

Rethinking Community Sanctions

Social Justice and Penal Control

Julie Stubbs, Sophie Russell,
Eileen Baldry, David Brown,
Chris Cunneen and Melanie Schwartz



Rethinking Community Sanctions

Praise for *Rethinking Community Sanctions*

What do community sanctions look like in Australia in the 21st century? What can be done to realise their progressive potential and minimise their insidious effects? This lively, theoretically informed, empirically grounded book, written by a group of scholars with a deep knowledge of Australia's penal system, opens up new ways of thinking about a form of sanctioning that is widely used but little understood.

David Garland, New York University, USA

Drawing on the leading international literature on punishment, and further contributing to it, *Rethinking Community Sanctions* provides the first book-length study of community sanctions in Australia that is both comprehensive in scope and critical in nature. It redresses the profound imbalance between the critical attention devoted to the prison as a sanction and that directed at the far more common reliance on punishment and surveillance in the community, and it carefully elucidates the connections between the two. It does so with particular reference to those most vulnerable to being ensnared in the carceral dragnet. And it offers a positive alternative vision for the future of community sanctions. As much as academics should be drawn to this book, so too should lawyers, criminal justice practitioners and politicians who care about the current trajectory of the penal system.

Russell Hogg, Honorary Professor,
Centre for Crime, Law and Justice, Faculty of Law,
University of New South Wales, Australia

This brilliant book offers the first critical analysis of community sanctions in contemporary Australia – but its contribution goes much further than that. It is the first study anywhere to properly develop a decolonising perspective on this topic. Both by putting the present-day injustices in their proper historical context and by centering three populations who are too often marginalised in and by penal policy, practice and scholarship (indigenous people, women and people with mental health disorders and/or cognitive disabilities), this book represents a major advance in the study of probation and parole, but also in how we understand relationships between punishment, community and society more generally. Everyone who cares about those relationships should read it, digest it and use it.

Fergus McNeill, Professor of Criminology and Social Work,
University of Glasgow, UK

A compelling, comprehensive conceptual and empirical analysis of the social, political and legal nuances of community correctional practices in Australia, this book shows how the risk episteme underpinning community sanctions is limited and has differential effects on women, people with disabilities and racialised and Indigenous populations. The authors challenge us to reflect on the administrative and operational limits of these sanctions, binaries of community/custody, welfarist/risk and harsh/'soft' penalties. Readers are asked to scrutinise how technological, sociopolitical and populist rationalities reconfigure supervision, while simultaneously remaining hopeful about the potential of 'community' sanctions.

Kelly Hannah-Moffat, Centre of Criminology and Sociolegal Studies, University of Toronto, Canada

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Rethinking Community Sanctions: Social Justice and Penal Control

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List of Abbreviations

ABS	Australian Bureau of Statistics
ACCO	Aboriginal Community Controlled Organisation
ACT	Australian Capital Territory
AJA	Aboriginal Justice Agreements
ALRC	Australian Law Reform Commission
AOD	Alcohol and Other Drug
APB	Adult Parole Board (Victoria)
ARC	Assessment Referral Court
BOCSAR	Bureau of Crime Statistics and Research (NSW)
CBO	Community-Based Order (NT)
CBT	Cognitive Behavioural Therapy
CCO	Community Correction Order
CCS	Community Correctional Services (Victoria)
CCt.O	Community Custody Order (NT)
CCTO	Combined Custody and Treatment Order
CIA	Community Impact Assessment
CISP	Court Integrated Services Program
CJP	Community Justice Program
COMMIT	Compliance Management or Incarceration in the Territory
CREDIT	Court Referral of Eligible Defendants into Treatment
CRO	Conditional Release Order
CSNSW	Corrective Services NSW
CWO	Community Work Order
DRC	Royal Commission into Violence, Abuse, Neglect and Exploitation of People With Disability
EBP	Evidence-Based Policy and Practice

