

Community Sanctions and European Penology

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Introduction

The numbers of offenders under supervision in the community have grown rapidly in recent decades. In most jurisdictions in and beyond Europe, offenders under supervision (whether as an alternative to prosecution or sentence, as a community sentence in its own right, or as part of a post-custody licence) heavily outnumber those detained in custody. To give two examples, in Germany in 2008 the prison population was around 73.000 (Federal Statistics Office/Statistisches Bundesamt 2008), whereas an estimated 225.000 persons were under some form of supervision (Federal Statistics Office/Statistisches Bundesamt 2011; Morgenstern and Hecht 2011); in June 2010 in England & Wales the prison population was 83.500 whilst the population of offenders under statutory supervision in the community was 241.500 (Ministry of Justice 2010). Systems and practices of offender supervision have also developed swiftly in Central and Eastern Europe where nascent probation systems have been a part of post-Soviet era criminal justice reforms.

Pan-European figures are hard to establish given the wide range of definitions and forms of community sanctions and differences in official recording of their use but Van 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. As Robinson, McNeill and Maruna (forthcoming) argue, therefore, '[t]he 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'.

But besides their increasing scale and reach, the intensity of supervisory sanctions has also developed considerably in recent decades, moving beyond traditionally rehabilitative measures to include unpaid work, medical, psychological or substance misuse treatment, mandatory drug or alcohol testing, exclusion orders and residence conditions, curfews, house arrest and electronic monitoring as well as other innovations. Under criminal law, the use of supervisory sanctions before trial or sentence is increasing, but supervision has also emerged under civil law (eg in the UK's Anti-Social Behaviour Orders) and in administrative forms (eg again in the UK's use of Multi-Agency Public Protection Arrangements). New forms of supervision directed at foreign nationals, migrants and refugees have also emerged.

One driver of this expansion and adaptation, at least in some jurisdictions, is increasing political and public concern about the costs of imprisonment and of reoffending (ie offending during or after criminal sanctions). A recent policy paper in the UK estimates that the 'vicious cycle' of reoffending by ex-prisoners costs the UK economy between £7-10 billion per year (Ministry of Justice 2010).

The potential role of community supervision in reducing these costs has become a key interest of contemporary penal policy; particularly in relation to using such sanctions and measures to displace shorter custodial sentences which have higher costs per day and are typically associated with high reconviction rates. To give one example of the possible savings: in the Netherlands, the notional cost of a 2 month prison sentence is between 10.800 and 24.000 EUR

while the total costs of community sanctions that can substitute for such a sentence range between 600 and 2000 EUR. Some argue (somewhat more controversially) that, as well as being much less expensive than imprisonment, community supervision can produce lower reoffending rates.

This remarkable expansion and adaptation, along with the recurring claims of greater 'efficiency' or 'effectiveness' that have been made for supervisory sanctions, should have ensured that such sanctions became a key focus of contemporary penology in Europe and elsewhere. Instead, despite the influence and standing of Stan Cohen's (1985) *Visions of Social Control*, it is the growth of 'mass incarceration' that has preoccupied scholars, unwittingly allowing the neglect of the parallel development of 'mass supervision'. This neglect has analytical and practical consequences. It skews academic, political, professional and public representations and understandings of the penal field, and in consequence it produces a failure to deliver the kinds of analyses that are now urgently required to engage with political, policy and practice communities grappling with the challenges of delivering justice efficiently and effectively in fiscally straitened times – and with the challenges of communicating the meaning, nature, legitimacy and utility of supervisory sanctions to an insecure public (see McNeill 2011). This chapter aims principally to issue a challenge to European penologists to take community sanctions more seriously, and to begin to sketch out how we might do so.¹

Defining and viewing the (sub-)field

Vigilant readers will have noticed already a certain slippage in terminology; I have referred sometimes to 'offender supervision', sometimes to 'supervision in the community', sometimes to 'community supervision' and sometimes to 'community sanctions'. Whatever we call it, this is clearly a penal subfield around which it is difficult to draw precise boundaries, which is described and labelled differently in different places, and which has been characterised by the regular renaming that come with innovation, differentiation and a perennial quest for credibility and legitimacy (see Robinson, McNeill and Maruna forthcoming). Raynor's (2007) preferred term, 'community penalties', reflects his jurisdictional home (England and Wales) and suffers (as he acknowledges) from its failure to include the large populations subject to some form of supervision following release from custody. In other Anglophone jurisdictions (principally in North America and Australasia) terms like 'community corrections' are used. Though these are broader in scope, they have the disadvantage of implying a particular form a practice (correctionalist) which is far from universal in its application, even in the jurisdictions in which the term is used.

