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Punishment *in* Society: The Improbable Persistence of Probation and other Community Sanctions and Measures

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Introduction

Things were looking awfully bleak for probation at the turn of the last century. Despite being around for nearly 100 years, probation in the United Kingdom, for instance, was said to be 'uncomfortable, threatened, unsure of its role, and not at all confident of its social or political credibility' in the 1990s (Garland, 1997: 3). Similar perceptions led to a series of high-profile conferences and reports on the state of probation in the United States at the end of the 1990s. According to one of the experts participating in the influential *Rethinking Probation* meeting (Dickey & Smith, 1998, p. 6), for instance: "Public regard for probation is dangerously low […] We have to realise that we don't have broad public legitimacy". A subsequent, and equally prestigious report, titled *Reinventing Probation* followed only two years later, raising the alarm level even higher (Beto, Corbett & DiIulio, 2000). The authors argued that community corrections were suffering from a "crisis of legitimacy" (p. 4), arguing: "Although low ratings [in public opinion polls] obviously are related to poor performance, they also signal a failure on probation's part to convey an image to citizens of a model of practice that embodies widely held values and serves overriding public safety concerns" (p. 1). Things really hit bottom, though, the following year. In an article titled 'The End of Probation?,' published in the in-house magazine of the American Probation and Parole Association, community corrections experts Maloney, Bazemore and Hudson (2001: 24) argued that the US model of probation had "gone the way of the Edsel" in terms of performance and reputation. They argued that, like the Ford Motor Company's infamous failure, 'probation' as a brand needed to be retired. By that, they not only advocated the end of traditional US probation practice (which they saw as based on the "rather bizarre assumption that surveillance and some guidance can steer the offender straight"), but also dispensing with the 'brand name' of probation in the United States.[i]

So, what happened next? Whatever became of that allegedly endangered species of penal sanction we used to call 'probation?' Actually, rumours of probation's imminent extinction had been rather exaggerated. Not only is probation still alive, it may be stronger than ever. Internationally, community-based sanctions have grown rapidly in number and significance since their inception and in most jurisdictions they now heavily outnumber custodial sentences. In the jurisdictions of the USA, there were more than twice as many people (over 5 million in total) on probation or parole as there were people in custody (around 2 million) at the end of 2007 (Glaze and Bonczar 2009). European figures are harder to establish given the wide range of definitions and forms of community sanctions and differences in official recording of their use but Von Kalmthout and Durnescu's (2008) extensive recent survey suggests

considerable expansion of the use of such sanctions in almost all European jurisdictions. Durnescu (2008) estimates that about 2 million people were incarcerated in Europe at the time of his survey, and about 3.5 million were subject to some form of community sanction. The fact that almost all prisoners are (eventually) released, often under some form of supervision, means of course that many "custodial" sentences also involve community-based supervision, whereas the converse is not the case. The vast majority of the 'ordinary' (but barely visible) business of supervised punishment therefore plays out daily in probation or parole offices, and in supervisees' homes, rather than in custodial institutions[1].

This chapter aims to explore and explain the conundrum represented by the durability and expansion of community sanctions despite the various diagnoses of their failing legitimacy and predictions of their demise. Specifically, we address the question: how have such sanctions adapted and survived in late modern societies? To that end, we begin with a brief overview of some influential and important accounts of the history of community sanctions, before elaborating what we take to be the key 'adaptations' which have characterised community sanctions in their quest for legitimacy in late modern societies and penal systems. As our analysis will reveal, we broadly concur with Hutchinson's (2006) (and others') observation that developments in the penal field have been characterised by a braiding of 'old' and 'new' forms and functions: the old tends to survive (or adapt) alongside the new, rather than being supplanted by it. Our analysis seeks to draw out what we see as the key characteristics or dimensions of contemporary community sanctions which are more or less visible (albeit to different degrees and in variable combinations) across multiple jurisdictions. We thus seek not to describe empirical 'reality' in a fixed time and place, but rather to highlight some of the key dimensions against which community sanctions may be analysed, compared and contrasted *across* time and space. The characteristics of community sanctions on which we focus -- 'managerial', 'punitive', 'rehabilitative' and 'reparative' -- are, as shall become clear, overlapping rather than discrete categories which combine instrumental and expressive (or affective) elements. In our conclusion, we turn our attention to the future of community sanctions and ask whether and how these measures might achieve broad legitimacy.

A Word on Word Choice

Before proceeding, however, we need to tackle some issues of definition and delineation of the subject. One of the leading commentators in the field has aptly described punishment in the community as a "slippery fish" (Raynor 2007: 1061). It is a sector of the penal field around which it is difficult to draw precise boundaries, which is described and labelled differently between jurisdictions, and which has been characterised by significant practical innovation/differentiation. Even naming the subject area is a contentious issue in itself. Raynor's preferred (and very Anglo-Welsh) term, 'community penalties', suffers (as he acknowledges) from its failure to include the large populations subject to some form of supervision following release from custody. Alternative labels, popular with North Americans, like 'community corrections', are broader in scope but arguably imply a particular form a practice

[1] Our focus here is on supervisory sanctions and measures as opposed to non-supervisory monetary penalties such as fines and restitution (see O'Malley, this volume).

(correctionalist) which is far from universal in its application, even in the jurisdictions in which the term is used. Given a range of problematic choices, we have opted for the more neutral but distinctly European label 'community sanctions and measures' (CSM), defined by the Council of Europe as:

> [those] which maintain the offender in the community and involve some restriction of his liberty through the imposition of conditions and/or obligations, and which are implemented by bodies designated in law for that purpose. The term designates any sanction imposed by a court or a judge, and any measure taken before or instead of a decision on a sanction as well as ways of enforcing a sentence of imprisonment outside a prison establishment (Council of Europe 1992, Appendix para.1).

