

## Article

# Probation and the philosophy of punishment

Probation Journal

2018, Vol. 65(3) 252–268

© The Author(s) 2018

Article reuse guidelines:

[sagepub.com/journals-permissions](http://sagepub.com/journals-permissions)

DOI: 10.1177/0264550518776768

[journals.sagepub.com/home/prb](http://journals.sagepub.com/home/prb)**Rob Canton**

De Montfort University, UK

**Abstract**

With the important exception of critiques of rehabilitation, philosophers of punishment do not often have probation as their focus. This (relative) neglect is mutual: when probation policymakers, scholars and practitioners reflect upon their own work, practices and values, the insights of the philosophy of punishment are rarely among their chosen resources. This paper attempts to make some connections and to point to some ways in which a fuller engagement might shed a different light on some familiar questions in the philosophy of punishment and enrich thinking about the work of probation.

**Keywords**

probation, public attitudes, prison, human rights, social exclusion

**What is the philosophy of punishment?**

The philosophy of punishment has usually been preoccupied with two principal inquiries: first, a definition of punishment; second, its moral justification.

**Definition**

The definition of *punishment* is contested. In many texts, definition precedes discussion about justification and, as Bagaric (2001) points out, some definitions of the word already tilt the argument in favour of (or against) some kinds of justificatory account. One element of almost all definitions of punishment, however, is that it must

**Corresponding Author:**

Rob Canton, De Montfort University, Health and Life Sciences, Hawthorn Building, Leicester, LE1 9BH, UK.  
Email: [RCanton@dmu.ac.uk](mailto:RCanton@dmu.ac.uk)

involve an imposition of some pain or deprivation, 'an evil, an unpleasantness' (Flew, 1954: 293), commonly referred to in the literature as 'hard treatment'. This seems fundamental: unless a response to wrongdoing has that character, it would not be punishment but something else – maybe ignoring, condoning, forgiving or rewarding. Yet there is another aspect of punishment that had been absent from (or at best less conspicuous in) the 'hard treatment' definition that long influenced philosophical debate. Punishment necessarily expresses *censure*: it communicates disapproval (whatever else it may convey and whatever form it may take) and this seems fundamental to the concept (Feinberg, 1965; Von Hirsch, 1993; Duff, 2001; Bennett, 2008). To censure is to blame, and this necessarily involves expressing disapproval of the act or omission and declaring someone responsible for it. If the state holds something to be wrong (as articulated in the criminal law), then censure in response to a crime is a mark of its sincerity, owed to victims and to the wider community. It is also owed to the offender as a responsible moral agent (Duff, 2001). These reflections introduce the idea of *the messages of punishment* (Rex, 2005).

### *Moral justification*

Most texts in the philosophy of punishment explore 'the justification of punishment' (Canton, 2017). Punishment needs to be justified because it involves treating people in ways that would not in other circumstances be considered permissible – taking away their liberty by locking them up, otherwise restricting their liberty (for example, by limiting their movements), making them work for nothing, requiring them to make financial payments.

A common initial distinction is between *reductive* and *retributive* justifications, which is not to say that these accounts exhaust the field. Reductivists seek the justification of punishment in its (supposed) tendency to reduce the incidence of offending – through deterrence, rehabilitation or incapacitation. (Of these mechanisms, it should be noticed, only deterrence can influence *potential* offenders. This may account for the salience that deterrent arguments have in public debate, despite the meagre evidence that the prospect of the weight of punishment makes much difference; Bottoms and Von Hirsch, 2012).

The purpose and justification of punishment, reductivists argue, is to prevent (or, more realistically, to reduce) crime. The central tenet of retributivism, by contrast, is that punishment is justified when offenders are being punished for what they have done *because they deserve it*. For some, this seems to be a self-evident moral principle. Corollaries of a retributive position are that innocent people may not be punished (they have done nothing to deserve it) and that offenders should be punished in proportion to their wrongs (to do otherwise would be to impose more or less than they deserve).

Retributive criticisms of reductive approaches include the charge that setting levels of punishment in order to manage the problem of crime amounts to using people. Punishment may have beneficial (reductive) consequences, but it is not on these grounds that it is to be justified. A particular concern for retributivists is that

(any form of) reductivism weakens the link between the offence and the punishment: the weight of the punishment would come to be determined not by what is deserved but by a judgement about the most effective means of reducing further offending. This undermines proportionality – a foundational principle of retributive thinking. The critique of rehabilitation (see below) was scathing of its disregard for proportion.

The debate between retributivists and reductivists seems intractable. It is as if retributivism and reductivism each captures something vital that eludes the other. It might be thought that the point of a penal system is to contribute to a reduction in the incidence of offending. Reductivists may protest accordingly that retributivism leaves punishment without a point. Yet that punishing is proper in itself and must be in proportion to what is deserved is a compelling moral intuition – and indeed one that is recognised in almost all places and at all times (Renteln, 1990). Our sense of justice is affronted when offenders 'get away with it', and we all recognise the protest that a particular punishment is excessive or unduly lenient.

Different penal measures give varying emphasis to retribution and reduction. Since the establishment of the first National Probation Service in 2001, the watchwords of probation have been *enforcement*, *rehabilitation* and *public protection*. Public protection and rehabilitation are plainly reductive aims, while enforcement (understood as ensuring that the order of the court is carried out) is plausibly a precondition of both reductive and retributive purposes.

