NONSENSE UPON STILTS? 
HUMAN RIGHTS, THE ETHICS OF 
PUNISHMENT AND THE VALUES OF 
PROBATION

Rob Canton, Division of Community and Criminal Justice, De Montfort University, Leicester

Abstract

This paper explores the potential for deploying the discourse of human rights to invigorate debate about the ethics of penal practices and in particular the values of probation. Human rights are argued to be the most promising basis for an ethically principled opposition to both excesses of punishment and an unduly instrumental understanding of penal practice. Recent themes in penal policy are identified and an account of human rights is set out. It is argued that human rights are distinctively important in discussions of punishment and that an attempt should be made to disentangle those rights that are appropriately forfeit as legitimate punishment and which rights should be retained. Two misgivings about human rights are identified and addressed. The place of the Council of Europe in working out the real-world implications of the European Convention on Human Rights is considered. The Council of Europe can also help to develop a legal framework to support its ethical initiatives. It is concluded that penal practice grounded in human rights affirms the responsibilities of offenders and therefore constitutes an appropriate penal communication. Ethically informed penal practice promotes legitimacy and perhaps enhances effectiveness in reducing reoffending.

Key words: Human Rights, Penal Policy, Probation, Council of Europe, Probation Values

In this paper, I argue that the discourse of human rights represents the most promising basis of a strategy to reaffirm the suppressed significance of ethics in penal policy against both the excesses of punishment and a preoccupation with instrumental outcomes. Having identified some recent influential themes in penal policy, I put forward a particular conception of human rights, arguing that we can enrich penal debate with these ideas and principles. It will be suggested that the aspirations of the Human Rights Act, in the realm of penal policy at least, have to a large degree been frustrated. After offering some reasons for this disappointment, I consider ways in which human rights discourse
might be more effectively deployed. It will be argued finally that the values of probation could - and perhaps should – be framed in the language of human rights.

**Themes in Penal Policy**

Cavaino and Dignan have usefully identified three dominant ‘strategies’ that have influenced penal policy in recent years (Cavaino and Dignan 2008; Cavaino, Crow and Dignan 1999, developing the working ‘credos’ identified by Rutherford 1993).

Strategy A is the affirmation of punishment – ‘a powerfully held dislike and moral condemnation of offenders, and the beliefs that as few fetters as possible be placed upon the authorities in the pursuit of criminals who, when caught, should be dealt with in ways that are punitive and degrading’ (Rutherford 1993: 11). As other commentators have also noted (Bottoms 1995; Garland 2001; Pratt et al. 2005), a zeal for punishment characterises contemporary debate. No politician dares risk the accusation of being ‘soft on crime’. Tough punishment is deserved and protects us – through deterrence and incapacitation. The more punishment there is, the safer we all will be.

Strategy B is concerned to ‘dispose of the tasks in hand as smoothly and efficiently as possible. The tenor is one of smooth management rather than of moral mission.’ (Rutherford 1993: 13) This emphasises managerialist imperatives of cost-effectiveness, often with bureaucratic indifference to ideas of harshness or leniency. It recognises that criminal justice practices cannot eliminate crime: crime must be managed and responded to effectively, efficiently and economically. The insistence on evidence-led practice – on 'what works' – fits well with this approach. B has an instrumental conception of criminal justice, setting as its priority the reduction of offending and reoffending and the protection of the public. The strategy is also characterised by other managerialist precepts: setting objectives and targets, performance management, quality assurance, inspections, Area rankings – all with their inevitable preference for auditable episodes and achievement – and is accomplished as well in the day-to-day practices of actuarial assessment and working to National Standards.

Strategy C is often implicit and not commonly avowed by policy makers. This is the strategy of what Rutherford calls ‘decency’, affirming the worth of offenders and victims (rejecting the idea of any necessary trade-off in their interests). It insists on the importance of fairness and justice; is sceptical of the efficacy of punishment, in particular cases and as a general strategy for reducing crime; and is suspicious of the social, cultural and ethical consequences of enthusiasm for punishment.

As Cavaino and Dignan rightly insist, these three strategies are ‘ideal types’, never found in a pure form, but co-existing and finding differences of expression in most contemporary jurisdictions. Indeed all of these strategies no doubt have a proper place in penal policy. Even as we may deplore the excesses of Strategy A and notice that retributive passions are selective – Strategy A prefers to avert its gaze, for example, from the wrong-doings of the powerful - few people deny the legitimacy of punishment for crimes. Again, without the disciplines and organisation of Strategy B, it is hard to see how any penal objectives could be realised or progress towards them evaluated.