Our choice of European terminology does not however indicate a restricted focus on Europe; indeed, we focus in particular on developments in the UK and in North America, which have arguably been the most influential jurisdictions internationally in terms of innovation and emulation elsewhere. Our choice of the Council of Europe definition principally reflects its inclusivity: it succeeds in capturing not just the wide array of penalties handed down by the courts (sometimes called 'front door' measures) which fall between non-supervisory penalties (e.g., fines) and custodial sentences, but also statutory post-custodial ('back-door') measures associated with early release schemes (such as parole). In the most general terms, what community sanctions and measures have in common is some form of oversight or supervision of individuals' activities whilst maintaining them in the community. What 'supervision' entails, the ends or purposes to which it is oriented and who assumes responsibility for it, are all dimensions of variation internationally and historically.

Adaptation and Survival

There are a number of important historical accounts of community sanctions of various kinds, most of which, by necessity, concentrate on a single jurisdiction and a single type of sanction. A good example is Vanstone's (2004) account of the development of probation in England and Wales (although this does involve comparisons with the broad American experience of probation). Another is Jonathan Simon's (1993) now classic study of the development of parole in a single US jurisdiction (California). There are of course also broader accounts of the emergence of penal modernism, such as Garland's (1985) *Punishment & Welfare,* which (more indirectly) offer key contributions to the historical literature on community sanctions. All of these accounts locate the formal/legal origins of community sanctions in the context of the social, political and cultural shifts which coalesced around the turn of the twentieth century to inaugurate a specifically 'modern' penality that brought the welfare or 'reform' of the individual into the domain of state responsibility.

The early community sanctions essentially formalised a range of practices which had previously been in the domain of what Garland refers to as 'penal philanthropy', giving them legal authority (e.g. in England & Wales via the Probation of Offenders Act 1907; in California via the establishment of a system of parole in 1893), extending their reach, and creating specialist institutions and agencies charged with

'disciplining' (in the Foucauldian sense) or 'normalising' those individuals deemed eligible. So, just as Garland sees modern penality as the 'midwife' of the probation order in England & Wales, so Simon locates the origins of Californian parole in the modernist tradition and the quest for the 'normalisation' of ex-prisoners. This 'normalisation', Simon argues, progressed from a model based on participation in the labour market to a 'clinical' model of 'rehabilitation through personality adjustment'. Similarly, the early decades of the twentieth century witnessed the transformation of probation practice as ideas about moral reformation gave way to a more 'scientific' discourse centred on diagnosis, treatment and 'rehabilitation' which, whilst profound, represented an important continuation of modernist narratives and 'transformative zeal' (Garland 1985, 2001; Bottoms 1980).

With their formal origins firmly embedded in the foundations of 'penal modernism', community sanctions have been deeply implicated in its 'crisis' (Garland 1990, 2001), the elements of which we need not review again here (NOTE TO EDITORS -- REFERENCE HERE TO INTRODUCTORY OR OTHER CHAPTERS?). In this context, academic and policy debates have centred on strategies of adaptation, and the search for modes of exercising power and legitimate narratives for community sanctions in social contexts which have variously been characterised as 'post-industrial', 'post-modern', 'post-disciplinary' and so on (e.g. Bell 1973; Lyotard 1984; Bauman 1991; Simon 1988; Deleuze 1995). Simon's (1993) California case study is a key contribution to this debate because it identifies a fundamental shift in modes of control which is explicitly tied to the collapse of penal modernism. At the heart of *Poor Discipline* is the decisive shift Simon observes, from the mid-1970s, from what he terms 'clinical' to 'managerial' parole – the latter characterised by significantly lowered expectations and functioning (in a manner redolent of Deleuze's 'societies of control') as a mechanism for securing the borders of communities by channelling its least stable members back to prison.

Simon's analysis of parole is part of a wider body of work which has utilised a Foucauldian framework to analyse shifts in the exercise of power, from the normalising or 'disciplinary' mode of control characteristic of modern penality, toward an actuarial, managerial 'new penology' (Simon 1987, 1988; Feeley & Simon 1992, 1994). In the last two decades – as other chapters in this volume will attest - much academic attention has been devoted to assessing the extent to which the 'new penology' thesis represents an accurate characterisation of developments in the field of community sanctions, and whether Simon's account of 'managerial parole' is a typical or an extreme case study of contemporary community sanctions. We take the view that it is too simplistic to identify any single 'replacement discourse' for community sanctions and measures generally. This is not only because of significant jurisdictional variations but also because the 'real story' is rather more complex.

Late modern community sanctions are certainly characterized by the demise of the coherent meta-narrative or purpose that penal welfarism (or more specifically the 'rehabilitative ideal') once provided (Simon, 1993); but the adaptations that have occurred in its wake have been multiple, various and fluid (see Lynch 1998). As the succeeding sections of this chapter will make clear, the adoption of managerial and actuarial discourses and practices has not been the only means of adaptation and survival open to probation. Indeed, as Stan Cohen (1985) predicted a quarter of a century ago, perhaps the most notable feature of community sanctions in the last 30-

40 years has been the proliferation and diversification of their institutional forms, technologies and practices and (at least in some places) of their ideological foundations. We have therefore witnessed not only the re-storying and re-configuration of the traditional range of sanctions and measures (probation, parole) through new narratives and techniques, but also the emergence of new forms of community sanctions (e.g., unpaid work, community justice innovations, electronic monitoring). It is also notable that, whether old or new, the same community sanctions have been 'marketed' in very different ways internationally.

In the sections which follow, we identify some of the major adaptations in the CSM field which have been observable internationally in the last 30 years or so. We group these trends into four 'visions' of CSM which we characterise as 'managerial', 'punitive', 'rehabilitative' and 'reparative'. In the final section of the chapter we address the extent to which these various adaptations have enabled community sanctions - and the organisations and professionals associated with their administration – to present themselves as coherent and legitimate responses to crime in late modern societies.

Managerial community sanctions

If there is one point of consensus in the perennially contested field of penality, perhaps it is the idea that penal systems, alongside other public services such as education, health and so on, have come to be increasingly dominated by 'managerial' strategies and concerns (e.g. Peters 1986; Feeley & Simon 1992, 1994; Garland 1996, 2001; Bottoms 1995). We think this a key part of the story of efforts to bolster the legitimacy of community sanctions in late-modern societies, but by no means the whole story.

