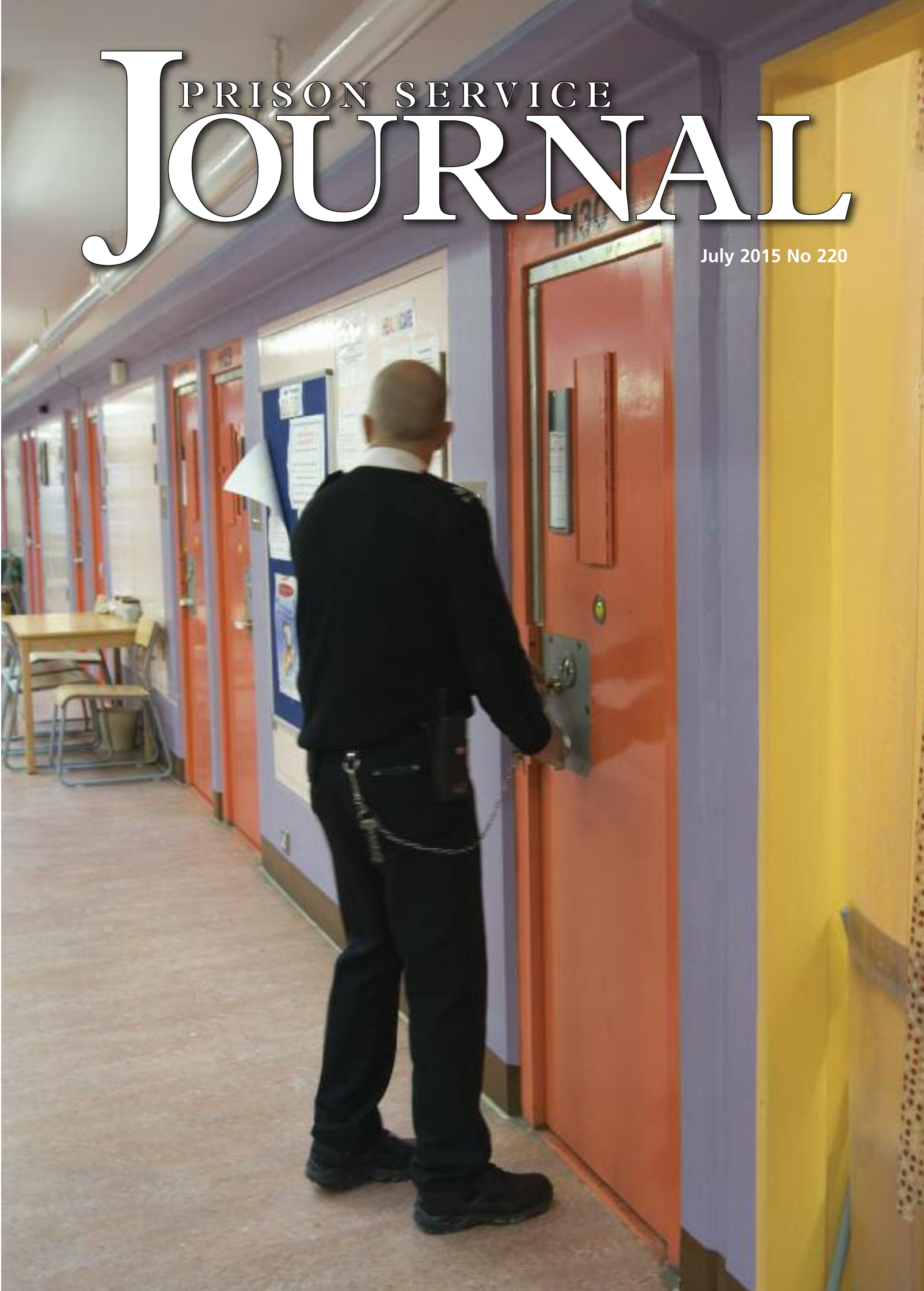

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Public Identification During Community Sentence — Good or Bad?

