

## Probation and the Limits of Criminal Justice

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### Abstract

This paper considers what criminal justice can be expected to achieve and draws attention to its limited capacity to reduce crime. The paper goes on to explore the implications of this account for the work of probation and what probation agencies need to consider when they try to explain their work to the public.

### 1. Introduction

**While many scholars, policy makers, practitioners and (it is to be hoped) service users are convinced about the worth of probation, we need to be aware of two fairly consistent research findings: first, the public doesn't really know what probation officers do; second, they don't think that probation is much good.** This is a very crude summary, of course, but even those who would want to interpret these findings more optimistically would agree that probation needs to be better understood and its credibility enhanced. This paper will reflect on this. What can probation be expected to accomplish and how should it present itself to politicians, the judiciary and the public?

The paper argues for four propositions:

Criminal justice has no more than a small contribution to make to crime reduction – punishment even less.

1. Probation can make a ‘modest but useful’ contribution to this endeavour.
2. Probation should be valued as much for what it stands for as for its instrumental achievements.
3. It is better to start with ‘what’s right?’ than ‘what works?’

## 2. Criminal justice and crime

**First, it will be argued that criminal justice has no more than a small contribution to make to crime reduction – punishment even less. Seeing criminal justice as the best or only way to reduce crime leads to an inflated and over-burdened system and to disappointment when this strategy fails to achieve the expected impact.** Even so, in my country (and surely not only mine) politicians encourage the public to see criminalisation, detection and prosecution as the best response to ‘deplorable behaviour’. [5]

Within the positivist traditions, authoritative reviews of the personal and social characteristics of offenders (see, for example, [10]) and of the influences that appear to be associated with offending across the life course [23] draw attention to the influence of parents and carers, of other associates, of school, as well as socio-economic factors, notably poverty and limited access to resources and opportunities (social exclusion). Some scholars would also want to consider genetic influences on offending, as well as bio-chemical factors, diet and other examples of biological positivism. And it is surely a mistake to think that any one set of these factors as ‘the cause’ of offending. Probably there are many complex interactions among these factors that make it more or less likely that people come to commit crimes. Even if we knew the answer, we might not be able to change things. Or at least not through the systems of criminal justice. Then there are other factors that bear on overall crime rates – demographics / birth rates, movements of people, socio-economics. People have their own views about this.

**The point is that these are clearly beyond the reach of criminal justice. The implications of criminological research direct policy towards a range of social and educational measures, but very few of these are *criminal justice* interventions.** This does not mean that criminal justice is unimportant: on the contrary, trustworthy and effective criminal justice institutions have an intrinsic worth and can make a decisive difference for many people. But it is not reasonable to suppose that the agencies of criminal justice can solve the problems of crime.

We cannot rely on criminal justice and punishment to deal with crime. If we do this, we become frustrated and this leads to unwise policies. It has been well said that

“... we are tempted to adopt barbarous measures out of disappointment, or foolish ones of out despair, simply because we fail to achieve what we have no right to hope for in the first place.” [12]

Probation too can be buffeted by these politics of unrealism.

## 3. Probation: modest but useful

Does probation succeed in making a contribution to reducing crime? Is this even its purpose? Well, there is no such thing as ‘the purpose of probation’ – just the purposes that people may want to set for probation. Nowadays different countries normally set one or more of these objectives.

- To reduce prison numbers by providing alternatives
- To protect the public by controlling offenders in the community
- To reduce reconviction through rehabilitation
- To effect reparation and mediation [7][22]

These are different purposes and evaluation of their success would need different indicators. We shall have a look at these objectives one by one in more detail.

### 3.1 Reducing numbers of prisoners

**In principle, this can be achieved either by sending fewer people to prison (closing the front door) or by shortening sentences through early release mechanisms**

(opening the back door). But in both respects probation / community sanctions appear to achieve less than might have been hoped for. They do not reduce the prison population and may not even much slow down its increase. Rather than displacing people from custody, they just draw more people into a net and subject them to increased levels of intervention [6]. Across Europe, large numbers of people subject to community punishments are not offenders who might otherwise have gone to prison, but would have been dealt with in other ways - financial penalties, warnings, other community punishments [1]. Again, early release, it is felt, can only command public support if it is very intensively supervised. The scope for non-compliance and breach is correspondingly greater. Many of those early released are then recalled for violations of their conditional release. In 2006, almost 2/3 admissions in California were parole violations and many of these were technical [21].

