

## **The privatisation of non-custodial measures: an uneasy balance between legitimacy and immediacy**

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### **Abstract**

All developed countries with few exceptions are facing problems related to prison overpopulation and non-custodial measures are marketed as the solution. The public's involvement and endorsement of non-custodial measures is imperative and the success of these measures will depend upon the contribution of the private sector. The private for-profit and non-profit sectors' involvement in this area is not new and unlikely to decrease; however, the public sector must be the one to identify the needs and not fall victim to the courting of the private for-profit sector, which prioritises profit and for who the offender in this context has become a commodity. The non-profit sector can counter the effects of risk management and its plethora of requirements, which are partly responsible for increasing technical violations and obliging probation to take on a more adversarial role. Up until our expectations of probation and offenders in the community become more attainable and reflexive, the non-profit sector can temper the depersonalised and automatic feedback.

The legitimacy of non-custodial measures depends upon them being cost-effective, efficient, socially acceptable and reflexive. This paper focuses on three genres of non-custodial sentences, which are characteristic of retribution, coercive treatment and restorative justice. The use of these in the United States, Canada, England and Wales, Sweden and Spain is briefly overviewed as well as the contribution of the private sector. Non-custodial measures aren't the panacea for all offending in all cultures but surely are a step in the right direction.

### **Key words**

Non-custodial measures; private sector; reflexive; legitimacy.

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**Resumen**

La mayoría de los países desarrollados se enfrentan a problemas relacionados con la sobrepoblación de las cárceles. Las medidas no privativas de libertad se presentan como una solución a este problema. Es necesario que la opinión pública participe y apruebe las medidas no privativas; el éxito de estas medidas dependerá también de la aportación del sector privado. La participación del sector privado, tanto de organizaciones con ánimo de lucro, como sin ánimo de lucro, en esta área no es nueva y es improbable que disminuya; sin embargo, el sector público debe identificar las necesidades sin dejarse influenciar por el sector privado con ánimo de lucro, interesado en obtener un beneficio económico, convirtiendo a los presos en una mercancía. Las organizaciones sin ánimo de lucro pueden contrarrestar los efectos de la gestión de riesgos y sus numerosos requisitos, que son en parte responsables del aumento de los incumplimientos técnicos y de que la libertad condicional asuma un papel contradictorio. Nuestras expectativas sobre la libertad condicional se han cumplido, y los delincuentes son más asequibles y reflexivos en la comunidad; las organizaciones sin ánimo de lucro pueden suavizar las reacciones despersonalizadas y automáticas.

La legitimidad de las medidas no privativas de libertad depende de que sean rentables, eficientes, socialmente aceptables y reflexivas. Este artículo se centra en tres tipos de medidas no privativas de libertad, como son las características de las penas, el tratamiento coercitivo y la justicia retributiva. Se analiza brevemente el uso de estos tres tipos de medidas en Estados Unidos, Canadá, Inglaterra y Gales, Suecia y España, así como la aportación del sector privado. Las medidas no privativas de libertad no son la panacea para todos los delincuentes en todas las culturas, pero son sin duda un paso en la buena dirección.

**Palabras clave**

Medidas no privativas de libertad; sector privado; reflexivo; legitimidad.

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## 1. Introduction

On 14 December 1990, United Nations member states adopted resolution 45/110, the Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules). By doing so, members recognised the need to “promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment” (1.1 Resolution 45/110). These came into force when many developed countries were facing problems related to prison overpopulation, despite drops in non-violent crime rates. In the post ‘nothing works’ era rehabilitation and treatment in prisons had lost credibility and criminal justice systems were scrambling to retain their own. Under these rules, the judiciary disposes of various penalties and post-sentence dispositions, which aim to divert when possible offenders from prison thus reducing prison populations, preventing when possible the harmful effects of incarceration, and reducing costs by allowing employed offenders to remain employed and with their families. But contrary to earlier premonitions, non-custodial<sup>1</sup> measures have had a net-widening effect by extending social control.

The private sector has been involved in this area from the onset. Although it is often presumed that services restricting the freedom of individuals have always been within the public service remit -if not a State function, it certainly isn’t the case. For example, the Californian prison San Quentin was originally built and run in 1852 by a for-profit private entity. Similarly, transportation of convicts was a market created originally and sustained by merchant shippers (Feeley 2002, p. 327). Transportation created a service in which convicts became a commodity. As in both of these cases, many of the requirements discussed in this paper were originally a private commercial trade that became a public service at the beginning of the 20<sup>th</sup> century, only to become once again privatised towards the end of the 90s.<sup>2</sup> In parallel, the private non-profit sector created and sustained certain services, which are now integral parts of our criminal justice systems and a State function such as probation.

This paper presents the front-door strategies i.e. non-custodial punishments used to divert offenders from incarceration in the United States, Canada, England and Wales, Sweden and Spain, and the private sectors involvement in their delivery and provision. The private sector can contribute towards rendering non-custodial sentences more effective, facilitate offenders’ social integration and increase victim satisfaction. Collectively, effectiveness, insertion and satisfaction are what may bring about a change of tide and what may be needed to restore the credibility and legitimacy of non-custodial measures. Nonetheless, the systematic management valued by the for-profit sector, which has been imported by criminal justice systems to demonstrate efficiency such as key performance indicators, have stripped criminal justice and in particular probation of its discretionary and reflexive powers thus undermining ground gained by community involvement. Further, when we discuss cost-effectiveness in this remit, we must be careful to distinguish between short-term indicators valued by the for-profit sector and long-term change, such as when calculating relapses and desistance. Effectiveness, when used in the criminal justice system should not be associated with financial capital gain but social capital, which is perhaps an unfathomable concept for the private for-profit sector. Socially responsible policies ultimately may cost the taxpayer less in the long-term but more at the onset. If not, we are bound to rehabilitation failures based on convenience (Rothman 1980).

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<sup>1</sup> In concordance with Tonry (1995) terms such as non-custodial punishments and alternative sentences in lieu of intermediate sentences confounds the public into thinking that these are but a ‘slap on the wrist’ and not punitive. Nevertheless, non-custodial sentences and punishments are used in this paper so as to minimise cross-jurisdictional confusion.

<sup>2</sup> There are numerous earlier examples in the United States such as detention centres for illegal immigrants and prisons. Although in this regard, the U.S. was an exception, these did set the precedence for later privatization.

Finally, comparative studies in the area of criminal justice are plagued with “technical, conceptual, and linguistic problems posed by the unreliability of statistics, lack of appropriate data, meaning of foreign terms, etc., complications of understanding the differences in other languages, practices, and world views which make it difficult to know whether we are comparing like with the like” (Nelken 2007, pp. 147-148). For instance, in certain countries probation is an order in itself and not a surrogate for a custodial sentence. Similar conclusions were drawn by van Kalmthout and Tak (1988, p. 15) in their study on community services. This led them to warn researchers against the irresponsible transposition of “the experiences of one country on another.” But, they recognised the value of comparative analysis for identifying broader lessons from the operation of sanctions in different jurisdictions (van Kalmthout and Tak 1988, p. 16). It is with this in mind that conclusions are drawn. The term probation is used in this paper to refer to all supervisory services delivered in the community; however, the country itself may not use the term when referring to its service.

## **2. Non-custodial measures**

The Tokyo Rules enumerated twelve possible means through which sentencing authorities could dispose of cases. Greater attention is paid to the most commonly used requirements and to the most promising but underused provisions. The first section focuses on the blatantly retributive strategies. The involvement of the for-profit sector is most evident in this area. This is followed by the second section, which presents coercive rehabilitation programmes. In contrast, the non-profit sector’s specialised providers are now the main contributors in this area and are heavily buttressed by volunteer associations. Finally, the most innovative but underused non-custodial measures are presented. This section presents requirements directed at the restitution and restoration for harm caused. Once again, the non-profit and voluntary sectors contribution as promoters and facilitators was and remains imperative. Each section also discusses how the private sectors’ contributions can facilitate or prevent non-custodial measures from being perceived by the public as viable and legitimate alternatives to custodial sentences.

