Probation Supervision: Where Do We Go from Here?

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Observations of a "Friend of the Court" on the Future of Probation and Parole

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MY LAW dictionary offers the following definition of "amicus curiae": "Friend of the court. A person who is allowed to appear in a lawsuit (usually to file arguments in the form of a brief, but sometimes to take an active part) even though the person has no right to appear otherwise." It defines a brief as "a written summary or condensed statement of a series of ideas or of a document." This article is written in the spirit of a "friend of the court brief," which summarizes some of the ideas and observations of an interested, but concerned, friend of probation and parole.

I am deeply troubled by the status of probation, parole, community corrections, and corrections in general. Whether I look at the punishment system from the perspective of purpose, politics, populations, programs, policies, personnel, or prospects for the future, I am disheartened. I do not think, however, that the field is doomed to continue along its current path. I believe it can and should be redirected. The first part of this article highlights some of the recent developments and issues that I find especially troubling. The second part addresses some of the tasks that remain to be faced if we are to chart a more promising course.

The Direction of Recent Developments

Five years ago I wrote an article suggesting that a new generation of alternatives to incarceration was emerging and that this development presented important value questions that needed to be confronted.[1] Since entering the corrections field in 1971, I had seen a decided shift in the arguments and strategies used to promote noninstitutional programs and in the nature of the programs being developed. Although there were aspects of these changes that I found encouraging, I was fearful of the consequences of employing strategies that did not include addressing fundamental philosophical and value questions.

In a variation of Rothman's "Noble Lie,"[2] advocates of community-based programs seemed to be adopting a tactical prescription for achieving decreased use of incarceration that read something like the following: conceal your distaste for incarceration and your decarceration agenda and profess to be concerned only with alleviating prison crowding and saving money; attack probation and other conventional nonprison penalties as meaningless and soft on crime and emphasize how nasty and effective in detecting and repressing misbehavior the alternatives you are supporting will be; and dismiss anything that smacks of rehabilitation or addressing offender needs unless it can be disguised as serving a punishment or control interest.

I found this formula not only hard to swallow on ethical grounds, but feared it would contribute to a number of undesirable consequences. I feared that the formula being promoted wouldn't work. I feared that decarceration would not result from concern about costs and crowding as long as the idea remained in force that the best way to respond to crowding would be to add more prison beds. I feared that by promoting newly developed sanctions as different from and more effective than conventional alternatives to incarceration, reformers ran the risk that decisionmakers would apply these new, tougher sanctions to offenders who traditionally had received the milder, discredited ones.

On a deeper level, I feared that designing new sanctions on the basis of what would "sell" would result in creation of programs that would be incompatible with the underlying values and aspirations of those who promoted them. I also feared that even if some short-term diversion from incarceration were achieved by basing alternatives on the same values and assumptions that rationalize and justify imprisonment, the long-term effect would be to further shore-up and legitimate the ideology that supports incarceration. More generally, I feared that endorsing the notion of a need for greater correctional control in the community and expanding the range of methods available to achieve it would contribute to a steady expansion of social control through the criminal justice system.

[1] M. Kay Harris, "Strategies, Values, and the Emerging Generation of Alternatives to Incarceration," *New York University Review of Law and Social Change*, vol. XII, no. 1 (1983-1984), pp. 141-170.

[2] David J. Rothman, "Decarcerating Prisoners and Patients," *The Civil Liberties Review*, vol. 1, no. 1, Fall 1973, pp. 8-30.

Changes in the Extent of Correctional Control

Pragmatic considerations have not stemmed the tide of prison expansion. Despite avowed concern over the high costs of building and operating them, approximately 200,000 prison beds have been added at the state and Federal levels in the last decade[3] and thousands of additional beds are being planned. At the local level, a recent survey of 154 randomly selected jails found that building or renovation was under way in 44 percent.[4]

The number of offenders being held in state and Federal prisons has virtually tripled over the last 15 years.[5] The combined population of state and Federal prisons is now growing by about 1,000 prisoners per week,[6] and if current population growth rates continue, the number of prisoners will double again by 1990.[7] Yet the most dramatic growth has been occurring in the nonconfined portion of the correctional population. The population of offenders on probation and parole has been growing at an even faster rate during the 1980's than the incarcerated population.

