Paying off the fine by working outside prison. On the origins and diffusion of community service

Introduction

This article examines the liberal origins and diffusion of community service, one of the most significant alternatives to imprisonment. While community service's recent history has enjoyed great scholarly attention, there is still much discussion and conflicting accounts of its origins. Community service's originality - or lack thereof - has provoked a considerable amount of debate, with many authors suggesting that the lineage of community service can be traced back to past penal practices such as penal servitude, bridewells, or impressment (Young, 1979; Pease, 1980, 1985; Vass, 1984, 1990; Van Kalmthout and Tak, 1988; Morris and Tonry, 1990). Conversely, others argue that community service, in its present form, is superficially connected to these practices and in reality differs considerably from them (Fuchs, 1985; Kilcommins, 2002, 2014). One aspect that often remains forgotten in the historical discussions about the lineage of community service is its relationship to fines or, better said, to unpaid fines.[1]

From the late eighteenth century throughout the nineteenth century, unpaid work without deprivation of freedom was conceived and promoted as a way of paying off fines when offenders' insolvency precluded payment in money, thus avoiding imprisonment for defaulters. This article is dedicated to highlighting the modernity of these liberal precedents, while simultaneously pointing out the usefulness of community service for the partisans of new penal initiatives of an increasing punitiveness. Firstly, it will explain the reasoning behind the adoption of unpaid work as a form of substituting imprisonment for fine defaulters and, more generally short-term prison sentences (section 2). Secondly, it will explore the subsequent difficulties of implementation in different European countries during the time until the conditions for the emergence of community service orders as we know them today were present. This emergence during the last third of the twentieth century allowed community work (hereafter, CW) to develop into an autonomous punishment in the community (section 3). Thirdly, it will reveal that the successful diffusion of CW in Europe has occurred in different ways, at different times and for varied reasons in each country. In fact, although the conditions for the emergence of CW can only be understood within the modern penal complex, the diverse trajectories of CW diffusion help explain how its expansion is attributable to its usefulness for both partisans of the continuity of penal modernism and of the qualitatively different penal postmodernity (section 4). By doing so, the article will explain the ideology and mechanisms that helped to introduce and spread this criminal justice innovation. This is required because, although 'scholars treat diffusion as a natural consequence of innovation' (Rubin, 2015: 366), many innovations in criminal justice regarding alternatives to imprisonment were a total failure.

Before proceeding, however, we must clarify our use of terms for this subject. 'Community service' is a concept that only achieved its present meaning in the last third of the twentieth century. Before that, some institutions that allowed paying off the fine by working outside prison were described and labelled differently across jurisdictions. These included forced or free work of benefit to society, which in turn could be paid or unpaid. All of these labels were originally conceived as a way to deal with the problem of fine default. I have opted to label these 'community work', while acknowledging that in many aspects they were quite different from our current understanding of this concept.

The search for alternatives to imprisonment for defaulters

Imprisonment triumphantly reigned during the nineteenth century. Only towards the end of the century did the idea of establishing a punishment of temporary work absent of imprisonment begin to spread. This proposal was very welcomed in the context of criticisms of short-term prison sentences and of imprisonment for defaulters, and was almost always a short-term prison sentence itself. In fact, distinguished representatives of the crusade against short-term imprisonment, like Carrara (1871) and Von Liszt (1889a, 1892), expressed their agreement with the creation of a labour sanction that could be used as a substitute for custodial sentences in the case of unpaid fines. Other criminologists, German ones in particular, supported this proposal (Aschrott, 1888; Lammasch, 1889; Rosenfeld, 1890; Mittelstädt, 1891; Schmölder, 1902).[2] Public work instead of imprisonment for fine defaulters was massively supported by German literature during the 23rd *Juristentag*, the biannual conference of German lawyers, in 1895 (Felisch, 1895; Merkel, 1895), and by European literature at the 7th International Penal and Penitentiary Congress held in Budapest in 1905. The main reason for this support was that public work adopted a functionally significant element at that time - the obligation to work – from custodial sentences, without all the negative effects of imprisonment.

