to meaningfully discuss these sentences without conceding semantic ground to their opposite numbers. However, in this context Feinberg (1970: 73-74) is talking about 'mere "pricetags"' such as public parking fees and demotions.

**OC06:** And I think, because they don't need to know I don't have people talking to me about it, so I tend to forget, really, that I'm on an order, and this that and the other! [...] So it's not really hard, too much of a detrimental effect.

This is a serious issue for the construction of penal impact, to the extent that the rehabilitative work of probation crowds out censure from offenders' experiences of community punishment – and in particular, from the clearly censorious act of convicting them. It renders the pains experienced non-retributive, and therefore beyond the comprehension of penal impact. The pains excluded continue to hurt, to be sure, but they cannot be justified under a retributive model. Without reprobation, it is not community *punishment*, but merely a penalty, however painful:

The reprobative symbolism of punishment and its character as 'hard treatment', though never separate in reality, must be carefully distinguished for purposes of analysis. Reprobation is itself painful, whether or not it is accompanied by further 'hard treatment', and hard treatment, [...] because of its conventional symbolism, can itself be reprobatory. Still, we can conceive of ritualistic condemnation unaccompanied by any *further* hard treatment, and of inflictions and deprivations which, because of different symbolic conventions, have no reprobative force (Feinberg 1970: 74, emphasis in original).

In the rest of this section I examine the extent to which rehabilitation does cancel out reprobation from the hard treatment of community sentences. I firstly return to the communicative model, reviewing the concern with censure from that specific standpoint, before returning to the data in this study, and attempting to identify the extent to which the retributive credentials of the punishments under study are

secure, bearing in mind that rehabilitation and retribution are not necessarily mutually exclusive objectives (recall [2.2.3](#)).

### 6.3.1 Censure and Communication

Recall from [2.1.3](#) that Duff (2001: 143-145) suggests that community punishment, like all modes of punishment, carries a standardised meaning that demonstrates some form of innate censure of the offender's actions; in the community context, by calling upon them to prove their 'trustworthiness as a citizen'. In so doing, he argues, probation contains a censorious message that communicates society's condemnation of the criminal act whilst encouraging the offender to change her behaviour in the future.

Duff's assurances regarding the censorious nature of community punishment are not immune from critique, however. In particular, his vision of communicative criminal justice is unduly *totalising* in terms of the meaning that punishment holds for those subject to it. Every mode of punishment is taken to carry the same essential meaning, regardless of context. It is reasonable to assume that Duff intends some flexibility here: for instance, a longer period of probation indicates that the offender has more to answer for; her 'secular penance' (Duff 2001: 106) must demonstrate more contrition. Similarly, there is no reason to suppose that an offender who is subjected to multiple modes of punishment could not be making amends through multiple means.<sup>8</sup>

Nevertheless, Duff's understanding of meaning, symbolic or otherwise, remains open to challenge. It addresses modes of punishment primarily from the perspective of a sentencing authority concerned with

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<sup>8</sup> For example, ICO1 committed an act of domestic violence, and received a supervision requirement and unpaid work requirement under a suspended sentence order, alongside a fine. Duff's model could interpret this as a relatively nuanced communication that indicates that: (a) ICO1's offence was very severe, so much that it is *almost* necessary to enact the temporary exile of incarceration; but that (b) he is still on the threshold of being able to prove himself worthy of citizenship; and that (c) certain of the harms caused by his offence can be repaired financially. The validity of these claims is debatable, but they are certainly possible interpretations.

judging the suitability of a sentence as a (proportionate, communicative) response to criminality. From the perspective of the current study, this raises two epistemological issues.

Firstly, the objectivism implicit in Duff's conception is at odds with my social constructivist approach. We cannot treat the meaning of different modes of punishment as static and agreed because, notwithstanding that they may be agreed by a large proportion of the relevant community, all meaning is dynamic and contested, determined by the interactions of individuals, groups and institutional forces within a broad social context (Berger and Luckmann 1967). The meanings Duff assigns to each mode of punishment may agree with his own perceptions, and may be less arbitrary to the extent that they draw upon the historical meanings attached to each mode by theorists, institutions, and broader society. However, there is no reason to suppose that those meanings necessarily concur with the experience of offenders in every individual case. They ought not to be presumed in an empirical study of the subjective impacts of these punishments upon individual offenders' lives.

This leads to a second, related concern. Duff's description of the meanings for the modes of punishment makes a series of empirically untested claims on the basis of an exclusively theoretical (and, in fairness, normative) account. The extent of his defence of the censorious meaning of community punishment therefore rests upon the concordance of his theoretical claims with the observed reality of offenders' punishment in the community.

In the next section, I therefore turn to examining how closely the work of participating staff supports the claims underpinning Duff's argument, both in terms of the meanings assigned by those supervisors, but also the experiences of the offender-participants.

6.3.2 Reproductive Probation? Censure in This Study's Findings

On Duff's (2001) account, in order for community punishment to be effectively censorious, it must fulfil three criteria. Firstly, punishment ought to communicate to the offender that their offence represented an unacceptable breach of socially agreed norms – that is, that their actions were *wrongful*. Secondly, by punishing the offender in the community, it ought to communicate that their trustworthiness as citizens has been cast into doubt. Thirdly, probation's rehabilitative engagements must focus upon the crime, and communicate that the assistance they provide to the offender in changing her ways is only forthcoming because of her initial wrongdoing.

Absent these three criteria in probation practice, pains associated directly with staff attempts to rehabilitate the offender (but not those obliquely or circumstantially related to her conviction and the imposition of her order, or those directly related to the order without being associated directly with probation practice) cannot be associated with the penal impact of community punishment, because they are not part of community *punishment*. To return to Feinberg's (1970: 74) distinction, these pains are 'mere penalties' rather than punishments, and cannot be justified under retributive theory. If such suffering is to be justified, it must rely on other theories, for which the analytical framework of penal impact is likely to be of little use.

The communicative criteria do not necessarily require that the offender actually perceive herself as being punished, either by the Probation Service in particular or the criminal justice system in general. For Duff it is not especially necessary to communicate that message. So long as the offender perceives that she has done wrong, that she therefore deserves the imposition of the order, and that efforts to attempt to help her to change her ways are motivated by her wrongdoing, then it does not



matter to what extent she perceives that as being an *adequate* punishment.

This might seem odd for a retributive approach, given that this class of penal justifications tends to draw inspiration from the classic assertion that wrongdoing deserves punishment.<sup>9</sup> Indeed, this reflects Duff's ambiguous relationship with traditional retributivism. For him, it does not necessarily matter whether wrongdoing deserves *punishment* or not, given that 'there is surely nothing puzzling about the idea that wrongdoing deserves censure' (Duff 1998: 50).

Of course, this distinction is largely theoretical – as Feinberg (1970: 74) notes, any reprobation is likely to involve some level of pain, and most hard treatment some element of censure. However, this will not always be the case, a fact that is illustrated by ICO3, whom we should recall was extremely dismissive of the potential for probation supervision to provide adequate punishment in his case. Whilst extremely dismissive of the punitive content of supervision, he otherwise adopted a position similar to Duff (2001) in terms of what made a punishment effective:

**ICO3:** I mean, I was charged with fraud. For me to attend here every fortnight is not a punishment. It is *not* a punishment. I should have been made to have paid at least some of that money back. Then that would have been more of a punishment than this. It's different if you've committed a sex offence, because how can you pay that back?

Note the similarity of this perception with Duff's (2001: 146-152) distinction of the relative meanings of fines and imprisonment, discussed above (at [6.3.1](#)).<sup>10</sup> Clearly to ICO3, probation has failed to communicate

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<sup>9</sup> On this mainstay of retributivist analysis, see the fascinating analysis in Kleinig 2011.

<sup>10</sup> ICO3's crimes were motivated at least in part by his increasingly high level of debt. The judge probably took this into account in the pragmatic decision not to impose a fine.

the message that he is being punished. But did it communicate that he (and his fellow offender-participants) had done wrong?

*(a) ADVISE, ASSIST, CENSURE? REHABILITATIVE PRIMACY IN PROBATION PRACTICE*

The first observation that ought to be made is that the work of probation officers represents only one part of the long chain of events linking the crime and punishment, and that each of these may be censorious in their own way. In particular, the criminal trial, and especially the sentencing decision, was highlighted by a number of offenders (e.g. ICO1, OCO2, OCO5 and OCO6) as bringing home what they had done. Just as we cannot assume that the meanings attributed by penal philosophers to penalties are those that are actually negotiated between the offender and the penal system, neither can we ignore the institutions of criminal justice that precede that system (Duff 2011).

However, notwithstanding the censorious possibilities of the courtroom (which in any event affect the specific pains of engagement with probation only indirectly), community punishment is an ongoing process, and one in which the probation officer acts as the main representative of the penal system in the offender's life. Their interactions with the offender will continue to determine the meaning and purpose of the sentence, and therefore the extent to which it communicates censure.

The evidence collected in interviews suggests that, despite the (albeit slight) differences in their attitudes towards their work, probation officers tended to approach their engagements with offenders in a broadly similar way. OCS5 describes the process of a 'typical supervision session', in a manner similar to other staff participants' approaches:

**OCS5:** I usually put a note on the last contact to say what I intend to do in the next session. At the beginning of the appointment I usually check out how people are, I'll talk to them about what we covered on the last session, what's happened between now and

then, what the intention is for this session, and that always links into what's in the supervision plan, so we often refer back to that.

In this context, OCS5 was clear that she was discussing an offender hypothetically 'about midway through' their order. The distinction is important, as the subjects of supervision would change quite a lot over the course of a sentence. Indeed:

**OCS5:** [T]he first appointment is more explaining why they're here again, and explaining what they've been doing and all the rest of it, which is all in their files and that, but it's just a way to open up that conversation, I suppose.

Officers then tended to leave this 'offence analysis' to one side, abandoning the focus on the act and turning to broader issues in the causes of the offence and the risk factors that might encourage recidivism:

**OCS5:** And then you might move on to address some of the other issues, which might not be directly linked, but then if you keep having to go back and explaining that, it can feel like you're not being allowed to move on, I guess, sometimes.

Although she did go on to stress that they would not avoid talking about the offence if it was relevant, and noted that it could occasionally be useful to stress why offenders were there, OCS5 nevertheless emphasised the general approach, from which staff descriptions tended to vary from only slightly throughout the course of the study: they would focus upon the act and how it had led the offender to the probation centre in the first few sessions, before shifting the focus onto prospective matters: things that were interfering with offenders' capacities to engage with their orders or to adopt pro-social attitudes and behaviours. Indeed, as ICS1 noted (see quote above, at p. 238), it could even be detrimental to focus overmuch upon the offence.

This suggests that the communicated meaning of probation engagements routinely changes over the course of an order. Notwithstanding that the offender's own opinion of their sentence may change over time,<sup>11</sup> staff attitudes towards achieving effective rehabilitation (and public protection) indicate that, whilst there is a significant censorious link at the start of the supervisor's involvement in a case ('You are here because you have done wrong, and we will help you not to do wrong again'), this tails off significantly and becomes far more benign and prospective in content ('Here is how we can support you'). Whilst the offence looms in the background at all times, its importance diminishes and can become lost behind the attempt to be positive and encourage meaningful change. This is highlighted in the following exchange with ICS3 and ICS2 in their group interview:

**ICS3:** It highlights how [supervision has] kind of impacted: on themselves, on victims, on the community, but then it's about... looking at, kind of, how to build them back up, I suppose. Bit more holistic approach, really.

**ICS2:** And altering their thought-processes. A thought like this at that second, at that moment when the crime was committed, but how could you have thought different; rather than: "You naughty person! You must be punished! You done this." They know that already.

ICS2's observations here are particularly instructive as (together with OCS1) she was one of the more outspoken proponents of including punishment in probation practice. Nevertheless, her comments indicate that the focus of probation switches increasingly away from the act and onto the actor, in line with the Service's objectives of reducing re-

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<sup>11</sup> An emerging branch of psychological discourse suggests that in general, anyone subjected to a negative experience (such as the pains of punishment) will 'hedonically adapt' to the experience, so that the unpleasantness of the experience lessens over time: Bronsteen, Buccafusco and Masur 2009.

offending and protecting the public. Having moved beyond offender analysis, the OM's task becomes ensuring that the offender is able to live a crime-free life, giving little direct attention to the fact of the offender's specific offence. In this context, offenders are free to develop a broad range of understandings of their sentence, from those who do continue to interpret their presence as a consequence of the crime (OCO2, OCO3, OCO5, ICO1), through to those who experience it in far less judgemental terms. I have already discussed OCO6's laid-back perception of her responsibilities to attend probation sessions; here she discusses the extent to which she felt punished by her order (emphasis added):

**OCO6:** No, but probation's been good. I don't feel like... it's not been too harsh, really. The hardest bit were going to court, and listening to it all. But apart from that it's not been... I don't think about it all the time. *I don't think about it at all, really!* 'Cause I have so many other things that are occupying me!

OCO6's punishment has lost all relevance to her own wrongdoing – indeed, she does not think about her offence at all in her day-to-day life, despite being inundated with probation appointments and interactions with other external agencies working alongside the criminal justice system. Her case is somewhat exceptional, given her history of alcoholism and mental health difficulties, but this simply serves to underline the point that, in the absence of a continuing focus upon the offender's wrongdoing, different contexts can lead offenders to attribute different meanings to their orders.

Indeed, censure was far from a universal experience among participating offenders. Particularly where the offender minimises or trivialises their own guilt and the severity of their sentence, as was the case with partially-engaged or engagement-resistant offenders, it was relatively easy for them to see the help that probation provides them in entirely prospective and non-castigatory terms. At first blush, it appears

that the retributive justification of the pains of rehabilitation associated with probation interventions may be rather compromised, and limit the retributive content of the order overall to at least some extent.

*(b) 'VICTIM-WORK' AS CENSURE: RETRIBUTION AFTER ALL?*

Notwithstanding this general tendency to reduce the censorious content of probation as the order continues, a closer reading of probation practice imposes two limitations upon any rejection of supervision's censoriousness. In particular, staff-participants' clear focus on 'victim work' shows a tendency to offer the species of offence-focussed reprobation Duff (2001: 143-145) requires.

This emphasis on 'victim work' was cited as a feature of supervision work by a number of staff, although OCS3 was most outspoken in her support for it. Indeed, for her, concern with victimisation was central to her role:

**OCS3:** I think the overall arching goal [of probation] would be to have no more offending, and no further victims. How we approach that with the individual, and what we, kind of, what other achievements we can get in the supervision very much depends on where they're at, or what their particular circumstances are.

Critically, the presence of past and potential future victims in the constellation of concerns that supervision had to address encouraged OCS3 to maintain fidelity to her roles as an enforcer – and indeed, as a punitive agent:

**OCS3:** [P]art of our values – of my own values – is a commitment to there not being any more victims. And so, whilst there's that constant tension whether you're believing in capacity to change, and wanting the best outcome for the offender, and then wanting the best outcome for the victim, and our own, kind of, internal

pressures about getting things done on time and... to be seen to be monitoring and assessing and acting on risk appropriately.

By 'victim work', staff referred to cognitive supervision sessions at which they attempted to bring the victim and the impact of the crime upon him to the offender's attention. This type of work involved both pro- and retrospective elements: recognising victims of the crimes that led to community punishment; and working to prevent future victimisation:

**ICS4:** Well there's more victim work now than ever there used to be. So obviously we're about protecting the victim. Not only the one they've just done but hopefully there's no more offending, so there's no more victims.

**ICS3:** There's that kind of, like, punishment and rehabilitation, and victims are sort of in your mind as well. What is going to be more beneficial for... I suppose, everybody?

The institutionalisation of victims' justice values into probation practice is important, because it serves to highlight the wrongfulness of the crime that the offender has committed, and focusses specifically upon the wrong done (or rather, the person or persons to whom wrong was done) rather than on the wrongdoer. It therefore serves to boost the level of censorial communication involved in the process of probation rehabilitation. One example where this is particularly the case was illustrated by ICS1, who described the importance of debunking the idea that shoplifting was a 'victimless crime':

**ICS1:** [V]ictim empathy is something that we do with every offender, no matter what the offence is. So, for instance, if it's a violence offence it maybe seems more obvious in terms of that, but for example we do do some exercise with shop theft, where quite often the perpetrator doesn't identify a victim. You know, they're stealing from a multi-million pound organisation if it's

Tesco's. But sometimes it's a local family shop, and that impacts more heavily. But[...] quite recently there was some evidence that, if there was no shop theft the grocery bill per person per year would reduce by £200-£250 per year [*sic*]. So, you know, people look at Tesco and think they can absorb it, but it does have an impact.

Work of this sort supports Duff's conception of probation's communicative censoriousness, in that it emphasises the identification of the crime as wrongful conduct. Moreover, it contextualises the rehabilitative efforts of the officer as censure, demonstrating that they are not helping offenders out of the goodness of their hearts, but because the offender's transgression demonstrates that they need assistance:

**ICS2:** I'm not comfortable with 'service user' [as a way of referring to offenders], because I think that then takes away from the victim and everybody, and it takes away from the fact that you're not here because you've won the lottery. [...] You're here because you've broken the law. So it's hard for me mentally to see that individual as a service user. A 'client'? Maybe yes, because... I don't know whether it's because they are a client when they go to see their barrister, or whatever. Yes you've still committed a crime, so 'client' rests better with me. They've come to deal with an issue. Their issue with me is offending. Behaviour. So to me, 'client' is better.

**OCS5:** So it might be, you know, helping them to think of alternative ways of dealing with problems, maybe looking at why patterns of behaviour have emerged and why they've got into certain cycles of behaviour, and what they can do to break those, and why that's important. Not just for them, but for other people as well, including victims.



Indeed, OCS7 confirmed that this was a way of returning to the offence in a way that was not overly dismissive of the offender's progress since the offence, while recognising that the offender was there for a reason and that what they had done was problematic.

Where victim work had been most effective, it served as both a key source of pains – especially those related to shame – and a core motivator for reform among offenders:

**OCO3:** It's just a natural progression. [...E]ach point is a valuable lesson to learn, from your initial action, to the consequences of your action. [...]It's all there to remember and learn from. And valuable lessons. Because it serves to stop you from becoming complacent.

Thus, victim-focussed work simultaneously serves rehabilitative *and* punitive agendas. OCO2, for instance, described the process of engaging in group-work as part of his accredited programme requirement:<sup>12</sup>

**OCO2:** I mean obviously there's different [questions] that you go through... I can't remember what they all are but you've got minimisation, denial and blame, and obviously, it gets you. You write down in past terms what's gone off, and obviously... I wrote it down and thought, "Did I really do that?" You know, you start thinking, and you think, "Wow." You just think, "What a... what a knob!" [...]I don't want to be that person anymore.