The reach of the penal system has attained truly astonishing dimensions. At the end of 1986, more than 3.2 million adults were under correctional supervision or control, representing a 30 percent increase since 1983.[8] These figures mean that as we entered 1987, about 1 out of every 55 adults, 1 in every 31 adult males, and 1 in every 9.5 black adult males was under some form of correctional control.[9]

Between 1979 and 1983, state spending for corrections increased at a rate of growth more than three times the overall rate of growth in state spending and by a larger percentage than for any other state-funded service.[10] It is hard to escape the conclusion that politicians are more concerned about what they perceive to be the political costs of appearing to be soft on crime than the economic costs of building more prisons. Last year I listened to a state legislative debate on a budget recission bill proposed on the basis of a projected budget shortfall. One speaker on behalf of the measure explained his support for provisions that would cut the funds appropriated for a number of social services by saying, "I too hate to see funds cut for medical assistance and foster care, but we have to cut somewhere, and we can't cut the budget for prisons."

Proliferation of Sanctioning Options

There has been tremendous expansion and diversification of noninstitutional penalties in recent years. Although the array of dispositional choices always has been broader than the "prison or probation" choice usually discussed, the field has moved much closer to fulfilling the demand for a full continuum of sanctioning options. More and more decisionmakers find that they have both the authority and the means for ordering restitution and other financial payments, community service, intensive supervision, house arrest, attendance at day treatment centers, commitment to work release or other residential facilities, and various forms of "shock confinement," including commitment to "boot camp" programs and other specialized regimes. They frequently are offered not only information derived from classification and prediction instruments, but also input from client specific planning services or community review panels. Many new programs are available at a variety of dispositional points, from pretrial release through parole revocation, and they can be employed in a wide variety of combinations.

The generation of alternatives to incarceration that has been developing during the 1980's can be distinguished from its forbears of the 1960's and most of the 1970's on a number of dimensions, including dominant purpose, guiding philosophy, and nature and design. Old programs have been remolded and redirected. For example, both intensive supervision programs and halfway houses or other residential centers of the 1960's and 1970's typically were oriented toward reducing recidivism, based on the assumption that decreased caseload size, residential structure and support, and differential treatment in a community-based, community-directed, community-supported program would result in improved service delivery and more efficient treatment.[11] In the 1980's, such programs typically are oriented toward obtaining compliance and maintaining control during the period that offenders are in the program.

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[3] Bureau of Justice Statistics Bulletin, "Prisoners in 1985" (June 1986) and "Prisoners in 1986" (May 1987).

[4] "Corrections Compendium," November and December 1986.

[5] In 1972, there were 196,183 state and Federal prisoners (Joan Mullen, et al., *American Prisoners and Jails*, vol. I: Summary and Policy Implications of a National Survey, 1980 [U.S. Department of Justice], pp. 12-15). At year end 1986, there were 546,659 (Bureau of Justice Statistics Bulletin, "Prisoners in 1986," May 1987). If the average annual growth rate for the eighties of 8.8 percent continued through 1987, the total would exceed 590,000 state and Federal prisoners.

[6] American Correctional Association, "On the Line," vol. 10, no. 5, November 1987, p. 7.

[7] Joan Petersilia, "Expanding Options for Criminal Sentencing" (Rand Corporation), November 1987, p. 2.

[8] "Record 3.2 Million Americans are Under Correctional Terms," *The Philadelphia Inquirer*, 12/14/87.

[9] These estimated rates are based on estimated resident population figures provided in U.S. Bureau of the Census, Current Population Reports, "Estimates of the Population of the United States, by Age, Sex, and Race: 1980 to 1986," p. 23, and the distribution of the adult correctional population by race and sex reported in Bureau of Justice Statistics Bulletin, "Probation and Parole 1985" (January 1987).

[10] Joan Petersilia, "Expanding Options for Criminal Sentencing" (Rand Corporation), November 1987, page 2 (citing a 1985 National Conference of State Legislatures survey).

[11] Harry Allen, *Critical Issues in Adult Probation: Summary*, NILECJ, September 1979, pp. 63 and 195-197.

