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Mantouvalou, V.; Noorda, H.

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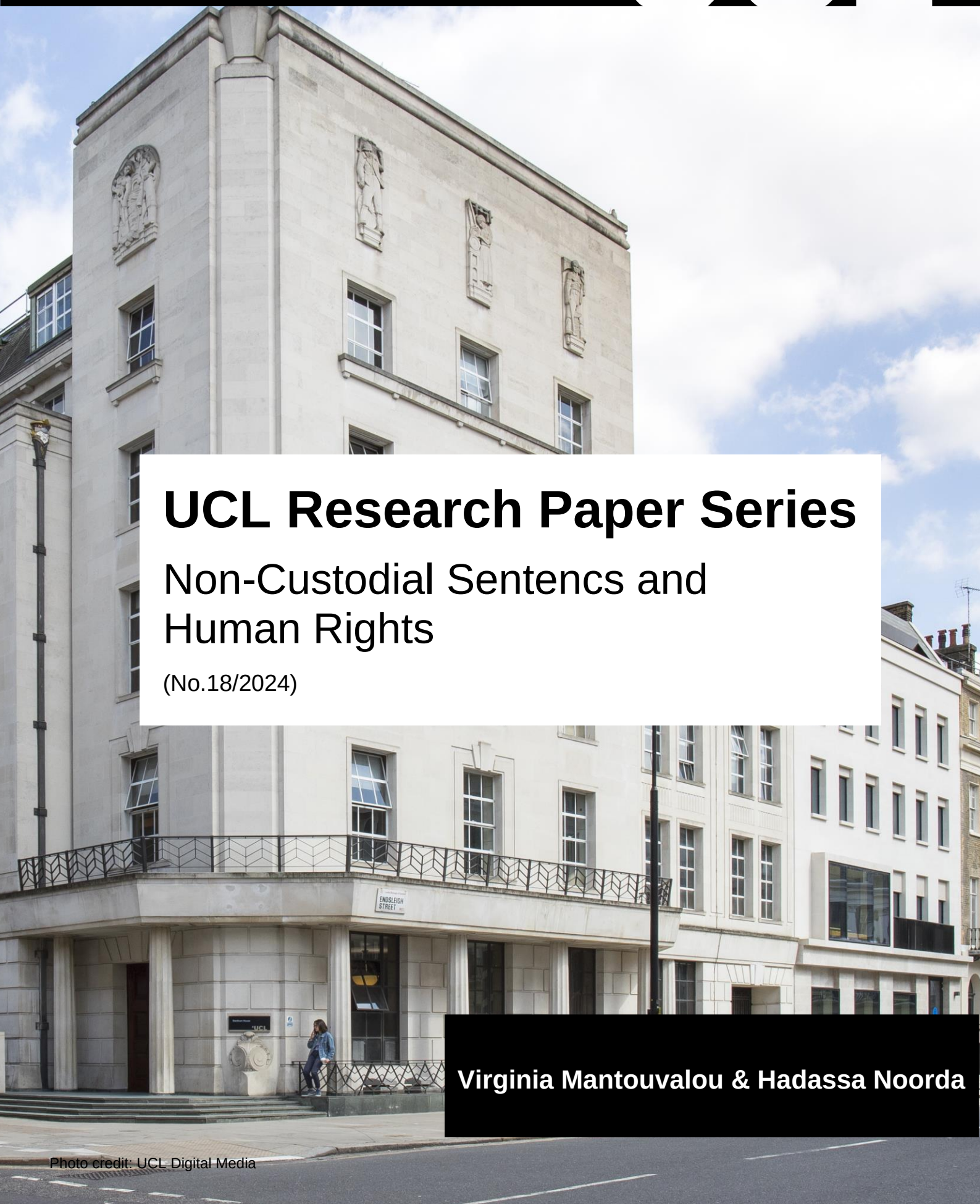

UCL Research Paper Series

Non-Custodial Sentencs and Human Rights

(No.18/2024)

Virginia Mantouvalou & Hadassa Noorda

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NON-CUSTODIAL SENTENCES AND HUMAN RIGHTS

Virginia Mantouvalou

Hadassa Noorda

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Non-Custodial Sentences and Human Rights

Virginia Mantouvalou and Hadassa Noorda*

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Abstract

The use of sentences which maintain offenders in the community can be viewed as a positive development in criminal justice because people targeted by these measures do not face the grave restrictions associated with imprisonment. However, analysis of practices of electronic monitoring and unpaid work requirements in the first part of this article suggests that these sentences may also raise serious concerns in a way that they should be viewed on a continuum alongside imprisonment. The second part of the article turns to human rights law. With the recognition that unpaid work requirements and electronic tagging may involve serious restrictions to freedom, result in a loss of rights, and negatively affect societal reintegration, the article identifies principles in human rights law which should apply to community sentences.

Key words: community sentences, human rights law, imprisonment, liberty, private life, forced labour

Introduction

The use of community sentences in Europe has increased in recent years,[1] while they are also widely used in the United States.[2] Community sentences may be defined as "sanctions and

* Professor of Human Rights and Labour Law, UCL Faculty of Laws, and Assistant Professor of Criminal Law, University of Amsterdam, respectively. We are grateful to Hugh Collins, Mark Dsouza, Conor Gearty, Rory Kelly, Richard Lippke and an anonymous reviewer for comments on an earlier draft. We also presented a draft to the London Labour Law Discussion Group and greatly benefited from comments by participants. Many thanks are also due to Danielle Worden and Jessie Levano for excellent research assistance.

[1] See Gill McIvor, Kristel Beyens, Ester Blay and Miranda Boone, "Community Service in Belgium, the Netherlands, Scotland and Spain: a Comparative Perspective" (2010) 2 *European Journal of Probation* 82. For some recent estimates, see M. Aebi, Y. Hashimoto and M. Tiago, "Probation and Prisons in Europe, 2020: Key Findings of the SPACE reports" (Université de Lausanne: Space, 2021), Council of Europe Annual Penal Statistics, https://wp.unil.ch/space/files/2022/06/Key-Findings_Prisons-and-Prisoners-in-Europe-2021_220615.pdf .

[2] N. Zatz, "The Carceral State at Work – Exclusion, Coercion and Subordinated Inclusion", in A. Bogg et al (eds), *Criminality at Work* (Oxford: Oxford University Press, 2020), p. 505.

measures which maintain suspects or offenders in the community and involve some restrictions on their liberty through the imposition of conditions and/or obligations".[3] The increase in the use of community sentences has raised concerns regarding the potential harshness of these sentences and has been associated with "net-widening", which refers to the use of sentences for offenders who would otherwise receive lighter or no sentences, expanding control by the criminal justice system.[4] In this article, we address connections between such sentences and imprisonment, with a focus on electronic monitoring and unpaid work requirements, and assess their compatibility with human rights law, an issue that has been underexplored in the case law of the European Court of Human Rights ("ECtHR").[5]

Imprisonment is a harsh sentence that affects those in prison and their families outside prison in numerous ways.[6] From a traditional point of view, the sentence of imprisonment is considered the restraint of a person's freedom, typically behind bars.[7] The application of community sentences, including electronic monitoring and unpaid work requirements, can

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[3] Council of Europe, Recommendation of the Committee of Ministers to member States on the European Rules on community sanctions and measures, CM/Rec(2017)3, 22 March 2017, p 4.

[4] The concept of net widening was first introduced by Stanley Cohen to illustrate the risks of criminal law reform. S. Cohen, *Vision of Social Control* (Cambridge: Polity Press, 1985), 41. See W. Bülow, "Electronic Monitoring" in J. Ryberg, (ed.), *Oxford Handbook on Punishment Theory and Philosophy* (Oxford: Oxford University Press, forthcoming).

[5] Community service and electronic monitoring act, in one way or another, as alternatives to traditional imprisonment. Our argument can be extended to include other alternatives, such as addiction programmes and prohibited activities. On these, see N. Morris and M. Tonry, *Between Prison and Probation: Intermediate Punishments and a Rational Sentencing System* (New York: Oxford University Press, 1990).

[6] In a classical study of New Jersey State Prison, Gresham Sykes addresses the effect of imprisonment on the prisoner's life. Sykes' description of this particular prison continues to influence the way scholars conceptualize the lives of inmates. G. Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton: Princeton University Press, 1958); see also Michael Reisig, "The Champion, Contender, and Challenger: Top-ranked Books in Prison Studies" (2001) 81 *Prison Journal* 389. More recently, there has been a revived awareness of the importance of limiting the negative effects of imprisonment on (former) inmates, their families and society. See, e.g. M. Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison*, (Chicago: University of Chicago Press, 2007); John Hagan and Ronit Dinovitzer, "Collateral Consequences of Imprisonment for Children, Communities, and Prisoners" (1999) 26 *Crime and Justice* 121. Imprisonment also has effects on individuals' dignity: see Sonja Snacken, "Human Dignity and Prisoner Rights in Europe" (2021) 50 *Crime and Justice* 301. For further critical analyses of imprisonment, see, among other sources, A. Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003); M. Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colourblindness* (Penguin Books, 2019); Alice Ristroph, "The Curriculum of the Carceral State" (2020) 120 *Columbia Law Review* 1631; T. Shelby, *The Idea of Prison Abolition* (Princeton: Princeton University Press, 2022).