Given the avowedly European focus on this collection, it makes sense to settle on the commendably neutral, if somewhat technical, European label 'community sanctions and measures' (CSM), defined by the Council of Europe as:

'[those sanctions and measures] 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

¹ This chapter draws heavily on the ultimately successful application for a COST Action on Offender Supervision in Europe (COST Action IS1106: http://www.cost.eu/domains_actions/isch/Actions/IS1106). That application was co-authored with me by Kristel Beyens, Miranda Boone, Ioan Durnescu, Martine Herzog-Evans, Christine Morgenstern and Gwen Robinson. This chapter gives me a welcome opportunity to acknowledge my intellectual debt to them, and more generally, to the many colleagues who have participated since 2007 in the European Society of Criminology Working Group on Community Sanctions. Both the COST application and therefore this chapter are really the products of our conversations over the last 5 or 6 years.

imprisonment outside a prison establishment (Council of Europe 1992, Appendix para 1)'

What this definition lacks in depth, it makes up for in breadth: it succeeds in capturing not just the wide array of penalties handed down by courts (sometimes called 'front door' measures) which fall between non-supervisory penalties (eg, fines) and custodial sentences, but also statutory post-custodial ('back-door') measures associated with early release schemes (such as parole). The use of the term 'measures' (as well as 'sanctions') allows for attention to be paid to measures imposed pre-court and/or in lieu of prosecution, rather than restricting our attention to those that are imposed by judicial or quasi-judicial bodies.

Clear though it is, this definition is all form and no function. As Robinson, McNeill and Maruna (forthcoming) note:

'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.'

Putting this a different way, we have here a kind of formal or legal scaffold, but it tells us very little about the kind of building whose construction it facilitates. It tells us little about the substance or the essence of community sanctions and measures. Of course, as Barbara Hudson's (2003) excellent introductory text on punishment both argues and demonstrates, there are many ways to construct and examine the objects of the penological gaze. Just as criminology is a 'rendezvous discipline', so penology is a quintessentially interdisciplinary subject that compels and requires criminological, legal, philosophical and sociological scrutiny, as well as raising fundamental political and practical questions. Community sanctions need to be scrutinized from all of these different vantage points.

In similar vein, Tonry's (2006) commanding and authoritative overview of the purposes and functions of sentencing also provides a neat framework for analyzing penal sanctions. Tonry distinguishes between sentencing's purposes or normative functions (that is, its justifications), its primary functions (these being the proper distribution of punishment; the prevention of crime; the communication of threat, censure and of social norms), its ancillary functions (in contributing to the management of an efficient and effective justice system, and in securing legitimacy and public confidence) and its latent functions (the ways in which it reflects self-interest, ideology and partisanship, and how and what it communicates informally).²

Though he does not explain his framework in these terms, we might suggest that, albeit with notable exceptions, philosophers and jurists tend to study and discuss the normative functions and primary purposes of sentencing, criminologists tend to examine its ancillary functions and sociologists tend to study its latent functions. The same taxonomy of perspectives can be applied to community sanctions; we can explore their purposes or normative functions, their primary functions, their ancillary functions and their latent functions, provoking respectively legal and philosophical enquiry, criminological research and analysis, and sociological interpretation.

² In the Mertonian sense, the normative, primary and ancillary functions of punishment are all 'manifest' functions, in that they are all explicitly stated and understood, though perhaps to varying degrees and in different ways by different parties to the process. Of course, depending on one's point of view, at least some of the manifest and the latent functions of punishment might also be seen as Mertonian *dysfunctions* in terms of their adverse social consequences.

Reviewing the (sub-)field

Although there is some 'normative' literature (especially in Germany) addressing the legal and constitutional requirements of forms of supervision, it remains relatively under-theorised as well as under-researched in comparative perspective. In recent years the most prominent strand of research in the field has addressed the effectiveness of specific forms of community sanction or supervision. It is worth noting that there are at least two separate sets of questions here. One concerns the effectiveness of one type of sanction vis-a-vis another (usually prisons versus community); the other concerns the effectiveness of particular styles of or approaches to supervision or intervention within the legal framework that the sanction requires.