TABLE 1. ADULTS UNDER CORRECTIONAL SUPERVISION OR CONTROL—1984*

States Ranked by Percent of Adult Population Under Correctional Control

Region and State	Adults in Jail, in Prison, on Probation or on Parole	Percent of Adult Population Under Correctional Supervision	Proportion of Adult Population Under Correctional Supervision
U.S., Total	2,665,386	1.54%	1 in 65
Federal	103,670	.06%	1 in 1667
State	2,561,716	1.48%	1 in 68
1. DC	20,168	4.13%	1 in 24
2. GA	134,011	3.19%	1 in 31
3. TX	328,209	2.91%	1 in 34
4. MD	89,569	2.74%	1 in 36
5. CT	53,267	2.21%	1 in 45
6. DE	9,403	2.05%	1 in 49
7-8. FL	155,913	1.84%	1 in 54
7-8. WA	58,758	1.84%	1 in 54
9. LA	52,240	1.68%	1 in 60
10. NC	76,337	1.67%	1 in 60
11. CA	313,226	1.65%	1 in 61
12. NV	10,851	1.60%	1 in 63
13. OR	30,313	1.54%	1 in 65
14. VT	5,595	1.43%	1 in 70
15. SC	32,843	1.38%	1 in 72
16. NJ	75,578	1.34%	1 in 75
17-18. MI	87,314	1.33%	1 in 75
17-18. AZ	29,098	1.33%	1 in 75
19. IN	51,698	1.30%	1 in 77
20. OK	30,037	1.26%	1 in 79
21-22. AK	4,240	1.25%	1 in 80
21-22. TN	43,399	1.25%	1 in 80
23. NY	163,605	1.23%	1 in 81
24-25. MN	36,966	1.22%	1 in 82
24-25. HI	9,146	1.22%	1 in 82
26. IL	100,866	1.20%	1 in 83
27. RI	8,764	1.19%	1 in 84
28. NE	13,564	1.17%	1 in 85
29-30. MO	43,032	1.16%	1 in 86
29-30. AL	33,466	1.16%	1 in 86
31. KS	20,027	1.12%	1 in 89
32. PA	98,938	1.10%	1 in 91
33. CO	24,505	1.06%	1 in 94
34. MS	18,275	1.01%	1 in 99
35-36. WI	34,932	1.00%	1 in 100
35-36. KY	26,992	1.00%	1 in 100
37. UT	10,095	.98%	1 in 102
38. AR	16,257	.96%	1 in 104
39. VA	38,867	.92%	1 in 109
40. OH	71,901	.91%	1 in 110
41. NM	8,757	.89%	1 in 112
42. WY	3,097	.88%	1 in 114
43. MA	37,302	.84%	1 in 119
44-45. ID	5,580	.82%	1 in 122
44-45. MT	4,805	.82%	1 in 122
46. IA	17,250	.81%	1 in 123
47. ME	6,057	.71%	1 in 141
48. SD	3,179	.64%	1 in 156
49. NH	4,267	.59%	1 in 169
50-51. ND	2,346	.48%	1 in 208
50-51. WV	6,811	.48%	1 in 208
Regional Average			
Northeast	453,373	1.21%	1 in 83
Midwest	483,075	1.12%	1 in 89
South	1,112,797	1.89%	1 in 53
West	512,471	1.51%	1 in 66

*Source: Bureau of Justice Statistics Bulletin, "Probation and Parole 1984," Feb. 1986. All figures are from year end 1984 except jail populations, which are for June 30, 1983.

Most of the latest wave of new generation sanctions—house arrest, electronic surveillance, day treatment centers, and shock incarceration/boot camp programs—were developed in response to prison and jail crowding and are explicitly and primarily focused on avoiding or reducing incarceration. It is difficult to determine, however, the extent to which they may be contributing to that end.

Based on admittedly limited empirical support, Petersilia concluded from a recent review of intermediate sanctions that such programs either have avoided the type of net widening associated with attracting offenders who otherwise would be on probation or that "their designers have examined the characteristics of their probation and parole populations and determined that 'widening the net' is appropriate for these populations."[12] She cites as examples intensive supervision programs in New Jersey and Georgia, noting that the former only accepts offenders already serving prison sentences and that an evaluation of the latter suggested that over half of the participants were indeed prison-bound.

For purposes of assessing how development of the new generation of intermediate penalties has affected the overall level and patterns of correctional control, however, other types of analysis should be undertaken. It is interesting to note, for example, that in 1984, the latest year for which I have been able to construct a state-by-state ranking, the states that have the highest proportions of their residents under correctional control also tend to be states that have been among the leading innovators in developing new intermediate sanctions and programs. They also tend to be states that have been leaders in acting to professionalize probation and parole.

