

Third Edition

Principled Sentencing

Readings on Theory and Policy

Edited by Andrew von Hirsch,
Andrew Ashworth and Julian Roberts

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and
Julian Roberts



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Preface to the Third Edition

That the imposition of sentence is a decision of critical importance can hardly be doubted. It determines how much an offender must suffer for his or her offence, and that suffering may include the deprivation of the individual's liberty. Moreover, when the facts of the offence are undisputed, as is often the case, the nature and quantum of sentence is the primary decision to be made. In most common law jurisdictions courts enjoy wide discretion at sentencing—although this discretion has been circumscribed by guidelines in many countries. In the early 1970s, sentencing theory and practice began at last to receive serious attention from scholars, and the scholarly literature has expanded rapidly ever since.

This Reader continues a series that began in 1981 with the publication of an anthology of readings devoted to sentencing theory and practice.¹ That volume was followed by another collection, 'Principled Sentencing'.² The scholarship on sentencing has been accumulating at a remarkable pace in recent decades. Moreover, sentencing guidelines have been developed in a number of jurisdictions, such as England and Wales. Currently, New Zealand is in the process of developing comprehensive sentencing and parole guidelines. Ten years have now past since the second edition of this Reader was published,³ and for this reason we felt that it was high time for a third edition. In compiling readings and writing the chapter introductions we have almost completely overhauled the previous volume. A number of particularly influential contributions remain, but three-quarters of the readings have been replaced by more recent extracts.

Two new chapters have been added to the volume: 'Sentencing Young Offenders' (Chapter 7) and 'Doing Justice to Difference: Diversity and Sentencing' (Chapter 8). These additions reflect the significant volume of scholarship that has emerged over the past decade on these important topics. Several of the existing chapters have been considerably expanded, for the same reason. Moreover, the introductions to each chapter have been thoroughly rewritten to reflect developments around the world. Readers familiar with the previous edition will notice further changes in the volume's format. Rather than provide a dense page or two of further readings at the end of each chapter, we now provide ten important additional titles for the reader who wishes to pursue the subject in more depth.

We continue in this edition to omit the death penalty as a subject for discussion. A civilised state, we feel, should not employ this atrocious sanction at all, so there should be no occasion for the courts to have to decide whether, when and why it should be imposed as a legal penalty.

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Rehabilitation

The rehabilitative ideal—that sentences should aim to reform the criminal tendencies of offenders—was a major force for much of the twentieth century, and remains an important penal rationale. The Model Penal Code, an influential piece of draft legislation written by the American Law Institute in the early 1960s, demonstrates the significance of rehabilitative aims at that time: courts were encouraged not to sentence an offender to imprisonment if, among other things, ‘the defendant is particularly likely to respond affirmatively to probationary treatment’.¹ Likewise, one of the three justifications for imposing a sentence of imprisonment was public protection on the ground that ‘the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution’.² The 1960s have often been regarded as the heyday of rehabilitationism, but the subsequent history of this ‘welfare’ approach to penal policy remains subject to different interpretations.

One view is that the rehabilitative ideal was dominant in the 1960s and then suffered a catastrophic decline in the 1970s, partly because of the publicity given to negative research findings, partly because of wider social and economic changes, and partly because of disenchantment about the intellectual basis of rehabilitative approaches:³ see the discussion by Francis Allen in Selection 1.1. A more nuanced view is that the rehabilitative ideal was important but never dominant—for example, in the Model Penal Code it sat alongside incapacitation and desert as justifications for imprisonment—and that, even though its foundations were much criticised in the 1970s, it has remained part of penal practice and penal theory throughout.⁴ Thus, not only in relation to young offenders (see Chapter 7 below) but also as part of probation for adults and parole, rehabilitation remains a significant penal rationale. This is not to deny that other forces interact with it—for example, surveillance and the control of risk are also key elements in probation and parole—but merely to assert its continued relevance. In Canada rehabilitation is one of the statutory purposes of sentencing,⁵ as it is in New Zealand.⁶ Similarly, in England and Wales one of the five statutory ‘purposes of sentencing’ is ‘the reform and rehabilitation of offenders’,⁷ and official interest in rehabilitative programmes has been stimulated by the ‘what works’ movement, which aims to identify and to publicise programmes that are effective in reducing reoffending.