The latter question – about the effectiveness of particular methods and approaches – has been a particular preoccupation in Anglophone jurisdictions (for an excellent overview, see Raynor and Robinson 2009), although it has also been the focus of much attention and development in Scandinavia and the Low countries. Under the general banner of 'What Works?', much of this research has been sponsored by national governments (eg the Home Office in England & Wales) and limited to the evaluation of programmes which, despite the amount of energy and investment directed at them, are only accessed by a small minority of offenders subject to supervision, even in those jurisdictions that are most committed to such programmes. At a recent CEP (the European Probation Organisation) event, concerned with sharing European experience around the accreditation of such programmes and co-sponsored by the Scottish Centre for Crime and Justice Research, discussions revealed that Northern Ireland may put the highest proportion of persons subject to supervision through such programmes. But even there, only about 1 in 3 people under supervision is involved in such work. In most other jurisdictions the ratio is less than 1 in 10.

It is perhaps not surprising therefore that, even within this primarily evaluative body of scholarship, it is increasingly recognised that research and development needs to move beyond a focus on special programmes and toward an examination of routine practices of supervision understood in social context (McNeill et al 2010) if significant improvements in reoffending outcomes are to be delivered. More critically minded and culturally sensitive scholars have also highlighted the need to attend to the risks associated with 'policy transfer' around 'What Works?': specifically the transfer of programmes which may be effective in one context, to others with different penal cultures and offender populations (Canton 2009).

Of course, even within a principally evaluative paradigm pre-occupied with effectiveness questions, major methodological and conceptual challenges are generated by the broader question of the effectiveness of different types of sanctions themselves (see McNeill and Whyte 2007: chapter 2). While it may (perhaps) be possible to specify the components of a structured, manualised programme, so as to somehow isolate independent, extraneous and dependent variables, the kinds of scaffold referred to in the last section are in and of themselves much too insubstantial to permit any meaningful evaluation of their aggregate 'effects'.

These more prosaic questions of technical efficiency and effectiveness therefore drive us back towards other prior projects of enquiry which are at least threefold. We need to examine (1) the lived experience of supervision for those subject to and affected by it, (2) the construction of cultures and practices of supervision by those that deliver it, and (3) the multiple contexts of supervision (material, social, political, cultural, organisational, professional and legal) that shape and structure it. In other words, we need to move beyond the narrowly evaluative, criminological enquiry that has dominated the subfield, to produce a more inter-disciplinary and more critical mode of analysis that draws on and extends beyond legal, philosophical and sociological traditions. We need to analyse the nature of community sanctions as socially constituted institutions of punishment, as culturally constructed and contingent practices and as lived experiences.

Constituting sanctions: The identities and purposes of supervision³

Perhaps one of the reasons for the failure to displace or marginalize the prison in the popular, penal-political or in the penological imagination, rests in the historical origins of community sanctions in many jurisdictions, particularly where they emerged not *as punishments* but rather as measures imposed (primarily in Anglophone countries) *instead of punishment* or (primarily in countries with Roman law traditions) as a form of *suspended punishment*. This peculiar non-status as a mode of punishment may have suited liberal and progressive reformers who were so often trying to *divert* first-time and/or minor offenders from the demoralizing dangers of imprisonment and into nascent forms of social welfare services (for the Scottish example, see McNeill 2005). However, its legacy in the context of late-modern penal populism and of contemporary public sensibilities has been a legitimation crisis for sanctions cast around remedial, rehabilitative and reintegrative intentions that are seen, rightly or wrongly, as being principally concerned with the interests and needs of ‘offenders’.

In those jurisdictions where both social trust and welfare provision are in short or declining supply, where inequality is rising and where penal politics is febrile, it is not difficult to see how and why such intentions and concerns cease to connect with public sensibilities. In general terms therefore, the social, economic, cultural and political dynamics elucidated in, for example, the works of Garland (2001), Melossi (2008), Simon (2007) and Wacquant (2009) arguably conspire to produce both a shrinking conceptual space for community sanctions. These late-modern dynamics (and indirectly the more ‘dystopian’ or ‘catastrophic’ readings of them, on which see Daems (2008)) deprive community sanctions of the sorts of moral, cultural and political resources upon which they have historically drawn. Instead, they tend to be cast as the kind of undue indulgence discussed above. As Garland (2001) puts it, where the offender ceases to be seen as a ‘poorly socialised misfit’ and becomes instead either an opportunistic, illicit consumer (to be controlled through target-hardening or increased surveillance) or alternatively a dangerous, threatening outsider (to be despatched, incapacitated or deported), support for more inclusive penal-welfarist strategies wanes. As I have already suggested, this is not to say that supervision in the community declines in volume, rather it serves to reveal how supervision’s uses, forms, meanings and character are compelled to change and to find new routes to legitimacy.

