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Punishing with Care: treating offenders as equal persons in criminal punishment

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Abstract

Most punishment theories acknowledge neither the full extent of the harms which punishment risks, nor the caring practices which punishment entails. Consequently, I shall argue, punishment in most of its current conceptualizations is inconsistent with treating offenders as equals qua persons. The nature of criminal punishment, and of our interactions with offenders in punishment decision-making and delivery, risks causing harm to offenders. Harm is normalized when central to definitions of punishment, desensitizing us to unintended harms and obscuring caring practices. Offenders may be partially silenced and excluded by mainstream criminal justice practices which limit interaction between offenders and practitioners. When we ignore significant harms, or silence and exclude, we treat others as passive non-subjects. This partially objectifies offenders, and is inconsistent with treatment as equals. Penal theories employing harm-centred and harm-normalizing definitions of punishment can provide few resources to help practitioners either avoid, or recognize and respond to, harms. Care ethics, by contrast, motivates the avoidance of harm, ongoing inclusive engagement, and respectful interaction with others. I argue that defining punishment without presupposing harm facilitates the identification of morally problematic harms, and recognition of caring practices. I offer a principled argument, and political and pragmatic supplementary arguments, for responding to offenders *without* intentional harm and *with* care. Principles drawn from care ethics can help to strengthen mainstream criminal practices by structuring decision-making and action. Bottom-up alternative criminal justice practices share some values with these proposed guiding principles, allowing a partial test of the principles. I consider examples of restorative justice practices, therapeutic jurisprudence, community justice and other problem-solving court practices, in addition to considering how well mainstream punishment practices measure up to these principles. My analysis illuminates the strengths and weaknesses of the principles, and how they might contribute to securing treatment as equals for offenders in mainstream practices.

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Contents

Introduction

Overview

The *United Nations Universal Declaration of Human Rights* states that 'All human beings are born free and equal in dignity and rights' (1948 art1). These limits are informed by the ways in which it is morally acceptable to treat persons. Offenders' conduct cannot change their status as persons. We are obliged to treat offenders in ways reflecting their status as equals; both as politically equal citizens, and recognizing their intrinsic human dignity as equal concrete persons. We ought to treat persons as equals and we ought not to objectify human beings. Some persons, such as the mentally incapacitated or minors, are not held criminally responsible. But all convicted offenders are persons,[1] and deserve to be treated as such. While we may treat offenders differently in response to their offending, compared with non-offenders, there are still limits on how we may treat offenders qua persons.

I develop an argument that practices of care are both present in, and necessary to, our present practices of punishment. I offer an archetype of the conceptual anatomy of care ethics: those features of caring as a practice, value set and attitude which will help us to identify caring in practice. One of the features of the conceptual anatomy of care ethics is that good care can only be delivered when we are open to, and engaged with, care-receivers about the care we provide. It is not possible to discuss our caring with recipients when we fail to recognize our act as care.

I challenge the usual definition of punishment, arguing that the inclusion of a harm-like characteristic as one defining feature of punishment, and the only substantive content defining feature, centres our conception of criminal punishment on harm,

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[1] With apologies to readers from Hartlepool (a coastal town in North East England), where during the Napoleonic Wars the only 'survivor' from a wrecked French vessel was tried and punished as a French spy. According to local legend, the 'survivor' was in fact the ship's monkey. Yet the 'spy' was punished *because* locals mistakenly believed the monkey to be a French person.

restricting our thinking. Theories built on this restricted definition can only provide restricted guidance for punishment decision-making and delivery, for two reasons.

Firstly, this normalizes and hence desensitizes us to harm, which is simplistically understood. When we expect an ambiguous level of harm, it becomes less clear when the presence of harm in punishment is non-trivial and morally problematic. We fail to consider whether harms are morally significant and whether they are avoidable and/or addressable, treating the offender as one who may be acceptably harmed. If we further fail to at minimum acknowledge and, where possible, address non-trivial morally significant harms to offenders, we confirm our objectifying assessment of the offender. This is a problem if we are to treat offenders as equals qua persons, as liberal democratic states claim. Secondly, harm-centred definitions obscure the necessary caring work present in punishment practices. I adopt a care ethics perspective in this thesis, since it offers a clear way to recognize existing care practices. I offer a procedural-only definition of punishment to allow consideration of these problems.

Moving towards a system of punishment enabling us to recognize offenders as equals is the core concern of this thesis. By taking account of the practices of care and designing punishments which address needs, we can treat offenders as equals and move towards a non-objectifying system of punishment. This research principally aims to provide more comprehensive normative guidance for sentencers and practitioners in punishment decision-making and delivery, which enables:

i.   Treating offenders[2] as equals and without objectification;

ii.   Considering personal and social contextual detail, accessed through respectfully hearing parts of offenders' narratives, avoiding objectification and achieving interactional justice;

iii. Recognizing the practices of care existing within and essential for contemporary punishment practices, and acknowledging and avoiding or addressing morally significant harms;

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[2] And ultimately victims and communities, although my focus of this study is the punishment of offenders.

iv. Providing guidance principles that strengthen institutional oversight practices with the internal resources of care.

Three arguments run in parallel through this thesis: principled, political and pragmatic. The principled argument from the perspective of care is that it is simply good or morally right and appropriate to respond to the needs of those around us, in chosen and unchosen relationships, with support where we are so able. This reflects the nature of human beings, as mutually interdependent and variably vulnerable. For care theory, to eschew care-receiving and care-giving misses something fundamental to the human experience. From a classical liberal perspective, responding to offenders with care and not harm permits treating offenders as equals and respects their inherent human dignity.

Two supplementary arguments add weight in favour of the normative principles for guiding punishment decision-making and delivery. Firstly, a political argument: democratic states are required to treat citizens in a way which respects their equal status, and to treat non-citizens in a way commensurate with their intrinsic human dignity. In order to achieve this, we must treat offenders inclusively, respecting their status as equals even as we censure their acts. This is provided through institutional mechanisms of procedural justice, at which classical liberal informed mainstream criminal justice is reasonably good; and through interactional justice, at which mainstream practices are not. Interactional justice is the quality of interpersonal treatment (Chiaburu & Lim 2008) and respectful inclusion of weaker parties by institutionally stronger parties (Bottoms & Tankebe 2012, p.121), which I shall argue mainstream approaches are less able to deliver, given the risks of objectification.

Finally, from a purely pragmatic perspective, it is instrumentally useful for all community members to contribute to producing the benefits and efficiency gains of socio-economic life. Responding to offenders with harm can only damage and deplete their resources for self-care or self-sufficiency and social co-operation. Responding supportively to offenders cannot guarantee positive, socio-economic participation in the future, but at least avoids guaranteeing that in future offenders

will require more support and be less able to contribute. This pragmatic argument lacks the political obligation and legitimacy motivation of the political argument, but shadows the idea that responding to offenders supportively *may* improve offenders' ability to engage co-operatively with others, as an active citizen and family member. In principle at least, offenders' social participation and engagement might be something that could be empirically tested.[3]

Inception

My academic background is in legal and political theory, and my work is informed by non-academic experience in practical politics and the criminal justice sector. I seek to produce theory with real-world relevance. This means attending to contexts and constraints found in social science. In addition to producing normative theory, I include a policy proposals. This is intended as a springboard for wider academic, practitioner and policy-maker discussion, and not envisaged as an ideal prescription.

This primarily normative, theoretical project has grown from my personal practical experience in the criminal justice sector. I worked for two years as a Helpline Information Officer for Nacro, the crime reduction charity. The helpline dealt with a range of enquiries from serving prisoners, ex-offenders, friends and family, and employers; providing information and advice on 'resettlement' issues, very broadly understood. Working in the criminal justice sector I learned not only about the 'collateral damage' harms caused by punishment, which sentencers had not necessarily envisaged or intended, but also about the unrecognized caring work. These harms arise not only by the fact of being punished, but through the nature of the punishment and practitioners' interactions with offenders. These harms add to the harms already caused by the offence. Yet caring work aiming to repair harm and rebuild lives through meeting needs and repairing relationships is also a part of

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[3] Although there may be difficulties in comparing changes to the offender's pre-conviction level of co-operation, the change over time for one offender during and after a community punishment might be considered.

punishment. Further, some of the caring associated with the harms caused by punishment practices occurs after the sentence has ended. Penal theory neither questions the full extent of the harm, nor notices the care. Why?

Method

John Braithwaite & Heather Strang[4] make an instructive observation: 'there is nothing as practical as a good philosophy and the best philosophy is informed by practice' (2000, p.203). A similar method is employed in this thesis. I begin by challenging the usually accepted definition of punishment, excluding harm as a definitive feature and thereby leaving room for care. My theory is developed over Chapters two to four, and then tested by comparison with theory and practice in Chapters five to seven. Where some practices run parallel to the theory advanced here, I am able to consider problems arising as unintended or unforeseen consequences in practice. This allows some discussion of the limitation of the care principles I propose, and how these principles might tackle these difficulties. In the development of the ideas, I have adopted a reflective equilibrium method (Rawls 1973, pp.48–51); revising existing conceptualizations with one offering broader explanatory power, and checking the principles derived from care against the possibility for coherent, as-intended application.

The research objectives of this thesis are:

- To examine the normative guidance for punishment decision-making and delivery provided by existing penal theory for sentencers and practitioners;
- To propose an alternative definition of punishment, incorporating practices of care;
- To reflect on the care ethics perspective and the implications of the care ethics approach to practical moral reasoning;

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[4] Throughout this thesis I shall use the ampersand to indicate that the parties are joined in a relevant way. Most obviously I shall use this to indicate joint authorship, as in the present example, but also to reflect the single area of jurisdiction that is England & Wales.

- To investigate the presence of care in existing punishment practices;

- To explore the instrumental value of personal and social contextual information to punishment and caring;

- To highlight the intrinsic value of listening respectfully to parts of offenders' narrative in gathering contextual information, as a means of treating offenders as equals and providing the interactional justice, which Tom R. Tyler has identified as contributing to procedural justice and evaluations of legitimacy in criminal justice (Tyler 2003, p.286);

- To propose principles based on the care ethics approach to propose normative guidance for punishment practitioners

- To reflect on how these principles cohere with, and extend, existing theory

- To test the principles in both punishment decision-making and delivery, insofar as this is possible, through the natural experiment provided by bottom-up alternatives to mainstream criminal justice

Context, significance and limitations

H. L. A. Hart drew a parallel between criminal punishment and Locke's consideration of property, suggesting related but distinct questions of definition, justification and distribution. He further divided the distribution question into questions of title (who is liable to punishment) and amount (the amount of punishment to which they are liable) (Hart 1978, p.11). Hart's parallel with Locke's conception of property was enormously helpful in separating out these questions and allowing separate reflection of different answers. Yet this misses an important point. Considering property necessarily relates to defining and justifying the distribution of *objects*, and the conditions under which objects might be transferred. Even in the condition of slavery, a person is 'owned' qua object, a slave,

not qua person. Punishment, on the other hand, requires reflection on dealings with persons: state agents interact with the *subject* of punishment, who is a person.

The justification of punishment is the focus of much existing penal theory. I have not attempted to make a contribution to this discussion since it has already received much attention. While this is an important question, I believe it has diverted our attention away from the treatment of offenders during punishment decision-making and delivery. My work here follows the justificatory arguments of others considering criminal punishment as socially necessary to provide a sufficiently secure environment for social and economic co-operation. Human beings remain the type of beings prone to making mistakes and where some individuals will wilfully choose that which we know to be (legally or morally) wrong (Ministry of Justice 2010, p.1). While our political societies are composed of human beings, we will need responses for offending. Punishment becomes an essential part of upholding the rule of law (Lacey 1988, p.182) and an 'unavoidable feature of social life' (Cragg 1992, p.204).

Likewise, I shall also take the aim of punishment, which for Hart is linked with the justification, to be a social-benefit aim. Ideally, the offence would not have occurred. We do not live in an ideal world, and we cannot prevent an offence which has already happened. What we can do is look to address the harm caused, and try to minimize potential harms in future. Minimizing harms might be achieved through reform, rehabilitation, education, healthcare treatments and deterrence. I shall raise questions about which harms it is appropriate to address through punishment, which is the state response *to* offenders *for* their offences.

I am interested in the treatment of, and interaction with, offenders during post-conviction practices of punishment decision-making and delivery, and the normative guidelines that are available to help sentencers and punishment practitioners, to enable treating offenders as equals and without objectification. I am interested in *how* we conceptualize punishment decision-making and delivery, since how we think informs the ways in which we carry out these practices, even if

this makes 'no practical difference' (Cohen 2003, p.243) to punishment decisions. This question about the nature of punishment as an interaction between a state agent and a human subject is the question that is partly obscured by Hart's property analogy. The nature of punishment is intimately related to Hart's distributive amount question. The nature of criminal punishment is of course related to Hart's other questions, but not as closely as the amount question.

I note above the socially necessary position I take on justification, and address the definition of punishment in Chapter one. I will however bracket off Hart's liability question from the amount question of distribution. The liability question will be outside of my scope, but the amount question will fall partially within it. Firstly, I take this approach since the proposals presented here begin after conviction. How should we, the community; or more accurately, how should the sentencer acting on our behalf as a state agent, punish this particular offender? Beginning from this point must assume that questions of definition, justification and liability have, for better or worse, been addressed in practice. Secondly, I do not purely address a question of distributive amount, but rather a question about the nature of our official interactions with offenders during punishment: how can we structure our punishment response to offenders for their offences in a way that recognizes offenders' status as equal persons?

Finally, I am not the only scholar to seek to make this separation. In response to Braithwaite & Pettit's broad, holistic theory of criminal justice, von Hirsch & Ashworth make the same separation. Desert theory, von Hirsch & Ashworth argue, 'offers mainly a conception of sentencing', hence they focus on 'the application of Braithwaite and Pettit's theory to sentencing policy' only (von Hirsch & Ashworth 1992, p.84). Sentencing necessarily only applies to the subset of those persons liable to criminal punishment who have been convicted, and so is separated from the liability question. My consideration will be the nature of sentences, the ways in which sentencers and punishment practitioners interact with offenders during punishment decision-making and delivery, and whether individual offenders are treated as equals qua persons.

Feminist informed

Feminist scholarship aims to take account of the complexities in real life (Sherwin 1988, pp.20–4), obscured by the balance of power. These complexities are reflected in the approach of care ethics, which seeks to take account of each individual's unique personal and social context. This thesis draws on, and applies, feminist scholarship, since care ethics has been mostly (although not solely) developed by feminist theorists and philosophers, building in some cases on the experience of women. The thesis is therefore heavily informed by feminist thought. It is however not a feminist piece of work of itself, in that it does not seek to take account of, or explore, the specific experiences of women, nor advance the practical, social and political inclusion on equal terms of women specifically. I apply the care ethics perspective, drawing on the different conception of individuals and sensitivity to particular personal and social contexts, to the treatment of offenders. This contributes to the wider concern for equality, to include all persons as equals, treating each person with equal concern and respect.

Following feminist concerns with complexity, there are many overlapping understandings of care. The understanding of care I employ in this thesis is one that sees care as a learned practice and mode of practical moral reasoning of which all human beings are capable to some degree. There has been debate over whether care ethics and the classical liberal 'justice' perspectives are compatible. Following Grace Clement, I take the view that they are not inconsistent, but that each perspective provides different responses by asking different questions (Clement 1996, p.5). By attempting to assimilate the distinct perspectives, we lose the differences which make both valuable.

Differences between care ethics and classical liberal justice perspectives are valuable in considering criminal punishment. '[T]he ethic of care is now an undisputed part of feminist challenges to the conventional post-Enlightenment assumption that individual citizens must be free to act in their own interests', and requires our recognizing 'responsibility for others' (Davis et al. 2006, p.9). Care ethics and other relational perspectives have differing ontological expectations of

individuals to liberal models, prioritizing different modes of response. This provides a critical lens for challenging the response of the *liberal democratic* state to individual offenders. I offer proposals for guiding principles for sentence decision-making and punishment delivery, but I do not seek to challenge the existing mainstream mechanisms of law for determining guilt. Finally, I take a public understanding of care, following Joan Tronto (1993) Grace Clement (1996), Selma Sevenhuijsen (1998; 2003) and Daniel Engster (2007). Just as individuals can have responsibilities of care in chosen and unchosen relationships, so too can the state. States have a role in facilitating our personal caring, as the arrangement of social and political institutions directing who cares for whom is a social and political question (Robinson 1999, p.33). States may also have a public role in addressing of victims' and offenders' needs.

Feminist critiques often focus on the excluded and oppressed, on who is left out and why, and the broader impact of exclusion on the affected individuals and society. Persons with a criminal record are a stigmatized group in society. This is not to say that different, less favourable treatment of offenders is never appropriate. But different treatment may become discriminatory if it becomes exclusionary or objectifying, or a disproportionate blanket response.[5] The thesis will develop a set of principles which may help to guide punishment decision-making and delivery from the care ethics mode of practical moral reasoning.

Feminist criminology

Although criminal punishment is a comparatively small section of feminist criminology, it has previously been considered in relation to care ethics. British criminologist Frances Heidensohn offered a view of criminal justice processes from both liberal justice (Portia) and connected, less formal, care ethics (Persephone) model (1986), arguing that greater attention ought to be paid to the relational and caring aspects of the 'Persephone' model of justice. M. Kay Harris suggests including

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[5] The European Court of Human Rights condemned the suspension of convicted prisoners' voting rights in England & Wales on this ground, since this response does not take account of the gravity of the offence or length of prison sentence (*Hirst v. the United Kingdom (no. 2) 19* BHRC 546 at 41).

the values associated with the 'care/response' mode of reasoning (Harris 2003, p.34), to raise awareness of the role of society in the development of conflicts such as criminal offending (Harris 2003, p.35). We will see this resonates with Anthony Duff's concern for systematic social exclusion (2001, pp.75–6), noted in Chapter one and developed in Chapter five. Heidensohn also recognizes that criminal justice proceedings involve matters of social justice (1986, p.297).

Building on Heidensohn's work, Guy Masters & David Smith invite us to temper the processes of justice (Portia) with the values of care (Persephone) (1998, p.21). The obvious place to look for care in punishment is restorative justice, with its clear focus on repairing harms and restoring victims. Masters & Smith's article, and Masters' doctoral dissertation (Masters 1997), focuses on restorative practices of mediation, conferencing and circle sentencing, described as relational justice practices, which they draw together with John Braithwaite's reintegrative shaming (1989) and Carol Gilligan's ethic of care (1982). I draw on Jennifer Llewellyn's framing of restorative justice as a relational practice in the discussion of relational equality (2012) in Chapter two.

The proposal I offer here refers to mainstream post-conviction procedures around punishment decision-making and delivery. Kathleen Daly has forcefully argued that gendered understandings of 'care' and liberal 'justice' were unhelpful, but contended that 'the female voice *is* the voice of criminal justice practices' (Daly 1989, p.2) since courts already consider the particular details of each unique offence. I shall suggest this focuses on the social context of the offence, rather than including offenders' interpretations of their own personal contexts. Daly stresses that the work of this voice, expressing relational concerns, needs to be documented, understood and analysed (Daly 1989, p.13). Julie Stubbs & Kathleen Daly argue that Gilligan's 'different voice' metaphor was 'superseded by more complex and contingent analysis of ethics and moral reasoning' (Daly & Stubbs 2007, p.153) during the 1990s, criticizing Masters & Smith's use of Gilligan's work in their 1998 article. Yet their article builds on Heidensohn's earlier work, and the

metaphor of Portia and Persephone eloquently captures the essential features of two contrasting perspectives.

Margaret Urban Walker identifies an overlap between the practices and language of restorative justice and the moral perspective of caring (Walker 2006, p.146). While stressing no intention to claim 'that what [was] "really" going on … is care ethics', she indicates the overlapping moral content with care ethics, allowing a hearing of 'values wholly consistent with and central to' caring, not necessarily afforded 'when advanced as care ethics' (Walker 2006, p.154). I draw on the practices and values of care ethics, as mapped out by Joan Tronto, to show the presence of care in many punishment practices, not just restorative justice.

Hudson raises particular concerns around 'insufficient regard for offenders' interests and moral status' (Hudson 2003a, p.206), particularly within restorative justice (Hudson 2003b, p.187). I shall suggest that care ethics' ontological expectations about individuals and contextual method of practical moral reasoning offer one way of attempting inclusion. I believe the guidance principles I shall develop from care ethics can help us to recognize offenders' moral status as equals, by avoiding exclusion and objectification; and providing treatment as equals and interactional justice more reliably than existing practices.

More broadly, feminist criminology has taken a specifically gendered perspective, employing a gendered lens, through which to consider two core problems. Firstly, 'the generalizability problem' (Daly & Chesney-Lind 1988, p.508): is it appropriate to employ theories of crime developed through the study of men and boys, to women and girls? Secondly, 'the gender ratio problem' (Daly & Chesney-Lind 1988, p.508) or gender gap (Heidensohn & Silvestri 2012, p.339): how can we explain the empirical observation that men commit more crimes than women? Women generally commit fewer, less serious and less violent crimes than men, and the offending behaviour of women and girls peaks earlier (mid-teens) than the offending of men and boys (late-teens) (Gelsthorpe & Sharpe 2006, p.50). Heidensohn problematized the practical treatment of women within criminal

justice. While strides have been made in bringing the status of women up to that of men in the eyes of the law, Heidensohn argues women defendants are judged according to androcentric norms, rather than the neutral norms that classical liberalism claims (1986, p.294). Feminist criminology has explored the treatment and experiences of women offenders and the 'double punishment' (Heidensohn 1986, p.291) for criminal and social 'double deviance' (Gelsthorpe 2004, p.16; Heidensohn & Silvestri 2012, p.351), in relation to the generalization and gender ratio problems. Baroness Corston also suggests that the proposed changes could be applied to other groups of prisoners, notably young men (2007, chap.5 & 6).

Adrian Howe credits Pat Carlen with putting 'women's imprisonment firmly and decisively on the critical penal agenda' (1994, p.215). Carlen reports evidence of infantilization of women prisoners, reporting one extreme example of the Governor of a Women's prison conceiving the establishment as 'an extended family … or a boarding school', a 'blatantly patriarchal attitude' (1990, p.110). Separately, Carlen notes problems in community punishment for women offenders. Some probation officers were reluctant to recommend community service for women where projects lacked childcare facilities. Some officers felt projects permitting women to bring their children would unfairly require women to do unpaid work and care for their children at the same time. Other work supervisors would only take women offenders on work placements if there was some 'traditional 'women's work' available' (Carlen 1990, p.75).

Gender

While Heidensohn & Silvestri remind us that a key contribution of feminist criminology 'is the push to recognize gender is a social construct and not simply a statistical 'variable'' (2012, p.338), Sandra Walklate cautions that gender is not the only variable with explanatory power (2004, p.10). Both claims resonate with the understanding of gender as a socially constructed variable, including socially and culturally learned behaviours, and intersecting with other socially constructed identities. The social category of 'gender' divides 'people into two differentiated groups, 'men' and 'women'' (Davis et al. 2006, p.2). This hierarchical social

construction is 'maintained by both the dominants and the oppressed because both ascribe to its values in personality and identity formation' (2006, p.2). The gender binary influences our self-understanding, as well as informing all other areas of our personal relationships and public lives, which are organized according to these socially constructed differences. Gender is one of many such socially constructed hierarchies, and such socially constructed binaries can be problematic since often the 'foundational assumptions and ubiquitous processes are invisible, unquestioned and unexamined' (2006, p.2). As Heidensohn & Silvestri note: 'we need to raise at least as many points about what happens to men, especially if they are young and poor, and come from minorities, as we do about women' (2012, p.361).

Gender binaries interact with other socially constructed differences: 'racial categorization, ethnic grouping, economic class, age, religion, and sexual orientation', interact 'to produce a complex hierarchical system of dominance and subordination' (Davis et al. 2006, p.2). I will argue for the importance of attending to offenders' identification of the relevant parts of their own narrative, and their interpretation of their own personal context. This offers instrumentally useful information for punishment, and also provides a means to respect the individual's knowledge and expertise in their own position, and to treat them as equals. Yet our narratives are at least in part socially constructed (Sherwin 1998, pp.34–5). Shared understandings of socially constructed differences intersect and interact to influence and inform our individual, lived experiences.

Walklate restates her note of caution that while gender is a significant variable, it is not the only one. She concludes her book *Gender, Crime and Criminal Justice* by noting some issues which her gendered approach has drawn out. While I do not provide a specifically gendered approach, these allow me to make some remarks about what I provide in this thesis. Firstly Walklate raises a 'need for an appreciation of both diversity and specificity' (2004, p.209). The ontological expectations of individuals from the perspective of care ethics anticipate that each person will be socially embedded within a network of relationships with others with whom they are interdependent. Attempting to understand any individual apart

from these relationships, the social reality they construct and share with others and other personal contextual information is not possible. I shall argue that proportionate punishment without this understanding of the individual is not possible. Accessing this information by respectfully engaging with offenders, as I will argue a care ethics approach prompts, is a means to providing interactional justice and hears the offender as an equal.

The care ethics approach I offer prioritizes the gathering of specific personal and social contextual information to inform decision-making practices. This allows room for hearing directly about the diverse experiences of individuals, and for including and exploring the ways in which these are socially constructed and individually interpreted. I shall argue that mainstream practices risk partly objectifying offenders. This objectification will have a greater impact (cause more harm and give rise to needs the individual cannot address alone) where the offender is already disadvantaged: on the weaker side of power inequalities, on the lower end of socially constructed hierarchies and with fewer socially acceptable conventional options (Heidensohn 1986, p.290). Heidensohn observes that core examples of such disadvantaged positions include women, ethnic minorities, unskilled workers and young people (1986, p.291). The argument in this thesis proceeds at a relatively abstract level, precisely to leave room for practitioners to use active, respectful listening, and to take account of a variety of contextual details including the impact of intersecting socially constructed hierarchies. These are precisely the concrete details of personal and social context, the 'specific circumstances' which care ethics anticipates 'will raise the quality of judgement' (Sevenhuijsen 1998, p.60), and ideally gathered through respectful open engagement with the other. By bringing the different perspectives of offender and sentencer (or practitioner) together, as I shall propose, we may increase our chance of identifying 'unquestioned' assumptions which perpetuate oppression and disadvantage, causing harms and giving rise to needs. As Benhabib observes, 'more knowledge rather than less contributes to a more rational and informed judgment' (1986, p.417).

Secondly Walklate notes a concern to draw ideas from outside criminology into the field in order to enrich debate. She suggests 'Cain (1989) was certainly correct in her assertion that feminism transgresses criminology, as was Smart (1990) in her assertion that criminology needs feminism more than feminism needs criminology' (Walklate 2004, p.210; citing Cain 1989, p.1; Smart 1990, p.84). I propose bringing care ethics from feminist ethics into mainstream post-conviction, punishment decision-making and delivery practices. This aims to better explain punishment practices and offers a means of providing treatment as equals to offenders. Thirdly, Walklate raises the question of whether politics will work 'progressively or regressively' (2004, p.210) in engaging with, and applying, criminological findings. Since Walklate observes that progressive or regressive application of findings depends on the willingness of politicians (2004, p.210), I have provided a starting proposal for policy discussion.

Finally, Heidensohn notes of Shiner, 'women are generally invisible in most' mainstream male criminological work (Heidensohn 2006, p.1, quoting a personal communication with Shiner 2005). We may consider that offenders are in some ways somewhat similarly politically and socially, 'generally invisible' as citizens, non-citizen community members and persons during punishment. I will argue that mainstream practices are desensitized to harms and further risk objectifying offenders. In this way, we fail to treat them as equals qua persons. It is this exclusion which interests me, and which I seek to acknowledge and address. In this thesis I will consider the risks to offenders of all social backgrounds, of being objectified and/or harmed by mainstream criminal justice practices. These harms will have different impacts for offenders with different social backgrounds, and different positions in socially constructed hierarchies. An offender's social context will in part inform the resources they are able to draw on in response to needs. Whether these resources allow for the individual's personal needs-meeting, through either self-care or self-arranged and funded care, or whether the individual will need assistance to overcome the harms they encounter.

The present thesis

The theory advanced here begins from an offender's conviction, and considers how best to respond to the needs associated with the offence. I shall identify the essential practices of caring within contemporary punishment practices, and employ the values and practical moral reasoning of care ethics to propose systematic guidance for post-conviction mainstream processes, in order to facilitate the treatment of offenders as equals. My work acknowledges both small and large-scale contextual details, aiming to treat offenders as equals. Care ethics offers a framework for thinking differently about punishment decision-making and delivery. By thinking about punishment differently, I shall argue that we can raise our chances of including offenders as equals, as intended and claimed by existing mainstream classical liberal informed criminal justice practices.

Since punishment is a response to offenders following offences, I argue it is unrealistic to expect this response alone to meet victims' needs. While the community will in some cases bear responsibility for helping to meet victims' needs, this may be best done outside of punishment, which addresses offenders. Because my work here is on punishment, I do not discuss how victims' needs ought to be met. Victims' needs, greater victim inclusion (which I note is important and desirable) and questions of criminalization and liability are topics for future research, and fall outside the scope of my present project.

I do not claim that the principles I derive from care ethics to guide punishment decision-making are the only principles available from care ethics, or that care ethics is the only method of arriving at a similar approach. I believe that other theoretical routes could potentially achieve similar principles to those derived from care ethics here. Broader relational theory (Koggel 1998; Llewellyn 2012) might have been employed. Similar results might have been achieved through the work of Hume and the Scottish Sentimentalists, who made cases for values similar to those of care ethics.[6] Indeed, Tronto draws on the Scottish Sentimentalists to illustrate

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[6] I do not claim that it *is* possible to achieve similar results through these approaches, only that it appears as though this may be a possibility.

that care ethics values are not gendered (Tronto 1993, pp.35–50), and Noddings draws on Hume's cultivation of moral sentiment to illustrate how caring practices might be learned (Noddings 2002, p.24). I adopted the care ethics approach given the presence of care practices in punishment practices. Care practices are obscured and devalued by harm-centred definitions of punishment, which also desensitize our perception of harm. Care ethics, however, leaves room for both recognizing harms, as necessary for acknowledging and addressing needs and providing care.

Chapter summary

Chapter one begins by considering existing penal theory and the guidance retributivist and consequentialist perspectives provide for sentencers in considering *how* to punish. I introduce the concepts of personal and social context as they will be used in this thesis, and pay particular attention to the theories of Anthony Duff (in particular 2001), and John Braithwaite with Phillip Pettit (in particular 1990), since these theories explicitly consider the inclusive treatment of offenders. The 'harm-like' component of most leading definitions of punishment is challenged. I argue this adds little and obscures the potential for non-harm practices such as caring. Harm-centred definitions of punishment normalize ambiguous levels of harms to offenders, making theories built on this understanding insufficiently sensitive to morally problematic, non-trivial harms. This treats offenders as less-than equal, persons who may be acceptably harmed. By failing to acknowledge and/or address this harm, we confirm this less-than evaluation, treating offenders as objects. Objectifying unacceptably fails to treat offenders as equals. To identify the kinds of conduct which might treat offenders as equals, I introduce the concept of interactional justice. This will be used in Chapter four to highlight what may be missing from mainstream processes. Given the risks of morally problematic harm under harm-centred definitions, I propose an alternative procedural-only definition of punishment, which presumes no particular substantive content. I note the steps forward made by some bottom-up practices for responding to offending in treating offenders inclusively.

Chapter two provides some background on care ethics, and develops the conceptual anatomy of care ethics. The method of moral reasoning and ontological expectations of persons distinguishes classical liberalism from care ethics (and other relational) approaches. I explore treatment as equals in the light of relational understandings of concern, respect and dignity, and the prioritization of contextual information for relational perspectives. Given these differences, classical liberal and care ethics perspectives each offer different approaches to what constitutes the equal 'concern and respect' (Dworkin 2000, p.227). Ronald Dworkin tells us that equal concern and respect represents 'treatment as equals' (2000, p.227), which Dworkin argues the state ought to provide to citizens (2001, p.6). This state treatment as equals is relevant since in criminal punishment, the state interacts with citizen and non-citizen community members. These differences, and Daniel Engster's definition and aims of care, will ultimately inform the principles derived from care at the end of Chapter two. I note some criticisms of care ethics, and offer a systematic presentation of the limits of caring identified in the literature.

I discuss positive limits of caring, which help us to identify who is 'best-placed', according to association, suitability and the gravity of needs, to provide care. With the contextual information prioritized by care ethics, this helps to identify who should do what and when, rather than requiring an empty form of blanket civility. I discuss negative limits, which acknowledge and respond to non-ideal, practical limits on the care we can provide; and operational limits, the practical limits which may arise from non-ideal applications of caring. These limits leave room for identifying harm in caring practices and reasoning. I argue a response to these limits is implied by the care ethics conceptual anatomy, ontological expectations and method of practical moral reasoning. A process of initial (before application) and ongoing (during the process of caring) review, providing self-scrutiny and supportive mutual moderation, helps to identify poor practices, which in turn implies our best available response to address the harms caused. From the method of practical moral reasoning and conceptual anatomy, based on care ethics' ontological expectations, I draw a generic set of principles to guide decision-making and action.

These will be developed in Chapter four to apply specifically to punishment decision-making and delivery.

Chapter three offers a brief note on penal history in England & Wales. This provides useful context for understanding the changes in recent years in the delivery of community and prison sentences, and will help track the presence of caring practices. Having argued in Chapter one that punishment may cause significant, non-trivial harms, which may be morally problematic, I briefly indicate some of the problems that can typically arise from standard punishment practices. I then offer an analysis of the ideals and aims imprisonment, community punishment, and of restorative justice in turn, identifying the presence of caring practices within, and as necessary to, each punishment practice. The explicit identification of caring practices as necessary parts of punishment, particularly imprisonment practices.

Chapter four develops the general principles I drew from care ethics in Chapter two, and contains the core arguments of my thesis. I begin by noting the importance of contextual information in mainstream criminal justice, but criticizing present attempts to gather such information in mainstream practices in England & Wales. Present means of gathering this information has strong potential to at least partly silence, exclude and objectify offenders, thereby failing to provide interactional justice. Because our criminal justice system prioritizes liberal values of non-interference, our interactions with offenders are reduced (limiting opportunity for interactional justice). This becomes more troubling when combined with a definition of punishment insensitive to morally problematic harms. Drawing on Benhabib's generalized and concrete understandings of others (1986, p.414), I argue for the importance of gathering contextual information directly from offenders by listening respectfully to their telling of parts of their narrative. This gathers instrumentally valuable information, and offers a means to provide interactional justice.

I discuss how we might punish with care, and develop the principles derived from care ethics in Chapter two for application to punishment contexts. Yet punishment

is more than caring, and I note that censure and disapproval of criminal conduct can also be grounded in care ethics aims. Building on my procedural-only definition of punishment, which presumes no particular substantive content, I offer three arguments, principled, political and pragmatic for responding to offenders with care and without harm in all cases; and note the benefits this offers over harm-based punishments.

I turn next to address some core concerns about these principles, and limits for their use in response to these concerns. I discuss the similarities and differences between caring for citizens in general and offenders in particular. I suggest that, when the needs of victims and offenders inescapably conflict, we can help resolve the practical difficulty of how to act by prioritizing the protection of basic rights and the needs of the more vulnerable party. I then argue that, despite these concerns, we ought to punish all offenders with care, in order to treat them as equals.

Some readers may be concerned that proportional punishment may be damaged if we include elements of offenders' personal and social context. I argue that, with a slightly revised understanding of proportionality and a more detailed, particularistic assessment of the 'seriousness' of punishment, the intuition can still be followed, and still has useful features. Classically, punishment seriousness is measured in terms of anticipated harm. While this measure is generalized and I propose a contextualised, offender-specific approach, retaining an element of likely harm in the description of punishment is consistent with my procedural-only definition, and importantly ensures that we do not forget the reality that most punishments do cause harms, the level of which should be open to moral scrutiny.

Classical, generalized proportionality maybe employed to provide maximum punishments, and the traditional scale of punishments can help us to identify punishments expected to cause less harm in general, in cases where the anticipated harm for a particular offender is morally significant. Both features can help to minimize avoidable harm, consistent with care ethics aims. I note three key normative limits to listening to offenders' narratives: cases where the offenders'

speech fails to treat others as equals, where the offender unfairly minimizes the harm for which they are criminally responsible, or where the offender is demonstrated to be grossly and maliciously lying.

One core problem that arises is that mainstream practices offer some protection to offenders, against bias and state intrusion, through treating offenders as generalized. Once we include offenders' context, to treat offenders as equals, avoid harms and identify needs, we risk exposing the offender to these problems. I cannot detail a full response to this concern here, but I sketch some possibilities for addressing this difficulty. Firstly, classical generalized proportionality might be treated as a maximum punishment. Offenders' context may allow generally less 'serious' but not more 'serious' punishments, where seriousness is assessed in the classical generalised anticipated harm sense, in line with the care ethics end of avoiding preventable harm. Secondly, the protection of offenders' basic rights might help to protect offenders against the intrusion and bias risked on the context specific approach I propose, in the same way this might help to protect victims' needs when offenders' and victims' needs conflict. Thirdly, the needs and basic rights of the more vulnerable party might be prioritized. I also note the difficulty of coerced caring, given that punishment is compulsory, and finish with further remarks on victims' needs.

From the care ethics perspective we should be equally concerned to learn about, consider and respond to victims' needs, considering them equally with the needs of others as part of the total distribution of needs. Ideally offenders should be involved in meeting victims' needs. But because, as many authors observe, apology and forgiveness are 'gifts' which cannot be demanded (eg Braithwaite 2002b, p.570), it may not be appropriate for the state to shape or script an offender's response to victims' needs as a part of punishment. Where offenders will not or cannot help to meet victims' needs, I will argue the community bears some responsibility to meet victims' needs. This follows the positive limits of care; the community has an appropriate association with crime victims, is suitable by virtue of appropriate skills and resources, and the gravity of victims needs requires that these are met.

Sentencers should avoid frustrating attempts to address victims' needs outside of the criminal justice response.

Chapter five explores how the principles advanced in this thesis are compatible with, develop and extend the existing penal theories of Duff, and Braithwaite & Pettit. Duff is concerned with systematic social exclusions (2001, pp.75–6); I argue that my work allows us to take account of lesser social exclusions, which nonetheless are relevant to the offender's context, potentially extending Duff's work. The proposals I offer in Chapter six for pre-sentence dialogue resonate with Duff's proposal for occasional negotiated sentences.

Braithwaite & Pettit share my concern for the inclusion of offenders, although I note their concern to express their theory in specifically civic republican terms, reflecting their broader project. I argue that the ongoing review implicit in care practices can contribute to their concern for the checking of power, by providing information about where these might be best used, and for consideration in formal processes. The aims of informal review practices implied in care ethics is to avoid new harms may also help to strengthen Braithwaite & Pettit's position against lack of power-checking and the possibility of sentence inflation that von Hirsch & Ashworth note.

Both Duff and Braithwaite & Pettit, however, build their theories not only on harm-centred definitions of punishment, but on liberal expectations of the individual. Adopting a relational, connected approach resonates with Braithwaite & Pettit's holistic, inclusive civic republican approach, and Duff's communitarian concerns. I note the clear overlaps between the care ethics approach I advocate and three leading psychological models for offender treatment. Even the least similar model recognizes and values the quality of relationships between practitioners and offenders. I finish with a consideration of blame. Hannah Pickard's innovative work allows us to separate the negative stigmatizing effects of blame from holding others responsible for wrongful conduct, even when applying negative consequences in response to wrongful behaviour. Pickard identifies this in the treatment of

personality disordered patients. Treatment presupposes that individuals are responsible for their behaviour, but stigmatization is counter-productive to treatment. Pickard & Lacey have already proposed exporting this practice of blaming to criminal justice. I suggest this practice might be used in care-guided punishments, allowing us to censure and disapprove criminal acts, while minimizing harmful stigmatization.

Chapters six and seven respectively draw on secondary social science literature to discuss the decision-making and delivery practices of bottom-up punishment practices, including restorative justice, community justice, therapeutic jurisprudence and problem-solving courts, which better deliver treatment as equals for offenders. These practices are explored for similarities with, and divergences from, the principles advanced in Chapter four. In so far as the principles are reflected, it is possible to test how these function in practice, and whether unintended or side-consequences tend to cause difficulty in practice. This provides a limited opportunity to offer some assessment of the principles, and indicate possible refinements. I suggest the care ethics value of competence may help strengthen the reduced oversight mechanisms in bottom-up processes. The self-scrutiny and mutual monitoring of care ethics review processes may help in mainstream practices, which only implicitly value contextual information. Care ethics approaches also explicitly reinforce listening *respectfully,* which is necessary for providing interactional justice and avoiding objectification. I close Chapter 6 with a proposal for pre-sentence dialogue, to develop information gathering for mainstream sentencing along the lines of the principles derived from the ethic of care.

In Chapter seven I observe how far the delivery of bottom-up practices considered in Chapter six fit with the care ethics guidelines I propose. Self-scrutiny and mutual moderation may help to inform and strengthen procedural protections for offenders in mainstream justice. While no approach is perfect, care ethics is better placed to guard against mistakes. The care ethics approach acknowledges the

likelihood of misapplications, and contains an internal, principled commitment to identifying and addressing problems, rather than as an external policy aim.

A note on language

Before commencing the main body of the thesis, I must make some remarks about my use of the term 'offender'. Of itself, this term is stigmatizing, degrading, potentially insulting and potentially an inaccurate description of a person in the present. This might describe one brief moment of a person's past, and yet we label and define the individual indefinitely on this basis. The term ex-offender, indicating a convicted offender, is a very minor improvement, still carrying the same stigma, and can be similarly degrading. Through labels like this we force individuals to consider themselves permanently in relation to some increasingly distant past event, ignoring all other substantive content about the individual. I recall vividly being asked by a frustrated Nacro helpline caller 'When? When do I become an 'ex-offender'?' Naively, I took the question to be about the rehabilitation period specified under the *Rehabilitation of Offenders Act 1974*. What the caller wanted to know was when society would treat them as an ordinary person, as an equal; a question I could not answer.

During the preparation of this thesis I have noticed debate among criminal justice practitioners, about what a more appropriate term might be. About the best alternative to 'ex-offender' I have seen is the rather cumbersome 'people who have offended'.[7] 'People who have offended' is a preferable term to 'offender' because it is inclusive and recognizes the offence as a past occurrence; not definitive of the individual's present or future, or indeed of the whole person. However in this thesis, I continue to use the term 'offender'.

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[7] I would personally prefer, 'people', since criminal behaviour appears to be a normal, ie statistically significant minority human behaviour. A study carried out for the Ministry of Justice shows that 33% of men and 9% of women born in 1953 had been convicted (Ministry of Justice 2010, p.1).

Primarily I employ the term 'offender' for consistency with the present literature. I believe there is a case for changing the terms employed in scholarly debate, but this thesis is not that place, especially given the challenges I make to the definition of punishment. Secondly, my work focuses in part on punishment decision-making and I have used the term 'offender' for consistency with practice. At the start of the trial, the defendant is accused of *having been* an offender on a specified *past* occasion. On conviction, the defendant is identified as this past offender and sentenced accordingly. Although not often considered, this may be understood specifically as a reference to the person in the past, not the present. My work also considered the treatment of persons during their sentence, and how punishment practitioners might use the same guidelines to provide non-objectifying treatment as equals. Again, I use the term offender for consistency with practice. It will be also somewhat less laborious for the reader to use one word rather than four to identify the concrete individuals in the discussion to which I now turn.

Chapter One

Slipping the shackles: the problems with penal philosophy

What values should inform us, and what practical guidance is provided for, punishment decision-making and delivery? This chapter will argue that core existing theories of punishment provide relatively little guidance about how we should treat offenders during punishment decision-making and delivery. This is not to say the appropriate treatment of victims and communities is irrelevant or unimportant for the reading of care ethics for which I will argue: without doubt, these are.

I focus on the nature of our punishment interactions with offenders. The approach presented here begins following conviction. How should we determine how to punish *this* offender for *that* offence? How should we treat or interact with offenders during punishment decision-making and delivery? I will argue that common definitions of punishment artificially restrict our conception of punishment to thinking in terms of harm. This definition normalizes harm, desensitizes us to harm, and makes morally significant harm harder to recognize. Additionally, harm restricts our view of what punishment may be, by obscuring caring practices. Without normative guidance about how to acknowledge or avoid harm, our ability to treat offenders as equals qua equal human beings is threatened by these limits. This is problematic for any social democratic or liberal theory claiming to treat persons as equals before the law.

Existing penal theory

I begin by discussing archetypes of mainstream penal theory, from the classical perspectives of retributivism and consequentialism. Both perspectives have shaped

and contributed to our existing practices. Retributivism provides proportionate, horizontal equality concerns, and consequentialism has influenced various attempts to reform, rehabilitate or 'treat' offenders, from behavioural psychology to welfare approaches. These leading conceptions of punishment have been dominant in different periods. Consequentialist conceptions were to the fore during Garland's penal welfarism, focusing on rehabilitating and treating offenders (1890 - 1970) (2003, p.3). Retributive 'hard-treatment' ideals, particularly Du Cane's[8] prison regime, with solitary confinement and work deliberately 'tedious, unpleasant and unconstructive' (Edwards & Hurley 1982)[9] competed in the Victorian era with ideals of prisoner welfare and reform (Hostettler 2009, p.244). Retributive influences reappear in the New Right ideologies of the 1970s and 1980s (Garland 2003, pp.120–1; Easton & Piper 2008, p.43).[10]

Retributivist and consequentialist archetypes are discussed to reflect on the guidance these perspectives provide for the treatment of offenders as equals during punishment decision-making and delivery. I will argue that both retributivism and consequentialism are relatively silent on the nature of our interactions with offenders, and on what information is needed and how this is gathered. I examine how far implicit and explicit organizing principles of existing penal theory provide guidance for punishment decision-making and delivery, which:

I.   Allows conceptual space for practical caring work and identification of problematic, morally significant harms

II. Facilitates inclusive, non-objectifying treatment as equals qua human beings for offenders

I shall argue that existing mainstream penal philosophy provides restricted guidance for punishment decision-making and delivery, threatening our ability to treat

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[8] Director on the Board of Convict Prisons since 1863, Du Cane became Chairman in 1869, and was the first Chairman of the Board of Prison Commissioners, between 1877 and 1895 (Cross 1971, p.7 p.13).
[9] However it must be noted that this regime provided prisoners with basic security and hygiene, not guaranteed in earlier prison regimes, reflecting the move towards penal welfarism.
[10] Recent penal history is summarized briefly in the opening of Chapter three.

offenders as equals, before considering the definition of punishment, exploring the theoretical problem from first principles.

Retributive, past-regarding theories

Retributivism is a deontic justification for punishment. Yet punishments may be retributive in two senses: distribution (punishing *only* offenders) (Hart 1978, p.9), or nature (requiring hard treatment) (Daly 2003b, p.199). For retributivists, offenders are punished (and non-offenders not) as the morally appropriate response. Hence retributivists speak of offenders' 'right' to punishment (Hegel 1967, p.71), following their autonomously chosen offending. Without holding offenders accountable where we would hold ourselves accountable, we fail to treat offenders as equals (Moore 1997, p.165).

Retribution provides for principled non-punishment of the innocent, since non-offenders do not deserve (have no right to) punishment. Retributive theory has its roots in the *lex talionis* concept of Roman law. As the adage 'an eye for an eye' suggests, offences are revisited upon offenders in measure and kind. While there is no 'like for like' punishment for driving without insurance, retributivism provides valuable ideas of horizontal equality (those committing similar offences should receive similar punishment) and proportionality (serious offences warrant 'stronger' punishment than minor ones).

For strong retributivists (eg Moore 1997) desert is necessary and sufficient to justify punishment. Ted Honderich criticizes this justification as circular, since it essentially argues that punishment is justly deserved, because offenders (morally) deserve punishment (2006, p.24). For weak retributivists, desert is necessary for punishment, but not sufficient. Other supplementary justifications may include: deterrence (von Hirsch 1995, p.13); tacit rights forfeiture (eg Goldman 1982, pp.67–8) following criminal violation of others' rights; or removing 'advantages' (eg Morris

1968, p.478) gained through non-cooperative free-riding (Matravers 2000, p.246) disrupting the balance[11] of resources and opportunities.

Retributive-informed punishment stresses proportionality, but proportional to what? The most common answer is the harm caused in light of the offender's culpability. Robert Nozick suggests that proportional punishment is determined by *r x H* (1981, p.363): 'r' represents offender responsibility (a variable that could take account of both culpability and mitigation) and 'H' is the harm caused, later expanded to include harms caused and harms intended (1981, p.389). However, harm is neither a simple scalar variable nor easy to measure.

Nigel Walker complains it is unclear how different penalties relate to each other in seriousness: is six months' imprisonment twice the suffering of three months and two-thirds that of nine months? How do fines compare? Further, how do harms caused by offences relate: is theft or assault more harmful? Finally, how do these separate scales of offences and punishment relate to one another (Walker 1991, p.102)? Andrew von Hirsch argues that there is no reason why the scale of punishments should be broad or include 'harsh' penalties, advocating a modest punishment scale with a future-regarding 'prudential disincentive', supplementing the primary moral-desert retributive justification for punishment (von Hirsch 1993, p.13, p.42). Retributivism offers neither a minimum nor maximum penalty, nor a metric to calculate what punishment applies. Measurement difficulties persist and there is no *retributive* reason to prefer a modest distribution.

How should we punish for retributive theories?

If we are to design sentences proportionate to harm and culpability, then we must consider three factors. Firstly, why proportional *harm*? Retributivism, it is argued, reflects a strong intuition that offenders ought morally to be punished (eg Moore 1997, p.163). This implies an official response that acknowledges and censures the wrong, and perhaps makes offenders pay. It does not follow that 'payment' requires

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[11] Assuming socio-economic balances of advantages exist, are simple enough to calculate and possible to restore (Dagger 1993, pp.480–2).

harm (Bennett 2004, p.326). We could equally require proportionate apology, restitution or Duff's 'secular penance' (2001, p.106), and there is no shortage of moral positions advocating harm avoidance.[12] Even if we have a strong intuition that offenders should suffer, it does not follow that this is morally appropriate.

Secondly, if we accept that punishment ought to be proportional in terms of harm and culpability, which harms count? Offending harms direct victims and communities, and offenders, in many forms.[13] Which should we include? Nozick gives some account for this in his formula for proportional punishment, by including both harm caused and harm intended (1981, p.389). But no adequate explanation is offered as to why some kinds of harm (harms to persons other than the direct victim; harm to the community; emotional harms; damage to social trust?) should be left out.

Thirdly, identical punishments affect different individuals in unique ways, reflecting offenders' internal dispositions (Bentham 1996, p.600). Alternatively, different impacts may follow from the offender's external, personal circumstances: relations with others (perhaps family or employers), future implications (eg job loss) and the impact on offenders' resources or ability to meet their own needs (eg to find housing). These side consequences are termed 'incidental punishment' by Walker (1991, p.108).

Horizontal equality demands like cases should be treated alike, but what does it mean for two punishments to be 'alike' if they can be experienced differently? To design punishment to produce particular effects requires an understanding of offenders' personal and social contexts. This allows consideration of how Walker's incidental punishment is likely (although not certain) to affect this particular individual. Without this, calculating punishments to be experienced as proportional,

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[12] Consider Christ's injunction to turn the other cheek, or the Wiccan Rede to harm none. For a variety of religious perspectives on the 'primacy of peacemaking' see Mackay 2007, p.122

[13] Anger or fear on the part of the victims, broken trust and outrage on the part of the community, and the regret or indignation of offenders (depending on their view of their conduct) (De Haan & Loader 2002, p.243). In addition there might be a financial impact, physical damage, loss or personal injury.

or with horizontal equality, is impossible (Walker 1991, p.110). It follows implicitly that sentencers must understand offenders' context.[14] Retributivist theory neither explicitly considers this complexity nor provides normative guidance for gathering contextual information about offenders.

Before proceeding, it is necessary to make a brief diversion to explain what I intend by offenders' personal context and broader social context. This is informed by care ethics, a perspective I shall introduce in Chapter two, and I shall keep my remarks to the minimum necessary to clarify the use of these terms here. Seyla Benhabib distinguishes two ways of conceptualizing persons. The generalized conception abstracts away the content of our lives identifying others as like us (1986, p.415).[15] We assume others have personal context: 'concrete history, identity, and affective-emotional constitution ... specific needs, talents, and capacities' (1986, p.411), but dismiss the content as morally irrelevant. Full personal and social contextual detail makes up the individual's life story or narrative as a concrete other (1986, p.414). Individual narratives are shaped by, and entwined with, those of others, in the broader, social and political context, through our networks of relationships and membership of social groups (Koggel 1998, p.164). Our narratives must 'cohere with reality' to be understood by others (Baylis 2012, p.114). Alasdair MacIntyre (1984, p.213) stresses that we 'co-author' our narratives, which are at least partly socially and culturally constructed (Sherwin 1998, pp.34–5).

I shall use 'holistic' in two separate contexts, both discussing a particular piece of information in context with other information. Firstly, personal contextual details are best considered in relation to all of the personal and social details of the individual. A particular need is best understood when considered holistically with information about the individual's other needs, resources and capabilities for meeting them, and other responsibilities. For example, an individual need for

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[14] Although retributivism still lacks a conversion metric between the scales of offence and punishment.

[15] Sevenhuijsen similarly argues that universalist ethical perspectives abstract 'from specific circumstances' (1998, p.59), whereas we will see care ethics 'stands with both feet in the real world' (1998, p.59).

democratic inclusion is important. But an individual may rightly prioritize concerns about having enough to eat. In relation to personal context, or understanding individuals holistically, I shall intend this sense of taking together all the known information about the individual to consider them holistically as a whole concrete person. Separately, the social context can be considered 'holistically'. We can consider the situation of a particular person in their broader social context: where are they located in a range of socially constructed hierarchies, and how does this impact the personal and social resources to which they have access? We can also consider the gravity of the needs of a particular individual in relation to the needs of others in their society, and importantly whether these conflict. For example, I might need support in addressing a substance misuse problem, but many more people in my society might need access to clean drinking water.

Personal contextual details flesh us out as concrete individuals, and are necessary for decisions about how to act and interact with others. Ronald Dworkin implied that treatment as equals, or equal concern and respect (2000, p.227), requires us to take account of concrete differences using an example of two sick children. Dworkin argued that 'if there is one dose of life-saving drug and two sick children, one at death's door and one merely uncomfortable' (Coverdale 2013, p.72, my retelling of Dworkin's example (Dworkin 2000, p.227)), then equal treatment such as tossing a coin to allocate the medicine, does not show equal concern and respect. This equal treatment misses the concrete differences between the children.

For Dworkin's example, to provide treatment as equals we must contextualize each child's 'specific needs' (Benhabib 1986, p.411). We consider the uncomfortable child's personal needs in the social context of, or in relation to, the dying child's needs. In order to treat offenders as equals we must likewise understand their personal context. Benhabib argues some concrete history and character information is necessary for making moral judgements (1986, p.414). This information makes up a part of the offender's narrative, distinguishing the offender as a concrete individual. Which details are important will differ since each individual's context is unique. Contextual information is necessary to understand

offenders as concrete others, providing the evidence-base necessary for treating offenders as equals: 'more knowledge rather than less contributes to a more rational and informed judgement' (Benhabib 1986, p.417). This basic outline of personal and social context information, as components of complete narratives and as necessary for treatment as equals, will be developed in Chapter two. But this is sufficient for following the present argument, to which I return.

Perhaps, as a past-regarding theory, it is hard for retributivists to look as far forward as sentencing. Although retributive accounts of punishment do have valuable features, the only organizing principle offered is that punishments should be proportional, although it is not always clear to what or how this should be measured. This is not to say no suggestions are made: retributivists stress punishment should be proportional to the seriousness of the offence, as measured by offenders' culpability for the gravity of harm caused. But they do not specify which harms should count or explain how to weigh or relate different harms.

How far do the organizing principles identified for retributive theories provide guidance for punishment decision-making and delivery, which:

I. Allows conceptual space for practical caring work and identification of problematic, morally significant harms
II. Facilitates inclusive, non-objectifying treatment as equals qua human beings for offenders

Retributivism is centrally concerned with harm and proportionality. Elements other than harm are visible, since retributivism acknowledges mitigating and aggravating factors. Yet these *past* circumstances are relevant insofar as they relate to the offence, not the offender. While retributivism is keenly interested in detail about offenders that indicate their culpability, these details are only of importance in their relevance to the offence, not as they are relevant to understanding the offender as a concrete person.

A conscientious retributive sentencer may seek offenders' personal contextual information to understand how a punishment *is likely to* affect the offender. But retributivism's lack of interest in the outcomes for offenders militates against this. Retributivism is only interested in offender outcomes insofar as the *likely harm to* an offender through punishment is likely to be proportional to the offence. Retributivism does not usually question whether harm is a morally appropriate response to offenders qua persons. Retributivism is unconcerned with outcomes, therefore the treatment and wellbeing of victims, offenders or others, is unimportant. The importance of personal contextual information, in order to understand the other as a concrete person, is implicitly accepted by restorative theories, but guidance on how this information should be gathered is largely missing from the theories. Principles to guide reflection on the information gathered about offenders as persons is also limited, since the importance of this information is only implicit.

Retributivist simplistic scalar views of harm neither assist us in making the proportionality calculations that retributivist reasoning requires, partly through inattention to offenders' personal context, nor help us to recognize potentially problematic harms. [16] Retributivism provides little guidance for sentencers' punishment decision-making, or for practitioners' punishment-delivery, beyond proportionality and horizontal equality. The lack of interest in the outcomes for offenders, victims and communities makes it difficult if not impossible to identify either non-trivial harm, or seek particular forms of offender interactions during punishment (such as treatment as equals).

Consequentialist, future-regarding theories

I turn to the other historically dominant stream of Western penal thought: consequentialism. Based on Beccaria's thought (1992, p.108), Bentham's utilitarianism (1996, pp.585–6), argued for a principle of maximizing general

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[16] Potential unintended outcomes, such as damage to the offenders' mental health, aggravated or unchallenged addiction and/or substance misuse problems, damage to family relationships.

'happiness' or 'utility'. Whereas retributivism is a past-regarding, deontic theory, reasoning according to articulated moral principles; consequentialist reasoning is based on the expected qualities of future outcomes. Consequentialists indicate a particular end goal as intrinsically desirable, and offer a future-regarding justification for practices seeking to further this desirable goal. [17] For consequentialist punishment, a variety of practices is permissible, provided we reasonably expect it to achieve a specific outcome. Matt Matravers argues maximizing aggregate utility (2000, p.15), is a common primary goal. Other common consequentialist ends are:

- Offender incapacitation for public protection (Walker 1991);
- Particular (offender) or general (public) deterrence (eg Ellis 2003);
- Rehabilitation or reform (Cullen & Gilbert 1982; Rex 1998, pp.38–9).

Incapacitation is limited. Home curfews protect the public, but not the offender's household. Imprisonment does not protect other prisoners and staff. Removing the means of offending fares little better, suspending a drink driver's licence only prevents their *lawful* driving. This teaches an important lesson: risk can be managed, it cannot be eliminated (Hudson 2003a, p.46). Only execution fully incapacitates offenders, but *permanently* denies *all* other lawful activities. Further, if our aim is to reduce crime, and incapacitation services this end, does this unreasonably suggest we should incapacitate as many as possible, regardless of guilt (Brooks 2012, p.37)?

Thom Brooks regards incapacitation as a form of deterrence, since the 'public threat' of imprisonment deters the general population from crime, and the actuality deters offenders from repeat offences (2012, pp.36–7). We might object that

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[17] Although I am not aware of any examples, nothing in consequentialist traditions prevents a consequentialist argument for retributive hard treatment: offenders should suffer because the intrinsically preferable end goal is a future where offenders suffer for their offences.

particular deterrence is coercive. But interference aiming to prevent harm to others is consistent with liberal thought (Hampton 1984, p.219). *Provided* we restrict punishment to those who have caused harm through offending, coercions through incapacitation and deterrence is permitted. If general deterrence unacceptably 'uses' offenders to deter *others*, from the Kantian principles of respect for persons (Kant 2002, p.229), this concern is side-stepped by viewing general deterrence as a serendipitous side-consequence.

Rehabilitation might be undertaken following a deterrence or community protection approach, instrumentally aiming to lower offenders' likelihood of reoffending as noted above; or from an offender welfare perspective, helping offenders to build skills necessary for living in society (eg Ward 2010). Jean Hampton distinguishes two forms of rehabilitation: therapeutic and educative. Therapeutic forms might include access to mental healthcare, support for addiction and substance misuse problems, or participation in psychology-led offending behaviour programmes (addressing anger and/or building thinking skills). Educative rehabilitation might include basic remedial education or vocational training, and personal support, such as debt management advice, or guidance on seeking work and accommodation. The aims of these practices are enabling offenders to 'conform to society's behavioural expectations and be economically productive' (Hampton 1998, p.39).

Rehabilitation may be better understood as *habilitation* (Jablecki 2005, p.32), developing practical and social skills offenders may never have had (Braithwaite 2002a, p.98). Pat Carlen has recently argued against broad rehabilitative practices, since rehabilitation is applied to already poor and disadvantaged offenders, who 'have nothing to which they can be advantageously rehabilitated' (2013, p.32). Instead, Carlen argues, rehabilitation returns the poor to their place. By contrast 'rehabilitation programmes have not been designed for corporate criminals' (2013, p.32). Carlen argues attempts to support offenders are 'undermined' by the perception of offenders as less deserving than non-offenders, and we shall see in Chapter three that penal policies have moved away from rehabilitative or welfare

ideologies which more clearly indicate caring, towards methods of control and containment. However I shall argue in Chapter three that the caring practices, which may strengthen the provision of support to offenders as Carlen recommends (2013, p.33), remain necessary to, and part of, contemporary punishment delivery practices, albeit in a limited form.

We know past offenders with stable jobs and homes are less likely to re-offend (May et al. 2008, p.6). Reiman argues powerfully that we *know* disadvantage contributes to crime, even if we do not know the complex causal link explaining why some individuals offend and others do not (2007, p.29). Therefore providing such support may be reasonably supposed to reduce re-offending. For consequentialists, if educative support (eg job training) achieves the desired end (reforming or deterring by getting offenders into employment) then it is a justified response. Retributivist Michael Moore objects that providing offenders with educative support is unfair: offenders benefit ahead of law-abiding (implicitly more deserving) disadvantaged people (1997, p.86). This is as much an argument for widening access, as for withdrawing support from offenders.

While voluntarily undertaken rehabilitation is preferable, there is space for autonomy in compulsory attendance in rehabilitative programmes. Hampton notes offenders choose whether to listen to moral lessons (1984, p.232). Offenders may likewise ignore rehabilitative support. We may engage reluctant offenders by obliging their attendance.[18] That our attempts will not always succeed is no reason not to try. Another objection is that each individual's unique context makes standardized programmes less effective. Rehabilitative programmes tailored to personal circumstances are more effective, but more expensive and difficult to deliver (McNeill 2012, p.4; see Sherman & Strang 2007, p.14 regarding individualized restorative justice). Yet measuring sentence impacts on offenders'

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[18] Anstiss et al.'s study supports the view that some approaches to sentence delivery (motivational interviewing) may succeed in engaging offenders, enabling them to choose desistance, even where offenders expected no change in their own offending (2011).

future behaviour remains difficult (Martinson 1974; eg Cullen & Gilbert 1982; Brody 1998).

Whereas retributivism suggests proportionate punishment, consequentialism does not initially limit punishments: on the face of the basic consequentialist argument, anything reasonably hoped to achieve the desired end is admissible.[19] We could disincentivize prolific petty offences through heavy penalties: 'boiling oil for bicycle thieves' (Braithwaite & Pettit 1990, p.46). There is no immediate, basic consequentialist reason against disproportionately strong punishments (or terrifying 'treatments', such as the drugging and brainwashing described in *A Clockwork Orange* (Burgess 1962)). Neither does consequentialism provide scruples against punishing innocent persons. Consider a panic-stricken populace following frightening offences. Disorder can be quelled by framing an innocent person and pretending the matter resolved. Although this has a very bad outcome for the innocent person, everybody else benefits from restored public order. If we have a reasonable claim that the consequentialist goal will be achieved, it seems draconian punishments are permissible. The flip side of over-punishment is under-punishment. Consequentialism does not require that *all* offenders who can be, are punished.[20] Suppose an unfortunate person nobody much liked is horribly murdered. The known killer escapes punishment, because the victim's demise better serves utility.

