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Transforming Rehabilitation: The micro-physics of (market) power

Abstract

This paper explores the impact of the introduction of competition and profit to the probation service in England and Wales following the implementation of the *Transforming Rehabilitation* (*TR*) reforms. The paper adapts the ideas advanced in Foucault's *Discipline and Punish* to draw similarities between the characteristics of 'disciplinary institutions' and a micro-physics of (market) power in probation under *TR*. It utilises Foucault's 'instruments' of disciplinary power – *hierarchical observation*, *normalizing judgement*, and *the examination* – as lenses through which to highlight the unintended consequences of the installation of market techniques within the service. The paper argues that the constraints peculiar to instilling *decentralising* market mechanisms that were presented as a means to liberate practitioners and reduce reoffending have entrenched further the *centralising* tendencies associated with managerialism.

Key words: Probation; Marketisation; Managerialism; Transforming Rehabilitation; Foucault.

Introduction

The *Transforming Rehabilitation* (*TR*) reforms fundamentally restructured the delivery of probation services in England and Wales. The Conservative-Liberal Democrat Coalition government (2010-2015) came to power in the aftermath of the most severe financial crisis since the 1920s, framed as a problem of public sector profligacy (HM Government, 2010). A key determinant for their criminal justice reform was an "unsustainable rise in the prison population" (MoJ, 2010: 8), which had spiraled the costs of justice. Yet, although Ministry of Justice (2016) analysis of sentencing trends in recent decades attributes increases in the prison population to a greater reliance on immediate custodial sentences, longer terms of imprisonment, and more recalls to prison, the Coalition government chose to focus on the perceived inadequacies of supervision in the community under successive New Labour administrations (MoJ, 2010). A top-down, target-centric "Whitehall knows best"

culture, it was argued, had been imposed upon probation, standardising practice, stymieing practitioner autonomy, and contributing to persistently high rates of reoffending (MoJ, 2010: 6, 2013a). Freed from the regulatory embrace of the state, competition for probation services would emancipate private providers to find 'innovative' new ways to reduce reoffending whilst being more cost-effective for the taxpayer (MoJ, 2013a). As such, *TR* split the probation service into two types of organisation: the publicly-owned National Probation Service (NPS) now manages offenders who pose a high *risk of harm* to the public, while 21 privately-owned Community Rehabilitation Companies (CRCs) supervise low-to-medium risk offenders (MoJ, 2013b). CRCs are paid through a 'Payment by Results' (PbR) mechanism, the stated aim of which is to give providers greater discretion in how they deliver services by shifting the emphasis from outputs to outcomes (MoJ, 2013b).

This paper argues that the constraints peculiar to instilling *decentralising* market mechanisms that aimed to liberate practitioners and reduce reoffending have entrenched further the *centralising* tendencies the Coalition government chose to associate with probation practice under New Labour. The first part of the paper explores the development of probation in England and Wales, highlighting the similarities between the service and Foucault's (1977: 139) concept of a "disciplinary institution". The paper, thereafter, draws upon Foucault's (1977: 170) 'instruments' of disciplinary power – *hierarchical observation*, *normalizing judgement*, and *the examination* – as lenses through which to explore the unintended consequences of the introduction of competition and profit under *TR*. Applied to probation, *hierarchical observation* refers to the 'architecture' of *TR* and how it was constructed. The PbR mechanism represents a "penal accountancy" (Foucault, 1977: 180) that has inhibited 'innovation' and continued to *normalize judgement*, as practitioners remain subservient to a similar system of targets that *TR* was supposed to displace. Finally, *the examination* is manifest in government inspections of *TR*, which are utilised to highlight how the logic of competition and profit exert disciplinary power over practitioners: they are Foucault's (1977: 177) "supervisors, perpetually supervised."

The paper differs from Foucault's general approach in that it does not seek to present *TR*, nor its architects, as plotting a strategic course to evermore discipline and control; rather, it applies these 'instruments' as examples of an unintentional micro-physics of (market) power, which have at once *decentralised* services and *centralised* practice. In other words, contrary to the liberating discourse of *TR*, the cumulative

impact of the marketising techniques instilled within probation has served to further instate disciplinary power. The evidence presented can be viewed as a case study of the application of market mechanisms to probation in one particular locality. Given that probation in England and Wales has played an historically significant role in informing the structure of services across Europe (Annison et al., 2014), the paper seeks to contribute to debates on the role of markets for probation services (and, more broadly, for criminal justice services) - especially in jurisdictions that are susceptible to privatising and marketising trends.

Probation: a "disciplinary institution"?

In *Discipline and Punish*, Foucault (1977: 9) explored how punishment became "the most hidden part of the penal process." Bodies that were previously mastered externally, by corporeal force, were now to be mastered internally through "structural relationships, institutions, strategies, and techniques" (Garland, 1990: 138). Foucault (1977) analysed the rise of the prison alongside other such homologous entities, like factories, schools, hospitals, and army barracks. These 'disciplinary institutions' shared common modes of organisation, intended to mould their inhabitants to the societal ends of the emergent capitalist system: 'hierarchical observation', 'normalizing judgement', and 'the examination' (Foucault, 1977: 170). *Hierarchical observation* involved the strategic dispersal of supervisors along the architecture of 'disciplinary institutions' to closely surveil their inhabitants and induce reform. *Normalizing judgement* depended upon a "penal accountancy" which, following surveillance, established behavioural 'norms' by punishing divergence (Foucault, 1977: 180). Finally, *the examination* combined the aforementioned disciplinary instruments, at once individualising bodies and standardising their conduct through the production of written knowledge, which formed the basis for the ceaseless dispersal of power (Foucault, 1977: 184). Together, these 'instruments' instated discipline within bodies, organising the new penal system around small, seemingly insignificant techniques contrived to coerce behaviour. A "micro-physics of power" (Foucault, 1977: 139) thus permeated individuals who, concurrently, became intermediaries in the further dispersal of discipline.