Support for public work without deprivation of liberty was mostly limited to its function as a punishment to replace imprisonment for fine defaulters (Bonneville de Marsangy, 1864; Von Liszt, 1905; Galdo, 1908; Heilborn, 1908; Rauh, 1912). There are two factors explaining this limited support. Firstly, the idea at the time was to increase the role of fines in the penal system, with the aim that they could replace short-term imprisonment. To do this it was necessary to find an appropriate measure to replace imprisonment for defaulters, a practice which was seen as grossly unfair (Von Holtzendorff, 1864; Goldschmidt, 1908; Mohr, 1913). This measure appeared to be forced labour without imprisonment, even though it did not eliminate the potential imprisonment of defaulters and subsequent swelling of the prison population. Those who did not respect labour discipline and breached the terms of CW ended up going to prison. Secondly, the relationship between the fine and work seemed to be mediated by the value of the work the offender must undertake for the benefit of the community, even though it was considered doubtful that it would be possible to achieve results of a similar economic value as those achieved by a normal worker (Heilborn, 1908; Mohr, 1913). What gave meaning to the punishment was not simply the fact that the offender had to work for a certain amount of time on a specific activity, but that the fruits of his or her labour were given back to the community. From this perspective, implementing CW was a kind of reversal, which turned imprisonment into a monetary sanction by replacing time with value in accordance with this extremely widespread idea at the end of the nineteenth century (e.g., Bonneville de Marsangy, 1864; Silvela, 1874; Von Liszt, 1889a; Rosenfeld, 1890). In this sense, there was no sanction more suitable to be turned into money than work. This notion was expressed as early as 1805 by Kleinschrod (1805: 241), for whom '[f]ines are balanced only by those penalties which involve doing a job of work.' The same idea is also found in Tittmann (1822: 134), for whom '[t]he substitute for a fine when it cannot be paid must be manual labour, not a corporal sentence which bears no relationship whatsoever with the fine.'

At the same time, this close relationship between the fine and CW was clearly seen in the debate about whether the work should be compulsory or voluntary. A significant doctrinal sector was in favour of the work being undertaken without compulsion (Bonneville de Marsangy, 1864; Von Holtzendorff, 1864; Stooß, 1891; Goldschmidt, 1908; Heilborn, 1908; Rauh, 1912; Carfora, 1928). Two arguments justified this proposal. Firstly, there was the idea that non-forced work was closely related to a monetary sanction, since 'this system resembles that of paying in installments' (7th International Penal and Penitentiary Congress held in Budapest in 1905, in Barrows, 1907: 30). It was thought that the punishment imposed in substitution of the fine should remain as similar as possible to the nature of the monetary punishment. Silvela (1874: 411) explicitly stated that '[w]ithholding part of the offender's wage, demanding – if he is not currently earning – that he works for the benefit of the State or the Municipality, does correspond to the idea of a pecuniary punishment, or rather it presents a new aspect under which the same punishment can be considered.' Von Liszt (1889b: 764) also argued that sentencing offenders to work constituted a monetary sanction, as the limitation of personal freedom was pushed almost completely into the background.[3] Following academic consensus, an offender's consent to perform CW was finally required in the first European legal regulations, such as the 1889 Italian Zanardelli Penal Code or the 1921 German legislation on fines.[4]

The second idea behind the proposal for voluntary work, as a protection for the wealthier classes, was that the work cannot be compulsory because ‘it would be very strange indeed to force someone who has never done manual work to suddenly work on the construction of a public highway or a building intended for public use’ (Carfora, 1928: 1440). This observation related to two considerations. First, there was a firm belief that many offenders would rather go to prison than pay the fine (e.g., Castro y Orozco and Ortiz de Zúñiga, 1848; Maffei, 1875; Krohne, 1889; Rosenfeld, 1890). However, it soon came to light that most offenders required to pay a fine did not do so because they simply lacked the financial means. Second, there was concern to task people with work that was similar to the jobs they usually did outside the penal system. In short, middle or upper class people would not have to do manual work. In fact, it was even stated that replacing the fine with work would only be applicable to labourers or, in general, to those who were able to do manual work. These proposals contributed to the evolution of the work sentence into a manual labourers’ penalty.

There was another reason of a more practical nature that also justified that the work should be based on the agreement of the offender. Community service is thought to be ineffective in the case of a totally uncooperative offender, since the offender would unlikely complete his or her sentence satisfactorily. Added to this is the fact that since the work was undertaken ‘freely’, it was easier to overcome the resistance shown by employers and unions to the work of offenders (Baumann, 1968).

