

ANTHONY E. BOTTOMS*



‘PUNISHMENT’ IN NON-CUSTODIAL SENTENCES: A CRITICAL ANALYSIS

ABSTRACT. This paper reviews various uses of the concept of ‘punishment’ in relation to non-custodial sentences, including the frequently-made comparison between ‘punishment’ and ‘rehabilitation’. It concludes that ‘punishment’ has no stable meaning in respect of such sentences and, when utilised, often results in non-custodial penalties being found wanting by comparison with imprisonment. It is suggested that all sentences should be regarded as ‘punishments’, and that the creative development of community penalties will best be achieved by working with a threefold conceptualisation of reparation, rehabilitation and incapacitation, set within appropriate boundaries of proportionality.

This article will examine some issues relating to the concept of punishment in non-custodial sentences, beginning with a frequently-made contrast between ‘punishment’ and ‘rehabilitation’. The first section comments on aspects of this contrast as they were raised in the important Victorian case of *Boulton v. The Queen*,¹ which is the focus of the article by Justice Maxwell elsewhere in this issue of the *Forum*. Then, secondly, I provide a historical overview of the changing ways in which the concept of punishment in relation to non-custodial sentences has been framed by Parliament and the courts in England and Wales over the last three decades. In the final two sections I offer an analysis of some of the key issues raised in the previous (mainly descriptive) text, and then outline a simple conceptual framework which, it is hoped, might provide a constructive way forward in these debates.

* Professor Sir Anthony E. Bottoms is Wolfson Professor of Criminology Emeritus and Director of the Centre for Penal Theory and Penal Ethics, Institute of Criminology, University of Cambridge. E-mail: aeb11@cam.ac.uk

¹ [2014] VSCA 342 (hereafter referred to as *Boulton*).

I 'PUNISHMENT' AND 'REHABILITATION' IN *BOULTON*

As is fully described in Justice Maxwell's article, in *Boulton* the Victorian Court of Appeal delivered a guideline judgment on the then newly-created sentencing option of the 'Community Correction Order', or CCO. The CCO is a non-custodial sentence which, it was intended by Parliament, could and should be used in place of some sentences of imprisonment. Indeed, the Guidelines attached to the judgment in *Boulton* state that 'in some cases it will be appropriate to impose a CCO ...for relatively serious offences which would previously have attracted quite substantial terms of imprisonment'.²

In the legislation that created the CCO, the Victorian Parliament repealed some previous statutory provisions that had distinguished between the purpose of an unpaid work condition ('to allow for the adequate punishment of an offender in the community') and a supervision condition ('to allow for the rehabilitation of an offender in the community').³ In relation to the choice between prison and the CCO invited by the new legislation, the Court of Appeal in *Boulton* explicitly rejected a 'split' approach of a kind analogous to these earlier provisions (that is, 'prison for punishment, CCO for rehabilitation'), on the grounds that this would 'effectively invit[e] the sentencing court to ignore the punitive effect of a CCO', and 'would likely result in prison continuing to be viewed as the only real option for offending of any seriousness'.⁴ Instead, the Court held, the CCO must be viewed as reflecting 'both the punitive and rehabilitative components of community-based sentencing'.⁵ This is a defensible position, but it nevertheless leaves open some questions about potential tensions between the 'punitive' and 'rehabilitative' strands *within* any particular CCO; and these questions become evident when one examines what the judgment in *Boulton* has to say about the appropriate length of a CCO.

In his speech in Parliament proposing the introduction of the CCO, the then Attorney-General for Victoria had claimed that the existing community-based sentences were too limited in their maximum length; accordingly, and to offer the courts greater flexibility, in the higher courts the maximum length of a CCO would be the same

² *Boulton*, Appendix I, para. 2.

³ Sentencing Act 1991, ss. 39 and 40, cited in *Boulton*, para. 60.

⁴ *Boulton*, para. 139.

⁵ *Ibid*, para. 62.

as the maximum term of imprisonment for the relevant offence.⁶ In *Boulton*, the Court accepted a submission that the two 'overarching principles' that 'should govern the CCO regime' are *proportionality* and *suitability*.⁷ On the issue of proportionality, the Court took the view that, given the differences between imprisonment and the CCO in their 'punitive character and ...rehabilitative capability', any comparison between the appropriate term of a prison sentence and the appropriate length of a CCO 'is likely to be of very limited assistance'; the most that could be said was that 'other things being equal the term of a CCO is likely to be longer – often, markedly longer – than the term of imprisonment which might otherwise have been imposed'.⁸ Presumably the reasoning here is that, for any specified period of time, the CCO has a lesser impact on the normal rights and interests of a citizen than does imprisonment,⁹ and that the principle of proportionality therefore requires that in a given case a CCO should normally be longer than the appropriate term of imprisonment would be. However, reasoning of this kind raises complex questions, not fully explored in the Court's judgment, about the different possible components of a CCO. As will be discussed more fully later, while some conditions available in community orders (for example, a home curfew with electronic monitoring) can be straightforwardly assessed for their degree of impact on a defendant's liberty, such an assessment is not so simple in the case of more 'rehabilitative' components such as supervision by a probation officer or attendance at treatment programmes. Moreover, in *Boulton* the Court, after seeking advice on the feasibility of the author of a pre-sentence report offering an opinion about the length of time required for rehabilitative treatment for a particular offender, was obliged to conclude that 'even the best expert opinion can provide only limited guidance to the court' on this matter.¹⁰ A submission to the Court by the Director of Public Prosecutions also correctly stated that 'currently there is no reliable empirical evidence regarding the impact of very long duration orders (i.e. longer than two or three years) on offender rehabilitation'; accordingly, there was also no evidence that 'longer orders will enhance the therapeutic effect of treatment or

⁶ Ibid, para. 56.

⁷ Ibid, para. 63; see also the Guidelines suggested by the Court at Appendix 1, para. 5 of the judgment.

⁸ Ibid, para. 122.

⁹ On this point, see for example *Boulton*, para. 90.

¹⁰ *Boulton*, paras. 177–180.

rehabilitation interventions'.¹¹ The policy implication of this evidence would seem to be that a long CCO (or, of course, an equivalent sentence in another jurisdiction) will need to be justified primarily by reference to conditions of the order that do not have a primarily rehabilitative focus. If this is correct, then – because the Court in *Boulton* was operating with a simple dichotomy between 'punishment' and 'rehabilitation' – presumably the later stages of a CCO must be presented as 'punitive'. Since, however, prison is rather more obviously punitive than any non-custodial penalty could be, this scenario seems simply to confirm the Court's previously-expressed fear that, for offences of any seriousness, prison might seem to be the only real option.