## Probation in the philosophy of punishment

The reasons why probation might be of especial interest to philosophers of punishment may now be becoming clearer. So long as philosophy confines its attention to standard cases like capital or corporal punishment, to incarceration or to financial penalties, then hard treatment is a plausible characterisation. These are and are meant to be 'hard' and unpleasant. But there are several other common punishments that do not appear to be hard treatment. Among the more obvious examples are conditional sentences and suspended sentences. Perhaps those subject to conditional or suspended sentences are encumbered with more burdens and apprehensions than other people, but the purpose seems to be less the imposition of hard treatment than the threat of it should there be further offending.

Probation supervision is of particular interest, as indeed are other community sanctions administered by probation agencies – for example, community service and (in some countries) electronic monitoring. Probation may certainly involve hardships or even 'pains' (Durnescu, 2011), but this is not all that probation amounts to and, so far from their being intended, it is the policy of many probation agencies to do all they can to mitigate those effects – for instance, by making it easier for people to comply with the requirements of a community order. To regard probation supervision simply as an imposition of hardship would be to misunderstand its aims and aspirations, as well as how it is experienced by practitioners and probationers. It is also clear that community supervision is experienced very differently by different people, confounding generalisations about burdens and

benefits, as well as complicating calculations about the weight of a sanction (Hayes, 2015; Van Ginneken and Hayes, 2017). Again, sometimes electronic monitoring is imposed just to be burdensome, hard treatment as punishment; in other circumstances it is used for surveillance, control or even as a contribution to rehabilitation (Hucklesby, 2008; Nellis, 2016; Hucklesby and Holdsworth, 2016). Yet the blunt reality of being tagged, if not the 'meaning', remains just the same, irrespective of the sentencer's purposes.

There have long been debates within the profession about whether probation is (or should be) a punishment. The English/Welsh probation order, originally enacted in the Probation of Offenders Act 1907, had envisaged that an order might be made where 'it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation' (Section 1 (1) [2]). Probation, this could be taken to mean, was *instead of* punishment. In the late 1980s, however, in the debates leading up to the enactment of the Criminal Justice Act 1991, there was marked disagreement between the government, who now wished to present probation as a punishment, and the profession, who resisted this characterisation. The profession was troubled perhaps because of the connotations of severity carried by the word 'punishment' and the associated rejection of the social work ethos that had been so important to many practitioners (Brownlee, 1998).

Under the Criminal Justice Act 1991, probation became a punishment and a sentence of the court (Wasik and Taylor, 1991). The guiding rationale of the Act was that punishment should be imposed according to desert. The burdens of different sanctions could be calculated and compared by regarding them as *restrictions on liberty*. Until then, probation had been seen as a response that was separate from the penal tariff (Thomas, 1979), but understood as a restriction of liberty, it was now commensurate and could be ranked together with other punishments. Within the parameters of a deserved punishment, reductive objectives like public protection and rehabilitation could and should be properly pursued. The political consequence was that probation could now be presented as punishment, so, as the government saw it, enhancing its credibility. In practice, the main effect of this was that probation could be combined with (other?) punishments. Yet otherwise it is at least arguable that, in its transition from being instead of a punishment to being a punishment in its own right, *nothing much changed*. The demands of the order and the consequences of non-compliance remained the same: treatment was no 'harder' than it had been before. It is not at all easy, then, to determine the point at which an imposition becomes a 'punishment'.

Subsequently there have been attempts to show that probation-administered sanctions constitute punishment. The Offender Management Model insisted that 'punishment' should be part of every tier (Grapes, 2007), although whether this meant anything more than that the sentence had to be put into effect and enforced as required was not altogether clear. The Criminal Justice and Courts Act 2013 required courts, when making a community order, to include 'at least one requirement imposed for the purpose of punishment' (and/or impose a fine) (Schedule 16, Part 1, 2). Again, it is by no means clear that this has led to any changes in

sentencing practice or in implementation (Bottoms, 2017). This is all more plausibly seen as part of a long-term endeavour to convince a sceptical public that probation is a suitable retributive burden rather than a question that can be resolved by philosophical inquiry. Is there, then, a difference between *being* a punishment and *being seen* as one? This is not to take cover behind what Christie (1981) calls 'the shield of words' by denying that probation and other community sanctions are punishment, but rather to suggest that this may turn out to be more a political than a philosophical debate.

These reflections also draw attention to another relatively neglected matter. In deciding whether or not a sanction constitutes punishment, whose perceptions count? After all, 'punishment means very different things to different people' (Van Ginneken and Hayes, 2017: 13). An intervention meant to be helpful could turn out to be nothing of the sort and indeed experienced as intrusive and burdensome. On the other hand, a sanction intended as hard treatment may be experienced as something very different. Community service, notably, has often brought a sense of personal achievement and even enjoyment (for example, McIvor, 1992), and yet it would seem odd to argue that this somehow disqualifies it as punishment. The philosophy of punishment tends to privilege the intentions of the sentencer here, even though the manner of implementation and the experiences of the offender can modulate the effects of these intentions and perhaps subvert them altogether.

### *Probation and censure*

Reflecting on probation also raises interesting questions about censure which, as we have seen, is central to many contemporary retributive accounts. Hard treatment may well convey censure, but Walgrave has pointed to the 'communicative aridity' of stern retributive punishment, arguing that restorative processes are much more fertile ground for effective communication (Walgrave, 2003: 65). These thoughts have led Duff (2001), among others, to suggest that other sanctions – perhaps community punishments – are likely to be much better than imprisonment in communicating censure.

