BETWEEN PRISON AND PROBATION

INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM

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To Elaine and Penny
For putting up with us

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The first four conferences brought together practitioners in various "intermediate punishment" projects and a few scholars to share information with one another and with us; the fifth was a two-day criticism of the first draft of this book by, among others, Todd Clear of Rutgers, Mark Corrigan of the National Institute of Sentencing Alternatives at Brandeis University, Dan Freed of Yale, Judith Greene of the Vera Institute, Andrew von Hirsch of Rutgers, Jim Jacobs of New York University, Kay Knapp then of the United States Sentencing Commission, George Keiser of the National Institute of Corrections, Lloyd Ohlin of Harvard, Joan Petersilia of the Rand Corporation, Albert J. Reiss, Jr., of Yale, Kenneth Schoen of the Edna McConnell Clark Foundation, and Franklin Zimring of Berkeley. Guided, chastened, and reinvigorated by that last conference we produced this book for which we alone take the blame though they deserve much of any credit that may accrue.

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Between Prison and Probation

1

Introduction

Effective and principled punishment of convicted criminals requires the development and application of a range of punishments between imprisonment and probation. Imprisonment is used excessively; probation is used even more excessively; between the two is a near-vacuum of purposive and enforced punishments.

Our plea is for neither increased leniency nor increased severity; our program, if implemented, would tend toward increased reliance on punishments more severe than probation and less severe than protracted imprisonment. At present, too many criminals are in prison and too few are the subjects of enforced controls in the community. We are both too lenient and too severe; too lenient with many on probation who should be subject to tighter controls in the community, and too severe with many in prison and jail who would present no serious threat to community safety if they were under control in the community.

There are many reasons for this inefficient and expensive situation. Some are to be found in community attitudes to punishment and the history of punishment practice in this country, others in the jerky evolution of sentencing practice and the shifts of sentencing discretion among legislature, prosecutor, judge, and parole board that have characterized sentencing reform in this country. The

aim of this book is to help bring order to the use of "intermediate punishments"; central to that task is the fashioning of sentencing guidelines that give principled and appropriate place to such punishments.

Brief commentary on the title of our book may help clarify our purposes and define our frame of reference.

Why in the title to this book do we refer to "intermediate punishments," rather than to "alternative punishments" or "alternative sanctions?" Use of the word "alternatives" assumes that these punishments are substitutes for real punishments. It assumes that the norm of punishment is imprisonment, against which all other punishments are to be measured. This is true neither historically nor in current practice. Most felonies never were and are not now punished by imprisonment. Prison may be the norm of punishment in the minds of some citizens, but it is not that to those acquainted with the operation of our criminal justice systems.

Further, "alternatives" gives false promise of reducing the present overcrowding in American prisons and jails. The "alternatives" movement has indeed offered that as a main argument for its support. But the truth is that "intermediate punishments"—intensive probation, substantial fines, community service orders, residential controls, treatment orders—tend at present to draw more from those who otherwise would be placed on unenforced probationary supervision or on suspended sentence than from those who otherwise would go to prison or jail.

The excellent 1987 report of the Canadian Sentencing Commission prefers the phrase "community sanctions" to describe all noncustodial punishments, dividing the world of punishment for crime into custodial sanctions and community sanctions. This is entirely acceptable terminology, but it tends to conceal that many community-based sentences impose and enforce considerable restrictions on the offender's freedom of movement, approximating to the custodial, and coercively limit other aspects of his autonomy. The usage we have preferred, therefore, involves a threefold division of all punishments into those that are incarcerative (prison and jail), those that conform to current "ordinary" probation and to suspended sentences, and those that, covering all the rest, are "intermediate punishments."

Why "punishments" and not "sanctions"? This is almost, but not

entirely, a question of taste rather than analytic substance. One of the reasons why American criminal justice systems have failed to develop a sufficient range of criminal sanctions to apply to convicted offenders is that the dialogue is often cast in the pattern of punishment or not, with prison being punishment and other sanctions being seen as treatment or, in the minds of most, "letting off." And, sadly, the popular view proves on closer inspection to be broadly accurate, with widespread nonenforcement of such noncustodial sentences.

It is better to be direct about the matter. Convicted criminals should not be spared punitive responses to their crimes; there is no point in imposing needless suffering, but effective sentencing will normally involve the curtailment of freedom either behind walls or in the community, large measures of coercion, and enforced diminutions of freedom; this is entirely properly regarded as punishment. The language of treatment, reform, and rehabilitation has been corrupted by unenforced and uncritically evaluated good intentions. We fool ourselves—or worse, pretend—if we fail to acknowledge that the intrusions into people's lives that result from criminal punishment are unpleasant and painful. We will do better if we are more blunt about these matters.

Hence *Intermediate Punishments in a Rational Sentencing System.*

All efforts at scientific analysis require artificial isolation of a topic to be studied, and intermediate punishments are no exception. Here is what we are not including within our frame of reference.