It is the dominance of A and B that must be resisted. David Garland has written about penalty:

> What appears on its surface to be merely a means of dealing with offenders so that the rest of us can lead our lives untroubled by them, is in fact a social institution which helps define the nature of our society, the kinds of relationships which comprise it, and the kinds of lives that it is possible and desirable to lead there (Garland 1990: 287).

If practices of punishment are indeed so embedded and influential, we must be vigilant about how we punish. The indulgence of contempt towards offenders is corrupting itself and a disregard for their rights will surely extend to potential offenders and maybe to all of us. In its most extreme forms, Strategy A can rationalise ‘the eliminative ideal’ (Rutherford 1997) – the idea that troublesome people can be made to go away. The pursuit of this unpleasant fantasy has led to much cruelty and inhumanity throughout history and in many parts of the world.

While Strategy B is less obviously objectionable, one might be cautious of its claims to be neutral or detached. As Bottoms notes, the ‘actuarial dimension of modern managerialism’ can serve to suppress political and moral responses to crime and punishment, so that ‘it may become difficult to counterpoise the traditional language of, for example, “justice”, against the aggregative and instrumental assumptions of an actuarial approach.’ (Bottoms 1995: 33) Similarly, the ‘what works’ initiative (McGuire and Priestley 1995; Chapman and Hough 1998) lends a strongly instrumental tone to policy that turns its back on a moral interpretation or critique. Garland again expresses the point well: practices of punishment, like any complex social institution, are not reducible to an instrumentality and:

> An awareness of penalty’s wider significance makes it easier to argue that the pursuit of values such as justice, tolerance, decency, humanity and civility should be part of any penal institution’s self-consciousness - an intrinsic and constitutive aspect of its role - rather than a diversion from its "real" goals or an inhibition on its capacity to be "effective" (Garland 1990: 292).

The practices of punishment are irreducibly moral activities, involving hardships, deprivations and impositions on offenders, with implications for actual and potential victims and for the whole society in whose name these practices take place. Attempting to influence people’s thinking and behaviour (the contemporary characterisation of probation practice) is also plainly a moral enterprise: even if there is a transcendent
human rights are those rights that we have in virtue of our humanity and are consequently not at the disposal of the state. Much of the philosophical literature has been concerned with the structural and formal properties of rights – for example, their relationship with responsibilities or the extent to which government projects for the general welfare are constrained by rights claims. In contrast, Griffin grounds human rights not in formal features or a role in a larger moral structure, but directly in a central range of substantive values, the values of personhood. (Griffin 2008: 34) As Griffin argues, a great deal can be derived from this notion of personhood: to be a person is to be a responsible moral agent and this entails rights of autonomy, choice, the ability and liberty to act.

But while such philosophical analysis is important and often illuminating, it is no less important, as Griffin insists, to be aware of the many and diverse rights that people have asserted for themselves and for others. Historically and politically, rights have been invoked in two main ways: to take a stand against cruelty and injustice; and to articulate claims – aspirational statements about the social and economic conditions that should be created so that people may thrive. In 1940, H G Wells published The Rights of Man. He explained that when he had originally drafted his Declaration of Rights he had first set out the conditions needed for people to thrive, only later in the declaration specifying articles against cruelty and oppression. But, after consultation with others, he reversed this order, especially at the request of ‘the younger men … who were going to do the fighting … [and who] had been stirred profoundly by those outrages upon human dignity perpetrated by the Nazis.’ The United Nations Universal Declaration of Human Rights (1948) similarly first sets out articles prohibiting oppression and cruelty, then articulating claims to human flourishing – a structure mirrored by the European Convention.

### Human Rights

**Liberties**

- Avoidance of cruelty
- Right to life
- Abolition of the death penalty
- Prohibition on torture, inhuman and degrading treatment and punishment
- Ban on slavery, forced labour and servitude

**Claims**

- Enabling individuals to thrive
- Dedication to human flourishing
- Right to respect for privacy
- Freedoms of thought, conscience and religion
- Right to marry
- Prohibition of discrimination
- (qualified) right to property
- Right to education

Conor Gearty is among the most recent commentators to consider these two dimensions to human rights: one, a rejection of oppression and insistence on ‘the moral wrongness of cruelty and humiliation’; the other a commitment to human flourishing (2006: 140). This corresponds to a philosophical distinction between liberties and claims.