Likewise, OCO5 saw the two processes – punishment and rehabilitation – as effectively coterminous:

**OCO5:** The punishment would've been two years' probation. Because I wouldn't face up to what I did. And the IDAP. To me that [was]... my punishment, I had to face up to what I did. And

<sup>12</sup> Like OCO3 and OCO5, OCO2's programme was the 'Integrated Domestic Abuse Programme', or IDAP. It consisted of regular group-work sessions that aimed to identify the causes of abusive behaviours and offer alternative modes of thinking and behaving, in order to encourage participants not to reoffend.

now I can change my ways. But at the same time, you know, to see if I can fix myself, to see if I can be a good person.

In cases such as these, and in the widespread attention to victimhood in probation practice, there is therefore evidence of reprobation of wrongful acts. It is clear that probation is not straightforwardly censorious in its activity, but neither is it the case that it straightforwardly has no censorious content.

### 6.3.3 Retribution, Censure, and Penal Impact

Where does this leave the construction of penal impact? On the one hand, it is clear that some offenders – especially those fully engaged with their order – do experience a significant amount of censure as arising out of their community punishment. On the other hand, OCO6 obviously did not, whilst others, such as OCO4 and ICO2, had a more tenuous understanding of the condemnation that Duff presupposes of community sentencing. Is it meaningful to talk of a (retributive) penal impact of community punishment in their position?

There are a number of questions bound up in this one: firstly, to what extent does the censoriousness of the sentence at court compensate for any deficiencies in the censure provided by probation? Secondly, to what extent must censure be expressed constantly and uniformly throughout the sentence? Thirdly, and most importantly for present purposes, to what extent does the level of probation censoriousness affect the penal impact of community penalties?

In the case of the first question, the answer varies from case to case. The impact of the court – and the trial – on the offender and her relation to her offending was often profound. This cut across the spectrum of offender attitudes: OCO5 and OCO6 both reported that this was a serious moment of introspection, shame and humiliation, whereas for ICO3, the lack of 'substantive fit' (Duff 2001: 143) between his offence

and the meaning of his community sentence devalued the institutions of court, and therefore undercut the censoriousness of the communicated message by reducing its inherent authority as an institution in relation to him. Likewise, ICO2's long criminal record meant that he had developed, if not contempt, then at least apathy towards the court through familiarity: one more time through the judicial mill would not have much effect on his perception of himself.

However, in terms of the level of censoriousness attached to an order, it seems that the court *does* have a significant part to play, both in terms of formally condemning the offender's conduct and in determining the form and content of punishment imposed – which orders and requirements, and in what measure. The impact of the number of requirements imposed and offender attitudes on the offender's pain (or indeed, the level of censure she felt) was not directly proportional – for instance, OCO2 and OCO6 both received very similar orders but reported radically different experiences. Nevertheless it appears that those who reported the lowest level of censure tended to have fewer requirements and orders imposed at sentencing.

Indeed, there was often a recognition that pragmatic, non-retributive factors had contributed to decisions regarding which requirements to impose. OCO1, OCO4, OCO6 and ICO3 all highlighted how their relative physical or mental disability played a role in disbarring them from prison and unpaid work, for instance. However, this did not automatically indicate a non-censorious perception of punishment. OCO2 and OCO3 both believed that poor health kept them out of prison, but experienced the communication of their wrongdoing very effectively. The court's role was therefore important to offenders' experiences of censure, but was not solely determinative thereof.

In order to identify how effectively community punishment imposed censure in the current study, a second question must be addressed: to what extent must censure be imposed equally throughout the sentence? Clearly the answer is not that there must be consistent uniformity. What matters is not a constantly negative, retrospective focus in probation practice, but that there is a clarity of message and a demonstrable impact upon the communicated party – that is, the offender.<sup>13</sup>

In terms of the clarity of message, it is evident that, due to the presence of victim work, offence analysis and similar offence-focussed work, even the positive aspects of probation work do tend to adhere to Duff's perception. The prevalence of concern with victims, as well as of focus upon the offender's thinking and behaviour, emphasised not only that support would offer the possibility of change, but that there was a reason why that change was desirable from the perspective of the State. Whilst one might contest the precise content of Duff's understanding of the communicative content of probation and other forms of community punishment, the essential content is there: we will help you to change, *because* the way you are now is problematic, in that it has led you to offend.

In terms of offender impact, things are less clear-cut. On the one hand, offenders such as OCO4 and OCO6 plainly had little day-to-day experience of being censured: OCO4's attention was elsewhere, given her battle with social services, whilst OCO6 largely perceived probation as a social welfare intervention. On the other, however, every offender understood why they were on probation: they recognised that they had broken the law and had received their orders as punishment for that

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<sup>13</sup> Of course, a sentence and its implementation do not *only* communicate to the offender – they also speak to victims, communities and the general public, for instance (Duff 2011). Nonetheless, it is the offender whose experience most matters in the infliction of censure, and so it is upon her that I focus.

breach. It might not be particularly *effective* punishment, from their perspective, but that did not stop it from being punishment:

**DH:** Do you see *this* [*gesturing about the interview room*] as a punishment? The probation work?

**OCO4:** ...Yeah.

**DH:** Why do you say that?

**OCO4:** [*Looks at DH as if he is stupid*] Well it is, innit? I gotta come down here every week, and do whatever they ask me, and stuff like that...

The fact that 'stuff like that' was very constructive and helpful from OCO4's perspective did not stop her from perceiving the censure implied by her situation. Attitudes similar to OCO4's were common amongst less-engaged offender-participants, both explicitly and implicitly. Duff's (2001) standpoint does not require much more than this, at least in terms of communicating *censure*, as opposed to effective (proportionate) punishment, or as a means to encouraging reconciliation, rehabilitation and reparation. Offenders knew that they were being punished, and that is probably enough for present purposes.

From the foregoing, then, it appears that Duff's (2001: 143-145) theoretical understanding of the censoriousness of probation supervision is broadly supported by the data from the current study. There certainly could be more reprobation in probation, as OCO6's ambivalent attitude suggests. Moreover, the experience of censure was far from uniform, with offenders varying considerably in their conception of their own wrongdoing during their everyday lives. However, probation engagements effectively communicated that the offenders had done wrong and that they deserved censure for their misdeeds, through punishment. These findings suggest, in sum, that even the most benevolent intervention fits into a retributive schema of the pains of community punishment. Accordingly, the

humanistic, rehabilitation-oriented approach of the participating staff does not prevent the inclusion of the pains resulting from their interventions from being considered as part of the justifiable penal impact of community punishment in England and Wales.

#### **6.4 Organising the Pains of Community Punishment**

A comprehensive understanding of penal impact requires a means by which to compare the detected pains of community punishment. After all, each pain was experienced differently, and at a varying intensity, by each offender. Furthermore, not every offender experienced every pain.

In addition, due to the limited attendance at offender group interviews, where pain severity was most explicitly discussed, it was not possible to explore the relative severity of every pain with every offender. Given these limitations, how can I provide an image of sentence severity through the analytical framework of penal impact that gets beyond a simple compendium of pains?

I approach the issue of comparing the severity of the pains of community punishment by examining tendencies in how the participating staff and offenders described the severity of pains, before moving on to discuss the implications of this study for the construction of the penal impact of community punishment. Firstly, however, I must briefly deal with the problem of attempting quasi-numerical comparison with non-numerical data.

##### **6.4.1 Numerical Schema and Non-numerical Data**

The first question is what sort of comparative model am I trying to develop: a hierarchy? A spectrum? Or something else? The problem is that both hierarchies and spectra imply an inherently numerical approach, whereas my data are non-numerical. Both models position individual data points between two extremes: on a spectrum, between two polarities; in a

hierarchy, between the most and the least significant in terms of the organising variable (in this case, penal severity). Whilst a hierarchy is often categorical rather than integral,<sup>14</sup> it ultimately places individual cases at higher or lower points within the categories it defines, and so relies on an implicitly numerical approach.

Unfortunately, this analogy is fundamentally weak. Pain cannot be reduced to a number, but it is difficult to systemise or compare pains consistently without either relying on numerical scales ('How severe is pain *x* for you on a scale of one to five, where one is the least intense and five the most?'), or upon non-numerical categories that are often just numbers dressed up in wordage ('Would you say that pain *x* is: Not at all intense/Not very intense/Somewhat intense/Intense/Very intense?'). Pains differ from person to person, firstly in their objective intensity: a paper cut is different from an amputation, or indeed from the pain of bereavement; but it is difficult to quantify exactly how different. Secondly, they also differ in the internal quantification of the pain (one individual might rank the paper-cut as a '2'; another as a '4'; and so on).

However, simply abandoning the numerical approach to comparison is also problematic. At its most extreme, a non-numerical comparison becomes a simple compendium, with perhaps a little annotation as to which pains tend to be most and least severe. However, if the comparison remains relatively close to the numerical level, it suffers the same problems of arbitrariness and overgeneralisation as an explicitly quantitative approach. Any qualitative comparison that attempts to make fine distinctions about relative penal severity must skirt between these two extremes, in other words.

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<sup>14</sup> That is, it reduces data points to broad categories rather than to individual values, as, for instance, under the Anglo-Welsh sentencing thresholds (discussed at [2.2.1](#)).

I cannot hope to overcome these long-standing difficulties here – to properly do so would require a programme of mixed-methods research beyond the resources of the current study. However, we can go further than the list of pains presented in Chapter **Five**, for three reasons.

Firstly, some data were directly collected on the relative severity of pains, from two of the three offenders who attended group interviews. As part of the interview, participants were asked to rank the relative severity of categories of pain, drawn from the results of primary interviews.<sup>15</sup> They were informed that they could refuse to compare, but both offenders who took part in this exercise were willing, and evidently able, to make relative comparisons, and constructed relative hierarchies of the pains in their own cases, discarding those that did not apply to them.

Secondly, additional data about the relative severity of pains were both directly and indirectly available in the primary interview transcripts. ICO1, for instance, felt that unpaid work was relatively easy for him given his circumstances, but was willing to empathise with others:

**ICO1:** Of course I mean, for me, I don't have any children, or anything like that. But a lot of the people I got to know on community service, they have children, they do go to work all through the week, and they liked to have their weekends for spending time with their children. And they couldn't. [...]And I feel for them.

In their willingness to compare the impact of the pains of community punishment in their own lives, and less frequently, to empathise with

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<sup>15</sup> One offender in the OC group interview (OCO5) had to leave early due to a miscommunication and so did not take part in the comparative exercise. Therefore only two, OCO3 and ICO3, actually undertook this task. The exercise started as a visual illustration using cue cards, but in both cases the offenders intervened to take control themselves, without prompting. Whether every offender would be as willing, and therefore whether this would be an effective exercise to build systematically into a methodology, is a matter of speculation; in all probability, some would find the task rather patronising or distracting.



others,<sup>16</sup> offenders provided an indirect source of information for effective comparison of pains.

Thirdly, staff participants offered some general observations about the relative severity of pains of community punishment when discussing broader trends that they observed in their client base. Although second-hand and subject to their own institutional and personal perceptual slants, these data provide a useful supplement to offenders' testimony.

Ultimately, what I will construct will be functionally indistinguishable from a hierarchy, and therefore subject to the limitations I have identified to at least some extent. However, to the fullest extent possible the categories of distinction I use are based upon participant experience, drawn from multiple data sources. Moreover, we can incorporate some subjectivity into the hierarchy that emerges. The distinction of offender attitudes and the availability of knowledge about their circumstances (from case-file analysis and interviews) allows further insight into the factors that cause certain pains to be experienced, and the extent to which they impact on offenders' lives. Whilst the limitations of this comparison must be recognised, and should be supplemented with further research, an effective, reflexive comparison is possible, and will help to open the way towards an effective comparison of pains.


#### 6.4.2 Tendencies in *A Study on the Impact of Community Punishment*

Let us therefore examine the data on the relative severity of pains in the current study's findings. The first port of call should be the explicit rankings presented by OCO3 and ICO3 in their second interviews, the results of which are included in Table 6.1.

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<sup>16</sup> This empathy was most common in the comments of fully-engaged offenders, and less so in those with less cooperative attitudes.

*Table 6.1 Relative Severity of Experienced Pains, by OCO3 and ICO3<sup>17</sup>*

Level of Pain	OCO3's Pains	ICO3's Pains
<div style="text-align: center;">  </div>	Family Relations	Family Relations
	Shame; Wellbeing	Shame
	Work/Looking for Work; Lifestyle	Loss of Freedom; Lifestyle; Stigma
	Stigma; External Agencies	
	Loss of Time and Money; Loss of Freedom	Loss of Time and Money; Work/Looking for Work
Less Significant		

*(a) GROUP INTERVIEW ANALYSIS*

We must bear the differences of attitude and perception between the two offenders in mind. Whereas OCO3 was fully engaged and tended to be very willing to link his pains to his order, and therefore to see it as a punishment, ICO3 engaged only partially and was stridently opposed to the notion that probation was punishing him, or even had the capacity to do so. Whilst he recognised the pains listed in Table 6.1, in other words, he rejected that they had much to do with probation. Rather, he 'brought it all on [himself] by what [he] did' (recall quote at p. 179 above).

I have already argued (at **6.3**) that circumstantial and oblique pains of punishment should be included in the analysis of penal impact. Thus, I am committed to consider the relative severity of indirect pains of community punishment, despite ICO3's dismissal of them. This is not to say, however, that ICO3's dismissal of these pains has no effect; it may be, for example, that the overall severity of his pains is lower, relative to OCO3. For instance, the impact of the interference with ICO3's family life may be relatively less severe than in OCO3's case, because he does not

<sup>17</sup> The categories herein differ somewhat from the data in Chapter **Five**. They were derived from primary interviews for the purposes of this exercise. They are discussed in the following analysis.

perceive it as a direct consequence of penal agents' actions. However, this is only extrapolation, and requires substantiation through further study.

Turning to these two self-constructed hierarchies of pain, then, it is clear that there is more similarity than difference, despite the attitudinal and circumstantial variation between the two participants. In particular, the impact of the conviction and punishment upon the offender's family life was seen as the most significant pain by both offenders, without compare, although both also considered shame (in the sense of personal angst over the offending and conviction, as discussed at [5.3.1](#) above) to come a close second. Both were also relatively dismissive about the impact of the order on their time and money, although in fairness, both were also subject to relatively few requirements, and both were out of work at the time of the study.

The rest form a continuum between these two certainties, although the differences in their experiences should not be understated. ICO3, for instance, was concerned neither with the intrusion of *external agencies* into his life, nor with the impact on his physical and mental *wellbeing*: although he was hounded by the police over his ex-partner's domestic violence allegations, he saw that as having nothing to do with his order (recall [6.2.2](#)); and whilst he struggled with depression during and after the offence, the conviction and order did not have a material effect upon his ability to cope. In both cases, OCO3 noted these issues as relatively significant: he noted being subject to additional police attention as a result of his conviction, and saw the order, particularly the separation from his family, as representing a real obstacle to his own recovery from poor mental health.

Both considered that their *lifestyle* was restricted as a result of the conviction, especially in terms of domestic upheaval. For ICO3, this was due to his partner leaving him as a result of his offence (although he

believes with hindsight that his conviction only hastened the inevitable); for OCO3, because his accommodation was rescinded by the providing charity following conviction. *Stigma* was also a significant, middling concern, although both felt that this was limited to their status as offenders rather than their being 'on probation', an attitude that tended to conform with the broader feelings of the sample as a whole (recall 5.5.2).

*(b) GENERAL OFFENDER EXPERIENCES*

Turning to the primary interview data from the offender sample as a whole, a similar general pattern is apparent. Deprivation of family relationships was clearly a very important factor, especially where that family included the offender's own children. In some cases (OCO4, OCO6) the children had been removed from the family home before the offence, and therefore the pains associated with their absence could not be attributed to the penal impact of their community punishment. However, where the children had been removed it was seen as extremely significant. OCO5 offers the clearest example of this impact. To overcome the alcoholism that had led to his domestic violence, OCO5 elected to go 'cold turkey', choosing against his case-worker's advice to undergo extreme physical pain purely in order to return to his family more quickly:

**OCO5:** [H]ow I see it, I was still drinking. And even if I had four cans a day I was still putting alcohol into my system. I wasn't stopping. I'm still feeding that habit. And I wanted to be back with me kids, and family. 'Cause I wasn't allowed back home 'til it all got sorted out. And I wanted to be back with my lovely family. So I just decided one day. Woke up one day thinking, "Right. Today's going to be, you know. [The day I stop drinking]."

For him, separation from his family was a greater evil than the health risks of instantaneous abstinence. Likewise, for OCO2, the fact that he had returned to the family home made his order significantly easier to endure:

**OCO2:** [...]I've had a second chance, I'm still breathing, I get to see my kiddie. It could've been the other way, and been more serious, and I'd not come out of it, so... it does get you thinking that life's too short. One lap round the track. Make the most of it. Instead of being a bloody idiot.

Shame was another common theme, although there was more variation here in terms of attitude. Fully-engaged offenders (OCO2, OCO3 {quoted above, p. 174}, OCO5 and ICO1) all emphasised the significant impact on their lives of feelings of shame about their crime:

**ICO1:** [It's] extremely horrible what, y'know, what I've done, and what happened, but the good thing that's come out of it is that it's actually made me take a step back and look at myself...

Shame occupied a more marginal position for other attitudinal groups, particularly where the offence committed had been, at least in the offender's mind, relatively minor (ICO2's shoplifting, for instance, or OCO6's victimless drink-driving). However, some in these group clearly were ashamed: ICO3 still ranked it amongst the most serious, despite falling into the partial engagement category, whilst OCS1 was of the opinion that OCO1's unwillingness to engage in his own rehabilitation by admitting the unconscious desires that led to his sexual offence stemmed, at least in part, from his deep personal shame over his transgression.

Likewise, most offenders were relatively dismissive of the impact of their punishment on their time and money, especially the former. The flexibility of probation officers in arranging and rearranging appointments was a clear factor here, although the exact level of suffering attendant depended to some extent on other parts of the offender's life. In particular, work-related commitments (where applicable) played a significant role:

**ICO1:** It was harder to keep up with [unpaid work whilst I was employed]. I mean, fair enough, being on the phones all day doesn't sound like a demanding job. It's not a *physically* demanding job but it is a mentally draining job. And of course, going to unpaid work after having been there all week and... you just feel absolutely drained, as well, with coming here for the appointments as well... it's just trying to balance that work and getting this done as well.

**OCO2:** I mean the only thing I found difficult [about attending my programme requirement] was working, and then coming in for a few hours on the IDAP, and then going home, and then having to sort out, you know, my lunch for the next day and having something to eat, and trying to settle down a bit before bed but, you know, I did it, and I enjoy coming down.