Definition

Rehabilitation bears a number of different meanings—restoration to full health after a major surgical operation, or re-admission to a community after a rejection by that community. In the penal context, it tends to be used to refer, not so much to the goal of reducing an offender's tendency to commit crimes, but more to the means used in order to try to bring about that goal. In this sense, rehabilitation encompasses approaches to fostering law-abiding habits which are intended to work by changing offenders' attitudes and inclinations. Thus the term 'reform', often used as a synonym for rehabilitation, tends to be written more fully as 'reformation of character', thereby indicating the true target of the methods employed. This longstanding approach has been termed the 'correctional model' of rehabilitation,⁸ since it is focused on the offender and on changing the causes of the offending behaviour. The term 'treatment' has often been used in this context, perhaps more so in former years than now, as an allusion to a medical model in which the pathological state of the offender is diagnosed and treated by experts.

Despite the prominence of elements of a non-treatment paradigm,⁹ there remains a treatment element in rehabilitative techniques, with expert diagnosis and prescription, and some of the strengths and weaknesses of this approach are considered below. Finally, we should recall that rehabilitation is essentially a consequentialist rationale for compulsory social intervention: in its stronger form the claim is that this approach to the prevention of crime and the reduction of reoffending can benefit society in general, whereas in a weaker form the claim would merely be 'that although we cannot be confident in our ability to change offenders for the better, we can at least avoid unnecessary harm resulting from excessive or damaging penalties.'¹⁰

In continental Europe it is more common to find the term 'resocialisation' used for these approaches, emphasising the aim of (re)integrating the offender into 'the community'. Terms such as resocialisation and reintegration indicate a rather different approach to rehabilitation than that of the correctional model described above. They envisage a more relational process,¹¹ which involves not only supervision but also some kind of discourse or negotiation with a range of 'stakeholders', including families, members of the wider community and even victims. The purpose of this process would be to facilitate the re-entry, resettlement or reintegration of the offender into the community. This relational approach is to be found in the recent resurgence of criminological interest in desistance¹² and in resettlement,¹³ trying to identify the conditions most favourable to an offender's desisting from offending and becoming resettled in the community after conviction, particularly after a custodial sentence. On the relational approach to rehabilitation, then, the emphasis is not so much on responding to the individual's offending behaviour as on dealing with the aftermath of the offence and the sentence so that the offender can be re-established as a law-abiding member of the community.

In some forms, this emphasis on relational processes with stakeholders appears to merge with a restorative response to offending. It does not necessarily take this course, but readers will find discussion of restorative justice in Chapter 5 below.

Theoretical Underpinnings

Since rehabilitation is a form of prevention, it is fundamental that rehabilitative techniques should be supported only if and insofar as they offer effective methods of reducing reoffending. Beyond this prosaic foundation, however, some rehabilitationists argue that the state's duty to strive to promote security and to reduce crime also supports a positive obligation to provide programmes and other treatment opportunities to enable offenders to break free from lawbreaking and to lead better lives, and that it also has an obligation to adopt the most humane and least intrusive forms of compulsory social intervention. Thus Rotman has argued that:

rehabilitation becomes a right of offenders to certain minimum services from the correctional services. The purpose of such a right is to offer each offender an opportunity to reintegrate into society as a useful human being.¹⁴

One reason for thus insisting on these state obligations, as Francis Cullen and Karen Gilbert argue in Selection 1.4, is that a majority of those convicted of offences are people who are socially or otherwise disadvantaged, and that it is the state's duty to compensate for this by offering the kind of support to offenders that is to be found in rehabilitative sentences.

Methods

More light can be cast on the definition of rehabilitation by considering some of the methods used. On the correctional model, the rehabilitative ideal is that the nature of the offender's condition (ie the causes of his or her offending) is diagnosed by an expert, and then the appropriate treatment is made available. There is therefore an assumption that the offender's social or psychological problems may play a significant part in the offending, and that is what the rehabilitative technique should tackle. An obvious example of this would be drug or alcohol misuse leading to dependency or at least to crime: some form of drug or alcohol treatment order would then be imposed, in the expectation that success in treating the substance misuse would bring a reduction or cessation of offending. More generally, use may be made of psychological techniques such as counselling or cognitive-behavioural programmes, sometimes delivered individually, though more frequently delivered in

a group context, sometimes incorporated into a community sentence and sometimes delivered in prison.

The aim of the correctional approach is to change the attitudes and dispositions of offenders: the method is a form of treatment aimed at producing rehabilitation, even though the ultimate objective may be expressed as the reduction of risk or of reoffending, or indeed the protection of the public. The aim of the relational approach to rehabilitation is to reintegrate the offender by tackling not only behaviour but also social and structural disadvantages relevant to him or her, such as accommodation, employment, financial planning and so forth.

