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This Issue in Brief

Estimates of Drug Use in Intensive Supervision Probationers: Results from a Pilot Study.—Authors Eric D. Wish, Mary Cuadrado, and John A. Martorana present findings from a pilot study of drug use in probationers in the New York City Intensive Supervision Probation (ISP) Program, a study prompted by ISP staff need for on-site urine testing of ISP probationers. Confidential research interviews were conducted with 106 probationers in the Brooklyn ISP program, 71 percent of whom provided a urine specimen for analysis. The urine tests indicated a level of drug use strikingly higher than the level estimated by probation officers, who depended upon the probationers to tell them about their drug use. The authors contend that the costs of reincarcering drug abusers who fail probation are substantial when compared with the costs of a urine testing program. They conclude that ISP programs, with their small caseloads and emphasis on community supervision, provide a special opportunity for adopting systematic urine testing and for learning how best to intervene with drug abusing offenders.

Felony Probation and Recidivism: Replication and Response.—As a result of the Rand report on felony probation in California, probation supervision is attracting close attention. In the present study, author Gennaro F. Vito examines the recidivism rates of 317 felony probationers from three judicial districts in Kentucky and makes some direct comparisons to the Rand report. The general conclusion that felony probation supervision appears to be relatively effective in controlling recidivism rates is tempered by the limitations of both studies. The author stresses the need to closely examine the purpose and goals of probation supervision.

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Probation: An Exploration in Meaning

BY RICHARD GRAY

United States Probation Officer, Eastern District of New York

PROBLEMS IN the definition of the role of probation and its agents stem from a traditional lack of definition concerning the field (Barkdull 1976, Fogel et al. 1980). In the void where probation has grown up, popular opinion has characterized it as a nonsentence, "getting off," or a measure of leniency (Allen et al. 1979, Fogel 1980, Barkdull 1976). At the same time, competing influences in social work and law enforcement have attempted to foist definitions, standards, and practices upon probation, to the point that officers new to the field often have unrealistic expectations as to their efficacy and field of expertise.

Allen et al. (1979) note that their research effort was seriously complicated by the lack of any generally accepted definition of probation. They recount that:

> The word "probation" has been used interchangeably to mean a legal disposition, a measure of leniency, a punitive measure, an administrative process, and a treatment method . . . not to mention a sub-system of corrections (Ibid. 1979).

Worsening the confusion is the claim by each group that its approach is the only proper approach to the diverse tasks assigned to probation including: helping, policing, enforcing, and service brokering.

David Fogel and his coauthors (1980) note that the main reason for this state of confusion is that most of the definitions and standards by which we are measured were developed to deal with fields that are often only peripherally relevant to probation. Probation has yet to provide itself with a standard definition.

As probation moves towards the 21st century, we find that it has in many ways changed drastically from what many of us thought it was, or should be. Whatever the perspective from which we approach it, probation has changed.

Joan Petersilia (1986), writing for the Rand Corporation, takes note of this change when she observes:

> Probation sentences for adult felons have become so common that a new term has emerged in criminal justice circles: felony probation. Today, over one-third of the nation's adult probation population consists of persons convicted in Superior Courts of felonies (as opposed to misdemeanors). This phenomenon raises some serious questions. Probation was originally intended for offenders who pose little threat to society and were believed to be capable of rehabilitation through a productive, supervised life in the community. (p.4)

But that is not all—house arrest, electronic surveillance, intensive supervision, and warrant squads bring into high relief the inadequacy of our definitions of what probation is or might be. Nevertheless, it remains plain that on some level, all of these seemingly disparate approaches bear some relationship to a core definition of probation that contains elements of rehabilitation, correction, social work, and general ombudsmanship that escape some of the more traditional formulations.

Role tension, or conflict between roles classically assigned to probation officers, has most often been seen as developing along the social work/law enforcement axis (Fogel et al., Allen et al. 1979, Dell' Apa et al. 1976).

From the social work perspective, probation, seen as a helping profession, has little or no room for law enforcement considerations. The duty to report to the court or to monitor behavior would violate the client-helper relationship and render it ineffectual (Deitrich 1978).

From the opposite pole, every probation officer has at some point known the ill will of law enforcement officials who see him or her as the soft hearted do-gooder whose only *raison d'etre* is to undo the work of days or weeks in apprehending some criminal. The perspective is often expressed: "We catch them and you let them go."