In a similar vein, ICO2 felt that it would be too difficult to go to college to become qualified enough to achieve gainful employment, given his need to come into probation centres. OCO6 stressed the difficulties associated with her various commitments under the order and her supplemental relationships with external agencies in keeping up with her friends, family, and interests.

The impact on personal finances in particular varied considerably between offenders. Obviously those hit with fines and from low-income backgrounds were the worst hit, especially OCO6, whose dire financial straits were discussed at [5.3.2](#) above. Clearly in her circumstances (a culmination of physical and mental illness, compounded by alcoholism and prolonged joblessness) the impact of the order in terms of loss of time and money was greater.

The intermediary factors also displayed considerable variation. One consistent theme amongst a number of offenders (specifically ICO1, ICO2,

OCO2, OCO3, OCO5 and OCO6) was addressing their alcohol abuse (a factor that would fall into the 'lifestyle' category in Table 6.1). In cases such as these, the pains of rehabilitation (5.3.1 above) can be expected to be rather more pronounced, all else being equal, especially where offenders attempted to get from a position of alcohol addiction to complete abstinence during their orders, as four of the six did (OCO2, OCO3, OCO5 and OCO6). We might expect fewer impacts upon lifestyle and (short-term) wellbeing for the two who attempted to maintain a (moderate) relationship with drink. For them, these pains would probably be less severe.

Some pains were inextricably interrelated. For instance, stigma was generally only problematic where it came from people whose opinions the offender valued (as, for instance, with ICO1's friends' reaction to his offence, discussed at 5.5.2 above), or where they were forced into a position where the opinions of strangers mattered. Stigma was particularly problematic to those seeking work, for instance, and was therefore more likely to be felt more severely in those circumstances.

Likewise, situational circumstances had some determinative role in the importance of some pains. OCO1, as a retiree, would not be concerned with working or looking for work, hence his disdain for his disqualification order. Issues with mental and physical wellbeing could also be included here: generally community punishment did not create new issues, but rather touched upon those that were already present. However, the pre-existence of these factors did not ensure that everyone touched by such an issue would have their punishment equally affected by it. Again, both OCO3 and ICO3 struggled with depression, but ICO3 reported much less difficulty in this regard, which he attributed to a conscious effort to avoid falling back into 'the rut'.

(c) *STAFF ATTITUDES AND ANECDOTES*

The third and final source of information about the relative severity of pains came from interviews with staff, both in terms of their impressions of the offenders' cases and their recollections and anecdotes about clients more generally. Whilst these sources were second-hand, and therefore provide only a very limited means of understanding the relative severity of pains, they offered a preliminary means of exploring the pains of community punishment for a larger segment of the (supervised) offender population.

Staff attitudes to the relative severity of pains were limited in terms of their attitudes towards their work. As noted above (at [5.2.2](#)), probation officers continue to see their work primarily in rehabilitative terms. In line with this, they tended to focus on certain specific pains when working with offenders (particularly penal welfare issues). This focus also extended to a limited interest in the relative severity of pains; like Durnescu (2011) they tended to problematise those pains, rather than to use them in order to achieve retributive proportionality. Thus, it was not of particular importance precisely how severe pains tended to be; that they were present was enough.

However, this tendency requires a significant caveat, given the increasingly attenuated role for rehabilitation in staff practice. OMs tended to relegate punishment to their enforcement role and to minimise their interest in it as much as possible. However, all but one staff member (ICS3) recognised that *punishment* was a key part of their criminal justice function.<sup>18</sup> Moreover, when confronted with the following question in group interviews, staff tended to be reluctant to assent:

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<sup>18</sup> ICS3 was ICO3's supervisor. It is tempting to draw from this one reason for ICO3's rejection of probation as a punishment, but these data are not sufficient to support that claim. Indeed, the two staff who demonstrated the most retributive attitudes, OCS1 and ICS2, did not have the clients who had felt punished the most: ICS2's client, ICO2, was ambivalent to his punishment (although this might have been due in part to his learning



**DH:** If you could achieve your clients' rehabilitation without hurting them, would you?

Participants cited, amongst others, the fact that change was inherently painful, and that there was a symbolic importance to the pains of rehabilitation. They were not specifically there to inflict pain on their clients, but they accepted that the pain that was inflicted by their presence played an important penal role.

Notwithstanding these limitations in the scope and depth of probation officers' attention to the relative severities of pains, their accounts did offer some insights. In particular, staff provided information, albeit anecdotal, that helped to stress the types of circumstances that encouraged certain pains to become more or less intensified: pre-existing instability in family life, or in employment, or accommodation, for example. ICS2 mirrored the recognition by OCO6 (quoted above at p. 184) that her own penury made prison a more palatable option:

**ICS2:** [T]hey come to you and say, "Well the heating's not worked for such-and-such, and it's damp and it's horrible! So what's the point? In prison it's warm." And you try and say, "Yeah, but..." "Yeah, but it's warm. And you *know* you're going to get a meal. You don't have to walk with it to a ticket, feeling ashamed that you've gotta carry all these things... or I'm 'omeless and I 'aven't got a can opener to open the tins that I'm getting." They know they're going to get a hot meal!

Staff also tended to stress historical and circumstantial factors in offenders' lives that might affect the experienced harshness of an order, in particular in terms of their previous engagement with the criminal justice system. For instance, ICS4 had a large caseload of young adult offenders,

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difficulties), whilst of OCS1's clients, OCO3 felt significantly punished but OCO1 did not. Further research is necessary to determine the precise connection between staff values and experience of *punishment*, although these data do offer information about the connection between staff values and *pains*.

especially those aged 18-21, whom she noted tended to approach community punishment in similar ways:

**ICS4:** [S]ome people, some of the young generation that I supervise, they're very set in their ways. They've left school, they've hung around with friends all their life, smoking cannabis. They don't want to change. The court are *making* them change, because otherwise they're looking at sending them to prison. Which might not be a big deal for them either, in their mindset. So it's about challenging their behaviour and actually, you can do other things.

Offenders in this situation tended to experience the pains of rehabilitation relatively severely (especially in terms of impact upon lifestyle). She also noted that they tended to be less concerned with breaching their order, especially when starting out on it, and so to be less concerned with liberty deprivations (losses of freedom, time and money in the taxonomy above).

By comparison, staff recognised that those with a longer history of offending, especially those who had spent time in prison, tended to conceptualise their orders less in terms of liberty deprivation. OCO6, for example, showed a clear preference to stay out of prison, despite the lower standard of living that meant in her circumstances, but this opinion was not shared by those offenders who had spent time 'inside' (OCO2, OCO3, and ICO2). Indeed, these offenders tended to be the most willing to recognise the painful elements of community punishment.<sup>19</sup> Although staff tended to overemphasise the pains of liberty deprivation relative to the offender sample (recall [5.3.2](#)), they therefore showed a reflexive willingness to recognise that the precise (penal and rehabilitative) impact

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<sup>19</sup> ICO2, as a partially-engaged offender, bucks this trend; his long history of previous convictions left him with an ambivalence to the whole process of criminal justice. Nevertheless, there was a clear distinction between those with no previous criminal history, who were extremely resistant to typifying their orders as punishments (OCO1, OCO4, OCO6, ICO3) and those who had a longer experience of criminal justice (OCO2, OCO3, OCO5)

that community punishment had on offenders' lives was subject to a broad range of highly individuated factors.

In particular, staff recognised that compliance had a major impact upon the experience of pains. Where an offender was compliant, the pains of liberty deprivation were reduced considerably. ICS3 saw this as a key reason why participating offenders were relatively sceptical about the punishment through breach argument: those that were willing to participate (and most likely to be recommended by staff) were those that were already cooperating well with their order. Accordingly, they were less likely to be concerned about breaching, and would therefore experience the restriction of their freedom, time and money less severely.

By contrast, staff saw non-compliant offenders as being far more likely to experience the pains of liberty deprivation more severely, and the pains of rehabilitation less so. The relative severity of pains, therefore, depended in large part upon the offender's willingness to engage effectively with their order. Staff tended to view this willingness as being out of their hands, due in particular to the prevalence of desistance conceptions of rehabilitation amongst them:

**OCS3:** [I]t depends why they're here, I think. There's less kind of out-and-out aggression and walking out, but there might be cases where they go, "I don't see the point in this. I don't see why we're here." And they won't do it in an aggressive manner, they'll just, "I'm not going to change. I'm not going to change. You know, I'm 45 years old, why am I going to change my behaviour?" And you go, "Okay... well, we'll work with that." You know. And you look at their offending behaviour, you look at why they think the way that they do, you look at how they would like themselves to be viewed, and you work with that.

This bears emphasising. Staff were not complacent about offender attitudes to compliance. They did not see it as a question of either the offender attending and being willing to engage, or breaching them for non-compliance. Rather, staff pragmatically recognised that, if change required the personal agency and involvement of the offender, then progress would be impossible unless the offender was truly ready:

**ICS4:** I think supervision can help if that person wants the help, and you can force things on anyone, and they're not going to do it if they don't want to.

#### 6.4.3 Where, When and How Much Does it Hurt? Implications

These three sources enable us to reach the following conclusions about the relative severity of the pains of community punishment:

*(a) FAMILY RELATIONSHIPS AND SHAME ARE (GENERALLY) THE MOST SIGNIFICANT SOURCES OF PAIN, AND LOSS OF TIME AND MONEY THE LEAST*

Community punishment is most punitive when the offender experiences genuine remorse over what they have done, and where the order and its circumstances deprive her of or otherwise intrude upon her family relations. Its impact is least in terms of the loss of time and money involved in attending the requirements of offenders' orders, although we must remember ICS3's observation that this may be as much due to the sampling of offenders likely to already be compliant in this regard. That impact would obviously be expected to vary in terms of the number (and nature) of requirements (and other responses from external agencies) imposed on the offender. OCO6 provides an excellent illustration, given the impact of her fine on her already precarious finances, and the additional requirements of external agents on her time, she is subject to a greater objective level of intrusion in these terms (that is, from *my* subjective perspective as an uninvolved observer!). Thus, she is likely to rank the associated pains as more subjectively severe. However, we

should not fall into the trap that Kolber (2009a: 1606) vividly calls 'duration fetish', and assume that longer and more onerous orders will always increase the relative importance of this deprivation, at all or to the same extent.

Between these two polarities, the other pains of community punishment tend to form a continuum of relative importance that is highly dependent upon individual factors, which leads us to the second and third key observations: a number of factors complicate this picture by encouraging individual variation.

*(b) SOCIAL CONTEXT IS IMPORTANT*

The relative importance of pains will depend on a number of social contexts. The first and most obvious observation is that some pains will only arise if a specific context pre-exists: one cannot be deprived of family relations unless one already has access to one's family. Hence, OCO4's severe anguish over her (pre-conviction) loss of custody over her children must be ignored for present purposes. However, a series of more subtle relationships also emerges.

One's state of employment is a key factor. When one is in work, actively seeking work, or attempting to undertake education or other training in the pursuit of work, deprivations of freedom, time and money are more significant (ICO1, OCO2, ICO2). That is not to say that offenders reliant on state welfare are unaffected by pains of liberty deprivation (ICS2). However, generally speaking those in employment tended to rate these pains more severely (ICO1). Those out of work due to retirement or long-term mental or physical impairments tended to be least concerned in this regard (OCO1, OCO3, OCO6, ICO3).

Beyond the pains associated with liberty deprivation, we may identify two other core groups of pains, each of which is affected by a

different range of social contexts. These are, in the language of the last chapter, the *pains of rehabilitation* and *penal welfare issues*, respectively.

Recall that the pains of rehabilitation are principally those relating to shame and lifestyle, in terms of forced changes from a prior state, such as associating with certain criminogenic acquaintances, or addressing factors such as alcohol dependency. The severity of these pains was most reliant upon the social context of both the offender and the offence.

In terms of the offender's social context, the most important factors were the reactions of friends, family, and other individuals whose opinions mattered to the offender. ICO1's friends' overly protective reactions to his offence exacerbated his own personal feelings of shame, whilst the relatively benign response of the families of offenders such as OCO2, OCO3 and OCO5 can be contrasted sharply with the rejection of ICO3 by his ex-partner.

In terms of the social context of the offence, it is clear that shame was also profoundly important in OCO1's case, acting as a bar to his successful rehabilitation (at least in OCS1's opinion). This was so despite his relative isolation, and his stable, almost co-dependent relationship with his partner. However, his offence (sexual activity with a child under the age of 13) carries a particular stigma, to the extent that he refuses to accept the label ('sex offender', or, as OCS1 would prefer, 'someone who has committed a sex offence') necessary for him to effectively rehabilitate. By contrast, ICO2 and OCO6 committed what they perceived wider society as viewing as less severe crimes (shoplifting and drink-driving respectively) and so were able to avoid the levels of shame felt by OCO1, despite ICO2 exhibiting a similar level of co-dependence (with his mother; ICS2 used this exact term to describe their relationship) and being similarly marginalised from broader society.

Penal welfare issues cover the following categories in Table 6.1: lifestyle (in terms of accommodation and day-to-day activities); work/looking for work; family relationships; stigma; and external agencies. These pains tended to be more dependent upon broader political arrangements than pains of rehabilitation, because their impact was more closely related to the offender's broader position within society as a whole.

One key factor that bears expanding upon is the availability of State welfare support, both outside of and overlapping with the penal system. In particular, the increasing role of (external) non-State agencies as mediators of both penal and social welfare introduces difficulties associated with fragmentation of care, increasing the number of appointments, and exposing the offender to disjointed institutional values and interests over the course of the order. Offenders' health, wealth and wellbeing were increasingly subject to institutional agendas, the results of which interfered with and exacerbated the demands of their orders. Examples include: OCO6 in terms of (amongst others) her engagement with Atos<sup>20</sup> over her eligibility to work; several alcohol-dependent offenders in terms of their relationships with alcohol treatment charities; and OCO3 in terms of his receipt of charitable accommodation. Given the difficulties that can arise out of the increasing fragmentation of penal supervision (discussed above at [5.4.2](#)), specific welfare and economic arrangements encourage conditions in which some offenders will be subject to more frequent and confrontational interactions, substantially increasing the relative severity of related pains of community punishment.

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<sup>20</sup> A company hired by the DWP to assess benefits claimants' fitness to work, which determines whether they receive the more general Employment and Support Allowance (ESA) or Jobseekers' Allowance (JSA). If on JSA recipients are required to evidence that they are actively seeking work, or their benefits are removed. OCO6 was judged fit to work but refused to seek employment due to her own perceptions of her mental and physical health; accordingly at the time of our interview she had been without a source of income for nearly six months. Although there is no indication that Atos decided OCO6's case incorrectly, it was dogged by allegations of misdiagnosis of fitness to work throughout its term of employment, and voluntarily released the DWP from their contract due in April 2014 as a result.

This is not intended as a partisan critique of any particular approach to the welfare state. It is merely a restatement of the fact that penal politics are not immune from the effects of more general policy. Under the neoliberal approach in England and Wales, fragmentation and privatisation create additional tensions that affect how severe certain pains are for certain offenders. Society is affected by penal and social welfare policy alike, and this will affect the social context (and therefore the content) of community punishment, altering the relative severity of the penal system's impact upon offender's welfare. As above, so below.

Recognition of this interrelation can affect the way in which the State organises the penal system, for better or worse. Indeed, ICS2 was comparatively optimistic that the fragmentation of the Probation Service under the *Transforming Rehabilitation* agenda (MoJ 2013a, 2013b) might actually reduce the severity of pains related to external agencies, although she was less than certain:

**ICS2:** The CRCs are coming, so some of those partnerships that gave us the problems in the beginning are becoming... us. And we are becoming them. We're merging into one! [...] So... the not knowing what the criminal justice work's around probation... other agencies will know. We will know what other agencies used to. And there'll be more of that respect. So for me it can only bode for a good way. On the flipside of that, if it turns out to be water on oil, then it's just going to be water on oil. And if it's going to implode, it's gonna implode.

So policy affects practice, for better or for worse, and practice affects the social (and penal) contexts in which the pains of community punishment are felt, and therefore their relative intensity.



*(c) OFFENDER ATTITUDES ARE ALSO IMPORTANT*

Beyond the social, the individual also affects their own relative hierarchy of pains in terms of the attitude that they bring to their community sentence. In particular, attitudes towards *compliance* and *engagement* tended to affect the relative severity of the pains of rehabilitation and of liberty deprivation.

In general, fully-engaged offenders tended to be more compliant and therefore less the subjects of liberty deprivations associated with breach proceedings, whilst undergoing greater life changes and therefore being open to more severe and significant pains of rehabilitation. Partially-engaged offenders displayed a greater tendency to show more concern with pains associated with liberty deprivation, whilst engaging less with rehabilitation and so suffering fewer pains. Engagement-resistant offenders, however, bucked this trend. Both offenders in this category (OCO1 and OCO6) suffered more severely from pains of rehabilitation (OCO1 in terms of shame, and OCO6 in terms of lifestyle changes) than of liberty deprivation; neither cited the loss of freedom, time or money as particularly severe, although in OCO6's case this was complicated by her own poor financial status and the high intrusion of external agencies into her life (which were in any event more the result of penal welfare issues than of the penal system's inherent liberty deprivation).

One aspect of individual factors I have not touched upon in this analysis concerns demographic features: age, race and sex. This is partly because recruitment did not provide a great amount of diversity in these terms in neither the offender nor the staff sample. Age, gender and ethnicity can be expected to play significant roles in determining both individual and social factors in the relative experience of pains. However, we must avoid assumptions based on stereotype rather than experience. For example, both female offenders (OCO4 and OCO6) were relatively

unaffected in terms of their family relationships, despite the historic associations between motherhood and primary childcare in England and Wales. Then again, in both their cases their families had already been torn apart to some extent before their orders: OCO6 due to her alcoholism and financial debt, OCO4 by her identification by social services as an unfit parent.

The point that emerges here is that, whilst 'offenders' are not a uniform category of people in demographic terms, this study provides insufficient data to identify the effects of age, gender and ethnicity upon the relative severity of pains, nor indeed of other factors, such as the previous extent of the offender's experience of the penal system. We might draw upon criminology, sociology and jurisprudence more generally in attempting to theorise how these demographic factors might affect the nature of marginalised communities' penal experiences, but ultimately this cannot amount to more than an extrapolation that requires critical attention with fresh, empirical data examining precisely this phenomenon. Generating such data, however, falls beyond the scope of the present, exploratory enquiry.

