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0521829593 - The Virtual Prison: Community Custody and the Evolution of Imprisonment

Julian V. Roberts

Excerpt

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Introduction to the concept of community custody

Imprisonment is when a man is by public authority deprived of liberty.
(Hobbes, 1651/1957, p. 206)

The contention

Prisons have failed to achieve their goals, and so, in large measure, have most of their alternatives. The failure of our prisons to reform or reintegrate offenders has been apparent since John Howard toured Europe's prisons in the eighteenth century (see Howard, 1929; Lilly and Ball, 1987; Selke, 1993). More recently, research has made it increasingly clear that prison does not deter offenders any more effectively than most community punishments (e.g. Doob and Webster, 2003; von Hirsch, Bottoms, Burney, and Wikstrom, 1999). A significant body of research has now accumulated to demonstrate the negative effects of prison, beginning with the seminal work by Sykes on the pains of imprisonment (1958). Perhaps the best that can be said of prison is that prisoners emerge no worse than when they were admitted (Zamble and Porporino, 1988), and that is not saying very much. Although prison has failed to rehabilitate, its destructive force remains undiminished.

Yet the prison continues to dominate the penal landscape, and to maintain its status as an iconic legal punishment around the world. Indeed, when asked to 'sentence' an offender many people's first reaction involves custody. This is particularly true for the more serious offences. Support for custody is not restricted to Western nations, as revealed by the responses to the International Crime Victimization Survey (see Mayhew and van Kesteren, 2002). When asked to impose a sentence in a case of burglary, approximately a quarter of respondents in Western nations favoured incarcerating the

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offender. The proportion favouring incarceration was significantly higher in Africa and Asia, where 69 per cent and 60 per cent of respondents chose this sentencing option respectively (Mayhew and van Kesteren, 2002). The widespread support for custody reflects in large measure the punitive power of imprisonment: *to the public, nothing appears to punish like prison.*¹

David Garland has observed that the prison has become a 'massive and seemingly indispensable pillar of contemporary social order' (2001a, p. 14). At the same time, there has been growing recognition by scholars, courts, and even some legislatures that imprisonment – in its traditional institutional form – carries few if any benefits for the offender, and many costs. The pains of imprisonment are not restricted to the prisoner, they are shared with his or her family and community as well. While the prison's position in the penal landscape has become more entrenched, and its limitations as a penal tool more apparent, the search for plausible and effective alternative sanctions has intensified.

Alternative sentences have failed in a different respect; they have yet to achieve significant reductions in prison populations, the purpose for which they were conceived and developed. Nellis (2002) and others (e.g. van Kalmthout, 2002) have described the limited success of community penalties, and the lowered expectations associated with these sanctions at the advent of the millennium. These sanctions have not been used often enough in most jurisdictions to reduce the use of incarceration as a sanction. One reason is that they appear to lack the denunciatory power and the punitiveness of imprisonment. The advantages of community penalties – their ability to promote rehabilitative or restorative goals, their relatively low costs – do not appear to overcome the limited ability of community punishment to denounce criminal conduct, or to adequately hold offenders accountable.

What is needed is a sanction that offers some of the penal 'bite' of imprisonment – so that it really is a potential alternative – but which nevertheless spares the offender (and his or her intimates) many of the 'pains of imprisonment'. Hence the search in recent years for 'intermediate sanctions', those lying between prison and probation (see Morris and Tonry, 1990). But intermediate sanctions have to date failed seriously to encroach on the custodial caseload – as evidenced by the stable or rising prison populations, even in the face of declining crime rates.

A new sanction also needs to promote a fresh vision of imprisonment and indeed of legal punishment. Properly constructed and administered, community custody, or community imprisonment offers such a solution. Although this disposition has been around for many years in some

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jurisdictions (see Lilly and Ball, 1987, for a history of house arrest, the potential of community custody has yet to be fully realized. Considerable progress has been made in some countries, and that experience is reviewed in this book.