Some not dissimilar issues have been raised in the recent history of non-custodial sentences in England and Wales. Accordingly, I shall first describe relevant aspects of these developments, before returning in the concluding section to some of the conceptual issues raised by the judgment in *Boulton*.

II 'PUNISHMENT' IN NON-CUSTODIAL SENTENCES IN ENGLAND AND WALES

In England and Wales, within the last thirty years there have been two key moments relating to the concept of 'punishment' in non-custodial sentences. The first of these was the adoption by the then government of the concept of 'punishment in the community' in the late 1980s, which led in due course to significant legislative changes in the Criminal Justice Act of 1991. Then, secondly, in 2013 Parliament enacted a fresh legislative provision intended to make community sentences more punitive. In what follows, the thinking behind these two key changes is explained, and the impact of the relevant legislation is discussed.

2.1 *Before 1991: Probation is Not Punishment*

Before 1991, the range of disposals available to courts in England and Wales for convicted offenders was more restricted than it is now. For mentally normal adult offenders, there were six principal options, namely: (i) to send the offender to prison; (ii) to impose a suspended

¹¹ Ibid, para. 178, n. 105.

sentence of imprisonment; (iii) to impose a fine; (iv) to place the offender on probation, under the supervision of a probation officer;¹² (v) to pass a 'community service order', requiring the offender to undertake unpaid work; and (vi) to discharge the offender, either absolutely or conditionally. For present purposes, a matter of special interest was that, under the legislation then in force (which went back to 1948), a probation order could be imposed only when a court, 'having regard to the circumstances, including the nature of the offence and the character of the offender', considered it 'expedient' to place the defendant on probation '*instead of sentencing him*'¹³ (emphasis added). This 'instead of' language is congruent with the non-legal meaning of the term 'probation', which (from its roots in the Latin *probare*, 'to test') refers to an 'action or process of testing or putting to the proof'.¹⁴ Thus also, in this original conception of the probation order, if a period of probation were successfully completed, the offender was (for most purposes) deemed not to have been convicted of the offence for which he had been found guilty;¹⁵ this was because he was considered to have 'proved himself' by responding to the opportunity offered.

In an interesting test case decided soon after the 1948 Act,¹⁶ the question arose as to whether – as another section of that Act had appeared to suggest – an offender could be both fined and placed on probation for a single offence.¹⁷ The appeal court decided that this was not possible. It robustly declared that the legislative language

¹² A probation order could also include some special requirements, including a residence requirement, a requirement to receive medical treatment, and a requirement to attend a 'day training' centre (on which see n. 23 below).

¹³ Criminal Justice Act 1948, s. 3(1), subsequently consolidated with other provisions relating to criminal justice as s. 2(1) of the Powers of Criminal Courts Act 1973.

¹⁴ *The Shorter Oxford English Dictionary*, 1973. Hence the standard terminology used in many employment contracts: a new employee is given an initial period of probation, and only if and when this period is satisfactorily completed is his/her tenure of the post confirmed.

¹⁵ Criminal Justice Act 1948, s. 12(1), subsequently consolidated with other provisions relating to criminal justice as s. 13(1) of the Powers of Criminal Courts Act 1973.

¹⁶ *R v Parry* [1951] 1KB 590.

¹⁷ s. 13 of the Criminal Justice Act 1948 provided that, where an offender was convicted on indictment for a felony, the court 'shall have power to fine the offender in lieu of or in addition to dealing with him in any other manner in which the court has power to deal with him.'

relating to the probation order (that such an order was passed ‘instead of sentencing’ a person found guilty) meant that Parliament intended probation orders to be passed ‘instead of punishing’ defendants.¹⁸ Since a fine was obviously both a sentence and a punishment, to allow a court to order both probation supervision and a fine for a single offence would, the court held, subvert the legislative provision that probation was not punishment.

By the late 1980s, the landscape of criminal justice in England and Wales had changed significantly. There had been a steady increase in recorded crime since the mid-1950s, which had generated a significant rise in the prison population, notwithstanding that the proportion of adult defendants sentenced to imprisonment had declined. In these circumstances, the government of the day was seeking a credible way to encourage courts to pass more non-custodial sentences without appearing to be ‘soft on crime’. It chose to issue, in 1988, a Green Paper which introduced the concept of ‘punishment in the community’, one purpose of which was to strengthen the ‘punitive’ element of non-custodial sentences.¹⁹

The leading historical account of these developments argues that the Home Secretary responsible for promoting this policy (Douglas Hurd) was to a significant extent walking a policy tightrope, because he was trying ‘to find ways of giving greater substance to the non-custodial track, without losing credibility with those of [his] supporters whose belief in punishment was unshakeable’.²⁰ One of the perceived difficulties in this quest was ‘the anticipated hostility of the Probation Service towards the “beefing up” of community penalties’.²¹ As part of a co-ordinated governmental strategy to confront this difficulty, a junior Minister in the Home Office, John Patten, addressed a conference of Chief Probation Officers and made a strong

¹⁸ Parry, above n 16, at 592, per Lord Goddard CJ.

¹⁹ Home Office, *Punishment, Custody and the Community*, Cm.424, London: HMSO, 1988. In the language of U.K. politics, a ‘White Paper’ is a paper published by the Government containing policies that are proposed for legislation; a ‘Green Paper’ is more tentative, and contains preliminary Government proposals on which views are sought in a consultative process.

²⁰ Lord Windlesham, *Responses to Crime*, volume 2: *Penal Policy in the Making*. Oxford: Clarendon Press, 1993, p. 222. Douglas Hurd was Home Secretary in the Conservative government led by Margaret Thatcher, and the Conservative Party has traditionally taken a firm line on policies connected to law and order.

²¹ Ibid, p. 225.

defence of the 'punishment in the community' concept. Among other things, in this speech Patten argued that²²:

...all probation-based disposals are already in varying degrees forms of punishment. For example, the offender who has to report to a probation officer...or spend 60 days at a day centre²³ is clearly being punished. It is bizarre to scratch around to find polite euphemisms for what is going on.

In light of this kind of thinking, the notions that 'probation is not punishment', and that people who had successfully completed a period of probation could rightly claim not to have been convicted, were no longer politically sustainable. They were formally removed from the statute book by the Criminal Justice Act 1991.²⁴

2.2 *Altered Concepts, 1991 to 2012*

Consistently with the concept of 'punishment in the community', the 1991 Act introduced two new non-custodial penalties which potentially increased the scope for courts' intervention in offenders' lives. These were first, the 'Combination Order', which permitted sentencers for the first time to combine requirements for probation supervision and unpaid work within a single order; and secondly, the 'Curfew Order', which required an offender to stay in one place (usually his/her home) for a specified period of the day, usually with a requirement to wear an electronic bracelet ('tag') to ensure compliance with the curfew.²⁵ Since 1991, further forms of community penalty have also been created: the Drug Treatment and Testing Order in 1998;²⁶ the Exclusion Order and the Drug Abstinence Order in 2000;²⁷ and the use of electronic monitoring to 'track' offenders'

²² Ibid, p. 227. In the original News Release issued by the Home Office on the day the speech was delivered (in September 1988), this part of John Patten's address was printed in italic type, in order to emphasise it.

