



'Just' punishment? Offenders' views on the meaning and severity of punishment

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journals.sagepub.com/home/crj**Esther FJC van Ginneken**

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Abstract

In England and Wales, 'punishment' is a central element of criminal justice. What punishment entails exactly, however, and how it relates to the other aims of sentencing (crime reduction, rehabilitation, public protection and reparation), remains contested. This article outlines different conceptualizations of punishment and explores to what extent offenders subscribe to these perspectives. The analysis is supported by findings from two empirical studies on the subjective experiences of imprisonment and probation, respectively. Semi-structured interviews were conducted with 15 male and 15 female prisoners and seven male and two female probationers. Two primary conceptualizations of punishment were identified: 'punishment as deprivation of liberty' and 'punishment as hard treatment'. The comparative subjective severity of different sentences and the collateral (unintended) consequences of punishment are also discussed. It is shown that there are large individual differences in the interpretation and subjective experience of punishment, which has implications for the concept of retributive proportionality, as well as the function of punishment more generally.

Keywords

Imprisonment, justifications of punishment, probation, proportionality, subjective severity

Introduction

'Punishment' is never explicitly defined in English criminal law, and nor is its relationship with the other specified purposes of criminal justice, namely: crime reduction;

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rehabilitation; public protection; and reparation (Criminal Justice Act 2003, s. 142; Von Hirsch and Roberts, 2004). This is problematic, not least because it is impossible to determine how to punish *effectively* if one has not first defined what one means by ‘punishment’. As a result, the definition of criminal punishment has been subject to considerable debate in the literature, if not to the same extent as the question of its justification.

This article charts the contours of the debate around the definition of punishment in terms of the relevance and significance of individual offenders’ perceptions and experiences of their own punishment. It then explores the findings of two studies investigating the perceptions of offenders subjected to imprisonment and community penalties, respectively. From these data, we examine the extent to (and ways in) which participating offenders interpreted their sentences *as* punishments, and therefore how effective they perceived their punishments to be.

Objectivity versus subjectivity: Defining punishment

Any attempt to justify criminal punishment requires the penal state to ensure that the ‘correct’ amount of punishment is imposed, although different justifications vary significantly on how to determine what constitutes that ‘correct amount’ (Ashworth, 2015: 112–162).

However, a necessary precursor to this issue is the question of *definition*; that is, of what ‘counts’ as punishment in the first place. Most approaches to the definition of punishment tend to start with the so-called ‘Hart/Benn/Flew’ model (McPherson, 1967; compare Walker, 1991: 1–3), under which criminal punishment is:

- (a) *unpleasant*: punishment must involve something painful or otherwise difficult to endure;
- (b) *retrospective*: it is imposed for a breach of legal rules;
- (c) *individuating*: it is targeted against a specific offender;
- (d) *intentional*: it is executed intentionally by someone other than the offender; and
- (e) *legally bound*: it is imposed by an authority of the breached legal system.

This account is by no means immune from critique, particularly in its restriction to *intentional* punishment by others, which limits the unpleasantness of punishment to, at most, only that discomfort which was foreseen by the sentencing authority at the time of sentence. This has been described as arbitrary and overly restrictive (Ashworth, 2010: 94–95; McPherson, 1967: 22), and has tended to fail to adequately account for the potential effect of the perceptions and circumstances of its subjects (Kolber, 2009a; Ryberg, 2010: 74–82). Ultimately, the Hart/Benn/Flew model attempts to provide an effective starting point for discussing the justification of punishment as it should be, rather than for reflecting upon its practical social realities (McPherson, 1967: 24–25).

Nonetheless, this position remains controversial. In particular, Barbara Hudson has criticized its inherent abstractions as part of her rejection of the primacy of ‘legal reasoning’ in criminal justice decision making (e.g. Hudson, 2000: 189–191). For Hudson, the penal state is simply another organ of a system intended to achieve social ends: penal policy deals with people and ought to be concerned to at least some extent with

its impact upon them (Hudson, 1993). As a result, the criminal justice system ought to take account of the subjective effect it has upon the populace, especially in terms of the penal decision making around marginalized offenders, both in terms of their treatment at sentence (Hudson, 2000), and of broader approaches towards them in penal policy (Hudson, 1987: 114).

The limitations of the intention-focused objectivity of the orthodox account are particularly clear in the context of proportionality-focused penal justifications. While the objectivist assertion that one should treat like cases alike is hard to dispute, in practice subjective differences render the concept of 'like-situated offenders' problematic at best (Tonry, 2011: 225–229). As a result, even if two offenders can be realistically said to have committed offences of exactly equal seriousness, the same punishment may affect them very differently. The scale of the potential collateral impacts of punishment on the offender and those around them is vast (Walker, 1991), and can continue long after the official length of a sentence, to the extent that they can pose significant challenges for attempts to reintegrate offenders into society (Petersilia, 2003; Visser et al., 2004). Likewise it ignores, and therefore tacitly excuses, the fact that not all individuals come to the criminal justice system under equal conditions in our (distributively) unjust society (Hudson, 1987: 144; Tonry, 2011: 230).

More recently, this critique has been supplemented by a number of attempts in the US literature to develop subjective alternatives to the objective definition of punishment. The subjectivist challenge (expressed in Bronsteen et al., 2009, 2010; Kolber, 2009a, 2009b) dismisses the conception of punishment as a purely abstract imposition by the state. It observes that the subjective experience of punishment should be taken into account when measuring penal severity, either because suffering is inevitably rendered subjective by the unique social contexts of offenders (Kolber, 2009a, 2009b), or because of the existence of psychological phenomena that alter the degree of suffering felt over the course of the punishment (Bronsteen et al., 2009). An understanding of the factors influencing subjective variations is critically important to any attempt to define, and therefore justify, criminal punishment (Bronsteen et al., 2010).