Where confusion exists as to role, we may expect that it comes from one of three sources: over-identification with one or another of the polar extremes noted above, expectations not shaped by the tasks at hand, or total lack of expectations. The latter position often seems to be by far the most susceptible to reason. This question of role conflict was briefly analyzed by G. Frederick Allen in a 1985 *Federal Probation* article examining the role of probation and probation officers as perceived by probationers scheduled for termination from supervision caseloads in a large metropolitan office. At the end of his investigation he concluded that:

> Probation officers are supposed to be both treatment and social control agents. Performing these nearly contradictory functions has been a perennial dilemma for probation officers. Bartollas, Miller, and Wice (1983:212) cite three reasons for this: (1) Each type of officer may be attracted to one role more than the others; (2) actual conflict does exist between the policing and the helping roles; (3) these officers often encounter conflicting expectations from the public, from other practitioners in the criminal justice system, and from supervisors and peers in the agency.

Bartollas, et al. (1983), have noted further that probation officers are often confused by this role conflict and are generally uncertain about what they are supposed to do. Eventually the officer yields to the various pressures and gravitates towards one role.

The data obtained in this research suggest that probation work is a multidimensional process requiring the probation officer to respond to a variety of needs and special situations, and that the psychodynamics of many offenders may require an assistance-control approach.

One of the more productive approaches to the definition of the probation task revolves around the fact that it is a legal disposition. Allen et al. (1979) have indicated that as a legal sanction, probation contains three characteristic elements: (1) release of the offender into the community (2) with certain conditions imposed upon him (3) under the supervision of the probation department. Following the same line of investigation, Fogel (1980, 1981), Deitrich (1978), and Hardman (1960) all identify the function of the probation officer as enforcement of the court's order.

The obvious advantage of this definition is that it may be judged solely on probation-related criteria. Within the confines of such a perspective, the probation officer may be regarded as having done an acceptible job whether a case ends in rehabilitation or revocation.

Within the broad purview of such a definition, there is ample room for rehabilitation and policing determined by the needs of the case at hand. Rather than imposing an unrealistic universal rehabilitative emphasis, or an equally unrealistic punitive/enforcement emphasis, this type of administrative definition allows for truly individualized treatment based on the case, not a priori assumptions.

It also finds broad applicability independent of the needs observed in the caseload. A casework orientation can only respond in frustration to excessive caseloads where no deep therapy or rehabilitative counseling is possible. If, however, the probation officer's goal is to enforce the court's order, he can not only adjust his approach in accordance with the needs observed, but—as a service broker—he can help his clients move toward a rehabilitative ideal through services provided by others.

From this perspective, rehabilitation ceases to be our primary function; compliance is the aim. Nevertheless, as we seek compliance, our enforcement role can realistically seek rehabilitation, where warranted, through extra-agency referrals, or intra-agency specialization.

Nevertheless, before any approach, including compliance, can become a standard rationale for probation practice, it must be firmly rooted in the history of probation philosophy, comprehending all of its manifestations. This, of course, identifies the major flaw in most of our attempts to define the field. Rehabilitation as a philosophy failed in its willingness to ignore the pragmatic issues of law enforcement, compliance, and community risk factors and more generally failed to realistically assess human abilities. Besides, statistical studies have tended to show that most of the people rehabilitated by probation were already rehabilitated before they even met the probation officer (Walker 1985:176).

The failure of the law enforcement perspective was, by the same token, a result of its willingness to ignore the very strong humanitarian and helping-rehabilitative emphasis that lies at probation's heart. It tended to dehumanize both the probationer and the probation officer by missing the deep concern for humanity that sought the institution of a respite from "unfeeling law."

Finally, despite its fundamentally right instincts, the justice model fails to capture the essence of what probation is and can be by over-emphasizing its nature as a sanction. By defining what has, by definition, been a suspension of sentence as a sentence itself, the justice model, for the sake of fairness, has destroyed the one factor that gives probation its seemingly inexhaustible ability to adapt to the needs of the correctional issue at hand.

It is here, of course, that our task begins to find sufficient definition that we may begin to grasp its broader parameters. If we are to define probation at all, we must provide parameters broad enough to include not only what it has been, or what we might like it to become, but broad enough to capture its essence without artificially limiting its potential. For these reasons, it now becomes important to begin an examination of the historical roots of probation.

