



DEATH FOR PROBATION?

Death for probation, but will the ideal live on?

The 1991 Criminal Justice Act marks the sacrifice of probation on the altar of punishment. We should lament its passing. Probation, which we have known for 85 years, is no longer a conditional release granted instead of punishment, but rather a sentence in its own right; a demonstration that under a 'just deserts' model virtually any measure can be sucked into the maw of 'punishment in the community'. Ironically, probation was born as a result of nineteenth century reaction to the excessively harsh punishments which were then the order of the day. It came to be recognised that much offending was a result of abject poverty, lack of legitimate opportunity and a profound malfunctioning of

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Robert Harris (1992)

distributive justice. The 1879 Summary Jurisdiction Act enabled the lower courts to suspend punishment by binding offenders over to come up for judgement, and many did so and also used the services of the developing Police Court Mission to exercise some oversight of the offenders thus released. The 1907 Probation of Offenders Act placed this arrangement on a formal footing, and a social ideal founded in mercy and practical common sense was given statutory form. The First of January 1908 when the Act came into force was a great day for liberal reformers.

Occupying the ill-defined territory between retribution, rehabilitation and reform is not easy and the probation ideal in its statutory form has been subject to repeated attacks and attempts to force it towards retribution. For example, in the original Act of 1907 magistrates were enabled to make probation orders without proceeding to conviction and thus those deemed worthy of a chance could avoid the stigma of a conviction altogether. This liberal approach was soon under attack culminating in criticism by an influential departmental committee in 1936, and the law was eventually changed

in the 1948 Criminal Justice Act. From that time probation was preceded by conviction in every case although the conviction was only counted in proceedings related to the order and the order continued to stand instead of a sentence. Other attempts to make probation punitive have appeared from time to time, most notably the Younger Report's suggestion in 1974 for 'supervision and control orders' to be administered by the probation service, but until the 1991 Act such changes were successfully resisted. It is interesting to note that in the past resistance to illiberal changes in probation came tellingly from the Great and the Good. (Of the nineteen members of the Younger Committee, for example, no fewer than twelve entered notes of dissent in the Report). That support was not forthcoming in the recent debate about the abolition of probation and the establishment of a sentence given the name 'probation'.

Of course, there is little point in grieving for what might have been; the legislation now exists and it must be accepted that probation is now a type of punishment and likely to remain so. But it is legitimate to ask about what form that punishment is to take. According to desert theorists the punishment in probation is that it deprives offenders of time; they have to report to probation offices, attend at probation centres, and so on. Hence, the punishment is a certain restriction of liberty, and this does not seem objectionable. However, there appears to be developing a second agenda for probation, that of management. In a paper in 1989 given at a conference organised by the Central Council of Probation Committees, Professor Anthony Bottoms envisaged the future task of the probation service to be the management of offenders in the community,¹ and more recently Professor Robert Harris has echoed and substantially expanded this view.² This is a much more worrying agenda than the punishment entailed by the restriction of liberty because management in the circumstances of supervision is in essence a manipulative assault on autonomy, and autonomy is the very attribute which probationers need if they are to make those free choices which are necessary to a real determination to keep away from crime.

Finally, what of those offenders for whom neither punishment nor manipulative management are deemed appropriate? As Professor Harris rightly says, 'for the deprived, distressed but marginal offender, love and compassion can no longer be provided by the probation service'. His possible solution is the reinvention of the Police Court Mission, but it would not be mine; the Mission had too many flaws and was constantly tempted to tamper with the autonomy of its charges. In fact, a possible future is beginning to emerge already; as with the Mission it is founded on voluntary effort but its base is much wider than the Mission's was. This lead is being provided by the Federation of Prisoners' Families Support Groups which was founded in 1989. As the name suggests, its main focus is on the families of prisoners, but that is not exclusive and it seems entirely likely that this sort of concerned effort could extend into other areas, possibly to help for the sorts of offenders appearing before the courts which Professor Harris identifies. At present over one hundred groups are listed in the Directory of the Prisoners' Families' Support Groups;³ many of them are very small concerns indeed, but perhaps that is just what we need. After all, care for offenders is an individual and personal matter and need not be delivered by large organisations; thankfully also, it need not be statutory. We may rightly lament for the loss of a social ideal in statute, but equally we can be hopeful that it will strike root again in voluntary form. Many offenders are more in need of care than retribution; even in this new age of 'punishment for all' we can hope that one way or another a new spring of compassion will rise up and the ideal will survive.

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1 Bottoms, A.E. (1989) 'The place of the probation service in the criminal justice system', in: *The Madingley Papers II*, London: Central Council of Probation Committees.

2 Harris, R. (1992) *Criminal Justice and the Probation Service*, London: Routledge.

3 Copies are available at modest cost from Mrs Elizabeth Burdett, 3 Crescent Grove, London SW4 7AF.