We shall not discuss capital punishment. Neither proponents nor abolitionists can be happy with the uneasy and unprincipled compromises that have been reached in the application of this punishment in the United States; but we have enough to do without addressing that ancient and bitter controversy.

We shall not discuss punishments designed only to stigmatize: the stocks, the branding of the adulteress's "A" on the forehead, the public meeting à la Chinoise to harangue the culprit. These punishments seem more romantic than real in the urban agglomerations where crime flourishes.

We shall not discuss corporal punishments, the lash, the birch, the chopping of hands and tongues, the slitting of lips and noses,

the slicing of ears. They are less romantic than brutalizing, not only to those who suffer such punishments but—and the historical record is clear on this—to the society that applies them.

Nor shall we deal at any length with normal or ordinary probation, which for state and local crime in many cities has degenerated into ineffectiveness under the pressure of excessive caseloads and inadequate resources. To be sure, there may well be many times when nominal probation, giving the appearance but not the reality of punishment, is exactly what's wanted. Sometimes, for some offenses and offenders, prosecution itself, or the entry of conviction, may be punishment enough. As one scholar aptly put it in the title of a book on lower criminal courts, the process often *is* the punishment. We might augment this to suggest that the lawyers and their fees are often the punishment. For some offenses and offenders, the anxiety and the disruption resulting from prosecution and conviction may be so unpleasant that any punishment more than nominal probation is overkill.

Although we acknowledge that ordinary probation may often be the appropriate aftermath to a conviction, we exclude it from discussion here by defining it and imprisonment as the poles of the punishment continuum between which intermediate punishments are arrayed.

And though there is a lot in common between properly shaped and determinedly enforced "intermediate punishments" and effective release procedures from prison, that topic too will for convenience for the most part be excluded from our coverage. We cannot, however, be rigid in this exclusion because of the near indistinguishability in practice and in principle between, for example, house arrest as a condition of probation, as in Florida, and house arrest as an "institutional placement" by a state correctional department, as in Oklahoma. However, our focus is on sentencing rather than release from prison and on the sentencing choices available in the aggregate to policymakers and to sentencing judges.

What, then, is left? Intensive probation, the fine, the community service order, and a wide variety of treatments and controls to give bite and reality to intermediate punishments.

"Intensive probation" is a general phrase covering the enforcement of a variety of restrictions on freedom in the community

and a diversity of programs designed to reduce future criminality by the convicted offender. In the 1950s and 1960s, experimentation with the effects of differential caseloads began. This was soon followed by efforts to classify probationers for risk and to make assignments accordingly. More recently, in many states, probation programs have been developed that are designed to be punitive and to subject offenders to close scrutiny and to close residential controls, augmented in some cases by the provision of services facilitative of self-restoration. Prominent features of orders for intensive supervision now include house arrest, conditions of residence, treatment programs for drugs, alcohol, and mental illness, and the use of electronic controls on movement so that pervasive supervision can be achieved. Such programs, in our view, will be of increasing importance to crime control policies.

Another set of intermediate punishments is the fine and the other financial sanctions that may be imposed on convicted offenders. It is a paradox that this country, so generally confident of the financial incentive, places such little reliance on the financial disincentive and has such a poor record of collecting those fines that are imposed.

And the final broad heading of intermediate punishments is the community service order, turning convicted offenders to useful work in the community.

These intermediate punishments do not function in isolation from one another. The fine is often combined with other punishments. So too are house arrest and the community service order. Electronic monitoring is really a technique or a technology; it is seldom intended to serve as a punishment in itself. All are sometimes allied to brief periods of prison or jail. But separately or in combination, intermediate punishments raise difficult jurisprudential and political problems which we shall address. How can they be made credible and enforced in practice? How can they justly and fairly be applied so that class and race bias is avoided, so that these "lesser" punishments are not applied to privileged criminals while the underclass, particularly the black and Hispanic underclass, goes to prison? How can they be related to sentencing policy so that judicial discretion is controlled in their imposition to minimize disparity and injustice?

We do not shrink from urging the serious consideration of com-

plex intermediate punishments. For some offenders, a substantial fine may well be combined with an order that the offender make restitution to the victim, pay court costs, and be subject to a protracted period of house arrest, monitored electronically, for which too the offender pays the costs. For others, intensive probation involving regular and close supervision by a supervising officer playing a police role and also by a caseworker may be combined with a defined period of residence in a drug treatment facility, followed by regular urinalyses to ensure the offender remains drug free, and also an obligation to fulfill a set number of hours of community service—all strictly enforced. Too complex? Too expensive? Not at all—such sentences in appropriate cases serve the community, the victim, and the criminal better and more economically than the prison terms they supplant.