Although it is difficult to summarise the various dimensions of managerialism in criminal justice (or indeed other) contexts, at the heart of most accounts of managerialism in the penal realm has been the notion of '*systemisation*': that is, the transformation of what was formerly a series of relatively independent bodies or agencies (courts, police, prisons, probation services etc.) into a 'system'. For Bottoms (1995), this process of 'systemisation' has, in most jurisdictions, tended to embrace characteristics such as an emphasis on inter-agency cooperation in order to fulfil the overall goals of the system; mission statements for individual criminal justice agencies which serve those general system goals; and the creation of 'key performance indicators' for individual agencies which tend to emphasise the efficiency of internal processes rather than 'effectiveness' in relation to any overarching objective. As Garland (1996) has observed, systemisation has enabled the cooperative adoption of a variety of devices to deal with the problem of crime in a reconfigured field characterised by an acceptance of crime as a 'normal social fact': a risk to be managed rather than a social problem to be eliminated. The key imperatives of a 'managerial' penology are thus focused on the limited goals of "managing a permanently dangerous population while maintaining the system at a minimum cost" (Feeley & Simon 1992: 463).

It is not difficult to discern some of the ways in which community sanctions and the agencies responsible for implementing such sanctions have been re-cast along such

lines, and how such developments have helped to bolster their 'systemic' legitimacy. For example, in many jurisdictions CSM have come to be appreciated more for what they can do for other parts of the 'system' than what they might accomplish for individual supervisees or communities. Arguably the key example of this is the adoption in many jurisdictions, in the 1980s, of a pragmatic rationale for community sanctions which emphasised the provision of credible 'alternatives to custody.' Here, the primary motivation for increasing the 'market share' of CSM was to relieve pressure on (and the expense of) prison places (e.g. Raynor 1988; Vass, 1990). Another important example of the systemic functions of CSM in reducing prison costs, concerns the post-custodial supervision of ex-prisoners subject to conditional release from custody – a population which in many jurisdictions has been escalating (Padfield, van Zyl Smit and Dünkel 2010). Increases in rates of imprisonment and sentence lengths have encouraged the increased use of the 'safety valve' of early release mechanisms which, in turn, have brought greater numbers of individuals under the remit of post-custodial supervision (on licence or parole) (Cavadino & Dignan 2007).

These developments have been underpinned by a shifting understanding of CSM agencies as 'partners' in offender management alongside other parts of the system, such as police and prison services, where previously ideological conflict would have made such partnerships problematic, if not unthinkable. This has been evident, for example, in England & Wales, where formal partnerships have emerged between police and probation services to manage various categories of 'high risk' individuals in the community (e.g. Kemshall & Maguire 2001). Such partnerships, most notably Boston's famed Operation Nightlight (Corbett, 2002), are less unusual in the American context where probation and especially paroling authorities have long understood their role as partially a law enforcement one (see Sigler & McGraw, 1984). Moreover, in many US states, probation and paroling authorities are administered within the same agency as prisons. This US-style 'correctional services' structure has also recently emerged in England and Wales with the emergence of the National Offender Management Service, combining prisons and probation in the pursuit of the common goal of 'public protection' (Raynor & Vanstone 2007).

Alongside these developments we have also seen evidence of the redefinition and 'scaling down' of the criteria against which the performance of CSM agencies has been judged, with more emphasis on 'outputs' than 'outcomes'. For example, National Standards for CSM have emerged in a number of jurisdictions in the last 20 years, and the tendency of such standards to emphasise the timeliness of processes rather than their quality or effectiveness has been noted. Meanwhile, some of the features of 'actuarial justice' described by Feeley & Simon (1994) have become evident in the emergence and spread of new, actuarial technologies oriented to the assessment of risk, as well as new types of surveillant sanction oriented to what Feeley & Simon refer to as 'management in place'. Electronically monitored curfews and drug testing are arguably the best examples of this trend (Nellis 2010). The emergence of a discourse of 'offender management' in UK jurisdictions is another example of this lowering of ambitions (Robinson 2005).

The managerialist idea that 'systemic' goals are easily achievable or unproblematically generate legitimacy, however, has not necessarily been borne out (Wodahl et al. 2011). Taking the provision of 'alternatives to custody' as an example,

this would certainly appear on the face of things to be a more achievable goal than transforming individuals or turning lives around. However, in practice, even this has proven to be a rather difficult goal to achieve: research studies have tended to show that community sanctions are in fact rarely used as genuine alternatives to custody. For example, research conducted in England and Wales in the late 1970s showed that only about half of those sentenced to community service orders were actually diverted from prison, even though this was supposed to be explicit in their imposition; the other half appeared to receive community service as an 'alternative' to probation or a fine (see Pease 1985). Tonry & Lynch (1996) argue that the evidence relating to 'intermediate sanctions' programmes which were developed in the USA in the 1980s and 1990s is similar: few such programmes have diverted large numbers of individuals from prison. Indeed, where the use of CSM has increased, this has almost always tended to be at the expense of lower-tariff penalties such as fines and discharges, leading to what Cohen (1985) has referred to as 'net widening' and 'mesh thinning.' That is, CSM frequently brings greater numbers of less serious offenders into the penal net than might otherwise have been the case, and imposes upon them more rather than less severe sanctions (Bottoms et al. 2004).

A related problem is the so-called 'revolving door at the prison gate' (Padfield & Maruna 2006). Despite the penal reductionist aspirations alluded to above, more often than not more intensive and perhaps more risk-averse forms of post-release supervision have driven up recall rates and therefore prison populations (Munden et al. 1998). In recent years, as many as 40% of parolees across the US are reincarcerated either for committing a new offence or else a technical violation of their release conditions (e.g., positive drug tests, failure to comply with treatment, missed appointments, and so forth) (Glaze & Bonczar 2009). In fact, the number of parolees recalled to prison in the United States increased by more than 800% in less than three decades (Sable & Couture 2008). Such aggregate figures, moreover, hide disturbing variation between states. California has had particularly notorious experiences with recalls to imprisonment, for instance. In 2006, almost two thirds of admissions to the state's prisons were parole violators, and one third of those were based on technical violations of parole conditions (Grattet et al. 2008).