Retributivism seeks proportional punishment of all offenders, whereas consequentialism need not. There is no immediate consequentialist reason for minimum or maximum punishment, provided we reasonably expect to achieve the consequentialist goal. Act consequentialists argue we should choose whichever act will have the most desirable consequences. But since this requires complex, problematic utility calculations at every turn, rule consequentialists suggest following rules reasonably expected to achieve the desired end. Rule

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[19] Although we will see below, such limits become possible in the case of rule consequentialist variants.
[20] Although only a small minority of offenders can be punished (Braithwaite & Pettit 1990, p.197).

consequentialist variants offer some response to these problems: limiting rules regarding maximum and minimum punishment would protect offenders, victims and communities from an authority's over-zealous application of pure utilitarian calculus. Following such rules provides public confidence in criminal justice, another legitimate consequentialist end. Rule consequentialist variants of consequentialism can provide *consequentialist* limits to the scale of punishments.

How should we punish, following consequentialist theories?

Consequentialist punishment looks to achieve a particular goal, justifying in principle any measure with these results. Limiting rules protect offenders, victims and communities from over (or under) punishment. Yet concerns remain that this protection is incomplete. How far do the organizing principles identified for consequentialist theories provide guidance for punishment decision-making and delivery, which:

    I.   Allows conceptual space for practical caring work and identification of problematic, morally significant harms

    II.   Facilitates inclusive, non-objectifying treatment as equals qua human beings for offenders

The types of practices on the consequentialist table for discussion depend on the ends in question. This leaves room for non-harm practices, but how much room depends on the ends. It may not be relevant to, say, public protection, whether offenders are harmed or whether we acknowledge and address harms.

While retributivists were uninterested in outcomes, for consequentialists unintended and unforeseen consequences matter since these contribute to the consequentialist calculation. Yet these matter only in relation to achieving the endorsed goal. Some consequentialist ends, such as offender welfare, reform, rehabilitation or healing allow us to consider supportive practices. Harmful outcomes conflict with these ends. However consequentialist theories of punishment generally say little about how such ends should be delivered. This is left

to practitioners' judgement, and few guiding principles are provided for practitioners, beyond any rule consequentialist limiting rules. But the particular treatment of any party is unimportant, unless part of the consequentialist goal. Information about offenders may be 'equally' ignored in the same way as anyone else, unless the consequentialist goal involves an individual welfare or preference satisfaction element.

I observed earlier that retributivism is uninterested in outcomes, including impacts on offenders. However, I also argued that for truly proportionate punishment, it was necessary for retributivists to understand an offender's position. Likewise, because different individuals respond differently to the same punishments, consequentialists must understand something of the offender's context in order to determine a punishment to facilitate the consequentialist end from the offender's particular start-point. This applies *regardles*s of the ends. Implicitly, consequentialist theories value contextual information prior to the consequentialist ends. Conscientious sentencers should include this in decision-making. Yet no guidance is offered for collecting these details beyond what the separate ends may imply.

Defining Punishment

The usual suspects

We have seen that consequentialism and retributivism supply little guidance for our interactions with offenders. I turn now to explore the theoretical problem from first principles, beginning with the definition of punishment influentially employed by H. L. A. Hart:

     i. It must involve pain or other consequences normally considered unpleasant
    ii. It must be for an offence against legal rules
   iii. It must be of an actual or supposed offender for his offence
   iv. It must be intentionally administered by human beings other than the offender

v. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed

(cf Benn 1958, pp.325–6; Flew 1954, p.291)

(Hart 1978, pp.4–5)

Above, Hart defines punishment as (ii) *for* legally defined prohibited offences; (iii) *of* persons who have culpably and wrongfully committed such offences; (iv) *by* an external legal authority (Magistrates guilty of drink-driving may not lawfully punish themselves); and (v) *imposed as* a compulsory legally defined appropriate response within the relevant jurisdiction. These procedural criteria state the conditions in which an act counts as lawful punishment. What of (i) 'pain' or 'unpleasant consequences'? This criterion alone specifies punishment's substantive content, and does so ambiguously. No other potential content (restoration, discussion, reparation or interaction with the offender) or impact (deterrence, reform and rehabilitation) is included, only an ambiguous harm-like concept: there is a great deal of difference between 'pain' and 'burdensomeness'. Why harm, and why *only* harm? I shall argue this is not helpful and potentially morally problematic.

What is harm?

Most punishment definitions include a statement to the effect that punishment should be harmful to offenders. Nicola Lacey (1988, pp.7–8) and Hart (1978, pp.4–5) refer to 'unpleasant' consequences, for Duff these are 'burdensome' (1992, p.49). Hart and Duff include 'pain', Honderich suggests 'distress or deprivation' (2006, p.15) while Brooks uses 'loss' (2012, p.5). This introduces expectations that punishment practices will be ambiguously 'harmful' into the definition, which we then use in our broader theorizing about punishment and which may inform practice. Trivial harms are not concerning, but since other understandings of harm are morally significant, the ambiguity will cause problems. Distinctions can be made regarding the recipients, intentionality and gravity of harms.

As I shall argue in Chapter two, relational understandings of persons emphasize our connectedness. It becomes clearer on this account that harms to offenders will

have consequences for those with whom they have relationships. 'Obiter' harms (Walker 1991, pp.106–8) follow from offenders' punishments and affect others. Families lose bread-winners and care-givers; employers lose workers; friends suffer stigmatization by association. Consider victims fearing unrestricted offenders, or denied much-wanted contact with the offender and potential closure. While obiter harms are outside my scope, all unwanted harm ought to be minimized where possible according to the argument I shall offer. These concerns harmonize with my arguments about the treatment of offenders.

Intention might describe our primary purpose: we quarantine the sick primarily to prevent contagion (Korman 2003, p.570). These are intended consequences. Primarily intending *morally significant* harm to offenders is incompatible with the approach I take. Alternatively, harm might be (at least partly) foreseeable, if not a primary aim. When we quarantine despite foreseeing liberty curtailment, these unwanted 'incidental' consequences are unavoidable. Walker's 'incidental punishments', are distinct from the primarily intended ends, arising as integral to the means of achieving these ends. However, some unintended harms may be partly avoidable. Quarantine separates patients from their families. Telephone contact might help address the problem. Finally, harms may be unforeseen consequences (eg the patient reports undocumented side effects of treatment). We imprison for the *intended consequence* of temporarily curtailing liberty, at risk of the *unintended consequences* incidental (and obiter) harms of damage to family relationships, and perhaps *unforeseen-consequences* of acquiring addiction problems (PRT 2012, p.57). Both unintended and unforeseen consequence harms may be understood as incidental collateral damage, resulting from the means of achieving a separate primary end. In practice all unforeseen harms are unavoidable, whereas some foreseen unintended harms may be avoidable with planning. This does not prevent after-the-fact responses to minimize the impact of unintended harms.

Finally, there is the gravity of the harm. Democratic decisions about which behaviours should be criminalized indicate rough social agreement on which acts

are significantly harmful or threatening enough to warrant criminalization. Trivial inconvenience harms to offenders caused by punishment should not concern us: eg an offender is able to buy fewer luxury goods than they would otherwise choose. However, if we are concerned with offenders' status as equal human beings, or as equal community members, as Duff and Braithwaite & Pettit are, then significant unintended or unforeseen consequences of non-trivial harm (non-negligible personal, social, emotional or mental and/or physical health problems) cannot be dismissed. Even if intended-consequence harm is justified, we may question whether it is morally acceptable to stand idly by when another's morally significant suffering occurs as the 'collateral damage' of our actions.

Other things being equal, we ought not to remain indifferent to morally significant harms. In ordinary life, if we cause harm by accident we are expected to acknowledge the harm and take steps to repair the damage. On accidentally spilling another's drink, usually we apologize (acknowledge the unintended collateral damage) and replace the drink (attempt to repair harm). Even if punishment entails intended-consequence harm, ignoring unintended and unforeseen harm fails to treat offenders as equals. Malaysia and Singapore employ corporal punishment, despite opposition from Human Rights groups (Human Rights Watch 2013). While physical harm is intended during caning, medical treatment is provided afterwards to prevent incidental infection. Medically unfit offenders are not caned (addressing avoidable harm), and overseeing doctors may intervene during caning on medical grounds (scrutinizing for, and addressing, unforeseen harms as soon as problems arise) (Farrell 2012). Deliberately causing harm is antithetical to care ethics, and practices assuming the justification of causing harm as a primary aim are not included in the approach I offer. But even where harm is viewed as justifiably intended in the caning example above, the potential for unintended, 'collateral damage' harms are nonetheless acknowledged and addressed. We might find similar examples in caring practices: suppose a patient needs a hip replacement operation. The operation will unavoidably cause unintended 'collateral damage', but the patient will receive medical treatment to help prevent infection in the resulting wound, and relieve pain, attempts to actively avoid harm where possible.

Yet the operation will only be undertaken in the first place if the patient is considered well enough, to avoid unnecessary harm.

Except when three conditions are met, all punishments cause trivial unintended-consequence harm since punishments are *imposed*. All punishments minimally curtail individual agency, unless offenders:

1. Are in perfect agreement with the sentencer on the sentence;
2. Are in perfect agreement with the punishment practitioner's directions on sentence-delivery;
3. Readily undertake the sentence.

Even where these conditions are met, offenders' autonomy is minimally restricted: offenders are ordered to do only as they happen to choose. This may count as harm (eg under a procedurally unfair tyrannical regime), but need not. Such 'lucky' offenders do not *experience* harm. It is absurd to have to say these rare offenders, duly treated in accordance with law, are not punished because they do not experience harm.

Since trivial harms occur in most cases, perhaps this is intended by the ambiguous reference to harm in the definition of punishment. Trivial harms seem less likely to be morally problematic. Consider offenders who acknowledge their criminal behaviour[21] and reluctantly concede that they cannot avoid punishment. They prefer not to serve their community punishment but grudgingly comply. It is true, just, to observe this is trivially harmful, but not particularly helpful. Many non-punishment activities are similarly trivially harmful. I reluctantly concede that I cannot prepare a conference presentation on time without working on Saturday. I prefer not to, but grudgingly comply. Significantly, punishments are *imposed* rather than, to some degree, reflecting individual choices. But the academic example illustrates how we begin to stretch the definition of 'harm' if trivial harm is

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[21] 67% and 73% of defendants plead guilty in the Magistrates' (CPS 2012, p.83) and Crown (2012, p.85) court respectively in 2011-12.

intended. Trivial harm might occur in most case, but it is not clear what this adds to the definition of punishment. Alternatively, non-trivial harm *may* be morally problematic rather than reasonably acceptable, trivial consequences. Such unintended harms ought at least to be acknowledged and where reasonably possible addressed, rather than noted as one defining feature.

What's wrong with harm-centred penal theories?

So far we have a technical complaint about the language used in defining punishment. But the restricted concept of punishment produced raises practical concerns about providing non-objectifying, morally appropriate treatment of offenders qua human beings in punishment decision-making and delivery. Conceptually shackling our definition of punishment to harm restricts us to the conceptual space described by harm: the chain is at its full extent and we cannot step outside. Further, this is the only framework we have. Because *only* harm is present as substantive content in the definition of punishment, this both normalizes and elevates harm as the only necessary substantive content. Because 'harm' is *ambiguously* described, we expect harm simpliciter, without qualification, and presume this is acceptable *because* it is one defining feature of punishment. This ambiguous, normalized, elevated and thus, distorted, understanding of harm informing our definition leaves our conception of punishment insufficiently sensitive to the moral significance of non-trivial harms. This further obscures the possibility of non-harmful acts within punishment practices. This hampers our acknowledgement of morally problematic harms, and our assessment of whether, and indeed how, these should be addressed. This does not help us to define punishment and desensitizes us dangerously to the moral significance of harms. For these reasons, it is too strong, and potentially dangerous, to include harm as one defining feature of punishment.

I have stated the problem starkly for clarity: the distorting way harm is used in defining punishment creates a vicious circle which desensitizes us to the potential for morally significant harms and obscures caring practices. When we begin from harm, we fail to consider caring. Without caring practices and values we fail to

consider the nature and acceptability of harms. But not all theories of punishment suffer equally from the problems of presuming harm as one defining feature. Firstly, some theorists *do* mean to say intended-consequence harm is necessary for punishment (Korman 2003, pp.570–1). This position cannot be accommodated by the approach proposed here, but is still vulnerable to the complaints raised above. Morally significant harm may also arise as unintended or unforeseen consequences. Distinct from identifying harm as a desirable, primarily intended outcome, other theorists intend descriptively that all punishments unavoidably cause (ie are experienced as) pain or harm (Duff 2001, p.107; Daly 2003a, p.198). I have challenged this description: while most punishments will cause unavoidable trivial harm, this does not help us distinguish punishment from other activities, and some offenders do not *experience* harm. Where potentially morally significant harms arise, I shall argue this ought to be acknowledged as potentially problematic for treatment as equals, and where possible addressed.

I have problematized harm-centred definitions, but not all penal theories and practices rely on these. Separately, practical and theoretical restorative justice approaches do not necessarily offer accounts of punishment that are harm-centred (bottom-up alternative approaches to punishment will be discussed on p.75 of this Chapter). There is a myriad of subtly different positions that can confuse the issue. Restorative justice is often defined broadly as seeking restoration and healing (Okimoto et al. 2009, p.157), but not all proponents of this view describe restorative responses as 'punishment'. Restorative justice aims for restoration, but when poorly practiced can cause unacknowledged harm (Daly 2003a, p.206). What is needed is a definition of punishment that is open to the existence of non-harm practices, including, but not limited to, restoration, honesty about the risks of morally significant harms and alertness to the dangers of ignoring these harms.

The problems for existing theory

By *ambiguously* including harm as one of the hallmarks of punishment we skew our perception of harms, become desensitized to the gravity of harms and obscure caring in a vicious, self-reinforcing circle. I argue in Chapter three that caring is

present in, and essential to, existing punishment practices. How can sentencers and practitioners:

1. Identify morally significant non-trivial harms;
2. Recognize caring practices?

Dworkin argues powerfully that 'treatment as equals', recognizing the politically equal status of citizens, requires 'equal concern and respect' (Dworkin 2000, p.227). Non-citizens are still subject to criminal law, but 'every human being, even a criminal, is entitled to the respect granted to humans' (Margalit 1998, p.262). These liberal concerns are political and moral respectively. Identifying and responding to morally significant harms relating to punishment is important since those punished are persons. This is not to say that we may not respond differently to offenders for their offending behaviour, only that whatever demands differential treatment (punishment) makes of the offender, must be within the limits of treatment as equals qua persons.

While we should avoid morally significant harms, I do not argue that all harm should or can be forbidden. Again, trivial harm is not my concern. Some unintended (including unforeseen) harm is unavoidable in many areas of social policy. When unintended *morally significant* harm occurs, we must first identify this to respond accordingly. For example, the state cannot guarantee full employment: unemployment is unavoidable. Unemployment benefit acknowledges and addresses the foreseeable side-consequence harms that unemployment may cause (inability to adequately feed and clothe oneself). For individuals without private resources, these harms would be unavoidable but for this state provision. This demonstrates the 'equal concern and respect' (Dworkin 2000, p.273) the state owes citizens.

If intentionally causing persons harm at the very least signals a lack of 'concern and respect' (Dworkin 2001, p.106) for persons as equals, then intentional harms should be prohibited. Not all unintended morally significant harms can be avoided, but

these ought not to be ignored. Ignoring such harms implies others may be *acceptably* harmed, treating them as passive, inert *objects*. This risks objectifying offenders, inconsistent with the morally appropriate treatment of persons as equals. There are then two forms of morally significant harm to consider: 'collateral damage' unintended harms associated with [22] punishment practices and our interactions with offenders, and that caused when we objectify offenders by ignoring the first kind.

Chapter four develops the argument that mainstream criminal justice processes exclude and risk at least partly objectifying offenders. This is a problem for theory. Penal theories built on harm-centred definitions, and the practices built on these, cannot challenge the framework of considering punishment in terms of harm, because they lack the language with which to do so. The expectation of harm simpliciter normalizes the presence of harm, desensitizing us to harm and obscuring other practices. The ambiguity of harm simpliciter discourages consideration of the gravity of harm.

Because harm is expected and normalized, incidents of harm are not a cause for examination of our practices. These theories struggle to identify morally significant harm as problematic, since our reflection on the appropriateness of offender treatment is not invited. Accordingly, penal theories built on harm-centred understandings of punishment and the practices they inform provide only restricted normative guidance to avoid such harm in punishment decision-making and delivery. We risk causing unnoticed morally significant harm (for example, the offender becomes homeless as a result of their punishment). This communicates to the offender that it is acceptable to cause morally significant harm to them. This fails to provide treatment as equals. When we fail to notice the morally significant harm we cause, and thus fail to address it or correct the devaluing message, we

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[22] Again, I use harms 'associated with' punishment to include harms resulting at the time of punishment, harms where pre-existing needs are worsened by punishment and harms which occur after the sentence has ended (such as financial exclusion, or anxiety or stress disorders caused by the offender's experiences during punishment).

treat the offender as an object that may be acceptably harmed, not as a person and an equal. What organizing principles will help sentencers and practitioners to:

3. Make and implement punishment decisions, which;
4. Treat offenders as equals qua human beings?

The problems above are stated in the order in which they arise when questioning the use of harm in defining punishment. To at least some extent, mainstream harm-centred penal theory:

1. Has a skewed understanding of harm, is insufficiently sensitive to and therefore less able, to identify morally problematic non-trivial harms;
2. Thus fails to recognize non-harm practices, especially care;
3. Offers only restricted guidance for the reasoning processes used in punishment decision-making and delivery, resulting from an impoverished understanding of punishment; and
4. Produces restricted guidelines that compromise our ability to treat offenders as equals.

It has been helpful to frame these questions in an amended format. How far do implicit and explicit organizing principles of existing penal theory provide guidance for punishment decision-making and delivery, which:

I. Allows conceptual space for practical caring work and identification of problematic, morally significant harms
II. Facilitates inclusive, non-objectifying treatment as equals qua human beings for offenders

Treatment as Equals?

I have argued that we are desensitized to harm and thus may fail to notice morally significant harms as unintended or unforeseen consequences of punishment

practices. We risk at least partly objectifying offenders, inconsistent with treatment as equals. Not all exclusion is objectifying, but objectification is a particularly harmful possibility. If objectification identifies one failure of treatment as equals, what kind of practice would illustrate its success? Dworkin argues treatment as equals conveys 'equal concern and respect' (Dworkin 2000, p.227). This is helpful, but we have seen that equal concern and respect results in different treatment according to context, making it hard to specify. What practices might link this different, context-responsive, treatment as equals? The answer I offer (although this need not be the only one) draws on the study of organizations, and has previously been applied to the legitimacy of authority in criminal justice, particularly the police and courts (Bottoms & Tankebe 2012, p.121) by Tom R. Tyler: interactional justice.

Interactional justice helps illustrate what is missing when treatment as equals fails. The term was coined in 1986 by Bies & Moag: '[b]y interactional justice we mean that people are sensitive to the quality of interpersonal treatment they receive' (Bies & Moag 1986, p.44). Interactional justice may be further divided into 'interpersonal justice', reflecting an authority's treatment of persons with 'politeness, dignity and respect'; and 'informational justice', providing information about processes, explaining how decisions are made (Kumar et al. 2009, p.147). Organizational justice literature debates whether interactional justice, perceptions about the fairness and quality of 'interpersonal treatment' (Chiaburu & Lim 2008), is best conceptualized as a distinct complementary concept, or a sub-category within procedural justice, acknowledging both 'structural and social aspects of procedures' (Bobocel & Holmvall 2001, p.86).

Tyler & Bies appear to prefer a sub-category understanding of 'the interpersonal context of formal decision-making procedures', which they develop as the 'missing link' for a broader conception of procedural justice (1990, p.88). Later, Bies argues forcefully that interactional justice is conceptually distinct (Bies 2005, pp.94–5). Tyler meanwhile subsumes both 'quality of decision making' and 'quality of treatment' under the heading of 'procedural elements', in relation to the legitimacy

of law enforcement (Tyler 2003, p.284). Bottoms & Tankebe offer a helpful précis of Tyler's categories across his wider work. They summarize 'quality of decisionmaking' as the less powerful party 'being allowed to have their say, without interruption or harassment, prior to a decision being made' (Bottoms & Tankebe 2012, p.121).[23] Meanwhile the 'quality of treatment' reflects 'proper respect as human beings, each with his or her own needs for dignity' (Bottoms & Tankebe 2012, p.121).

For my purposes, interactional justice, as 'quality of treatment' and important for 'proper respect as human beings', encapsulates what is required for treatment as equals. There is a strong resonance between respect for dignity and inclusiveness, and the '*attentive, responsive and respectful manner*' (Engster 2007, p.31; original emphasis) associated with care ethics, introduced in Chapter two. While I will argue to the contrary, caring attitudes might be initially dismissed as having no place in criminal, let alone punishment decision-making and delivery. Yet Tyler argues interactional justice is necessary for procedural justice. If mainstream practices risk objectifying offenders, as I argue in Chapter four, then interactional justice fails, preventing us from treating offenders as equals.

Redefining punishment: slipping conceptual shackles

My definition echoes Hart's, but presumes nothing of the punishment's content. This permits us to step outside the harm-centred framework of other penal theories:

i. *Any* formal, imposed response (via state criminal justice agencies);
ii. Determined by a legally empowered agent;
iii. Determined for offenders, regarding their criminal conduct;
iv. Following admission or finding of guilt;

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[23] Bies & Moag likewise highlight the importance of the *procedural* element of 'voice' in their prior study of procedural justice, implying 'the importance of communication' (Bies & Moag 1986, p.46). This has overtones of Habermas' inclusion condition for ideal discourse: 'no one who could make a relevant contribution may be prevented from participating' (Habermas 2008, p.82).

v.   Following diligent adherence to provide due process.

I take punishment to be *any* official criminal justice response to a criminal offender for their offence. Punishment is the formal response of the community to the offender, whatever the content. It must be noted that all definitions of punishment necessarily close off some practices that might be justifiable. The definition of punishment I propose is deliberately broad, and suffers from this limitation much less than the main alternative candidates in the penal theory literature. This allows me to focus on the central concerns of this thesis, the obscuring of caring practices and effective insensitivity to morally significant harms, both of which contribute to the failure to treat offenders as equals in our interactions with them. Harm is neither ruled in nor out by my definition, although I develop arguments for acknowledging and addressing, or where possible avoiding, morally significant harms. This definition of itself specifies no particular mode of response, however I will argue for treating offenders without harm and with care.

There are examples of penal theories that are concerned about the treatment of offenders. Anthony Duff identifies his theory as retributivist, although others consider his work a hybrid approach (Brooks 2012, pp.103–6), given future-regarding purposeful aims. Duff is concerned with the inclusion of citizen offenders and their treatment as full members of the normative political community. John Braithwaite & Philip Pettit identify their theory as consequentialist, and are concerned with treating citizens as equals, which is essential for their civic republican understanding of liberty. However, some suggest their approach is a modified form of consequentialism (Matravers 2000, p.24), given their focus on 'promoting dominion', rather than maximizing aggregate utility (Matravers 2000, p.15). Bottom-up practices (such as the restorative justice, community justice, therapeutic jurisprudence and problem-solving court approaches introduced on pp.76-7) developed following dissatisfaction with the treatment of both victims and offenders in mainstream criminal justice, also share concerns around inclusion for offenders and victims. Restorative theories, for example John Braithwaite (1989;

2002b) and Wesley Cragg (1992), make important advances, and are introduced at the end of the chapter.

Duff's penal theory

Duff's theory is sympathetic to my concerns to treat offenders as equals. His work is concerned with the legitimacy of punishment where offenders have suffered *systematic* social exclusion (exclusion from political voice, material goods, normative community membership and linguistic exclusion from democratic debate (2001, pp.75–6)). Duff's theory has communitarian roots (2001, chap.2), positing shared values within a political community. Law is communicative: 'our collective voice', expressing shared values (Duff 2007, p.46). Crime is a 'public wrong': criminalization is grounded in appropriate public concern for wrong against an individual victim, the community's sympathetic response to victims, and censure of offenders for transgressing shared values (2007, p.52, p.302; 2010a).

Members of the normative moral community (for Duff, the political community) by hypothesis understand the language used in the expression of law, morally persuading citizens against offending. Fellow citizen offenders ought to be treated with the concern and respect due as human persons and as members of the normative political community (Duff 2001, pp.90, 113; Duff & Marshall 2004, p.40; Duff 2007, pp.191–3). Holding offenders accountable for their wrongdoing treats them as moral equals and community members (Duff 2001, p.113; 2007, p.192), as offenders deserve.

Duff's theory is described as 'humanist' (Duff 2001, p.77), engaging offenders as citizens, as the subject not object of punishment (Cruft et al. 2011, p.18; see also Duff 2001, p.77). Transparent rational persuasion invites offenders to accept their conduct as wrongful, encouraging them to seek reconciliation with direct victims and the community through repentance (Duff 2001, p.177). Trial and punishment initiate dialogue with offenders (1996, pp.81–2), on appropriate 'secular penance'

(2001, p.106), guided by loose sentencing guidelines and occasionally 'negotiated' between offender and sentencer (2001, pp.158–63).

Duff's retributive theory spotlights the significance of the offender's equal membership of the (political) community. Punishment is both retributively justified and purposive (Duff 2001, p.88). Punishment's purpose is to reconcile penitent offenders with 'those wronged': victim(s) and the wider community. These future-regarding aims are not contingently desirable consequentialist goals but intrinsically, morally appropriate responses to offenders (Duff 2001, p.89; Matravers 2011, p.71). Punishment communicates censure, understood as 'moral criticism' (Matravers 2011, p.69), to facilitate offender's repentance (Duff 2001, p.107).

Duff's 'transparent rational persuasion' is not moral education. Offenders know their conduct is wrong since the law expresses citizens' commonly held values. Offenders 'do not care enough' (Duff 2001, p.91) to avoid the wrong. Moral education, suggests Duff, aims to persuade offenders to reform themselves, rather than reforming them. Rational persuasion for Duff goes a little further. Reasoning about why the conduct is wrong *enough* to avoid (why the offender should 'care enough') may be morally educative. Duff includes repairing harm and damaged relationships through reparation (2001, p.92). Deterrence is insufficient justification for punishing citizens, but grounds non-citizens' compliance with the law, since values are not necessarily shared (2001, p.86).

Duff discusses 'hard treatment' penalties as necessary (2001, p.29) eliciting repentance in reluctant offenders. For spontaneously penitent offenders, apology is insufficient for reconciliation with and reintegration to the community (2001, p.95); penance as hard treatment is still needed (2001, p.109). Brooks reminds us that Duff considers 'prisons *as they should be* and not *as they are found*' (2012, p.104). We should then bear in mind that when Duff describes 'hard treatment' he does not intend the present 'pains of imprisonment' (Sykes 2007, pp.63–84; Crewe 2011).

Although Duff's earlier work was explicit on the necessity of intended harm, his line has become more nuanced recently.

In 1992 Duff identified that 'punishment aims to inflict something painful or burdensome ... nor are this pain and this burden mere unintended side effects' (Duff 1992, p.49). By 2001, hard treatment served to 'focus' the offender's attention on the offence, facilitating necessary penance (2001, p.108). Duff argues that repentance and hence punishment is necessarily painful, since publicly admitting wrongs is unavoidably painful (2001, p.107). Yet in the same volume he proposes that punishment 'should not aim to 'deliver pain' to offenders' (2001, p.129): such harms are regrettable (2001, p.178). In 2010, Duff writes 'a decent system of criminal law will be coercive, burdensome and (since it is human) liable to be oppressive' (2010a, p.294). Note that 'burdensomeness' appears to resonate most powerfully with trivial harms, which while they may be relatively onerous (for example reporting frequently to a probation officer) may be less morally significant. Burdensomeness was present in Duff's 1992 writings, along with 'pain'. Pain, resonating more strongly with non-trivial potentially morally problematic harm, is now conspicuous in its absence. The potential oppression noted is intended along the lines of Duff's systematic exclusion critique, but begins to recognize the unintended harms that can arise in relation to punishment. Duff continues that the ambitions of a decent criminal law 'must be modest, its operations constrained by a recognition of the harm it can do and of the costs (material and moral) it incurs' (2010a, p.293). He goes on: '[w]e punish too many people, too harshly and destructively' (2010a, p.294).

This suggests that despite the presence of harm in Duff's justification of punishment and wider theory, there is nothing to prevent Duff adopting a broader definition of punishment, avoiding the constraints of thinking in terms of harm. This is a broader reading of Duff's theory, but his position on the regrettable nature of foreseeable harms indicates that his position on the necessity of harm may be nearer to foreseen but unintended-consequence harm, than to intended-consequence harm (2001, p.129). While Duff includes the 'necessity' of hard treatment, harm remains

part of the definition of punishment practices. Like many authors, Duff is ambiguous as to the gravity of the harm. References to suffering worryingly imply that non-trivial, potentially morally significant harms are normatively expected. As such, Duff's position is also vulnerable to the criticisms I raised: desensitization to morally significant harms, and risking objectifying offenders by ignoring these.

I turn now to some criticisms of Duff's position. Since non-citizens are still subject to criminal laws, Dubber criticizes Duff's reliance on citizenship (2010, pp.195–9). 'Crime', Dubber argues 'is an interpersonal event, not an intercitizenal one' (2010, p.196), and that considering citizenship 'adds nothing to the normative account of the penal process' (2010, p.197). Duff responds that the political community of citizens, not the moral community of persons, is the appropriate community of concern for punishment. This thicker, shared community may better motivate appropriate concern and respect than simple species-membership (Duff 2001, p.70). The approach I shall offer is not limited to citizens, and applies to offenders as persons.

Duff raises concerns about 'systematic' social exclusion from the benefits of community membership. Where offenders are *systematically excluded* by the socially, economically or politically powerful, Duff's shared language and shared values are less broadly shared. This reduces the community's authority to call offenders to account and threatens the legitimacy of punishment (2001, p.185; 2007, p.191). This problem is Duff's project. Yet offenders need not be fully excluded to suffer the disadvantages of exclusion about which Duff also shows concern (2007, p.191; 2001, p.183, p.200). Objectification also treats offenders as external to the community of citizens, since citizenship is a status of persons. Risking objectifying offenders, through ignoring morally significant harms or exclusionary interactions, also threatens their membership of the normative political community.

Duff understands punishment as communicative, expecting and valuing dialogue during trial, sentencing and punishment. Duff emphasizes engagement with (citizen)

offenders and victims allowing citizens 'equal and mutually respectful participation in the civic enterprise' (2010a, p.300). Language is an important means of procedural inclusion, even if a legal interpreter is necessary to help offenders understand technical language (Duff 2001, p.189). The tenuous justification of present punishment for Duff is underscored by shortfalls in shared understanding (2001, p.197).

Iris Marion Young observes norms of 'deliberation' and 'articulateness' used in collective democratic decision-making 'must be learned; they are culturally specific, and … a sign of social privilege' (Young 1997, p.65). Norms facilitate discussion, yet simultaneously exclude. Brownlee recognizes that Duff's anticipated dialogue is necessarily limited by the format of mainstream trial and sentences (2011, pp.59–61): offenders' parts in the dialogue are scripted by the state since sentences are *imposed*. Additionally, Duff hints towards, but does not to my mind sufficiently develop, the observations that dialogue provides an opportunity for the community to admit and address the impact of systematic exclusion (2001, pp.198–201).

Duff's insights include recognizing the significance of exclusion for offenders' (political) status as equals. Acknowledging that the offender may previously have suffered harm, Duff recognizes this relevant information can inform appropriate punishment responses. Duff restricts the set of harms he considers to citizenship-denying *systematic* social exclusion. Dialogue is valued, providing contextual information and treatment as equals. Yet the potential for this is at trial is criticized. My concern is that morally significant harms in our punishment practices and interactions with offenders, which harm-centred definitions of punishment have normalized and obscured through desensitization, objectify offenders and deny treatment as equals. My complaint stands for citizen and non-citizen offenders. These harms, as Duff recognizes in the case of systematic exclusion of citizens, are compounded by our failure to recognize or respond to the harm:

> [it is] illegitimate … to try the defendant for his wrongs, *whilst refusing to answer to him for the wrongs that he has suffered (and*

> *still suffers) at our collective hands.* For what denies his equal
> citizenship … is not the injustice that he has suffered by itself, but
> that injustice plus our refusal or failure to recognise it, to answer
> to him for it, and to try to provide some appropriate remedy
> (Duff 2010b, p.139; original emphasis).

Duff maintains a harm-centred definition of punishment, which risks ignoring morally significant harms, which by his own argument, causes further harm. Duff is concerned about our failure to recognize injustice against citizens, and the impact for penal legitimacy. What Duff misses is that failure to recognize morally significant harms risks objectifying offenders.

Braithwaite & Pettit's penal theory

Braithwaite & Pettit offer a broad, holistic[24] theory, discussing punishment aims, methods, decision-making and delivery, and questions of criminalization, investigation and prosecution (1990, pp.12–5). They also consider resource distribution within this 'comprehensive' understanding of interconnected criminal justice sub-systems (police, prosecutors, courts, probation and prison officers) as nested within and connected to 'other systems in the legal and social order' (1990, p.19). Their insight is that punishment may cause harms to offenders, unacceptably threatening offenders' status as equals. Our equal status and minimizing harms are particularly salient for Braithwaite & Pettit's civic republican perspective. I turn briefly to civic republican liberty, essential to interpreting their theory.

Civic republicanism, an alternative branch of liberal thought, offers a distinctive understanding of liberty. Consider a benevolent slave-master who orders the slave to do as they please. The master could choose to order the slave to do otherwise: the slave's freedom is restricted by the master's potential arbitrary interference. Republican liberty is the condition of one's freedom not being subject to another: neither wholly negative nor positive (Berlin 1997, pp.393–8). This is distinct from

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[24] Braithwaite & Pettit use holistic to indicate the location of punishment within the criminal justice system, itself embedded within other social systems, and to consider punishment as it is located in this broader social and political context.

negative freedom from interference (Pettit & Braithwaite 1993a, pp.67–9) prioritized by the dominant strand of classical liberalism over the last two centuries. This condition of the equal protection of all persons from unwarranted and arbitrary domination by another more powerful agent, supplemented by shared knowledge of equally accessible channels of enforcement, is termed 'dominion'[25] by Braithwaite & Pettit.

Republican political dominion is necessarily an *equally held* empowerment of individuals against the misuse of vastly stronger state power. If the protection against state powers is stronger for only some individuals, this immunity is not an increase in dominion. Suppose the law permits a man to beat his wife. Husbands are freed from state domination, but the state leaves wives vulnerable to marital domination. Dominion must be equal to avoid domination.

Braithwaite & Pettit define crimes, unwarranted and arbitrary harms, as 'the denial of dominion' (1993a, p.229). Whatever other harms are caused, victims suffer a diminishment of dominion. State criminal justice activity is not (in accountable, democratic states) arbitrary. Citizens are protected by checks and balances, procedural rules and avenues to challenge official decisions. Promoting dominion after crime requires minimally restoring citizens' equal dominion (distinct from attempting to return the balance of advantages); and aims to increase protection from abuse of state power through accountability.

Braithwaite & Pettit argue promoting dominion is the most appropriate target for the criminal justice system. They reject harm reduction as a target for the *criminal justice system*, since this could result in unfairly disproportionate surveillance of citizens (1990, p.47). Unlike harm reduction, they argue, dominion promotion is a satiable target (1990, p.79). Promoting dominion 'guards against' the paradigm offence types, particularly against the person or property; and requires the state to

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[25] See Braithwaite & Pettit 1990, pp.61–7; 1997; see also Lovett & Pettit 2009 indicative of Pettit's more recent work, where the term 'dominion' is replaced by discussion of conditions of domination verses nondomination. While I agree the terminology change is helpful, I have retained the terminology of dominion for consistency with the work to which I refer.

be parsimonious in the application of punishment (1990, p.85). They propose four, ordinal, middle-range, policy principles via which criminal justice can promote dominion (1990, p.87). These are parsimony, checking of power, reprobation and reintegration.

Parsimony, a master principle, advocates fewer, smaller uses of state power; reducing occasion for abuse, thus promoting dominion (1990, p.87). Sentencers should use the smallest punishment necessary to maximize dominion. Braithwaite & Pettit advocate enhanced practitioner discretion in deciding when to use formal or informal methods (1990, p.111). Parsimony implies setting maximum penalties, providing citizens qua offenders secure knowledge regarding how the state may treat them. Minimum penalties are absent, permitting parsimonious, informal resolutions (1990, pp.101–2).

Checking of power protects individuals from state agents' 'prejudice or caprice' (Braithwaite & Pettit 1990, p.88) through procedural justice mechanisms. Reprobation delivers community disapproval of criminal acts (1990, p.88). Carefully managed, non-stigmatizing, integrative (1990, p.84) or reintegrative shaming, as it is elaborated elsewhere by Braithwaite (1989, pp.100–1), has a core role in their theory. Employing informal, social shaming responses, the authors argue, promotes dominion, by reducing parsimoniously the need for formal coercive responses; and facilitates deterrence and reintegration.[26]

Finally, reintegration is necessary both for victims *and* offenders. Degrading treatment diminishes victims' dominion; symbolic reintegration reaffirms their equal status (Braithwaite & Pettit 1990, p.91). Braithwaite & Pettit recognize that treatment of offenders during punishment, and the effects of punishment, can be 'stigmatizing', according offenders' a second-class status (1990, p.92). Stigmatization should be avoided as contrary to reintegration, inconsistent with equal dominion and treatment as equals. Braithwaite & Pettit's insight is that state

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[26] Oversight problems with this approach are taken up in Chapter five.

interactions with offenders may result in harms, and our response to offending ought to be informed by the social context of the offence.

Braithwaite & Pettit accept relevant harm may result from state actions, arguing that parsimony demands its minimization. The concern to minimize harms resulting from state actions suggests this is a side consequence, and that my procedural-only definition of punishment may be available to Braithwaite & Pettit. Similarly to my arguments, they appear to accept that punishment cannot avoid all harms. But the 'harm' to be minimized parsimoniously is once again ambiguous: harm to whom, of what gravity?

Andrew Von Hirsch & Andrew Ashworth raise concerns about over-punishment between the proportionally deserved penalty and Braithwaite & Pettit's statutory maximum (1992, p.88). Further infrequent, serious offences may threaten dominion less than frequent petty offences, allowing less punishment for more serious offences, thus threatening horizontal equality. Von Hirsch & Ashworth argue Braithwaite & Pettit cannot appeal to desert to temper these problems, because their consequentialist approach removes undeserved blame and 'reprobation from the quantum of punishment' (1992, p.88).

Braithwaite & Pettit may have a defence against von Hirsch & Ashworth's over-punishment concerns if we attend to their precise definition of dominion, sketched above, and apply this charitably. It is *un*republican to be *un*parsimonious, abuse power, or leave over-punishment decisions unchallenged: these reduce dominion. Maximizing *equal* dominion guides ideal republican practitioners' decisions and actions. Yet Braithwaite & Pettit neither make this explicit, nor explain how they will account for non-ideal actors in non-ideal circumstances, nor acknowledge the likelihood of practical limitations. This explains why von Hirsch & Ashworth reiterate their concerns (Ashworth & von Hirsch 1993); and why Pettit & Braithwaite reject the criticism as 'simply not paying attention' (Pettit & Braithwaite 1993a, p.237). Braithwaite & Pettit may have an alternative response; power checking appears prima facie to protect against sentence inflation. This however is not without

problems, and I return to this in Chapter five. My approach may be able to strengthen Braithwaite & Pettit's power checking, but cannot substitute for formal institutional oversight.

Bottom-up approaches to punishment

I move now to a group of bottom-up approaches to punishment, arising in response to concerns about mainstream criminal justice exclusion of victims in particular. Nils Christie's influential paper *Conflict as property* argued the state further wrongs victims by denying them proprietary involvement in cases with which they are personally entwined:

> The victim is so totally out of the case that [s/]he has no chance, ever, to come to know the offender ... [s/]he will go away more frightened than ever, more in need than ever of an explanation of criminals as non-human
> (Christie 2003, p.26).

Developing externally to state criminal justice, restorative justice attempts to include and empower victims. There have been other bottom-up developments from front-line criminal justice practitioners. Some scholars imply internal bottom-up approaches are less authentic, seeking to refine rather than replace mainstream practice (McCold 200

4, p.18). These developments include therapeutic jurisprudence, community justice and problem-solving courts. Shared features of the approaches considered here include offender and victim inclusion, discussion of offenders' problems underlying offences and agreement-seeking approach to punishment decision-making and delivery. Speaking, listening and engaging with others are essential features of these practices.

Restorative justice is particularly interesting. Firstly, there is both an empirical (Galaway & Hudson 1996; Morris & Maxwell 2001; Sherman & Strang 2007;

Shapland et al. 2011), and theoretical literature on restorative justice (Braithwaite 1989; Cragg 1992; Braithwaite & Strang 2000; Walgrave 2000).[27] Secondly, restorative justice has made in-roads into mainstream practice. Restorative justice practices are diverse, but emphasize the importance of repairing harm and (re)building relationships, rather than offender suffering.

Restorative justice includes face-to-face conferencing and mediation, discussed below, is intended by 'restorative justice' in this thesis, unless otherwise stated. Yet indirect mediation (without contact) or general victim-focused programmes for offenders are sometimes included under the heading of restorative justice in wider literature. Causing further confusion, restorative justice may be used as an umbrella term (Miller 2011, pp.10–1) for bottom-up responses. Over time this has included 'community corrections, informal justice, community service, alternative sentencing, community mediation [and] victim offender reconciliation' (Zehr & Mika 2003, p.40). Restorative justice methods are additionally used in schools to address bullying (Restorative Justice Council 2010). Some community schemes cover minor criminal cases and non-criminal disputes (Medows et al. 2010, p.10). Restorative justice is understood by different theorists as an alternative *to* punishment, or as an alternative *form* of punishment, (eg Zehr and Duff respectively). Restorative justice dealing with criminal cases, as an alternative *form* of punishment, will be intended here, unless clearly stated.

Restorative justice methods were informed by traditional aboriginal healing practices, in Canada, New Zealand and Australia (McLaughlin et al. 2003, p.2), often beginning as small-scale local projects. Restorative justice developed externally to the criminal justice system, seeking local alternatives to formal criminal proceedings. Restorative Justice is used in mainstream punishment for youth offending in New Zealand (Maxwell et al. 2010), Australia (Cunneen & White 2011) and the UK (Mahaffey 2010). Conferencing and mediation bring together the offender and victim by mutual agreement. Conferencing includes support from

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[27] Due to their practice-led nature, not all bottom-up approaches have theoretical literature associated with them, such as the problem-solving court movement.

friends, family and, potentially, local community representatives. Both practices include a neutral facilitator and offenders must take some responsibility. These approaches seek outcomes acceptable to all through discussion and mutual understanding. Victims and offenders both recount the offence and its impact. Offenders have an opportunity to apologize (Roche 2004, pp.9–10), victims may ask questions (Miller 2011, pp.163–4). Making and accepting an apology is important to several theorists (Bennett 2008; Duff 2007; Cragg 1992, p.215), although apology and forgiveness cannot be demanded. The literature suggests that when restorative justice works well, both sides may find closure (Shapland et al. 2011, p.164).

'Therapeutic jurisprudence' is a perspective viewing sentencers' actions *as* therapeutic or 'healing' (Wexler & Winick 2008, p.4). This has given rise to specialist court movements, such as Drug and Mental Health Courts, after some American judges became dissatisfied with the 'revolving door' (Hora 2002, p.1469) the criminal justice system offered these offenders. These practices have spread across the Western world (McIvor 2010, p.216). While each project is different, therapeutic court programmes aim to support offenders with personal difficulties underlying offending, using a mixture of practical, personal and clinical support; and techniques from motivational interviewing to rewarding offenders who address their difficulties (Winick 2003, p.187; Nolan 2009, p.44).

'Community justice' followed community policing innovations, centring on the concerns of high-crime area residents. Local people are engaged in discussing policing and crime prevention priorities, and considering how offenders should be dealt with. This goes hand-in-hand with initiatives to improve local services: offenders often serve part of their sentence renovating public spaces to provide facilities for local people. Prioritizing 'quality-of-life' crimes (such as graffiti, street-corner drug dealing and soliciting) help make communities safer for businesses and residents (Clear et al. 2011, p.99). Discursive, sometimes problem-solving methods are used to repair the harm to direct victims and the wider community (Clear 2003, p.63).

Community justice and therapeutic jurisprudence both contribute to problem-solving courts. Beginning in America, problem-solving courts bring together various different services with expertise in different areas to improve 'inter-agency communication' (Berman 2010, p.8). In problem-solving sessions these agencies come together to discuss underlying problems with offenders, and develop a problem-solving strategy. Practices differ between projects and jurisdictions, but problem-solving courts aim to support offenders completing their sentence and to break the cycle of reoffending. The first problem-solving court in Midtown New York combined 'punishment and help … to stem the chronic offending that was demoralizing local residents, businesses, and tourists' (Berman 2010, p.3). This includes the supportive strategies of therapeutic jurisprudence, but shares the community impact focus and problem-solving techniques of community justice. Dialogue, fostering mutual understanding and agreement is central to these practices and theories. We can take from these bottom-up *practices* that punishment decision-making and delivery ought to be guided by inclusive *dialogue*, ideally involving many interested parties, as we see in the examples of restorative conferencing and problem-solving courts. Inviting dialogue and inclusion goes some way to reducing the risk of exclusion, silencing and objectification for offenders *and* victims, and reassuring them that justice has been done.

Restorative theories

Restorative theories and practices do not always match up. There is no theoretical base informing problem-solving courts (Miller & Johnson 2009, p.41). Restorative theories offer instructive values to guide punishment decision-making and delivery. For restorative justice, crimes are violations of persons and relationships. These violations cause harms and give rise to needs, and create obligations. Restorative justice aims to engage the parties in identifying who bears responsibility for the harm, and to support them in putting the wrong right, or repairing harm (Zehr & Gohar 2003, p.17, pp.19-21).

Cragg argues that Duff's punishment as penance is insufficient. Reconciliation is needed for which offenders must repair harm and demonstrate knowledge of how

to live within the law. This cannot be facilitated by the offenders' suffering, which Cragg notes can only highlight wrong done.[28] What is needed to facilitate reconciliation is outlined by Cragg as 'forgiveness, compassion, mercy, understanding', which need not 'frustrate justice' (Cragg 1992, p.216). Likewise, Braithwaite focuses on the eventual reconciliation and reintegration of offenders with the community through carefully controlled and limited shaming, without denying justice (Braithwaite 1989, p.150). Cragg and Braithwaite's approaches leave room in punishment for practices not understood as harmful.

These bottom-up approaches re-centre criminal justice processes on the victim and community, rather than the offence and legal practitioners (Clear 2003, p.63), to strengthen community relationships and provide victim restoration. This challenges the traditional focus on the state's response to the offence and top-down theories of punishment. The theory that has developed around bottom-up approaches blends traditional official state responses with the restorative concern to respond directly to offenders themselves as concrete persons with personal contexts, not just the social contexts of offences (eg Cragg 1992, p.205). We saw that consideration of the offenders' contextual situations was an implicit aspect of retributive and consequentialist thought. Yet the theories discussed in the earlier part of this chapter say little on interaction with offenders to gather context. Far from being at odds with pre-existing practice and theory, bottom-up practices challenge mainstream theory and practice to make good on its implied concern for context through engaging with offenders.

Why are these problems for theory?

Existing penal philosophy and theory provides restricted guidance for sentence decision-making and delivery. As a result, practices informed by these theories struggle to ensure offenders' treatment as equals. Definitions of punishment shackled to harm hobble penal theory and mainstream practice. Our ability to identify morally significant harms, addresses obscured needs associated with offending, and to treat offenders as equals is restricted. I have argued that such

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[28] Hampton makes a similar argument that 'pain' acts like an 'electric fence' (Hampton 1984, p.212).

definitions desensitize us to morally significant harm, by normalizing harm and obscuring caring. This risks the objectification of offenders, inconsistent with treatment as equals. Some bottom-up practices address needs in the context of individuals' lives and relationships (however damaged) between offenders, victims and community. Yet these are niche practices within overarching mainstream criminal justice.

Why should normative theorists care? Perhaps 'faulty' practices should be re-designed to better match the theory's prescription. Perhaps normative theorists should leave practical decision-making to policy professionals. Besides the obvious response, leaving the detail to practitioners and ducking the question, these problems are relevant for theory. Problems of excluding and objectifying offenders arise, and are caused and compounded, because the harm-centred parameters of the existing conceptual framework of penal philosophy prevent us from recognizing the significance of harms. This results in restricted punishment decision-making and delivery guidance, limiting our ability to treat offenders as equals, and to acknowledge and address serious harms. Restorative practices do a better job of inclusion, highlighting mainstream failings, but have their own difficulties.

In his 2007 work *Answering for crime,* Duff poses the following problem:

> We must ask ourselves how we can begin to remedy the injustices that these offenders have suffered … but what can we do meanwhile in response to their crimes? Part of an answer is that we must ourselves be collectively ready to be called to account … my standing to call you to account for the wrongs that you commit against me is at least strengthened if I am ready to be called and to hold myself to account for the wrongs I have committed against you. Another part of the answer might be to develop more nuanced legal procedures, or post-conviction processes, that would have room for genuine recognition and discussion of such injustices: we could look for inspiration here to 'restorative justice' procedures, which seek to restore, or to (re)create, the social relationships that are damaged by both crime and social injustice (Duff 2007, p.193).

Care ethics may be able to provide guidance for these 'more nuanced legal procedures', 'post-conviction processes', and 'room for' acknowledging and addressing 'social injustices', by providing guiding principles for practical punishment decisions. The usual normative framework, based on a harm-focused definition of punishment, is restricted in its ability to allow space for recognising both care and harm, and in providing treatment as equals. To offer an improvement on the existing normative framework, the principles I will offer need to:

1. Acknowledge the moral significance of harms, to help avoid or address harms;

2. Identify the essential presence of caring practices with contemporary punishment practices;

3. Provide guidance principles for punishment decision-making and delivery; which

4. Enhances our ability to provide treatment as equals.

Chapter Two

An ethic of care

Chapter one argued that offenders' personal contextual information is implicitly valuable to both retributive and consequentialist approaches to punishment. This chapter introduces care ethics as a practice and method of practical moral reasoning, distinct from liberal approaches in its focus on concrete individuals and their personal and social contexts. Guiding principles will be drawn out in a generic form here, and applied to punishment in Chapter four. We saw in Chapter one that harm-centred conceptions of punishment cannot easily recognize caring work. Yet harm is acknowledged in care ethics. Caring work is often restricted to a non-ideal form in practice, given the frequent need to address conflicting needs and shortfalls. I will argue that there are some implicit responses to these limits within care theory. This chapter provides an introduction to the origins of care ethics, distinguishes a care approach from both liberal and communitarian perspectives, indicates the potential benefits of care ethics and addresses core criticisms.

Background

Contemporary care ethics developed from Carol Gilligan's path-breaking theoretical work in moral development (1982), as a critique of classical liberal moral theory, responding to broader, often feminist,[29] concerns. Gilligan observed care moral reasoning's 'different voice', extending from 'an injunction not to hurt others to an ideal of responsibility' (1982, p.149), focusing on relationships and recognizing the role of connection in avoiding aggression (1982, p.173). This voice was absent from Lawrence Kohlberg's psychological research on moral development (1969), which focused on the construction and application of abstract, generalized rules. Gilligan

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[29] Not all care theorists are feminist: Slote provides a minimally feminist, largely gender-neutral account of care as a virtue (Slote 2001).

argued Kohlberg's method was insufficiently sensitive to this relational and context-sensitive, psychologically observable alternative model. She found the 'different voice' *empirically* associated with women, but resisted readings suggesting an essentialist link with gender (Gilligan 1982, p.2). The empirical observation has been difficult to reproduce, reflecting the limitations of her small-scale study. Gilligan argued methodological insensitivity may explain why Kohlberg's results suggested men reached higher stages of moral development, as classified by Kohlberg, more often than women subjects.

The abstract rules reasoning, in contrast to the connected, contextually situated 'different voice', are illustrated by the responses of Gilligan's child subjects, particularly Jake and Amy, to the 'Heinz dilemma', used by Kohlberg and reproduced by Gilligan.

The Heinz Dilemma:

> Heinz considers whether or not to steal a drug which he cannot afford … to save the life of his wife … the druggist [refuses] to lower his price ... Should Heinz steal the drug?
> (Gilligan 1982, p.25)

Gilligan reports that Jake views the moral dilemma as 'sort of like a math problem with humans', presuming that anyone reasoning logically would reach the same conclusion (1982, p.26). Amy however finds the moral puzzle in the druggist's failure to respond to the dying woman's need. Amy sees 'a narrative of relationships' extending over time, a 'fracture of human relationships that must be mended with its own thread' (1982, p.31), rather than 'a self-contained problem in moral logic' (1982, pp.28–9).

Gilligan's approach was limited, but her work raised critical questions. Care theorists differ in their approaches and foci, but all criticized similar problems perceived with the dominant Western, classical liberal informed moral reasoning: the Kantian and consequentialist perspectives of liberal legal and political theory (Clement 1996, p.1; Held 2006, p.63). Care theorists usually argue that classical

liberal perspectives conceptualize individuals abstractly as self-sufficient, independent rational actors with (full, enduring) autonomy (Code 1991, p.77). Difference-blind treatment is necessarily neutral, abstracted treatment of individuals on a generalized conception of others. Brian Barry argued that difference-blindness is a requirement of fairness; hence it is a strength of liberalism (Barry 2002, p.76, pp.91-2). Feminist theorists responded that many generalized, alleged neutral norms entailed bias towards a male norm, excluding the experiences of women (Noddings 2002, p.27, p. 45). Some liberal political theorists have responded to these concerns, although the implications about how information is prioritized are still relevant to my present study.

Care and relational theorists challenge these classical liberal ontological expectations of individuals, arguing that individuals are not empirically found to be self-sufficient, rational, or fully autonomous over complete lives. 'Dependency is inescapable in the life history of each individual' (Kittay 1999, p.29). In childhood, old age, periods of mental and physical illness or disability, we depend on others. Since we inhabit limited, 'fragile bodies' (Walker 2006, p.148) and minds we are vulnerable to the unpredictable onset of dependence.[30] Further, since we are all vulnerable and likely to depend on others, we are interdependent: others may come to depend on us for care due to their similar vulnerability. For Virginia Held, valuing caring relationships and the social practices maintaining relationships, is distinctive of care ethics (2006, pp.19–20). Care theorists contend that liberal theory devalues or ignores the work necessary to meet basic human needs and maintain relationships (Held 2006, p.14).

Including rather than abstracting the complexities of real lives, as characteristic of feminist scholarship, produces a diversity of arguments (Clement 1996, pp.1–10). Yet most care theorists develop criticisms of liberal moral reasoning through the

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[30] Minow (1990, p.51) echoes Mair's observations that some in the 'disabled' community refer to the self-sufficient autonomous individuals associated with liberalism as 'Temporarily Able Persons' (Mairs 1987, col.2), reflecting our vulnerability.

following broad alternative understandings, the third of which is particularly relevant to my project:

1. Since care and relationships are necessary to the flourishing of interdependent, vulnerable beings, these are morally significant (Kittay 1999, p.88; Sander-Staudt 2011);

2. Since experience of caring is historically associated with women, drawing on women's experience is relevant and corrects androcentric bias in the existing moral literature (Kittay 1999, p.17);

3. Since experience of practical caring work demonstrates the importance of contextual, situational detail in understanding and meeting needs and maintaining relationships, a concrete, particular perspective is more helpful than a generalized abstracted view (Kittay 1999, pp.64–5, p.88);

4. Since concrete persons are in, and value, relationships, this implies a holistic consideration of needs across many individuals.

Whereas liberal theory has been characterized as generalized and abstract, presuming individual independence and employs allegedly neutral norms, care ethics anticipates interdependent and variably vulnerable individuals. Interdependence implies personal limits: some things we cannot achieve alone. Relationships and practical caring work are morally salient, and best interpreted through concrete contextual detail (Clement 1996, p.11). At a minimum, the argument is that liberal theories are poorly applied. For many care theorists, liberal approaches cannot be internally corrected and an external care-perspective supplement is necessary. Kittay seeks to 'amend' (1999, p.79) and Noddings to 'modify' (2002, p.30, p.80) rather than replace liberalism, responding to the flaws perceived by care theorists in classical liberalism. None discussed here propose discarding liberalism completely. Clement argues liberal perspectives and care ethics perspectives are not incompatible, but since each offers distinct insights,

attempting to express one perspective in the terms of the other, compromises both (Clement 1996, p.5). What, then, is care?

Sander-Staudt identifies the description of caring as one or more of several overlapping concepts as a 'leading' portrayal of care ethics, reflected in my own review of the literature. Care theories describe care as at least one (often more) of these overlapping, interacting concepts (Sander-Staudt 2011, sec.2):

- An attitude or disposition: concern for care-receiver's wellbeing, providing strong grounds for their actions (Clement 1996, pp.104–7);
- A practice: enabling others to meet basic biological or developmental needs (Engster 2007, p.16), which recipients could not otherwise meet (Bubeck 1995, p.129);
- A value set or virtue: moral qualities associated with complex practical-caring (Slote 2001; Held 2006).

The conceptual anatomy of care ethics

Here I sketch the 'conceptual anatomy', distinguishing the 'overlapping concepts' of caring values, practices and attitudes as separate organs of a greater whole. This conceptual anatomy bears a 'similar but non-identical' resemblance to everyday caring experiences, as any *one particular* subject resembles *all* individual members of the species. Dissection disassociates an organ from the body, making the structure of the particular organ easier to study. But this distorts and obscures the relationships between the organ and other dynamic, symbiotic structures that ordinarily interact, and influence the organ's function in the body. In the same way, the conceptual anatomy is framed as separate *ideals,* which in practice overlap and interact. These ideals are not always practically achievable, but provide guiding aims and will serve as a field-guide for identifying practical caring work in Chapter three. This is not a static or complete definitive description, but sketches the minimum core components care ethicists suggest caring relationships and practices require.

Practice

Fabric and thread metaphors abound in care writings (Gilligan 1982, p.31). There is no 'best' place to begin unpicking these tangled, holistically understood, conceptual skeins. However, since care ethics is heavily informed by practical experience of caring work, this is a reasonable place to start. Which activities count is disputed, but the labour of familial caring (for children and elders) is a core example. When this work becomes commercialized, writers begin to disagree: is the hired childminder primarily providing care to children, or services to parents?[31] Caring does not demand sacrificing our own needs (Clement 1996, p.36). Self-care is identified in Gilligan's highest stage of care ethics moral development.[32] Here we recognize ourselves and our needs as equal to others, 'attempting to balance … obligations to self and others' (1996, p.96).

Joan Tronto and Berenice Fisher provide a popular, broad definition of caring work, minimizing cultural specificity: 'everything that we do to maintain, continue, and repair our 'world' so that we can live in it as well as possible' (Fisher & Tronto 1991, p.40). However, this definition covers activities we may not wish to include. Performing clerical duties for a salary facilitates living in the world as well as possible. Tronto attempts to qualify this definition, specifying caring work as focused on meeting others' needs. What appears to be doing the conceptual work is the attitude of the act-performing party. Tronto focuses on caring as a value and practice, yet this illustrates how these are bound up with the attitude of care, discussed below. Tronto terms this linkage the integrity of care (1993, p.136).

Tronto provides the following conceptual structure for the 'phases' of practical caring work:

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[31] We might exclude purchased services, since providers might be financially rather than altruistically motivated. Yet this perpetuates the presumed priority of economic relationships over caring relationships.

[32] Self-care is included by Gilligan in the highest stage of care reasoning (1982, p.75, p.79, p.82, p.95; 1986, p.319, p.322, p.324). Clement argues this prevents carer's autonomy from being dismissed (1996, pp.35–8).

1 '**Caring About**': making efforts to become *aware* of others' needs;

2 '**Taking Care Of**': logistical *arrangement for* practical caring work delivery;

3 '**Care-Giving**': on-the-ground *provision* of needs-meeting practical caring work

4 '**Care-Receiving**': the care-receiver's response helps care-givers adapt practical caring work to meet care-receiver's preferences, providing *responsive* ongoing care.

(Tronto 1993, pp.106–8. Tronto's phases, with paraphrased explanations.)

Bubeck offers a narrower definition of care work as occurring only when i) 'face-to-face', and ii) where needs 'cannot possibly be met by the person in need herself' (1995, p.129). Both elements seem too strict. Firstly, Bubeck suggests discussing a problem as something one cannot achieve alone (1995, p.132), undermining her first stipulation that care must be face-to-face. On telephoning the Samaritans, an unknown other *provides* emotional support. Precisely the lack of face-to-face contact *responsively* facilitates some callers' preference for anonymity. Providing such helplines demonstrates need *awareness* and *arranging* for needs-meeting, reflecting Tronto's phases of caring. Bubeck's second stipulation of meeting needs which 'cannot possibly be met by the person in need herself' (1995, p.129) perhaps goes too far. A person with severe arthritis might be able to prepare a meal, but they might find it painful, difficult and time-consuming. Supporting someone who *could* address their own need at increased personal cost is arguably the sort of action we would want to include as care. If Bubeck intends to include this example, then we need to understand her 'cannot possibly', as closer to 'cannot reasonably'.

Values

Tronto provides the following breakdown of the 'ethical elements' of caring, implied by and informing our practice. These are:

> 1 '**Attentiveness**': we are morally required to have regard for others' needs, particularly those with whom we have a relationship;
>
> 2 '**Responsibility**': we take or share responsibility for meeting needs. Responsibilities are flexible, allowing the content to be moulded according to the need, context and practical possibilities;
>
> 3 '**Competence**': we have a responsibility to provide good care, recognising our limitations and employing the attitude of care;
>
> 4 '**Responsiveness**': listening and responding to the care-receiver helps us better understand the nuances of the need.
>
> (1993, pp.127–37. Tronto's elements, with paraphrased explanations.)

Tronto highlights the integrity of care (1993, p.136), displaying the interdependence of the separate 'organs' of the conceptual anatomy of care ethics. The integrity of care appears to flow from the value of competence. Insofar as we wish to provide 'good' caring, we must employ the attitude, practices and values of care ethics' conceptual anatomy together. I use Tronto's 'practical phases' and 'ethical elements' to identify caring in punishment practices in the next chapter. Despite the narrowness of Bubeck's definition, we will see caring practices in punishment according to her definition.

Attitude

One can perform caring activities without a particular attitude (Tronto 1993, p.105). Yet for Kittay, caring attitudes represent 'the open responsiveness to another that is … essential to understanding what another requires' (Kittay 2002, p.259). Both are correct within their own terms. Tronto's conception of caring draws deliberately broad boundaries, to include poorly practiced care, enabling constructive criticism

(Tronto 1993, p.103). Kittay's description exemplifies Tronto's awareness and response of practical caring, and the attentive and responsive care values. Without this open engagement with the other, our ability to respond to the nuances of their need and preference are disabled, impoverishing the caring work provided (Clement 1996, p.101). As Noddings stresses, 'care demands listening, discussing and responding' (2006, p.29).

These are pragmatic requirements: acting in attentive, responsive ways allows us to provide better-informed, targeted responses. Yet the attitude or disposition of care is present precisely when we are not simply going through the motions, but delivering caring '*in an attentive, responsive and respectful manner*' (Engster 2007, p.31; original emphasis). Herring also notes that respect is 'the attitude reflected in good care' (2013, p.19). This attitude, and the responsiveness values and practices, have some resonance with the inclusive treatment and 'proper respect as human beings, each with his or her own needs for dignity' (Bottoms & Tankebe 2012, p.121) of interactional justice, seen in Chapter one. Interactional justice is a concept which will help to identify what is missing in mainstream practices. I shall characterize the attitude appropriate for caring as a thread of openness to, and engagement with, the other, running through our reasoning and practices, drawing them together.

Defining care ethics

More flexible than Bubeck's but narrower than Tronto's definition, Daniel Engster offers a concise definition of care: 'help[ing] others to meet their vital biological needs, develop or maintain their innate capabilities, and alleviate unnecessary pain and suffering' (Engster 2007, p.31). Engster also provides a set of aims for practical caring work, which he argues apply both for caring individuals and governments:

> To help individuals meet their basic needs … when they cannot reasonably meet these needs on their own.