These are important (and relatively neglected) considerations for the philosophy of punishment. It is arguable that in its preoccupation with proportionality and the just weighting of punishment, philosophy has paid insufficient attention to the form that punishment might take. Further, censure theory should encourage attempts to look beyond the formal pronouncement of the court and to reflect upon the manner in which the sentence is put into effect. The manner of implementation unavoidably communicates and may reinforce or perhaps undermine the message intended by the sentencer, although this is a communication that is heard normally by the offender alone. Certainly some forms of hard treatment may suppress or distort the messages that need to be heard.

A problem, however, is that censure should express disapproval in a way that can be readily understood not only by offender and victim but by the community in general. Zedner (1994) pointed to shortcomings of restorative justice: a restorative justice encounter may not be able to respond to the wider social significance of the

crime and can communicate only to those present at the event. Probation-administered sanctions may be thought to have similar limitations, and this is part of the reason why government has been anxious to present them as punishment, so that the message of censure can be heard by victims, courts and the wider public. Notoriously, however, these attempts have had limited success. Like any communication, then, censure is vulnerable to misunderstanding: there is more than one 'audience' – offender, victim, the general public – and there can be no assumption that all will receive the message in the same way, even if a single message is intended. Censure of the act can, for example, easily be heard as (and is sometimes meant as) denunciation of the person who did it, with stigmatising consequences that can be hard to erase, even after the due punishment has been served.

Ideas of communication and censure play a central part in another well-known account of punishment. Emile Durkheim argued that the criminal law could be understood as the formal expression of the values that the community shares – and which indeed, in a significant sense, make a group of people *into* a community (Garland, 1990; Lukes and Scull, 2013). Crimes represent a violation of these shared values and, in and through its response to the violation, society asserts and strengthens them. In a liberal democracy, these values are ours (Duff, 2001). Crime gives an occasion for this reaffirmation and, as necessary, clarification of our values. This is not to say that punishment is the only or best means of moral education and the affirmation of values, but the communications of punishment, as Durkheim insists, should vindicate our values and contribute to strengthening them. In his insightful work on compliance, Bottoms (2001) has distinguished prudential from normative reasons to comply with the law. If the prospect of punishment provides self-interested reasons not to offend, the affirmation of our shared values in responding to crime puts forward moral reasons. This is the difference between deference and normative censure. Yet while the public pronouncement of the punishment may be necessary to vindicate those values flouted by the crime, it risks evoking public vilification and the stigmatising of the offender.

It has been argued so far that pondering the practices of probation illuminates some of the concerns of the philosophy of punishment. Probation puts to test formal definitions, and the question has even been raised whether there is a profitable distinction to be drawn between *being* punishment and *being seen as* punishment (though by whom?). Censure and the communications of punishment have been considered. Some forms of hard treatment may give a robust message of censure to the public, but their effectiveness in communicating the right message to the offender is questionable. Yet while probation and related sanctions could be used to clarify the blunt communication of the pronouncement of sentence, probation has struggled to represent a sufficiently stern censure to other audiences. Discussion turns next to the work of probation and in particular its values.

### *Probation and its values*

Since so much of probation's work is with offenders, it is their rights and interests that are typically its principal concern. But this cannot be the whole of its moral purview.

In an influential paper, Nellis (1995) challenged probation to extend its values discourse to encompass the rights and needs of victims as well as the legitimate concerns of wider society.

Again, probation is among the institutions of the penal system – the formal response to criminal wrongdoing – and must therefore be concerned with those responses that are morally fitting. Does probation stand for something different from or even in opposition to a morally acceptable form of punishment? If that were to be the case, this ought to be exposed and attempts made to explore the uncomfortable implications. But if, on the other hand, there is no such tension, then probation needs to examine how it can make its proper contribution and support the principled objectives of punishment.

The implementation of community sanctions and measures does not exhaust probation's work. Notably, in many countries, this work includes after-care – providing support to former prisoners in their resettlement – which goes beyond the 'punishment' involved in fulfilling the conditions of conditional release. There is also work with other agencies, not only in the interests of public protection, but to try to ensure that these agencies meet their responsibilities to ex-offenders, who are often among their most vulnerable clients and not always able to access services without the active support of probation's referral and liaison. The point here is that, whether or not probation 'is punishment', agencies have duties that go beyond this. These include attempts to redress the miserable consequences of imprisonment and to encourage civil society to accept its responsibilities towards those of its members who have committed crimes but are in the process of being punished or who have now fulfilled the due punishment.

## **Rehabilitation**

The place where the deliberations of the philosophy of punishment and the concerns of probation most obviously intersect – and perhaps collide – is on the matter of rehabilitation. Probation has long been associated with rehabilitation and has often argued its worth on the grounds of its effectiveness in reducing reoffending. Rehabilitation, as its proponents typically claim, can be seen as benign and humane, expressive of a compassionate recognition of the adverse circumstances and problems that have marked the lives of so many offenders and which seem to have contributed to their offending and to thwart their efforts at desistance. Yet the origins of modern forms of retributivism are to be found in a rejection of rehabilitation, and it is important to understand the grounds of this critique (American Friends Service Committee, 1971; Von Hirsch, 1976; Bean, 1976).