Effectiveness

Although there are those who have sought to justify the pursuit of rehabilitation on grounds of humanity towards offenders,¹⁵ the main justification of correctional rehabilitation is that it seeks to achieve crime reduction by treating the *causes* of offending, thereby achieving a more lasting effect than deterrence or incapacitation. The main justification for relational rehabilitation is that it seeks to achieve crime reduction by ensuring the satisfactory reintegration of the offender into the community where he or she must live. On its own terms, therefore, rehabilitation is rightly judged on its results. If the methods employed cannot be shown to produce better results than other penal methods, its central claims are undermined.

There are, however, formidable difficulties in assessing effectiveness. First, there is a definitional question—effectiveness in what terms? The usual answer is that reconviction rates are the best measure, over (say) a period of two years after the end of the sentence. But the incompleteness of reconvictions is well known, not least because in England and Wales only around a quarter of offences reported each year are brought to justice. Moreover, treating a single reconviction as a failure may be unduly pessimistic: significant reductions in the frequency and/or the seriousness of reoffending may properly be regarded as positive outcomes.

Secondly, even accepting all those problems, how should effectiveness be measured? Often the best that can be achieved is to measure the two-year reconviction rate for offenders with similar characteristics (offence, previous convictions, age) given different sentences. The British Home Office accepts the view that only the random allocation of offenders to different sentences or treatments can produce a ‘gold standard’ of evaluation¹⁶; however, randomised controlled trials are rare, and it can be strongly argued that reliance on them alone would produce a narrow and unbalanced evaluation.¹⁷ Evaluations with well-matched comparison groups can provide reasonably robust evidence, as the Home Office has recognised,¹⁸ as can other research methods with proper controls. For most evaluations, all the reservations about reliance on previous convictions remain to be negotiated.

With these qualifications, does the evidence show what works for whom, when and why? International interest in 'what works' was generated by two large meta-analyses of research into rehabilitative interventions in the early 1990s, suggesting that well-targeted rehabilitative programmes could have a significant effect on reoffending.¹⁹ The revival of interest was followed by further analyses by James McGuire, emphasising the need to ensure that various implementation requirements were strictly met if the successes claimed for certain rehabilitative programmes were to be replicated.²⁰ However, the more cautious side of this literature was not reflected in the Halliday Report of 2001 to the British Government, which included the broad claim that the application of 'what works' developments such as cognitive-behavioural programmes could reduce reoffending 'by 5–15 percentage points'.²¹ In Selection 1.2 Anthony Bottoms refers to this claim as 'reckless', and explains why it was a travesty of the available evidence. In practice, however, these programmes were 'rolled out' nationally, somewhat in a 'one size fits all' manner, and it is hardly surprising that the results have not borne out the over-optimistic estimates.²² The result, in Britain, is that the pendulum may swing too far in the other direction, ignoring the successes of small, well-targeted programmes.

As Peter Raynor argues in Selection 1.3, there is an accumulation of evidence about what works and what does not,²³ and there is reason to expect some schemes to work well if properly funded, targeted and implemented. The Home Office seems to accept this more realistic assessment, at least in its research arm.²⁴ This suggests that, if rehabilitationism is to continue as one of the major penal rationales, its focus will need to be scaled down so as to relate only to those sub-categories of offenders for whom its techniques can reliably be expected to be effective. In that role, it might be no more than an auxiliary penal aim, always linked to one or more of the other aims.

Sentencing Implications

What implications does a rehabilitative rationale have for sentencing? In principle, the correctional model proposes that sentences should be designed, at least in part, to meet the treatment needs of offenders, in terms of both the method and the duration of intervention. In order to impose such sentences, a reliable diagnostic tool is required to assess the needs of the individual offender. In England and Wales a system known as OASys has been developed to fulfil this function.²⁵ Assuming that an accurate assessment can be carried out, the courts need to have access to treatment programmes suitable for those offenders said to need them. Usually these will be in the form of a community sentence with a particular requirement, such as drug or alcohol treatment, or attendance at a specified programme (eg anger management, enhanced thinking skills). On a rehabilitative model, the duration of the

order would be determined chiefly by the length of time said to be required in order to complete the programme.