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The question of whether offenders should be publicly identified while performing an unpaid work order, as part of a community sentence in England and Wales, requires consideration of both legal acceptability and social desirability. The desire to separate the criminal community from the rest of society has deeply rooted historic origins, the dichotomy being a traditional hallmark of the penal system. To call for public identification of those subjected to unpaid work orders as wrongdoers is a modern manifestation of this desire. Yet the contemporary social desirability and legal acceptability of such public identification is less straightforward. Using an analysis of the historical relevance of public identification to inform this discussion I will argue that the demand that 'These people getting community sentences … be shown to the public as having done something wrong, as a deterrent'[1] is a demand that lacks the benefit of adequately informed historical perspective as well as contemporary social and legal insight. Rather, public identification will be shown to undermine the contemporary aims and objectives of sentencing, act counterproductively to the interests of general society as a victim, and step dangerously in the direction of exceeding what is acceptable within the current understanding of offenders' rights.

Community sentences and public identification — the historical backdrop

Before discussing the historical backdrop it should be noted that 'community sentence' is a term subject to varying definitions. It is a dynamic rather than static concept. Scull opts to incorporate 'a wide spectrum of approaches…almost anything which so much as sounds as though it involves increasing the community responsibility for the control of crime'.[2] If the approach becomes too broad, and the terminology interchanged too loosely, it is hard to see what would fail to be classified as a community sentence. Bearing this caution in mind, if Scull's direction is taken community sentences can specifically be defined as alternatives to 'the treatment of…deviance in institutions providing a large measure of segregation — both physical and symbolic — from the surrounding community'.[3] A framework is thus provided within which community sentences and public identification can be granted a historical perspective.

Pursuing this, the corporal and even capital punishments which featured prominently in the sentencing repertoire up until the early 19th century are classic examples of community sentences. Although Foucault does not use the specific terminology of 'community punishment' in the opening section of *Discipline and Punish*, Garland observes that the very 'public spectacle' of the regicide depicted typified the reigning penal style of maximising public identification of the wrongdoer.[4] This, as Cohen notes, exploited the boundaries of shame through use of public stocks, whipping and, ultimately, the threat of the gallows.[5] Clearly the impact of the spectating *community* was paramount. Public identification went to the nature and form of the sanction. These were community sentences, even within a cautious adoption of Scull's approach.

This analysis unearths the parallel between the historical punishment of public affliction\humiliation and the demand for public identification of those subject to unpaid work orders. Both fall within the ambit of community sentences and, importantly, offer scope for the *public* furtherance of the criminal community/rest of society dichotomy. Thus, in order to evaluate the desirability and acceptability of public identification, the fate of historical public identification through community sentences must be discussed.

Immediately the legal acceptability of historical community sentences is unearthed as lacking

1. 'Have Your Say' questionnaire, quoted in L Casey, *Engaging Communities in Fighting Crime* (The Cabinet Office, London 2008) 53.
2. A Scull, 'Community Corrections: Panacea, Progress or Pretence?' in D Garland and P Young (eds), *The Power to Punish* (Gower 1989) 146.
3. Ibid 147.
4. D Garland, *Punishment and Modern Society* (Clarendon Press 1990) 135.
5. S Cohen, *Visions of Social Control* (Polity Press 1985) 19.

justification. Ignatieff describes how the degree of legal arbitrariness exhibited by sentencers reinforced pressure from the religious reformers of the enlightenment period who called for review, which culminated by 1850 in the curtailment of hanging, the abolition of branding and the stocks.[6] The lack of substantive justification and procedural propriety was compounded by a shift in social attitude. Cohen depicts the social shift as, and attributes the force of the reform to, the 'victory of humanitarianism over barbarity, of scientific knowledge over prejudice and irrationality', describing early forms of public community punishment as being 'based on vengeance, cruelty and ignorance'.[7] Attempts to attribute these rejections purely to the corporal nature of the punishment would preclude any meaningful relevance to the issue of public identification in the context of today's unpaid work order. Yet such attempts would be short sighted. Braithwaite emphasises that public visibility of the pillory, flogging and executions was a major factor in their rejection, as prevailing social desirability welcomed the 'systematic uncoupling of punishment and public shaming'.[8] Public identification as both the nature *and* form of punishment was no longer desirable nor acceptable, given the moral pressure and calls for knowledge-based sentencing. Desire had shifted from seeking to avenge the crime through public shaming to pursuing transformation of the criminal who stood behind it.[9] Garland comments that for Foucault this signified a 'deeper change in the character of justice itself', the carceral shift incorporating a focus on the circumstances of the individual criminal and thus carrying additional reformatory ideals.[10]