²³ The Criminal Justice Act 1972 had introduced a new kind of requirement that could in appropriate cases be included in a probation order. This required the probationer to attend at a probation service 'day training centre' for up to 60 days to receive rehabilitative training appropriate to his or her circumstances.

²⁴ Criminal Justice Act 1991, s. 8, repealing the previous terms of s. 2 of the Powers of Criminal Courts Act 1973, and substituting a fresh version of that section. See also Martin Wasik and Richard D. Taylor, *Blackstone's Guide to the Criminal Justice Act 1991*, London: Blackstone Press, 1991, pp. 47–54.

²⁵ Criminal Justice Act 1991, ss. 11 and 12.

²⁶ Crime and Disorder Act 1998, s. 61.

²⁷ Criminal Justice and Court Services Act 2000, ss. 46 and 47.

movements in 2013.²⁸ The first three of these were initially created as separate sentences, but early in the present century the trend towards the proliferation of different non-custodial sentences was reversed. The Criminal Justice Act 2003, which became operative in 2005, repealed all the then-existing 'community sentences'²⁹ and replaced them with a single new order, the Community Order, which allowed courts to include any or all of the existing measures (probation supervision, unpaid work, curfew, drug treatment, exclusion, etc) as requirements of the new order, imposed singly or in any combination. Overall, therefore, the policy trend since 1990 has been towards: (i) the introduction of some more 'punitive' orders; (ii) a significantly greater variety in the content of community penalties, and (iii) especially since 2005, a greatly increased scope for mixing different requirements within a single order.

A second important feature of the 1991 Act was its articulation of a fresh conceptual framework for the imposition of community sentences. Among criminal justice scholars in the U.K., the late 1980s witnessed a quickening of interest in Andrew von Hirsch's theorisation about punishment, variously described as 'desert theory' or 'proportionality theory',³⁰ and this led among other things to an influential article by von Hirsch and Martin Wasik in which they sought to apply desert theory to non-custodial penalties.³¹ This paper was published at about the same time as the Green Paper *Punishment, Custody and the Community* (above, n. 19), and it caught the attention of officials in the Home Office who were beginning to think about the details of the legislation that was needed to take forward the idea of 'punishment in the community'. The result was that the subsequent

²⁸ Crime and Courts Act 2013, s. 44 and Schedule 16, Part 3.

²⁹ For a list of community sentences at that time see Powers of Criminal Courts Act 2000, s. 33. A fine was not included in the list, since all sentences designated as 'community sentences' involved a degree of supervision or oversight of an offender by a duly appointed person.

³⁰ Particularly influential in this regard was the U.K. edition of Andrew von Hirsch's book *Past or Future Crimes?: Deservedness and Dangerousness in the Sentencing of Criminals*, Manchester: Manchester University Press, 1986.

³¹ Martin Wasik and Andrew von Hirsch, 'Non-Custodial Penalties and the Principles of Desert' [1988] *Criminal Law Review* 555–571. For a development of this framework within the context of the 1988 Green Paper, see Anthony Bottoms, 'The Concept of Intermediate Sanctions and its Relevance for the Probation Service' in Roger Shaw and Kevin Haines (eds.) *The Criminal Justice System: a Central Role for the Probation Service*, Cambridge: Institute of Criminology, University of Cambridge, 1989.

White Paper, *Crime, Justice and Protecting the Public*,³² made explicit use of the concept of 'just deserts'.³³ With regard to 'community sentences' (see n 29 above), this desert-based framework led to two key provisions in the 1991 Act, which – in a fresh legislative context – are still in force. These are:

- A court must not pass a community sentence unless it is satisfied that the offence(s) for which the offender is convicted is/are 'serious enough to warrant such a sentence' (that is, the offence could not be satisfactorily dealt with by, for example, a discharge or a small fine);³⁴
- When a court passes a community sentence, 'the restrictions on liberty imposed by the order or orders shall be such as in the opinion of the court are commensurate with the seriousness' of the relevant offence(s).³⁵

Clearly, these provisions reflect the standard desert theory principle that the amount of punishment awarded to a convicted offender should depend primarily on the seriousness of the offence(s) that he/she has committed, and not on other considerations such as crime prevention. But experience in England since 1991 has shown that the second of the above statutory provisions is not at all easy to implement.

A central problem has been that, as I put it in a 1998 paper, the 1991 Act's 'attempt to provide a unified desert-based "penalty-scale" for community sentences based on "the restrictions on liberty imposed by the order or orders" makes sense only if the phrase "restrictions on liberty" is interpreted in a very different way for different community orders'.³⁶ This comment was based on doctoral research by Sue Rex, which had – amongst other things – found marked

³² Home Office, *Crime, Justice and Protecting the Public*, Cm 965, London: HMSO, 1990.

³³ Although, in an egregious error which was not noticed before publication, this was referred to throughout the text of the White Paper as 'just desserts'.

³⁴ Criminal Justice Act 1991, s. 6(1); now re-enacted with minor revisions as s. 148(1) of the Criminal Justice Act 2003.

³⁵ Criminal Justice Act 1991, s. 6(2)(b), now re-enacted with minor revisions as s. 148 (2)(b) of the Criminal Justice Act 2003. Subsection (a) of these sections additionally provides that the chosen requirement must be 'suitable for the offender'.

³⁶ Anthony Bottoms, 'Five Puzzles in von Hirsch's Theory of Punishment' in A. Ashworth and M. Wasik (eds.) *Fundamentals of Sentencing Theory*, Oxford: Clarendon Press, 1998, pp. 74–75.

differences in contact hours between different community penalties. For example, the shortest amount of unpaid work that a court could specify when imposing a community service order (CSO) was 40 hours, which would normally be completed in about six weeks. However, a standard one-year probation order, which had been traditionally regarded as equivalent in severity to a short-to-medium length CSO (say, up to 100 hours unpaid work) was calculated to require only approximately 21 hours of formal 'restrictions on liberty' (that is, attendance at appointments).³⁷ But Rex's research also suggested that a simple calculation of aggregate contact hours was too crude a way of measuring perceived 'restrictions on liberty'. For example, many offenders on probation commented that the very length of the probation order (a year or more) seemed restrictive, even though contact hours were limited; while others reported a sense of discomfort about the need to disclose, in probation interviews, personally sensitive information.³⁸ Considerations of this sort led, for a while, to attempts to develop a multi-dimensional 'punishment severity scale' for non-custodial penalties, using criteria based on various different ways in which sentences might impinge on the offender's lifestyle.³⁹ There has however been little follow-up to such attempts, and they are probably too complex to be easily usable on a daily basis in court.

