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CONSENT TO PROBATION IN ENGLAND AND WALES: HOW IT WAS ABOLISHED, AND WHY IT MATTERS

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Peter Raynor

Abstract:

Much of probation theory and probation training in Britain during the 1980s emphasized the importance of ‘contracts’ or negotiated agreements between probation officers, probationers and the sentencing Court – for example, joint decision-making was central to the influential ‘non-treatment paradigm’ and its variants. However, the legal requirement of consent to a probation order was abolished in 1997, partly because it was seen as diminishing the authority of the Court. This paper discusses the arguments and attitudes which lay behind abolition, and considers how far the absence of formal consent should be seen as making a difference in practice. Recent studies of supervision skills, therapeutic alliance, compliance with probation, sentencer involvement in supervision, and the role of individual choice in desistance from offending all point to the continuing importance of co-operation and joint ownership of the supervision agenda. Although these can exist in the absence of a formal requirement for consent, they have greater support and legitimacy when such a requirement is present. Finally, the article explores how official thinking and political gestures lead to decisions which are detached from the realities of practice, and discusses some of the current dangers which arise from this.

Introduction: the end of consent

The aim of this article is to describe and explore an episode in the history of the probation order in England and Wales during the late 1990s, which passed almost without comment at the time, but represented an important departure from what had until then been the theoretical foundations of probation practice. Buried in the detail of the Crime (Sentences) Act of 1997 was a clause seen as little more than a tidying-up exercise by civil servants, which abolished the requirement for a person made subject to a Probation Order to give his or her explicit consent in Court to the making of the Order and any additional requirements in it. This change attracted little attention from probation's leaders at the time. They had other preoccupations: for example, there was a generally perceived need to rebuild the Service's credibility following the appointment of Michael Howard as the responsible Minister in 1993 and the consequent shift away from a policy of developing 'alternatives to custody', which had been pursued with some success in the 1980s and early 1990s (Raynor and Robinson 2009). Whilst Howard proclaimed that 'prison works' (Howard 1993) the preferred strategy in the Probation Service was to try to show that probation worked better, and the Service was beginning to embark on the enthusiasm for 'what works' and effective programmes which was to lead to the world's largest (albeit flawed) experiment in evidence-based correctional practice. The spirit of the time favoured finding effective replicable things to do *to* offenders rather than ways of working *with* them, and consent was not a priority. Although the first full evaluation of a cognitive-behavioural programme in a British probation area actually spent a good deal of time exploring whether probationers on the programme had received a full explanation and had the opportunity to make an informed choice (mostly they had: see Raynor and Vanstone 1997) and even whether probation officers had had a voice in the decision to implement the programme (they had), these issues were forgotten in the rush to

find magic bullets and ways to fire them in bulk. These managerial challenges left little time for what many would have regarded as philosophical niceties.

The decision to abolish consent, and the official reasons for it, are set out in Government documents of the mid-1990s, and some aspects of it are discussed in an earlier article (Raynor 2012). The Criminal Justice Act of 1991 had created the concept of the ‘community sentence’, which was a penalty, like imprisonment, but to be served in the community under supervision. Until then, probation had been understood as an order made ‘instead of sentence’, reflecting its early Anglo-American history: it originally developed out of the practice of conditional discharge, when Courts refrained from exercising their power to sentence in return for promises of good behaviour from the defendant, but could sentence for the original offence in addition to any new offence if the defendant was convicted of a new offence during the period of discharge. This required the defendant’s consent, because it was in effect an agreement between the defendant and the Court. Probation (meaning ‘proving’, a proof or test, giving the defendant the opportunity to demonstrate reform) added to the conditional discharge an element of personal supervision, on behalf of the Court, using close personal contact with an appropriate person to form a relationship with the probationer and to provide help and guidance (Vanstone 2004). Although other models were used in some jurisdictions (for example supervision backed up by suspension of prosecution, or suspension of imprisonment [Vanstone and Raynor 2010]), the Anglo-American approach was widely adopted: Max Grünhut, writing about probation in Germany, argued that the strength of probation ‘is due to a combination of two things, conditional suspension of punishment, and personal care and supervision by a court welfare officer’ (Grünhut 1952, 168). In Britain probation was understood as an Order of the Court rather than a sentence, because the power to sentence for the offence was retained by the Court and could be used later if the

probationer did not comply with the requirements of the Order to which he or she had consented. The duties of the probation officer, as laid down in the original British legislation, included a duty to ‘advise, assist and befriend’ the probationer (Probation of Offenders Act 1907, section 4[d]).