As illustration, Kolber (2009b: 188) offers the fictional punishment of 'truncation': a blade passes at a fixed height over (or through!) the restrained offender. Depending upon the offender's height, the effects of this punishment would vary widely (the offender would either be beheaded, given an 'imprecise haircut' or (physically) unaffected: 2009b: 188). In objective terms, however, these differences are invisible: all offenders would simply be 'truncated'. Kolber asserts that the same applies to the various differences that affect the subjective experience of suffering as a result of punishment.

There has been an extensive theoretical retort to these subjective approaches to the calibration of punishment (Gray, 2010; Markel and Flanders, 2010; Markel et al., 2011). For Markel et al. (2011) punishment is not designed to inflict suffering. Rather it exists to censure, to offer political and philosophical condemnation of the offender's wrongdoing. As a result, the intended outcome is more important than its social reality. To take account of the subject's views is to treat them as more important than the will of the electorate (Markel and Flanders, 2010: 979–982), or the message that the punishment seeks to convey (Gray, 2010). In any event, they argue, it is to treat an unfortunate consequence of punishment as an intentional invasion, and to avoid the urge to

minimize as much as possible the suffering that criminal justice inflicts (Markel et al., 2011: 616–618).

Indeed, despite the subjectivist critique, objective conceptions of punishment have remained the mainstay in political practice. Several of the most influential theories of punishment speak exclusively in objective terms, from Feinberg's (1970/1994) 'hard treatment' to Duff's (2001: 143) 'modes of punishment'. Measurements of penal severity have also tended to use objective terms, such as liberty deprivation (e.g. Schiff, 1997), and socio-economic standard of living (Von Hirsch and Jareborg, 1991: 35–38). These measures enabled the construction of highly complex sentencing tariffs that attempted to systematize the deployment of sentencing options along specifically retributive lines (e.g. Von Hirsch et al., 1989).

Towards empirical analysis

Both the subjectivist critique of the Hart/Benn/Flew model and the opposing views from objectivists suffer from significant limitations. The subjectivists fail to clarify where the limits of punishment actually lie, which precludes a nuanced account of the justification of punishment by preventing an accurate description of what it is that we must justify. In their willingness to include unintended and non-state effects in their definition of punishment, they risk over-defining the concept of punishment until it becomes every negative experience following from conviction (a restriction that Ryberg (2010: 82–87) calls the 'challenge of delimitation'). However, equally, to deny that punishment results in suffering, or that different offenders experience different levels of hardship as a result of the same sentence, is to miss the social reality of penal experience at the level of the definition of punishment, and therefore to diminish the possibility of its effective justification (compare Ryberg's (2010: 74–82) 'challenge of differences in impact').

Both problems are partially the result of fundamental assumptions about the nature of punishment in practice. The subjectivists have tended to assume that there is a great deal of variation in individual offender experience, and that this directly affects their understanding of the punishment inflicted. Their objectivist detractors, by contrast, assume that variations in experience do not substantially affect the nature of the intended imposition. What is interesting, therefore, is that neither camp has attempted to test their suppositions empirically, to examine whether differences between intended and experienced punishment affect the pursuit of retributive justice in practice.

There is an impressive body of research on the experience of imprisonment, which has argued that the pains extend beyond the deprivation of liberty (Christie, 1981; Crewe, 2009; Sykes, 1958/1974). It is also important to consider the complex mental health problems of many prisoners, as well as the high rates of suicide and self-harm (Fazel and Danesh, 2002; Fazel et al., 2005). These illustrate – at the very least – the extreme vulnerability of prisoners, but also suggest harmful effects of imprisonment on health and well-being.

The literature on the subjective experience of community penalties is slightly more limited (although see Durnescu et al., 2013). What studies have been made (e.g. Durnescu, 2011; Gainey and Payne, 2000; Hayes, 2015; Payne and Gainey, 1998) tend to involve explorative research on the pains of different penalties for offenders, working with relatively small samples and focusing on social realities for subjects during punishment (see

also Durnescu et al., 2013: 26–31). A limitation of these (custodial and non-custodial) studies is that they seldom explicitly link the subjective experience of punishment to its intended aims (although note Durnescu, 2011 and Gainey and Payne, 2000). They have tended to conceptualize punishment as a more or less fixed social reality, rather than as a tool of socio-political policy, with specific aims. This is not, however, to say that offenders' perceptions of the meaning of punishment have not been the subject of research (e.g. Applegate et al., 2008; Ashkar and Kenny, 2008; Rex, 2005). In particular, Schinkel (2014a, 2014b) and Sexton (2015) have begun to explore the distance between sentencing theory and penal practice.

Schinkel (2014b) examined the extent to which long-term prisoners' views aligned with Duff's (2001) normative theory of communicative punishment. She found little evidence that offenders engaged with their sentence on a moral level, or perceived imprisonment as censorious. While recognizing that Duff's theories are aspirational rather than descriptive, she noted that the characteristics of sentencing and imprisonment in Scottish justice made it more difficult to achieve those aspirations in practice (Schinkel, 2014b: 592–594). This is particularly relevant to other expressive accounts of punishment – notably Markel and Flanders' (2010: 929–941) 'condemnatory conception of retributivism'.