A particular objection has been that some conceptions of rehabilitation take crime to be a symptom of a disease. Classic principles like blame, responsibility and desert might then be dismissed as obscure concepts reflecting an unscientific and outmoded understanding of human conduct, irrelevant to an understanding of a crime or to subsequent treatment. Yet this 'medical model' is fundamentally flawed in its conception (Flew, 1973). It also leads to many injustices (Bean, 1976). Proportionality becomes irrelevant and an inconvenient impediment to effective

treatment: the form and duration of intervention comes to be determined not by the individual's desert, but by assessments about the treatment required. A corollary of medical thinking is individualisation. This implies wide discretion to sentencers and, in the case of imprisonment, to those who will decide about the time of release, violating the central principles of desert and proportionality (Von Hirsch, 1976). 'Like cases' might be dealt with very differently, depending on the assessed treatment needs of those involved. Instead of being determined by clear and challengeable considerations of desert, then, sentencing decisions can be obscured by vague medical or psychological criteria with scope for wide discretion and, accordingly, discrimination (American Friends Service Committee, 1971; Von Hirsch, 1976).

C S Lewis famously protested: 'when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a "case"' (Lewis, 1987 [1949]: 148). Others were especially concerned about the intrusive and manipulative technologies that might be involved and which meddled with the individual's very self (for example, Mitford, 1977). Further, the vaunted compassion of rehabilitation becomes an occasion for oppression as the social injustices and inequalities associated with so much offending are translated into individual pathology, 'depoliticising' the social origins of criminal behaviour.

Rehabilitation has been further indicted for condescension and disrespect towards offenders. Holding people accountable for what they do is integral to our associations with one another (Strawson, 1962; Bennett, 2008). There are circumstances in which we may take 'an objective attitude' (Strawson takes mental illness as the plainest example – in such cases, people may not understand what they were doing or were unable to help themselves), but this is exceptional and could not be sustained as the usual basis on which people relate to each other. Not to censure people who have violated the legitimate norms of society, as articulated in the criminal law, would be to fail to treat them as rational, fully qualified members of a moral community (Bennett, 2008). Part of what it means to respect moral agency is to censure and impose punishment when this is deserved. The tight conceptual connection between punishment, moral agency, being and being respected as a person entails a right to be punished.

### *McNeill's four forms of rehabilitation*

These critiques take rehabilitation to be 'treatment', however, and as McNeill has persuasively shown, 'both the concept and the project of rehabilitation compel and require' other ways of understanding it (McNeill, 2012: 19). He goes on to separate out 'four forms' of rehabilitation: as well as 'psychological rehabilitation' – the target of the retributive critique – he distinguishes legal, social and moral rehabilitation. Legal rehabilitation is the restoration of the individual to their full civil rights once a punishment has been duly served. The Rehabilitation of Offenders Act bears this sense of the word: the legislation relates not to psychological change, but to

people's rights in relation to their record of past offending. This form of rehabilitation is conceptually quite distinct from (and does not depend upon) the personal reform at which psychological rehabilitation aims. Similarly, psychological change, no matter how convincingly achieved, does not ensure legal rehabilitation: some offences are never 'spent' so that legal rehabilitation is never granted (Maruna, 2011).

A third conception is social rehabilitation – a full and effective opportunity to have access to the resources of civil society. While this is conceptually distinct from (and should not depend upon) personal reform, full social rehabilitation is impossible without legal rehabilitation to protect the rights of ex-offenders. Yet legal rehabilitation does not guarantee social rehabilitation (Henley, 2015). For example, while the law may not directly bar access to services and resources, these might even so remain effectively unavailable because of the distinct needs and circumstances of (most obviously) former prisoners. It is to further social rehabilitation that the probation service advocates on behalf of offenders and liaises with responsible agencies, recognising that social inclusion and fair opportunities must accompany changes in ex-offenders' attitudes and behaviour.

A fourth form – 'moral rehabilitation' – involves earning redemption, perhaps through reparative or restorative justice, and a gaining of reacceptance into the moral community whose values were violated by the offence. This conception of rehabilitation is again distinct, although its relationship to the other 'forms' is complicated. Without a commitment to personal change, can an offender be accepted into a moral community? On the other hand, someone who is committed to personal change, found due legal recognition and enjoys full and fair access to the resources of civil society, may still be viewed with suspicion or active mistrust.

It is now clear that, with the possible exception of 'psychological rehabilitation', *censure theory and other forms of retribution are not only compatible with rehabilitation but require it*. A fulfilment of a just punishment requires some kind of ending or closure. Punishment will otherwise be disproportionate, thus violating one of the foundational principles of retribution. Probation agencies have a role in helping ex-offenders to exercise their legal rights in relation to disclosure of their past offending (legal rehabilitation), in supporting resettlement and reintegration by enabling people to have fair access to resources (social rehabilitation) and perhaps in encouraging society to accept its responsibilities to deal with ex-offenders on an appropriate moral basis that does not reduce them to the worst things they ever did (moral rehabilitation). In these ways, probation has a critical part to play in the administration of a retributively just punishment.

### *Psychological rehabilitation*

The main criticisms of psychological rehabilitation, as we have seen, are that it is founded on an untenable understanding of crime as disease; that it offends against justice by countenancing (indeed entailing) disproportionate interventions; that it is disrespectful and condescending in treating people as somehow incapable of moral agency; that it dabbles with the soul in ways which violate personal autonomy; and

that it colludes with social injustice by interpreting behaviour associated with structural unfairness as personal weaknesses. It is crucial to grasp that the critique cannot be answered by claims that rehabilitation 'works' or that punishment does not. These arguments miss the point. It is true that the rehabilitative project would be weakened by insufficient evidence to show that it *did* work, but complaints of injustice and disrespect cannot be met by claims of instrumental effectiveness.