*(d) THE ORDER IMPOSED IS STILL IMPORTANT!*

I have proceeded throughout this chapter as if 'community punishment' was more or less homogenous, but of course this is not the case. A final point to recognise is that the order imposed is itself crucial in determining the pains to which the offender will be subject. Although some pains are consequences of the imposition of punishment (by the penal system and in terms of society's reaction to it), and therefore do not vary with the precise penalty imposed, others are more malleable. For example, fines clearly make financial losses more significant to the offender, especially if she is already on limited income (ICO1, OCO6). Likewise, the pains of liberty deprivation are more clearly significant to an offender subjected to

unpaid work (ICO1); indeed, those offenders to whom liberty deprivation was a major concern often stressed the punitive nature of this requirement, regardless of whether or not they felt particularly deprived by their own order (ICO3, OCO1 and OCO4 all raised this observation). Although none were involved in the study, offenders subject to curfews or other restrictions of movement, especially when backed up with electronic monitoring, might also be expected to experience the pains of liberty deprivation more severely.

In general, the number and nature of orders and requirements imposed upon offenders will determine: (i) the level of obligation imposed upon them, and therefore the relative severity of the pains of liberty deprivation; (ii) the extent and manner in which the order attempts to rehabilitate the offender, and therefore exposes them to associated pains; and (iii) the extent to which penal welfare issues are addressed, reduced, and/or exacerbated by the order. Like the individual and social contexts, the order imposed is not part of a simple, direct causal chain with the pains of community punishment, but plays a vital role in constituting those pains and their relative importance by defining the precise relationship between the offender and the implementing penal actors.

*(e) MORE DATA ARE NEEDED (BUT THEY ARE OBTAINABLE!)*

The picture that emerges from this discussion is one of complexity and individuality. Whilst there are some general trends regarding which pains matter most and least, this is complicated by a wide range of social and individual factors. Moreover, the limitations of the available data on this issue from the findings of the current study bear repeating. Further research is needed to establish a more general (and generalisable) understanding of how socio-individual factors influence the general relationship of pains in community punishment. In particular, quantitative research examining more specifically the relationships between individual

and social factors and the relative severity of pains could be constructed based upon this analysis, and could be supplemented with qualitative research examining more specific combinations of orders, requirements, and demographic communities of offenders.

However, whilst data of this nature are limited in the present analysis, there are reasons to be optimistic about the possibility of policy-makers (and sentencers) improving their understanding of how general hierarchies of pain are affected by the extant factors in individual cases. Whilst the research agenda I have just suggested would be very lengthy and work-intensive, it is not the only source of such information. Both offender and staff participants demonstrated an excellent aptitude to compare and contrast the pains of community punishment. By listening to practitioners' and subjects' voices, policy-makers could supplement the protracted, expensive process of social scientific research with more direct, if somewhat less rigorous, sources of information about the relative penal severity of the pains of community punishment.

### **6.5 Understanding Penal Impact: Content, Context and Meaning**

We can now move beyond a discussion of community punishment only in terms of the plethora of pains that potentially accompany it, to a position closer to an understanding of its penal impact as a punishment. Specifically, we can identify which pains contribute to the sentence, both in terms of their causative links and their fit into a retributive system of (censorious) punishment.

We can distinguish between those pains in terms of their connections to the activities of State agents, intentional or otherwise, and therefore determine whether they were directly or obliquely intended at the point of sentence, or were circumstantial to it. Again, this distinction serves not to diminish the importance of circumstantial pains – indeed,

many of these, such as the infliction of shame and interference with family relations had the most severe impact on offenders' lives.

Moreover, circumstantial pains are an important feature of *community* punishment precisely because of the locus implied by the name. Unlike relatively invisible fines and bind-overs, or relatively distant imprisonment, community punishment exposes the offender to the pains of her punishment in her ongoing social context. It is hardly surprising, therefore, that the stresses of everyday life have a significant impact upon the pains experienced during and after conviction and punishment.

It follows that, in order to take account of the severity of community punishment in terms of pain, we must move beyond only the directly intended acts of the State, and towards an understanding of the social and other milieux in which those punishments are enacted.

We can also identify, albeit tentatively, which pains tend to be more severe, and in which contexts. Whilst the data in this sample are somewhat limited, they do suggest that offenders saw pains associated with penal welfare and with rehabilitative processes as being significantly more severe than those of liberty deprivation. However, a wide range of individual and social factors can affect exactly how severely each pain is felt in comparison to the others, as well as which pains are felt at all. These data represent a good starting point for mapping these factors, and allow us to venture some educated approximations of what impact they will have upon penal severity when present.

What is clear from this lengthy discussion is that any understanding of penal impact must take into account not only the legal, social, political and other *content* of a punishment, but also the *context(s)* in which it operates, and the *framing* it receives from penal agents and subjects. Bearing this in mind, we may at last sketch the contours of the penal impact of community punishment in England and Wales.

## **Chapter Seven: The Penal Impact of Community**

### **Punishment in England and Wales**

In this chapter, I draw the enquiry to a close by answering my overarching research questions. First, however, I must pause to recall the means by which these answers were reached. The focus of the present study's methodology upon semi-structured interviews allowed it to gain a nuanced understanding of the participants' subjective perspectives and experiences, and provided the opportunity to explore the pains of community punishment in depth. However, my research design, like any, also exposed the study to several inherent and practical limitations. As a result of the small sample size, and of the partial coverage of demographics and requirements within the sample that was collected, the study's findings are of limited generalisability. Ultimately, they reflect the experiences of the 20 participants, and not the general penal impact experienced by all offenders, and implemented by all staff.

This does not invalidate the conclusions I draw below, but it does constrain them. Despite the limitations of my methodology, it nevertheless enables an *exploratory* discussion, developing an understanding of the specific characteristics of the penal impact of community punishment in the experiences of the sampled offenders. This allows us, in the first instance, to re-examine the phenomenon of (community) punishment, substantially advancing our understanding of it as a social (as well as a legal) process. In the second, it highlights remaining gaps in our knowledge, which may be filled by future research.

This chapter discusses both of the conceptual benefits provided by this study's empirical findings. It considers what the present findings tell us in **7.1**, before concluding with a discussion of opportunities for further research in **7.2**.

## 7.1 Conclusions

My first task, then, is to directly address both research questions. To briefly restate, those research questions were: first, what is the impact of community punishment on the lives of those subjected to it; and second, to what extent is that impact affected by the relationship between the offender and her supervisor?

The answers to these questions will provide a better understanding of the ways in which community punishment works *as* punishment, and therefore of its place within the (principally retributive) sentencing hierarchy in England and Wales. That understanding, in turn, allows us not only to critically reconsider the extent to which the present application of community punishment is proportionate and parsimonious, but also the penal-populist critique that such punishment constitutes a 'soft' option.

### 7.1.1 Pain Delivery and the Penal Impact of Community Punishment

From the outset I should stress again the importance of measuring penal impact in terms of the pains of community punishment. Community punishment is, after all, part of a penal system, and that system is itself one of 'pain delivery', exactly in Christie's sense (1981). A retributive understanding of that pain delivery system compels us, by its very ugliness, to limit the infliction of pain to the necessary minimum, and to think more clearly about what that minimum ought to be (*ibid*: 100-101; see 3.1.5 above).

This is not, however, to say that the impact of community punishment can be considered only in terms of pain. After all, my findings suggest that community punishment in general, and rehabilitative requirements administered by the Probation Service in particular, are capable of effecting significant positive changes in offenders' lives, helping them to move away from criminality. It can also help offenders to escape from precarious, unstable or otherwise difficult circumstances, behaviours,

and attitudes. I noted at the end of 5.4.1 that one of the most important outcomes of the supervisory relationship was the hope that it gave many offenders for a 'better' future, whatever that meant to each of them. It would be unfair to ignore those efforts in my overview of the impact of community punishment on offenders' everyday lives. Moreover, it would be wrong to skirt over the fact that some offenders, especially the fully-engaged, had made what they considered to be substantial progress towards a more stable way of life, often in the face of significant criminogenic obstacles.

However, this study is ultimately grounded in retributive theory, and even under a communicative approach, the rehabilitation of offenders is only a contingent good. What penal impact seeks to evaluate is impact in terms of *penal severity*. What do the pains of community punishment disclosed by the participants in the present study suggest about the penal impact of community punishment in England and Wales?

#### 7.1.2 The Impact of Community Punishment upon Offenders' Lives

The answer to the first research question is rather complicated. The impact of community punishment upon offenders' lives varied considerably, both in terms of the number and the severity of the different types of pain experienced by each participating offender. This variation was contingent on a number of factors, associated with the *sentence* that the offender received (the order and requirements imposed, as well as the actions of any penal agents responsible for implementing them); the *socioeconomic context* of the offender (her family, friends, and broader social contacts, as well as her accommodation and employment); and *individual characteristics* of the offender herself (including her mental and physical health, her lifestyle, and her attitudes, perceptions and beliefs, both about the order and more generally). As a result, some suffered



comparatively fewer pains that were directly attributable to the process of community punishment; others suffered more substantially.

As illustrations, consider the experiences of OCO4 and OCO6, as against those of OCO5 and ICO1. On the one hand, OCO4 suffered comparatively little as a result of community punishment. Her life was already in a state of profound instability as a result of her long and bitter battle with social services over her fitness as a parent. There was some exacerbation of this tension as a result of her conviction and sentence, but the additional pains incurred by that increase in tension could not be considered a particularly severe escalation in the unpleasantness of her everyday life: her sense of persecution, of impotent rage against a faceless and actively confrontational system, could not be particularly added to. Furthermore, the importance of the vacuum that had been left in her life by her children's fostering meant that the other pains associated with her community punishment seemed substantially less severe.

Likewise OCO6. Her community penalty, like OCO4's, was relatively light in terms of the requirements placed upon her. On top of this, her conditions prior to sentence were already precarious, due to her long time with neither income nor welfare support. Coupled with her alcoholism and depression, she was extremely vulnerable to socio-economic hardship outside of the order she received. That vulnerability muted the impact of the pains of her punishment, in that she had a (relatively) poor standard of living before punishment was imposed (*cf.* Kolber 2009a). However, her passive response to her punishment did throw up some tensions, notably over the sale of her home, which she had invested substantial time into improving, and which she saw as her children's inheritance.

On the other hand, OCO5 and ICO1. Both were recovering alcoholics who had committed acts of domestic violence whilst inebriated, although they dealt with their addictions in very different ways. Not only

did OCO5 struggle with the physical symptoms of withdrawal, arising from his decision to go 'cold turkey', but he also had to come to terms with the reasons for his drinking, chief amongst which was the death of his brother:

**OCO5:** I drank since me brother passed away, and that's what set it off. Basically. It made me forget. And when I did stop drinking, probation put me on counselling sessions. 'Cause they knew it could... bring things back up, and when I was at the counselling sessions I opened up to the counsellor, and she really helps me deal with what was in me head. What happened when I was younger, and things like that.

Amongst 'what happened' was a history of abuse from his parents, both verbal and physical, as well as prolific drug use amongst the rest of his family. Part of his move away from the crime, which filled him with a profound sense of shame and disgust, was the rejection of the former source of strength that was his identity as an Irish Traveller, a lifestyle he now has a largely negative attitude towards. As a result, he is distanced from his extended family. Coupled with the loss of access to his partner and children in the early stages of his order,<sup>1</sup> he was left substantially isolated from loved ones.

ICO1 faced a different, but similarly considerable, body of pains. Coming from a very different background, his offence nevertheless left him with a similar sense of shame and a motivation to become a better person. His order was more onerous than OCO5's, including unpaid work and the suspension of a prison sentence in addition to the accredited programme and supervision requirements and fines that both offenders received. For him, shame and stigma were more palpable elements of his

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<sup>1</sup> He was able to have the restraining order against him overturned towards the end of his supervision period, which significantly eased the process of community punishment for him.

suffering, both in the abuse he received whilst undertaking unpaid work, and in the more subtle shift in his friends' attitudes towards him. No matter his efforts to distance himself from the image of alcoholic violence suggested by his offence, his friends' protective attitude towards him during their time together suggested he could not easily escape the taint of his offence.

Given the diversity and individuality of the range of experiences suggested by these brief (and inevitably partial) sketches,<sup>2</sup> to what extent can the impact of community punishment upon offenders' lives be characterised in general? Despite the inherent subjectivity of pain as a metric (*cf.* Christie 1981: 9-11), several broad observations can be made about the patterns of pain emerging from my participants' accounts of community punishment.

The first is that every sentence involves the infliction of some pain, especially where those pains are endemic to the broader processes of criminal justice. Moreover, community punishment also involves certain pains that are intrinsic to its processes, especially those related to the loss of liberty, time, and money. However, overall, offender-participants tended to see such intrinsic liberty deprivations as relatively minor components of the overall penal impact of their sentences.

The other pains associated obliquely or circumstantially with the imposition of community punishment were more profoundly affected by social, communal and individual factors, which play a bigger role in determining their incidence and relative severity. The most severe pains amongst these indirect pains of penal intervention tended to be: the disruption of (or other interference with) family relations; and the offender's own feelings of shame about her criminality. Participating

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<sup>2</sup> I provide a more general overview of each offender's background and experiences in Appendix G, below.

offenders valued their families and their own sense of self-worth more highly than other values, such as friendship ties, stigmatisation by wider society, and employment. Possibly, this reflects the increasing insularity of individuals into smaller family units attending the individualistic socio-cultural shifts of late modernity (Winter 2005). But whatever the reason, community punishment has the greatest penal impact where it diminishes access to family, and where it inflicts a personal sense of shame.

However, individual cases will complicate this general impression, due to the principal importance of these punishments' setting 'in the community' (Green 2014: 22-25), which exposes the community-punished offender to a wide range of different socioeconomic, communal and other group contexts (such as family and friendship groups). Even before the aggressive privatisation of the *Transforming Rehabilitation* agenda, community punishment was never entirely in State hands. Multiple agencies, groups, and individuals respond to the fact of the offender's conviction, and/or her sentence. This fact – the branding of the offender as such and her specific obligations within the penal system – can exacerbate existing painful processes (as, for instance, with ICO3's marital breakdown), or cause new pains in the reactions of the broad constellation of social actors around her (such as OCO3's struggle to find employment). Whilst these pains must be carefully distinguished from those that arise out of the social context of the offender without having any connection to her conviction or the imposition of punishment, this context is vital to the understanding of community punishment's penal impact. Its pains are uniquely interpersonal, and come from a uniquely socio-penal background.

In particular, it is important to stress the key role of *external agencies* in the experienced impact of community punishment. Indeed, even before privatisation, non-penal organisations from both the public sector and civil society held increasing importance in the community

punishment process. In the context of my findings, this was most obvious with the many alcohol-dependent offender-participants (OCO2, OCO3, OCO5, OCO6, ICO1 and ICO2), each of whom evaded a more liberty-depriving alcohol treatment requirement due to the availability of counselling and other alcohol support services from charities and other third sector organisations. Instead of choosing to deal with this criminogenic need within the penal system, the courts setting their sentences instead chose to allow these external agencies to continue their activities under the supervision of the Probation Service, placing the third sector agencies in an ambiguous, socio-penal role.

Indeed, the involvement of external agencies in offenders' lives more generally should not be understated. A wide range of organisations, from the police to social services, welfare agencies to healthcare workers, Citizens' Advice Bureaux to charitable accommodation providers, were active in offenders' lives during the penal process, and were incorporated into those offenders' experiences of punishment due to the Probation Service's liaison with them. The result is a classic example of Cohen's (1985: 40-86) 'dispersal of discipline' theory in practice. It also renders that range of socio-penal agencies vital in the determination of the incidence and magnitude of the pains of community punishment.

### 7.1.3 The Role of the Supervisory Relationship

This leads neatly to the second research question, as to the impact of the supervisory relationship. In my sample, that impact was rather mixed. The supervisor intensified (or indeed outright inflicted) some pains, both through the specific methodologies of rehabilitation imposed and in their secondary, but increasingly important, role as an enforcement agency (recall **5.3**). However, in other cases, the supervisor ameliorated pains extant in the offender's life, especially where those pains were associated with the criminogenic factors in the client's case, or where they were

associated with the interventions of external agencies (recall **5.4**). In still other cases, supervisory interventions had a negligible effect, especially upon the pains endemic to criminal justice processes, or to broader social responses to the stigma arising from the 'offender' label (recall **5.5**).

Overall, however, the impact of community punishment upon offenders' lives is manifestly affected by the supervisory relationship. To a certain extent this was preordained by the historical development of these sentencing options. For over 100 years community punishment has been primarily the responsibility of the Probation Service, whose operational model was supervision. It is no surprise, then, that supervision has a considerable impact to this day, however attenuated by the intrusion of other agencies and other forms of intervention.

#### 7.1.4 A Soft Option? Punishment in the Community After All

What do these answers say about the retributive credentials of community punishment in contemporary England and Wales? In the **Introduction**, I highlighted the legitimacy crisis surrounding community punishment, which arises from the phenomenon of populist punitiveness that attends modern English penal policy-making (Lacey 2008). I highlighted this crisis of legitimacy – the challenge that community punishment was 'soft on crime' compared to its main alternative, imprisonment – as a key motivation for the research questions that this study has just addressed. From the foregoing conclusions, is it possible to say anything about the extent to which community punishment represents a 'soft option'?

Since this study only touches upon the penal-populist critique indirectly, it is perhaps unsurprising that my findings give only a partial answer to that question. An effective analysis of the overall 'softness' of community punishment for the purposes of evaluating the penal-populist critique would require not only an understanding of how severe such punishments are in the abstract, but also how 'tough' they are *relative* to

imprisonment (and to a lesser extent, to other sanctions). Since I have only considered community punishment in this study, such a direct comparison is impossible.<sup>3</sup>

However, it is clear that community punishment is capable of being substantially painful in certain circumstances. Furthermore, my findings provide some detail as to what factors affect the presence and magnitude of pain experienced by an offender, and the general effect that they tend to have. Those pains exceed the narrow confines of liberty deprivation, and so are commonly ignored by the penal-populist critique (e.g. Furness 2012, Winnett 2012). That critique focusses mainly upon the evaluation of alternatives to imprisonment in terms of incarceration, which is (most visibly: Sykes 1958) the restriction of physical freedom. However, punishment consists of a far wider range of pains. Proponents of community punishment as an alternative punishment to imprisonment must get beyond liberty deprivation.

Another component of the penal-populist critique – that the apparent benevolence of probation-run interventions prevents community sentences from being ‘tough’ – is also flawed. To be sure, not every participating offender conceived of their punishment as *adequate* – each having a separate understanding of what made punishment effective. For ICO3, the lack of financial reparation through fines or compensation payments meant that his fraud had not been repaid. Offenders like OCO1, OCO4 and OCO6, meanwhile, stressed the limited intrusion of community punishment into their everyday lives, and the flexibility of probation officers in setting up compulsory sessions around offenders’ other commitments.

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<sup>3</sup> This is not to say that no comparisons between community punishment and incarceration could be made without a companion study of the penal impact of imprisonment. For instance, Crewe’s (2011) concepts of the ‘depth, weight, [and] tightness’ of the pains of imprisonment takes some account of relative severity, and so provides a means for some comparison. To do so, however, falls beyond the scope of my research.