While a number of countries created community custody sanctions in the 1990s, the statistical evidence pertaining to the use of custody (reviewed in chapter 2), reveals that little has changed: with a few exceptions, these regimes have failed so far to reduce prison populations. The reasons for this failure will be explored over the course of this volume, but they include the following: the community custody sanctions have not been sufficiently used; there has been considerable judicial and community resistance to the concept; the statutory platforms have permitted 'widening of the net' to occur.

The evolution of community punishments

Community-based sentences have proliferated in recent decades; most jurisdictions now provide judges with a wide array of alternatives to imprisonment at the adult and juvenile levels. Yet community sanctions have not displaced the use of prison as a sanction, except for the least serious offences. Alternatives to imprisonment must generate public and professional confidence; they must constitute credible replacements (see discussion in Davies, 1993). This credibility has proven hard to come by. When imposed for serious crimes of violence, community sanctions continue to attract public opposition as a result of critical media stories and adverse commentary from politicians. Judges, too, are often sceptical of these sentencing options, particularly regarding the extent to which offenders in the community are adequately supervised. Lacking confidence in the administration of the sentence, many judges curb their use of these sanctions.² This has certainly been the experience in Canada, where judges have restricted their use of the certain community-based sentences when they have lacked confidence that supervision is adequate (see also Zvekic, 1994 for similar experiences in other jurisdictions).

One consequence of these problems with alternative sanctions is that politicians continue to promote imprisonment as the most appropriate response to more serious forms of offending – witness the proliferation of mandatory sentences of imprisonment created in the USA, Canada, Australia, and England and Wales during the 1990s (see Roberts, Stalans, Indermaur, and Hough, 2003). Judges continue to impose imprisonment as a primary sanction, and this has resulted in stable or rising custody rates

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in many jurisdictions such as England and Wales (Hough, Jacobson, and Millie, 2003).

The search for alternative sanctions has led to the adoption of a wide array of penal measures, including curfews, electronic monitoring, and other innovations. Community penalties received fresh impetus with the evolution of technology by which to ensure the offender's presence at home. However, the alternatives devised to date are 'partial sanctions' imposed to achieve a limited goal – often compliance with other court ordered conditions such as mandatory treatment or abstinence. They do not represent a transformation in the way that we think about imprisonment, but simply offer alternative means by which to hold offenders accountable without requiring their detention. This severely limits their ability to replace prison as a punishment.

Community custody and the Sword of Damocles

This volume explores a form of imprisonment that is served in the community. Such a sanction exists in many nations and goes under different names: community custody; community control; a suspended sentence of imprisonment; conditional sentence of imprisonment; home detention. The common element is that the offender is serving a sentence of custody in the community, with the threat of institutional confinement hanging over his head, should he or she fail to comply with a set of conditions. The presence of the threat explains the many literary references in the literature to the legend of the 'Sword of Damocles'. Damocles was a courtier forced to remain motionless while sitting under a sharp sword that was hanging by a horsehair. One careless movement would result in rather unpleasant consequences for the man. He was obliged to endure this punishment by his ruler, to illustrate what it was like to live under constant threat of death (the ruler, a tyrant, was singularly unpopular, and the object of numerous assassination attempts).³

Since the landmark volume by Ball, Huff, and Lilly on house arrest was published in 1988, much has changed. Community custody regimes have proliferated and become more diverse. They are used instead of pre-trial detention, as a stand-alone sentencing option and also as a form of early release from prison. Despite much progress, many problems remain, not the least of which is the image of the sanction. Members of the public and crime victims often believe that offenders confined to their homes do little more than stay at home and out of trouble – what law-abiding members of society do all time. Not surprisingly, offenders see matters differently.

Clearly some rapprochement between these two perspectives is necessary, if the sanction is to attract widespread public support.