Perhaps there are two main lessons from this experience. The first is that, as Isaiah Berlin put it in a different context, it can be dangerous 'to assume that all values can be graded on one scale'.⁴⁰ Secondly and more generally, Andreas von Hirsch's approach to non-custodial sentences is firmly focused on desert considerations, and it pays only limited attention to the broader social context within which, in real punishment systems, those desert considerations have

³⁷ Ibid at 72, citing Sue Rex, 'Perceptions of Probation in a Context of "Just Deserts"', unpublished PhD thesis, University of Cambridge, 1997. The maximum number of hours imposable under a community service order was 240.

³⁸ Ibid at 74, again citing Rex.

³⁹ Sue Rex, *Reforming Community Penalties*, Cullompton: Willan, 2005, pp. 60–61. Some of these issues had previously been raised in a rather different way by Austin Lovegrove in a 2001 article, but neither Sue Rex nor I were aware of this source when writing the texts referred to above. See: Austin Lovegrove, 'Sanctions and Severity: to the Demise of Von Hirsch and Wasik's Sanction Hierarchy', (2001) 40 *Howard Journal of Criminal Justice* 126–144.

⁴⁰ Isaiah Berlin, *Liberty* (ed. Henry Hardy), Oxford: Oxford University Press, 2002, p. 216.

to be implemented.⁴¹ There is therefore merit in Sue Rex's view that 'desirable as [von Hirsch's] objectives are, [he] has little to say about the positive rationale for community penalties' (for example, how 'they might be socially useful as well as just')⁴². This stance tends to limit both the positive public case that can be made for such penalties, and their potential attractiveness to sentencers.

These points can be developed through the results of some further research by Sue Rex. Maintaining her interest in the purposes of community sentences, she carried out a questionnaire-based study with four groups of respondents, namely: (i) lay magistrates⁴³; (ii) probation officers, probation trainees and community service staff ('staff'); (iii) victims; and (iv) offenders. Amongst other tasks, respondents were asked to indicate the extent to which they agreed with various statements about 'what the court should be trying to do in sentencing offenders'.⁴⁴ Thirteen such statements were formulated, eight of which are listed below, in the alphabetical order of the shorthand labels that Rex gave to them:⁴⁵

Censure:⁴⁶ 'Show them that society does not like what they did'.

Encouragement: 'Get them to do something useful with their lives'.

Incapacitation: 'Keep them away from offending'.

Persuasion: 'Make them see why what they did was wrong'.

Rehabilitation: 'Help them with problems behind their offending'.

Reparation: 'Make them put something back into the community'.

Retribution: 'Make them pay for what they did wrong'.

Special Deterrence: 'Show them that crime does not pay'.

Subsequently, respondents were asked to think about four specific sentences – prison, curfew with electronic tagging, community service and probation – and, for each of these, to indicate which of the

⁴¹ This remains the case in his most recent account: see Andreas von Hirsch, *Deserved Criminal Sentences: An Overview*, Oxford: Hart Publishing 2017, ch. 8 on 'Proportionate Non-Custodial Sanctions'.

⁴² Rex, n 39 above, p. 19.

⁴³ In England and Wales, most persons presiding over lower courts are 'lay magistrates', so described because they are respected members of the public, with no formal legal qualifications, who provide their services on a voluntary (unpaid) basis.

⁴⁴ Rex, n. 39 above, p. 81.

⁴⁵ Ibid at 81–86 (in the headings of Tables 5.1–5.5).

⁴⁶ Rex's text mainly uses the shorthand term 'Disapproval' for this statement, but she also treats 'Disapproval' and 'Censure' as synonymous (ibid, p. 96), and I have preferred the latter term.

thirteen statements they considered to be 'the main purposes of that particular order'.⁴⁷ The principal responses to this question are shown in Table 1.

For the three non-custodial sentences, there was a remarkable degree of congruence between the four groups of respondents: all the groups regarded 'incapacitation' as the main purpose of curfews, and all groups also concurred that the main purposes of unpaid work and probation were 'reparation' and 'rehabilitation' respectively. Hence, and importantly, curfews, probation and unpaid work were seen by all groups of respondents as sentences with distinctively different penal purposes. A fairly similar substantive difference emerges when the second purpose for each sentence is examined: here there is less congruence between the groups, but for curfews 'censure' was the dominant second purpose,⁴⁸ while for probation it was 'persuasion' and for unpaid work retribution and encouragement. These data suggest that, for a sentencer, *the choice of the type of community penalty entails a degree of choice about which of several possible penal values is most important in dealing with that particular case*. This introduces a subtly different conceptual emphasis from that of von Hirsch, and I shall return to it later.

This subsection has presented a complex picture. Empirically, we have seen that in England and Wales the variety of activities that can be prescribed as part of a non-custodial sentence has significantly increased since 1991. Moreover, since the creation of the single Community Order in the 2003 Act, courts have been granted greatly increased powers to order a mixed set of activities within a single sentence. These two developments, taken together, mean that what might be described as the punitive 'weight' of the average community sentence is now greater than it was in the 1980s. However, the attempt to use desert theory as a unifying framework underpinning the imposition of community sentences has not been an unqualified success. There is clearly merit in the desert-based insight that proportionality is a concept that has relevance for non-custodial as well as for custodial sentencing, so that, for example, imposing a heavy 'package' of curfew plus unpaid work for a minor theft would seem very unfair. However, the attempt to operationalise this insight through a single concept of 'restrictions on liberty' has failed, and it is

⁴⁷ Rex, n. 39 above, 89–90.

⁴⁸ It is worth noting that the responses for curfew requirements are very similar to those for custodial sentences, although with an alteration in the priority (Curfew = (1) Incapacitation, (2) Censure; Custody = (1) Censure, (2) Incapacitation).