Elsewhere, Schinkel (2014a) explored the lived experience of other penal aims. She found an apparent desire among prisoners to view imprisonment in a consequentialist light (in particular to serve the purpose of reform or deterrence), although they accepted punishment as an end in itself to a lesser degree.

Sexton (2015), by contrast, conceptualized experienced punishment (and in particular, imprisonment) not in terms of pre-existing penal theory, but as a combination of 'salience' and 'severity', with severity being determined by an individual's interpretation of concrete circumstances, and salience by the discrepancy between that individual's expectation of what their sentence would be like, and their actual experience. In other words, penal severity is influenced by both previous experiences and prison environment. Her findings indicate that there is a significant distance between intended and experienced punishment, and that policies, attitudes and relationships within prisons also substantially shape the meaning of the sentence imposed at trial. She also notes that prisoners do not accord the same punitive meaning to every deprivation and frustration experienced, with symbolic punishments (e.g. loss of freedom and family) generally being considered more painful than the physical deprivations themselves.

Sexton and Schinkel have made substantial headway in showing the importance of considering subjective experiences of punishment, whether in terms of its impact on the severity of a penalty, or on the effectiveness of intended outcomes in practice. In this article we contribute to this effort by sketching the contours of offenders' definitions of punishment and exploring the role of suffering from their own perspective. Furthermore, we move the discussion beyond the prison context by including the experience of punishment from the perspective of offenders serving sentences in the community.

Methodology

To explore these issues, the current article combines the findings of two methodologically similar studies concerned with the subjective experience of punishment: one in the context

of prisons; and the other in the context of community penalties (i.e. community and suspended sentence orders).¹ In this section, we discuss the methodologies of both studies in turn, before discussing how they were combined for the purposes of the present analysis.

Study A: Prisoners

Data were collected using semi-structured interviews with 15 male prisoners and 15 female prisoners in a local category B private prison in England. This prison was selected as research site for pragmatic reasons (primarily its location and large group of prisoners close to their release date). It is important to note the substantial variation in prison quality among prisons in England and Wales (Liebling, assisted by Arnold, 2004), which means that lived experiences of punishment likely vary depending on institutional characteristics; in particular, private prisons are associated with 'lighter' punishment than more traditional public prisons (Crewe et al., 2014).

The criteria for the sample were: (a) the ability to speak and understand English; (b) a release date within three months of first contact; (c) a determinate sentence of six months or longer; and (d) the ability to give informed consent. A prison administrator identified the prisoners who met these criteria and they were invited to participate in the study. One prisoner was on remand and has therefore been excluded from the present analysis. The participants served sentences between six months and six years; 11 were imprisoned for the first time.

Semi-structured interviews were used to get a detailed, narrative account of the subjective prison experience and participants' perceptions of the impact of imprisonment on their lives and futures. The aim of the research project was to get an insight into prisoners' adjustment to prison, their experience of imprisonment and their preparation for release. Before the interview, participants were given information about the purpose and procedure of the study and asked to sign an informed consent form. The interviews lasted one hour, on average, and were transcribed verbatim. The data analysis involved thematic analysis, facilitated by NVivo 9.

Study B: Community penalties

Participants were recruited from two Centres in a single Probation Trust, immediately prior to the structural reforms of Anglo-Welsh probation following the Offender Rehabilitation Act 2014. The study examined: the experienced (punitive) impact of community penalties on those subjected to them; and the extent to which the offenders' supervision affected that impact. As a consequence, the concept and definition of 'punishment' was a recurring theme in interviews. A total of nine offenders (two female, seven male) were recruited, six from one Centre and three from the other. Offenders were recommended by their supervision officer on the basis of: the offender's offence; the type of orders and requirements they received; and their age, gender and ethnicity. Potential participants were approached with a written Participant Information Sheet, which was also discussed with them at a consent meeting. All participants had had at least two months' experience of being subject to their order. All orders involved probation supervision.

Once the offender had agreed to participate and consented to its full use, an analysis of their case-file was undertaken to situate their case in context. This then informed an initial semi-structured interview, which was followed by a second group interview with all participating offenders at that Centre. The transcripts of these interviews were subjected to thematic analysis to identify the pains that existed in offenders' lives during (and as a consequence of) their community sentence, the relative severity of those pains and the impact on both of these of the relationship between offenders and their supervision officer.

Combining both studies

Both studies adopted purposive sampling, in order to maximize diversity given the small number of participants (Silverman, 2010: 141–143). Although this approach does not produce as representative a sample of the population as a fully randomized one might, it encourages samples that illustrate the diversity of the population in question, and therefore provides more of an exploratory overview for the purposes of studies such as ours.

While neither study was directly concerned with exploring offender's conceptions of punishment, the subject was broached by a substantial number of participants in both samples. It became particularly clear that participants understood the concept of punishment in a wide range of ways. The similarity of our research designs therefore allowed for an illustration of these different interpretations of punishment more generally, by identifying commonalities between the themes emerging within our separate analyses.

Combining and comparing data from different studies is not without its limitations. For example, the interviews were conducted by different researchers; factors such as gender, research experience and personality inevitably influence the course of the interview and nature of the data generated. Given that this article is the product of a post-hoc comparison as opposed to a study designed with this purpose in mind, we have been cautious with direct comparisons. The themes that follow are not therefore intended as a definitive representation of prisoner and probationer perceptions of punishment's purposes. Rather, in this article we draw attention to the importance of these themes and this topic of discussion, and the similarities across *different* penal contexts, as a means of contextualizing the subjectivist/objectivist debate.

