Journal of Criminal Law and Criminology

Volume 49 | Issue 6 Article 3

1959

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Recommended Citation
Thorsten Sellin, Adult Probation and the Conditional Sentence, 49 J. Crim. L. Criminology & Police Sci. 553 (1958-1959)

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ADULT PROBATION AND THE CONDITIONAL SENTENCE

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Probation has been defined innumerable times. Over thirty years ago, Edwin J. Cooley asserted that "the function of probation is to effect improvement in character and conduct, to achieve, if possible, permanent reformation and rehabilitation. Probation seeks definitely and positively to do constructive work, to mould and improve the individual's habits, to stimulate his ambition and self-control, to aid him in practical ways".[1]

The opening sentence of the *United States Probation Officers Manual*[2] states that: "probation ... is the application of a systematic and constructive method of correctional treatment, without custody, to certain offenders who are considered potentially capable of being restored to social usefulness without the stigma of imprisonment and the bitterness which generally follows such a separation from normal relationships. At the same time the proper use of probation presupposes that the offender is not so confirmed in his criminal behavior as to create a serious menace to society should he be at large in the community. It is the task of the probation officer to bring into focus the needs of the particular offender; help in the careful selection of the individual who would likely benefit from probation; chart a practical plan for his reclamation; and, then, through supervisory activities, assist in the development of resources within the person which might help him adjust to his home and community".

Finally, a recent pamphlet issued by the California Department of the Youth Authority, which has been entrusted with the establishment of standards for adult probation in that state, notes that: "probation is a form of 'community treatment' carried out through protective and case work services. As applied to adults, it seeks to accomplish the reformation and rehabilitation of persons convicted of crime by returning them to the community during a period of supervision rather than subjecting them to incarceration in jails or prisons".[3]

It is clear from the above quotations that Probation is *not* the making of pre-sentence investigation, *nor* the mere checking on a person's whereabouts, whether by written or oral reports from him, *nor* the mere collection of money from him in order to meet the costs of a trial, the payment of a disguised fine or the fulfillment of some other financial obligation which it has pleased the court to impose upon him. Such police surveillance or fiscal transactions do not fall within the meaning of probation, unless they are a subsidiary and incidental part of the positive form of correctional treatment which alone has the right to the name —and they are rarely so in practice.

The framers of the official definitions above agree that probation is a form of correctional treatment of a very positive and constructive kind, one that should be used only for carefully selected offenders and applied by persons of character, ability, and professional training, capable of utilizing modern casework techniques and available community resources. It is important to keep this in mind.

Now, it is a well-known fact that something called probation has been adopted by all states for adult offenders and that those who have agitated for or sponsored legislation to achieve that end have had in mind the kind of correctional treatment referred to above. Here and there this is what probation today means in practice, at least as applied to *some* probationers, but by and large the lack of an informed public opinion, the parsimony

[1] COOLEY, E. J., PROBATION AND DELINQUENCY. xv, 544 pp. New York: Thomas Nelson and Sons, 1927, p. 436.

[2] Washington, D. C.: Administrative Office of United States Courts, (1949).

[3] YORK, JAMES N., Ed., *Standards in the Performance of Probation Duties*. ([Sacramento, Calif.]: Department of the Youth Authority, [Nov., 1954]), p. 5.

of legislatures or local holders of public purse-strings, the indifference of many courts, and the apparent willingness of the friends of probation to accept or tolerate an inferior or even counterfeit brand falsely labeled probation have led to a depreciation and deformation of this correctional treatment. This has long been known to those familiar with the facts, but they have hoped that as time passed and more rational attitudes toward the treatment of offenders developed, the real potentialities of probation would be understood and given an opportunity for full expression. But, the results of two recent surveys of probation in two of our most populous states, Pennsylvania and California, highlight the fact that progress has been slow and almost illusory, at least in Pennsylvania.

Pennsylvania adopted probation in 1909, exactly half a century ago. One might assume that after such a length of time, probation would be an accepted form of treatment and well implemented. A survey by the National Probation and Parole Association in 1957[4] covering the entire state, disclosed that only in a few counties did the courts consider any pre-sentence investigation necessary, that half a dozen counties had no probation service for adults, and that case loads of investigatory and supervisory officers were many times heavier than those considered generally as appropriate. The report observed that in most counties the principal duty of officers "supervising" adults was the collection of fines, costs and indemnities, that in some counties the probationer who duly made such payments was considered a success on probation, and that in several counties he was discharged from probation as soon as he met such financial obligations. In other words, it was found that probation, as defined at the beginning of this paper, was practically non-existent for adult offenders and that the so-called probation services were being employed chiefly for the performance of other and mostly clerical tasks.

