Journal of Criminal Law and Criminology

Volume 37 | Issue 4 Article 3

1947

# Twilight Zones in Probation

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In the area of probation dealing with restitution there seems to be much confusion among probation officers. Some workers find it an irritant and negate the value of restitution as a tool in the treatment of a certain type of offender on probation; some employ it haphazardly — vaguely conceiving it as a means of punishment only; and others find in it elements of practical value for rehabilitation purposes. The writer includes himself among the last and has briefly advocated an integration of restitution in the probation services.[1] The ensuing article, therefore, is a follow up appraisal in which it is hoped some light will be shed on the causative factors behind this confusion. It will attempt to show that there is a zone in the Law, the liberal interpretation of which, can help materially to reduce this confusion and enable probation and restitution to be employed more effectively than they are now.

The law in our democracy, as a living instrument of the people, early recognized the need for a dichotomy of function in order to arrive at "equal justice under the law." There was thus established with the development of the law, a civil branch and a criminal branch of jurisprudence. With time, each developed along parallel lines, a code of procedure to fit its needs. But the prime consideration that remained throughout their respective complex growths was that all matters civil be brought before the Civil Courts, all matters criminal be brought before the Criminal Courts. However, true to all living instruments, there never has been rigid, definitive structural growth so that there are times when matters that appear to be civil have criminal elements and vice versa. Those cases which fell into this penumbra of the law where the criminal and civil elements merge, have too often been placed on the Criminal Calendars. Seldom has a long term perspective been brought to bear upon the problem nor any reflection upon the implications to society and the offender of permitting these cases to be made criminal offenses rather than civil offenses. In these twilight cases the complainant in the person of his attorney, weighs the relative values of proceeding civilly or criminally. If the defendant proves to be unable to meet the other's demand in every last measure the case usually appears in the Criminal Court, no matter how unrealistic the demands may

[1] *Journal of Criminal Law and Criminology*—January, 1944.

have been. The net result has been in many ways a distortion of the law for far too many cases have come before our Criminal Courts that could have as readily been adjudicated in the Civil Courts to the satisfaction of the complainant and with less public expense and much less grief for many individuals.

The case of David Feinson is an illustration of this point. Aged 38, the father of 3 children, he was brought before the Criminal Court for an offense which constituted his one and only arrest. He and two others had operated as alleged partners in a dairy business. All receipts were to be turned over to the complainant who would pay all bills and incidental operating expenses. In turn he would hand over all profits to Feinson and the other partners after deducting his financing charge of 5%. The defendant subsequently withheld from the complainant a number of payments from customers which he defended on the grounds that his agreement with the complainant was in effect a partnership agreement and that the monies withheld constituted his drawing account. However the complainant differed with this interpretation and charged Feinson and his other so-called partners with the commission of the crime of Grand Larceny. Efforts were made to reach a settlement outside of Court and have the agreement interpreted by the Courts. The case was brought before the Criminal Court and Feinson placed on probation with an order of restitution amounting to $2796.73, whereas the others were not prosecuted when they made immediate payment of the money withheld.

The conversion of funds by individuals who rightly or wrongly contend they are partners in a business venture poses the question of interpretation of their relationship as well as criminal liability. In this case the gravamen of the issue would appear to have been whether there existed the unlimited liability of a partnership wherein all partners shared singly or collectively the innocent or purposive conversion of partnership funds. The complainant denies any intent on his part to enter into a partnership arrangement and with equal vehemence the defendant affirms such intent. The complainant asserts there was a contractual employer-employee relationship; the defendant denies this claim and contends it was a partnership arrangement wherein the acts of one partner bound the others in responsibility. The writer is of the opinion that such cases can be adjudicated in a Civil Court and a civil judgment for damages obtained, thus saving society the expense of a criminal prosecution, restraining any attempt to make probation a collection agency and sparing the defendant the stigma of a criminal conviction with its attendant disability.