This 'waste management' approach to parole has been widely criticised (Simon 1993), and indeed Wodahl and colleagues (2011) persuasively argue that the escalating rates of returns to prison represent the greatest threat to the perceived legitimacy of CSM today. The perception is that these 'alternatives' to custody are unable to do their job without resort to custody itself. Indeed, a distinct irony of the managerial turn in CSM is that, whilst the trend is motivated and animated by a distinct risk aversion and impression management, managerialism itself has been a near-constant target of criticism from politicians, practitioners and the wider public alike. On the one hand, 'managerial' performance indicators which bear little or no relation to the quality of supervision or service meet with criticism, for example in UK jurisdictions recently (e.g. National Audit Office 2008; Chapman 2010). On the other, despite the more intrusive and demanding nature (for those supervised) of joint risk management activities of police and probation services, little reassurance seems to be offered to an insecure public. It seems clear that instances of failure, whether systemic or not, tend to attract significant adverse publicity and thus to threaten the legitimacy of CSM (Fitzgibbon, forthcoming; McCulloch and McNeill 2007; McNeill 2011; Robinson and McNeill 2004).

Punitive community sanctions

For many advocates of CSM, perhaps especially in European jurisdictions, the idea of punitive community sanctions is anathema. Traditionally, such sanctions have been associated not just with the provision of welfare, but also the avoidance of state punishment. For example, the probation order established in England & Wales by the 1907 Probation of Offenders Act enjoyed the legal status of an alternative to punishment. That said, such 'alternatives' have always involved the exercise of power and control over individuals, albeit a 'softer' form of power than the prison. Drawing on Foucault's (1975/1977) argument concerning the 'power of normalisation', Garland (1985) for example noted that the new regime of probation established in the early 20th century represented both a more 'humane' response to crime and a more extensive and subtle 'network of control'. CSM have also tended to be backed up by the possibility of punitive sanctions in the face of non-compliance (see Raynor & Vanstone 2007).

In our view it would be naïve to suggest that contemporary CSM lack a punitive dimension. Rather than being implicit and concealed however, as was perhaps the case in earlier eras, in some jurisdictions the explicit display of punitive credentials has indeed become a key part of the quest for legitimacy in late-modern penal systems. This has to be understood in the context of at least three developments, which significantly impacted on CSM in the 1980s, 1990s and beyond.

The first two of these are linked with processes of 'managerialisation' discussed in the previous section. The first is the systemic goal of 'penal reductionism' (Cavadino & Dignan 2007): namely the idea that only punitive sanctions will be perceived by sentencers as 'credible' alternative sanctions. Perhaps the most obvious related development concerned the introduction in several jurisdictions of new orders requiring individuals to undertake unpaid work or 'community service', although (as we discuss below) the punitive identities of such orders were often blurred with their rehabilitative potential (McIvor 2010). The second, related development is the adoption of desert-based sentencing frameworks which took hold across the United States in the 1970s with numerous international jurisdictions following suit in the decades that followed. As a number of commentators have observed, the turn to retributivism as the dominant rationale for sentencing is at least partly explicable with reference to the managerial pursuit of 'achievable' goals – in this case dispensing punishment in proportion to criminal behaviour – although there were other significant drivers behind it (Bottoms 1995; Garland 1996). The systemic pursuit of 'just deserts' for criminal acts necessitated thinking about penalties of all kinds in relation to their retributive content, or 'punitive weight'. CSM thus came, in this context, to be reconceptualised and calibrated along a new 'continuum of punishment' within which they were viewed as 'tough' and relatively inexpensive penalties for those guilty of less serious offences (Morris & Tonry 1990). In this context, the constructive potential of CSM arguably became less important than their retributive qualities, which could be measured in length, intensity and intrusiveness.

The third, and most recent, driver of punitive community sanctions, has been the politicisation of crime and criminal justice, and the increasing resort on the part of

politicians and policy makers to 'populist punitiveness' or 'penal populism' (Bottoms 1995; Pratt et al. 2005)[2]. In this context traditional, rehabilitative CSM have met with criticism for being too 'soft' or aligned with the needs and/or interests of those convicted of crimes, rather than those of the 'law-abiding majority' or victims of crime (e.g. Home Office 2006). In an important sense, since it was rehabilitation itself that was seen as being 'too soft', casting probationers as disadvantaged and in need of help or treatment, sanctions conventionally dressed in rehabilitative clothing were stripped of their legitimacy and left in need of new garb (Maruna & LeBel 2003).

These drivers, on their own or in concert, make sense of a 'punitive turn' in the CSM context which has witnessed the creation and 'branding' of new types of 'intensive' CSM with a more explicit retributive or punitive orientation. The 'intermediate sanctions' movement in the USA, which saw the emergence in the 1980s and 90s of community service, intensive supervision, house arrest, day reporting centres and boot camps is an example of this (Tonry & Lynch 1996) as is the imposition of fees on probationers and parolees to pay for their own supervision (Diller, Greene & Jacobs, 2009). Another example is the tendency toward the 'creative mixing' of multiple conditions or requirements as part of a single sanction, as has been observed in England and Wales (Bottoms et al. 2004). Indeed, in England & Wales a plethora of separate community sanctions has recently been 'streamlined' into a single generic 'community order', which enables sentencers to select any combination of conditions from a 'menu' of twelve different requirements and restrictions (Mair, Cross and Taylor 2007).

As we noted above, many jurisdictions have also witnessed a lowering of tolerance in respect of 'failures to comply' with or 'violations' of CSM, which is arguably another correlate of the 'punitive turn' in CSM (e.g. see Robinson & McNeill 2008). Another (recent) example (discussed further below) is the 'punitivising' of community service work (Maruna & King 2008) through various forms of 'stigmatizing shaming' (Braithwaite 1989). In the UK and many other jurisdictions, technological innovations have also been used to increase the 'punitive bite' of CSM, or to increase the restrictions placed on probationers in the community. In the development of electronic monitoring (EM) it has been notable that little attention has been paid, despite some supporting research evidence, to the role that EM might play in more constructive or rehabilitative supervision practice (Nellis 2010).