> To help individuals to develop and sustain their basic capabilities for sensation, mobility, emotion, imagination, reason,

communication, affiliation, literacy, and numeracy when they cannot reasonably achieve these goals on their own.

To help individuals to avoid and alleviate unnecessary pain and suffering when they need help in meeting this goal.'
(2007, p.76)

Engster draws on Martha Nussbaum's basic capabilities approach. Nussbaum's basic capabilities are: life; bodily health; bodily integrity; senses, imagination and thought; emotion; practical reason; affiliation, including engagement in social interaction and treatment 'as a dignified being whose worth is equal to that of others'; other species; play; control over one's environment, including political and material aspects (2000, pp.78–80). Tronto also suggests Nussbaum's capabilities approach as a promising way of interpreting needs (1993, p.140). Engster argues that meeting basic needs, building capabilities, and avoiding unnecessary suffering requires '*an attentive, responsive and respectful manner*' (2007, p.31 original emphasis), arguing these attitudes motivate the following questions:

Attentiveness most basically directs us to ask the question: Do you need something? […] Responsiveness directs us to ask the question: What do you need? […] Respect directs us to ask the question: What can I do to help you […] what would help you to be able better to meet your needs
(Engster 2007, pp.30–1)?

Engster's definition encapsulates, and his aims shadow, the conceptual anatomy of caring. I adopt Engster's definition to meet sceptical readers half way. Engster's care theory is notably framed in more individual-focused terms. Engster grounds a duty to care in an obligation to uphold caring as a social institution: since we depend on the 'web of caring for our survival and social existence, we are all morally obligated to contribute to its maintenance and reproduction insofar as we are able' (Engster 2007, p.151). Within care literature responsibilities to care are more often framed as arising from relationships with the needy person. Concern for a particular other's wellbeing (a caring attitude), not a self-interested concern to support social institutions, is most often identified as grounding caring responses (Clement 1996,

p.56; Kittay 2002, p.101). This difference should not pose a problem. Engster displays the conceptual anatomy of care in his definition (2007, p.31) aims (2007, p.76), and attention to needs-meeting (2007, pp.61–2). He recognizes the moral value of care-giving and relationship maintenance (2007, pp.56–7). His use of web imagery reflects the broader care literature and concords with expectations of interdependence. Nothing in Engster's work suggests that our contributions cannot be relationally performed or valued.

Following Tronto and Held, Engster sees care as politically valuable, siting care at the heart of conceptions of justice (Engster 2007, p.5). For my purposes, considering *state* interactions with *individual* offenders, Engster's more individualistic, political approach may be helpful. Engster offers a minimal interpretation of respect as 'the recognition that others are worthy of our attention and responsiveness', intending nothing 'so strong as equal recognition' (2007, p.31). Yet this can be fleshed out either relationally or with a thinner, liberal understanding, discussed in the equality section of this chapter. My interest is what guidance we might provide punishment decision-making and delivery practitioners regarding interactions, between state agents and offenders, to provide treatment as equals. Therefore theorists considering the political (Tronto 1993, p.171; Held 2006, p.38, p.77, p.153; Engster 2007) and policy (Kittay 1999, chap.5; Sevenhuijsen 2003, p.193, pp.181-2, p.195; Noddings 2006; 2002) applications of care ethics, are particularly relevant to my project.

Tronto identifies care as both a moral and political concept, arguing for the inclusion of care concerns within existing political theory, a project which Engster takes up. Following Tronto and Engster, I understand caring as a politically important value, but an incomplete political theory. While care is not the only value, Engster stresses that care theory is 'central to *any* adequate theory of justice' (2007, p.5; original emphasis). Tronto argues including care as a political value allows a changed 'sense of political goals', providing 'additional ways to think politically and strategically' (Tronto 1996, p.143). In Chapter one, I argued that harm-centred definitions of punishment can cause problems. I proposed an

alternative definition of punishment to facilitate 'thinking differently' about the treatment of offenders in punishment decision-making and delivery. In using care ethics to provide guiding principles for this, I seek 'additional ways to think politically and strategically' about the treatment of offenders as equals. Speaking in relation to citizenship, Selma Sevenhuijsen also views that the inclusion of care ethics in political considerations can help to create discursive space (1998, p.15). She argues that 'placing care within concepts of democratic citizenship … [may] enable us to judge with care' (1998, p.vi).

Method of practical moral reasoning

The most distinctive and useful feature of care ethics for my purposes is the method of practical moral reasoning, in broad contrast to liberal perspective methods. Clement defines the focus of care 'based on its contextual decision-making, its priority of maintaining relationships, and its social conception of the self'; and the liberal justice perspective 'in terms of its abstract decision-making, its priority of equality, and its individualistic conception of the self' (1996, p.5). These fundamental differences in 'focal point' (1996, p.5), result in a different 'primary moral commitment', at the centre of the care approach to practical moral reasoning (Friedman 1995, p.73). I offer a general characterization to highlight these differences, representing general themes, rather than the specific approach of any particular theorist. When we reason from the liberal justice perspective, we begin with abstract 'blank spaces' (Coverdale 2013, p.74) like an algebraic equation, or the 'math problem' Jake describes. We imagine what rights and duties might inhere between parties in a general hypothetical situation (eg promise, contract), and extrapolate from this thought experiment to provide 'action-guiding rules for the real world' (2013, p.74). Consider the following example:

Both A and B have a right to bodily integrity.
Both A and B have a duty not to hit each other.

Contextual real-world details form no part of this reasoning, although on encountering real world circumstances which do not appear to fit the rules, we might be able to develop exceptions:

If A is acting in proportionate self-defence, then A has a right to hit B.

If A and B freely agree to a boxing match, then A and B have a right to hit each other.

By contrast, when we reason from the perspective of care we begin with concrete persons, consider the relationship between them and the needs they presently have. Relationships, chosen and unchosen, inform our responsibilities. We consider what needs-meeting resources are available in the context of their particular situation, and how these can be best employed to efficiently and effectively meet needs, or respond to a shared obligation to meet needs and maintain relationships. For example, the hospital patient, P, needs a meal. This could be provided by a medic, M, orderly, O, or relative, R.

P needs a meal. P is unable to meet this need alone.

M, O, and R share a responsibility to provide a meal to P.

Who should undertake to bring a meal to the patient? This question asks who is 'best placed' to provide this care. The medic might be nearest, but others need her specialist skills. The patient might prefer a relative, but the relative may not be able to visit. The orderly might have the most appropriate combination of time and resources. Further, is an appropriate meal appropriate to:

- The patient's medical need?
- Separate dietary needs?
- Usual cultural tastes and preferences?
- What this particular person prefers?

The patient may *require* a gluten-free (medical need) vegetarian (separate dietary need) meal, but a cheese salad is inappropriate for the coeliac or vegetarian who detests cheese. [33] These examples indicate the importance of contextual information, in responding to the individual's need and preferences, as indicated in the practices and values of caring explored above. Finally, *how* will the patient eat the meal? A patient's condition may inform food choices. Finger food is more easily managed by a person with an immobile arm than food requiring a knife and fork. This displays appropriate respect for the care-receiver, as highlighted by Engster (2007, p.31). Care perspective reasoning prioritizes gathering and employing contextual information to inform our practical responses. One way to gather and consider this information is through engaging with the care receiver to answer a series of questions together:

- What needs are there (considering the place of a particular need holistically, with regard to the individual's other needs, and with regard to the wider distribution of needs in the social context)?
- Who should provide care (considering holistically the total distribution of resources, relationships and responsibilities, individually and in society)?
- What care is appropriate (given time, resources and responsibilities)?
- What are the care-receiver's preferences?

Liberal perspectives do not preclude applying contextual information *later*. But prioritizing 'generalized' (Benhabib 1986, p.415) understandings of individuals and abstract information over contextual and relational considerations, reduces the availability of personal and social contextual information to apply later. Sevenhuijsen argues that '[b]ecause the moral agent is assumed to be detached from his or her situated must and connections, he or she is unable to reflect on

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[33] As a child, my mother was provided 'special' culturally specific school lunches: Catholic students were served pilchards every Friday. My mother has never liked pilchards.

moral dilemmas in relation to concrete others' (1998, p.60). Kittay particularly stresses the importance of an open and engaged attitude towards care-receivers for contextual information-gathering (2002, p.259). Care reasoning prioritizes thick, personally and socially contextually informed, holistically considered decision-making, shadowing the conceptual anatomy of care wherever possible, and permitting flexible, informed responses to particular needs. Helping another dress is a task facilitated with contextual detail. Since only the wearer knows whether the shoes pinch, we learn through engagement with the other which shoes they find more comfortable. Sevenhuijsen also observes that care ethics approaches expect situated concrete social circumstance information 'is exactly what will raise the quality of judgement' (1998, p.60).

A core difference between the practical moral reasoning of classical liberal versus care ethics perspectives is that estimates are a 'second-best' form of information-gathering from care perspectives. Indeed, avoidably presuming to know how to address needs better than the care-receiver belittles their lived experience of their particular situation. Care-givers cannot solicit unconscious patients' preferences and real-life problems require real-time responses: we cannot be 'paralysed' by lack of information (Harding 2004, p.11). How should we reason when contextual information is limited? Care perspectives employ estimates, based on experience and the information we do have, *only* when this represents the best practically achievable option to secure a timely response.

There are two related criticisms to the above meal example. Firstly, it is ambiguous what exactly we are caring about: the preference not to eat cheese? The requirement not to eat gluten? While the preference against cheese may seem trivial, the requirement for a gluten-free meal is not. Both are facilitated by an engagement with the care-receiver, and demonstrate concern for their wellbeing as concrete individuals. Considering these *in context* as 'preferences' and 'requirements', and considering the potential to avoid unwanted harm gives an indication of which should carry more weight.

Although Bowden argues that care-informed reasoning resists formulation as rules (2000, p.179), care theories are not anti-rule per se. The meal example does not consider that there will be many other patients in the hospital. In this case, a rule approach is more helpful: the needs of many can most efficiently, be met with hospital kitchens, cooks and porters to bring prepared food to wards. What the care perspective adds to this is the need for some engagement between recipients and the catering system, so that individual specific medical *requirements* beyond basic nourishment can be met. Personal taste preferences and cultural requirements[34] may not be ideally met under a central provision scheme. But this may be justified in the context of the best use of hospital resources, considering the need to feed patients holistically with other needs to provide medical supplies and staff.

What the care perspective adds is the ability to judge contextually whether a particular approach is appropriate and to examine why. Care ethics reasoning might appear as moral relativism. Taking the care perspective opens principles to context-informed discussion, permits consideration of which principles should apply, and fosters an awareness of the limits of our principles. Rather than offering ambiguous, unprincipled thought, we have a flexible selection of principles, responding to contexts (Clement 1996, p.97). We have seen that care ethic's relational concerns are distinct from, though not inconsistent with, liberalism. Yet there is an alternative perspective viewing individuals as necessarily interdependent: communitarianism. I now turn to distinguish care and communitarian perspectives, before turning to the relevance of the differences between care ethics and classical liberal perspectives for treatment as equals.

Individuals, relationships and responsibilities

Care theorists depict individuals as both interdependent and variably vulnerable (Walker 2006, p.148). Unlike liberal self-sufficiency expectations, admitting one has reached one's limit is normalized. Seeking support is desirable, not a personal

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[34] MD Anderson Cancer Center, Houston, offers kosher meals but not halal meat (MD Anderson Cancer Center 2013). Patients requiring halal meat rely on family provision.

failing. For those able to learn, as a child learns to talk, or professionals refine skills, this is a development opportunity. But even where individual capabilities cannot be developed, these ontological expectations argue against stigmatizing care-receivers because they need help with basic needs (Clement 1996, pp.104–7; Engster 2007, p.31). This does not mean that we cannot consider independence or individual choice as valuable: we can meet needs in ways which enable and empower care-receivers to exercise individual choice (Noddings 2006, p.28). Self-directed choices are available other than through sole self-authorship (Anderson 2003, p.159).

Relationships are important for these interdependent, more communitarian selves and are valued accordingly (Held 2006, pp.19–20). Yet, most obviously in Engster's writing (2007, p.99); individuals need not be subsumed by relationships on relational understandings. Communitarianism acknowledges that individuals cannot understand themselves apart from their social context. Therefore, each individual is obliged to contribute to the maintenance of community practices and values. Communitarian approaches *may* prioritize traditional forms of relationship at the expense of the parties. In cultures highly valuing marriage, it may be 'unthinkable' if not (legally) impossible for a spouse to separate from an abusive partner. While Michael Walzer proposes 'there is no self knowledge without the help of others' (1983, p.272), communities do not have a monopoly on relationships enabling self knowledge. Relationships change, new ones begin, and previously important relationships end. Yet individuals persist and can in part be understood through these developing relationships.

Unlike fully communitarian selves, expected to make personal sacrifices for the common good, relationships exist to benefit concrete individuals. Engster argues that care theory grants individuals moral priority, and responds to conflict with dialogue to resolve differences if possible (Engster 2007, p.99). Care ethics recognizes that sometimes the appropriate response is to sever relationships in the interests of the parties. Care reasoning lends itself to political debate because practical caring work and reasoning responds regularly to conflicting needs, beliefs

and inadequate resources (Tronto 1993, p.109, p.136; Clement 1996, p.19; Noddings 2002, p.247; Held 2006, p.22, p.92, p.139; Engster 2004, p.117).

Responding to needs according to context is a flexible approach allowing for care-receivers' preferences. Chosen and unchosen relationships and social and cultural expectations are part of the context informing appropriate responses, and *may* imply a caring responsibility (Engster 2007, pp.56–7). When and whether we have a responsibility to act, and what we have a responsibility to do, is in part informed and limited by what it is socially and culturally conceivable that we might do. This becomes complicated if our social and cultural context is different to those of our care-receiver, as understandings are not always shared (Tannen 1984).

Cultural factors introduce limits and rigidity into the otherwise flexible approach. If my responsibilities are partly defined by social and cultural roles, then I may only do what is acceptable or thinkable that someone in my position could do as a diligent scholar, a law-abiding citizen etc. On finding a winning lottery ticket in the street, the only option available to the *law-abiding citizen* is to take it promptly to the nearest police station (BBC 2009). These social expectations may be restrictive, but have benefits in that they allow others to predict how we will act, facilitating co-operative responses.

Social and cultural expectations may perpetuate oppression: for example expectations placing women in subordinate social roles, restricting their options. The appropriate response to cultural tradition justifications may be 'in that case it's high time you stopped' (Barry 2002, p.254). Discriminatory expectations should be challenged, although this may not always be appropriate in needs-meeting exercises. Social and cultural expectations are not fixed and might be understood as highly viscose: we should expect gradual change over time. This fluidity allows both the advent of, and challenges to, discriminatory practices.

Treatment as equals: concern, respect and dignity in liberalism and the ethic of care

Equality is a central theme of my project. I begin from a concern that offenders are human beings entitled to treatment as equals qua persons, whatever else differential treatment in response to the offending (punishment) requires. Care theorists do not typically write in terms of equality, presuming this a concern of liberal justice (Clement 199 6, p.11). Yet there are exceptions: in her discussion of a care/response moral orientation in a 'feminist vision of justice', Harris states 'all people have equal value as human beings' (2003, p.33). Kittay's connection-based equality proposes entitlements to relationships enabling us to receive care, and social support in our caring so that no person is coerced to perform more caring work than they choose (1999, p.66), to include dependency relations. We will see here that there is a prima facie overlap between classical liberal and relational perspectives. Christine Koggel and Jennifer Llewellyn separately emphasize that liberal and relational equality are both founded on ideals of equal concern and respect, yet interpreted differently (Koggel 1998, p.45; Llewellyn 2012, pp.93–4).

An equal moral status between persons is suggested by care ethics ontological expectations of individuals. Since we all have personal limits and needs, care-receivers are 'not lesser' (Engster 2007, p.31). Care-givers are in a position of power (Baier 1986, p.241), yet are not understood as 'greater'. We will see later in this chapter that care-givers placing themselves 'above' care-receivers fall foul of the operational limits of care: infantilizing care-receivers, impoverishing understanding of needs and providing poor care. As Jonathan Herring repeatedly stresses, care-receivers might also be care-givers to others; and care-receiving and care-giving roles might be reversed between the same individuals in future circumstances (Herring 2013, p.4, p.153, p.167, p.174, p.176): A parent might escort a child to school (providing care), before attending a medical appointment (receiving care).

If care-receivers are not 'lesser', and care-givers not 'greater', it follows that we are in some sense equal. Clearly, we have differing needs and capabilities (resources to meet needs), relational contexts and preferences. The equality is a principled

recognition of a moral status *as equals*, rather than descriptive of outcomes or identical practices. If we have an equal moral status, we should be treated in ways reflecting this. The language of equal concern and respect, coined by liberal theorist Ronald Dworkin and employed by relational theorists Llewellyn and Koggel, best expresses this.

Koggel spotlights the central insight of classical liberalism as the recognition that if 'treating like cases alike is to have any moral substance, it must rest on the fundamental requirement that each person be treated with equal concern and respect' (Koggel 1998, p.45). Following Gilligan's representation of care as 'an injunction not to hurt others' (1982, p.149), Koggel argues this also 'assumes the moral principle that each person deserves equal concern and respect' (1998, p.184). In constructing her relational account of equality, Koggel draws on Gilligan's 'different voice' of caring, which 'grasps' the significance of relationships (1998, p.141). Koggel argues we should focus on relationships rather than caring attitudes (1998, p.187). However, her proposition that an injunction to refrain from harm presupposes equal concern and respect also applies to Engster's aim 'to avoid and alleviate unnecessary pain and suffering' (2007, p.76).

Classical liberal reasoning applies rules generated in the abstract, and does not appear to value the gathering of contextual information *prior* to decision-making. In Chapter one we saw Dworkin's example of treating two differently sick children with equal concern and respect, reflecting the necessity of contextual information. Dworkin distinguished between an equal distribution or 'equal treatment', and our equal, individual 'right *to treatment as an equal …* with the same respect and concern as anyone else' (2000, p.227). The children each have an equal right to life. But we treat the children '*as equals* by medicating the child in mortal danger although (and because) we provide different treatment' (Coverdale 2013, p.72). How are equal 'concern' and 'respect' fleshed out in this instance?

Llewellyn reminds us that Dworkin's equal concern and respect is limited to political state-citizen interactions (2012, p.91). She characterizes the *concern* and *respect* of

classical liberal equality as individual-based, valuing abstract non-interference, through either disinterestedness or self-interest. Classical liberal *dignity* she argues follows from a commitment to our rational nature, implying equal moral worth (2012, pp.93–4). Where liberal dignity is grounded in rationality, and individuals are conceptualized as equally independent *rational* actors, individuals are necessarily equally dignified. Therefore equal dignity is an ex-hypothesi property of liberal individuals, deserving of respect. This chimes with Benhabib's generalized conception of the other: dignity lies in what we have in common, therefore an equal property of individuals (Benhabib 1986, p.411).

If we understand ourselves as self-sufficient alone and see others as potentially limiting our autonomy (Code 1991, p.77), it becomes clear why non-interference is valued in classical liberalism as *a means of respecting* equal dignity and/or rationality (leaving each to make their own equally rational judgement). Benhabib links Rawls' liberal theory and Kohlberg's understanding of moral development, in a generalized understanding of 'the autonomous self [as] disembedded and disembodied' (Benhabib 1986, p.409). When based on assumed equal dignity and/or rationality of abstractly identical individuals, neutral, generalized rules are fair. This explains why Barry identifies difference-blindness as a demand of fairness and strength of liberalism (2002, p.76, pp.91-2). On this understanding, contextual detail about specific circumstances is 'a threat to … independence and impartiality' (Sevenhuijsen 1998, p.60).

Yet liberal dignity need not be grounded in rationality alone. Nussbaum ascribes dignity across her basic capabilities, not to 'any single "basic capability" [sic] (rationality, for example), since this excludes from human dignity many human beings with severe mental disabilities' (2008, p.362). Nussbaum builds her basic capabilities on a *connected* understanding of liberal individuals, shaping their lives 'in *co-operation and reciprocity* with others, rather than being passively shaped … by the world' (Nussbaum 2000, p.72; my emphasis). She includes relationships and relational concerns in the basic capabilities, which imply our dignity, in turn deserving our respect. We should treat the other as an equal because we share the

same human dignity or generalized basic capabilities even if developed differently. Concrete contextual information is still missing.

Clement argues that the liberal prioritization of non-interference and individual rights excludes the importance of relationships (1996, p.81). Koggel counters that liberals, potentially such as Nussbaum as discussed above, can acknowledge relational aspects of individuals. The 'real objection', is that these are not understood as 'relevant to an account of what it is to be a person or to treat a person with equal concern and respect' (Koggel 1998, p.128). Llewellyn explains relational equality 'does not require the abandonment' (2012, p.95) of key liberal ideals. Instead, relational theories can offer 'a deeper and richer sense of these aspirations and *a better means of achieving them* than liberalism' (2012, p.95; my emphasis). Care ethics perspectives are one sub-set of relational perspectives. It is this richer understanding of treatment as equals, which I attempt to bring to criminal punishment. A care ethics approach provides overlaps with the thin liberal understandings of the same concepts, such as concern, respect and dignity. How then are relational, care-perspective approaches to equality different to the liberal perspectives? To explore this, I turn to Llewellyn's relational theory.

Drawing on Llewellyn and Benhabib, I argued that liberal dignity is a property of generalized individuals, by virtue of which we deserve respect. Llewellyn identifies relational dignity as a property of relationships, visible (or visibly absent) in our interactions with others (2012, p.95). Herring also notes respect as a 'key marker' of care (2013, p.18). Respect for the other's 'innate humanity' requires dignified treatment (2013, p.19). Relational dignity is a property of our interactions with others, which proceeds from our 'thicker' respect and concern for the other. This ideal is reflected in the attitude of openness and engagement present in the conceptual anatomy of care ethics. Open engagement and responsiveness allows us to gather information about needs and preferences, and the broader social context of others. The care approach prioritizes recognition of concrete persons, situated in particular contexts.

Llewellyn's *relational respect* is founded on relationships, and not self-interested concerns for individual reciprocity. Recognizing our connection acknowledges others' 'rights and needs' (Llewellyn 2012, p.94), but on a concrete rather than abstract level. 'On recognizing ourselves as relationally connected to others', Llewellyn argues, 'it becomes clear that to respect them requires some knowledge and concern for their needs and aims' (2012, p.94). This is informed by personal and social contextual details through 'listening' and 'awareness' (Herring 2013, p.18).The generalized other and our abstract obligations are replaced with the concrete other and their personal context, needs, responsibilities and resources, and holistic social context. It is this concrete, unique other for whom we show respect by attending to their context.

Relational respect requires concrete contextual knowledge of the other, instrumental for dignified treatment. In Dworkin's sick children example, it may be obvious that one child is uncomfortable and the other dying. Consider an average man. Without seeking further contextual information, we cannot know that he has M.E., and needs to rest more often than his peers. Without this information, we do not know how to treat him as an equal. Such contextual information is necessary for Dworkin's liberal concern and respect. The problem is that liberal practical moral reasoning does not help us to gather contextual information. Benhabib argues in favour of concrete understandings of persons, since 'more knowledge rather than less contributes to a more rational and informed judgment' (1986, p.417). The insight of care ethics, highlighted earlier, is that a concrete, particular perspective is more helpful than a generalized abstracted view for informing decisions about how to act in particular circumstances (Kittay 1999, pp.64–5, p.88). Practices prioritizing open, respectful engagements allow greater scope for interactional justice, as suggested in Chapter one, than liberal non-interference. Like liberal practices, gathering contextual information provides no guarantees of treatment as equals but, by facilitating access to the necessary contextual information, this better equips us to provide equal concern and respect.

Criticisms of care ethics

Female essentialism, male exclusion

Strands of care theory prioritizing women's experiences, of mothering (Ruddick 1990, p.46; Kittay 1999) in particular, are vulnerable to charges of female essentialism (claims that all women are a particular way), and the exclusion of men. Ruddick (1990), Noddings (2002) and to an extent Held (1995) focus on the caring experiences of women. This addresses an imbalance in the literature, which for centuries implicitly considered only the perspective of men. While these authors use female examples in their discussion, none discussed here claim that men cannot be carers or understand care reasoning. We need not make essentialist claims to observe that practical caring work has been historically socially coded feminine (Clement 1996, p.3; Friedman 1997, p.667), ascribed to women (Kittay 1999, pp.40–1; Noddings 2002, p.45) and other disadvantaged groups (Tronto 1993, pp.111–5).

These complaints have less purchase here. I take care as a learned method of reasoning, following Noddings (2002, p.22), a relational, contextual perspective, open to most human beings. I allow that socialization (probably stereotypically gender-divided) may render some individuals more practised at this approach than others. Some individuals may possess a natural talent, just as most people can sing a little, but few are international opera stars. Correspondingly, some individuals may find practical caring work or reasoning more challenging.

Patriarchal

Two related criticisms are that far from being women's authentic ethical reasoning, the 'different voice' of care is a patriarchal construction foisted upon women, or will at best become a tool of exploitation. Catherine MacKinnon suggests 'women value care because men have valued us according to the care we give' (1987, p.39). In her argument, care ethics is in neither the political, practical nor ethical interests of women. Yet the values and practices of caring have been neglected in androcentric ethical thought, providing reason to consider whether and how these marginalized concerns might be given their proper place. As Held argues and Engster reminds us,

care is 'necessary for *any* adequate theory of justice' (Engster 2007, p.5). There can be no justice without practical caring work (Held 2006, p.17). This further demonstrates the necessity of alertness to oppression, since for much of history there has been practical caring work without justice (Held 2006, p.17). This is considered in the review responses implicit in care ethics.

Parochialism and maternalism

One example of this criticism is Noddings' early attempt to highlight the distinctive characteristics of actively providing care directly to another. Noddings argued that claiming to 'care' for starving children overseas where we can offer little practical assistance diminishes the practical value of the direct caring work provided to those we feed, clothe, etc (1984, p.86). This leads to concerns of parochialism, favouring 'our own' (family, fellow nationals, co-religionists etc) over others. However, Noddings revised her approach to preclude arbitrary favouritism by explicitly including considerations of justice within her theory (Sander-Staudt 2011, sec.3d). In addition, Tronto argues that parochial care is poor care, failing to live up to the values and attitude described in the conceptual anatomy of care.

A related danger of poorly applied caring is that of maternalism. Here, care-givers presume to know best, ignoring and infantilizing care-receivers. Tronto recognizes these dangers occur when we do not live up to our own standards (Tronto 1993, p.170). I discuss these below as the operational limits of practical caring. A further criticism of caring remains. If care is not parochial, then caring may be either so broad as to be empty, requiring little more than civility; or impossibly demand that we care actively for all humanity. This concern will be addressed in the positive limits of care, where I argue that the relationships and the nature of needs helps us to divide caring responsibilities, but some context-responsive flexibility necessarily remains.

The parameters of caring

I have set out the expectations and conceptual anatomy of caring in this chapter. These concepts are framed as ideals to guide practical moral reasoning and caring work. Below I systematize the parameters of caring and set out the responses, which I suggest are implicit in the expectations and anatomy of care, to these unavoidable limitations of non-ideal circumstances. This acknowledges a tension within care ethics: harm is unacceptable yet unavoidable. These responses allow us to manage this tension in caring: intentional harm to others is unacceptable; unintended and unforeseen harms are unavoidable *and* therefore ought to be recognized and addressed like any other harm. Since not all harms can be avoided or resolved, this tension cannot be removed.

Chapter one suggested that care activities are difficult to see in harm-centred understandings of punishment. Everyday caring practices acknowledge and address conflicting needs and unavoidable harms aiming to minimize unwanted suffering where possible. Consider the impact on young children whose primary carer is hospitalized. Despite caring intentions, this separation nonetheless causes harm. When one spouse petitions for divorce but the other seeks to restore the relationship, whatever the outcome one party will be unavoidably hurt. These limits and the implicit responses illustrate that, since harm cannot always be avoided, there is always space for acknowledging harm in care ethics. Non-ideal circumstances limit care. The negative limits of care admit and respond to practical limiting factors. The operational limits of care admit possible errors in applying 'good' care, and indicate a response. I begin with the positive limits of care, which help us to identify where our responsibilities end, and those of others begin.

The positive limits of caring

Positive limits of care address the concern that care ethics is either narrow and empty or impossibly broad. With personal and social contextual information, these limits help identify what we have a responsibility to do for whom, and on which occasion. Slote and Clement separately discuss 'balancing' our practical caring work and concern for wellbeing between intimate and non-intimate others (Slote 2001,

p.90), and between others and ourselves (Clement 1996, pp.95–6). How and when it is appropriate to provide care is informed by these factors:

- *Association*: the closeness of the other's relationship with us, considered in context of their relationships, or any causal relationship we have with the need;
- *Gravity*: a function of the urgency and seriousness of the need in social context;
- *Suitability*: the relevance of the care-giver's capabilities.

Relationships affect when and how it is appropriate to provide care. Responsibility-implying associations are easier to identify when relationships are closer. Consider how we might comfort a distressed friend compared to a distressed stranger. Even as community-minded persons, we lack a 'close' personal relationship with strangers. A person receiving disappointing news on the bus probably prefers to talk the problem over with a friend later than the stranger in the next seat *now*: here a closer personal relationship is more appropriate. Whether we have a responsibility to act depends on the comparative closeness of our relationship in the context of the needy person's other relationships: is there someone more appropriately associated to help, and able to do so? Which relationship is most appropriate, is socially and culturally informed. In some cultures it is unacceptable for a female patient to be attended by a male physician without an appropriate chaperone.

Further, we may have an appropriate association where we bear some causal responsibility for the need. Arguably we have some moral obligation to acknowledge and address such harms. However, the needy person may prefer to receive assistance from someone (anyone) other than ourselves. In these situations we should be sensitive to whether our attempts to help repair harm, as arguably we are obliged to do, or rather cause further harm, which we ought to avoid.

Associations imply less responsibility when relationships are weaker: we have no prior relationship, we did not cause the need, we are 'just passing'. Yet sometimes,

weak, geo-temporal proximity relationships are sufficient associations to imply a caring responsibility. In Singer's drowning child example, we see a child drowning in a shallow pond, and can easily wade to the child's rescue at only the cost of our laundry bill (1972, p.231). While the child's parents have a *closer relationship* and a relationally informed responsibility for the child's welfare, in Singer's example they are not present. Our weak association implies action: we may not stand idly by when we could easily save the child.

Responsibilities vary with the *gravity* of the need, combining seriousness and urgency. Some needs are comparatively serious or urgent. Suppose two people misplace bus-passes. Only the person who must travel today has an *urgent* need to find their bus-pass. A person losing their job and able to pay rent for only three months has a *serious* but non-urgent need for housing. A person in cardiac arrest has an *urgent and serious* need, requiring immediate skilled attention. As the gravity of need increases, our weaker association begins to imply responsibilities. The parents of Singer's child might have some responsibility to prevent the child from slipping in the damp grass at the water's edge. As a passing stranger, we have no such responsibility. Things change, and our weak geo-temporal proximity association with the child implies action when the gravity of the need increases and the child's life is at stake.

Thirdly, our responsibility varies with our suitability to meet the particular need. Perhaps we have specialist skills, knowledge or resources. Extending Singer's example, any lifeguards present have a greater responsibility to attempt rescue given their special training, enabling them to effect rescue with minimal danger to themselves and others.[35] In 2012, professional footballer Fabrice Muamba collapsed during a match. A fan of the opposing team, who happened to be a leading cardiologist, saw that the attending sports medics were performing CPR. Although not attending the game in a professional capacity he went onto the pitch to offer aid (Deaner 2012). His special skills, despite a 'team rivalry' relationship, implied a

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[35] On-duty paid lifeguards also have a contractual duty.

responsibility to offer care. Medical professionals have professional duties of care, but these duties are intimately linked with the life-saving nature of their professional skills.

What responsibility a particular relationship requires or implies is informed by social and cultural considerations, the gravity of needs and our suitability. Most obviously in cases of life-threatening high-gravity needs and/or greater suitability, weaker associations will imply caring responsibility. The rescuer in Singer's drowning child case has no special life-saving training and there is no time to fetch skilled help. Further, the only association between the child and rescuer is geo-temporal proximity. We can lack relevant skills, resources and strong associations, but we may still be the only person near enough to attempt to provide timely support.

Here we are called on to care beyond our competence due to the gravity of the need: we ought to try to save a life. Interestingly the moral responsibility grounded in proximity to another's abject suffering has been discussed in legal theory and is reflected in legal doctrines. Pardun argues the legislative intent behind 'good Samaritan' laws reinforces just such a 'moral compass' (1998, p.606). The implication of care reasoning is that we consider contextual information, and to make an *in-context* decision as to what appears most appropriate, based on the skills and knowledge we do have, and estimating when necessary.

The guidance sketched above contributes to identifying where our responsibility ends and the responsibilities of others begin. This is not the whole story: contextual information plays an important role and I noted earlier the role of cultural context in responsibility. Care, as Engster and Tronto imply, is not the only value. But it is an important political value (Tronto 1993, p.161, p.171; Tronto 1996), which has a central role at 'the heart of justice' (Engster 2007, p.5) in interpreting needs contextually. This allows some ambiguity within care ethics, but this flexibility can be a strength, allowing context-sensitive responses. I now turn to the risk of practical and operational shortcomings.

The negative limits of practical caring

In Chapter one we saw three different kinds of unintended harm: foreseeable and (partly) avoidable harms, foreseeable but unavoidable harms, and unforeseen and therefore unavoidable harms. In theory at least, some harms can be predicted, such as the pain of separation from family of quarantined hospital patients. This foreseeable harm can be at least partly addressed in advance by arranging telephone contact between patient and family. We might also foresee the harm of the patient not being able to attend work and damage to relationships with their employer. This is unavoidable and cannot be addressed in advance. Unforeseen harms might include the patient's unusual reaction to treatment. In theory these harms may be addressed after the fact to minimize the impact of the harms. Patients might be provided occupational therapy to help them return to work. The patient's unusual reaction can be recognized and a response devised, provided we monitor for unforeseen harms, necessarily of an unknown nature.

In real life non-ideal circumstances, it is not always this simple to address harms and respond to all needs with ideal care. Tronto's integrity of care implies we should care as well as we are able to, but this cannot guarantee ideal outcomes every time. Care ethics accepts that non-ideal circumstances will result in non-ideal caring responses. Here, care ethics leaves room for identifying harms. Since some harms cannot be avoided, care ethics cannot demand success from us; only our best effort in good faith to apply the aims of care as well as possible, given certain unavoidable limits:

- Restricted time and scarce resources (shortfalls);
- Conflicting needs;
- Insufficient information;
- Human error.

Limited time and scarce resources demand the prioritization of our caring. We choose which needs will be met, and conversely, which needs will be least adequately met, or not met at all. We must choose where to provide poor or no

care. We consider this information holistically, using our skills and experience to make a best-in-the-circumstance (or least-worst) plan for action, rather than an ideal 'best' choice, taking account of the shortfall. Because we make this prioritization decision, we know about these unavoidable harms.

Caring work does not occur in a vacuum: these harms and the cumulative impact of 'losing out' becomes part of the context for future needs-meeting (Noddings 2002, p.19) which, following Tronto's awareness phase, we cannot ignore. In the above example, quarantined patients' foreseeable separation from their family is addressed through telephone contact. But suppose we lack the resources to provide telephone access to all patients. Whichever rationing method we use (perhaps we means-test the service or have patients draw lots, or perhaps there are limiting practical factors: some isolation rooms are equipped and others are not), we must bear in mind the impact of reduced contact with family on those patients denied access as part of the context.

Sometimes needs conflict, or the means of meeting needs might conflict. In the above example we may be able to provide either telephone access for patients, *or* occupational therapy, but lack the resources for both. We foresee unavoidable harms and must make a decision about which will be avoided and which will not, about who is harmed. Lack of information may lead to faulty decision-making in both the shortfalls and conflicts cases. Separately, human error in interpreting the information we do have, may lead to mistakes.

So far we have considered foreseeable harms. We know the likely nature of their impact, and may be able to offer some help to minimize the impact, even if we cannot avoid them. But, particularly for insufficient information and human error, we cannot know in advance what the nature of these harms will be. We can however expect that some unforeseeable harm will occur. We can address this by monitoring the impact of our caring (Noddings 2002, p.19; Tronto 1993, p.131); to understand developing needs, discussed in the review section in this chapter. While

we cannot prevent the patient's unforeseen reaction to treatment, we can watch for unusual symptoms, take the harm seriously and seek a remedy.

The operational limits of care

The operational limits also leave room for acknowledging the presence of harms in non-ideal caring practices. While the negative limits acknowledge non-ideal circumstances, the operation limits acknowledge the problems caused by (deliberate or incompetent) poor practical caring work, reasoning, or the absence of the relevant attitude, and are drawn from Tronto's discussion of the dangers of care (1993, p.170). Firstly, maternalism infantilizes care-receivers when care-givers presume to know best how to meet needs. While care relationships are necessarily relationships of unequal power (Baier 1986, p.21; Kittay 1999, pp.33–4, p.50), failing to interact responsively with care-receivers diminishes their dignity (Engster 2007, p.31). Secondly, Tronto's parochialism occurs when we wrongly prioritize the form of care we deliver over other kinds without full consideration. This results in inappropriate, inadequate or inefficient[36] needs-meeting: for example, the teacher presumes the struggling student needs extra tuition, when the student needs bereavement support. These problems arise with insufficient openness and engagement, allowing poor attentiveness and responsiveness to care-receivers.

Separately, Tronto's competence value is threatened when needs are masked, due to conscious or unconscious incompetence of those directing caring work. Tronto describes a school chronically short of maths teachers instructing an unqualified teacher to supervise maths classes (1993, p.133). Pupils have 'maths classes', *appearing* to have their need met, but in fact learn no maths. Needs that *appear* to be met are masked from the view of others who might have taken them into holistic consideration. Circumstances force the teacher to attempt to deliver practical caring beyond their competence. Just as a passing untrained stranger might attempt

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[36] Care ethics scholarship does not often speak in terms of efficiency, considering this part of the contrasting 'justice' or 'universalist' approach. Yet if we are concerned to care as well as we can across several individuals (considering needs in their social context), and scarce resources mean we must prioritize our caring, then considering how we can get the best available needs-meeting from the available resources, an efficiency question, is an important, legitimate concern.

to rescue Singer's drowning child without skilled knowledge, the untrained teacher does their best. The care provided is poor, but this is not the fault of the care-giver. In Tronto's case, either the school is conscious of this need-masking and culpably providing poor care, or the school is unconscious of the problem and incompetently provides poor care (Tronto 1993, p.133).

Initial and ongoing review

One way we may be able to identify the problems of negative and operational limits, to either avoid causing harm, or to acknowledge and address harm, is to review the impacts of our caring (Noddings 2002, p.19). Initial and ongoing review are intimately linked. Gregory explains care practices as reflexive, requiring our 'self-awareness of our impact upon the situation' (2011, p.66). Initial review is a *reflexive* strategy, interrogating our proposed actions for likely effectiveness and appropriateness to individual and social context, in light of the parameters of caring. One example is care-givers consideration of their competence to provide care, displaying sensitivity to the effects of their actions.

The moral obligation to be aware of others' needs (Tronto 1993, p.127, p.129) implies taking seriously the consequences of our caring decisions. If we apply Tronto's integrity (1993, p.136), we are instructed to consider whether and how we can respond to needs of which we become aware. Together with an understanding of care as an ongoing process (1993, p.103), this suggests a *reflective*, ongoing review practice, comparing the outcomes of our caring with our intent. Was our caring appropriate? Is *this* care still appropriate? Are needs masked or unexpected harms caused? Should changes in the social context, relationships, resources, capabilities and responsibilities; change the prioritization of needs? An example might be found in the peer observation practices among teachers, who benefit from watching colleagues, from colleagues' feedback and from an opportunity for 'critically *reflective* engagement with teaching practice' (Donnelly 2007, p.124; original emphasis).

Review practices resemble a driver checking mirrors to assess safety. If I see a child in the road while executing a three-point turn, that I was checking my mirrors cannot excuse my hitting the child. *This misses the point of checking*. The correct approach is to continue to check, *and* implicitly to brake if I see a child in my path. While checking is not acting, integrity implies responding accordingly.[37] As mirror-checking throughout our journey is integral to good driving, reviewing our caring practice is integral to good caring. As internal to the practice, the absence of checking or reviewing is automatic cause for concern about our practice as good drivers or carers.

However, interdependence anticipates that we will each have personal limits that might cause, or obscure from us, our mistakes. These cannot be understood as individual faults since interdependence expects that we could not have done otherwise. If our individual review practices may be understood as *self-scrutiny*; interdependence, with our obligation to share *responsibility* (Tronto 1993, p.131) for responding to needs, suggests *mutual moderation*. We can support one another to identify shortcomings in collective and individual caring work. For example, the patient or hospital visitor may support the nurse's caring by calling attention to a dressing that has worked loose.

Moderation meets both the care-giver's need for support, and provides some protection to care-receivers against unforeseen or malicious harms. Review offers one way to identify and challenge deliberate or accidental oppression by carers. Discrepancies of opinion about whether care is appropriate provide occasion for discussion, including the responses of those cared-for, to collaboratively refine knowledge of best practice through critical reflection.

In search of a less partial, more powerful body to co-ordinate our review practices, Tronto recommends the incorporation of care into broader political theory, under

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[37] Action is not always possible, such as when a pedestrian emerges without time for the driver to react in this example, or when resources restrict needs-meeting. Review helps identify cases where we can improve practice, and implies our action where possible.

democratic conditions (Tronto 1993, p.170). Engster identifies a role for the state in regulating care. Governments have the necessary power and authority to define and enforce adequate care standards, given the social and cultural context and resources available. These must be open to democratic revision, as state agents do not possess special knowledge about how 'adequate' care ought to be defined (Engster 2007, p.102). Below I propose an example of how this implied review process might work. We begin by asking a series of questions, which leads us into a feedback loop. These questions shadow the questions asked in care ethics methods of practical moral reasoning on p.93.

Principles for guiding decision-making and action

Information-gathering

Through *respectful listening* and discussion, we *identify needs* with care-receivers, and use the positive limits of care to consider who is best able to meet needs. Inquiring about needs includes the immediate care-receiver's needs in their personal context, and those of others in their social context, building an understanding of the distribution of needs. These questions are firstly contextual (understanding needs in personal and social context) and secondly holistic (in the context of the social need and resource distributions). But needs and their gravity are only half the story. How we are able to respond is contextually informed, by relationships and available needs-meeting resources. The information gathered helps to build up a picture of the individual as a concrete person, considering their needs, resources and capabilities, relationships and responsibilities. This information helps us to prioritize needs according to the negative limits of care. Given these relationships, and resources-to-responsibilities ratios,[38] how can the individual be helped to meet their needs? When is it best, and who is 'best placed', to provide care? The positive limits of care help us to identify who is 'best placed', has the most appropriate association and resources, to respond to the needs.

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[38] Accounting for the fact that one person may appear to have many resources, but in fact also have many competing responsibilities.

Response-designing

Next we begin to design a best-available response *creatively considering* the problem. Following the negative limits, we prioritize where we cannot meet all needs. Which of the available options will produce the least unavoidable harm? Which of these options best meets the care receiver's preferences?[39] This provides an ideal response, should all other things be equal. While other things are seldom equal, we can use this ideal response as a guide when we begin to narrow down our options according to what is practical.

Suppose Sheila, 23, is looking for accommodation for her release from prison in three months. She applies to her local council for housing; however they will be unable to offer her housing in time for her release. This is not possible. Sheila's parents want to help, but they live in a small house with their three other younger children, and cannot accommodate Sheila. This is not practical. The prison housing adviser suggests she applies to hostel accommodation. Sheila is worried about living in a hostel and is concerned other residents might encourage her back into alcohol misuse or crime. This is not preferable. Sheila's Grandma lives on the other side of town. Sheila's parents help her to make an agreement with her Grandma. Sheila's Grandma says Sheila can live with her for a few months, provide she does the heavier housework, looks for a job and contributes to the bills. Living with Grandma will make it easier for Sheila to avoid people and places associated with her past offending, and, she hopes, help her to stay out of trouble. This option is possible, practical and preferable.

Creative consideration identifies the best available response from the recipient's perspective, informed by the kind of support the care-giver can competently provide. Good caring requires that we provide competent care where possible. With the exception of emergencies, care-givers should reflexively consider their competence to provide the desired care, sensitive to the potential to accidentally cause avoidable harm. This might either require revising preferences, or

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[39] These might conflict, addressed in the balancing phase of review, discussed presently.

reconsidering who is best placed to provide care. Initial review, including self-scrutiny and mutual moderation, considers holistically the likely impact of the preferred solution for the individual, across the social context. We 'balance' our decision for holistic distributive and *cumulative fairness*.

The *cumulative fairness* principle I propose deliberately leaves room for a broader political theory to fill in the distributive fairness criteria. I noted on p.92 that caring is not the only value. Which theory should be adopted is beyond the issues I wish to address in this thesis, although the approach I propose is broadly compatible with most social democratic approaches. We begin balancing for distributive fairness over time (cumulatively) by employing our earlier 'monitoring'. If we know some have 'lost out' (or been harmed) from earlier prioritization, this is relevant information (Noddings 2002, p.19). All things considered, is our decision distributively and cumulatively fair, or ought it to be rebalanced? In the above example, Sheila's ex-partner may ask her to move in and resume their relationship. This option is discarded because Sheila's ex-partner was abusive and pressured her into offending, making this option a poor choice all things considered. There are at least two reasons why we might seek to rebalance.

Firstly we may rebalance a caring decision for cumulative fairness in the light of the care-receiver's previous prioritization losses. It is reasonable for a healthy adult requiring treatment for a minor wound to wait while more vulnerable patients are seen, according to contextually informed triage. But it is unreasonable to ask them to wait seven hours in usual contexts; we must not ignore the impact of their repeated deprioritization. Secondly, we consider care-givers' responsibilities-to-resources ratio, an important part of care-givers' context. In addition to sharing burdens of unaddressed needs in prioritization, we should consider fairness in the distributions of practical caring work. Crudely, a couple parenting one child have more resources (two pairs of hands) to address fewer needs, than the single parent raising three children. This is not to say that we should not be able to choose (or accept unchosen) large caring burdens, but rather to argue that larger burdens

should be taken into consideration when further responsibilities, or social support resources (Kittay 1999, pp.110–3), are distributed.

Harm-avoiding

Once we have *delivered care,* seeking to meet needs and build capabilities while minimizing harms, the value and practice of responsiveness to care-receivers directs us to *review our responses* when we understand care as an ongoing process or string of events. Did we deliver the expected needs-meeting? If the need was met unexpectedly, this is a learning opportunity. If the need was not met we must understand why. As needs are met over time, is the previous best-available response still appropriate? Have needs or resources or relationships changed in ways which affect this? If needs have been unsuccessfully met, or if there have been relevant changes, does the needs-meeting response option remain appropriate? It may be that, while now less appropriate, the measure in place is preferable to achievable alternatives. Another reason to reassess changing needs is that the cumulative impact of unmet needs may worsen the original need: a minor repair postponed can lead to a much bigger problem.

Finally, we reach the rebalancing stage again, checking our responses in the light of previous prioritization losses and the responsibilities-to-resources ratio. This feeds back around to reassessing the quality of our care, until the needs are as well met as they can be, or other needs demand our attention. Understanding practical caring as an ongoing process rather than discrete events implies reviewing our caring in the light of expected change over time and adjusting our responses accordingly.

The general formulation of the care ethics guiding principles of practical moral reasoning is given here. In Chapter four, these are refined to apply specifically to sentencing decision-making and punishment delivery. These draw together the ideas expressed in the initial and ongoing review processes, described above, and echo the method of reasoning expounded earlier.

1. *The past-regarding, information-gathering pair*: when deciding how to respond to a need, we gather information about the personal and social context of the individual with the need. We learn about their narrative, and how this shapes the present, through:

   a) *Respectful Listening*: Care ethics expects the individual is best placed to understand their own needs (Sevenhuijsen 1998, p.60; Engster 2007, p.31).[40] Respectfully hearing partial narratives, learning relevant personal and relational context, as the other considers relevant.

   b) *Needs Identification*: We identify how their needs fit together holistically in a personal context, and consider the adequacy of present needs-meeting attempts. Using the positive limits of care, we consider who is best placed to meet this need, and what we can do to facilitate this.

2. *The future-regarding, response-designing pair*: these principles consider how needs might best be met first in isolation to provide a target for planning, and then holistically in the social context:

   a) *Creative Consideration*: What needs-meeting resources are open to the individual, and what other responsibilities do they have? In light of this, how does the individual prefer to be helped? This principle helps the care-receiver describe their ideal preferred response. This principle includes care-givers' reflections on their competence; is this kind of caring within our competence?

   b) *Cumulative Fairness*: Initial review identifies a preferable response to these needs in the broader social context, and

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[40] Although I shall argue in Chapter 4, contra Sevenhuijsen an Engster, that while individuals experiences of their needs provide essential information, some individuals may need support in articulating needs, considering possible responses, and identifying preferences.

rebalances this according to cumulative considerations. This takes account of potential harms and the cumulative impact of previous prioritization losses. This principle provides an-all-things-considered response, and where there are shortfalls or conflicts, prioritizes needs according to the negative limits of care.

3. *Present-focused, harm-avoiding pair*: two present-focused principles, informed by past and future consideration:
   a) *Care Delivery*: The planned practical care delivery is provided, in a way that is conscious of avoiding, where possible, harm to others.
   b) *Response Analysis*: Keeping decisions under ongoing review, scrutinizing our actions for appropriateness.

In Chapter one I asked how far existing theory provided guidance for punishment decision-making and delivery, which

I. Allows conceptual space for practical caring work and identification of problematic, morally significant harms
II. Facilitates inclusive, non-objectifying treatment as equals qua human beings for offenders

In this chapter we have seen that care ethics has the potential to offer guidance for decision-making through the practical moral reasoning method offered by the perspective of care. That caring work deals regularly with conflict, and manages the tension between unacceptable and unavoidable harm, demonstrates that care ethics is able to recognize non-trivial harms, and caring practices. And in its richer, contextual understanding of persons, care ethics also offers a better informed opportunity to include others as equals and avoid exclusion and silencing. This shows that care ethics *may* offer one alternative means of conceptualizing punishment practices. How these can be applied as normative guidance for

punishment decision-making and delivery will be discussed in Chapter four. The next chapter examines the presence of care within punishment, strengthening the argument for *why* we might take a care perspective in relation to punishment.

Chapter Three

Caring practices in contemporary punishment delivery practices

Chapter one considered existing penal theory and the guidance available to sentencers and practitioners for punishment decision-making and delivery. I suggested that caring practices may be present within existing punishment delivery practices, but argued these are obscured in penal philosophy by the harm-centred conceptualizations of punishment, upon which existing theory is built. Chapter two provided us with the conceptual anatomy of care ethics, which will be employed here to identify these caring practices as present in, and essential for, punishment delivery practices. I begin with a brief note on penal history, tracking the development of caring themes in policy and practice. I note and evidence some of the unintended harms of existing penal practices, which may be morally significant, yet to which we are desensitized. I then review of imprisonment practices, as central to our penal thought, community punishment and lastly restorative justice, the niche practices where caring is clearest.

Penal history

The approach advanced in this thesis is intended to have a wider relevance than simply for common law jurisdictions. However, the criminal justice system with which I am most familiar is that of England & Wales.[41] Accordingly I draw many of my examples from that system. Here I sketch a little of the history of penal ideology and practice in England & Wales over roughly the last century, to understand the continuously evolving presence of care practices.

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[41] I worked in the criminal justice voluntary sector in England & Wales for two years, as a Resettlement Helpline Information Officer for Nacro, the crime reduction charity.

Garland's era of penal welfarism began in the 1890s. In 1895, the Gladstone Committee replaced the earlier prison regime philosophy ('Hard labour, hard fare, and hard bed') with improved prison conditions: better food, less solitary confinement and 'deterrence and rehabilitation' through 'training and treatment' (Hostettler 2009, p.244). It must however be noted that the standardized regime and solitary system Du Cane imposed on the prisons in England & Wales was a step forward from the unhygienic conditions in which prisoners had been held previously. Du Cane's regime was intended to reform offenders by facilitating reflection and repentance, following the 'Enlightenment penology of Cesare Beccaria and Jeremy Bentham', which had represented 'faith in scientific reason and the perfectibility of man' (Garland 2003, p.40). Useful industrial labour began to replace hard labour (Hostettler 2009, p.245). Outside the prison, the *Probation of Offenders Act 1907* gave statutory footing to police court missionaries, existing charitable offender support. The Act permitted courts in England & Wales to appoint probation officers to 'advise assist and befriend' released offenders (National Probation Directorate 2007, p.3).

An ad hoc probation report practice on offenders' backgrounds developed in the 1920s, as 'pleas for leniency' (McNeill et al. 2010, p.473). It became mandatory for courts to appoint probation officers under the *Criminal Justice Act 1925* (National Probation Directorate 2007, p.8). Probation reports developed through the 1930s, growing increasingly scientific in tone, fitting with the developing rehabilitative treatment ideology (Smith 1996, p.135). 1945 indicated another rise in rehabilitation ideology (that reformatory treatment can help offenders to stop offending), under conditions of social and economic optimism and trust in science and social work (Easton & Piper 2008, p.42). Probation services began providing prison aftercare and probation hostels were introduced under the *Criminal Justice Act 1948* (National Probation Directorate 2007, p.10). The same act abolished penal servitude, hard labour and flogging (Howard League for Penal Reform 2011).

In the mid-1950s prison officers were encouraged 'to become more involved in the lives of prisoners and to improve officer/inmate relationships' (Edwards & Hurley 2002, p.5). Probation reports received statutory footing in 1961 as 'Social Inquiry Reports' into offenders' backgrounds, which later became pre-sentence reports. These reports included a variety of information about offenders' 'school, family, neighbourhood, finance, health, attitudes and relationships within the family, offence, employment and previous convictions; family and immediate social environment' (Hardiker 1975, p.92). In 1963 the prison service was brought under the remit of the Home Office, with the stated purpose of 'training and treatment of convicted prisoners … to encourage and assist them to lead a good and useful life' (Flynn 1998, p.35), a long standing part of the prison rules. The 1950s and 1960s saw the height of penal welfarism (Garland 2003, p.34), with treatment practitioners given 'discretionary', 'unaccountable' powers, and who were viewed with social workers in a 'benign, apolitical light' (2003, p.36). These powers were eventually criticized as authoritarian (2003, p.182). The rehabilitative idea began to decline after the early 1960s, but social inquiry reports fitted the increasingly determinist ideology (Smith 1996, p.136). 1965 saw the death penalty abolished and suspended sentences introduced (Easton & Piper 2008, p.42), and in 1967 parole supervision by probation officers was introduced (National Probation Directorate 2007, p.11).

The *Criminal Justice Act 1972* introduced community service (National Probation Directorate 2007, p.6). Following the *Criminal Justice Act 1974*, probation officers began supervising community sentences and suspended sentences (National Probation Directorate 2007, p.12). But Martinson's influential 1974 paper concluded of rehabilitative attempts that 'nothing works' (1974), ushering in what Garland terms the politics of crime and control (Garland 2003, p.120). Rehabilitative optimism declined and in 1979 the May Committee investigating the prison service found that 'the rhetoric of treatment and training had had its day and should be replaced', with 'positive custody', including work, education and exercise, to keep prisoners occupied and healthy (Flynn 1998, p.37).

The 1980s saw a rising New Right focus on individual responsibility under less favourable economic conditions (Easton & Piper 2008, p.43), gradually replacing collectivist and welfarist approaches. Whereas criminal justice agencies had previously been given responsibilities, powers and budgets, they were constrained by centralized targets. Previous ambitions to attempt rehabilitation were lowered to merely punishing offenders according to pre-determined scales, diminishing the social, crime-reduction purpose of sentencing (Garland 2003, pp.120–1). A state-led rise in victim-focused strategies and victim inclusion during the 1980s followed the demise of the rehabilitative ideal (Armstrong & McAra 2006, pp.9–10). Meanwhile, the probation service pioneered treatment for intravenous drug users as a means to reduce offending (National Probation Directorate 2007, p.3).

The Woolf Report, following high profile prison riots of 1990, proposed drastic reforms to the prison service intended to provide a sense of fairness to prisoners, leading to the *Custody Care and Justice* (1991) white paper. While not all proposals were adopted, one important change was the introduction of personal officers; prison officers with responsibility for individual prisoner's wellbeing (Easton & Piper 2008, p.299). Following the *Criminal Justice Act 1991* pre-sentence reports, replaced social inquiry reports; compiled by probation officers to 'assist' sentencers in 'determining the most suitable method of dealing with [offenders]' (Criminal Justice Act 2003, s158 1a). 1992 saw the first privately-run prison in England & Wales, and today there are 11 private sector prisons (HMPS 2011). In 1993, Home Secretary Michael Howard famously asserted 'Prison Works'. The prison service became an agency of the government headed by Director General Derek Lewis, with private commercial experience, but no previous experience of prisons (Flynn 1998, p.41). This tunes with Garland's culture of control, and Candace Kruttschnitt's later observation that in the UK 'the notion of treating prisoners humanely has been subsumed into an actuarial form of managerialism' (2005, p.166).

Psychology-led offending behaviour programmes were introduced in prisons and community punishment in the early 1990s (Palmer & Hollin 2006, p.6). High quality programmes are essential for success, but require adequate resources, and there

are problems for ensuring standardization across many individual practitioners (2006, p.10). Quality accreditation for offending behaviour programmes has been in place in varying formats since 1996 (2006, p.11), and is currently provided by the Correctional Services Accreditation Panel (Ministry of Justice 2012a). Programmes currently available range from community-based drink-impaired driver programmes, to sex offender treatment programmes (available both within prisons and the community) and include programmes around managing anger, tackling addiction problems, forming healthy relationships and boosting thinking skills. Some programmes have been specifically developed for women (HMPS 2012b). Home Detention Curfew or electronic tagging was established in 1999, often controversially provided by private sector contractors (BBC 2013).

In 2000 national probation service objectives were introduced under the *Criminal Justice and Court Services Act*, and the previously regionally organized probation service became the National Probation Service under the National Probation Directorate in 2001 (National Probation Directorate 2007, p.14). Drug Treatment and testing orders were introduced under the Act, which also renamed orders: probation orders became community rehabilitation orders, and community service orders became community punishment orders (2007, p.14). The *Criminal Justice Act* 2003 redefined the purposes of probation supervised community sentences as 'punishment of offenders; crime reduction; the reform and rehabilitation of offenders; the protection of the public and … reparation by offenders' (Justice Committee 2011, p.15).

2005 saw community service renamed 'unpaid work', and branded 'community payback'. Community orders replaced community rehabilitation and community punishment orders. These and newly introduced suspended sentence orders allowed sentencers to combine flexibly a set of 'requirements' under the *Criminal Justice Act* 2003, allowing sentencer's to take account of offenders' contextual information and tailor sentences to the circumstances of individuals' (Mair 2011, p.225). The stronger community punishments were intended to offer an alternative to prison sentences of less than 12 months (Mair & Mills 2009, p.46). The National

Offender Management Service was introduced in 2004, and in 2008, the prison and probation services were merged under the National Offender Management service (Howard League for Penal Reform 2008, p.7). Moves have been made to open probation services to commercial tendering, despite concerns raised by the House of Commons Justice Committee (2011, p.37). This was justified by claiming charitable and private sector organizations, with the skills and experiences to deliver services more efficiently, would be able to compete for secure funding for their work (Ministry of Justice 2013, pp.16–7).

Penal reality

What we see here is an explicit move away from actively harmful practices, such as the early replacement of prison hard labour with 'productive' labour, the 1948 ending of flogging and the 1965 abolition of the death penalty.[42] This coincides with a rise in more supportive practices, as Garland's penal welfarism recognizes: from early nineteenth-century concerns for hygiene and safety, the later introduction of training and treatment, efforts to improve relationships between prisoners and officers in the 1950s and concern for prisoners' sense of 'fairness' in the 1990 Woolf Report (despite this being well into Garland's era of crime and control). Harm avoidance is integral to Engster's definition of care, relationship maintenance for Tronto's definition, and fairness important for interactional justice and treatment as equals. Even the work, education and exercise proposed by the 1979 May committee displays concerns to develop individuals' capabilities, and meet basic biological needs for health. Penal welfarism can be seen in the 1907 and 1925 provision of probation support to offenders not sent to prison, the 1948 extension of support to ex-prisoners, and probation supervision of prisoners released on license after 1967. The era of crime and control, beginning for Garland in 1970 (2003, p.168), is visible in the 1974 introduction of probation supervision for suspended prison sentence offenders, and the 1979 replacement of 'treatment and

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[42] These measures continue the trend that Foucault identifies, moving even further away from the physical punishment of the body (1979, p.11), despite England lagging behind in the abolition of public executions (1979, p.14), towards controlling the offender through the surveillance of prison staff and practitioners. The last public execution in England & Wales was in 1868, prior to but moving towards Garland's penal welfarism, beginning in the 1890s. This marked the end of punishment as a public spectacle, applied to the body of the offender.

training' within prisons with 'positive custody'. Garland is right to emphasize the move away from penal welfarism and rehabilitative optimism and into a climate of risk management and control. Yet elements of caring work persist despite changes practice and policy.

I have begun to highlight the presence of care in penal practices, which I will argue are necessary if obscured in current penal practice. I have thus far presupposed that penal practices often cause morally significant harms, unnoticed by practitioners, and unintended by the court. Before identifying the presence of care, I must first indicate the kinds of harm which raise concerns. Here I present two typical but fictional vignettes based on my own experience and supported by social research, and the harms presented elsewhere in the literature. It must be noted that, despite these examples, most prisoners are men. The minority of prisoners who are women[43] suffer further harms since the system is designed largely by and for men (Kruttschnitt 2005, p.146).

Jane is sentenced to seven months in prison. The separation from her family damages Jane's mental health. In England & Wales, women prisoners are held on average 55 miles away from home. Women in custody are five times more likely to have 'very poor physical, psychological, and social health' (PRT 2012, p.31). In 2010, '72% of male and 70% of female sentenced prisoners suffer[ed] from two or more mental health disorders' (PRT 2010, p.7). *Jane's sentence means she no longer qualifies for housing benefit* (Shelter 2013), *losing her tenancy because she cannot pay the rent. The landlord clears and re-lets the property.* 'Around a third of prisoners lose their housing on imprisonment' (Wilson 2012, p.10). *Because Jane cannot work for the period she is in prison, Jane loses her part time job. On release, Jane is homeless, unemployed and has lost most of her possessions, including personal documents which would help prove her identity (passport, utility statements). This and her lack of address makes it harder for Jane to apply for benefits, housing, register with a doctor or open a bank account. Jane misuses*

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[43] Approximately 3,853 prisoners in England & Wales were women, in a total prison population of 83,836 on 30 June 2013 (Berman & Dar 2013, pp.8– 9).

alcohol as a coping mechanism. '75% of all prisoners have a dual diagnosis (mental health problems combined with alcohol or drug misuse)' (PRT 2011, p.54). *Jane's lifestyle becomes more chaotic, making her more vulnerable. The intention of the court was not to make Jane homeless and destitute, to harm Jane's mental health, to make her vulnerable or to put barriers in the way of rebuilding a normal life.* Only 36% of people leaving prison go into education training or employment (PRT 2012, p.8). 'Half of all prisoners do not have the skills required by 96% of jobs and only one in five are able to complete a job application form' (PRT 2012, p.62). Many past offenders face financial exclusion (PRT 2012, p.64).

Jade is convicted of benefit fraud. The court accepts that she was pressured to offend by an abusive ex-partner and orders a community punishment arranged around her job. Jade's employer knows about the conviction, but is pleased with her work. However, local people hear about the financial and dishonest nature of her conviction and start to avoid the small shop where she works. Jade's employer reluctantly dismisses her to try to save the business. Jade struggles to find alternative work and to make ends meet. 'More than 60% of employers deliberately exclude [people with convictions] when recruiting' (PRT 2012, p.60). *The court did not intend Jade to lose her job.*

> I was lucky enough to be on a wing for vulnerable prisoners. There wasn't much fighting but there were plenty of … suicide attempts … the boys on my wing hurt themselves, not other people…. I felt divorced from myself in prison. I saw a boy who'd done stupid things and found himself in a dark place…. I knew who I wanted to be: someone with qualifications, who didn't smoke, who ate better, who had better friends – ones that didn't turn up in the middle of the night with decent drugs and bad ideas – and someone who had managed to make that seemingly magical transition from male to female. But I doubted I could become that person. My self-esteem was crushed, back then, crouching down at the bottom of society
> (Lees 2013, on life as a transgender inmate).