The 1991 Criminal Justice Act altered this legal framework radically by making probation a sentence. Probation was to be one variety of ‘community sentence’: community service was another. Probation was no longer to be seen as an order made ‘instead of sentence’. These aspects of the 1991 Act were fairly readily accepted by probation leaders and most penal reformers: the overall aim of the Act was to reduce the use of imprisonment, and the probation service was being offered a ‘centre stage’ role in achieving this, which looked like good news. In the event, the main decarcerative provisions of the Act were quickly abandoned when the Government lost its nerve in the face of criticism from the press and from some sentencers. The prison population, after an initial short-lived decrease, went up again, but the changes relating to probation stayed. By the mid-1990s the Government was beginning to see the legal requirement of consent to a probation order (required since Britain’s original probation legislation in 1907) as an anomaly. The official reasoning behind its abolition in 1997 was as follows: ‘Probation is no longer a voluntary undertaking accepted by the court on condition of good behaviour, but a sentence of the court which requires compliance.’ The requirement for consent was ‘a derogation from the authority of the court’ and ‘can give the impression of a court being hesitant in its decisions or, worse, subject to the whims of an offender’ (Home Office 1995, 43). We will return to these arguments later. First, it is important to look at this decision in the context of some of the thinking and writing which had helped to shape British probation up to that time. In much of this work, questions about consent and coercion were central.

Therapists, radicals and the client-centred approach

The working culture and practice theories of probation in England and Wales in the 1970s and 1980s are best understood in the context of its historical development. (In this article, ‘British’ probation mainly means probation in England and Wales: Scotland has had no independent Probation Service since the early 1970s, although probation practice and theory have continued to develop there in the context of ‘criminal justice social work’ within Local Authorities.) During the third quarter of the 20th century probation expanded as part of the post-war development of a comprehensive Welfare State, and it needed a theoretical base to sustain expanded training courses which were being set up mainly as part of social work training in Universities. Social work theorists at that time looked to America, where training was more established, and were strongly influenced by American approaches to psychotherapy and counselling (see Raynor and Robinson 2009). In these approaches they found an emphasis on voluntarism: psychoanalysis stressed that patients’ consent was needed, and Carl Rogers developed an entire system of therapy around the principles of non-directive and client-centred practice (Rogers 1951). Social workers came to think of themselves as practitioners of a psychosocial therapy (Hollis 1964). Probation theorists, promoting the idea of social work in a criminal justice setting but working typically with people who were subject to a degree of control through the requirements of court orders, struggled to understand how similar principles could be embodied in their own work: for example, an influential article by Hunt (1964) argued that consent could, in effect, be retrospective, when probationers came to see that what had seemed oppressive or coercive at the time was, in fact, good for them. A much longer and more detailed version of a similar argument was presented in a widely read text by Foren and Bailey (1968), who argued in essence that probationers required direction because they were immature and not yet capable

of deciding everything for themselves, but as they matured they could see why the direction was in fact helpful. Nobody, however, was suggesting that consent and voluntarism were unimportant issues, or could be dispensed with. In my experience as a probation officer, including hundreds of hours of court duty, sentencers always remembered to ask for consent, sometimes in a perfunctory way, but also sometimes with careful and thorough attention to whether the defendant had properly understood what was proposed. Consent was usually given, but not always. If it was not given, the consequence would be a sentence, but not necessarily a severe one. I can remember very few custodial sentences passed in these circumstances: more often the result would be a fine.