How, then, might proponents of rehabilitation respond to these criticisms? One reply is to argue that the more extravagant variants of the medical model have had their day and that modern conceptions of rehabilitation can avoid these objections. The contemporary dominant rehabilitative model of Risks-Needs-Responsivity (Bonta and Andrews, 2007; Raynor and Robinson, 2009) should be regarded as *educational* rather than medical or psychiatric. It does not treat people for mysterious 'diseases' that are imagined to determine their behaviour, but tries to help them to learn how to avoid offending by thinking and behaving differently. This educational approach empowers people by giving them more options in deciding how to behave, rather than adjusting the psyche to stop their misbehaving. Again, the matter of proportionality could be managed through 'limiting retributivism' (Frase, 2003). So long as the weight of the punishment is fair and proportionate, the punishment may well be designed to achieve positive outcomes – notably the reduction of reoffending through rehabilitation – within the boundaries of what is deserved (which, as we have seen, was the envisaged place of the probation order in the scheme of the Criminal Justice Act 1991).

Christopher Bennett (2010) brings a nuanced appreciation of what rehabilitation is or could be, setting out criteria by which the ethical propriety of rehabilitative interventions might be appraised. These include the objectives of rehabilitation, the reasons for attempting to influence people, the means by which this is to be achieved, whether rehabilitation is offered or required and whether rehabilitation is meant to replace or to accompany due retributive punishment. Before considering the extent to which probation practices meet these criteria, some more general remarks should be made.

First, the matter of consent. A careful reading of Lewis's (1987 [1949]) passionate attack on the 'humanitarian theory of punishment' reveals that it was the absence of consent that especially perturbed him. Yet no one is expected to have to consent to imprisonment or other forms of hard treatment. For that matter, it is difficult to conceive of *any* punishment that would not be compulsory. Censure *requires* wrongdoers to attend to disapproval, and if this could be simply ignored (because optional) it could not count as a censure. Compulsoriness seems a necessary (though not sufficient) condition of punishment.

Consent, however, is a complex matter. Many offenders accept the requirements of a community sanction willingly or even eagerly, while others no doubt feel constrained by the likely alternatives. It should be borne in mind too that an expression of formal consent at court may not resolve the question: it by no means ensures continuing cooperation and, on the other hand, even where consent is not required, cooperation may still be readily forthcoming (Canton, 2014). The vacillation between consenting to work with probation and then withdrawing that

consent, like that between wanting to change and wanting not to, is entirely familiar to practitioners. The well-known 'cycle of change' is an attempt to conceptualise this and to guide practitioners in trying to work purposefully through these doubts and shifts (Prochaska and DiClemente, 1994).

Second, in their proper concern for autonomy and dignity and the respect that these entail, philosophers sometimes seem to write as if offenders have a settled commitment to different values with which the state has no right to interfere. It is as if they have a course of (mis)behaviour to which they are dedicated and which it would be a violation of their integrity to try to change. Now while there may be some people who can be characterised in this way – notably, conscientious or politically-motivated offenders – they are probably very few. Sykes and Matza (1957) convincingly challenged the idea that offenders have different values (see also Matza and Sykes, 1961; Matza, 1964). Offenders are not 'moral strangers' (Ward and Maruna, 2007: 125): their aspirations are for the same human goods as others, though the means they choose are (in the eyes of the majority) inappropriate and distorted. Working with offenders typically involves helping them to develop legitimate means of achievement, rather than invasive attempts to interfere with their value commitments.

Third, there is the question of intrusiveness. It is likely that it was the intrusiveness and manipulations of 'treatment', in combination with the absence of consent, that are at the heart of Lewis's misgivings. Other (later) critiques of the medical model were developed at a time of deep suspicion about technologies to shape human behaviour. There was a profound – and often well-founded – mistrust of psycho-surgery, drugging, aversion 'therapies', behaviour modification and other 'Clock-work Orange' technologies (see in general Pearson, 1975; Mitford, 1977). Interventions of this type plainly violate individual autonomy and dignity, crudely representing the 'objective attitude' that Strawson discussed and rejected as a fitting response to wrongdoing in most cases. Deception and manipulation too are plainly unethical. But does probation practise rehabilitation in such ways, and can its contemporary practices satisfy Bennett's criteria of morally proper forms of intervention? It is to these questions we now turn.

### *Probation and rehabilitation*

While often associated with the rehabilitative 'treatment' of offenders, probation has not always been understood in this way (Vanstone, 2004). Even when it came to be so understood, the term 'probation' bundled together a wide diversity of practices. 'Casework' – carrying assumptions that treatment was needed to respond to clients' individual difficulties and personal shortcomings – was the way in which many probation officers used to describe their work, although that term itself encompassed a variety of practices and theories. Counselling, psychotherapy, transactional analysis, family therapy, group work of many styles, behaviourism and common sense advice were all said to have been used by probation officers at different times and places and, no doubt, with variable levels of accomplishment and 'success' (Raynor and Vanstone, 2002).

Which of these approaches might fail to respect people's rights as responsible moral agents would be a matter for empirical investigation. A critical test in this respect is the 'transparency' of the character of the intervention (Duff, 2001; Bennett, 2010). Transparent persuasion involves an attempt 'to persuade the offender to accept that offending behaviour is wrong by offering him good and relevant reasons against acting in this way' (Bennett, 2010: 62). It is transparent in the sense that the practitioner's methods and purposes are made clear and explicit. Transparent persuasion fully honours the person's capacity for moral agency and in no way represents the objective attitudes that vitiate some other approaches to rehabilitation.