We were dismayed that the woman [prisoner] who had already been in the segregation unit for three years in 2010 was still there in 2013. Her cell was unkempt and squalid and she seldom left it … she still had too little to occupy her. Her prolonged location on the segregation unit amounted to cruel, inhumane and degrading treatment – and we use these words advisedly…. Much of this was outside the prison's direct control and required a national strategy for meeting the needs of these very complex women – as exists in the male estate
(HM Chief Inspector of Prisons 2013, p.5, HMP Bronzefield Unannounced Inspection Report).

No amount of resources, however great, can enhance a convicted citizen's chances for productive re-entry to a democratic society when that citizen has been confined in an institution too large to provide individual services, too geographically remote to provide vital life contacts, and too regimented to foster self-esteem. … If you were required to live in a cell with few facilities, little privacy, limited contact with other persons significant to you, limited access to employment, and a high degree of authoritarian regimentation, how might you fare upon re-entry into the broader and more competitive society, there to be greeted with the stigma of having been "away"
(Wisconsin Council on Criminal Justice 1972, p.1)?

Being released from prison proved more difficult for me than going in. Everything I'd lived for over the past 30 years had been taken away … prison was all that I knew. … I had power in there. I had a reputation, I was a somebody. And then … I'm on the street being treated like some arsehole. … I was full of heroin before nightfall, desperately trying to figure out a way of getting myself back into jail
(Collins 1999, p.98).

It used to be said … that offenders who have completed their sentence have paid their debt to society and are entitled to the same considerations and opportunities as anyone else … th[is] is no longer realistic, if it ever was. Convicted offenders carry the stigma of conviction with them … they are increasingly the object of suspicion and sometimes surveillance. Part of their dignity and status as a citizen is withdrawn from them
(Faulkner 2001, p.150).

The stories above show some of the 'collateral damage' encountered by offenders: self-harm and crushed confidence, addiction and institutionalization problems,

social skills adapted to meet the needs of a prison environment, not everyday life in the community. The above examples focus mainly on the experiences of prisoners, but the stigmatization and social exclusion faced by prisoners on release is, to a degree, encountered by all those with a criminal record. These harms in particular can extend long after a sentence has finished, and are not intended by the courts. These harms will give rise to greater needs in some individuals than others depending on their personal context, the resources upon which individuals are able to draw to overcome the effects of these harms. For example, an individual able to seek employment with family, or become self-employed, is less affected by the prejudice of employers against people with a criminal record. Where individuals have fewer such resources, these harms will have a greater impact, for example, on those who are already on the weaker side of power inequalities, on the lower side of socially constructed hierarchies, and with fewer socially acceptable conventional options (Heidensohn 1986, p.290). This is significant since the 2005 House of Commons Home Affairs Committee Report on the rehabilitation of prisoners notes that offenders often come from 'disadvantaged backgrounds' (2005, p.15).

Following Walker (2006, p.154), discussing restorative justice, I do not mean to claim that what is 'really' happening when prison officers maintain order is wholly described by care ethics. Rather, I mean to highlight that what appears to be important to maintaining order within a prison (supporting prisoners, maintaining relationships, communication and sensitivity to context), or delivering a community punishment effectively, *may* be understood as care. Insofar as these activities can be understood as care, they can be strengthened and potentially improved by recognizing them as caring practices and applying caring values. Indeed, stable and effective penal regimes are impossible without adequate caring practices and attitudes.

Caring practices in imprisonment

Prison is central to popular, political and academic theoretical penal thought (Worrall & Hoy 2005, p.xiii), and therefore a crucial example of punishment delivery practices which include obscured caring practices. Worrall & Hoy argue that we lack

the language to consider punishment without reference to prison (2005, p.xv), contributing to perceptions that non-custodial sentences cannot be real punishment (McIvor 1994, p.175). Imprisonment is the practice of curtailing a person's liberty for the purposes of lawful criminal punishment. While caring concerns, such as the 1970s focus on rehabilitation have declined in policy significance, and while many harms result from imprisonment, we do not have to look too far into the ideals and implementation of imprisonment to find that caring aims and practical examples of care-giving remain.

Ideals and care ethics values

Discussing Californian prisons, Irwin & Owen observe that 'the official purposes of imprisonment do not include harming prisoners' (2005, p.94). The England & Wales Prison Service states its objectives as:

> To protect the public and provide what commissioners want to purchase by:
> - Holding prisoners securely
> - Reducing the risk of prisoners re-offending
> - Providing safe and well-ordered establishments in which we treat prisoners humanely, decently and lawfully.
>
> (HMPS 2012a)

Kruttschnitt observes that the 'emphasis on treating prisoners with humanity may be more than just rhetoric' (2005, p.150) in England & Wales. While management may be moving in an actuarial management direction (2005, p.166), she argues prison officers stress the importance of experience and intuition (2005, p.167). In England & Wales 'the purpose of the training and treatment of convicted prisoners shall be to encourage and assist them to lead a good and useful life' (The Prison Rules 1999 SI 1999/728, r3). 'Punishment' or something akin to 'harsh treatment' are noticeably absent in the objectives and purpose of prison. This echoes the claim

of Sir Alexander Patterson, a prison commissioner from 1922-45, that offenders 'are sent to prison as a punishment, not for punishment' (Flynn 1998, p.33).

The stated purpose implies supportive aims, reflected in the standard provision of education and training, and rehabilitative programmes. Engster lists development of basic capabilities as one end which caring practices should pursue (2007, p.76). Some training (especially vocational) is specific, other courses such as basic remedial education reflect Nussbaum's basic capabilities (2000, pp.78–80), essential for any good life (2000, p.76). Prison rules direct 'special attention' to the maintenance of relationships between prisoners and their families, when in the interests of both parties (The Prison Rules 1999 SI 1999/728, r4). Relationships are central to the care ethics understanding and expectation of interdependent individuals.

Prison Officer job description

In early 2009, the HM Prison Service Prison Officer job description listed duties that might be described as 'care work': 'taking care of prisoners and their property... rights and dignity; Providing appropriate care and support for prisoners at risk' (HM Prison Service 2009). This has been revised and the word 'care' omitted, but officers are still required to 'respect ... Prisoners, their property, rights and dignity', to encourage prisoners 'to deal with personal challenges' and ensure 'bullying, assaults, substance misuse and self harm' are identified and dealt with 'effectively' (HMPS 2013). Tronto distinguishes between ends of caring and protection in police work: while crime prevention activities are supportive and *address needs* for residents to feel safe at home, protection activities are not caring because they *presuppose* the harmful intentions of a third party, rather than responding to need (1993, pp.104–5). Prison officers attempt to protect prisoners from assault, and protect the public. Yet the work supporting and encouraging prisoners may also include work which in Engster's terms helps individuals to meet basic needs.

Liebling, Price & Elliott's ethnographic study of prison officers describes their work as 'establishing order ... retaining or restoring relationships and ... keeping

communication flowing' (1999, p.82). This focus on maintaining relationships and communicating is indicative of care practices, and gathering information through respectful and responsive interaction helps to facilitate other goals. Communication is fundamental to the awareness and responsivity values Tronto identifies as the first and fourth ethical elements of caring work, attentiveness to others' needs, and responsiveness to their feedback on caring. We have also seen that it is a part of the prison officer's role to take responsibility, Tronto's third ethical element, for meeting at least some of prisoners' needs, particularly in their roles as personal officers.

Alison Liebling later argued that 'staff–prisoner relationships matter' (Liebling 2000, p.337; citing Home Office 1984), noting that on a prison wing in her study where the relationships between staff and prisoners was good, fewer formal controls were used and 'staff used their verbal skills' to achieve compliance. Although Liebling identifies this as a complex finding requiring additional research, she identifies a contrast with another 'wing with poor staff–prisoner relationships and a high resort to formal sanctions [where] a major disturbance followed' (Liebling 2000, p.337). Liebling observes that staff recognized as 'role models' by peers 'were described as having ... sensitivity to the effects of their power; and a sensitivity to individuals and contexts' (2000, p.346). Care relationships are necessarily imbalances of power: care-receivers *depend* on the support of care-givers. Sensitivity to one's power in such context is important for appropriate caring work, demonstrating the reflexive practice Gregory identifies in caring as 'self-awareness of our impact upon the situation' (2011, p.66). Power imbalances make the open engagement attitude and responsiveness of the care-giver more important for both understanding needs and establishing trust between care-giver and care-receiver. The importance of relationships and sensitivity to individuals and context are both indicative of care practices, as we saw in Chapter two. Care-givers are necessarily in a position of power over care-receivers, and receiving the care-receiver's response to our caring (Tronto's fourth practical phase), helps to make us aware of the impact and adequacy of our actions.

Implementation and caring practice

Prison life causes prisoners to lack opportunities to take responsibility for some personal needs: preparing food or washing clothes. The prison service meets prisoners' basic food and laundry needs through industrial-scale provision. This could be interpreted as caring work, but not necessarily with the appropriate attitude. Mass provision inhibits the openness and engagement with the cared-for person, which helps care-givers to better understand needs and provide more responsive, better quality care. However it may be argued that, far from being care, this is a pragmatic, logistical response to basic human needs.

Basic needs-meeting is not the only care present within prisons. Following the 1991 Woolf Report, each prisoner is allocated a specific Personal Officer (Easton & Piper 2008, p.299). Personal officers provide a first point of contact for prisoners, and are 'expected to help with anything from sentence planning to food requirements to bereavements' (Justice Committee 2009, p.50). Where personal officers cannot themselves help directly, they may signpost prisoners on to other services. Interacting with prisoners respectfully and attending to prisoners' needs while recognizing personal competence limits displays Tronto's practical care-giving phase (1993, p.107), and competence value (1993, p.133). This is an idealist description of how this practice is expected to function. In practice, mistakes will be made, time and resources limited, and personal officers may not always live up to these expectations, reflecting the negative and operational limits of care. Yet this is part of prison officers' duties (HMPS 2013).

Other prison staff help prisoners with personal and emotional problems. Chaplaincy workers are available to all prisoners to discuss personal problems. Education, from basic literacy to vocational training and Open University programmes, is (theoretically) available (GOV.UK 2013, pt.6). Prisons in England & Wales provide the same healthcare as is provided in the wider community. In theory at least, prisoners can access support for addiction problems, mental health issues, and disability or learning difficulties (2013, pt.3). The efforts of staff are frustrated by insufficient resources, the impact of overcrowding and short-notice transfer of

prisoners, as well as the general difficulties of the prison environment.[44] HM Chief Inspector of Prisons described 'care for common mental health problems' as 'underdeveloped', and 'uniformed officers' training in mental health as 'inadequate'; while 'patients with complex mental health needs had good access to mental health staff' (HM Inspectorate of Prisons 2012, p.7). The *National Association of Teachers in Further and Higher Education* and Association of College Lecturers research found that only one third of prison education managers regularly receive records following transfers (PRT 2011, p.64). The UK Drugs Policy Commission has observed 'prison drug services frequently fall short of even minimum standards' (2008, p.14). Yet these supportive services do work for some offenders. A study found 21% of offenders reported no qualifications on entering prison, yet 70% of this group said they had gained a qualification in prison (PRT 2012, p.63). '[D]rug treatment programmes in prison, especially psycho-social programmes and therapeutic communities, were associated with a 26% reduction in criminal behaviour' (PRT 2012, p.58).

Prison regimes include further activities which could be understood as care. In addition to education, training and support for substance misuse, rehabilitative psychology-led offending behaviour programmes (Palmer & Hollin 2006, p.6) can form part of prisoners' individual sentence plans, ranging from sex offender treatment programmes to anger management and cognitive skills (HMPS 2012b). Other supportive activities include prison job clubs, providing advice on job seeking and CV writing, and prison resettlement units offer support in finding accommodation and services for release. Unfortunately, demand often outstrips supply (PRT 2012, p.60). This support can, if prisoners are aware, be supplemented by contacting external organizations. Various voluntary sector organizations attempt to support offenders on release from prison with finding accommodation and work (eg, Nacro, St Giles Trust, Apex Trust).

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[44] Prisoners must be escorted to medical appointments, education classes, work placements etc. Staff shortages, perhaps due to sickness or disturbances elsewhere in the prison, prevent prisoners' attendance.

Peer-to-peer prisoner support is particularly significant. The prison service runs an 'insiders' mentoring programme to help new prisoners learn the rules of each establishment (HM Inspectorate of Prisons 2012, p.26). Peer mentoring is arranged through the prison service and external organizations for prisoners addressing substance misuse issues (HM Inspectorate of Prisons 2012, p.60). In addition to prison-provided literacy programmes, the Shannon Trust trains prisoner volunteers with good literacy to provide one-to-one mentoring to prisoners with low literacy (Shannon Trust 2010). The St Giles Trust train prisoners to offer advice and support to others on securing accommodation for release (St Giles Trust n.d.). The Samaritans train and support prisoner volunteers to listen confidentially to others experiencing distress, despair or contemplating suicide, using the same guidelines as for their external volunteers. There are over 1,200 Listeners across prisons in England & Wales, who organize themselves so that there is always someone available to listen, usually in private, to a prisoner in distress (Samaritans 2013). Peer support helps to meet the needs of prisoners receiving one-to-one, face-to-face support with issues they could not address alone: caring according to Bubeck's strict definition (Bubeck 1995, p.129). These programmes also afford mentors the opportunity to provide care. If, as Noddings argues, caring is a learned behaviour (Noddings 2002, pp.24–6), this offers offenders an opportunity for prisoners to develop care-giving skills, perhaps for the first time (Jablecki 2005, p.32).

Tronto's caring ethical elements (awareness, responsibility, competence and responsivity) and practical phases (caring-about, caring-for, care-giving and care-receiving) can be seen in the values and practices of imprisonment. By providing laundry, cooking and cleaning, prison authorities take responsibility for prisoners' basic needs. To encourage and assist offenders requires responsive interaction with offenders, and implies gaining some awareness of prisoners needs. Competence in providing caring might be found in training staff, in prison service trained peer mentors, and in the recruitment of specialist staff, (teachers, drugs workers, chaplains, psychologists etc). Responsivity, as with other forms of punishment is harder to demonstrate in imprisonment, but might be found in the actions of peer

care-givers or personal officers, responding to the particular need or concern of their care-receiver.

Tronto's phases of practical caring can also be identified in prison life. Her first phase, 'caring-about', making efforts to become aware of and understand needs, can be seen in initial screening for mental health and addiction problems and 'first night' procedures paying extra attention to the needs of new prisoners. Tronto's second phase, 'caring-for', or making arrangements for care might be found in the assignment of personal officers and their actions, interaction with prisoners on a day-to-day basis, and also in facilitating mentoring schemes to allow new prisoners to get to know the institution. The direct 'care-giving' of phase three can be found in many of the training and rehabilitative programmes from education offending behaviour programmes. Care-giving and 'care-receiving', Tronto's final phase of practical caring, can be identified in peer support.

The unpaid practical caring work of prisoner volunteers helps contribute to the purpose of prison, and to maintaining order. Shannon Trust mentors contribute towards raising literacy standards, 'enabling' prisoners' chances of a 'good and useful life'. Drug recovery peer mentors contribute to prison drug treatment services. Prison Listeners help to reduce suicide risks. Prisoners receiving support for drug problems, emotional problems, giving or receiving advice about housing, and helping fellow inmates to read are not causing disturbances or threatening the safety of other prisoners and staff. Prisoners receiving such care are prisoners whose capabilities to address their own needs are gradually strengthened, helping to equip them for a 'good and useful' life.

Liebling & Arnold note Pilling's 1992 observation that respect for prisoners is necessary for both healthy relationships and prison order (2004, p.207). Engster and Tronto highlight the importance of respect for caring practices. Providing appropriate respect to prisoners is important for treatment as equals and for interactional justice. Butler & Drake distinguish respect-as-consideration, and respect-as-esteem (2007, p.115), which Hulley et al. define as 'recogniz[ing] human

rights', and non-degrading treatment respectively (2012, p.5). Prisoners' sense of self-worth is influenced by their treatment by officers, which is linked with Tyler's work on interpersonal treatment as a component of interactional justice (Butler & Drake 2007, p.122; Hulley et al. 2012, p.5, p.6, p.17). Liebling argues respect and fairness are correlated with order and wellbeing, whereas 'poor treatment leads to negative emotions … distressing and damaging for individuals' (2011, p.534).

Liebling recently returned to HMP Whitemoor to conduct, with colleagues, a further study of investigating prisoner–staff relationships following her earlier study (Liebling et al. 1999). The new report details that staff feel afraid (Straub et al. 2011, p.177), unsupported by management (2011, pp.179–80), and unsure of how to build and manage relationships with a changed cohort of prisoners (2011, p.176). As such, staff 'had retreated into the basic custodial aspects of their role' (2011, p.180). Trust and information exchange with prisoners had suffered (2011, p.160). Many offenders at Whitemoor are now serving longer or indefinite sentences, and include a sizeable Muslim minority. In combination with the reduction in staff confidence and a greater threat and fear of violence (2011, p.102), Liebling reports 'prisoners feeling more trapped, vulnerable and hopeless than they were' (Liebling 2011, p.536). Liebling candidly observes '[t]his research has troubled me more than any other study … because of the pain and distress experienced and the contrast with the same prison 12 years earlier' (2011, p.532).

These studies highlight the importance of respectful, responsive communication within a prison and the dangers that can arise when this is missing: basic needs for bodily security and freedom from fear are not met. The obscured caring practices, which do occur in prisons, may be stunted and poor examples of caring. Yet these are necessary to meet the prison service aims of holding offenders safely and securely, encouraging a good and useful life among prisoners, and providing basic respect for the human dignity of offenders.

Caring practices in community punishments

Ideals and care ethics values

The first 'court missionaries' of 1876 worked to support offenders with alcohol problems and in finding work (National Probation Directorate 2007, p.4). Treatment for substance misuse and supporting offenders in finding work is still part of community punishments. Probation officers were trained in a social work context (Nash 2011, p.473) until a separate Probation Diploma was introduced in 1997, after 'the Government decided that social work was an inappropriate understanding … of the service' (Justice Committee 2011, p.13). Gregory identifies this transition as away from a 'social work' understanding of probation and towards what Cavadino et al's describe as 'a 'punitive managerialist' mode' (Gregory 2011, p.61; see also Cavadino et al. 1999, p.54; and Gregory 2010) of operation. The *Criminal Justice and Court Services Act 2000* replaced 'advise, assist and befriend' with ideals of enforcement, rehabilitation and public protection (Canton 2012, p.6). The role of probation officers has changed, particularly since the 2001 national structuring and 2008 merger with the prison service in the National Offender Management Service (Howard League for Penal Reform 2008, p.7). Probation officers as offender managers have been obliged to 'become punishment-orientated, law-enforcing officers' (Nash 2011, pp.476–7). Yet a House of Commons Justice Committee Report of 2011 found that 'staff continue to emphasize the original values of probation' (Justice Committee 2011, p.13).

Advising, assisting and befriending are sympathetic to caring values. These values imply some level of open engagement with recipients, particularly with supportive, enabling attitudes. The values of care ethics, as Tronto's ethical elements of caring will help us identify, can be found in the ideals of probation. Tronto's first and second ethical elements were awareness and responsibility (1993, pp.127–33). To either 'advise, assist and befriend' or 'rehabilitate' offenders, officers must have an awareness of offenders' personal challenges. This must in part at least be gained through respectful and responsive interactions with offenders. Officers may also play a role in supporting offenders in taking responsibility for their offences. This

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implies supportive, responsive interactions with offenders. Probation officers must take responsibility, perhaps shared with colleagues, such as psychologists and addiction workers, for helping provide support to the offender. Tronto's third and fourth ethical elements were competence and responsiveness (1993, pp.133–6). Probation services aim to provide competent support for offenders through the training of officers and appointment of appropriately skilled staff (addiction workers, psychologists etc). Tronto's final element is least clear in mainstream punishment delivery practices, yet we may find responsiveness in those cases where officers make time to hear offenders and to respond to their concerns.

The quality of delivery of these aims varies in practice between officers, and is influenced by factors such as time and resources. While the practices of probation workers engaged in community punishment has changed, these still reflect caring practices. Even when acting as risk managers, this contributes to an end of reducing avoidable harm, following Engster's aims of care (2007, p.76). There are then caring aims integrated into the aims of community punishment delivery practices, and caring practices which facilitate the delivery of punishment. To the extent that these caring values are present, the aims of community punishment delivery practices are better delivered where this caring is done well.

Implementation and caring practice

There are 35 Probation Trusts in England & Wales, funded by, and accountable to, the National Offender Management Service. The probation service produces pre-sentence reports to assist sentencers. Gregory, a probation officer turned scholar, argues that under the pre-1997 social work understanding of probation, 'an ethic of care underpinned practice' (Gregory 2011, p.63). Drawing on her 2003 study of officers trained under the social work model, she argues the moral reasoning of care was employed by officers when preparing pre-sentence reports (2011, p.63). We will see in Chapter 4 that more recent, risk assessment based pre-sentence reports are criticised. The service supervises offenders subject to community and suspended sentences, and prisoners released on licence; and provides approved accommodation and running offending behaviour programmes.

Community orders, which replaced and consolidated previous orders, and Suspended Sentence Orders (SSOs below) (providing support and programmes for offenders with suspended prison sentences, expecting to reduce further offences and subsequent immediate custody), were introduced in 2005. While these orders resemble those they replaced, breach is more serious: breached suspended sentence orders are expected to result in immediate custody, and courts can no longer respond to community order breaches by taking no action (Mair et al. 2007, p.31). Orders can include an individually tailored selection from 12 potential requirements.

1. Unpaid work (40–300 hours)

2. Supervision (up to 36 months; 24 months maximum for SSO)

3. Accredited programme (length to be expressed as the number of sessions; must be combined with a supervision requirement)

4. Drug rehabilitation (6–36 months; 24 months maximum for SSO; offender's consent is required)

5. Alcohol treatment (6–36 months; 24 months maximum for SSO; offender's consent is required)

6. Mental health treatment (up to 36 months; 24 months maximum for SSO; offender's consent is required)

7. Residence (up to 36 months; 24 months maximum for SSO)

8. Specified activity (up to 60 days) [may include restorative justice]

9. Prohibited activity (up to 36 months; 24 months maximum for SSO)

10. Exclusion (up to 24 months)

11. Curfew (up to 6 months and for between 2–12 hours in any one day...)

12. Attendance centre (12–36 hours with a maximum of 3 hours per attendance)

(2007, p.11)

The first eight requirements are intended as 'rehabilitative' (2007, p.14). Only stand-alone curfew orders do not require probation contact (2007, p.20). Most community orders include some contact with probation officers. This contact may be of varying duration and quality, but it provides some opportunity for officers to engage with offenders, important for building trust and developing relationships. There is also some evidence that probation officers do endeavour to build relationships with offenders in order to help manage them (HM Inspectorate of Probation 2013, p.17, p.49), a factor we saw earlier in the work of prison officers. Supervision by a probation officer, does not guarantee needs-meeting practical caring work with respect for offenders. But it provides an opportunity for responsive conditions for caring to develop.

Where probation officers offer meaningful opportunities for dialogue, officers are in a position to find out about needs, and to make arrangements towards addressing these needs in discussion with the offender. Arrangements for needs-meeting might be seen in the variety of requirements, recognizing a diversity of needs and providing a means of meeting these, and in the sentencers selection of appropriate measures. This reflects Tronto's first two practical phases of care ethics, caring-about (noticing needs) and caring-for (making arrangements). Where probation officers or other specialist staff deliver programmes, or interact with offenders to deliver appropriate support, this reflects Tronto's third phase of practical care-giving. In cases where care is delivered well, and the officer is able to make time to hear offenders' concerns and views on the support they receive, this reflects Tronto's final care-receiving phase of practical caring.

Care can be delivered in better and worse ways. In Chapter two we saw that caring has negative and operational limits. Yet better caring was argued to be provided when care-givers had an appropriate attitude, such as the 'advise, assist, befriend'

attitude held by some probation officers. This does not mean that all community punishment interactions are caring, or even deliver good care, but that there is the *potential* for caring work. Rehabilitative programmes, in the community or prison, work best when tailored to the individual needs of the offender, enabling the supportive elements to be delivered as good care. The aims of caring overlap with some of the aims of community punishment. Yet this work is not identified as caring: it is centrally defined as the delivery of rehabilitative services. Some work carried out by probation officers may represent practical caring, and to the extent that this understanding is helpful, the caring elements can be improved by recognizing them as care, and applying caring values and principles.

Rehabilitative programmes may help meet basic needs, following Engster's care aims. For example, health-related needs might be addressed through substance misuse and mental health programmes. Offending behaviour programmes, ranging from anger management to community treatment programmes for sex offenders might also be said to help the individual offender to build basic capabilities for functioning well in the social environment. While these may also be described following Hampton's definition of 'rehabilitation', rendering offenders productive rather than parasitical (1998, p.39), this is achieved by benefitting the offender. In Scotland, where probation officers are still considered social workers, Robinson & McNeill found that officers understand themselves as benefiting the community through supporting individual offenders, and helping to address offender's needs:

> It's the [offender] who needs help at that point in time [who is most important to me].... I know in the long run it is helping the bigger, the wider community
> (Scottish Criminal Justice Social Worker interview comment, Robinson & McNeill 2004, p.290).

> You are assisting them not only in their own right but also to reduce the likelihood of them offending again. But arguably that's in their interest as well ... assisting the individual does assist society
> (Scottish Criminal Justice Social Worker interview comment, Robinson & McNeill 2004, p.291).

Caring perspectives are able to deal with conflict, and can offer us resources to help prioritize conflicting needs according to the particular context. Yet the opposite is also true: sometimes, needs converge, and by assisting one individual we can assist many others.

Unpaid work requirements are noted as being potentially rehabilitative (Mair et al. 2007, p.20). This has not always been intended, but this perspective has history. Writing about Scottish unpaid work in 1994, McIvor suggests that while not 'an expressly rehabilitative sanction, there is nonetheless a widespread belief even among sentencers that it may in some instances be rehabilitative in effect' (1994, p.176). She explains that this belief is held on the grounds that unpaid work may bring offenders into contact with others, with greater needs than themselves, providing fresh insights from a broader perspective on their own lives, problems and offending behaviour. Later evidence seemed to suggest that contact with beneficiaries helped offenders to broaden their perspective in this way (McIvor 1998, pp.55–6). This opportunity for offenders to understand how their work helps others is reflected in an offender's comment about an unpaid work requirement made through the North Liverpool Community Justice Centre in the late 2000s:

> We were on this estate painting these fences and these people said to the probation guy that some of the fences weren't any good … and you thought why do they care about it but once it was done good they thanked us and you could see it was useful for them.
> (offender respondent 55 Mair & Millings 2011, p.78).

Similar feelings were echoed by the Residents' Association of The Westminster Estate in Kirkdale, North Liverpool, one of the estates benefiting from offenders' unpaid work. Residents' Association Chairman, Harry Mooney, observed that the unpaid work had demonstrated to residents that the offenders were not as bad as media portrayals, and were just ordinary people. Elaine Doolan, Residents' Association Secretary, reported that residents were initially apprehensive, until they met and developed relationships with the offenders labouring on their estate.

These relationships sometimes outlasted the orders, with past offenders coming back to visit. Doolan noted the work helped to give offenders pride in their local area and themselves (Rt Rev Jones 2012, at 15:43 mins).

Unpaid work may offer offenders opportunities to provide some kind of practical assistance to others. This allows offenders an opportunity to share responsibility for delivering something of benefit to others, and to begin considering the needs of others when going about their work. In this limited way, this might offer an opportunity to experience the attitude of care and to begin to engage in practical care. If caring is a learned behaviour (Noddings 2002, pp.24–6), then this may enable offenders to develop care-giving skills.

The National Probation Service specific aims are:
1. the protection of the public
2. the reduction in reoffending;
3. the proper punishment of offenders;
4. ensuring offender awareness of the effects of crime on the victims of crime and the public; and
5. the rehabilitation of offenders

(The Offender Management Act 2007, s2 para. 4)

These aims exhibit a tension present in other punishments, yet appearing most clearly in community punishment. On the one hand, there is a belief in reform, present in aims 2, 4 and 5 especially. On the other there is a clear expectation of recidivism, visible in particularly aim 1 and perhaps 3. Helping offenders to understand the impact of their offence might be understood as supporting offenders in enabling their desistance from offending. This might represent care-giving, meeting needs for healthy relationships, or for living a life free from the harms of crime (for offenders, victims and communities). Aims 2, 4 and 5 might be interpreted as viewing offenders as individuals to be supported and encouraged, who can be enabled to desist from offending. However, aims 1 and 3 reflect Tronto's end of protection, as identified in her police work example (responding to

harmful intentions rather than needs (1993, p.104)). Aim 1 in particular expects the future harmful conduct of offenders, taking steps to protect others from harm. Probation practices, particularly as 'advise, assist and befriend' are at once expected to address needs by successfully rehabilitating or reforming offenders, avoiding unacceptable harm; yet, most obvious in the probation officer's role as offender manager, recidivism is anticipated as unavoidable. The Aggregate Report on Offender Management Inspection on probation identifies good practice examples showing both how officers engage individual offenders to support them away from offending (HM Inspectorate of Probation 2013, pp.33–4); and to identify offenders posing greater risks than previously thought, and to put in place or return to court for measures to manage the risk (2013, p.17, see especially Gloucestershire and Durham Tees Valley examples).

This tension of risk management, where risk is understood as 'an inescapable part of the human condition' (Hudson 2003a, p.45) has some resonance with the tension identified in care ethics in Chapter two: harm is at once unacceptable, and unavoidable. The tension in care ethics is manageable: only primarily intended harm is identified as unacceptable; unavoidable harms are acknowledged and where possible addressed. But this tension cannot be eliminated. As Hudson observes of criminal justice, while 'risks might not … be eliminated, they can be kept within reasonable levels, and can be reduced where they can be anticipated' (2003a, p.46). Both caring and criminal justice risk management are practices which respond to the human condition: our interdependence and vulnerability.

In Chapter two I noted the care ethics approach to managing this tension. Care ethics acknowledges that harms are both unacceptable when a primary intention, and yet unavoidable as side and unforeseen consequences: harm is at once unacceptable and accepted as unavoidable. Yet care ethics anticipates that we cannot ideally meet all needs all of the time, which I have made more explicit through my systematization of the limits of care. These limits, together with the values and practical moral reasoning approach of care ethics, suggest a response of reviewing our practices, both at the decision-making and delivery stage, when

caring is understood as an ongoing process. If we are concerned to care well (Kittay 2002, p.259; Clement 1996, p.101), as an ongoing activity (Tronto 1993, p.103; Noddings 2002, p.103), then we are obliged to review our caring to monitor progress, to identify *and address* problems. Given the resemblance between these two tensions in punishment delivery practices and in caring practices, and the presence of caring practices within punishment, the self-scrutiny and mutual moderation resources of care, present in the cumulative fairness response design stage, and care delivery response analysis stage, may help us to address the tension within punishment.

Carlen is correct to argue, as we saw in Chapter one, that rehabilitative support in mainstream criminal justice is at present not ideally and often poorly practiced. Because the validity of support for offenders is undermined by perceiving offenders as 'less-deserving', these practices are not framed as supportive or caring concepts, but identified as 'rehabilitation', 'risk management' or reform through training and treatment. As Carlen argues, offenders' needs are often not well met by conceptualizing this as rehabilitation for offenders qua offenders. By recognizing both the necessity of supportive practices and identifying them as caring, we might be better placed to provide the 'support from the state' Carlen recommends for 'all those – whether lawabiding or lawbreaking – whom [the state] has failed materially and culturally in terms of ensuring satisfaction of their minimum needs' (2013, p.33). With Carlen, my concern is about improving support for offenders, not necessarily about rehabilitation as an end in itself. Providing practical caring where it is needed, both acknowledges and addresses need and provides a means to recognize the other as an equal, 'equally worthy of our attention and responsiveness' (Engster 2007, p.31).

Caring practices in restorative justice

In Chapter one I noted that I will consider face-to-face methods of restorative justice, as alternative punishments. While there is no 'typical' restorative justice process, (Shapland et al. 2011, p.114), most mediation and/or conference sessions

follow a similar structure. Facilitators welcome participants, ensuring each understands who the others are, and their role in the discussion. Victims and then offenders in turn, each recount the events leading up to, and of, the offence. Turning to the present, the facilitator asks the victim and then the offender to describe the subsequent impact on their lives and present feelings. After both victim and offender have spoken, other parties are invited to contribute. Finally, facilitators direct discussions towards the future, towards agreeing how to repair the harm of the offence. This offers an opportunity for making and accepting apologies (although not made in all cases). In most schemes, a written agreement is produced drawing on the discussion outcomes and participants' wishes. This agreement is not legally binding (2011, pp.101–2). In many schemes, facilitators undertake to inform victims if and when the offender completes any agreed activity.

Ideals and care ethics values

Braithwaite proposes a set of standards for restorative justice, divided into three groups. Constraining standards, or minimum levels which must be achieved; maximizing standards which are ideal aims if not always fulfilled; and emergent standards, or practices which are becoming more widespread (Braithwaite 2002, pp.569–70). These values and aims are not hierarchical and allow flexibility in and between programmes. Resonances with care values can be seen. For example, Braithwaite's constraining standards include empowerment, respectful listening, and equal concern (2002b, p.569). This reflects the respectful listening I drew from the values of care ethics in Chapter two, and the concern for treating offenders (intended in mainstream punishment) or all parties (in restorative justice) as equals. Braithwaite's maximizing standards are aims of restoration, which broadly concord with Engster's aims of care as meeting needs, developing capabilities and avoiding (or repairing) harm. These include restoration of relationships, communities, human dignity, freedom, compassion, and also speaks of restoring civic duties, developing human capabilities and preventing future injustice or harm (2002b, p.569). The emergent standards Braithwaite details are restorative justice specific, in that Braithwaite argued these were not values found elsewhere, such as United Nations

Human Rights documents. Braithwaite lists 'remorse over injustice, apology, censure of the act, forgiveness of the person [and] mercy' (2002b, p.570). These are aims, rather than necessary requirements. There is broad agreement in the literature that victims must not be expected to forgive (Duff 2001, p.114; Minow 1998, p.14, p.17), nor offenders to apologize. Apology and forgiveness, Braithwaite stresses, are gifts which lose their meaning if required (2002b, p.570).

Restorative justice practices value respectful discussion, negotiating and agreeing responses to offending where possible. Johnstone & Van Ness explain respectful discussion as an awareness of our own limited knowledge, an openness to others differences, treating others with dignity and worth and valuing their contributions (2007, p.19). It is possible to see the values and practices of care ethics, particularly the open, engaged attitude, reflected in restorative justice values. This has been noted by feminist scholars. Margaret Urban Walker observes an overlap between the practices and language of restorative justice and the moral perspective of caring (2006, p.146). The discussion of equality as relationally understood in the previous chapter was drawn from Llewellyn's framing of restorative justice as a relational practice (Llewellyn 2012). Below, I offer a brief systematic account of where and how far caring practices can be found in restorative justice, and how important they are to this practice.

Engster's aims included avoiding unwanted and unnecessary harms. Whereas mainstream proceedings seek to respond to the offence proportionally to the harm caused, restorative practices seek to repair the harm through the response (Zehr & Mika 2003, p.43). This attempt to repair harm might be understood as helping to minimize harms, meeting basic needs for relationship repair, running parallel with Engster's aims of care. We also saw Tronto's ethical elements of caring included awareness, taking responsibility, competence and responsiveness (1993, pp.127–36). To greater and lesser degrees, these are also present in restorative justice.

Seeking awareness of the needs of others is displayed in the discursive aims of restorative justice. As we saw in the initial description of the usual structure of a

restorative encounter, both victims and offenders are invited to speak, but importantly, with each other. Restorative justice values dialogue and an important condition for dialogue is that participants listen to, and engage with, the other's speech (Braithwaite 2002b, p.569). Without listening, dialogue becomes alternating monologues. The intended inclusive dialogue recognizes both that offenders and victims each have needs to be expressed and recognized, but attempts to permit this in a way that allows offenders and victims each to gain a better understanding of the other's needs.

Tronto's second ethical element is taking responsibility. Restorative justice practices enable offenders to take responsibility for the harm caused and provide opportunity for apology (desirable but not required). Insofar as offenders themselves are encouraged to take responsibility for their acts and to respond constructively to their victims, offenders are encouraged to care. Restorative justice providers might be understood to take responsibility for providing facilities and opportunities for mediation.

The third ethical element was competence (Tronto 1993, p.134). This is reflected in the use of trained facilitators, giving all participants the time to speak, and in helping participants to articulate their perspective in a way which can be understood by the other. This will be subject to individuals' performances, and resources may permit only limited facilities. Sometimes volunteers and practitioners will be misinformed or make errors (Roche 2004, p.195). Yet this *aspiration* is in tune with the concern to provide for needs competently, and these limitations (practical negative and operational) are those I argue care ethics recognizes in Chapter two. Tronto's final element was responsivity (1993, p.134), seen in the non-compulsory enabling of apology and forgiveness exchange. We might identify responsiveness in part in the facilitator's responses to the contributions of the participants: helping to encourage the nervous, and calm the angry etc.

Implementation and caring practices

Although restorative justice is in theory a requirement available in community punishment, restorative practices within, and external to, mainstream criminal justice are limited niche practices, often restricted to geographic areas and small sets of offence type (eg Medows et al. 2010). That said, a recent Ministry of Justice *Restorative justice action plan* stressed an 'increased use' of restorative justice, since 85% of victims found the experience helpful, and reoffending rates reduced by 14% (Ministry of Justice 2012b, p.1).

Tronto's four practical phases, caring-about, caring-for, care-giving and care-receiving, are clearly visible in restorative justice practice (1993, pp.106–8). Tronto's caring-about represents acknowledging the needs of those around us, even where this requires effort on our part. This is illustrated in restorative justice activities, inviting offenders and victims to participate in restorative practices, acknowledging their needs. Caring-for is seen in arranging the training and hiring of facilitators, and providing resources. Care-giving is most clearly present on the facilitator's part, where offender and victim are helped towards mutual understanding, and towards agreeing an outcome satisfactory to both parties. Care-giving and receiving by the parties themselves is seen where exchanges of apology and forgiveness occur. Care-receiving, might also be illustrated in the practices of the facilitator responding to the participants and progressing the conference accordingly. Better still, would be the practice of facilitators undertaking to keep victims informed about offenders' progress in keeping to the agreements. As with the discussion of community punishments and imprisonment above, the ideals and ideal implementation seen here is not always achieved in practice. Negative practical and operational limits to restorative justice are discussed further in Chapters six and seven. This final responsiveness phase is least well applied in mainstream punishment practice.

Conclusion

This chapter has considered a little of penal history, illustrating the presence of care in the ideals and implementations of punishment against a backdrop of changing

ideologies. I have also explored the discussion of care ethics in relation to punishment, particularly restorative justice practices. I have argued that, contrary to expectations generated by harm-centred conceptions of punishment, parts of the ideals and practices of present punishment delivery practices, including restorative justice, community punishment and imprisonment, may be understood as caring practices. Further, the functioning of these practices as caring is *necessary* for these punishment delivery practices to work as we expect: restorative justice participants must listen and become aware of the other's perspective and needs in connection with the offence. Probation officers must take account of individual offender's circumstances to provide appropriate support (HM Inspectorate of Probation 2013, p.17, pp.33-4). Open engagement with offenders also helps probation officers to identify and manage risks for the benefit of offenders and others. Prisons provide some 'treatment and training' through peer and personal officer support, which can in turn make contributions towards the safe and ordered running of a prison. Listener volunteers help to support others who may harm themselves or others. Orderly and safe prisons are not possible without some degree of caring practice. Perhaps fines may be excluded, but even these are administrated in England & Wales by taking account of the individual's resources, and seek to minimize harms of avoidable financial hardship by allowing payment by instalments. Caring practices are necessary for contemporary punishment delivery practices.

It is easy to miss caring practices when we focus on punishment defined partly in terms of harm. But were these practices to disappear, we would certainly notice their absence, as Libelling's revisit to HMP Whitemoor shows (Straub et al. 2011). These practices may not be considered 'caring' by those engaged in them. Yet I have shown it is possible to view them in this way. We saw in Chapter two the idealized components for good care, the conceptual anatomy of care. Employing care principles when designing and implementing these practices will help to strengthen these practices. In the implementation of the punishment delivery practices examined, the care provided is not ideal. The responsiveness element and understanding of care ethics as an ongoing process, rather than a discrete event, is often either limited or missing.

While punishment delivery practices display many core features of the anatomy of care ethics, since these practices are not intended as care or necessarily enacted with the attitude of care, they may not be as 'good' care as they might be. Because the approach to practical moral reasoning of care ethics is not employed, it is possible if not likely that these caring practices will be inefficient: missing and misinterpreting needs, failing to meet them as well as they might have been met or to engage respectfully with offenders and provide interactional justice. The penal theories examined in Chapter one offered little guidance for practitioners delivering punishment or about their interactions with offenders during the process, despite implying the value of understanding the offenders' personal context. But we have seen here that at least some elements of punishment delivery practices could be achieved, and potentially improved upon, by employing caring aims and values to accompany the unrecognized caring practices. By choosing to understand these practices as care practices and by following caring principles, our ability to provide good care is strengthened. We benefit from awareness and responsivity to others' needs and from reflexive initial and ongoing review practices, highlighting our own limits and how these might be addressed, that the care ethics perspective enables. In Chapter two, I provided a general statement offering one account of the practical moral reasoning method of care ethics. This chapter has considered the importance of care for punishment delivery, and the interactions between offenders and punishment practitioners. In Chapter four I consider how the principles and priorities of care ethics can complement and enhance mainstream criminal justice practices of information-gathering punishment decision-making, and how these principles might be applied to such settings.

Chapter Four

Information-gathering and treatment as equals in punishment decision-making

This chapter begins by considering how punishment decision-making is informed. Chapter one argued that both retributive and consequentialist penal theories implicitly require offenders' personal contextual information. Here I argue that mainstream criminal justice practices also value offenders' personal contextual information, but fail to gather this sufficiently. Restrictions on offenders' opportunities for speech risks at least partly silencing, excluding and objectifying offenders. Further, the classical liberal informed practices and protections for offenders, designed to respect the offender's equal rights, fail to provide the interactional justice necessary for procedural justice and may further exclude offenders. The potential for exclusion, silencing and objectification are more troubling when the central place harm then takes in most definitions of punishment, distorts our recognition of harm.

While I propose punishing *with* care, there is more to punishment than caring for offenders. I note that the care ethics concern to avoid unnecessary harm could ground the censure of criminal acts as unnecessarily harmful. In considering *how* to punish with care I revise the principles derived from care ethics in Chapter two; to help guide sentencers, and later practitioners, in punishment decision-making and delivery. This provides instrumentally useful details, and a means of recognizing offenders' expertise in their own lived experience. The care ethics principles prioritize respectful engagement with others, offering a means of providing interactional justice. I consider *why* we should punish with care. I offer a principled argument, which can be fleshed out from either a liberal or care theory perspective,

supplemented by political and pragmatic arguments, in favour of responding to offenders:

1. *Without* intentional, primary purpose harm;
2. *With* care.

I consider some important limits and concerns about these principles. I identify the differences between the state's duty to care for citizens in general and offenders in particular, and balancing needs-meeting between offenders and victims, before arguing that we should punish all offenders with care. I then address concerns and proportionality. I shall argue that rather than abandoning the principle, it still applies in a revised form which takes account of offenders' context in assessing punishment seriousness. Chapter six proposes a practice to gather offender's contextual information, as they choose and view as important, through dialogue. While listening respectfully is a core theme, I note here some important limits on gathering offender's context. However, including offenders' contexts makes offenders vulnerable to state intrusion and bias, and I offer a brief indication of how this might be addressed, before noting a tension between care and the compulsory nature of punishment. I finish with a note on the needs of victims.

The purpose of criminal trials

Lai distinguishes three aims for adversarial criminal trials. Firstly, a 'search for the truth' (2010, p.245), determining whether an offence occurred and whether the defendant has a lawful defence. Secondly, 'to bring criminals to justice' (2010, p.255), engaging in 'moral dialogue with the accused' (2010, p.249). Finally, to ensure appropriate and legitimate law enforcement (2010, p.247). Each requires information-gathering and assessing facts. These details however focus on the social context of the alleged events. Information about the defendant is only relevant insofar as it either illuminates the offence circumstances, or indicates a lawful defence.

Drawing on Duff's concerns for the inclusion of offenders as (citizen) members of the normative community, Lai reinterprets the purpose of criminal trials 'to do political justice to accused persons, according them their dues as human beings and citizens' (Lai 2010, p.255). Lai identifies the value of treating even the worst offenders as equals according to the demands of justice. We bring 'notorious war criminals before a criminal tribunal, even though it is far simpler just to shoot them in the street' (Lai 2010, p.255) not because we doubt guilt, but because we value the rule of law and procedural justice. Lai stresses:

> A person, in virtue of being a person, deserves to be treated with dignity…. A liberal trial is one that adequately respects the accused as a rational and autonomous moral being, and as the bearer of basic political rights
> (Lai 2010, p.255).

Duff et al argue trials are a communicative process, calling defendants '*to answer*' (Duff et al. 2007, p.2) for wrongs, suggesting dialogue between the defendant and the court. However, Brownlee critiques Duff's dialogue as overly scripted, allowing defendants few options (Brownlee 2011, pp.59–61). As Lai reminds us, criminal trials in Western liberal democracies are built on the classical liberal principles of respecting the defendant as rational and political equals. However, I will argue that mainstream processes do not always achieve these aims. Potential for misunderstanding in court, and restrictions on what, how and when defendants are permitted to communicate, unintentionally risk excluding, silencing and objectifying offenders. Classical liberal informed protections in mainstream practices, which both 'do not force [defendants] to participate at the trial and, at the same time, give that person the cherished right to do so' (Lai 2010, p.255), entitle citizens to 'distance themselves normatively from prosecution' (Duff et al. 2007, p.204). They also fail to engage with defendants and compound these problems: mainstream practices cannot guarantee, and risk failing to supply, interactional justice, the 'missing link' in procedural justice (Tyler & Bies 1990, p.88).

Contextual information in mainstream criminal justice

Contextual information is already instrumentally valued in mainstream criminal justice practices. Attention to the unique details of each case prompt Daly's claim that criminal justice already speaks with a situated, 'feminine' voice[45] (Daly 1989, p.2). However, there are two kinds of relevant contextual information: offence context and offenders' personal and social context. Offence context is the focus of mainstream trials. Offenders' personal context is not gathered in the same way, reflecting a concern that offenders should only be tried in relation to the present alleged offence.

Contemporary mainstream criminal justice practices in England & Wales are not the only example of core criminal justice practices valuing contextual information. English legal history offers some interesting insights. Until the seventeenth century, felony trials afforded defendants 'the opportunity to speak in person to the charges and the evidence adduced against him' (Langbein 2003, p.2). Representation was forbidden, for fear of interference 'with the court's ability to have the accused serve as an informational resource' (2003, p.2). If guilty, then defendants necessarily knew more about the offence than any other present. Defendants were therefore used to access information about the offence and themselves. As late as the mid-eighteenth century, defendants were encouraged to contest trials, since their defence speech provided context. A Surrey assize judge of 1751 complained of feeling obliged to hang an offender who admitted guilt, as the defendant's silence 'shut out' information which might have suggested alternative punishments (2003, p.61). I do not intend that defendants should be so 'used', only to highlight that the instrumental value of contextual information, heard directly from offenders, has long been recognized. This example demonstrates the possibility for contextual information to be gathered in objectifying ways (an 'informational resource'). I shall seek to preserve the first insight, but to reduce the risk of objectification.

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[45] Daly rejects any gendered claims regarding care ethics, but argues that this relational approach requires further research (Daly 1989, p.13).

Contextual information is also instrumentally valued in the civil law practices of contemporary French courts. 'Almost the first thing that happens', Field reports, 'is that the President constructs a picture of the defendant's life and character by questioning the defendant', asking 'defendants to tell their story themselves' (2006, p.526). The official dossier, containing detailed background interviews, is used as a second-choice means of accessing and understanding the defendant's personal context, if hearing their storytelling is not possible (2006, p.527). Character evidence about defendants is usually taken first, to provide personal context *through* which to understand the offence and offender (2006, p.530). French practices have been described as judging defendants 'on the facts but through the personality' (2006, p.524), implicitly differentiating between facts about *offender* and *offence*.

We cannot draw direct practical lessons from the French experience due to procedural differences, which might explain the different information-gathering. French courts must retire with sufficient information to determine guilt and sentence (Field 2006, p.533); whereas English jury trials only determine guilt (2006, p.525). This reflects the English principle of trying the offender purely in relation to the alleged offence (2006, p.524). The French examination of defendants' character and context is much broader.

Contextual information was identified in Chapter one as implicitly relevant for both retributive and consequentialist penal theories. Given that punishments affect different individuals differently, we must understand something of offenders' contextual background in order to determine either a proportionate punishment; or reach a consequentialist target, given the individual offender's starting position. Sentencers could be given a more adequate opportunity to hear and access contextual information directly from offenders, without radically altering the principles of trial in England & Wales, by providing post-conviction, pre-sentence dialogue. This could also benefit sentencers and offenders in the vast majority of uncontested trials. This echoes the French preference for hearing directly from offenders. An illustrative, discussion-priming proposal is provided in Chapter six. In

the next sections, I discuss the gathering of information and the problems which can arise in mainstream practice.

The instrumental benefit for sentencers of contextual information is only a contributory reason for preferring dialogue. Including offenders is separately valuable as a means of providing treatment as equals. Engagement with offenders is not automatically respectful, but allows this possibility.

Telling tales: the communicative value of storytelling

Bennett & Feldman identify everyday storytelling and story-hearing as key communicative practices in American courtroom processes, and note that 'storytelling in legal judgement' (Bennett & Feldman 1981, p.3) is also used in England & Wales. It is essential that all courtroom actors (ie, judge, jurors, defence, prosecutor, witnesses) (Bennett & Feldman 1981, p.ix) share an understanding of storytelling construction *and* social action, to understand the story in the way the teller intends. How plausible a narrative is depends on how the listener interprets the information: When hearing narration of a defendant's alibi, listeners must also understand the teller's signals about *how* this information should be interpreted, and *why* the information should be interpreted in this way.

Bennett & Feldman recognize understandings of storytelling are culturally and socially informed. As Young observes, the norms of speech are privileged norms, particularly those used in court. These norms may restrict what we are able to hear (Young 2000, p.72). Members of different groups may interpret stories differently, introducing bias into the courtroom through social differences, not necessarily as intended prejudice (1981, p.170). These biases cannot be overcome, since 'the whole inventory of divergent social understandings … would be impossible to document' (1981, p.181). The authors conclude that the 'most important contribution of the storytelling perspective is that it explains how legal judgements work and, at the same time, shows how justice fails' (1981, p.182). They argue that

stories are used to convey a variety of contextual information, but acknowledge that ultimately some stories will be misheard.

Yet Bennett & Feldman emphasize that storytelling devices are *misunderstood,* rather than incomprehensible. We share enough meanings to be able to communicate acceptably well[46] across social cleavages in everyday life, and the authors specify the role of 'everyday' storytelling (Bennett & Feldman 1981, p.ix, p.7). As we saw in Chapter one, our personal narratives, our total personal and social contextual detail, are at least partly socially and culturally constructed (Sherwin 1998, pp.34–5).

While different social and cultural groups attach different meanings to narrative devices, this does not prevent us from being active listeners. Since we are aware that while ideas overlap, their apparent meanings may not be fully shared, we can actively seek to better understand the other. Active listening skills are used to enhance understanding (Cournoyer 2011, pp.194–6). After attending to the narration, the listener paraphrases and reflects: eg 'you have told me that ….' in order to check meanings. This can be extended to test out the listener's interpretation, eg 'it sounds as though … have I understood?' This allows clarification of meaning without blame for misunderstandings. This treats the speaker inclusively, allowing them to highlight misunderstandings and the harms that have, or may, result. At the end of the clarification process, while we may still not understand exactly as the other intends, we have made good-faith efforts, respecting their self-knowledge. This might be useful to sentencers in gathering and clarifying contextual information from and about offenders through pre-sentence dialogue.

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[46] Not perfectly, and this is not to deny that some misunderstandings, including important ones, will persist.

Mediated (mis)understandings

Contextual information about offenders is communicated to sentencers in mainstream criminal justice processes in ways which restrict the information sentencers receive. Information presented in court during trial is subject to legal restrictions, to prevent bias against the defendant. Information about offenders' personal contexts, still subject to rules of relevance, is also presented to sentencers post-conviction. I shall discuss information raised during trial, before turning to pleas in mitigation and pre-sentence reports.

During trial

Information is presented in court, by the prosecution, and then by the defence, who each call witnesses. Witnesses, including defendants where they choose, may only respond to practitioner's questions. This allows lawyers to draw out details, crafting a particular narrative arc. The good defence lawyer will draw out the narrative which produces the most convincing case for their client. Information about the social context of offences will be raised, but the personal and social context of the offender is relevant only insofar as it helps to build the case.

Firstly, information presented in court is subject to the law of evidence, 'formal procedural limits' restricting what information may be admitted and 'perceived as relevant' (Bennett & Feldman 1981, p.xi). These restrictions are essential for a fair trial under common law adversarial traditions, and I do not challenge these. Yet this additionally restricts the information available to help sentencers understand the offender as a concrete person at later stages.

Secondly, witnesses' narration in court is shaped by legal professionals, not by witnesses themselves. Bennett & Feldman argue that lawyers use various devices to 'engineer' the delivery of evidence (1981, p.124). Bibas notes of the American criminal justice system: '[d]efendants stay silent, letting their lawyers do the talking for them' (2012, p.xvi). While defendants (and other witnesses) may give evidence, their speech may be skilfully directed by legal practitioners. The speech is interpreted by the court, where its relevance will be determined.

Bennett & Feldman note that lawyers direction of evidence requires the co-operation of witnesses (1981, p.124), but stories are nonetheless purposefully crafted by someone other than the apparent speaker. Duff argues this should count as defendant's dialogue with the court, since legal representatives should assist in telling their client's narrative (Duff et al. 2007, p.212). Narratives might be structured to the defendant's legal advantage. Yet this prevents sentencers hearing, and offenders from telling, parts of the offender's narrative, which offenders identify as important. For most defendants, the vast majority of 'their' courtroom narrative will be mediated through legal representatives. If they choose to give evidence, their storytelling is directed by and mediated through lawyers' questions. We should not presume that because some contextual details are raised in a restricted and carefully shaped way, that offenders' stories have been told to their satisfaction, or that sentencers have a sufficient understanding. During trial, offenders' speech is restricted and mediated.

Post-conviction

Whether offenders plead guilty or are convicted, information is still raised orally through pleas in mitigation. Here the prosecution state the facts of the case, and defence lawyers provide pleas in mitigation for their client. Again, the information presented is crafted by legal professionals and may be incomplete (Ashworth 2010, p.377). Ashworth reports that crown court judges place a higher value on pleas in mitigation than pre-sentence reports, given that the report may have been prepared well in advance (2010, p.379) and is therefore less 'up-to-date' (2010, p.381).

Pre-sentence reports in England & Wales are prepared by probation officers after interviewing the offender. Reports 'assist' sentencers in 'determining the most suitable method of dealing with [offenders]' (Criminal Justice Act 2003 s158 1a). However, sentencers may choose to proceed without reports, or to ignore the report. These reports recognize the value of the contextual information they are intended, among other things, to convey, but at the same time devalue the

information by allowing for it to be discarded. Similar reports exist in other jurisdictions. The Social Inquiry Reports, from which pre-sentence reports were developed, contained much personal and social contextual information about offenders. Yet, pre-sentence reports contain decreasing amounts of contextual information and increasingly focus on risk assessments (Hudson 1996, p.156; Field 2006, p.537; Nash 2011, p.479).

In England & Wales, the reports follow a national standard template, focusing on providing a balanced and accurate account, the 'risk of serious harm' and any information from the victim. Much of the risk assessment process is conducted through a computerized system (OASys), meaning reports can be produced quickly should conviction follow a not guilty plea (Ashworth 2010, p.379). There have been criticisms of the varying quality of reports (Ashworth 2010, p.378), and Cyrus Tata and Ashworth separately suggest that sentencers place little emphasis on the content, particularly detail about the offender's context (Ashworth 2010, p.380; Tata 2010, p.245). Yet Tata also notes Scottish sentencers were critical of reports that lacked sufficient personal context and focused on offending (2010, p.245).

Tata's study of the Scottish equivalent of pre-sentence reports found that how reports were used 'differ[ed] markedly from what report writers strive to communicate and how policy and practice literatures have supposed judicial sentencers read reports' (2010, p.256). Tata suggests that 'one of the key roles which reports play is … easing the concerns of legal professionals that defendants may not have been treated with sufficient care and dignity' (2010, p.256). The '[r]eports facilitate a display of humanity, which is essential if legal professional discomfort about the abruptness of the process is to be eased' (2010, p.257).

Both pre-sentence reports and pleas in mitigation provide the sentencer second-hand information. Practitioners determine which parts of offenders' contexts are relevant and how these are most usefully communicated. Sentencers reappraise this mediated information. This saves sentencers time but denies offenders the chance to convey their stories for themselves. At the post-conviction pre-sentence

stage, offenders are silenced. Some details the offender considered important, and any meaning the offender gives to this information may be lost; like meaning in a game of Chinese Whispers.

Tell it to the judge?

Silencing and exclusion

Because offenders' speech may be compromised during trial, and silenced during sentencing, they can neither tell their personal story to appear as a concrete other, nor help identify and correct misunderstandings. Such misunderstandings may obscure potential harms which would otherwise have been foreseeable, making avoiding unnecessary harm difficult. Pleas in mitigation and pre-sentence reports might convey this information, but we risk two problems. Firstly this allows a second occasion for Bennett & Feldman's misunderstood storytelling by the sentencer, even if the practitioner understands and communicates correctly. Secondly, this devalues the offender's self-knowledge and lived experience of their own position, treating them as passive and excluding them from speaking with the decision-maker. Excluding and silencing the offender misses an opportunity to provide interactional justice.

Hudson observes that while victims may feel 'excluded *from* the proceedings, the offender is excluded *by* the proceedings' (Hudson 2003b, p.179; original emphasis). If victims lack voice, defendants' speech is limited. Except when in the witness box, offenders are largely 'spoken of' between legal practitioners, excluded as neither speaker nor audience. Crucially, convicted offenders have no right to speak with the sentencer at post-conviction, to offer or clarify information about themselves. This applies to offenders who admit guilt as well as those who contest the charges. Those in positions of relative power decide what is to be done *with* offenders. Reduced to a problem to be addressed, offenders become the *object* not *subject* of punishment.

The 'usual suspect' definitions of punishment desensitize us to morally significant harms that we ought to acknowledge and address. Because we are at risk of misunderstanding narratives, it becomes more important that offenders are able to highlight such possibilities at sentencing. Lyotard identifies situations when the other is prevented from speaking about the harms we cause them as wrongs of silencing (Lyotard 1993, p.144). When offenders are silenced from highlighting these harms, we treat them as passive or inert. Our lack of concern implies that morally significant harms are acceptable, failing to provide treatment as equals. This silencing and excluding prevents offenders from identifying potential harms, and risk at least partial objectification, to which I now turn.

Objectification

When sentences are decided and punishment delivered, offenders are *silenced*. Offenders' *experiences or feelings need not be taken into account*: mainstream theory views this contextual information as an optional extra. When processes and decisions are not explained to offenders (informational justice), when feelings and emotional responses are not explored respectfully (interpersonal justice), we treat offenders as *inert*. We treat offenders more as part of the set of objective facts before the court, and less as intimately involved concrete persons. In some cases, as this offender's report of their experience in an English Magistrates' court illustrates, some offenders may experience mainstream sentencing as something which happens *passively* to them:

> I know [nothing] of what's happening, sometimes I don't even
> speak and like they've done it all and I'm on my way and still don't
> know what's happened
> (offender respondent 36, Mair & Millings 2011, p.78).

Although offenders are punished for their offences and are not interchangeable in this sense, the sentencer's perspective is a stream of cases. Sentencers sentence the present defendant for the present case. If understood as part of an administrative flow of punishment decision-making events, offenders may come to appear *interchangeable*. Bibas describes the 'mechanization' of the American

criminal justice process, employing swift, 'cookie-cutter plea bargains' (2012, p.xx). 'Criminal justice', he argues, 'used to be individualized, moral, transparent, and participatory but has become impersonal, amoral, hidden, and insulated from the people' (2012, p.xvii).

Martha Nussbaum lists seven features involved in treating a person as an object, arguing that objectification was present if one or more of the features could be found. Three of these reflect the possible treatment of offenders described above. These included '*denial of subjectivity*': treatment 'as something whose experiences and feelings (if any) need not be taken into account; passive treatment or '*inertness*': treatment 'as lacking in agency'; and '*fungibility*': treatment 'as interchangeable' (Nussbaum 1995, p.257; original emphasis). Failing to recognize the presence of non-trivial morally problematic harms, and thus failing to respond to them, may also suggest inertness and denial of subjectivity. Langton identifies three further features, including 'silencing', or treating others as though they are unable to speak (Langton 2009, pp.228–9).

Lina Papadaki further clarifies the concept of objectification. She argues that Catherine MacKinnon and Andrea Dworkin each offer conceptualizations of objectification that are too narrow. Here objectification treats other persons as tools, sacrificing their humanity in Kant's terms, transforming them indefinitely into an object (Papadaki 2010, p.18). These authors imply that objectification always permanently and intentionally harms another's humanity (2010, p.34). Nussbaum's conception is broader. Following Nussbaum, Papadaki argues that not all objectification necessarily harms an individual's humanity in Kant's permanent sense. Objectification may rather ignore or improperly acknowledge the other's humanity. Further, while objectification may be deliberate (knowing both that objectification will result and that this is wrong); Papadaki acknowledges objectification may be accidental. For example, following faulty beliefs about the nature of women, some men take steps to paternalistically 'protect' women. Despite altruistic motivation, objectifying outcomes result. Papadaki offers the example of a woman locked in a room by a (male) friend, since he knows both that

she plans a dangerous ice-climbing trip and is unskilled (2010, p.34). Papadaki distinguishes four types of objectification:

	Harms victim's humanity	Ignores victim's humanity
Deliberate	Reductive Intentional Objectification	Non-reductive Intentional Objectification
Unintended	Reductive Unintentional Objectification	Non-reductive Unintentional Objectification

The objectification risked in punishment decision-making and delivery is of the non-reductive, unintended kind:

> *Non-reductive objectification is unintentional* when the objectifier (A) does not intend to deny the objectified individual's (B's) humanity, and yet A denies B's humanity in the sense of ignoring/not properly acknowledging B's humanity
> (Papadaki 2010, p.33)

Post-conviction, the offender is silenced and cannot speak to correct or clarify information. For Langton, silencing is a marker of objectification (2009, pp.228–9). Even where the silencing is incomplete, and some satisfactory communication occurs, this denies subjectivity, treating offenders as passive or inert, which are markers of objectification for Nussbaum (1995, p.257). An additional risk of objectification is present: where sentencers are unaware of and therefore unable to prevent otherwise avoidable harms, it is implied the offender may be acceptably so harmed, treating them as less than equal. For Duff, community perpetrated injustice is a problem of itself, but the state's *failure to acknowledge* and address these contributes to denying the offender's equal citizenship (2010, p.139). Restricting offenders' speech contributes to sentencers' lack of awareness of harms to which we are already desensitized. An example may help here.

Recalling Jane's story from the vignettes in Chapter three, Jane is sentenced to seven months in prison, losing her entitlement to housing benefit. Jane can no longer pay the rent. Jane's potential inability to pay rent may not be relevant to the circumstances of the offence, or to a plea in mitigation. This contributes to the

silencing and exclusion which at least partly objectifies offenders like Jane in the first instance. Jane is homeless on release, a morally significant harm. Failing to respond to this harm, through ignorance or desensitization to harm, is the second example of objectification. If the sentencer were aware of the likelihood of this morally significant 'collateral damage' harm, steps could be taken to prevent this. For example, the sentencer could consider whether a strong community punishment might be more appropriate than the short prison sentence (community orders were strengthened in 2005 to avoid short prison sentences (Mair & Mills 2009, p.46)).