Findings

Offenders possessed a diverse range of opinions about what punishment *is* and what it *should be*, as is the case in public and academic discourse. In general, imprisonment and community penalties are seen as broadly punitive, but there is disagreement about the extent to which individual suffering qualifies as punishment. Some offenders considered the deprivation of liberty to be the only justifiable component of punishment, while others felt that other forms of hard treatment also contributed to making their sentences punitive. In this section we briefly consider each approach, as well as exploring some of the consequences for how offenders perceived imprisonment relative to its community-based alternatives.

Punishment as deprivation of liberty

The conceptualization of punishment in terms of the deprivation of liberty reflects the principle that punishment should only consist of the inevitable restrictions associated with the sentence imposed. In the prison context (and to a lesser extent, in the community, Durnescu, 2011: 534–536), the most obvious and visible deprivation is of (physical) freedom. Indeed, Sykes (1958/1974) identified the deprivation of liberty as one of the inherent pains of imprisonment, alongside the deprivation of goods and services, heterosexual relationships, autonomy and security. Associated with these deprivations are restrictions on seeing family, not being able to have normal employment and having to comply with the prison rules. This is consonant with the principle that ‘imprisonment should be used as punishment, not for punishment’. There should be no additional hard treatment, since this would entail the loss of additional (civil) rights (a position embodied in English law by *Raymond v Honey* [1983] 1 AC 1, 10).

Prisoners had mixed views on whether deprivation of liberty was a punishment in itself. Some prisoners explicitly ascribed to this view:

We’re in prison as a punishment, we’re not in prison to be punished. You know, if you’re wrong you get chastised or punished for it, in the right way. You don’t get abused, you don’t have any demeaning behaviour or being pushed aside, like you’re nothing. (Lance)²

[Prison is] definitely a punishment [...] I know we get good things being in here, really, we get looked after well and that, compared for the fact that we’re in prison, but at the same time, we’re pulled all away from our family, we still got all these things not going for us than what we got on the outside. When you’re in here, you can understand it’s not a normal part of life, so it is hard, yeah. (Eric)

For Eric, no matter how good the standard of life in prison, there is still the punishment of being in prison. The inherent deprivation of liberty that this entails may be felt more severely by offenders who have a comparatively higher standard of life outside of prison. For instance, offenders who lose their job or house as a result of imprisonment may feel that they suffer greater punishment than offenders who were already unemployed or homeless. Similarly, mothers and fathers in prison are likely to experience more subjective suffering than offenders without children, all else being equal. The idea of punishment as deprivation of liberty appears simple and objective in theory, but more complicated in practice. For instance, James points out additional unintended effects of imprisonment, lasting beyond the sentence itself:

How many times does someone need to be punished for one crime? Once, twice, three, four times? Do you understand what I’m saying, I’ve served my sentence, my liberty has been taken away from me, yeah, like... It’s never ever put behind me. How is my criminal record, or the things that I’ve done in the past, being put behind me, if every time I have to apply for a job, I have to disclose it, considering that my actual criminal record has no bearing on the actual job that I’m actually applying for. (James)

James saw liberty deprivation as the official, proportionate punishment, but also feels punished by the negative ‘side-effects’ of his sentence. In his view, these side-effects are

not justified in relation to the crime committed, and undermine the justice of his sentence.

Offenders serving community penalties held similar views. Ron, for instance, felt that supervision appointments interfered with his employment prospects:

But with the supervisory order as well, it's still there, nagging in your head that, right, even though, let's say I could go for a job full-time... 40 hours a week... but then I know I've still got to come back here to come and see [his probation officer]. And some of my employers might be like, 'No, you've got to do Monday to Friday.' And I know that [the probation centre is] not open on a Saturday or Sunday. So how do you work round that? (Ron)

The subjective severity of the restrictions imposed by a community sentence depends significantly on the offender's personal circumstances. Just as liberty deprivation raises issues in terms of employment, so too can it interfere with family responsibilities such as childcare.

On the other hand, other offenders did not feel that the restrictions imposed by an order constituted any meaningful deprivation of their liberty at all. Andrew, for example, received a disqualification order (preventing him from working with children) despite being past working age: 'I laughed, actually, when I read it [laughs]. Comical. [...] I don't know any under-18-year-olds anyway [laughs]' (Andrew).

A community penalty may create the *illusion of liberty*, because offenders are not physically restrained in their behaviour; their behavioural options are only limited by anticipated punishments for non-compliance (i.e. breach proceedings). Some of the probationers described their sentence as something that was 'hanging over [their] head' (Ron), intended to make them comply:

I think the... disciplinary punishment is still there. But it's maybe more in the background. It's always there, just like I say, more in the background. Because they're concentrating on you with the rehabilitation stuff, because you're engaging with it, you're wanting that. But any time, if you slip up, and think, 'Oh, I can't be arsed with all this! I tried it's not happening fast enough... I'm not getting me house, you're not getting this sorted, you're not getting that sorted, so I'm done with it.' And then the punishment, the breach side comes more in. (Jonny)

While the threat of breach also essentially deprives probationers of their liberty, Jonny did not see this as punishment in itself. He perceived the community penalty as rehabilitation, rather than punishment in terms of liberty deprivation. He regarded imprisonment, by contrast, as 'disciplinary punishment', because it involved the deprivation of liberty.

Punishment as hard treatment

However, the deprivation of liberty was not the sole determinant of what counted as punishment to participants in either study: '[i]t's like a playschool really, like a boy scouts. This isn't like punishment really, it's easy, it's not punishment, it's not like a deterrent or anything. It's just not a deterrent, you know, what I think prison should be' (Lance). According to this view, the inherent restrictions of a sentence are not enough.