The human element alone might well warrant civil action instead of criminal prosecution. It is impossible to measure and evaluate the grief, the loss of face, and the sense of personal and familial degradation experienced by the true first offender in a Criminal Court. There is no method by which such individuals can be requited for the debasement of being photographed for the Rogues Gallery, the "lineup" and lack-

ing immediate bail — the association with persons with confirmed anti-social tendencies, to be found in the average County jail.

The practice evolved by many attorneys of bringing these twilight cases before the criminal courts instead of the civil courts came about with the realization that a defendant in a criminal action is more easily intimidated than the very same individual in a civil action. The stigma of a criminal suit and the prospect of incarceration have the tendency to overwhelm and intimidate the individual and to render him more amenable to his adversary. With the growth of probation as an integral adjunct of the criminal courts, there has been, an added stimulation toward the interpretation of a case solely on a criminal level. Not only is the defendant rendered more amenable but there is almost a guarantee of success in collecting monies. The Probation Department is forced into the untenable position of a commercial collection agency. Probation becomes indistinguishable from the office of the Sheriff or Marshal and its true functions are obscured from the public eye.

A case in point is that of Michael Dunne. He is 53 years of age, the father of four grown children and never before had appeared in any Court. It appears that the complainant authorized him to dispose of her bracelet. She accepted his offer of $1050, whereupon he gave her $50 in cash and a check for $1,000 drawn against his account. When she presented it for payment, it was returned to her marked "insufficient funds." The complainant referred the matter to her attorney, who, learning Dunne had used the proceeds from the sale of the bracelet to pay some pressing debts, made a complaint in the Magistrates' Court and Dunne was held for the Grand Jury. In the interim, he was released in the custody of the complainant's attorney. While the matter was still pending in the Magistrates' Court, Dunne paid the complainant an additional $200, who expressed her primary interest in full payment. To guarantee that this would be done, her attorney proceeded to prosecute the case in the Criminal Court despite unmistakable evidence that the defendant had no prior arrest, had heretofore conducted a legitimate enterprise and now wished to make good. Dunne was placed on probation and ordered to make restitution of $800. The complainant's attorney was clear in his wishes. At no time did he seek adjustment outside of the Court fully cognizant that the defendant would be "sweated" for payments more readily by Probation. There is no hiding the fact that no consideration was given to the possibility that the same net result could be achieved civilly nor of the effect of a criminal conviction on Dunne, his family, and his future — not to say the expense to the community of supervising a man on probation who does not need its services. The interesting point that lends emphasis to our contention is that about the same time two other complaints against the defendant of a similar nature were made to the District Attorney's Office by other complainants but no prosecution followed because satisfactory adjustment was made. If the case in question was of such a nature as to warrant criminal action, one wonders why the other two, of equal

gravity, did not merit such attention. The conclusion one inevitably reaches was that probation was here introduced not as a vehicle of rehabilitation but as a collection agency and the Court's true purpose obscured by placing too much emphasis on the interpretation of this twilight case as a criminal case.