[7] For a critical analysis, see Hadassa Noorda, "Imprisonment" (2023) 17 *Criminal Law and Philosophy* 691.

therefore be viewed as a positive development in criminal justice because people targeted by these measures do not face the grave restrictions associated with traditional imprisonment.[8] Community sentences are associated with important aims, such as maintenance of community ties and easier reintegration. However, non-custodial sentences can also have serious effects on the lives of individuals, even if they are not locked up, and may even lead to their imprisonment.[9]

Although these sentences are served in the community, restraining a person through non-custodial sentences can restrict the ability to participate in society in ways that potentially make these sentences as restrictive as prison with respect to their impact on certain aspects of offenders' lives, viewed appropriately as existing on a continuum alongside imprisonment.[10] By suggesting this, we do not mean that the gravity of community sentences is always the same as imprisonment. However, understanding their similarities underlines the potential harshness of community sentences, warns against the use of sanctions on individuals who otherwise might not have been sanctioned, and provokes thinking into how an extension of human rights principles can help assess these measures and enhance the protection of individuals subject to these sentences. In light of this, we propose that some features of these sentences are such that they should be scrutinised by courts as closely as prison sentences for their impact on offenders' lives and for their compliance with human rights law.[11]

This article is divided into two parts. The first part examines community sentences, with a focus on electronic monitoring of offenders and unpaid work. In the second part, we consider safeguards according to European human rights law, including the right to liberty, the right to private life, the prohibition of inhuman and degrading treatment, and the prohibition of forced labour. Our aim is to assess the extent to which existing safeguards should cover non-custodial

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[8] On positive aspects of community sentences see, e.g. See McIvor, Beyens, Blay and Boone, "Community Service in Belgium, the Netherlands, Scotland and Spain: a Comparative Perspective".

[9] On further effects of community sentences, See McIvor, Beyens, Blay and Boone, "Community Service in Belgium, the Netherlands, Scotland and Spain: a Comparative Perspective"; D. Van Zyl Smit, "Community Sanctions and European Human Rights Law", in L. Zedner and J. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice – Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012), p. 203. For an earlier analysis of central concerns, see Dirk Van Zyl Smit, "Legal Standards and the Limits of Community Sanctions" (1993) 1 *European Journal of Crime, Criminal Law and Criminal Justice* 309.

[10] This impact-based approach was first introduced in Noorda, "Imprisonment".

[11] For analyses of the impact on offenders' rights, see also V. Mantouvalou, *Structural Injustice and Workers' Rights* (Oxford: Oxford University Press, 2023), chapter 4; Andrew Von Hirsch, "The Ethics of Community Based Sanctions" (1990) 36 *Crime & Delinquency* 162; C. Morgenstern and D. Van Zyl Smit, "International Human Rights Standards and Community Sanctions" in Bruinsma and Weisburd (eds.), *Encyclopedia of Criminology and Criminal Justice* (Berlin: Springer, 2014).

sentences, which have not been scrutinised sufficiently for their compatibility with this body of case law to date. By putting forward this argument, we do not mean to underestimate the effects of imprisonment on individuals, which cannot be reduced to human rights violations. Instead, we seek to emphasise that some principles of human rights law applying in prison need to be extended to community sentences.

Part 1: Community Sentences and Imprisonment

In what follows, we develop the argument that community sentences and imprisonment bear similarities by looking at, first, electronic monitoring, and, second, unpaid work as a community sanction.

Connections between traditional imprisonment and electronic monitoring

Before addressing connections between traditional imprisonment and electronic monitoring, we need to define electronic monitoring. According to Mike Nellis, "electronic monitoring is a way of supervising offenders in the community whilst they are on bail, serving a community sentence or after release from prison".[12] Our focus here is on electronic monitoring as a community sentence.[13] This practice is often used to enforce other conditions (prohibitions from visiting certain places or requirements to stay at home) and is coupled with rehabilitative programmes. Two types of electronic monitoring are used in several jurisdictions: location tags and curfew tags. A location tag records data about the tagged person's movement at all times. It checks if the person is visiting areas she has been forbidden from by a court or prison order, and if she is going to appointments or other activities that are part of her sentencing conditions. A curfew tag checks if the person is where she is meant to be during curfew hours, for example, at home. If this is not the case, the tag sends an alert to a monitoring centre. Different technologies can be used, including GPS and radio frequency, to ensure that an offender adheres to a set of requirements. Generally, a device on the ankle provides continuous information about the wearer's location.

[12] M. Nellis, "Surveillance, Stigma and Spatial Constraint: The Ethical Challenges of Electronic Monitoring", in M. Nellis, K. Beyens, D. Kaminski (eds.), *Electronically Monitored Punishment: International and Critical Perspectives* (London: Willan, 2012).

[13] For philosophical questions related to pretrial detention, see Richard Lippke, "Preventive Pre-trial Detention without Punishment" (2014) 20 *Res Publica* 111. On whether electronic monitoring can be enforced as a condition for parole or early release, see Elaine Alexander and Larry Alexander, "Electronic Monitoring of Felons by Computer: Threat or Boon to Civil Liberties?" (1985) 11 *Social Theory and Practice* 89.

In several respects, electronic monitoring has less impact on offenders' lives than imprisonment, as these practices allow offenders to serve their sentences in the community. Yet, they are also associated with several problems.[14] A key question is whether electronic monitoring serves as an effective alternative to imprisonment in terms of preventing reoffending.[15] Furthermore, critics have argued that electronic monitoring might lead to net widening, namely widening control by the criminal justice system through the use of community sanctions. This concern takes different forms: one concern is that electronic monitoring may result in harsher punishment.[16] Another concern is that monitoring of released offenders "can lead to an increase in technical violations (such as missing curfew deadlines), which, although not crimes in the traditional sense, nevertheless often result in the incarceration of offenders who would otherwise have been in the community on parole or probation". [17] If true, this implies that "the introduction of electronic monitoring might increase both the number of people controlled by the criminal justice system and the amount of control exercised over these individuals".[18]

Our focus is on how the use of electronic tagging as a community sentence should not be readily accepted as a less restrictive alternative to imprisonment but should instead be seen as part of a continuum that includes the use of prison facilities.[19] Understanding the connection between traditional imprisonment and community sentences shows the potential harshness of community

[14] For a treatment of the ethical questions related to monitoring as a non-custodial sanction, see William Bülow, "Electronic Monitoring of Offenders: An Ethical Review" (2014) 20 *Science and Engineering Ethics* 505; Bülow, "Electronic Monitoring".

[15] E.g. Jyoti Belur et al., "A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders" (2020) 68 *Journal of Criminal Justice* 1; Anthea Hucklesby, "Vehicles of Desistance?: The Impact of Electronically Monitored Curfew Orders" (2008) 18 *Criminology & Criminal Justice* 51; Gabriela Kirk, "The Limits of Expectations and the Minimization of Collateral Consequences: The Experience of Electronic Home Monitoring" (2021) 68 *Social Problems* 642; Brian Payne and Randy Gainey, "Electronic Monitoring: Philosophical, Systemic, and Political Issues" (2000) 31 *Journal of Offender Rehabilitation* 93.

[16] Nellis, "Surveillance, Stigma and Spatial Constraint: The Ethical Challenges of Electronic Monitoring"; Kirk, "The Limits of Expectations and the Minimization of Collateral Consequences: The Experience of Electronic Home Monitoring" .

[17] Belur et al., "A Systematic Review of the Effectiveness of the Electronic Monitoring of Offenders". See also Andreas von Hirsch, *Deserved Criminal Sentence* (Oxford: Hart Publishing, 2017) for a discussion of this aspect of non-custodial sentences as well as to what extent mere technical breaches should lead to imprisonment.

[18] Bülow, "Electronic Monitoring of Offenders: An Ethical Review".

[19] Noorda, "Imprisonment"; Cf. Antony Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001), p. 150. In Duff's view, intermittent sentences and home curfews are unlike continuous imprisonment because they do not involve removal or exclusion from ordinary life and community.

sentences. We will address the connections between imprisonment and electronic tagging by looking at imprisonment first. When looking at the impact of imprisonment, we see that the boundary between imprisonment and other kinds of sentences is blurred.[20] On the one hand, the degree and type of deprivation of liberty in prison facilities depend on the regime of incarceration. Prisoners, for example, may be granted contact with the outside world in various ways. The ECtHR encourages countries to allow conjugal visits for prisoners.[21] Furthermore, prisoners may be allowed to leave prison to visit relatives or continue employment or education. In some jurisdictions, there are "open prisons" or possibilities for inmates to work in the outside community or to visit relatives.[22] For instance, in some prisons in Norway, inmates are not prevented from escaping by locks and walls. In these facilities, inmates have the keys to their rooms, are free to go to the library, cook their food, and are permitted to leave the prison for a certain time.[23]

On the other hand, the severity of measures other than imprisonment should not be underestimated. Some alternative measures restrict liberty not by physical means but by requiring the person to obey certain limits under the threat of force if they disobey.[24] The alleged difference between such normative requirements and physical boundaries is undermined by the fact that the normative requirements are backed by the threat of more severe restrictions to the target's freedom. For example, a person subject to house arrest and electronic monitoring can be checked to see if she is where she is meant to be. The tagging device will send an alert to a monitoring

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[20] Section 5 of this article addresses deprivations of liberty in terms of the European Convention of Human Rights. On the distinction of imprisonment and other types of measures, see also Hans Tulkens, *Graden van vrijheid* (Arnhem: Gouda Quint, 1988); Dirk Van Zyl Smit, "Degrees of Freedom" (1994) 13 *Criminal Justice Ethics* 31. In a similar vein, Nicola Padfield has argued that it is time to discard the custodial/non-custodial divide. See Nicola Padfield, "Time to Bury the Custody 'Threshold'"?" (2011) 8 *Criminal Law Review* 593.

[21] *Aliev v Ukraine* (App. No. 41220/98), judgment of 29 April 2003, para. 189. However, the ECHR has not recognized a right to conjugal visits for prisoners. For an analysis, see D. Abels, *Prisoners of the International Community: The Legal Position of Persons Detained at International Criminal Tribunals* (The Hague: T. M. C. Asser Press, 2012), p. 543.

