

COMMUNITY JUSTICE AND A MODEL OF REHABILITATION

Maurice Vanstone, Reader in Criminal Justice and Criminology, Swansea University; and Philip Priestley

Abstract

In the past twenty five years or so, the pluralist tradition in the criminal justice system has been undermined by a political obsession with punishment, and one of the consequences of this has been the marginalisation of probation values and practice and a misguided re-shaping of the probation model. Recent policy developments have, we argue, been based on lack of understanding of both the traditions and potential of probation. Against the background of the different forms probation models have taken we put forward a model for the future which we believe restores it as an important part of a plural response to crime, decouples it from punishment, and fits with the values that Brian Williams so consistently espoused.

Key Words: probation, neo-punitivism, community justice, alternatives to punishment, rehabilitation

Introduction

The neo-punitive putsch of the 1980s and 1990s (Tonry 2004, Worrall & Hoy 2005) effectively dismantled the pluralist tradition in the criminal justice system of England and Wales, a tradition that between 1878 when probation was placed on the statute book in Massachusetts and 1907 when the United Kingdom followed suit, stimulated a confidence in, and a commitment to probation (in some form or another) throughout the world, for example, New Zealand and Queensland in 1886, Belgium in 1888, Ceylon in 1891, France 1893, Bulgaria and Italy in 1904, and Chile and Sweden in 1906 (Timasheff 1943; Trought 1927; Harris 1995; Hamai and Villé 1995). It was a confidence aptly illustrated by the assertion of Signor Pessina, Professor of Law in the University of Naples, at the Fifth International Prison Congress held in Paris in 1895 that '[it] is only a question of time for it to find a permanent place in the judicial system of all civilized countries' (Barrows 1896: 31).

Probation, whether rooted in English Common Law or the continental law of *sursis*, was always an alternative to punishment, and accordingly probation officers strove to minimise the use of prisons by providing alternatives to incarceration. Moreover, there was a political consensus in favour of probation, which embraced Conservative Home Secretaries as late as Douglas Hurd and David Waddington, a former barrister in favour of hanging, who famously described prison as ‘an expensive way to make bad people worse’ (Home Office, 1990), the restraint of the growth of prison populations, and the promotion of other responses to offending behaviour. Probation was valued by the courts and those who were subject to it. For example, Willis (1983) amongst other things found that probationers want ‘genuine’ help, had received practical help with their problems and value the fact that probation provided them with a sympathetic ear; and North East London Probation Service’s Research and Information Unit (1993) found that probationers value concrete, genuine relationships in which they know where they stand. Several other studies told a similar story (Bailey and Ward, 1992; Stewart and Stewart 1993; Pritchard et al 1994). Evidence shows that probation can be effective too. Trotter (1993) trained probation officers in what he describes as pro-social modelling and in a controlled experiment demonstrated a correlation between its application and low reoffending; and other studies confirmed the efficacy of programmes of work with probationers which are concrete; well structured and planned; monitored, and effectively supervised (Andrews et al 1990; Lipsey 1992; Macdonald 1993; Petersilia 1990).

Despite this, a Service that has such a rich international history, that has been valued by those to which it has been provided, and that has such potential for making a significant contribution to the protection of the public is in a parlous state, undervalued and marginalised by government. In stark contrast, prison dominates criminal justice and is unchallenged and taken for granted. In our view, attempts to reshape the probation model have been misguided, based on an apparent lack of understanding of both the traditions and potential of probation, and accompanied by a slavish devotion to punishment as a solution to the problem of crime. During its life probation has manifested itself in numerous different forms or models, and in this paper we put forward a model for the future which we believe fits with the values that Brian Williams espoused (Williams 1995).

Past Models

It is arguable that there has never been a pure probation model, and that rather there have been general trends and fashions in theory and practice and a series of hybrids. Nevertheless, in attempting to construct the kind of model we envisage, it is useful to reflect on what shapes practice have taken and what theories, principles and values have accompanied them. Such reflection requires what might seem to be crude categorisation and a quick wander over familiar territory (Raynor 1985; Senior 1984).