Foucault's (1977) discussion of the utilitarian philosopher Jeremy Bentham's designs for a 'Panopticon' prison provides an example of how a 'disciplinary institution', and its attendant 'instruments', might operate in its purest form. The

Panopticon, he argued, is an unrepentantly disciplinary edifice: prison cells encircle a central tower, their windows permitting both light from the exterior and visibility from the interior and their walls concealing the prisoners in the adjoining cells. From a centrifugal point, the person situated in the tower is able to monitor, unseen, both prisoners *and* supervisors. Such an architecture facilitated more efficient surveillance over a greater number of inhabitants, regulating action and monitoring performance. The transformative power of the prison thus depended upon knowledge: acquiring information on individuals meant that they could be controlled, while such control simultaneously created the conditions for the collection of further knowledge. This "power/knowledge spiral" (Cohen, 1985: 25) is self-perpetuating: *discipline only begets more discipline.*

Foucault's (1977) analysis of the omnipresence of power/knowledge relations in the prison might imply that the institution has proved tremendously successful in rehabilitating offenders. And yet, in the latter part of *Discipline and Punish*, he argued that the prison is, in fact, a 'failure'. Rather than being corrective, the prison manufactured a criminal class prone to reoffending through processes of stigmatisation and overly regimented labour. Paradoxically, though, the prison's inadequacies – "failure to reduce crime, its tendency to produce recidivists, to organise criminal milieu, to render prisoners' families destitute, etc." (Garland, 1990: 149) – are precisely what make the institution *successful*. The primary reason for its longevity lies in its political utility: concentrating a new category of criminal classes in communities wherein they are easily managed sedates the threats they might otherwise pose to capitalist society's twin pillars of property and authority.

However, Foucault's "cavalier reading of cause, effect and sequence" (Cohen, 1985: 26) in the penal sphere has generated considerable criticism, not least for a lack of evidence to sustain its claims. While the narrative of discipline in perpetuity is compelling, Foucault does not specify the forces or actors, other than 'power' itself, behind such insidious calculation. Instead, he takes the unexpected corollaries of the prison's failures to be to its predestined purpose. This renders his analysis overly deterministic, neglecting "the political and ideological forces which put up principled opposition to the introduction and extension of disciplinary practices" (Garland, 1990: 167). In other words, Foucault examines power as if its exercise is solely concerned with *more* power, at the expense of alternative and competing explanations for a particular policy or sanction. Here, probation provides an example of an institution

which emerged not as a punitive organisation, but rather, to *contain* the spread of the prison's disciplinary power in the late nineteenth century (Garland, 1985).

Despite these flaws, Foucault's (1977) disciplinary thesis has proved a rich source of understanding for the (under-theorised) field of community supervision (Robinson and McNeill, 2017). Foucauldian interpretations of probation might, therefore, consider it to be a 'disciplinary institution' because of its focus upon surveillance, monitoring, and the correction of 'abnormal' behaviour. As Cohen (1985: 85) observed, "The same micro-physics of power reproduces itself in the prison and the community". Garland (1985), for example, draws from Foucault (1977) to explore the emergence of modern penality at the turn of the twentieth century. He shows that, from its central position on the penal grid, the prison became one sanction among many, as the state deployed its resources to the productive ends of the "reform and normalisation" of offenders (Garland, 1985: 31). Likewise, tracing the origins of parole in California, Simon (1993: 247) argues that "the power to punish has been exercised as a form of normalization". As the state assumed greater responsibility for offender welfare, the probation (and parole) service looked to scientific diagnoses for rehabilitation (Garland, 1985; Simon, 1993). Between 1951 and 1981, the number of full-time, qualified probation officers in England and Wales increased from just over 1,000 to nearly 5,500; meanwhile, the total offender caseload grew from 55,000 to approximately 157,000 (McWilliams, 1987). For Cohen (1985), these expansions constituted a dispersal of discipline, albeit concealed within the rhetoric of decarceration.

Cohen (1985: 127) thus anticipated a "master shift…towards the control of whole groups, populations and environments – not community control, but the control of communities." As Garland (2001) argues, against the backdrop of persistent postwar increases in crime, the confluence of socio-economic, political, and cultural change resulted in seismic shifts in criminal justice policy and practice. Throughout the 1970s, a 'nothing works' (Martinson, 1974) challenge to probation's effectiveness prompted a new crime control consensus which oriented the service towards different penal aims: "retribution, incapacitation, and the management of risk" (Garland, 2001: 8). The epistemological foundations on which probation was established were further shaken in the 1980s and 1990s by a new "punishment in the community" agenda (Raynor and Vanstone, 2007: 67), part of an attempt to 'toughen' the service's public profile. Accordingly, probation has struggled to reconcile its historic emphasis on rehabilitation

with the demands of increasingly punitive discourse (Robinson, 2008), as the prison population has doubled from approximately 43,000 in 1993 to nearly 83,000 in 2018 (MoJ, 2016, 2018a).

