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Ethics of community-based sanctions

This chapter puts forward a variety of ethical concerns and moral arguments related to community-based sanctions, and particularly focuses on the moral arguments that exist vis-à-vis community-based sanctions as an alternative to imprisonment. The chapter starts with a concise outline of a human rights and human dignity approach to community-based sanctions. Next, community-based sanctions are discussed within the wider framework of public health ethics and specific questions and moral arguments related to autonomy and mandatory treatment are brought forward. Then, the concept of community-based sanctions is placed within the broader framework of restorative justice and finally, the importance of proportionate community-based sanctions that are justifiable in themselves and not merely as an alternative to imprisonment is highlighted.

As the rates of imprisonment are on the rise worldwide and prisons get more and more over-crowded, we are faced with an ever-growing mix of ethical, financial, and safety concerns that urgently need our attention. A strong case can be made from an ethical and societal perspective that community-based sanctions are to be preferred for the majority of today's prisoners, and especially for children, women, and prisoners with mental health and substance abuse issues. As exemplified by the Tokyo Rules (i.e., the United Nations Standard Minimum Rules for Non-Custodial Measures), experts urge for an approach to crime and criminal justice that views imprisonment as a last resort. If prisons were limited to individuals who are justifiably incarcerated, many of today's issues could have been prevented or at the very least contained. Indeed, little evidence exists that higher rates of imprisonment increase public safety, on the contrary, research indicates that imprisonment raises rather than diminishes recidivism. At the same time, several research studies show that alternative sanctions are successful in reducing recidivism and drug abuse.

For a substantially large part of the current prison population, a strong case can be made in favor of community-based sanctions. About 95% of prisoners are eventually released back into society. A major problem that prisoners face upon reentry is that their time spent in prison has eroded their life both professionally (lack of training, loss of skills, limited or no employment opportunities), and privately (family and friends, emotional support networks in general, housing opportunities). Moreover, stigmatization acts as an indirect, enduring form of punishment that further aggravates the situation. Not surprisingly then, recidivism rates are extremely high. In fact, research shows that imprisonment is counterproductive in terms of rehabilitation and reintegration in society for low-level offenders and for those in need of special care (e.g., individuals with mental health and substance abuse problems). Although it is often argued that only incapacitation can offer adequate security, in today's society, where prisons lack the necessary resources to provide adequate care and opportunities for rehabilitation, we need to admit that prison terms often aggravate recidivist behavior, and thus raise rather than diminish crime rates. Moreover, in many cases adequate control can also be administered through alternative sanctions (e.g., house arrest, electronic monitoring, supervised community service, et.). From a societal perspective, prisons pose a huge cost to society in terms of buildings, staff, care, as well as in terms of consequential costs such as the risk of disease spread upon reentry into society. Also, the long-term costs of imprisonment on offenders' family members and communities are often neglected. Despite these issues, for a limited number of severe offenders, incapacitation (imprisonment or secure mental health facilities) remains the only viable option. Provided that no human rights violations occur, incapacitation can be appropriate for offenders that pose a continuous high risk of committing serious offences and for which imprisonment provides the only acceptable risk-minimizing strategy. Unfortunately, the sheer fact of over-crowding and shortage of available, effective alternatives gives rise to growing numbers of human rights violations simply because prison systems lack the necessary resources to provide

prisoners with adequate care (e.g., adequate general healthcare and mental health care, adequate light, air and privacy).

With current findings in cognitive neuroscience and genetics elucidating the nature and causes of human behavior, we are urged to rethink our traditional notions of free will and criminal responsibility. At the very least, we are urged to rethink punishment. It is paramount that sanctions, whether constituting imprisonment or any type of alternatives to imprisonment, are in no way inhumane, cruel or degrading. From an ethical perspective, it can be forcefully argued that imprisonment should be limited to those cases where no other effective alternatives exist. If less restrictive alternatives achieve the same level of effectiveness in reducing recidivism rates, then those alternative sanctions are to be preferred and need to be implemented. Several strong moral reasons exist that promote effective community-based sanctions as an alternative to imprisonment. These moral reasons all hinge upon the (potentially) more humane nature of alternative sanctions.

Human rights and human dignity

The rights of suspects and offenders and the rights and needs of victims and society as a whole need to be carefully balanced. To assure that the rights of victims are not infringed upon, it is necessary that community-based sanctions are prescribed by law, include appropriate reparation towards victims and other relevant actors in society. Moreover, effective risk prevention and acceptable risk-minimizing measures are of the utmost importance.