### **3.2 Protecting the public**

**Serious offences committed by people under supervision have been a catalyst for change in many countries.** Even when inquiry shows that probation and other agencies have done everything possible, there is still often political criticism and changes made. Investigation may disclose procedural errors and, most commonly, poor communication among individuals and between agencies. Yet whether such errors made a decisive difference or probation could have done much to prevent such crimes are very much another matter. In short, while multi-agency public protection arrangements are believed to be very successful, these successes are by and large invisible to the public who only become aware of public protection work when things go wrong – a serious crime occurs and arrangements are judged to have failed. The public may doubt that community punishment could ever match the certainty that imprisonment seems to offer.

### **3.3 Reducing reoffending**

What of the third objective – that probation reduces further offending? It is well known that much of the evidence for programmes that ‘work’ originated in Canada, although these offending behaviour programmes have now been used in Europe for several years. Inevitably, different countries have different experiences [11]: so much depends on the manner of implementation, the practice context, training and understanding of staff, as well as on the characteristics of the offenders undergoing the programmes, as well as differences in law, practice and in culture [19]. Broadly, the evidence seems to show that general offending behaviour programmes, especially those based on cognitive behavioural psychology, can help reduce re-offending, if (but only if) they are well designed; delivered by skilled staff in a responsive manner; targeted at those ready and motivated to attend them. Further, the programme must be completed and be followed up and consolidated by case managers [19][2].

Desistance research has reminded us powerfully of the importance of social capital as well as human capital in reducing reoffending [17]. Here, probation can act as referrer and ‘broker’, helping people to access the services to which they are entitled, trying to work actively with resource holders to make sure that their services are genuinely available and overcoming obstacles. But once again there are limits. Life is always tougher for people with criminal records and in times of hardship and economic austerity, it will be tougher than ever.

Roughly how people behave is a function of three influences and the interactions among them:

- **motivation** – within the limits of the possibilities open to them, people will do what they choose to do. There is a crucial role for probation in offering encouragement and sustaining motivation to change, especially at difficult times. Few things are more disheartening and demotivating than the belief that

change is impossible and this is among the reasons why many accounts of probation values affirm this belief in the possibility of change.

- **abilities** – people can only do what they are personally capable of doing. This is another aspect of ‘human capital’, drawing attention to the need to develop skills that may conduce to a ‘good life’. People have their own conceptions of their good life, but it commonly involves personal relationships and activities like gainful employment that provide the means of living and building ‘commitments’ and ‘investments’. Probation and criminal justice social workers can try to help people to develop the abilities that this requires and / or liaise with specialised organisations to ensure that their clients have access to the necessary services.
- **opportunities** – people can only do what they have an opportunity to do. Desistance research has accordingly foregrounded the importance of social capital. Very many probation clients experience enormous social disadvantage and the persistence of these disadvantages will make desistance very much harder to accomplish. Part of probation’s responsibility, then, is to encourage society to support social inclusion, to reduce discrimination based on stigma and to enable its clients to access the services and opportunities that they need by advocating on their behalf. Rehabilitation (and associated ideas like reintegration and resettlement) imply not only a person who is trying to change, but a society willing to accept that they may change and to give them a fair chance to lead the better life to which they aspire. With regard to all these three factors, it is plain that probation work can make an important difference, but cannot always be decisive.

### **3.4 Reparation and mediation**

‘We should no longer simply ask ourselves “Are we providing effective treatments?” or “Are we inflicting consistent punishment?”, but should consider whether we are providing opportunities for those involved in and affected by offences to be dealt with in ways that respect their perceptions, responsibilities, needs and potential contribution to setting matters right.’ [18]

**There are some jurisdictions in Europe where restorative practices flourish – the Czech Republic especially comes to mind. But some of the older probation agencies have found it hard to incorporate this into their work and / or have been distracted by other political priorities that tend to regard this sort of activity as marginal, even as they pursue (often wholly unrealistic) targets of crime reduction.** Still there are reasons for optimism about the effects of restorative justice. Victim and offender ‘satisfaction’ is high – especially when compared with the experiences of conventional due process. And while it is unlikely that the restorative justice encounter, however vivid and compelling, can effect lasting changes in offenders’ behaviour, it can support reduced reoffending. Social support and opportunities to move away from offending are no less necessary, but restorative justice encounters can be a catalyst to engage with rehabilitative opportunities [20]. Probation can contribute – and in some countries already does contribute – to making this happen. So I conclude the argument for my second proposition: probation can make a ‘modest but useful’ (Robert Harris) contribution to crime reduction.