For Feeley and Simon (1992: 449), enlarged caseloads stimulated the emergence of a 'new penology', which displaced the transformative optimism of clinical approaches to community supervision. In other words, (Foucauldian) disciplinary institutions no longer served to correct offenders via scientific rehabilitation; rather, they sought to identify and manage the foreordained criminality of recalcitrant groups (Feeley and Simon, 1992). This "absence of an aspiration towards eliminating crime", Simon (1993: 245) argues, reflects the potency of conservative criminal justice discourse. As a result, Robinson (2008) contends that late-modern rehabilitation has been reimagined according to *expressive*, *utilitarian*, and *managerial* ends. The hardening of socio-political attitudes towards offenders has resulted in *expressive* rehabilitation, or "rehabilitation *as* punishment" (emphasis in original; Robinson, 2008: 436). In a *utilitarian* sense, the public have supplanted offenders as the primary stakeholders in rehabilitative endeavours. A greater emphasis on public protection, therefore, gave rise to *managerial* practices focused on controlling offender risks and the costs of criminal justice (Robinson, 2008; Feeley and Simon, 1992).

The tempering of rehabilitative ambition necessitated a disciplined workforce. The impact of 'managerialism' - "the process of subjecting the control of public services to the principles, powers and practices of managerial co-ordination" (Clarke et al., 2000: 5) - on probation practitioners' discretion in recent years has been well documented, as 'effectiveness' has increasingly come to be expressed quantitatively in terms of targets and audit (Davies and Gregory, 2010; Phillips, 2011). Performance targets became integral to demonstrating accountability, embedding within the service a desire for "perpetually increasing productivity" (Davies and Gregory, 2010: 401). Similarly, the introduction and regular revision of National Standards from 1992 onwards "imposed standardised practice at the level of the supervision of individual offenders" (Bailey et al., 2007: 115), challenging practitioner autonomy and changing the nature of supervisor-offender relationships. These shifts towards accountability and 'value for money' increased central control over probation, and were enforced and monitored via audit by bodies like HMI Probation and the National Audit Office (Raynor and Vanstone, 2007). In this sense, the normalising gaze of disciplinary power

was inscribed within the (centralised) organisation and governance of the service and transposed onto probation staff.

Indeed, the Coalition government's reading of the probation service under New Labour exhibits many similarities with Foucault's (1977) concept of a 'disciplinary institution'. Like Foucault's (1977) account of the prison, probation was constructed as a failing service: rather than rehabilitating offenders, ineffectual community supervision perpetuated criminality and succeeded only in drawing evermore offenders into the state's disciplinary embrace (MoJ 2010, 2013a). Prescriptive guidelines for practice, the Coalition government argued, were emblematic of increasingly interventionist modes of governance that had suffocated practitioners (MoJ, 2010). Processes of targets, National Standards, and audit functioned as a *disciplinary discourse*, suffused throughout the probation service and into wider society: practitioners were the *products* of stifling state intervention and the (inadvertent) *producers* of the state's disciplinary power. As such, like the emergence of the probation service, *TR* was born from a desire to check the disciplinary power of the prison and its associated costs (MoJ, 2013a).

On the surface, then, Foucault's (1977) analysis of the *modern* functions of the *prison* might appear to be two steps removed from *late-modern probation practice*. This is evidenced by accounts of community sanctions that detail the evolution of penal strategies away from correction towards control (e.g. Feeley and Simon, 1992; Simon, 1993; Garland, 2001; Robinson, 2008). On closer inspection, however, Foucault's (1977) disciplining 'instruments' of power – *hierarchical observation*, *normalizing judgement*, and *the examination* – are evident within managerial developments to probation: such control extends beyond the *supervised* to the *supervisors*. This paper, therefore, concerns the new organisation and governance of these services under *TR*, highlighting the unintentional consequences of a micro-physics of (market) power for providers and practitioners.

Hierarchical observation*: The 'architecture' of *TR

For Foucault (1977: 170-1), the 'disciplinary institutions' were great 'observatories', architecturally engineered according to a precise logic of distribution, with supervisors (doctors, teachers, prison guards, etc.) strategically positioned amongst the 'objects' of power (patients, pupils, prisoners, etc.) to ensure compliance.

The ‘disciplinary institutions’ facilitated *hierarchical observation* – that is, they were designed and built to maximise surveillance of their inhabitants. In the prison, for instance, offenders were segregated from one another and surveilled by guards. The purpose of such design was to train bodies to become *self-disciplining*, to function without the stimulus of a coercive gaze, which marked a fundamental departure from previous power relations. Foucault (1977: 174) noted that, whereas a ‘master’ presided directly over a ‘servant’ in the agrarian economy, the emerging capitalist system required more efficient means of control than overt displays of repression. As such, an expanded division of labour relied upon “an uninterrupted network” of power to function (Foucault, 1977: 177). Power was not exercised *on* a body *by* another, as in the master-servant relationship; instead, it was dispersed vertically and horizontally from an ostensible ‘head’, through multiple layers. This means that supervisors, too, were being surveilled; they were the *products* of power as well as its *producers*.