However, community punishment contains an explicit censorious message, to the effect that even these offenders accepted that they had done wrong, and that their sentence represented an expression of condemnation against that wrong. Community punishment has the potential to communicate wrongdoing, as well as to inflict considerable pain upon offenders. Furthermore, my findings substantiate McNeill's (2011: 16-17) assertion that rehabilitative benevolence is not necessarily mutually exclusive of (retributively useful) pain. Community punishment can inflict pain effectively, even whilst helping offenders to desist from crime. Indeed, it was often the most fully-engaged offenders who reported the most severe pains, because they were exposed more directly to the pains of rehabilitation (recall [5.3.1](#)). This suggests that if community punishment is to be an effective retributive intervention, then it requires more sophisticated application in individual cases, rather than wholesale 'toughening up' (Ministry of Justice 2012: 3).

Such an application will require a fuller understanding of the pains of community punishment beyond liberty deprivation, and of the wide range of individual and social factors that influence their relative intensity. If such an account is taken at the level of penal policy (and indeed at sentencing) then this, in itself, could well undermine the penal-populist critique insofar as it encourages more fundamental shifts in public discourses about what constitutes punishment. Furthermore, given the prevalence of 'soft on crime' narratives about community punishment in mass media (recall [3.3.2](#)), it is entirely possible that offenders' own expectations about those sentences are coloured by liberty-centric populist punitiveness. To the extent that this is the case, a shift in focus by penal policy-makers and sentencing authorities might encourage offenders themselves to be more cognizant of the indirect pains of community



punishment (whether oblique or circumstantial), and to view their sentences as being more effective.

A final piece of evidence regarding the relative severity of community punishment can be found in the attitudes of offenders who had been sentenced to community punishment, but who had had previous personal experience of incarceration. These offenders were ambivalent as to the relative severity of community punishment:

**OCO3:** I think prison is one thing and probation [...] is like a stepping-stone back into society. I've found it helpful, personally. I think it's necessary. Because you can't just be kicked out of the gate and be expected to carry on. So there's a definite role for it. I think it's like anything else: the individual, and I can only speak personally from this, obviously, will only get out of it what they put in...

**OCO2:** It is a punishment, and obviously, this is why we're here. It is a form of punishment to me. It was either this or going to prison. And obviously I didn't want to go to prison. I'm glad I've came here, 'cause it's given me a lot of insight into how to communicate properly to people. [...] To me, it's "Put up or Shut up!", you know? You're not in jail, so, enjoy it! Which is what I'm doing. I've still got my freedom.

When asked to compare the severity of community punishment with imprisonment, participants tended to agree that prison was generally more severe, and stressed that community penalties were no easy option. They presented a composite punishment that, whilst doing them a great deal of good, also imposed significantly upon their lives. It would be

difficult to suggest, therefore, that community punishment was *routinely* more severe than a comparable term of imprisonment.<sup>4</sup>

As a polity and a society, these findings suggest that we should resist the populist punitive urge towards a unilateral and perpetual 'toughening up' of the penal system in general, and community sentences in particular. We must also recognise that even non-custodial sentences can be profoundly painful penal experiences, and should also therefore resist the mass proliferation of community punishment as if it were a universal panacea for custodial excess (*cf.* McNeill and Beyens 2013: 14).

Both of these possibilities – toughening and mass proliferation – are extant in modern Anglo-Welsh penal practice. 'Toughening up' has recently been encouraged by the enactment of a requirement that every community punishment involve at least one component for the explicit purpose of punishment, whether as an additional requirement of the community order or SSO imposed, or as a parallel fine, or some mixture of both of these options (s. 177(2A) CJA03, as amended by the Crime and Courts Act 2103, s. 44 and Sch. 16).<sup>5</sup>

My findings would seem to suggest that this provision rests upon an overly narrow understanding of punishment. If I am right that punishment is a question of pain delivery, then any requirement that imposes pain is part of the inflicted punishment. Accordingly, s. 177(2A) CJA03 should be interpreted as a requirement to make the punitive message of community punishment explicit by making the censure implied by the sentence clear, rather than a more literal reading that compels judges to add additional requirements as punishment to an (already

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<sup>4</sup> An interesting question relates to the other sentencing threshold, between community punishment and other non-custodial sentences. Here the data are somewhat mixed, but there is limited evidence that fines could be significantly more severe, especially to an offender of limited means, than community punishment, as both ICO1 and OCO6's experiences attest.

<sup>5</sup> This requirement of explicit punitiveness may be ignored where 'exceptional circumstances' would make the additional requirement unjust: see s. 177(2B) CJA03.

painful) order. This would have two consequences. Firstly, it would deny the potential pains of less explicitly punitive engagements, especially supervision requirements. Secondly, it would require an undue increase in the harshness of sentencing that would force the least severe community punishments, those that are not currently imposed with any specific punitive purpose in mind, up-tariff.<sup>6</sup> Meanwhile, in the case of more onerous sentences where punishment was intended by the sentencing authority there would be no substantive change. The result would be a reduction of proportionality, and certainly of parsimony, and an overall weakening of the claim of the Anglo-Welsh criminal justice system to do effective justice.

Mass proliferation of community punishment is another worrying trend in modern Anglo-Welsh penal policy and practice. This can be seen in the considerable increase of the offender population under community punishment in recent years (see Cavadino, Dignan and Mair 2013: 120 at Table 5.1).<sup>7</sup> However, it is also visible in recent reforms requiring the attachment of a mandatory 12-month supervision period after release for all those completing a prison sentence of 24 months or less, running parallel with any period spent on license (s. 256AA CJA03, as amended by the Offender Rehabilitation Act 2014, s. 2).<sup>8</sup> Although the purpose of this period is explicitly intended to be rehabilitative (s. 256AA(5) CJA03), and aims to deal with the insufficient resources available for the reduction of offending amongst offenders with short prison sentences (MoJ 2013b: 12-13), it will inevitably expose offenders to additional pains and processes that would not have been present had they been released unconditionally.

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<sup>6</sup> To an extent these findings should be used to encourage judges not to think in these terms. Even in their least onerous incarnations, community punishments should be understood as delivering pain, and therefore as inherently punitive.

<sup>7</sup> Bear in mind that Cavadino, Dignan and Mair (2013) distinguish community orders and SSOs, whereas I have taken both orders together in my definition of 'community punishment': recall [1.3.1](#).

<sup>8</sup> At the time of writing (August 2014) this provision has not yet passed into law.

Again, the result in practice is a substantial increase in penal severity at the lower end of imprisonment's place on the sentencing tariff, and an effective reduction in sentencing authorities' capacity to sentence proportionally. Seen in this way, these reforms provide an effective argument for alternation of short prison sentences, since the additional supervision makes them too severe to appropriately correspond to the seriousness of the crimes to which they are currently matched.

Overall, then, these findings suggest that Anglo-Welsh criminal justice should resist the toughening up and thoughtless proliferation of community punishment. Rather, as citizens of an (aspiring) liberal democracy, we should recognise the pain endemic in any penal intervention and critically re-evaluate the breadth and depth of the reach of the penal State. In so doing, we would move a little closer towards the utopian ideal of a fair, and critically a *just* society.

## **7.2 Postscript: Propagating Penal Impact**

Throughout this enquiry I have continually stressed the need for further research. This is perhaps unsurprising, in that research never really ends: each project throws up issues that inspire the next. Nonetheless, some of the limits of the conclusions I have drawn here are particularly amenable to being overcome through further research, and I close out this argument with an overview of some of these prospects for the advancement of our collective understanding of criminal justice.

Overall, the analytical framework of penal impact appears to be a useful advance for approaching the subjective severity of punishment. It can tell us a great deal about the extent to which subjective factors affect the sociological experience of punishment, and therefore the extent to which they are suitable for the offences against which they are arrayed (*i.e.* proportionate and parsimonious, but also effectively censorious). It is

therefore of particular use for the formulation of sentencing tariffs by policy-makers attempting to make objective approximations of penal severity accord more effectively with the subjective experiences of offenders. More studies utilising this general approach would be useful in the refinement (and minimisation) of the Anglo-Welsh penal system.

In the field of community punishment, further studies of penal impact should be made to explore more specific experiences. They should address specific demographic groups' experiences. In particular, the experience of community-based supervision by women offenders, especially when situated in a Women's Centre (recall n. 8 of chapter **Four**), could be usefully contrasted with the general experience of Probation Centre supervision. Likewise, study based with specialist teams covering more onerous requirements such as drug rehabilitation and electronic monitoring, and working with breached offenders both inside and outside of prison, would further refine my conclusions and develop a stronger understanding of subjective penal severity.

It would also improve the understanding of individual penal impact in these cases to examine the dyadic relationship between the offender and her supervision officer more thoroughly, whether by a series of new case studies, or by further analysis of the paired participants in this research's data. Doing so would clarify exactly the extent to which penal impact is affected by the interface of staff and offender attitudes, and would point to other factors affecting penal severity in particular cases.

Finally, similar research to the present enquiry might be made evaluating the effects of the *Transforming Rehabilitation* reforms upon the pains and penal impact of community punishment, examining the extent to which they have in fact exacerbated or mitigated the pains associated with the fragmentation of supervision amongst external agencies (recall ICS2, quoted above at pp. 273-4).

However, penal impact is also applicable to the study of other penal phenomena. In particular, by studying the penal impacts of imprisonment, fines, and other non-custodial sentences, both in terms of the generalised 'offender' and in terms of specific socio-economic and -cultural groups, we may begin to make substantial comparisons between the relative penal severities of the various sentencing options available in England and Wales, and the overall (retributive) propriety of the sentencing tariff.

Finally, there is no need to limit penal impact studies to the purely qualitative end of the methodological spectrum. Every methodological approach has its own strengths and limitations, and should be supplemented by other research designs to maximise our understanding of social phenomena. In particular, we could use the findings in Chapter **Five** to construct a larger-scale, quantitative survey that tests these conclusions against the experiences of a larger segment of the offender population, especially as regards the relative severity of pains. Doing so would highlight areas of limitation, contrast and disagreement that would, in turn, be amenable to further qualitative study (and so on *ad infinitum*!).

Overall, then, whilst this study is of considerable use in defence of community punishment from its punitive critics (populist or otherwise), it suggests a wealth of further avenues of research that will further contribute to the refinement of the understanding of penal severity in law and policy.

But even if policy-makers constructed a sentencing tariff that was perfectly reflective of the penal impacts of all available sentencing options in England and Wales,<sup>9</sup> we would still be far from a system that was totally criminally just. I doubt, after all, that 'criminal justice' can be utterly divested from other ideals of 'justice' (especially from social and

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<sup>9</sup> This would be impossible, of course. The experience of punishment is inherently dynamic, even when its institutions and modes are not in constant crisis and subject to constant reform. The goalposts of penal impact are always shifting, and research can only attempt to keep up as best it can.

distributive dimensions), and therefore that criminal justice reform will ever be sufficient to achieve effective 'justice' in a transcendental sense. Perhaps all that can be done is to take incremental steps towards a more (criminally) just society (Sen 2009): one that inflicts less pain overall (Christie 1981); that is more exact in its allocation of punishment to crimes; and that is mindful of the fact that location of punishment in 'the community' does not automatically mean an escape from penal severity (Cohen 1985). Greater attention to the demands of retributivism would not fix all of the problems of criminal justice in England and Wales, but it would at least be a step in the right direction.

## **Bibliography**

*All hyperlinks were last tested on the 20<sup>th</sup> November 2014.*

- Advisory Council on the Penal System (1977), *The Length of Prison Sentences: Interim Report* (London, HM Stationery Office).
- Agresti, A., and Finlay, B. (2009), *Statistical Methods for the Social Sciences* (4<sup>th</sup> edn., Upper Saddle River, NJ: Pearson Prentice Hall).
- Alasuutari, P. (2004), *Social Theory and Human Reality* (London: SAGE).
- Allen, G. F. (1985), 'The Probationers Speak: Analysis of the Probationers' Experiences and Attitudes' 49(1) *Federal Probation* 67-75.
- American Friends Service Committee (1971), *Struggle for Justice* (New York, NY: Hill and Wang).
- Annisson, J. (2007), 'A Gendered Review of Change within the Probation Service' 46(2) *The Howard Journal* 145-161.
- Annisson, J., Burke, L., and Senior, P. (2014), 'Transforming Rehabilitation: Another Example of English "Exceptionalism" or a Blueprint for the Rest of Europe?' 6(1) *European Journal of Probation* 6-23.
- Ashworth, A. (2009), *Principles of Criminal Law* (6<sup>th</sup> edn., Oxford: Oxford University Press).
- Ashworth, A. (2010), *Sentencing and Criminal Justice* 5<sup>th</sup> edn., Cambridge: Cambridge University Press).
- Ashworth, A., and Roberts, J. (2012), 'Sentencing: Theory, Principle, and Practice', in Maguire, Morgan and Reiner (eds.), *The Oxford Handbook of Criminology* (5<sup>th</sup> edn., Oxford: Oxford University Press).
- Ayer, A. J. (1936), *Language, Truth and Logic* ([1990], Harmondsworth: Penguin).
- Bagaric, M., and Amarasekara, K. (2000), 'The Errors of Retributivism' 24(1) *Melbourne University Law Review* 124-189.
- Baker, E. (1998), 'Drifting from Desert to Protection: Sentencing Policy in the 1990s' 10(5) *Federal Sentencing Reporter* 268-274.
- Bauwens, A. (2010), 'The Use of Method Triangulation in Probation Research' 2(2) *European Journal of Probation* 39-52.
- Becker, H. (1963), *Outsiders* (New York, NY: Free Press).
- Bennett, C. (2010), "'More to Apologise For": Can a Basis for the Recidivist Premium be Found within a Communicative Theory of Punishment?', in Roberts and von Hirsch (eds.), *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Oxford: Hart).



## Bibliography

- Berger, P., and Luckmann, T. (1967), *The Social Construction of Reality: A Treatise from the Sociology of Knowledge* ([1991], London: Penguin).
- Bhaskar, R. (2011), *Reclaiming Reality: A Critical Introduction to Contemporary Philosophy* (London: Routledge).
- Blagdon, N., and Pemberton, S. (2010), 'The Challenge in Conducting Qualitative Research with Convicted Sex Offenders' 49(3) *The Howard Journal* 269-281.
- Boda, Z., and Szabó, G. (2011), 'The Media and Attitudes towards Crime and the Justice System: A Qualitative Approach' 8(4) *European Journal of Criminology* 329-342.
- Bottoms, A. (1980), 'An Introduction to "The Coming Crisis"', in Bottoms, A., and Preston, R. (eds.), *The Coming Penal Crisis: A Criminological and Theological Exploration* (Edinburgh: Scottish Academic Press).
- Bottoms, A. (2008), 'The Community Dimension of Community Punishments' 47(2) *The Howard Journal* 146-169.
- Braithwaite, J. (1989), *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press).
- Braithwaite, J., and Pettit, P. (1990), *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Clarendon Press).
- Brody, S. (1976), *The Effectiveness of Sentencing* (Home Office Research Study #35, London: HM Stationery Office).
- Bronsteen, J., Buccafusco, C., and Masur, J. (2009), 'Happiness and Punishment' 76(3) *University of Chicago Law Review* 1037-1082.
- Bronsteen, J., Buccafusco, C., and Masur, J. (2010), 'Retribution and the Experience of Punishment' 98(5) *California Law Review* 1463-1496.
- Brooker, C. (2008), '"Community Payback" Bibs? That's Rubbish. At Least Come Up with Something Catchy, Like "Scum Slave"', *The Guardian*, 1<sup>st</sup> December.
- Brownlee, I. (1998), *Community Punishment: A Critical Introduction* (Harlow: Longman).
- Bryman, A. (2012), *Social Research Methods* (4<sup>th</sup> edn., Oxford: Oxford University Press).
- Burr, V. (2003), *Social Constructionism* (2<sup>nd</sup> edn., London: Routledge).
- Byrne, B. (2004), 'Qualitative Interviewing', in Searle, C. (ed.), *Researching Society and Culture* (2<sup>nd</sup> edn., London: SAGE).
- Canton, R. (2007a), 'Probation and the Tragedy of Punishment' 46(3) *The Howard Journal* 236-254.