In the history of probation we have been beset by varying ideas as to what exactly it is that we should be doing. We began early on with a primitive religious idea that some lesser misdemeanants might profit from the liberal application of Christian charity and properly applied exhortations to adhere to a set of moral absolutes of near universal acceptance. As probation grew and ceased to be only the effort of the well-meaning to amend the character of the fallen, it gradually sloughed off its appeal to religious and moral sensibilities and began an appeal to sociological and psychological variables that had somehow given rise, not to morally reprehensible actions, but predictible, and theoretically treatable, maladies of environmental or genetic origin. With the subsequent growth of probation through the 20th century, this medical model came increasingly under fire as ineffective and ultimately violative of the rights of the criminal under treatment. Most recently we have observed the rise and fall of the justice model which, under the promise of identifying and implementing the true mission of probation, has likewise failed to deliver a practicable and believable plan for action.

It is the author's contention that these and other

general philosophies of probation have failed for two basic reasons. First, they have failed to acknowledge their fundamental continuity in thought and practice with all of their predecessors. Second, they have attempted to remove probation from its practical person-to-person setting by imposing definitions from an administrative wish-perspective that conflicts with the day-to-day realities faced by the line officer.

As far back as John Augustus the idea of conditional release was never viewed as a panacea. There were no illusions that it would work for everyone, but Augustus and his early followers carefully handpicked minor misdemeanants who were felt to be amenable to the intensive, personal attentions of Boston's do-gooders. Likewise, with the rise of the settlement house movement in the early 1900's, there was again an attempt by the well-heeled to reach out to the "deserving poor," those that could be trusted to make the best use of the opportunities afforded them (Lindner 1984).

It is, in fact, impossible to understand probation without an appreciation of its deep roots in the at least nominally Christian culture of the mid-19th century. Benefit of clergy, bailments, and the very idea of probation are impossible outside of a culture which at its roots allows the possibility of justice tempered by mercy. Against this backgound, and only against this background, can probation be understood as a mercy, grace in its classical manifestation as unmerited favor.

Without passing beyond Augustus, we may find an abundance of parallels with basic Christian doctrine throughout his journal. His criteria for bailments center around the subject's penitence. Unrepentant misdemeanants were generally found unfit. His association with the Martha Washington Temperance Society again reflects the strongly biblical base for the movement. Further, a review of his jorunal finds Augustus quoting scripture or reflecting its phraseology on numerous occasions.

We do not here intend to show some special religious affiliation on the part of Augustus, only that the culture in which he was raised and which molded his consciousness was thoroughly suffused with the ideas of law, justice, mercy, and grace as espoused originally in scripture.

From this biblical perspective, probation may be seen less as a function of justice than as a function of grace. It is a mercy offered to the poor, an escape from justice offered to the penitent. But, it is also a perspective entailing a rigorous demand for justice and equity whether or not the benefit of probation is granted.

Although we would not go so far as to impute religious motivation to either John Augustus or his followers, it is vitally important to realize that the civil religion of America has been shown on multiple occasions to share these same great themes with its Christian roots (Bellah 1975, 1978). It is only against such a background that probation is at all intelligible. As a scientific approach to rehabilitation or personality change, it is largely ineffectual. As a model for justice, its requirement for individualized treatment continually defeats the ideal of sentence parity. Only when viewed as an extention of mercy or grace—a reprieve from the virtual death of imprisonment—can we make sense of the system.

Beginning with the understanding that Augustus' original conception of probation was far more closely related to modern conditional discharge, or pretrial diversion, and without enshrining Augustus' ideas as gospel, it will be useful to take an honest look at some parts of his journal.

From the start, probation is conceived as a nonsanction. Reproducing a letter from the Christian Register, Augustus may be said to approve what follows as suggestive of the proper role of probation and its agents:

> There are many cases in which respectable security for the future good conduct of the offender, is sufficient to meet the full demand of justice. Now in these respects, the public magistrate of a large city, however merciful, cannot always trust his own clemency; for he represents the legal aspects of each individual case, and cannot often be acquainted with the circumstances which should mollify his decision. Hence the need for a prisoner's friend—of one who shall assume the position of Christian advocate, and shall represent the side of mercy in opposition to strict, untempered legality. We therefore regard the places filled by John August and John M. Spear as essential to the full organization of the lower courts. Duties of this class might be reduced to legal form, and delegated to officers specially appointed for the purpose . . . (Augustus 1984:65)

Although probation professionals have long been loathe to acknowledge the possibility, the history of probation, root and branch, defines itself (philosophically at least) as a nonsanction. In the monitor's words, cited above, probation represents the "side of mercy in opposition to strict, untempered legality," It is a reprieve from the "fangs of an unfeeling law." (Ibid.)