The late 1960s and 1970s saw another period of expansion both in probation and in mainstream social work, and an increasing tendency for both to become graduate professions. Some courses set out to recruit graduates and to offer postgraduate qualifications. Recruiting graduates in the late 1960s and early 1970s meant recruiting people who had experienced the political upheavals in the Universities of the late 1960s, many of whom had been politicised as a result, and were choosing careers in social work or probation in the hope of bringing some benefit to disadvantaged sections of the community. Public service was a more attractive prospect than simply boosting the profits of some employer. Although (in almost all cases) they were not the subversive Marxist infiltrators that later Conservative politicians liked to imagine (see Aldridge and Eadie 1997), many of them brought a more critical edge to their understanding of crime and society, and embraced modern criminological concepts such as labelling and deviance. They (or we – I was recruited in 1970) were undoubtedly more inclined to question authority generally than many of their predecessors and seniors, and they usually wanted to engage with their clients on a more equal basis, not assuming pathology

and providing 'treatment' but instead taking their views seriously, understanding their predicaments and aiming for a collaborative approach to problem-solving.

Contemporary social work theory was also moving away from the tendency to pathologise and 'treat' towards a more collaborative approach: a good example was the 'task-centred casework' advocated by Reid and Epstein (1972) which emphasized the importance of agreement on target problems, priority tasks and time limits. This generated some very interesting experiments in Britain, including in the probation service (Goldberg et al. 1985). To cut a long story short, social work thinking in probation and elsewhere was developing the idea of negotiated agreements or 'contracts' between helpers and clients, and probation theorists had to think about how this approach to practice could be accommodated within the framework of a Court order. One influential paper by Malcolm Bryant and his colleagues (1978) argued that the probationer had a duty to the Court to comply with the basic requirements of the Order, but that any agreement to engage with the probation officer in a process of help and problem-solving was an additional, informal contract, not strictly part of the Court order. A more detailed and criminologically informed paper by Bottoms and McWilliams (1979) famously argued for a 'non-treatment paradigm' of probation practice, with an emphasis on 'shared assessment' and 'collaboratively defined tasks as the basis for social action'. These arguments have remained influential through subsequent restatements and revisions (Raynor and Vanstone 1994; McNeill 2006) and continue to influence probation practice today.

My own involvement in these debates about contract and consent was largely contained in the book 'Social Work, Justice and Control' (Raynor 1985 and 1993), which argued that a probation order should be understood as a three-way contract between Court, probation

service and probationer, negotiated in detail during the pre-sentence report process and formalised in Court. In essence the contract between the Court and the probationer consisted in a withholding of punishment, conditional on the probationer's agreement to comply with probation requirements, and perhaps also to 'make good' in some way by reparation or by working to resolve the problems which led to offending. Failure to comply could terminate the contract and lead to other disposals, though these need not necessarily be more punitive. The contract between the Court and the probation service involved monitoring compliance, reporting breaches and trying to make the Order a success, and the contract between client and supervisor could (following Bryant) be limited to respect, negotiation and facilitating formal compliance, or could incorporate further agreements about working on problems and appropriate help. Breach action could only follow a failure in formal compliance, not a failure to be 'helped' (this distinction between formal and 'substantive' compliance has also been usefully explored more recently – see Robinson and McNeill [2008]). The later edition of 'Social Work, Justice and Control' suggested that the Court's sentence could be understood as a package, with the size of the package determined by proportionality and the seriousness of the offence, and the content by what was most likely to be helpful and effective in relation to the particular offender and the reduction of future offending.

As I look back on this body of work three decades later, I have to recognise that much of it, including mine, was of rather uneven quality; nevertheless, such thinking was influential at the time. For example, when Martin Davies carried out research on probation training for the Home Office (which was the Government department responsible for criminal justice until the Ministry of Justice was set up in 2007) he found that 'Social Work, Justice and Control' was rated the second 'most significant' book by trainee probation officers in 1987-8 (Davies 1989). First place, deservedly, went to McGuire and Priestley's 'Offending Behaviour: Skills

and Stratagems for Going Straight' (1985). Interestingly, as part of the same research project Davies developed a questionnaire to identify probation officers with 'anti-correctional pro-client attitudes', i.e. left-wing officers, who could allegedly be distinguished partly by their attitudes to electronic tagging (Davies and Wright 1989). I am not, however, aware of any official attempt to use this test to purify the workforce. To sum up, this brief survey of aspects of probation theory in the 1980s demonstrates the centrality of contract, or negotiated consent, in the theory and practice of the time. All this, however, seems to have been forgotten or never known by the architects of the 1997 Act, who were so concerned to protect the Court from the 'whims' of the offender.