Consider the case of Georgia, which (apart from the District of Columbia, a wholly urban area), tops the chart. At the end of 1984, 1 out of every 31 adult residents of Georgia was under some form of correctional supervision or control. Georgia has been among the first states to develop many of the new generation intermediate sanctions, beginning with restitution centers, intensive supervision, and mandatory community service, and extending to "boot camp"/shock incarceration and, more recently, "revocation centers" to be used as alternative placements for offenders who violate conditions of other non-prison penalties. Other jurisdictions have copied Georgia's approach, including their campaigns for marketing these programs as means of "turning up the heat on probationers," being "as 'punishing' as prison," and otherwise representing attractive options for conservative citizens and decisionmakers.

The picture in Georgia raises issues about the long-term consequences of tailoring the use of intermediate sanctions to accommodate traditional attitudes and patterns of punishment, as opposed to seeking to effectuate a shift in orientation. Noting that Georgia has a larger proportion of its residents under correctional control than any other state, I am skeptical whether taxpayers actually would be willing to lay out all of the resources that would be necessary to incarcerate all of the people for whom new programs are said to serve as alternatives. In other words, it appears that Georgia may simply use new penalties to help satisfy its hefty appetite for punishment and control, rather than using them to scale back its use of other penal sanctions.

As Sherman and Hawkins pointed out when they compared states that made the most and least use of state imprisonment (using data from 1976) in terms of their relative use of both jail incarceration and probation, "many of those states which most frequently employ penal confinement to deal with offenders also tend most frequently to employ probation."[13] They went on to say,

> What liberals too often overlook is that the greater use of one method of punishment does not necessarily imply less frequent use of another. An army that is equipped with a new offensive weapon does not instantly jettison, or limit the use of, all those weapons previously employed. The new weapon is seen as providing extra firepower and an increasingly lethal potential; more of the enemy can be killed. In what some insist on calling the war against crime, the case is not very different. . . . Additions to the penal armory make it possible therefore to "kill" more offenders, and the body count can be stepped up. . . .[14]

It is difficult for me to weigh, on the one hand, the fact that a program like Georgia's intensive supervision program may actually keep several hundred people a year from being committed to Georgia's prison system, with the very creditable fear, on the other hand, that the clothing in which the program is being draped may do a lot to shore up and encourage the punitive, repressive philosophy and practices that represent such a major obstacle to reducing incarceration or developing more constructive approaches. I fear that short-term diversions from incarceration may be achieved at the expense of diminished prospects for longer-term shifts in direction of punishment practices.

On the other hand, comparison of recent changes among the states in prison populations and incarceration rates reveals that while Georgia and Texas still are among the 10 states having the largest prison

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[12] Joan Petersilia, "Expanding Options for Criminal Sentencing" (Rand Corporation), November 1987, p. 87.

[13] Michael Sherman and Gordon Hawkins, *Imprisonment in America: Choosing the Future* (University of Chicago Press), 1981, p. 44.

[14] *Id.*, pp. 45-46.

populations, they no longer fall among the 10 with the highest incarceration rates per 100,000 residents. In addition, the percentage changes between 1980 and 1986 in sentenced prison populations in both states were well below the average increase for all states and also below the average for southern states.[15]

Many other forces obviously affect changes in prison use besides the availability of alternative sanctions, but these figures help temper somewhat my own skepticism in reveiwing claims that expansion and intensification of other penalties may help relieve some of the pressures to increase prison populations. However, I do not think the path that states such as Georgia and Texas have been following should be used as the model for the course the field ought to be taking for the future.

Unfortunately, most discussion of the alternative courses available to probation and parole agencies for the future to suggest that there are only two options. The choice seems to be to "get tough" and do it convincingly or to accept being relegated to administering a discredited, underfunded, residual sanction, the one that is reluctantly employed when no other options are available. "Regular" probation is commonly dismissed by policymakers, researchers, and the public as being either meaningless and ineffective or, whatever the reality may be, hopelessly burdened by such a reputation. Petersilia, for example, in discussing development of intermediate sanctions says, "It is very important that jurisdictions—and by extension, the public—see these alternatives as more than means of strengthening, reforming, or repackaging probation. To begin with, the popular conception of *probation* evokes an image of lenient treatment for low-risk offenders. Thus, innovations that are seen in this image will raise public suspicion, if not hostility . . . ."[16]

Where strong leaders have galvanized support for probation agencies, the revitalization seems to be associated with a fundamental transformation in what probation involves, in its mission, activities, and values. Where probation looks the healthiest, it looks the least like the probation we traditionally have known. And I am not at all sure I like the definition of probation that is emerging. Although it is understandable that efforts would be made to keep probation agencies flourishing, I fear that the implications of common paths being taken have not been fully explored.