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EOMS	Extra Offender Management Services
EQUIPS	Explore, Question, Understand, Investigate, Practice, Plan and Succeed
ESO	Extended Supervision Order
GLM	Good Lives Model
HMIP	Her Majesty's Inspectorate of Probation
HOPE	Hawaii's Opportunity Probation With Enforcement
ICCO	Intensive Community Correction Order (NT)
ICO	Intensive Correction Order (NSW)
JR	Justice Reinvestment
LGA	Local Government Area
LSI-R	Level of Service Inventory – Revised
LSI-R:SV	Level of Service Inventory – Revised: Screening Version
MACNI	Multiple and Complex Needs Initiative
MERIT	Magistrates Early Referral into Treatment
MHD&CD	Mental Health Disorders and Cognitive Disabilities
NAAJA	North Australian Aboriginal Justice Agency
NGO	Non-Governmental Organisation
NOMS	National Offender Management Service
NPP	Non-parole Period
NSW	New South Wales
NSWLRC	New South Wales Law Reform Commission
NSWSPA	NSW State Parole Authority
NT LRC	NT Law Reform Committee
NT	The Northern Territory
OMF	Offender Management Framework
PACCOA	Probation and Community Corrections Officers' Association of Australia
PGI	Practice Guide for Intervention (NSW)
PSA	Post Sentence Authority (Victoria)
Qld	Queensland
RCADIC	Royal Commission into Aboriginal Deaths in Custody
RCPDCNT	Royal Commission into the Protection and Detention of Children in the Northern Territory
RNR	Risk-Need-Responsivity

SA	South Australia
SCAV	Sentencing Advisory Council Victoria
Tas	Tasmania
TJ	Therapeutic Jurisprudence
UK	United Kingdom
Vic	Victoria
VISAT	Victorian Initial Screening Assessment Tool
WA	Western Australia
WACC	Western Australia Community Corrections
WDO	Work and Development Order

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Julie Stubbs, Sophie Russell, Eileen Baldry,
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Chapter 1

Rethinking Community Sanctions

‘There is a failure here that topples all our successes’ (John Steinbeck, *The Grapes of Wrath*, cited in *State of New South Wales v Carr* [2020] NSWSC 643, Hamill J, [14]).

Darryl Carr is a proud Wiradjuri man. He has ambitions to be an artist, and has strong cultural ties to his community. He has a mild intellectual disability. Mr Carr has spent the vast majority of his adult life in prison. Most of the time he has been locked up is not referable to any heinous crime he has committed, but has been because he failed to comply with the strictures of an extended supervision order (“ESO”) imposed under the *Crimes (High Risk Offenders) Act* 2006 (NSW) or its predecessor. Some of these breaches involve using illegal drugs, others involve breaches of curfews, schedules of movements and accommodation conditions. These were described by the author of a risk assessment report as “technical” breaches. None involve the commission of violent or sexual offences ... [1]

[In 2014] I refused to reintroduce electronic monitoring. Rather, I insisted upon the parties fashioning different and more simple conditions that may be easier for Mr Carr to understand and comply with. I made what I thought were fairly pointed observations as to the way in which the order was being administered. Of particular concern was the alacrity with which relatively minor breaches were dealt with by criminal punishment (that is, incarceration), a lack of engagement with culturally appropriate programmes given Mr Carr’s clear identification with his indigenous heritage, and the isolation of Mr Carr from his family, especially his mother. Overall the concern was that the order was having a punitive, rather than a protective or rehabilitative, impact [4].

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... there is very little evidence of the Department exercising any real discretion or restraint in enforcing the conditions. It has been rare that it has elected not to prosecute these breaches or to attempt to manage Mr Carr in a more sensitive way... Mr Carr has spent about two-thirds of the last decade in custody for breaches of the ESO [7].

Some of the reports suggest that the impact of the order and the way it is being enforced may be counterproductive to Mr Carr's rehabilitation. I am quite sure that it has been [29].

(*State of New South Wales v Carr* [2020] NSWSC 643, Hamill J, [1,7,8,29]).

Justice Hamill was considering an application to revoke an extended supervision order (ESO) that had been in place since 2009. Despite being a juvenile, Mr Carr had been tried as an adult for three serious sexual offences committed when he was 16 years old. He was sentenced to eight years imprisonment with a four-year non-parole period but was not granted parole and served the full sentence. On release he was placed on an ESO for five years. He had been sent back to prison 16 times for breaching the order, and each time the ESO was suspended, thus, the order was still in effect 11 years later. On this occasion the Department did not oppose the application and the order was revoked.