Housing advice is available to Jane during punishment delivery, recognizing that some prisoners have housing needs. However not all prisoners know how to access this support and demand for this help often outstrips availability, particularly in larger prisons (PRT 2012, p.60). Prison advice services are under-resourced to meet these needs adequately. This is poor caring, and a poor use of resources for meeting housing needs, holistically considered. Prison resources could be focused on offenders entering prison homeless if Jane kept her home.

Returning to the decision-making stage, suppose a seven month prison sentence is 'known' to be 'correct'. Here it is a regrettable, *unavoidable* consequence that Jane loses her home. This may follow from reasoning according to the negative limits of care: Jane's housing need regrettably cannot be met with current resources. Care ethics counsels that we should respond to Jane respectfully, acknowledging needs. When this harm and the associated housing needs are not acknowledged as a significant harm against Jane, we suggest this harm is acceptable. We suggest that Jane is less than equal, risking objectification.

This unavoidable harm is remedied insofar as possible by housing advice in prison. Even in this case[47] current practices *may* still objectify Jane, should the sentencer, as the state's agent and community representative, fail to acknowledge the state's

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[47] I have suggested there are reasons to think this an inefficient use of resources

responsibility for the unavoidable 'collateral damage' harm. Ignoring this harm confirms the unintended objectifying message that harms against Jane are acceptable; improperly acknowledging Jane's status as an equal and her entitlement to interactional justice. The prison housing adviser's help is too little too late, they are not always state agents in the same way as sentencers. If the state ignores the harm, implying that the morally significant harm Jane experiences is acceptable, this treats Jane as a passive subject of punishment, whose understanding and feelings are unimportant, objectifying Jane on Nussbaum's account (1995, p.257).

This second example carries less weight than the first example, where an alternative sentence might have been explored. There will perhaps be some occasions of this second type where partial objectification does not occur, because the unavoidable harm is properly acknowledged by the state, and only meagre efforts to address the harm are possible. Nor do I suggest that the first example will happen all or even most of the time. Yet the risk remains unnoticed in present practice. The silencing, exclusion, and desensitization to harms of mainstream practices do not help to reduce this risk.

Practical problems rooted in theory

In punishment decision-making and delivery, we do not normally intend to objectify offenders. On the contrary, liberal values inform practices endeavouring to provide respect, protection from bias and interference, through non-interference. My concern is not that full objectification necessarily occurs in all cases. Rather, mainstream practices avoidably *risk* at least partly excluding, silencing and objectifying offenders. By applying the same procedural rules about when and how offenders may speak, we seek to provide procedural justice. Given the objectifying history of English legal practices it is not surprising that the foundations for the mainstream adversarial trials,[48] which evolved during the same period as classical

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[48] Hostettler identifies the origins of the Adversarial Trial in the Trials and Treason Act of 1696 (Hostettler 2006, p.30), around the time that Liberal ideas were also developing, with the publication

liberal principles of neutrality and non-interference, prioritize minimal or non-engagement. Offenders' entitlement 'to remain passive' (Duff et al. 2007, p.203) minimize state intrusion, thus providing respect for generalized, necessarily equally dignified/rational, individuals.

This conceptualization of respect influences our practices. Chapter two saw that from relational perspectives such as care ethics, dignity is a property of relationships: dignified treatment conveys respect. To understand what counts as dignified treatment, we require personal context: 'knowledge and concern for their needs and aims' (Llewellyn 2012, p.94). Chapter one notes fair procedures are only part of treating others as equals. If dignity is a relational property, displaying respect through dignified interpersonal treatment, then we provide neither dignity nor respect by declining to interact.[49] Care ethics offers a framework for engagement. Interpersonal treatment of others conveying respect for their status as fellow human beings (Bottoms & Tankebe 2012, p.121) provides interactional justice, 'missing link in procedural justice' (Tyler & Bies 1990, p.88).

Because the sentencer's post-conviction focus is on indications of mitigation or aggravation, there is a risk that insufficient personal contextual detail will be gathered about offenders to avoid easily preventable harms, as we saw in revisiting Jane's story above. In some cases sufficient information will be conveyed, enabling action to prevent avoidable harms: sentencers aware of Jane's vulnerability to homelessness may be able to prevent this harm. In these cases, morally significant harms do not arise, are not ignored and objectification is avoided. This is more by good luck than good judgement and the risk of unacknowledged and unaddressed harms remains.

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of John Locke's 'Two Treaties' in 1695 - where it reportedly made 'a great noise' in Oxford and attracted the attention of Some Whigs (Hoppit 2000, p.195), who played a role in the development of the Trials and Treason Act (Hostettler 2006, p.30) – with Locke's text rising to prominence shortly afterwards in 1703 (Hoppit 2000, p.195).

[49] Non-interference and silence can be respectful, but only in the context of wider relationships, which usually entail expectations that prior interaction will be resumed.

Present practices lack the information-gathering priority, restricting their ability to reduce this risk. The classical liberal prioritization of non-interference misses the awareness value and practice that Tronto identifies in care ethics. This fails the moral obligation to identify and acknowledge the needs of others (1993, p.127), and misses otherwise avoidable harms. When these harms are missed, offenders are at least partly objectified in that the state ignores or fails to properly acknowledge the moral significance of the harm against them, diminishing their humanity and dignity (Papadaki 2010, p.33): their status as equals qua persons. A critic might object that the moral obligation to identify and acknowledge the needs of others is a care ethics value and not necessarily a principle of liberalism. Yet objectification is inconsistent with liberal principles.

Without the care ethics priority of situational and contextual information, and the direction to gather this through respectful open engagement, we are less likely to identify missing information as a problem, or to engage with offenders as a means of providing treatment as equals. Bennett & Feldman identify a propensity to misunderstand storytelling in court, which may apply both during trial and pleas in mitigation. I have argued that offenders risk being partly silenced and excluded through the mediated storytelling of practitioners, and through their silencing at the post-conviction punishment decision-making stage. Our ability to gather the personal contextual information of offenders respectfully, sufficiently and cogently is jeopardized when we combine the risks of misunderstanding with silencing and exclusion. Given our desensitization to morally significant harms, this increases our risk of failing to acknowledge or address these harms, and thus at minimum partly objectifying the offender. Taken together, these produce a toxic environment, where the risks of morally significant harm are increased, and our chances of avoiding or acknowledging and addressing the harm diminished, risking further objectification.

Developing theory: how to punish with care

Above I argued that mainstream practices have limited abilities to gather offenders' personal context and to provide interactional justice and treatment as equals. How can these problems be reduced? Care ethics approaches help to identify potential harms, given the information-gathering priority following from a richer understanding of concern and respect. This better enables us to acknowledge and either avoid or address harms; or to communicate respect by explaining why we cannot address individuals' needs. The respectful mode of engagement care ethics implies also helps to deliver interactional justice. Thus far we have considered whether it might be possible and helpful to approach punishment decision-making and delivery from the perspective of care ethics. The desirability of doing so is implied by these factors:

1. Harm-centred definitions of punishment desensitize us to harm, making harms more difficult to identify;

2. Failure to acknowledge morally significant harms risks objectification;

3. Silencing and excluding offenders risks further objectification;

4. Necessary caring practices are obscured in punishment;

5. A resonance between the tensions identified in care in Chapter two, and punishment in Chapter three; where in both cases harm is unacceptable and yet anticipated.

Punishment is more than caring and meeting needs. A care ethics approach does not mean that we cannot disapprove of, or censure, criminal conduct. Crime causes harm, thus frustrating the ends of care. This grounds disapproval of criminal conduct and supports general and particular deterrence from a care ethics perspective. Disapproval is communicated by the social democratic identification of behaviours as criminal, and by the censure of criminal acts through compulsory, public punishments (conviction details are publicly available information). While criminal acts may be censured to communicate disapproval and deterrence, care ethics aims to meet needs and avoid unwanted harm (Engster 2007, p.28),

prompting a constructive response to offenders. This resonates with Braithwaite & Pettit's republican disapproval of crimes (1990, p.88), and reintegration of offenders and victims.

Following a procedural-only definition of state criminal punishment, the guidelines below allow needs, capabilities and other caring concerns such as minimizing harms to play a greater role in punishment decision-making and delivery. This does not alter the likelihood that such revised practices will cause unintended, unforeseen and sometimes unavoidable harms. Care ethics aims to avoid harms, but recognizes negative and operational limits restrict which harms we can avoid. Tronto's integrity of care (1993, p.136) suggests we should recognize both those harms that we can address and those which we cannot. The self-scrutiny and supportive mutual moderation present in the initial and ongoing review stages below helps to identify and avoid potential harms; and to acknowledge and address unavoidable and initially unforeseen harms. While this is still subject to human error, I will argue in later chapters that this informal review can help to supplement, inform and target formal review practices. Here I revise the principles derived in Chapter two to apply specifically to the case of punishment decision-making and delivery.

Care ethics principles for punishment decision-making and delivery

It is my thesis that the principles drawn from care ethics can provide a framework for punishment decision-making and delivery, which

I. Allows conceptual space for practical caring work and identification of problematic, morally significant harms

II. Facilitates inclusive, non-objectifying treatment as equals qua human beings for offenders

A theme of respectful dialogue runs through the principles, reflecting the openness and engagement attitudes, and awareness and responsivity found in care ethics. Engagement creates space for interactional justice, the inclusive, non-objectifying

treatment of offenders as equals. Below I revise the principles derived from care ethics for application to punishment, revisiting each pair of principles in turn.

1. The *past-regarding, information-gathering* pair: learning about the past offence, and the present situation of parties:
   a) *Respectful Listening*: listening respectfully to offenders' personal context (part narratives), details which they identify as relevant.
   b) *Needs Identification*: drawing on offenders' personal and social context, those parts of their narrative that offenders' identify as most relevant, offenders and sentencers (or practitioners) identify together the offender's needs associated with the offence.

These principles support sentencers/practitioners in understanding information about the offender, which otherwise may be unclear or incomplete. Exploring offenders' context through respectful dialogue allows us to gather information about offenders in relation to their offence, and to understand their needs as part of a distribution of needs across the social context after the crime. Engster's claim that we are all 'capable of understanding and expressing' (2007, p.31) our needs, echoes Sevenhuijsen's earlier claim that 'people themselves (can) have knowledge about their own subjectivity' (1998, p.60). This recognizes individuals' self-knowledge and reflects the care ethics concern for particular personal and social context and respectful engagement.

Yet not all persons will be able to articulate needs skilfully, given the privileged norms of speech (Young 2000, p.72). In some cases we may need to add 'how can we help you to identify what you need?' or 'how can we help you explore and consider the social disadvantage which you appear to encounter?' to the questions Engster's argues are motivated by caring (see Chapter two p.88 Engster 2007, p.31). Support may be needed to help offenders consider and express needs, and to assist sentencers in interpreting the offender accurately. Listening respectfully allows the

provision of interactional justice, communicating that while the state punishes offenders for their offences, offenders still deserve treatment as equals.

Acknowledging a problem is a first step to addressing it. Together, sentencers and offenders identify offenders' needs associated with the offence. I specify 'associated needs', since the needs may pre-date or indirectly relate to the offence. The easy example is acquisitive crime funding pre-existing addictions (where addiction support might be considered). Alternatively we might consider the credit card fraudster whose conviction worsens their ability to pay off other debt (where advice on negotiating with creditors might help); or the financial director barred from future employment of the kind for which they are skilled following misconduct (where retraining opportunities might help).

How and when it is appropriate for punishment responses to address offenders' needs? This reflects the positive limits of care. Sometimes, criminal justice agencies are best-placed to support offenders: we saw in Chapter two an unskilled passing stranger rescues Singer's drowning child, as the only party able to provide timely care.[50] These principles are past-regarding and retributive in that they respond to offenders according to moral principles, recognizing offenders' status as equals.

2. The *future-regarding*, *response-designing* pair: considering what can be done to improve the future for the affected parties:

    a) *Creative Consideration*: considering the available needs-meeting resources, and creatively considering how the offender's needs might be met. This includes sentencer's (or practitioner's) reflection on their competence.

    b) *Cumulative Fairness*: initial review balances individual preferences identified in creative consideration with the

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[50] Nothing here should be taken as rationalizing imprisonment for the offender's own good, in the hope of medical, mental health or addiction treatment (Corston 2007, p.9). These services must be made available to community-sentenced offenders, and should include residential treatment by agreement.

wider social context, considering the distribution of needs, resources and previous prioritization losses holistically for distributive fairness.

The second pair of principles begins to design the sentence response to the offending. This chimes with Duff's proposal for occasional 'negotiated sentences' (2001, pp.158–63). Sentencers and offenders together begin by considering creatively what ideally might meet needs most effectively. Given offenders' expertise in their own positions, their views on what may be successful for them are valuable (although we may suggest their views are biased, overly optimistic, practically unachievable etc). As a part of considering which response is preferred, sentencers should also consider the non-care aspects of punishment (eg censure, deterrence) in light of the offender's personal and social context. Sentencers should also consider their competence to provide (or arrange) supportive sentence elements. This is a part of the sentencer's (or practitioner's) reflexive consideration of the effect of their power in context, acknowledging the potential for the sentencer (or practitioner) to cause harm. This may mean revising preferences to reflect non-care aspects, or considering how the offender might be supported through their sentence to access support for their need outside of the criminal justice system.

Where resources are limited, we may need to prioritize needs, as detailed in Chapter two. While we identify effectively which needs will be un-met or poorly met, we still treat the other as an equal because we consider their needs on the same terms as those of others: in personal and social context. The creative consideration principle begins to overlap with the cumulative fairness principle, considering these responses holistically, taking account of the needs of victims and the community. Sentencers should avoid frustrating external attempts to meet victims' needs.

The cumulative fairness principle draws offenders' needs into holistic consideration with social context, relative to other needs of victims and communities. Where can

harms be avoided, needs met and capabilities strengthened? Should selected responses be rebalanced in the light of previous prioritization losses, changes in relationships and responsibilities-to-resources ratios? These principles are consequentialist, and aim to improve future outcomes for victims, offenders and the community.

3. The present-focused, harm-avoiding pair: informed by past and future consideration:

   a) *Punishing With Care: responding to offences by censuring acts and where possible providing needs-meeting without causing harms, including stigmatizing and objectifying either offenders or victims'*

   b) *Response Analysis: keeping our decisions under ongoing review.*

These principles are present-focused and see punishment being delivered with care. This means avoiding objectifying offenders and avoiding aggravating existing needs of offenders and victims, whatever else is ordered. Care ethics deals regularly with conflict, providing tools for managing conflicting needs. Prioritization helps to manage negative limits, self-scrutiny and mutual-moderation also addresses negative and operational limits. I shall have more to say on these limits below.

Finally, response analysis involves practitioners listening to offenders throughout their sentence, reviewing and monitoring for fit between the sentence and offenders' changing needs and developing capabilities. This reflective, ongoing review helps identify problems, enabling correction where needs are not met as expected, unintended harms arise, or different needs are discovered. These informal review practices can act as supplements to formal review practices, such as probationers returned to court for a variation of their order, responding either to good progress or breach. These post-sentence principles focus on supporting the offender in the present.

Developing theory: why punish with care?

While I have argued that caring practices are present in punishment delivery, some readers may be concerned that it is inappropriate to respond to offenders either without primarily intending harm, or with caring. I offer three arguments, principled, political and pragmatic, for responding to offenders:

1. *Without* intentional, primary purpose harm*;*
2. *With* care.

A principled argument can be fleshed out with either a liberal or care ethics approach. However care ethics approaches can, by prioritizing personal and social context information-gathering through respectful engagement, help to avoid the silencing and exclusion risked by liberal practices through providing space for interactional justice. Supplementary political and pragmatic arguments are offered. I begin with harm avoidance, taking the arguments in the above order, before working backwards through the supplementary arguments, showing why we might prefer to respond to offenders following care ethics, even if we still believe that intentionally harming offenders in punishment is acceptable.

If we must treat human beings as equally worthy of our care (Kittay 1999, p.69; Engster 2007, p.31), then when we punish, our treatment of offenders must respect these parameters whatever else it does. Since the aims of care ethics include avoiding unwanted harm, it follows that we should avoid *intentionally causing* avoidable harms. We ought not to avoidably objectify or intentionally harm offenders. Engster's other aims of caring are meeting basic needs and developing capabilities (2007, p.76), additionally suggesting a supportive response.

A similar principled argument against harm can also be made from a liberal perspective, since deliberately harming another fails to treat human beings as 'dignified beings of equal moral worth' (Nussbaum 2000, p.79). Here we provide respectful treatment to acknowledge the dignity of the (presumed) rational individual. Causing harm intentionally fails to respect the rationality/dignity of the

generalized other. Liberal arguments overlap with care ethics, and the two perspectives are not inconsistent, but there are practical reasons for preferring the care ethics approach. As Llewellyn notes, liberal and relational understandings of concern, respect and dignity are not incompatible, but the practice-focused care ethics perspective provides guidance for action. As we saw in Chapter two, relational theories 'offer a deeper and richer sense of these aspirations and a better means of achieving them' (2012, p.95). Relational theories prioritize information-gathering to deliver dignified treatment, informed by personal context.

For those not persuaded that offenders ought not to be intentionally harmed, and ought to be treated inclusively and supportively, there are supplementary arguments for both avoiding intentional harm *and* responding to offenders with care. These political and pragmatic supplementary arguments do not necessarily rely on accepting that offenders:

1. Have an as equal status qua persons;
2. Ought not to be harmed;
3. Deserve our caring.

The political argument for avoiding harms applies to citizens, since Dworkin's equal concern and respect is a duty of the state regarding citizens. This is pertinent for state criminal punishment as a state interaction with individuals. Political theorists of many persuasions argue that part of the purpose of the state is to protect citizens from harms caused by others (Nozick 1974, p.27; Hobbes 1996, p.189), through state instituted rule of law (Rawls 1973, p.241). It is prima facie counterproductive for the state to intentionally harm citizens it ought to protect. Brooks argues that '[p]rotecting … the well being of citizens need not require that we protect and promote the well being of each citizen at all times' (2012, p.154). Not protecting offenders' wellbeing may be consistent with the end of protecting citizens en masse; deliberately (or recklessly) causing unnecessary, avoidable harm is a different case.

While treatment as equals allows differential treatment, differential treatment deliberately causing avoidable harm to some individuals is inconsistent with equal concern and respect.[51] The state must avoid intentionally harming some citizens with the end of protecting others if it is to show *equal* concern and respect. If some citizens are unavoidably harmed as a part of protecting others, the state ought further to acknowledge unintended and unforeseen harms and their impact on those the state exists to protect. Such harms should be addressed, where the negative limits of care allow.

Finally, there is a pragmatic, instrumental argument, covering citizen and non-citizen community members. The majority of offenders return to the community at some stage (Mushlin 2004, p.407),[52] expected to establish 'good and useful lives' (The Prison Rules 1999 SI 1999/728, r3) as socially and 'economically productive' (Hampton 1998, p.39) members of society. This requires that offenders are equipped to meet their own needs and to contribute to social co-operation as employees, family and community members. By harming an individual, we can only deplete their available resources for meeting their own needs, the needs of others and engaging in social co-operation. Harming offenders compromises their ability to be socially and economically productive. Hence we should avoid harm.

There are pragmatic reasons for responding with care instead of harm. Helping to address harms associated with the offence[53] and supporting offenders in developing their basic capabilities, reflects Engster's aims of caring (2007, p.76). Building capabilities better equips offenders for potential social co-operation. This does not guarantee offenders will be fully able or inclined towards social co-operation post sentence; but at least it does not guarantee the reduction or

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[51] Commitment to the state protection of citizens precludes the argument that equal concern and respect is provided through treating everyone in ways which deliberately or recklessly cause avoidable harm.

[52] Until recently there were a very small number of prisoners in England & Wales who would never be released. The position of offenders subject to indeterminate sentences has clouded this issue. The uncertainty is both a practical and theoretical problem, and harms these offenders and their families.

[53] Which might include facilitating restorative practices between offenders and victims, and enabling offenders to take responsibility.

destruction of offenders' available resources to be good and useful citizens, meeting their own needs and potentially those of others. Even if we believe offenders may or should be intentionally harmed, there are pragmatic reasons of social and economic efficiency for both refraining from harm *and* punishing with care.

Treating offenders as equals is also important for democratic politics. As observed, most offenders return to the community where they are expected to participate on equal terms. The offender requires necessary resources, but also requires that the community allows them to develop a social role as an equal member. By treating offenders inclusively and supportively in punishment decision-making and delivery, the state can communicate offenders' status as political equals.

Benefits

In Chapter six, I shall sketch a proposal for replacing pre-sentence reports with pre-sentence dialogue. *Listening respectfully* to narratives provides instrumentally valuable information to sentencers, both in terms of designing punishment (this may indicate offenders' criminogenic needs or need for moral education) and in terms of designing supportive caring measures (such as developing low skills, providing employment advice). [54] This provides more effective information-gathering. Respectful listening is further intrinsically valuable, since this is a means providing the treatment as equals and interactional justice that Tyler argues procedural justice demands (Tyler 2003, p.286). This treats offenders as equal, concrete others, rather than objects.

Instrumentally seeking efficient information-gathering does not necessarily imply the intrinsic benefits, but both provide reasons for respectful listening. As Kay Pranis notes (2002, p.30), and Braithwaite echoes (2002, p.564), listening can be empowering for those who have been excluded. 'To have a voice is to be human. To have something to say is to be a person. But speaking depends on listening and

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[54] That these may overlap with criminogenic needs, particularly in the case of mental health and addiction needs, strengthens my argument that some caring is necessary within punishment.

being heard' (Gilligan 1993, p.xvi). Listening is then particularly important for recognizing the offender's status as equal. Acknowledging what we cannot address, and being able to explain the negative limits that prevent us, also demonstrate listening and recognition of others as equals. We should not underestimate the importance of listening for the communication of respect, as this prisoner's comment suggests:

> Although the answer was not what I wanted, I did speak to [the Governor] and she showed me respect. She spoke to me as a normal person … she listened and considered what I had to say and went out of her way to explain (Prisoner, Risley in Liebling & Arnold 2004, p.209).

By employing the attitude of openness and engagement of care ethics, running through the principles above, our chances of listening respectfully increase over that available through prioritizing liberal non-interference. However, these practices of listening and providing needs meeting are subject to some limits, to which I now turn.

Limits and Concerns

Caring for citizens and offenders?

Above we saw Brooks note that attending to citizens' wellbeing need not require promoting and protecting the wellbeing 'of each citizen at all times' (2012, p.154). What are the similarities and differences between state duties of care owed to citizens and to offenders? In Chapter 2 I articulated the positive limits of care, arguing these help to identify and limit our responsibilities. These were:

- our *association* with the other, in the context of their other relationships;
- the *gravity* of the other's need (seriousness and urgency) in the context of other needs around us; and
- our *suitability* to meet needs (including but not limited to specialized or scarce skills or resources).

States have a relevant *association* with their citizens and citizens owe duties to the state: eg paying taxes, abiding by laws, following regulations. Following from this relationship, states owe citizens duties too. This can be seen in the political theory, noted earlier, conceptualizing the state's purpose as including protecting citizens from harms and fostering the collective good. Held argues that the existence of states presumes citizen connectedness: fellow citizens are not the perfect strangers that contractual and rational choice theory suggest, but rather identify with one another (2006, pp.128–9). This resonates with Duff's expectations of shared values within the political community (2007, p.46), which includes offenders. Interpreting this from a care ethics perspective, this relationship with citizens suggests state responsibilities to help citizens to meet basic needs and avoid preventable harms, as Engster identifies (2007, pp.75–6).

States are additionally *well suited* to deliver some forms of care to citizens, some of which find expression in the civil law. Local Authorities in England & Wales have a general duty 'to safeguard and promote the welfare of children within their area who are in need' (the *Children Act 1989* section 17 1a). Family law disputes, about the upbringing of children or the administration of their property, are informed by the 'welfare principle' under the same Act, which requires that 'the child's welfare shall be the court's paramount concern' (s1(1)). Under the *Mental Capacity Act 2005* the court may be asked to decide where a vulnerable adult should live according to their best interests (Herring 2013, p.298). In these examples, the courts act to protect the interests of *individuals* deemed unable to protect themselves.

States have the necessary resources and organizational capacity to co-ordinate responses to these needs, and to enforce standards in care-delivery. Care ethics concern is not 'one individual's interest versus another's but about the well-being of the relation between them' (Held 2006, p.129) and the 'intermingling' of interests between related individuals (Herring 2013, pp.59–60). While individualized approaches do not always account for these intrinsic as well as instrumental value

of relationships, Engster identifies enforcement of adequate care standards as a specific state responsibility (2007, p.102).

These civil law duties of care exist towards all vulnerable people, not just vulnerable citizens. The European Convention on Human Rights also applies to all persons within the jurisdiction of contracting states, regardless of the individual's legal right to be present (Emmerson et al. 2007, p.1). For example, states are particularly *well suited* to protecting citizens *and others* against violations of criminal law. Emmerson et al explain that the European Court of Human Rights has identified positive obligations on states to protect individuals as potential victims of crime. In *X and Y v Netherlands*, the Court identifies a positive state duty to protect individuals by establishing and enforcing 'an adequate system of law to deter and punish individuals guilty of violating the Convention rights of others' ((1985) 8 E.H.R.R. 235, see Emmerson et al. 2007, p.92). *Osman v. United Kingdom* specifies protection of Article 2's 'right to life by putting in place effective criminal law provision' ((2000) 29 E.H.R.R 245, see Emmerson et al. 2007, p.91).

Conceptualizing this from a care ethics perspective, the state's monopoly on the use of legitimate force is a special resource for law enforcement. In addition to the state-citizen relationship, which Held argues is necessary for, and presumed by, rights (2006, p.137), this further implies the state is best-placed to meet citizens' needs for basic rights protection, which helps to meet basic needs and avoid preventable harms. The local state is also best-placed to enforce non-citizens human rights, given the gravity of non-citizens' human rights claims. In Chapter two we saw Singer's untrained passing stranger rescuing the drowning child, protecting her right to life. For non-citizens, the local state is not analogous to an untrained passing stranger. While relationships are weaker, the state has the resources necessary to meet this need. Ignoring such high-gravity needs of non-citizens in our midst would be a 'moral evil' (Tronto 1993, p.123).

There are similarities between state duties of care towards both citizens and non-citizens. Likewise, there are similarities between state duties of care towards

offenders and non-offending others. Offenders are also protected under the positive duty to provide 'effective criminal law provision', since many offenders are also crime victims (Sherman & Strang 2007, p.12). Yet delivery of Convention rights protection may differ for offenders. Genders & Player identify that 'prison authorities owe prisoners both a positive duty to safeguard their lives, as well as a negative duty to refrain from practices that put their lives at risk' (2013, pp.10–1). Emmerson et al note, drawing on *Thompson and Venables v. News Group Newspapers and Others* ([2001] Fam 340) and *Maxine Carr v. News Group Newspapers and Others* ([2005] EWHC 971 (QB)), a positive obligation on domestic courts to grant identity protecting injunctions to offenders convicted of high profile offences, who would otherwise likely face life-threatening attacks (2007, p.93).

Another example of differentiated state care responses towards offenders is found in attempts to recognize the distinct requirements of women prisoners. The state has a responsibility to provide care, given the citizenship (or proximate) relationship with offenders, the suitability of the state's resources to meet needs, and additional positive duties to eliminate discrimination and promote gender equality under the *Equality Act 2006*.[55] Discussing the provision of 'distinct response to the particular needs of women [offenders]' (Social Exclusion Unit 2002, p.142), in light of their social exclusion needs,[56] Loraine Gelsthorpe & Carol Hedderman observe that demand 'is too small, and the complexity of women's needs is too great, to make this an area for easy or quick profits' (2012, p.387). This can be expected to deter private sector providers, necessitating public services to meet basic needs.

Again, the state appears best-placed to provide support, this time through the criminal justice system. This is not to say that the criminal justice system is

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[55] The British Government Equalities office was established in 2007 to lead 'the development of a more integrated approach on equality across Government' including criminal justice (Government Equalities Office 2008, p.9), to help deliver these gender equality duties. I focus on applying care ethics values to guide the consideration and meeting of offender's needs, as important for the state's treatment of offenders as equals. However this creative approach demonstrates how needs might be even more effectively met through a more holistic approach, which a broader public employment of care ethics would support (Tronto 1993, pp.174–80; Engster 2007, p.74; Held 2006, pp.134, 136).

[56] eg 'high levels of mental and physical illness, poverty, [and] debt' (Hedderman 2010, p.489).

necessarily the best way for needs to be met,[57] but rather that when individuals are already caught up in the criminal justice system, providing timely access to support through the criminal justice system may be more efficient (Hedderman 2010, p.489). The Together Women 'community-based intervention' (Jolliffe et al. 2011, p.1), beginning in 2006-7, attempted to provide such timely, holistic support, although difficulties were encountered in demonstrating this.[58]

How are state care obligations towards non-offenders and offending citizen or non-citizen community member, subject to sentencing and punishment, different? I have identified above similarities between these responsibilities of care, but there is a difference: offenders are vulnerable to sentencers and punishment practitioners. This is not simply with respect to receiving procedurally fair lawful punishments, where I have argued that trivial, unavoidable harms are likely to occur and should not trouble us too much. Offenders are also vulnerable with respect to the unintended, unnoticed 'collateral damage' harms. These may cause morally significant harm, and which may continue to have damaging effects long after their sentence has ended. This vulnerability is increased when there is a risk offenders

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[57] The Women's Offending Reduction Programme, established in 2002, was 'developed to deliver a cross-government response, drawing together strands of work and best practice from across departments (Home Office 2004). Baroness Corston echoed the importance of cross-departmental working, proposing a 'Champion for Women' body to co-ordinate inter-departmental working on women in the criminal justice system (2007, p.37). The government responded positively but selectively to the Corston Report, appointing a Ministerial Champion for Women (Ministry of Justice 2007, p.7). This holistic response to women offender's needs, understanding individuals as concrete persons, facilitates the responsive, respectful listening and engaging practices I have proposed. Yet Player reports obstacles to the success of the project: ideological, in terms of reconfiguring women's welfare needs as risks, which will be considered here on p.204; and practical: lacking sufficient, stable funding, and counter-incentives for some agencies to work jointly with the criminal justice systems (2013, pp.9–11).

[58] The project aimed to establish and disseminate best practice in adequately supporting women offenders' in the community, through individual needs assessment and voluntary agreement (Jolliffe et al. 2011, p.1). We should note, however, that access to support through the project was freely available to local women, mixing offenders and non-offenders (Jolliffe et al. 2011, pp.23, 28). '[I]t was regarded as essential that service users should be involved in the design and review' of support plans, rather than being 'passive service recipients' (Hedderman et al. 2011, p.5). Because the five pilot projects were designed to meet local needs, it has been hard to draw conclusions across the pilot locations in terms of reducing re-offending, and the official evaluation criticised inconsistent and incomplete data collection (Jolliffe et al. 2011, pp.25–6). Of more concern, given the holistic, inclusive approach involving women in planning and agreeing their own support, the evaluation does 'not include an up-to-date assessment of the service users' perspective' (Hedderman et al. 2011, p.5).

will be silenced, excluded and misunderstood, as I have illustrated in the earlier part of this chapter. From a care ethics perspective, the state has an opportunity and, given the causal relationship between state punishment and collateral damage harms, a responsibility, to attempt to minimize avoidable harms where possible.

Both the similarities and differences between the state's duties to care for citizens and noncitizens, offenders and non-offenders, can be understood through a principle of protecting the vulnerable: protecting citizens vulnerable to offenders, and offenders vulnerable to vengeance, in order to secure basic rights. The state owes the offender a duty of care because the offender is vulnerable to the decisions of the vastly more powerful state. A principle of protecting the vulnerable (cf Goodin 1985) can explain the different content of duties towards citizens in general and offenders. For offenders, this echoes the 'equality of arms' principle, which acknowledges and addresses the vastly weaker resources of the private individual when charged with a criminal offence by the might of the state. This is one of the central notions of a fair trial (Ashworth 2002, p.34). Both Engster and Tove Pettersen use protection of the vulnerable to mark out the limits of caring, which will be useful to us later in the chapter.

Protecting the vulnerable: conflicting needs

Sherman & Strang emphasise that victims and offenders are not 'fundamentally different kinds of people' with fundamentally different needs. They remind us of our interdependence, and that many individuals are both offenders and victims (2007, p.12). While not always noted, it is a mistake to presume offenders' and victims' needs *necessarily* conflict. However, on some occasions victims' and offenders' needs will inevitably conflict directly.

Care ethics writings often discuss the balancing of needs, reflecting the particularistic, context-sensitive approach and avoiding context-insensitive rules. Chapter two noted Slote (2001, p.90) and Clement (1996, pp.95–6) each employ 'balancing'. However the concept of balancing raises concerns in a criminal justice setting. Offenders' basic rights cannot simply be exchanged in the balance for other

valuable ends, such as public protection or victim satisfaction (Hudson 2003b, p.187; Ashworth 2010, p.237; 2002, pp.64–74). How may we respond to conflicting needs?

One reason for choosing care ethics approaches is that care decision-making often responds to conflict through attention to contextual details (Tronto 1993, pp.136–41). I offered my own approach to balancing in the negative limits of care, articulated in Chapter two as shortfalls in time, resources and information, conflicting needs and human error, which limit our ability to meet all needs in full, and demand prioritization of needs-meeting. Awareness of these limits prompts the reflexive review mechanisms of care, as integral to prioritization decisions. Firstly, we consider whether caring responsibilities towards some individuals have previously failed. For example, the failure of civil law duties to safeguard children's welfare is a failure of care on the part of the state. We should 'be collectively ready to be called to account' for unintended, past harms against the offender (Duff 2007, p.193), which may strengthen a responsibility to offer support. Secondly, responsibilities-to-resources ratios of the offender and others (particularly those with caring responsibilities either towards, shared with, or owed by, the offender) may be relevant. Finally, the review mechanisms of care offer ongoing reflection on our decisions to identify mistakes and other problems. These elements remind us that individual personal and social contextual information is necessary for care ethics decision-making.

What else should guide our decision when offenders' and victims' needs conflict? I cannot develop a full answer here, but I shall indicate some potential approaches. 'Without justice', Herring observes, 'an ethic of care might be seen to support harmful or manipulative activities' (2013, p.67). We saw in the operational limits of care, that poor caring risks infantilization and parochialism. How can we ensure that our caring decisions are not abusive and objectifying, but are also just? I have argued that care and justice perspectives are compatible but, following Clement, that we should avoid assimilation, which loses the valuable, distinct insights of at least one perspective (1996, p.5). Earlier I noted that the different content of duties

of care towards citizens in general and offenders in particular might be understood as a principle of protecting the vulnerable. This principle may also provide some guidance for managing conflict between victims' and offenders' needs, prioritizing the needs of those most unable to help themselves.

For Robert Goodin, what is significant about our duties to others 'is that others are depending on us. They are particularly vulnerable to our actions and choices' (1985, p.11). Goodin argues that our special duties to close friends and family are not 'special' instances of general duties (1985, p.11) but our neighbours 'in space and time' (1985, p.121) such as friends and family (ie those with whom we are interdependent and relationally connected) are more likely to be vulnerable to our choices and actions. Goodin argues that 'economically, you could drive a very hard bargain indeed with someone who is utterly dependent upon you. Morally it would be utterly outrageous to do so' (1985, p.38). Economic exploitation is not the only problematic case for Goodin. He considers a skater who recklessly ignores warning signs and falls through thin ice. Once the skater is beyond self-help, Goodin argues they become especially vulnerable to the actions of bystanders. '[T]o suggest … others should (or even that they *may*) stand idly by and watch people reap the bitter fruits of their own improvidence is surely absurd' (1985, p.129). Goodin's argument is individualistic rather than relational. Yet Engster makes a similar argument with respect to an imprudent skater: 'If an ice skater recklessly skates on to thin ice and falls into the water, he or she still deserves … our care' (Engster 2007, p.64).[59]

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[59] Goodin distinguishes between the imprudent skater, who does not deserve to be harmed (although their recklessness should be discouraged), and 'evil people whose wickedness deserves to be punished' (1985, p.133). Although it is far from clear Goodin would reason as I do, we do not punish offenders for their wicked personalities but the criminality of their acts. Some criminal offences are also moral wrongs, explaining why wicked conduct may be an aggravating factor in some cases. Some offenders may be considered like the reckless skater, whose' poor choices and bad decisions lead to their present predicament. Many offenders encounter personal and social circumstances which limit their options and skew their choices. Following Engster, I take the view that while states may censure criminal acts we must still treat offenders as equal persons, who are in the first instance equally deserving of our care.

In Chapter 2 we saw that Gilligan's highest stage of moral care recognized the equal importance of one's own needs: the exhausted carer meets neither their own nor others' needs. Pettersen argues that Gilligan's mature care requires that we do not heap all our efforts into caring for one individual at the expense of either others or ourselves (Pettersen 2008, pp.135–9). Engster also notes the importance of self-care and care for others (2007, p.56), suggesting this limit protects care-givers from exploitation (2007, p.64). We cannot be expected to provide care for a particular individual when this disrupts responsibilities to care for a more vulnerable[60] third party, or for ourselves (2007, p.62).

Limiting care provision to protect the vulnerable provides a principle for resolving conflicts. This principle allows us, following Hudson, to recognize the moral 'force of the argument for prioritizing victim's rights', as the already wronged party, without establishing an absolute rule (2003b, p.187). Victim's basic rights must be protected, but Hudson argues, drawing on Dworkin, offender's basic rights are the same category of good and worthy of protection (2003b, p.187). An absolute rule does not allow us to respect this whereas a contextually-sensitive approach focused on protecting the most vulnerable party allows prioritization of victims' needs in many, but not all, cases. For example, where an offender committing common assault has suffered years of abuse from their victim, the victim is not so clearly the most vulnerable party.

Tronto argues that caring reasoning and work requires 'a democratic social order' (1993, p.163). In bringing care values to democratic politics we should avoid simplistic 'competition among needs', seeking rather 'a commitment on the part of society to address all the needs that are most urgent' (Tronto 2013, p.153). To avoid pitting 'needs against one another', Tronto emphasises that 'a discourse of rights becomes vital' (2013, p.153). Basic rights, such as Ashworth's understanding of

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[60] I cannot offer a detailed definition of vulnerable in the space available, but this should be understood as identifying individuals with relatively higher-gravity needs, who are also less able than others to help themselves. Everyone in a burning building has an urgent and serious need to reach safety. While we might try to help as many people as possible, our efforts under this principle should be targeted towards people with mobility needs, who are more vulnerable to the danger posed by the fire than those who are able to evacuate themselves.

human rights,[61] can help us to identify high-gravity needs[62] that *must* be met when balancing conflicting needs. This approach follows Held (2006, pp.66–68, 132, 134–7), Pettersen (2008, p.99), Tronto (1993, pp.163–7; 2013, pp.26, 153) and Herring (2013, pp.273–82), highlighting the continuing importance of mainstream approaches.

Paralleling the conflict between the needs of different parties, Ashworth notes that there are inevitably 'clashes between individual [human] rights and public interest'. Like the conflicting needs of victims and offenders, both are goods that are valuable. Ashworth argues that 'the structure of the [European] Convention [on Human Rights] provides for distinct methods of resolving those conflicts, by means of concepts that have some flexibility and also a solid core' (2002, p.54).

Where offenders' and victims' needs conflict, the care ethics approach can provide the flexibility to respond to contextual nuances, and basic rights (either human rights or citizenship rights) provide Ashworth's 'solid core' or the 'floor' (Held 2006, p.71) beneath which we must not sink. While Held previously advocated the rights as a moral floor approach, building care ethics on top; she now argues 'caring relationships should form the wider moral framework into which justice should be fitted' (Held 2006, p.71). The approach proposed here begins with care reasoning, tempered by basic rights. Recognizing basic rights helps prioritize caring between conflicting needs, securing the care ethics aim of avoiding preventable harm. While acknowledging Held's core observation that there can be no justice without practical caring work (Held 2006, p.17), Herring notes '[t]o be blunt, we could not survive in a society which was not just' (2013, p.67). The conflicting basic human rights[63] of more vulnerable others, then, must limit the caring in our response to

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[61] Ashworth argues that, while he employs the term 'human rights', to reflect the language of the European Convention on Human Rights, the term '"human" could be replaced by another adjective such as "fundamental", "basic" or even "constitutional"' (2002, p.3)

[62] which are both serious, understood in terms of the harm threatened, and urgent, in the positive limits of care I sketched in Chapter two

[63] There is a similarity between this conceptual deployment and that of autonomy. Susan Sherwin reports how she revised her understanding of autonomy as largely unhelpful to women in healthcare, when South American Colleagues noted the rhetorical power of the concept in securing

offenders. This meets Tronto's concern for society to address the most urgent needs, rather than viewing needs as simply competing demands (2013, p.153), noted above.

Why punish every offender with care?

The principles derived from care will be more successful with some types of offender than others. Not all offenders are ready, willing or able to discuss their needs, or wish to accept help. While I recognize that not all offenders can be helped, the community, through criminal justice state agents, has a responsibility to attempt to provide care to offenders as best-placed under the positive limits of care to provide care. Consider the following example. Mandy, Candy, Brandy and Sandy each commit similar common assaults, but respond in different ways:

	Accepts conduct as wrongful	Does not accept conduct wrongful
Regrets the offence	Mandy	Candy
Does not regret offence	Sandy	Brandy

Mandy assaults her friend after they had both been drinking. Mandy accepts her conduct was wrongful. She regrets the offence and asks for help managing her drinking. Candy assaults her adult daughter, chastising her since in Candy's judgement, her daughter's conduct brought dishonour on the family. Candy does not accept her conduct was wrong, arguing that the cultural honour code her community follows condones her action. The sentencer and probation worker engage with Candy and explain why the law sees assault as wrong. Candy isn't completely convinced, but her involvement with the criminal justice services is not well-regarded by her community. She begins to regret the offence and the effects of her punishment on her family and relationships. After Brandy assaults a stranger, it becomes apparent that Brandy has a mental health condition. Brandy could not at the time of her offence understand that her conduct was wrongful. Brandy is

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women's rights (2012, pp.13–5). In both cases we find a politically useful concept that can coherently be employed to achieve care ethics ends.

removed from the criminal justice system and cared for as a mental health patient. Sandy also assaults a stranger. Sandy accepts her conduct was wrong, but does not regret the offence and says she will do it again. All attempts to reason with Sandy fail.

Offenders might respond in one of four ways, as illustrated above. The care ethics principles allow us to take account of the individual's needs, attempt to supply appropriate support and consider the likely impact of particular sentences on offenders' in context in order to avoid further harm. Offenders like Mandy, who acknowledge problems and are ready to address them, are likely to benefit most from these principles.

Offenders like Brandy with serious mental health problems ought not to be punished for their conduct. Responding by considering personal context and needs helps us to identify offenders like Brandy. Offenders who have less serious mental health conditions must have their problems accounted for. Both identifying which offenders should be excused on mental health grounds and how to treat them are complex issues. There is a broad literature on this topic, as there is on how to respond to unexcused offenders with mental health problems (Eastman & Peay 1999; Peay 2010; Loughnan 2012). Although there is not space to detail a response, care and need-focused responses are likely to be beneficial for these offenders, as the literature indicates (Genders & Player 1995; Smartt 2001; Shuker & Sullivan 2010; Ward & Salmon 2011; Pickard 2011).

Offenders like Candy are potential success stories. Candy begins to understand the majority perspective, even if she rejects it. Candy is persuaded instrumentally to avoid repeat offences. As with Hampton's moral education and Duff's transparent rational persuasion our obligation is to *attempt* to persuade offenders, while respecting their position as equals. Success is not expected in all cases, leaving room for Candy's autonomy. Care ethics then, is not the only perspective to propose a particular mode of response to offenders as morally appropriate while acknowledging full success is impossible. This approach provides interactional

justice to Candy, treating her inclusively as an equal without objectification or stigmatization.

Until we engage with an offender, we cannot know which example offenders are most like. On first encounter, we cannot tell Sandy, who is unreceptive, from Candy, who is somewhat responsive to our arguments. Crucially we cannot identify Brandy, who needs support. Offenders like Sandy are a problem for the principles I advance. All attempts to persuade Sandy that she should avoid such conduct in future fail. Sandy just likes assaulting people. But we cannot know our attempts to persuade will fail *in advance*. We must attempt to engage the offender,[64] as we cannot *know* offenders will reoffend until we can evidence this with a further conviction. Ultimately, some offenders will be like Sandy and our efforts to persuade or support them will fail repeatedly. Such risks cannot be eliminated, only managed.[65] This does not change Sandy's status qua person who deserves interactional justice. Therefore, whatever our treatment of Sandy, it must be within the limits of what is appropriate for human beings, including treatment as equals. Further, Sandy's conduct cannot change our responsibilities to treat other offenders as equals.

Proportionality and seriousness

Some readers may be concerned that proportionality is lost if we include offenders' personal and social contextual details. While classical proportionality may be disrupted, the intuition can still be followed. Proportionality is the intuition that more serious offences deserve more serious punishment than less serious cases. Conceptually related horizontal equality, that like offences ought to be punished alike, corresponds with Dworkin's 'special case' of treatment as equals: equal treatment, appropriate when all other things are equal (2000, p.227).

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[64] Anstiss et al.'s study supports the view that some approaches to sentence delivery in prisons (motivational interviewing) may succeed in engaging offenders, enabling them to choose desistance, even where offenders expected no change in their own offending (2011).

[65] This thesis does not discuss in detail whether or how care ethics might be applied for the purpose of risk management in these cases, but this might be an interesting case for the expansion of the care ethics approach in future research.

Offence seriousness is classically conceptualized as the amount of harm caused or intended by the offender, in the light of their culpability (Ashworth 2000, p.240). Ashworth notes that ranking offence seriousness measured by harm is complex and controversial: 'No easy formula presents itself', however, 'progress can be made by separating threats to the person from threats to property, immediate attacks from remote harms, and more culpable from less culpable wrongs' (2002, p.111). This allows for the detail of individual cases to be included in the final measure of offence seriousness. Deliberate harm to persons is generally more serious than accidental harm to property: yet we can recognize that my deliberately slapping you is less serious than my accidentally burning down your home. Punishment 'seriousness' is measured by the harm expected to be caused to offenders. Following mainstream principles of non-interference and difference-blindness, intended to protect offenders from intrusion and bias, this anticipated harm measure necessarily considers a generalized, abstract offender.

Classical punishment seriousness measures describe *generalized* anticipated harms and cannot describe the likely harm *particular* offenders may and do encounter. Judging offenders' *guilt* according to a generalized 'reasonable person' standard is necessary and appropriate. Offences cannot be excused or mitigated by the offender's unreasonable beliefs, assumptions or other discriminatory perspectives: consider hate speech offences where offenders unreasonably contextualize their conduct as unproblematic or desirable, or the adult subjecting a young girl to female genital mutilation believing that this is in the child's best interests. Yet generalized measurement oversimplifies punishment seriousness. Without an understanding of the likely impact of a punishment on particular offenders, the accuracy of proportionally linking an offence with a punishment is limited. Insufficient knowledge about offenders as concrete others risks objectifying offenders, causing preventable harms through ignorance, and failing to respond to offenders' needs

I argued above that mainstream practices provide sentencers with insufficient detail about offenders' personal and social contexts. We saw that some contextual detail

about offenders' backgrounds (eg in some cases addiction or abuse) is valued, but this is *relevant* only insofar as it describes the offence seriousness, suggesting aggravation (voluntary intoxication) or mitigation (self-defence, provocation). Despite practical difficulties in measuring and linking offence and punishment seriousness, present sentencing guidelines roughly link levels of offence seriousness with a proportionally deserved punishment in practice.

My concerns resonate with Carlen's concern: 'women who commit crimes for reasons that are readily comprehensible to men will receive proportionate penalties', that is, in my terms, generalized, classically proportionate penalties, 'although these penalties will take no account of the circumstances that they face specifically as women' (Carlen 2013, p.36). Present practices only consider the impact on particular offenders in special circumstances: eg the court may consider the effect of a prison sentence on an offender in poor health. Yet arguments are often made that such offenders ought not to escape proportionate punishment (Pertierra 1995; Porcella 2007), rather than considering punishment as proportionate for both the offence *and* offender.

Following Benhabib (1986, p.414), identifying truly 'alike' cases requires personal and social contextual information about concrete offenders: 'more knowledge rather than less contributes to a more rational and informed judgment' (1986, p.417). Blanca Ruiz echoes this observation, noting that 'detail particularity renders every moral situation unique and in need of an equally unique response' (Ruiz 2005, p.788). Including offender's personal and social context acknowledges potential 'collateral damage' harms that credibly threaten particular offenders: in the earlier example, Jane lost her entitlement to housing benefit, contributing to losing her home. Other examples include offenders' avoidably losing jobs, or damage to their relationships. Without individual context, proportionality and horizontal equality are impossible: 'it is impossible to treat individuals fairly if they are treated as abstractions' (Hannah-Moffat 2009, p.215).

I apply a revised form of proportionality, employing a measure of punishment seriousness which includes the likely impact on the particular offender in light of their personal and social context. This follows the classical proportionality intuition that offence and punishment seriousness should match. With classical proportionality this includes a measurement of harm caused and anticipated respectively. Departing from classical proportionality, the measurement of punishment seriousness is supplemented with offenders' context. This approach acknowledges the complexity of punishment seriousness, reflecting the acknowledged complexity of offence seriousness.

The classical, generalized proportionality calculation provides a beginning point to inform the revised punishment seriousness measure used to inform proportional punishment. The classical, generalized proportional punishment may also be employed as a maximum punishment, to which I return on p.205. While classical proportionality is often intended in academic discussion and applied in practice by the courts, the approach I follow, that offenders' context should inform punishment seriousness measures, has resonance with recent scholarship challenging contemporary proportionality use (Torti 2013; Sheketoff 2010). For my purposes, proportional punishment is instrumentally useful, in providing a beginning point to include offenders' context, potentially suggesting a maximum punishment, and providing two separate ranked scales of generalized offence and punishment seriousness, which I argue below are useful to us in practice. More relevantly, including offenders' context necessary for this revised proportional punishment further facilitates the identification and consideration of needs, treating offenders as equals.

I have argued against *defining* punishment normatively in terms of harm, which restricts our thought to the conceptual space defined by harm, and removed harm from the definition of punishment to avoid normalizing harm simpliciter. There are nonetheless benefits to including classical punishment seriousness, measured as generalized harm, as a *starting point* for *describing* actual punishment seriousness. This acknowledges the reality that most punishments cause harms, but that there is

(or ought to be) more to punishment than harm. When we recognize classical punishment seriousness assessments as an incomplete generalization, this has two further benefits. Firstly, we can acknowledge that more information is needed to describe anticipated punishment harms, informing seriousness in particular cases. This prompts the inclusion of offenders' context, as discussed above.[66] Secondly, we can identify actual punishment harms as variable, potentially causing morally significant 'collateral damage' harms. The classical, generalized ranking of punishments, from more to less serious, can then provide an instrumentally useful means of identifying alternative punishments expected to cause less harm in general. This follows the proportionality intuition, matching actual offence seriousness and actual expected punishment seriousness (revised proportionality), and is consistent with care ethics aims to minimize preventable harms.

When offenders' contextual information identifies no risks of significant harm, or needs which might be supported through particular punishments, these revised, particularistic measurements of seriousness might coincide with classical proportionality. Sometimes, revised proportionality will depart from classically proportional punishment. An offender's context may suggest that the classically proportionate punishments risks greater levels of particular harm than anticipated on the generalized consideration. Again, in Jane's case, considering contextual information indicates that Jane will very likely lose her home if imprisoned. The classical ranking of punishments identifies punishments generally expected to cause less harm. These may then be considered for likely particular harm, helping sentencers avoid preventable 'collateral damage' harms.

The proportionality intuition is still followed. Revised proportionality supplements the classical generalized assessment with particular likely effects of punishment for concrete offenders. Proportionate punishment is still possible, but includes contextual detail about offenders' personal and social context and not a

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[66] Although I lack space for discussion here, I do not intend to exclude the possibility that other information might be included in assessing punishment seriousness. For example, the potential interference with offender's agency, or level of censure expressed. Much more normative research would be required to consider whether these or other factors are appropriate.

generalization linked with complex offence seriousness. Horizontal equality still applies, although in fewer cases since measurement of when all other things are equal is more complex. Following Sevenhuijsen, care ethics approaches expect that this situated, concrete personal and social circumstance information 'is exactly what will raise the quality of judgement' (1998, p.60). Separately, the scale of offence harms might also be used to reflect on likely needs and potential support for victims. I shall have more to say on victims' needs in due course.

The normative limits of care ethics principles

Listening respectfully is core to the principles I propose for providing interactional justice and treatment as equals. Listening directly to offenders acknowledges the intrinsic value of offenders' self-knowledge. Acknowledging the offender's moral perspective is important for treatment as equals. Listening does not mean we sentence offenders relative to their beliefs. Listening respectfully and taking offender's context seriously during punishment decision-making and delivery requires that we critically engage where we believe offenders are mistaken. Sentencing is not the place to engage offenders in moral debate. Moral judgements are not objective and cannot be measured. What can be, and is measured in criminal cases, is that certain acts are legal wrongs prohibited under the criminal law.[67] Yet understanding the offender's position instrumentally helps sentencers avoid preventable harms, meet needs through building capabilities, and identify appropriate punishment measures to challenge offender values and actions inconsistent with the basic rights of others. Following the limits detailed below, offenders who fail to treat others as equals, deny responsibilities and, in some cases, lie, may be treated as choosing not to engage constructively in the alternative pre-sentence dialogue I shall sketch in Chapter six. Written reports may provide a second-best substitute.

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[67] I am not able to discuss a full theory of criminalization, or justification for punishment practices, here since this is beyond the scope of this thesis. Tentatively, given the aims of care ethics to 'avoid harm and relieve unnecessary or unwanted suffering' (Engster 2007, p.28), care ethics may justify criminal punishment along the lines employed by harm principle justification. This, however, requires much further consideration.

These limits accept that not all personal and social contextual detail is 'good'. In some cases this may help identify risks. I have in mind a practice example described in HM Inspectorate of Probation Aggregate Report 2009–2012, where a probation officer built a relationship with her client, who eventually disclosed more fully the nature of his offending. The nature of the offenders' community supervision was modified to manage more effectively the different risk that the client potentially posed (2013, p.17). I shall say more about the risk of interpreting offenders' needs only as risks in the next section. However, managing cases sensitively to provide individuals with more appropriate support, rather than 'additional' punishment, helps to avoid harm can be supported from the perspective of care.

The offender's speech fails to treat others as equals

That all persons deserve equal concern and respect is fundamental to both care ethics (Gilligan 1982, p.149; Koggel 1998, p.184) and liberalism (Dworkin 2000, p.227; Koggel 1998, p.46). While we should listen respectfully and engage in the first instance, sentencers need not take account of persistent unreasonable views ignoring the principles under which we seek to treat offenders as equals. For example, persons charged with assaulting a family member may sincerely view their offence as justified to preserve family honour. While this view may reflect cultural backgrounds and sincere, deeply held beliefs, this objectifies the victim and denies their basic rights. Another example is the conduct of a rapist objectifying their victim by considering their consent unimportant, or 'contextualizing their misrecognition of the woman's "no" as "yes" within the cultural context of prevailing ideas about women's sexuality' (Lacey 1998, p.202). This contextual information is not 'good' in itself, but punishment delivery may be designed to engage offenders, explaining why their actions are inconsistent with treating others as equals.

The offender's speech minimizes responsibility

This limit is based in the integrity of care (1993, p.136). Taking a relational, care ethics approach expects individuals to recognize their connections and responsibilities. This limit becomes apparent when offenders minimize their

responsibilities to others. For example, neglect or abuse of a position of trust: consider care assistants who neglect or steal from clients. Alternatively, this limit might arise where offenders trivialize their responsibility or the harm they caused. For example, some sexual offenders suggest their actions were less harmful given their victim's (blameless) conduct, or focus on their own position: internal guilt, custodial experience and future prospects (Miller 2011, pp.91–6, pp.181-2).

The offender demonstrably and maliciously grossly misleads

Sometimes offenders will lie. I am cautious about including this as grounds for refusing to listen to offenders. My experience of helping others to understand criminal records information was peppered with problems caused by honest mistakes[68] and good-faith responses based on misinformation,[69] interpreted by others as malicious deceit. This is supported by Bennett & Feldman's observations of the potential for misunderstanding in storytelling. By providing opportunity for *private* dialogue, *after* conviction, with the purpose of understanding offenders' context to avoid preventable harm, offenders should have nothing to lose by being truthful, encouraging constructive dialogue. However, some offenders may feel there is something to be gained by lying. While the possibilities of genuine misunderstandings should be explored, deliberate and gross lying may be read as the offender's unwillingness to participate in constructive dialogue.

Protecting Offenders: interpreting context

Garland notes a 'new and urgent emphasis upon the need for security, the containment of danger, the identification and management of any kind of risk' in penal policy (2003, p.12). This emphasis is relentless in a political climate which sees politicians vying to take 'firm action' against crime, which may jeopardise offenders' human rights (Ashworth 2002, p.109). Elaine Player argues that the actuarial approach to risk management, which has dominated the last decade of penal policy, is less accurate when applied to minority groups, since it has been developed with

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[68] Believing an offence 'spent' once the sentence is completed, but the rehabilitation period specified under the *Rehabilitation of Offenders Act 1974* has not elapsed.
[69] Erroneous information from police officers, lawyers and magistrates.

reference to majority offender populations. The risk management approach leaves questionable space for the impact of gender differences (2007, p.413).

By engaging with offenders' personal and social contextual information, we risk information about offenders' needs being used only to infer public risk, and risk subjecting offenders to prejudice. Troublingly, within the Canadian prison system, women offenders' 'self-injurious behavior has become more overly identified as behavior that is "difficult to manage," ... undifferentiated from assaultive behavior directed at others that requires some form of "behavioural management"' (Hannah-Moffat 2006, p.188), a consideration for security classification, a poor choice for which offenders are blamed, rather than a cause for concern about offenders' welfare. Mainstream criminal justice practices provide some protection against these risks through classical liberal principles of neutrality and non-interference, which avoid intrusion and prejudice by treating the offender as abstracted and generalized (Benhabib 1986, p.414). Yet, the focus on neutrality does not facilitate the gathering of information about the real personal and social context necessary for providing concrete individuals with treatment as equals. Kelly Hannah-Moffat emphasizes that reducing offenders 'to a series of risk categories and calculations', treats offenders as abstract 'members of statistical distributions' (2006, p.185). Viewing offenders purely or mainly as a source of risk reduces them to an inert, inactive objects, again risking objectification on Nussbaum's account (1995, p.257).

How can we protect offenders from interpretations of information disclosed about their needs as sources of risk? '[P]rotecting the public has become the dominant theme of penal policy' (Garland 2003, p.12), increasing the risk of objectification in the 'risk society' (Hudson 2003a, pp.43–3). When sentencers apply contextual information, assessments of relevance will draw on the broader political values of the society. However these norms are not necessarily benign. What principles should protect offenders and guide sentencers and practitioner's interpretation of offenders' personal and social context? These problems resonate with addressing conflicting needs considered earlier. Again, I cannot provide a full answer here,

although I indicate some avenues for managing the risks of prejudiced and risk-only interpretations of context.

Care ethics guides us to engage responsively and respectfully with the other, which interpreting offenders merely as risk sources clearly fails to do. The reflexive and reflective review practices of care ethics prompt us to analyse our own caring and the caring of others for effectiveness and appropriateness. However, I accept both that in practice some practitioners will not follow guidelines, and that those who do will make mistakes. We cannot expect full answers to these problems from care ethics alone, since it is not a 'total account of morality' (Tronto 1993, p.126) or a complete political theory (2007, p.5). But care ethics can help us to identify and choose between other useful principles. What other protections can we offer to offenders?

Firstly, I suggested above that classical proportional punishment might be useful to us in limiting our treatment of offenders. Present practices provide a means, albeit approximate and necessarily somewhat self-referential (Ashworth 2000, p.241) (as a 'common feature of human affairs and policy-making' (2000, p.242)), of ranking and equating seriousness of offence with seriousness of punishment deserved. Classical proportionality may be used to articulate maximum penalties. In a discussion of the future of fundamental rights, Ashworth proposes adding 'the right not to be subjected to disproportionate punishment' (2002, p.133). While we can allow that personal and social contextual information should be used to inform proportionate sentencing, from the perspective of care ethics it is acceptable to use individual context to avoid preventable harms. It is not acceptable to use the information in ways which will clearly cause preventable harm, such as increasing the punishment beyond the proportional maximum. This echoes a principle, since repealed, expressed in the *Criminal Justice Act 1991*, as Wasik and Taylor explain in discussing the custody threshold expressed in terms of the seriousness of the offence in section 1(2) of the Act:

> The Act … requires the sentencer to have regard to mitigating and aggravating factors which impinge upon the seriousness and permits the sentencer to take account of any other mitigating (but not aggravating) factor. It follows from this that factors which are not associated with offence seriousness may operate to save the offender from custody, but pulling him back for the threshold, but can never provide the impetus for custody if the offence is not itself serious enough to justify it.
> (Wasik & Taylor 1994, p.17)

Secondly, I noted that basic or human rights can help to address conflicts between victims and offenders. Offenders' human rights can play a similar role in protecting the offender from the risk of being viewed as only a source of risk, avoiding over punishment. The offender's non-derogable human rights 'must be upheld in all circumstances' (Ashworth 2002, p.75). Under the European Convention, these are:

> the right to life (Article 2), the right not to be subjected to torture or inhuman or degrading treatment (Article 3), the right not to be subjected to forced labour (Article 4.1), and the right not to be subjected to retrospective criminal laws or penalties (Article 7).
> (2002, p.75)

This provides Held's 'floor', offering some protection whatever risk is indicated. Under the European convention some human rights are 'qualified rights': Articles 8-11 (respect for private life, freedom of thought and religion, of expression and of assembly and association) (Ashworth 2002, p.76). These cannot be ignored, although they may be abridged on public interest grounds, where 'necessary in a democratic society' or 'for the protection of the rights and freedoms of others' (Ashworth 2002, p.77). But between non-derogable and qualified rights, Ashworth identifies 'strong rights': the rights to liberty and security of the person (Article 5) and the right to a fair trial (Article 6), requiring stronger grounds than the qualified rights before they can be abridged. 'Strong rights' cannot be overridden by 'a simple argument that public safety would be enhanced if the right were curtailed' (2002, p.76).

Ashworth draws on *Doorson v. Netherlands* ((1996) 22 E.H.R.R. 330), where the Court held that the 'credible and specific dangers' posed to witnesses' Article 5 rights, detracted 'from the defendant's right to confrontation under Article 6(3)(3d)' (Ashworth 2002, pp.77–8). In other words, the Strasbourg Court held that strong rights of the defendant may be abridged only as far as necessary to protect the strong rights of the more vulnerable party. The Court also required counterbalances for the resulting 'handicap' faced by the defence (2002, p.78), recognizing and addressing the defendant's increased vulnerability, and demonstrating the possibility of creative approaches to minimizing unavoidable harms.

Thirdly, I suggested above that a principle of protecting the vulnerable might help address conflicts between victims' and offenders' needs. The principle might similarly help protect offenders from bias and state intrusion when information about offenders' needs is treated as risk information, to which offenders are vulnerable. From the perspective of care ethics, serious and immediate risk to particular others cannot be ignored, as is seen in the 'credible and specific dangers' posed to witnesses in *Doorson v. Netherlands* above*.*

Coercion and care

Ideally care should be provided responsively, respecting offender's decisions about when and how far to engage with sentencers, and what information about their personal and social backgrounds to share with sentencers and practitioners. This should include offender's choices whether to consent to receiving a particular form of care. Chapter six will argue, drawing on Roche (2004, pp.47, 216–9) and Winick (2003, pp.183, 187), that conditions for consent can be strengthened. Roche argues that transparency, accountability, advice and information about the options available, and credible exit options without penalties can help to allow offenders' informed and voluntary choices in restorative justice settings. Winick argues successful therapeutic interventions are more likely when offenders understand measures as their autonomous choices. Chapter seven also discusses the management of coercion. However, disclosure of personal detail appears, and is intended, to lead to a less 'serious' punishment, measured by harmfulness. This will

likely influence choices to disclose, making protections for offenders against prejudice and the misuse of information, noted above, more important. While we can provide conditions that foster and respect individual choice, we cannot avoid coercion completely, as the criminal law is coercive.