TABLE 1
Top two purposes of different sentences, as assessed by different groups of respondents

	Magistrates (N = 385)	Staff (N = 132)	Victims (N = 111)	Offenders (N = 143)
Custody				
1st	Censure (90%)	Censure (77%)	Censure (69%)	Retribution (61%)
2nd	Incapacitation (82%)	Incapacitation (66%)	Incapacitation (66%)	Special Det. (60%)
Curfew (tagging)				
1st	Incapacitation (93%)	Incapacitation (88%)	Incapacitation (85%)	Incapacitation (74%)
2nd	Censure (81%)	Censure (66%)	Censure (69%)	Retribution (51%)
Unpaid work				
1st	Reparation (97%)	Reparation (90%)	Reparation (90%)	Reparation (78%)
2nd	Retribution (85%)	Encouragement (70%)	Encouragement (69%)	Retribution (63%)
Probation				
1st	Rehabilitation (91%)	Rehabilitation (92%)	Rehabilitation (64%)	Rehabilitation (60%)
2nd	Persuasion (82%)	Persuasion (75%)	Censure (55%)	Persuasion (57%)

Source Rex (2005), Table 5.7, p. 90. Percentages in the table are the proportions of each respondent group who agreed or strongly agreed that the stated purpose was one of ‘the main purposes of that particular order’ (pp. 89–90)

clear from Sue Rex's research that there is a widespread consensus that different types of community sentence (curfew, unpaid work, probation supervision) have significantly different penal purposes.

We need to hold on to these various conclusions as we turn to the last part of this brief history, which saw a strong but largely unsuccessful attempt by the U.K. government to insist that all community sentences must include a certain sort of 'punishment'.

2.3 2012–2013: *Legislating for Offenders to be 'Properly Punished'*

In March 2012, the Ministry of Justice in England and Wales published a consultation document⁴⁹ which set out 'wide-ranging proposals to reform community sentences so that they can be effective both at reducing re-offending and providing robust and credible punishment'.⁵⁰

In his Ministerial Foreword to the formal governmental response to this Consultation, the Minister of Justice, Mr Chris Grayling, said that: 'Debates on criminal justice are too often framed as a choice between punishment or rehabilitation. But the truth is, this is a false division. Any sensible system needs both'.⁵¹ However – and despite the increased 'weight' of community sanctions described in the previous subsection of this essay – Mr Grayling also made clear that, in his view, one of the weaknesses of community penalties was their lack of punitive bite: 'I share public concern that offenders given community sentences often feel they are getting away with it, slapped on the wrist rather than properly punished'.⁵² As one way of redressing this situation, the Consultation proposed that every community order should contain what was described as a 'punitive element'. A small majority of those who responded to the Consultation disagreed with this proposal, 'with most of those that did so arguing that current community orders all contain a punitive element'.⁵³ It was also reported that other respondents – including some who were in favour of the proposal – 'tended to qualify their responses by stressing that

⁴⁹ Ministry of Justice, *Punishment and Reform: Effective Community Sentences*, Ministry of Justice Consultation Paper CP8/2012.

⁵⁰ Ministry of Justice, *Punishment and Reform: Effective Community Sentences; Government Response*, Cm 8469, 2012.

⁵¹ *Ibid.*, p. 5.

⁵² *Ibid.*, p. 3.

⁵³ *Ibid.*, para. 32.

every offender's circumstances are different, and that what is punitive for each offender needed to be tailored accordingly'.⁵⁴

Despite this mainly negative response, the Government decided to press ahead with its proposal, since in its view it was 'vital, if community sentences are to have the confidence of victims and the public, that they should wherever possible include a demonstrably punitive element'.⁵⁵ But what exactly might constitute a 'demonstrably punitive element'? The Government said that its expectation was that 'these would generally be restrictions of liberty that represent to the public a recognisable sanction (such as curfews, exclusion, or community payback)'.⁵⁶ However, in light of the responses received to the consultation, it was decided not to 'specify what requirements courts should impose, on the basis that what is punitive for one offender may not be punitive for another'.⁵⁷ It was further decided that the purpose of the reform would be achieved if a fine were imposed alongside the community order.

Accordingly, in the Crime and Courts Act 2013, Parliament enacted a provision that, save in exceptional circumstances, when a court sentences a defendant to a Community Order it must *either* include in that order at least one requirement imposed for the purpose of punishment, *or* impose a fine in addition to the community order, *or* do both of those things.⁵⁸ It remains the case, however, that there is no official guidance on how the first of these requirements is to be fulfilled. Thus, for example, the Sentencing Council for England and Wales, in its 2016 Definitive Guideline on the Imposition of Community Orders, reproduced the 2013 statutory requirement with the simple comment that 'it is a matter for the court to decide which requirements amount to a punishment in each case'.⁵⁹

⁵⁴ Ibid.

⁵⁵ Ibid, para. 37.

⁵⁶ Ibid, para. 38. 'Community payback' is a currently fashionable informal description of the unpaid work requirement.

⁵⁷ Ibid.

⁵⁸ Criminal Justice Act 2003 s. 177 (2A) and (2B), inserted in that Act by s.44 and Schedule 16, Part One of the Crime and Courts Act 2013.

⁵⁹ Sentencing Council, *Imposition of Community and Custodial Sentences: Definitive Guideline*, London: Sentencing Council, 2016, p. 3. Definitive sentencing guidelines issued by the Sentencing Council are always preceded by a public consultation on a draft of the proposed Guideline. In its published response to the consultation on the community order guideline, the Council stated that it had given very careful consideration to the question whether certain requirements should be designated as punitive, but it had 'ultimately decided that as Parliament did not

What evidence is available about how the courts have responded to this legislation? Table 2 provides selected data on requirements in community orders in England and Wales since 2006 (the first full year of the Community Order in its present form), with a special focus on the years since 2012.⁶⁰ The key issue, for present purposes, concerns the proportions of curfew, exclusion and unpaid work requirements before and after the legislation came into effect, since these three requirements were regarded by the Ministry of Justice as particularly exemplifying the concept of a ‘punitive requirement’ (see above).⁶¹

The new provision came into force in December 2013, so the relevant comparison is between 2012–2013 (‘before’ data) and 2014–2015 (‘after’ data). As can be seen from Table 2, this comparison shows no dramatic effects. The data for unpaid work requirements are somewhat ambiguous, but there is no clear increase. Exclusion orders did increase slightly, but the number of these orders remained tiny – less than one per cent of all requirements. The only requirement for which there was a clear increase was the curfew (usually accompanied by electronic tagging), which constituted 7.5% of all requirements in 2012–2013, rising to 10.9% in 2014–2015. However, the scale of this increase must be considered modest when set against the Justice Minister’s view that offenders receiving Community Orders should in future be ‘properly punished’ rather than ‘slapped on the wrist’. Overall, therefore, this evidence suggests that courts, when put to the test, did not share the Justice Minister’s view that ‘offenders given community sentences often feel that they are getting away with it’.⁶²

Footnote 59 continued

specify which requirements should be imposed as punishment, the guideline should not limit the discretion of sentencers by determining which requirements should be imposed for the purpose of punishment’: Sentencing Council, *Imposition of Community and Custodial Sentences: Response to Consultation*, 2016, p. 11.