Now what effect has all this on the Probation Officer? As he sees case after case on probation where the only problem is restitution and where his sole function is to procure the money from the probationer; where the complainant or his attorney constantly exert pressure for payments; where often exaggerated assertions of the probationer's affluence are made; where surety companies are sometimes uninterested in probation's concern with the human considerations — under these circumstances what can be the effect on the Probation Officer? He develops a "restitution neurosis" — an unresolved conflict where he questions the positive values of restitution in sound cases because of his resistance to being made a collection agent in unsound cases. Restitution then becomes his "bete noir" and, like some neurotics, he loses sight of real significances in restitution where it can be employed constructively and applies his resistance to it generally. An essential part of his profession, the individualization of treatment, is discarded and the Probation Officer is placed in an impossible position. While he must extract the money from the probationer he must simultaneously attempt to establish what is generally recognized as a delicate case work relationship of confidence, sympathy and understanding. The writer submits that this dual role lacks reality and is never achieved. One cannot be a constant irritant and remain a friend. One cannot threaten a probationer with Court action repeatedly and retain his confidence. The concept of the integration of restitution in the probation services which the writer has advocated[2] does not apply to such cases or methodology. The true structure and meaning of restitution in probation as related to a social case-work practice envisages a freer, and more confidential relationship. Therein the individual comes to accept the Court Order of Restitution not as a tug of wills between him and his Probation Officer ending in his resignation to the other's more powerful authoritative force, but as something he and his probation officer have worked out together for his benefit. Professionally, the Probation Officer thereby enhances his true position. His services have a significance and meaning which distinguish him from a collection agent. If restitution is to be attained by "sweat and tears" unquestionably it can be done more efficiently by a collection agency or the Marshal's office, both of which make no pretense of being sympathetic, understanding and helpful. Probation should not be fettered

[2] *Ibid.*

with so dubious a practice but should strive at all times to be employed constructively on a casework level. And it *is* casework. The Reverend Michael J. Scanlon[3] sees probation as social case work because he maintains "it calls for personal and individual effort. It does not try to correct mankind — it seeks to correct a man, an individual." To Joanna Colcord[4] "Probation is simply case work with the added 'punch' of the law behind it."

In harmony with this concept, restitution is not foisted on probation for itself alone but as part of the probation philosophy — to render some service to the individual probationer. To re-phrase it — restitution on a case work basis is but one aspect of the probation treatment the offender needs. He makes restitution through the Probation Department because he has other problems along with it, which problems were the causative factors in his conflict with the law. Under such a program probation is not abused nor converted into a collection agency — sterile and perfunctory. Instead, it gains the depth and dignity of a profession in its efforts to "correct a man, an individual."

The following case will serve as an illustration. Dan Carlsen, a young man of 26 was placed on probation for an indefinite period when he pleaded guilty to Petit Larceny. He was involved in the theft of books, surgical instruments and laboratory equipment from a local hospital where he had been employed as an animal attendant. The order of the Court directed him to make restitution of $250. This sum represented the value of that portion of the stolen property which had been damaged between the time of the theft and the recovery. In this case probation was not called upon to act as a kind of collection agency. A thorough pre-sentence investigation had revealed that the young man was a badly disturbed individual in need of help. The recovery of the value of the stolen goods for the complainant was not the sole problem confronting the Probation Officer. Carlsen had not committed the theft for the cash equivalent of the books or surgical and laboratory paraphernalia. Some of these were reposing in his home in impressive array. With them he had recreated the atmosphere of the hospital laboratory. Obviously, there was something more basic to be considered than restitution alone.

Carlsen was the only child of his mother's first unsuccessful marriage. Her second marriage was also a failure and she turned to this child as her sole avenue of emotional expression. As an orphan she had undergone much privation, received little or no affection but was shunted from home to home. As a servant before and after marriage, she served others but received no attention. She was a lonely figure. The boy was reared amid poverty and privation. She bound him to her with strong emotional ties and over protected him with fierce intensity. His schooling was frequently interrupted by long periods of illness during which he was hospitalized and sent to convalescent homes as a chronic cardiac. Somehow he managed to graduate from high school and being a good student he was very anxious to go to

[3] *Year Book*—National Probation Association 1930.
[4] *Broken Homes:* P. 120.

college. His poor health and inadequate financial resources precluded any such possibility but through the efforts of a social service agency he completed a short course in an agricultural institute.