Imprisonment involves a loss of individual liberty, which is regarded as one of the most fundamental human rights. In order to sanction offenders by incapacitating them, by taking away their individual liberty, governments need to make sure that no other sanctions, that do not involve incapacitation, would work equally well in addressing their goals. If the goal is to prevent future crime, then current research shows that community-based sanctions work, at the very least, as good as imprisonment. In general, due to today's over-crowded prisons and the lack of available resources to provide adequate care, community-based sanctions are much less conducive to human rights violations than imprisonment and should therefore be the preferred option for most offenders provided that the rights of victims are upheld and the safety and concerns of society at large addressed. Similarly, imprisonment is much more likely to involve some type of infringement of human dignity compared to community-based sanctions. If implemented, community-based sanctions and civil rights restrictions in particular need to be tailored to the offender and the crime in question, both to protect society and its members, and to maximize opportunities for effective rehabilitation. Unnecessarily intrusive or un-proportionally harsh sanctions should be considered violations of an offenders' basic human rights and dignity.

The United Nations Conventions on the Rights of the Child states that the imprisonment of children should only be used as a last resort, and should be kept to the shortest appropriate time span. Institutionalization of child offenders is often counter-productive in terms of re-education and rehabilitation, and can be considered inherently harmful to the child. Most child offenders are best sanctioned by means of community-based alternatives that include appropriate treatment and other services that they might need. It is in the best interests of both the child and the community, that sanctioning does not destroy the child's support networks and that the whole community takes part in their re-education and rehabilitation.

The United Nations Principles for the Protection of Persons with Mental Illness holds that all individuals who are mentally ill have a basic right to the best available health care and should be treated with humanity and respect for the inherent dignity of the human person. Substance abuse is a mental health disorder and offenders that are suffering from substance abuse have a right to the best available treatment. In general, if incapacitation is necessary, offenders with mental health and substance abuse issues, should not be held in prisons, but treated in secure mental health facilities. If adequate control can be achieved by means of community-based sanctions and mandated outpatient treatment, then this is to be preferred from a human rights perspective.

Public health ethics

Community-based sanctions that include adequate treatment programs offer a better prospect at rehabilitation and reducing recidivism rates in offenders with mental health and substance abuse issues, compared to imprisonment. Hence, from a public health ethics perspective, society can only benefit by establishing effective community-based sanctions. Public health ethics is concerned with the health of populations and groups of individuals, rather than the health of a given individual, and largely focuses on preventive measures that can justifiably be set in place by governments or can be demanded from private actors. Public health policies have a commitment to promote health generally and a commitment to improve the health of those who are systematically disadvantaged. Prisoners with mental health and substance abuse problems, are, due to the lack of available care and in general inappropriate place of confinement (e.g., drugs are often freely available inside prisons and adequate treatment options are lacking), a systematically disadvantaged group.

The rates of mental ill health among prisoners are higher compared to similar groups in the general population, and the overall incidence rate is high. Over-crowding, boredom and inadequate care in prisons often leads to mental health problems and/or exacerbates existing ones. More than half of the prisoners in the US and up to two thirds of prisoners in the UK suffer from mental ill health. Female prisoners in the US have a higher prevalence of mental health disorders compared to male prisoners. In the US, only 1 in 3 state prisoners, 1 in 4 federal prisoners and 1 in 6 jail prisoners report receiving treatment during their incarceration. Research indicates that especially offenders with mental health and substance abuse issues are at risk of multiple incarcerations. Because mental health issues are a risk factor for criminal behavior, and imprisonment of individuals with mental health issues exacerbates these issues, we have strong moral reasons to build and implement effective community-based sanctions that focus on mental health and substance abuse treatment for those offenders that suffer from mental ill health and substance abuse. Moreover, treatment for mental ill health should also take other factors into account that may challenge or even prevent successful treatment. Broader issues such as housing, employment, education and skills, social and emotional support networks need to be addressed. The availability of structural and emotional support networks are a necessary condition for long-term treatment success. It is therefore of the utmost importance that mental health and drug courts not only focus on treatment, but also provide access to structural and emotional support networks. A lot of these objectives can be achieved by incorporating the offender's family and wider community in the process of rehabilitation and reintegration.

Autonomy

If offenders with mental health and substance abuse problems are given the option of entering into a community-based corrections program that involves intensive mandatory treatment rather than being sentenced to prison, then one could argue that treatment in this sense constitutes a quasi-coercive approach. Quasi-coercion constitutes a controversial issue according to many experts, some even describing it as an abuse of human rights. Others merely view it as a solution to drug-related crime. A third possibility can be considered however. It can be viewed as a more humane way of dealing with drug-related crime and with offenders that suffer from mental health and substance-abuse problems. Although quasi-coercive to some, and thus negating an individual's right to autonomous decision-making, it has been defended as potentially enhancing autonomy by others. Autonomy is one of the most important concepts in contemporary medical ethics. It refers to an individual's capacity for self-determination or self-governance and implies that our choices are our own and do not result from any kind of external pressures.