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The days of the Criminal Justice System (CJS) serving the limited purpose of deterrence through public shaming were incompatible with the social shift towards knowledge as power[11] and what Rothman's account describes as the emerging link between rehabilitative ideals and incarceration.[12] The public nature and form of early community sentences was 'stigmatizing rather than reintegrative',[13] and Von Hippel noted that this 'expelled from the community of decent people' those publicised, while simultaneously failing to fulfil the limited aim of deterrence.[14] Pike draws attention to the fact that the public identification simply precluded offenders from pursing their 'livelihood in any honest and lawful way' rendering them all the more desperate.[15] On account of this and the overall failure of public identification, its combination with community sentences was deemed an intellectually deprived, socially backwards practice of the past.

Clearly, a discussion of the historical counterparts to the modern community sentences reveals that they served the desire for a divide between the criminal community and rest of society. Yet more poignantly, the discussion reveals that public identification as a vehicle to that end lacked legal acceptability, legal justification, while failing to serve its limited purpose of deterrence. The degree of arbitrariness involved in the sentencing, largely due to the lack of knowledge-based objectives, compounded the legal unacceptability. In Foucault's terms, the successful rise of the carceral system was down to the fact that it made 'the power to punish natural and legitimate'.[16] In contrast to arbitrary public identification in community sentences, it utilises the 'legal register of justice', filling the gap in legal acceptability by giving a 'legal sanction to the disciplinary mechanisms'.[17] Moreover, the social desirability of public identification waned in light of the negatively charged voyeuristic connotations it carried. The desire for dichotomy remained, but social norms

6. M Ignatieff, 'State, Civil Society and Total Institutions' in S Cohen and A Scull (eds), *Social Control and the State* (Blackwell 1983) 75.
7. S Cohen, *Visions of Social Control* (n 5) 18.
8. J Braithwaite, *Crime, Shame and Reintegration* (CUP 1989) 59.
9. D Garland, *Punishment and Modern Society* (n 4) 136.
10. Ibid.
11. See generally Foucault's depiction of knowledge as the power behind self-justifying structural change in M Foucault, *Discipline and Punish: The Birth of the Prison* (Second Vintage Books edn, A Sheridan tr, Vintage 1991).
12. S Cohen, *Visions of Social Control* (n 5) 19.
13. J Braithwaite, *Crime, Shame and Reintegration* (n 8) 59.
14. R von Hippel, *Deutsches Strafrecht* (Berlin, 1925) 158 as cited in J Braithwaite, *Crime, Shame and Reintegration* (n 8) 59.
15. L Pike, *A History of Crime in England*, vol II (Smith Elder and Co 1876) 280-1 as cited in J Braithwaite, *Crime, Shame and Reintegration* (n 8) 60.
16. M Foucault, *Discipline and Punish: The Birth of the Prison* (n 11) 301.
17. Ibid 301, 302.

and moral conscience had progressed so that public stigmatisation was no longer acceptable. In moving with the rise of knowledge-based power, which Foucault deemed to rely on the carceral system as its basic instrument,[18] public identification was rendered socially undesirable, an ill-informed historic failure.

Considering the current call for public identification, it would be foolish to ignore the lessons that can be learned from the rejection of public identification on the grounds noted above. Importantly, the desire for knowledge and the increasing public conscience broadened the aims and objectives of punishment and it is to them that I turn.