## **3. Retribution**

During the post-enlightenment period, prisons were championed as more humanitarian than corporal punishment. Similarly, probation and latterly electronic monitoring (EM) have been promoted as cheaper alternatives and to have fewer negative side effects than incarceration. Many studies have now demonstrated that probation hasn’t reduced prison overcrowding or reduced reoffending (Pertersilia, Turner and Petersen 1986). Nevertheless, more restrictive sentences and longer prison sentences haven’t succeeded in decreasing violent offending (Tonry 1997; McIvor 2010). There therefore remains substantial scope to examine alternatives and improvements, as well as to evaluate contributions made by the private sector.

### *3.1. Probation*

Probation is the front-door diversion most commonly used by the judiciaries in the countries discussed. Probation has evolved or involved considerably over the last forty years. It was first used over two hundred years ago and was created and administered by lay members of society e.g. Matthew Davenport Hill and John Augustus. Originally, detainees were placed under the guardianship of a lay person who vouched that the person in question would be law-abiding and attend court appearances (Bonta *et al.* 2008). Once becoming a state-administered service, persons were also expected to attend appointments with a court designated person. Nowadays, probation officers deliver treatment to offenders, write pre-sentence reports, coordinate their work with external providers as case managers as well as meet with offenders. Their change in remit has led them to contract ancillary

service providers. Nonetheless, with the exception of the United States (U.S.) probation has remained a public service (Schloss and Alarid 2007).

As a service it has faced a legitimacy crisis since the 1970s. Tonry (1995, p. 5) believes that in the case of the U.S. this was the outcome of Conservative campaigning and the public's fear of folk devils, a perception that he summarises as "prison counts and only prison." This coincided with the publication of Martinson's (1974) infamous article *What works?*, which discredited treatment in prison settings thus delivering another blow to the credibility of the criminal justice system as a whole (Sechrest, White and Brown 1979). Intensive supervision and the popularisation of risk assessments emerged in this context (Petersilia and Turner 1990).

### 3.1.1. United States

On 31 December 2009, there were 4,203,967 adults on probation in the U.S. (Glaze and Boncar 2010, p. 28). Although the number of probation entries minimally decreased in 2009, the number of exits increased substantially (Glaze and Boncar 2010, p. 28). The drop in entries was due to legislation enacted and court-ordered mandates in certain states such as Washington and California, which forced them to reduce their community supervision population and direct their resources at high-risk offenders. Undoubtedly, probation has taken on a more adversarial role. Certain states now train officers to use firearms and pre-sentence reports play a more important role and guide sentence calculations (Alarid and Del Carmen 2010, p. 148). The social workers of the 1970s are now taking on roles very similar to those held by law enforcement agents.<sup>3</sup>

Florida was the first state to privatise probation in 1975. The Salvation Army Misdemeanour, a division of the non-profit Christian Mission the Salvation Army, was contracted by the state to supervise misdemeanour probationers (Lindquist 1980). By 2007, roughly 10 states were using private agencies to deliver probation services (Schloss and Alarid 2007, p. 233). In most states that have privatised the service, the majority use a private provider to supervise low-risk offenders i.e. misdemeanour offenders but there lacks uniformity in practice. Schloss and Alarid (2007) originally intended to compare state statutes and private probation guidelines but concluded that it would be impossible because the detail in the statutes varied considerably. This led them to recommend that requirements for private probation be standardised.

As aforementioned, in many states probation is now expected to concentrate on high-risk offenders. Intensive supervision probation (ISP) is directed at this category of offenders. In theory, it is a form of supervision that should be imposed in cases involving offenders who in its absence are likely to reoffend (Petersilia and Turner 1990; Caputo 2004; Tonry 1997). When launched, it was promoted by advocates to be a viable alternative to prison that was more than "just a slap on the wrist" (Petersilia, et al. 1985, p. 65). Offenders on ISP can be expected to attend frequent appointments with their designated officer, remain employed, abstain from drug and/or alcohol use, and submit to random testing, pay outstanding debts and remain at a set address. Although many of these requirements still remain within the remit of probation, the introduction of and growing dependency on electronic monitoring (EM) and the bureaucratisation of their work has led the service to be criticised for abandoning its rehabilitative role and for becoming a managerial body (Oldfield and Grimshaw 2010).

ISP is a penalty that exists only in the U.S. Nonetheless, in 2008 the Home Office announced that it would pilot over two years the Intensive Alternative to Custody, a

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<sup>3</sup> In the case of England and Wales, professional training for probation officers no longer included social work training (Annie, Edison and Knight 2008).



new custody order. As in the case of the U.S., it involved consortia of private profit and non-profit sector.

### 3.1.2. England and Wales

Probation service's caseload has gradually increased<sup>4</sup> as a result of the revival of the suspended sentence order (SSO) and the agglomeration and restructuring of the community order (CO) under the *Criminal Justice Act (CJA)* of 2003. The CO and SSO are virtually indistinguishable; however, unlike the CO, the SSO is a suspended sentence and if breached may result in incarceration (Mair and Mills 2009; Oldfield and Grimshaw 2010). The CJA introduced these new sentencing options for Magistrate and Crown Courts claiming that they would allow for both the judiciary and probation to better customise orders so as to reflect the offence, offending behaviour and needs of the offenders.

As in the case of the Tokyo Rules, COs and SSOs can include up to 12 different requirements. In the fourth quarter of 2009, 37% of SSOs included one requirement and 42% had two; whereas, 51% of COs carried one requirement and only 35% two (Ministry of Justice 2010, p. 3). Although the number of requirements attached to orders remained relatively stable between 2005 and 2009, the type of requirement disposed of changed slightly. Supervision remains the most common requirement; however, courts are increasingly likely to include unpaid work as an additional or sole requirement (Mair and Mills 2009, p. 11).

Although the number of offenders beginning a CO or SSO increased in 2009 -as has been the case since the CJA came into force on 4 April 2005, the number under supervision at the end of the year decreased (Solomon and Silvestri 2008, pp. 14-15; Oldfield and Grimshaw 2010). It is suspected that some offenders who would have received a longer CO in the past are now being given a SSO -one example of net-widening (Solomon and Silverstri 2008).<sup>5</sup> Regardless, both are supervised by the National Offender Management Service (NOMS), which now unites the probation and prison services and supervises all offenders serving non-custodial sentences as well as those subject to an Intensive Alternative to Custody Order, and prisoners released on license. The only exception is the stand-alone curfew that is monitored by electronic tag or an attendance centre requirement. The privatisation of services once provided by probation is presently being debated. Most of the requirements are now delivered by the private sector (Meek, Gojkovic and Mills, 2010); however, probation is still responsible for reporting progress, completions and breaches to the sentencing court.

As mentioned, supervision remains the most common requirement attached to an order. The for-profit sector's involvement is increasingly evident in this area. Although probation has and remains a public service heavily buttressed by the voluntary sector<sup>6</sup>, the for-profit sector is gaining ground. Following the enactment of the *Offender Management Act* of 2007, local probation was replaced by Probation Trusts. At the time, Jack Straw, then Minister of Justice, claimed Trusts would have more scope to develop policy at a local level but would compete to retain contestability over services with voluntary and private organisations therefore obliging a public service to adopt managerial methods in order to retain its remit. Services would be tendered using the 'competitive dialogue procedure'. Frequent

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<sup>4</sup> Probation caseload increased by 27% between 2002 and 2008. 26% of these were court orders and 28% were related to pre and post-release work (Oldfield and Grimshaw 2010, p.13).

<sup>5</sup> In 2009, 3% (45,100) of offenders were given an SSO, an increase of 10% from 2008 and 35% from 2005. SSOs allow a custodial sentence of less than 12 months to be suspended for a period of between six months and two years providing the offender completes certain requirements in the community. Comparatively, 14% (195,800) were given a CO - a rise of 3% from 2008 and 29% more than in 1999 (Ministry of Justice 2010).

<sup>6</sup> The Society of Voluntary Associations (SOVA) was created in 1975 by a group of volunteers working in the London area with probation. It offers support, training and promotes best practices to volunteers working with offenders (van Kalmthout and Durnescu 2008).

flyers, Serco, Kalyx and com:pact –a joint venture between Mitie and A4E were shortlisted (Ministry of Justice 2011a).