From a failed alternative to imprisonment for defaulters to an autonomous community punishment

Various problems emerged, both of a theoretical and practical nature, when attempts were made to implement CW in legislation. Those of a theoretical nature included the concern for the justice of a solution that forced the poor to work, while the rich could simply pay a sum of money. Further, the observation was made that work is not punishment and, in fact, people are fortunate to be able to work. Thus, linking a penalty to work devalues the notion of work (Rosenfeld, 1890; Buchwald 1948). Problems of a practical nature were related to numerous factors: the lack of alternatives for offenders who were unable to work (Felisch, 1895; Stooß, 1907); the possible competition to free work (Felisch, 1895; Merkel, 1895); and the (un)availability of suitable work for all insolvent offenders. The third factor was mostly due to a lack of organization, which meant it was necessary to limit the application of this penalty to cases of replacing an unpaid fine, and it was not considered advisable to extend this use further (Von Liszt, 1889a, 1889b), to rural zones (Rosenfeld, 1890), or to minor offences (Lammasch, 1889). Only after these theoretical and practical aspects had been resolved could CW become a standard sanction used to expand the range of options available to the courts as an alternative to imprisonment. This partially explains both the initial success of the first legislative attempts to implement unpaid work as a substitute penalty for unpaid fines, limited to forest crimes,[5] and its subsequent failure after having been generalised. As a basic principle, we may say that for regulations in which the role of unpaid work was defined, especially forest offences, the particular socio-economic context in which it was introduced guaranteed the need for manual work, the possibility of community control over the work and an approval of the work's common usefulness. In contrast, institutions with a wider work scope encountered serious difficulties when organizing the work, to the point that various regulations considered in their day to be the most forward-thinking, actually deserve to be classified as failures.

The first legal regulations for CW as a substitute punishment for fines emerged in legislation with a very specific purpose – reforestation. Examples of such regulations include the General Ordinance of the Kingdom of Saxony concerning procedures in forestry cases (*General-Verordnung betreffend das Verfahren in Forst-Untersuchungssachen*) of November 30, 1814, the French Forest Codes (*Code forestier*) of 1827 and 1859, and the Prussian Law on Forestry Theft (*Gesetz betreffend den Forstdiebstahl*) passed on February 20, 1879. As there was the need for manpower for a specific task, it was possible to establish jobs which rendered this penalty extremely economical for the State.

This initial success was followed by attempts to expand CW beyond the substitution of unpaid fines imposed for offences involving forestry issues, especially in Germany, where it was possible to find interesting legal precedents.[6] The starting point of the interest in CW was the interaction between work and criminality. In other words, if the lack of paid employment is one of the determining factors in individual's criminal deviation, the development of paid occupational activity has a transcendental importance on our social model by enabling socialisation that distances the individual from criminal deviation. This axiological view of work was also attributed to unpaid activity, such as community service.[7]

However, consolidation of a penalty like the one analysed here was not possible until minimum standards of dignified and humane working conditions were achieved. According to the principle of less eligibility, it was difficult for social actors and legal scholars to accept the generalised implementation of a work penalty that left offenders free while at the same time many sections of the 'free' population were working in almost inhumane conditions, as occurred with the first industrial proletariat (Rusche and Kirchheimer, 1939[2003]; Brandariz García, 2002; Kilcommins, 2002). Moreover, it requires considerable organisational effort to create enough jobs for all those sentenced to short-term prison sentences. Success depends to a large extent upon a good infrastructure. As the following examples illustrate, conditions for the successful implementation of CW had not been provided until the last third of the twentieth century, even though CW had already been recognized in a number of European countries as an alternative to a fine or to short-term prison sentences. In fact, some countries had already recognized it as a penalty in itself at the end of the nineteenth century.

For example, in the German Confederation, the 1838 Criminal Code for the Kingdom of Saxony established that for fines replaced with custodial sentences shorter than three months, the prison sentence could be replaced by unpaid manual work for a maximum of four weeks working a maximum of three days a week. This stipulation was dependent on the offender's social status and previous work experience. Similar provisions were included in the 1850 Penal Code of Thuringia. But the first attempt to generalise community service at the national level, included in the 1871 German Imperial Penal Code, was a complete fiasco. The failure was due largely to the negligence of the authorities, which did not draft the provisions for enforcement prescribed by law, with the only exception of the Free State of Thuringia (Heinitz, 1953). German legislation on fines in the years 1921, 1923, and 1924, which established work penalty without imprisonment (*Arbeitsstrafe ohne Einsperrung*) as a substitute for an unpaid fine, also failed in practice (Best, 1932; Grünhut, 1944; Grebing, 1978; Pfohl, 1983), like the precedent regulation did. According to the Imperial Statistics (1930: 45), only 5.8 percent of the fined offenders paid their fines through CW in 1929. In 1939 Rusche and Kirchheimer (1939[2003]: 176) could still claim that '[t]he apparatus for the administration of criminal justice is not adjusted to such positive activity, nor is it expected to be so adjusted under the prevailing conceptions.' In fact, the economic and social situation prevailing over interwar Germany, shaken by a severe recession, made the possibility of offering the alternative of CW in a context of increasing unemployment seem unrealistic.