Aims and Objectives

In Ignatieff's language, conscience had served as the motor of institutional change, fuelling 'the widespread adoption of the penitentiary as the punishment of first resort'.[19] Yet humanitarian considerations also prompted Frederic Rainer and his contemporaries to promote the foundations of the probation service,[20] which in turn has paved the way for the most recent formulation of 'community sentence' under the Criminal Justice Act (CJA) 2003.[21] The recurring influence of humanitarianism demonstrates that public conscience, be it deprived and barbaric or developed and rehabilitative, is the driving force behind the aims and objectives of sentencing. Whether public identification in the context of unpaid work is desirable or acceptable is therefore a debate which has at its core the reigning sentencing objectives. In today's context this includes the purpose(s) of shifting back towards community sentences. Hence, I will turn to discuss the aims and objectives of the penal shift to the modern community sentence.

Whether public identification in the context of unpaid work is desirable or acceptable is therefore a debate which has at its core the reigning sentencing objectives.

'Emile Durkheim, Thurmond Arnold, Sir James Stephen and many others have pointed out that the legal process serves as a highly dramatic method of affirming collective sentiments concerning the wrongness of criminal behaviour'.[22] Further, as Sykes writes, the norms these sentiments result in require replenishment in order to thrive and 'punishment of the offender symbolizes anew the immorality of the deviant act'.[23] So, historically, the public desired a dichotomy, initially reinforced through the arena of public corporal punishment and then through the private segregation of the prison. Yet the complexity of modern society's range of overlapping aims and objectives of sentencing raises doubts as to the social desirability not simply of expressing the dichotomy through 'a social organisation — the prison — which stands interposed between the law-abiding community and the offender',[24] but, more importantly, doubts as to whether the dichotomy is socially desirable at all. I will illustrate how the current aims and objectives of sentencing point to this and, therefore, as public identification is the modern avenue for maintaining the dichotomy, why the debate on social desirability points away from publicly identifying those subjected to an unpaid work order.

The resurgence of community sentences throughout the 20th century is a clear example of politically charged penal policy. Evidence of this includes, inter alia, Labour's modernising programme of the late 1960s and the Conservative's regime from 1979, which was 'ostensibly devoid of liberal leanings on penal matters' at a time when the prison population had reached critical levels.[25] Indeed, the steadily soaring prison population from the end of the Second World War onwards has proved to be an intense point of political scrutiny and party tactics.[26] As Morgan and Clarkson note, 'The use of custody is always an expensive penal option and the expense is called into question if the incapacitative, deterrent, and rehabilitative benefits are doubtful'.[27] So,

18. Ibid 304.
19. M Ignatieff, 'State, Civil Society and Total Institutions' (n 6) 75.
20. M Vanstone, *Supervising Offenders in the Community* (Ashgate Publishing, 2004) 1.
21. See Criminal Justice Act 2003, s 147.
22. G Sykes, *The Society of Captives* (Princeton University Press 1958) 38.
23. Ibid.
24. Ibid 38.
25. M Nellis, 'Community penalties in historical perspective' in A Bottoms, L Gelsthorpe and S Rex (eds) *Community Penalties: Changes and Challenges* (Willan Publishing 2001) 20-24.
26. For a chart of the increasing prison population see G Berman, *Prison Population Statistics* (HC Library, SN/SG/4334, 23 February 2012) 2, (chart 1).
27. R Morgan and C Clarkson, 'The Politics of Sentencing Reform' in C Clarkson and R Morgan, *The Politics of Sentencing Reform* (OUP 1995) 6.