The earliest probation model which is, perhaps, best described as Redemptive or Christian, was tied closely to the temperance roots of probation (Bochel 1976;

McWilliams 1983; Vanstone 2004), focused on the moral regeneration of lost souls, and is brought to life in the writings of early practitioners (Holmes 1902; Holmes 1923). The Treatment or Medical model was associated very much with the development of casework (which in itself was a feature of the professionalisation of the Service) and the concept of the expert worker diagnosing the problems of the client and developing treatment programmes accordingly. A critical reaction to perceived flaws in this model, the Personalist or Non-treatment model, (Bottoms and McWilliams 1979) was premised on the concept of offering unconditional help within collaborative relationships and based on principles of respect for people and an acceptance of the legitimacy of their view of the world; it addressed the problem of control within orders by distinguishing between coercion and 'choices made under constraint' (Raynor 1979). The Surveillance/Controlism model was brought right to the fore of the debate within the Probation Service by the introduction of electronic tagging and intensive supervision, and characterised as it was by extra conditions in orders, reporting as the prime activity and discipline it resembles the current Punishment in the Community approach (Raynor 1985; Senior 1984). (Perhaps the most vivid example of this was the long defunct Kent Control Unit which in the early 1980s took the Day Training Centre concept several stages further and introduced the idea of curfews and a highly disciplined regime.) Sentenced to Social Work was developed by Bryant et al (1978) in the Hampshire Probation Service to resolve the tension between care and control: essentially, it involved a primary contact between the probationer and the court based on compliance with conditions and a secondary contract between the probationer and the probation officer based on the needs of the probationer.

Although, it is difficult to produce practice examples of the Socialist model espoused by Walker and Beaumont (1981) some of the work undertaken in the detached Probation Unit in South Yorkshire Voluntary Day Centres in the early 1970s incorporated a socialist perspective (Hugman 1980). Walker and Beaumont recognised the difficulty of probation officers adopting a Marxist position when employed by a capitalist state, but they did suggest some practice guidelines for officers which relate mainly to the eschewing of conditions, the promotion of voluntarism as a guiding principle, and participation in social action.

Other more recent models include Anti-Oppressive, focused on the particular problems and needs of probationers drawn from ethnic minority groups and women (Denney 1992; Rungay 1996); Systems Intervention 1, concerned with diversion from custody (Rutherford 1986; Thomas 1982); Systems Intervention 2, focusing on the socio-economic context of probationers' lives (Drakeford and Vanstone 1996); and New Rehabilitation, premised on collaborative relationships but within the context of a concern for effectiveness (McGuire and Priestley 1985; Raynor and Vanstone 1996).

Finally, the Separation model was advocated by Harris (1980) as a way of facing the irreconcilability of the tension between control and care. Within this model the Probation Service relinquishes supervision of probationers and instead develops a court based social

work agency offering help and advice to people on a voluntary basis. It was never taken up, but we will return to it later in our discussion of our proposed model.

Clearly, there are differences in these models as well as some commonality. They differed markedly around issues such as the collaborative nature of supervision, the causes of crime and the target of change; but all, even the Control Unit, incorporated the objective of helping probationers to desist from offending, and in a sense they were all undermined by the neo-punitive putsch. So, how did this come about?

The neo-punitive Putsch

It is not possible to locate with precision the intellectual, political, and administrative sources of this practical opposition to the liberal tradition within the UK criminal justice system. It has been conventional to portray the tensions between penal conservatism and progressive reformism as a pendulum moving now in this direction, now in the other. Sometimes the laws of social physics led to the pendulum oscillating in tiny but contradictory ways around the mid-point. David Waddington's aspersions (op. cit. 1990) on the value of imprisonment, for instance, followed a robust defence of punishment in society by a previous prisons minister (Patten 1988,) who also subsequently argued that 'fear of damnation and hope of redemption must return if Britain is to become civilised again' (Spectator 1992). But two factors intervened to push the pendulum further towards punishment than ever before - one in the United States, and one in Britain.

The neo-retributivist lobby in the United States had led the way during the 1980s and won the day in terms of establishing imprisonment as society's preferred response to crime (Young 1999). On their way up the punitivists of the right - a largely unlettered lot led by radical right preachers and populist politicians on the make - met and joined forces with academic critics retreating from perceived civil liberties excesses in 'therapeutic' sentencing - a curious coalition of academics, sociologists, and lawyers (Kittrie 1971; von Hirsch 1976). They coalesced around the notion of the 'justice model' (Fogel 1979) and made common cause to squeeze out 'welfarism' and 'rehabilitation' as penal aims. It is an oddity of this opportunist alliance that one of the earliest and most influential expressions of support for the 'justice' model came from the American Quakers. (American Friends Service Working Committee 1971). US prison populations rose from 500,000 to 2.2 million between 1990 and 2006. If the penal estate there was a State of the Union its population would exceed that of thirteen other states. At mid-year 2006, 11% of the entire population of the State of Georgia, USA, was in prison, on probation, or on parole - the equivalent figure in the UK would amount to more than six million people (Sabol 2007).