Carr is extraordinary in several respects. Objection rightly could be made that it deals with a very particular form of community-based order, a post-sentence supervision order and is not typical of regimes of community-based control in Australia. Yet, it enlivens many questions and pressing concerns for scholars and practitioners of community sanctions, concerns that are central to this book. At a time of renewed optimism in the effectiveness of correctional interventions and risk-based governance, strongly endorsed by political discourse and some practitioners, it offers a cautionary note. In the claims of success, what is papered over? Success for whom and on what terms?

The judge invoked Steinbeck as he pointed to a string of failures of correctional practice in *Carr*. These include failures to comply with judicial expectations; administer conditions suitable for a man with complex disability support needs in a manner that supports rehabilitation and is not merely punitive; provide supervision that is culturally appropriate for an Aboriginal man; exercise discretion appropriately in response to breaches, taking Mr Carr's background and personal characteristics into account.^{1,2} Are these failures no more than the

¹For a discussion of complex disability support needs, see Chapter 6.

²The terms Aboriginal, Indigenous and Torres Strait Islander peoples and First Nations are used interchangeably throughout the book when referring to Australia. We use some terms drawn from Aboriginal languages, as in the Koori Court in Victoria – *Koori* refers to Aboriginal people in Victoria and much of NSW – and we refer to Aboriginal nations or languages. For instance, Mr Carr is a man from the *Wiradjuri* nation. We use the term Indigenous to refer collectively to First Nations peoples of nations beyond Australia.

familiar gap between law and practice, arising perhaps from mismatched expectations between the judiciary and correctional authorities, bureaucratic intransigence, implementation failures or scarce resources? Or do they tell us something more about the limits of current approaches to community-based orders and the foundations on which they are based?

What was the purpose of extended supervision in this case, and how was it given effect? How might we measure the success or otherwise of the order, which clearly did not support Mr Carr's rehabilitation? What role did risk assessment play in the determination of the type and duration of penal control to which he was subjected? As an Aboriginal man with an intellectual disability, what sort of support might best have assisted him to return safely to the community with improved well-being? How might community sanctions be reimaged?

In this book we place people and social groups who are increasingly vulnerable to criminal legal intervention and forms of penal control at the centre of our analysis which prompts some new questions and fresh insights.

Key Themes in the Emergence of Current Forms of Community Sanctions

Despite a resurgence of interest in community sanctions after a long period of neglect, especially relative to studies of mass incarceration, community sanctions remain poorly understood. They are often seen as 'not prison' rather than as having some positive public purpose. The absence of a clear purpose leaves them open to competing understandings and shifting political influences. This detracts from the capacity to deliver effective programmes, undermines proper evaluation, review and refining of community sanctions and limits the communicative potential of punishment (Duff, 2001). A failure to convey the nature and purpose of community sanctions to practitioners and the public, risks undermining their legitimacy and increasing the reliance on imprisonment. It feeds public, media and political scepticism about criminal legal systems and a loss of confidence in the judiciary that can exacerbate fears about safety. Ineffective or poorly targeted community sanctions also swell prison numbers through breaches of orders.

Community sanctions have been used in disparate ways and have 'vacillated' between control/enforcement and rehabilitation, influenced by shifting political imperatives and competing understandings (Schwalbe, 2012, p. 185). The idea of rehabilitation has shifted with a greater focus on community safety than the individual (Garland, 2001a) and its legitimacy has become dependent on its adaptation and alignment with 'utilitarian, managerial and expressive' narratives (Robinson, 2008, p. 430). Political commentary has largely disregarded community sanctions or else has sought to reassure the public by emphasising tougher sanctions (Bottoms, 2008). In Australia, this has been especially evident in the areas of bail (Brown & Quilter, 2014), suspended sentences (Freiberg & Moore, 2009; Gelb, 2013) and parole (Fitzgerald, Freiberg, & Bartels, 2020).