The California study[5] revealed that the average case load in 1956 of probation officers working with adults was 248 units[6] or four times the standard of 60 recommended by the California Youth Authority, and five times the standard of 50 recommended by the National Probation and Parole Association. The authors of the report concluded that probation supervision in California was highly deficient, yet that state adopted probation in 1903.

A comparison of the two survey reports shows that the reasons for the low standard or virtual absence of probation for adults were not identical in the two states. In California it was largely due to the fact that the officers were mostly occupied with the peripheral task of making pre-sentence investigations for the court and had no time for probation, while in Pennsylvania the supervision case loads were overwhelming and the officers burdened with fiscal tasks.

It may appear strange to place pre-sentence investigations and probation in juxtaposition as has been done in the preceding paragraph, and a word of explanation may therefore be in order. Just as institutional treatment following upon a sentence to imprisonment means whatever is done to, with, or for a prisoner once he has been received in the institution, so probation means whatever is done to, with, or for a probationer after he has been placed on probation. Probation is a correctional treatment and nothing else and, as defined, it is constructive and rehabilitative treatment.

If a court is to exercise its discretionary power intelligently in cases where that power can be utilized to the end that the best possible disposition of a case can be made, a pre-sentence investigation is highly desirable. But a pre-sentence investigation is no more a part of probation than it is a part of prison sentence; it is preliminary to both. Looking at the matter objectively, there is no logical reason why a probation staff should have to make such investigations. It would be just as logical to require that the agency in charge of prisons conduct them for the court, for in most states fifty per cent or more of those convicted in courts of trial jurisdiction are ultimately sentenced to imprisonment; in Pennsylvania, nearly three-fourths.

[4] National Probation and Parole Asso., *Probation Services in Pennsylvania.* 183 pp. and Tables. (Mimeographed). Harrisburg: Governor's Commission on Penal and Corrective Affairs and Governor's Committee on Children and Youth, 1957.

[5] The Special Study Commission on Correctional Facilities and Services, *Probation in California.* 137 pp., Sacramento: State Board of Corrections, December, 1957.

[6] The National Probation and Parole Association considers that one pre-sentence investigation is equivalent to five and one pre-parole investigation is equivalent to three supervision units. In other words, if a probation officer is compelled to make ten pre-sentence investigations a month he should be relieved of supervision of probationers, since he would have reached the fifty work units regarded as the standard by the Association. An officer forced to make, let us say, five pre-sentence and two pre-parole investigations monthly should not have to supervise more than nineteen probationers.

The most reasonable view would seem, to this author, to be that the court should have specially trained people, not probation officers, to conduct the pre-sentence investigations. The fact that this work is forced on the probation staff is due to an historical accident. Since probation was originally grafted on the suspended sentence, not recognized as a "punishment" provided by law, and hence enforceable by any agency other than the court itself, it is easy to see why the court turned to its own appointed probation officer as the most suitable person to make an investigation. Where this system of local court probation administration persists—and it does in both Pennsylvania and in California—there is little hope for change, even though this ancillary responsibility of the probation staff may become so heavy that it drives out probation, as it has done in California. Where probation has been made a state function, which it should be, since it should be recognized as a form of treatment on a par with imprisonment and imposed by sentence, the investigatory responsibility should remain with the court, done by specially trained persons appointed by the court and given special titles that do not cause them to be confused with probation officers. A probation system properly designed to afford frequent and personal contacts between the probation officer and the probationer and his family should not have to require the probation officer to make pre-sentence investigations. He should, of course, be fully informed of the results of the investigation of a probationer assigned to him for supervision.

In view of the findings of the two surveys mentioned, it is natural that any one who is deeply interested in the advancement of correctional treatment should try to take stock of the situation and consider what remedies might be found. It would be easy to say that we need more and highly trained professional probation officers, but so long as probation is so conceived that it can be used as a cover for the kind of clerical and fiscal tasks that probation officers for adults do in Pennsylvania, there is need for more clerks rather than for more professional staff. Instead of urging the extension of probation, we should urge that it be more restrictively used, thereby reserving it for carefully selected offenders, giving it the status it should have in accord with the official definitions, and thus creating the absolute necessity of employing professionally trained people to administer it.