In a probation context, *hierarchical observation* refers not to the physicality of probation offices, but rather, to the meta-physical architecture of the service. For the Coalition government, practitioners were assessed “on the basis of hitting multiple targets and whether they had complied with detailed central requirements” (MoJ, 2010: 6). Centralised interference, it was argued, had rendered probation practitioners subservient to state directives, constraining discretion and contributing to ineffective practice (MoJ, 2010, 2011). A totalising scrutiny thereby facilitated the control of activity (Foucault, 1977). The Coalition government thus accelerated New Labour’s intentions for competition for services, expounded in the Carter Report (2003). *TR* promised to *decentralise* decision-making, “to put trust in frontline professionals who work with offenders and to free them from bureaucracy” (MoJ, 2013a: 13). The new architecture of probation was built on the assumption that profit-driven markets could distribute resources more efficiently than the state, improving performance and producing better ‘value for money’ for the taxpayer (MoJ, 2013a). Decentralisation, through competition, would restore practitioner autonomy, as private providers brought ‘innovative’ practices to the public sector (MoJ, 2010, 2011).

Numerous papers by the Coalition government insisted on the advantages of competition for offender services when compared to state provision, expressed in terms of enhanced ‘efficiency’, ‘effectiveness’, ‘innovation’, and ‘value for money’ (e.g. HM Government, 2010; MoJ, 2010, 2011, 2012). But the only evidence cited across these publications, in *Competition Strategy for Offenders* (MoJ, 2011), was a single reference

to a report by the Office of Fair Trading (OFT) (2011). This gave just one example of competition for criminal justice services, a case study of prison procurement - which found that the tendering process could prove 'costly', while rigid contractual conditions concerning desired outcomes created barriers to entry that inhibited 'innovation' (OFT, 2011: 75). A lack of evidence for the value of competition is supported by Ludlow's (2014: 78) literature review of competing for prison services, which concludes that "there is no research from the prison sector to support the Government's contention that benefits inevitably flow from competition."

The OFT (2010, 2011), moreover, argued that competition for public services is most effective when there is 'demand-side' choice - that is, when clients can *choose* which products they consume. In this instance, competition "in the market", where multiple providers compete for clients within a geographic region, is encouraged as the most appropriate form of market in public services (OFT, 2011: 10). As "involuntary clients", however, offenders must accept the probation services to which they are sentenced or face sanctions, usually imprisonment or another community punishment (Trotter, 2014: 3). Instead, in the absence of 'demand-side' choice for criminal justice services, 'supply-side' markets can be created wherein providers compete for central funds to supply services (OFT, 2011). This is an example of competition "for the market", where providers compete for a monopoly on services in a geographic region (OFT, 2011: 80). For supply-side competition 'for the market' to be most effective, there must be "appropriate incentives on providers – they are rewarded for success or punished for failure" (OFT, 2010: 48).

The OFT (2011) assert that the best way to incentivise providers in the absence of 'demand-side' competition is through 'Payment by Results' (PbR). In essence, PbR provides a means of aligning the interests of commissioners with providers, as the focus is on *outcomes* as opposed to *outputs* (OFT, 2011). In a probation context, private providers would be paid for the *outcome* of reducing reoffending: by determining 'what' is to be achieved, rather than 'how', practitioners are given greater flexibility to tailor their work according to offenders' needs (MoJ, 2010). The political appeal of PbR lies, therefore, in its simplicity: "the taxpayer only funds rehabilitation services that work" (MoJ, 2012: 1). However, when the risk of failure is high, as with groups of prolific offenders, an absolute focus on outcomes can prove unattractive to prospective bidders (Hedderman, 2013). Incorporating a 'fee for service' element within PbR, in which providers are paid for the services they deliver, thereby helps to offset the risks

by maintaining providers' cashflow (NAO, 2015). However, if the balance between 'fee for service' and 'payment by results' is incorrect, then innovation can be stifled because providers focus on *outputs* rather than outcomes (NAO, 2015). Thus, while it is true that success *is* rewarded, the taxpayer also funds the delivery of statutory requirements.

Despite positive steps towards an evidence-base for PbR in rehabilitation services under Kenneth Clarke's tenure as Justice Secretary, pilots were placed on hold, and subsequently cancelled, when he was replaced by Chris Grayling in 2012 (Burke and Collett, 2016). Shortly after he assumed office, Grayling revealed that PbR would be applied to rehabilitative services *before* a thorough analysis of the pilots had taken place, explaining his decision by expressing a desire to restore practitioner discretion: "All the evidence across Government over the years is that you are much better placed to get much better results if you trust the professionals and do not impose huge layers of bureaucracy" (c.f. Bardens and Garton-Grimwood, 2013: 7). In other words, by dismantling the *hierarchical observation* of state-administered targets and National Standards, practitioners would be sufficiently empowered to rehabilitate offenders. Grayling's assertions, therefore, represent a reversal of distrust in, and derision of, practitioner autonomy in the 1980s to justify greater central control over probation.