It is this element more than any other that makes the justice model of probation a less than satisfactory definition. Despite its punitive aspects, probation is at root "getting off." If we are to understand it, it must be in this light.

This is not to say that probation does not possess punitive aspects; what it does say, however, is that any punitive aspect is secondary to its humanitarian emphasis.

Law enforcement is likewise an essential part of the historical development of probation. Once more, John Augustus' journal reflects a pragmatism that includes room for strict enforcement.

> Would it not be more in consonance with the desires of the thinking part of society, and more productive of good, to allow such

> persons . . . to be bailed, on a plea of guilty, on the ground of their renouncing their business, and to discharge the bail by laying the indictment on file . . . . Such a course would be perfectly safe, for if one party should again be guilty of a violation of the law, the indictment can be taken from the file, and upon it the party can be brought in for sentence; with this indictment hanging over them, there is little danger of a new offense of a similar character. (Ibid.:73)

Accountability stands at the heart of Augustus' conception, and with it a careful examination of the prospective beneficiary to ensure that he is worthy of the chance.

> Great care was observed, of course, to ascertain whether the prisoners were promising subjects for probation, and to this end it was necessary to take into consideration the previous character of the person, his age and the influences by which he would in future likely to be surrounded, and though these points were not ridgidly adhered to, still they were the circumstances which usually determined my action. (Ibid.:34)

There are, in fact, large categories of offenders whom Augustus does not even consider as fit for probation treatment including : "common thieves, robbers," and various other felons (Ibid.:24). He generally felt that probation was a remedy fit only for minor misdemeanants. Among these, the repentant and those possessed with some hope of reformation were most often the recipients of his assistance.

The Augustus paradigm may be comprehended in a short outline form as follows:

I. The offender should be a minor misdemeanant.
II. He should be repentant.
III. His background, past behavior, and future influences should indicate that he is amenable to change.
IV. He must agree to submit to the conditions of release.

These points should be more than familiar to any probation officer, as they represent much of the same basic logic applied to the field today. They are especially reflective of the criteria applied in pretrial diversion procedures. Although modern probation practice has virtually done away with the first two requirements as initial criteria for general probation cases, they nonetheless represent the ideal probationer towards which our presentence investigative efforts, and postsentence evaluative efforts, look.

It is important to remember that while probation has changed dramatically since Augustus' time, people as a whole have not. We may expect, therefore, that the commonsense notions of a fanatical servant of the good of others might hold some insight for dealing with people in modern times. So, we may expect that if Augustus' observations were at all valid, they should continue to appear as controlling variables in probation generally.

Where, however, are we to look for general principles that apply broadly to the field and not to one perspective alone? The answer, of course, is the courts. For it is from the courts that we receive our license to function and in the context of which we ply our trade. We are ultimately and almost inextricably bound to the courts by the nature of our position. It should not, therefore, seem unreasonable to turn to the courts for a balanced definition of what we are.

When, however, we look to the courts for a definition, we come very close to the ideas originally held by Augustus. The annotations to the 1925 probation law (18 U.S.C. 3651) include the following definition:

> The basic purpose of probation is to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse such opportunity, and courts have a wide discretion to accomplish such a purpose.
> *Robert* v. *U.S.*, 64 S. Ct. 113, 117

Other definitions provided by the courts have emphasized that it is a legislative grace extended to the repentant. Most succinctly, they were summed up by the Court of Appeals for the Seventh Circuit when it held that . . .