Compelled care cannot be an ideal form of caring practice, since we compromise our responsiveness to the person receiving care. However, I still intend to include these kinds of responses within my proposal for care ethics guided punishment. While this is not good care, it still requires the labour associated with care. The offender may prefer not to engage in a programme, although their attendance is compelled. While the sentencer may have been rightly unresponsive to the offender's preferences, given the necessity of a compelled, public punishment; the practitioner may nonetheless strive to respectfully and responsively engage the offender. Recognizing this practice as care firstly acknowledges the value of these caring-work practices. Secondly, we can judge our efforts by care standards. Our caring in these cases will inevitably fall short of the ideal but this should prompt reflection, on individual cases and broader procedures and practices, to consider how care delivery might be improved and the responsiveness of the care provided strengthened, on both individual and best-practice levels.

Victims' needs

Punishment is the official state response to offending directed to offenders. We cannot necessarily expect victims' needs to be adequately met by the punishment of offenders. Ideally, offenders should contribute to meeting victims' needs, but where offenders are unable or unwilling, the community must take responsibility. Following the positive limits of caring described in Chapter two, the community is best-placed to provide support, having an appropriate association with victims and suitable resources. Similarly to Singer's drowning child, the community must respond in light of the community's relationship with the victim, and where victims' needs are of such gravity that we cannot ignore them.

Suppose, during a heated academic debate, Agatha vents her frustration by snatching up Beatrice's reading glasses, deliberately breaking them and cutting her fingers in the process. Agatha needs stitches in her hand. The medical treatment she receives does not repair the broken glasses. We should no more expect the criminal justice response to Agatha for minor criminal damage to repair Beatrice's shock, betrayal of trust, or fear of the violence displayed by her colleague. The community response to Agatha should censure her behaviour: it is harmful and wrong to go about deliberately breaking other peoples' reading glasses. This causes victims personal distress and is not conducive to social efficiency.

The response to Agatha might also explore the way she deals with frustrations, with a view to helping her build capabilities to respond in more positive ways, both to avoiding repeat offences and help Agatha avoid personal injury. Victims have been excluded from mainstream criminal proceedings, although improvements have been made (Armstrong & McAra 2006, p.9; Garland 2001). It is important that Beatrice is included in our collective, criminal justice response to Agatha, and that both Beatrice and Agatha are treated as equal concrete persons. It is important that the community takes steps to repair the harm experienced by Beatrice: to reassure her and re-establish her equal status, rejecting Agatha's implicitly insulting evaluation (Braithwaite & Pettit 1990, p.91; Murphy 2011, p.29), perhaps to assist with the practical burdens of spectacle repair.

Punishment is a response *to* offenders *for* their offences, not a response to victims. By attempting to address both victims' and offenders' needs with punishment measures, directed only towards offenders, we may risk masking needs and meeting neither. Further, it may be inappropriate to include victim needs-meeting within the state response to the offender, which censures the act as harmful. It may even be unhelpful to victims to insist that punishment is an appropriate setting for victim needs-meeting. Consider a traumatized victim who does not wish to see or speak about the offender. Even informing this victim of the offender's punishment

response might cause harm.[70] Expecting this victim to draw satisfaction from this, or to consider some reported act of the offender as an indirect form of 'making good', is unrealistic. But sentencers can be aware of the kinds of things that might be done to help Beatrice, and avoid frustrating attempts to support victims. Sentencers might facilitate restorative justice, where this is the express wish of both parties, or order compensation payment as a part of the offender's punishment response. But this should be a small part of community support for victims.

Although not my present focus, the care ethics approach would endorse practices of respectfully and responsively gathering information directly from victims, similar to the practices of pre-sentence dialogue I shall propose for offenders, with one important difference. For offenders, dialogue is to be preferred but optional. Where offenders prefer, existing pre-sentence reports will be used to gather contextual detail about the offender's personal and social context. Social context information-gathering from victims must only be done with the victims' consent, in their preferred format.

Conclusion

This chapter has argued that mainstream trials do not provide the dialogue and information-gathering opportunities that we expect. Due to procedural limits, mediated communication, potential for misunderstanding, and the desensitization to morally significant harms of harm-centred conceptualizations of punishment, mainstream practices risk silencing, excluding offenders and partly objectifying offenders. I have considered how we may punish with care, developing the principles drawn from care ethics to expand opportunities for gathering offenders' personal context information, in ways which respect offenders as equals, providing interactional justice. I have considered why we should punish with care, offering arguments from care and liberal perspectives, and supplementary political and pragmatic arguments. I have argued that this approach should be taken in all cases,

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[70] Perhaps the offender participates in constructing a hospital garden (Thames Valley Police & Thames Valley Probation Service 2010)

since all offenders deserve non-objectifying treatment as equals, notwithstanding that some offenders will reoffend. I have noted the main benefits and addressed key limits of the principles. The next chapter considers how the principles I propose build on the existing theories of Duff and Braithwaite & Pettit.

Chapter Five

How do the care ethics principles for punishment build on and develop existing scholarship?

Chapter one identified the following problems in existing penal theory, which at least to some extent:

1. Has a skewed understanding of harm and is desensitized to, and therefore less able to identify, morally significant harms;
2. Thus fails to recognize non-harm practices, especially care;
3. Offers only restricted guidance for the reasoning processes used in punishment decision-making and delivery, resulting from an impoverished understanding of punishment; and
4. Produces restricted guidelines that compromise our ability to treat offenders as equals.

Chapter two introduced my understanding and application of care ethics, from which I drew a generic set of decision-making principles. Chapter three investigated the presence and essential role of care practices in present punishment practices. Chapter four discussed the way information is gathered by sentencers, during trial and post-conviction, and argued that when this practice is informed by the classical liberal provision of respect through non-interference, this further risks objectifying offenders. I presented three arguments for applying care to the case of punishment; principled, political and pragmatic, and discussed what the principles developed from Chapter two might mean for punishment and addressed core concerns. Here I discuss how these principles are compatible with, and advance, existing theory.

The first part of this chapter shows how care ethics meshes with and develops existing theory, of Duff, and Braithwaite & Pettit. The principles derived from care in Chapter four are both compatible with the theory of these authors, and help strengthen and extend their work. The second part shows how the principles drawn from care ethics fit three psychological models for the treatment and rehabilitation of offenders. These are peripheral to the present research; yet there are resounding harmonies between each model, and the anatomy and ontological expectations of care ethics. These merit mention since they demonstrate the cross-disciplinary applicability and compatibility of the approach advanced here, strengthening the argument in favour of the principles developed from care ethics as normative guidance for punishment.

Remaining with a treatment perspective, I briefly examine practices of blame. Hanna Pickard imaginatively separates the act of holding individual agents responsible, which she terms 'detached blame' (2011, p.219), from the destructive emotional elements that the disapproving of norm-breaching conduct is thought to entail ('affective blame' (2011, p.210)). Care ethics perspectives have no difficulty in censuring criminal conduct, since this gives rise to needs and causes avoidable harms, contrary to Engster's aims of caring. The potentially damaging stigmatization of full affective blame is, however, counter-productive to the caring aims of building capabilities and avoiding harm. Care ethics encourages us to respond to wrongs in a constructive manner. Lacey & Pickard indicate compelling 'instrumental, moral and political reasons' for exporting this model of blame into the criminal justice arena (2013, p.28). This supports the same practical ends as care theory: repairing and avoiding harm, through supporting individuals (needs-meeting). Lacey & Pickard argue for employing 'detached blame' within criminal justice. If Lacey & Pickard are right to argue for this move to detached blame in criminal justice, the approach I offer is one way in which this could be achieved, given the clear resonances between the principles developed in Chapter four and Pickard's detached blame.

The care approach and existing penal theory

Common concerns

There are significant similarities between the approach advanced here, and the work of Duff, and Braithwaite & Pettit. Yet there are differences in how far these similarities extend. These similarities include:

Common aims:

1. Treating offenders inclusively, recognizing their equal status;
2. Repairing harm and restoring damaged relationships, ideally by offenders;
3. Some (potential for) concern for victims' restoration.

Common methods:

1. Valuing of contextual information;
2. A prima facie expectation of dialogue, which implies interaction.

For Duff, as for the care ethics approach described here, responses to offending are guided by what is morally appropriate. Duff highlights the particular relevance of social exclusion, highlighting the relevance of social context information-gathering. For Braithwaite & Pettit there is some correspondence between their parsimony principle and the concern of the care ethics approach advanced here to make efficient, effective use of scarce needs-meeting resources. I have included concern for victims' restoration, although this is stronger in the existing theory. My approach is focused on the punishment of offenders, which I have argued cannot necessarily meet victims' needs. But I have explicitly indicated a concern to avoid causing victims any further harm, and to avoid frustrating external attempts to meet victims' needs. The inclusion of victims is a very relevant concern for the socially holistic, relational practices and values of care theory, and while the restoration of victims is outside the scope of my present work, this is a clear avenue for future expansion of the application of care theory to criminal justice practices.

Duff, and Braithwaite & Pettit both discuss the treatment of victims in greater detail, hence I note this only as a potential overlap with a future development of the approach I offer.

Care and Duff's penal theory

Shared aims

Chapter one introduced Duff's retributive, communitarian informed penal theory, with its focus on the treatment of offenders as members of the normative community; and the implications for penal legitimacy where offenders have been *systematically* excluded from the benefits of society. Duff's concern for the relevance of political community membership evidences the shared aims of treating offenders as equals, and involving offenders in repairing harm, and especially for Duff, restoring victims. The shared civic voice (Duff 2007, p.46) includes offenders (2007, p.192; 2001, p.113) and victims (2001, p.114) as equals. The public, secular penance (2001, p.131) expected of offenders demonstrates the ideal of offender provided repair and reconciliation. Duff views trial and punishment as dialogue (1996, p.82), advocating transparent rational persuasion of offenders (2001, p.177). Duff adopts inclusive aims and discursive methods as intrinsically morally appropriate responses to offenders (2001, p.89), similarly suggested by care ethics principles.

Shared methods

Duff's concern for contextual information-gathering is evidenced in his attention to social exclusion. Duff describes several variants of exclusion: from political voice, material goods, normative community membership and linguistic exclusion from democratic debate (2001, pp.75–6). He distinguishes between 'only 'social disadvantage'' and 'serious, persisting and systematic injustice' (2001, p.183). Systematic injustices across Duff's categories amount to 'persistent … unrecognized or uncorrected failure to treat [offenders] … as members' (2001, p.196). In order to know whether an individual has suffered such systematic exclusion, implicitly we

must attend to their social context to identify how their treatment differs from others.

For Duff, contextual information is primarily relevant for the community's legitimacy in calling the offender to account. For the care ethics approach, contextual information provides essential situational detail, without which our responses to offending are impoverished. Including contextual information also provides the evidence base necessary for treating offenders as equals, and a means of providing interactional justice. Duff's focus is 'systematic' exclusion which may threaten penal legitimacy[71] (2001, p.183). However, social exclusion may be less systematically far-reaching, or less than the causal responsibility of the whole community. Duff acknowledges lesser exclusions are important, noting that courts might recognize 'social disadvantage' (2007, p.191; 2001, p.183, p.200). Yet the community may bear some responsibility for addressing needs relating to such exclusion, even if it is not causally responsible for the harm.

Consider a child who grows up abused by their guardians. The community is not causally responsible for these harms. Yet where needs go unmet by those who ought to take responsibility, the *needs-meeting responsibility* falls to the wider community. Following the positive limits of care, the child's guardians have the most appropriate association (a close familial relationship) to provide care to the child. The gravity of the child's needs is such that these ought not to be ignored by others able to meet the need. Our weaker association as fellow community members begins to imply responsibilities towards the child, as we saw in the case of Singer's drowning child. If the community has been blind to the child's plight, failing to address the child's need for a minimally non-abusive home life, the community has also failed in its needs-meeting responsibility, although not responsible for causing the harms. The community's failure may be caused by the operational limits of care: the child's needs are masked, falsely appearing to have been met by the abusive adults.

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[71] This also demonstrates this importance of considering information about exclusion holistically and cumulatively if we are to identify lesser social exclusion and systematic injustice.

The adult the child becomes is not 'systematically' excluded in Duff's terms: the adult may vote and participate in democratic debate; and may share the values and civic language of the wider society. From the care perspective however, such past harms are relevant. When we understand care as an ongoing process, this past failure in needs-meeting is relevant from the point of view of the *cumulative fairness* principle of the approach advanced here: the individual has unfairly 'lost out' or been harmed by our previous caring distribution choices, relevant for considering the current distribution of caring resources (time, resources, facilities etc).

Duff recognizes these 'less broad than systematic' social exclusions and asks how we can address harms resulting from past lesser social exclusions; yet at the same time respond to the offence and resultant new harms? Duff suggests 'more nuanced legal procedures and post-conviction processes', drawing on restorative justice methods, might indicate a way forward (2007, p.193). But Duff focuses on systematic injustices which threaten the legitimacy of punishment, on harms which threaten the offenders' status qua citizen. He acknowledges but does not discuss lesser social exclusion in detail (2007, p.193), focusing his work on the case of systematic exclusion. Duff's project spotlights significant systematic injustices that deny the citizen their status as an equal community member. My focus is those less-than-systematic exclusions that are nonetheless relevant for responding to offenders as a concrete person, avoiding preventable harm and providing treatment as equals. The guiding principles proposed in Chapter four allow us to identify and take account of personal and social contextual details in our response to offending. Since Duff has not developed a response to these lesser social exclusions, the care ethics approach I propose provides one, coherent and compatible, way of extending his theory.

One possible explanation for these lesser exclusions appearing of less relevance to Duff might be found in his expectations of individuals, particularly individual offenders. Duff's theory has communitarian roots, recognizing the important role of

the community in the individual's understanding of the criminal law, the community's obligations of minimal social inclusion, and the offender's civic relationships with the state and fellow citizens (2010a, p.302). Other relationships, and the interdependencies these involve, are less visible since Duff argues precisely for a liberal political community, 'fostering individual autonomy and freedom' (2001, p.47).

The ontological expectations from the care ethics perspective conceptualizes persons as connected through interdependence, implying personal limitations. There are times, then, when we depend on the assistance of others, or they rely on our care. The liberal independent understanding does not allow for the constraints of personal needs and caring responsibilities towards others (Kittay 1999, p.89). The impact of lesser social exclusions will be very similar across generalized, ex-hypothesi similar individuals. The impact of lesser social exclusions on concrete individuals in their particular personal and social context will be very different, in some cases causing morally significant harms. Duff's position may not necessarily prevent us from detecting these different impacts on individuals, but it does not help us to do so. Koggel argues that liberal conceptions of individuals 'do not take [relational] aspects to be relevant to an account of what it is to be a person to treat a person with equal concern and respect' (1998, p.128).

Were Duff to adopt a care theory or relational conception of persons rather than the liberal conception, these 'relational aspects', our particular personal and social context, could inform our understanding of the different impact on differently situated individuals. For example, on Duff's account it is not systematic exclusion to be excluded from the labour market, but not excluded from formal education, political rights etc. But this exclusion might have more relevance in some circumstances. For example if the unemployed person is 'young and poor, and comes from minorities' (Heidensohn & Silvestri 2012, p.361). In this case, the amount of exclusion this individual encounters increases, given the individual's membership of disadvantaged groups, as these socially constructed differences interact. It is not necessarily clear whether this would always count for Duff's

systematic exclusion. The approach I offer allows a holistic consideration of the individual, interpreting their personal and social contextual details or situation, allowing consideration of whether the exclusion is morally significant.

Shared methods

Duff views trial and sentence as the beginning of dialogue which helps offenders acknowledge their wrongs and seeks reconciliation through repentance (2001, p.177). Dialogue is a core part of Duff's concern, yet the care ethics guided approach drawing on the practical moral reasoning methods of care ethics allows us greater opportunities to provide discussion. In Chapter one I noted Brownlee's concern that the offender's part in the dialogue during punishment is heavily scripted: we stipulate offenders' punishment and the terms of their carrying it out. Punishment 'dialogue' is not particularly discursive, despite Duff's rich understanding of communication (Brownlee 2011, p.57). We normally expect 'dialogue' to involve:

1. Reciprocal mutual recognition as speakers *and* listeners;
2. Sustained rather than minimal interaction;
3. Aiming towards common understanding;
4. Equal rights to participation;
5. Willing participation.

(Brownlee 2011, pp.57–8 paraphrased)

Brownlee discusses punishment only, whereas Duff considers trial *and* punishment as communicative, potentially discursive practices, as the offender wishes. Chapter four raised concerns about offenders' ability to participate in equal dialogue during trial.

Duff perceives the trial as normatively communicative; however I argued in Chapter four that trials do not always meet this expectation pp.161-66. Even where offenders participate in mediated dialogue, they are still partly excluded as their

speech is crafted and given meaning by others, as argued in Chapter 4. This communicates information between defendant and court, but not necessarily with the sustained, willing, reciprocal engagement that is implied by 'dialogue'. Duff's trial dialogue is likely to be mediated and potentially non-participatory (Duff et al. 2007, p.204), and does not reflect the rich understanding of dialogue Brownlee argues is usually intended. Hence her complaint that sentencing is too scripted and restricted to represent dialogue as she describes.

The care perspective implies exactly the kind of ongoing dialogue Brownlee describes: both parties engage in dialogue recognizing the other as a speaker and listener, as for example care-givers receive care-receivers' responses to the care provided. This engagement with the other implies discussion and response, in order to refine the care we provide. Since care is an ongoing process, we can expect sustained interaction as needs are meet and capabilities developed. We will see that some of the practices examined in Chapters six and seven employ repeat sessions with the original sentencer precisely to offer this otherwise unavailable sustained dialogue. These practices and the pre-sentence dialogue I have proposed for discussion expect that both parties attempt to reach mutual understanding, using pre-sentence dialogue to help sentencers understand the offenders' personal context as they perceive it as relevant. This treats the offender as an equal knower, with relevant expertise in their own position to bring to the discussion. Willing participation is also anticipated, but provision to respect the choice of some offenders not to participate will be offered.

Understanding offenders' personal contexts is important if we are concerned to provide proportionate punishment. Accessing this information through respectful dialogue offers a means of both respecting the offenders' lived experience, and providing interactional justice. The care ethics guidance proposed here allows greater scope for dialogue than Duff's existing theory, and might be employed as one way of extending or strengthening Duff's existing work. As noted in Chapter one, care ethics principles may offer the 'more nuanced legal procedures', post-

conviction processes', and 'room for genuine recognition and discussion of such injustices' (Duff 2007, p.193) that Duff notes but does not develop.

Brownlee raises another concern: the state's *condemnation* of offenders diminishes their status and disrupts the conditions of equality necessary for dialogue. She argues that 'a condemned party no longer has the standing to engage in an equally empowered, rational and reciprocal exchange' (Brownlee 2011, pp.62–3). In part, Brownlee accepts this may be mitigated if we regard the act (rather than offender) as censured (a weaker term). Yet even when censure applies to an act, the actor is still the subject of punishment. Brownlee argues that neither of these responses are available to Duff (Brownlee 2011, p.63), since he speaks explicitly of condemning offenders. There are a number of possible responses to the apparent status-change problem for offenders whose acts are censured.

Firstly Pickard's detached blame, discussed later, might be employed allowing censure *without* status-reducing stigmatization. This holds persons accountable, acknowledging agency and responsibility, and imposing consequences for misconduct. Yet detached blame permits us to avoid the negative, stigmatizing and alienating consequences, which can result from full, affective blame. Avoiding these negative effects reduces or avoids damage to the other's equal ability to participate in discussion.

Secondly, while Brownlee argues condemnation is normally used in the strong denunciatory, damning and stigmatizing sense (2011, p.63), it is not so clear this is what Duff intends. Duff describes punishment, blame and even condemnation in an enabling sense, explaining blame and punishment need not deliver stigmatization. Duff argues 'our condemnation or blame must … allow and assist' offenders, to 'enable or help him to repair his relationships with his victim and with the community' (1996, p.82). In Duff's influential 2001 book, 'condemnation' is not indexed, whereas 'censure' has several entries. In Chapter one I highlighted a journey in Duff's writings away from 'pain' as a primary purpose of punishment towards an unavoidable side-consequence, and his discussion of condemnation may

reflect a similar journey. The permanent exclusion sense of condemnation Brownlee suggests sits uncomfortably with Duff's concern to treat offenders *as* community members, who *remain* community members. Consequently there does not seem to be sufficient evidence to conclude that Duff intends full condemnation in the sense of Brownlee's permanent exclusion, given Duff's focus on repair and reconciliation between community members.

However, Brownlee's complaint refers to the equal conditions of participation, stipulated as her fourth expectation of dialogue. The offenders' opportunity to speak ends when their guilt is determined, save for the following of the punishment script. This is the problem I identified in detail in Chapter four; to an extent during trials, and particularly at punishment decision-making and delivery stages, offenders are at least partly silenced, excluded and objectified. This is the problem the principles advanced in this thesis seek to address, creating opportunities for offenders to be heard by beginning with *respectful listening*. When offenders are punished, how can we interact with them so that we continue to treat them as equals, and provide interactional justice? Duff seeks to advance an inclusive, communicative, dialogue based, theory of punishment. The approach I propose may provide a stronger account, resisting Brownlee's status-change and scripting criticisms of Duff's approach, by providing greater opportunities for dialogue.

While Duff's theory is envisaged as a dialogue, Brownlee argues that only limited discussion is possible. Care principles may help to strengthen Duff's theory: by explicitly prioritizing respectful, responsive dialogue, providing a means to treating offenders as equals. The care ethics approach explicitly encourages information-gathering through *respectful listening*. Following the principle of *need identification*, open, engaged and responsive discussion helps to identify needs, and put these in the offender's personal context, along with the social context of the offence. Because these are explicit aims, it is easier to identify practices which fall short: we have language with which to express the problem. *Creative consideration* discusses how we might take needs into account in our responses to offenders. The *cumulative fairness* and *response analysis* principles explicitly recommend active

review of our practice to help identify anticipated mistakes. While Duff's theory displays concern for personal contextual information, treating offenders as equals and discursive methods, he limits his work to systematic exclusion and penal legitimacy. Finally, Duff's retributive theory represents a morally intrinsically appropriate way of responding to offenders. The care ethics approach and the principles derived from this also respond in a morally principled way, intrinsically appropriate to human beings.

Care and Braithwaite & Pettit's penal theory

Shared aims

The shared aims (treatment as equals, offender's repairing harm and restoring victims) are also clear in Braithwaite & Pettit's work. The equal importance of involving victim and offender can be seen in their concern to reintegrate both victims and offenders into the community (Braithwaite & Pettit 1990, pp.91–2). This reflects their republican requirement of equal dominion: less-than-equal treatment of individuals has a damaging impact on equal dominion. Braithwaite & Pettit are also explicit about their preference for restoration to come from offenders for dominion-repairing reasons. Where offenders cannot or will not make restoration to victims, needs-meeting responsibility shifts to the community (1990, p.91), as I have also suggested in Chapter four p.208.

Shared method – information-gathering

Braithwaite & Pettit offer a revised consequentialist, civic republican theory of criminal justice, which includes punishment decision-making and delivery, targeted on maximizing republican dominion. Their approach is compatible with the care ethics approach I propose, but they are concerned with social contextual information-gathering only implicitly. The authors argue for strengthened practitioner discretion to proceed informally (the on-the-ground decisions of police officers, prosecutors and judges). Braithwaite & Pettit argue that discretion and parsimony should lead us to prosecute only those cases necessary for securing

compliance with the law (1990, p.198). This suggests that individual practitioners are regarded as best placed to determine what is parsimoniously appropriate in each case, implying that social context at minimum *must* be relevant. Across Braithwaite & Pettit's relatively short but broad writings, their concern for individual understandings of context remains implicit. Offender's personal context may be relevant to Braithwaite & Pettit. Since this represents some departure from mainstream processes, we might expect a more explicit indication if this was part of their intention. Some superficial personal context, which overlaps with social context, is suggested as relevant. Braithwaite & Pettit suggest a police officer might respond to a drunk wielding a broken bottle by either arrest, or by confiscating the bottle and sending the drunk home. Presumably, the practitioner's discretion will include an assessment of how violent the drunk appears (Braithwaite & Pettit 1990, p.111).

Despite Braithwaite & Pettit's holistic approach and concern for holistic practitioner discretion, and implicitly social contextual information, this does not necessarily suggest a holistic or personal contextual approach to understanding offenders. The civic republican approach identifies a concept of liberty distinct from classical liberalism, and understands this holistically in the sense that differences in dominion reduce liberty for everyone. To maximize liberty, the restrictions and potential restrictions on each person must be the same (Braithwaite & Pettit 1990, pp.62–3). However, as the authors argue, civic republicanism is a branch of liberal theory. This is reflected in their understanding of individuals.

While the civic republican liberty approach is socially holistic in the sense that liberty is only achieved through equal dominion for all, we retain the default liberal understanding of individuals as generalized, self-sufficient and equally independent. As we saw in the discussion of practical moral reasoning in Chapter two, while classical liberal perspectives may include contextual details, for the classical liberal perspective this is a separate, second stage in our reasoning. The self-sufficient default presumption hampers the consideration of the concrete constraints of

personal needs and caring responsibilities towards others (Kittay 1999, p.89), or the limits to our personal capabilities that interdependence and vulnerability suggests.

We cannot expect our personal context not to affect our political capacity to engage as citizens. As we saw earlier, carers and dependants are not free to engage in social co-operation as citizens in Rawls' sense (Kittay 1999, p.92). It is not that Braithwaite & Pettit's position necessarily cannot consider concrete others, rather they adopt a position that considers some social context, but does not equally prioritize concrete personal context. Carers and dependents must make claims to have their needs considered, rather than beginning from a position where interdependence is anticipated. As we saw Llewellyn argue in Chapter two relational perspectives, such as the reading of care ethics I advance, offer 'a deeper and richer sense of [concern and respect] aspirations and a better means of achieving them than liberalism' (2012, p.95).

Both Braithwaite & Pettit's practitioner discretion and the *creative consideration* principle reflect openness to a variety of possibilities. Yet the care ethics principles prioritize direct interaction as a preferred means of information-gathering, and the equal relevance of personal as well as social context. More responses are available for Braithwaite & Pettit's broader theory, since their approach encompasses decisions to charge and to prosecute as well as sentencing and punishment. Braithwaite & Pettit's case for discretion and concern for holistic consideration are in harmony, as distinct from in unison, with the care principle of *cumulative fairness* and with the review processes implied by care, at least insofar as the social context, and the holistic consideration of needs. The principles developed in the last chapter begin by considering, creatively, and broadly, the available responses (with whatever the care-giver and care-receiver can imagine together) and contract down to consider what is possible, preferable and achievable. The *cumulative fairness* principle, drawing offenders' needs into balance with other relevant needs, makes explicit Braithwaite & Pettit's intention that preferred responses should be considered holistically, with respect to the needs of the community.

Shared methods

Dialogue is compatible with Braithwaite & Pettit's holistic approach. They describe a holistic and implicitly context sensitive approach, suggesting 'the criminal justice process should … be a communicative process … engag[ing] defendants in moral discourse' (Braithwaite & Pettit 1990, p.128). This requires at least minimal fact-finding interaction, and is compatible with the principle and practice of *respectful listening*. The practices of listening and attempts to include resonate with Braithwaite's role in developing restorative justice, both within criminal justice and other areas, such as industrial regulation compliance (Braithwaite 1985; 2000; 2002a; 2002b; 2003). Dialogue and the implied contextual information-gathering are in harmony with Braithwaite & Pettit's master principle of maximizing republican dominion, since this recognizes the status of individuals as equals, and could be considered more explicitly.

In Chapter one I noted von Hirsch & Ashworth's concerns about over-punishment between proportional desert and Braithwaite & Pettit's maximum penalty, and loss of horizontal equality. The oversight and accountability provided through Braithwaite & Pettit's power-checking principle might go some way to correct these concerns by allowing appeals against inappropriate sentences. However, Braithwaite & Pettit expect *informal* measures will enable the minimizing of formal measures, going so far as to claim 'there will be less power to be checked' (1990, p.138). Informal measures are still exercises of power as state responses to offending, therefore requiring avenues of accountability for republicans.

Informal measures, including the socializing of citizens to understand the shamefulness of crime (1990, p.89), are not necessarily benign. Consider socialization practices which induce people to understand the 'shamefulness' of a particular skin colour or social background. Institutional checks do not work well for assessing these extra-legal responses, or the informal discretionary actions of practitioners which Braithwaite & Pettit emphasize (1990, p.87, pp.101-2, p.111). There are fewer protections for the community should a police officer inappropriately decide to proceed informally, leaving an offender to the potentially

over-zealous shaming of their community; or responding with a warning when stronger action is warranted.

Informal (socialization) and formalized reintegrative shaming can be a powerful tool for reintegrating offenders and mending harms (Braithwaite 1989). Yet Braithwaite & Pettit acknowledge that shaming is difficult to manage, and has a cultural component not necessarily present in Western societies (Japanese practices being a core example of reintegrative shaming (Braithwaite & Pettit 1990, p.122; Masters & Smith 1998, p.17)). Shaming can easily become stigmatizing, and this becomes more concerning without the checks and balances that civic republicans ought to demand.

This is a fundamental problem for republican theory, a perspective which demands effective, equally accessible procedural institutional mechanisms of review for powers used by the state to secure citizens' individual liberty. The 'master principle' (Pettit & Braithwaite 1993, p.319) of parsimony, and dominion-promoting target *might* guide individual state agents towards these goals. Even assuming state agents always act in diligent accordance with these goals, there is no provision for identifying and correcting human error. This is insufficient power-checking for a republican account.

The *creative consideration* principle contains an element of assessing one's own competence to deliver the appropriate care. While merely considering our own competence cannot deliver competent responses of itself, this could provide an alternative avenue of appeal, which in turn may help temper over-punishment risks for Braithwaite & Pettit. Sentencers might be called to explain their assessments of their competence, or decisions not to seek expert advice, which may allow concrete ground for the appeal of less formal responses. This expands the principle of open justice, obliging sentencers to explain their reasoning publicly (Roche 2004, p.47).[72]

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[72] This will be particularly relevant for problem-solving justice practices, which can also lack checks and balances, as discussed in Chapter six.

The self-scrutiny and mutual moderation review processes found in the *cumulative fairness* and *response analysis* principles, are an integral part of caring well, and offer an informal reflection on practice precisely to spot inappropriate actions such as over-punishment. *Cumulative fairness* includes a rebalancing element, reviewing our *ceteris paribus* preferred decision. This is part of the initial review stage, and should allow sentencers to reflect on their decisions to double-check social context appropriateness before application. Separately *punishing with care*, as including elements of caring practices, includes an aim to minimize harms, including stigmatization or over-punishment.

Response analysis ongoing review processes are not procedural checks, but urge self-scrutiny and supportive mutual monitoring, to meet an aim of providing good care. This acknowledges and responds to the negative practical and operational performance limits, acknowledging that *what* we may do is limited by shortfall, conflicting requirements and mistakes; and that *how* we may do this is subject to poor application. This allows potential for over-punishment to be spotted, and could inform (providing details of the concern) and target (suggesting cases for review) formal review practices to help address this.

Ongoing review practices present in the *response analysis* principle, checks that our beliefs about what was most appropriate at sentencing were, in fact, reasonably accurate during delivery. Review processes help to supply richer, informally available information to help identify where institutional checks should be applied, and to inform these processes. Braithwaite & Pettit prefer informal measures, including the suggestion above that a police officer might respond to an aggressive drunk by disarming and sending them home, rather than arrest (1990, p.111). They also suggest police officers should respond to 'most detected offences with warnings and persuasive overtures', since, 'moralizing social control in general works better than punitive control' (1990, p.171).

Communities might have some access to formal power-checking for the inappropriate use of formal warnings, such as police cautions and conditional

cautions. As noted above, it is difficult to provide oversight for the appropriate use of informal warnings, but self-scrutiny will at least encourage police officers to reflect on the appropriateness of their conduct. Where officers work in pairs, some mutual moderation may be available from colleagues. Community mutual moderation might allow the raising of some dissenting voices, offering offenders some (albeit scant) protection from the informal 'moralizing social control' (1990, p.171) which is not necessarily benign, as noted above. Self-scrutiny and mutual moderation may help target Braithwaite & Pettit's formal republican power-checking most efficiently, and provide some informal oversight (which nonetheless implies action) for informal measures.

Care ethics aims to avoid harm, meet needs and develop capabilities. The principles I have developed to help guide punishment practitioners seeks to identify needs, understand these in personal and social context, and respond to needs as part of a socially holistic understanding of needs within an offenders' punishment. These principles may help strengthen Braithwaite & Pettit's position against over-punishment charges, by providing some informal power-checking of informal measures. Self-scrutiny expects sentencers and punishment practitioners to reflect on the adequacy of their practices. The absence of such reflection is an automatic cause for concern in itself. Mutual moderation also provides an expected framework of mutual support to raise problems about shortcomings.

Further, under the expectations of care ethics, these may be framed as collective learning opportunities. Shortcomings arising from expected and unavoidable personal limits need not be understood as accusations of personal failing; although mutual moderation will also help detect malicious malfeasance. While this may not wholly address the problems of lack of oversight and risked over-punishment, this at least acknowledges that not all practitioners will act ideally, and that those who attempt adherence to principles may still make mistakes. This is some progress on Braithwaite & Pettit's expectation that practitioners will intentionally and successfully strive to prioritize dominion through parsimonious use of formal powers.

Von Hirsch & Ashworth further challenge Braithwaite & Pettit's attempt to 'separate blame from the quantum of sentence' (von Hirsch & Ashworth 1992, p.92). They object that we cannot possibly 'keep punishment as presently constituted with its blaming implications … and *still* separate the blame from the severity of the sanction' (1992, p.95), since hard treatment is intimately linked with censure in punishment as 'presently constituted'. I have argued that understandings of punishment built on a framework partly defined by harm are limited, obscuring the presence of caring. Part of von Hirsch & Ashworth's critique may be explained through this restricted harm-centred understanding of punishment: they simply cannot imagine a punishment *not* framed as hard treatment, despite the potential for morally significant harm. Braithwaite & Pettit's attempt to disconnect reprobative, reintegrative shaming (Braithwaite 1989) from 'severity of sanction' (von Hirsch & Ashworth 1992, p.86) may be supported by Pickard's subsequent developments of a conception of blame, sharing similarities with Braithwaite's reintegrative shaming. As we shall see at the end of this chapter, Pickard argues that we can 'detach' holding individuals responsible from applying negative consequence for unacceptable behaviour, from the damaging, stigmatizing, 'negative reactions and emotions' (2011, p.219) often associated with blame.

Neither I nor Braithwaite & Pettit abandon desert completely. For Braithwaite & Pettit, while not all offenders need be punished, they intend that only offenders known to be criminally responsible are punished. Von Hirsch & Ashworth emphasize that the desert theory they defend relates to sentencing (1992, p.84, p.98), and claim only to discuss sentencing aspects of Braithwaite & Pettit's much broader theory. Since sentencing applies to those already identified as liable, this addresses only Hart's *amount* of punishment question. Yet von Hirsch & Ashworth are right to caution that 'knowing' an offender to be criminally liable, and avoiding over-punishment, are both difficult for the informal responses, and the community's 'moralizing social control' (1990, p.171), which Braithwaite & Pettit favour.

If liability is not what von Hirsch & Ashworth intend, what else might be intended meant by desert? Desert is a proportionate *amount* of punishment, reflecting the offender's culpability and the harmfulness of their conduct (von Hirsch & Ashworth 1992, p.88). Horizontal equality then provides for similar penalties for similar offenders. Braithwaite & Pettit reject proportionality as unachievable, given the differences between offenders' experiences of punishment, branding horizontal equality as 'silliness' (1990, p.127). In Chapter four I argued that classical, generalized proportionality might be used as a beginning point for a revised approach to proportionality, including offenders' context and treating generalized punishment expectations and specific offence similarity as one among many contextually understood pieces of the jigsaw. The principled recognition of individuals' contexts, treating offenders *as equals*, explains differences in sentencing between similar offences, and other apparent instances of horizontal inequality. These differences are not arbitrary or unprincipled, and reflect differences between offenders as concrete individuals, rather than as generalized 'offenders'.

What do we learn about the care principles?

The care perspective takes a more relational approach to recognizing offenders and victims, and to seeking to repair harm, than either Braithwaite & Pettit or Duff. Care theory seeks to repair harm and (re)build relationships via identifying and addressing needs associated with the offence. These needs are considered holistically in the social context, suggested by the interdependent conceptualization of individuals. Braithwaite & Pettit's approach is holistic, and Duff's approach considers the role of community and its responsibility for wrongs, but both operate with an independent, self-sufficient individual agent in mind, rather than interdependent, vulnerable or limited individuals. Duff is concerned about systematic social exclusion (2001, pp.75–6), and the further harm of ignoring the impact of this first harm (2010b, p.139). The moment of discussing the offender's crime may be the time to discuss community-perpetrated wrongs against the

offender, as part of the relevant social, and the offender's personal, context. Duff hints towards this but does not discuss it. The supportive practices of problem-solving courts may be one way in which we can act to recognize the impact of earlier harms, and holistically consider how these needs might be included, given the social context.

Braithwaite & Pettit seek for offenders to restore their victims, and like Duff to recognize offenders' equal status as citizens. However the approach proposed here takes a broader view of which needs may be relevant: contextually understood needs associated with, rather than causally linked to, the offence. Punishment responses specifically aim to avoid unnecessary, preventable harms by avoiding creating or aggravating needs, including victims' needs, through the response provided. Associated needs may include needs prior to the offence, where the offence either aggravates the need[73] or reduces the individual's ability for self-care.[74] For offenders, this may include needs which contribute to offending. At the punishment delivery stage under the principle *punishing with care*, we work to actively avoid causing of new harms, to ether victim or offender, through the review processes under the *response analysis* principle.

Shared criticisms?

If Duff's dialogue is not especially discursive as Brownlee contends, are the principles in Chapter four equally vulnerable to this criticism? The principles derived from the care approach specifically aim to foster dialogue, expecting offenders to make an unscripted communication, which must be attended to. That is to say, we listen respectfully and engage, in the first instance, with offenders; subject to the normative limits of respectful listening, as specified in Chapter four. This applies the same procedure, but leaves room for offenders' responses to diverge and for

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[73] Victims previously afraid to go out alone after dark are afraid to go out alone at all; offenders who previously had difficulty finding work now must disclose a criminal record, further reducing their chances of employment.

[74] A victim who had previously struggled to make ends meet is less able to meet their family's needs after paying for repairs to a broken window; an offender who previously struggled to manage an addiction problem may be less able to do so in a prison environment where some illegal drugs may be more readily available.

discussion to engage with the specific contextual detail. Sentencers' hold responsibility for sentencing, but sentencers' and offenders' contributions in particular are individually valued rather than pre-determined.

Both Duff's approach and the approach I advance, allow offenders to decline to participate, for different underlying reasons. For Duff, this reflects liberal principles (Duff et al. 2007, p.204). From the care perspective, this responds to a potential care-receiver's indication that they prefer not to receive support at this time (we lose an opportunity to include individually supportive measures, offenders do not go unpunished). Both respect offenders' autonomy. Since it is partly my concern to contribute to real-world policy debate, the contribution that care principles might make here is detailed in Chapter six as a proposal for pre-sentence dialogue. The principles I offer would extend the opportunities for the dialogue Duff seeks, which are not as great as he suggests. While trials may provide fact-finding information-gathering opportunities, contra Duff and with Brownlee, I do not consider trial as dialogue, given the mediation and procedural restrictions on speech, as discussed in Chapter four.

I have argued that Braithwaite & Pettit's theory has weaknesses in the provision of oversight for informal responses to offending employed as a formal response by state agents. I have illustrated how the principles I have developed can help to address this. While these measures are by no means equal to the procedural protections of formal processes, they are an advance on what Braithwaite & Pettit offer. The flexibility of the principles I advance for punishment *decision-making and delivery* allows for a principled application of knowledge about personal and social context, needs, responsibilities and resources in sentencing. This will be complex but it is not arbitrary, following the detailed set of principles I have proposed, in line with the aims and conceptual anatomy of care ethics. Yet von Hirsch & Ashworth's concerns point to potential limitation for my approach. If, outside of this thesis, the care ethics principles were addressed to the question of who should be *liable* for prosecution; the flexibility (which is a great strength in producing roughly proportional, horizontally equal and future-regarding punishments) gives rise to an

uncertainty problem: how could we be sure about what conduct, in which context, leaves us liable to criminal prosecution?

I do not have a fully worked out care perspective position on liability since this is beyond my scope. My initial expectation is that care ethics would see all known offenders proceeded against, in order to identify cases where needs-meeting support is necessary, and to identify and offer appropriate support. Punishment responses to offenders, however, might look very different, particularly for minor offences, since I have rejected the necessity of harm. Noddings suggests 'an ethic of caring is likely to be stricter in its judgement, but more supportive and corrective in following up its judgement than ethics otherwise grounded' (2003, p.93). This tentative suggestion is open to charges of net widening, requiring further theoretical work. Since the question of who is criminally liable is also bound up with the question of what is criminalized, any future theoretical work on liability will also need to engage with a theory of criminalization. As speculated in note 67 in Chapter four (p.201), a theory of criminalization might be developed from a harm principle justification.

Care and three psychological models

Three competing psychological models dispute the most effective methods of discouraging recidivism, which have informed the design and assessment of offending behaviour programmes (Polaschek 2012; Birgden 2002; Ward et al. 2007; Brayford et al. 2010). While this psychological approach is peripheral to my research, there are strong resonances, with the care-guided approach presented in this thesis. Here I highlight the focus on relationships, meeting needs and building capabilities these approaches share, and counsel for the design of psychological offending behaviour programmes. The oldest is the *risk-need-responsivity* model, proposed by Andrews, Bonta and Hodge (1990). Its principles are:

1. High *risk* of recidivism offenders are prioritized and services
   and therapies are provided to reduce recidivism risk. Offence

type and other offender needs are less relevant (Andrews & Bonta 2010, p.47);

2. Criminogenic *needs* functionally related to the offender's recidivism risk are prioritized (2010, p.48). This does not prevent other (personal, social, medical, economic etc) needs from being considered (2010, p.35);

3. *Responsivity* tailors the means of service delivery to offenders' criminogenic needs, learning style and abilities (2010, p.49).

While support for non-criminogenic needs is not ruled out, there no requirement to consider them at all under this approach. 'Only "manageable" [criminogenic] problems are targeted for intervention … resolved through behavioral or lifestyle changes … structural barriers conveniently disappear' (Hannah-Moffat 2006, p.189). These 'intervenable needs' are defined in terms of resource availability, 'structural arrangements for intervention … [and] statistical knowledge' of variables associated with reduced recidivism (2006, p.187). However this model was developed through 'statistical analyses of aggregate male correctional population data' (Hannah-Moffat 2009, p.211), with little consideration of the appropriateness of this model for other groups. Hannah-Moffat reports that most studies had focused on 'validating' the existing criteria for minority groups (2009, p.213), rather than considering afresh what approach might best acknowledge and account for gender and other intersecting differences (2009, p.216). The *risk-need-responsivity* model is only minimally compatible with a care-based understanding of punishment. The approach is alert to and responds to some needs, albeit considered hierarchically and according to practitioners' assessment of criminogenic need rather than individuals' identification of needs and priorities; and values respectful relationships between practitioners and offenders as instrumental to rehabilitative success (Bonta & Andrews 2010, p.19, pp.22-23).

This first model has been criticized, since it perceives offenders as 'bearers of risk' (Ward 2006, p.112), rather than as concrete individuals, keen to live fulfilling lives (2006, p.113). Tony Ward argues we can both promote this good and manage risk

by considering offenders as socially enmeshed individuals, with criminogenic needs in addition to the ordinary needs and life-goals of non-offenders (2006, p.114). The second model I shall consider, the *good lives* model Ward offers, is a strength-based paradigm aiming to build offenders' strengths, responsive to their aspirations and interests, providing offenders 'with the internal and external resources to live rewarding and offence-free lives' (Ward 2010, p.41). The *good lives* model is 'founded on the ethical concept of human dignity and human rights' (2010, p.42). Hence it becomes 'ethically obligatory' recognize offenders as equals (2010, p.42). The *risk-need-responsivity* model addresses the top-down defined criminogenic needs of offenders posing the greatest risk of recidivism. Whereas, for the *good lives* model, risk reduction for all offenders is part of offering 'a more fulfilling … less harmful' life (2010, p.61), through developing the 'skills values, attitudes and resources necessary' (Ward 2006, p.115). The *good lives* model values needs-meeting, capability building and harm avoiding, as well as treating offenders as equals.

Ward & Salmon have linked Engster's reading of care theory with sex offender treatment (2011). The authors identify the attentive responsive and respectful engagement with the offender, and the empowering of offenders through building and strengthening basic skills necessary 'to function independently when released' (2011, p.408) as echoing Engster's aims of care. 'Caring clinicians' seek to avoid pain and suffering, and display genuine interest and concern for offender well-being (2011, p.410). Both the *risk-need-responsivity* model and *good lives* model responds to offenders' 'learning style [and] motivation' (2011, p.409). But the *good lives* model aims to 'meet offender's needs, strengthen and maintain capabilities' (2011, p.410) more broadly. The authors claim 'strength-based approaches like the *good lives* model … will help align practice with caring norms' (2011, p.408).

Both models meet needs to reduce the risk of reoffending. Yet the *good lives* model presumes most offenders will choose to move away from offending given adequate opportunity, and empowers offenders towards this end. This may not be true of all offenders, but represents the ideal case. Despite differences, both models value

relationship quality (Andrews & Bonta 2010, p.23; Ward 2010, p.61) (as does the *desistance* paradigm discussed below (Maruna & LeBel 2010, p.81)). For the *risk-need-responsivity* model, relationships are primarily valued instrumentally. The *good lives* model (and *desistance* model) sees intrinsic value in offenders' relationships, taking a broader view on the needs that might be prioritized, and hence the practices of needs-meeting that might be appropriate. The *good lives* model prioritizes needs-meeting, helping offenders to develop capabilities to live fulfilling and law-abiding lives.

By contrast, the *desistance* paradigm, supports offenders because they have chosen or may choose to desist from offending. The model understands desistance as an individual offender-led process, when a (marginal) preference for desisting from offending coincides with an opportunity for doing so, within the context of supportive professional and social relationships (Maruna & LeBel 2010, pp.80–1; McNeill 2012, p.9). While McNeill et al. report there is relatively little research on exactly how probation facilitates desistance (2012, p.7), practitioners can play an important role in building relationships which 'foster and promote desistance' (2012, p.7), by taking an interest in offenders as individuals, developing their strengths and addressing needs (2012, p.10). This individualized, empowering and contextual treatment reflects Engster's aims of meeting needs and developing capabilities, and displays core themes of care anatomy: open, responsive engagement with care-receivers. Efforts to understand offenders' personal and social contexts and needs holistically, and to empower offenders to meet these needs as they choose, reflect the *respectful listening* and *need-identifying* guiding principles derived from care theory. As Engster notes, responsiveness and respect 'directs us to ask the question: what can I do to help you, or even better, what would help you to be able better to meet your [own] needs?' rather than merely 'thrusting goods at individuals' (2007, p.31).

Desistance is a 'difficult and complex process … likely to involve lapses and relapses' (McNeill et al. 2012, p.8). Yet more than practitioners' support is needed to maintain this new identity. Maruna & LeBel report previous research indicating

individuals' chances of successfully changing their lives improve when those around the individual believe they will succeed (2010, p.75). In order for past offenders to assume a new non-offending identity, this must be accepted by others (Maruna & LeBel 2010, p.76; McNeill et al. 2012, p.10). If offenders' efforts are 'blocked … by the practical effects of a criminal record' or 'the refusal of the community to accept that someone has changed, then desistance may be quickly derailed' (McNeill et al. 2012, p.10). Preventing such social blocking of the offenders' attempts to build a new identity is difficult under present conditions, given the harms our interactions with offenders can cause and give rise to, as illustrated in Chapter three. Desistance processes are offender-led, yet require the engagement of friends and family, community and the state (2012, p.2). While desistance is something which only offenders can do for themselves, there is a clear harmony between care theory approaches and the *desistance* paradigm; between building capabilities and empowering offenders' choices to assume a non-offending social identity (2012, p.9).

The *desistance* paradigm, attempting to meet needs, build capabilities and avoid harms, respects offenders' choices about their own process of desistance, providing a striking reflection of Engster's aims of care. The recognition and valuing of the role relationships play, in informing and influencing the individual's personal and social context, also resonates strongly with care ethics. Further investigation of these resonances between care theory and the *desistance* model in particular might prove a fruitful direction for future research, although here I only note these apparent resonances. Yet 'the concept of desistance has now reached such a level of acceptance that specific and practical methods are being founded on its principles' (Herzog-Evans 2011, p.29). This provides a practical indication that the guiding principles drawn from care ethics may have some acceptance in punishment-delivery, and may perhaps be usefully employed at punishment decision-making stages. We should note that, from the perspective of minority groups such as women offenders, desistance processes and their significance are presently poorly understood (Hedderman et al. 2011, p.6).

Overcoming or avoiding stigmatization is crucial to the *desistence* model, and desirable for the *good lives* model. Pickard's development of a conception of blame able to avoid stigmatizing, 'negative reactions and emotions' (2011, p.219) might accommodate both Duff's censure of offenders, which I also propose; and Braithwaite & Pettit's separation of blame from sentence level, explaining why von Hirsch & Ashworth claim that desert is 'discarded'. Pickard's insight on blame is prompted by developments in the psychological treatment of psychiatric patients (2011, p.210), although Lacey & Pickard have argued for extending this model to criminal justice practices (Lacey & Pickard 2013). I turn now to a brief discussion of blame.

Care, punishment and blame

I have argued that, since avoiding harms is one of the aims of care, care theory guided principles will be able to censure criminal acts because they are likely to cause avoidable harm. Yet there may be a tension between the use of blame, which censure suggests, and avoiding harm, since stigmatization is often associated with blame and also causes harm. There have been several philosophical accounts of blame.

For Strawson, blame is a natural reaction: an attitude we hold towards a particular other regarding the nature of their acts and its expression (1962, pp.4–6), within the context of personal relationships (1962, p.10). Our attitudes may be modified if we learn that the behaviour we react to can be excused or justified. For Strawson, reactive attitudes cannot be separated from our expression of holding accountable. Stigmatization is unavoidable in some cases of blame.

For Sher, blame is a past-focused desire that an agent should not have acted as they did, coupled with feelings of frustration or resentment (2006, p.93). While expressing blame might be the venting of negative emotions towards an offender, or the actioning of negative intuitions, this need not be the case. We need not, Sher argues, desire or even feel it appropriate that negative actions should be expressed

in all cases of blame (2006, p.88). In this development, stigmatization, which may result from the expression of such negative emotions, is again unavoidable in some cases where blame is expressed.

Scanlon describes blame in composite form. For Scanlon, blame is *our moral judgement* about the meaning of another's action, which indicates something about the agent; coupled with *our decision* to hold an attitude towards the agent reflecting our judgement (2008, p.211). This may or may not constitute a change in attitude towards the other, depending on whether the conduct confirms or challenges our previous interpretations of the other and their actions. For Scanlon, blame is our chosen response, following from our judgement about another's acts. Stigmatization may result (or be perpetuated) from our judgements and chosen attitudes when these express blame.

Stigmatization is a distinct possibility on these accounts of blame. But these need not be in conflict with care approaches, as some similarities exist: blaming is a relational practice for Strawson, an emotive response for Sher (albeit one which need not necessarily be expressed towards the object of our blame) and a choice based on our judgements of others' acts for Scanlon, which may be contextually informed. Pickard innovatively uncouples the elements of 'holding responsible' and 'expressing negative attitudes' in her exploration of 'detached blame' (2011, p.219). Pickard argues that these destructive, 'negative reactions and emotions' (2011, p.219) associated with what she terms 'affective blame' (2011, p.210) are not necessary to the practice of holding a person responsible, even when negative consequences for the behaviour are imposed. Holding accountable separately from 'negative reactions and emotions' (2011, p.219) she terms 'detached blame' (2011, p.219). If the harm-causing aspects of blaming can be avoided, this will be important for care perspectives which aim to avoid unnecessary harm.

Pickard's insight is to show that emotive responses like the negative emotions associated with blame *may* be irrational, like fearing spiders known to be harmless (2011, p.219). Despite this potential for irrationality, we feel entitled to the negative

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reactions towards the other, in light of their wrongful behaviour (2011, p.219). Negative attitudes, which when expressed may be stigmatizing, are linked with full 'affective' blame (2011, p.218) through a 'defeasible and resistible but nonetheless genuine … feeling of freedom to express blame' (2011, p.219). Our sense of entitlement to hold these attitudes is not a rational judgement, but rather an emotive, *potentially* irrational reaction relative to the other's wrong (2011, p.219). The negative emotions associated with full affective blame are understandable, but separable.

Full, affective blame (Pickard 2011; Lacey & Pickard 2013, p.1) is contrary to the ends of psychological – and, by extension, penal – treatment. Treatment presupposes patient agency: patients can exercise choice and control, and learn to change maladaptive behaviours (Pickard 2011, p.213; Lacey & Pickard 2013, p.4). Pickard's description of blame without the damaging effects resonates with Braithwaite's reintegrative shaming, as identified in Lacey & Pickard's article (2013, p.21). The challenge for practitioners is to hold individuals responsible through 'detached blame' (2011, p.219), or blame without the counter-productive and separable negativity.

If full blame is unhelpful, Pickard proposes that clinicians can avoid affective blame through empathy with patients. By gaining personal contextual information through hearing patient narratives (fuller details of personal and social context), it can become possible to understand a patient's maladaptive responses (2011, pp.219–20). Gaining an understanding of the patient as a concrete person allows clinicians to understand more clearly why a patient might have acted as they did, without excusing wrongful conduct. This facilitates the 'holding individuals responsible' element of blaming, perhaps with negative consequences; but without the damaging stigmatization of full blame. Information-gathering thought respectful listening allows for the identification of patient needs in context. This treats patients inclusively and allows therapists to see patients as concrete persons, rather than treating their disorder in isolation.

There are clear resonances between Pickard's narrative and empathy means of achieving detached blame, and the *respectful listening* and *need identification* principles I have proposed following a care ethics perspective. In a similar way, I suggest that sentencers and punishment practitioners ought to treat offenders as equals through understanding offenders as concrete persons, responding to them as individuals, and valuing their expertise in their own lived experience. Pickard explains that supporting a patient in exploring their personal history can help both clinician and patient to better understand the patient's individual context, and the factors that have shaped their character and development of problematic responses. The creative consideration principle I propose will see sentencers and offenders consider potential responses together, echoing Pickard's clinician-and-patient joint investigation of the patient's history, to develop responses (2011, p.220). This in turn can provide a starting point for therapists, to help individual patients develop alternative coping mechanisms and essential skills for living well in society (2011, p.220). This echoes both the *good lives* model and *desistance* approaches discussed above: seeking to equip offenders with skills for living well, in Pickard's case by employing detached blame, and empowering offenders to develop internal resources for themselves and skills for desistance.

There is a distinction between disapproving or censuring a harmful criminal act, and applying the same 'negative reactions and emotions' (Pickard 2011, p.219) of blame, to the offender. In both Braithwaite's and Pickard's work, the destructive consequences of 'negative reactions and emotions' (2011, p.219) are not necessary for holding offenders responsible. Matravers describes censure as 'moral criticism' (2011, p.69). We may offer moral criticism for an *act*, but it does not necessarily follow that we must similarly criticize *and stigmatize* the offender. For Braithwaite, disintegrative shame only further alienates offenders (1980, p.68, pp.101-4; 2002a, pp.81–4). Pickard's constructive form of blame, and Lacey & Pickard's exportation to criminal justice, chimes with Bennett's criticism of current criminal blame practices. Bennett argues blame in response to criminal acts is a proportionate 'severing of relations' or diminishing of offenders' civic status. This distances offenders from the community (Bennett 2008, p.148), and is unhelpful for

punishment ends of reform, rehabilitation, restoration or even particular deterrence. Stigmatization is contrary to the principled treatment of persons as equals (Dworkin 1977, p.227).

Pickard's conception of responsibility without the negative effects of blame originates from a therapeutic, caring, approach. Pickard advocates exploring narratives and needs. Lacey & Pickard argue that there are 'instrumental, moral and political reasons' (Lacey & Pickard 2013, p.28), for exporting Pickard's conception of blame into the criminal justice process: the *moral* relevance of society's obligations towards offenders, such as offenders' needs resulting from community-perpetrated harms (for example Duff's systematic social exclusion); the *political* good of democratic inclusion of fellow community members (especially citizens, for example Braithwaite & Pettit's republican reintegration and Duff's normative community membership); the *instrumental* end of reducing risk through facilitating offender reform and offender-led desistance through empowering offenders. These reasons take similar paths to the principled, political and pragmatic arguments advanced against harm and in favour of care-guided responses to punishment in Chapter four. Above we saw similarities between the guiding principles derived from care, and the approach proposed by Pickard to enable detached blame. Employing care ethics principles may be a way to allow conceptual space for, and to foster the use of, detached blame within criminal justice, as Lacey & Pickard suggest (2013, p.28). Detached blame is an excellent example of responding to another for wrongful conduct, in such a way as to avoid further harms. The principles advanced in this thesis help to gather the contextual information necessary for Pickard's empathy, provide for initial and ongoing review, encourage offender engagement in sentencing decision-making processes and also seek to balance offenders' needs with community needs.

Conclusion

This chapter has discussed the similarities between the principles developed from the perspective of care in the previous chapter and some existing penal theory, and

where the care ethics approach might strengthen and extend existing theory. I have identified a similar methodological concern for contextual information and discursive method in the work of Duff. This contextual and discursive method is compatible with, although less prominent in, Braithwaite & Pettit's theory. The principles derived from care provide space for the broader consideration of past harms against offenders, and offer an opportunity to extend Duff's theory, notwithstanding that Duff's focus remains the legitimacy of punishment. For Braithwaite & Pettit's theory, the dialogue-based method appears compatible, offering concern for nuanced description with similar intent.

Care ethics is not a 'total account of morality' (Tronto 1993, p.126), and is necessarily situated within a wider political theory. While I cannot elaborate a full political theory here, it is worth noting that this is consistent with the reading of care ethics I have employed. Engster sites care at 'the heart of justice', arguing that care ethics represents 'only a minimal set of moral and political principles' regardless of how we 'choose to organize private or public lives'. For Engster, care theory is potentially compatible with 'liberalism, libertarianism, communitarianism, and natural law theory – or other religious or cultural values' (2007, p.5), and is necessary since in all societies humans will need care. For my own part, I would restrict the set of practices and principles to those compatible with any broadly social democratic approach.

The care-guided approach advanced here is not a complete theory of punishment. I do not, and care ethics perhaps cannot, consider who should be liable for punishment. I have specifically considered interaction with, and quality of treatment of, offenders during the decision-making and delivery of punishment. This is not to say that victims' experiences and needs are not important: on the contrary, respectful listening to the particular narratives of victims will help strengthen sentencers' understandings of the social context of an offence and victims' associated needs.

The earlier parts of this thesis considered whether it would be possible and helpful to consider punishment from the perspective of care ethics. I argued in Chapter four that this was possible and desirable. In this chapter I have shown the harmonies between the principles I propose and existing theory, and considered the possibilities for my proposals to extend existing theories. I have also noted harmonies with psychological approaches to offender management and the principles I propose. In the remaining chapters I consider how the framework I offer, for guiding punishment decision-making and deliver according to care ethics to strengthen the treatment of offenders as equals, might fare in practice and consider the changes we might see. I use the natural experiment of some existing bottom-up punishment practices to provide a part-test of the principles I propose.

Chapter Six

Punishing with care: informing punishment decision-making

Chapter four identified principles derived from the ethics of care to guide sentencing decision-making and delivery. There are several bottom-up practices of responding to criminal offending which, while not explicitly following care ethics values, have values and practices partly in harmony with, and moving parallel to, the principles I propose. This allows some insight into how the principles I propose might fare in practice. The next two chapters examine elements of these practices with a view to testing these principles. To the extent that these practices harmonize with the principles proposed, the strengths, weaknesses and limitations of these principles can be illuminated. In this chapter, mainstream practices will also be compared.

Sentencing defines the nature and content of punishment: put simply, different options are available to prison and probation officers when planning a sentence. This chapter focuses on the ways in which bottom-up criminal justice practices inform punishment decision-making. Chapter six largely considers the first two pairs of principles, covering information-gathering and response design:

1. The past-regarding, information-gathering pair:

   a) *Respectful Listening*;

   b) *Needs Identification*.

2. The future-regarding, response-designing pair:

   a) *Creative Consideration*;

   b) *Cumulative Fairness*.

The final pair of principles applies mostly to punishment delivery and review, considered in relation to bottom-up approaches in Chapter seven:

3. Present-focused, harm-avoiding pair:

    a) *Punishing With Care*;

    b) *Response Analysis*.

Restorative justice was introduced briefly in Chapter three, noting the link identified between this practice and care ethics (Walker 2006). Conferencing will be considered in Chapter seven as a formal punishment practice. Here I consider the practice of circle sentencing, a restorative practice specifically aimed at gathering contextual information to inform punishment decision-making. Next I introduce the perspectives of therapeutic jurisprudence and community justice, which contributed to the development of problem-solving courts, bringing to problem-solving practice of their attendant strengths and flaws, to differing degrees.

This chapter will focus on initial decisions to admit to drug court programmes, and the sentencing stage of problem-solving courts. Chapter seven will consider the regular review meetings, which are integral to these practices. This distinction is blurred in practice since the same problem-solving techniques are used at the initial practice-informing stage and the sentence or programme delivery; whereas restorative justice processes aim to gather information and propose a response to harm through a one-off in-depth discussion. The issue is further clouded since American drug courts are often convened under bail laws, operating outside of usual trial or plea bargaining procedures, and 'under the radar' of due process (Miller 2012 at 23–4 mins). Partly this represents an administrative division of labour between Chapters six and seven, given these overlaps. Exploring the values associated with problem-solving courts is more difficult than for restorative justice, since problem-solving courts lack an underlying theory. Yet there are key practical similarities between diverse projects, which give some insight.

Restorative justice information-gathering

Restorative justice is a broad church (Ashworth 2003, p.164) encompassing a variety of practices.[75] In this thesis I have used the term to refer to face-to-face methods which bring offender and victim in to direct contact by consent to discuss the offence and its consequences, and designing a way forward. Sherman & Strang's meta-analysis identifies face-to-face restorative justice conferencing and court-ordered restitution as 'best practice' (2007, p.24), suggested by the existing research. These practices seek healing, repairing relationships and restoring victims through allowing victim and offender to meet, engage in dialogue and reach an agreement (McCold 2004, p.15). This chapter discusses the information-gathering techniques of restorative justice, as used to inform and conduct sentence decision-making. Chapter seven considers delivery of court-ordered conferencing as an alternative form of punishment.

Conferencing is sometimes used as an information-gathering and decision-making tool in mainstream sentencing, for example in New Zealand (Daly 2005, p.164). Conferencing is not usually used in this way in England & Wales (Easton & Piper 2008, pp.191–8).[76] However restorative conferencing might be used externally to mainstream processes, at a pre-trial or pre-sentence stage, and these reparative agreements may be reported to the sentencer (detailing the quality of offenders' participation and noting victims' sentencing preferences, rather than recommending a sentence). Sentencers may disregard such reports. But occasionally, where restorative practices have run alongside, but separately from, mainstream practices, restorative justice outcome agreement elements have been ordered in England & Wales sentencing (Shapland et al. 2011, pp.17–20, p.98). Since these practices were not intended to inform punishment decision-making, I do not include these practices here.

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[75] Restorative justice may be used as an umbrella term (Miller 2011, pp.10–1) for grass-roots responses. Over time this has included 'community corrections, informal justice, community service, alternative sentencing, community mediation [and] victim offender reconciliation' (Zehr & Mika 2003, p.40).

[76] In youth justice in England & Wales, conferencing may be used in issuing a young person with a warning or reprimand. Though similar to adult police cautions (although informed consent is not required (Easton & Piper 2008, p.265)), these are not court orders.