As bio-ethicist Arthur Caplan has convincingly argued, mandatory psychopharmacological treatment for substance abuse can, rather than being an assault on an individual's autonomy, function to increase the autonomy of individuals with substance abuse problems. Individuals who are severely addicted are coerced by their addiction in the sense that addiction limits an individual's

capacity for self-determination and hence, autonomous choice. By treating their addiction for finite periods of time, the capacity for self-determination of these individuals can be restored and treatment can thus be seen as augmenting or restoring their autonomy rather than restricting or neglecting it. Moreover, rather than coercing an individual, the option of quasi-compulsory drug-treatment endows the offender with a choice. A choice between either accepting quasi-compulsory drug-treatment as an alternative to imprisonment, or serving time in prison. It is a restrained choice, and some would argue that one cannot autonomously choose between both options and will likely be pressured into choosing quasi-compulsory drug treatment to avoid spending time in prison. Similar arguments have been put forward about consenting to research in prison settings. However, it has been shown that even prisoners with mental health issues are capable of making an informed choice within prison settings. Even if we assume that a choice between imprisonment and quasi-compulsory outpatient drug-treatment cannot be made fully autonomously, does this mean that we should not offer it? Aren't many, if not most, of our choices heavily constrained by situational factors, hence not fully autonomous? There is a huge and important difference between coercion on the one hand, which is obviously morally problematic, and being able to choose between imprisonment and quasi-compulsory treatment on the other. Indeed, rather than experiencing the option of quasi-compulsory drug-treatment as coercive, it has been viewed as an opportunity by many offenders.

In order to create a just society, the philosopher John Rawls designed a thought experiment by which we can determine the morality of certain issues (e.g., slavery). The thought experiment runs as follows: If we had to recreate society without knowing which position we would have in that society, without knowing if we would end up being a judge, a victim, or a drug-related offender for example, what would we decide? Would we create a world in which imprisonment is the only option available or create a world in which we can choose between two options, one being imprisonment and the other being mandated drug treatment? If we position ourselves behind this Rawlsian Veil of Ignorance, would we prefer a world in which we have both options, or a world in which the only option available to drug-related offenders is imprisonment? The same argument can be made for community-based sanctions involving mandatory mental health or drug-treatment in general. Would we prefer to have a choice, or not? Although both imprisonment and community-based sanctions involve a restriction of liberty, many view the latter as a more humane type of punishment compared to the former. It has been argued that quasi-compulsory treatment can only be justified if it indeed results in lesser harm to the person and to others. Recent studies suggest that quasi-compulsory treatment is as effective as voluntary treatment provided in the same facilities in reducing crime and substance use. A European study on quasi-compulsory treatment promisingly found that offering treatment to substance-dependent offenders is an effective alternative to imprisonment, both in terms of reducing substance abuse and crime and in improving health and social integration, with better results even in the long run. Several US studies involving drug courts show similar promising results in terms of reductions in drug use and crime.

Restorative justice

It is important that community-based alternatives to imprisonment pay sufficient attention to the needs and concerns of the victims, as well as to the legitimate concerns of other relevant actors in society. Community-based sanctions are better suited to address reconciliation attempts compared to prison sentences. Effective community-based sanctions can thus complement the aims of restorative justice programs, in which the rights, needs and interests of victims, offenders, and all other relevant actors are addressed while attempts to reconcile the parties involved are being made. Restorative justice approaches to crime are based on the belief that all the relevant parties need to be actively involved in resolving the existing conflict and addressing its consequences. Restorative justice programmes have the broader aim of enhancing social capital and promoting tolerance through the implementation of a relational and peaceful approach to conflict resolution. The rising need for and potential benefits of a relational approach to ethical dilemmas is defended by several ethicists, both in the domain of criminal justice as in the domain of medical and global ethics.

Although community-based sanctions are potentially more humane compared to imprisonment, we should not forget that community-based sanctions are punishments. As should be the case for prison terms, community-based sanctions should not be unduly harsh or unnecessarily intrusive. The sanction's severity should be proportionate to the crime and the level of intrusiveness of the sanction should not exceed what is necessary to achieve its goals. It is not because community-based sanctions are often given as an alternative to imprisonment, that anything should go just because *it is not prison*. As is the case with imprisonment or any other type of sanction, community-based sanctions are prone to human rights and human dignity violations. As legal philosopher Andrew von Hirsch argued, community-based sanctions need to be justified in their own right, and not merely in comparison to another, harsher type of sanction.

Further Reading

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