[22] See D. Van Zyl Smit and D. Dünkel (eds.), *Imprisonment Today and Tomorrow: International Perspectives on Prisoners' Rights and Prison Conditions*, 2nd edition (The Hague: Kluwer Law International, 2001).

[23] Inmates in these facilities are expected to strive for self-improvement, which can be extremely demanding. See Kelly Hannah-Moffat, "Prisons That Empower" (2000) 40 *British Journal of Criminology* 510; C. Basberg-Neumann, "Imprisoning the Soul" in T. Ugelvik and J. Dullum (eds.), *Penal Exceptionalism? Nordic Prison Policy and Practice* (London: Routledge, 2012); Victor Shammas, "The Pains of Freedom: Assessing the Ambiguity of Scandinavian Penal Exceptionalism on Norway's Prison Island" (2014) 16 *Punishment and Society* 104.

[24] As William Bülow notes, the prison already figures in these sentences. See William Bülow, "Retributivism and the Use of Imprisonment as the Ultimate Back-up Sanction" (2019) 32 *Canadian Journal of Law & Jurisprudence* 285.

centre if the person is not in the designated location and force can then be used against her. If the tagged person disobeys their requirements, they may be subject to more severe restrictions that include imprisonment.

Non-custodial sentences are in important respects more humane than imprisonment behind walls and locks. However, many of the harmful aspects of traditional incarceration are shared by non-custodial sentences.[25] The mandatory wearing of an electronic tagging device can, for example, strongly restrict a person's freedom to take part in society. When electronic monitoring is used to enforce a prohibition from visiting public areas that citizens otherwise have access to, their ability to participate in society may be limited.[26] This is not to say that electronic monitoring excludes individuals from society altogether, as traditional imprisonment does. In most cases, this form of monitoring resembles other, more limited kinds of restriction on individuals' ability to participate in society. However, electronic monitoring can have certain impacts as severe as traditional imprisonment, especially when combined with area restrictions, house arrest, or other measures intended to limit the individual's liberty.

On top of that, electronic monitoring may spill over into the lives of third parties similarly to how imprisonment can cause hardships to family members of prisoners.[27] Family members of individuals monitored with electronic tags may be affected when they are monitored at home. Andrew von Hirsch addresses this aspect of electronic monitoring: "Home visits, or an electronic telephone monitor ringing at all hours of the day, affects not only the defendant but any other persons residing at the apartment–and it is *their* as well as his or her own dwelling place".[28]

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[25] See, for example, Noorda, "Imprisonment". Noorda has introduced the concept of "exprisonment" to describe practices of restraint that do not subject individuals to prison or jail sentences but do restrain or control them in their daily lives. On exprisonment, see Hadassa Noorda, "Preventive Deprivations of Liberty: Asset Freezes and Travel Bans" (2015) 9 *Criminal Law and Philosophy* 521; Hadassa Noorda, "Exprisonment: Deprivations of Liberty on the Street and at Home" (2023) 42 *Criminal Justice Ethics* 1.

[26] Von Hirsch and Shearing argue that exclusion from public spaces is not an appropriate retributive punishment for less serious acts of criminal wrongdoing, see A. Von Hirsch and C. Shearing, "Exclusion From Public Space", in A. Von Hirsch, D. Garland and A. Wakefield (eds.), *Ethical Perspectives in Situational Crime Prevention* (Oxford: Hart Publishing, 2001). For a response, see Nellis, "Surveillance, Stigma and Spatial Constraint: The Ethical Challenges of Electronic Monitoring".

[27] See Bülow, "Electronic Monitoring"; See also Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison*; Hagan and Dinovitzer, "Collateral Consequences of Imprisonment for Children, Communities, and Prisoners"; William Bülow, "The Harms beyond Imprisonment: Do We Have Special Obligation towards the Families and Children of Prisoners?" (2014) 17 *Ethical Theory and Moral Practice* 775; William Bülow, "Who is Responsible for Remedying the Harm Caused to Children of Prisoners?" (2023) 17 *Ethics and Social Welfare* 256.

[28] Von Hirsch, "The Ethics of Community Based Sanctions", p. 170.

The ways that such measures, or combinations of measures, resemble traditional imprisonment and negatively affect the ability of individuals to participate in society should not be overlooked. The saliency of this point is proven by the fact that in some jurisdictions, electronic monitoring is formulated as an alternative way of serving a prison sentence rather than an alternative sentence altogether. The convicted individual is still given a sentence of imprisonment but the term is served outside the prison, rather than being transformed into another sentence.[29]

Connections between traditional imprisonment and unpaid work requirements

Similar observations that support the point that non-custodial sentences share harmful aspects with imprisonment, which should be assessed closely, can be made if we examine unpaid work as (part of) a non-custodial sentence. Unpaid work is (part of) a sentence imposed on offenders convicted for less grave offences instead of imprisonment. The purpose of this sentence is to keep offenders in the community, but punish and rehabilitate them by imposing on them a duty to work. Moreover, unlike other community sentences, unpaid work is viewed as a way to pay back to the community by requiring offenders to engage in tasks that are supposed to be beneficial to the community, such as removing graffiti or collecting garbage.

As mentioned earlier, we acknowledge that in important respects, this community sentence is more humane than imprisonment with respect to the impact on offenders' lives. However, work requirements share certain features with prison labour, namely work that people do while incarcerated, which we highlight in order to consider their compatibility with human rights law in the second part of this article. Analysis of the legal rules on work in prison and unpaid work as (part of) a community sentence suggests that we are faced with a continuum of restrictions of offenders' labour rights that make them vulnerable to exploitation in both instances. Both working prisoners and those undertaking work as a community sentence are excluded from many rights that other workers enjoy, while working either for the state or for private, including profit-making organisations. To illustrate this point, we look at prison labour first and turn to unpaid work as a community sentence after that.

Work in prison is typically not part of prisoners' punishment. It is justified, instead, by other aims, such as the learning of new skills, improvement of employability, and reducing

[29] In Sweden, individuals sentenced to a prison term of no more than six months might apply to serve their sentence at home under electronic monitoring (Law on intensive supervision by means of electronic monitoring [Lag 1994:451 om intensivövervakning med elektronisk kontroll], available at https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1994451-om-intensivovervakning-med_sfs-1994-451).

recidivism.[30] It can also provide prisoners with income that they can use to support their dependents and make their life feel less boring and monotonous while incarcerated. For reasons such as these, opportunities to work in prison can be desirable and beneficial.[31]

Even though work in prison is not part of punishment and should therefore be a right rather than a duty, it is often compulsory. A Council of Europe survey that looked at forty (out of its forty-seven at the time) member states found that in twenty-five of those prisoners are required to work at least in certain circumstances.[32] Studies show that prison work is often meaningless, repetitive and is perceived by prisoners as being part of their punishment rather than a route to reintegration. Those who refuse to work may be sanctioned with reduced visits from friends and family, reduced television or gym time, less or no income and even solitary confinement.[33]

Incarcerated people are vulnerable because they do not have freedom of movement,[34] and are hence in a very disadvantaged position in comparison to other workers who may have opportunities to change jobs. There are further problems with prison labour involving the mentality of prison authorities, the limited number of work opportunities and the quality of the work available.[35] Moreover, legal rules exclude working prisoners from protection of labour and social security rights.[36] In comparative studies of European countries, it was highlighted that working prisoners are often excluded from the right to form trade unions and the right to strike, from being covered by collective agreements or a social security system, and from minimum wage

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[30] On this, see P. Smith, L. Mueller and R. Labrecque, "Employment and Vocation Programs in Prison" in J. Wooldredge and P. Smith (eds.), *The Oxford Handbook of Prisons and Imprisonment* (Oxford University Press, 2017); Robert Sampson and John Laub, "A Life-Course Theory of Cumulative Disadvantage and the Stability of Delinquency" (1997) 7 *Advances in Criminological Theory* 133.

[31] Richard Lippke, "Prison Labour: Its Control, Facilitation, and Terms" (1998) 17 *Law and Philosophy* 533; Howard League for Penal Reform, "Business Behind Bars: Making Real Work in Prison Work" (*Howard League for Penal Reform* 2011), https://howardleague.org/wp-content/uploads/2016/05/Business_behind_bars.pdf

[32] Azerbaijan, the Czech Republic, Estonia, Finland, Georgia, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Norway, Poland, Montenegro, Russia, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom. See *Stummer v Austria* (App. No. 37452/02), judgment of 7 July 2011, para 60(a).

[33] Jenna Pandeli, Michael Marinetto and Jean Jenkins, "Captive in Cycles of Invisibility? Prisoners' Work for the Private Sector" (2019) 33 *Work, Employment and Society* 596 at 604.

[34] Lippke, "Prison Labour: Its Control, Facilitation, and Terms", p. 553.

[35] The work of Hatton contains several examples of degrading treatment of prisoners by prison officers. See, for instance, Hatton, "Introduction", p. 112-114. See also Pandeli, Marinetto and Jenkins, "Captive in Cycles of Invisibility? Prisoners' Work for the Private Sector".