clearly political interests feature prominently in penal policy, and considering the actual and predicted[28] rise in the prison population its reduction has become a recurring official aim with a view to finding effective alternatives.[29] Yet to become too absorbed in notions of the political monopoly over penal policy is to risk losing sight of that which informs, manipulates and, I submit, *controls* the political choices made. This controlling force is public opinion, equally accurately termed 'social desirability'. It is the social desire to find effective alternatives that has fuelled the steady increase in community sentence options and, as Cavadino and Dignan note, led to an 'unprecedented transformation' in the modalities of community punishment since the turn of the millennium.[30] The dominant egalitarian tendencies for just deserts in sentencing during the mid 1980s to mid-to-late 1990s remains, yet has become subsumed within the social bent on increasing individual rights (to which I will return) and 'restorative justice values, which emphasise individualism in restorative event outcomes, inclusiveness in bringing people together to talk, and the idea that offenders … should be reintegrated as far as possible into the community'.[31] As 'politicians are increasingly referring to what they call 'public opinion' to justify or buttress' shifts in penal policy,[32] it is discernable that above the cloud of politics it is the social desire to stem the rise in ineffective and expensive imprisonment and to strive for reintegrative, rehabilitative and restorative justice measures that has progressed the range of community sentences available, including the unpaid work order.

Clearly, the previously persistent desire to maintain a dichotomy between the criminal community — served by public identification and humiliation before the carceral age, and then in the very physical sense by the geographical segregation from society during the dominance of the carceral age — must seriously be doubted as being socially desirable in view of the recent social shift in sentencing aims. If the desire for the dichotomy is unsustainable then, in the context of unpaid work in the community, the central avenue for pursuing that dichotomy — public identification — is also unsustainable.

The call for public identification as a means of deterring crime is understandable, as is the issue of how 'legitimate workers' may feel. Yet, as I have demonstrated, the social desire for reintegration and rehabilitation greatly influenced the CJA 2003, and if these aims are truly to be achieved through the avenue of unpaid work, if this community sentence is to be a progression in penal policy rather than a regression to the failures of historic community sentences, the feelings of legitimate workers cannot take priority. Deterrence must be subsumed within the broader range of objectives. McIvor notes that unpaid work comes closest to realising its rehabilitative potential when it is of a higher quality and that recidivism is reduced when placements are rewarding.[33] Similarly, studies show that 'offenders who perceived their sentence as fair had lower than expected reconviction rates'.[34] Thus, as crime is reduced by fair, rewarding, quality placements, to call for public identification is juxtaposed to a broader picture of what is socially desirable — the ultimate aim of lower crime rates. Indeed, if the aim is penal effectiveness rather than penal posturing the 'focus (should be) on the reintegrative and rehabilitative aspects of the penalty instead of being punitive for its own sake'.[35]

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As true as the above may be, the desire for reintegration that points away from public identification begs the question, 'Reintegration into what?' At some level the answer must be society in general. Yet general society is itself a victim, and thus a

28. Ministry of Justice, *Prison Population Projections 2011-2017: England and Wales* (Ministry of Justice Statistics Bulletin 27 October 2011) ch 2, and see ch 6 on the impact of the August 2011 Public Disorder.
29. M Nellis, 'Community penalties in historical perspective' (n 25) 24.
30. M Cavadino and J Dignan, *The Penal System* (Sage Publications 2007) 132.
31. J Shapland, G Robinson and A Sorsby, *Restorative Justice in Practice* (Routledge 2011) 15.
32. Ibid.
33. G McIvor, 'Pro-social Modelling and Legitimacy: Lessons from a Study of Community Service' in *Pro-social Modelling and Legitimacy: The Clarke Hall Day Conference* (University of Cambridge 1998) as cited by M Cavadino and J Dignan, *The Penal System* (n 30) 152.
34. M Killias, M Aebi and D Ribeaud, 'Does Community Service Rehabilitate Better than Short-term Imprisonment? Results of a Controlled Experiment' (2000) 39(1) *Howard Journal of Criminal Justice* 40 as cited by M Cavadino and J Dignan, *The Penal System* (n 30) 152.
35. M Cavadino and J Dignan, *The Penal System* (n 30) 152.

reintegrative focus necessitates a discussion of the 'suffering' victim(s) and community.