Consent and cooperation in recent research

Recent research also tends to support the view that when people are under supervision as a result of offending, their views and choices matter. To mention just a few examples, a recent study of supervision skills shows significantly less re-offending by people supervised by more skilled staff, and part of being 'more skilled' is the ability to engage the motivation and participation of probationers and their active co-operation in problem-solving (Raynor et al. 2014). Similarly, research on effective psychotherapy over many years has demonstrated the importance of therapeutic alliance (see, for example, Bordin 1979). Work which engages the co-operation of clients or service users tends to be more effective. Probationers themselves, given the chance, tell us much the same. For example, in a recent study of compliance with probation (Raynor 2013) three probationers who has successfully completed their orders after initial failures of compliance described how they liked probation officers to be fair and reasonable and prepared to discuss how to make a probation order work: 'We managed to come to an agreement on one more chance, and I did it'; 'You can get your point across, explain your reasons'. Compliance with probation is constructed and negotiated in the

relationship between supervisor and supervisee, not simply conjured into being by a court order (Ugwudike 2013). Even the growing field of sentencer involvement in supervision, pioneered in drug courts and now extending to other fields, typically involves explicit agreements and follow-up hearings in which supervised people give an account of their progress, difficulties are explored and problems addressed (McGuire 2003; McIvor 2010). The process seems to work most successfully when sentencers have the interpersonal skills to engage in a productive discussion with defendants and to elicit substantive compliance: ‘through engaging offenders in regular dialogue about their progress and circumstances, judges can improve offenders’ compliance with court orders and play an active role in supporting their efforts to change’ (McIvor 2010, 233). There is no indication at all that sentencers feel their authority or dignity is undermined by these discussions with offenders: if anything, one could argue that the achievement of good outcomes strengthens their authority. In addition, the importance of effective engagement with people under supervision has been recognised recently by the Ministry of Justice itself in its Offender Engagement Programme (OEP: Rex 2012; Rex and Hosking 2014), a training initiative based on ‘core correctional practices’ (Dowden and Andrews 2004) and partly imitating a Canadian training initiative (Bonta et al. 2011); however, like so many promising initiatives, the OEP has now been discontinued and its future impact is uncertain.

It can, of course, be argued that the practices outlined above do not actually *depend* on giving explicit consent in Court to the requirements of probation. Indeed, some of them have been documented in jurisdictions with no requirement for consent (e.g. England and Wales since 1997), and it is clear that the process developed between supervisor and probationer is not simply the product or reflection of legal rules. It is also true, as some argued in the 1990s, that consent in Court could be unthinking and reflect only token compliance (‘You say yes in

Court because it gets you a bit of time. If you say no it's rude and cheeky to the judge . . . you say yes thinking you are going to do it' – probationer quoted in Raynor 2013, 113).

Nevertheless, the fact that consent *can* have little meaning does not mean it has to. If it is backed up with careful discussion of options, requirements and the purpose of probation, for example during the pre-sentence report process, then it can help to motivate, and it can be used as a reminder of original intentions when these waver later in the supervision period. This was often my experience as a working probation officer in the 1970s. In addition, if legitimacy enhances compliance (Tyler 1990) then there would appear to be greater potential for perceived legitimacy in a system which takes defendants' choices seriously in Court than in one which appears not to be interested in them. If part of the purpose of a probation order is to encourage the probationer's active co-operation and participation, denial of choice seems a strange starting point. Defendants can make choices in or around Court about other matters, such as how or whether to instruct solicitors, whether to swear an oath when giving evidence, whether to give evidence at all, whether to apply for bail, whether to ask for time to pay a fine, etc. – but the expression of opinion by a potential probationer seems to have been regarded by the authors of the 1997 Act as an impertinence. This is an example of belittling and disregard of the convicted offender, and reminds us that England and Wales are among the few countries in Europe that still resist the idea that prisoners should be allowed to vote in elections.