Accounts of community sanctions continue to be influenced by the decarceration/net-widening debates prominent in the 1980s, and by a false

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dichotomy between prison and liberty. However, within the twenty-first century penal landscape, some forms and uses of community sanctions challenge conventional temporal, spatial and political boundaries. Preventive and risk-based logics applied across criminal legal systems unsettle ideas about the timing, duration and legitimacy of forms of control, eroding constraints on pre-trial and post-release interventions. New orders combine prison-based and community-based control in distinctive ways. Shifts in funding models and competitive tendering arrangements reshape the relationships and blur the boundaries between government and non-government sectors.

These shifts, along with insights from critical scholars and newly emergent fields, make it timely to reconsider community sanctions.

As Robinson, McNeill, and Maruna (2013, pp. 324–325) observed, no single narrative is sufficient to account for the emergence of current forms of community sanction. The resurgence of community sanctions has featured both the ‘re-storying and re-configuration of the traditional range of sanctions and measures’ and the ‘emergence of new forms of community sanctions’, along with ‘the same community sanctions being “marketed” in very different ways internationally’.

A recurrent trope in this re-storying has been ‘what works’. On some accounts there has been a revival of rehabilitation due to new evidence of what works, albeit this is a refashioned form of rehabilitation. The notion that the success or failure of policy drives penal developments offers a somewhat mechanistic account that elides the emotional tenor of criminal legal policymaking and the symbolic and political uses of the appeal to evidence (Freiberg & Carson, 2010; Goodman, Page, & Phelps, 2017). It also sidelines contestation about what constitutes success or failure and deflects normative questions such as how to achieve positive social purposes.

International research indicates the increased ‘scale, reach and intensity’ of supervision (McNeill & Beyens, 2013, pp. 2–3) and a greater reliance on the imposition of conditions. Challenging long-held conceptions of community sanctions as an expression of mercy or a ‘let off’, researchers have examined ‘the pains of supervision’ in recognition that, however benevolent in intent, community-based orders and the supervision that they entail deliver pain (Hayes, 2015; McNeill, 2019). A new theorisation of modes of penal action by Garland (2020, p. 325) focuses on ‘the concrete practices by which penal actors operationalize punishments and contrive to produce their intended effects’. Garland (2020, p. 326) sets out four modes of penal action:

Penal afflictions (punishments that wound offenders’ bodies),
penal levies (punishments that appropriate offenders’ resources),
penal controls (punishments that impose restraints on offenders),
and penal assistance (punishments that provide resources to offenders).

He draws attention to the ways in which specific penal measures, such as imprisonment or probation, may combine more than one mode of penal action,

something that is often overlooked, and that particular modes of penal action can be employed via various penal measures.

Scholars have begun to examine disparities in the use of community sanctions across social, economic and spatial divides, noting the intensification of supervision and the rise of mass supervision where surveillance and control is concentrated in, and on, particular communities, with adverse effects (McNeill & Beyens, 2013; Pew, 2009; Robinson, 2016). Phelps (2017a) has provided important insights into such matters based on empirical research concerning probation in the United States. She argues that probation may represent an alternative to imprisonment for the relatively privileged, but it is more likely to be net-widening for people who are disadvantaged, both at the front-end by substituting for diversion and at the back-end by penalising those who do not or cannot comply with their conditions. Phelps (2017a, p. 56) found that racial disparities in probation contributed to even more pronounced racial disparities in imprisonment as more white people were diverted from prison and Black people had higher revocation rates.

Disparities arising from social disadvantage also manifest in other ways. As McNeill and Beyens (2016) found across Europe, some social groups (e.g. people with impaired mental health, foreign nationals) are commonly denied community sanctions and instead given custodial sentences. Also, individuals may be denied parole due to factors such as homelessness, or because they would reside in areas without necessary programmes and supports. A paucity of programmes and services exacerbates social disadvantage and renders life more precarious for former prisoners, increasing the likelihood of non-compliance with the conditions of their release (Balfour, Hannah-Moffat, & Turnbull, 2018). In Australia, the term ‘postcode justice’ has been coined to capture the spatial manifestations of the problem whereby access to justice is mediated by where one lives. While postcode justice is not reducible to a simple urban/non-urban binary, those outside metropolitan areas are especially disadvantaged (Colvin, 2019).