But before discussing these changes, it is necessary to note a second problem perhaps posed by the origins of community sanctions as measures of *diversion from* punishment; a problem that may partly explain the slower progress of human rights discourses in the field of community sanctions than in the relation to imprisonment. This problem rests in the sense in which the origins of community sanctions in many jurisdictions lie in acts of sovereign or executive clemency or mercy. Thus recipients of such sanctions were seen not as being diverted from punishment because they *deserved* to be so diverted; rather they were granted such sanctions (whether probation or parole) because the state elected not to proceed with the measures of punishment to which it *was* nonetheless entitled. As philosophers of punishment have pointed out (Smart 1969; Murphy 1988; Walker 1991) part of the point of mercy is that it is undeserved. For that reason it is not something to which someone can easily extend a rights claim.

Though in many jurisdictions community sanctions now find themselves located in an explicit or implicit tariff of penalties (whether enshrined in sentencing laws and guidelines, penal codes or merely in professional practices), there remains in several other jurisdictions a stubborn public (and sometimes professional) perception that the ordering of such a sanction is an act of judicial or executive largesse. When this perception is combined with any public suspicion that the largesse is tied to some non-legal or non-judicial consideration (for example, making cost

³ This section, and the two that follow it, draw extensively upon and update Sparks and McNeill (2009).

savings or gaining some political or diplomatic advantage), public cynicism may be the result. This has two main implications for human rights; firstly, in the social and political climate discussed above it generally militates against parsimonious approaches to sentencing and release decisions; secondly, it constructs those subject to supervision as recipients of mercy and thereby *de facto* deprives them of the moral basis for legitimate claims to any entitlements to community sanctions (rather than custodial ones) and to fair treatment in the execution of community sanctions.

The durability of the perception that the subjects of supervision are recipients of mercy (ie as having been 'let off') has vexed probation policymakers and practitioners for decades (eg the Morison Report 1964; Casey Report 2008). To some extent, it perhaps reflects the failure of community sanctions to make significant in-roads into public consciousness. Public opinion research tends to show very little public understanding of the nature and requirements of contemporary community sanctions, though some support for their aims and methods does exist (Allen and Hough 2008; Maruna and King 2008). To address the credibility and legitimacy issues that arise from the 'marketing' problems of CSM, attempts have been in some jurisdictions to create identities for CSM more focused on managing risk and public protection, on delivering punishment in the community, or on recasting them as principally reparative in nature (on which see Robinson, McNeill and Maruna (forthcoming)). At the same time, the traditional view of probation as means of re-educating or correcting the corrigible so as to enable their social integration and inclusion has been downplayed (though not necessarily abandoned). In very broad terms, and in some jurisdictions more than others, we might summarise these developments as suggesting a drift away from what Gearty (2006) would perhaps describe as a concern with the claim rights of offenders (linked to a concern with *their* flourishing and well-being) and towards protecting the liberties of potential victims and of communities (see Canton 2008). Paraphrasing Melossi, we might say that in some guises at least, community sanctions have become less a site where offenders are made fit for enjoying the rights and responsibilities of the social contract (with the intention *rétablir dans ses droits*), and more a mechanism for managing the ways in which they are deemed to threaten the liberties of others, and thus the social contract itself.

Constructing sanctions: Practising supervision

If this sounds somewhat dystopian and perhaps over-emphasises developments in Anglophone jurisdictions, it might be more accurate to describe community sanctions in general as facing a perennial tension over the extent to which they are defined and constructed around the purposes of public protection, penal reductionism and/or rehabilitation/social inclusion. Despite the pressures noted above, in most jurisdictions all three purposes endure in some form or other, and in some places a more explicit commitment to the pursuit of reparation or mediation has been added where CSM services have sought to engage much more directly with victims.⁴ In some jurisdictions, policymakers and practitioners have gone so far as to argue that the three purposes are interdependent, for example casting both the inclusion (or integration) of offenders and the reduction of the use of imprisonment as means by which public protection can and should be enhanced (Robinson and McNeill 2004; McNeill and Whyte 2007).