Deciding without understanding: why listen when we know best?

In other ways too the abolition of consent was an indicator of broader issues and assumptions. Whilst some politicians have been inclined to use probation as a political football, and others (to change the metaphor) have seen it as a convenient stage on which to display tough gestures for their followers to admire, senior British civil servants are a highly educated and

usually highly competent elite, not prone to impulsive decision-making or theatrical public displays. However, they are typically more used to talking to each other, and to other alumni of the elite Universities, than to the mass of ‘ordinary’ citizens whose lives they administer. They do not find it unusual to decide what is best for others without actually asking them. This is also a well-established tendency on both the Right and the Left of British politics: Conservative politicians have a long tradition of paternalism, probably derived from the traditional relationship between rich landowners and their tenants and servants, whilst policy-making in the Labour party can seem equally distanced from the ordinary citizen.

In a recent book about the causes of policy errors by British Governments of both major parties, Anthony King and Ivor Crewe refer to several features of the British policy-making process which make mistakes more likely (King and Crewe 2013). One of these is ‘cultural disconnect’, in which decisions are made without thinking about or understanding the circumstances and way of life of those they will affect. Among other examples they cite the case of Nicholas Ridley, a wealthy aristocratic Minister in one of Margaret Thatcher’s Conservative governments, who was asked how an elderly couple could afford to pay new taxes and replied ‘Well, they could always sell a picture’ (King and Crewe 2013, 253). I have described elsewhere (Raynor 2013) the experience of attending a seminar on compliance with supervision at the Home Office in the 1990s, where a genuinely puzzled senior civil servant asked why offenders on probation could not put their appointments in their diaries like normal people. This failure to understand the often chaotic world of persistent offenders is widespread. Of course senior civil servants cannot really be criticised for not knowing much about ways of life so far removed from their own regular hours and suburban comfort, but they can and should be criticised when they pay little attention to those who have some specialist knowledge of offender supervision, or indeed to the service users themselves. The

long process and difficult transitions involved in desistance from crime and the construction of a non-offending identity were not much thought about in official circles until the dissemination of new literature on desistance in the early years of the 21st century (see, for example, Maruna 2001; McNeill 2006), and the central role played by human agency and offenders' own choices in the process of desistance was clearly not part of official thinking in 1997. The signs of 'cultural disconnect' are clear, though perhaps not on the monumental scale of Ridley's belief that the poor could raise money by selling their art collections.

One final point to be made about the abolition of consent is that it was a precursor of worse to come. The modern style of policy making, in which populism rules and inconvenient experts are disregarded as just another obstructive interest group, has led on to the current state of confusion and distress in probation in England and Wales, as the system prepares for a massive and untested programme of forced privatisation (Ministry of Justice 2013). Significantly, these changes were to have been subject to pilot studies, but politicians then decided to go ahead anyway without bothering to pilot them. One suspects that the politicians, mesmerised by the private sector, are more interested in achieving privatisation as an end in itself than in any (rather improbable) improvements in effectiveness which might result from it. The actual outcomes are a secondary consideration, and all this is to be implemented at breakneck speed in order to be in place, and largely irreversible, by the time of the next General Election in 2015, in case that produces a Government less fixated on this kind of policy.