Liberty rights affirm that, as governments pursue the general welfare, certain rights may challenge and sometimes constrain their projects. Ronald Dworkin famously described rights as trumps – cards that may be played successfully against other considerations like the collective welfare (Dworkin 1984), while Nozick asserted: ‘Individuals have rights, and there are things that no person or group may do to them (without violating their rights)’ (1974: ix). In these accounts, Dworkin and Nozick have liberties mostly in mind. But citizens also call upon their governments to create conditions in which they may thrive. For people to have real chances to pursue their interests and projects calls not only for others’ forbearance from interference, but also propitious circumstances and meaningful opportunities.

Numerous theoretical and practical misgivings have been expressed about human rights and their earlier equivalent natural rights. ‘Nonsense upon stilts’ was Jeremy Bentham’s caustic dismissal of the claims of the Declaration of Rights published by the revolutionary French National Assembly in 1791. Why was he so scathing? As a sound utilitarian, Bentham did not want projects for the greater good subverted by individual claims of...
obscure origin. Governments ought to pursue the general good, so the notion of a right invoked against the government is self-defeating’.

Yet we need an ethical basis from which to challenge and criticise government - even (perhaps especially) in a democracy. The language of rights has been deployed to remind governments of their limits and their obligations, that ends may not be assumed to justify means, that individuals and minorities may not simply be disregarded in the relentless pursuit of their conception of the general welfare.

This is not to say that we should think of rights as existing in a Platonic realm, somehow aloof from politics. Nor is the determination of rights a matter only for judicial interpretation. On the contrary, the question of the rights that we have, their extension, their relationship with the rights of other – especially in cases where rights conflict - is the stuff of politics (Gearty 2006). Like most serious moral questions, the matter of the rights that we have remains open, indeterminate and inherently contested.

Griffin notes that the term ‘… serves several practical purposes. It highlights a certain consideration, attracts our attention to it, marks its importance in our culture, makes its discussion easier, increases the chances of its having certain social effects such as ease of transmission and potency in political action … ethics should be concerned not just with identifying right and wrong, but also with realising the right and preventing the wrong. Having the simple term “human right” is important to the latter’ (2008: 19).

To invoke a right, then, is to attract attention to a morally significant aspect of a state of affairs or course of action. Even if the right claim is persuasive, however, it will rarely be decisive. Not all rights are absolute – probably very few are. To develop Dworkin’s metaphor, the trump card may be over-trumped by playing a higher (trump) card, perhaps involving a weightier right. To assert a right, then, even persuasively, does not by itself entail that it would be unjustifiable to infringe that right, but it does mean that there is a need for moral justification.

Thus, even when rights are compromised or denied deliberately as an intended part of a punishment, this should be done consciously not casually. A right may not be ignored or merely set aside as inconvenient and if it must be infringed (because other moral considerations turn out to be more compelling), then this should take place with a sense of regret, with an attempt to mitigate the implications for the right-bearer and should stimulate a search for other solutions which better respect the right. If Griffin is correct to say that our rights are intimately bound to our humanity and personhood, then to say that someone’s rights simply do not count is to risk treating them as less than human.

In the United Kingdom, the legislative expression of these principles is the Human Rights Act 1998. This incorporated into the law of the United Kingdom the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1950 by the Council of Europe. The Convention stood for Europe’s determination to guard against any recurrence of the atrocities witnessed during the Second World War. It affirmed that there were some human rights that people possessed in virtue of their humanity - some rights that the state may not take away in any circumstances and others that may only be denied or compromised in specifically defined circumstances.

**Rights and Punishment**

Why do human rights particularly matter in discussing punishment? Here, in the practices of punishment - uniquely, perhaps - the withdrawal or compromising of rights is not just a regrettable side effect of policy, not even just a deliberate act, but constitutes punishment. At the start of Discipline and Punish, Michel Foucault contrasted the shift from dramatic acts of punishment of the body – corporal and capital punishments – to the discipline of the penitentiary, summarising ‘From being an art of unbearable sensations punishment has become an economy of suspended rights’ (Foucault 1977: 11). In a very different philosophical tradition, John Rawls included in his formal definition of punishment that it involves being ‘deprived of some of the normal rights of a citizen’ (1967: 150). So, for Rawls, punishment is by definition a deprivation of (some) rights.