However, the elevation of public protection as the dominant purpose or meta-narrative in some jurisdictions (Robinson and McNeill 2004) – even where such discourses are used as a means of re-legitimising welfarist practices (see McNeill et al 2009) – is far from unproblematic. To promise public protection seems to make sense during times when people are insecure about the pace and scale of change in western societies and in this respect the contemporary preoccupation with risks might suggest that the position of community sanctions can be secured by promising to manage and reduce risks and thus to protect. However, there is a paradox at the

⁴ Here we mean 'real' victims of extant crimes, as opposed to 'potential' victims of future crimes.

heart of protection and there are risks with risk: To promise to protect is to confirm the existence of a threat and thus to legitimise and reinforce fear (Douglas 1992). Whenever and wherever supervision agencies commit themselves to, or worse define themselves through, the assessment and management of risks, they expose themselves not to the likelihood of failure, but to its inevitability. Not all risks are predictable and not all harms are preventable. Even being excellent at assessing and managing risks most of the time (assuming that this could be achieved) would not protect probation from occasional, spectacular failures and the political costs that they carry (McCulloch and McNeill 2007; McNeill 2011).

A further related problem with public protection is that it tends to dichotomise the interests and rights of offenders and the interests and rights of victims and communities in a zero-sum game (McCulloch and McNeill 2007). It becomes not just a case of protecting 'us' from 'them', but a case of setting 'our' safeties and liberties against 'theirs' (see also Canton 2008). For supervision agencies in some jurisdictions at least this has led to public and political pressure for more secure or incapacitating forms of control; forms of control that serve, at least in the short term, to re-assure. But the traditional mechanisms of protection associated with community sanctions are to be found in the support of longer-term processes and projects of change and reintegration which provide relatively little security and reassurance in the short-term. Thus although changed ex-offenders ('desisters' in the contemporary parlance) who have internalised and committed to the responsibilities of citizenship may offer a better prospect for a safer society in the long term, change programmes and services look somewhat feeble when set against the increasingly threatening offender that communities are taught to fear. In this context, where supervision is cast as just one in a range of means of securing public protection, and where it lacks a distinctive moral purpose or penal-cultural identity, they remain in the shadow of the always more incapacitating, always more punishing prison. Even within the community, they have to compete against or seek re-legitimation through the promise of new technologies like remote electronic monitoring which, on some accounts, aspire to create the 'virtual prison' in the community (Roberts 2004).⁵ In this sense, community sanctions are vulnerable to what we might cast not as the penal temptation (*pace* Wacquant) but as a less and less satiable appetite for incapacitation.

And yet, there is emerging evidence in various jurisdictions that penal practitioners – even in those jurisdictions where risk-based discourses and technologies have made the greatest advances – can resist and subvert, as well as sometimes being co-opted to, these pressures. Thus Deering's (2011) recent analysis of the accounts of probation practitioners in England and Wales uncovers a familiar combination of pragmatic adherence to government aims and continued commitment to ideals about the possibility and value of individual change and development, as well as a stubbornly social (or sociologically positivistic) analysis of the causes of crime (see also McNeill et al 2009). Deering doesn't really acknowledge or discuss the implicit tensions in this position; that is, the tension between a belief that crime is a product of social and structural factors and a practice rooted in supporting individual change and empowerment. The durable practice ideology that he uncovers remains one in which the practice focus is on individual rather than social change; on crime rather than criminalisation; on better coping with the stresses of disadvantaged lives rather than moderating the forces that generate these pressures; in essence on the processing of private troubles rather than the confrontation of social issues. That said, he is surely right to note that the continuation of an essentially humanitarian ethos in probation practice is probably (from the probationer's point of view) an important moderator of more punitive and exclusionary policy discourses.

Experiencing sanctions: the lived realities of supervision

⁵ Of course as Mike Nellis (2009) has pointed out, electronic monitoring in and of itself does not incapacitate – it merely provides a new means of monitoring and perhaps securing compliance with curfew conditions or home detention.

With respect to offenders' and ex-offenders' human rights, the implications of the ascendancy of public protection are perhaps obvious: firstly, their access to community sanctions (whether instead of custody or as mechanisms for early release) can become conditional on assessments of the risks⁶ involved in their liberation, irrespective of the sometimes dubious basis of such assessments; secondly, they may not be required to consent to the forms of supervision to which they find themselves subject, since these measures are not aimed at their interests; thirdly, sanctions may come to be loaded with more onerous and intrusive conditions, in the putative public interest; fourthly, combinations of the involuntary nature of supervision and its more onerous conditions may increase the likelihood of technical violations⁷ of community sanctions; and fifthly, violations may lead to greater penalties than would have been imposed at first instance. Under these conditions, community sanctions can all too easily become a driver of incarceration rates rather than a brake upon them (see Simon 1993). For those caught up in such systems and practices, questions of legitimacy and procedural justice in the administration of community sanctions become no less pressing than they are for those in custody.