For some offenders, the view may be taken that they must be sent to prison and their rehabilitation needs must be met in a custodial setting—whether those needs be drug or alcohol treatment, a cognitive-behavioural programme, sex offender treatment or whatever. However, whether the sentence is community-based or custodial, this approach would vest considerable discretion and power in those who administer the programme and assess the progress of those undergoing it. This approach points towards indeterminate sentences, and is rarely adopted as such in contemporary penal systems. Indeterminate sentences are usually available only for incapacitative purposes. Within such sentences, however, the completion of rehabilitative programmes is often relevant to release decisions, as evidence of a reduced need for public protection from the offender.

The extent to which rehabilitation should determine the duration and onerousness of the sentence would also depend on what other sentencing aims are brought to bear, particularly those of proportionality. It is thus possible to ensure that rehabilitative interventions can be accommodated within sentencing approaches that make the seriousness of the criminal offence an important criterion for deciding the severity of sentence. A rehabilitative scheme, then, may be designed in order to try to reconcile interests in ‘offender reform’ and ‘justice’—while at the same time recognising the potential tensions between these objectives.

Objections to Rehabilitative Sentencing

Among the objections to rehabilitative sentencing, we may discuss five possible arguments: that it proceeds on an inaccurate model of human behaviour; that it is unduly controlling; that it privileges discretion over accountability; that it can lead to disproportionate interventions; and that the problems of establishing effectiveness cannot be satisfactorily overcome.

The first objection is that rehabilitative techniques are connected to a particular positivist strain of criminology that assumes individual pathology in lawbreakers and seeks to tackle the reduction of reoffending through interventions focused on the individual’s character and propensities. This is too simple a theory of crime causation. At a minimum, there is a need to develop a theory of individual decision-making and action (as Per-Olof Wikström puts it, ‘what moves people to commit acts of crime’), and to combine it with a theory that explains the interaction of individual motivation with other conditioning factors.²⁶ By abstracting the individual from those other influences, rehabilitative techniques can never confront the whole range of causal factors—for example, the family environment, and social conditions such as poor housing, employment and education policy. Furthermore, there seems to be a tendency to promote programmes rather than other, more individualistic forms of rehabilitative intervention. In response, rehabilitationists

may proceed by confession and avoidance, accepting the limitations of their techniques but arguing that interventions may have some effect if they help equip individual offenders to withstand the various temptations, pressures and hardships that they may have to confront.

A second objection is that rehabilitationism posits an authoritarian relationship between the state and the offender, leading to a form of paternalism that may be repressive and tends to give little or no recognition to the offender as a moral agent and autonomous subject. In a way this follows from the first objection, since the model of individual pathology assumes a process of diagnosis and treatment that is controlled by the state official (usually, probation officer). It was in opposition to this that Anthony Bottoms and Bill McWilliams developed their non-treatment paradigm for probation, arguing that the offender should be centrally involved in deciding what caused him or her to offend and what response would be desirable, and promoting a principle of voluntarism in treatment.²⁷ Coerced treatment is not consistent with the ideals of the liberal state, in the sense that it does not respect the individual (offender) as an autonomous citizen (Allen, Selection 1.1). It is unlike the medical model, since a patient can always refuse the treatment prescribed by the doctor, whereas such a response is at odds with the coercive framework of the sentencing system. Rehabilitationists may deny that there is anything authoritarian about the prevailing practices, but the official trend in recent years has been to emphasise the controlling and disciplinary features of the framework of probation and other interventions.

A third objection is that it privileges discretion over accountability. In principle, if treatment is designed to rehabilitate, it should continue for as long as it takes to achieve that objective; and it is the treatment-administering authorities who should decide when the offender's attitude and dispositions have changed sufficiently to justify release from ongoing obligations. In practice, many programmes now have a finite length, and so they do not raise this particular problem. But some forms of treatment have no prescribed length, and they place a considerable amount of discretion in the hands of the treatment agents or the reviewing body. An example of this in the English system is the release of prisoners from the indeterminate sentence of imprisonment for public protection (IPP) and from the sentence of life imprisonment. These sentences allow considerable discretionary power over the length of an offender's incarceration, and the criteria for release relate to risk to the public and therefore have some connection with correctional rehabilitation.

A fourth objection to rehabilitationism is that it may lead to disproportionate restrictions on, or deprivations of, liberty. As Andrew von Hirsch and Lisa Maher argue in Selection 1.5, it is important to ascertain whether a rehabilitative approach leads to the imposition of measures (deprivations, restrictions) that are more onerous and/or less fair than would otherwise be imposed. This can occur in at least three ways. First, if an assessment of an offender indicates a need for a particular type of programme, the effective length of sentence will be determined by the duration of that programme rather than by the seriousness of the offence. This may