

Probation: Myths, realities and challenges

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INTRODUCTION

In very many jurisdictions in Europe and around the world, recent decades have seen very significant developments in relation to offender supervision in the community. Probation institutions (meaning those institutions responsible for implementing all sorts of community sanctions and measures (CSM) at whichever stage in the criminal justice process) have grown remarkably both in their scale and in their geographical reach. The forms of supervision that they deliver have also intensified so that probationers (meaning here those subject to CSM) now may face a range of different and more onerous conditions; for example, relating to residence in or exclusion from particular places, medical, psychiatric or psychological interventions, offending behaviour programmes, drug or alcohol related interventions, electronically monitored curfews, and so on.

The rapid expansion of offender supervision (and its changing forms) has been remarkably under-researched, at least relative to the attention that has been paid to 'mass incarceration'. However, recent efforts have begun to redress this neglect, partly under the auspices of the COST Action on Offender Supervision in Europe (IS1106: see www.offendersupervision.eu) which I chair. That research network's first book contains a brief, thematic review of the available European research on how supervision is experienced (by those subject to it) and practiced (by those who deliver it), as well as on associated decision-making processes and on the influence of European norms and standards (McNeill and Beyens, 2013).

For many years now, advocates of probation expansion have developed and deployed a number of compelling arguments. Perhaps the most influential of these, at least in the European context, has been that probation represents a much more cost-effective way of dealing with many offenders than imprisonment. It is a much less expensive sanction and avoids many of the unintended criminogenic consequences of imprisonment (e.g. disrupting family ties, diminishing labour market participation, stigmatizing and alienating offenders). The best available evidence suggests that, in general, reconviction rates are slightly lower for CSM, even taking into account differences between the prison and probation populations. From a moral or principled perspective moreover, advocates argue (or assume) that probation is inherently less problematic than prison in terms of respect for human rights and human dignity, since it obviously damages the person (and their family) less and thus represents a more parsimonious and less destructive punishment. Of course, critics sometimes see this as a weakness and suggest that probation is

insufficiently onerous to represent an adequate sanction for some offences and some offenders.

Whilst I continue to regard myself as an advocate of the development of probation systems and practices, for precisely the sorts of reasons outlined above, my research and experience over the last few years has compelled me to qualify these arguments – and to call for more critical and measured sort of advocacy for probation; one that recognizes its potential costs and harms as well as its benefits. The question becomes less whether probation is a useful and constructive institution of justice and more **under what conditions is probation a useful and constructive institution of justice?**

THREE MYTHS AND ONE ILLUSTRATION

Perhaps the simplest way to illustrate my reasoning is to reflect on the example of my own jurisdiction. The Scottish experience of the last 40 years is helpful in debunking three myths about probation:

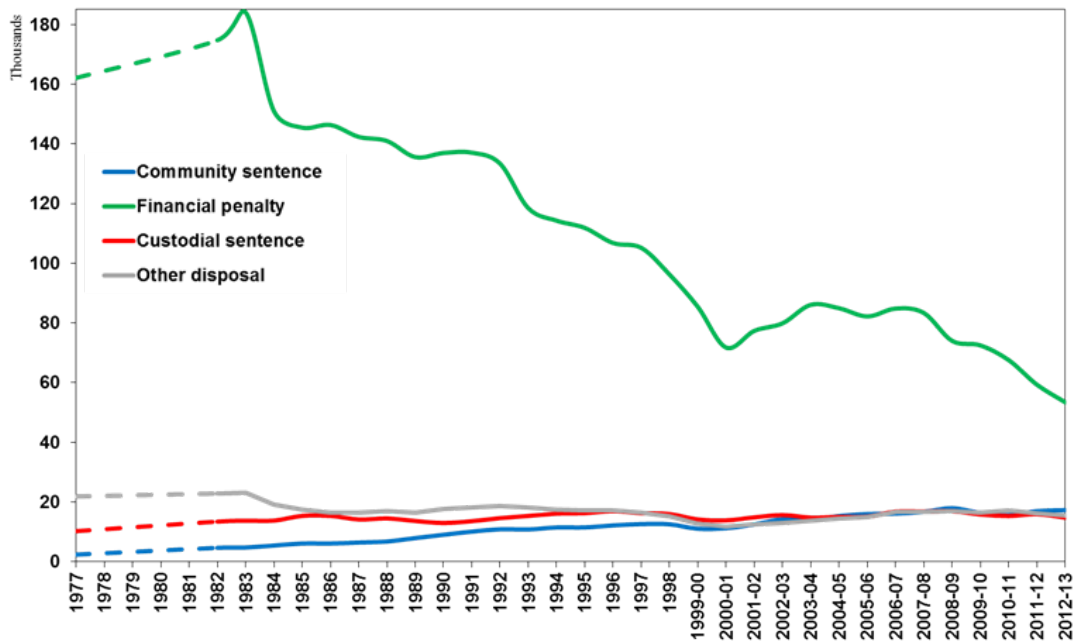
1. The growth of probation shrinks the prison population.
2. Making probation ‘tougher’ and/or more ‘credible’ and/or more ‘effective’ and/or more ‘professional’ increases public and judicial support for it.
3. Doing probation is easier for offenders than doing prison time.

In Scotland, between 1977 and 2008-09 (the peak year) we witnessed a near nine-fold increase in community sanctions and measures (from just over 2,000 to about 18,000, and this figure excludes post-release supervision)¹. Not only have the numbers of people under such supervision increased, the legal forms of supervision have multiplied, as have the range of conditions to which people can be subject. This remarkable growth has been achieved partly through Government investment in ring-fenced funding (since 1991) of the criminal justice social work services delivered by local authorities, through the implementation of national objectives and standards and through the development of social work education and training. In the last decade, rates of reconviction of those subject to CSM have declined (especially relative to those receiving custodial sentences). The credibility of criminal justice social work services has improved.

However, over the same period, the number of custodial sentences in Scotland has also increased, from about 10,000 to about 16,000. This puzzling simultaneous rise in *both* probation *and* custodial sentences is largely explained by the dramatic decline in the use of financial penalties – from around 160,000 in 1977 (and 180,000 by 1983) to about 70,000 by 2008-09 (and less than 60,000 in 2012-13). Though it would take more detailed research to establish the precise relationships between the fates of the three main sorts of penalties (financial, supervisory and custodial), *prima facie* it seems that

¹ The Scottish data, charts and tables discussed in this section were supplied directly by Justice Analytical Services in the Scottish Government.

probation's growth has, for the most part, displaced financial penalties rather than custodial sentences.



In the Scottish case, this finding may be accounted for in part by reforms elsewhere in the justice system. Since more and more 'low-level' offences and offenders have been diverted from court processes altogether (often through fines or fixed penalties applied by prosecutors), the profile of the population coming to court for sentencing today is different from that in the 1970s. If that population now includes a higher proportion of more serious offences and offenders, then that might account for the decline of the *fine as court imposed sanction*.

