Federal Probation

Probation Supervision: Where Do We Go from Here?

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Probation: A System in Change*

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PARALLELING OTHER changes in America's political environment, there has been a growing dissatisfaction with government programs dealing with the nation's marginal or deviant populations (the poor, the criminal, the uneducated). Nowhere has this been more evident than in the field of corrections where demands for fundamental reform have been advanced by conservatives and liberals alike. One of the most dramatic manifestations of these calls for change has been the abolishment of discretionary release from prison in a number of states.

There have been less obvious, but nonetheless important, changes in community supervision—probation and parole—as well. There have been many, but they have centered chiefly around two major themes: a) sanctioning goals and b) discretion—its amount and its location. It may be helpful to briefly trace the nature and history of these issues and trace their implications for community supervision, particularly probation, in the next decade.

The Era of Treatment and Broad Discretion: 1920—1970

This was the age of rehabilitation, a time during which a good deal of the theory and technology of probation and community supervision developed. It was personified by the professional probation officer who had a special responsibility for changing clients and was given a good deal of discretion to do so, including the power to employ coercive means if they were necessary for the therapeutic process. Although there was an immediate concern about new criminal violations, the emphasis was on fundamental change. The aim was to intervene into the life of the offender so that when released from probation, he or she would choose not to commit crime again.

Probation services employed standardized caseloads because there was a standard job to do. Essentially it was, at least in theory, basically a matter of counseling and referral to community agencies. Presentence investigations were designed to identify the causes of the criminal's behavior and to enumerate the interventions necessary to alter those causes. Rehabilitation was forward looking; its vision was long and clearly focused on the prevention of future crime.

An attack on rehabilitation took place in the early 1970's, chiefly attributed to Robert Martinson, who declared that empirical evidence failed to show that treatment worked in any universal way. His findings were characterized as proclaiming that "rehabilitation doesn't work," an overstatement that distorted the actual findings. The fact is that treatment does work in some cases for some kinds of people, but the interpretations of Martinson's findings were trumpeted loudly. The inevitable result was to raise questions about the legitimacy of the parole release function and community supervision.

The Era of Desert and Minimum Discretion: 1970—1980

If rehabilitation was not to be the purpose of sentencing, what was? The answer was just deserts, an old-fashioned idea brought up to date. It focused on proportionality between crime and punishment, not on the control of crime. Its sole aim was to set a fair sentence. Thus its perspective was backward looking and totally preoccupied with the character of the crime committed, not what the offender was likely to do in the future.

The core idea was to develop a system whereby the exact, just penalty for a crime was clearly articulated in advance and uniformly applied, which led, in turn, to an inexorable conclusion. If the only purpose is a fair punishment based on the crime committed, it is possible to fix the precise sentence for an offender at the moment of sentence, since all relevant information regarding that decision is known at that time. The remaining foundation of the rationale for parole boards fixing the time of release from prison crumbled.

Desert also caused a devaluation of the worth of community supervision. Much of the energy and force for developing and maintaining a professional personnel corps was spent with the loss of rehabilitation. However, despite this ambiguity of purpose,

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across the United States most probation agencies went on as they always did. They served such an incredibly important function in our society that mere theory could not displace them. But clearly there was a growing critical attitude toward probation as the possibility of treating individuals receded. Proposals for "justice models" as a substitute organizing principle were made, but they had little appeal to budget makers. More fatally, they had no relevance to the growing demands for crime suppression in this country.

The Era of Incapacitation and Structured Discretion: 1980's

The failure of desert to address crime control concerns soon led to its demise as a widely accepted sole purpose of a sanctioning system. Still another old-fashioned purpose emerged: the notion of incapacitation. If you can't change people, you certainly can control them. Indeed, the growth of prison populations was, by some, welcomed. The manifestation of the growth of the incapacitation philosophy is revealed in many other ways as well. For example, much of the contemporary emphases on intensive surveillance/supervision and electronic monitoring are essentially incapacitative in purpose.

However, nowhere in the United States has incapacitation taken over as an exclusive purpose of sanctioning. Increasingly, desert (and its cousin, general deterrence) is used as a limiting principle under which the state cannot impose a sanction more than is deserved or less than is deserved. Within those bounds the purposes of incapacitation may be served. Elements of rehabilitation continue to exist, but at a modest level. The reintroduction of risk control purposes—treatment and incapacitation—raise questions about the logic of abolishing all forms of discretionary release from prison. Information may well be secured after sentencing that has important bearing on when a particular inmate might be moved to the community, under stipulated conditions, without an undue increase in risk to the public.

While the United States Sentencing Commission, for example, chose not to specify explicit sanctioning priorities, it is clear that, on the whole, incapacitation is a prominent feature of the new code, as is desert. Treatment also continues to exist, but clearly as a much lower priority, at least insofar as it is a mandatory feature of the system. Because of these risk control features, it becomes at least arguable whether all forms of discretionary release should be abolished in the Federal system.

Another characteristic of this era is the recognition that discretion is inevitable and the task is to recognize its existence and structure it. Typically, systems tend to be created under which expected decisions are specified for given types of cases, and the decision maker is required to explain any significant variation from an expected outcome. The United States Sentencing Commission has done precisely that through its guidelines under which specific sentences for specific crimes are detailed and a review of the articulated reasons for deviations from those outcomes is made possible.