Punishment requires an extra punitive element: hard treatment. This view relates to (and emerges from) the popular sentiment that a sentence only counts as punishment if it is actually unpleasant in practice. The unpleasant experience communicates disapproval and is seen as deserved in light of the offence, as well as contributing to any deterrent effect of criminal justice.

While the deprivation of liberty is itself a form of hard treatment, in this article we use this term to describe the imposition of more deprivations than are inherent in the sentence, for example through a stricter-than-necessary prison regime. Many offenders took this view of their sentences, both in and out of custody. While some prisoners perceived their sentence as hard treatment, others did not; they expressed the opinion that imprisonment came with too many privileges, which made life inside too comfortable:

This is meant to be a punishment. It's not, it's a joke. People have got better lives in here than they have on road. Here, you get everything for free and that. You get your dinner for free, you get clean clothes. If you haven't got clothes, they give you fucking clothes. They do your washing, you get stuff every -, it's just -, it's a joke. You get exercise every day, you get association every day... It's not a punishment, it's not. It should be. [...] Why do you think I keep coming in jail? Because I know, jail is a joke. [...] It makes me angry when I even think about it. 'Cause I wanna... I wanna get punished, I wanna feel bad, I don't wanna be able to wear my own clothes and that. I wanna wear prison clothes, to feel like... like, to feel bad innit. (Peter)

For Peter, the possibility that coming to prison can represent a higher standard of living for those suffering from socio-economic exclusion made it impossible to see imprisonment as punishment (compare the principle of 'less eligibility': Sieh, 1989). There had to be some clearly negative consequence, at least in the short term, but conditions outside the prison walls meant that this was often not the case.

Again, the community penalty context offered a similar range of viewpoints. Chris, for instance, did not see his supervision as punishment because it involved no additional hard treatment:

'Cause coming in to probation, to me, is not punishment. It's like me going to the doctor's, once a fortnight. Similar type of thing to me. You just tell people what's on your... if you've got anything to say, or what's on your chest. (Chris)

By contrast, Ashley was also rather dismissive of the idea that her order involved much hardship, but nevertheless believed that she was being punished:

Interviewer: Do you see *this* [gesturing about the room] as a punishment? The probation work?

Ashley: ... Yeah.

Interviewer: Why do you say that?

Ashley: [Looks at the interviewer as if he is stupid!] Well it is, innit? I gotta come down here every week, and do whatever they ask me, and stuff like that.

For Ashley, in other words, the presence of extra hard treatment was unnecessary – what mattered was the formal and mandatory nature of the order and its imposition.

Still other community-based offenders interpreted punishment as involving additional hard treatment, but nonetheless felt punished by their community penalties, especially where they interfered with family life, or where they caused offenders to feel ashamed. For instance, Ron's experience with unpaid work involved wearing a high-visibility uniform, which exposed him to the censure of those around him:

I mean, fair enough, we all know that we're all there for the same reason, but however you get members of the public sometimes shouting out of their cars, you know, hurling abuse at you. And as much as you want to hurl it back you can't. Because if you do, you get breached. (Ron)

As Sexton (2015) argues, experiences such as Ron's could be construed as punishment because of what they represent: in the case of shaming, an attack on one's identity. However, the perception of such a fundamental (in Sexton's language, symbolic) punishment was entirely subjective in practice. For example, Chris encountered several similarly painful experiences during his order, including the breakdown of his family, the loss of his job and his acquisition of a reputation as a criminal in his friendship group, which he found rather humiliating. However, those pains were:

[...T]he consequences of what I did. That's my fault. Not the justice service's [*sic*]. I still don't think that was a punishment. I brought it all on myself by what I did. If I ain't had done that... I probably would've been separated, eventually. But I could've lived where I wanted, and kept the friends I had, the same. But that's all 'cause of the consequences of what I did. (Chris)

Even though these were collateral consequences that followed (however indirectly) from his sentence, Chris did not perceive them as punishment because they were unintended and not directly imposed by the state. The differences in subjective severity of punishment are thus not only dependent on the negative effects people experience as a result of their sentence, but also on which negative effects they count as part of the (formal state) punishment. Compare Ryberg's (2010: 82–87) conception of the 'challenge of delimitation', and Walker's (1991: 106–110) notion of 'obiter' punishments; both authors challenge a (purely objective) conception of punishment that cannot account for these unintended consequences. The upshot is that we are left with an ambiguity as to what extent an objectivist (such as Chris), or a subjectivist (like Ron) is right. In other words, when people speak of punishment, they speak of many different things, and those pre-conceptions mould their perceptions of the punitive experience. Before we consider the implications of this finding, we will extend the discussion to perceived comparative severity of community penalties and imprisonment.

Comparative severity

According to the proportionality principle, imprisonment should constitute 'harder' treatment (or at least, a greater deprivation of liberty) than a community penalty, since it should only be available for crimes too serious for community penalties (s. 152(2))

CJA03). In practice, the ranking of sentences in terms of (subjective) severity is not straightforward, however, because the experience of hard treatment varies greatly among offenders. Katie, a prisoner-participant, demonstrated some awareness of the potential differences in hard treatment that separate modes of punishment could impose:

Katie: People dread probation orders a lot more than they dread jail.

Interviewer: Yeah? Why?

Katie: Definitely, because probation's taking a day out of your life. You just do your jail, it's over with. You go back to your life, do you know what I mean? You have no choice but to do your jail. You get sent to jail, that's it. But when you're out there, probation is a choice.