The differential effects of community sanctions – whether in the form of mass supervision, intensified surveillance and control, the exclusion of disadvantaged people from community-based orders or the failure to support them in the community while serving orders – too often go unexamined.

There is overwhelming evidence of heightened levels of criminalisation of First Nations peoples in Australia and other countries and community sanctions are often proposed as a putative means to reduce their levels of incarceration. Yet, First Nations people are rarely the focus of research or policy concerning community sanctions. Women, too, are often overlooked or treated as anomalies (Worrall & Hoy, 2005, p. 130) and racialised women are even more likely to be disregarded along with other people who are disadvantaged at the intersection of multiple axes of power (Stubbs, 2020). Other groups vulnerable to criminalisation and who have distinct needs that are commonly unheeded in research and practice include people with disabilities (Steele, 2020). There is a pressing need to redress these and other elisions and erasures in research and practice and to press for more equitable outcomes.

Phelps (2017a) has urged scholars to ask more questions about the effects of probation for individuals, families, neighbourhoods and communities, and on inequality. We share her concerns with respect to community sanctions generally and take up that appeal throughout this book.

Emerging Themes and Questions

We have been particularly influenced by Gwen Robinson and Fergus McNeill, who have led a resurgence of scholarship on community sanctions and addressed many gaps in knowledge. They provided (Robinson et al., 2013) an important account of four overlapping narratives that have helped to legitimate community sanctions: managerial, punitive, rehabilitative and reparative community sanctions. Recognising the limits of over-generalised accounts, Robinson and McNeill (2016) point to the need to situate such work historically, socially, culturally and politically. Together with international colleagues, they have highlighted convergences and differences between European nations in community-based punishments and in the forms of legitimization of community sanctions.

Michelle Phelps' (2017a, 2017b) detailed account of state-based variation in probation in the United States has fostered greater recognition of the limits of national level analyses that can mask key differences and attendant inequalities.

Phelps and colleagues have revisited leading accounts of penal change and proposed a way to reconcile those that highlight similarities in developments across nations or places with accounts that point to differences between locations and over time. They (Goodman et al., 2017, p. 2; see also Page, Phelps, & Goodman, 2019) point to the limitations of the pendulum metaphor commonly used to describe shifts between more punitive and more rehabilitative orientations toward punishment, especially in the United States, which masks 'the blending of penal orientations, policies, and practices, as well as the struggle between actors within and beyond the penal field that limits wholesale transformations in regimes'. Page et al. (2019, p. 823) note:

...penal change can appear both variegated and coherent i.e., divergent across locations, but moving in one overall direction... we can recognize variegation and granularity without having to jettison concepts and shorthands such as penal populism, mass incarceration, and the culture of control, all of which have been used, sometimes appropriately, to denote that punishment in states and countries has shifted in important and traceable ways over time.

Their agonistic approach highlights struggle among key actors, who may, nonetheless, share a weak consensus about matters such as the boundaries of debate and commonsense (see Chapter 8; Hogg & Brown, 1998). Outcomes are reached through 'conflictual consensus' Page et al. (2019, p. 823) and may accord with, or challenge, larger trends. As McNeill demonstrated with respect to

Scotland (cited by Page et al., 2019, p. 325), historical accounts that present an ‘overarching narrative’ may erase conflict and omit some participants in struggle who are seen as ‘antagonists’.

Other critical perspectives have begun to influence the community sanctions research field, perhaps somewhat later than in other domains.

Contemporary academic work has tended to focus on strategies of adaptations, shifts in modes of exercising power and legitimate narratives for community sanctions in social conditions described as late modern, post-modern, post-industrial or post-disciplinary (Robinson et al., 2013, p. 329). Abolitionist, decarceral and decolonial scholars have begun to push these boundaries further. They start from a position that the modes of control that comprise the carceral state are inseparable: carceral power is not only exercised through the prison but through other forms of control and containment including community sanctions. As Michelle Alexander (2020, p. xii) noted in her foreword to Schenwar and Law’s influential book, *Prison by Any Other Name*,

The term ‘mass incarceration’ makes it easy to forget the majority of people who are under some form of carceral control aren’t even in prison... More than twice as many people are currently on probation and parole... We could cut the number of people in cages in half and still have entire communities under surveillance – placed on probation, parole or electronic monitors – and perpetually hunted or harassed by the police.