As aforementioned, the closest equivalent in England and Wales to the ISP is Intensive Alternative to Custody Order (IACO). The IACO was first piloted in 2008 in seven probation areas. The Greater Manchester Probation Trust contracted the services of Work Solutions, Partners of Prisons and Group4Securicor to deliver related ancillary services. Work Solutions is part of the Economic Solutions Group, a non-profit organisation with an annual turnover of £53m. Group4Securicor is the leading security company in England and Wales. The pilot has therefore involved a heterogeneous mix of service providers. Consortia between organisations and/or corporations allow for smaller non-profit organisations that perhaps lack the financial backing, business and bureaucratic acumen of larger for-profit corporations to bid for large scale tenders; however, concerns exist regarding whether non-profit organisations and for-profit corporations are ideal companions in particular, the unequal distribution of profits to cover costs between larger and smaller agencies and problems relating to integrity (Meek, Gojkovic and Mills, 2010, p. 13). It is questionable as to whether local non-profit organisations that are rich in local knowledge and perhaps legitimacy will be able to hold their own when strategies are negotiated with larger corporations. Nonetheless, this can arise regardless of whether the larger entity is for-profit or not.

### 3.1.3. Canada

In 2010, probation was the most common sentence handed down by Crown Courts. In 2008/2009, a probation sentence was handed down in 45% of all convictions whereas a custodial sentence was imposed in 34%. Of these, only 4% received a conditional sentence and only 3% included a restitution requirement (Thomas 2010, pp. 5, 8). Thomas (2010) found proportions to have fluctuated minimally over recent years.

In Canada, probation is a judicial function and a provincial responsibility. Although sentences are based on a common Criminal Code, they can be administered differently dependent upon the jurisdiction (Calverley and Beattie 2004). In 2004, probation, unpaid work and conditional sentences were available in all jurisdictions; however, not all non-custodial requirements were. With the introduction of conditional sentences on 3 September 1996, sentenced custody admissions decreased (Hendrick, Martin and Greenberg 2003).<sup>7</sup> In parallel, probation's caseload increased. The conditional sentence is the closest equivalent to the ISP and IACO. When introduced, the legislature clearly stated that the sentence was created with diversion in mind and in response to prison overpopulation. Further it should be more onerous than probation and those serving a conditional sentence should be subjected to more intensive supervision. The legitimacy of the sentence and its overseers would appear to be lacking given that only 4% of those convicted received the sentence in 2008/2009.

Non-profit organisations have been contracted by certain provinces to provide ancillary offending related programmes as well as to monitor offenders on EM and on conditional release; however, probation officers are expected to draft reports, open and close cases and lay administrative charges for breaches. The Howard League and the Salvation Army are the only two private organisations to have been awarded contracts to supervise offenders on probation; however, the current Prime Minister, Stephen Harper, has expressed a desire to expand privatisation in the area of criminal justice but has yet to make any direct references to probation.

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<sup>7</sup> Although originally brought in as an amendment to the Criminal Code of Canada, it was amended shortly following the enactment of Bill C-51 on 31 July 1999. On 6 August 2009, the Conservative government presented a bill which further restricted the use of conditional sentences by reducing the list of offences for which this sentence can be used (MacKay 2009). Obviously, this may come to annual gains made though the introduction of the conditional sentence, which had led to drop in admissions.



#### 3.1.4. Sweden

Swedish probation is somewhat of a 'framework penalty' and has numerous different combinations (Lappi-Seppälä 2007). Probation can be combined with a fine, a short prison sentence, unpaid work or a treatment contract. In 2009, 7 881 offenders were imposed a probation sentence. Of these, 1 390 included contract treatment and 1 466 community service (Swedish Prison and Probation Service/Kriminalvården 2010). There are 30 independent supervision boards. These are made up of an experienced judge and individuals drawn from members of parliament, charitable organisations, unions etc., and are appointed by the municipalities. Their main task is to manage violations of conditions and can go so far as to recommend that probation be revoked. Over half of offenders on probation are supervised by a probation officer. Probation officers are volunteers who support and motivate offenders to comply and meet the requirements for whom "...a connection to the client's environment and interests are required" (Ibid., 2010, p. 13). The remainder are overseen by non-custodial care officers. On 31 December 2009, 1 009 senior and qualified probation staff, and 146 unqualified probation staff were employed by the Swedish Prison and Probation Service.<sup>8</sup> Of these, 960 were probation officers (SPACE II 2011, P.60).

Sweden introduced electronic monitoring in 1994 being one of the first European countries to use it for front door, back door i.e. post-custodial and prison schemes (Wennerberg and Pinto 2009). Intensive supervision is also available for those sentenced to up to 6 months of custody, a term that can be served at their home whilst on EM. Only offenders working or attending treatment or education are eligible (Swedish Prison and Probation Service/Kriminalvården 2010, p. 13).

#### 3.1.5. Spain

Probation does not exist in Spain; however, there exists three types of non-custodial sentences: unpaid work, suspended sentences and security measures. Non-custodial sentences are technically referred to as alternative measure sentences and fall under the remit of alternative sentence supervision coordinators. The Vice-Directorate of Territorial Coordination (VDTC) coordinates ancillary services; oversees institutional collaboration projects; manages and supervises community sentences; oversees the execution of suspended sentences and supervises those on EM. Finally, it drafts reports for the various judicial authorities. In short, it is a closest Spanish equivalent to probation. On 31 December 1999, Spain reported having 650 'qualified' staff i.e. chiefs of units, social workers and temporary psychologists, and 151 'unqualified' staff i.e. generic workers employed to oversee all community sentences (SPACE II 2011, p. 60). On the same date, 185,476 persons were serving a community sentence of which, 161,008 were completing community service. Of these, 122,366 were convicted for a road safety offence (Ministerio del Interior *online*). Far fewer, 20,718 had received a suspended sentence.

#### 3.1.6. Basque Autonomous Community

The Spanish Federal Local and Provincial Administration (SFLPA) is responsible for coordinating the local administration of alternative measures (van Kalmthout and Durnescu 2008). The Reinsertion Assistance Service (Servicio de Asistencia a la Reinserción (SAER)) is the public agency within the Justice Department in the Basque Autonomous Community (BAC) responsible for writing reports on convicts serving non-custodial sentences and overseeing their compliance with sentencing requirements. The reports are based on the information received from the ancillary service private treatment providers. The SAER is also responsible for designing offenders' individual plans for social reinsertion (SAER Memoria 2008).

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<sup>8</sup> The total of qualified and unqualified staff represents 12.5 staff per 100,000 population.

Up until the enactment of Royal Decree 515/2005 of 6 May<sup>9</sup> on Community Services, tribunals and technical teams in the BAC had worked with familiar NGOs, non-profit organisations and foundations to provide the majority of offending related programmes in the community for those serving non-custodial sentences. The BAC has latterly opted to enact covenants with private agencies to oversee the completion of sentence requirements and now intends to formalise these ties so as to offer stability and ensure availability (Roberto Moreno. Interviewed by author, 2 June 2011). EM is managed regionally, which will undoubtedly diversify the BAC's portfolio; however, contracts are bid and administered at a state level.

The EM market has rapidly expanded and transformed probation's work. It is not a new technology *per se* but has slowly but surely become increasingly popular and the judiciary in all of the jurisdictions have expressed when interviewed or via their sentencing practices that they now consider it a legitimate strategy. EM's popularity is growing among politicians in Europe – presumably due to its high profile as a means to protect the public.

### 3.2. *Electronic monitoring*

At present, there exists partnerships between public, private for-profit and non-profit organisations, and voluntary associations, which is certainly not a new phenomenon and in certain cases are indispensable; however, the private for-profit sector's involvement in the production, development, provision, and servicing in the EM market is mindboggling and much can be learnt from this experience.

Electronic monitoring has evolved considerably. Most now include global positioning systems (GPS) and some states in the U.S. and Swedish regions now use devices that can also provide voice recognition, remote alcohol and/or drug detection, biometric analysis and kiosk reporting. The majority of these tasks were originally carried out by a person working for probation. Kiosk reporting in particular has considerably lightened their workload and in theory should allow for probation officers in the U.S. to focus on high-risk offenders (DeMichele and Payne 2005). The offender is recognised by their thumb print and can report their progress and provide information without having to report in person to their probation officer.