[36] See generally Mantouvalou, *Structural Injustice and Workers' Rights*, Chapter 4 that discusses prison labour, unpaid work as a community sentence and work in immigration detention.

laws.[37] A Council of Europe survey showed that in twelve member states, prisoners are not included in a pension system,[38] while in other countries the affiliation to a social security system depends on the type of work performed, and particularly whether it is remunerated and whether it is for outside employers. In France, for instance, the Criminal Procedure Code states that the employment relations of those who are incarcerated are not covered by an employment contract.[39] As a result, prisoners do not have a right to form and join trade unions or a right to sick pay. Moreover, prisoners are not entitled to the minimum wage, from which they are explicitly excluded by law, or a right to access labour courts. Similar exclusions are found in Germany, the UK, and many other legal orders.[40] It has, therefore, been said that prisoners are used as a "source of cheap labour or in order to undercut the wages of local workers",[41] while their treatment has been described as exploitative.[42]

Unpaid work as a community sentence is in some crucial respects similar to prison work. First, it is not freely chosen by offenders. Those who do not comply with work requirements may be incarcerated. The requirements have therefore been linked to other duties imposed by the state to work under the threat of incarceration for those who are not compliant with an obligation to work, presented in this way as an aspect of the carceral state.[43] Indeed, in the early 2000s in the US there were about 9,000 people in prison or jail for not complying with work requirements.[44] Moreover, those sentenced to community work may be required to wear a jacket with "community

[37] European Prison Observatory, "Prison in Europe: Overview and Trends" (*European Prison Obeservatory* 2013), http://www.prisonobservatory.org/upload/PrisoninEuropeOverviewandtrends.pdf, p. 30-31. See also Evelyn Shea, "A Comparative Study of Prison Labour in France, Germany and England" (2006) *Penal Issues*, p 11; and RS21, "On Strike in Germany's Jails: An Interview with the Prisoners' Union" (*RS21, 2016*), https://rs21.org.uk/2016/01/26/on-strike-in-germanys-jails-an-interview-with-the-prisoners-union/.

[38] *Stummer v Austria* (App. No. 37452/02), judgment of 7 July 2011, supra n 35, para 60(c).

[39] Code de procedure pénale, article 717-3.

[40] See for instance, National Minimum Wage Act 1998, section 45 and 45A. See also *Pullin v Prison Commissioners* [1957] 1 W.L.R. 1186; *Keatings v Secretary of State for Scotland* [1961] S.L.T. (Sh. Ct.) 63 . For an overview of several legal orders see, D. Van Zyl Smit and F. Dünkel (eds), *Prison Labour: Salvation or Slavery?* (Routledge, 1999).

[41] A. Coyle, *A Human Rights Approach to Prison Management* (London: International Centre for Prison Studies, 2009), p 92.

[42] Mantouvalou, *Structural Injustice and Workers' Rights*, Chapter 4.

[43] Zatz, "The Carceral State at Work – Exclusion, Coercion and Subordinated Inclusion".

[44] See also Noah Zatz et al., "Get to Work or Got to Jail: Workplace Rights Under Threat"(2016) *UCLA Institute for Research on Labor and Employment: A New Way of Life Reentry Project*, UCLA Labor Center.

payback" written on it. One of the negative effects of this is that it can humiliate and stigmatise an offender.[45]

Those who are required to do unpaid work as a community sentence are excluded from labour rights in a manner similar to working prisoners. They do not receive a minimum wage for the work that they do: they in fact do not receive a wage at all, as the work is supposed to be community payback. They also cannot make social security contributions for the period during which they work, given that their work is unpaid. As they do not work under a contract of employment, they do not have any labour rights that are attached to employment status. In addition, sometimes the supervisory functions of the unpaid work requirements, usually exercised by the probation service, are privatised and also placed at the disposal of private companies in the form of the third party profit-making beneficiaries of unpaid work. Examples of this work for private beneficiaries in unpaid work in the UK included work for general medical practitioner partnerships, private sector care homes, private sector nurseries, private sector sheltered accommodation, private cemeteries, and private landowners (via charitable intermediaries).[46] In this way individuals sentenced to perform unpaid work can be used by organisations that make profit, while they are deprived of labour rights, in a manner that makes us question how this work can serve as community payback.

A community sentence that imposes a requirement to work might be viewed as a legitimate sentence in principle and subject to conditions, and is in several respects more humane than incarceration because of the maintenance of community ties. Yet, the exclusion of offenders from labour rights, while they are under a duty to work, raises dangers. As early as 1932, the International Labour Organisation said that:

> …wherever human labour is performed in conditions of subordination, dangers arise; and with prisons, these conditions and the resulting dangers are pushed to the extreme. As a rule, the work

[45] Von Hirsch, "The Ethics of Community Based Sanctions", p. 168.

[46] See, for instance, the UK Ministry of Justice Consultation Paper, "Punishment and Reform: Effective Probation Services" (27 March 2012), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236077/8333.pdf; and International Labour Organization, Direct Request (CEACR) - adopted 2020, published 109th ILC session (2021), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P13100_COUNTRY_ID:4041702,103138.

> of prisoners is performed under compulsion. Thus a penalty involving the obligation to work may easily become the cause of social evils.[47]

This reasoning should be extended to offenders required to do unpaid work, which should be viewed on a continuum with prison labour. Those doing unpaid work as a sentence are subject to similar coercion and exclusion from labour rights as offenders who work in prison. Unpaid work as part of a community sentence is not in that respect less exploitative than work in prison, but very similar to it.[48] It could be viewed as even worse as there is a legal compulsion to work as opposed to *de facto* compulsion that exists in prison labour, while there is also the threat of imprisonment for those who do not comply. This is a distinct threat because it is one of a sanction of a different magnitude.

By suggesting that unpaid work requirements should be viewed on a continuum with work in prison, we do not mean that these requirements are as onerous as being locked up, as the effects of imprisonment are particularly grave. Yet, some features of unpaid work requirements are such that they should be scrutinised as closely as prison sentences for their impact on offenders' lives and for their compliance with human rights law.

Community sentences and societal reintegration

Thus far we have argued that aspects of sentences imposed on offenders in community settings should not be viewed as necessarily having less impact on offenders than incarceration. In this section we propose that a further way in which community sentences are on a continuum alongside imprisonment is evident if we consider their implications for societal reintegration of ex offenders, looking particularly at their employment prospects. In general, community sentences, including electronic monitoring and unpaid work requirements, do not raise the same concerns with respect to reintegration of offenders as severe forms of imprisonment. But, as we address in this section, they can negatively impact the employment conditions and employment prospects of the targeted persons. This is largely a matter of how non-custodial sentences are regulated and monitored. Nevertheless, we should keep the negative impact of these sentences on societal reintegration of

[47] Cited in G. de Jonge, "Still "Slaves of the State": Prison Labour and International Law", in D. Van Zyl Smit and F. Dünkel (eds.), *Prison Labour: Salvation or Slavery? International Perspectives* (reissued by Routledge 2018, originally published in 1999), p. 323.

[48] Cf. David Garland, "Penal controls and social controls: Toward a theory of American penal exceptionalism" (2020) 22 *Punishment & Society* 321.

offenders in mind as we assess the compatibility of these sentences with human rights law, as we address in the second part of this article.

Being targeted with a community sentence can impose a stigma of being risky.[49] The most common understanding of stigma is based on a classic study by Erving Goffman.[50] In this study, Goffman explains that a stigmatised individual possesses a particular attribute defined by others that is perceived as a negative characteristic of the individual, such as the quality of being a criminal or being suspected of criminal behaviour. As a result, others may discriminate and avoid the stigmatised person.[51] Persons subject to community sentences may be perceived as posing a risk to others and experience stigmatisation. For example, having to wear an electronic monitoring device can reveal to others that the person is an offender, which may lead to stigmatisation and harm employability.[52] This issue has been reported by respondents in empirical studies, with some believing that "employers would be less likely to offer them a job if they found out they were tagged".[53] Although courts in most jurisdictions are willing to suit the offenders' working hours, some offenders refuse requests for overtime work rather than declare they are subject to electronic monitoring.[54] Stigma is not always visible in cases of electronic monitoring, but it may be revealed when employees change their work schedule, work overtime, do work related travel, etc.[55] In these ways, the stigma of being tagged can affect relationships and employment possibilities. Finding and keeping work in these circumstances can be challenging, even though supporters of electronic monitoring maintain that the ability to hold a job whilst tagged is one of the attractions of electronic monitoring over prison.

In some cases, the stigma that is associated with alternative sentences results in public humiliation. This may arise when individuals convicted to electronic monitoring must wear a tag

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[49] On the stigmatic impact of regulatory measures, see Hadassa Noorda, "Regulation as Punishment" (2021) 40 *Criminal Justice Ethics* 108. See also, Richard Tewksbury and Matthew Lees, "Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences" (2006) 26 *Sociological Spectrum* 309.

[50] E. Goffman, *Stigma: Notes on the Management of Spoiled Identity* (New York: Simon and Schuster, 1963).

[51] Goffman, *Stigma: Notes on the Management of Spoiled Identity,* p. 70.

[52] E.g. Lauren Kilgour, "The Ethics of Aesthetics: Stigma, Information, and the Politics of Electronic Ankle Monitor Design" (2020) 36 *The Information Society: An International Journal* 131; Avlana Eisenberg, "Mass Monitoring" (2017) 90 *Southern California Review* 123; Nellis, "Surveillance, Stigma and Spatial Constraint: The Ethical Challenges of Electronic Monitoring".

[53] Mike Nellis, "Surveillance and Confinement: Explaining and Understanding the Experience of Electronically Monitored Curfews" (2009) 1 *European Journal of Probation*, p. 51.

[54] Kath Dodgson et al., *Electronic Monitoring of Released Prisoners: An Evaluation of the Home Detention Curfew Scheme* (Home Office Research Study 222, London: Home Office, 2001).

[55] See also Noorda, "Regulation as Punishment", p. 115-117.

that is difficult to conceal and when offenders doing unpaid work must wear high visibility jackets.[56] As Dirk van Zyl Smit notes, these requirements do not serve purposes, such as rehabilitation or payback to the community, but the purpose of stigmatisation and humiliation,[57] constituting an affront to dignity. Even where community sentences are not humiliating, the potential impact of these sentences on offenders' lives poses a threat to targeted individuals unless steps are taken to protect their rights.