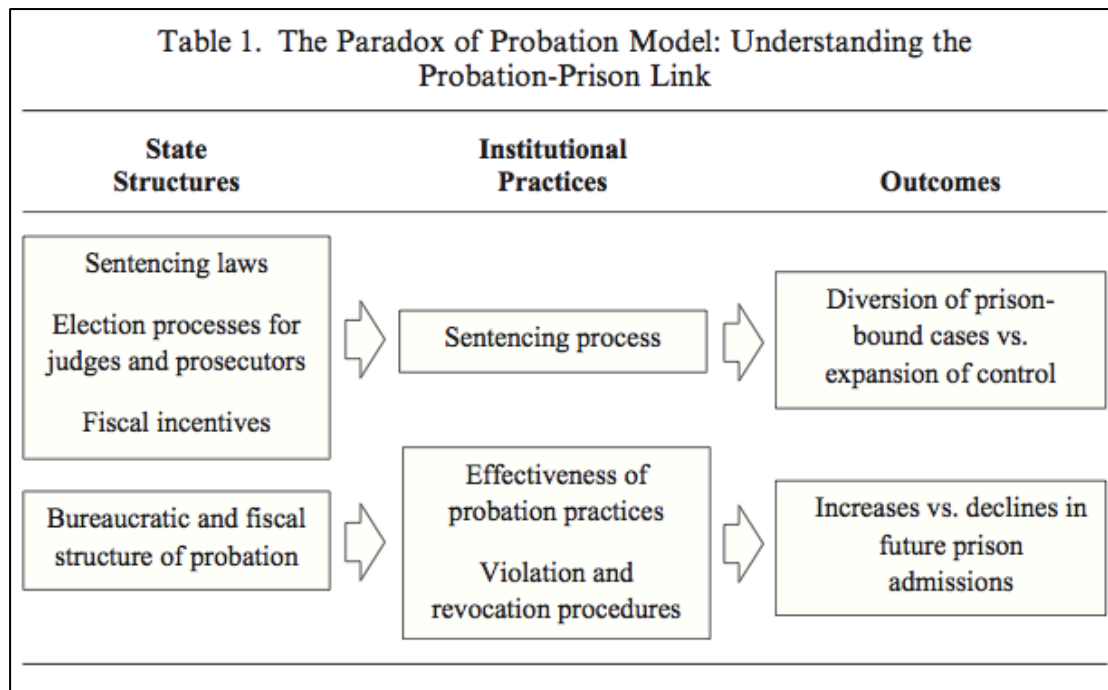
However, since the total number of convictions has also fallen significantly in Scotland over the same period, the rise in the prison population, and the apparent failure of probation to do much to arrest that rise remains a matter of concern. Indeed, examining the data about the criminal histories of people receiving supervisory and prison sanctions in Scotland does not provide strong evidence that probation is successfully diverting higher tariff offenders:

Community Service Order (CSO)	Total number of all offenders = 100	Number of previous convictions			
		None	1 or 2	3 to 10	Over 10
2007-08	3,501	35	25	29	11
2008-09	3,727	34	26	29	11
2009-10	3,631	36	24	29	11
2010-11	3,668	34	25	29	12

Probation Order (PO)	Total number of all offenders = 100	Number of previous convictions			
		None	1 or 2	3 to 10	Over 10
2007-08	4,634	23	23	35	19
2008-09	5,150	23	23	36	18
2009-10	5,048	21	24	35	19
2010-11	4,597	20	22	37	21

Discharged from custody	Total number of all offenders = 100	Number of previous convictions			
		None	1 or 2	3 to 10	Over 10
2007-08	7,060	12	11	32	46
2008-09	7,404	12	11	31	46
2009-10	7,432	12	10	32	46
2010-11	7,289	12	10	29	49

A recent US research study has helped us to better understand the complexities of the relationships between probation and prison growth. Based on an analysis of data across all US states and over 30 years (from 1980-2010), Phelps (2013) concludes that, under different conditions, probation can be both a genuine alternative to imprisonment and a form of net-widening. The following figure sets out the key conditions and relationships which affect the which of these outcomes arises:



Phelps (2013: 58)

There is too little space to elaborate these relationships properly here, but perhaps the key point is that reforming probation itself (for example, in relation to its effectiveness, or its approach to breach and violation of conditions, or even in relation to its symbolic and expressive aspects) is an insufficient means of seeking to reduce prison populations. The wider structural contexts and the ways in which sentencing processes are governed and implemented are also crucial influences on outcomes. In order for probation to reduce prison populations and to avoid a net-widening effect, its systemic context needs to facilitate and incentivize penal reductionist goals (through political and sentencing reform); it needs to be effectively targeted; its practices need to be effective; and its management of breach/violations needs to be careful and considered.