## Bibliography

- Canton, R. (2007b), 'Punishment (Aims and Justifications)', in Canton and Hancock (eds.), *Dictionary of Probation and Offender Management* (Cullompton: Willan): 249-251.
- Canton, R. (2011), *Probation: Working with Offenders* (Abingdon: Routledge).
- Canton, R. and Hancock, D. (2007, eds.), *Dictionary of Probation and Offender Management* (Cullompton: Willan).
- Carter, C. (2009), 'Their Punishment, Your Choice', *Nottingham Evening Post*, 3<sup>rd</sup> April.
- Carter, P. (2003), *Managing Offenders, Reducing Crime: A New Approach* (London: Home Office).
- Casey, L. (2008), *Engaging Communities in Fighting Crime* (London: Cabinet Office).
- Cavadino, M., Dignan, J., and Mair, G. (2013), *The Penal System: An Introduction* (5<sup>th</sup> edn., London: SAGE).
- Christie, N. (1977), 'Conflicts as Property' 17(1) *British Journal of Criminology* 1-15.
- Christie, N. (1981), *Limits to Pain* (Oxford: Martin Robertson).
- Clarke, A. C. (1999), *Profiles of the Future: An Inquiry into the Limits of the Possible* (London: Victor Gollancz).
- Cohen, S. (1985), *Visions of Social Control: Crime, Punishment and Classification* (Cambridge: Polity Press).
- Cohen, S. (2002), *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (3<sup>rd</sup> edn., London: Routledge).
- Collin, F. (1997), *Social Reality* (London: Routledge).
- Committee of Ministers of the Council of Europe (1992), *The European Rules on Community Sanctions and Measures*, Recommendation No. R (92) 16 of the Committee of Ministers of the Council of Europe to Member States, 19<sup>th</sup> October 1992.
- Crawford, A. (1997), *The Local Governance of Crime: Appeals to Community and Partnership* (Oxford: Clarendon).
- Crewe, B. (2011), 'Depth, Weight, Tightness: Revisiting the Pains of Imprisonment' 15(3) *Punishment and Society* 509-529.
- Criminal Justice Joint Inspectorate (2012), *It's Complicated: The Management of Electronically Monitored Curfews: A Follow-Up Inspection of Electronically Monitored Curfews* (London: The Stationery Office, June 2012).
- Crouch, B. (1993), 'Is Incarceration Really Worse? Analysis of Offenders'

## Bibliography

- Preferences for Prison over Probation' 10(1) *Justice Quarterly* 67-88.
- Dalton, R. (2014), *Citizen Politics: Public Opinion and Political Parties in Advanced Industrial Democracies* (6<sup>th</sup> edn., Washington DC: CQ Press).
- Deering, J. (2010), 'Attitudes and Beliefs of Trainee Probation Officers: A 'New Breed'?' 57(1) *Probation Journal* 9-26.
- Deering, J. (2014), 'A Future for Probation?' 53(1) *The Howard Journal* 1-15.
- Dingwall, G. (2008), 'Deserting Desert? Locating the Present Role of Retributivism in the Sentencing of Adult Offenders' 47(4) *The Howard Journal* 400-410.
- Ditton, J., Chadee, D., Farrall, S., Gilchrist, E., and Bannister, E. (2004), 'From Imitation to Intimidation: A Note on the Curious and Changing Relationship between the Media, Crime and Fear of Crime' 44(4) *British Journal of Criminology* 595-610.
- Duff, R. A. (1986), *Trials and Punishments* (Cambridge: Cambridge University Press).
- Duff, R. A. (1998), 'Punishment, Communication and Community', in Matravers, M. (ed.), *Punishment and Political Theory* (Oxford: Hart).
- Duff, R. A. (2000), 'In Defence of One Type of Retributivism: A Reply to Bagaric and Amarasekara' 24 *Melbourne University Law Review* 411-426.
- Duff, R. A. (2001), *Punishment, Communication and Community* (Oxford: Oxford University Press).
- Duff, R. A. (2003), 'Probation, Punishment and Restorative Justice: Should Altruism be Engaged in Punishment?' 42(2) *The Howard Journal* 181-197.
- Duff, R. A. (2011), 'Responsibility, Restoration and Retribution', in Tonry, M. (ed.), *Retributivism has a Past: Has it a Future?* (Oxford: Hart).
- Durnescu, I. (2011), 'Pains of Probation: Effective Practice and Human Rights' 55(4) *International Journal of Offender Therapy and Comparative Criminology* 530-545.
- Durnescu, I. (2012), 'What Matters Most in Probation Supervision: Staff Characteristics, Staff Skills, or Programme?' 12(2) *Criminology and Criminal Justice* 193-216.
- Durnescu, I. (2014), 'Probation Skills between Education and Professional Socialisation' 11(4) *European Journal of Criminology* 429-444.
- Durrance, P., and Ablitt, F. (2001), '"Creative Solutions" to Women's Offending: An Evaluation of the Women's Probation Centre' 48(4)

## Bibliography

- Probation Journal* 247-259.
- Elias, N. (2000), *The Civilising Process: Sociogenetic and Psychogenetic Investigations* (E. Jebcott (trans.); Dunning, E., Goudsblom, J., and Mennell, S. (eds.); revised edn., London: Blackwell).
- Ellis, L., Hartley, R., and Walsh, A. (2010), *Research Methods in Criminology and Criminal Justice: An Interdisciplinary Approach* (Plymouth: Rowman & Littlefield).
- Emsley, C. (2010), *Crime and Society in England and Wales, 1750-1900* (4<sup>th</sup> edn., Harlow: Pearson Longman).
- Everingham, C. (2003), *Social Justice and the Politics of Community* (Aldershot: Ashgate).
- Farrington, D. (1986), 'Age and Crime' 7 *Crime and Justice* 189-250.
- Feeley, M. (1992), *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (New York, NY: Russell Sage Foundation).
- Feilzer, M. Y. (2007), 'Criminologists Making News? Providing Factual Information on Crime and Criminal Justice through a Weekly Newspaper Article' 3(3) *Crime Media Culture* 285-304.
- Feinberg, J. (1970), 'The Expressive Function of Punishment', in Duff, R. A., and Garland, D. (eds.), *A Reader on Punishment* ([1994], Oxford: Oxford University Press).
- Feinberg, J. (1980), 'The Nature and Value of Rights', reprinted in Feinberg, J., *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Guildford: Princeton University Press).
- Fish, M. (2008), 'An Eye for an Eye: Proportionality as a Moral Principle of Punishment' 28(1) *Oxford Journal of Legal Studies* 57-71.
- Fitzgibbon, W. (2011), *Probation and Social Work on Trial: Violent Offenders and Child Abusers* (London: Palgrave Macmillan).
- Fitzgibbon, W., and Lea, J., (2014), 'Defending Probation: Beyond Privatisation and Security' 6(1) *European Journal of Probation* 24-41.
- Flew, A. (1954), 'The Justification of Punishment' 29(111) *Philosophy* 291-307.
- Flyvbjerg, B. (2011), 'Case Study', in Denzin, N., and Lincoln, Y. (eds.), *The SAGE Handbook of Qualitative Research* (4<sup>th</sup> edn., London: SAGE).
- Foucault, M. (1970), *The Order of Things: An Archaeology of the Human Sciences* ([2002], Routledge/Tavistock (trans.), London: Routledge).
- Foucault, M. (1972), *The Archaeology of Knowledge* ([2002], A. Sheridan (trans.), London: Routledge).

## Bibliography

- Foucault, M. (1977), *Discipline and Punish* ([1991], A. Sheridan (trans.), London: Penguin).
- Foucault, M. (1980), 'Truth and Power', in Foucault, M., *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (C. Gordon (trans.), New York, NY: Harvester Wheatsheaf).
- Franklin, B. (2008), 'Newspapers: Trends and Developments', in Franklin (ed.), *Pulling Newspapers Apart: Analysing Print Journalism* (London: Routledge).
- Frase, R. (2004), 'Limiting Retributivism', in Tonry, M. (ed.), *The Future of Imprisonment* (Oxford: Oxford University Press).
- Frase, R. (2013), *Just Sentencing: Principles and Procedures for a Workable System* (Oxford: Oxford University Press).
- Furness, H. (2012), 'Stronger Community Sentences for Criminals, Ken Clarke Says', *The Daily Telegraph*, 28<sup>th</sup> March.
- Gainey, R., and Payne, B. (2000), 'Understanding the Experience of House Arrest with Electronic Monitoring: An Analysis of Quantitative and Qualitative Data' 44(1) *International Journal of Offender Therapy and Comparative Criminology* 84-96.
- Garland, D. (1985), *Punishment and Welfare: A History of Penal Strategies* (Aldershot: Gower).
- Garland, D. (1990), *Punishment and Modern Society: A Study in Social Theory* (Oxford: Clarendon Press).
- Garland, D. (2001), *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press).
- Gelsthorpe, L., and Morgan, R. (2007, eds.), *Handbook on Probation* (Cullompton: Willan).
- Gergen, K. (1999), *An Invitation to Social Construction* (London: SAGE).
- Goffman, E. (1968), *Stigma: Notes on the Management of Spoiled Identity* (Harmondsworth: Penguin).
- Goffman, E. (1991), 'On the Characteristics of Total Institutions', in E. Goffman, *Asylum: Essays on the Social Situation of Mental Patients and Other Inmates* (London: Penguin).
- Goode, A. (2007), 'Unpaid Work', in Canton and Hancock (eds.), *Dictionary of Probation and Offender Management* (Cullompton: Willan): 317-319.
- Goodman, A. (2007), 'Social Work', in Canton and Hancock (eds.), *Dictionary of Probation and Offender Management* (Cullompton: Willan): 299-300.

## Bibliography

- Graffam, J., Shinkfield, A., and Hardcastle, L. (2008), 'The Perceived Employability of Ex-Prisoners and Offenders' 52(6) *International Journal of Offender Therapy and Comparative Criminology* 673-685.
- Grapes, T. (2007), 'Offender Management', in Canton and Hancock (eds.), *Dictionary of Probation and Offender Management* (Cullompton: Willan): 188-191.
- Gray, D. (2010), 'Punishment as Suffering' 63(6) *Vanderbilt Law Review* 1619-1693.
- Green, S. (2014), *Crime, Community and Morality* (London: Routledge).
- Greenberg, D. (1977), 'The Correctional Effects of Corrections', in Greenberg, D. (ed.), *Corrections and Punishment* (Sage Criminal Justice System Annuals, vol. 8, Beverley Hills, CA: Sage).
- Greer, C., and Reiner, R. (2012), 'Mediated Mayhem: Media, Crime and Criminal Justice', in Maguire, Morgan and Reiner (eds.), *The Oxford Handbook of Criminology* (5<sup>th</sup> edn., Oxford: Oxford University Press).
- Griffiths, J. (1970), 'Ideology in Criminal Procedure or a Third 'Model' of the Criminal Process' 79(3) *Yale Law Journal* 359-417.
- Guest, G., MacQueen, K., and Namey, E. (2012), *Applied Thematic Analysis* (London: SAGE).
- Harding, A. (1983), 'The Origins of the Crime of Conspiracy' 33 *Transactions of the Royal Historical Society* 89-108.
- Harding, J. (2000), 'A Community Justice Dimension to Effective Probation Practice' 39(2) *The Howard Journal* 132-149.
- Harding, J. (2007), 'Community Justice', in Canton and Hancock (eds.), *Dictionary of Probation and Offender Management* (Cullompton: Willan): 49-51.
- Harrison, K. (2006), 'Community Punishment or Community Rehabilitation: Which is Highest on the Sentencing Tariff?' 45(2) *The Howard Journal* 141-158.
- Hart, H. L. A. (1960), 'Prolegomenon to the Principles of Punishment' 60 *Proceedings of the Aristotelian Society, New Series* 1-26.
- Hart, H. L. A. (1968), *Punishment and Responsibility* (Oxford: Oxford University Press).
- Hay, D. (1976), 'Property, Authority and the Criminal Law', in Hay, D., Linebaugh, P., Rule, J. G., Thompson, E. P., and Winslow, C., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Verso).
- Hayes, D. (2013), 'Reading between the Lines: English Newspaper

## Bibliography

- Representations of Community Punishment' 5(3) *European Journal of Probation* 24-40.
- Herman, E., and Chomsky, N. (2002), *Manufacturing Consent: The Political Economy of Mass Media* (2<sup>nd</sup> edn., New York, NY: Pantheon Books).
- Hewitt, T. (2008), 'The Big Issue: Vest Way to Tackle Yobs', *The Mirror*, 2<sup>nd</sup> December.
- Hill, R. (2007), 'National Probation Service for England and Wales', in Canton and Hancock (eds.), *Dictionary of Probation and Offender Management* (Cullompton: Willan): 177-179.
- Home Office (1977), *A Review of Criminal Justice Policy 1976* (London, HM Stationery Office).
- Hucklesby, A. (2011), 'The Working Life of Electronic Monitoring Officers' 11(1) *Criminology and Criminal Justice* 59-76.
- Hudson, B. (1994), 'Punishing the Poor: A Critique of the Dominance of Legal Reasoning in Penal Policy and Practice', in R. A. Duff, S. Marshall, R. E. Dobash, and R. P. Dobash (eds.), *Philosophy and the Criminal Law* (Manchester: Manchester University Press).
- Hudson, B. (2003), *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (2<sup>nd</sup> edn., Buckingham: Open University Press)
- Integrated Research Application System (IRAS) (2014), *IRAS Online Form User Manual version 2.0*, published online at <URL: [https://www.myresearchproject.org.uk/Help/Contents/IRASHelp\\_UserManual.pdf](https://www.myresearchproject.org.uk/Help/Contents/IRASHelp_UserManual.pdf)>.
- Jewkes, Y. (2011), *Media and Crime* (2<sup>nd</sup> edn., London: SAGE).
- Kahan, D. (1996), 'What do Alternative Sanctions Mean?' 63 *University of Chicago Law Review* 591-654.
- Kahan, D. (1998), 'Punishment Incommensurability' 1 *Buffalo Criminal Law Review* 691-708.
- Kahan, D. (2006), 'What's Really Wrong with Shaming Sanctions?' 84 *Texas Law Review* 2075-2096.
- Kant, I. (1785), *Groundwork for the Metaphysics of Morals* ([2002] A. W. Wood (ed., trans.), London: Yale University Press).
- Kaplan, A. (1964), *The Conduct of Inquiry: Methodology for Behavioral Science* (Scranton, PA: Chandler).
- Katz, J. (1988), *Seductions of Crime* (New York, NY: Basic Books).
- King, M. L. Jr. (1987), *The Words of Martin Luther King, Jr.* (C. S. King

## Bibliography

- (ed.), New York, NY: Newmarket Press).
- Kleinig, J. (2011), 'What Does Wrongdoing Deserve?' in Tonry, M. (ed.), *Retributivism has a Past: Has it a Future?* (Oxford: Oxford University Press).
- Knott, C. (1995), 'The STOP Programme: Reasoning and Rehabilitation in a British Setting', in McGuire (ed.), *What Works: Reducing Reoffending* (Chichester: Wiley).
- Knott, C. (2007), 'National Offender Management Service', in Canton and Hancock (eds.), *Dictionary of Probation and Offender Management* (Cullompton: Willan).
- Kolber, A. (2009a), 'The Comparative Nature of Punishment' 89(5) *Boston University Law Review* 1565-1608.
- Kolber, A. (2009b), 'The Subjective Experience of Punishment' 109(1) *Columbia Law Review* 182-236.
- Kuhn, T. (1996), *The Structure of Scientific Revolutions* (3<sup>rd</sup> edn., London: University of Chicago Press).
- Lacey, N. (1988), *State Punishment* (London: Routledge & Kegan Paul).
- Lacey, N. (2008), *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge University Press).
- Lacey, N., and Zedner, L. (1995), 'Locating the Appeal to "Community" in Contemporary Criminal Justice' 22(3) *Journal of Law and Society* 301-325.
- Landau, T. (2004) 'How to Put the Community Back into Community-Based Justice: Some Views of Participants in Criminal Courts Diversion' 43(2) *The Howard Journal* 131-148.
- Lee, Y. (2010), 'Repeat Offenders and the Question of Desert', in Roberts and von Hirsch (eds.), *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Oxford: Hart).
- Lewis, P. (2008), 'Jack Straw Launches High-Visibility Community Punishment', *The Guardian*, 2<sup>nd</sup> December.
- Lilly, J. (1989), 'What about House Arrest?' 62 *Journal of State Government* 89-91.
- Lipton, D., Martinson, R., and Wilks, J. (1975), *The Effectiveness of Correctional Treatment* (New York, NY: Praeger).
- Lovegrove, A. (2001), 'Sanctions and Severity: To the Demise of Von Hirsch and Wasik's Sanction Hierarchy' 40(2) *The Howard Journal* 126-144.



## Bibliography

- McCulloch, T., and McNeill, F. (2007), 'Consumer Society, Commodification, and Offender Management' 7(3) *Criminology and Criminal Justice* 223-242.
- McGuire, J. (1995, ed.), *What Works: Reducing Reoffending* (Chichester: Wiley).
- McKnight, J. (2009), 'Speaking Up for Probation' 48(4) *The Howard Journal* 327-343.
- McNeill, F. (2006), 'A Desistance Paradigm for Offender Management' 6(1) *Criminology and Criminal Justice* 39-62.
- McNeill, F. (2011), 'Probation, Credibility and Justice' 58(1) *Probation Journal* 9-22.
- McNeill, F., and Beyens, K. (2013), 'Introduction: Studying Mass Supervision', in McNeill, F., and Beyens, K. (eds.), *Offender Supervision in Europe* (London: Palgrave MacMillan).
- McPherson, T. (1967), 'Punishment: Definition and Justification' 28(1) *Analysis* 21-27.
- Mair, G. (1998), 'Community Penalties in England and Wales' 10(5) *Federal Sentencing Reporter* 263-267.
- Mair, G. (ed., 2004), *What Matters in Probation?* (Cullompton: Willan).
- Mair, G. (2007), 'Community Penalties', in Canton, R., and Hancock, D. (eds.), *Dictionary of Probation and Offender Management* (Cullompton: Willan).
- Mair, G. (2008), 'Research on Community Penalties', in King, R., and Wincup, E. (eds.), *Doing Research on Crime and Justice* (2<sup>nd</sup> edn., Oxford: Oxford University Press).
- Mair, G. (2011), 'The Community Order in England and Wales: Policy and Practice' 58(2) *Probation Journal* 215-232.
- Mair, G., and Burke, L. (2012), *Redemption, Rehabilitation and Risk Management: A History of Probation* (London: Routledge).
- Mair, G., and Mortimer, E. (1996), *Curfew Orders with Electronic Monitoring* (Home Office Research Study #163, London: The Stationery Office).
- Mair, G., and Nee, C. (1990), *Electronic Monitoring: The Trials and their Results* (Home Office Research Study #120, London: The Stationery Office).
- Markel, D. (2001), 'Are Shaming Punishments "Beautifully Retributive"? Retributivism and the Implications for the Alternative Sanctions Debate' 54(6) *Vanderbilt Law Review* 2157-2242.