The EM device was created in the U.S. As of the early nineties it became an integral part of their criminal justice system and is now used to supervise the compliance of individuals on bail, probation, parole, house arrest, and exclusion and restriction orders (DeMichele and Payne 2005, p. 19; Gowan 2000). Drake (2009) estimated that close to 44,000 GPS units were in use in 2009, which does not include those that solely rely on a radio frequency. Over half of which were in Texas, Florida and California.

Similarly, England and Wales was the first European jurisdiction to pilot EM in 1989 and to officially recognise it as a formal surveillance instrument under the *Criminal Justice Act 1991*. Although direct supervision by probation is on the decline, indirect EM monitoring is on the rise. EM is now used at various stages in criminal cases: as a condition on bail, as a sentence of the court (curfew orders), and as a condition of early release from prison under the Home Detention Curfew scheme. In 1998, contracts were awarded to three companies to supply and install the equipment, monitor offenders and to notify relevant authorities of violations (National Audit Office 2006).

In Sweden, EM was first made available on a national scale in 1994 and is now a standard tool under the Swedish Penal Code (*Law on Intensive Supervision by means of Electronic Monitoring 1994:451*). It is not the sentencing court that

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<sup>9</sup> This law was reformed through the enactment of Royal Decree 1849/2009 of 4 December. In the law's preamble, the legislature argued that the law needed to be reformed because it had not been fully effective due to a lack of opportunities for offenders. Although, the Autonomous Communities were best equipped to provide local projects for unpaid work, they had not been meeting this remit.

decides on the use of EM but the regional correctional authorities. Offenders who receive a custodial sentence of less than six months are eligible. In 2008, 9% of offenders on EM had their sentence revoked, the majority of which were as a result of a relapse into drug or alcohol use (Wennerberg and Pinto 2009, p. 12; Lappi-Seppälä 2007, p. 48). Decisions to revoke orders are taken by a Judicial Board. In 2009, 26% of offenders on EM were reconvicted; whereas, 38% of a comparable group not on EM were (Marklund and Holmberg 2009). Unlike Spain, EM is not to be used as a form of house arrest. A study completed by BRÅ in 1999 reported that supervision at the workplace was dissatisfactory as was the reporting of the contact person. The now widespread use of EM with GPS may have resolved these issues; however, not the concerns regarding the variations of random monitoring completed between districts.

In comparison, offenders on EM in Spain must remain at their residence or a designated location set by the sentencing judge (Art. 37). For all intent and purpose, it is home confinement; however, it is increasingly used in cases of domestic abuse to ensure compliance with exclusion orders and/or restraining orders and in such cases is considered 'bilateral' EM. March 2007, 2,788 offenders were supervised on EM in Spain and 3,364 were in Sweden (SPACE II 2010, p. 22). Given the difference in their population sizes, this is demonstrative of Sweden's endorsement of this form of supervision and perhaps Spain's use of EM for only minor offences and on average for up to 1 month (Wennerberg and Pinto 2009). Although EM was introduced as a sentencing alternative in Spain and Catalonia as of 2000 for front door and back door<sup>10</sup> schemes, it was only made available in certain autonomous communities recently. As aforementioned, this is a profitable and growing market. Unsurprisingly, the for-profit sector is one the key stakeholders.

### *3.3. Privatisation of surveillance: credibility and legitimacy restrictions and amplifiers*

Probation has been criticised for having been reduced to risk management (Howard League for Penal Reform 2011, p. 12). Intensive supervision, risk assessments and EM are examples of progressive extensions to this mindset. Further, at this point in time, evidence indicates that sentencers are not using non-custodial sanctions as viable alternatives to short-term custodial sentences. They are being used to substitute community orders and therefore do not divert those who would have gone to prison otherwise.

That said, in order for probation and intermediate sentences such as ISPs and IAOCs to regain or retain credibility and therefore legitimacy, they must be perceived to be effective i.e. reduce reoffending, cost-effective and socially acceptable. As far as the judicial agents are concerned they should also strive to be proportionate, equal and the penultimate resort with custody as the last resort. Although these are three legal principles, the public highly values proportionality i.e. just-deserts in sentencing (Doob 2000; Roberts 2003). In accordance with Robinson and Ugwudike (2012), a more responsive and flexible use of probation will make them more effective and therefore legitimate. Moreover, those who complete their sentence are less likely to reoffend (May and Waldwell 2001; Harden and Millie 2001).

Although dated, various studies completed in Anglo-Saxon jurisdictions found restoration to the community to be perceived by members of the public as more effective at reducing reoffending than EM (Wright 1989; Angus Reid Group 1997; Flanagan 1996). In comparison, two-thirds of victims interviewed in Sweden reported viewing EM positively and only a minority viewed it as too lenient (Lappi-Seppälä 2007, p. 47). It cannot be denied that the private for-profit sector invests

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<sup>10</sup> Post-custodial schemes such as early release.

in research and development, and this is particularly evident in the area of electronic monitoring. But, what has this market served? In this respect, EM is a good example of entrepreneurial innovation, having created "new institutions that dramatically extend the reach of the criminal sanction.... who promote 'alternatives' that in fact expand the reach of the criminal sanction" (Feeley 2002, p. 334). The EM market has grown exponentially and in the case of England and Wales has "acquired a momentum" (Nellis 2003, p. 245). Earlier radio-frequency monitoring has now been replaced in most jurisdictions discussed by GPS and voice recognition. The use of EM kiosks and impersonal substance use testing completed at these has further mechanized surveillance and risk management. This led Bridges, Bloomfield and Flanagan (2008, p. 2) to conclude that probation and EM may be "meeting the contract but missing the point."

Electronic monitoring has been demonstrated to be effective at supervising the offenders movements; however, it has not been shown to contribute towards minimising other factors such as negative associations, substance abuse and psychological dispositions (Olatu, Beaupré and Verbrugge 2009, p. 26; National Audit Office 2006); however, the structure offered by EM may increase the likelihood that offenders will comply with their curfew orders and reduce their consumption of drugs and/or alcohol by reducing their opportunities to violate their conditions by remaining at home at set times (National Audit Office 2006, p. 24). Further, studies have reported high success programme completion rates for offenders on EM (Boelens Jonsson and Whitfield 2003; Bonta, Wallace-Capretta and Rooney 2000a; Jarred 2000; Finn and Muirhead-Steves 2002); however EM in itself was not concluded to be responsible for desistance from offending but rather the programmes completed whilst on it (Bonta, Rooney and Wallace-Capretta 2000a). Granted, if the offender can remain in the community, maintain ties with family members, work and complete treatment programmes, they are more likely to reintegrate successfully in their community (Black and Smith 2003; JHSA 2006); however, to what degree is it EM and not social ties that are responsible for the reintegration of the offender?

Cullen and Gendreau's (2000) meta-analysis of existing research on ISPs indicated that they actually increased reoffending; however, this may be due to the many inflexible requirements and the use of EM, which increase the probability of technical violations e.g. detection of drug or alcohol use. Technical violations have increased but reoffending hasn't for those on probation or under intensive surveillance (Petersilia and Turner 1990).<sup>11</sup> Inflexible enforcement of breaches does not reduce reoffending; however, action taken to encourage their compliance and completion does (May and Wadwell 2001). This is where members of the community as volunteers or probation officers in the case of Sweden can soften the automatic turn that probation has taken and EM's lack of discretion, and perhaps increase completions and insertion. In this respect, "*enabling supervision to be more relationally engaging, more respectful of the offender's active role in (and ownership of) the change process, more helpful in tackling practical problems and more fair in its administration, is most likely to yield better outcomes*" (McNeill and Weaver 2010, p. 12).