In the Scottish case, some similar findings emerged from small scale research into efforts to establish Probation Alternative to Custody projects in the 1980s and 90s (Creamer, Hartley and Williams, 1992). When intensive probation was carefully targeted, when pre-sentences reports were well-prepared, and when judges had confidence in the quality of the supervision, probation could exercise an influence for penal reductionism.

The recent Scottish Prisons Commission (2008) drew on similar arguments and evidence to recommend not just internal reforms to the organization and practice of criminal justice social work, but also *systemic* reforms to sentencing, emphasizing of the centrality of reparative, community-based sanctions not as alternatives to prison, but as the default penalty (except for those who commit serious offences or present significant risks to public safety). The subsequent introduction of some of the proposed reforms and specifically of the Community Payback Order (in 2010-11)

does seem to have had some effect in reducing the use of short-term prison sentences, though we await a full evaluation of these reforms.

The final myth I mentioned above relates to public (and sometimes judicial) misperceptions about the demands that probation (and other CSM) make of those subject to them. Although I noted at the outset how increasingly onerous conditions have become a part of sentencing options in many jurisdictions – both for ‘front-door’ CSM and for post-release (‘back-door’) supervision – both probation’s advocates and its critics tend to stress its ‘helping’ aspects. And indeed, the available research of the experiences of those supervised tends to stress its positive aspects and effects (Durnescu, Enengl and Grafl, 2013). However, although such research is affected by problems of possible selection bias (i.e. those with more positive experiences and who are complying with supervision are likely to be over-sampled), it also reveals ‘holding’ and ‘hurting’ aspects of supervision (see McNeill, 2009). While ‘holding’ can imply both constraint and support, both recent research on the pains of probation (Durnescu, 2011) and historical research (McNeill, 2009) makes clear that that probation can and does often cause forms of suffering – whether legitimate or illegitimate and whether intended or unintended.

Offenders in several jurisdictions have reporting finding supervision – and the conditionality with which it is commonly associated (Turnbull and Hannah-Moffat, 2009) – increasingly burdensome. Indeed, there is evidence that significant proportions of those with experience of both community-based and custodial sanctions find the latter easier to deal with – at least in certain respects. Thus, for example, in Scotland, Armstrong and Weaver (2011) found that some respondents regarded short prison sentences, whilst damaging in many respects, represented respite from chaotic lives. Though they regarded CSM as more constructive sanctions, this did not mean they regarded them as easier to negotiate; indeed, they pointed out the challenging and demanding aspects of supervision. Other studies have suggested that some offenders actively prefer the apparent simplicity and clarity of doing their jail time to the intrusions and complexities of supervision. In particular, they fear ending up suffering more severe sanctions as a result of violating conditions (May and Wood, 2010; Payne and Gainey, 1998).

CONCLUSION

In my own work in recent years, I have often argued – both directly and indirectly – that prison represents an unpromising context for seeking to support desistance from crime (e.g Weaver and McNeill, 2007). It follows that if reducing reoffending is an important objective of criminal justice, we should use prisons sparingly and that we should construct their regimes carefully. I have also argued for reforms to probation practices so as to enable them to better support desistance.

None of the reflections above represent a retreat from these positions or arguments: I remain convinced that – other things being equal – probation is better placed to

support desistance than imprisonment. However, the caution that I have sought to add in this address is this: **We cannot and must not assume that probation and its growth is an unqualified good.** While it can and does support change, it also represents an expansive and penetrating form of penal control which – like all others forms of penal control – must be used proportionately and parsimoniously. Moreover, even where probation’s principal intent is to support social rehabilitation or reintegration and thus to benefit probationers, its intrusions into the lives of its European citizens must always be constrained by the same human rights safeguards and principles that we apply to imprisonment.

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