But which rights are forfeit and which retained? How is punishment to be determined and administered in a principled way that respects the offender’s humanity? First, as Bentham properly insists:

> the right itself must be specifically described, not jumbled with an undistinguishable heap of others, under any such vague general terms as property, liberty, and the like’ (Bentham 1816: line 244).

For example: while six months in prison may fairly be described as six months loss of liberty, imprisonment impinges upon many, more specific human rights - including loss of opportunity to experience family life, to seek gainful employment, loss of privacy, and so on. As all probation officers know, prison impactsdifferently on different people. Being explicit and specific about the real consequences of prison and the extent to which these consequences trespass upon people’s rights is a precondition of any principled approach to punishment - particularly any systematic discussion of proportionality in sentencing4.

Some infringements of rights are deliberate and intrinsic to the lawfully determined punishments. But punishment normally has other consequences too. Nigel Walker (1991) uses the expression *obiter* punishment for those effects that fall upon other people – perhaps parents, children or partners of offenders. He also discusses incidental punishment - those consequences that are not intrinsic to the punishment, but side-effects. For example, sending someone to imprisonment is not to sentence them to homelessness or their children to Local Authority Care. If it does have that result, then as much as possible should be done to redress this. In principle it should be possible to determine the loss of rights which are a proper consequence of lawfully determined punishment, while anything further loss, obiter or incidental, should be minimised and maybe compensated.
Walker’s comments apply to all punishments, but are especially pertinent to imprisonment, where obiter and incidental consequences are likely to be wider and weightier. One difficulty, however, is that English law lacks a statutory determination of the purpose of imprisonment, so that it is hard to tell what rights are part of the punishment and which are obiter or incidental (van Zyl Smit 2007).

The principle of Raymond v. Honey is that ‘under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication’ (quoted van Zyl Smit 2007: 569). People have differed on the question of these ‘necessary implications’, however. For example, is losing the right to vote a necessary implication of imprisonment? In a Divisional Court judgement dated 4th April 2001, Kennedy LJ said ‘... prisoners have forfeited the right to have a say in the way the country is governed for that period. There is more than one element to punishment than forcible detention. Removal from society means removal from the privileges of society, amongst which is the right to vote for one’s representative.’ (cited ECHR 2005) But on October 6 2005, the Grand Chamber of the European Court of Human Rights found that the UK’s current policy of a blanket ban on all serving prisoners from voting is in contravention of Article 3 of Protocol No 1 of the Convention (the right to free and fair elections) (ECHR 2005). Here the idea of necessary implication cannot resolve the matter, since it is precisely the question of which implications are necessary that is at issue.

One promising test might be to ask whether the denial of a right serves any legitimate penal purpose. Now that there is a statutory definition of the purposes of sentencing (Criminal Justice Act 2003, s. 142), it might be possible to argue that a right is justifiably removed if, but only if, its removal contributes to a legitimate purpose of punishment (rehabilitation, public protection, etc.) Meanwhile the test of proportionality is probably the single most secure safeguard against undue infringement of the rights of offenders (van Zyl Smit and Ashworth 2004).

**Penal Policy and the Human Rights Act 1998**

In 1999, anticipating the implementation of the Human Rights Act 1998, the Home Secretary, Jack Straw, proclaimed ‘These are new rights for the new millennium… It is one of the most important pieces of constitutional legislation the UK has seen.’ (Home Office 1999) He repeatedly affirmed that we should not merely be prompted into defensive action for fear of litigation, but ethically motivated to use human rights as a framework for policy.

In this same press statement, Straw referred to a ‘culture of rights and responsibilities’ (my emphasis) – an expression that quickly became established in government references to the Act. Now as a normative proposition – that people should accept responsibilities as well as asserting rights – this is something to which many would assent. At the same time, it must be emphasised that this is not part of the European Convention or the Human Rights Act. The rights of the Convention are in no way contingent upon the fulfilment of the responsibilities that the state supposes that people under its jurisdiction should accept. Human rights do not have to be deserved – an important point to be affirmed in the penal context. Sole and sufficient credentials are to be human.

The impact of human rights on penal policy has been disappointing. There have certainly been gains - several cases in which Courts have adhanced the Act and the Convention to raise the standards of justice for offenders – especially for prisoners (for prisoners’ rights, see van Zyl Smit 2007; for associated questions about community punishment, Gelsthorpe 2007). But this often seems wrung from a grudging and reluctant government - just the kind of litigious defensiveness that Straw said he was so keen to avoid. There is little sign that the Convention has been deployed as an active force to inspire penal policy.