At this point in time, its efficacy is inconclusive. Its ability to prevent future offending has not been demonstrated, which has led certain researchers to conclude that it should be selectively imposed and not used as a generic requirement (Gibbs and King 2003). This also led Florida's Office of Program Policy Analysis and Government Accountability (2005) to recommend that it only be used with dangerous habitual and sexual offenders; however, the equipment is now widely available and is a condition for certain requirements such as in the case of exclusion orders, curfews and early release. Regardless of where audited, EM has

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<sup>11</sup> In contrast, Aebi and Linde (2010) argue that although property and homicide have decreased, violent and drug offences have risen in Western Europe.

been shown to be more cost effective than custody, but do all of the offenders imposed EM require it or is it also imposed unnecessarily on those judged to be a low risk thus widening the penal net by increasing the probability of technical violations that had little to do with their offending behaviour in the first place?

As shown, privatisation of surveillance has occurred to one degree or another in all of the jurisdictions presented. At its most extreme is the U.S., which has not only privatised all aspects related to EM but also probation in certain states. England and Wales are not far behind. Although risk assessments, reports and the enforcement of revocations are still carried out by NOMS, which is on the cusp of privatisation and is being pressurized to take on the ethos and rules of the for-profit sector, it is the private for-profit sector that supplies and installs electronic surveillance equipment and monitors compliance. Similarly, the Canadian government has established public-private partnerships with various companies to supply EM equipment, monitor compliance and report breaches (JHSO 2007). In the case of Spain and Catalonia, the equipment is supplied and installed by the private for-profit sector but is monitored by the prison service; whereas in Sweden, the equipment is supplied, installed and monitored by the State (Wennerberg and Pinto 2009). Finally, in certain jurisdictions such as England and Wales, the same companies responsible for supplying and monitoring equipment also run private prisons e.g. Serco, G4S, which is a conflict of interest (Public Services International Research Unit 2006; Drake 2009). In short, traditional probation has been overshadowed by intermediate sanctions such as intensive supervision and technologies such as EM. Neither has been demonstrated to encourage desistance. Further, based on the few studies completed, intensive supervision is not highly valued by the public. If ISP increases reoffending, it is questionable if it is really cost-effective.

It is worth examining whether the supervision provided by EM, which encourages programme completion, can be provided by lay persons and a probation service that is more reflexive and personal. The involvement of lay persons and non-profit organisations to provide local support and to facilitate the insertion of offenders and more reflexive probation will not prevent all future offending but is more promising than mechanised law enforcement, which has not been shown to be effective or cost-effective. It is worth noting the low revoke rates of offenders with lay probation officers in Sweden on EM. Nonetheless, Bonta, Rooney and Wallace-Capretta (1999) and proponents of the risk-need-responsivity model still argue that it is appropriate treatment that reduce reoffending.

#### **4. Drug courts and coercive treatment**

Drug Courts and treatment are argued to be a more holistic approach combining punitive and therapeutic approaches. Under Article 3, paragraph 4 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, members agreed to provide drug treatment, aftercare, rehabilitation or social rehabilitation as an alternative or in addition to indictment or punishment. Ten years later and with more experience, signatories of the UN Declaration on the *Guiding Principles of Drug Demand Reduction* (resolution S-20/3) committed themselves to develop within their respective criminal justice system "appropriate capacities for assisting drugs abusers with education, treatment and rehabilitation services." The Declaration also recognised that this would require "close cooperation between the criminal justice, health and social systems." Drug courts are in part an outcome of latter conclusion (Mitchell *et al.* 2012). Holloway, Bennett and Farrington's (2008, p. 6) meta-analysis on treatment programmes, criminal behaviour and drug use indicated the "two most effective programmes measured by the meta-analysis were therapeutic communities and supervision."



Drug courts now exist in the U.S., Canada, and England and Wales. The first drug court was established in Miami-Dade, Florida in 1989, as a diversion programme for drug offenders and was in response to the threatened loss of federal funding due to the state's prison overpopulation (Gottfredson and Exum 2002). Having concluded that a sizeable proportion of its prison population were convicted for offences attributable to their drug abuse, drug courts were introduced to steer those with problematic drug or alcohol use towards treatment in lieu of the traditional adversarial system and prisons (Weekes et al. 2007). Unlike other non-custodial measures launched in the U.S. which have subsequently been abandoned or fallen into disuse, drug courts have proliferated. On 30 June 2010, 2 559 drug courts were operating in the U.S. (NADCPa *online*). These predominantly divert low-level and first time offenders. Some states focus on first-time offenders, whereas others target repeat offenders. Further, offenders with current or past violent convictions cannot have their cases diverted to a drug court that receives financial funding. Drug courts in the U.S. function within two systems, the juridical and therapeutic. The therapeutic system is highly dependent upon the quantity and quality of local service providers. Consequently, their quality varies.

Canada's first drug treatment court was established in Toronto in 1998. Six more have since been erected (Werb et al. 2007). As in other areas, drug treatment courts in Canada involve a multi-agency approach and include a statutory health agency alongside the criminal justice system i.e. courts and the police, and community based organisations (Caledon Institute of Social Policy 2001). For example, the John Howard Society provides housing to participants.

Since 2004, six Dedicated Drug Courts (DDC) have been created in England and Wales. DDCs can impose sentences including one or a combination of the twelve requirements available to Magistrate Courts for COs and SSOs. Once again, multiple agencies are involved in the process. When assessed, DDCs were found to facilitate partnership working between the court, probation, the designated treatment agency and the police, and to be viewed positively by offenders and staff (Kerr et al. 2011, pp. 6, 16).

Sweden and Spain have not created a special legal jurisdiction to try persons accused for a drug related offences. Mandatory drug and alcohol treatment has existed in Sweden since 1982 and contract treatment is but one of the sentencing alternatives in their highly structured sentencing system (Boekhout van Solinge 1997). A special treatment plan is used in combination with a probation order and is voluntary i.e. consent or go to prison. Treatment can be offered in a residential setting or by an outpatient provider. If a court finds compulsory residential treatment to be a viable alternative, it can request that the social welfare board assess and rule on the case. They are responsible for overseeing and implementing the court's decision. Nevertheless, treatment is delivered by public institutions as well as private and non-governmental organisations (European Centre for Drugs and Drug Addiction 2011). Sweden's drug policy is first and foremost directed at preventing initiation (Holloway, Bennett and Farrington 2008). Unsurprisingly, 24% of persons sentenced to prison were condemned for drugs or goods trafficking in 2009 (Swedish Prison and Probation Service/Kriminalvården 2010, p. 16).

Custodial sentences can also be suspended in Spain if the court concludes that the offending is drug related and the corresponding custodial sentence is less than 5 years (Art. 87 Spanish Criminal Code). The offender's dependency must be confirmed by a medical examiner who can be a private practitioner. Further, a public or duly accredited private centre must certify that the offender has either completed the treatment programme or is receiving treatment. Although drug treatment is coordinated at a national level under the Government's Delegation for the National Plan on Drugs within the Ministry of Health and Consumers Affairs, Autonomous Communities also have their own drug treatment strategies overseen by a regional drug treatment coordinator. For example, six associations, non-



governmental associations and social organisations received grants from the State in 2009 to supervise and administer non-custodial sentences involving drug treatment (BOE 16 November 2009); however, courts take recourse to many more public and regionally financed private service providers. In 2005, tribunals in the BAC diverted offenders to at least 46 different treatment programmes. This figure includes private and public residential centres in and outside of the BAC e.g. Etorkintza, Proyecto Hombre, Jotad, as well as statutory healthcare services (Observatorio Vasco de Drogodependencias 2009). In 2008, 1 908 offenders received a non-custodial sentence in the BAC. Of these, 1 318 were for drug related offences and 1 261 received a suspended sentence (SAER Memoria 2008).

#### 4.1. *Therapeutic reflexive communitarian alternatives*

In order for the courts to “provide a net economic benefit to society” and to recuperate costs stemming from the transition to and the running of drug courts as well as those related to reduced drug use, the criminal justice sector and the public i.e. health care, victimisation etc., 8 to 14% of offenders would have to remain abstinent for at least 5 years (Matrix Knowledge Group 2006, p. vii). Drug courts are now used in many countries in Europe, North and South America etc. On the whole, they have been found to produce significant economic, social and individual benefits (Walker 2001). Turner et al.’s (2002) controlled study on a drug court in Maricopa, Arizona statistically significantly demonstrated a drop in recidivism for participants. In contrast, studies completed in the U.S. and Canada are less optimistic (US General Accountability Office 2005; Werb *et al.* 2007).