Individuals who are restricted in their freedom through the community sentence of electronic monitoring could be viewed as being able to participate in society and retain their occupation.[58] However, in many cases, electronic monitoring interferes with employment requirements or harms employment. When one is sentenced to house arrest with electronic tagging, the ability to move around freely is almost completely restricted. While offenders who are employed are generally permitted to work, in many jurisdictions they cannot go to and from work and complete outdoor tasks without the explicit permission of the executive officer.[59] One concern raised by offenders under electronic monitoring pertains to alterations to the work schedule because their employers would have to provide verification to the executive.[60] Other concerns include the inability to do overtime and work-related travel.[61] This is not the same everywhere as offenders in countries where electronic tagging allows for more flexibility do not usually mention

[56] Nellis, "Surveillance, Stigma and Spatial Constraint: The Ethical Challenges of Electronic Monitoring". Nellis notes that some electronic monitoring programmes in the US deliberately use devices that are hard to conceal. For examples of public humiliation of offenders in the context of unpaid work requirements, see Mantouvalou, *Structural Injustice and Workers' Rights*, chapter 7; Van Zyl Smit, "Community Sanctions and European Human Rights Law", p. 191.

[57] Van Zyl Smit, "Community Sanctions and European Human Rights Law", p. 191, 203.

[58] In contrast, a short prison sentence can lead to the loss of employment (e.g., Michael Tonry, "Less Imprisonment is No Doubt a Good Thing, More Policing is Not" (2011) 10 *Criminology & Public Policy* 137.

[59] Belgium is an exception to this general practice, see Delphine Vanhaelemeesch, Tom Vander Beken and Stijn Vandevelde, "Punishment at Home: Offenders' Experiences with Electronic Monitoring" (2014) 11 *European Journal of Criminology* 273.

[60] Marina Richter, Barbara Ryser and Ueli Hostetter, "Punitiveness of Electronic Monitoring: Perception and Experience of an Alternative Sanction" (2021) 13 *European Journal of Probation* 262, p. 270.

[61] Jamie Martin, Kate Hanrahan and James Bowers Jr., "Offenders' Perceptions of House Arrest and Electronic Monitoring" (2009) 48 *Journal of Offender Rehabilitation* 547; Randy Gainey, Brian Payne and Mike O'Toole, "Relationships Between Time in Jail, Time on Electronic Monitoring, and Recidivism: An Event History Analysis of a Jail-Based Program" (2000) 17 *Justice Quarterly* 733.

these problems. For example, in Belgium, tagged individuals can work overtime, change their shifts, or accept late starting times.[62]

There is a further potential issue that links the employment conditions of those subject to community sentences and those in prison. We said earlier that offenders doing unpaid work as a community sentence are excluded from labour rights. In this way, they become vulnerable to exploitation by state authorities and private entities who may use them and benefit from these exclusions. Those in unpaid work are required to perform specific tasks, which they would not have chosen, as a payback to the community. Their punishment consists in their deprivation of their time and the requirement to engage in these tasks. Their exclusion from labour rights, such as a right to be remunerated for the work that they do, creates vulnerability to exploitation.

Electronic tagging as a community sentence may also create vulnerability to exploitative work. Tagging is often seen as providing offenders with opportunities to participate in rehabilitative programmes, including work programmes.[63] In some jurisdictions, these programmes require, among other things, finding and keeping employment, which is seen as a means to provide more structure and stability in offenders' lives and reduce criminal behavior.[64] However, despite the perceived positive effects of rehabilitative programmes, there is concern about the vulnerability of individuals subject to these requirements for the following reasons: even though persons under electronic monitoring are not excluded from labour rights, tagging may impact on individuals' freedom to engage in work of their choice. Requiring a tagged individual to work can coerce this individual into undesired situations for lack of options. Tagged workers have the right to quit their job and change employer, but these individuals are required to work as part of a rehabilitative programme and, compared to other workers, finding employment whilst electronically monitored can be challenging. The result of this situation can be low pay and exploitation. Similar issues may arise when individuals subject to electronic tagging are not required

[62] Vanhaelemeesch, Vander Beken and Vandevelde, "Punishment at Home: Offenders' Experiences with Electronic Monitoring".

[63] Morris and Tonry, *Between Prison and Probation: Intermediate Punishments and a Rational Sentencing System.*

[64] See, for example, Mary Finn and Suzanne Muirhead-Steves, "The Effectiveness of Electronic Monitoring with Violent Male Parolees" (2002) 19 *Justice Quarterly* 293; Kristy Hudson and Trevor Jones, "Satellite Tracking of Offenders and Integrated Offender Management: A Local Case Study" (2016) 55 *The Howard Journal* 188; Sandra Lapham, Janet C'de Baca, Jodi Lapidus and Garnett McMillan, "Randomized Sanctions to Reduce Re-Offense Among Repeat Impaired-Driving Offenders" (2007) 102 *Addiction* 1618.

to work but face financial challenges due to unemployment.[65] Thus, even though it does not exclude people from labour rights, electronic monitoring creates vulnerability and harms the employment conditions of targeted individuals.

Moreover, a further effect of both community sanctions and incarceration involves employment opportunities after the end of the community sentence. People in prison, those on community sentences, and those who have left prison need to obtain a job to cover their basic needs, the needs of their dependents, and other costs of their life. Some may argue that those convicted of crimes (assuming they were guilty) bear responsibility for their criminal records and that the consequences of the availability of such records are one of the costs of their misconduct. However, identification of offenders impedes important principles of criminal justice: rehabilitation and reintegration of offenders.[66] In addition, work is generally viewed as offering the best protection against recidivism.[67] Yet, having a criminal record harms employment prospects. Offenders are excluded from many work opportunities, and particularly jobs that are not precarious,[68] while it has been observed that those who have worked in prison "come to expect – and sometimes embrace – low-wage precarious work outside prison".[69] This exclusion is often because of prejudice rather than because of real unsuitability for the job in question. In addition, there is evidence that they also face serious obstacles when attempting to find better work because of their criminal record.[70]

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[65] In light of this, one should note that offenders subject to electronic monitoring must pay their phone and electricity bills and, in some jurisdictions, they also pay for the monitoring equipment. See Gainey, Payne and O'Toole, "Relationships Between Time in Jail, Time on Electronic Monitoring, and Recidivism: An Event History Analysis of a Jail-Based Program".

[66] On rehabilitation and reintegration as principles of European prison law and policy, see D. Van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (New York: Oxford University Press, 2009). See also *Vinter and Others v United Kingdom* (App. No. 66069/09), judgment of 9 July 2013.

[67] See, for instance, John Haggan, "The Social Embeddedness of Crime and Unemployment", (1993) 31 *Criminology* 465; Christopher Uggen and Jeremy Staff, "Work as a Turning Point for Criminal Offenders" (2001) 5 *Corrections Management Quarterly* 1.

[68] See, for instance, Marti Rovira, "Invisible Stripes? A Field Experiment on the Disclosure of a Criminal Record in the British Labour Market and the Potential Effects of Introducing Ban-The-Box Policies" (2023) *British Journal of Criminology*; Amanda Agan and Sonja Starr, "The Effect of Criminal Records on Access to Employment" (2017) 107 *American Economic Review* 560; Dallas Augustine, "Working Around the Law: Navigating Legal Barriers to Employment During Reentry" (2019) 44 *Law & Social Inquiry* 726.

[69] E. Hatton, "Introduction", in E. Hatton (ed), *Labor and Punishment—Work in and out of Prison* (University of California Press 2021), p. 1, 6.

[70] Augustine, "Working Around the Law: Navigating Legal Barriers to Employment During Reentry" .

This far we have argued that community sanctions should not be readily accepted as a less restrictive alternative to imprisonment. When it comes to restrictions of physical liberty and the creation of vulnerability to labour exploitation, the community sanctions that we examine in this piece have important similarities to imprisonment and have to be viewed on a continuum with imprisonment. Are there legal safeguards protecting offenders in community sentences against this treatment? The section that follows addresses this question by looking at human rights law.

Part 2: Human Rights Law

In this section, our focus is on the compatibility of electronic tagging and unpaid work requirements with the European Convention on Human Rights ("ECHR"). This part of our inquiry is motivated by the very real concern of net widening, which we mentioned earlier in this piece, namely the use of community sanctions when less restrictive measures, such as a financial penalty or a warning, would have been sufficient. By proposing that aspects of community sentences may violate human rights law, our argument is not that more people should be sentenced to imprisonment. As mentioned earlier, imprisonment has been associated with many ills, including affronts to dignity and restrictions to freedom that constitute human rights violations.[71] What we seek to emphasise is that aspects of community sentences may also constitute an affront to dignity, and that existing human rights safeguards should, therefore, protect those who are tagged or required to do unpaid work in the community.

The ECHR has rightly been described as "a largely untapped resource"[72] in scrutinising community sanctions. Against this background, we consider human rights standards in the area using two routes. First, the ECtHR has an expanding case law on prison conditions and prisoners' rights, and we seek to build on this jurisprudence in order to assess community sanctions. This analysis is based on our argument in the first part of this article that these sentences should be viewed on a continuum with imprisonment. Second, we also employ non-binding, legal materials involving non-custodial sentences that can shed light on how Convention rights should be interpreted when assessing the compatibility of community sanctions with human rights law. In 1992 the United Nations adopted rules on community sanctions, the United Nations Standard

[71] See, for instance, Costas Paraskeva, "Overcrowding in prisons: the developing case law of the European Court of Human Rights addressing contracting states' failures and obligations under article 3 of the ECHR", (2021) 5 *European Human Rights Law Review* 494; Snacken, "Human Dignity and Prisoners' Rights in Europe".