The Need to Resurface Value Questions

It is small wonder that many probation agencies have chosen the "get tough" path and that those who have tried to hold onto their traditional identities feel alienated, bitter, and beseiged. However, I think there are other, more attractive options for the future. Realizing those options requires that probation and parole personnel assume far more active role in changing the grounds of the debate, both by articulating more forcefully what is wrong with current trends and by reaffirming core values now being downplayed. We need to resurface the moral and ethical issues that lie at the heart of questions about the just imposition of criminal sanctions and to define more clearly the principles that should guide their resolution.

Unfortunately, most debates concerning whether any particular punishment should be used and under what circumstances now are being carried out almost exclusively on utilitarian pragmatist grounds. Attention is focused on questions of cost, public acceptance, political support, and crime control effects. This is true of both supporters and opponents of various penalties. Thus, those who see a need for more imprisonment build their arguments on grounds of crime control—more incarceration is needed to incapacitate and deter—and advocates of decarceration argue that prisons are ineffective or inefficient in securing those ends. Similarly, current debates about various alternative penalties tend to involve arguments about how well they will work and at what relative price.

To the extent that principles as opposed to pragmatic arguments have been brought into discussions about sanctioning choices, reliance has been placed on certain legally recognized minimum principles—punishment must not be cruel and unusual or fundamentally unfair. These principles are, of course, essential, but they are not sufficient bases for building a just and morally esteemable system.

Questions about the use of any particular form of punishment, and about punishment policies generally, intrinsically involve moral and ethical issues that cannot be resolved through a sole focus on whether a given action will have certain effects. It is critical to recognize that there are independent moral constraints that apply to pursuit of utilitarian aims. Put another way, "there are certain aspects of the moral ideal of human rights that are 'trumps' over utilitarian considerations."[17] Human rights must be defined independently of maximizing the

[15] Bureau of Justice Statistics Bulletin, "Prisoners in 1986" (May 1987), p. 3. The sentenced prison population increased between 1980 and 1986 by 36.6 percent in Georgia, 28.9 percent in Texas, 65 percent in all states, and 46.1 percent in the south.

[16] Petersilia, "Expanding Options for Criminal Sentencing," p. 9.

[17] David A. J. Richards, "Rights, Utility, and Crime," in Michael Tonry and Norval Morris, eds., *Crime and Justice: An Annual Review of Research*, p. 264.

general good and those rights must be used to set the boundary conditions within which utilitarian aims may be pursued. Otherwise, we invite the exploitation of the individual, the demise of pluralism, the tyranny of the masses, and a host of other evils violently inconsistent with our ideals.

Explicit attention to moral and ethical considerations must be reinfused into discussions and decisions about punishment and this must be done in such a way that more than lip service is given to a human rights perspective. As Richards has put it, adopting a human rights perspective involves making a commitment to "two crucial and interconnected normative assumptions: first, that persons have the capacity to be autonomous and, second, that persons are entitled, as persons, to equal concern and respect in exercising that capacity."[18] These assumptions central to human rights theory in turn demand that all social practices evidence respect for the natural capacity of all persons for independence of domination by others. This can be restated as a demand for respecting the liberty interests of all persons.

Operationalizing "Deference to Liberty Interests"

Deference to liberty interests should govern consideration of both general decisions about sanctioning policy and decisions about which particular sanctions to use in a particular case. We need to identify which forms of sanction best communicate respect for the underlying values of human dignity, including which ones most fully respect the moral personalities of offenders themselves. When described as the principle of parsimony—the idea that the least drastic, least intrusive option that will satisfy legitimate purposes is to be preferred—this criterion is widely, nearly universally, endorsed. However, far too little has been done to try to operationalize this value or to apply it with any rigor when policy and case decisions are being made.

The standard approach seems to be like ordering from a menu in a Chinese restaurant, selecting options from each column in hopes of satisfying all tastes and preferences. The emphasis seems to be on diversity and quantity—how many months in jail, how much of a fine, how many hours of community service within what period of time, how many conditions to stack on a particular offender. Any discussion of quality is usually just a variant of concern with quantity—speaking, for example, of the "intensity" of supervision when referring to the number of home visits or the caseloads of officers.