Even leaving aside the pressures and problems generated by the dominance of public protection, the punitive effects of community sanctions have rarely been recognised or discussed, perhaps particularly because they have until comparatively recently been cast as essentially benign, inclusive, welfarist measures with re-integrative intent. But of course, as the history of penal welfarism itself so clearly illustrates, the pursuit of welfare can often result in consequences that are experienced as being highly punishing by those on the receiving end (Garland 1985; see also Daems 2008). It is worth noting, for example, that the limited empirical evidence available about probationers' recollections of their experience - even at the peak of penal welfarism and in an avowedly welfarist jurisdiction (Scotland in the 1960s) - suggest that probation has always been simultaneously about helping, holding (both in the sense of support and in the sense of constraint) and hurting (McNeill 2009).

With respect to the hurts that punishment generates, there is, of course, an extensive body of scholarship, in the tradition of Gresham Sykes' (1958) seminal work, on the pains of imprisonment. More recent iterations of this literature point not just to the peculiar pains of life in 'supermax' conditions (King 2005) but also to the pains and harms of mass incarceration itself (Haney 2005), and to the pains and harms suffered by prisoners' partners and families, through 'secondary prisonization' (Comfort 2007). Perhaps more directly pertinent here are the pains of penal rehabilitation in its current risk-focused guise. Thus, for example, we find evidence of burgeoning resentment amongst English prisoners towards what apparently seems to them to be the capricious and illegitimate exercise of 'soft power' by prison psychologists involved in key decisions about prisoner progression or release (Crewe 2009; and more generally Maruna 2011). In similar vein, Lacombe's (2008) ethnographic study of prisoners in an English prison-based sex offender programmes reveals the ways in which risk-based rehabilitation invites and requires them to contort their perceptions and presentations of self in line with the requirements of the particular program or process to which they are subject. Cox's (2012) compelling ethnographic analysis of the pains of youth imprisonment (albeit in a US state) reveals a similar picture.

These pains of risk-based rehabilitation extend beyond the prison too. The traditional absence of punitive intent in probation or criminal justice social work (alluded to above) does not necessarily entail an absence of 'penal bite'; at least if studies of those subject to community supervision are to be taken seriously. For example, researchers at the RAND corporation in the

⁶ This is not the place for a discussion of the accuracy of risk assessment, but it should be noted that professional assessments of risk are not immune to the wider social and political pressures discussed above.

⁷ By technical violations, we mean breaches of the conditions of supervision as opposed to the commission of further offences.

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 and Deschenes 1994: 306; see also Petersilia 1990; Payne and Gainey 1998; May and Wood 2010). More recently, Durnescu (2011) has specifically explored the 'pains of probation' as experienced in Romania. Alongside deprivations of time and the other practical and financial costs of compliance, and limitations on their autonomy and privacy, probationers also reported the pain of the 'forced return to the offence' and the pain of a life lived 'under a constant threat'. The threat in question in Durnescu's (2011) study was that of breach or revocation and with it further punishment, but the works referred to in the last paragraph also point to the threat of failing to persuade a probation officer, a psychologist, or some other professional that one's 'riskiness' can be and is being properly addressed and managed.

In one sense, there may be little that is truly novel in this. For a prisoner of the Eastern State Penitentiary in the 19th century, placed in silent and solitary confinement in the hope that he would repent and make his peace with his Maker, the pains of penitentiary reform were doubtless profound. His project of 'coercive soul transformation' may have been designed and delivered somewhat differently than that directed at the late-modern risk-bearing prisoner or probationer – but both are subjected to disciplinary regimes (Foucault 1977). But what may be peculiarly demanding for late-modern penal subjects (inside or outside prison) is that, rather than being left to deal, before God, with their own sinfulness and redemption, they are compelled to *display* the malleability of their riskiness, to *perform* its reduction and manageability. At least in some risk-based systems, it is the credibility of this performance which will determine progression in and release from punishment. In these circumstances, rehabilitation is both disciplinary and punishing in a particularly potent way (see Crewe 2012).