To a large extent, the 'punitive turn' in the CSM context has been driven by good 'liberal' intentions to reduce the use of custody (Morris & Tonry 1990; Petersilia 1998). However, an absence of punitive intent does not equate with an absence of 'penal bite' from the perspective of those subject to the more intensive community sanctions. Indeed, recent years have seen the emergence of interest among researchers in a variety of jurisdictions in the measurement of the relative punitiveness, deprivations or 'pains' of community sanctions of different types (cf. Sykes 1958). For example, researchers at the RAND corporation in the USA found that there are intermediate sanctions which surveyed prisoners equate with prison in terms of punitiveness. For some individuals, intensive forms of probation "may actually be the more dreaded penalty" (Petersilia & Deschenes 1994: 306; see also Petersilia 1990;

[2] Based, at least in part, on a misreading of public opinion regarding criminal justice (see Roberts & Hough, 2011).

Payne & Gainey 1998; May & Wood 2010). More recently, Durnescu (2011) has specifically explored the 'pains of probation' as experienced in Romania.

It is clear then that the evolution of CSM in late-modern penal systems has been characterised by increasing attention to their 'punitive weight', and that this has been a significant part of the quest for legitimacy. Yet, some critics have argued that the narrative behind this 'get tough' approach to CSM is inherently self-defeating. Implicit in the premise of punitive CSM is that the individuals sentenced to these restrictive measures are too bad, too dangerous and too risky for ordinary CSM. Yet if they are so dangerous, sentencers and members of the public might rightly ask, why are they not in prison? CSM "simply cannot compete with the iron bars, high walls and razor wire of the prison" when it comes to protecting the public from the dangerous (Maruna and King 2008: 346).

In the next two sections, we examine two arguably more constructive strategies that have been used to bolster the legitimacy of CSM, essentially as a means of 'civilising' punishment; namely, the revival of rehabilitation and the development of reparation.

Rehabilitative community sanctions

Historically, probation practitioners in most jurisdictions have understood themselves and their practices as being aligned far more closely to social work and welfare model than a criminal justice one. Yet, the rehabilitative ideal so central to this tradition famously fell out of favour in the 1970s (Allen 1981), and CSM were rapidly reoriented – as we saw in the above section – in more managerial and/or punitive terms. Rumours of the death of rehabilitation, however, turned out to be greatly exaggerated as a resurgent rehabilitative ideal emerged in the late 1980s in the form of the 'What Works' movement (see esp. Andrews & Bonta 1998; McGuire 1995). Led by a collective of researchers associated with Correctional Services Canada and spread through a series of conferences and workshops with both academic and practitioner participants, 'What Works' has been a global success story. According to one of the scholars at the forefront of the movement:

> Three decades ago, it was widely believed by criminologists and policymakers that 'nothing works' to reform offenders and that 'rehabilitation is dead' as a guiding correctional philosophy. By contrast, today there is a vibrant movement to reaffirm rehabilitation and to implement programs based on the principles of effective intervention. How did this happen? I contend that the saving of rehabilitation was a contingent reality that emerged due to the efforts of a small group of loosely coupled research criminologists (Cullen, 2005: 1).

Setting aside for a moment how one might best account for this success, proof of the redemption of the rehabilitative idea is provided, for example, by the state of California renaming its Department of Corrections with the rather redundant new title of Department of Corrections and Rehabilitation under the leadership of a Republican governor. Likewise, the current Coalition Government in the UK led by the Conservative Party (infamous in the mid-1990s for initiating a 'punitive turn' in penal policy around the argument that 'prison works') is promoting something they are calling a 'Rehabilitation Revolution' (see Ministry of Justice 2010). These are rather

remarkable developments considering that for much of the past three decades 'rehabilitation' was viewed as something of a "dirty word" (Ward & Maruna 2007) not least among those on the political Right (see e.g. Farabee 2005).

Cullen (2005) is right to point out that the revival of rehabilitation in contemporary penal systems owes much to the efforts of criminological researchers who refused to accept that nothing could be done to change offenders' behaviour. However, there is rather more to the story in our view, and we should not overlook the ways in which rehabilitation has been transformed and re-marketed in the context of late modern penality, such that far from going 'against the grain' of broader penal developments, it has been rendered compatible with them. As one of us has argued elsewhere, it is more accurate to talk of the 'evolution' of rehabilitation than of its survival or revival, the latter being terms which imply a somewhat static (and inaccurate) picture (Robinson 2008). This evolutionary process has produced visions and modes of rehabilitation in the CSM context that have diverged from earlier incarnations in important ways, as we shall describe below.

Firstly, the 'new' rehabilitation has had to adapt to social and political contexts which have become increasingly intolerant of approaches and interventions that appear to put the needs and interests of offenders above those of (actual and potential) victims. Proponents of rehabilitation in jurisdictions which have been subject to 'populist punitiveness' (see above) have thus had to de-emphasise its welfarist, humanitarian and essentially offender-centred justifications, in favour of rationales which emphasise the instrumental and more broadly 'utilitarian' value of rehabilitative sanctions. David Garland (1997: 6) was among the first to observe this realignment of rehabilitation in the USA and England & Wales when he observed that correctional staff "now emphasise that 'rehabilitation' is necessary for the protection of the public. It is future victims who are now 'rescued' by rehabilitative work, rather than the offenders themselves". This idea that the legitimacy of contemporary rehabilitation rests on a utilitarian justification (Robinson 2008) helps to explain both the spread of 'programmes' under the banner of the 'What Works' movement, and the resurgence of interest and investment, in a number of jurisdictions, in the 'reentry' or 'resettlement' of ex-prisoners (e.g. Maruna & Immarigeon 2004; Travis, 2005; Farrall & Sparks 2006). What at first sight appears to indicate a heightened concern with the welfare and reintegration of ex-prisoners or a desire to undo the harmful consequences of imprisonment, however, is arguably more an expression of concern for the communities to which most prisoners ultimately return and resume their lives (see e.g., Ward & Maruna, 2007; Wacquant, 2010). In the UK, for example, former prisoners are thought to account for around 1 million crimes a year, costing an estimated £11 billion annually (Social Exclusion Unit, 2001).