## Bibliography

- Markel, D., and Flanders, C. (2010), 'Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice' 98(3) *California Law Review* 907-988.
- Markel, D., Flanders, C., and Gray, D. (2011), 'Beyond Experience: Getting Retributive Justice Right' 99(2) *California Law Review* 605-628.
- Martinson, J. (1974), 'What Works? Questions and Answers about Penal Reform', 35 *The Public Interest* 22-54.
- Maruna, S., and King, A. (2004), 'Public Opinion and Community Penalties', in Bottoms, Rex, and Robinson (eds.), *Alternatives to Prison: Options for an Insecure Society* (Cullompton: Willan).
- Marx, G. (1988), *Under Cover* (Berkley, CA: University of California Press).
- Maslow, A. (1966), *The Psychology of Science: A Reconnaissance* (London: Harper & Row).
- Mason, J. (2002), *Qualitative Researching* (London: SAGE).
- Meyer, J. (2004), 'Home Confinement with Electronic Monitoring', in Caputo, G. (ed.), *Intermediate Sanctions in Corrections* (College Station, TX: University of North Texas Press).
- Millie, A., Tombs, J., and Hough, M. (2007), 'Borderline Sentencing: A Comparison of Sentencers' Decision-Making in England and Wales, and in Scotland' 7(3) *Criminology and Criminal Justice* 243-267.
- Mills, H. (2011), *Community Sentences: A Solution to Penal Excess?* (London: Centre for Crime and Justice Studies).
- Ministry of Justice (2010), *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (London: The Stationery Office).
- Ministry of Justice (2012), *Punishment and Reform: Effective Probation Services* (London: The Stationery Office).
- Ministry of Justice (2013a), *Transforming Rehabilitation: A Revolution in the Way we Manage Offenders* (London: The Stationery Office).
- Ministry of Justice (2013b), *Transforming Rehabilitation: A Strategy for Reform* (London: The Stationery Office).
- Morgan, R. (2007), 'Probation, Governance and Accountability', in Gelsthorpe and Morgan (eds.), *Handbook on Probation* (Cullompton: Willan).
- Morgan, R., and Hough, M. (2008), 'The Politics of Criminological Research', in King and Wincup (eds.), *Doing Research on Crime and Justice* (2<sup>nd</sup> edn., Oxford: Oxford University Press).
- Morris, N. (1974), *The Future of Imprisonment* (Chicago, IL: University of

## Bibliography

- Chicago Press).
- Morris, N. (1982), *Madness and the Criminal Law* (Chicago, IL: University of Chicago Press).
- Nash, D., and Kilday, A. M. (2010), *Cultures of Shame: Exploring Crime and Morality in Britain, 1600-1900* (Basingstoke: Palgrave MacMillan).
- Nash, M. (2011), 'Probation, PSRs and Public Protection: Has a "Critical Point" Been Reached?' 11(5) *Criminology and Criminal Justice* 471-486.
- Nellis, M. (2006), 'Surveillance, Rehabilitation and Electronic Monitoring: Getting the Issues Clear' 5(1) *Criminology and Public Policy* 103-108.
- Nellis, M. (2007a), 'Humanising Justice: The English Probation Service up to 1972', in Gelsthorpe and Morgan (eds.), *Handbook on Probation* (Cullompton: Willan).
- Nellis, M. (2007b), 'Probation Values', in Canton and Hancock (eds.), *Dictionary of Probation and Offender Management* (Cullompton: Willan): 238-240.
- Nellis, M. (2009), 'Surveillance and Confinement: Explaining and Understanding the Experience of Electronically Monitored Curfews' 1(1) *European Journal of Probation* 41-65.
- Newburn, T. (2007), '"Tough on Crime": Penal Policy in England and Wales' 36(1) *Crime and Justice* 425-470.
- Noaks, L., and Wincup, E. (2004), *Criminological Research: Understanding Qualitative Methods* (London: SAGE).
- Office for National Statistics (ONS) (2012), *Ethnicity and National Identity in England and Wales* (London: ONS, 12<sup>th</sup> December), available online at <URL: [http://www.ons.gov.uk/ons/dcp171776\\_290558.pdf](http://www.ons.gov.uk/ons/dcp171776_290558.pdf)>.
- ONS (2014), *Annual Mid-Year Population Estimates, 2013* (London: ONS, 26<sup>th</sup> June), available online at <URL: [http://www.ons.gov.uk/ons/dcp171778\\_367167.pdf](http://www.ons.gov.uk/ons/dcp171778_367167.pdf)>
- Ormerod, D. (2011), *Smith and Hogan's Criminal Law* (13<sup>th</sup> edn., Oxford: Oxford University Press).
- Padfield, N. (2011), 'Time to Bury the "Custody Threshold"?' (8) *Criminal Law Review* 593-612.
- Pamment, N., and Ellis, T. (2010), 'A Retrograde Step: The Impact of High-Visibility Uniforms Within Youth Justice Reparation' 49(1) *The Howard Journal* 18-30.
- Payne, B., and Gainey, R. (1998), 'A Qualitative Assessment of the Pains Experienced on Electronic Monitoring' 42 *International Journal of Offender Therapy and Comparative Criminology* 149-163.

## Bibliography

- Pedain, A. [2003], 'Intention and the Terrorist Example', *Criminal Law Review* 579-593.
- Phillips, J. (2014), 'Understanding "The Relationship" in English Probation Supervision', in Durnescu, I., and McNeill, F. (eds.), *Understanding Penal Practice* (London: Routledge).
- Rawls, J. (1971), *A Theory of Justice* (Cambridge, MA: Harvard University Press).
- Raynor, P. (2008), 'Community Penalties and Home Office Research: On the Way Back to "Nothing Works"?' 8(1) *Criminology and Criminal Justice* 73-87.
- Raynor, P. (2012), 'Community Penalties, Probation, and Offender Management', in Maguire, Morgan and Reiner (eds.), *The Oxford Handbook of Criminology* (5<sup>th</sup> edn., Oxford: Oxford University Press).
- Raynor, P., and Vanstone, M. (2007), 'Towards a Correctional Service', in Gelsthorpe and Morgan (eds.), *Handbook on Probation* (Cullompton: Willan).
- Rex, S. (2005), *Reforming Community Penalties* (Cullompton: Willan).
- Rex, S., and von Hirsch, A. (1998), 'Community Punishment and the Assessment of Punishment Severity' 10(5) *Federal Sentencing Reporter* 278-282.
- Roberts, J. (2004), *The Virtual Prison*, Cambridge: Cambridge University Press.
- Roberts, J. (2010), 'First-Offender Sentencing Discounts: Exploring the Justifications', in Roberts and von Hirsch (eds.), *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Oxford: Hart).
- Roberts, J., and von Hirsch, A. (2010, eds.), *Previous Convictions at Sentencing* (Oxford: Hart).
- Roberts, J., Stalans, L., Indermaur, D., and Hough, M. (2003), *Penal Populism and Political Culture in England and Wales* (Oxford: Oxford University Press).
- Robinson, G., and McNeill, F. (2004), 'Purposes Matter: Examining the "Ends" of Probation', in Mair, G. (ed.), *What Matters in Probation* (Cullompton: Willan).
- Robinson, G., and Svensson, K. (2013), 'Practising Offender Supervision', in McNeill, F., and Beyens, K. (eds.), *Offender Supervision in Europe* (London: Palgrave Macmillan).
- Robinson, P. (1987), 'A Sentencing System for the 21<sup>st</sup> Century?' 66(1) *Texas Law Review* 1-61.

## Bibliography

- Rock, P. (2012), 'Sociological Theories of Crime', in Maguire, Morgan, and Reiner (eds.), *The Oxford Handbook of Criminology* (5<sup>th</sup> edn., Oxford: Oxford University Press).
- Rosenbaum, D. (1988), 'Community Crime Prevention: A Review of the Literature' 5(3) *Justice Quarterly* 323-393.
- Rubin, H., and Rubin, I. (2012), *Qualitative Interviewing: The Art of Hearing Data* (3<sup>rd</sup> edn., London: SAGE).
- Rumgay, J. (2007), 'COUNTERBLAST: Who Cares?' 46(4) *The Howard Journal* 431-433.
- Ryberg, J. (2010), 'Punishment and the Measurement of Severity', in Ryberg, J., and Corlett, J. A., *Punishment and Ethics: New Perspectives* (Basingstoke: Palgrave MacMillan).
- Schiff, M. (1997), 'Gauging the Severity of Criminal Sanctions: Developing the Criminal Punishment Severity Scale (CPSS)' 22(2) *Criminal Law Review* 175-206.
- Sen, A. (1987), *The Standard of Living* (Cambridge, MA: Cambridge University Press).
- Sen, A. (2009), *The Idea of Justice* (London: Penguin).
- Shapland, J. (ed., 2008), *Justice, Community and Civil Society: A Contested Terrain* (Cullompton: Willan).
- Silverman, D. (2006), *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction* (3<sup>rd</sup> edn., London: SAGE).
- Silverman, D. (2010), *Doing Qualitative Research* (3<sup>rd</sup> edn., London: SAGE).
- Simpson, J., and Weiner, E. (eds., 1989a), *The Oxford English Dictionary* (2<sup>nd</sup> edn., Oxford: Clarendon Press), definition of 'lex talionis': available online at <URL: <http://www.oed.com/view/Entry/107788?redirectedFrom=lex%20talionis#eid>>.
- Simpson, J., and Weiner, E. (eds., 1989b), *The Oxford English Dictionary* (2<sup>nd</sup> edn., Oxford: Clarendon Press), definition of 'punishment', available online at <URL: <http://www.oed.com/view/Entry/154677?redirectedFrom=punishment#eid>>.
- Simpson, J., and Weiner, E. (eds., 1989c), *The Oxford English Dictionary* (2<sup>nd</sup> edn., Oxford: Clarendon Press), definition of 'pain', available online at <URL: <http://www.oed.com/view/Entry/136056?rskey=8hCEyO&result=1&isA>>.

- [dvanced=false#eid>.](#)
- Slack, J. (2010), 'The Satnav Tags that Let Sex Offenders Walk Our Streets', *Daily Mail*, 27<sup>th</sup> December.
- Spelman, W. (1995), 'The Severity of Intermediate Sanctions' 32(2) *Journal of Research in Crime and Delinquency* 107-135.
- Spierenburg, P. (1984), *The Spectacle of Suffering: Executions and the Evolution of Repression - from a Preindustrial Metropolis to the European Experience* (Cambridge: Cambridge University Press).
- Sykes, G. M. (1958), *The Society of Captives: A Study of a Maximum Security Prison* (Princeton, NJ: Princeton University Press).
- Thomas, T., and Thompson, D. (2010), 'Making Offenders Visible' 49(4) *The Howard Journal* 340-348.
- Tonry, M. (1995), *Malign Neglect: Race, Crime and Punishment in America* (Oxford: Oxford University Press).
- Tonry, M. (2010), 'The Questionable Relevance of Previous Convictions to Punishments for Later Crimes', in Roberts and von Hirsch (eds.), *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Oxford: Hart).
- Travis, A. (2011), 'Key Probation Services to be Put Out to Tender', *The Guardian*, 12<sup>th</sup> July.
- Underdown, A. (2007), 'Effective Practice', in Canton and Hancock (eds.), *Dictionary of Probation and Offender Management* (Cullompton: Willan).
- Van Zyl Smit, D., and Ashworth, A. (2004), 'Disproportionate Sentences as Human Rights Violations' 67(4) *Modern Law Review* 541-560.
- Van Zyl Smit, D., and Snacken, S. (2009), *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford: Oxford University Press).
- Van Zyl Smit, D., et al (2007), *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (New York, NY: United Nations Office on Drugs and Crime).
- Vanstone, M. (2004), *Supervising Offenders in the Community: A History of Probation Theory and Practice* (Aldershot: Ashgate).
- Vanstone, M. (2008), 'The International Origins and Initial Development of Probation: An Early Example of Policy Transfer' 48 *British Journal of Criminology* 735-755.
- Von Hirsch, A. (1976), *Doing Justice* (New York, NY: Hill and Wang).
- Von Hirsch, A. (1986), *Past or Future Crimes* (Manchester: Manchester University Press).

## Bibliography

- Von Hirsch, A. (1993), *Censure and Sanctions* (Oxford: Oxford University Press).
- Von Hirsch, A. (2010), 'Proportionality and the Progressive Loss of Mitigation: Further Reflections', in Roberts and von Hirsch (eds.), *Previous Convictions at Sentencing: Theoretical and Applied Perspectives* (Oxford: Hart).
- Von Hirsch, A., and Jareborg, N. (1991), 'Gauging Criminal Harm: A Living Standard Analysis' 11(1) *Oxford Journal of Legal Studies* 1-38.
- Von Hirsch, A., and Roberts, J. (2004), 'Legislating Sentencing Principles: The Provisions of the Criminal Justice Act 2003 Relating to Sentencing Principles and the Role of Previous Convictions' (8) *Criminal Law Review* 639-652.
- Von Hirsch, A., and Wasik, M. (1988), 'Non-Custodial Penalties and the Principles of Desert' (9) *Criminal Law Review* 555-572.
- Walklate, S., and Mythen, G. (2011), 'Beyond Risk Theory: Experiential Knowledge and "Knowing Otherwise"' 11(2) *Criminology and Criminal Justice* 99-113.
- Ward, T. (2009), 'Dignity and Human Rights in Correctional Practice' 1(2) *European Journal of Probation* 110-123.
- Wardle, C. (2008), 'Crime Reporting', in Franklin (ed.), *Pulling Newspapers Apart: Analysing Print Journalism* (London: Routledge).
- Weeks, K. (2011), *The Problem with Work: Feminism, Marxism, Antiwork Politics and Postwork Imaginaries* (London: Duke University Press).
- Whitman, J. (1998), 'What is Wrong with Inflicting Shame Sanctions?' 107(4) *Yale Law Journal* 1055-1092.
- Winnett, R. (2012), 'Tough New Community Sentences Unveiled by David Cameron', *The Daily Telegraph*, 17<sup>th</sup> March.
- Winter, S. (2005), 'What Makes Modernity Late?' 1(1) *International Journal of Law in Context* 61-80.
- Wintour, P. (2008), 'Home Secretary Blames Media for Confusion over Knife Criminals' Visits to Victims in A&E', *The Guardian*, 15<sup>th</sup> July.
- Wood, P., and Grasmick, H. (1999), 'Towards the Development of Punishment Equivalencies: Male and Female Offenders Rate the Severity of Alternative Sanctions Compared to Prison' 16(1) *Justice Quarterly* 19-50.
- Wormald, P. (1999), *The Making of English Law: King Alfred to the Twelfth Century, volume 1: Legislation and its Limits* (Oxford: Blackwell).
- Worrall, A. (1997), *Punishment in the Community: The Future of Criminal*

## Bibliography

*Justice* (Harlow: Pearson Education).

Wykes, M. (2001), *News, Crime and Culture* (London: Pluto Press).



**Appendices**

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## Appendix A: Participant Information Sheet for Offenders

Offender PIS, v. 4  
25<sup>th</sup> February 2013.



### Study on the Impact of Community Penalties

*Researcher: Mr. David Hayes*

*Supervisors: Professor Dirk van Zyl Smit and Dr. Candida Saunders*

*The University of Nottingham, School of Law*

#### **Participant Information Sheet**

I would like to invite you to take part in a research study, which will form part of a Ph.D. thesis. The research investigates the experiences of adults undergoing community punishment, in terms of how much and in what ways it affects their lives.

**Why am I being approached?** You are being approached because you are serving a community order, and have at least two months' experience of doing so.

**Do I have to take part?** No. This research is entirely voluntary. If you do participate then you can withdraw at any time before 31<sup>st</sup> January 2014, without having to give a reason.

**What would I be asked to do?** If you choose to participate in the study, you will be involved in the following ways:

1. You should be willing for me to have access to your case-file before you sign the consent form.
2. We would then meet for a one-on-one discussion. This should take about 60 minutes.
3. After the interviews I will arrange for you and five other probationers to take part in a group discussion, which will last about 90 minutes.

The research will conclude by 31<sup>st</sup> January 2014. If you do take part, I will try to be as flexible as possible, so that your participation doesn't interfere with your other commitments.

**Confidentiality and Anonymity:** Everything you say in one-on-one and group discussions will be kept in strict confidence. Any information that could be used to identify you will be made anonymous. There are two important exceptions to the duty of confidentiality I owe to you, which I am required to bring to your attention. I have to report any admission of a previously undetected crime or a threat to yourself or any other person to the relevant authorities.

**Expenses and Payments:** You will receive a £10 shopping voucher after both meetings. I can also pay for your travel expenses. At the end of the study you will receive a certificate to use as evidence of your participation, for use in your CV, for example.

**Possible benefits of participating:** This research will be contributing to policy discussion in a form that will emphasise your own personal experiences of community punishment, allowing your voice to be heard in a national debate.

**After the research is completed:** If you want me to, I will send you a summary of the findings of the study once it has concluded.

**Complaints and concerns:** If you have any concerns or queries during the research then you should feel free to contact me using the details below. You can also contact my supervisors. Please email Prof. Dirk van Zyl Smit ([Dirk.Van\\_Zyl\\_Smit@nottingham.ac.uk](mailto:Dirk.Van_Zyl_Smit@nottingham.ac.uk)) and/or Dr. Candida Saunders ([candida.saunders@nottingham.ac.uk](mailto:candida.saunders@nottingham.ac.uk)), who will investigate your concerns.

**Further information and contact details:** You can always contact me if you have any questions about the research. My details are as follows:

**eMail:** [Law.Community.Punish@nottingham.ac.uk](mailto:Law.Community.Punish@nottingham.ac.uk)

**Post:** David Hayes  
The School of Law  
Law and Social Sciences Building  
University Park  
Nottingham NG72RD

Please include the contact details you'd like me to use to reply to your enquiry. Please feel free to contact me through a third party if you'd prefer.

**Thank you for your interest in this study!**

## Appendix B: Consent Form for Offenders

Offender Consent Form v. 3  
25<sup>th</sup> February 2013



### Study on the Impact of Community Penalties

Researcher: Mr. David Hayes

Supervisors: Professor Dirk van Zyl Smit and Dr. Candida Saunders

The School of Law, The University of Nottingham

### Consent Form

The participant should fill in this form by him- or herself. Please initial in the right-hand boxes:

- I have read and understood the participant information sheet. ☐
- I have had the opportunity to ask questions and they have been fully answered. ☐
- I understand the aims of the study and why I have been invited to join it. ☐
- I agree to the use of my case file to provide a background for the information collected during the study. ☐
- I understand that the information I provide will be kept for seven years in strict confidence and that it will be made anonymous. ☐
- I understand that the researcher's duty of confidentiality does *not* cover any mention of undetected criminal acts or threats to the safety and wellbeing of any person. ☐
- I understand that I can withdraw from the study at any time prior to December 31<sup>st</sup> 2013, without having to give a reason. ☐
- I know who to contact if I have any further questions, or if I wish to make a complaint. ☐
- I agree to take part in the study. ☐

*'This study has been explained to me to my satisfaction, and I agree to take part.'*

Participant's Signature: ..... Date: .....

Name (in Block Capitals):.....

*'I have explained the study to the above participant and he/she is willing to take part.'*

Researcher's Signature: ..... Date: .....

## Appendix C: Participant Information Sheet for Staff

Staff Participant Information Sheet, v. 5  
15<sup>th</sup> July 2013



### Study on the Impact of Community Penalties

*Researcher: Mr. David Hayes*

*Supervisors: Professor Dirk van Zyl Smit and Dr. Candida Saunders  
The University of Nottingham, School of Law*

#### **Participant Information Sheet**

I would like to invite you to take part in a study into the experiences of adult offenders undergoing community orders, which will form part of a Ph. D. thesis. This document will provide information about the aims of the study and what you would be asked to do if you took part in it. However, if you have any further questions then please feel free to contact me.

**Why am I being contacted?** You have been contacted because you are responsible for the supervision of one or more offenders, and therefore have an invaluable understanding of what offenders go through during a community order.

**This study is voluntary:** You should feel no obligation to take part. If you do participate, you can withdraw at any point before 31<sup>st</sup> December 2013, without having to give a reason.

**What does participation in the study involve?** If you agree to take part in the study, then you will be involved at three steps of the research, as follows:

1. **Offender Recruitment:** You would be asked to identify one of your supervisees as a potential participant. You should recommend an offender whose supervision you are prepared to discuss. I will provide suitability criteria closer to the time as a guide to your suggestions.
2. **One-on-One Discussion:** This stage consists of a face-to-face interview at the Supervision Centre most convenient for you. The interview will last for approximately 60 minutes.
3. **Group Discussion:** After the interviews I will arrange for you and five other officers to take part in a group interview, which will last about 90 minutes.

These stages will take place between your consenting to participate in the study and December 2013. We will discuss what times are most convenient for you at every stage.