Most of the information available on nonprison penalties reinforces these tendencies. Available literature consists mainly of descriptions of individual programs or broadly inclusive categories of programs (e.g., intensive supervision) that do little to advance appreciation of the various dimensions, modes, forms, or qualities of various types of sanctions. Discussion of program aims and philosophies tends to be so vague and all-encompassing as to offer virtually no guidance at all. Most program descriptions promise to punish, control, intimidate, correct, and exact restitution and other "paybacks." But there is a striking absence of articulated criteria to be used in deciding which sanctions in what quantity should be applied.

If we are interested in developing ethically defensible sanctioning policies, a great deal of work remains to be done in clarifying the diverse dimensions of sanctions and how and why we might want to employ them. Thus, it appears that greater conceptual clarity, better analytical tools, and normative principles are needed for (1) identifying the liberty interests implicated in sanctioning choices; (2) determining the bases on which infringements on those interests may be justified; and (3) developing standards to govern the nature and extent of such infringements justifiable in particular cases.

A Typology of Sanction Forms

Freiberg has outlined a framework for a model that may help in satisfying the need to identify with greater clarity the liberty interests implicated in sanctioning choices. Conceiving sanctions as expressions of power relations and the intentional manipulation of values, he has distinguished the following seven general forms of sanctions, according to the different values, resources, or types of power to which they relate: physical, economic, social, informational, political, privacy, and legal.[19]

Use of these categories allows examination of what Freiberg calls *sanction form* separate from the justifications or purposes of sanctions and separate from any particular type of sanction, such as imprisonment, which may involve several sanctioning forms. Thus, a typology of sanction forms may be especially helpful in "unpacking" the myriad elements present in current non-custodial sanctions in order to clarify their essential character and their relation to liberty interests.

Physical sanctions are those that relate to the use of, or control over, the body, directly or indirectly. They encompass not only the use, or threat of use, of means of hurting, incapacitating, or otherwise acting upon the body itself, but also the use of the

[18] *Id.*, p. 262.

[19] The following summary of various sanction forms is taken from Arie Frieberg, "Reconceptualizing Sanctions," *Criminology*, vol. 25, no. 2, May 1987, pages 223-255.

body for labor and the regulation of the movement of the body. Thus, the physical sanction includes such "action on the body" as pain infliction (e.g., flogging); alteration of the appearance of the body (e.g., plastic surgery); destruction of part of the body (e.g., surgical or chemical castration or lobotomy); and death. In addition, movement of the body can be regulated or restrained by both physical means (e.g., handcuffs, straightjackets, imprisonment) or nonphysical means (e.g., removal of travel documents, prohibitions from specified areas) and may be permanent (e.g., banishment or exile), temporary (e.g., 2 years in prison), or intermittent (e.g., weekend imprisonment). Use of the body for labor can be as all-encompassing as slavery, as extensive but usually time-limited as impressment into the armed services, or as limited in duration and extent as mandated community service work or day center attendance.

Negative *economic sanctions* involve involuntary transfers of money or property to the state (e.g., fines, court costs, or supervision fees) or to individuals (e.g., restitution or damages). They also may involve loss or lessening of the opportunity to earn money (e.g., denial of access to employment or payment of nominal wages). Negative *social sanctions* derive from the fact that people are social beings who value interaction with others and require their affection, love, and approbation. Such sanctions contain reputational (involving shame, humiliation, or disgrace) or interactive aspects (involving constraints on social involvement and interaction).

Informational sanctions reflect the intimate connection between knowledge and power and involve either regulation of information, knowledge, or skill or ideological manipulation. Both distribution of information about offenders (e.g., providing the police with lists of probationers and the conditions of their sentences) and limiting access of offenders to various knowledge or skills (e.g., through occupational licensing restrictions) are informational sanctions. Efforts to change, control, or influence beliefs and value systems through religion, therapy, education, or propaganda represent informational sanctions of the ideological type. Negative *political sanctions* involve limiting access to or participation in public or private decision-making processes, such as loss of voting rights or office.

Negative *legal sanctions* are those where the protection of the law is refused or access to law is barred or diminished. Such sanctions would apply, for example, where the law prescribes a particular mode of procedure and that procedure is not followed, yet that transaction fails to attract any legal consequences. Similarly, negative legal sanctions operate when positive legal sanctions that prevent or mitigate the operation of other, negative sanctions are withdrawn or reduced (e.g., pardons, commutations, or paroles are eliminated or restricted).