⁶⁰ It should be emphasised that the data in Table 2 refer to *requirements* in community orders, and not to offenders sentenced to community orders. The distinction is important, because many defendants receive community orders containing more than one requirement. During the period covered by the table, the average number of requirements per order remained stable at 1.6 to 1.7.

⁶¹ No data are available concerning the number of community orders that are imposed concurrently with a fine.

⁶² *Government Response*, above n. 50, p. 3. Informal consultations with experienced probation staff also suggest that the ‘punishment’ requirement in the 2013 Act has had at most only a modest effect on sentencing practice.

TABLE 2
Requirements in Community Orders, England and Wales 2006–2015

	2006	2012	2013	2014	2015
Total no. of requirements	211,905 (100%)	192,732 (100%)	173,766 (100%)	168,909 (100%)	153,794 (100%)
% unpaid work	35.9	32.0	29.4	27.6	31.3
% curfew	4.5	7.7	7.3	9.9	11.9
% exclusion	0.002	0.5	0.4	0.7	0.7

Source Ministry of Justice statistics

Concurrently with its 2012 Consultation, the Ministry of Justice also commissioned research with the aim of providing evidence on the relative effectiveness, in preventing recidivism, of Community Orders with different types of requirement. This research, which was carried out by Helen Bewley using a sophisticated propensity score matching methodology,⁶³ was especially focused on the effectiveness of what were described as ‘punitive’ requirements, namely unpaid work and curfews with electronic monitoring.⁶⁴

Three results from Bewley’s research are of special significance in the present context.⁶⁵

- There was no statistically significant effect on reconviction (at the 5 per cent level of significance) when either of the ‘punitive’ requirements (unpaid work or curfew) was added to a basic supervision requirement.⁶⁶
- There was a statistically significant reductive effect on the *number* of further offences when a curfew requirement was added to a basic

⁶³ Helen Bewley, *The Effectiveness of Different Community Order Requirements for Offenders Who Received an OASyS Assessment*, London: Ministry of Justice Research Series 17/12, 2012. The restriction of the sample to cases with a completed risk assessment form (known as ‘Offender Assessment System’ or ‘OASyS’) was necessary in order to collect sufficient data for the construction of propensity scores for individual offenders. At the time of the research, the vast majority of offenders receiving community orders had also received an OASyS assessment.

⁶⁴ Exclusion requirements, although considered ‘punitive’ by the Ministry of Justice, had to be left out of the analysis because of small numbers.

⁶⁵ These results are all derived from Table 31 (‘Summary of Impact Estimates’) in Bewley, above n. 63.

⁶⁶ ‘Reconviction’ is in this analysis treated as a binary variable (reconviction or no reconviction). The results were the same whether the follow-up period was one year or two years.

supervision requirement;⁶⁷ however, there was no similar effect when an unpaid work requirement was added to a supervision requirement.

- Adding a supervision requirement to a 'punitive' requirement had a statistically significant reductive effect on *both* reconviction *and* the number of further offences.⁶⁸ This was therefore the strongest impact identified.

Three comments on these results seem apposite. First, while – as we have seen – the Justice Minister's main interest lay in adding what he called 'punitive' requirements to Community Orders, the strongest result in terms of the reduction of reoffending was found, ironically, when a rehabilitative requirement (supervision) was added to a punitive requirement. Secondly, as regards the number of further offences, a clear difference emerged between the effects of the two requirements (curfews and unpaid work) described as 'punitive'; and this in turn suggests that the overarching label 'punitive' might be misleading. Thirdly, these results taken as a whole show an interesting differentiation between the three different community requirements of curfews, unpaid work and supervision. That differentiation was also apparent, in a different context, in Sue Rex's research, and it is therefore a matter of potential interest to policymakers.

III THREE KEY ISSUES

From the preceding discussion of developments in England and Wales, three main analytic issues can be identified. These relate respectively to proportionality, the meaning of the concept of 'punishment', and the changing character of non-custodial sentences.

The concept of *proportionality* played little formal part in courts' thinking about non-custodial sentences until the passage of the Criminal Justice Act 1991. As we have seen, the attempt in that Act to align very different community penalties on a single scale of severity based on 'restrictions on liberty' was not very successful; yet, inter-

⁶⁷ This effect was significant at the 1% level on a one year follow-up, and at the 5% level on a two year follow-up.

⁶⁸ This effect was significant at the 1% level on both one year and two year follow-up periods, for both reconviction and the number of further offences. Unfortunately, no disaggregation as between the two 'punitive' requirements (unpaid work and curfew) is reported (cf. the second result reported above).

estingly, no-one now expresses any serious doubt that the concept of proportionality should play a significant role in non-custodial sentencing.⁶⁹ Thus, there is a consensus that it would be an *unjust outcome* if the 'package' of requirements in a community order were disproportionate to the seriousness of the offence, judged in terms of culpability and harm. Given the above, the challenge is therefore to find some way of operationalising the concept of proportionality that is not simply focused on restrictions on liberty, in the sense of 'counting contact hours'.

The concept of proportionality requires an appropriate alignment between the seriousness of the offence and the severity of the sanction. In a helpful discussion, Austin Lovegrove has argued that assessing sentence severity *within* a given type of penalty is reasonably easy: we can, for example, readily state that longer sentences of unpaid work are more severe than shorter ones.⁷⁰ He suggests, however, that it is much more difficult to assess comparative sentence severity *across different penalties* – for example, probation supervision by comparison with unpaid work.⁷¹ If this is right (and earlier sections of this article suggest that it is), then applying the concept of proportionality to non-custodial sentences will always present difficulties, precisely because there are several different kinds of non-custodial penalty (fines, supervision, unpaid work, curfews, etc). From this observation, two conclusions seem to follow. First, realistically speaking, criminal justice systems will have to accept that, when dealing with non-custodial penalties, they will have to accept a looser concept of proportionality than strict desert theorists would advocate. Secondly, criminal justice systems will need to take very seriously Sue Rex's demonstration that decisions about which type of community penalty to impose are not simply (as desert theorists sometimes imply) about the quantum of the intervention in the offender's life; they also often entail a degree of choice about which of

⁶⁹ As pointed out by von Hirsch and Wasik, that is true even of significant critics of existing proportionality schemes, such as Austin Lovegrove, above n 39. See: Andrew von Hirsch and Martin Wasik, 'Proportionate Sanctions and Sentence Substitutability: A Reply to Austin Lovegrove', (2001) 40 *Howard Journal of Criminal Justice* 145–147.