In his earlier incarnation as a fiscally conservative Governor of California, Ronald Reagan had supported probation subsidy as an alternative to incarceration (Rutherford 1972). The apparent 'failure' of these measures, and of 'intermediate sanctions' and intensive supervision schemes to cut either the growth in incarceration, or the reconviction rates of

their graduates, left the field open to the advocates of 'zero tolerance' policing and the mass imprisonment of lower class Americans, especially young black males (Miller 1996). Conservative Home Secretary Michael Howard (1994-1997) followed suit in this country, asserting that 'prison works' (Conservative Party Conference 1993), and stimulating its use by the criminal courts of England and Wales. He also signalled his early opposition to what Probation stood for by abolishing professional training for the service, (Franklin 1999) proposing instead the employment of suitable ex-servicemen to control, direct, and punish people on probation instead of implementing the 'woolly' do-gooding agenda of the founding fathers, which was to 'advise, assist, and befriend.'

Ironically, at this moment in penological time, reported crime rates in the US, followed by western Europe, and the UK ceased to increase exponentially, and began to fall – a process which continues into the present day. Howard was quick to claim some of the credit for this downturn, but the evidence from the United States is that crime went down in places which deployed problem-solving policing as well as in those where they employed zero-tolerance tactics; and that New York had a dwindling prison population whilst its crime rate was exhibiting dramatic falls (Young 1999). It is still not clear what the underlying causes of falling crime rates in developed economies are – changing age structures, improved security measures on cars and houses, general economic prosperity? But clearly it is not possible to attribute the decline directly to public policy; or specifically to increased incarceration. No politicians ever claimed rising crime rates as policy outcomes during the four decades of their ascendancy. (Of course politicians have no sense of history, and even less of irony, so they happily associate themselves with good news wherever it is to be found).

In Britain, the advent of a New Labour administration in 1997 brought to power as its Prime Minister a former Home Affairs spokesman, Tony Blair, who had campaigned whilst in opposition on the catch-phrase 'Tough on crime, and tough on the causes of crime' - words which capture exactly the tautological nature of its unfolding penal policy (Tonry 2004). This continued, and indeed outdid in ambition, the 'prison works' profession of Michael Howard, presiding over a rise in the prison population from 61,000 in 1997 to 80,000 in 2007 (NOMS 2008), and projecting further large rises for the future.

For our present purposes, the most important consequence of the neo-punitivist attack on probation in England and Wales, and on all that it stood for, has been its forced re-definition as 'punishment in the community,' a nonsensical and audacious reversal of historical truth – somewhat akin to re-labelling maternity units as funeral services. Curiously, no organised or principled opposition to these fundamental reversals of ethos, mission, and practice came from within the probation services themselves (Worrall & Hoy 2005), nor indeed from NAPO – the National Association of Probation Officers¹.

Community Justice - Forward to the Basics

The key to re-asserting the primacy of probation values and practice in a post-punitive criminal justice system is to restore it as part of a plural response to crime, and to de-merge it from the punitive definition which has so recently devoured it. We propose a dual approach to the tasks of public protection and harm reduction which must be the aim of democratically accountable civil administrations. The separation of these functions in criminal justice was proposed by Harris (1980) but he was largely ignored, primarily, we believe, because he made it at a time when there was still considerable faith in the Service's ability to manage the competing tensions and before punitive populism had taken hold. Now that probation has been re-defined as punishment, it might be apposite to re-examine and re-shape the idea in order to re-construct the Service.

A control agency. On the one hand there needs to be a 'control agency' responsible for restraining and containing individuals who pose major threats to others. This entails identifying the size of the 'dangerous' population – it would include current 'A' list prisoners, terrorists, serial murderers and rapists, and many of those held in secure hospitals. Such a list would not exceed ten thousand people, at the time of writing; the remainder of the current prison population, and its projected increases over future years, essentially represent an investment in the public demonstration functions of the criminal law, symbolic sacrifices to the political imperatives of 'law and order.' The sizes of these populations are not ordained by natural forces; they are the products of climates of fear, failures of political imagination, and punitive thinking that inhabits a wild and 'woolly' shore more remote than anything ever dreamt of by the liberal consensus. The symbolic purposes of criminal justice are important features that need to be retained, but their nature, their extent, and their cost need to be arrived at via processes of rational public discussion and determination far removed from the contemporary bear-pit of media comment, dishonest reporting, and commercially motivated scare-mongering.