Privacy sanctions involve intrusions into the nature and quality of a person's independent existence in society. They typically operate primarily through surveillance, which impinges on the freedom to act without being observed or listened to, but also may involve searches of the person or of one's property or surroundings. Although there are clear connections between privacy sanctions and informational sanctions in that surveillance and searches involve gathering information, it is important to emphasize that "intrusion into privacy is a sanction in itself and not just a means of detecting deviance leading to the imposition of other sanctions."[20] That is, the privacy sanction has important psychological or spiritual dimensions related to maintaining one's personal autonomy inviolate.

A Case In Point: Identifying the Liberty Interests Involved in House Arrest with Electronic Surveillance

The potential value of utilizing a framework like the one Freiberg offers can be illustrated by using it to identify the liberty interests implicated in a particular program or type of function. For example, these categories have been helpful in clarifying my own rather vague concerns about use of electronic surveillance. My past experiences in discussing the desirability of using telemetric devices to monitor offender movement generally have centered around questions like the following:

(1) Do you favor or oppose electronic surveillance?
(2) Don't you think that electronic surveillance is better than imprisonment?
(3) Aren't your concerns out of proportion to the relatively noninvasive uses to which telemetric devices are now being put?

My initial reaction to the first question standing alone is to say that I don't like the idea of employing electronic surveillance to monitor offender movement. At many levels, it seems to run counter to my values and preferences. Reading George Orwell's *1984* had a profound effect on me. I fear Big Brother. I think eternal vigilance in defense of incursions on personal privacy is a key part of clinging onto liberty. My own beliefs and preferences tell me that the best means of responding to crime and conflict involve such things as relationship, communication, and per-

[20] *Id.*, p. 241.

sonal interaction, rather than technology, isolation, and remote watching and control.

The second question gives me more pause. I have long sought to reduce imprisonment and am reluctant to dismiss anything that might contribute to that end. However, in my view this way of framing the issues often poses a false dichotomy, either because there are other, more attractive options that are not entered into consideration, or because the choice is framed in a way that does not fit the true facts of the situation. Thus, to be helpful in clarifying values, we should ask not simply whether one would prefer 6 weeks of electronic surveillance to 2 years of confinement at San Quentin, but also whether one would prefer such surveillance to having an offender receive two home visits a week or pay a fine. Similarly, it is misleading to take expressions of preference for electronic surveillance over incarceration as support for use of electronic surveillance on offeners who arguably should be placed on regular probation.

Even if it is suggested that electronic surveillance only will be imposed in cases in which offenders consent, I would argue that questions about the types of sanctions to be employed require the making of societal choices that knowledge of offender preferences cannot resolve. Some offenders might prefer various forms of corporal punishment and even torture to incarceration, but that does not answer the question of whether society should reinstitute bloody physical penalties.

The third question is based on the idea that it is unreasonable to oppose electronic surveillance as it currently is being used if the real basis for concern involves more invasive applications. Current uses do not encompass permanent or below-the-skin bodily intrusion. They do not entail bodily feedback or other direct consequences for rule-breaking, but only a recording of information concerning certain movements. Thus, it is arguable that what is involved is not significantly different from standard probation or parole surveillance.

It is true that some of my concerns are tied to the "slippery slide" phenomenon, to the fear that once we have started down this track it will be hard to slow or stop before we hit the bottom. But I don't think my trepidation is of the "one puff of marijuana will turn you into a crazed dope fiend" variety that makes the slippery slide argument seem foolish. My concern is with the failure to articulate criteria and standards that might serve as brakes. Why not implant devices that allow constant monitoring of a person's whereabouts, conversations, and actions? Why not take the next step and use devices that give offenders an electric shock or make them lose consciousness when they step outside defined boundaries? Why not apply any of these devices to the general population or those predicted likely to become offenders? We need to step back from reviewing specific programs or proposals to clarify the values and principles that we want to be used in resolving such questions.

It is through confronting questions like these that I am able to say that I am opposed to the uses of which I am aware to which electronic surveillance is being put, because I am not convinced that those uses satisfy the principle of parsimony, contribute to an overall de-escalation of the punishment system, or compare favorably with other options I could suggest, and I do fear what may be proposed next. But it is difficult to argue these issues unless we all are willing to be far more explicit about the aims, values, visions of the future, and other criteria we believe ought to govern decision-making in this arena.