At this point in time, little conclusive evidence exists demonstrating that coercive drug treatment and drug courts reduce long-term reoffending (Mugford and Weekes 2006; Mitchell *et al.* 2012). The evidence indicates that offenders condemned of drug related offending who attend court mandated drug treatment commit fewer offences, in particular acquisitive crimes whilst in treatment (Gottfredson, Najaka and Kearley 2003, pp. 188-89); however, the evidence is less conclusive for periods after treatment completion. Nor is it clear what exactly has led to the desistance or reduction i.e. coercion, counselling, substitute prescriptions etc. (Miller 2009); however, this may be due to relapses into drug use and that drug use for some offenders is not the primary cause of crime.

“A realistic starting point... is that relapses happen” (Lappi-Seppälä 2007, p. 39). Regular drug testing was introduced in the 1980s for those released on bail or probation. As in the case of intensive supervision and EM, recalls for technical violations such as drug use have grown exponentially.<sup>12</sup> When interviewed, offenders receiving mandated treatment reported contrasting perceptions of drug testing as well as drug services and probation workers aims (McSweeney, Stevens and Turnbull 2008). Some found drug testing motivational whereas others questioned if it accurately assessed progress made. We have now come to accept that offending behaviour is not a static condition but dynamic and yet through the introduction of elements such as EM and systematic testing, probation has become more automatic (Feeley 2002). The lack of responsiveness and unrealistic expectations increase the likelihood of failure, which undermines the credibility of drug treatment as a viable non-custodial sanction.

The European Union and the European Monitoring Centre on Drugs and Drug Addiction (European Centre for Drugs and Drug Addiction 2012) recently created the ‘Best practice portal’ in response to the EU drug action plan (2009-2012) as well as to improve the quality and effectiveness of related activities, which includes treatment. Similarly, the European Association for the Treatment of Addiction has produced a programme accreditation scheme. The Swedish Prison and Probation

<sup>12</sup> Between June 1995 and January 2009, imprisonment for breach of non-custodial sentences increased by 470% (Ministry of Justice, 2009).

Service (Kriminalvården) introduced a similar programme review as well as an accreditation process. England and Wales use two quality standards that are also used when commissioning: the Quality in Alcohol and Drug Standards (QuADS) and the drugs and alcohol national occupational standards (DANOS). The latter was introduced to ensure treatment providers were competent and to introduce a qualification framework for national competency benchmarks (National Treatment Agency 2003). Although there has been an effort to standardise interventions, when reviewed, researchers continue to report a lack of uniformity.

That said, the successful functioning of mandated drug interventions depends on the criminal justice's ability to cooperate with external treatment providers. Whether imposed by a drug court or not, a holistic approach increases the likelihood of engagement with treatment and improves the chances of successful completion of treatment, which increases the likelihood of lesser drug use and related offending (Matrix Knowledge Group 2006; United Nations 1999, p. 13). Although dated, Lightfoot *et al.* (1982) found substance abusers receiving case management to have had better community outcomes than a control and in particular, those who lacked social support and had unsuccessfully attended treatment in the past. In this case, the private sector – predominantly non-profit organisations (Meek, Gojkovic and Mills 2010), provides not only treatment but also support, which given probation officers growing caseload may be scarce. Unfortunately, due to sometimes conflicting interpretations and remits, information sharing between the agents involved can be difficult. For instance, treatment providers may value and be more attuned to an offender's motivation, and have a more reflexive response. The probation officer has been stripped of this discretion due to strict and inflexible requirements (Mair and Mills 2009, p. 26).

In line with the conclusions drawn by Doob and Marinos (1999) in their study on conditional sentences in Canada and Hough and Roberts' (1999) in their study on public opinion on sentencers in England, an informed public is key to gaining public support and also serves to counter inaccurate media portrayals. The same organisations that offer treatment to offenders are also the best equipped to train and inform probation services and the public. With the exception of Sweden, the contribution of the voluntary sector is limited in this area; however, volunteers can buttress treatment services provided by specialised non-profit organisations and statutory health agencies. They can facilitate the insertion of participants and have the potential to provide social capital for a group of offenders who may have become socially marginalised and have depleted social networks due to their chaotic lifestyles (Bottoms 2003; Roe *et al.* 2010, p. 1976).

Undoubtedly, drug use is heavily morally burdened. There are those who advocate prohibitionism and abstinence; whereas others at the other polar extreme support the decriminalisation of all narcotics. Educating the public may not change their moral stance; however it may humanise the drug dependent. Members of the public may come to accept that prison has been repeatedly demonstrated not to increase the likelihood of recovery and that it is in their interest that drug misuse be effectively dealt with. Further, most drug dependents are socially marginalised. Either through direct contact or through the use of user narratives the public's attitudes and stereotypes may be minimised and may become more inclusive (McNeill and Weaver 2010). In this respect, the involvement of volunteers and non-adversarial non-profit organisations to assist drug offenders whether through treatment and/or support is imperative.

In 1999, the United Nations promoted the use of performance indicators to evaluate whether programmes worked or not, and if so, for who. They recommended that the following indicators be included: reduced drug abuse on behalf of the offender and, the improved general health and quality of life of the offender such as employment and stable accommodations. With the exception of employment and accommodations, these are qualitative variables that require a

margin of discretion and flexibility. It is questionable whether the key performance indicators used by the for-profit sector can validly assess qualitative progress; however, as in the case of support and training, the non-profit sector is the best equipped on a local level to help the offender develop what Braithwaite (2002) referred to as a micro-community i.e. 'social capital', which can help improve their quality of life and general health.

Offenders value specialist drug workers knowledge and understanding (Mair and Mills 2009). They are perceived as more approachable, less adversarial and trustworthy due to their independence from the criminal justice system (Meek, Gojkovic and Mills 2010). Many of these traits are shared by restorative justice schemes. The following section will discuss some of the present strengths and weaknesses of restorative justice practices, which are grounded on community involvement.

## 5. Restitution and restoration

This is a quickly evolving area. Fines are not a new sanction, unpaid work as a form of community compensation has now been in place for over forty years and penal mediation has been used since the 80s. The latter has evolved considerably, which is mainly due to the emergence of the victim in criminal proceedings. This section presents the various forms of restitution presently being used and concludes with a brief comment on the new avenues that have opened up over the last fifteen years.

Fines and unpaid work are presented together given that the emergence of unpaid work as a sentence was in response to the shortcomings of fines. Non-profit agencies were and continue to be the protagonists of changes occurring in this area.

### 5.1. Restitution: fines and unpaid work

Once again, fines are a non-custodial sentence that for all intent and purpose has gone into disuse in the U.S. (Tonry 1997). Under federal sentencing guidelines they cannot be used as a sole penalty and can only be used as a condition of probation. Nevertheless, many states' own sentencing guideline do. Following the successful pilot of day-fines in the Staten Islands, New York by the Vera Institute of Justice, similar pilots were rolled out in other states; however, Arizona is the only state presently using them (Vera Institute of Justice 1996; Tonry 1997).

Fines and/or restitution can be levied in Canada. In addition, there exists a victim fine surcharge, which is a charge of up to 15% in addition to the fine.<sup>13</sup> When used as a sentence and unpaid, the offender can be immediately re-arrested<sup>14</sup>; however, if used as part of a probation order the offender can enter the fine option programme i.e. unpaid work.

In contrast to the U.S., fines were the most common order used in England and Wales in 2009 having increased by 6% over the previous year. 94% were handed down for summary offences and nearly all were handed down by a Magistrate court. Drug offences were the most common indictable offence for which fines were used. Although far less common than treatment and exclusion orders for summary offences, the use of fines for indictable offences has steadily increased since 2005. The use of the SSO as of 2005 is argued to be largely responsible for this increase (Ministry of Justice 2010).

Unpaid work is one of the oldest community sentencing options and dates back to the 1960s in Alameda County, California. It allowed for low-income traffic offenders

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<sup>13</sup> A similar fine exists in Sweden however it is a fee paid by employed offenders on EM (§ 5 Lag (1994, p. 451) om intensivövervakning med elektronisk kontroll [Law on intensive supervision by means of electronic monitoring]); Von Hofer 2001, p.309).