> The purpose of probation is to provide a period of grace in order to aid the rehabilitation of a penitent offender and to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable.
> *U.S.* v. *Torres-Flores*, 624 F.2d 776

This definition goes not only to the heart of the history of probation, but resonates with the normative experience of probation practice. With Augustus, the courts define probation as a legislative grace. It is manifestly getting off, but getting off subject to conditions. No one, however, has made it an axiom of probation practice that those conditions have to be easy. In fact, the courts have also held that punishment may be an incidental part of probation but not its central goal. This was the finding of the Illinois Circuit Court of Appeals in *Higdon* v. *U.S.*, 637 F.2d 893. Further, the courts have been given by the legislature what have been repeatedly defined as broad discretionary powers to set conditions of probation in order to assure that ample opportunity is given the probationer to obtain whatever rehabilitation he may and to ensure that the safety of the community is preserved.

Under such definitions, we are remined that although providing the context for rehabilitation and, perhaps more accurately, simply recording the observed presence or absence of the indicia of such changes, we are simultaneously charged with the protection of the community through enforcement of the court's orders and careful observation of the client's relative compliance.

In respect of the views of Augustus and the courts, a very different function of probation begins to emerge. Rather than presenting itself as a sanction,

probation, reaffirmed as a nonsanction, takes on the character of a grace. As such, it rather easily becomes identifiable as part of the legitimative structure of the criminal justice system.

Because mercy and grace, in the form of probation, accounts for more than half of the criminal sentences in the Federal system (Walker 1978:175), the system may be said to present itself as fair, and so legitimate, in that a chance is made available to almost all but the most dangerous and the most hardened. This peculiar type of legitimation of judicial process may be traced to ancient times when it was not uncommon for an emperor or king to release a prisoner, especially those condemned to death, on the great feast days of the prevailing religion. A very familiar case in point was the release of Barabbas on the eve of Passover, as attested in the New Testament. We may, in modern times, see that probation, while not strictly analogous, is regularly viewed as a reprieve from the de facto (if not de jure) civil death of imprisonment.

According to Robert Bellah (1975), by the mid-19th century, the values of American political life and the earlier values of a nearly homogeneous, protestant, Anglo-Saxon, 16th and 17th century America had become nearly identical. In this context, the emergence of grace as an integral part of the legitimative scheme of American justice should come as no surprise at all. Further, with the ancient character of America in myth and archetype presented as a refuge, there was perhaps no fitter institution for addition to the arsenal of the courts.

It was during the second awakening, centered around the abolitionist controversy, but characterized by increased interest in the care of prisoners and the reform of drunkards, that Augustus and Judge Thatcher, his conceptual forbearer, appeared. Not insignificantly, it was in Massachusetts, the very center of colonial protestantism, that they began the practices that ultimately defined the modern field of probation. Augustus, then building on Judge Thatcher's already great readiness to rely on recognizances (Hussey and Duffee, 1980:39), added the elements of supervision and the careful selection of repentant misdemeanants, and in miniature form recreated the perilous gospel of Jonathan Edwards by allowing the probationer to dangle in the realm of grace between ultimate redemption and a return to the pit of institutionalization.

This was not only an idea whose time had come, it was an idea that spoke to the very heart of protestant America: Probation as mercy, rehabilitation as redemption, all available to the repentant, through the graces of a manifestly just government that ministered the favors of a merciful God.

By the turn of the century, probation had spread to several states. Significantly, the earliest probation programs were in protestant New England. It thereafter spread to Chicago and then to the rest of the country (Abadinsky, 1982:22).

Having taken this brief view of the history of probation, it will perhaps become apparent how and why a return to its conceptual roots, and its definition through the courts, is essential to grasp the real meaning of probation. Any definition other than a legislative grace, providing opportunity for rehabilitation, subject to some level of verification, significantly decreases the value and the integrity of probation as practiced and originally conceived. This historical and legitimative perspective is the only one broad enough to comprehend the equally erroneous medical and law enforcement models, while providing room for both approaches within probation broadly conceived. Not only that, but there is room to extend grace to whomever the courts will, so that as ministers of grace (as the protestant archetype would phrase it), probation officers may be expected to supply supervision, law enforcement, and social service functions to a broad base of clients without contradicting the essential meaning of the profession.

It is finally when probation is understood as the systematic extension, supervision, and evaluation of an essentially unwarranted opportunity for self-improvement, that the much vaunted law enforcement/social work dichotomy is finally laid to rest in a conceptual framework broad enough to provide both necessary parts of the task. It is also from this perspective that justice, conceived as mercy and grace, becomes determinative of real fairness, not mindless adherence to arbitrary standards.

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