Barbara Hudson has plausibly attributed much of this under-achievement to the government’s preoccupation with public protection. Human rights have been bullied aside by insistent demands for public safety. She writes:

> Increased recognition of the rights of victims and potential victims cannot be allowed to be at the expense of rights of offenders and potential offenders; what must be achieved is a balance between two sets of rights (2001: 110).

She repeatedly calls for balance in this debate and has been echoed by other wise commentators. Others, however, notably Andrew Ashworth (1996) are unhappy with this concept of balance. The metaphor in this context immediately evokes the thought of the scales of justice, one pan to be weighed against another. It is a utilitarian conception that implies that the rights of the many may be allowed to outweigh the rights of others, whereas rights can and should function as constraints on what the state may legitimately do or what a majority might inflict upon a minority. While Hudson rejects a zero-sum conception of rights (it is not the case that more rights for victims entails fewer rights for offenders), this is precisely what the metaphor of balance suggests.

To accept the metaphor, frequently invoked in policy papers, is from the beginning to prejudice thinking in unhelpful ways. Why is to be assumed that the rights of victims and offenders must be in opposition? Many offender rights – almost all rights relating to the realities of sentencing implementation - do not in any way infringe the rights of victims. Moreover, while we can speak of victim and offender in relation to particular criminal incidents, these are not enduring and mutually exclusive categories. Similarly if we look for ‘balance’ between the rights of offender and the rights of the community, we are at risk of automatically excluding offenders from the community. Nor are there just two sets of interests to take into account. Families and communities also have rights in this regard.

The metaphor of balance sets up and reinforces these artificial antitheses and has contributed to the mistrust of rights and their consequent underachievement.
Two Problems with Human Rights and Penal Policy

Two common and reasonable concerns about human rights in penal affairs is that they are (i) vague and (ii) minimal. In the first place, values ought to be action-guiding, but can human rights offer sufficient guidance? What, after all, do some of these very general rights-claims really amount to? And if they cannot be deployed to guide policy and practice, are they not at risk of sitting at the side redundantly? But secondly – as an influence, say, on the values of probation – are they not also too minimal? Rights, surely, are what is left when all else fails and therefore of limited assistance in guiding the strategies and practices of a civilised and decent criminal justice system (see the discussion by Gelsthorpe and Nellis 2003). Probation values can surely do better than a prohibition on torture.

(i) ‘Human rights are too vague to guide policy or practice.’ While the rights of the Convention are of fundamental ethical significance, their precise implications are unclear. In some areas too these implications await judicial interpretation – perhaps especially where one right is in conflict with another right or obligation. The approach of the Council of Europe points to a solution. Europe’s oldest political association, the Council oversees the European Convention. It sets standards, inspects and facilitates international cooperation to enhance human rights. The Council of Europe promulgates Rules - the most important here being the European Prison Rules (Council of Europe 2006). As formal Recommendations adopted by the Committee of Ministers, these Rules carry considerable authority and have, for example, been cited in judgements in the European Court. Rules are typically accompanied by Commentaries to explain their rationale and implications. Essentially the Rules point to the possibility of a relatively detailed and specific working out of the liberties – and often the rights claims of prisoners – required by the Convention. The Rules draw out what it will mean in practice to respect the rights of offenders, victims and the community – and how to resolve conflicts of rights in a principled way. Rather than obstacles seen as frustrating punitive or reductive purposes, rights are the beginning and the focus of policy. The Rules thus contribute to a solution to this challenge of generality and remoteness.

(ii) ‘Human rights set the bare minimum standards of decency and penal values should aspire to more than this.’ It is indeed true that rights to life and a prohibition on torture seem like a bare minimum. But here we should note the important legal principle of positive obligations (Mowbray 2004). Article 1 of the Convention calls on states to ‘secure’ the rights of their citizens and this calls for positive action, not merely forbearance – in terms of our earlier distinction, claim rights as well as liberties.

The idea of positive obligations has the potential to challenge and to stretch the state’s duties. For example, in E. and others vs. United Kingdom, the court held that the UK had violated Article 3 (prohibition of inhuman and degrading treatment) by failing to protect E. sufficiently from abuse at the hands of her mother’s cohabitant (Hofstotter 2004). In MC vs. Bulgaria the court found that the requirement in Bulgarian law that a prosecution for rape could not take place without proof of physical resistance constituted an inadequate protection against crimes of rape (Leach 2006), so that the law of Bulgaria was in this respect at odds with the Convention. In this way, a basic liberty-right progressively evolves into something much stronger.