General Society and Victims

Casey's report reveals that the move to 'privatised'[36] justice has generated a consensus among the public that the 'Criminal Justice System (is) a distant, sealed-off entity, unaccountable and unanswerable to them'.[37] Evidence from an April 2008 survey reveals that 90 per cent of people thought that punishment should involve payback to the community, 92 per cent being in favour of work as the most important requirement and 77 per cent agreeing that the public 'should be informed about when and where it would be carried out'.[38] Thus, there is a strong argument that social desirability demands that those performing unpaid work orders be publicly identified in order to break this consensus.

Yet despite what appear to be convincing survey reports, despite what prima facie observations might point towards as being socially desirable, a closer analysis reveals a different perspective. It must be borne in mind that community sentences such as unpaid work are located in a particular area of the CJS. Irrespective of their intentional, theoretical purpose as alternatives to imprisonment,[39] the increasing prison population is testimony to the fact that Foucault's pessimistic vision[40] — society as a 'giant carcereal archipelago in which the discipline which characterized prisons is reproduced by sanctions implemented in the community'[41] — is still a long way off. Rather, in reality the unpaid work order and community sentences in general are sentencing options which have conformed to Morris and Tonry's characterisation as 'intermediate punishments', occupying a 'place between imprisonment on the one hand and minor penalties…on the other',[42] doing little to alleviate the fear and actuality of net-widening.[43] This is compounded by the CJA 2003 setting a custody threshold that expressly refers to custody as a punishment for crimes so serious that a community sentence is not justifiable,[44] thus going against the notion of unpaid work as an alternative to custody. So it is clear that someone sentenced to an unpaid work order is a particular type of relatively low-key offender, yet one that remains at risk of recidivism. With this in mind, claiming that public identification remains desirable becomes a less forceful argument.

Combining my earlier discussion, which revealed that public identification is juxtaposed to successful, rehabilitative, reintegrative community sentences, with an understanding of the type of offender involved it becomes clear that public identification is an ill-suited means by which to engage the victim and reverse the lack of the public accountability in the CJS. Moreover, public awareness of community sentences, let alone even basic penal understanding, is largely absent.[45] This reveals the call for public identification during unpaid work orders to be an ill-educated demand. A Howard League report of 2011 stressed that the unpaid work order is only truly effective and at its strongest in fighting recidivism when the aims are restorative, with a retributive and punitive focus genuinely endangering 'the restorative work that represents the best of community payback'.[46] Casey notes that the public agree with the aims and principles of the community sentences.[47] With the social desire for effective community sentences and the public agreeing with the rehabilitative, restorative and reintegrative aims of unpaid work orders, the demand for public identification is further revealed to be myopic.

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Were it to become widely publicised that effective unpaid work orders cost about £3000 per offender in

36. I use the term 'privatised' in this sense to refer to the removal from the public eye rather than private sector involvement.
37. L Casey, Engaging Communities in Fighting Crime (n 1) 53.
38. Public Survey, April 2008 quoted in L Casey, *Engaging Communities in Fighting Crime* (n 1) 52.
39. D van Zyl Smit, 'Legal Standards and the Limits of Community Sanctions' (1993) 1(4) *European Journal of Crime, Criminal Law and Criminal Justice* 309, 309.
40 . See generally M Foucault, *Discipline and Punish: The Birth of the Prison* (n 11).
41. D van Zyl Smit, 'Legal Standards and the Limits of Community Sanctions' (n 39) 310 citing S Cohen, 'The Punitive City: Notes on the dispersal of Social Control' (1979) 3 *Contemporary Crisis* 339.
42. D van Zyl Smit, 'Legal Standards and the Limits of Community Sanctions' (n 39) 309.
43. N Morris and M Tonry, *Between Prison and Probation. Intermediate Punishments in a Rational Sentencing System* (OUP 1990) 151, 159.
44. Criminal Justice Act 2003, s 152(2).
45. L Casey, *Engaging Communities in Fighting Crime* (n 1) 52, 53.
46. The Howard League for Penal Reform, *Response to Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (The Howard League 2011) 1.16-1.18.
47. L Casey, *Engaging Communities in Fighting Crime* (n 1) 53.