In Italy community service was introduced in the 1889 Zanardelli Penal Code,[8] where it was applied in two forms: as a substitute of imprisonment for fine default in the case of insolvency, and as a sanction for two minor offences (begging and public drunkenness), substituting *arresto*. Its first form had almost no practical incidence (Padovani, 1981: 167, regarding its implementation as 'sporadic'; Paliero, 1986a, 1986b). Between 1895 and 1899 it was applied as a substitute for default imprisonment or detention in only 39 cases, whereas during the same period, there were annually over 180,000 prison sentences and the conversion of fines into a subsidiary prison sentence amounted to more than 80,000 *a year*. The same can be said about the second role of community service as a principal penalty: between 1895 and 1899 it was imposed as such in only 26 cases (Lucchini, 1904).

The mere existence of community service was ignored by many judges and rejected by the vast majority of experts, because of patchy infrastructure resulting from a lack of government commitment (Lucchini, 1904; Paliero, 1986a). In 1925 it was still evident that the Italian State lacked the organisational ability necessary to implement community service as a substitute for short-term imprisonment (De Marsico, 1925). As a result, community service was excluded from the 1930 Rocco Code. The explanatory notes plainly stated that ‘there was little point in maintaining an institution that had ceased to be used, was rarely applied and furthermore, was ineffective’ (Ministero della giustizia e degli affari di culto, 1929: 36).

In the middle of the nineteenth century Switzerland stated the principle that compulsory work without confinement (*Zwangsarbeit ohne Einsperrung*) could replace an unpaid monetary sanction. Although originally intended for offences contravening federal financial, customs, or police legislation, it slowly spread to other cases in the cantonal penal codes (Rosenfeld, 1890; Von Liszt, 1905). Interestingly, the practical application of the 1875 Swiss regulation of the canton of Waadt received a negative appraisal in a report, which was produced to prepare a draft project of the Swiss Penal Code of 1904. Consequently, the option of settling an unpaid fine by working was omitted from subsequent legislation (Brenn, 1945), before being re-introduced in the 1937 Swiss Penal

Code. This regulation was defined as a ‘norm that sadly only exists on paper’ (according to Schultz, 1977: 112, and confirmed by Killias, 2002).

Work as a substitute or accumulative measure of the unpaid fine also failed in the 1928 Spanish Penal Code, considered at that time as an ‘almost unprecedented legislation in a Penal Code’ (Cuello Calón, 1929: 202-203). Failure seems to have been due to a lack of clarity (Roldán Barbero, 1983) and infrastructure (Jaramillo García, 1928). Free work in the 1932 Spanish Penal Code was never effectively applied, and subsequently disappeared from the 1944 Spanish Penal Code.

Given these precedents, it is indeed remarkable that CW would be re-discovered in the last third of the twentieth century, and even more surprising that it would become one of the most important intermediate sanctions. The United Kingdom was the first European country to use CW successfully as a penal measure in itself. The 1972 Criminal Justice Act introduced community service for any offender aged 17 and over convicted of any offence – other than murder – punishable by imprisonment in England and Wales. It was only after this enactment that CW was able to evolve rapidly enough to ensure success, in terms of the continuance of the scheme in other countries (Kilcommins, 2014).