[72] Van Zyl Smit, "Legal Standards and the Limits of Community Sanctions", p. 203-204. More generally community sanctions are relatively under-researched. See R. Canton, *Punishment* (London: Routledge, 2022) Chapter 3.

Minimum Rules for Non-custodial Measures, known as the "Tokyo Rules". [73] The Tokyo Rules provide a set of minimum protections for persons subject to non-custodial measures and propagate the use of such forms of sanction.[74] More specific recommendations – e.g. on early and conditional release (2003), on probation, (2010), and, most recently, on electronic monitoring (2014) – have been issued following the adoption of the Tokyo Rules.[75] The main Council of Europe instruments governing prison conditions and community sentences are the European Prison Rules[76] and the European Rules on Community Sanctions and Measures (ERCSM).[77]

Even though these instruments are not legally binding, the detailed standards that they set are influential at national and supranational level, with European Prison Rules having regularly been invoked by the ECtHR in the course of the interpretation of the Convention.[78] Reference to non-binding materials in the process of the interpretation of the Convention is a technique that has been regularly deployed by the ECtHR in recent decades.[79] In this context, it has been argued that these more specific instruments "derive a degree of authority and legitimacy from the fact that they passed through a long drafting process that involved many governmental and nongovernmental parties and that they were adopted unanimously by the representatives of the states concerned".[80]

Discussing the value of the European Prison Rules, for instance, in the interpretation of the ECHR, Judge Pinto de Albuquerque described them as "the prototype of hardened soft law

[73] General Assembly resolution 45/110 of 14 December 1990.

[74] Underlying the support for the use of non-custodial sanctions are issues of prison overcrowding, human rights, and offender rehabilitation and reintegration. See Van Zyl Smit, "Legal Standards and the Limits of Community Sanctions". For an overview of human rights standards and community sanctions, see Morgenstern and Van Zyl Smit, "International Human Rights Standards and Community Sanctions".

[75] Morgenstern and Van Zyl Smit, "International Human Rights Standards and Community Sanctions"; Frieder Dünkel, "Electronic Monitoring in Europe – a Panacea for Reforming Criminal Sanctions Systems? A Critical Review" (2018) 6 *Kriminologijos studijos* 58.

[76] Council of Europe, Recommendation of the Committee of Ministers to the Member States on the European Prison Rules, revised 2020 (CM/Rec(2006)2-rev).

[77] Council of Europe, Recommendation of the Committee of Ministers to the Member States on the European Rules on Community Sanctions and Measures, revised 2017 (CM/Rec(1992)16-rev).

[78] See, for instance, *Ivan Karpenko v Ukraine* (App. No. 45397/13), judgment of 16 December 2021, where the Court explained that it attaches considerable importance to the European Prison Rules, para 57.

[79] Virginia Mantouvalou, "Labour Rights in the European Convention of Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation" (2013) 13 *Human Rights Law Review* 529.

[80] Morgenstern and Van Zyl Smit, "International Human Rights Standards and Community Sanctions".

in the Council of Europe's normative system".[81] In relation to the ERCSM and the Tokyo Rules, Morgenstern and van Zyl Smit observed that there is a "lack of wider reference to the rules dealing with community sanctions" in the case law of the ECtHR, which they described as "regrettable because both sets of rules adopt a highly principled approach towards the human rights-based use of community sanctions and represent what human rights lawyers call "evolving standards of decency" in this field".[82] Our contribution then also aims to explain how these standards can be incorporated in ECHR provisions so as to address this gap when assessing community sanctions.

Liberty

A good starting point in the case law of the ECtHR, when exploring principles on imprisonment and other matters that can be extended to community sanctions, is the well-established point:

> …that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. It is inconceivable that a prisoner should forfeit his Convention rights merely because of his status as a person detained following conviction.[83]

This suggests that any further restrictions of freedom of prisoners and other offenders have to be scrutinised closely for their compatibility with the Convention.

Article 5 of the Convention protects liberty in a narrow sense, namely physical liberty.[84] It establishes a right to liberty and security but also provides a list of exceptions, when deprivation of liberty is permitted. These include the deprivation of liberty after conviction, as well as deprivation of liberty for non-compliance with a court order, or for fulfilment of an obligation prescribed by law. However, physical liberty cannot be entirely separated from a wider understanding of liberty: liberty to participate in society (e.g. to pursue a profession or education, and to engage in social life).[85] The ECtHR has at times been reluctant to apply Article 5 safeguards

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[81] See *Mursic v Croatia* (App. No. 7334/13), judgment of 20 October 2016.

[82] Van Zyl Smit and Morgenstern, "International Human Rights Standards and Community Sanctions", p. 2620.

[83] *Stummer v Austria* (App. No. 37452/02) judgment of 7 July 2011, para 99. See also *Hirst v the United Kingdom (no. 2)* [GC], no. 74025/01, para. 69-70, ECHR 2005-IX.

[84] *Engel and others v The Netherlands* (1979–1980) 1 E.H.R.R. 647 at 58.

[85] On notions of liberty under the Convention, see Shona Wilson Stark, "Deprivations of Liberty: Beyond the Paradigm" (2019) *Public Law* 380.

to restrictions of liberty outside of the very narrow space of physical liberty, and has been criticised for this reason.[86]

In examining whether a restriction of liberty falls within the scope of Article 5, the ECtHR looks at a number of factors such as the type of the restriction, its duration, and the way in which it is implemented.[87] In making its assessment, it also examines the cumulative effect of these factors, which means that even if each individual factor does not amount to a deprivation of liberty, their cumulative effect may be classified as such.[88] In *Guzzardi v Italy*, which involved someone who had been charged for criminal offences, removed to an island and placed in compulsory residence in a small area on the island, the restrictions were such that the Court compared them to an open prison and ruled that they fell in the scope of Article 5.[89] However, in *De Tommaso v Italy*[90] the Grand Chamber found that measures including a curfew and restrictions on association and residence did not constitute deprivation of liberty for the purposes of Article 5 as they were not as restrictive as in *Guzzardi*. The key difference was that the applicants were not required to live on an island.[91] This distinction was criticised in the dissenting opinion of Judge Pinto de Albuquerque.

On the basis of the *Guzzardi* principles, electronic tagging can have a significant impact on those targeted, especially when combined with area restrictions, house arrest, or other measures intended to restrict liberty. Although electronic tagging does not restrict liberty physically by locks and walls, it requires tagged persons to obey certain limits. If they disobey their requirements, they might get sent to prison.[92] There is therefore a strong connection between tagging and imprisonment in this way too, which needs to be taken into account in assessing whether it falls within the scope of Article 5. It has further been argued that the mandatory wearing of an electronic tagging device can strongly restrict a person's ability to lead a normal life and resembles traditional imprisonment, at least in certain circumstances,[93] and that curtailment of liberty affects

[86] Stark, "Deprivations of Liberty: Beyond the Paradigm".

[87] *Guzzardi v Italy* (App. No. 7367/76), judgment of 6 November 1980.

[88] *Guzzardi*.

[89] *Guzzardi*, para 95.

[90] *De Tommaso v Italy* (App. No. 43395/09), judgment of 23 February 2017.

[91] However, the Court examined the restrictions in this case under article 2 of Protocol 4 on freedom of movement.

[92] Bülow, "Retributivism and the Use of Imprisonment as the Ultimate Back-up Sanction".

[93] Noorda, "Imprisonment".

the enjoyment and exercise of other basic rights.[94] The cumulative effect of tagging, together with other restrictions, in other words, may bring this treatment in the scope of Article 5.

Some parallels can also be drawn between the type of restrictions of freedom that we discuss, and case law of the UK Supreme Court on control orders imposed on individuals who are terrorism suspects. The restrictions in these cases involved curfews, electronic tags, and other measures affecting people's association and communication. In examining them, the UK Supreme Court ruled that to assess whether Article 5 is violated, a relevant consideration is whether the conditions imposed on claimants restrict the right to private life under Article 8 of the ECHR because of extensive social isolation.[95] Even if these restrictions of article 8 are viewed as compatible with the right to private life, they can constitute a relevant consideration that can lead to a violation of Article 5. Article 5 should, in other words, be interpreted in light of Article 8 of the Convention, which we discuss in further detail below.

Extending Article 5 to community sanctions means that the guarantees of the provision, such as the principle of lawfulness of the detention, would apply to those in community sentences.[96] And even though the ECtHR has repeatedly ruled that appropriate sentencing is not within the scope of the Convention, "measures relating to the execution of a sentence or to its adjustment can affect the right to liberty protected by Article 5§1, as the actual duration of deprivation of liberty depends on their application, among other things".[97] In this respect, Article 11 of the ERCSM that says that these measures should not be implemented in a way that aggravates their afflictive nature can also be useful. What further human rights protections should be applicable to electronic monitoring and unpaid work requirements?

Humiliation

Elements of the community sentences that we examined can be humiliating, and raise in this way issues under Article 3 of the ECHR, which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". The ERCSM preamble explains that community sanctions aim to balance the interests of the community with the social adjustment of the offenders, with rehabilitation being a central concern. In many jurisdictions, rehabilitation is

[94] On the right to vote in prison, see e.g. Andrei Poama and Tom Theuns, "Making Offenders Vote: Democratic Expressivism and Compulsory Criminal Voting" (2019) 113 *American Political Science Review* 796.

[95] *Home Secretary v AP* [2010] UKSC 24, para 12. See also the earlier *Home Secretary v JJ* [2007] UKHL 45.

[96] See, for example, *Rio Prada v Spain* (App. No. 42750/09), judgment of 21 October 2013, para 123 ff.

[97] *Khamtokhu and Aksenchik v Rusia* (App. No. 60367/08), judgment of 24 January 2017, para 56.

the primary purpose of community sanctions.[98] Aspects of community sanctions that are humiliating can be problematic under human rights law.