Trends in Probation

These trends in sanctioning purposes and discretion control have affected not only the criminal justice system in general, but they have had special effect on community supervision programs. For example, under the new Federal sentencing procedures, probation officers are expected to help determine risk probabilities and culpability in individual cases. They are expected in their presentence investigations to address these issues that are almost determinative of the sentence to be fixed by a judge, a particularly grave responsibility since there may be no parole board to alter such sentences once set.

In addition to these specific characteristics of the new system, there are many other items on the agenda facing probation supervision in the next decade. Six bear mentioning.

First, there is pressure to ensure that the information gathered, the conditions judges fix, and the behaviors in which probation officers engage have a direct relationship to the sentencing goals being pursued. Thus, if we choose to have someone pay restitution (a just desert goal), there is need to demonstrate proportionality between that restitution and the act committed.

Then there is the growing expectation that conditions will be much more focused and specific than in the past and probation officers will be expected to enforce them more uniformly. Too often a general condition, such as requiring all probationers to seek employment, simply opened the door to selective enforcement and, more often than not, few violations were actually ever reported to a court. Increasingly the aim is to set out only those conditions that the court means to have enforced and then have probation officers enforce them.

Secondly, the acknowledgment of risk control as an important function of the criminal justice system brings with it a need to face the central dilemma of risk control—errors are made when we predict. Some persons will commit crimes who were predicted as not

likely to, while others who would not have committed crimes are held in custody because false predictions are made that they would. Research has indicated that for every person we correctly identify as being a danger to society, inevitably others will be mistakenly identified who do not constitute such a threat (*Directions for Community Corrections in the 1990's,* O'Leary and Clear, National Institute of Corrections, 1984, pp. 7-8).

An important means of managing this problem is through the use of risk assessment scales. The technology for these has been around for nearly 50 years, but they have become more prominent recently, not for predicting the behavior of individual offenders, but rather as classification devices through which offenders are placed in various groups. Offenders who are classified as high risk are expected to be treated in a certain way, those who are low risk are expected to be treated in another. If there are variations from those expected actions, they are to be explained.

Across the United States the use of such instruments is now quite widespread, and they are pivotal in systems in which risk control is an objective. It should be clear that such instruments do not eliminate the problem of errors. Whenever we use risk criteria, mistakes are made. The advantage of risk assessment instruments is that they make explicit the existence of such errors, minimizing them through the use of objective scales, and encourage the development of strategies—such as gradual release mechanisms—that at least modulate their effects.

Third, we now see much more emphasis on a variety of supervision methods rather than on the standard caseload that has been typical of probation. Small intensive caseloads are used for incapacitative purposes or to ensure that certain conditions of the courts are enforced when there is reason to believe that they will not otherwise be observed. Some treatment may be attempted in these small caseloads, but enforcement functions tend to be paramount. Most departments are moving toward gradations of caseloads in which there exists large caseloads for those who are judged to be at low risk, small intensive caseloads, and a variety of types in between. We expect to see more of this as the technology of supervision becomes more complicated and elaborate.

Fourth, inevitably, as there are increased variations in the forms of supervision, rules need to be enunciated about how persons move across these levels of supervision, as well as with respect to their initial assignments. Typically, this kind of decision was left in the hands of probation officers previously, but now we recognize the insufficiency of that solution. Intensive supervision techniques can be quite onerous in terms of their demands on probationers, and their unchecked use raises questions of fairness. For example, while a sentencing judge might put a person under intensive supervision for 6 months, how is the decision made whether or not that person should continue in intensive supervision at the end of that time? Are all these matters returned to the court, or is the department given discretion? What are the rules with respect to placing a person already on probation in intensive supervision? If we require outside review before a person is incarcerated, should we not similarly require an outside review before an officer can place a probationer in an intensive supervision program?

Fifth, in order to better focus resources and secure greater accountability, there is a trend towards requiring an officer to articulate the specific objectives of the supervision he or she is pursuing in individual cases. A major complaint against probation officers in the past has been a treatment model which allowed them almost unchecked sway over the lives of probationers. In order to guard against this, there are now being developed in many parts of the country techniques that require that specific behavioral outcomes be articulated for each person under supervision and related to the conditions of the court and the purpose of probation. By so doing, the officer's behavior becomes visible and potential or actual abuses of discretion more likely addressed.

Sixth, the growing emphasis on specificity of probation goals with respect to individual offenders facilitates another trend, the development of information systems which not only record characteristics of individual offenders, but create opportunities to sum up these characteristics for entire caseloads and indeed entire agencies, thereby enabling managers to operate at a much more strategic level. In one recent experiment, probation officers in one jurisdiction identified 150 cases who needed drug treatment programs and also indicated that such programs were nonexistent or of poor quality in 40 percent of the cases (*Controlling the Offender in the Community,* Clear and O'Leary, D.C. Heath Company, 1983, p. 146). It is only by specifying such outcomes and creating information systems that give feedback to individual officers and to whole systems that effective utilization of resources and development of new resources can occur. Variations of these systems are growing in a number of places across the United States and powerful tools in strategic planning are provided to managers and decision makers because of them.

As one reviews the future of probation, one is reminded that there is reputedly an old Chinese curse which says, "May you live in an interesting time." I have been to China several times but unfortunately have been unable to find anyone who confirms that it is a Chinese statement. But whether it is or not, it appears that probation supervision systems are going to live in a very interesting time. Inevitably, interesting times are somewhat of a curse because of the turmoil involved. But I can't think of a more exciting time to be in this field.