<sup>14</sup> Only if the judge includes a default order when sentencing.

who were unable to pay their fine to work it off (Tonry and Lynch 1995). The California project was promoted as a sentence option that was inexpensive to administer, profitable and met with wide-spread support. Similarly, in the mid-1960s, Canada's Corrections Branch concluded that a high proportion of males admitted to provincial correctional centres were there due to their inability to pay their fines. Further, in certain provinces it had become apparent that this group consisted predominantly of First Nations (Heath 1979). In an effort to eliminate 'prison for debt', the Fine Option Programme was created. Under this programme an individual can work their fine off through unpaid work that is performed at a non-profit, charitable community-based organisation. Unpaid work is now one of the most commonly used requirements for both COs and SSOs in England and Wales (Mair and Mills 2009, p. 11). It was first introduced in England at the beginning of the 1970s and is the product of the Wooton Report on cannabis and LSD use. In contrast, unpaid work is now "the most underused intermediate sanction in the United States" (Tonry 1997, p. 11).

As in the case of Canada, most unpaid work in Sweden is undertaken for a non-profit organisation. Probation in combination with an unpaid work order was made available experimentally in 1993 and became a permanent feature of the Swedish system as of 1999. In 1999, changes were introduced making unpaid work more retributive. These changes amended the calculating rules and raised the minimum length of the day. In 2005, unpaid work and conditional sentences were the second most common combination for a non-custodial sanction (35%) (Lappi-Seppälä 2007, p. 27). In 2007, men condemned for a violent crime were the most common recipient of a community work order (1 722); whereas, women convicted of a drunk driving offence were (147) (Swedish Prison and Probation Service /Kriminalvården 2009). In 2009, 1 466 offenders were sentenced to a community work order. In addition, 4 259 were on conditional release with a requirement to complete unpaid work, which are supervised by either a supervising probation officer in the capacity of a layman or by a non-custodial care officer. The former is a volunteer whose remit is to support, steer and motivate the offender not to reoffend or relapse into drug use (Ibid., 2010).

Similarly, unpaid work is a common sanction for persons condemned of a motoring offence and 'non-serious' forms of family violence in Spain. Both were previously administrative offences (McIvor *et al.* 2010). Up until the enactment of Royal Decree 1849/2009 of 4 December, problems related to its delayed implementation in certain autonomous communities, long waiting lists and the potential for a sizeable number of orders to expire without having been executed attracted criticism from Spanish judges thus minimising the credibility of this requirement. Under this decision, municipalities are now responsible for providing and overseeing unpaid work undertaken by their residents. Municipalities must now present monthly reports to their local Prison Administration stating the number of projects available as well as the outcome of completed projects.

Given the original motive for incorporating fines in the criminal justice system, it should come as no surprise that the solvency of the offender is now taken into consideration when fines are set in all of the countries discussed. In the case of Sweden, the daily rate should reflect roughly half of the offender's daily earnings. A handbook is used by officials, police, prosecutor and courts to calculate the exact rate (Sveri 1998). Fines and unpaid work can be imposed as part of sentence and can be an agreed outcome of mediation. If a mediated outcome of restorative justice, both requirements are more likely to be respected.

### *5.2. Restoration: mediation and healing circles*

Victim offender mediation (VOM) was first formally used in a criminal court setting in 1974 in Ontario, Canada (Umbreit, Coates and Vos 2004). VOM is now used at all stages of the judicial process i.e. prior to a court referral or after, prior to

adjudication or conviction but before sentencing, and after sentencing. Restitution can include direct compensation to the victim, unpaid work and unusual payback schemes.

The restorative justice models presently used in North America and Europe are similar but also quite distinct. Twenty-nine states in the U.S. now use VOM. Non-profit community based agencies are responsible for close to half of all VOM programmes. Probation, correctional facilities, prosecuting attorney offices, victim service and police services are responsible for the remainder (Tonry 2005). In the U.S., the majority of the offences referred to VOM are misdemeanours such as vandalism, theft, minor assaults and burglaries. In Canada, VOM is also currently being used in cases involving violent crimes and to the shock of many in cases of sex abuse. Further, Canada has a police based diversion programme, Community Justice Forums, which is based on the Family Group Conferencing used in New Zealand and Australia. These are products of the Restorative Justice philosophy. It is no coincidence that all three countries have important aboriginal communities, which make them more conducive to restorative practices (Tonry 2005). If appropriate, a trained facilitator (police officer or community volunteer) summon primary, secondary and tertiary victims –including the perpetrator (Umbreit, Coates and Vos 2004). The offence, the perpetrator and a course of action are discussed. In most cases, it involves restitution to the victim and the community. If successfully completed, charges are not filed. As in the case of drug courts, it is a more holistic approach that aims to repair and reduce harms, and should not be an adversarial process. Similar practices are now being used in the U.S. but they do not have the same scope as those used in New Zealand, Australia and Canada.

VOM is the form most commonly used in Europe. The ideal outcome is an acknowledgement of the harm caused and an agreed restoration. In turn, the case is not adjudicated. It was first used with young offenders and is now being used increasingly in cases of domestic violence. Few studies have been completed assessing the efficacy of restorative justice in Sweden and Spain. Miers *et al.* (2001, pp. 56-59) assessed the Catalonian youth model and concluded that although it had had positive outcomes, there was a need to carry out additional studies to evaluate the long-term effects. More recently, Varona (2009) published a study assessing penal mediation in the BAC. Victims and offenders were found to have been satisfied with the process. The BAC has since officially recognised trained private mediators thus directly incorporating the work of trained private workers in the criminal justice process.

The Healing Circle, a First Nation version of restorative justice, is based on group deliberation, decision-making, conflict resolution and community healing. It is being used in cases that for some are unconceivable. The Community Holistic Circle Healing (CHCH) was established in 1998 in Manitoba, Canada to deal with a serious sex offender in the Hollow Water First Nation Community. In 2001, it was evaluated and concluded to have numerous collateral positive effects (Couture *et al.* 2001). Similar projects have since emerged in Ontario under the Mennonite Central Committee's Circles of Support and Accountability and work with high-risk sex offenders when they are released back into the community (Wilson and Prinzo 2001). It is therefore being used as a front and back-door strategy.

### *5.3. Democratic improvements to communitarian justice*

As presented, restitution can include direct compensation to the victim, community service and unusual paybacks agreed upon by the victim and offender. Restitution may be a sentence on its own or be the outcome of restorative dialogue. Non-profit community agencies were and continue to be the protagonists of these measures; however, the private for-profit sector is now breaking into the market of unpaid work and fines, requirements that have traditionally fallen within the remit of probation.



Fines are seen not to be sufficiently punitive or effective due to the high rates of non-compliance. The English and Welsh public perceive EM as a more punitive measure than fines - in particular if the offender can afford the fine. If the offender cannot pay their fine, respondents felt that the family of the offender should suffer the financial consequences (National Audit Office 2006).<sup>15</sup> Perhaps in response, Her Majesty's Court Service in England and Wales launched "Operation Payback" in November 2004. An advertising campaign was held notifying persons with outstanding fines that they may have the wheels of their cars clamped, the sum deducted from job seekers allowance and income support etc. The scheme aimed to identify offenders with outstanding fines, have them paid and if necessary to issue warrants ordering defaulters back to court (BBC 2004a). It may also have served to play into the public's perception that fines weren't sufficiently painful. Only a month earlier, the government signed an agreement with the credit reference agency Equifax to access their computer database (BBC 2004b). Magistrate court committees were able to access and use information such as current address, credit card and loan applications in order to track outstanding fraud defaulters. If unable to pay the fine, defaulters can be sent to prison or pay it off through the completion of unpaid work. In order to salvage political credibility, private for-profit companies have been brought on board to assist the government.