Distinguishing community custody from other sentences

A community custody sentence shares some characteristics with other dispositions, but is nevertheless conceptually distinct. The stringent conditions imposed, along with the presence of the offender in the community brings to mind enhanced probation sentences. These were introduced to address traditional probation's lack of credibility, but the basic philosophy of probation remains unchanged and as Clear (1997) notes, most ISPs in the USA are not designed to divert offenders from prison, whereas that is one of the central goals of community custody. The closest other sanction is a suspended sentence in which the offender is obliged to follow certain conditions for a specific period of time.⁴

The differences between the two sanctions are nevertheless apparent. Suspended sentences are inchoate sanctions: a term of community supervision is imposed, with the threat of imposition of a harsher sentence in the event of non-compliance. A suspended sentence (accompanied by a period of probation) is an indeterminate punishment, the precise nature of which (within statutory limits) is determined (and imposed) in the event that the offender breaches the terms of probation. The indeterminacy of the sentence to be imposed undermines its efficacy as a sanction; the offender has little or no idea what to expect. Indeed, courts in Canada have been discouraged from identifying in advance the sanction that will be imposed in the event of non-compliance.⁵

The two sanctions are applicable to quite different offender profiles. A suspended sentence was conceived for low risk offenders, convicted of crimes of relatively low seriousness, or serious crimes committed in very exceptional circumstances.⁶ These offenders usually need nothing more than the threat of imprisonment to return to a law-abiding life; indeed many will have been deterred by the process of conviction alone.

Offenders serving terms of community custody, however, are drawn from a much wider spectrum of crime seriousness and criminal history. Whether community custody is appropriate for offenders convicted of the most serious crimes short of murder is very contentious; in most Western jurisdictions the use of this sentence in such cases is likely to provoke widespread public opposition and negative media coverage. This explains in part why some criminal justice systems exclude certain offences from consideration for this kind of sanction. However, as will be discussed later in this volume,

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punishments that appear unacceptable today may become unremarkable within a few years.

The sentence of community custody therefore is conceptually distinct from a suspended sentence. The distinction confers a clear advantage upon this form of imprisonment, as the sanction is therefore applicable to a wider range of cases. Most members of the public (and many criminal justice professionals) regard a suspended sentence as a warning, rather than a sentence *per se*: desist from criminal behaviour, and no sanction will ensue; violate the conditions of the probationary period, and the sentence of imprisonment will be executed. A person on whom a suspended fine was imposed would not be perceived by the public to have been punished, if, after six months the threat of the fine was lifted, leaving the individual with nothing to pay. Suspended sentences, then, are quite limited in their scope of application, and offer little promise in terms of reducing admissions to custody.

Community custody sentences are also to be distinguished from conditional sentences. Under these dispositions, if the offender obeys those conditions, a more severe (yet unknown) punishment is waived. For example, according to the Swedish Penal Code, a conditional sentence may be imposed if a more severe sanction is not needed 'to restrain him from further criminality' (chapter 27, s. 1). The offender is placed on probation for two years, during which time he or she 'shall lead an orderly and law-abiding life, avoid harmful company, and seek to support himself according to his ability' (chapter 27, s. 4). In the event of non-compliance, a number of measures may be invoked, including extending the probationary period and imposing another sanction. In the present penal climate, such a sanction will have only a limited applicability as a substitute for imprisonment; to use the Swedish term, the 'penal value' of the sanction is simply too low. Indeed, the statute appears to recognize this because a conditional sentence may not be given if the gravity of the crime is high.

Sometimes the threatened sentence is made explicit, as when a six-month term of custody is imposed and immediately suspended. In other sentencing regimes, the offender is put on probation and warned that non-compliance will lead to a return to the court at which point some other sanction will be imposed and executed. Community custody is different in the critical respect that the offender is deemed to be serving a term of imprisonment, albeit while remaining in the community. A harsher fate awaits the non-compliant offender, but it consists of a change in the location in which the sentence of custody is served: the offender can be transferred from

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the community to a correctional facility. Offenders who fail to comply with their community custody conditions therefore will enter prison; it is the same journey that prisoners released on parole make – only in the reverse direction.