Restorative practices are used in some jurisdictions explicitly as information-gathering and decision-making mechanisms, aiming to deliver a sentencing proposal. One clear example is the practice of sentencing circles, used for example in Canada and Australia. I focus on the Canadian example since it is a relatively well-established practice, explicitly focused on informing a court-ordered response, and consider chiefly this one example so as to think more about the principles and motivations underlying the practice, rather than becoming embroiled in procedural differences between jurisdictions.

Circle sentencing

Canadian circle sentencing began in First Nations Communities, following a concern to include aboriginal law and values (McNamara 2000, p.2). Canadian Appellate Courts now also use circle sentencing in non-aboriginal settings (Stephens 2007, p.25 at footnote 18). Practices vary as circles reflect the values of the participant's community. In the Canadian example, circle sentencing takes place *after* a fact-finding mainstream trial. Circles aim towards healing and restoring community harmony, and are similar to restorative conferencing, in that all relevant parties (including victims, offenders and their supporters, community members, elders or non-political leaders, police representatives, defence and prosecution lawyers, and the sentencer) may participate on an equal basis in face-to-face discussions. Each participant has an opportunity to speak in turn, ask questions and contribute to building a restorative reparation agreement (Rexroad 2006, p.241). Following *R v. Joseyounon (1996)*, Canadian case law guidelines describe when First Nations circle sentencing is appropriate, focusing on voluntary participation, particularly victims' consent; and the willingness of the court to consider a nonconventional sentence. This final aspect of the case law guidelines implies that sentencers ought to give serious consideration to implementing the circle agreement, although their primary obligation remains imposing a 'fit' sentence (Cunneen 2007, p.124). But do parties have equal voices in practice?

Criticisms

Equal-voiced participation cannot be presumed given participants' unequal social standing in the community. Women occupy a subordinate social role in some Canadian First Nations communities. When circle sentencing responds to domestic violence, women victims may be intimidated by their victimization *and* may lack the social standing to be heard as equals (Goel 2000, pp.324–8). Cameron addresses a lack of empirical research on the 'gendered power imbalances between the survivor and the abuser, cultural and economic factors … exacerbate[ing] the subordination of women, and administrative shortcomings' (Cameron 2006, p.482) threatening victims' safety in dealing with domestic violence. Her 2006 study concludes that the judicially convened sentencing circles examined in her study 'fail to meet the needs of survivors of intimate violence in many instances' (2006, p.483), by perpetuating oppression and repeating the harm of exclusion. The problem of ongoing discrimination and re-victimization is echoed across the circle sentencing literature (McNamara 2000, p.4), and into the literature concerning restorative justice processes as part of a sentence.

Separately, circles may focus too heavily on the concerns of offenders and restoring harmony between offender and community, producing unduly lenient sentences (Rexroad 2006, p.418; Cameron 2006, p.313). This fails to respond appropriately to offending, and may fail to avoid harm and to meet associated needs in line with the aims of care. One potential response to victim discrimination and inadequate punishments is also the site of another concern: the sentencer's role in final sentencing and concerns about proportionality. Canadian sentencers may reject circle recommendations to impose a 'fit' sentence. A sentencer following circle agreements may be criticized for imposing an unduly lenient punishment or perpetuating the victim's oppression. In departing from agreements, sentencers might be criticized for devaluing the circle. However, this offers sentencers an opportunity to avoid further harm to victims.

Where sentencers do not alter circle-derived punishments, sentences may be viewed as disproportionate since offenders committing similar offences could, with

different circles, receive quite different punishments. While this is true, this is not necessarily disproportionate. I argued in Chapters one and four that taking full account of personal as well as social contextual detail regarding offenders and offences is required for truly proportionate sentencing. This provides a more nuanced approach to proportionality which admits another variable: how alike individual offenders are, as distinct from similarities between offences. Chapter one argued that this more nuanced approach is implicit in both retributive and consequentialist penal reasoning. The circle allows access to offenders' personal contexts, to be understood in relation to the offence and victim. This broader account of proportionality and horizontal punishment expects more variation between punishments for similar offences in the light of differences between offenders.

Equally, sentencers' power to overrule circle outcomes could provide a safeguard against oppression, offering some formal oversight to a more informal process. Where sentencers do adjust circle recommendations, this need not disregard the agreement altogether. Sentencers' oversight roles and responsibilities for a 'fit' sentence may help to temper instances of circle over-punishment, protecting offenders, and under-punishment, protecting victims in this case. Roche similarly suggests that judges might provide procedural oversight to restorative justice conferences (2004, pp.216–9). Transparency about sentencers' intentions might improve legitimacy, accountability and confidence in their intentions. Were sentencers to articulate their reasons for adhering to, or departing from, circle agreements, this might clarify sentencers' respect for both the circle's value and the equal status of the parties. Similarly, Roche highlights decision-makers knowing they will (or may) be called to explain and justify their decisions in many democratic practices (2004, p.3), as a means of improving the quality of decision-making. The sentencer's role is balancing the concerns of the circle, the treatment of offenders and victims as equals, and the delivery of appropriate censure for the offence. This will not be easy, but is not so different from sentencers' current role in mainstream criminal justice: to impose an appropriate, proportional sentence, given the facts of the case and guidelines circumscribing potential punishments.

Further, different circles are differently convened to reflect local values. This has the benefit of taking better account of the social context in which the offence occurred, increasing the nuances considered proportionally, but does risk the unquestioning perpetuation of oppressive values. Mainstream laws that have ceased to reflect majority moral beliefs, derive some procedural, democratic and popular legitimacy from their discussion, enactment, enforcement and openness to revision (consider the decriminalization of same-sex relationships). A means external to the circle for the community to periodically discuss and review the values applied in the circle might help to strengthen the approach.

While circle sentencing seems an imperfect, unreliable method for *ensuring* victims and offenders are heard as equals and their needs considered; the restorative justice approach of circle sentencing may still do a better job than mainstream criminal justice. Circle sentencing practices '*may* have more room for *some* of the needs of *some* women to be met' (Cameron 2006, p.510). We cannot expect changes in criminal justice practices alone to alter wider social perceptions and institutions that expect and perpetuate oppression (2006, p.510). The capacity of restorative justice practices to help to identify and meet needs of both offenders and victims, in a balanced way that does not contribute to the difficulties already faced, does not seem to be fully realized. Yet restorative justice makes important steps forward in recognizing the individuals harmed and aiming to treat them equally.

Circle sentencing methods are reasonably in line with the principles I propose, and go further, explicitly considering how the needs of communities and victims may be actively met. In particular, there is a similarity between the likelihood of different sentences for similar offences, because we take account of more information about the individual offender. However, since circle procedures differ between communities, the approach I propose should allow less variance from different procedures, since I seek a modest modification to mainstream practice. The equal standing within the circle may be undermined by participants' unequal standing in

the community. If social prejudice prevents circles from hearing victim', or offenders, equally in the discussing, circle sentencing may risk masking these needs. I have suggested that existing forms of sentencer responsibility for a 'fit' sentence might, rather than posing another problem, become a means of providing some oversight for the treatment as equals of all parties in the circle. Sentencers might act to prevent over- or under-punishment, which may result from the exclusion of some participants. Greater transparency explaining sentencers' departures from circle agreements might help to improve confidence in sentencers' provision of oversight and respect for the circle's value.

The healing and harmony *motivation* of circle sentencing in response to the harm caused resonate with the aims of care: meeting needs and avoiding harms through (re)building relationships. Sharing power and opportunities to speak suggests the process is equipped to treat victims, community members, families and offenders *as equals*. *Respectful listening* is a means of empowering the disempowered (Koggel 1998, p.53; Pranis 2002, p.30; Braithwaite 2002b, p.564) and providing interactional justice, avoiding at least in theory the exclusion, silencing and objectification risked in mainstream practices in England & Wales in Chapter four. The *subjects* of restorative circle sentencing are the persons involved (McCold 2004, p.18, p.20). The primary *concern* is restoring social harmony, which may come at the victim's expense, if circles perpetuate discrimination. The equal discussions of the circle and negotiated agreement, is one source of *information* for sentencing decision-making. *Power* is claimed to be shared equally by the participants in their contributions to the circle agreement. Yet sentencers hold ultimate authority and responsibility to impose a 'fit' sentence, overruling agreements if necessary.

Fit with care principles

In Chapter four I proposed principles developed from care ethics, to help guide sentencers' consideration when sentencing. How well do circle sentencing practices measure up with these principles? Information is gathered through *respectful listening*, hearing each participant on an equal basis in theory. In line with the principles I propose, this allows for hearing from offenders themselves about their

personal context: those parts of offenders' narrative which they deem relevant to the offence and their present position. Each piece of personal contextual information should be considered holistically: recognized as linked and taken together to help describe a concrete person, and not considered as isolated details. This allows *needs-identification* for offenders. Collectively agreeing an appropriate resolution resembles the responsibility taking and sharing, awareness and responsiveness values of care ethics (Tronto 1993, pp.126–37). This shared responsibility approach suggests that a balanced needs-meeting and burden-sharing response *might* be a possible outcome. This follows the second pair of principles, *creative consideration* of responses, and *cumulative fairness*, balancing the needs of offenders (and in this case, victims) with other values determined by the broader political morality, according to available resources.

Going beyond the principles I propose, this supplements social contextual information found at trial and provides information about community and victims' needs. I propose the *creative consideration* of needs-meeting possibilities, envisaging this being primarily between sentencer and offender in mainstream criminal justice scenarios (detailed at the end of this chapter). But in the circle sentencing case, many more participants are able to contribute to the caring-for practices of identifying potential responses to needs. This information will be useful at the *cumulative fairness* stage, where the principles I propose seek to balance responses to offenders' needs with the needs of others, given the available resources and personal and social context of the offender and offence. Going beyond the proposals I offer, circle sentencing theoretically allows consideration of how needs can be met for victims.

Problem-solving justice

If restorative justice is a variety of overlapping and related practices under an umbrella heading; then therapeutic jurisprudence and community justice are conceptually distinct approaches to similar overlapping and related practices in problem-solving courts, albeit focusing on different elements. Because therapeutic

jurisprudence and community justice approaches overlap in problem-solving courts, it is important to consider how each perspective contributes to problem-solving practices. Once all three have been explored, I will reflect on the fit between these practices and the principles I propose.

Therapeutic jurisprudence practices

Therapeutic jurisprudence describes a practice of intensive, judge-led supportive progress assessment for particular groups of offenders. The first problem-solving courts were drug courts, employing a therapeutic jurisprudence ideal: the belief that judicial interventions can and should have a therapeutic effect (Schma 2000, p.6). The first drug court opened in Dade county Florida in 1989, propagating a wave of 'problem-solving' courts (Berman & Feinblatt 2001, p.126). These early courts operated with a model closer to the 12 step programme associated with the Alcoholics Anonymous practices, than a traditional courtroom (Miller 2012, at 06 mins). Specialist problem-solving courts for various issues (for example, mental health, domestic violence) have since spread to each of the American states, and to many other countries (Berman 2009, p.2). Other therapeutic courts followed, for example mental health courts. However, here I shall focus on the drug court example.

Drug courts are judge-led initiatives, responding to problems through trial and error, in search of what works for individuals (Nolan 2001, p.42). In America, where the practice is more established than in England & Wales, drug courts work with 'clients' on a voluntary basis, as a diversion from criminal prosecution. Winick recommends problem-solving judges should employ motivational interviewing (a psychological technique requiring engaging with the offender, drawing out their problems and helping them to see possible solutions as achievable options, and their associated benefits). Winick argues that where drug court participants experience problem-solving measures, including decisions to participate in drug court programmes, as their own choices, this improves offenders' chances of success (2003, p.183, p.187).

American drug courts often operate largely outside of the traditional channels of judicial influence (trial and plea bargaining) operating instead through pre-trial provisions as extended diversion under bail processes. This is noteworthy, since the due process protections of American law, such as rights to representation apply to trial and not to bail hearings, or the alternative post-sentence probation model, where representation is a privilege. While American drug court participants do not have these protections, they are subjected to onerous and long-term conditions of bail, which is where US drug court programmes usually operates (Miller 2012, at 20–26 mins). By comparison, Scottish drug courts operate as post-sentence probation supervision with judicial involvement (2012, at 24 mins). It is further worth emphasizing that, unlike England & Wales, probation supervision in Scotland is undertaken by Criminal Justice Social Workers, still trained in a social work setting (Halliday et al. 2009, p.412).

Therapeutic jurisprudence values

Drug-courts are a judge-led response to the 'revolving door' of re-offending (Hora et al. 1998, p.523), resulting from the ineffectiveness of mainstream approaches in dealing successfully with offenders' underlying problems. Given this supportive, needs-meeting aim, Christine Saum & Alison Gray describe the practice as 'care perspective' informed (2008, p.115), and Judge William Schma links therapeutic jurisprudence to the ethic of care, with potential to deliver desirable societal benefits obscured by mainstream justice (2000, p.6). However, the process rests on the power and discretion of the judge, responsible for overseeing and directing the treatment process, and who may make orders rewarding success or disciplining failure.

Therapeutic jurisprudence views legal and judicial actions as not only with the potential to be therapeutic or to order therapeutic interventions, but *as* therapeutic of themselves (Miller 2009, pp.422–3). This, says Miller, is a problem. While problem-solving drug courts are constructed to draw in specialist expertise to benefit the decision-making judge, sentencers are not therapeutic experts (2009, p.445). How effective is it for sentencers to make therapeutic decisions? Do judges

with the best of therapeutic intentions risk doing more harm than good through lack of appropriate knowledge? Where drug courts operate outside of the usual due process channels, can offenders receive proper protections? In either case, should offenders be subjected to drug courts at all? These questions will be taken up presently.

The *motivation* of therapeutic interventions is a belief that criminal justice interventions both can and should have a therapeutic effect (Schma 2000, p.6). Therapeutic approaches aim to tackle underlying problems and difficulties associated with a chaotic lifestyle, to stop re-offending through building offenders' capabilities in the community as active citizens. The *subject* of therapeutic jurisprudence processes is claimed to be the offender, with *concern* directly for offenders' individual problems, but community benefits are anticipated. This supportive, individual-focused, needs-meeting approach appears to share the responsive, other-focused openness and engagement features of care. The therapeutic jurisprudence ideal sees judges building agreements with participants, who choose to engage. Judges draw on *information* from the offender and expert advice from clinicians and support workers external to criminal justice, who are specialists in dealing with a particular kind of problem (eg addiction to a specific substance). The claimed locus of *power* is the offender themselves, with the offender's 'ownership' of the treatment process, identified as important for their success (Winick 2003, p.183). Although it is ultimately sentencers who control orders, McIvor also reports the efforts of Scottish Sheriffs to have immediate offender input when drug court orders are made (2009, p.38).

Community justice practices

Community courts, specializing in addressing quality-of-life crimes and community justice (hereafter community justice) concerns, followed drug courts. The first problem-solving community court opened in New York's Midtown district in 1993, followed in 2000 by the Red Hook Community Justice Center in another New York neighbourhood (Malkin 2009, p.150). The Center brings criminal justice and community services together on the same site. Strang describes this community

justice strategy as a largely American phenomenon (2004, p.75). Yet in late 2004 a problem-solving community justice pilot project began operating in North Liverpool (Mair & Millings 2011, p.7). Problem-solving, community-centred courts can also be found in Australia (Victoria NJC 2013). Community justice aims to empower local people to address local problems, including offending. Focusing on high-crime localities for greatest impact, community justice draws together concerns about crime and social justice problems that foster crime. These social problems form the 'flip side' of criminal justice (Clear et al. 2011, p.3). The needs-meeting element of problem-solving justice is often combined with a community sentence. Community justice approaches seek comprehensive changes proactively, through: repairing and improving public spaces (often as part of a community sentence); empowering local people through peer-support, job-creation and supervision for children; problem-solving rather than apportioning blame; and decentralizing priority setting to enforce national laws according to local concerns (2011, pp.20–3).

Community justice practices follow the values of community policing (engaging communities, building trust and co-operation with local people) and are structured to allow informal discussion. 'Sentences are not "imposed" by a judge remote to the circumstances of the case; rather, the penalty is determined in interaction with those who were affected by the case, including the offender' (Clear et al. 2011, p.65). Specialist courts, overlapping with therapeutic jurisprudence (eg domestic violence courts), may engage with community justice strategies. Community justice seeks problem-solving solutions, aiming to 'dispose of cases on a local level and … provide the care needed to address the complex problems faced by low-level offenders' (2011, p.73). Community justice values context-specific responses to offending, although prioritizing local social contexts over offenders' personal contexts. Community justice values the repairing and restoring of community relationships, building community capabilities and meeting community needs. This perspective recognizes that building the capabilities of offenders and helping to meet offender needs, is instrumentally useful in meeting these community goals. Hence there is an instrumental overlap with the concerns of care ethics.

Community justice values

Resonating with Braithwaite's reintegrative shaming work (1989; 2002a), informal social controls are identified as key to public safety, and social capital is strengthened through joint working with local residents, businesses and public services. Community justice recognizes the importance of place (the safety of the geographical location of the community). In high-crime areas, local people often prioritize tackling 'quality-of-life' crimes (Nolan 2009, p.12), offences which make everyday life threatening (street drug dealing, soliciting, etc).

Yet the flexibility offered by decentralized priority setting might raise practical co-ordination problems between areas, and consistent application of the law. Localization may also disadvantage minorities, since those best able to articulate their concerns at public engagement fora are often the already powerful (Mansbridge 1983, pp.132–5). One way this concern has been addressed is through increasing and diversifying the outreach work of American courts and police departments, to reach a broader spread of the community and hear the concerns of the marginalized. This requires time, effort and resources to build relationships and does not guarantee success, but acknowledges and attempts to address the problem.

Community justice benefits from the wider information available from engaging with offenders as concrete persons. Yet there is concern that the informality of community courts does not afford offenders proper due process protections. The social environment improvement values of community justice may offer some protection to offenders, but this cannot protect against poor practice. A system of appeals might help, yet it is difficult to appeal on procedural grounds when procedures are unclear, and defendants have 'chosen' not to have their guilt determined by trial (Clear et al. 2011, p.67).

While community justice practices claim to empower communities, Malkin argues that discretionary powers of community court judges rather enhance judges' power within the local community (2009, p.154). Although there is some guidance

available for American jurisdictions seeking to set up community justice projects, this could be improved (Clear et al. 2011, p.76). Community-court projects have a poor reputation for adequate data collection (Sherman & Strang 2007, p.25; Strang 2004, p.76), which would help evidence best practice (Clear et al. 2011, p.756) and provide guidance. It is further difficult to compare data collected across different community justice schemes, since each project reflects the unique circumstances of the community it serves.[77] It is not clear whether the use of problem-solving methods actually reduces reoffending, coincides with other factors or simply relocates problem behaviours (Malkin 2009, p.147). There are concerns about net-widening (2009, p.150), and resource efficiency given the resources required to intensively support offenders (Boldt 2009).

The *motivation* of community justice projects is the empowerment of local people in high crime areas to address local problems. The offender and their personal problems are the *subject* of community justice, following an expectation that this will help meet *concerns* to empower communities, and achieve the goal of improved public safety. The sources of *information* that inform sentencing decisions include the 'affected parties' (victim and offender) and may include contextual information. In America, defendants may be questioned in some cases by community members, such as citizen jurors in youth community courts (Mullins 2009), while judges (rather than the parties) steer the process. *Power* is viewed as held by local people, whose concerns inform local law enforcement priorities, although sentencers ultimately determine punishments.

Problem-solving courts

Problem-solving court practices developed from therapeutic jurisprudence and community justice, addressing the offender's current needs for their own, and the community's, long-term benefit. Similarly to community justice, sentencers engage informally during the trial proceedings about the offence. After the trial (and before sentencing) there may be a separate problem-solving meeting, similar to drug

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[77] Restorative justice conferences reflect the unique situation of the participants, and better progress has been made in evaluating these schemes (Strang 2004, p.77).

courts. Sentencers engage with offenders to understand and explore underlying problems from offenders' perspectives (Nolan 2001, p.40; Miller & Johnson 2009, p.9). Problem-solving courts are evolutionary in nature. Supporters and critics agree there is no founding theory on which these practices are built (Berman 2009, p.3; Strang 2004, p.76), and since no two projects will be quite the same, no single exemplar exists (Miller & Johnson 2009, p.44). Yet problem-solving practices share five key aspects:

1. Collaboration;
2. Information sharing;
3. Individually tailored sentences;
4. Outcomes;
5. Accountability.

(see particularly Miller & Johnson 2009, pp.123–4; Berman 2009, pp.2–3; also Nolan 2009, pp.10–11; and Wolf 2007, p.4 who includes community engagement).

The first three apply particularly to problem-solving as an information-gathering, sentence-informing mechanism, which address the primary concern of problem-solving sentencing, according to the offender's needs.

Problem-solving requires strong relationships. *Collaboration*, is required between criminal justice system agencies (police, court staff and probation workers) and partner organizations (local social services, mental health services and voluntary sector support organizations). Building relationships between agencies in advance facilitates co-working and provides access to a 'voice of experience' in problem-solving meetings, and contributes to developing and delivering problem-solving.

Information sharing is essential. In addition to partner agencies sharing knowledge, offenders are encouraged to share personal information and are treated as 'expert' in their personal experience of their problem. This gives a richer understanding of the problem, providing the problem-solving meeting (often including the offender, sentencer, prosecution and defence teams, probation workers and voluntary and statutory support agencies) more information to help identify the most appropriate response. This facilitates *individualized, tailored sentences*.

Problem-solving court sentencer involvement has therapeutic and community focused roots, (McIvor 2010, p.217) and is primarily concerned with offender needs. Results matter in problem-solving courts since successful *outcomes* (where offenders' feel fairly treated, and community quality-of-life is raised), are more important than the volume or speed of cases processed (Berman 2010, p.10). Collecting outcome data can help identify what works locally, identifying strengths and monitoring weakness.[78] Unfortunately, the impact of punishment responses is difficult to measure, and consistent data collection remains a problem for these community courts (Malkin 2009, p.154; Mair & Millings 2011, pp.62–4). *Accountability* is raised: offenders are accountable to both probation services and sentencers for their progress at review meetings. Sentencers are accountable to the community for following community-identified priorities through helping offenders to move away from offending towards stable, *good lives* (Ward 2010); or by choosing *desistance* (McNeill et al. 2012).

Problem-solving courts use sentencer-led progress reviews: the problem-solving does not stop after the initial problem-understanding, information-gathering session that feeds into decision-making. Problem-solving courts, as practised at the New York projects and the North Liverpool Community Justice Centre, are criminal justice responses, with problem-solving operating often as part of the community sentence. Key features enabling the community justice centre approach include:[79]

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[78] The first year problem-solving outcomes at the North Liverpool Community Justice Centre found reoffending rates were 'not statistically significantly different'. However, offenders dealt with through community justice projects were significantly more likely to breach sentence conditions than a mainstream group (Jolliffe & Farrington 2009, p.3). Owing to greater use of extended review powers under sections 178 and 191 of the *Criminal Justice Act 2003*, and intensive unpaid work orders (full-time rather than part-time), this may partly reflect increased breached detection rather than an increase in breaches (Jolliffe & Farrington 2009, p.4). Increased breaches and technical violations were also observed in American intensive supervision programmes (Petersilia et al. 1993).
Popovic reports problem-solving courts as therapeutic although not 'time efficient' (Popovic 2006, p.75) since individual hearings are generally longer. This resonates strongly with Tronto's observation that caring does not benefit from being temporally 'compressed' (2003, p.123). However, one of the few achievements the North Liverpool Community Justice Centre has evidenced with statistical data, is the reduced length of time from first hearing to sentence. In 2007 at the North Liverpool Community Justice Centre this was 26 days, compared with a 147 day national average (McKenna 2007, p.73).
[79] See Mair & Millings 2011 Chapter one for a more detailed discussion.

1. Same-site location of criminal justice and partner agencies;
2. Problem-solving approaches;
3. Extensive use of extended review powers;
4. Single resident judge dealing with all cases and reviews;
5. Community engagement work to understand local problems and priorities.

Initial problem-solving sessions feed into sentence decision-making. Follow-up review sessions are considered in Chapter seven.

The *motivation* of problem-solving courts is to address offenders underlying problems for their own wellbeing and to promote community quality-of-life. The *subject* of problem-solving courts is the offender, and its primary *concerns* are the offender's problems following an expectation of improvements to community quality-of-life. Victim wellbeing is less important than preventing reoffending and improving community quality-of-life. This risks side-lining victims' interests. *Information* is gathered during an initial problem-solving meeting, from the offender themselves, about their personal context and problems, and from experts experienced in addressing similar problems (ongoing review hearings will be considered in Chapter seven). This breadth of information is one of the strengths associated with problem-solving courts. *Power* is understood to be shared between the offender and sentencer. Although sentencers hold the final responsibility and authority, they endeavour to build consensus with offenders. There is some resonance here with Duff's occasional negotiated sentences (2001, pp.158–63).

Criticisms

Therapeutic jurisprudence and community justice are both employed in problem-solving courts. Eric Miller describes drug courts as problem-solving courts employing community justice (2012). Miller uses the term 'holistic', rather than therapeutic jurisprudence (reflecting therapeutic attention to offenders' needs) or restorative justice (reflecting community restoration concerns), to reflect the

drawing together of criminal justice and partner professional agencies (and thus, bringing together the expertise of specific-problems solving, eg drug treatment in the case of drug courts, with concerns for both offender and community (2012, at 28 mins).

For problem-solving justice Miller identifies two pairs of concerns. The lack of due process protections, particularly for the particularly for the American examples of drug courts as 'bail courts'. If we value the informalities of these practices, as encouraging open engagement, do these provide appropriate protections for offenders? This is closely bound up with a second concern Miller raises; the lack of clarity in criminal justice policy, particularly in the American context; because drug courts are judge-led and ad hoc, there is a lack of clarity about the policy intention intention (Miller 2012, at 33–4 mins). Miller argues that American drug courts offer a means of supervising and supporting drug addicted offenders in the community rather than imprisoning them, an alternative punishment; whereas most American drug courts are diversionary, albeit a lengthy and onerous process, since a criminal record may be avoided with good progress (Miller 2012, at 29 mins).

These due process and policy concerns will be discussed further below, as particularly in relation to the American context, these concerns resonate with considerations of admission to drug courts, as close as diversionary drug courts get to punishment decision-making (the therapeutic support is a court-ordered diversion, albeit long and onerous, rather than court-ordered punishment). Another related pair of concerns are those of coercion (coerced participation and problem-solving court disclosure) and confidentiality (protecting information about offenders). Lack of appeal against either admission to, or decisions during, a drug court programme is a serious concern in the light of coercion. These concerns, in England & Wales and in Scotland, relate more strongly to the delivery of a problem-solving court order (whether diversionary as in some American cases, or a response to offending as in the Scottish case) and will be discussed in Chapter seven. Because of the nature of problem-solving courts, these concerns overlap the processes of punishment decision-making and delivery.

Due process protections and competence

Problem-solving courts sentencers behave more like a 'caring but authoritarian guardian' than an 'impartial arbitrator' (Payne 2005, p.74), with other informalities intended to make court sessions less intimidating. This aims to increase offender engagement in problem-solving. But can offenders receive proper advocacy (Berman & Feinblatt 2001, p.134) or does this treat offenders as 'second class citizens' (Popovic 2006, p.66)? American *diversionary* drug courts do not provide as full access to review processes as mainstream courts, concerning in the light of offenders' questionably 'voluntary' participation (2006, p.66).

Berman quotes problem-solving Judge Cindy Lederman, raising concerns about the character of would-be problem-solving judges. She observes that, American problem-solving judges have 'a tremendous ability to harm people', since they become 'involved' with offenders' lives and family circumstances. Judge Lederman implies mainstream judges, who simply preside, determine guilt and sentence, risk less harm (Berman 2000, p.82). Yet mainstream sentencing also has potentially harmful effects on offenders and families. Chief Justice Blatz of the Supreme Court of Minnesota suggests that problem-solving judges do not act alone; problem-solving courts allow voices to be raised against potentially harmful decisions (Berman 2000, p.84). Problem-solving sentencers draw on expert advice from partner organizations (2000, p.82) the offender's contextual information and defence lawyers' scrutiny (2000, p.84), to a greater degree than for mainstream processes. But it is right to raise concerns about due process protections, particularly when many problem-solving sentencers are not trained in the use of the psychological techniques they employ in the courtroom,[80] or in the detail of appropriate problem-solving methods depending on the client's needs. Two responses are available to strengthen this position.

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[80] Winick suggests that problem-solving sentencers should adopt 'motivational interviewing' techniques (2003, p.187).

Training sentencers as public servants

Firstly, we could insist that problem-solving judges become appropriately trained, gaining rudimentary specialist knowledge of the particular need their court serves to address, and skilled in engaging and motivating vulnerable offenders appropriately within the court. Bean asks 'what … of an overly enthusiastic judge, a sadistic judge, or an incompetent judge' (2002, p.248)? Consistently incompetent sentencers must either accept retraining or be removed from post. Training is already provided to sentencers: the Judicial College (previously the Judicial Studies Board) (Judicial Office 2012) ensures that sentencers in England & Wales are informed about changes to the law and sentencing guidelines; the Federal Judicial Center has a similar role in America. Training could be expanded to cover problem-solving and engagement techniques. Where problem-solving justice occurs within mainstream community sentences, the formal appeals process is available. Problem-solving courts' regular review sessions, discussed in the next chapter, potentially expose offenders to further unfairness; but equally allow for misunderstandings to be identified and corrected.

Further, sentencers are public officials carrying out public duties. As public servants, sentencers are asked to measure cases impartially, without consulting their private biases. Their role as public servants is to provide an appropriate punishment response on behalf of the community. Civil servants are expected to leave personal political beliefs at home. We might expect 'overly enthusiastic' (Bean 2002, p.248) problem-solving judges to leave personal biases on a peg by the door, and simply to apply the law appropriately, in light of the personal and social context information about the offence *and* offender. Failure to do so is not just a case of a judge with questionable personal prejudices: it is a case of being either unable or unwilling to do the job. Appeals are already made against procedural irregularities. It is not so far-fetched to consider appeal on the grounds that sentencers acted according to prejudice rather than law.

Collaboration for informal oversight

Secondly, structuring in informal review according to the principles drawn from care ethics may go some way to meeting due process concerns about access to appeal and oversight, particularly for courts since operating as *diversions from* mainstream criminal justice or effective as pre-trial measures. I have suggested a concern to provide good caring as an ongoing activity, bound together with the integrity of care as Tronto suggests, point to a practice of self-scrutiny. We continuously monitor our own caring for aspects that might be improved, for accuracy of caring as intended, for mistakes and unforeseen problems.

Self-scrutiny begins with the first pair of principles, encouraging continuous critical reflection as the driver continues to check mirrors while travelling. This runs through the care principles with the open, engagement of the attitude of care, and is the responsive part of our engagement, paired with our awareness of or listening to the other. I have indicated key stages of review in the care ethics principles, the initial review at the cumulative fairness stage, where we consider the socially holistic appropriateness of the best response for the individual; and ongoing review as a part of the response analysis stage, understanding caring as an ongoing practice. I have drawn a parallel between self-scrutiny and a driver checking their mirrors to make sure their actions are and remain safe. The good driver continues to check mirrors throughout their journey and responds accordingly. Because these review practices are internal to good caring, the absence of self-scrutiny is itself a cause for concern. We should be just as concerned about our caring practice if we omit self-scrutiny (part of a caring attitude), as the babysitter who forgets to feed the baby should be concerned about their practical caring.

At the *creative consideration* stage we consider our own competence to provide the emerging care preference. While high-gravity needs in non-ideal circumstances (such as life-threatening emergencies), will sometimes call upon us to care beyond our competence. Where acting beyond our competence is avoidable (ie the gravity of the need allows for more suitable help to be sought), we ought not to do so, since this risks incompetent care. Partly addressing Miller's concern about

therapeutic fitness, the sentencer in a drug court ought to ask themselves: 'can I provide appropriate 'therapy' for this offender; what else is needed?' Appeal processes could be established around sentencers' assessment of their competence, and decisions whether to seek and follow advice, in the same way sentencers are already called upon to explain other aspects of their reasoning, building on accountability and the principles of open justice (Roche 2004, p.47).

Because caring practices often require a sharing of responsibility, our reflection must also have a collaborative element; mutual moderation monitors the caring of others in the same way we monitor our own. Both these practices are implied in, and are internal to practices of caring, and are implied in both Engster's and Tronto's descriptions of caring as a value set, attitude and practice. Further, these practices occur under care perspective ontological expectations of persons: we expect all persons to be interdependent. This interdependence suggests that there will be some occasions where we rely on the help of others, a limit beyond which we need support. Normalization of need is a core part of care ethics. Given that we encounter these limits as persons, there is no reason to presume these limits apply only to our biological basic needs. What we are able to do individually informs the contributions we are able to make to collaborative social endeavours. Once again, these personal limits are expected by virtue of our interdependence.

We find a division of labour within the criminal justice system between the different practitioners in the courtroom, each relying on the legal expertise and case-specific knowledge of the others in order to progress the case. When we presume liberal self-sufficiency, we assume each has effective mastery of the skills and knowledge necessary for participating, as self-sufficient individuals. Because on the liberal ontological expectations of generalized others with necessarily equal rationality/dignity and presumed self-sufficiency, to suggest that another is in error is at least potentially insulting. Either we imply the other could or would not use their rational capacity, or has a deficiency of knowledge. Both run counter to the expected *rational self-sufficiency*, suggesting a personal failing. Because we seek not to slight the powerful, or because we wish to hide our own errors, this motivates

covering up and the denying of mistakes. Consider a junior nurse, who is the regular care-giver for a particular patient. Tronto notes that due to this specific contextual knowledge, the nurse's view about the best treatment for this patient may conflict with the senior consultant's view (1993, p.109). If the nurse raises the concern, the consultant may perceive this as a challenge to their hierarchical and technical authority, rather than as an attempt to improve patient care through discussing nuances and conflicting needs. Based on this opposed-individuals, adversarial account, junior nurses may need to learn not to challenge consultants if they wish to keep their job.

If instead we begin by following the principles of care ethics, this requires that we recognize our own limits and those of others as normal and expected. The purpose of recognizing limits is to provide support and not to stigmatize. As I argued in Chapter 2, care ethics implies that following the principles of caring, we undertake to self-scrutinize our actions for adequacy, and to provide similar, supportive, mutual moderation for others. When we know that the participants, for example in the courtroom, are following the principles of care, we also know that others will perform this mutual moderation task for us; not to find fault, although deliberate misconduct can also be identified this way, but to support us. This allows problems to be identified outside of the oppositional, individual fault that model that liberal expectations inadvertently imply.

Senior consultants may be more willing to listen when the nurse's concerns can be understood as part of a collaborative attempt to address patient preferences as well as medical need. This conceptual shift to collaboration provides the nurse with a justification for voicing concern. Given the deeply embedded adversarial nature of mainstream Anglo–American and Commonwealth courtrooms, the adversarial model may be a more likely default option than the collaborative model, even in courts aspiring to proceed differently.

Care ethics does not preclude identifying individual faults. But it provides an alternative way of understanding the problems that arise either through

misunderstanding, misapplication of practice, mistakes and unforeseen harms: the negative and operational limits of caring. Care ethics allows problems to be considered collaboratively, sharing responsibility with others for using limited resources most effectively and efficiently. When all participants share these expectations of supportive mutual moderation and self-scrutiny, this provides legitimacy for participants (even those with less power) to address the more powerful, suggesting mistakes might have been made. The best present criminal justice example of this is found in the regular review practices of problem-solving courts, where it is expected that diligent defence lawyers will identify the judge's mistakes, chiming with Chief Justice Blatz' expectation (Berman 2000, p.84). Yet these practices are limited. Because they do not proceed explicitly under care ethics guidelines, there is more room for such an intervention to be negatively interpreted, rather than as a collaborative act to support and improve the caring response devised by the court and sanctioned by the sentencer. Under present practices, particularly practitioner participants may see themselves in oppositional, adversarial roles. In American diversionary drug courts, since charges may be dropped for compliance, defence lawyers have an incentive to 'play along' rather than necessarily challenge. From the care perspective, we work together towards the shared goal of identifying problems to allow needs-meeting, capability building and harm avoidance. This is taken up in Chapter seven, with the regular review practices of problem-solving courts.

These review practices do not of themselves address problems, but they imply that further action should be taken to remedy the problem, insofar as possible. These practices do allow the identification of problems for discussion: was the offender's context properly understood? Will the proposed therapeutic intervention be appropriate? Has the offender been treated as an equal? Have the offender's needs, responsibilities and resources/capabilities been considered? [81] Were mistakes made applying the law? Was the appropriate procedure followed?

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[81] Even if not grounds for mitigation, they may still inform what kind of sentence might help meet the offender's needs and build capabilities, the most obvious being an offence unrelated to the offender's alcoholism, disposed of with a community order including an alcohol support requirement.

Whether a mainstream courtroom, or a problem-solving review hearing, each participant will bring their own skills and knowledge, to contribute to identifying problems.

The problems identified, and possibilities for addressing them, can then feed into either problem-solving review or, where available, formal institutional oversight practices. The informal practices can provide information about where problems exist, which problems are more urgent or complex, and propose responses. This informal review might for instance provide information about an instance where a sentencer's assessment of their competence appears flawed, or where a sentencer should be called on to explain other aspects of their reasoning. Where informal review identifies sufficient cause for concern, this might help to identify which cases should be subject to review, or assist in providing information about concerns for appeal. Finally, a side benefit of explicitly adopting the principles developed from care ethics may help to improve policy clarity, which Miller complains is particularly lacking in American drug courts, by openly acknowledging that we seek to provide community-based caring work (needs-meeting support, capability building for healthy living and harm avoidance), which is nonetheless a punishment response to an offender.

Fit with care ethics principles

Each of the problem-solving practices discussed focuses holistically (in Miller's terms) on the offender and community together. The literature suggests a subtle difference between therapeutic jurisprudence and community justice: community justice *tends* primarily to address community needs, potentially through the instrumental route of addressing offender needs; whereas therapeutic jurisprudence *tends* primarily to address offender needs, anticipating instrumental community benefits. Yet despite variance in focus, each includes offenders as subjects, and seeks their contribution in understanding needs and designing responses. This inclusive treatment as equals reflects my core concern in this thesis and echoes the responsiveness of care, the aim to include the care-receiver, in this

case the offender, in determining the nature of our responses. There is resonance here with the past-regarding *respectful listening* and *needs identification* principles, both of which seek care-receiver (offender) input into information-gathering and need identification. When done respectfully, this provides a means of providing interactional justice.

By bringing in others with expertise, this helps to broaden the *creative consideration* of available responses. Implicitly, this allows both a broad consideration of how a particular need might be met, and provides for sentencers concerned about their technical competence to make such decisions with access to expert support. As identified above, the care ethics expectations and guidelines allow sentencers to receive advice in support of the caring elements of the decision-making as collaboration. The care ethics principles make explicit this expectation, of reflecting on our own competence, and seeking assistance as necessary.

Problem-solving courts seek to involve offenders immediately in this information-gathering for initial review process, reflecting some of the concerns of the *cumulative fairness* principle. By taking account of the offender's position, we may be able to acknowledge where instances of re-balancing are appropriate, following previous prioritization losses. Concerns for community restoration may also help to balance the offender's needs, in their social context, with the distribution of needs in the wider community. Again, the inclusion of victims and their needs are not actively considered. This also resonates with the principles I have developed from care ethics *for punishment*, since I have argued it is unrealistic to expect victims' needs to be adequately addressed through our response to offenders. This is not to deny the importance of victims' needs, only to suggest that these ought to be given proper consideration in their own right, outside of sentencers' considerations of the nature of the offender's punishment.

Miller argues that supporting addicted offenders in the community rather than imprisoning them is a justifiable criminal justice policy aim. Yet American drug courts are defined as diversionary. One benefit the care ethics principles can offer is

an opportunity to be more honest about the necessity of support for offenders' needs in the criminal justice response. By acknowledging the existing and proper role of care in punishment, and approaching caring as such and aiming to care well, we have an opportunity to provide open and engaged, better-quality caring.

Comparing mainstream decision-making practices

Chapter four discussed the limitations of mainstream criminal justice processes in gathering contextual information about offenders. Mainstream practices prevent offenders from sharing information through expressing their personal and social context by telling their own stories, as they see and understand the details. In recent years, mainstream victim inclusion has improved. Victim liaison staff help to keep victims informed of legal processes. The needs-meeting that exists for victims is partly through restorative means, which will be discussed in Chapter seven. Mainstream sentencing may seeks to avoid further harm through deterrent effects and offender rehabilitation, which can involve meeting needs. Yet mainstream decision-making considers needs as defined by the justice system, rather than individual offenders. Mainstream practices provide due process protections, but limit information-gathering, thereby reducing the capability of sentencers to be aware of offender narratives around both needs and potential further harms.

The *motivation* of mainstream information-gathering practices is offender punishment and rehabilitation, and offenders are the sole *subject*. The *concern* of mainstream practice may be to the offenders' benefit, the community's benefit, or a combination of both. But often the practical question this produces is how to allocate offenders into existing programmes, rather than designing rehabilitation based on offender needs. A 2002 UK Social Exclusion Unit report notes that sentence-planning allocated prisoners to available programmes rather than what they needed (2002, p.40), and 'rationed' access rather than informing the development of programmes to ensure access for all needing support (2002, p.43). These approaches fail to meet needs responsively. Some progress on operational difficulties has been made since 2002. The report noted the lack of suitable IT

systems and problems transferring paper records (2002, p.41). An IT system was introduced across the prison and probation services in England & Wales in 2003, although this brought its own difficulties (Mair et al. 2006).

While mainstream rehabilitative efforts may intend benefiting the community and offender, either insufficient attention is paid to individual offenders' needs in context, or this information *is not* or *cannot* be acted upon for the environmental or operational reasons discussed in Chapter 7. It makes a difference that we consider the offender's needs as an equal human being who is also harmed by the offence. This is possible in mainstream sentencing, but not procedurally necessary, whereas for restorative justice and in problem-solving courts, repairing harms and meeting offender needs is an explicit fundamental principle, if not always realized. In restorative justice and problem-solving courts, offenders' needs are seen as essential information. In mainstream processes these needs are regarded as optional additional information, sometimes helpful, as illustrated in the ability of sentencers to disregard pre-sentence reports.

The mainstream *information* source includes information raised at trial and in the written or verbal pre-sentence reports made by probation workers. I have raised a concern that this information is mediated to sentencers by probation workers, and that sentencers draw their own conclusions without further input from the offender, who is silenced at this stage. The literature also documents concerns around the level of personal contextual information included about offenders (Hudson 1996, p.156; Field 2006, p.537; Nash 2011, p.479), the value placed on reports by sentencers (Ashworth 2010, p.380; Tata 2010, p.245), who may choose not to request or to disregard a report, and the risk that the information in prepared in advance reports is out of date (Ashworth 2010, p.381). While this may not be as inclusive in practice as the supporters of restorative justice approaches claim, the importance and inclusion of these views is explicitly recognized. Presently I shall sketch a proposal allowing sentencers to hear offenders directly, and for supporting offenders in articulating their personal situation to sentencers, drawing

on the principles of care ethics and the insights of bottom-up approaches to criminal justice.

The restorative justice model uses a decision-making process of discussion and agreement between all the interested parties. Restorative justice and problem-solving courts practices, and pre-sentence reports, may include expert advice. Bottom-up sentencers may consider and reject circle agreements, expert and offender views in problem-solving courts and pre-sentence report recommendations. But there is an important difference between mainstream sentencers narrowly following or dismissing received expert advice, and a problem-solving court approach, which allows sentencers to engage directly with experts and offenders and discuss recommendations over a period of time. Sole *power* is held transparently by mainstream sentencers. With mainstream decision-making, contextual information and expert perspectives tend to be valued implicitly and instrumentally, making consideration of how and when to include these more difficult. Restorative justice and problem-solving courts tend to make these concerns more explicit and provide practices designed to uncover them.

Sentencers ultimately hold authority for sentencing. This is less transparent in bottom-up approaches, since information-gathering and interpreting powers are shared with other parties. Yet even approaches focusing on mutually agreed outcomes between the parties, such as restorative circle sentencing, ultimately hold sentencers responsible for the fitness of the sentence passed. Firstly, this provides clarity about where challenges to decision-making should be directed. Secondly, public officials make sentencing decisions as representatives of the state. The community, through the state representative, responds to the offence in a way that offers appropriate, proportional censure. It is legally and symbolically important that this communication should come through a sentencer with appropriate authority, and not from another person. This follows both the usual and my procedural definition of punishment; there is no administrative reason why state agents could not be restorative conference facilitators. This might however conflict with the neutral facilitation principles of restorative justice. In some cases police

officers act as facilitators. Such practices are criticized as threatening facilitator neutrality and process accountability (Roche 2004, p.19, p.223).

Restorative justice and problem-solving courts make steps forward from mainstream sentencing, since there is greater opportunity to include victims and offenders as equals. The moral reasoning approach of care could enhance this by explicitly mandating holistic attentiveness and openness to both sets of needs or problems, as interconnected issues for interdependent parties. Mainstream punishments seek to balance harms caused by the offender with harms meted out to the offender, which can both cause harm and fail to meet needs. The balancing of needs-meeting was introduced in Chapter 2 as implicit in care ethics. This balances harms associated with the offence, with the available needs-meeting resources for offender, victim and community. Restorative justice and problem-solving courts endeavour to appropriately respect individuals and seek to match needs to needs-meeting, whereas care allows us to balance needs-meeting and harm avoidance according to the individual situations and experiences of the parties involved. For bottom-up processes sentencers are involved in practices that explicitly seek to avoid further harms and meet needs. Sentencer involvement provides a better chance to develop a fuller understanding of the information, than a sentencer receiving a pre-sentence.

What do we learn about the principles?

What does this tell us about the principles proposed by care? We have seen that the decision-making and informing stages of restorative circle sentencing are reasonably aligned with the first two pairs of principles proposed in chapter four:

1. The information-gathering pair:

    a) *Respectful Listening*;

    b) *Needs Identification*.

2. The response-designing pair:

a) *Creative Consideration*;

b) *Cumulative Fairness*.

We have also seen some concerns about restorative circle sentencing: that equal treatment within the circle may not provide treatment as equals in the light of social inequalities. There is also concern that victims' needs may be ignored or unduly light sentences agreed to meet a primary concern for community harmony, or that sentencers may disregard circle agreements. I suggest above, following Roche, that these concerns might be partly addressed by improvements in accountability and transparency: by allowing for sentencers to be challenged to explain decisions to move away from circle agreements, allowing sentencers to protect victims and provide appropriate sentencing. This follows the self-scrutiny practices of review that I have argued are implicitly internal to care practices, and are covered in the *cumulative fairness* (and *response analysis)* principles proposed in Chapter two and four.

As we saw in Chapter two, the expectations care ethics around information-gathering, encouraging the most complete information collection available (in the light of negative limitations) and to respond in a timely manner. This furthers the ends of caring competently (Tronto 1993, p.133). *Respectful listening*, a specific means of information-gathering reflecting the open engagement attitude of care, allows us to treat offenders as equals, and supply interactional justice. The principles in Chapter four indicate contextual information-gathering through *respectful listening*. Care ethics provides not just a way of valuing contextual information and respectful means of access, but a procedural direction that we seek this information *and* incorporate this into decision-making in the *creative consideration* principle. However care ethics and the principles I have derived expects that negative and operational limits will frustrate what we are able to do. Care ethics responds with review processes, made explicit in Chapter two, intended to minimize harms and maximize good practical caring work. Review processes are present in the *cumulative fairness* (and *response analysis)* principles. Initial and

ongoing review does not offer failsafe protection, but is in line with restorative justice and problem-solving court aims, and may help strengthen these practices.

Making explicit the review processes (identified in the *cumulative fairness* and *response analysis* principles) raises the profile of self-scrutiny and supportive mutual-moderation practices. In Chapter two I argued that these practices are internally implicit in care ethics, which expect competent caring work to be practiced with integrity. Because these are internal requirements of 'good' practical caring work, it is a problem of both principle and practice if these review elements are missed or poorly applied. Existing bottom-up practices seem to lack explicit review of caring practices qua caring. Ultimately, all review practices, explicit and implicit, formal and informal, are restricted by human error.

I have discussed the practices of community justice, therapeutic jurisprudence and problem-solving courts together as overlapping and related practices. We have seen that the discursive practices used to explore needs and to consider responses are reasonably in tune with the *respectful listening* and *needs identification* principles advanced in this thesis. Across all three there is a concern that victim's needs may be side-lined in attempts to address offenders' needs. This is a problem for practices that claim to include victims. Victims' needs are not well covered by the care ethics informed approach I have developed. However, I have argued that punishment responses are directed to offenders, and are therefore not necessarily sufficient or appropriate for meeting victims' needs. While it is preferable to have offender input to needs-meeting for victims, since offenders bear some responsibility for the harms caused, victims' needs should also be acknowledged and addressed by communities, external to the practice of punishing offenders in response to their offence. Further, sentencers should avoid aggravating victims' needs, frustrating external needs-meeting for victims, and where appropriate and possible facilitate the offender's role in needs-meeting for victims. As Braithwaite argues, offenders' apology and victims' forgiveness are both gifts that lose their meaning if required (2002b, p.570).

The principles of *creative consideration* and the initial review of *cumulative fairness* are also echoed. Problem-solving court practices discuss potential responses to offending with offenders and involve systematic review procedures, which resonate with the review present in *responses analysis* and will be considered in Chapter seven. There are concerns about problem-solving courts as an informal process, including due process, lack of consistent application and effective oversight. There are further concerns about coercion, which will be explored in greater detail in Chapter seven. I have suggested that the principles I propose may help to make the implicit, caring intentions of these practices more explicit. This may help to provide clarity about the aims of the practice, and empower participants to work together.

We have seen that these bottom-up alternative means of responding to offenders are reasonably well in line with the first two pairs of principles, covering the information-gathering and response-designing phases of responding to offenders. These practices are not free from problems, however, I have suggested ways in which the care principles might help to address these weaknesses, in line with inclusive, problem-solving principles. Yet it is important to note that the principles derived from care cannot provide a failsafe way of preventing these problems. I have suggested that care principles provide a way of encouraging sentencer reflection on competence, and of reviewing the available options through self-scrutiny and supportive mutual-moderation, to help identify unforeseen harms.

The principles I propose make initial and ongoing review explicit. These are internal to the practice of good caring, as checking mirrors *and responding accordingly,* is to good driving. Failure to perform a competence consideration in the self-scrutiny practices of initial and ongoing review is a failure of good caring practices, just as failure to check mirrors is a failure of good driving practices. This review is part of the care-giver's or driver's practice, not an external practice to caring or driving, as the appeal process is external to the practice of sentencing. The formal review and appeal processes in mainstream criminal justice are external to the practices of punishment decision-making and delivery, and more closely resemble the oversight of a traffic police officer observing the drivers' procedures.

A failure to check mirrors should cause the driver to be concerned about their competence to practice. Likewise, a failure of review in care practices is cause for concern in itself. Mainstream review processes have fewer such triggers. Like the traffic officer, there is no cause for concern if they happen to be looking one way rather than another. The information gathered through the informal, internal mechanisms of self-scrutiny and mutual moderation could be used to inform and target mainstream procedural review processes; in the driving analogy, helping the traffic officer know where to look.

The mainstream alternative to these bottom-up practices, and the principles I have drawn from care ethics, similarly cannot guarantee a perfectly reliable system, since all criminal justice responses are created and employed by fallible human beings. Mainstream sentencing information-gathering and response-design is not free from error, but its strength is that it has a formalized process which enables challenge on procedural grounds. The weakness of mainstream processes is that they also formalize non-interference and equal treatment, which as we saw in restorative circle sentencing, does not always deliver inclusive treatment as equals. This excludes and silences offenders, depriving sentencers of hearing directly from offenders themselves and restricting sentencers' understanding of offenders' contexts. Including the principles of care in mainstream responses would make criminal responses more complex and nuanced, but this would also allow for greater proportionality, taking account of both offence and offender.

Mainstream processes allow formal procedural review. This process can be strengthened through the initial and ongoing review stages of the principles developed in Chapter Four. These review practices may help to provide information about limits and shortcomings for these processes, and to help direct where they might be most productively applied. No system designed and delivered by human beings can be infallible, but applying care ethics guidance within the mainstream may help to strengthen existing review mechanisms while also providing opportunities to treat offenders as equals and deliver interactional justice.

Treatment as equals

How far then do these separate practices of information-gathering succeed in including offenders as equals? Certainly this is an objective of all practices, including mainstream practices, but I have argued that this is not as always as well achieved as we might hope. Circle sentencing restorative justice practices provide equal treatment, allowing each person a chance to speak, often by using a talking piece passed around the circle. But social inequalities outside the circle may still affect the ability of participants to speak when called upon. Community justice, therapeutic jurisprudence and problem-solving sentences each attempt to include the offender's voice, including motivational interviewing techniques. But to an extent, how far this is possible depends on the personal traits (and training) of the sentencer. While personal traits and 'charisma' are not transferrable, learnable skills, the attitude of care, that of open engagement, may go some way to help replicate this quality. In Chapter seven, we will also see that all practices draw on the designing in of diversity in the hope of increasing the chance of challenges to mistakes and poor practice. The processes employed by mainstream practices to gather information were discussed in Chapter four, and I have argued may serve to exclude, silence and objectify offenders, despite seeking to respect the offender's equal dignity through non-interference. From the perspective of care ethics, there is still no guarantee that individuals will be treated as equals, since all practices are vulnerable to human error. The care ethics principles focus on respectful listening when gathering information through open and engaged dialogue. This specifically respectful attitude and approach allows an opportunity for treatment as equals and interactional justice. The initial review practices direct self-scrutiny and mutual moderation (available in bottom-up practices) providing some checking that these principles are followed. These internal informal review practices increase the chances of early identification of failures of treatment as equals over formal review processes, since the informal processes are internal to the punishment decision-making practice, and can help to avoid exclusion and silencing. The key points of each of the approaches considered here, and their ability to treat offenders as equals, is summarized in a table overleaf.

Key comparisons

	Motivation	Subject	Concern	Information source	Power	Treatment as equal?
Restorative justice (circle sentencing)	Responding to harm caused	Persons involved: victims & offenders, their supporters (communities of care), community leaders in circle sentencing	Restoring social harmony	*Equal* discussions of the circle and negotiated agreement	Shared equally by circle participants, yet sentencer has authority and responsibility to impose 'fit' sentence	As equal treatment within circle, undermined by unequal social status
Community justice	Empowerment of local people to address local problems	Offender and her/his personal problems	Empowering communities to achieve public safety	Affected parties: victim & offender, may include contextual detail	Held by local people, whose concerns direct policy priorities, yet sentencers still steer the process and ultimately determine punishment	Attempted, although unequal social status may undermine inclusion
Therapeutic jurisprudence	Court processes can and should have a therapeutic effect	Offender	The problems underlying her/his offending behaviour – secondary goal of community benefit	Offender (expert in personal difficulty, eg addiction); external specialist (addiction treatment clinician)	Offender 'ownership' of treatment process. Sentencers aims for negotiated agreement, but has ultimate authority	Inclusion attempted, but need not be respectful (see Miethe et al. 2000, pp.536–7)

	Motivation	Subject	Concern	Information Source	Power	Treatment as equal?
Problem-solving courts	Address offenders underlying problems for their own well-being, while promoting community quality-of-life	Offender	The offender's underling problems (considered holistically), with expected improvement to community quality-of-life	Offender, variety of external specialists, criminal justice staff	Shared by offender and sentencer, who endeavours to build consensus, although sentencers hold ultimate authority	Attempted but is somewhat dependent on personality of sentencer
Access to mainstream rehabilitative provision	Offender punishment and rehabilitation	Offender	May be the offenders' benefit, the community's benefit, or a combination.	information raised at trial, pre-sentence reports	Held transparently by sentencers	Not guaranteed, silencing and objectification risked
Care ethics principles	Meeting basic needs, building capabilities, avoiding unnecessary harm respectfully and responsively; where meeting needs will likely include repairing harm	Offender, understood in the personal and social context (those parts of the offender's narrative which they deem important).	Meeting basic needs, building capabilities, avoiding unnecessary harm, repairing harms	Offender initially, we take seriously people's stories about what they need to live well (Sevenhuijsen 1998, p.60). Support with needs-meeting and capabilities building sought from specially skilled practitioners where possible	Care-givers are necessarily in a position of power over care-receivers, as sentencers and practitioners are over offenders. Good care-givers do not abuse their power, and are sensitive to the effects of power, as Liebling observes the best prison officers are (2000, p.346)	Focus on respectful listening helps to encourage treatment as equals

Decision-making proposal: pre-sentence dialogue

This proposal endeavours to bring the individual-focused 'problem-understanding', information-gathering element of circle sentencing and problem-solving justice into the mainstream criminal process, and is intended as a starting point for policy debate. Pre-sentence dialogue in place of pre-sentence reports would allow sentencers an opportunity to hear offenders' personal context through listening to offenders' narrative first-hand once guilt has been admitted or determined. This maintains due process protections of current trials. While problem-solving courts with regular reviews might be considered a gold-standard, regular review is neither economically achievable nor necessary for all offenders: the North Liverpool Community Justice Centre does not use in-depth problem-solving review to inform all sentencing.

Pre-sentence dialogue would allow sentencers to spend time (perhaps limited to two hours) talking with offenders who choose to participate. We must acknowledge that not all offenders will be willing to co-operate, or ready to accept and address personal problems. To be credible, pre-sentence dialogue must be voluntary, with pre-sentence reports available as a fall-back option, providing contextual information about offenders who prefer not to engage. While we must communicate that offenders' engagement is welcomed and encouraged, and offer information about how to seek help later, decisions not to participate must be respected. Pre-sentence dialogue has three benefits: sentencers access instrumentally useful information about offenders directly and so can seek clarification. Hearing the parts of their narrative that offenders' consider relevant and important provides a means to recognize the intrinsic value of the offenders' lived experience of their own position. When done respectfully this provides interactional justice and treatment as equals.

Such dialogue with offenders will be easier within a trusting environment. Relationships are ideal for building trust, and much of the best quality care is provided within the context of long-term relationships. Relationships are unlikely to develop in a one-off session with a sentencer. Trust can be developed in other

ways. At the North Liverpool Community Justice Centre, the courtroom is a light and less formal space. The dock is positioned next to the bench, and when standing, defendants of average height were at eye level with the seated judge.[82] Mair & Millings note that this was commented upon by many of their respondents, and 'led offenders to feel less threatened and more involved in the process' (Mair & Millings 2011, p.77). Environmental changes can help to foster trust and become more important in the absence of relationships. A private, informal setting may help make an offender comfortable exploring personal problems within a small group, rather than in an extended problem-solving meeting or in open court.

Building trust is only part of the sentencer's role. Secondly, the sentencer must be able to interpret offenders' verbal and non-verbal communication, especially where the offender lacks confidence or is unable to articulate themselves clearly. Training must be provided to help sentencers to engage with, and understand, offenders, and to help them to build this information into their sentencing decisions. This might include specific training in motivational interviewing techniques, active listening skills and basic counselling skills to help encourage and support the offender in exploring their situation. While the sentencer tries to persuade the offender to engage and consider problems in relation to their own goals, this is done through rational argument.

The fair, efficient and non-confrontational conduct of staff at problem-solving community courts like the North Liverpool Community Justice Centre (Mair & Millings 2011, p.77) contributed to encouraging offenders to engage. Offenders must be allowed time and space to speak, and made to feel that their views are valued and their engagement important and welcome. Although offenders will be bound by the eventual sentence passed and are not in control of its content, Winick also stresses the importance of the offender's choice to engage in problem-solving to their ultimate success (2003, p.183, p.187). This will take sentencers time, but may offer a time-saving over the total time for preparing and reading pre-sentence

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[82] Personal observation from an informal visit made to the North Liverpool Community Justice Centre in 2011.

reports; not to mention potential for saving future court time, *if* we can more accurately help offenders avoid further offending. This is a big 'if', but this aspiration is included in all punishments with deterrent or reformative elements. As Benhabib observes, 'more knowledge rather than less contributes to a more rational and informed judgment' (1986, p.417).

The act of listening can be empowering of itself (Koggel 1998, p.53; Pranis 2002, p.30; Braithwaite 2002b, p.564). Simply making time to speak with the offender and explain processes (providing 'informational justice' (Kumar et al. 2009, p.147)), or listening to what offenders have to say and engaging with rather than disregarding offenders' contributions (the 'quality of treatment' (Bottoms & Tankebe 2012, p.121) component of interactional justice) can go some way towards providing an atmosphere in which an offender might feel more comfortable in discussing their personal lives. This respectful treatment and process explanation is the minimal interactional justice necessary for treatment as equals. As Tyler notes, quality of treatment is important for procedural justice (Tyler 2003, p.300). The value to offenders can be seen in these North Liverpool Community Justice Centre offender observations:

> 'They pay more attention and they seem interested in what you say, even the bizzies[83] here treat you with respect'
> (offender respondent 28, Mair & Millings 2011, p.77).

> '[I]t's all explained and I know what's gone on … I've learned something today and had my say'
> (offender respondent 36, Mair & Millings 2011, p.78).

> 'They take time here … you can calm down and work through it'
> (offender respondent 39, Mair & Millings 2011, p.78).

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[83] As a native of Merseyside, I understand this to be a local term for the police. Mair & Millings confirm the permanent presence of police teams at the Centre as part of the co-location of Criminal Justice Agencies (2011, p.8).

Similar experiences are reflected in offenders' comments from McIvor's study of Scottish drug courts:

> '[Y]ou can talk to [the sentencer] the way you speak to anybody ...
> you can tell him if things are not working out'
> (2009, p.41).

> '[The Sheriff will] listen to your point of view ... He looks through
> the addiction ... and sees the person'
> (2009, p.41) .

> 'I'm getting treated now like a human being and an equal'
> (2009, p.43).

As a separate side benefit, there is reason to believe compliance with sentences might be strengthened when individuals feel they have been treated as equals. As Tyler observes, and his broader research is accepted to have shown (Bottoms & Tankebe 2012, p.169): '[i]n the context of particular encounters with police officers and judges, people are more likely to consent and cooperate if they feel that they have been fairly treated' (Tyler 2003, p.286).

Following restorative practices, offenders might be permitted to choose a personal supporter: a friend or family member, an existing support worker, even a court-appointed social or probation worker where support is preferred but the offender is unable to suggest a suitable person. Offenders must be permitted to speak for themselves, subject to normative limits identified in Chapter four pp.201-3, unless their express wish is to correct the story-telling of another (perhaps where ill health prevents offenders from speaking for sustained periods). Selected supporters who cannot be expected to act supportively (eg known abusers or manipulators of the offender; drug dealers; abusive partners) or are potentially legally inappropriate (eg co-defendants) may be rejected. Where there are mental health or addiction concerns, a treatment practitioner should be available to the offender (eg Community Psychiatric Nurse, Mental Health Advocate, or other key worker). This individual should provide any necessary care or support during the discussion and be able to offer an 'expert' knowledgeable view of the offender's condition. Where

the practitioner is known to the offender, they may also be able to help with information about how the condition affects the offender as an individual, where the offender chooses to disclose this information. Legal advisers should also be present, to ensure their client is empowered to express their own narrative, and to protect their interests since, just as during a trial, what their clients say has a direct impact on the client's future (Nash 2011, p.476).

Support and encouragement can facilitate discussion, active listening (reflecting others' speech to check understandings) can help both to allow the other to feel included, and support the offender in articulating their personal context, including needs. Since criminal behaviours cause harm they should, following Engster's aims of care, be deterred. All punishments will carry some deterrent value in that they are *imposed*. Punishment is more than just caring. But by listening to the offender's personal context, the sentencer is able to provide a more accurate, individually tailored punishment. This can provide both censure for the offence since harm-causing behaviours should be deterred, which is nonetheless sensitive to the offender's existing needs. This acknowledges the role of caring in punishment practices, helps to meet needs and build capabilities for the offender, potentially to the benefit of the community, and may help to avoid further harms both to the offender and others.

Conclusion

I have outlined above the how the principles drawn from care might help structure interactions between sentencers and offenders in order to include the offender as an equal. These same principles, and similar practices, might also be followed on a smaller scale during punishment delivery. Reflecting on concerns such as building trust, and encouraging offenders' speech and engagement through sensitivity to practitioners' power, might also help keep trust and information flowing (Straub et al. 2011, pp.iv–v), as necessary for safe and effective punishment practices. As Liebling observes, 'role model' prison officers are sensitive to the effects of their power (2000, p.346). Bearing these concerns in mind could also help to avoid

causing harm to the offender during their punishment through unintentionally silencing them. I turn now to consider bottom-up practices of punishment-delivery.