A deep sense of frustration developed in him, a need to over-compensate by all manner of pretenses for the bitterness of his childhood and adolescence. He posed as a doctor of veterinary medicine, created the air of scientific erudition that soon brought him the title of "doctor" from persons in the community. He occasionally mingled in taverns where he received the group's accolade because of his pose as a medical practitioner. He indulged in untruths to bolster his ego by tales of his scientific expeditions to South America and built up for himself an unreal world of science. His employment in the hospital was never mentioned as that of an animal attendant, it was always that of a medical research expert. He posed as the holder of a university degree. The character of the offense the only one ever committed, could be explained only as symptomatic of underlying psychological motivations. Probation with restitution was definitely indicated for him, not for what he could pay back primarily, but as the means of obtaining help for him to work out his emotional difficulties which accounted for his bizarre behavior.

This case is but one of many. In it there is no area of confusion for the Probation Officer. He sees his function clearly — to provide avenues of service that will lead this probationer to a more meaningful life, to an adjustment in society on a level with his own capacities. In such cases the Probation Officer employs restitution as a part of the whole Probation process and on a case work basis. He is not fearful of being maneuvered into the position of a money collector because restitution in such cases is tied up with a total plan of treatment; it is incorporated into a framework of rehabilitation.

Now let us see the problem as an offender sees it. Lester Ingram is a probationer, 38 years of age and a successful writer for one of the best known weeklies, having a considerable circulation. He was asked to submit his point of view because he is intelligent and articulate. He has given much thought to his probation. He was charged with Grand Larceny when under an alleged promise to marry he took $2500 from a woman he met at a summer resort. Here is what he had to say:

"Restitution in some instances can be worked out without Criminal Court prosecution or any form of sentence. In virtually every case the complainant is more concerned with getting his money or goods back than he is with dissemination of justice. Hence his attorney will do everything possible to see to it that enforced restitution becomes a judgment of the Court. At the inception of my troubles — at which time I admitted to the District Attorney's Office that I had taken the money in question — I had every intention of returning it. I offered to make restitution. I denied culpability but I did not deny any indebtedness. I offered to make restitution to the best of my ability. I asked him to see if restitution could not be worked out without making a criminal case against me. If this had been acceptable to all concerned — and I also added I expected to earn some additional money, all of which would be turned over to the complainant — then I would not have undergone the torment, shame,

and degradation of the criminal procedure. I would not have been ostracized by friends and important business associates. Instead of being permitted to make full restitution without public disgrace, I was hauled to jail. I spent $1800 on lawyers and bailbonds which could have gone toward restitution. Only in that way were the complainant and her lawyer satisfied. They obtained their money and their revenge. My two lawyers were satisfied too. They each received $750, while a third lawyer, who claimed to have 'pull' received another $100 for doing nothing. The bonding company was happy because I paid them $200 and did not 'skip' out on my bailbond. It was a travesty and economic waste because full restitution could have been obtained by other means than criminal prosecution."

The overall picture, therefore, is confusing to the Probation Officer. He views restitution with a jaundiced eye. He finds in his daily work examples of activities in which certain industries engage that are considered legitimate under one set of circumstances and then regarded as criminal by those very same industries under another set of circumstances. It is a common occurrence for specific business houses to buy and sell merchandise on memoranda and accounts receivable. That these practices lend themselves to abuses can well be realized, yet those very same firms lean on the Criminal Court and its adjunct, the Probation Department, to help them maintain such loose practices, by criminal prosecution and money collections. Similarly, surety companies hasten to make criminal offenses of borderline cases for the very same reason that it is a surer method of collection when probation is a party thereto.

It would be interesting to obtain the opinions of legal practitioners and probation officers. The writer submits that the District Attorney and the Criminal Courts might more closely scrutinize those cases that fall in the shadow zone between criminal culpability and civil damages to see whether they can screen out the type of case which Probation can serve only as a collection agency. In the performance of this task Probation can be of help. Where restitution alone is indicated and not as part of the whole Probation process, then the Court might very well assign the case for collection to the Sheriff or Marshal, or establish a separate collection Bureau under the jurisdiction of the Court but distinct from Probation. With proper screening Probation can retain its respect for the human personality and keep its integrity as an individualized instrument of crime control through rehabilitation.