Finally, community custody needs to be distinguished from a group of sanctions in which the offender is obliged to perform a number of tasks, and is subject to a number of restrictions on his or her liberty, but is not confined to home by means of house arrest or a curfew. For example, in Poland the 1969 Penal Code created a sanction of ‘limited liberty’. This can be imposed for a period of up to two years. A number of conditions apply: among these the offender has to perform community service, make payments out of his or her salary, and is restricted from working in particular occupations (Stando-Kawecka, 2002). Absent the element of confinement (albeit in the community), this sanction cannot be considered a sentence of imprisonment.

Historical use of house arrest

In many jurisdictions, community custody often includes house arrest as a condition. Indeed, some people consider the two to be interchangeable, although they are not. House arrest has been used down the centuries for other purposes, principally to isolate an individual who posed a threat to the ruler or government. For example, England’s King Richard II was confined in this way in Pontefract castle in 1399. The purpose of his confinement was that he ‘should be deprived of all commerce with any of his friends or partisans’ (Hume, 1834, p. 39). Five centuries later, house arrest is still employed by authoritarian governments to isolate (and hence neutralize) dissidents from other like-minded individuals. Imprisonment would not achieve the same degree of isolation, and inevitably generates protests from Western industrialized democracies.

Historically, house arrest has been unprincipled in scope and duration;⁷ it is indeterminate, lasting until the individual dissident recants, or until the regime topples. Community custody, on the other hand, is a penal sanction imposed consistent with specific legal requirements. It is accordingly determinate in length, and principled in nature. Moreover, it is imposed because the individual has offended, not on account of the threat that he allegedly poses to the government. Finally, community custody is inclusive; the purpose is to retain the individuals’ links with society and with their social milieu, albeit under certain restrictions, rather than to isolate them.

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Exclusionary and inclusive penal sanctions

'A universal feature of imprisonment is the way it snatches its participants from everyday life and places them in an abnormal environment, divorced from their routines, and exposed to quite different pressures and imperatives . . . Constructive human reactions and behaviour become more difficult' (Stern, 1998, p. 107). This quote from Vivien Stern captures well the asocial world of prison, to which community custody is a clear alternative. The rise of the prison was a consequence of a movement towards *exclusionary* penal policies that replaced very punitive, indeed brutal, corporal punishments (such as branding) but which kept the offender in the community.

Community custody represents a return to more *inclusive*, communitarian responses to offending: the message to offenders is that they are punished by, but not excluded from, their community. This punishment requires the offender to fulfil certain social obligations common to all members, while simultaneously denying them some, but by no means all of the privileges that membership in the community confers. Prison creates spacial separation between offenders and victims, and between offenders and the communities to which they belong (Stern, 1998). This feature of prison goes back to the period in which it was first used to detain offenders as a punishment. As Bellamy (1973) observes, prisoners in the late middle ages were hidden from society at large. A less destructive kind of separation is also possible by means of carefully constructed sentences of community confinement.

More than this however, community custody attempts to achieve a transformation both in the way that we punish offenders, and the way in which we conceive of imprisonment. In this sense, it represents another step in the evolution of imprisonment, and one that carries as yet unrealized potential to achieve safe and principled reductions in prison populations. It is not the first transformation in the concept of imprisonment, but the latest in a series of evolutionary steps. A person living during the nineteenth century would have found the concept of weekend (or intermittent) custody a novelty: in those days offenders went to prison, and did not emerge until the sentence had been served.

Today, many jurisdictions permit judges to sentence offenders to weekend or periodic terms of imprisonment. It is not just the schedule of imprisonment that has evolved, but the manner in which time is served. Members of the public living earlier in the twentieth century would also have been shocked to learn that many prisoners are allowed to vote, and that some prisons now have trailers in which prisoners may receive conjugal visits, and

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have the benefits of many recreational facilities. The public would have had difficulty in seeing such programs as appropriate to prison because of the bright line that existed in popular imagination between prison and community life.