A second important adaptation is that rehabilitation has come to be understood less as an 'end' in itself than as a 'means' to the preferred 'ends' of late-modern penal systems (Garland 1997, 2001). Specifically, rehabilitation has come to be understood as part of a 'toolkit' of measures oriented toward the protection of the public and the management of risk. A related development has been the repositioning of rehabilitative measures within managerial systems which have come to be dominated by the discourse of risk. In this regard, rehabilitation has not only come to be reconceived as a means toward the 'end' of risk reduction or management, but it is also increasingly rationed in line with assessments of risk which determine the

eligibility of offenders for the new 'programmes'. Such an approach secures a space for rehabilitation among the range of legitimate responses to offending, but limits its reach and influence in new ways.

One of the best illustrations of this risk-driven, differentiated approach is a model of probation practice introduced in England & Wales in 2005 (National Probation Service 2005). This so-called 'offender management model' uses the logic of risk to determine the level of resource appropriate to individual offenders; embedded within this model is a 'tiering framework' which specifies four, discrete intervention styles, to one of which all offenders under statutory supervision are assigned. These tiers are labelled 'punish', 'help', 'change' and 'control' and represent differential responses to increasingly serious risk profiles. Only the third tier, 'change', contains an explicitly disciplinary or rehabilitative element, and it is targeted at those posing a medium/high risk of reoffending. This explicitly actuarial model illustrates quite clearly that contemporary rehabilitative interventions are far from inimical to managerial systems.

However, the re-framing of rehabilitation in risk management terms and regimes has not simply entailed putting a new 'spin' on the same old product. Importantly, the product itself has adapted as part of the evolutionary process we have described. Whilst it is probably unwise to characterise contemporary rehabilitative CSM as if they were a unified product, it is probably fair to say that among the range of contemporary CSM, the most explicitly 'rehabilitative' are those offending behaviour programmes which emerged under the banner of a 'What Works' movement initially led principally by Canadian and UK-based correctional researchers and practitioners. Based on cognitive-behavioural principles and methods, the new offending behaviour programmes proliferated and spread in the 1990s, particularly in Anglophone and Northern European jurisdictions, in the light of evidence (from experimental and 'demonstration' projects, e.g. Ross et al., 1988) of their technical effectiveness in reducing reoffending and contributing to public safety. Many governments convened expert 'accreditation panels' to ensure that programmes that were to receive public resources were 'evidence-based' and conformed to the design and delivery principles promoted by key 'what works?' researchers (Raynor and Robinson, 2009).

However, some have argued that we should not attribute the legitimacy of rehabilitative 'programmes' solely to their (putative) instrumental effectiveness. For some commentators, the dominance of cognitive-behavioural programmes in certain jurisdictions is at least in part attributable to their expressive and communicative qualities and their resonance with 'advanced liberal' forms of governance which emphasise personal responsibility for wrongdoing, and rely upon strategies of 'responsibilization' as the dominant response to anti-social behaviour (Garland 1996; Kendall 2004; Rose 2000). The same has been said of the contemporary resurgence of 'restorative justice' approaches, which are a central part of CSM in at least some jurisdictions, in Africa, Europe and North America (Dignan 2005; discussed further in the next section). Both modes of intervention seek to engage offenders in a 'moral discourse' which both communicates censure and seeks to instil in offenders both a measure of 'victim empathy' and a new 'moral compass' which, it is hoped, will dissuade them from future offending (see also Duff 2001). The 'rehabilitated' offender, then, is presented as an individual capable of managing his or her own risks without recourse to externally imposed sanctions or controls, and without making any claims on the state in terms of its duties to create opportunities for reform and

reintegration. Thus rehabilitation is cast as a personal project rather than a social project.

Despite some concerns about the overtly moralising content of contemporary 'programmes', proponents of rehabilitative CSM have tended to view their proliferation and spread in a positive light. In jurisdictions like England & Wales, the 'new rehabilitation' has attracted considerable financial investment from central governments eager to capitalise on the potential of such interventions to deliver public protection via measurable reductions in reoffending on the part of 'treated' subjects. However, to the extent that the legitimacy of rehabilitative CSM rests on a primarily instrumental justification, their future is far from assured. Given that a public protection focus does not privilege any particular approach or technology, failure to demonstrate the desired (crime reduction) outcomes invites reversion to other, potentially more 'effective' approaches in the penal toolkit; not least incapacitative ones (Robinson & McNeill 2004). It is in this sense that Garland (1997) has rightly pointed to the contingent legitimacy of late-modern rehabilitation, and the same can be said of rehabilitative community sanctions more generally.

Reparative community sanctions

This vulnerability of rehabilitative CSM to their own instrumentalist logic suggests a need to look in other directions for more durable or secure sources of legitimacy. Writing in 1980, when the revival of rehabilitation still appeared an unlikely prospect, Anthony Bottoms (1980) suggested that penal systems might be about to turn towards a more reparative ideal. He noted that a reparative approach could retain the proportionality central to the justice model but eschew damaging forms of punishment in favour of more constructive options. Sometimes reparation might be directly focused on the particular victim; sometimes it might be directed at the community. Rehabilitation may be a by-product of reparative efforts, he argued, but it need not be sought directly.

The jurisdiction in which Bottoms was writing (England and Wales) had seen the inception of community service as a new standalone community sanction available across Great Britain in 1978, and the new sanction built on longstanding traditions of undertaking unpaid work as part of probation supervision. However, community service in many jurisdictions has not been 'marketed' solely or even principally as a reparative sanction. For example, reflecting on the development of the new sanction in neighbouring Scotland, McIvor (2010: 42) explains its multifarious purposes thus:

> Community service in Scotland was intended to fulfil a number of sentencing aims including *punishment* (through the deprivation of the offender's free time), *rehabilitation* (through the positive effects of helping others) and *reparation* (by undertaking work of benefit to usually disadvantaged sections of the community). The *reintegrative* potential of community service was to be achieved through the offender being enabled to remain in the community, retaining employment and family ties, and, through coming into contact with others while carrying out unpaid work, avoiding social isolation.

Alongside these multiple purposes and identities, community service or unpaid work at different places and at different times has had quite different legal meanings and functions – as a standalone sanction or as an adjunct to probation supervision, as an alternative to prosecution, as a direct alternative to custody, or as an autonomous sanction in its own right (McIvor, Beyens, Blay and Boone 2010).