The ECtHR has often emphasized that rehabilitation is the primary purpose of prison sentences,[99] and a mandatory factor which member states of the ECHR have to take into account as they design their penal policies.[100] On our analysis this has to be clearly extended to community sanctions. Looking at prison conditions which may be inhuman or degrading, the Court has explained that:

> to fall under Article 3, the suffering and humiliation involved must […] go beyond that inevitable element of suffering and humiliation connected with detention. The State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him or her to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his or her health and well-being are adequately secured.[101]

Prison conditions may increase the severity of the sentence, in other words, and make it in this way incompatible with Article 3 of the Convention.[102]

In line with this case law, extending this principle to community sanctions means that rehabilitation has to be their primary purpose and that only aspects of the non-custodial sentence that are unavoidable "given the practical demands" of the sentence are compatible with the ECHR. Community sentences that employ public shaming are inconsistent with human dignity,[103] lead to unnecessary suffering and may violate the prohibition of inhuman and degrading treatment under the Convention.[104] This may arise when those convicted to unpaid work are required to wear high

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[98] Morgenstern and Van Zyl Smit, "International Human Rights Standards and Community Sanctions", p. 2618.

[99] See *Vinter and Others v United Kingdom* (App. No. 66069/09, 130/10 and 3896/10), judgment of 9 July 2013. See the analysis in Dirk Van Zyl Smit, Pete Weatherby and Simon Creighton, "Whole Life Sentences and the Tide of European Human Rights Jurisprudence" (2014) 14 *Human Rights Law Review* 59; Sonja Meijer, "Rehabilitation as a Human Rights Obligation" (2017) 25 *European Journal of Crime, Criminal Law and Criminal Justice* 145.

[100] *Khoroshenko v Russia* (App. No. 41418/04), judgment of 30 June 2015, para 121.

[101] *Mursic v Croatia* (App. No. 7334/13), judgment of 20 October 2016, para 99.

[102] Natasa Mavronicola, "Crime, Punishment and Article 3 of the ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context" (2015) 15 *Human Rights Law Review* 721, p. 732.

[103] M. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton: Princeton University Press, 2006), p. 230-233.

[104] Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law*, p. 204.

visibility jackets, for instance. These stigmatise and humiliate individuals without serving purposes such as rehabilitation or community payback. A possible explanation for the use of these jackets could be that visibility is needed for reasons of public safety, but this is not persuasive given that these offenders already live in the community and therefore cannot be viewed as constituting a threat to the public.

Similarly, one could argue that electronic tagging programmes, for example when individuals are required to wear a tag that is difficult to conceal, may violate the prohibition of inhuman and degrading treatment.[105] Being sentenced for an offense always contains an element of humiliation, and some might think that this is desirable because it will deter potential offenders from committing crimes. Others might be in favor of this believing that offenders deserve it. However, the infliction of humiliation may run afoul of the aim of rehabilitation and reintegration of offenders. The treatment of all offenders should respect their dignity and should not deliberately increase their public humiliation: "the manner and method of the execution of the measure [should not] subject [someone] to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention"[106] or in community sanctions which are the focus of our piece.

Private Life

Both imprisonment and alternative measures have effects on the right to private life of offenders. These effect can fall within the scope of Article 8 of the ECHR as we touched upon earlier. Article 8 states: "[e]veryone has the right to respect for his private and family life, his home and his correspondence". The second paragraph permits restrictions insofar as there is a legitimate aim and the restriction is proportionate to the aim pursued.[107] In this way, the provision is different to the analysis under Articles 3 and 5 above that do not contain a proportionality test. Article 8 has typically been interpreted broadly by the ECtHR to cover activities that are well beyond the sphere of one's home and family life.[108]

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[105] Nellis, "Surveillance, Stigma and Spatial Constraint: The Ethical Challenges of Electronic Monitoring".

[106] *Pilcic v Croatia* (App. No. 33138/06), judgment of 17 January 2008, para 36.

[107] Paragraph 8(2) ECHR says: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[108] See, for instance, *Von Hannover v Germany* (App. No. 59320/00), judgment of 24 June 2004; *Barbulescu v Romania*, (App. No. 61496/08), judgment of 5 September 2017.

The ECtHR has examined several aspects of the right to private life of prisoners, including the protection of their correspondence[109] and their rights to have contact with their families.[110] In this context it has said that "[w]hilst detention, like any other measure depriving a person of his or her liberty, entails various limitations of his or her rights and freedoms, that person does not forfeit his or her Convention rights merely because of his or her status as a detainee, including the rights guaranteed by Article 8 of the Convention, so that restrictions on those rights must be justified in each case".[111] Against this background, the ECtHR has found that excessive monitoring of prisoners may violate Article 8 of the Convention, for instance, if the legislation does not define clearly "the scope of those powers and the manner of their exercise" so that they are not employed arbitrarily.[112] More broadly, the Court has ruled that sentencing that interferes with article 8 has to meet the test of proportionality. [113]

A similar test of proportionality needs to be applied to electronic tagging. This is supported by Article 8 of the ERCSM that recognises the importance of privacy of offenders, stating that the "nature, content and methods of implementation of community sanctions and measures shall respect the principles of dignity and the privacy of suspects and offenders, their families and others". The more precise formulation of the test of proportionality under Article 8 of the ECHR can be guided by the Committee of Ministers Recommendation on Electronic Monitoring.[114] This Recommendation provides that when through electronic monitoring offenders are excluded from or limited to specific areas, the implementation of the sentence should not restrict the person to an extent that they cannot have a reasonable quality of daily life,[115] that monitoring restricting an offender to a place of residence should be avoided as much as possible,[116] and that the use of data

[109] *Silver and Others v UK* (App. No. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75), judgment of 25 March 1983.

[110] *Chaldayev v Russia* (App. No 33172/16), judgment of 28 May 2019.

[111] *Gorlov and Others v Russia* (App. No. 27057, 56443/09 and 25147/14), judgment of 2 July 2019, para 81.

[112] *Gorlov and Others v Russia* (App. No. 27057, 56443/09 and 25147/14), judgment of 2 July 2019, para 97.

[113] On proportionality in sentencing, see more generally S. Summers, *Sentencing and Human Rights: The Limits of Punishment* (Oxford: OUP, 2022), Chapter 3.

[114] Council of Europe, Recommendation of the Committee of Ministers to the Member States on the electronic monitoring (CM/Rec(2014)4).

[115] Council of Europe, Recommendation of the Committee of Ministers to the Member States on the electronic monitoring (CM/Rec(2014)4), para 19.

[116] Council of Europe, Recommendation of the Committee of Ministers to the Member States on the electronic monitoring (CM/Rec(2014)4), para 21.

collected in the process of monitoring should be strictly regulated.[117] All these principles should serve as guidance to the ECtHR on what restrictions of freedom can be justified as a proportionate interference with Article 8 of the Convention, and could lead to findings that excessive use of tagging devices, for instance, may violate the right to private life. Even though electronic monitoring of offenders does not of course restrict their private life as much as imprisonment, its more specific conditions still have to meet the requirements of proportionality as restrictions of the right to private life.

There is a further, distinct way in which the right to private life of those in community sentences is affected in a manner similar to those in prison, exactly because of their status as offenders. This is in that it harms their work prospects, and the resulting ability to rebuild their lives after their sentence. We said earlier that one of the effects of alternative sentences (as well as imprisonment) is the limited ability to obtain a job because of people's criminal record. Employers may be able, encouraged or required to perform criminal record checks of job applicants.[118] As a result, those with a criminal record may not be able to obtain a job. Blanket duties to disclose one's criminal record may affect work prospects, when required or permitted by law, and may be incompatible with the right to private life. People may justifiably not want to share information of a criminal conviction, because this can be their private information. The ECtHR examined a case on retention and disclosure of a caution administered to an applicant, which led to the withdrawal of a job offer and harmed her employment prospects, which were protected under Article 8.[119] It ruled that "the indiscriminate and open-ended collection of criminal record data"[120] is unlikely to be compatible with the ECHR, unless there are "clear and detailed statutory regulations clarifying the safeguards applicable and setting out the rules governing, *inter alia*, the circumstances in which

[117] Council of Europe, Recommendation of the Committee of Ministers to the Member States on the electronic monitoring (CM/Rec(2014)4), paras 29-32.

[118] For different approaches on criminal record disclosure, see Elena Larrauri, "Criminal Record Disclosure and the Right to Privacy" (2014) 10 *Criminal Law Review* 723; James Jacobs and Elena Larrauri, "European Criminal Record and Ex-Offender Employment" (2015) *New York University Public Law and Legal Theory Research Paper Series* 15-41; Bronwyn Naylor, Moira Paterson and Marilyn Pittard, "In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks" (2008) 32 *Melbourne University Law Review* 171.

[119] *MM v United Kingdom* (App. No 24029/07), judgment of 13 November 2012. See also the UK Supreme Court decisions *R (on the application of P and others) v Secretary of State for Justice and others* [2019] UKSC 3*; R (on the application of T and another) (Respondents) v Secretary of State for the Home Department and another (Appellants)* [2014] UKSC 35.

[120] *MM v United Kingdom* (App. No 24029/07), judgment of 13 November 2012, para 199.

data can be collected, the duration of their storage, the use to which they can be put and the circumstances in which they may be destroyed".[121]

Given that a central purpose of sentencing is the offender's rehabilitation, and that employment opportunities are significant for rehabilitation, broad obligations to disclose one's criminal record and exclusions from employment opportunities is incompatible with this rehabilitative aim.[122] The ECtHR has also found that Article 14, which prohibits discrimination in the enjoyment of the rights of the Convention, imposes an obligation to treat significantly different situations in a different manner in a case that involved a job applicant's criminal record.[123] This principle supports the position that not all criminal offences carry the same weight when considering job applicants' suitability for specific posts, and that certain convictions (perhaps particularly so when offenders have been sentenced to community sentences) should not be disclosable at all, because the effects of disclosure on private life can be devastating.