Perhaps presaging these developments, Edgardo Rotman (1994) drew an important distinction between anthropocentric and authoritarian rehabilitation:

'The authoritarian model of rehabilitation is really only a subtler version of the old repressive model, seeking compliance by means of intimidation and coercion. Rehabilitation in this sense is essentially a technical device to mould the offender and ensure conformity to a predesigned pattern of thought and behaviour... The anthropocentric or humanistic model of rehabilitation, on the other hand, grants primacy to the actual human being rather than metaphysical fixations or ideologies, which long served to justify the oppressive intervention of the state. Client centred and basically voluntary, such rehabilitation is conceived more as a right of the citizen than as a privilege of the state. A humanistic public policy regarding crime implies the idea of human perfectibility, which at the level of rehabilitation includes not only the offenders themselves, but also the society that bred them and the institutions and persons involved in their treatment' (Rotman 1994: 292).

This distinction, and more specifically its implication that the person engaged in rehabilitation must be treated as a moral subject and not as a material object to be manipulated or adjusted in the interests of others, seems central to many of the claims that can be made for and against rehabilitation – and to broader questions about the legitimacy of rehabilitation (in its various guises; see Robinson 2008, McNeill forthcoming) and of its relationships with institutions of punishment, whether custodial or community-based.

Conclusions: Developing comparative and European penology

Despite my earlier call for more thoroughly inter-disciplinary analyses of community sanctions, it is obvious, on reviewing this chapter, that it is the product of a principally sociological engagement with the topic. In a sense, therefore, this brief and selective exploration of the

existing literature on supervisory sanctions therefore does little more than to underline the need to more comprehensively review and synthesise existing analyses, as well as to generate new knowledge about such sanctions as a set of situated social practices which can and must be analysed in comparative context, taking into account how they are differently experienced, practiced and constituted in different places - and to what effect.

Although interested scholars have begun to take important first steps towards comparative work (eg Dünkel and Spieß 1983; Hamai et al 1995; van Kalmthout and Durnescu 2008), existing publications (in the form of edited collections) have tended to rely principally on single nation descriptive accounts of probation systems, services and practices, and to emphasise policy rather than practice or theoretical issues, with limited comparative analyses provided. That gap – in comparative analyses of community sanctions as constituted, as practiced, as experienced, constitutes an important lacuna in the existing literature on comparative penology itself (eg Rusche and Kirchheimer 1939; van Kalmthout and Tak 1988; Downes 1988; Cavadino and Dignan 2006; Dünkel et al 2010; Lappi-Seppälä 2012). This body of work has tended to privilege the analysis of imprisonment rates/regimes and macro-level explanations for jurisdictional variations. Valuable though this is, it is increasingly recognised that deeper and richer understandings of penal cultures and practices are required to make sense of differences in approaches to punishment (Nelken 2009), and that systems, practices and experiences of supervision (and not just prison rates and regimes) must be a part of such analyses.

Returning to the arguments with which we started, the development of such analyses seem to matter now more than ever, for both analytical and practical purposes. At an international or transnational level, supervision began to emerge as an important topic in the early 1990s when the United Nations and the Council of Europe tried to strengthen community sanctions to reduce the use of imprisonment but also tried to establish minimum standards for such sanctions so as to ensure that human rights were respected. Both organizations involved national stakeholders as well as NGOs and scientific experts in the preparations of suitable documents to support these goals. Nevertheless, the 'United Nations Standard Minimum Rules for Non-Custodial Sanctions and Measures [Tokyo Rules]' from 1990 and the Council Europe's 'European Rules on Community Sanctions and Measures' from 1992 - neither of which is binding on Member States - gained little attention in the Member States.

In the years since, in particular after 2001, other topics such as the 'fight' against organized crime, terrorism or corruption became priorities on the international agenda. In the EU, where criminal policy remains largely within the competence of the Member States, 'mutual trust based on mutual understanding' is of key importance for efficient cooperation in that field - this was recently affirmed in the 'Stockholm programme' that sets policy priorities in the area of justice, freedom and security, [Official Journal C 115 of 4.5.2010]). More specifically, a Framework Decision (FD) adopted by the EU in 2008 on 'supervision of probation measures and alternative sanctions' (OJ L 337/102 of 16.12.2008) now requires Member States to supervise offenders sentenced in another state and thus to implement 'foreign' supervision orders. Mutual understanding based on mutual knowledge of such orders and practices has therefore become crucial in managing such transfers. Yet recent seminars that have brought together practitioners, scholars and policy makers reveal that this understanding is still lacking, partly because of the limitations in academic study of this field alluded to above.