What of consent? Many probation officers in this country had set store by the requirement that offenders must consent to probation supervision and to other forms of community sanction. This formal requirement allowed the profession to say that what was done was done with the individual's consent and therefore respected her autonomy and dignity. It was true that the consequences of withholding consent might be a weighty punishment, but a choice is no less a choice because one option is much less eligible than another (Raynor, 1985). (There is a limit to this line of reasoning. If the proposition is 'your money or your life', handing over the cash doesn't look or feel like a choice and even less could the transaction be fairly described as done with consent.) Nevertheless, however formal, expressed consent licensed the probation interventions that were to follow. This consent requirement was abolished for almost all community sanctions in England and Wales (Crime [Sentences] Act 1997s. 38 [2]), although it remains a legal requirement in many countries.

Probation practitioners and scholars have long been aware of the tension inherent in the notion of compulsory treatment and have attempted to resolve this in different ways. Bryant and colleagues (1978) proposed that a probation order should be seen as including a 'primary contract', between the offender and the court, which would constitute the formal, compulsory imposition, and an optional 'subsidiary contract' between the client and the probation officer which would include social work help. Opportunities would be made available, but it would be the client's choice to accept or decline them. Default on this subsidiary contract would never lead to formal enforcement action, which would follow only if the primary contract was breached. Bottoms and McWilliams (1979) also rejected treatment, with its connotations of a sickness in need of a cure, as an appropriate characterisation of probation and proposed that 'help' should guide probation's work. In this way, the individual would be in charge of any processes that were attempting to bring about personal change.

While these accounts and the (more recent) adoption of an educational model go some way to resolving concerns, it would be complacent to suppose that worries about the ethical propriety of psychological rehabilitation can now be set aside. There remain serious problems at the interface between criminal justice and psychiatry where mental illness and (especially) personality disorder are believed to be associated with offending. When considerations of response to treatment are bound up with decisions about release from custody, the risk of injustice and

oppression is all the greater (Crewe, 2011). This risk has been realised in the worst cases where authorities have refused to countenance releasing someone until they have completed a 'programme' to which they have been effectively denied access (Bettinson and Dingwall, 2013).

Rehabilitation survives and evolves by adaptation and accommodating its practices to other penal priorities (Robinson, 2008) and in those circumstances where it is put at the service of risk assessment and management the chances of unethical practices are greatly increased. The dominance of risk-thinking, moreover, has sometimes made rehabilitation subordinate to the imperatives of 'public protection' rather than valuing it for its own sake. Desistance and 'good lives' approaches, by contrast, foreground the individual's own conception of their well-being, where the practitioner's task is not to 'treat' them but support them in their endeavour to achieve a life in which offending has no place (for example, Farrall and Calverley, 2006; Ward and Maruna, 2007).

These insights from the philosophy of punishment set challenges to probation to make sure that its work develops within parameters that respect the individual's dignity and capacity for moral agency. Proposals for innovation should be appraised not only for claims about their effectiveness, efficiency or cost, but for their ethical characteristics. For example, technologies that could tempt an organisation to disregard altogether the consent of individuals may fail to meet the test. If an intervention involves deception or manipulation, this too is ruled out. Again, the involvement of private companies may fail Bennett's criterion about the purpose of rehabilitation which should first of all be about the individual's own well-being and least of all about commercial profit.

## **Conclusion: The messages of probation**

As we have seen, many contemporary thinkers in the philosophy of punishment are concerned with its communications, its 'messages', and especially censure. This censure is, first of all, addressed to the offender, and it has already been suggested that in this respect community supervision may be much better fitted to impart these messages than the blunt disapproval expressed by a sentence of imprisonment. Further, however, the genuinely respectful communication proposed by Duff and by Bennett calls for a response, which in its turn invites a further response – in other words, a *dialogue*. Censure is no mere scolding – not just a cry of anger or denunciation – but a communication. This communication should be open to – indeed should try to elicit – a response which in its turn merits respectful attention. Probation supervision could then be regarded as a dialogue between the community, as represented by the probation officer, and the offender. Sometimes the individual will wish to express remorse, but there may also be occasions when she needs to say other things – something about the social context of the offence, perhaps, and what it would take to help her to desist. The probation officer, on society's behalf, should take these responses with complete seriousness. Perhaps the hardest problem in understanding probation in this way, however, lies in convincing the public, another audience for the censure, that probation-administered sanctions

constitute a sufficient expression of disapproval. Even though this paper puts forward no solution, it is argued that this may be a better way of framing the problem than worrying away at the idea of whether probation 'is' or is not a punishment.

Durkheim, as we have seen, drew attention to the declaratory functions of punishment in affirming the values that the offence has violated. As part of the penal system, probation too must vindicate these values and be recognised as a censure. But the values embodied in the criminal law are not the only ones to which we should attend: there are other social values which responses to wrongdoing should try to express. These include a belief in the possibility of change and a rejection of the idea that anyone is permanently defined by or reduced to their worst behaviour. They also include the belief that punishment must have its conclusion, that once the punishment has been completed people ought to be dealt with on the same basis as others – the achievement, in other words, of legal, social and moral rehabilitation (McNeill, 2012). As we have seen, these are not only rehabilitative principles, but follow directly from any principled version of retributivism. Further, probation represents and should give practical expression to the idea that the community has obligations towards those of its members who have committed crimes as well as claims against them. That assertion is part of probation's response to the objection that rehabilitation loses sight of the social origins of offending. Attention to the messages of community penalties (Rex, 2005) needs this broader purview. Some forms of hard treatment may convey censure to the community, but fail in representing these other social values.