This is a principle with clear and significant implications for – in particular – the rights of victims of crime. The court has emphasised that this principle of positive obligation must not be interpreted in a way that places an ‘impossible or disproportionate burden’ on the state and sets quite a challenging test (ECHR 1998: para 116; Leach 2006), but where the requirements of the test are met, the Court may decide that the state has failed in its duty to secure the rights of a victim.

It seems to me that the principle has – or should have – implications for the rights of offenders. As we have seen, punishment involves the deliberate curtailment of some rights and it would be absurd to look for redress or compensation in these respects. But I have tried to argue earlier that punishment often has other consequences, obiter and incidental; that these consequences should be mitigated so far as possible; and that the state incurs obligations of redress where these rights are avoidably infringed. This argument could be used to establish a right to after-care services, for example, to try to mitigate some of the harsher incidental consequences of punishment. After-care could be seen, then, not as a continuation of punishment or risk management, nor even as an attempt to meet ‘criminogenic need’, but as a right.

So while the two problems to which attention have been drawn may indeed help to explain the under-achievement of human rights discourse in penal policy and practice in this country, there are ways in which these challenges can be met. The work of the Council of Europe demonstrates how an ethics of punishment could be constructed on the foundations of the Convention, while the principle of positive obligations begins to show how minimal rights could progressively be developed into something much stronger.

Although the detail and implication remain to be worked out and the complexity of the project is not to be under-estimated, positive obligations in the penal domain could be the basis for affirming a general right to rehabilitation. At a time when the treatment model was under attack – does the state have any right to coerce or manipulate change? – Edgardo Rotman argued not only for protection against coercion, but also in favour of ‘...a right to an opportunity to return to (or remain in) society with an improved chance of being a useful citizen and staying out of prison’ (Rotman 1994: 286). In terms of our earlier discussion, penal policy must take account not only of liberties, but also claims. The idea has been instructively reaffirmed more recently by Lewis (2005) and by Ward and Maruna (2006) and has a promising grounding in human rights.
Human Rights and Community Punishment

Prisoners’ rights are always vulnerable, but is the position of those under community supervision as perilous? Probably not: the dependence and vulnerability of serving prisoners makes their rights especially precarious and in need of vigilant defence. At the same time, the long-term policy to make community punishment ‘credible’ - with increased constraints on liberty, demanding content, increases in control and harsh enforcement - could jostle rights aside.

Three areas for particular vigilance are:

1. Disclosure – the proper boundaries between disclosures of personal information about offenders believed to pose a risk (and therefore threatening the rights of potential victims) and the rights of such former offenders to privacy and safety from harassment. This is an area in which obiter and incidental punishments are likely to have an impact.

2. ‘Techno corrections’ raises similar issues and involves considerable invasive potential, not only for offenders and their families, but for potential offenders and perhaps – since who of us may not be a potential offender? – for everyone. The pressures of commerce – the need for companies to sell their equipment and to extend their markets - may not always be assumed to be benign and are likely to have human rights consequences.

3. Enforcement – increasing numbers of people are in prison not because of the substantial harms they have been responsible for, nor even on the basis of assessed risk, but because of their failure to comply with the requirements of supervision (Maruna 2004). This is especially the case for those released early on licence, but is increasingly a concern for community supervisees as well. Since this bears on liberty – the issue on which English Courts have been most assiduous in protecting the rights of offenders (van Zyl Smit 2007) – there are established judicial remedies, but there is a continuing need for vigilance against a trend that threatens proportionality in sentencing.

As with imprisonment, the curtailment of rights involved in the implementation of community sanctions and measures should be parsimonious, with as many rights retained as consistent with the implementation of the court’s order. The infringement of rights should not be disproportionate to the offence and measures that impact on these rights should be justified in terms of their furtherance of a legitimate penal aim9.

Human Rights and the Values of Probation

Might probation articulate its values in the language of human rights? I have speculated here about the reasons why this seems (mostly) not to have happened, but the possibility remains. There are at least three advantages to trying to frame probation values in this way:

1. It would make probation values mainstream, using the common language of contemporary ethical discourse. This in itself reminds us of the essential humanity of offenders (and not only offenders) and that infringement of their rights calls for justification.