⁷⁰ Lovegrove, above n. 39.

⁷¹ Lovegrove argues that, for a precise cross-sanction measure of sentence severity, we would need to develop an 'exchange rate' between sanctions, analogous to currency conversions.

several possible penal values is most important in dealing with that particular case.⁷²

Turning now to *punishment*, the analyses in previous sections have shown that this concept is, in and of itself, not very helpful in addressing the relevant issues, because it can be – and has been – utilised in very different ways. The starkest illustration of this point can be seen in the contrast between comments by two U.K. government ministers (both from the same political party): John Patten in 1988 insisted that ‘the offender who has to report to a probation officer..... is clearly being punished’,⁷³ but Chris Grayling in 2012 thought that such an offender was being ‘slapped on the wrist rather than properly punished’.⁷⁴ Each used the word ‘punishment’ in large part as a rhetorical device to suit his immediate purposes, but the fact that they could use the same term in such radically different ways should alert us to the need for careful analysis of what is really meant when the language of ‘punishment’ is deployed in political discourse.

To try to clarify these matters, we can first note that any sanction imposed on a convicted defendant can reasonably be described as a ‘punishment’, and this is the meaning of the word that John Patten adopted. By contrast, Chris Grayling’s talk of offenders being ‘not properly punished’ was a call for increased severity of response by the courts. To confuse matters further, an official document issued by the U.K. Ministry of Justice suggested that a ‘demonstrably punitive element’ within a community order would normally be one which would ‘represent to the public a recognisable sanction (such as curfews, exclusion, or community payback)’.⁷⁵ This phraseology suggests a third meaning of ‘punishment’: namely, the (not very

⁷² On these two points, note also the argument by Antony Duff that (i) there is a case for giving proportionality an important, but not dominating, role in theories of punishment, and (ii) that scholars need ‘to attend not just to the general meaning of punishment as a mode of censure, but to the distinctive meanings of different modes of punishment....What does imprisonment or a fine, Community Service Order or probation order say to the offender and others about the offender and her offence? This is a dimension of punishment that has not received enough theoretical attention’: R A Duff, ‘Punishment, Retribution and Communication’ in A von Hirsch, A Ashworth and J Roberts (eds.) *Principled Sentencing* (third ed.), Oxford: Hart Publishing at 132.

⁷³ Windlesham, above n. 20, p. 227.

⁷⁴ Ministry of Justice, above n. 50, p. 3.

⁷⁵ *Ibid.*, paras. 37, 38.

plausible) view that only sanctions that require offenders to be in specified places at fixed hours can be 'punitive'.⁷⁶

What underpins this significant instability in the concept of 'punishment', as it is manifested in debates on non-custodial sentences? It is hard to offer a definitive answer, but one important possibility is that such debates are always overshadowed by the dominant sanction of imprisonment, which has come to be equated with 'real punishment' in much recent political and popular discourse. This dominance can pose significant difficulties for advocates of non-custodial penalties, as is apparent from aspects of the judgment in *Boulton*, considered at the beginning of this article. That is because it is always easy (if not always strictly accurate) to argue that prison is more punitive than any available non-custodial penalty; hence, if 'punishment' (meaning severity of sanction) is the criterion, then non-custodial penalties will often be found wanting.

This takes us to the third of the key issues to be discussed in this section, that of *the changing character of non-custodial sentences*. In many jurisdictions, there is now a political culture that has been significantly influenced by what has been called 'penal populism' (or 'populist punitiveness').⁷⁷ This has generated a standard political tactic when trying to promote the use of community penalties: namely, to emphasise that they are (or at least can be) 'really punitive' – and to argue that, if necessary, they will be made more punitive. The most recent of many such arguments in England and Wales was made in 2016 by the Lord Chief Justice, Lord Thomas of Cwmgiedd; he said that much more could be done to explore keeping some offenders out of prison, including the use of 'really tough, and I do mean tough, community penalties'.⁷⁸ There is little doubt that this kind of thinking has led, over time, to the average community sentence now comprising a greater 'weight' of penal intervention than

⁷⁶ The implausibility of this claim can be illustrated if we return to an example given by Sue Rex (above, text to n. 37). It is not obvious why 40 hours of unpaid work, completed in six weeks, is a 'punishment', whereas one year of supervision by a probation officer is not. An alternative logic might be that the putatively 'punitive' requirements are those from which the offender is not expected to derive any personal benefit, but this is equally implausible when one thinks, for example, of unpaid work placements in charity shops or community programmes; moreover, an offender trying to desist might well welcome a curfew order as something that gives him a good reason for not going out with former criminal associates.

⁷⁷ On these concepts see John Pratt, *Penal Populism*, Abingdon: Routledge, 2007.

⁷⁸ In evidence before the House of Commons Justice Committee: *The Times*, 23 November 2016.

was the case in the 1990s; and while this might in part have been beneficial,⁷⁹ there is clearly a danger of an infinite escalation if calls for ‘tougher’, ever more ‘punitive’, community penalties are constantly deployed.⁸⁰

The three issues discussed in this section suggest the need for some rethinking of the concepts used in recent debates on non-custodial penalties. To return to the first section of this article (discussing *Boulton’s* case), fresh thinking is also required to avoid the problems that seem to arise when the conceptualisation of non-custodial penalties is restricted to a dichotomy between ‘punishment’ and ‘rehabilitation’. It is the task of the final section to try to chart a more constructive way forward.

IV A POSITIVE WAY FORWARD ?

In the search for a more constructive way forward, it is useful as a starting point to return to the 1988 Green Paper on *Punishment, Custody and the Community*. In this document, the then U.K. government suggested that three ‘principles’ or ‘objectives’ should, ‘where possible’, underpin community penalties other than the fine.⁸¹ These objectives were:

- [R]estrictions on the offender’s freedom of action – as a punishment;
- [A]ction to reduce the risk of further offending; and
- [R]eparation to the community and, where possible, compensation to the victim.⁸²

The 1988 Green Paper is now mostly remembered for coining the concept of ‘punishment in the community’, and indeed it did lead directly to the introduction of a new punishment – the curfew order (see previous discussion). Yet despite this emphasis on ‘punishment’, it is noteworthy that the government went on to argue that the objectives it had listed could ‘*often best be met by supervising and punishing the offender in the community*’; and indeed that imprison-

⁷⁹ Bewley, above n. 64.

⁸⁰ Such developments are however not inevitable, as is evidenced by the very modest response of courts in England and Wales to the ‘punitive element’ clause in the Crime and Courts Act 2013 (see Table 2).

⁸¹ Home Office, above n 19, paras. 1.5 and 1.6.