The expansion was most prominent in Western Europe, where a policy of proliferating alternatives to incarceration was strongly promoted by the influential Council of Europe. France offers a good example of implementation, after a less than encouraging beginning.[9] However, it must be pointed out that in some countries, like Italy, Portugal, Switzerland, and West Germany the renewed interest in CW in the 1970s and early 1980s did not achieve much more success than their nineteenth- and early twentieth-century precedents, despite the new cultural framework inspired by the postulates of the International Movement of Penal Law Reform. In Italy, community service (*lavoro libero*) was conceived as a substitute for default imprisonment. Considered 'inoperative' in practice (Di Gennaro et al., 1976), it was implicitly derogated by the Constitutional Court Judgement no.131 of 1979 declaring the unconstitutionality of imprisonment for defaulters (Di Gennaro et al., 1980). This judgement compelled the Italian legislator to look for a new model of conversion of unpaid fines. The Constitutional Court itself suggested 'other measures which do not affect personal liberty of the offender but aim at creating, respectively increasing, his solvency by enabling him to work for public institutions during one or more working days or public holidays'. Law no.689 of November 24, 1981, amending the criminal justice system – *di modifiche al sistema penale* - adopted this suggestion by providing a regulation both of community service (*lavoro sostitutivo*), restricted to replace only uncollectable fines (Paliero 1986a: 156), and of monitored liberty (*libertà controllata*). Monitored liberty is applied in 99 percent of cases of conversion of unpaid fines, while community service has been barely applied in practice. In Portugal, community service was introduced in 1945 as a substitute for non-payment of fines due to insolvency, unsuccessfully (Vera Jardim, 1988). It was re-introduced in the 1982 Penal Code, again as a substitute penalty for fine defaulters, but also as an alternative for a prison sentence of no more than one year, without achieving 'statistical expression' in any of these functions (Pereira, 1986, 2002)[10]. It only developed in full after a legal reform enacted in 2007. In Switzerland, free work (*freie Arbeit*) was conceived as an alternative to the payment of the fine. In this form, which had a long tradition in Swiss legal history, it found no practical significance (Van Kalmthout and Tak, 1988). Only in 1990 community service was introduced as another form of executing custodial sentences not exceeding one month, and since 1996 prison terms of up to three months. These reforms increased its use (Killias, 2002). In West Germany, CW as a penalty in itself was considered and rejected during the 1962-74 reforms, mainly because of doubts regarding whether it could be put into practice (Van Kalmthout and Tak, 1992). It could only be imposed as a condition of dismissal or probation, and as a substitute of imprisonment for fine defaulters. At first it did not look as if the scepticism in the 1960s about the viability of community service as an alternative for fine defaulters would be proved wrong (Pfohl, 1983; Feuerhelm, 1991, 1997; Van Kalmthout and Tak, 1992). Weigend (2001: 200) wrote that at the turn of the century the practical relevance of community service was quite limited.

> As a condition of probation or of conditional dismissal, community service is imposed in less than 0,1 percent of the relevant cases […]. Programs that seek to replace jail for fine-defaulters by community service have so far managed to reach only 6 percent of defaulters […].

The situation was a 'bitter disillusionment' for some (Stöckel, 2002: 334). Today the practice and enforcement frequency of community service is still portrayed as less than satisfactory (Sevdiren, 2011). Even though large efforts have been developed to provide a functioning infrastructure in several federal states (Redlich, 2005; Dünkel and Scheel, 2006; Treig and Pruin, 2018), the number of imprisoned fine defaulters in Germany remains unsatisfactorily high (Aebi and Chopin, 2015).

In other countries, such as Finland or Spain, CW was not introduced on a wider scale until much later, in the 1990s. Finland quickly achieved good annual numbers of community service orders and was able to avoid a substantial percentage of short-term prison sentences (Lappi-Seppälä, 2001, 2012; Dünkel and Lappi-Seppälä, 2014).[11] Spain, on the other hand, was only able to fully implement CW as an added requirement for suspended short-term prison sentences or as a penalty in its own right from 2008. This implementation was only possible after CW had also been established as an alternative or cumulative penalty for a number of restricted offences, including gender violence and driving offences (Brandariz García, 2013; Blay and Larrauri, 2016).[12]

As we can observe, national developments in Europe are not characterised by a neat, linear, and progressive implementation of CW, but rather by historical differences that ended in various degrees of success. However, beneath the layers of nuanced developments, a community of values shared by some countries, but not by others, can be identified. These values help to explain why a uniform penal policy concerning CW has not been developed in Europe, despite common assumptions and preoccupations.[13] Certainly, two common key features have been the introduction of CW on the grounds of the search for adequate alternatives to a short custodial sentence imposed to fine defaulters, and its expanded use following its introduction. However, this has occurred in different ways, at different times, and for varied reasons in each country (Brandariz García, 2002; McIvor et al., 2010; Robinson et al., 2013).

A new 'punitive' sanction in the community?