In Foucauldian terms, competing for services has expanded probation's reach, both horizontally *and* vertically: the number of private and voluntary organisations involved in service provision has widened, while supply chains have lengthened. From June 1st 2014, *TR* split the probation service into the publicly-owned NPS and 21 privately-run CRCs (MoJ, 2013b). Assessing risk is the sole province of the NPS, which advises the courts on sentencing and determines where offenders are allocated; CRCs are expected to 'innovate' to reduce reoffending by working with offenders serving community sentences and providing 'Through the Gate' continuity of service from the prison into the community (MoJ, 2013b). The voluntary sector leads just one CRC (Durham Tees Valley); the twenty remaining contracts were awarded to agglomerations of private and voluntary organisations in which a for-profit company is the lead provider (HMI Probation, 2017a). Over three years, however, probation expenditure increased by just £36m – from £853m in 2012/13 to £889m in 2015/16 - while absorbing 45,000 more offenders released back into the community following a short-term prison sentence (NAO, 2014; House of Commons Committee of Public Accounts, 2016). The implication was that the private sector would be able to distribute its

resources along the new architecture of probation more efficiently than the state, becoming more cost-effective by replacing the gaze of state directives with market logic of competition and profit.

And yet, the nature of delivering services to "involuntary clients" (Trotter, 2014: 3) necessitates an intimate relationship *between* the market and the state: the former cannot wholly replace the latter when there is no competition '*in* the market' (OFT, 2011). The state may have *decentralised* direct service provision for low-to-medium risk offenders, but probation is still *centrally funded*; and, ultimately, the private sector is accountable to the state. Under *TR*, the absence of 'client' demand for services means the state controls the supply of offenders *and* fixes the prices at which providers are paid, a structural trait also that extends more generally to markets for criminal justice services. That CRCs remain dependent upon the state renders targets, reconfigured in contractual form via the PbR mechanism, integral to the functioning of probation. While requirements on 'how' practice is delivered have been relaxed (MoJ, 2013b), *TR* has not dismantled the *hierarchical observation* structuring the probation service because providers can be punished via the withdrawal of (state) funding for failure to meet state-specified targets. For practitioners, therefore, such targets have inadvertently contrived to further embed disciplinary controls within their practice.

Normalizing judgement: PbR as 'penal accountancy'

In 'disciplinary institutions', the surveillance inherent to *hierarchical observation* facilitated a "micro-penality" in which divergence from a 'norm' was rendered punishable (Foucault, 1977: 178). Failure to conform to predefined standards - whether expressed through punctuality, performance, speech, or behaviour - was branded an 'offence' that required correction. Such logic had the effect of standardising conduct, or *normalizing judgement* (Foucault, 1977), and was also critical to the emergence and development of community supervision (Garland, 1985; Simon, 1993). A 'micro-penality', for Foucault (1977: 180), provided a means of individualising subjects through a "gratification-punishment" duplex, with actions marked on opposing poles of 'good' and 'bad'. In this way, behaviours could be quantified as part of a "penal accountancy" (Foucault, 1977: 180): individual action could be contrasted with the whole, setting the standard to which all must adhere and ranking subjects according to their (quantitative) value.

And yet, as argued above, the late-modern tempering of probation's rehabilitative aspirations meant that corrective controls were displaced onto practitioners. The Coalition government argued that a probation system based on state-administered targets had created perverse incentives in which outcomes were neglected, for which the resultant constraints on practitioner autonomy had *normalized judgement* in practice (MoJ, 2010). Standardised procedures thereby functioned as coercive guidance (Foucault, 1977; MoJ, 2013a). *TR* promised that "the level of prescription set out in contracts in relation to activities aimed at rehabilitation and reducing reoffending will be kept to an absolute minimum" (MoJ, 2010: 10). A discourse of empowerment was, therefore, inherent to the *TR* reforms, giving practitioners greater freedom by "reducing direct central control" (MoJ, 2010: 11). Described as "radical and decentralising" (MoJ, 2010: 10), PbR was integral to incentivising both 'innovation' and 'value for money' (MoJ, 2011, 2013a).

In spite of government advocacy of PbR, no central body monitors the effectiveness of the programmes currently in operation (NAO, 2015). This lack of evidence has previously led to crudely designed contracts - particularly in the delivery of welfare services, which have resulted in poor 'value for money' (NAO, 2015). This interpretation is supported by research into the effects of PbR on voluntary sector providers of public services, in which funding linked to targets exerted downward pressures on organisations responsible for delivery and has stifled innovation (Sheil and Breidenbach-Roe, 2014). As such, PbR contracts often require substantial advanced investment to cover the costs of potential failure; by nature, therefore, they suit larger organisations who are better placed than smaller enterprises to absorb the risks (NAO, 2015). This explains why the lead providers in the overwhelming majority of CRCs are private, for-profit companies (Burke and Collett, 2016).

Through the PbR mechanism, CRCs receive payments for three aspects of service delivery: 'fee for service', for the satisfactory completion of certain activities; 'fee for use', in cases where CRCs perform work for the NPS; and the outcomes-based 'Payment by Results' (NAO, 2016: 21). However, contractual information is difficult to obtain due to commercial confidentiality laws (House of Commons Justice Committee, 2018a). For example, a National Audit Office (2016) report estimated that the 'Payment by Results' element of the PbR mechanism constitutes approximately 10% of payments, although HMI Probation (2017a) have since stated that 'Payment by Results' increases incrementally from 6% to 28% over the course of the contracts. If

providers do not meet contractual specifications, then they can be financially penalised (NAO, 2017). This logic resonates with Foucault's (1977: 180) "penal accountancy": missing targets is 'bad', and can be punished via the withholding of (state) funding; hitting targets is 'good', regardless of whether the service delivered is meaningful.