Zimring (1974) found unpaid work in the U.S. to have had little if no effect on re-offending. A decade later, Pease's (1985) review of two British studies conducted in the 1970s was equally unpromising. Re-offending rates for unpaid work were neither higher nor lower than rates for offenders sent to prison. More recently, Tonry and Lynch (1995) came to a similar conclusion in their review of studies in the U.S. and the Netherlands. The only exception is the study completed by Killias in 2001 on Switzerland. In contrast, Spain reported a comparatively lower recidivism rate for completers than its contemporaries e.g. Belgium, Scotland and Sweden (McIvor *et al.* 2010). The researchers concluded that this may have been due to the contrasting profiles of offenders receiving unpaid work orders in Spain. A sizeable proportion of qualifying offenders were employed and educated beyond school level at the time of sentencing, which was not the case for other countries studied. This led them to conclude that the low recidivism may indicate that their offences did not have a strong association with deprivation or poverty, which contrasts considerably with the stated motives for which unpaid work was first introduced in North America.

Although not related to reductions of reoffending but equally relevant for the sake of public credibility, an audit on unpaid work commissioned by the Probation Service in 2008 found that only 35% of the projects were visible to the public. Shortly after, the Ministry of Justice announced that unpaid work was to be transformed into the Community Payback Scheme. January 2009, a webpage was created that aimed to involve communities. Offenders must now wear an orange vest that clearly states that they are carrying out community payback services thus combining restitution with public shaming and stigmatisation. At present, probation services are responsible for supervising the completion of this requirement; however, as aforementioned this is an area that the Ministry of Justice has announced will now be open to the private sector. On 21 January 2011, the government ran a competition for the delivery of the community payback scheme, which includes its provision, and when necessary the transport of individuals to and from the sites. This public service is therefore now open to the private and voluntary sectors. Serco, Sodexo and Mities are the preferred bidders with no voluntary groups making the shortlist (Ministry of Justice 2011b). Probation Trusts will compete with the aforementioned private corporations to secure contracts. Unison, the main union for probation officers, claims unpaid work is one of the

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<sup>15</sup> In contrast, Wright (1989) found 85% of respondents to consider restitution to be more effective at reducing reoffending than EM; whereas, respondents interviewed two years earlier by Cole *et al.* (1987) did not view fines as an equitable alternative to probation and incarceration.



principal tasks presently overseen by Probation Trusts and voiced its concern that some Trusts may no longer be viable should they lose this contract.

Unpaid work is promoted as a means of not only 'paying back the community' i.e. restitution but also of developing skills and re-establishing links with the community despite them becoming more punitive and exclusionary. Further, the private for-profit sector is playing an increasingly important role in their delivery. On the other hand, the involvement of the victim, community and offender in restorative justice schemes is promising but research assessing its efficacy i.e. reducing reoffending is sparse.

#### 5.4. Restoration and the community

In accordance with (Shapland *et al.* 2006, p. 506), restorative justice is "an umbrella concept, sheltering beneath its spokes a variety of practices, including mediation, conferencing, sentencing circles and community panels." Most studies assessing the effectiveness of restorative justice have been completed on its use in Anglo-Saxon countries. Consequently, conclusions drawn cannot be directly exported to other countries; however, they may be indicative of certain common weaknesses and strengths. On the whole, restorative justice whether mediation, conferencing or circles have been found to reduce reoffending, reduce post-traumatic stress in victims and when used as diversion to be cheaper (Latimer, Downe and Muise 2005; Strang and Sherman 2007). Although promising, selection bias for programmes must also be taken into account. Only individuals likely to cooperate are selected for programmes; however, that is the case with all non-custodial measures. Regardless of the form used, restorative justice can be used to ensure greater compliance with restitution orders, which may include attendance to programmes (Latimer, Downe and Muise 2005). As mentioned in the section on EM, it isn't surveillance *per se* that has been demonstrated to reduce reoffending but the programmes that the offender attends whilst being monitored.

As far as victim satisfaction is concerned, face-to-face contact between the offender and victim is considered one of its strengths. Regardless of the format used, the victim's involvement in the process and not solely for utilitarian purposes such as obtaining a conviction from their testimonial was found to increase satisfaction. Victims and ideally the community should be involved throughout the process. Although, the criminal justice system is frequently viewed as the obstacle, we fail to account for the 'normative assumptions' about justice held by the community, which can be equally cumbersome to the process (Shapland *et al.* 2006). Further, when used in a criminal justice setting, roles are pre-determined. The offender must accept responsibility i.e. guilt before mediation can begin and the community is rarely involved during VOM. Zehr (1990) described VOM as dyadic and recognised that it failed to empower the community. In order for it to be democratic, the community must also be involved. All of these weaken the benefits that can be drawn from mediation such as insertion. It isn't solely the victim that must 'receive' the offender but the community as well (Maruna 2006).

Studies examining victim satisfaction with criminal justice case proceedings indicate that it is their inclusion and participation in the process, which increases satisfaction (Umbreit 1998; Latimer, Downe and Muise 2005). Further, if involved in the process they are more likely to perceive the sentence as fair. Finally, victims are more likely to receive an apology than in the case of adversarial hearing (Strang and Sherman 2003, p. 28), which some argued facilitates their 'healing' and diminishes their desire for revenge or retribution.

Its ability to divert offenders from custody is inconclusive. Studies carried out in England and Scotland in the early nineties concluded that VOM programmes were responsible for minimal net-widening (Dignan, 1990; Warner 1992); whereas studies carried out in the U.S. during the same period concluded that VOM did indeed divert offenders. Those that received a custodial sentence received a shorter

sentence than those who had not partaken in mediation (Clark, Valente, and Mace 1992).

As in the case of all the measures presented, the success of restorative justice lies in "Getting the word out about such viable options." Getting the word out about what restorative justice is, who can and should be involved, what can be expected and accepting that cultural normative beliefs may be entrenched but are not static. As shown, different forms are being used in by the traditionally adversarial system, religious communities and various distinct cultures. One of the strengths of restorative justice is that it is flexible and can adjust and be reflexive to the needs of all participants, and is forward thinking. For example, the Social Reconstruction Project Prakash is an international volunteer camp supported by a UK NGO, Quaker Peace and Social Witness and the United Nations. Similarly, ex-prisoners are now running various community-based restorative justice projects in Northern Ireland and have been accredited with facilitating the adoption of nonviolent approaches to conflict and resolution (Eriksson 2009; McEvoy 2009).

## 6. Conclusion

In a punitive context dominated by risk aversion, we often overlook aims of non-custodial measures such as rehabilitation and insertion, which go beyond utilitarian aims to reduce prison overpopulation and punish. Community sanctions have become more onerous and punitive in effort to appease public concerns or rather community sentences' lack of legitimacy. Further, retribution has come to override the legal principles of proportionality and custody as a last resort therefore annulling any attempts to either contain or decrease prison populations. There is now ample evidence demonstrating that they are not being used to divert individuals from prison. To the contrary, they are being used to manage risk and against individuals who in past would not have been brought into the penal web. In this regard, certain non-custodial measures such as EM are the modern example transportation. That is, contrary to popular belief they are being used to sanction individuals who should be punished less rather than more (Feeley 2002). This is all the more preoccupying when we consider that many of the companies at the forefront of the electronic monitoring market are also those at the head of private prisons.

The main objective set at the beginning of this paper was to consider whether and if so how, the private sector can contribute to rendering non-custodial sanctions more legitimate and therefore credible alternatives to custody. There are now numerous studies confirming the lack of confidence of agents involved in the judicial process in non-custodial sentences as well as the public. Many examples were provided; however, there remains much room for improvement. The involvement of the private for-profit sector is not new and seems inevitable in certain areas; however, it can and should be pruned in other areas. There is a relative consensus that prison population growth must be contained and that community sentences are a means of achieving it; however, there lacks "an ideological commitment to reducing the use of custody" (Mills 2011, p. 22). It must therefore involve a commitment to reducing prison populations, to using non-custodial sanctions whenever possible and custody as a last resort. This will also involve reforming criminal legislation to avoid net-widening, changing sentencing practices and the public's normative beliefs regarding justice, and allow the community i.e. victim, offender and public to re-appropriate the process (United Nations Office on Drugs and Crime 2007). In accordance with Bridges (2007 cited in Mills 2011, p. 21) "What we have to think about is recalibrating our expectations about what sentencing is supposed to achieve."

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