Though these varied purposes and uses may have been useful in its popularisation, in some jurisdictions at least they may also have deprived community service of the clear normative narrative that the decline of rehabilitation seemed to require. Indeed, the pragmatic popularisation of community services as 'all things to all people' perhaps explains in part why the links between community service and ideals of restorative and community justice (more of which below) have tended to be more tenuous than they might have been. This is despite the fact that analyses like those offered by Bottoms (1980), Christie (1977) and Hulsman (1976), were arguing for a more victim–focused approach that blurred the distinction between criminal and civil wrongs, and sought victim-oriented solutions to harmful actions, rather than punishment. Bottoms (1980) expected such arguments and approaches to gather pace; partly because he accepted Durkheim's (1901/1973) analysis that more developed societies would increasingly tend towards seeking to 'redress the imbalance between the offender and the victim, rather than simply mete out sanctions against the offender' (Bottoms, 1980: 16-17).

Bottoms (1980) also pointed out that whereas rehabilitation, at least on a Foucauldian reading, represented (or was readily corralled into) a project of 'coercive soul-transformation', a different alternative to expressive pre-modern punishment had been identified in the work of the 18th century Classicists (e.g. Beccaria 1764/1963) who argued for the use of punishment as a way of 'requalifying individuals as […] juridical subjects' (Foucault 1975/1977: 130). Critically, reparation – and reparative work in particular -- seems capable of fulfilling this function in ways in which rehabilitation[3] cannot, principally because rehabilitation offers no redress *per se*; it operates only on the individual, not on the conflict itself and not on the victim or the community (Zedner, 1994).

The problem of redress (or the lack of it) may lie behind recent attempts to bolster public and judicial confidence in CSM[4]. Both in Scotland and in England and Wales, these have centred, albeit in different ways, on the notion of reparation, or more specifically 'payback'. A recent Scottish Prisons Commission (2008), for example, argued that imprisonment should be de-centred from our conception of punishment by making paying back in the community the 'default option'. The Scottish Parliament subsequently passed legislation (the Criminal Justice and Licensing Act 2010) to rebrand almost all CSM as 'Community Payback Orders'. The Commission defined payback as "finding constructive ways to compensate or repair harms caused by crime. It involves making good to the victim and/or the community. This might be through financial payment, unpaid work, engaging in rehabilitative work or some combination of these and other approaches' (Scottish Prisons Commission, 2008: para 3.28)". The Criminal Justice and Licensing Act 2010 is notable in that it enshrines a

[3] Of course, the term rehabilitation is highly ambiguous, and in one of its senses, rehabilitation does imply the restoration of citizenship's rights and duties (see Raynor and Robinson 2009).
[4] Carlen (1989: 120) argued that in some fractured and disadvantaged communities, idealistic community justice alternatives are simply not "feasible."

reparative logic for almost *all* CSM, not just those involving unpaid work. As the Scottish Prison Commission (2008, para 33) notes, 'one of the best ways for offenders to pay back is by turning their lives around' (see McNeill 2011). Rehabilitative effort is thus cast as a form of reparation.

The likely success of this type of reparative legitimation strategy for CSM is difficult to judge. Around the time of the publication of the Scottish Prison Commission's report, the UK Cabinet Office published the Casey (2008) Report on 'Engaging Communities in Fighting Crime', which proposed building public confidence in 'unpaid work' by re-branding it as 'community payback'. Casey's 'payback' was quite different from the Scottish Prisons Commission's, however. She suggested that the work involved should not be something the general public would choose to do themselves (i.e. it should be unfulfilling and unpleasant) and that individuals doing payback should wear high visibility vests identifying them as such (i.e. it should be shaming) (see Maruna & King 2008).

Looking beyond community service or unpaid work, reparation has also been an important, if contested, discourse for CSM in other jurisdictions. Canton (2007) cites Austria, Belgium, Norway and parts of Germany as developing victim-offender mediation, as well as noting that some of the newer European probation services (for example, in the Czech Republic, Latvia and Turkey) have enshrined principles of reparation and mediation in their founding statements. Reparative work has also played a significant role in societies in transition in particular, often as an outgrowth of peace and reconciliation efforts on a community level (see Eriksson 2009). Northern Ireland, for instance, has one of the best developed, grassroots systems of community-based restorative justice in the world (see McEvoy & Mika 2001). In post-Apartheid South Africa, on the other hand, although probation services have developed rapidly, reparative justice remains more on the margins of this work (Ehlers 2007; Roche 2002). Elsewhere in Africa, however, community sentencing tends to focus almost entirely on community service, which Ehlers (2007) suggests 'fits well with cultural traditions of making amends as a response to wrong-doing' (p. 229). (see chapter XXX McEvoy xxx for more on punishment in post-conflict situations)

The 'community justice' movement that has spread from the US (Clear and Karp 1999; Karp and Clear 2002) to the UK (Harding 2000, 2003; Nellis 2000, 2005) also assigns a central role to themes of reparation, based partially on a reading of the communitarian philosophy of Amitai Etzioni (1991). While there is no standard or agreed formula for what constitutes community justice (Clear and Karp 1999), Winstone and Pakes (2005) suggest that community justice reflects three key principles:

> 'First, the community is the ultimate consumer of criminal justice. Rather than offenders, or even victims, it is communities that the system ought to serve. Second, community justice is achieved in partnership at the local level. Third, it is problem focussed: problems are addressed rather than cases processed' (Winstone and Pakes 2005: 2).

Most recently, the community justice movement has been perhaps most influential through the development of 'justice reinvestment' – an essentially problem-focussed

approach that aims to move spending from correctional budgets 'upstream' towards crime reduction initiatives in precisely those neighbourhoods from which incarcerated populations are most disproportionately drawn (Tucker and Cadora 2003).