The argument is that the philosophy of punishment should extend its deliberations. It should go beyond considerations of the proper imposition of hard treatment and even beyond accounts of censure and develop into a *philosophy of responding to wrongdoing*, as it were, that would include not only the pronouncement of punishment, but how this is put into effect and how it might be justly concluded. As well as debating 'the justification of punishment', there must be further thinking about what other obligations now arise in the course of a principled response to wrongdoing and what is due to as well as from the offender. This may include rights to rehabilitation (Rotman, 1994). Probation is the social institution that gives expression to these values and must not be reduced to contested and often speculative claims about its ability to reduce reoffending – its 'effectiveness'. Nor should it be regarded simply as a device to manage the criminogenic consequences and the social and financial costs of the destructive experiences of imprisonment. Whatever its contribution to those worthwhile endeavours, its moral worth and significance should be emphasised in their own right. Probation, then, imparts a message about some of the values that should characterise a decent liberal society.

As Morris (1971: 424) puts it:

wrongdoing arises in a world in which there is a conception of righting the wrong. It arises in a world in which persons possess a conception not just of separation from others but of coming together again with them, a conception of mending what has been torn, repairing what has been damaged – restoration.

The more that we recognise that punishment is due to people to respect their membership of a moral community (Duff, 2001), the clearer it becomes that the community has responsibilities towards as well as rights against offenders. This is something that probation promotes and represents. Reflection on probation, then, should challenge the philosophy of punishment to extend its purview to a philosophy of responding to crimes which would consider and appraise not only the punishment but the subsequent reintegration. Psychological rehabilitation, guided by acceptable ethical principles, may be part of this; legal, social and moral rehabilitation are essential to it.

### **Declaration of Conflicting Interests**

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

### **Funding**

The author(s) received no financial support for the research, authorship, and/or publication of this article.

### **References**

- American Friends Service Committee (1971) *Struggle for Justice: A Report on Crime and Punishment in America*. New York: Hill & Wang.
- Bagaric M (2001) *Punishment and Sentencing: A Rational Approach*. London: Cavendish.
- Bean P (1976) *Rehabilitation and Deviance*. London: Routledge.
- Bennett C (2008) *The Apology Ritual: A Philosophical Theory of Punishment*. Cambridge: Cambridge University Press.
- Bennett C (2010) Punishment and rehabilitation. In: Ryberg J and Angelo Corlett J (eds) *Punishment and Ethics: New Perspectives*. Basingstoke: Palgrave Macmillan.
- Bettinson V and Dingwall G (2013) Challenging the ongoing injustice of imprisonment for public protection: James, Wells and Lee v the United Kingdom. *The Modern Law Review* 76(6): 1094–1105.
- Bochel D (1976) *Probation and After-Care: Its Development in England and Wales*. Edinburgh: Scottish Academic Press.
- Bonta J and Andrews D (2007) Risk-Need-Responsivity model for offender assessment and rehabilitation. Available at: <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rsk-nd-rspnsvty/index-eng.aspx> (accessed August 2017).
- Bottoms A (2001) Compliance and community penalties. In: Bottoms A, Gelsthorpe L and Rex S (eds) *Community Penalties: Change and Challenges*. Cullompton: Willan.
- Bottoms A (2017) 'Punishment' in non-custodial sentences: A critical analysis. *Criminal Law Forum* 28(3): 563–587.
- Bottoms A and McWilliams W (1979) A non-treatment paradigm for probation practice. *The British Journal of Social Work* 9(2): 159–202.
- Bottoms A and Von Hirsch A (2012) The crime-preventive impact of penal sanctions. In: Cane P and Kritzer H (eds) *The Oxford Handbook of Empirical Legal Research*. Oxford: Oxford University Press.