It will be appreciated that the just and efficient application of such a wide-ranging armamentarium of punishments raises issues of complexity at the sentencing stage if the sentence is to be tailored to the threat that the offender presents to the community and to his social and psychological needs, if recidivism is to be reduced, and unjust disparity in sentencing is to be avoided. Hence the centrality of sentencing theory in our consideration of intermediate punishments.

A glance at the Contents will reveal the sequence in which we consider these problems. This book has two parts. Part I discusses sentencing in practice and in principle to demonstrate how and why intermediate punishments should be integrated into comprehensive sentencing systems. Part II then surveys the prospects for serious development of promising intermediate punishments in the United States. The purpose of our book is to contribute to the development of principled and effective sentencing policy in the many criminal justice systems in this country, with an enriched range of punishments better suited to the diversity of crime and criminals to be sentenced, and with intermediate punishments being more extensively imposed and more determinedly enforced for the better protection of the community and the larger achievement of justice.

2

Toward a Comprehensive Punishment System

When this book is published, there will be more than 1,000,000 Americans aged 18 and over in prison and jail, and more than 2,500,000 on parole or probation. If one adds those on bail or released awaiting trial or appeal and those serving other punishments such as community service orders, the grand total under the control of the criminal justice system exceeds four million, nearly 2 percent of the nation's adult population.

The pressure of these numbers on insufficient and mostly old penal institutions and on sparsely staffed probation offices has sharpened interest in all punishments lying between the prison and the jail at one end and insufficiently supervised probation at the other—there is general agreement about the need to develop and expand "intermediate punishments" but the path to that end is far from clear.

There are two main lines of argument in this book. First, it is submitted that there has been a failure in this country to develop and institutionalize a range of punishments lying between incarceration and probation. That argument can stand alone and would

support an expansion of intermediate punishments without considering any questions of sentencing processes. The selection between those properly committed to prison and those sentenced to intermediate punishments cannot be based *alone* on the gravity of their crimes or the lengths of their criminal records, nor can the choice between probation and an intermediate punishment. We deal at length in Chapters 3 and 4 with this inconvenient reality.

The second line of argument takes the matter further: for certain categories of offenders now in prison, some though not all could better be sentenced to intermediate punishments, and for certain categories of offenders now on probation, some though not all could be better subjected to more intensive controls in the community than probation now provides.

The first argument is obvious enough and does not deny the conventional wisdom; indeed, such is the extent of current experimentation with intermediate punishments that the ground is fertile and the time precisely right for their growth. The second argument will meet with more opposition since it seems to contradict the intuitive sense that like cases should be treated alike, that crimes of equal severity committed by criminals with equal criminal records should be punished identically. We regard this position as an erroneous application of principles of "just desert." A comprehensive and just sentencing system requires principled "interchangeability" of punishment of "like" cases, some going to prison, some receiving an intermediate punishment. Similarly, there must be principled interchangeability of punishment of like cases, with some being put on probation while others receive the more intensive control or qualitatively different experience of an intermediate punishment.

We take the definition of "intermediate punishments" from the introduction and provide a bare statement of our recommendations, the rationale forming the rest of this book:

- Intermediate punishments should be applied to many criminals now in prison and jail and to many criminals now sentenced to probation or a suspended sentence.
- Intermediate punishments must be rigorously enforced; they should not, as is too often the present case, be ordered absent adequate enforcement resources.

- Breaches of conditions of intermediate punishments must be taken seriously by the supervising authority and, in appropriate cases, by the sentencing judge, if these punishments are to become credible sanctions.
- The fine should be greatly expanded, in amount and in frequency, both as a punishment standing alone and as part of a punishment package. Fines must be adjusted to the offender's financial capacity (to be achieved by a system of "day fines") and must be collected; this requires innovative assessment and enforcement arrangements, since at present fines are set too low, do not sufficiently match the means of the offender, and are too often not collected.
- The use of community service orders, standing alone or as part of a punishment package, should be greatly increased. Such punishments are applicable to the indigent and to the wealthy; they have much to contribute provided, as for other intermediate punishments, they are vigorously supervised and enforced.
- Intensive probation is a mechanism by which reality can be brought to all intermediate punishments. Allied to house arrest, treatment orders, residential conditions up to house arrest, buttressed by electronic monitoring where appropriate, and paid for by fees for service by the offender where that is realistic, intensive supervision has the capacity both to control offenders in the community and to facilitate their growth to crime-free lives.
- Current sentencing reforms, both proposals and developments, devote inadequate attention to intermediate punishments. Sentencing guidelines, legislative or voluntary, shaped by a sentencing commission or by a court system, must provide better guidance to the judiciary in the use of intermediate punishments if a comprehensive sentencing system is to be developed. In particular:

  1. there is a range of offense–offender relationships in which incarcerative and intermediate punishments are equally applicable;
  2. there is a range of offense–offender relationships in which intermediate punishments and lesser community-based controls are equally applicable;
  3. the sentencing judge requires adequate information about the offender and his financial and personal circumstances to decide on the applicability to each convicted offender of a fine, of a com-