At the centre of the 'reforms' is a policy described as 'Payment by Results' (PBR), meaning that part of the Government's payment to the private contractors will be conditional on the achievement of targets such as reductions in re-offending. However, this apparently rational

approach to improving effectiveness appears likely to have some perverse and self-defeating consequences. It is already apparent that in order to be rewarded for meeting targets, some private and voluntary sector organisations will work selectively with those service users who are most likely to help them meet the targets (a process known as ‘creaming off’), and ignore the needs of others (‘parking’ them). A recent study (Merriam 2014, p. 208) includes the following quotation from a manager in a voluntary organisation which is already involved in PBR: ‘We’ve got a “cream and park” system, which is cream off those near targets and park the rest. With the payment by results model we have to get results quickly.’ In this way contemporary developments provide yet another example of this article’s underlying theme: the individual wishes and needs of supervised individuals are easily sidelined by political, managerial, and now commercial imperatives.

Sailing in the Ship of Fools

When the distinguished civil servant and scholar David Faulkner wrote his analysis of British criminal justice policy (Faulkner 2001) he subtitled it ‘A Field Full of Folk’, an image drawn from William Langland’s 14th century religious poem ‘Piers Plowman’. Sadly, the recent history of the Ministry of Justice and particularly the National Offender Management Service (NOMS, set up in 2004 to unify the administration of prisons and probation) can suggest a rather different ancient image: the Ship of Fools. Originating in Book VI of Plato’s Republic as an allegory of political confusion, the Ship was popularised in an early international best-seller by the 15th century German humanist Sebastian Brant, published as ‘Stultifera Navis’ by J. B. von Olpe in Basel in 1498 (and in several other languages). This enduring image has inspired many artists, including Albrecht Dürer, Hieronymus Bosch and more recently Oskar Laske; it has been used by literary figures as varied as Michel Foucault and the ‘Unabomber’ Theodore Kaczynski, and it has attracted musicians including the Doors and the Grateful

Dead. The essential features remain the same: a ship full of ignorant, deluded or lunatic passengers and crew who argue and fight over how and where to sail the ship, but lack the skills and knowledge to avoid the inevitable shipwreck. In some variants the captain is weak and easily persuaded; in others, he is himself one of the deluded unfortunates, blindly following his chosen disastrous course. Part of the tragedy of life aboard the ship is that not everyone on it is a fool, but those who have a good idea of the appropriate destination and how to get there cannot find enough others to agree with them, and their warnings about the rocks ahead are ignored.

It is perhaps unnecessary to push this analogy further. Its relevance will be recognized by many people who have worked in or near NOMS in recent years. The remaining problem is how to get off the ship. Probation might become less of a political football through a re-emphasis on local connection and on accountability to the Courts rather than to a central Government Department; however, it will require significant political changes before such options become feasible again in England and Wales. In the meantime, those who try to carry out useful probation research on better approaches to practice have other choices: research is becoming more international and comparative (for example McNeill, Raynor and Trotter 2010; McNeill and Beyens 2013), and England and Wales are increasingly revealed to be exceptions, well out of the probation mainstream, rather than 'world leaders' as is sometimes claimed. My own solution has been to move much of my research (though not myself) offshore: the Channel Island of Jersey, although parts of its financial services industry are controversial, has a small, well-resourced and strongly evidence-based probation service, answerable to the Courts (which require consent before a probation order can be made) and not subject to significant political interference. It has encouraged and supported research which would have been difficult if not impossible to conduct in present circumstances in

England and Wales (see, for example, Raynor and Miles 2007; Raynor 2013; Miles and Raynor 2014; Raynor, Ugwudike and Vanstone 2014). In addition, probation in Jersey is a public service for the benefit of the community, and the instruments and methods developed in the recent research on supervision skills are not being marketed for profit but are freely available on the Jersey Probation and After-Care Service website. In a recent television broadcast the French Minister for Justice suggested that Jersey's probation service could be a model for France (francetvinfo, 2014).

Other travellers may find other ways to leave the Ship of Fools, or indeed the ship itself might find its way, somehow, to a more satisfactory destination. As far as probation is concerned, I would suggest that this would include a reconfigured and more traditional understanding of the purposes of probation, and of the relationship between punishment, help and consent. Even if shipwreck is unavoidable, a knowledge of the past, and of what was once seen as good and helpful practice, may be useful in the process of reconstruction. This article is intended as a modest contribution to describing where we have come from.

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