- Brownlee I (1998) *Community Punishment: A Critical Introduction*. Harlow: Longman.
- Bryant M, Coker J, Estlea B, Himmel S and Knapp T (1978) Sentenced to social work? *Probation Journal* 25(4): 110–114.
- Canton R (2014) Yes, no, possibly, maybe: Community sanctions, consent and cooperation. *European Journal of Probation* 6(3): 209–224.
- Canton R (2017) *Why Punish? An Introduction to the Philosophy of Punishment*. London: Palgrave Macmillan.
- Christie N (1981) *Limits to Pain*. Oxford: Martin Robertson.
- Crewe B (2011) Depth, weight, tightness: Revisiting the pains of imprisonment. *Punishment & Society* 13(5): 509–529.
- Duff RA (2001) *Punishment, Communication and Community*. Oxford: Oxford University Press.
- Durnescu I (2011) Pains of probation: Effective practice and human rights. *International Journal of Offender Therapy and Comparative Criminology* 55(4): 530–545.
- Farrall S and Calverley A (2006) *Understanding Desistance from Crime: Theoretical Directions in Resettlement and Rehabilitation*. Maidenhead: Open University Press.
- Feinberg J (1965) The expressive function of punishment. *The Monist* 49: 397–423.
- Flew A (1954) The justification of punishment. *Philosophy* 29(111): 291–307.
- Flew A (1973) *Crime or Disease*. Basingstoke: Macmillan.
- Frase R (2003) Limiting retributivism: The consensus model of criminal punishment. In: Tonry M (ed.) *The Future of Imprisonment in the 21st Century*. New York: Oxford University Press.
- Garland D (1990) *Punishment and Modern Society: A Study in Social Theory*. Oxford: Oxford University Press.
- Grapes T (2007) Offender management. In: Canton R and Hancock D (eds) *Dictionary of Probation and Offender Management*. Cullompton: Willan.
- Hayes D (2015) The impact of supervision on the pains of community penalties in England and Wales: An exploratory study. *European Journal of Probation* 7(2): 85–102.
- Henley A (2015) Abolishing the stigma of punishments served. *Criminal Justice Matters* 102(1): 57–58.
- Hucklesby A (2008) Vehicles of desistance? The impact of electronically monitored curfew orders. *Criminology & Criminal Justice* 8(1): 51–71.
- Hucklesby A and Holdsworth E (2016) *Electronic Monitoring in England and Wales*. Centre for Criminal Justice Studies, University of Leeds. Available at: <http://28uzqb445tcn4c24864ahmel.wpengine.netdna-cdn.com/files/2016/06/EMEU-Electronic-monitoring-in-England-and-Wales.pdf> (accessed August 2017).
- Lancaster E (2008) 'Values talk' in the criminal justice system. In: Green S, Lancaster E and Feasey S (eds) *Addressing Offending Behaviour: Context, Practice and Values*. Cullompton: Willan.
- Lewis CS (1987 [1949]) The humanitarian theory of punishment. Available at: <http://tinyurl.com/yc5vs8l6> (accessed August 2017).
- Lukes S and Scull A (eds) (2013) *Durkheim and the Law*. Basingstoke: Palgrave Macmillan.
- Maruna S (2011) Judicial rehabilitation and the 'clean bill of health' in criminal justice. *European Journal of Probation* 3(1): 97–117.
- Matza D (1964) *Delinquency and Drift*. New York: Wiley.
- Matza D and Sykes G (1961) Juvenile delinquency and subterranean values. *American Sociological Review* 26(5): 712–719.

- McIvor G (1992) *Sentenced to Serve*. Aldershot: Avebury.
- McNeill F (2012) Four forms of 'offender' rehabilitation: Towards an interdisciplinary perspective. *Legal and Criminological Psychology* 17(1): 18–36.
- Mitford J (1977) *The American Prison Business*. Harmondsworth: Penguin.
- Morris H (1971) Guilt and suffering. *Philosophy East and West* 21(4): 419–434.
- Nellis M (1995) Probation values for the 1990s. *Howard Journal* 34(1): 19–44.
- Nellis M (2016) Electronic monitoring and probation practice. In: McNeill F, Durnescu I and Butter R (eds) *Probation: 12 Essential Questions*. London: Palgrave Macmillan.
- Pearson G (1975) *The Deviant Imagination: Psychiatry, Social Work and Social Change*. Basingstoke: Palgrave Macmillan.
- Prochaska J and DiClemente C (1994) *The Transtheoretical approach: Crossing Traditional Boundaries of Therapy*, 2nd edn. Malabar, FL: Krieger.
- Raynor P (1985) *Social Work, Justice and Control*. Oxford: Blackwell.
- Raynor P and Vanstone M (2002) *Understanding community penalties: Probation, policy and social change*. Buckingham: Open University Press.
- Raynor P and Robinson G (2009) *Rehabilitation, Crime and Justice*. Basingstoke: Palgrave Macmillan.
- Renteln A Dundes (1990) *International Human Rights: Universalism versus Relativism*. Newbury Park, CA: SAGE.
- Rex S (2005) *Reforming Community Penalties*. Cullompton: Willan.
- Robinson G (2008) Late-modern rehabilitation: The evolution of a penal strategy. *Punishment & Society* 10(4): 429–445.
- Rotman E (1994) Beyond punishment. In: Duff A and Garland D (eds) *Reader on Punishment*. Oxford: Oxford University Press.
- Strawson P (1962) Freedom and resentment. Available at: [http://people.brandeis.edu/~teuber/P.\\_F.\\_Strawson\\_Freedom\\_&\\_Resentment.pdf](http://people.brandeis.edu/~teuber/P._F._Strawson_Freedom_&_Resentment.pdf) (accessed August 2017).
- Sykes G and Matza D (1957) Techniques of neutralization: A theory of delinquency. *American Sociological Review* 22: 664–670.
- Thomas D (1979) *Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal Division*, 2nd edition. London: Heinemann.
- Van Ginneken E and Hayes D (2017) 'Just' punishment? Offenders' views on the meaning and severity of punishment. *Criminology and Criminal Justice* 17(1): 62–78.
- Vanstone M (2004) *Supervising Offenders in the Community: A History of Probation Theory and Practice*. Aldershot: Ashgate.
- Von Hirsch A (1976) *Doing Justice: The Choice of Punishments*. New York: Hill and Wang.
- Von Hirsch A (1993) *Censure and Sanctions*. Oxford: Clarendon Press.
- Walgrave L (2003) Imposing restoration instead of inflicting pain: Reflections on the judicial reaction to crime. In: Von Hirsch A, Roberts J, Bottoms A, Roach K and Schiff K (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Oxford: Hart.
- Ward T and Maruna S (2007) *Rehabilitation*. London: Routledge.
- Wasik M and Taylor R (1991) *Blackstone's Guide to the Criminal Justice Act 1991*. London: Blackstone.
- Zedner L (1994) Reparation and retribution: Are they reconcilable? *The Modern Law Review* 57(2): 228–250.