I. It is well known that courts place many on probation who do not require the kind of rehabilitative and reformative treatment which probation signifies. Recently, Judge Bolitha J. Laws wrote: "Much of the average probation case load is made up of obviously safe risks, persons who do not present difficult problems of treatment or whose behavior is not a threat, particularly not a physical threat, to persons in the community. If they were released without supervision—if they were given suspended sentences instead of probation—the staff could devote a far greater proportion of its time than it now can to the difficult cases, those for whom expert casework is sorely needed to avoid commitment... Only by some such redistribution of judicial dispositions can probation begin to make its proper impact on the prison problem".[7]

Judge Laws' proposal is eminently sound. The suspended sentence is now variously used in the states. In most states it is a recognized prerogative of the courts. It should be used when the court believes that a warning is all that is necessary and should possess as its only potential threat the possibility that if the defendant commits a new crime he might be punished for his earlier offense. The period for which such a suspension should remain in force should be fixed by statute at not more than one or two years, let us say. If the defendant commits a new crime during this period, the court should be free to determine—assuming that the suspension meant the suspension of the imposition of the sentence—whether or not the defendant should be sentenced to imprisonment, placed on probation, or given a conditional sentence.

Legislation clearly defining the use of the suspended sentence by the courts could remove from the roster of probationers a considerable percentage of those now there, especially in states where a suspended sentence now can be granted only when a probation order is issued, thus forcing the courts in such states to foist on the probation officers individuals whom they merely wanted to give a scare—or a kindly favor.

II. We might pare down the probation clientele still further by introducing a form of disposition called the *conditional sentence*, entirely distinct from the suspended sentence. This is nothing new in American legislation. On February 13, 1789, Massachusetts adopted the following act:

"Whereas Courts having Criminal Jurisdiction

[7] *Criminal courts and adult probation.* NPPA JOURNAL 3: 354–60, Oct., 1957; p. 358.

are authorized for the punishment of certain offences, to award at their discretion, either a fine or imprisonment, confinement to hard labour, or corporal and ignominious punishment of the offender;

And whereas the fines in such cases imposed are oftentimes avoided by the inability or obstinacy of offenders who remain in prison, at the great expense of the counties having them in charge, which discourages the infliction of fines.

1. *Be it therefore enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same,* That when before any Court, having jurisdiction thereof, any person shall be convicted of any crime or offence, which by law is punishable by a fine, or by imprisonment, confinement to hard labour, or corporal and ignominious punishment of the offender, at the discretion of such Court, the Justices of such Court are hereby authorized and empowered, if they see cause, to award a conditional sentence against such offender, and to order such offender to pay a fine within a limited time, to be expressed in such sentence; and in default thereof to suffer such other punishment as may by law be inflicted on the offender for such offence.

2. *And be it further enacted,* That in case the persons against whom such sentence shall be awarded shall not pay the fine imposed within the time limited, it shall be the duty of the Sheriff of the County, having charge of such offender, to cause the other part of such sentence to be inflicted, according to the form and effect thereof, any law, usage, or custom to the contrary notwithstanding".[8]

In more modern terms and better suited to present-day thinking, a modification of the principle found in the above old Massachusetts act would be worth adopting. A conditional sentence would then be awarded to any offender, who should not be merely threatened with possible future consequences in case of a new crime—the suspended sentence cases—nor is in need of the professional aid and guidance that is probation, but who should be made to meet certain obligations, such as the payment of fines, costs, or indemnities, or who should be required merely to keep the court informed of his whereabouts by periodic written or oral reports.

The conditional sentence should be for a fixed period within a statutory limit and the manner of meeting the obligation imposed should be determined by the court. The payment of any sum involved or the periodic reports mentioned should be made to some fiscal agency or to some officer of the court, such as the clerk, but not to a probation officer. The only conditions attached to a conditional sentence should be of such a nature that their non-observance could be unfailingly discovered and brought to the attention of the court.

If the defendant under a conditional sentence were to fail to meet the condition, the court, upon finding that the condition had indeed not been fulfilled, should be empowered to lengthen the period of the conditional sentence, place the defendant on probation, or sentence him to imprisonment. If, on the other hand, the defendant had fulfilled the conditions in the manner and within the time limits fixed by the court, he would be entitled to a full discharge.

The suspended sentence and the conditional sentence would give the court two judicial dispositions which if properly used would make it unnecessary to place on probation a very considerable proportion of defendants who are today automatically assigned to probation supervision and therefore clutter up the probation service although they are not in need of its specialized knowledge or aid. The combined effect could be to reserve probation for those who actually need that specialized service, in other words for a much smaller proportion of defendants than are now placed on probation. It is only by some devices such as these that probation is likely to achieve its proper status. So long as "probation" for adults remains what it is in Pennsylvania, for instance, it cannot achieve the respect of citizens or courts, does not deserve much in the way of increased financial support, and should not be dignified by a name, which stands for a high and noble purpose in the correctional field.

[8] THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS . . . (Boston, March, 1801), Vol. 2: (41)–(42).