The notion of CW was strengthened when civil society started to become structured around free time and leisure, understood as collective commodities and rights. If free time is not seen as a desirable commodity, a lack of it cannot be seen as the basic element of a criminal sanction (Kilcommins, 2014). Leisure in its modern sense is a recent phenomenon and a product of modern industry (Sayers, 1989). The growing commodification of leisure has led to a gradual increase in the need to work more to earn more. In turn, this transformation has added value to free time (Cross, 1993), played an essential role in the construction of the post-war welfare state complex), and increased the punitive bite of a penalty imposed on free time. With its origins firmly embedded in the foundations of penal modernism, CW could, in this context, be re-conceptualized and calibrated along a new ‘continuum of punishment’ within which it is viewed as a ‘tough’ and relatively inexpensive penalty for those guilty of less serious offences (for all, Morris and Tonry, 1990; Robinson et al., 2013).

The explicit display of punitive credentials indeed became a key part of the quest for legitimacy of CW in the UK (Young, 1979; Vass, 1990; McIvor, 2010), but also, and even more explicitly, in the US (Morris and Tonry, 1990; Clear and Braga, 1995). This development diminished its potential for reducing the use of prison, with evidence showing that CW failed as a device for diverting otherwise prison-bound offenders from institutions (Cohen, 1985; Pease, 1985; Pradel, 1987; Morris and Tonry, 1990; McIvor, 1992, 1995; Faget, 1997; Albrecht and Van Kalmthout, 2002). It was used less as an alternative to prison than as an alternative to other non-custodial penalties: in several cases the new measure was added to or replaced a less repressive penalty, producing an increase in both costs and punitiveness. This was the case in England and Wales (Pease et al., 1975; Young, 1979; Bottoms, 1987), where the increase in punitiveness took place largely at the expense of fines, which experienced a dramatic fall during the period (Mair, 2004; Robinson, 2016). In this context, the potential of CW as an alternative to imprisonment became arguably less important than its retributive qualities (Maruna and King, 2008; Robinson et al., 2013). Not surprisingly, this promoted the new profile of CW as a new standalone sanction, beyond its traditional role as a substitute penalty for default imprisonment and short-term prison sentences.

Justification of CW was considerably different in other countries that did experience the punitive turn, such as Spain, France, or Germany,[14] but nevertheless lacked frameworks of close cooperation with the community. The idea that the community takes a role in resolving criminal problems which the State is unable to solve on its own is deeply embedded in the legal, cultural, and political context of England and Wales (Crawford, 1997; Brownlee, 1998; Cavadino et al., 1999; Worall and Hoy, 2005). In these countries, the term 'community' refers clearly to the fact that such a sanction is not only executed outside the prison, but its execution encompasses various forms of involvement and assistance by community members to reintegrate offenders into society, that is, to administer justice (Kilcommins, 2014). However, community punishment 'is not a concept used in Spanish policy, legal discourse or academic literature' (Blay and Larrauri, 2016: 191). There is no community involvement in the enforcement of this alternative, with only minimal co-operation with private, semi-public, and public organisations in order to implement it. In contrast to England and Wales, where the ‘community’ emerged as a moral partner which guides and assists offenders in their rehabilitation (Vass, 1990), in France ‘the word ‘community’ has a very negative connotation. It generates feelings of menace, as well as a threat to the national unity and to the secular state’ (Herzog-Evans, 2016: 51). Community punishments are usually labelled as ‘alternative sentences’. There is a lack of collaborative culture with the community in their enforcement. For its part, once again in stark contrast to England and Wales, where ‘appeals to community connect with, and are nourished by anti-statism’ (Crawford, 2000: 220), Germany is a country in which the overall reliance on the state is strong. There was not an approach emphasizing the role of the ‘community’ in the enforcement of CW.