2. It would set probation values in an international context. It has been argued earlier that the rights of the community and the rights of offenders are less often in conflict than is implied by the rhetorical trope of a balance. Nevertheless, where rights are in conflict in this way, it is not at all clear that nation states can always be relied upon to make principled judgements. Accountability to the Convention and the ECHR is a valuable safeguard. Equally, key principles like proportionality can be gauged through international comparisons. Among the questions to be asked about proportionate punishment (not the only one) is how the practices of one jurisdiction compare with another’s (compare van Zyl Smit and Ashworth 2004).

3. It makes the policies and practices informed by these values justiciable – capable of being decided by a court.

This is not the place to revive an argument for the values of social work, but it is to be noted that some of these values have a clear counterpart in the discourse of human rights. For example, the value of respect for persons may be taken to represent the principle of personhood and agency (self-determination?) from which Griffin derives so much. The value of confidentiality is expressed in the right to privacy. Article 14 of the Convention prohibits discrimination.

Rights and Diversity

Affirming rights that we have in virtue of our common humanity – rights that are not contingent upon gender, race, sexuality, abilities or beliefs – also looks like a promising ethical foundation on which to oppose unfair discrimination.

On the other hand, rights have been charged with being culture-bound: an attempt by the West to universalise their own ethical standards and impose them on others. Clapham answers this well, if maybe not perhaps conclusively.

Human rights were invoked and claimed in the context of anti-colonialism, anti-imperialism, anti-slavery, anti-apartheid, anti-racism, and feminist and indigenous struggles everywhere. Western governments may recently have dominated the discourse at
the highest international levels, but the chanting on the ground did not necessarily take its cue from them, nor did it sing to the West’s tune (2007: 19).

Since much unfairly discriminatory practice reflects and reproduces structural inequalities, human rights discourse alone is no doubt insufficient to oppose discrimination in penal practices. It is not argued here that this agenda can simply be subsumed into the discourse of human rights. On the contrary, appreciation of diversity and challenges to unfairness call not only for ethical commitment, but also for an understanding of the ways (often quite subtle and elusive) in which criminal justice can treat people unfairly and how this could be changed. It calls as well for self-awareness among practitioners and the skills to challenge unfair discrimination.

At the same time, anti-discrimination has tended to focus on relational questions - of the way in which some people are dealt with unfairly compared to others. Anti-discrimination should mean treating everyone as well as possible and this calls for a clearer understanding of what best treatment should be. The discourse of rights attempts to clarify precisely what we owe - to offenders, to victims, to one another - and is therefore arguably the priority of what best treatment should be. The discourse of rights attempts to clarify precisely what we owe - to offenders, to victims, to one another - and is therefore arguably the priority of what best treatment should be.

New policy is often accompanied by an equality assessment to ensure that implementation does not impact adversely and unfairly on particular groups. In a rights culture, there might be a similar detailed audit of compliance with the Convention - for current practice as well as for policy, practice and technological innovation.

It is not to be expected that human rights can resolve all substantial moral disagreements. Indeed one should be suspicious of any ethical approach that purports to dissolve (or even definitively resolve) intractable moral dilemmas. The invoking of a right is often a beginning to a discussion rather than its conclusion. As Gearty puts it:

The statement 'these are our human rights' is best understood to be part of an argument rather than a revelation about moral obligations that should - through force of its Truth - bring all discussion to an end (Gearty 2006: 68).

Conclusions
I have tried to argue here that the discourse of human rights represents the best prospect for reaffirming an ethical discourse in penal policy against the excesses of punishment and preoccupation with instrumental outcomes. Punishment must be tempered and principled; criminal procedures must be not only effective, but just.

I have tried to identify some of the reasons why the opportunities afforded by the incorporation of the Convention into UK law by the Human Rights Act 1998 (Scott 2002) have not been fully grasped and why, to this extent, human rights have not achieved as much as they should and could. We need human rights not only to guard against penal excess (liberties), but to encourage the state’s acceptance of its positive obligations (claims) towards offenders.

Although this is essentially a moral case, it is also a precondition of an effective and legitimate penal system. The way in which punishment is administered must harmonise with its messages. If offenders are to have more regard for the rights of others (victim awareness / empathy), then their rights must be respected. If offenders, including prisoners, are to be more responsible, they must be addressed as responsible people and not merely detained and acted upon.

Requiring offenders to be responsible moral agents, we should so address them, striving to elicit their sense of responsibility. This vision of punishment respects the tight conceptual connections between moral agency, personhood, human rights and punishment.