But the FD is important for another reason: it raises the profile and import of the EU itself as a significant actor in the penal field (see Baker, this volume), specifically with reference to community sanctions. Thus, for example, and without going into the detail of the FD itself, the 'scientific experts' supporting the then Belgian Presidency of the EU in working towards the implementation of the FD, noted the following:

'Member States (hereafter 'MS') differ in their reliance on explicit purposes of sentencing. Some refer explicitly to the aims of rehabilitation and prevention of recidivism for community sanctions and measures (hereafter 'CSM'); others leave it up to the court to assess whether a CSM can fulfil 'the aims of the punishment'.

This should not raise a particular problem for transfers under the FD, so long as all parties understand that the FD itself states in article 1 its objectives as: "facilitating the social rehabilitation of sentenced persons, improving the protection of victims and the general public, and facilitating the application of suitable probation measures and alternative sanctions in cases of offenders who do not live in the state of conviction" (Snacken and McNeill 2012: 1)

Though this statement concerns the purposes of *transferring* supervision, in some senses it can be interpreted as establishing common pan-European meta-purposes (or in Tonry's terms normative and primary functions) for community sanctions themselves. Other European instruments have less force than the FD but they nonetheless suggest convergence in what we referred to above as the constitution of sanctions; in the elaboration of their identities and purposes (see Morgenstern 2002, 2009). Thus similar statements of purpose can be found in the Council of Europe (2010) 1 Probation Rules R 1:

'Probation agencies shall aim to reduce re-offending by establishing positive relationships with offenders in order to supervise (including control where necessary), guide and assist them and to promote their successful social inclusion. Probation thus contributes to community safety and the fair administration of justice.'

The CEP (the European organisation of probation services) Statement on Probation Values and Principles equally emphasizes that 'Social inclusion is a requirement of social justice and a key guiding principle in probation practice' (para 3). Thus, it seems that, as Snacken and McNeill (2012: 1) argue:

'there is an emerging consensus at the pan-European level that, whereas all penal sanctions, including deprivation of liberty, aim at reducing re-offending and protecting victims and the general public, *a particular characteristic of probation measures is their emphasis on working with offenders in the community and fostering their social rehabilitation and inclusion*' (emphasis added)

Some suggest that such developments represent a useful and important bulwark against the broader social, political and cultural forces discussed above; against an Anglo-American-style 'new punitiveness' or a 'culture of control' (Snacken 2010). These developments can be seen as providing a potential brake on dystopian or catastrophic developments in penalty generally and as an alternative means of the re-legitimation of community sanctions in particular. In another sense, these kinds of developments may function at the analytical level as a resource for imagining different and more constructive penologies (Daems 2008).

It may be obvious by now that I have a great deal of sympathy with this position; I have already alluded briefly above to the risks associated with policy transfer. Of course, the tendency when such arguments are made is to think about the importation of the 'harsh justice' (Whitman 2003) represented in some Anglo—American influences, models and practices. But whether we regard the transnational influence of *European* institutions and organisations as benign or malign depends largely on the extent of our political and normative sympathies with their values and effects. Moreover, beyond the question of the 'leniency vectors' (Zimring and Hawkins 2007) that such institutions and organisations may or may not represent, profound questions about the political legitimacy of their influence on state-level criminal justice also arise.

In principle therefore, critiques of and concerns about policy transfer need to be considered and applied both *within Europe* and at the *European* level. It follows that securing the benefits and protections of a richer and more developed comparative penology necessarily entails a more developed European penology. The recent development of networks of researchers and practitioners in Europe – at all career stages – engaged in such work opens up the possibility of sharing existing academic and practice-based knowledge; of building comparative analytical frameworks and other inter-disciplinary methodological innovations; of supporting collaborative research activity (across jurisdictions and disciplines), building research capacity; of developing the skills of young researchers; and thus of creating new insights, theories and perspectives about penalty within and across Europe *and* about European penology. The argument of this chapter has been that, within these broader projects, the inter-disciplinary study of community sanctions and offender supervision in Europe must be seen as an increasingly important part.

Perhaps through such endeavours, we may at least aspire to develop both comparative penology and European penology so that both can contribute more effectively to the development of justice and security in Europe. That contribution matters not least where we seek not a Europe in which experts, policy networks and elites preserve liberal values from populist assault, but where we aspire instead to developing scholarship which, through its engagement with public policy, practice and debate, supports a 'better politics of crime and regulation' itself – both within and across European states (Loader and Sparks 2010: 117, and this volume).

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