In these three countries, the debate on alternatives to imprisonment, which was particularly focused on short-term imprisonment, followed the road already mapped at the end of the nineteenth century, in spite of abundant data calling into question the supposed decarceration effect of CW. Germany pursued a policy of ‘day fines instead of short-prison sentences’. This produced a substantial decrease in the percentage of prison sentences to total convictions, but also an unexpected increase in imprisonment for fine defaulters which, in turn, increased the interest in alternative measures such as suspension and community service (Gerken and Henningsen, 1987; Faraldo-Cabana, 2017). CW was perceived as the best alternative to imprisonment for fine defaulters, prompted by the desire to obviate the negative consequences of short-term prison sentences. In France, continuity with the nineteenth-century debate on the alternatives to imprisonment was clear when justifying the introduction of CW in 1983: the legislator's prime intention was to reduce the use of short-term prison sentences (Van Kalmthout and Tak, 1988). However, increased punitiveness in recent decades called into question the decarceration discourse (Herzog-Evans, 2016), because 'the increase in alternatives to imprisonment was not made at the expense of prison sentences as their designation would suggest, but at the expense of sentences such as fines and suspended sentences' (Kensey, 2002: 223).[15] Something similar happened in Spain, whose policy makers continued to use short-term prison sentences when implementing alternatives to imprisonment, with the supposed 'alternatives' being not so much replacements for them as an alternative to fines.[16] In the three countries considered here, although there were both a politically acceptable justificatory system and a narrative that endorsed decarceration policies based on the use of alternatives to imprisonment, the results undermined enthusiasm for CW and dashed hopes for the reduced use of imprisonment.

The narrative is different in other countries, like Finland, which did not experience the punitive turn until the twenty-first century (Lappi-Seppälä, 2009) and consequently have ‘marketed’ CW differently. For Finland the idea of ‘punitive’ community sanctions has been almost anathema, because they are associated with the avoidance of unnecessary state punishment and the search for a more humane response to crime that implies no incarceration (Takala, 1996; Lappi-Seppälä, 2001). CW is seen as an appealing form of punishment in that it made it easier to rehabilitate offenders by avoiding imprisonment and by making possible a symbolic reparation for the damage caused.

Conclusion

Penal policy is neither formulated in a vacuum nor spawned from a coherent and consistent consensus. There is very little evidence for concerted, carefully planned policy making in criminal law (Garland, 1985). On the contrary, when we search for the ‘origins’ of a concrete form of punishment, what is often found is not a clearly identified problem and the proposal of a universally accepted solution, but the dissension of other things. In the case of CW, this ‘other thing’ is the substitute penalty of imprisonment for defaulters and, more generally, short-term prison sentences.

As already shown, during the nineteenth century the ideological justification of CW largely depended on whether short-term imprisonment was seen as an eligible, positive option capable of fulfilling the purpose of punishment or not. CW was presented as having the potential to help reintegrate the offender into society and thereby rehabilitate him while simultaneously emptying prisons. Yet, success of CW in terms of its practical application depended to a large extent upon a good infrastructure and organization. This was not generally available during the nineteenth century and the first two thirds of the twentieth century. Failed implementation questioned the purpose of CW and its place in the order of things. Its revival in late twentieth century England and Wales has been linked to an era of 'penal welfarism' (Garland, 1985; Bottoms et al., 2004), which ended with the decline of the so-called 'rehabilitative ideal' (Allen, 1981). It coupled with the 1973-5 recession, a period of economic stagnation that both put an end to the post-World War II economic boom and casted doubt on the sustainability - in pure economic terms - of the continued growth in prison populations. This ideological and empirical critique contributed to the search for intermediate sanctions and gave birth to the 'alternatives to custody in the community' movement that constituted a new phase of penal welfarism. Failure to divert offenders from prisons was not an obstacle in a context of increased punitiveness, in which it was considered entirely proper that a sentence like the community service order should draw *both* from those who previously were more controlled and those who were less controlled. The punitive shift promoted CW as a form of retributive punishment, the interest in which was reawakened by the perceived failure of the modern penal project in late modernity. In such a context, CW obeyed a different set of values and cultural expectations from those that had erstwhile provided frames of reference for its development as a modern punishment, moving it into the postmodern penal realm.

But rediscovery of CW in other European countries cannot be understood against this background, even if, at face value, they may seem similar in practice. CW must be re-situated within a cultural framework, which instead of focusing on the punitiveness of recent past, shows both more ideological connections with the nineteenth-century crusade against the much discredited, short prison sentences, as well as the greater meta-narrative of purpose that penal modernism once provided. In these countries CW is still justified within the normative foundations around which the modern penal project was constructed, i.e., as one of the most important intermediate sanctions designed to avoid imprisonment, whether by reinforcing the use of fines, as a condition of probation, or as a stand-alone penalty in itself.

One important implication follows through from this line of analysis. CW shows us that the postmodern needs not be entirely new, only different from the modern. The wellsprings from which punitive CW derives have their roots in the logic of modern penality. Its successful diffusion is proof of its malleability as a modern punishment *and* as a postmodern penality.