She also referred to the DTTO (Drug Treatment and Testing Order, now the drug rehabilitation requirement) as a 'Don't Take the Order', since she perceived it as being more onerous than imprisonment.

What Katie describes has been recognized in the literature as the pain of self-government (Crewe, 2011) and resonates with the current culture of responsabilization in the criminal justice system (Kemshall, 2002). Offenders are expected to make the 'right' choices, even in the face of a variety of social structural problems common to many offenders' unstable and marginalized lives (Hudson, 2000). While offenders may perceive themselves as still having their 'freedom', there is little freedom to make any mistakes, because the threat of breach is ever-present (hence the 'illusion of liberty', discussed earlier). The coercive element to this responsabilization discourse makes it punitive – even though it may be disguised as rehabilitative (see also Hannah-Moffat, 2001, who analysed a similar discourse around women's imprisonment in Canada).

In contrast to Katie's opinion, Alice (who was serving a suspended sentence order) perceived imprisonment as a more severe punishment, despite her intense financial difficulties and reliance on food banks and charitable support to satisfy even her basic needs:

If I'd have gone to prison I would've had regular meals, clothes washed, could've gone on a course, you know... not that I wanted to go there but I would've had a better standard of living in there, than I've had at the moment! But then I'd sooner be out here, sooner be at home, definitely. (Alice)

In other words, whereas some offenders recognized the inherent pains of uncertainty and self-government, offenders such as Alice and Katie suggest that offenders' definitions of punishment cannot simply be reduced to a straightforward acceptance of the punitive weight of all hard treatment. The context of the order, in other words, affects its perceived punitive content.

Indeed, some probationers considered fines more punitive than community sentences. For Chris the different nature of hard treatment imposed by a given 'mode' of punishment (Duff, 2001: 143) has a considerable impact on its effectiveness *as* punishment:

I don't think probation is a punishment. I honestly do not think. I mean, I was charged with fraud. For me to attend here every fortnight is not a punishment. It is not a punishment. I should

have been made to have paid at least some of that money back. Then that would have been more of a punishment than this. (Chris)

It is possible that Chris conceived of punishment in the literal sense of ‘an eye for an eye’. He implies that a meaningful punishment should bear a relation to the offence (i.e. a financial penalty would have more retributive value for a financial offence). In addition to their potential symbolic quality, fines may also feel more punitive than probation requirements in terms of liberty deprivation and collateral consequences:

You know, you get that money in, but then you’ve got to think about it, like, ‘Well, hang on... I’ve got that to pay for, *that* to pay for, *that* to pay for... oh, and I’ve got my fine to pay for!’ And of course if you don’t pay that... that’s gonna land you in more hot water. Yeah. I mean, don’t get me wrong. That’s my opinion on fines. Some people might see them as a lighter way of dealing with parking tickets and stuff like that, but... no, I think they can have a big effect on people in a *lot* of ways, compared to, say, unpaid work. (Ron)

For Ron (as well as Alice, who expressed similar sentiments, especially given her pre-existing financial difficulties), a fine is not a simple matter of using cash to fix a problem: money is often not so easily available and paying a fine could mean defaulting on other bills. The severity of monetary penalties depends very much on a person’s financial situation and socio-economic status. As Ron points out, for those who struggle to pay a fine the threat of further punishment also factors into the perceived severity.

Discussion

The upshot of this diversity of offenders’ perceptions is twofold. First, there is no agreement among offenders in their interpretation of punishment: some only considered the deprivation of liberty, while others expected further hard treatment to be inflicted. Yet others also considered unintended negative consequences during or after their sentence to form part of their punishment. This suggests not only that punishment fails to consistently communicate its content to offenders, as Schinkel (2014b) found, but that there is not even an agreed language for communication: punishment means very different things to different people.

Second, the experienced severity of a punishment is contingent on the interpretation of punishment, as well as on the individual’s circumstances: in practice, punishment is a product of the interaction between offender and the imposed sentence. Evidently, we cannot assume that punishment holds the same meaning to every person. We might aspire to such a position in the future, but at present it simply does not exist. In particular, while some offenders view punishment as the abstract deprivation of liberty, the conceptions of others of punishment as additional hard treatment (or as the *experienced* rather than intended deprivation of liberty) precludes the conclusion that objective accounts accurately describe the perception of punishment by its primary ‘audience’. Further, such an account takes no notice of the significant role of the context in which punishment is implemented, and the offender’s personal circumstances. This ignores the contribution of penal agencies, social contexts and of offenders themselves, in constructing punishment in practice. Objectively, the prison environment has no impact on the sentence

severity (i.e. a judge does not sentence someone to a specific prison), but subjectively it can. Similar remarks can be made about interactions with a probation officer, especially in a privatized (and therefore increasingly diverse) market.

Our literature review outlined the debate between objectivist and subjectivist scholars, who disagree fundamentally on whether punishment entails the intentional infliction of condemnation, or a more general exposure to suffering. There is no agreement among offenders regarding this issue either: while some view deprivation of liberty as the punishment, others expect punishment to involve additional suffering. This disagreement is complicated by the subjective experiences of punishment: what one person experienced as hard treatment, another did not. While some offenders thought a community penalty was more severe than imprisonment, others believed the opposite. Punishment does not take place in isolation from offenders' lives. Prison sentences and community penalties can affect employment, a person's housing situation and relationships.