End Notes
1. This paper is adapted from a professorial inaugural lecture delivered at De Montfort University, Leicester on Wednesday 7th May 2008. I am most grateful to all who attended that lecture and to the many among them who offered comments and criticisms. I should like to express particular thanks to colleagues at De Montfort, to Professor Dirk van Zyl Smit, and to people with whom I have worked at the Council of Europe, especially Hans-Jürgen Bartsch, Ilina Taneva and my mentor in advancing human rights in penal affairs, Norman Bishop.

2. Ultimately, perhaps, the distinction on which I have so far been insisting may collapse – Mackie suggests that ‘A right, in the most important sense, is the conjunction of a freedom and a claim-right.’ (Mackie 1984: 169).

3. For Bentham rights also imply a right-giver. Governments can bestow (or take away) rights, but the idea of natural rights was ‘simple nonsense’ and that of intransigent (that which cannot be taken away by law) natural rights was ‘rhetorical nonsense’, ‘nonsense upon stilts’.

4. Punishment should be proportionate to the wrong done, but while much has been written about harm and culpability to try to get a grasp of offence seriousness, there is very much less study about the realities of punishment. Identifying those rights that are adversely affected by punishment might be a good beginning.

5. The Convention and the Act refer to ‘responsibilities’ only in connection with freedom of expression.

6. An influential example is to be found in the opening sentences to the influential 2002 White Paper Justice for All: ‘The people of this country want a criminal justice system that works in the interests of justice. They rightly expect that the victims of crime should be at the heart of the system. This White Paper aims to rebalance the system in favour of victims, witnesses and communities and to deliver justice for all, by building greater trust and credibility.’ (Home Office 2002: 3).

7. Baroness Corston has recently noted that the offending behaviour of many women can only be understood in the context of a history of abuse (Corston 2007). Gwyneth Boswell (1996) showed that the same is true of many – perhaps most – of the young men who commit grave crimes. Yet while we deplore what they have undergone as victims, we ignore the consequences of their experiences.

8. Where there are conflicts of rights, there should be a wise and patient working through of the implications. There can be no routine assumption that the rights of ‘victims’ prevail over the rights of ‘offenders’ (Ashworth 1996). It will depend on the rights at issue.
9. Less well known than the European Prison Rules are the Rules on Community Sanctions and Measures (Council of Europe 1992, 2000). Their influence on English policy and practice is not easy to discern: few probation staff have even heard of them. But these too attempt to work out some of the practice consequences of giving due priority to the Convention and deserve to be better known.

10. A statement of compatibility should endorse legislation, but this seems often seems minimal, routine and focused on avoiding litigation.

11. Stephen Pryor's name is associated with a project to maximise the responsibilities of serving prisoners, to engage them and involve them in their experience and rehabilitation. See The Responsible Prisoner. As Duff argues, punishment should strive to bring it about that people refrain from offending because they are persuaded that, as responsible members of a community, offending is morally wrong.

References


Nonsense Upon Stilts: Human Rights, the Ethics of Punishment and the Values of Probation

20

21
Abstract
Circles of Support and Accountability (COSA) are an innovative, volunteer-based means of supervising sex offenders, usually upon release from prison, which were ‘transplanted’ from Canada to England and Wales at the turn of the 21st century. The Religious Society of Friends (Quakers), and the Lucy Faithful Foundation, were concerned with both the extreme demonisation of sex offenders in the press, and with the need to find better ways of safeguarding children from sexual abuse. The Home Office was simultaneously developing new mechanisms of public protection and funded three COSA pilot schemes between 2002 and 2005. The processes of development and implementation were essentially informal and improvised, crucially dependent on the choices, decisions, energy, status and reputations of particular individuals in particular places and networks. Circles flourished at the intersection of a nascent official concern with public protection, and the determination of faith-based professional activists (and others) to reaffirm the redeemability of sex offenders, but there was never a “structural logic” which made the emergence of COSA inevitable. Drawing on information from the key players, this paper details the processes by which they came into being.

Introduction
Circles of Support and Accountability (COSA) are an innovative, volunteer-based means of supervising sex offenders, usually upon release from prison, which were ‘transplanted’ from Canada to England and Wales at the turn of the 21st century. They were initially taken up and piloted by the Home Office, albeit on a small scale, and their early development can be illuminated by Jones and Newburn’s (2007) insights into “policy