For Hedderman (2013), using 'reconviction' as the outcome that triggers payments under PbR poses practical issues for service delivery. Among the challenges she identifies are, first, that crime statistics are notoriously unreliable: reconviction data reflect only those who are caught and successfully prosecuted; it does not provide an accurate picture of reoffending, nor does it allow for delays in prosecutions. Second, because PbR is largely untested within criminal justice, monitoring the contracts may prove to be expensive. Third, given the weighting of the PbR mechanism, it is possible for providers to meet the targets required to trigger the 'fee for service' (output) payments but *miss* the 'payment by results' (outcome) targets. Finally, "reconviction is a measure of failure rather than success" (Hedderman, 2013: 50); perversely, therefore, inaccurate reporting of offending is in providers' commercial interests.

Where it was anticipated that CRCs would supervise 80% of the total caseload (NAO, 2016), as of March 2018, the actual figure was closer to 59% (MoJ, 2018b). CRCs' business volumes are thus reduced due to fewer low-to-medium risk offenders being processed through the criminal justice system, with the NPS absorbing the excess, as state funding has been *withheld* (NAO, 2016). According to the National Audit Office (2017), cumulative payments of £3.7bn for CRCs' contracts proved to be a huge overestimation because of lower than anticipated business volumes, with a new upper limit set at £2.1bn over their duration. Hence, the "penal accountancy" (Foucault, 1977: 180) inherent to PbR has punished CRCs for their reduced clientele, a factor that lies beyond their control.

And yet, individual workloads within the CRCs have *increased*, in part because of the pressures probation is under to deliver services to an enlarged caseload (HMI Probation, 2017a). Further, CRCs are not obliged to publish data on staffing levels: when questioned before parliament on media reports that staff had been cut by 20% during 2015/16, David Liddington, then Justice Secretary, replied that it is not for government to dictate appropriate levels of staffing for CRCs, providing they deliver on their contractual requirements (House of Commons Hansard, 2017). Indeed, HMI Probation's (2017a: 12) *Annual Report* concedes that redundancies along with high rates of sickness have left staff in some CRCs with "exceptional caseloads", for which

the focus is on adherence to contractual 'fee for service' targets. The report identifies a trend towards telephone supervision of offenders, accounting for some 40% of 'meetings'.

The PbR mechanism, then, has imperilled 'innovation': funding for new projects must come from providers' own reserves, leading to "specialised, individual-focused services being decommissioned in favour of generic group activities" (House of Commons Committee of Public Accounts, 2016: 12). The level of prescription in the contracts may have been relaxed to better accommodate changes to *how* practice is delivered, but statutory obligations as to *what* activities must be performed to trigger payment has meant that standardised practice remains prevalent. Consequently, there is a stringent focus on performance metrics that are too numerous and overly complex (HMI Probation, 2017a) – such that, for practitioners, the normalising gaze of targets has become further embedded since *TR*.

Contractual uncertainty has also filtered through to voluntary sector providers (NAO, 2016). Revenue is the most serious obstacle faced by criminal justice charities, as *TR* has restructured funding to favour contracts over grants (Clinks, 2018; House of Commons Justice Committee, 2018b). However, according to a Clinks (2018) survey on the role of the voluntary sector in *TR,* just 35% of 132 organisations that responded are directly funded by a CRC. These organisations are disproportionately larger - in terms of income and staff - than those external to supply chains. The organisations outside of supply chains still accept referrals from probation and prisons, demonstrating how CRCs and the NPS employ such services whilst avoiding financial obligations to commit to their delivery (Clinks, 2018). Conversely, Wyld and Noble (2017) note that some charities have had limited contact with their CRC partners. In one instance, a charity involved in 9 of 11 successful bids to provide services had not performed any work for the CRCs. As such, they allege that some CRCs used voluntary organisations as "bid candy" to strengthen their business proposals during the tendering process (Wyld and Noble, 2017: 32).

Without proper funding for criminal justice charities, particularly smaller organisations, the financial sustainability of large parts of the sector is perilous (House of Commons Justice Committee, 2018a; Clinks, 2018). Unwanted by much of the voluntary sector, PbR contributes to this instability (Wyld and Noble, 2017; Clinks, 2018). Many charities are disincentivised from bidding for contracts because of the legal costs incurred in their negotiation (House of Commons Justice Committee,

2018b). To this end, "PbR has…created a risk averse culture" in which charities that are dependent upon funding for their survival prefer to persist with familiar modes of working rather than seeking new ways to 'innovate' (Wyld and Noble, 2017: 26). In this sense, with Foucault (1977: 180), the potential 'punishment' for failing to meet output targets is a stronger determinant of providers' actions than the possible 'gratification' garnered from a focus on outcomes. This is in large part a reflection of how payments are weighted: the 'payment by results' element is small when compared to 'fee for service', deterring providers from developing new practices because failure threatens their income (NAO, 2016).