comparison to approximately £45000 for one year in prison,[48] I submit that the social desirability for effective, restorative, rather than punitive, retributive placements would soar. Additionally, a nuanced reading of the figures from the Casey report reveals that of the 90 per cent of the respondents in favour of payback to the community only 52 per cent wanted those working to be publicly identified by their clothing, in contrast to the 77 per cent who simply wanted to be *informed* about when and where the work would be carried out.[49] Considering that the desire for community payback was a long way short of being matched by the call for public identification, even before the public is educated as to its ineffectiveness, I submit that the real social desire strongly points towards education of the public rather than public identification. Hall is correct in saying that a victim-centred criminal justice model is still a distant vision, fraught with political and financial complications.[50] Yet such a model can only become a reality if the true social desire for a greater insight and understanding of the CJS provokes an analysis which pushes beyond the emotive, rash response to criminals.

The discussion has tended to adopt an external perspective on the process of the sentenced offender. Yet, in Gelsthorpe's words, when considering victims' and the public's rights in comparison to offenders' rights 'it would be a mistake to think that the former are everything and the latter are but nothing'.[51] Rather, Dworkin stresses that as both 'sets of view and needs are 'rights', then they are the same category of thing and must be held in careful balance'.[52] Even before the Human Rights Act (HRA) 1998 it was indisputable that there were certain legal standards that community sanctions had to adhere to and that a 'rights culture' was growing.[53] The historical shift from *Becker v Home Office*[54] to *Raymond v Honey*,[55] whereby an offender now 'retains all of his civil rights, other than those expressly or impliedly taken from him by law'[56] is evidence of this. As numerous international instruments[57] and post HRA law combine to illustrate, Packer's behavioural view of the criminal process — which predominantly focuses on the notion that the primary function of criminal law should be to modify behaviour, in other words to rehabilitate and reintegrate the offender[58] — has great contemporary relevance. In light of this modern focus on rights and rehabilitation as integral, mutually informing components of the CJS, I will turn to argue that the legal acceptability of publicly identifying those performing an unpaid work order is seriously questionable.

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Offenders' Rights

Van Zyl Smit describes how the progressive acknowledgement of the punitive aspect of community sentences incorporates an unavoidable recognition of the presence of proportionality in sentencing.[59] In doing so the rehabilitative origins of the community sentence are highlighted, attention being drawn to a fact raised above: that, in practice, community sentences are appropriate when custody is not justified. In turn the unpaid work order must only be viewed as appropriate for relatively minor offences, yet a sentence that the Sentencing Guidelines Council views as governed by the organising principle of proportionality,[60] with 'fairness at the heart of sentencing decisions'.[61] The spotlight on proportionality is joined by a focus on the sentencing purpose of rehabilitation. According to s 142(2) CJA 2003, rehabilitation is only one of a number of purposes that

48. HC Deb 3 March 2010, vol 506, col 1251W.
49. L Casey, *Engaging Communities in Fighting Crime* (n 1) 53.
50. M Hall, 'Victims of Crime in Policy Making: Local Governance, Local Responsibility?' (2009) 48(3) *The Howard Journal* 267, 277.
51. L Gelsthorpe, 'Probation values and human rights' in L Gelsthorpe and R Morgan (eds), *Handbook of Probation* (Willan Publishing 2007) 505.
52. Ibid citing R Dworkin, *A Matter of Principle* (Clarendon Press 1986).
53. For a detailed overview see D van Zyl Smit, 'Legal Standards and the Limits of Community Sanctions' (n 38) 313-331.
54. *Becker v Home Office* [1972] 2 QB 407 (CA) 416-20 (Lord Denning).
55. *Raymond v Honey* [1981] QB 874.
56. Ibid (QB) 879 (Webster J) citing *Solosky v The Queen* (1980) 105 DLR (3d) 745, 760 (Dickson J).
57. Including, inter alia, the Standard Minimum Rules for the Implementation of Non-Custodial Measures involving the Restriction of Liberty (Groningen Rules) 1988, the United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) 1990, the European Rules on Community Sanctions and Measures 1992.
58. H Packer, *The Limits of the Criminal Sanction* (Stanford University Press 1968) 12.
59. D van Zyl Smit, 'Legal Standards and the Limits of Community Sanctions' (n 39) 322.
60. Sentencing Guidelines Council: *Overarching Principles: Seriousness* (SGC Secretariat 2004) 1.30-1.37.
61. J Jacobson and M Hough, *Unjust Deserts: imprisonment for public protection* (Prison Reform Trust 2010) 31.

a court must have regard to. However, when the rehabilitative origins of the community sentence are considered and the detrimental effect on rehabilitation that the punitive aspects of punishment entail, rehabilitation takes on a pronounced position.