⁸² Ibid, para. 1.5.

ment is often 'likely to add to the difficulties which offenders find in living a normal and law abiding life' (emphasis added).⁸³ Accordingly, there was seen to be 'scope for reducing the use of imprisonment' by utilising 'components' (or requirements) of community penalties that would 'embody' the three stated objectives.⁸⁴ In other words, the argument was that the three objectives, when taken seriously, could on occasions 'trump' custody.

Can these embryonic suggestions be constructively developed? I believe that they can, and in pursuit of that goal, three separate points need to be made. The first is that, although the concept of 'punishment' (or 'punishing') is freely deployed in the Green Paper, it is not used – as Chris Grayling was later to use it – as a rhetorical device to press for very heavy penalties. Indeed, as can be seen from the quotations above, negative remarks were made about imprisonment, and it was explicitly stated that the three identified objectives could often 'best be met' by community penalties. Thus, it can reasonably be argued that the most important aspect of the Green Paper's conceptualisation is not punishment, but rather the identification of the three objectives.

Secondly, and crucially, the results of Sue Rex's subsequent research (see Table 1) strongly echo and reinforce many aspects of the Green Paper's conceptualisation. In that research, four very different groups of respondents - lay magistrates, probation staff, victims and offenders – were impressively unanimous in their view that the dominant purpose of unpaid work sentences is *reparation* (the third objective listed in the Green Paper), while the dominant purpose of probation is *rehabilitation* (the Green Paper's second objective). Rex's results for curfew orders fit less neatly into the Green Paper's conceptualisation: her respondents saw *incapacitation* as the primary purpose of this measure, with censure as a secondary purpose; by contrast, the Green Paper does not mention incapacitation, and prioritises censure ('punishment') in its first objective, which is concerned with delivering restrictions on the offender's freedom of action. However, given that (see above) all non-custodial penalties can reasonably be viewed as censure (or punishment), it seems appropriate to follow Rex's respondents, rather than the Green Paper, and to characterise 'restrictions on freedom of action' as primarily incapacitative. On that basis, a slight adaptation of the Green Paper's framework would identify three main purposes for non-custodial penalties, namely: reparation (exemplified by unpaid work and

⁸³ Ibid, para. 1.6.

⁸⁴ Ibid, para. 3.8.

compensation orders); rehabilitation (exemplified by probation supervision and by drug treatment programmes); and incapacitation (exemplified by curfew orders and exclusion orders). Might this threefold classification offer a useful way forward in future debates about non-custodial penalties?

A potential objection to this suggestion takes us straight to the third issue to be considered. Reparation, rehabilitation and incapacitation are all instrumental (forward-looking) purposes, and they are therefore in some tension with the backward-looking sentencing goal of proportionality – that is, making the penalty proportionate to the seriousness of the offence. Yet, as previously argued, proportionality is a crucial element of any sentence. Can this apparent tension be overcome?

I believe that it can. Most prior attempts to introduce proportionality into frameworks of non-custodial sentencing have begun with proportionality as the primary point of reference, and have then allowed a degree of substitutability of different kinds of penalties within appropriate ‘bands’ of proportionality.⁸⁵ But this approach can seem constricting, and arguably it does not sufficiently recognise the important point identified in Rex’s research, namely that a sentencer’s decision concerning the type of non-custodial penalty necessarily entails a degree of choice among different penal values. An alternative (and I would suggest, a defensible) approach would therefore be to focus first on the choice among the three conceptual objectives of reparation, rehabilitation and incapacitation,⁸⁶ and then to ensure that the total weight of the punishment is not disproportionate to the seriousness of the offence.⁸⁷

We can at this point usefully return to the important issue identified in the first section of this essay, arising from an aspect of the judgment in *Boulton*. As was shown in that earlier discussion, if one restricts the conceptual framework of non-custodial penalties to a dichotomy of ‘punishment’ and ‘rehabilitation’, then difficulties can arise, especially when considering longish community orders. (This is because at the end of such an order only ‘punishment’ will be left as a purpose of the sentence, and that will probably be seen to be better accomplished by

⁸⁵ See for example Wasik and von Hirsch, n 31 above; also Bottoms, n. 31 above.

⁸⁶ Of course, this might sometimes involve passing a sentence involving more than one objective (e.g. reparation and rehabilitation, or rehabilitation and incapacitation)

⁸⁷ The case for this approach is perhaps strengthened by the reality that proportionality can only be approximately assessed in relation to different community penalties (see previous discussion).

imprisonment). But now suppose that a judge in Victoria is, after reading this article, considering imposing a CCO of four years. We know (see earlier discussion) that a CCO of this length this cannot be justified simply on rehabilitative grounds (although of course rehabilitation might form an important component of the first part of such a sentence). But, drawing on the discussion above, it would seem entirely reasonable for a court to impose a lengthy period of unpaid work for the community, as a form of meaningful reparation to the community (see Table 1)⁸⁸; and, if considered necessary, this could be supplemented by some periods of curfew as incapacitation.

In England and Wales, the Sentencing Council has recently issued a Definitive Guideline on the imposition of custodial sentences, in which it emphasises that before passing such a sentence a court must always ask itself: '*is it unavoidable that a sentence of imprisonment be imposed?*'⁸⁹ In addressing this well-posed question, sentencers must necessarily consider whether a community sentence could, in a given case, appropriately meet the aims of sentencing, including appropriate censure. A constructive way of addressing that issue would seem to be by considering whether the available community penalties could provide, as well as or better than a custodial sentence, the identified objectives of reparation, rehabilitation and/or incapacitation. That way of looking at the issues seems to be both more specific and less confusing than asking whether the community penalty is sufficiently 'tough' or 'punitive'; and, as the 1988 Green Paper argued, the answer to such a question will very often be that the stated objectives can 'best be met by supervising and punishing the offender in the community'.⁹⁰

In short, therefore, while the language of 'punishment' (or 'toughness') appears to offer little to the creative development of community penalties, the threefold conceptualisation of reparation, rehabilitation and incapacitation might, if properly developed and set within appropriate boundaries of proportionality, have much more to offer.

⁸⁸ I have here used the current official terminology ('unpaid work') for this type of sentence in England and Wales. It is worth noting that in France, the equivalent sentence is known as '*travail d'intérêt général*', or 'work in the public interest'. Although the names of sentences are perhaps not decisively important, this French phrase seems to capture well some important features of a requirement that a court could justifiably impose for a lengthy period – it conveys censure, yet by speaking of the offender working 'in the public interest' it is also inclusive.

⁸⁹ Sentencing Council, above n. 60, p. 7 (emphasis added).

⁹⁰ Home Office, above n. 19, para. 1.6.