Whether voluntary or profit-seeking entities, providers are similarly constrained by the contractual logic of PbR. As CRCs' funding is derived exclusively from the state, and is thus limited, remaining 'competitive' in the probation marketplace is most easily achieved through practices geared towards meeting targets. The 'innovation' *TR* was supposed to inspire has proved difficult to reconcile with the need for 'efficiency'. Accordingly, PbR has reconfigured rather than replaced state-administered targets. Where the normalising gaze of the prison instated "a micro-physics of power" (Foucault, 1977: 139) within its inhabitants by establishing bodily rhythms and repetitions, the PbR mechanism has dispersed a micro-physics of *market* power throughout providers and practitioners in the private and voluntary sectors by entrenching a "tick-box culture" of monitoring (Clinks, 2018: 24).

The examination: Individualisation and standardisation

The examination brought together the aforementioned disciplinary 'instruments' through consistent and rigorous inspection (Foucault, 1977: 184). Here, discipline manifested in written form, the result of knowledge garnered from surveillance which makes possible the establishment and enforcement of norms. Where, previously, writing about individuals had been limited to narrative histories of the powerful, the recording of the minute techniques intrinsic to the functioning of the 'disciplinary institutions' represented a "reversal of the political axis of individualization" (Foucault, 1977: 192). In this sense, disciplinary power is dependent upon individuals being *seen* – or at least *believing* that they are constantly seen. Those subjected to *hierarchical observation* are rendered 'cases', individualised as objects of enquiry through which mutually constitutive power/knowledge relations are exercised.

Documenting individuals means that 'cases' can be easily compared to one another, thereby *normalizing judgement.* As such, *the examination* is at once individualising *and* standardising: individuals are acutely aware of observation, ensuring that they meet and exceed norms to avoid punishment.

Enforced via processes of audit and inspection, a culture of performance has enveloped probation in recent decades (Davies and Gregory, 2010; Phillips, 2011). The Coalition government argued that such "overly bureaucratic inspection regimes" had contributed to ineffective probation services and, hence, increases in the prison population (MoJ, 2010: 82). Here, the ritual exercise of *examination* rendered practitioners the objects and instruments of disciplinary power (Foucault, 1977). And yet, the probation service is arguably under more scrutiny than at any point in its history. In Foucauldian terms, *the examination* has been intensified under *TR*, as a multiplicity of governmental and quasi-governmental agencies has a stake in holding probation to account. Together, this evidence outweighs empirical academic enquiry into *TR*, and familiar problems recur: communication between CRCs and the NPS is insufficient; IT is inadequate, although this issue predates *TR* (HMI Probation, 2014); individual workloads are inflated, for both managers and practitioners; and there are high rates of sickness and absence (HMI Probation, 2017a; House of Commons Committee of Public Accounts, 2018; House of Commons Justice Committee, 2018a).

One of the most important themes underlying CRCs' performance to date is the financial constraints under which they operate, not least because the increase in funding for probation is negligible when compared to the increase in the total caseload (NAO, 2016). When the contracts were awarded, the Ministry of Justice did not expect CRCs' fixed costs to exceed 20% of their total expenditure; on average, however, fixed costs amount to 77%, as 14 of 21 anticipate losses totalling £443m over the duration of the contracts (House of Commons Committee of Public Accounts, 2018). As a result, the Ministry of Justice was forced to intervene to preserve providers' financial stability, injecting £342m in extra funding to help struggling CRCs (NAO, 2017). The Ministry of Justice also highlighted £7.7m in potential fines for CRCs' failures to meet 'fee for service' metrics; but it has only enacted £2m, waiving fees or allowing providers to reinvest the remaining amount (House of Commons Committee of Public Accounts, 2018). Consequently, providers' financial hardship underlines the importance of *hierarchical observation*, of meeting state-administered targets in order to maintain income (House of Commons Justice Committee, 2018a).

Despite a focus on targets, CRCs are hitting just one-third of their output measures, while "19 CRCs have not met their targets for reducing the frequency of reoffending" (House of Commons Committee of Public Accounts, 2018: 3; HMI Probation, 2017a). Where CRCs are missing performance metrics, it is often only by a few percentage points, although HMI Probation (2017a) argue that too much emphasis is placed on quantitative outputs. Resettlement is a pertinent example: "plans are prepared but most are woefully inadequate; most reviews are cursory at best, and very few are followed through, to make any real difference" to offenders (HMI Probation, 2017a: 57). Similarly, the House of Commons Justice Committee (2018a) criticised the decision to implement the PbR mechanism *before* the pilots were completed, which led to a fundamental imbalance between outputs and outcomes. As such, the completion of targets does not necessarily equate to the delivery of *meaningful* rehabilitation.

The difficulties of reconciling 'quality' of practice with the pecuniary portents of the failure to meet targets under PbR are further evidenced by thematic inspections of areas of practice that span the probation estate. According to an HMI Probation (2018a) report on supply chains, due to uncertainty surrounding their finances, CRCs have cut back on the commissioning of specialist services from voluntary organisations. HMI Probation and HMI Prisons' (2016, 2017) joint reports on the 'Through the Gate' element of the reforms highlight insufficient access for offenders to accommodation, education, training, and employment post-release. Though the inspections emphasised that some of these problems are beyond the control of CRCs - for instance, cuts to the prison system, social security, and a national shortage of housing (House of Commons Committee of Public Accounts, 2018) - they nonetheless judge that the work is not being performed effectively. As HMI Probation and HMI Prisons (2017: 3) conclude, "If Through the Gate services were removed tomorrow, in our view the impact on the resettlement of prisoners would be negligible." This analysis presents a striking example of the failure of *TR* to deliver on one of its core tenets, of an absence of 'innovation' in the face of financial stress.