**Confidentiality and Anonymity:** Your participation in the study will be entirely confidential. Any information that could be used to identify you will be made anonymous.

**Expenses and Payments:** I will reimburse your travel costs for the group discussion stage. I would be grateful if you could provide a receipt if at all possible.

**Possible benefits of participating:** This research will be contributing to policy discussion in a form that will emphasise your own personal feelings and experiences about community punishment, allowing your voice to be heard within a national debate.

**After the research is completed:** Once the study has finished, I will provide a summary of the findings of the study, if you want one.

**Complaints and concerns:** If you have any concerns or queries during the research then you should feel free to contact me using the details below. You can also contact my supervisors. Please email Prof. Dirk van Zyl Smit ([Dirk.Van\\_Zyl\\_Smit@nottingham.ac.uk](mailto:Dirk.Van_Zyl_Smit@nottingham.ac.uk)) and/or Dr. Candida Saunders ([candida.saunders@nottingham.ac.uk](mailto:candida.saunders@nottingham.ac.uk)), who will investigate your concerns.

**Further information and contact details:** You can contact me through any of the following means:

**eMail:** [Law.Community.Punish@nottingham.ac.uk](mailto:Law.Community.Punish@nottingham.ac.uk)

**Post:** David Hayes  
The School of Law  
Law and Social Sciences Building  
University Park  
Nottingham NG72RD

Please include the contact details you'd like me to use to reply to your enquiry.

**Consent:** I will provide a consent form at the start of the one-to-one discussion. Please feel free to ask me any questions you may have before that meeting, or in person at the start of the interview.

**Thank you for your interest in this study!**

## Appendix D: Consent Form for Staff

Staff Consent Form, v. 2  
25<sup>th</sup> February 2013



### Study on the Impact of Community Punishment

Researcher: Mr. David Hayes

Supervisors: Professor Dirk van Zyl Smit and Dr. Candida Saunders

The School of Law, The University of Nottingham

#### Consent Form

The participant should fill in this form by him- or herself. Please delete as necessary:

- Have you read and understood the Participant Information Sheet for Probation Service Staff? YES/NO
- Have you been able to ask any questions? If so, were they answered satisfactorily? YES/NO
- Do you understand the purpose of the study and your involvement in it? YES/NO
- Do you understand that you are free to withdraw at any time until December 31<sup>st</sup> 2013 without having to give a reason? YES/NO
- Do you understand that whilst the data used in this study will be used in future publications, you will not be identified and your personal results will remain confidential, even if your responses are quoted? YES/NO
- Do you understand that data will be stored in an anonymised written document on a secure server at the University of Nottingham behind password protection for a period of seven years after the date of the results being published? YES/NO
- Do you know who to contact if you have any further questions, or if you wish to make a complaint? YES/NO
- Do you agree to take part in this study? YES/NO

*'This study has been explained to me to my satisfaction, and I agree to take part.'*

Participant's Signature: ..... Date: .....

Name (in Block Capitals): .....

*'I have explained the study to the above participant and he/she is willing to take part.'*

Researcher's Signature: ..... Date: .....

## Appendix E: Case-File Notes: Blank Template

Case-file Notes

1.0

14<sup>th</sup> June 2013

### **CASE-FILE NOTES**

*All data that has been collected is anonymous and should be held in strict confidence. This data should be attached to the written interview transcript and filed accordingly.*

**Participant Codename:**

**Supervisor Codename:**

#### 1. Case History

- The offence:

--

- Brief summary of the offence:

--

- Previous criminal history:

--

- Purposes of Sentence:

--

- Order and requirements:

--

- Risk of Reoffending:

--

- Risk of Serious Harm:

Group	Risk in Community	Risk in Custody
Children		
Public		
Known Adult		
Staff		
Prisoners	-	
Self		

## Appendix E: Case-File Notes: Blank Template

### 2. Life Situation

- Demographics:

Age (Group)	Gender	Ethnicity	Religion

- Family:

- Friends:

- Work and Finance:

- Accommodation:

- Mental/Physical Health Concerns:

- Other:

## Appendix E: Case-File Notes: Blank Template

### 3. Notes for Interviews

- Which questions, if any, from the interview schedule are particularly relevant to ask (and are there any other questions not on the schedule that should be asked?):

- The supervisor?

--

- The offender?

--



### Interview Schedules for Qualitative Interviews

#### KEY

- Text in **bold** identifies a main question. Something from each of these heads should be covered in each interview.
  - Indented text is a potential follow-up question, used to develop the question and move the interview towards richer detail. These consist of a menu of different options that it would be impossible to get through in any useful amount of detail during a 60-minute interview. Instead, follow-ups will be selected on the basis of the participant's unique experiences and their comments in answering earlier questions. They will be deployed in such a way that all questions will be asked multiple times, if not necessarily in the same form (or even at all) to each and every participant. In any event, all participants will be able to (in)validate conclusions reached using these questions in the focus groups stage.
    - Double-indented text identifies separate items on a list or optional follow-ups on other follow-up questions.

Text in *italics* indicates a note on the purposes or use of the questions.

#### Opening Note for the Research Ethics Committee

This schedule draws upon various sources, but adopts terminology in Rubin, H., and Rubin, I. (2012), *Qualitative Interviewing: The Art of Hearing Data* (3<sup>rd</sup> edn., SAGE: London). Briefly: a *main question* provides the basic structure of the interview, identifying the key milestones to reach in terms of data generation. A *tour question* is a special subtype of main question that requests a broad overview of a process or phenomenon in order to establish rapport and point to potentially interesting topics. *Follow-up questions* provide additional detail and texture, improving the quality of the data gathered. *Probes* are requests for additional information or other means of controlling the flow of the interview itself.

Rubin and Rubin identify a number of characteristics of a successful interview schedule, the foremost of which is its *dynamic* nature. Responses in early interviews will help to refine and clarify questions in later ones, and will highlight areas for further discussion during the focus group stage.

At the start of these interviews, participants will be asked to fill out a transcript topsheet noting their age, sex and ethnicity, which will help to lead into the interview, establish rapport, and allow the study's full demographic range to be properly understood.

## **Appendix F: Primary Interview Schedules for Offenders and Staff**

### **Offenders**

#### **Topic (1): The Order and its Impact (c. 40-45 minutes)**

- a) **Talk me through your order. What do you have to do, and when?** (*Opening Tour Question*)
- i. How easy is it to keep up with your order? Do you worry about breaching?
    - (*If breach is an issue*) What makes it so difficult to stick to the order?
  - b) **How much do you feel that the order has affected your life?**
    - i. How much time does your order take up? What would you otherwise do with the time?
      - How much time and money do you have to spend on travelling for the purposes of your order?
    - ii. How have your friends responded to your order? Do they know about it?
    - iii. What about work? Are you working at the minute, or looking for work?
      - (*If they work*) How is your job affected by the order?
      - (*If they're looking for work*) How does being on the order affect your ability to find work?
    - iv. Has the order had any effect on your accommodation?
    - v. How has your relationship with the rest of your family been affected by the order?
    - vi. How do you think the way that others see you has been affected by the order?
      - Has it affected the way you see yourself?
    - vii. Do you feel that there is anything you cannot do under the order?
  - c) **What do you think the judge wanted to do to you by sentencing you to the order?**
    - i. Do you feel as if you are being punished by the order?
      - (*If yes*) Does it seem like the punishment reflects the severity of the offence you were sentenced for?
    - ii. Who decides if you are punished or not?
      - Who's responsible for telling you? (*Bridge to the second topic!*)

#### **Topic (2): Relationship with Supervision Officer (c. 15-20 minutes)**

- a) **Tell me about your supervision officer. What does a typical supervision session with him/her involve?** (*Opening Tour Question*)
- i. What is the purpose of his/her supervision sessions, as far as you can see?
  - ii. How well does s/he communicate with you in these sessions?
  - iii. (*If multiple requirements*) How does your supervisor compare with other officials you have to deal with under your order (*give examples*)?
  - iv. How important is supervision to what your order is supposed to do?

**Is there anything else that you think I should have asked?  
Anything else that I should know?**

## **Appendix F: Primary Interview Schedules for Offenders and Staff**

### **Supervision Officers**

Topic (1): The Supervision Officer (c. 25 minutes)

- a) **How did you get into the Service? Did you have a previous career? What qualifications do you have? How long have you been a Probation Officer?**
- b) **Talk me through a typical supervision session, as you would run it. What do you tend to do?**
  - i. How typical is the 'typical' session? Is there such a thing as typical practice?
  - ii. What sorts of topics tend to come up?
- c) **What do you try to achieve in supervision?**
  - i. What values do you think make a good supervisor?
  - ii. What does the concept of 'Probation Values' mean to you?
  - iii. To what extent do you think you apply probation values in your work?
    - Are there tensions between your work and probation values? How are they resolved?
- d) **How important is supervision to the typical community order?**
  - i. What is the purpose of supervision? (*Perhaps ask for a hypothetical job description?*)
    - Is your job to punish the offender? Should it be?
  - ii. What do offenders tend to need from supervision? (*Bridge to next Topic!*)

Topic (2): The Offender-Supervisee (c. 35 minutes)

- a) **What does the offender you recommended need from their supervision sessions?**
  - i. How important is your supervision to the order that s/he receives?
  - ii. What is/are the purpose/s of their supervision sessions?
- b) **Do you think you have a good professional relationship with the offender you recommended?**
  - i. How typical are the offender's needs?
  - ii. What factors make him/her easy/difficult to deal with?
- c) **How has his/her community order affected their life, as far as you can tell?**
  - i. How easy is it for the offender to keep up with his/her requirements?
    - What factors make it easy/difficult for him/her to avoid breach?
  - ii. How do you think the offender's relationships with friends and family have been affected by the order? Can you give any examples?
  - iii. Does the order affect the offender's capacity to work/look for work?
  - iv. Is there anything that the offender seems unable to do because of the order? (*except what they are restricted from doing under their requirements*)
    - How do you find this sort of thing out? Does the offender talk about this sort of thing?

**What's in the future? How are the government's 'contestation' proposals affecting your current work?**

**Is there anything else that you think I should know? Anything that you were surprised I didn't ask?**

## **Appendix G: Overview of Offender Backgrounds**

### **Appendix G: Overview of Offender Backgrounds**

In this appendix, I provide a brief overview of the circumstances of each offender participating in this study, including their offences, and the orders imposed upon them. This data, gathered from case-file analysis, will help to situate the offenders' experiences of the pains of community punishment, and so provide a useful reference for the evaluation of such sentences' penal impact.

Each offender is listed (OC, followed by IC). Their recorded demographic information is given in terms of gender, ethnicity, and age group. A summary of their offence, order, and the salient features of their situation is then given. Fuller details are precluded both by the need to preserve the offenders' anonymity, and by the limits of space.

#### OCO1: Male, White (British), 65+

OCO1 committed sexual assault against a child under the age of 13, to whom he was related. He received a community order with a programme requirement and 36 months' supervision. He also received disqualification and restraining orders. He has no previous criminal history.

OCO1 is habitually housebound as a result of his age and physical infirmity. He lives with his partner, whom his supervisor believes is in a co-dependent relationship with him. He is out of contact with the rest of his family, especially with the immediate family of the victim. She has supported him despite the nature of his offence. He has no formal qualifications and is retired. During his working life he was consistently employed in a diverse range of semi-skilled and unskilled jobs.

#### OCO2: Male, White (British), 45-49

OCO2 was convicted of two counts of common assault, one against his partner, and the other against a relative of hers, whilst intoxicated by

## **Appendix G: Overview of Offender Backgrounds**

alcohol. He has six previous convictions, all for violent offences. He received a 24-month suspended sentence order (SSO) with 24 months' supervision and a program requirement.

OCO2 has no formal qualifications but spent considerable time in the construction industry. However, prior to sentence he suffered a heart attack which kept him out of work.<sup>1</sup> He is a recovering alcoholic, and now abstains from alcohol. The case-file notes a number of emotional problems, notably anger management issues. His relationship with his partner is generally healthy, although they had been having an altercation over his alleged infidelity at the time of the offence. They have a young child together.

OCO3: Male, White (British), 45-49.

OCO3 was convicted of common assault whilst living in charitable accommodation provided to ex-offenders. He required this housing because of a restraining order taken out against him after an alcohol-related attack on his partner. He was sentenced to a community order with a 12-month supervision requirement. He has seven previous convictions for 30 offences, stretching back to his early adulthood. Only two were for violent offences, however.

OCO3 suffers from depression and post-traumatic stress disorder, and is a recovering alcoholic. He has a strained relationship with his immediate family, whose strong religious views left him, in his own words, as 'an emotional cripple'. He has a relatively large number of O' Levels, but has generally worked a variety of unskilled and semi-skilled jobs, including time in the armed forces. He was discharged from this following his PTSD diagnosis, and is currently unemployed. He was briefly homeless

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<sup>1</sup> He stated in interview that he saw this as one reason why he received a non-custodial sentence.

## **Appendix G: Overview of Offender Backgrounds**

but was taken back in by the charity on whose premises he committed the latest offence, albeit in substantially less pleasant accommodation. He and his partner have a healthy relationship, and were able to overturn the restraining order keeping them apart towards the end of his order.

OCO4: Female, White (British), 35-39.

OCO4 assaulted a police officer in the course of their duty, during a struggle in a police station after she and her partner were arrested during a loud altercation in their home. She received a community order with a six-month supervision requirement. She has one previous conviction, also for a violent offence.

OCO4 has a committed relationship with her partner. However, both are frequently verbally abusive towards one another. Her partner has an extensive criminal record and was also serving community punishment at the time of her order. They have four children, each of whom was removed from their care by social services and fostered separately from them. OCO4 is engaged in a bitter dispute with social services over custody. Following a car accident she is physically unfit for work, but has previous experience of unskilled labour and was relatively successful in formal education.

OCO5: Male, White (Other), 25-29

OCO5 was convicted of common assault and assault occasioning actual bodily harm, against his partner and one of their children. He received a community order with a program requirement and a 24-month supervision requirement. He was also subject to a restraining order and received a fine. At trial he received an alcohol treatment requirement, but this was overturned when it emerged he had been seeking alcohol support

## **Appendix G: Overview of Offender Backgrounds**

in the community. In addition to his order, he volunteered with community gardening and boxing projects run in partnership with the Probation Trust.

OCO5 is a recovering alcoholic – he also blames his addiction for his becoming diabetic. He started drinking to excess after the death of his brother. His relationship to the rest of his blood relatives is strained. He reports a history of abuse from his parents, coupled with tension over his leaving their Travelling community to settle with his own family. He has five children (four at the time of the offence). Before his alcoholism he was self-employed, but was at time of interviewing in receipt of JSA. Due to his family's lifestyle he received no formal education. He intends to start a new self-employed business after he completes his order, and also to volunteer as a mentor for fellow ex-offenders.

OCO6: Female, White (British), 50-54.

OCO6 was convicted of driving while unfit through drink. She was then resentenced for breach of her order, and received an 18-month SSO with a 12-month supervision requirement. She had one previous conviction, also for drink-driving, more than ten years ago.

In addition to being a recovering alcoholic, OCO6 suffers from depression. Alcohol counteracts her medication for this condition, so when she drinks it is especially severe. Despite having relatively few formal qualifications, she has received many vocational qualifications associated with holistic therapy, and hopes to start a business in that area. She is presently unemployed, and believes that her mental health qualifies her for Employment and Support Allowance (ESA), but has been assessed as fit for work, and therefore only eligible for Jobseeker's Allowance (JSA), which is less generous and requires active job-seeking before payments are made. Since she has not sought work she had had no income for several months prior to her interview. As a result she is struggling to

## **Appendix G: Overview of Offender Backgrounds**

repay her fine, and relies upon food banks for subsistence. However, she owns her house outright.

Numerous other actors are involved with her case, including alcohol support and poverty relief charities, the Citizen's Advice Bureau, her GP, and the Department of Work and Pension's (DWP) assessor.

She has four children, all of whom are teenagers or adults. None of them live with her, in part because of her poverty, in part due to her alcoholism. She is in regular contact with her mother, whom she cares for.

### ICO1: Male, White (British), 30-34

ICO1 committed assault occasioning actual bodily harm in an alcohol-related incident against his (then) girlfriend. He received a 12-month SSO with a 12-month supervision requirement, and 120 hours of unpaid work. He had no previous convictions.

ICO1 became homeless during his order, and was reliant upon friends for temporary accommodation. He also became temporarily unemployed, although he regained unemployment shortly after the interview. He has numerous formal qualifications and a long history of employment in semi-skilled jobs. He is a recovering alcoholic, although unlike others in the sample, is not completely abstinent. As a result of a previous relationship his case-file notes that he has trust issues that, compounded by his inebriation, led to the offence. He has a healthy relationship with his blood relatives, but is no longer in a relationship with his victim.

### ICO2: Male, Black (British), 25-29

ICO2 was convicted of one count of robbery, two counts of theft and one count of criminal damage. He received a community order with a



## **Appendix G: Overview of Offender Backgrounds**

12-month supervision requirement. He has 22 previous convictions: five violent, the rest theft offences. In particular he is a prolific shoplifter.

ICO2 suffers from learning disabilities that make him very shy and reserved, especially around strangers. He has no formal qualifications, and has been reliant on JSA for some time. He resides with his mother, with whom his supervisor believes he has a co-dependent relationship, which reduces his ability to live independently. He has few other relationships. Most of his friends are either friends of his mother's or childhood acquaintances with whom he was historically involved in gang-based criminality. He briefly left the family home after an argument with his mother, but has since returned. He is alcohol-dependent. Many of his previous convictions (and two of the current counts) are related to theft of alcohol, the result of a combination of his addiction, his low income, and low impulse control stemming from his learning difficulties. Alongside his formal punishment he is undertaking a voluntary alcohol information programme run by the Trust, although he has completed it in the past without overcoming his addiction.

ICO3: Male, White (British), 45-49.

ICO3 committed a fraud offence whilst employed in the financial services industry. He received an 18-month SSO with an 18-month supervision requirement, and has no previous convictions.

ICO3's offence was motivated by a large amount of debt, which he has a history of repeatedly building up. He has had to declare bankruptcy on one previous occasion. Following the offence his partner left him and evicted him from the family home; he has since moved to privately rented accommodation. He has three teenaged children by his ex-partner whom he sees regularly. He has also commenced a new relationship, and cares for his elderly mother since the death of his father.

## **Appendix G: Overview of Offender Backgrounds**

He is seeking work but has difficulty gaining employment due to his dishonesty offence. He has a history of suffering from depression, now compounded by his father's death.

Since their breakup, his ex-partner has alleged that he has domestically abused and raped her. He denies both complaints. He alleges that she suffers from mental health problems, and that she is trying to manipulate the police in order to prevent him from seeing their children.