What Future for Punishment *in* Society: Looking for Legitimacy

Criminal justice sanctions executed in open society represent a particularly interesting case study for students of 'punishment and society'; after all, as our title suggests, CSM represent a primary form of punishment *in* society, rather than removal from (mainstream) society as a form of punishment. A key contention of social analyses of penality is that we can, in the range of penal sanctions, institutions and practices, see reflections of wider social, political and cultural developments. Our account of adaptation strategies suggests that nowhere in the penal field is this more evident than in relation to community sanctions, which have proved remarkably 'elastic' in both form and function throughout their history. Because of probation's umbilical connection with the fading project of penal welfarism (Garland 1985), community sanctions have in the last 30-40 years been engaged in a particularly revealing struggle for legitimacy (e.g. Weber 1922/1946; Suchman 1995) -- a struggle that has been much more profound for sanctions executed in the community than for the prison (albeit that prisons in many countries have experienced a variety of legitimation crises of their own: see further Liebling and Crewe, this volume). Community sanctions have had to adapt to new social and political conditions, not from behind the 'safety' of the prison walls, but within and exposed to community and society.

As Joshua Page argues in this volume (see chapter XX), accounts of penality and its transformations require careful analyses not just of the social forces that operate on the field (from 'outside', as it were), but of the relations and dynamics 'inside' the penal field itself, in its various subfields and in its interactions with other fields of social action. Drawing on the work of Pierre Bourdieu, Page outlines the contours of the penal field, explaining the relationships between the habitus or dispositions of penal actors and their ownership of and struggles over various forms of capital within and across penality and its intersecting fields. Although we have not cast it principally as such, our analysis of the adaptation of CSM can be read as an account of a range of ways in which CSM's executives, practitioners and advocates have sought to secure such capital in an increasingly unsettled penal field -- one in which CSM remain perennially marginal and insecure, despite their proliferation. Different forms of capital are being sought and struggled over in the different attempts to secure legitimacy that we have outlined.

As Wodahl et al. (2011) have recently noted (following Suchman 1995)[5], different types of legitimacy are in play here: *pragmatic legitimacy* rests in the ability of CSM to meet the needs of its stakeholders; *moral legitimacy* relates to their commitment to achieving goals that conform to societal values; *cognitive legitimacy* arises only when an institution's actions and functions are so woven into the social fabric that they

[5] There are of course various conceptions of legitimacy from a range of social science disciplines. Suchman's analysis, on which we have drawn, derives from the organisational studies literature, rather than from the sociology, psychology or political science literatures on which criminological scholars have tended to draw (e.g. see Crawford & Hucklesby 2011).

"simply make sense" in such a way that "alternatives become unthinkable" (Suchman 1995: 583). Thus, as penal welfarism came to be eclipsed, the rehabilitative ideal lost its moral legitimacy, undermining the progress of CSM towards a 'taken-for-granted' (i.e. cognitively legitimate) position in the penal field. This occasioned a loss of cultural and symbolic capital as old forms of knowledge and distinction become devalued. The pursuit of new forms of capital required CSM to learn to 'play the (penal) game' by different rules; the managerial adaptation described above (ironically, sometimes called "modernization") represents a pitch for pragmatic legitimacy in a changing field characterised by reconfigured stakeholder needs (for example, for low cost alternatives to custody). But the politicisation of criminal justice changed the game again in at least two ways. Firstly, pragmatic legitimacy became insufficient – CSM needed to respond to shifting societal and political penal values by offering the 'punitive bite' that it was hoped might secure some 'moral legitimacy'. In Bourdieu's terms this might be cast as a grab for symbolic capital that depended on being seen to be sufficiently 'tough' in delivering 'symbolic violence' for and by the punishing the state (in Bourdieu's terms). Secondly, broader social forces related to risk and insecurity impelled CSM towards a different form of pragmatic legitimacy rooted in the promise to meet stakeholder needs for protection. Here, the cultural and symbolic capital with which CSM sought to trade resided in new claims of expertise and effectiveness around risk and its management.

The reparative strategy is the outlier on this list. It is perhaps the most interesting contemporary development and, in our view, the brightest hope for the future of CSM. If today's proponents of CSM recognise the vulnerabilities of trading on the promise to protect (a promise on which they cannot ever adequately deliver), they might instead now look towards a reparative strategy which seems, in theory at least, potentially capable of delivering *both* pragmatic and moral legitimacy -- both cost-effective sanctioning and constructive redress[6]. After all, reparation's pre-modern historical forms and precedents suggest deep and enduring cultural resources (see Braithwaite & Pettit, 1990) that might somehow be mined to provide new forms of capital for CSM. Such forms of capital might even be secure enough (because of their deeper historical and cultural roots) to allow CSM to achieve the taken-for-grantedness that has eluded them and condemned them to live in the shadow of the prison; always the alternative, never the main attraction – or as our Edinburgh-based editors might say: "Always the Fringe, never the Festival." [7] That said, the Edinburgh Fringe is bigger, (some say) better and perhaps more profitable than the Festival, and neither its performers nor its audiences could be accommodated in the Festival. The same is true of CSM vis-a-vis prisons. In a very important sense, for all their travails, the position of CSM may be symbolically fragile but materially secure, expressively insufficient but instrumentally necessary. CSM will survive because they must; we could not afford to do (punishment) without them. The questions of adaptation we

[6] The success or failure of reparative CSM is judged principally in terms of the amounts, types and qualities of reparative acts and not in terms of reconviction rates. Reconviction rates 'sell' community sanctions on the basis of their role in reducing crime. A focus on reparation, however, 'sells' CSM in terms of delivering justice (McNeill, 2011). Showing that justice has been done, that debts have been settled, that redress has been provided, is in many ways an easier and more achievable measure of success for CSM.

[7] The Festival here refers to the renowned Edinburgh International Festival that takes place in Scotland each summer. The Fringe started as a small, spin-off festival over fifty years ago, but has since grown to become much larger and more varied than the original Festival, albeit of more varied quality, ranging from the sublime to the frankly incompetent.

have raised probably speak more to the future forms and functions of CSM than to their longevity. In any event, we suggest that penologists must pay more attention to watching this space, and not just the one inside the prison walls.

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[i] These recent travails of probation may have been most dramatic in Anglophone jurisdictions around the world, but elsewhere, for example in many mainland European countries, probation services seemed to face their own struggles to secure or sustain credibility and legitimacy within criminal justice systems and penal political discourses. For an analysis of one particularly interesting continental example – the reconfiguration of Belgian criminal justice social work in the wake of the Dutroux case – see Bauwens (2011).