The combination of the rehabilitative focus with the prominence of proportionality creates a situation in which the legal acceptability of publicly identifying those subject unpaid work orders becomes seriously questionable. Van Zyl Smit states that 'specific sanctions have a definite penal content and once this content has been specified there is a prohibition on deliberately adding to it'.[62] Regarding the unpaid work order, recognition of the punitive aspect pushes the focus onto 'the element of labour',[63] thus Ashworth stresses that it is the number of hours to be performed that constitutes the penal content.[64] If public identification and the pains it incorporates are added, the limit of acceptable penal content becomes a concern. Contemplating the maxim that offenders are sent to prison as punishment, not for punishment, supports this reasoning. As the unpaid work order is intended to be an alternative to custody the maxim must transfer into the sphere of community sentences. Thus, the hours to be performed constitute the punishment and any additional punitive element of public identification is unacceptable.

Moreover, Rex emphasises that emotional and psychological effects of community sentences may cause some individuals to suffer more than others.[65] In discussing the modern pains of imprisonment Crewe places specific emphasis on the pains of uncertainty and psychological oppressiveness,[66] these pains being of particular relevance to the notion of being identified as a criminal in public. When the parts of this argument are drawn together it is difficult to see how the unpaid work order could include public identification and remain a sanction that von Hirsch would approve of as being endurable 'with self-possession by person of reasonable fortitude'.[67] A scenario emerges whereby the imprecise penal content of public identification is augmented by the uncertain effect it has on individuals, and the fact that any additional element of punishment it carries is potentially beyond the boundaries of acceptable penal content. When this is joined with the earlier discussion on the legal arbitrariness and lack of justification of historical public identification, legal acceptability comes under serious scrutiny and the right not to be subjected to inhuman or degrading treatment or punishment also gains increased relevance.[68] For these reasons I submit that the legal acceptability of public identification of those doing unpaid work as part of a community sentence is open to challenge.

. . . the conflict between broader social desires and the narrow, retributive demands of the public will not be bridged unless the public are educated in the realities of penology.

Conclusion

A broad perspective thus inclines away from public identification. Yet this is only fully understood when the historical origins of the community sentence are considered as a comparison, as well as the reasons behind the shift to, and the progressive move away from, the carceral age. Further, the conflict between broader social desires and the narrow, retributive demands of the public will not be bridged unless the public are educated in the realities of penology. It is only when the legal unacceptability is fully appreciated, and when society becomes aware that its own conscience has led to the penal shifts, that the desire for a dichotomy will be reserved and the call for public identification dropped in favour of fulfilling broader social desires.

62. D van Zyl Smit, 'Legal Standards and the Limits of Community Sanctions' (n 39) 320.
63. Ibid.
64. A Ashworth, *Sentencing and Criminal Justice* (CUP 1992) 267-269 and note that s 199 CJA 2003 has extended the maximum number of hours which a person can be required to work from 240 to 300, further highlighting that it is the number of hours which constitute the penal content.
65. S Rex, *Reforming Community Penalties* (Willan Publishing 2005) 68.
66. B Crewe, 'Depth, weight, tightness: Revisiting the pains of imprisonment' (2011) 13(5) *Punishment and Society* 509, 513-515 and 520-523.
67. A von Hirsch, 'The Ethics of Community-Based Sanctions' (1990) 36(1) *Crime and Delinquency* 162, 167.
68. Human Rights Act 1998, sch 1, art 3.