Community custody strips imprisonment of many of the elements that have caused it to be so destructive: the removal from family and friends, the disruption of professional life, the enforced intimacy with strangers, the loss of employment and its accompanying social status, and the many stigmatizing consequences of penal sequestration. At the same time, if properly conceived, imposed, and administered, community custody sentences can achieve some of the goals of custody (such as denunciation and deterrence) by replicating many of the features of detention: restricted movement, the denial of certain privileges, and the existence of institutional surveillance. These are punitive features of community custody, but this sanction can also include conditions designed to promote the offender's rehabilitation and reintegration into society, as well as restorative goals. If the conditions of community custody are appropriately crafted and enforced, they can help promote desistance from further offending by weakening criminogenic relationships, and strengthening pro-social links. Thus community custody is a sanction that is sufficiently punitive to constitute an acceptable substitute for imprisonment, sufficiently flexible (in duration and with respect to the conditions imposed) to assure proportionality in sentencing, and capable of advancing sentencing objectives that are well beyond the power of prison to promote.

This emerging form of custody also carries considerable dangers, however, which will be explored in this book. In many respects, conditional imprisonment constitutes a penal paradox: the offender is sentenced to imprisonment, yet returns to his home to serve the sentence. Some members of the public will view such a sentence as another *sleight of hand* by the sentencing process. The court imposes one sentence (a term of custody) but the offender serves another (community detention). In a similar way, some people object when a court imposes a life sentence of imprisonment and the offender serves 'only' ten years, or when the court imposes a nine-year sentence and the offender is back in the community after eighteen months.⁸ This has created pressure on legislatures to create 'truth in sentencing' legislation.

The 'top of the head'⁹ reaction of most members of the public in Western nations to parole is negative, at least in the context of violent offenders. Part of this reaction is merely punitive; people see little benefit in mitigating the punishment imposed on such offenders. But from the perspective

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of a layperson, an offender granted release on parole a year or so into a nine-year sentence has at least served some time inside prison; a community custody offender begins and ends (assuming compliance with conditions) the sentence without going near a correctional facility.¹⁰ Community custody carries the potential therefore, to exacerbate the already significant problem of low levels of public confidence in the courts. Recent polls conducted in Britain, Canada and elsewhere have demonstrated that the sentencing process attracts lower performance ratings than any other component of the criminal justice system (see Hough and Roberts, 2004a, for a review).¹¹

Victims, and victims' advocates often approach community custody with considerable scepticism. Many victims come to court with little knowledge of sentencing trends, and expectations that most offenders convicted of a crime of violence spend significant periods in custody. Matters can become much worse for victims when they are allowed, indeed encouraged, to submit their views to the judge about the impact of the crime. Victim impact statement forms sometimes include ambiguous directions that allow the victim to address any other issue that they believe is important for the court to consider.¹² It may come as an unpleasant surprise to the victim when the court rejects the victim's (or prosecutor's) plea to impose a lengthy prison term and instead imposes a term of community custody, permitting the offender to resume living at home. Under the existing adversarial justice system, victims' views should not be determinative of the sentence that should be imposed. If they were, the concepts of state punishment and public wrong would be irreparably harmed. Nevertheless, any sanction that carries the potential to increase the suffering of victims will require careful handling by courts.

Offenders too, might have reasons to be wary of community custody. While being allowed to serve their terms of imprisonment at home rather than in detention must be of benefit to them, there are also dangers. Terms of community custody are often longer than the sentences of imprisonment that they replace. If an offender is ordered to serve a twelve-month community custody sentence instead of, say, six months 'inside' (and subject to parole release), he or she may risk a longer period of detention, if conditions are breached after four months and the court orders him or her to serve the remaining eight months in a correctional institution. The technological devices used to monitor compliance with house arrest can be intrusive and potentially demeaning.

Third-party interests have to be considered. Community confinement carries important consequences for the partner and family members who share