The significant variation in offenders' subjective experiences and definitions of punishment poses a challenge to the retributivist notion of proportionality in practice. It appears that the severity of experienced punishment is heavily (and, on an objectivist account, arbitrarily) dependent on a person's circumstances. Treating like cases alike is problematic when that treatment is conditioned by circumstances and contexts that are so subjective as to be unique to each offender. Objectivist accounts of punishment as a means of expressing condemnation whose relative severity is determined objectively by (democratic) state processes are thus flawed, at least as present offender attitudes stand, because it appears that offenders do not (necessarily) recognize this as the function of punishment. If an objective account is to be an effective description of punishment as it is, rather than a mere aspirational target, substantial efforts must be made to harmonize offenders' perceptions of what punishment is, as well as to reduce differences in socio-economic and other contexts before and during punishment. On an objective account, in other words, it appears impossible to effectively achieve 'just deserts in an unjust world' (Tonry, 2011: 220), at least without radical changes to the implementation and execution of criminal punishments.

It is important to note that, although we have remarked on the importance of considering punishment *in context*, we have not identified patterns of variation related to, for example, demographic or socio-economic characteristics. This can be partly attributed to the exploratory nature of the research studies from which this article draws; the small sample sizes are more appropriate for detailed analysis of the range of experiences and individual differences, rather than trends or patterns. This would be an interesting avenue for further research. It is already documented that, for example, older people experience different pains of imprisonment (Crawley and Sparks, 2005, 2006); it would be interesting to extend such research to other demographic groups and sentences. The question about patterns of variation in punishment experiences may also be more suitably addressed with quantitative research, which links ratings of prison experiences to prisoner characteristics. However, this would require the development of an appropriately sensitive set of questions to capture the subjective experience of imprisonment.

We must also acknowledge that we cannot draw any general conclusions about the effectiveness of punishment beyond the subjective evaluation of its effectiveness as reported by the offenders in this study. While these subjective evaluations are relevant

especially in terms of what the punishment communicates, it is likely that they vary substantially from outcomes in terms of, for example, reoffending. However, before the effectiveness of punishment can be meaningfully evaluated, it needs to be clarified what it is and what it should achieve. Since we analysed the meaning of punishment in the context of the objectivity versus subjectivity debate, we focused on the distinguishing feature of these two perspectives: the conceptualization of punishment as deprivation versus hard treatment. This is not to say, however, that the meaning of punishment can be reduced to these roles. The subjective experiences of punishment are immensely complex, as has been convincingly shown in past research (Cohen and Taylor, 1972; Crewe, 2009; Durnescu, 2011; Sykes, 1958/1974), and are likely to vary across countries, establishments and time. Future research could develop this line of inquiry with multi-site and/or longitudinal studies, which could investigate changes in the subjective experience of punishment over time (even after a sentence has been officially completed). Collaborative analysis, such as presented in this article, is helpful for enabling comparisons between diverse samples.

By the same token, we also cannot make any claims about how prevalent each of the attitudes canvassed in this article are among a more general population of prisoners and/or probationers. But then again, we do not need to. The precise contours of this diversity of opinion are less important than the mere fact that diversity exists. In other words, these results compel us to at least engage with the subjectivist challenge: to accept that the content of a punishment is, at least in part, and at least some of the time, out of judicial hands. To change this requires the recognition that penal severity is subjectively determined to at least some extent, and to make efforts either to recognize that fact, or to try to change it. Further research will enable a thorough evaluation of the extent to which (traditionally conceived) retribution can survive this understanding.

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Notes

1. The corresponding author can be contacted for further specifics about the methodology of either study.
2. All pseudonyms used in this article reflect participants' genders.

References

- Applegate BK, Smith HP, Sitren AH, et al. (2008) From the inside: The meaning of probation to probationers. *Criminal Justice Review* 34(1): 80–95.