Forced Labour

Further issues arise when looking particularly at unpaid work as a community sentence in relation to Article 4 of the ECHR that prohibits slavery, servitude, forced and compulsory labour, an issue that has not been examined by the ECtHR this far but which was examined by the ILO as we will see below. A first question is whether unpaid work as a community sentence constitutes "forced labour". Article 4 has a significant caveat. It explains: "For the purpose of this Article the term "forced or compulsory labour" shall not include […] any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during release from such detention".[124]

The ECtHR has not examined unpaid work in this context, but it has examined prison labour. We should therefore consider the principles that it has developed. The question what work is "ordinary" is crucial. In an early case on prison labour, *Van Droogenbroeck v Belgium*,[125] the Court examined the claim of a recidivist prisoner who was required to work, with his release being conditional on accumulating a certain amount of savings. It noted that even though work was compulsory, it should not be viewed as a violation of Article 4 because it did not go beyond

[121] *MM v United Kingdom* (App. No 24029/07), judgment of 13 November 2012, para 199.

[122] For arguments in favor of limited access to criminal records, see Richard Lippke, "Legal Punishment and the Public Identification of Offenders" (2018) 24 *Res Publica* 199.

[123] *Thlimmenos v Greece* (App. No. 34369/97), judgment of 6 April 2000.

[124] Article 4, para 3(a).

[125] *Van Droogenbroeck v Belgium* (App. No. 7905/77), judgment of 24 June 1982.

what is ordinary in promoting a person's reintegration in several member states of the Council of Europe.[126] What work is ordinary for prisoners has to be assessed in light of present day conditions and not in light of what was accepted in the past. In a more recent case on social security rights of working prisoners, dissenting Judge Tulkens said that *"[e]ven a prisoner cannot be forced to do work that is abnormal*".[127]

Findings of other monitoring bodies can elucidate the meaning of "forced labour" in this context. The ILO has said that what is needed is the formal written consent of the prisoner and working conditions similar to a free labour relationship (in relation to wage levels, social security and occupational safety and health). These would indicate that labour is voluntary.[128] The European Committee of Social Rights has also considered prison labour in the context of Article 1 paragraph 2 of the European Social Charter, which protects the right to work in an occupation freely entered upon, and reached similar findings to the ILO, namely that working conditions in prison have to be regulated strictly, and that when employed by private employers, prisoners have to be employed with their consent and in conditions as similar as possible to working conditions outside prison.[129] The Committee has further said that the prohibition of discrimination concerns their pay, working hours and other working conditions, as well as social security rights.[130] All these materials promote the "normalisation" of prison labour, which means that working conditions of those incarcerated should resemble the conditions of those outside prison insofar as possible. This idea is also endorsed in the European Prison Rules,[131] which further provide that there should be equitable remuneration for working prisoners[132] and that working prisoners should be included in social security systems as much as possible.[133] Insights from these monitoring bodies should guide the approach of the Court on prison labour and work as a community sanction.

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126 *Van Droogenbroeck v Belgium* (App. No. 7905/77), judgment of 24 June 1982, para 59.

127 *Stummer v Austria* (App. No. 37452/02), judgment of 7 July 2011.

128 International Labour Office, "Eradication of Forced Labour", *General Survey concerning the Forced Labour Convention, 1930 (No 29), and the Abolition of Forced Labour Convention, 1957 (No 105),* Report of the Committee of Experts (15 February 2007), paras 59-60 and 114 ff.

129 Conclusions XVI-1, Germany.

130 Conclusions 2012, Statement of Interpretation on Article 1 para 2.

131 Council of Europe, Recommendation of the Committee of Ministers to the Member States on the European Prison Rules, revised 2020 (CM/Rec(2006)2-rev), rule 26.7.

132 Council of Europe, Recommendation of the Committee of Ministers to the Member States on the European Prison Rules, revised 2020 (CM/Rec(2006)2-rev), rule 26.10.

133 Council of Europe, Recommendation of the Committee of Ministers to the Member States on the European Prison Rules, revised 2020 (CM/Rec(2006)2-rev), rule 26.17.

Of course a difference between prison labour and unpaid work in the community is that "[p]rison work shall be approached as a positive element of the prison regime and shall never be used as a punishment",[134] while in community sanctions work constitutes the sentence. To examine further their compatibility with human rights law, the Court can be guided by the ERCSM. These rules provide that tasks imposed on offenders should be "socially useful and meaningful", that they should help develop their skills, that they should not lead to profit by the authorities or private actors, and that they should comply with health and safety rules.[135] Given that these measures constitute a more recent development in sentencing, they provide an opportunity to the ECtHR to revisit the question what is ordinary work for offenders that is compatible with Article 4, and whether community work complies with more concrete ERCSM standards that can be incorporated in Article 4.

Further guidance on this can be derived by the ILO. The ILO Committee of Experts examined unpaid work in the community and explained that effective public control and supervision is essential in the delivery of the sentence.[136] Moreover, it emphasised that safeguards should be in place to ensure that the work which offenders are required to do is in the general interest,[137] that providers should not benefit from the unpaid work of the offenders,[138] and that the scheme should "not result in the private provider placing offenders in compulsory work for

[134] Council of Europe, Recommendation of the Committee of Ministers to the Member States on the European Prison Rules, revised 2020 (CM/Rec(2006)2-rev), rule 26.1. See generally, Van Zyl Smit and Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* at 187 ff.

[135] Council of Europe, Recommendation of the Committee of Ministers to the Member States on the European Prison Rules, revised 2020 (CM/Rec(2006)2-rev), rules 39-41.

[136] See Report of the Director-General, Eighth Supplementary Report of the Committee set up to examine the representation alleging non-observance by the United Kingdom of the Forced Labour Convention, 1930 (No 29), made under article 24 of the ILO Constitution by the trade unions UNISON, GMB and Napo, 29 October-12 November 2015.

[137] Report of the Director-General, Eighth Supplementary Report of the Committee set up to examine the representation alleging non-observance by the United Kingdom of the Forced Labour Convention, 1930 (No 29), para 46.

[138] Report of the Director-General, Eighth Supplementary Report of the Committee set up to examine the representation alleging non-observance by the United Kingdom of the Forced Labour Convention, 1930 (No 29), para 49.

profit-making entities for economic gain".[139] In other words, the sentence should not lead to the exploitation of offenders.

Some theorists have argued that offenders forfeit all or some of their rights in committing crimes, including the right to control their labour.[140] However, forced and compulsory work schemes may lead to disproportionate sanctioning. The retributive requirement of proportionality requires that offenders suffer losses related to the seriousness of the crime they committed. Offenders forced to work may suffer losses that exceed proportionality.[141] Moreover, such schemes may also create vulnerability to labour exploitation. Protecting offenders from disproportionate sanctioning and abuse will be difficult, as they perform labour in conditions of subordination.[142] As Richard Lippke argues, one effective way to prevent exploitation and abuse of these workers "would be to permit inmates to refuse to labor or to walk away from it without incurring further sanction."[143] Based on this line of reasoning and in line also with principles developed in this section, offenders ought to continue to control their labour while in prison.

The principles of expert bodies on prison labour, unpaid work as a community sentence and the ERCSM should inform the analysis on the compatibility of the schemes with Article 4 of the ECHR. Being required to work with no pay or other labour and social security rights, at the same time as private actors or state authorities systematically benefit from this situation, should not be acceptable as working conditions for offenders should be as similar as possible to working conditions for everyone else.[144]

Conclusion

The purpose of this article has been twofold. On the one hand, we sought to highlight that non-custodial sentences should not be viewed as necessarily more humane and less restrictive than

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[139] Report of the Director-General, Eighth Supplementary Report of the Committee set up to examine the representation alleging non-observance by the United Kingdom of the Forced Labour Convention, 1930 (No 29), para 51.

[140] E.g. Christopher Morris, "Punishment and Loss of Moral Standing" (1999) 21 *Canadian Journal of Philosophy* 53; Alan Goldman, "The Paradox of Punishment" (1979) 9 *Philosophy and Public Affairs* 42.

[141] On prison labour and the retributive requirement of proportionality, see Lippke, "Prison Labour: Its Control, Facilitation, and Terms", p. 541.

[142] On prison labour that is performed in conditions of subordination, see The International Labour Organisation (1932) cited in de Jonge, "Still "Slaves of the State": Prison Labour and International Law", p. 323.

[143] Lippke, "Prison Labour: Its Control, Facilitation, and Terms", p. 543.

[144] For compelling arguments in favor of the position that offenders retain the right to control their labour and that the terms and conditions of their labour should mirror those of free workers, see also Lippke, "Prison Labour: Its Control, Facilitation, and Terms".

prison in all respects. Aspects of these sanctions can have serious effects on the lives of offenders. They should therefore be examined on a continuum with imprisonment, rather than an altogether different category of sentences. On the other hand, and on the basis of this position, we suggested that safeguards to protect the dignity of these offenders are needed and we examined for this reason human rights principles that are applicable to those who serve or have served community sentences.

Our argument does not mean that community sentences should not be used instead of imprisonment. There are serious concerns with incarceration, including overcrowding and other inhuman prison conditions, while the very value of the institution of imprisonment as a whole is questioned in the literature.[145] Yet the observation that alternative sentences are serious suggests that they should not be imposed lightly, that the concern of net widening is real and important, and that close scrutiny of these non-custodial sentences is required for their compatibility with human rights law.

[145] On this, see above, n 6.