Chapter Seven

Punishing with care: punishment in practice

Chapter six focused on sentencing decision-making in bottom-up approaches of restorative justice and problem-solving courts. This chapter considers sentence delivery for these approaches and the fit with the principles derived from the values and moral reasoning approach of care ethics. The strengths and weaknesses of these practices, considered in view of the similarities and differences between these practices and the principles I propose, will give an indication of the strengths and weaknesses of the principles developed from care ethics. Chapter six primarily considered the first two pairs in relation to punishment decision-making, the final pair will be more important in this chapter:

1. The information-gathering pair:
   a) *Respectful Listening*;
   b) *Needs Identification*.

2. The response-designing pair:
   a) *Creative Consideration*;
   b) *Cumulative Fairness*.

3. Present-focused, harm-avoiding pair:
   a) *Punishing With Care*;
   b) *Response Analysis*.

However, concerns around information-gathering, and personal and social holistic consideration of responses (sentences) design will still be relevant, given the blurred distinction in problem-solving practices between the initial problem review and ongoing review as part of punishment delivery.

Restorative justice sentences

Chapter six considered the practice of circle sentencing, as one example of face-to-face restorative justice practices used as information-gathering mechanisms to inform sentencing. Circle sentencing practices use restorative principles and discussion to inform a sentence which is ordered by the court and, once confirmed by the sentencer, is legally binding. We saw that these practices parallel the concerns of care ethics in theory, even going further in some cases. Yet sometimes they fall short in practice and may mask some needs, failing to realize their promise. Here I discuss restorative justice conferencing, where this is ordered by a court, following a mainstream trial as part of sentence.

Restorative justice conferencing was introduced in Chapter 3 (pp.149-50). To briefly recap, facilitators ask victims and then offenders in turn to recount events leading up to, and of, the offence. Victims then offenders each describe the subsequent impact on their lives. After both victim and offender have spoken, other parties are invited to contribute. Finally, facilitators direct discussions towards agreeing how to repair the harm. The offender's participation in the restorative conference is required as a part of their sentence, for example, the 'specified activity' requirement of community orders in England & Wales may include restorative justice practices. Restorative justice activities, such as conferencing, may be ordered by sentencers, requiring the offender to take part in the activity as part of their sentence. One example is the 'specified activity' requirement of community orders. Agreements produced during restorative conferences are not usually legally binding of themselves (Shapland et al. 2011, pp.101–2) but offer opportunities for voluntarily making and accepting apologies (although not in all cases).

Restorative justice conferencing aims to provide offenders and victims with equal chances to speak, to explain feelings, discuss facts and contribute to an agreement. Hudson notes the 'openness' of restorative justice conferencing to 'story telling' (Hudson 2003b, p.192), providing an opportunity to allow offenders and victims to narrate their contexts, for themselves, expressing feelings, problems and needs. This provides an opportunity to understand the offence and the harms and

associated needs for offenders and victims, through personal context, by attending to sections of individuals' narratives. This is important since victims are often reported as seeking an opportunity to tell their story or to be heard (Miller 2011, pp.160–3; Shapland et al. 2011, pp.100–2). Story telling allows individuals to emphasize particular details, and explain the effects of the past on their present lives. This also allows victims to encounter offenders as concrete persons, not simply as threatening: 'restorative justice helps people to see the offender not necessarily as a nasty person' (2011, p.106, p.111).

When restorative justice works well, it can provide opportunities for victims to find closure (Sherman & Strang 2007, p.64; Ministry of Justice 2012b, p.1). Shapland et al. report that closure may also be achieved for offenders (2011, pp.164–5), and cite Jo-Anne Wemmers & Katie Cyr as suggesting that allowing victims and offenders to meet and talk, has therapeutic potential of itself (2005, p.531). Sherman & Strang report that 'in many tests, offenders who receive restorative justice commit fewer repeat crimes' compared to mainstream responses, and in 'no large-sample test has restorative justice increased repeat offending' (2007, p.88). These findings echo the analysis of Shapland et al. (2011, p.170). The smaller costs associated with reduced reoffending offset the cost of conferencing, making the process value for money (2011, p.170); while reducing repeat offending at least as well, if not better, than more expensive short prison sentences (Sherman & Strang 2007, p.88). Victims reported benefits including reduced post-traumatic stress symptoms and decreased desire for revenge (Shapland et al. 2011, pp.170–1). Yet there is a danger that restorative justice becomes a 'tick-box' exercise (Sherman & Strang 2007, p.21)., and seeking reconciliation by any means may come at the victim's expense, as we saw for circle sentencing.

Restorative justice targets the restoring of victims and the repair of harm. Avoiding aggravating harm, or causing further harms, is implied as counter-productive to restorative ends. While restorative justice can deliver in part on the first principles of identifying needs through respectful listening, this is weakened when parties' voices are unequal in practice, resulting in exclusion, coercion or oppression. There

are no guarantees of full exploration of offender and victim needs or avoiding subordinating the interests of one party. There are no consequences should offenders fail to keep the agreement. While offenders must usually accept guilt and responsibility for harm, they are not required to apologize. The potential benefits are not necessarily realized: a 1993 study of youth justice conferencing in New Zealand found that as many as 25% of victims reported feeling worse as a result of the conference. The same study, however, found 59% of victims felt better, and other studies have found much higher satisfaction rates among victims and offenders (Maxwell & Morris 1993, pp.118–9).

Satisfaction is difficult to measure and interpret since this deals subjectively with how well personal expectations are met (Shapland et al. 2011, p.29). Comparisons between restorative justice and mainstream responses to cases *disputed* in court are problematic since court processes include a fact-finding element (Daly 2005, p.167). Victim dissatisfaction may be caused by un-met expectations, communication problems, or by offenders' refusal to apologize. Providing participants with information about what to expect during and after conferences can both improve satisfaction and informed consent (Maxwell & Morris 1993, p.118, p.121; Shapland et al. 2011, p.140). Facilitators may undertake to keep victims informed of offenders' efforts, although Shapland et al. report communication failures in practice. This decreases victim satisfaction, by implying that offenders reneged on agreements (2011, p.29).

Criticism

The previous chapter showed that restorative justice practices do not always fully realize their potential to acknowledge and address the needs of victims and offenders in sentencing decision-making. Despite restorative justice facilitator-provided procedural fairness, allowing each party to speak, the parties are not necessarily *heard* on the same terms. Similar concerns mentioned in the literature are re-victimization and the side-lining of victims' concerns in restorative conferencing and mediation. Hudson raises the opposite complaint that in our concern to protect victims' interests, as the already wronged party, we risk treating

the offender's rights as nothing (2003b, p.187). For this reason Hudson argues restorative justice should abandon any claims of 'even-handedness … to victims *and* offenders, it should define itself more clearly as victim-centred reparative justice' (2003b, p.187). Both are concerns that the poor application of restorative justice ideals may result in exclusion or coercion. This fails to treat offenders (and victims) as equals, and may cause additional harms.

Hudson criticizes the balancing of victims' rights with respect for offenders as too vague, arguing this fails to keep the rights and interests of the parties in balance. The prioritization of concrete contextual information in care ethics might help improve on the vagueness Hudson criticizes. The classical liberal perspective communicates respect for rationality/dignity for the generalized other through non-interference. Contrastingly, care ethics and relational perspectives offer dignified treatment, based on an understanding of respect which acknowledges connection and prioritizes concrete contextual information about the other. To have equal concern and respect for the other suggests taking an interest in those relationally connected with us and their wellbeing, an insight Llewellyn attributes to care theorists and communitarians. 'Once we recognize that selves are relational', Llewellyn argues, 'it becomes clear that to respect [others] requires some knowledge and concern for their needs and aims' (2012, p.94). This permits considering each offender and victim in their personal and social context. A contextual focus allows us to recognize the force of the argument for prioritizing victims' rights, without having to accept this as always appropriate, thereby diminishing offenders' rights. In Chapter four I further noted the roll a principles of protecting the vulnerable might play in balancing victim and offender needs when they conflict.

Braithwaite & Strang argue oppression issues, such as coercion, or silencing and exclusion of weaker parties, are best addressed by designing diversity into restorative conferences,[84] through the inclusion of many different participants and

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[84] Similar to the information-gathering practices of sentencing circles, since they include a variety of participants, each of whom have an opportunity to speak.

perspectives. This, they argue, increases the chances that one participant will challenge the discrimination of another, by asking to hear the excluded voice (Braithwaite & Strang 2000, p.205), thus enabling equal participation. Since this cannot be guaranteed, facilitators should step in as a last resort (2002, p.566), echoing Chief Justice Blatz' related expectation that voices will be raised against poor decisions in problem-solving courts. Bruce Winick also argues that processes can be structured to minimize problems of offender coercion in problem-solving courts, both seen in Chapter six.

What is needed to shore up Braithwaite & Strang's hoped-for protection through designing diversity in to conferences is a way of explicitly monitoring whether oppression and exclusion have been avoided, and a commitment to addressing problems detected, where possible. The internal review processes (initial and ongoing) in the principles drawn from care ethics may, however, help to strengthen this practice. Care ethics cannot offer a failsafe method. But because the approach explicitly acknowledges the potential for problems, it can take steps to acknowledge and address unavoidable harms. The initial and ongoing review processes present in the *cumulative fairness* and *response analysis* principles may help to strengthen restorative justice practice by making explicit review ideals. Explicit expectations of self-scrutiny and supportive mutual moderation could assist participants in providing respectful, non-discriminatory listening.

For example, restorative justice participants could be encouraged to actively reflect on and self-scrutinize their own participation, to consider their contributions in the holistic context of the conference and to help identify misunderstandings between participants. Participants could provide mutual moderation by actively reflecting on the contributions of others. This could help identify negative limits (shortfalls, conflict) to be actively prioritized so that all participants are conscious of the implications of their agreement; and allows reflection on, and identification of, operational limits (potential harms to victims, risks of infantilizing offenders). This might help to constructively identify potential problems, such as the further exclusion and oppression of victims. This care ethics practice makes Braithwaite &

Strang's expectations that diversity will provide challenges to discrimination explicit to participants, and offers a structure for engaging in the practice, rather than relying on individuals to independently and spontaneously identify and challenge the oppression of others. Under the expectations of care ethics, participants are more clearly working towards a shared goal, and negotiating complexity collaboratively, rather than in adversarial opposition. I return to this in consideration of the fit of bottom-up practices with care ethics principles below.

Another way of reducing operational concerns of exclusion and coercion is through external oversight. Shapland et al. identify the need to develop mechanisms for after-the-fact regulation and accountability of restorative justice (2011, p.185). Roche argues that accountability and transparency can be strengthened in restorative justice. Roche argues that restorative processes derive some informal deliberative accountability (2004, p.80) from discursive practices. Drawing on Phillips' argument that democratic outcomes can derive legitimacy procedurally (1998, p.164), Roche argues that informal deliberative accountability provides some legitimacy for restorative practices (2004, p.44). Roche is keenly aware that restorative justice practices are not always ideal, and argues deliberative accountability can be further strengthened by requiring facilitators to give account regarding the deliberative reasoning of the restorative justice conference. A formally or informally enforced requirement to provide explanation (rather than practitioners' discretion) reduces chances of convenient 'arbitrary' explanations, and recognizes the importance of this transparency to fairness. Roche proposes further that judges with sufficient knowledge of restorative justice practices could provide procedural review of restorative justice meetings, to identify defective decision-making processes (2004, pp.218–9). This could improve the capacity of restorative justice to provide a balanced response to offending, in which the parties have a protected equal voice, and know what to expect: in short, to help restorative justice realize the potential of its own ideals.

The *purpose* of restorative justice conferences is healing and restoration primarily for victims, but where possible includes offenders and communities. This is notably

different to circle sentencing where community harmony was the priority. A *method*, of open, engaged dialogue in conferences and mediation allows (but cannot guarantee) *respectful listening*. A state agent may be required to listen respectfully, at least in the first instance, to an offender's storytelling; but their direct victim cannot be so required. There is little opportunity for *review* once conference agreements have been made: there is no opportunity for further discussion, or to amend the agreement.[85] Restorative justice has the potential to see offenders and victims alike as concrete persons, to respect them as equals rather than risk excluding, silencing and objectification. Restorative justice practices potentially allow needs associated with the offence to be recognized for both victims and offenders, and to lay the ground for needs-meeting. This helps to treat offenders as equals.

Needs and possible responses are identified in restorative justice conferences through *respectful listening* to the other, and engaging responsively with them. Designing the 'outcome agreement' together allows the parties to share responsibility for identifying needs and planning together about what should be done to see that these needs are met. This parallels Tronto's first two phases of practical care (alertness to needs, and taking steps to see that these will be addressed). This responsibility-sharing approach has similarities with the second response-design pair of principles drawn from care ethics: to *creatively consider* a *cumulatively fair* response, given the resources available, other needs and responsibilities. This is informed by the resources and relationships of the parties, and the distributive values emphasized by the particular political morality. One core difference is that whereas the principles I propose focused on responding to offenders in the context of mainstream sentencing, restorative justice claims to take the needs of victims and offenders together holistically in the social context. While this is broader than the principles I propose, concern for victims is endorsed by the responsibility-sharing values of the conceptual anatomy of care ethics.

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[85] Nothing prevents the design of restorative process to include review, but this may undermine the value of a 'fixed' agreement in providing reassurance and stability for both parties. This concern may not be particularly worrying, since agreements are not usually binding.

Care ethics may be able to help acknowledge and address the limits of restorative justice practices, through their built-in informal, implicit review processes. Initial and ongoing review processes might, as explicit guidelines for practice under the principle of cumulative fairness, encourage participants to speak out against oppression. There are clear benefits for formal accountability processes and external regulation, and the informal review processes offered by care ethics' initial and ongoing review might provide information for, and help target, formal processes.

Problem-solving sentences

This section examines the nature and typical content of problem-solving sentences, as they are delivered in the community. I offer a brief note about the delivery of therapeutic programmes in American drug courts, since this is the foundation on which problem-solving criminal sentences are built. These appear most often in community courts to address 'quality-of-life' offending (graffiti, street-corner drug dealing and soliciting) (Clear et al. 2011, p.99), grounded in community justice principles of improving public safety.

Drug court programmes

American *diversionary* drug courts usually provide programmes as part of an extended pre-trial bail process. American judges set out individualized treatment programmes to address the offender's needs, considering advice from experts, criminal justice staff and the offender's wishes. Unlike mainstream trial proceedings, sentencers engage directly, with offenders rather than defence agents (McIvor 2009, p.38), to motivate and encourage 'clients' towards a stable, drug-free life. On the 'bail' model, the charges may be dropped at any time before the court enters judgement, in response to the offender's good progress. An alternative practice is the post-sentence model, for example that found in Scotland where, following a short period on bail for assessment, offenders are sentenced to Drug Treatment and Testing Orders, (retained in Scotland for use in Drug Courts, in

parallel with the Drug Treatment Requirements made under Community Punishment Orders in mainstream proceedings), linked with treatment services, and provided with monthly judicial review (McIvor 2009, p.32).

Both models potentially permit *respectful listening*, collaborative *needs-identification* and *creative consideration* in *analysing response* effectiveness. Participants attend regular review sessions with the judge, held informally in the courtroom. Clients participate in a variety of treatment from 12-step programmes (eg Alcoholics or Narcotics Anonymous) to acupuncture, are submitted to regular drugs testing (Nolan 2001, p.40), may be required to find work or complete their education, and complete written 'homework' tasks (Payne 2005, p.75). American drug court programmes usually last at least a year. When things go well, restrictions on participants are gradually reduced. Praise and prizes are provided for small-step successes (from courtroom applause, to graduation T shirts). Yet reprimands are made for failure to meet requirements (including verbal 'dressing down' to revoke of earned privileges, or short prison sentences as a last resort) (Nolan 2001, p.40; 2009, p.14). When things go badly on the diversionary model, offenders drop out of the programme and may be prosecuted for their original offence.

Drug courts have found support across the political spectrum (Nolan 2001, pp.53–4, p.59) since, despite their therapeutic, rehabilitative aims, they are often rigorous and not 'soft options' (2001, p.51). Some offenders find the greater involvement of problem-solving court sentencers' in punishment delivery encouraging and supportive in comparison to mainstream alternatives (McIvor 2009, p.43). Others find this amounts to invasive individual surveillance (Payne 2005, p.74 & p.75 respectively; Mair & Millings 2011, p.77 (both cases)). One Australian drug court participant required to share a personal diary in court told researchers that he simply made it up (Payne 2005, p.75).

A study of a Las Vegas drug court's ability to provide Braithwaite's 'reintegrative shaming' suggested that the practice (in that particular court) was instead stigmatizing and degrading (Miethe et al. 2000, pp.536–7). Without due process

protections this potential is even more concerning. The lack of due process protections and appeals processes for drug court programmes on the bail model raises serious concerns over the coercion of offenders subject to drug court proceedings. The 'voluntariness' of participation is dubious, since the alternative is a standard criminal justice response, usually perceived as retributively 'harder'. Drug court schemes are criticized for 'cherry picking' low-risk participants to raise success rates and failing to deal, as originally intended, with the complex and chaotic needs of offenders who cause greater social problems (Boldt 2009, p.12).

Community court sentences

In community courts, problem-solving sentencing is part of a criminal justice response, rather than a diversionary process. As we saw in Chapter six, the initial problem-solving meeting feeds into the sentencer's decision-making, allowing expert advice, practitioners' experience and offenders perspectives to inform the problem-solving element of the sentence. Similarly to Scottish drug courts' post-trial practices, problem-solving sentences use regular sentence review sessions, allowing the original sentencer to oversee and fine-tune the problem-solving. The purpose of the reviews is to provide the offender with supportive encouragement in addressing their own needs in small stages, rather than expecting offenders with long-standing problems to fully address these immediately.[86] Through problem-solving meetings, offenders are additionally held accountable to sentencers for their efforts to address problems (noted in Chapter six as part of the distinguishing features of problem-solving courts). Outcome success rates of problem-solving sentences provide accountability between the sentencer and the community.

Chapter six considered concerns around due process protections for offenders, particularly since drug court reviews do not operate under the protections provided in mainstream trials, since these reviews are pre-trial or post-sentence measures. I suggested that the care ethics approach might help by providing informal review

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[86] This checking and rechecking of the appropriateness of the problem-solving element to the offender's needs is indicative of the responsiveness identified in the conceptual anatomy of care, and included in the work of Tronto (1993, p.134) and Engster (2007, p.31).

practices of self-scrutiny and the mutual moderation of all those involved. This can supplement and strengthen, but cannot replace, formal procedural protections. I also considered concerns around the competence of sentencers, who may lack appropriate extra–legal training and expertise, in providing responses expected to be therapeutic. Again, the care ethics principles require care-givers, and in this case, sentencers, to consider their own competence to provide care. This might allow an element of formal appeal, challenging a sentencer's assessment of competence to provide particular therapeutic interventions.

These concerns of due process protections and extra-legal competence also apply at the delivery stage of therapeutic jurisprudence and problem-solving court processes due to the pre- or post-trial nature of the practices. External oversight is provided for punishment delivery, performed by probation or prison officers, by the Prison and Probation Ombudsman. Similar external oversight for problem-solving sentencers could allow an avenue of complaint for problem-solving courts, strengthening the protections available to the offender. This might be especially beneficial for practices with fewer due process protections. Where problem-solving occurs within the context of a community order, oversight and avenues for grievance are available through the Prison and Probation Ombudsman. Yet where sentencers, in addition to probation officers, direct the application of the sentence, perhaps additional oversight is required for sentencers exercising this role, paralleling the Ombudsman's oversight of probation officers. The existence of a clear route for grievances helps to establish clear boundaries of acceptability, and provides a remedy for poor practices.

Problem-solving sentences
Problem-solving sentences target concerns to improve community quality of life through problem-solving for individual offenders. However, addressing the needs of offenders may exclude the concerns and needs of the victim and the community. The *purpose* of problem-solving sentences is to address individual offender's problems, anticipating benefits for the wider community through reduced reoffending. This is delivered through a problem-solving *method*, designed at an

initial problem-solving meeting as part of the sentence decision-making process, allowing the sentencer, criminal justice experts, community experts, treatment experts and offenders to explore together the offender's problems and devise an individualized, constructive solution. Regular *review* allows sentencers to check offenders' adherences to Community Order conditions, and to oversee and amend the problem-solving aspects to ensure needs are met. Power appears to be shared between the sentencer, practitioners, experts and the offender, and sentencers work towards consensus. Problem-solving review hearings check offender compliance and the effectiveness of problem-solving agreements. This allows non-compliance to be addressed sooner and holds the offender accountable for completing their court-ordered response to their criminal offending. This also allows the fine-tuning of the sentence by the sentencer (who has more power to vary requirements than probation officers) to effectively meet needs, strengthening and developing offenders' capabilities. However, concerns are raised regarding coercion to which I now turn.

Criticisms

There are concerns common to both the decision-making and delivery phases of these bottom-up practices: coercion and confidentiality. Potential for coercion casts a shadow over restorative justice and problem-solving sentences, therapeutic jurisprudence in particular. There are, however, two forms of problem coercion: coerced offender participation (in circle, conference or problem-solving sessions), and coerced disclosure of personal details. This second problem is greater for problem-solving courts due to repeat review sessions. It may be hard to see why coerced participation should cause a problem since the criminal law is coercive. As noted in Chapter four, the law does not recommend or advise: it compels. Bottom-up practices in this respect are no more coercive than mainstream practices, yet bottom-up practices claim offender participation is voluntary.

Coerced participation

One problem for coerced participation is that it is difficult to communicate 'voluntariness' within a compulsory criminal justice setting. Clear, viable exit opportunities are necessary to demonstrate voluntary participation. Roche argues that offenders' decisions not to participate in restorative justice, or where restorative justice breaks down, should not be held against offenders in later sentencing. To do so stacks restorative justice in the victims' favour, rather than reflecting the needs of both parties (Roche 2004, pp.85–6). Voluntary participation treats offenders as equals, capable of making their own decisions about their lives. This avoids treating offenders passively, or as though their views count for nothing, which risks objectification.

Although bottom-up approaches are often not experienced as 'soft' options (Nolan 2001, p.51) by participating in restorative justice, therapeutic jurisprudence and problem-solving courts, the offender usually receives a less serious penalty, when measured according to harm anticipated, as classically understood. Offenders may be influenced, even subconsciously, by this consideration, making it difficult to eliminate all potential coercion. Voluntary participation might first be strengthened through information and transparency: providing comprehensive, easily accessible, information regarding what the practice involves, and the options and powers offenders have; and permitting offenders legal advice and a period for reflection. This supports transparency and informed choice, making coercion easier to identify and challenge, and echoes Roche's call for greater accountability and transparency in restorative justice.

The second coercion problem, coerced disclosure of personal information, is particularly an issue in problem-solving review meetings. While disclosure is voluntary, when the best advice and support is clearly only available through disclosure, this must have a coercive effect. Offenders are exposed to greater potential coercion or bias from sentencers, due to the ongoing review practices in problem-solving courts. Yet this may equally facilitate relationship-building, supporting offenders and allowing for the acknowledgement and addressing of

mistakes. There are two related problems here: firstly, the offender may feel coerced into disclosing personal details; secondly, problem-solving partner agencies may be tempted to share offenders' personal details inappropriately. This second confidentiality problem will be put aside while I address coerced participation.

Coerced disclosure

Offenders will be encouraged to engage in in bottom-up practices: legal representatives may advise disclosure to be in the offender's best interest, and the sentencer will also encourage offender engagement to facilitate support provision. We expect here Duff's transparent rational persuasion (2001, p.177), recognizing the offender's option to choose not to listen (Hampton 1984, p.232). Providing sentencers and legal advisers are able to persuade and advise without crossing a fine line into pressured coercion, problem coercion can be avoided. This is a self-scrutinizing task, but not so far removed from the work already done by legal advisers whose clients decline to follow part of their advice.

Winick recommends motivational interviewing (2003, p.181), echoing the structuring of processes so as to minimize problem coercion, seen in Braithwaite & Strang's view of restorative conferencing (2000, p.205). Motivational interviewing resonates with the *desistance* and *good lives* psychological models of offender treatment. These models identify reductions in reoffending as arising from offenders' decisions and preferences. Supporting offenders in constructing a new law-abiding identity and addressing personal problems are key for reducing reoffending. Most offenders reach a stage where desistance becomes an attractive option (Maruna & LeBel 2010). Despite the coercive environment of therapeutic jurisprudence, Winick argues sentencers should understand themselves as building consensus rather than coercing (2003, p.181), and that offenders' chances of success are increased when they perceive decisions as their own choices (2003, p.183, p.187). If coercion can be removed where offenders can be rationally persuaded to co-operate, how are we to respond to offenders preferring non-engagement? Basic rights protection, as noted in Chapter four, for example through legal advice and reasonable exit options, must be available.

Compromised confidentiality

Returning to confidentiality, this is a particular problem for problem-solving courts and therapeutic jurisprudence (especially for diversionary projects outside of mainstream criminal justice due process protections). Collaborating justice agencies and partner organizations may seek to share information about an individual inappropriately, a problem encountered by the North Liverpool Community Justice Centre staff (Mair & Millings 2011, p.45). While this may be altruistically motivated to better provide support, this is problematic as it ignores offenders' wishes, treating offenders passively and risking objectification. Some protection for confidentiality is provided through the *Data Protection Act 1998* in England & Wales, requiring an individual's consent to the sharing of information about themselves, and purposes for which the information is used. Confidentiality might be strengthened in problem-solving courts through agreeing confidentiality policies across partnership agencies collaborating within a problem-solving project.

Social context

A further concern, as we saw in Chapter five in relation to risk-need-responsivity approaches to offender treatment, is that the in-depth consideration of personal problems shifts our focus away from structural and social factors. Eric Miller raises concerns that drug courts' attention to individual needs may obscure contributory social factors (eg race, class, gender and economic status (2009, p.449)). Where social exclusion has blocked opportunities and caused harm this may unfairly heap responsibility for the challenges offenders' face onto their shoulders, ignoring community responsibilities. Mainstream, classical liberal, individual-focused approaches risk ignoring this relational and social information. Relational and care ethics approaches suffer less from this problem, as these approaches anticipate interdependent individuals and prioritize gathering personal and social contextual information to better understand this interdependency. The needs-meeting and capability-building we offer will be impoverished if we ignore these social contextual factors. The principles derived from care theory emphasize that it is imperative to understand how an individual's personal and social context fit into

social and cultural realities. Operational failures to consider social context will in at least some cases be identified by the ongoing review processes made explicit in the final *response analysis* principle.

Fit with care principles

Problem solving and restorative justice practices fit reasonably well with the principles proposed here. Problem-solving courts use regular review hearings, either post-sentence or as part of an extended diversion or bail proceedings, to explicitly monitor changing situations as needs are met and capabilities developed incrementally. This reflects the *response analysis* principle. Problem-solving courts aim to *punish with care*, by supporting offenders in meeting their own needs and strengthening their capabilities. However, bottom-up practices lack formal oversight mechanisms, and need a way of monitoring whether their own principles are followed and produce the expected effect.

Attempts to avoid harm through *punishing with care* and the ongoing review of care ethics, present in the *response analysis* stage*, both aim* to prevent avoidable harms. This allows acknowledging and addressing, where possible, harms arising as unforeseen 'collateral damage'. Transparency might be strengthened through the review processes of self-scrutiny, and mutual moderation under the *cumulative fairness* and the *response analysis* principles. Transparency, self-scrutiny and mutual moderation can all contribute to identifying coercion and confidentiality problems. The benefit of the explicitly supportive care-informed principles is that this can empower weaker parties to raise concerns to the sentencer by securing them an opportunity to speak, *and* sentencers (and practitioners) a responsibility to listen. These informal measures could help to provide information for formal review (detailing concerns about coercion), and help direct efficient use of formal review processes (identifying cases where coercion appears a problem). By using the principles derived from care to shape ongoing day-to-day punishment-delivery decision-making, this may help to provide equal respect for offenders.

We saw earlier that designing diversity into restorative conferences aims to reduce the chances of oppression in restorative justice (Braithwaite & Strang 2000, p.205). This provides shades of the self-scrutiny and mutual moderation I have argued care ethics counsels. Yet restorative conference participants are ordinary members of the public, and not necessarily aware of their role in review. Care ethics principles could help to make this role explicit. Braithwaite & Strang's oppression challenging practices rely firstly on participants' spontaneous, perhaps passive, identification of a problem, mistake or discrimination, rather than active scrutiny of proceedings. Secondly, the participants must choose to raise their concerns in order for them to be considered by the conference. Some participants may consider that discrimination has occurred, but consider this too minor to raise, or feel that the excluded view is in any case not worth hearing, perpetuating rather than challenging the discrimination. A shared expectation of self-scrutiny and mutual moderation, coupled with the protection of basic rights and a principle of protecting the vulnerable, as seen in Chapter four, may help to correct this.

For Braithwaite & Strang, the conscious scrutiny of the restorative justice facilitator is a last resort. Their ideal response is that participants' desire to hear others will defeat discrimination indirectly. The restorative justice facilitator is to an extent external to the participant's discussion, and from this external neutral position resolves to guard against discrimination. But the facilitator is only one person. From the care perspective, each participant is responsible for self-scrutiny, to question whether their own participation is aware, respectful and responsive to others. Mutual moderation from others supports our self-scrutiny: when mutual moderation causes one participant to identify the deliberate or accidental exclusion or discrimination of another, self-scrutiny will call on them to raise this to the group, since 'the absence of attentiveness [to others' needs] is a moral failing' (Tronto 1993, p.126).

Problem-solving court practices in theory also provide 'ongoing review' space for practitioners to highlight difficulties (Chief Justice Blatz, reported in Berman 2000, p.84) and to help identify concerns about problem coercion in therapeutic

jurisprudence and problem-solving courts (Winick 2003, p.181). While participants (lawyers, judges, experts and offenders) have the expertise to identify practical differences, their problem-solving role may conflict with their courtroom role. Consider the defence lawyer who knows the offender will have difficulty with a requirement, but knows that raising this difficulty (with the client's consent) weakens an argument they have made; or the medical expert who knows a particular response is unlikely to succeed with patients like the offender, but cannot offer a better alternative.

The problem of conflicting needs is reduced when practitioners apply care ethics. Care ethics acknowledges both practical and individual limitations, and further recognizes that accounting for these leads to the best care provision for individuals and more efficient use of needs-meeting resources holistically considered across the social distribution of needs. Returning to the example of the lawyer, who knows that raising a difficulty for the offender with a requirement weakens an argument they have made. Both apparently conflicting details may be valued from the perspective of care ethics. If we aim to care well then we provide better care by pooling our knowledge, with the care-receiver's consent, and sharing responsibility with others suited to help. Because review practices are internal to good care, raising both sides of such a paradox furthers, rather than conflicts with, the ends of caring well. Although conflicts of individual practitioner aims may still be possible, they may be less problematic.

Acknowledging and addressing problems when they do occur can also be strengthened through the informal initial and ongoing review internal to good caring. Because we expect individuals to have personal limits, and expect negative and operational limits to our caring practice, care ethics offers internal review mechanisms. Self-scrutiny and mutual moderation are parts of the decision-making and delivery process for caring; not an external or separate activity. Through review, continuing checking of contexts, needs, resources and responsibilities in the light of punishment decisions and practices helps identify when things do not go as

expected. By continuing to listen, we reduce the harm of exclusion, and increase the chances of problems being aired.

The initial stage of review occurs in the *cumulative fairness* principle of the response-design stage (pre-sentence or pre-decision), and ongoing review in *response analysis* principles of the harm-avoiding stage (the regular review of problem-solving sentence delivery). Initial review will be most useful for one-off restorative conferences, whereas ongoing review can help to strengthen the repeated review practices of problem-solving courts. Both offer potential to inform and target mainstream formal oversight. Review practices help to identify problems, either to avoid or to acknowledge and address harm.

What do we learn about the principles?

We saw above that the care ethics principles can help to provide some informal oversight to bottom-up practices, yet no oversight, whether formal or informal, external or internal, can offer complete protection. The initial and ongoing review implied by care ethics will not always succeed in identifying problems. And while I have argued that review implies appropriate action, the negative and operational limits of care mean that problems will not always be adequately identified or addressed. Adding self-scrutiny and mutual moderation to existing bottom-up punishment practices strengthens protections for offenders. I argued in Chapter four that basic rights, desert as a maximum punishment, and a concern to protect the vulnerable may also help protect offenders from intrusion and prejudice. These approaches may similarly help here, offering some protection against coercion. This reinforces that we still need the formal processes of the court and for sentence delivery oversight, for procedural justice, yet we must still expect errors and unavoidable harms as no system is infallible.

While care ethics ongoing review practices are not failsafe protection, these are internal to the practice of good caring. Our (albeit imperfect) chances of identifying the problem of poor practice are improved when the failure is of a recognized,

necessary part of the practice, rather than a separate additional practice. When we are explicitly guided by the principles I derived from care ethics, failure to carry out ongoing review implies a failure to conduct the practice properly. The practitioner following care ethics principles is a poor practitioner, as the driver who fails to check mirrors is a poor driver. The separate formal institutional protections found in mainstream criminal justice are valuable. Part of what makes them valuable is their separation from, and independence of, the practices of punishment decision-making and delivery. Yet what is less clear is that cases not subject to full formal appeal and review practices are appropriately passed over, and that poor decisions are not left unidentified. While both practices are limited by human error and liability to poor implementation, this is where care ethics principles can help to strengthen mainstream institutional protections, by helping to gather information to suggest which cases require full formal oversight.

Treatment as equals

Restorative justice conferences are one-off incidents, and do not have a continuous process of punishment delivery. As equal participants in conferences, offenders are in theory treated as equals, although there are risks this may break down in practice. This may be due to social status external to the conference. Further, through understandable concern for the victim's rights and wellbeing, we risk devaluing the offender's rights; I have suggested that the care ethics principles may help to strengthen the practice of designing in diversity to address discrimination problems. Offenders are routinely included in discussion in the delivery of problem-solving court sentences. This engagement is not necessarily respectful. However, by following the principles derived from care, which specify respectful open engagement, we can help to provide the conditions necessary for interactional justice, and treatment as equals. From the perspective of care, dialogue focused on respectful listening is encouraged. Key comparisons between these bottom-up punishment delivery methods considered above are summarized overleaf.

Key comparisons

	Purpose	Method	Review	Treatment as equals?
Restorative justice	Healing and restoration, primarily for victims, but including communities and offenders if possible.	Dialogue: in circles, conferences and mediation, emphasis on understanding the other to reach agreement.	Few review practices available in practice, potential for much more to be done to strengthen accountability (Roche 2004, p.229).	One-off conference, no ongoing interaction during punishment delivery.
Problem-solving sentence or therapeutic programme	Address individual offender's problems, in the expectation of community benefit.	Dialogue: problem-solving meeting allows offender to explain problems and discuss solutions with experts and the sentencer, emphasis on problem identification.	Regular review hearings discuss the progress made in addressing the offender's problems and consider whether changes to needs-meeting are necessary. Particularly in America, the involvement of sentencers means the original order can be amended if necessary	Inclusion attempted, but need not be respectful (Miethe et al. 2000, pp.536–7), somewhat dependent on personality of sentencer.
Care ethics principles	Meeting basic needs, building capabilities, avoiding unnecessary harm; respectfully and responsively.	Dialogue: open engagement, emphasis on listening, responsiveness to needs and to feedback from the other.	Internal practices of informal review (self-scrutiny & mutual moderation) support formal review and oversight where formal review is present.	Respectful listening focus strengthened by ongoing responsiveness to offender and informal review.

Conclusion

As with all practices performed by humans, criminal justice is subject to human error. The care perspective is well-suited to supplement mainstream justice, since it explicitly acknowledges these limits. The care perspective principles also provide ongoing review practices, internal to the delivery practices, which specify self-scrutiny and mutual moderation. This will not acknowledge and address all problems, but it can help to strengthen formal review processes. Further limits to these principles, such as the protection of basic rights and vulnerable parties discussed in Chapter four, give us some guidance for resolving the practical difficulties of coercion, intrusion and bias which the greater consideration of contextual destails risks. We have seen that the bottom-up alternative approaches to criminal justice follow the principles of care ethics reasonably well already, although they struggle to offer the formal oversight of mainstream trials. Mainstream trials, by contrast, are well positioned to engage with the more formalized limits, particularly the protection of basic rights, which I suggested in Chapter four might help to address conflicting needs and protect offenders from intrusion and bias.

Were the principles I propose, drawn from care ethics, to be brought into mainstream practices, this could help to bring the context-recognizing benefits of bottom-up approaches, which help to provide treatment as equals and interactional justice to offenders, into mainstream practices. Care ethics values also bring concerns to meet needs and avoid preventable harms. Mainstream practices provide the formal oversight which bottom-up approaches lack. While the care ethics principles can provide inclusive context sensitivity and informal review practices to mainstream practices; mainstream practices provides an environment which supports the additional necessary limits caring practices: basic rights protection, and a concern to protect the vulnerable. Given that mainstream practices also include unacknowledged care practices, we can conclude that mainstream practices and care ethics principles complement one another,

strengthening the argument for including care ethics principles in mainstream practices.

Conclusion

I began from the widely accepted position in liberal theory that persons should be treated as equals. How should we treat, and interact with, convicted offenders during punishment decision-making and delivery, in order to treat offenders as equals? Punishment practices cause unacknowledged, unintended 'collateral damage' harms, and include many examples of caring work. Yet we acknowledge neither the full extent of the harms which punishment risks, nor the caring practice which punishment entails.

Why do we neither acknowledge the full extent of 'collateral damage' harms nor the caring work in punishment practices? I have suggested that one contributing factor to this oversight is present in most leading definitions of punishment. The use of an ambiguous, harm-like element as one defining feature of punishment, and the only substantive content defining feature, distorts our perception by elevating and normalizing harm. This forms a vicious circle, both desensitizing us to harms and obscuring caring practices. We expect harms and fail to question whether 'collateral damage' harm represents appropriate treatment for offenders as equal persons. While trivial harms are not concerning, some harms are non-trivial and may be morally problematic. When we ignore, thereby failing to respond to, morally significant 'collateral damage' harms, we treat offenders as inert and passive, objectifying them as an item that may be acceptably harmed. A procedural-only definition of punishment allows normative reflection on what treatment is appropriate for offenders qua persons.

Retributive and consequentialist penal theories say little on how we should treat and interact with convicted offenders. This is not surprising since the focus of these theories has often been the justification of punishment. I have argued that both approaches implicitly require contextual information to understand the unique situation of the offender in order to determine punishment, either proportionally or

to reach specific end goals. However, neither approach offers explicit guidance about how this might be obtained.

Mainstream procedures aim to protect offenders from intrusion and bias, but risk part objectification. While objectification may not happen in all cases, this casual regard for the offender's personhood is inconsistent with treatment as equals. Dworkin told us that treatment as equals is the provision of equal concern and respect (2000, p.227), which implies accounting for concrete information about individuals' contexts. Because the treatment this provides is rightly context specific, I have proposed interactional justice as a practice that would help us to identify cases of appropriate information-gathering and treatment as equals.

Caring practices as I have described them are learned behaviours, and continuous processes rather than discrete acts. The anatomy of care ethics, which helps to identify the presence of caring in punishment practices, contains a moral injunction to become aware of needs (Tronto 1993, p.127, p.129) and where possible, subject to the negative limits of care, to respond to needs (1993, pp.136–7). We expect all persons to have individual limits and needs, and that our needs-meeting will be restricted by shortfalls and need conflicts. Hence, care ethics recognizes that non-ideal needs-meeting and caring will occur. I have suggested that the processes of initial and ongoing review are internal to the practices of good caring in response to these recognized limits. I have offered a systematic presentation of these limits, positive, negative and operational, which together with the injunction to care well, directs a response to the un-met or poorly met needs of which we become aware through review practices.

The care ethics perspective I have argued for in this thesis has several key differences to the classical liberal perspectives that have informed the development of the criminal justice processes in England & Wales, which has informed approaches to criminal law in other jurisdictions. These differences include a difference in practical moral reasoning; while classical liberal approaches apply an abstract, generalized form of reasoning, care ethics practical moral reasoning

prioritizes concrete contextual detail, preferably directly gathered from the individuals involved. These methods of reasoning are informed by differing ontological expectations about individuals: whereas the classical liberal approach understands individuals as most often independent, self-sufficient and autonomous; care ethics anticipate interdependent, variably vulnerable individuals. Care ethics approaches have the effect of normalizing expectations of individual personal limits and needs, in turn normalizing the acceptance of, offering of or request for, support. These expectations, and associated mode of moral reasoning, suggest a contextual or relationally informed interpretation of concern, respect and dignity.

Contextual information, gathered preferably through engagement with the other where possible, is prioritized under care ethics approaches, but not from classical liberal perspectives. I have shown that contextual information is valued in mainstream criminal justice practices and aims; however I have argued that the classical liberal informed practices are not well disposed to collect this information. Trials, where they are contested, limit offenders' speech. But post-conviction pre-sentence practices silence and exclude offenders. Under conditions desensitizing us to harm, this further compounds the risks of misunderstanding offenders, missing personal and social contextual detail that could facilitate harm avoidance, and reduce risks of offender objectification.

Care ethics is able to acknowledge both caring practices and harms and is therefore not as immediately likely to obscure caring or ignore harms, compared with present punishment theory. I have argued that, in significant ways, the principles that inform the care ethics mode of moral reasoning can be applied to punishment decision-making and delivery. Care ethics prioritizes the personal and social contextual detail which mainstream practices already value. I have offered a formulation of these principles designed to guide sentencers and punishment practitioners. These principles centre on fostering dialogue, with a special focus for practitioners on listening. As the stronger party, listening is one way in which sentencers and practitioners can empower the offender (Pranis 2002, p.30), helping to overcome objectification problems. As the discussion of criminal practices

showed, it is possible to gather this information very disrespectfully. The principles developed from care ethics focus initially on respectful listening, before working through difficulties between sentencer and offender, to help inform an appropriate response in the light of the social context of the offences, and the offender's personal context, including some social elements.

This provides efficient access to instrumentally useful information to sentencers, from a 'traditional' punishment perspective: suggesting where moral education might be appropriate, or indicating what kinds of programme (rehabilitative, reformative, educational, healthcare, or psychological) and at what level they might be necessary; and also from a care perspective (how can the individual's needs associated with the offence be met, and capabilities built). There will be overlap between these two instrumental benefits of more efficient information-gathering since, despite the harms present in punishment, I have argued that caring practices are essential for safe and effective contemporary punishment practices. There is a practical overlap since the caring aims of meeting needs, building capabilities and avoiding unnecessary harms are often the methods employed to meet punishment aims of rehabilitating, treating and training offenders.

When engaging with offenders in order to gather information is achieved respectfully, as care ethics suggests, this provides respect for the individual's self-knowledge and lived experience. This respect provides the interactional justice, also incompatible with objectification, which is not guaranteed in mainstream practices since these restrict the offender's opportunities for speech. This inclusion and respectful interpersonal treatment, argues Tyler, is necessary for procedural justice and contributes to the support and acceptance of legal institutions and their decisions, an additional benefit of interactional justice from my perspective. The respectful, responsive engagement fostered by care ethics may then help contribute towards securing procedural justice.

The principles I propose do not interfere with the existing necessary restrictions on the information that may be raised during trials, as I propose post-conviction

processes. I have noted the similarities between caring for citizens in general and offenders in particular, and the differences in the delivery of care to citizens. While I can only outline the limits to the principles I offer here, I have suggested that conflicting needs may be resolved the protection of basic rights, and the protection of the most vulnerable party, following the aims of care to meet the most serious needs, and avoid preventable harms.

I have argued for responding to offenders *without* deliberate harm, and *with* care. A principled argument can be made for preferring care responses to harm responses from both the liberal and care ethics perspectives. Liberal and care ethics ends of concern and respect overlap and are not inconsistent. But the reading of care ethics that I employ offers stronger practical guidelines for achieving treatment as equals through a relational understanding of concern and respect, prioritizing connection and contextual information. For democratic politics, inclusion of all citizens is important. Offenders' treatment as equals gains symbolical importance for securing democratic legitimacy, where convicted offenders are disenfranchised by their punishment. Pragmatically, harming offenders can only deplete the resources offenders have to co-operate with others, provide self-care and meet other caring responsibilities. This reduces offenders' chances of becoming productive citizens post-punishment. By responding with care and strengthening offenders' capabilities, offenders will have greater resources for care and for participating in social and economic activities, where they choose.

I have argued that the care ethics approach should be used for all offenders, although I have discussed four types of offender responses, namely offenders who:

1. Accept their conduct as legally wrong and regret their conduct;
2. Do not accept conduct as wrong but nonetheless regret their conduct;
3. Cannot accept their conduct as wrong and cannot therefore regret their conduct (offenders excused on mental health grounds);

4. Accept their conduct as legally wrong but nonetheless do not regret their conduct.

The principles I propose encounter difficulties in the fourth case. There is more to punishment than care, and our care for offenders should be limited by the protection of basic rights, particularly for more vulnerable others. These principles can also help to guide our caring decisions when needs conflict. Some readers may be concerned that proportional punishments may become impossible if we include offender context. I have argued that by accepting a small revision, allowing the means of assessing punishment seriousness to become more context sensitive, a revised proportionality calculation following the proportionality intuition is still possible and beneficial. I have retained the classical generalized assessment of punishment serious as anticipated harm as a starting point for considering punishment seriousness in particular cases.

Classical, generalized proportionality might provide a maximum level of punishment. Classical ranking of punishments expected to cause more or less harm *in general* provides a starting point to minimize preventable harm in cases where offenders' context indicates a risk of significantly more harm than the generalized approach expects. Offenders are exposed to additional risks of interference, prejudice and interpretations of their needs as risks to others once we take account of individuals' contexts. Again, while I cannot outline a response in full to this concern here, I have suggested that, in addition to a maximum punishment from which only downwards departures are made, the principles of protecting the vulnerable and securing basic rights might also provide some protection for offenders from these risks. I have also noted the contradiction involved in describing compulsory punishments as care, since this denies the care-receiver involvement in decision-making. Yet I have argued that it is useful to retain this description, to acknowledge the central role of caring practices, and to judge our practice by the standards of care.

It is desirable that offenders should help, and be supported in helping, to repair harms caused to direct victims: offenders have an appropriate association as they bear some responsibility for the victim's needs. Yet not all offenders will be willing or able to do so. I have suggested that, since punishment is a conduct censuring response *to* the offender, it may be misguided to expect punishment to also meet victims' needs adequately. It may even be unhelpful to victims to insist that punishment is an appropriate setting for victim needs-meeting. However, since the positive limits of care suggest that the community should take some responsibility for victims' high gravity needs, sentencers should be aware of the kinds of measures that will be used outside of the criminal justice system to respond to victim's needs where offenders cannot or will not. Sentencers may be able to take steps to help offenders meet victims' needs, most obviously by providing for restorative justice where this is the wish of both parties. Further, sentencers should avoid frustrating external needs-meeting for victims in their punishment decisions.

There are similarities between the principles I offer and the theories of Duff, and Braithwaite & Pettit. I am particularly concerned with the treatment of offenders as equals. Braithwaite & Pettit are concerned for the inclusion of all citizens, victims and offenders to protect equal dominion, necessary for republican liberty (1990, pp.64–6). Duff, meanwhile, is concerned to avoid systematic social exclusion, since this threatens the legitimacy of the state later calling individuals to account as offenders (2001, p.183). Braithwaite & Pettit and Duff focus on the inclusion of citizens. However the criminal law's protection and prohibitions applies to all persons within the jurisdiction. The approach I offer also includes treating non-citizens as equals qua persons, and leaves room for citizenship status as part of the offender's personal context.

Duff's concern is to reconcile offenders with victims (2001, p.109), and Braithwaite & Pettit seek to reintegrate both victims and offenders as full members of the political community (1990, pp.91–2). The approach I adopt also promotes the repair of harm and restoration of relationships. While I have been unable to discuss victims' needs in full, since they deserve the same detailed treatment as offenders'

needs, ultimately care ethics counsels connection and contains a moral injunction to identify and respond to needs. I have argued that care perspectives value contextual information, particularly when gathered through engagement with the 'care-receiver'.

Duff's communicative theory also expects dialogue (2001, p.177), although this has been criticized as overly scripted (Brownlee 2011, p.57). The pre-sentence dialogue I propose places no restrictions on offenders' speech, but does include normative limits on what sentencers must take into account, in cases of offenders' treatment of others as less than equal, denial of responsibility or gross lying. Practitioners' interpretation and use of disclosed information is further limited by principles of protecting basic rights and vulnerable parties, in addition to the aims of care: to meet needs, build capabilities and avoid preventable harms. Duff's theory expects existing formal procedural review, as does my approach. Braithwaite & Pettit demand power checking measures as essential for their republican freedom (Braithwaite & Pettit 1990, p.88).

There are however limits to Braithwaite & Pettit's power-checking, especially for the informal measures they expect will reduce the use of formal powers. I have suggested that the informal initial and ongoing review practices internal to the care ethics approach may help to strengthen Braithwaite & Pettit's approach with self-scrutiny and mutual moderation. However these cannot fully meet this concern. With Duff, I share a concern for past social exclusion as relevant to present punishment decision-making, although I include smaller social exclusions, as part of a broader concern to understand the offender's personal and social context. In considering criticisms of Braithwaite & Pettit's work, I note that there may be limitations to the care ethics principles I propose, if an attempt was made extend these to cover the question of criminal liability. I have not attempted to address this question and care ethics may be an inappropriate tool to apply. However, I have argued care ethics has many strengths when applied to punishment decision-making and delivery.

The principles I have offered here resonate with three psychological models of offender rehabilitation, insofar as these value relationships, holistically understood offender needs, building offender capabilities and supporting choices. They also overlap with the conceptualization of blame without stigmatization, as advanced by Hanna Pickard (Pickard 2011), which Pickard & Lacey propose to export to the criminal justice arena (Lacey & Pickard 2013). Pickard suggests that elements of patients' narratives (personal context) may be used by clinicians to help avoid stigma, and to help clinicians and patients explore adaptive responses for patients.

Finally I considered the principles I have proposed in relation to some bottom-up responses to crime, beginning from either principles of inclusion and healing for communities and victims, or restoration and concern for offenders' wellbeing. We saw in circle sentencing that unequal social positions outside of the circle might effectively prevent some circle members' equal participation, masking their needs and failing to treat them as equals. This is especially troubling, given the expectation of inclusion. Practices of therapeutic jurisprudence that operate outside of mainstream criminal justice practices (for example operating as bail courts in America and outside of the usual due process protections) lack oversight, due process protections and opportunities for appeal. These concerns applied in part to problem-solving community courts. I anticipate the inclusion of the principles developed form care ethics as a part of a mainstream post-conviction, pre-sentence dialogue practices, where due process protections are still available. The creative consideration principle includes an element of sentencers' reflection on their own competence to care, particularly when moving away from their (legal) area of expertise. I have suggested that in the same way sentencers are expected to explain their reasoning in sentencing, sentencers might also on occasion be called to explain their assessment of their own competence when applying extra-legal, problem-solving measures. This could provide an additional avenue of appeal.

After proposing a practice of pre-sentence dialogue to replace pre-sentence reports, I considered the punishment delivery aspects of these bottom-up practices. Concerns about due process protection and oversight persist. Concerns about

coercion and confidentiality loom larger, given the repeated nature of review hearings in therapeutic and other problem-solving courts. I have suggested that external oversight could be introduced to problem-solving courts, providing monitoring of sentencers' roles in punishment-delivery similarly to the oversight provided by the Prison and Probation Ombudsman. Once again, the initial and ongoing review practices, which I have argued are integral to good caring, may help to strengthen formal review practices.

When *respectful listening* is employed, we are able to provide interactional justice, the 'missing link in procedural justice' (Tyler & Bies 1990, p.88). I recommend a care ethics guided approach not for efficiency, economic or procedural justice reasons, but rather because *respectful listening* enables us to treat offenders as equals. This reflects offenders' moral status qua persons, and often a political status as equal citizens or community-members. In comparison with mainstream criminal justice practices, the guiding principles I have developed from care ethics enable us to:

1. Acknowledge the moral significance of harms, to help avoid or address harms;
2. Identify the essential presence of caring practices with contemporary punishment practices;
3. Provide guidance principles for punishment decision-making and delivery; which
4. Enhances our ability to provide treatment as equals.

This thesis has been concerned with the risked partial exclusion, silencing and objectification of offenders qua offenders. I have argued that the personal and social contextual details, which the individual offender defines as relevant to their particular circumstances at sentencing, should be taken into consideration, recognizing the intrinsic value of offenders' self-knowledge. The social context information about the individual will necessarily include intersecting socially constructed hierarchies. Sentencers should consider this information about offenders in ways which follow the care ethics aims of avoiding preventable harm

and meeting needs, the normative limits noted in Chapter four, and with a concern to protect the basic rights of more vulnerable parties in addition to the aims of These principles will limit the caring we are able to provide to offenders.

Despite the distinctive development of contemporary care ethics beginning in the work of Carol Gilligan, there are interesting resonances between care and relational ethics and other ethical traditions. In the Introduction I noted that the work of David Hume might have been explored as an alternative route to conclusions similar to those reached in this thesis. Some writers have proposed some apparent surface similarities between care ethics and Confucian ethics (Li 2002). The differences as well as the similarities might be fruitfully explored. Other resonances are indicated between the values underpinning care ethics and Buddhist thought (Nelson 2004; White 1999, p.114), and other non-Western philosophies (Pio et al. 2013, chap.13), which I hope to have the opportunity to explore in future research. This tentatively suggests that the approach advanced here may have a broader application than simply the Western liberal democratic examples I have considered.

A further advantage, then, of the approach which I provide and the definition of punishment which I offer, is that it is not tied to a specific culture, society or historical stage, barring some general assumptions: that human beings living in societies will collectively identify some actions as so wrongful or harmful that they ought to be prohibited, and that prohibited acts performance requires a collective community response (in short, that the society will have a criminal law). I have further worked on the 'naked conviction' (Dworkin 1998, p.86) that persons ought to be treated as equals. Since this is a disputed moral claim, and no individual has privileged access to moral truth, it is possible that this premise might be incorrect. However, I have not yet heard any argument sufficient to persuade me otherwise.

There are two immediately obvious ways in which the work presented here could be extended. Firstly, we might explore the impact of gender and other socially constructed hierarchies as they intersect with an individual's status as an offender. Secondly, a greater focus might be paid to offenders' mental health concerns, since

this group are recognized as over-represented within, and as requiring care by, the prison system. The use of therapeutic communities within prisons, such as HMP Grendon, has been identified as beneficial to some of the most serious offenders. The intent of my present work has been to highlight the exclusion of offenders as persons, and the importance of including offenders as equals. I have not pursued either of these concerns here for three reasons.

Firstly, research on these issues would benefit from an empirical approach, rather than the theoretical, normative approach I have employed. The normative approach may be a less helpful starting point when studying socially constructed hierarchies. Research might more fruitfully begin by asking those affected to tell us their experience. This echoes the theme of listening, which I have emphasized is important for including others as equals. Secondly, I did not feel there would be space to provide sufficient in-depth discussion, which these issues warrant, particularly given the constraints of time and the two very broad literatures, on care ethics and punishment, with which I was already dealing. Finally, I feel that the research I have presented stands together as a complete whole, from the point of view of considering the nature of our punishment practices and how the treatment of offenders as equals might be improved; and to raise the profile of the necessary caring practices in punishment, according caring in its proper place in punishment theory.

The procedural-only definition I have offered for punishment allows normative reflection on the practice of punishment, and which practices it might be morally appropriate to apply to offenders who are persons. This is not to say that this is necessarily the most helpful definition to employ in practice, and there may be good political and practical reasons to offer an alternative, political community specific, definition of punishment. For example, stating the nature of practices and clear maximum levels of punishment, to assist individuals in using such instruments to assert their basic rights and provide protection from abuses of power.

This thesis has focused on contemporary criminal punishment practices as they are enacted in Western liberal democratic states, England & Wales in particular. This is not because these practices are any way superior to any other cultural understandings. I have focused on these examples for two reasons. Since I am most familiar with the practices in England & Wales, these are the practices of which I have the best understanding. Secondly, I focused on the theories and practices of Western liberal democratic states, such as England & Wales, since this is the society in which I live. The problems I have highlighted with these theories and practices are real problems for the society of which I am a member. It is my hope that the starting points for policy discussion which I propose can help to address these problems, assisting in the task of improving our society, by meeting needs, building capabilities and avoiding preventable harm in responding to offenders.

The emphasis on harm in 'tough on crime' public discussion by politicians, the media and others further reinforces the objectifying message that offenders may be acceptably harmed, not just to 'offenders' but to the 'law-abiding' public. The 'tough' talk further implies this harm is not, or even ought not to be, trivial. When the tough talk drowns out the unspoken necessity of caring, it is easy to be dismissive of caring practices. When budgets are tight, it becomes easy to cut the apparently frivolous attempts to care for the 'undeserving'. But the ethics of care responds primarily to needs, and sometimes 'the undeserving' will have the highest gravity needs. Even 'undeserving' persons should have their equal personhood recognized. Even Lai's 'notorious war criminal' is brought to tribunal because, 'in virtue of being a person', they 'deserve to be treated with dignity' (Lai 2010, p.255).

It is not that liberal trials cannot provide offenders' dignified treatment as equals, indeed this is their intent and the practice is consistent with liberal understandings of concern and respect. However trial practices, and, of more concern, post-conviction and punishment practices, are unable to acknowledge the moral significance of the harms that may arise, and the objectification risked, when these harms are ignored. It is this casually risked, invisible objectification that is inconsistent with liberal ends of providing dignified treatment as equals. The care

ethics understanding of individuals as interdependent informs the alternative context- and connection-prioritizing conceptualization of concern and respect. This allow the care perspective to contribute towards providing stronger opportunities to, at minimum, acknowledge and, where possible, address these harms; thereby avoiding objectification.

In the Introduction to this thesis I noted that labelling individual as offenders might be unhelpful, since this defines a whole concrete person by one act in their past and fails to take account of the many law-abiding acts of the same individual. Even a prolific shoplifter will pay legitimately for some goods and services, including taxes. Conversely, only the minority of offenders are apprehended. A survey of American office workers found 58% of office workers admitted to taking office supplies for personal use (Harris Interactive 2006). The distinction between the 'law-abiding' and the 'law-breakers' is at best blurred. If this misleading distinction is pressed too hard and too often under present conditions, we construct another unquestioned social hierarchy, with the 'law-abiding' people at the top, and the 'law-breaking' objects at the bottom. The aim of this thesis has been to consider how offenders might be included as equal persons. This is not to say that different, less favourable, treatment of offenders is never appropriate. Nor does this hierarchy reflect the socially constructed hierarchies of gender, sexuality, 'race' etc, since these are based on unchosen individual traits. But different treatment may become discriminatory if it becomes an unquestioned, blanket response, and exclusionary or objectifying, as I have suggested is risked in mainstream criminal practices.

It matters that the caring practices are obscured by theoretical definitions, because theory informs policy and practice. I have argued that caring practices are necessary to punishment as it is practised. Caring practices are essential for delivering the rehabilitative, deterrent, or reformative aims of punishment. Supportive caring practices, helping offenders find homes and jobs and remain in contact with families in particular, are also needed. Having homes, jobs and family support has been empirically shown to decrease recidivism (May et al. 2008, p.1). As the Halliday Report recognized, overcrowding and overstretched resources threaten the

ability of prisons to provide the care that is necessary for rehabilitation (Halliday 2001, p.24).

I am particularly troubled by the present Ministry of Justice plans for a 'super prison'. I am concerned about the ability of a much larger facility to strengthen provision of personalized, context sensitive, individually supportive caring practices. As Liebling and colleagues' report on their recent follow-up study at HMP Whitemoor shows, when the caring side of punishment practices is withdrawn, our prisons, the archetypal form of punishment in the public and politicians' minds, become hostile, threatening, violent and unsafe places for offenders and staff (Straub et al. 2011, pp.iii–v).

The proposals I have made are modest. I have not suggested changing trials, but have proposed changes to the ways in which sentencers gather information about offenders. The principles I have proposed speak more to the ways in which practitioners go about their duties of punishment decision-making and delivery than the type of sentence ordered, except insofar as this constrains the options of practitioners. If sentencing decisions are potentially similar: '100 hours unpaid work', or '3 months imprisonment' and so on, then why are my proposals important at all?

Following Jerry Cohen, I have considered 'what we should think, even when what we should think makes no practical difference' (Cohen 2003, p.243). While we may arrive at similar punishment decisions, the principles I propose raise the chances that offenders will be included as equals during the processes of punishment decision-making and delivery. Liberal democracies claim that this is the case. Yet I have argued that desensitization to harms and the obscuring of care by the focus of definitions of punishment on harm, mean that we miss the risk of at least partly excluding, silencing and objectifying offenders when following classical liberal principles. These problems are harder to identify when we are desensitize to harms and the obscuring of care as I have argued. 'What we should think' might make 'no practical difference' (Cohen 2003, p.243) to the headline punishment decision. But

how we think about punishment informs the ways in which we carry out those decision-making and delivery practices and how we interact with offenders. The guidance offered by care ethics principles I have proposed offers an alternative framework for thinking differently about punishment decision-making and delivery.

Thinking differently about punishment allows us to think well, since 'thinking well involves thinking charged with the right feeling' (Diamond 1982, p.31). Thinking from the perspective of care allows us to recognize offenders as equals, to treat them as such by prioritizing respectful engagement to gather information, and to use this information to avoidance of preventable, morally significant harms. This helps reduce the risk of objectification. The care ethics perspective expects individuals who are interdependent and allows a different interpretation of the concern and respect necessary for treatment as equals. This permits the proper recognition of the necessary caring practices in punishment, and a more honest assessment of the harms caused to offenders during punishment decision-making and delivery. This gives us a chance to either consider in advance and avoid, or to acknowledge and attempt to address harms after-the-fact, thus better informing our caring. We will not always be successful, but the informal review practices that I have argued are implicit in care ethics strengthen our chances of identifying morally significant harms.

Some readers may consider that to respond to offenders supportively is to unfairly offer a second chance, but this is mistaken. Crime always causes harms and is always lamentable. Would that we could 'unhappen' the offence: going back in time and persuading offenders to act lawfully, even constructively, or to respond differently to provocation. This however is not an option. I have not argued that offenders should be given 'second chances'. We cannot offer another attempt at responding lawfully to a particular past situation. The present is a different opportunity. Our punishment practices happen in the present, neither in the past nor the future.

Previous criminal conduct tells us nothing of the offender's future or present conduct. A criminal conviction, even a newly acquired one, only indicates that an individual behaved unlawfully on a previous occasion. A criminal record may even be a poor indicator of risk, since it is not dynamic, and cannot reflect the ways in which offenders' personal and social contexts, their needs, capabilities, resources, relationships and responsibilities, change over time. I have argued that we should treat offenders inclusively and without objectification, as human beings, citizens and/or community members. This is to argue that in the present offenders should be offered a chance to demonstrate their non-criminal behaviour, during and especially after punishment, as employees, tenants, family members and community members.

Nothing can be done to avert the harm that has already happened. We can however aspire to mend harms and avoid new harms in our response to offenders, limited by concerns to protect the basic rights of the vulnerable. The punishment of the offender may not be the only response that the community should make to the offence. For example, communities have some responsibility for victims' needs. I suggested above that punishment may be an inappropriate place to expect victims' needs to be adequately addressed. A development of how mainstream courts can better include and hear victims, in line with the care ethics informed practices I have suggested for offenders, would be an interesting way to develop the present work further. Helping to address victims' needs and build their capabilities might also help to strengthen crime victims as individuals, and in their social co-operative relations.

I have provided principled, political and pragmatic arguments for responding to offenders constructively; for punishing with care. This gives us a better chance at avoiding offender exclusion and objectification through providing interactional justice; treating offenders appropriately as human beings, recognizing and including citizens politically (especially if not democratically included), and ensuring community members have strengthened and not depleted resources with which to meet their own needs, support others and engage in social co-operation. I have not

argued offenders deserve second chances at the past, simply that offenders deserve a fair chance, as equals, in the present.

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