- Ashkar PJ and Kenny DT (2008) Views from the inside: Young offenders' subjective experiences of incarceration. *International Journal of Offender Therapy and Comparative Criminology* 52(5): 584–597.
- Ashworth A (2010) *Sentencing and Criminal Justice*. 5th ed. Cambridge: Cambridge University Press.
- Ashworth A (2015) *Sentencing and Criminal Justice*. 6th ed. Cambridge: Cambridge University Press.
- Bronsteen J, Buccafusco C and Masur J (2009) Happiness and punishment. *The University of Chicago Law Review* 76(3): 1037–1082.
- Bronsteen J, Buccafusco C and Masur JS (2010) Retribution and the experience of punishment. *California Law Review* 98(5): 1463–1496.
- Christie N (1981) *Limits to Pain*. Oxford: Martin Robinson.
- Cohen S and Taylor L (1972) *Psychological Survival: The Experience of Long-Term Imprisonment*. Harmondsworth: Penguin Books.
- Crawley E and Sparks R (2005) Older men in prison: Survival, coping and identity. In: Liebling A and Maruna S (eds) *The Effects of Imprisonment*. Abingdon: Routledge, 343–366.
- Crawley E and Sparks R (2006) Is there life after imprisonment? How elderly men talk about imprisonment and release. *Criminology and Criminal Justice* 6(1): 63–82.
- Crewe B (2009) *The Prisoner Society: Power, Adaptation, and Social Life in an English Prison*. Oxford: Oxford University Press.
- Crewe B (2011) Depth, weight, tightness: Revisiting the pains of imprisonment. *Punishment & Society* 13(5): 509–529.
- Crewe B, Liebling A and Hulley S (2014) Heavy–light, absent–present: Rethinking the ‘weight’ of imprisonment. *British Journal of Sociology* 65(3): 387–410.
- Duff RA (2001) *Punishment, Communication, and Community*. Oxford: Oxford University Press.
- Durnescu I (2011) Pains of probation: Effective practice and human rights. *International Journal of Offender Therapy and Comparative Criminology* 55(4): 530–545.
- Durnescu I, Enengl C and Grafl C (2013) Experiencing supervision. In: McNeill F and Beyens K (eds) *Offender Supervision in Europe*. Basingstoke: Palgrave Macmillan, 19–50.
- Fazel S and Danesh J (2002) Serious mental disorder in 23000 prisoners: A systematic review of 62 surveys. *Lancet* 359(9306): 545–550.
- Fazel S, Benning R and Danesh J (2005) Suicides in male prisoners in England and Wales, 1978–2003. *Lancet* 366(9493): 1301–1302.
- Feinberg J (1970/1994) The expressive function of punishment. In: Duff RA and Garland D (eds) *A Reader on Punishment*. Oxford: Oxford University Press, 71–91.
- Gainey R and Payne B (2000) Understanding the experience of house arrest with electronic monitoring: An analysis of quantitative and qualitative data. *International Journal of Offender Therapy and Comparative Criminology* 44(1): 84–96.
- Gray D (2010) Punishment as suffering. *Vanderbilt Law Review* 63(6): 1619–1693.
- Hannah-Moffat K (2001) *Punishment in Disguise*. Toronto: University of Toronto Press.
- Hayes D (2015) The impact of supervision on the pains of community penalties in England and Wales: An exploratory study. *European Journal of Probation* 7(2): 85–102.
- Hudson B (1987) *Justice through Punishment: A Critique of the ‘Justice’ Model of Corrections*. Basingstoke: Macmillan.
- Hudson BA (1993) *Penal Policy and Social Justice*. Basingstoke: Macmillan.
- Hudson BA (2000) Punishing the poor: Dilemmas of justice and difference. In: Heffernan W and Kleinig J (eds) *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law*. Oxford: Oxford University Press, 189–216.
- Kemshall H (2002) Effective practice in probation: An example of ‘advanced liberal’ responsibility? *Howard Journal of Criminal Justice* 41(1): 41–58.
- Kolber AJ (2009a) The comparative nature of punishment. *Boston University Law Review* 89: 1565–1608.

- Kolber AJ (2009b) The subjective experience of punishment. *Columbia Law Review* 109(1): 182–236.
- Liebling A assisted by Arnold H (2004) *Prisons and Their Moral Performance: A Study of Values, Quality and Prison Life*. Oxford: Clarendon Press.
- McPherson T (1967) Punishment: Definition and justification. *Analysis* 28(1): 21–27.
- Markel D and Flanders C (2010) Bentham on stilts: The bare relevance of subjectivity to retributive justice. *California Law Review* 98: 907–988.
- Markel D, Flanders C and Gray D (2011) Beyond experience: Getting retributive justice right. *California Law Review* 99: 605–628.
- Payne B and Gainey R (1998) A qualitative assessment of the pains experienced on electronic monitoring. *International Journal of Offender Therapy and Comparative Criminology* 42(2): 149–163.
- Petersilia J (2003) *When Prisoners Come Home: Parole and Prisoner Reentry*. Oxford: Oxford University Press.
- Rex S (2005) *Reforming Community Penalties*. Cullompton: Willan.
- Ryberg J (2010) Punishment and the measurement of severity. In: Ryberg J and Corlett AJ (eds) *Punishment and Ethics: New Perspectives*. Basingstoke: Palgrave Macmillan, 72–91.
- Schiff M (1997) Gauging the severity of criminal sanctions: Developing the Criminal Punishment Severity Scale (CPSS). *Criminal Law Review* 22(2): 175–206.
- Schinkel M (2014a) *Being Imprisoned: Punishment, Adaptation and Desistance*. Basingstoke: Palgrave Macmillan.
- Schinkel M (2014b) Punishment as moral communication: The experiences of long-term prisoners. *Punishment & Society* 16(5): 578–597.
- Sexton L (2015) Penal subjectivities: Developing a theoretical framework for penal consciousness. *Punishment & Society* 17(1): 114–136.
- Sieh EW (1989) Less eligibility: The upper limits of penal policy. *Criminal Justice Policy Review* 3(2): 159–183.
- Silverman D (2010) *Doing Qualitative Research*. London: SAGE.
- Sykes GM (1958/1974) *The Society of Captives: A Study of a Maximum Security Prison*. Princeton, NJ: Princeton University Press.
- Tonry M (2011) Proportionality, parsimony, and interchangeability of punishments. In: Tonry M (ed.) *Why Punish? How Much? A Reader on Punishment*. New York: Oxford University Press, pp. 217–237.
- Visher C, LaVigne N and Travis J (2004) *Returning home: Understanding the challenges of prisoner reentry*. Research report. Washington, DC: Urban Institute, Justice Policy Center.
- Von Hirsch A and Jareborg N (1991) Gauging criminal harm: A living-standard analysis. *Oxford Journal of Legal Studies* 11(1): 1–38.
- Von Hirsch A and Roberts J (2004) Legislating sentencing principles: The provisions of the Criminal Justice Act 2003 relating to sentencing principles and the role of previous convictions. *Criminal Law Review* 8: 639–652.
- Von Hirsch A, Wasik M and Greene J (1989) Punishments in the community and the principles of desert. *Rutgers Law Journal* 20(3): 595–618.
- Walker N (1991) *Why Punish?* Oxford: Oxford University Press.

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