A thematic inspection of probation services for female offenders, too, revealed a "lack of strategic focus on women" (HMI Probation, 2016: 4), which suggests further standardisation of practice. There were examples of good practice in women's centres; but these achievements were often tempered by a shortage of available services, alongside the short-term, insecure nature of contracts with the partner agencies by which they are provided (HMI Probation, 2016). The report concludes that *TR* has

negatively impacted female offenders, in large part because dedicated funding for women is no longer protected. HMI Probation's (2018b) wider inspection of enforcement and recall also discovered deficiencies in service provision. In the case of community orders and suspended sentences, where the offender does not serve a period of imprisonment, the report found that practice is particularly poor, as CRCs tend to be more concerned with meeting targets than purposeful rehabilitation. Licence recall, however, is considerably better, for which the report speculates that this cohort of offenders is supervised by experienced, more qualified staff.

Finally, in their review of the impact of *TR* thus far, the House of Commons Justice Committee (2018a: 6) concludes that they "are unconvinced that the TR model can ever deliver an effective or viable probation service." Their ambition for a greater focus on standards, "even if that means there is an increased inspection and audit burden" (House of Commons Justice Committee, 2018a: 4), echoes HMI Probation's (2017b) calls for a return to benchmarks of 'quality' through annual inspection of *all* CRC and NPS divisions. The more CRCs have struggled, the louder the calls for disciplinary scrutiny. Indeed, the cumulative weight of evidence on *TR* prompted the Conservative government to further restructure probation services. On July 27th 2018, a consultation document announced a new strategy in which CRCs' contracts will be terminated two years early, in 2020; 21 CRCs will be reduced to ten and aligned with NPS divisions (MoJ, 2018c). The market logic underlying the *TR* reforms, however, will not be challenged: the government remains committed to a "mixed market approach" (MoJ, 2018c: 3), and will work with private providers to renegotiate contracts. Notably, the consultation pledges to "introduce minimum standards specifying the form and frequency of contact between offenders and their responsible officer" (MoJ, 2018c: 7). These appeals for more *examination* mark a significant departure from the profit-motive as the foremost driver of standards within probation. Accordingly, whether employed in the public, private or voluntary sector, it seems that those responsible for delivering probation services will remain Foucault's (1977: 177) "supervisors, perpetually supervised."

Conclusions

By highlighting the similarities between Coalition government's portrayal of the probation service under New Labour and the 'instruments' employed within

Foucault's (1977) 'disciplinary institutions' – *hierarchical observation*, *normalizing judgement*, and *the examination* – it is possible to demonstrate how the *TR* reforms have further embedded the *centralising* tendencies they attempted to displace. The Coalition government argued, not without justification (e.g. Davies and Gregory, 2010; Phillips, 2011), that processes of target, National Standards, and audit had stifled innovation and stunted performance in probation (MoJ, 2010, 2013a). And yet, market mechanisms have not reversed a disciplining micro-physics of power within probation; rather, they have instated a micro-physics of *market* power within providers and practitioners.

The Coalition government's articulation of *TR* drew from familiar neoliberal discourses in which markets are presumed to be more 'efficient' and 'effective' than the state (Ludlow, 2014). In the absence of natural indicators of supply and demand within criminal justice markets, however, offenders' status as 'involuntary clients' (Trotter, 2014) means that there is no competition '*in* the market'; instead, providers must compete '*for* the market', or a state-sanctioned monopoly over services (OFT, 2011). The new architecture of probation was supposed to reverse centralising trends, replacing the *hierarchical observation* of overbearing state directives with competition and profit to improve services. And yet, the evidence suggests that providers and practitioners remain observant of quantitative targets, prioritising outputs rather than outcome-driven innovations. Here, PbR acts as a form of "penal accountancy" (Foucault, 1977: 180), *normalizing judgement* by punishing providers that deviate from such 'norms'. Accordingly, *the examination* becomes an inescapable feature of criminal justice markets, for the state must demonstrate 'efficiency' and 'effectiveness'. For *TR*, however, this scrutiny has resulted in a "power/knowledge spiral" (Cohen, 1985: 25): the greater providers' difficulties, the greater the demands for audit.

This case study has demonstrated the structural challenges of manufacturing a market for probation services. The tensions inherent to the organisation and governance of *TR*, extant within its systems of fees, fines, and incentives, have diffused discipline throughout the probation marketplace. Indeed, variants on the disciplinary consequences of 'markets' for criminal justice services discussed in this paper have the potential to re-emerge in other jurisdictions. This is because criminal justice provision is one such area in which a state cannot fully divest itself of responsibility; its role as both the *supplier of clients to* and the *purchaser of services from* private providers means that it co-exists in an uneasy harmony with the market. A Foucauldian analytics, therefore, can be utilised to accentuate these asymmetric power relations, as well as

their implications for criminal justice providers and practitioners operating within privatised and marketised institutions.

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