The nature of the confinement needed to achieve public protection can also be a topic for debate – long-term imprisonment and psychiatric detention need not be cruel, or inhuman, or degrading, and in many cases might be educational and rehabilitative over very long periods of time. A control agency might also usefully administer secure remands, drug testing, electronic monitoring and other community based mechanisms.

Community Justice. The other arm of our proposed structure takes two forms – a system of community justice structures, and a community justice agency to give executive expression to their decisions. Community justice is a generic term for a growing number of legal proceedings, agencies, projects, and services which are bound together by two common characteristics; they are community based, and they are dedicated to problem-solving in all their procedures. The growth in these practices is also of two kinds – in their variety and purposes; and in their geographical spread throughout the English speaking world.

Drug courts. Among the earliest and most widespread of these community justice initiatives is that of the 'drug court.' Conceived as a common sense alternative to the unthinking and lengthy imprisonment of individuals possessing small amounts of illegal substances, the drug court brings together a coalition of all those concerned with the problem of drug taking by an individual – the drug taker, family, friends, neighbours, health services, community agencies – and sets out to find consensual solutions to the problems rather than imposing one that creates another set of problems whilst leaving the original ones intact (Schmitt 2006). Drug courts now exist in every American state, in Canada, Australia, and New Zealand, and are being piloted in England and Scotland (Walker 2001). Ongoing evaluations indicate that they can be effective in helping individuals acquire control over their substance use habits and the offending that both leads to it and supports it (Belenko 2001; Wilson 2006). There are also problem-solving courts for drink driving, sex crimes, juvenile justice, domestic violence, and family mediation (Berman and Feinblatt 2001).

Restorative Justice. Another kind of problem-solving informs a parallel set of innovations, interventions, and initiatives known collectively as 'restorative justice.' Drawing inspiration from a wide range of sources, restorative justice sees offences as conflicts of interest which criminal justice expropriates for purposes of denunciation, labelling, and social extrusion; all negative experiences for those exposed to them (Christie 1982). Restorative justice seeks to reclaim these conflicts as occasions for inclusion, mutual problem solving, the reduction of harm, expressions of regret or contrition, and offers of reparation at a personal or symbolic level (Sullivan & Tiffit 2001). All of these methods operate on the basis of consent and mutuality and their outputs are measured in terms of social and personal positives (Strang 2002).

Probation - A Community Justice Service. A fully restored, revived, and rehabilitated Probation Service would become a community justice agency managing additional elements from the youth offending, substance use, and psychiatric services, plus further and vocational education. It would service these problem-solving court structures, and work in ways that are consistent with their operating philosophies and that also reach out into communities in ways that locate many of the procedures nearer to the sites of the conflicts themselves, so that they become pro-active and preventive rather than just reactive and defensive. This agency, and the services it co-ordinates, needs to operate in a self-consciously reflexive and empirical way - testing out methods, collecting systematic data, and measuring tangible outcomes in a real world of community safety. This form of community justice reconstructs probation in a form that provides the best chance of preserving not only its traditions and values but that also re-positions it within a re-formed criminal justice system.

Conclusion: A Better Place to Be

The model of community justice sketched here has embedded within it a model of rehabilitation that is diametrically opposed to the punitive justice now dispensed in the

United States and the United Kingdom. Community justice promotes a response to offending which stresses harm reduction, personal responsibility, principles of consent/citizenship/positivity/education; and operates in a self-consciously experimental, empirical, and reflexive way to refine its certifiable effectiveness – a criminal justice system dedicated to the production of citizens rather than fully paid up outlaws.

End Note

1 The Nazi 'gleichschaltung' of pre-existing German agencies and organisations to their own political ends, carried out within weeks of their assuming power in 1933 (Evans 2005), similarly provoked very little overt opposition from those most affected by the process (with the honourable exceptions of the Catholic Church, and the Jehovah's Witnesses. The Witnesses, who were not numerous, ended up in concentration camps. The Catholics, who were, did not (Garbe 1999).

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