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[1] Interestingly, the only exceptions come from outside the Anglo-American academia and have been completely ignored by it: Von Hentig (1955), Pfohl (1983), Tak (1986), Van Kalmthout and Tak (1988), Feuerhelm (1991).

[2] This proposal also spread to cases other than being used to replace unpaid fines (Lammasch, 1889). It met strong opposition (s., e.g., Berolzheimer, 1903; Gennat, 1905).

[3] There was no shortage of opposition to this idea. There were those who thought:

> [t]he pressure of having to work for the State for a certain amount of time with other convicts under official supervision, has a major impact on the offender's freedom. Such a punishment is, by its very nature, predominantly a custodial sentence. (Stooß, 1891: 349-350)

[4] After taking a position of principle concerning the indispensability of a fine to imprisonment, which precluded insolvent offenders from being deprived of their liberty because they could not pay the fine, the 1922 Criminal Code in the Soviet Union established non-custodial *compulsory* work at the offender's place of employment but at a reduced level of payment as the substitute penalty.

[5] Such as taking, trading, smuggling, and consumption of wild fauna and flora, including timber and other forest products, contravening the law.

[6] The first legislative reference commonly cited is an ordinance of 1698 by Frederick Augustus of Saxony and Thuringia. It established the possibility sentencing the offender to imprisonment or alternatively to a fine, both of which could be served by carrying out manual work with the offender remaining at liberty (Rosenfeld, 1890).

[7] Criticisms of the utopian and mesocratic character underlying the idea of resocialisation through work served little purpose (Taylor, 1997; Feuerhelm, 1997).

[8] With very little enthusiasm from Zanardelli, who despite being aware of the practical difficulties of its implementation, claimed that free work could be found in every previous project from 1879; and that was the only reason why he maintained it in his own project, trusting that well-thought-out regulation would promote the right approach to application (see Camera dei Deputati, 1887).

[9] CW was introduced in the French Penal Code in 1983. It was intended to offer an alternative to imprisonment. Initially, it was not used to any significant degree (Pradel, 1987), to the point that in 1985 only 2 percent of those sentenced received such a sanction. Today, 'community service orders represent more than 16 percent of the noninstitutional sanctions' (Terrill, 2016: 206), a quantitatively successful balance.

[10] There were only 86 documented cases between 1983 and 1990 (Dias, 1993).

[11] CW in Finland began on an experimental basis in 1991 in four regions. In 1997 it was nationally adopted as an alternative to sentences less than or equal to eight months (Utriainen, 2002), in order to avoid net widening and to ensure that it really would be used in cases where the offender would otherwise have received an unconditional prison sentence (Lappi-Seppälä, 2001).

[12] In Spain extensive discussion on CW took place during debates on the 1980 draft for a new penal code. In the end, it was not included as an alternative sanction until the enactment of the 1995 Penal Code because of a lack of infrastructure and high levels of unemployment (Brandariz García, 2002). In its role as an added requirement to a suspended prison sentence it did not achieve much success. The reason was the impossibility of managing implementation due to lack of resources.

[13] Prison overcrowding, record levels of imprisonment and obsolescence of the rehabilitation paradigm are often mentioned as the main justifications of policy demands for more use of alternative sanctions in the 1970s (Young, 1979; Cartledge, 1986; McIvor, 1992; Janssen, 1994).

[14] In this case, to a much lesser degree, mostly centred in sexual and violent offences.

[15] In fact, in the last forty years, the relative use of non-suspended prison sentences only changed slightly, representing approximately one fifth of all sentences: 17.8 percent in 1975, 19.8 in 2010 (Robert, 2013: 111). On the contrary, the use of fines strongly declined in favour of other non-custodial sentences. As Robert (2013: 112) explained, 'this trend has been led by increased punitiveness: whilst more than half of offenders got away with a simple fine at the beginning of this period, only one-third can expect to do so today'.

[16] The 1995 Penal Code, which entered into force in May, 1996, introduced new intermediate punishments that did not substitute prison sentences, but fines. The use of prison sentences remained fairly stable (56.12 percent in 1995, 54.05 percent in 1997). In contrast, the proportion of fines substantially decreased (from 42.54 percent in 1995 to 29.82 percent in 1997) while the number of other non-custodial sentences correspondingly increased (0.39 percent in 1995, 10.28 percent in 1997). Fines were substituted by other intermediate punishments, such as disqualifications, removal of professional status and other deprivations of rights, or CW.