### **4. What probation stands for**

Third, however, probation should be valued as much for what it stands for as for its instrumental achievements. The instrumental claims made for probation – to rehabilitate, to reduce the prison population, to protect the public – are, as we have just seen, always contestable and perhaps the worth of probation does not rest solely or even mainly on this. A commitment to treating people well in order to bring out the best in them, the belief that people are not reducible to their worst behaviour (‘offenders’) and

the recognition of the value of social inclusion will be more effective in reducing reoffending than threat, incarceration, stigmatisation and exclusion (all of which are represented by the prison). At its best, probation represents the idea that society has responsibilities towards people who have offended, as well as claims against them on the basis of the wrongs they have done. Communities have responsibilities towards (ex)offenders and this is not a technical matter than can be handed over to professionals while everyone else turns their back.

The challenge for probation is to work out how these values are to be expressed in practice. Desistance research in particular is adding considerably to our understanding of how probation is experienced and what it is that service users value. The professional relationship appears to be central:

**‘The desisters and their probation officers shared similar views about the characteristics they deemed crucial to such relationships: having someone that they could get on with and respect; who treated them as individuals; was genuinely caring; was clear about what was expected of them and trusted them when the occasion called for it.’** ([14], [22])

Unsurprisingly, offenders resent a sense of being merely ‘processed’, discourtesies and apparent lack of concern. Desisters, like probation officers, emphasise the need to identify and address causes of offending. They also highlight how essential the individual’s own motivation is to the change progress [22].

Farrall [8] found that desistance could be attributed to specific interventions by the probation officer in only a few cases, although assistance in identifying employment opportunities and mending damaged family relationships appeared particularly important.

**‘However, it is noted that the process of talking about their life with probation officers did lead to the probationer clarifying and identifying problems which they could work on. Whilst it may be that the probation officer did not ‘do much’ in terms of solving these problems, the identification of the problem was also a step which, it can be argued, would not have been taken without the help of the officer.’** [22]

McCulloch [16] accordingly argues for an increased level of probation involvement in families and local communities, emphasising their significance in offenders’ lives. My third proposition, then, is that probation is to be valued for what it represents in and through its work, what it ‘says’ as well as well what it does and must have regard to how it is perceived by policy makers, by the general public and by its service users.

## **5. ‘What’s right?’ is a better first question than ‘what works?’**

My fourth and final proposition is that while policy and research often set for themselves the question *what works?*, a better starting point might be *what’s right?* The discourse of human rights, a shared international language in which ethics may be debated, can offer a promising foundation for discussing probation’s worth and potential.

**‘Human rights ... include both liberties and claims, being used in political debate to remind governments of the limits of their powers over their citizens (liberties) and of their obligations to create circumstances in which people can thrive and prosper (claims). Human rights are especially important in criminal justice and punishment, where the coercive powers of the state are so manifest .’** [4]

Giving first attention to the (contestable) claims of *what works* can lead to human rights being seen as obstacles to effectiveness, whereas

‘... the pursuit of values such as justice, tolerance, decency, humanity and civility should be part of any

penal institution's self-consciousness - an intrinsic and constitutive aspect of its role - rather than a diversion from its “real” goals or an inhibition on its capacity to be “effective”.’ [11]

It is no easier, of course, to resolve what is right than to find out what works, but human rights serve to remind us of what the demands of humanity insist about the way in which people are to be treated in the processes of criminal justice. I have argued elsewhere that often, perhaps typically, what is right also turns out to be what works best (Canton 2013). Here legitimacy and justice are central concepts. Legitimacy (with policy makers, courts, the public and service users) is achieved by giving a clear account of the work, arguing for its purposes and its values, and then by doing the work well, with justice and integrity. It is not achieved by making exaggerated and implausible claims about punishment or rehabilitation or public protection. This must be borne in mind as probation continues the difficult challenge of trying explain its work.

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**TAG:** *criminalità organizzata, crimini, diritti umani, leggi criminali, leggi penitenziarie, Diritto dei Paesi dell'UE, Diritto dell'Unione Europea, procedura penale europea ed internazionale*

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