Indeed, the prison industrial complex, a core concept within abolitionist thinking, draws attention to the interrelationships between public and corporate interests in the carceral state and between policing, prisons and community sanctions.

The re-emergence of a more radical politics around abolitionism has reignited recognition of the colonial roots of criminalisation and penalty and of oppression based on class, race, gender, disability, Indigenous and immigrant identities, and their intersections. The roots of the carceral state lie within the colonial encounter and the urge to remedy, fix, rehabilitate or otherwise normalise individuals or collective peoples within an oppressive normative framework. The *raison d’être* of the civilising mission was to force change on those who were otherwise seen to be in deficit whether through eugenics, as in the sterilisation of people with disabilities, or the assimilation of First Nations peoples through imprisonment in training schools and on reservations (Ross, 1998). As Liat Ben-Moshe (2020) argues, the lines between punishment, punitiveness and treatment are very blurred.

The impulse to rehabilitate through penal interventions is saturated with colonial influences. Abolitionists have drawn attention to the contemporary role of the ‘caring professions’ in maintaining and enforcing systems of surveillance and punishment authorised and/or regulated by the state, directly or through the private sector (Meiners, 2016; Schenwar & Law, 2020). Within this context, criminalisation and punishment, whether through the prison or community corrections, is seen as fragmenting communities; community resilience and defragmentation can be generated

through community action against the carceral state and by building new approaches to solving social issues based on community solidarity.

Calls by feminist scholars for more critical examination of gendered, racialised, class-based and other differences in punishment are not new, but they often have been disregarded. Women's different and diverse pathways to criminalisation, and often more complex needs than men, have implications for theory and practice. Critical feminist scholars using intersectionality and other frameworks point to the structural and discursive vulnerability of racialised women and girls to criminalisation (Crenshaw, 2012), and to the epistemological, ethical and political concerns arising from their invisibility in scholarly accounts and public discourse (Bosworth & Kaufman, 2013; Ocen, 2013; Parmar, 2017; Stubbs, 2020). They also encourage greater attention to the raced and gendered logics that underpin such processes.

The emergence of a critical disability criminology offers a new perspective on community sanctions (Baldry, Dowse, Snoyman, Clarence, & Webster, 2008). Criminal legal systems throughout the world have become *de facto* institutions in which disadvantaged people with complex support needs are managed (Baldry, Clarence, Dowse, & Trollor, 2013; Ben-Moshe, 2020). Critical disability criminology aims to redress the failures to engage with the criminalisation of disability (Spivakovsky, 2014). There is a need

...to move beyond traditional theoretical approaches which examine social support systems, processes of criminal justice and the presence of impairment as separate issues and towards an integrated conceptualisation of the over-representation of people with [mental health disorders and cognitive disabilities] in the criminal justice system as a complex human, social and political phenomenon.

(Dowse, Baldry & Snoyman, 2009, p. 31)

Critical disability criminology draws from the social model of disability (Oliver, 1996). It makes a crucial distinction between an impairment of the individual body or mind (e.g. a diagnostic label of foetal alcohol spectrum disorder or acquired brain injury), and disability as a socially constructed category that creates and compounds discriminatory barriers and obstructive social arrangements that disable people (Baldry et al., 2013; Dowse et al., 2009; Oliver & Barnes, 1998).

When combined, these theoretical approaches [critical criminology and critical disability] take the power relations embedded in age/generation, class, 'race', gender and ableism as cross cutting analytic lenses to interrogate critically the relations between socio-economic disadvantage, disability(ies) and processes of criminalisation and, ultimately, to comprehend the substantial over-representation [of people with disability in criminal legal systems].

(Baldry, Briggs, Goldson, & Russell, 2018, p. 639)