The Liberty Interests Affected by Electronic Surveillance

Using Freiberg's categories helps put shape to my concerns about the compatability of electronic surveillance with deference to liberty interests. House arrest involving electronic surveillance constitutes a physical sanction, in that it involves regulation of movement of the body and often use of the body, as when employment is a condition of participation. It typically involves a negative economic sanction in that offenders are required to pay all or part of the costs associated with their surveillance. It also represents a social sanction, entailing restrictions on social intercourse as well as potential for negative reputational implications, through either the visibility of the monitoring device or others' awareness of the status the monitored offender occupies.

House arrest involving electronic surveillance also has informational sanction elements. A variety of people are given access to information about the offender—information conveyed via computer, telephone, and other means. In addition, this type of sanction may have some ideological elements. The emphasis put on "making the offender serve as his or her own warden" has overtones of compulsory inculcation of discipline. Indeed, much of the anecdotal information put out about such programs holds out the possibility that participation may help offenders "to see the light" in various ways. It is said, for example, that the experience may help offenders recognize the shallow nature of some of their relation-

ships (as when "buddies" lose interest in coming to their homes) or the value of budgeting their expenditures (as when they ended up with cash on hand for the first time because they were not free to go out and "fritter it away").

The political sanction aspects of such a program involve not only the restrictions standard with respect to any criminal conviction in a particular jurisdiction (e.g., loss of the right to vote), but also may place significant additional limitations on an offender's ability to be involved in various decision-making processes, whether of a neighborhood association or a political campaign.

Electronic surveillance programs typically involve a variety of negative legal sanctions, such as reduction or elimination of the constraints on officials that ordinarily apply before a search can be conducted or surveillance can be extended into one's home. Similarly, electronic surveillance represents a significant form of privacy sanction. Telemetric devices are omnipresent and can transcend walls and other physical barriers and personnel demands that limit or slow personal watching. Thus, they free surveillance from its traditional dependence on personal contact or direct observation, considerably expanding its potency.

The process of applying Freiberg's framework of sanction forms to electronic surveillance highlights the fact that the liberty interests involved are both more complex and more significant than typical discussions would suggest. Indeed, it is precisely this sanctional complexity that makes this type of sanction so attractive to some people and so distasteful to others. At the least, if we are serious about honoring the principle of parsimony, such an analysis process raises significant questions about the appropriateness of using a type of sanction that infringes on so many liberty interests unless a great deal more justification is offered as to the necessity of each form of infringement.

Hopefully the minimal steps taken here in beginning to flesh out the issues that surround identification of the various forms of sanctions that a particular penalty may involve provide an indication of the much broader analysis and dialogue that remain to be undertaken. We need to stop considering various programs and penalties in the absence of a clear delineation of the elements they contain and apart from articulated values and principles against which to judge them. We need to specify the criteria and purposes for which we deem it appropriate to employ any sanction form, the circumstances under which use of multiple sanction forms may be justified, ways of gauging the net "weight" of various restrictions being considered, and standards for addressing a range of other related issues.

As imposing as this preliminary list of tasks may be, the greatest challenge does not lie in the conceptual or analytical work to be done. The real challenge lies in making headway in resolving the enduring tensions and ambivalence that surround determining the direction in which we want to move with respect to criminal sanctions. Doing more to clarify what criminal sanctioning is all about and the interests that are involved can aid in better setting limits on governmental intervention. It can help in fulfilling a collective resolve to aim toward a continuing decrease in resort to coercive and painful intervention in people's lives. But it also can be used to help hone and expand the means of punishing and controlling and be applied in the interests of steadily expanding the repressive powers of the state. We must decide which path we want to follow.

Charting a Different Path

In 1986, I had the opportunity to lead a People to People Citizen Ambassador Program delegation to England, France, Germany, and Sweden to explore alternatives to prison crowding. Among the many stimulating sessions we had were a number with probation personnel in London. I was particularly struck by the fact that while the British seem to be marching to the same tune as the United States when it comes to prison building and many other "get tough" measures, the probation service seemed to be continuing to march to the beat of a different drummer. Even in face of a general "get tough" climate, more dollars were being put into creating jobs, housing, and other tangible forms of social and economic services at the instance of the probation service and others concerned with crime and offenders.

The probation service was fighting policies and trends they viewed as misguided or counterproductive. They continued to insist that community service orders should be used as a sole sanction for prison-bound felony offenders. They were continuing to stress voluntarism. They were operating probation hostels to assist in meeting the housing needs of their clients, but no staff members were in residence. They were housed next door in case their clients wanted to come in for assistance, but they did not police the hostel. The probation service was running "drop in" centers where non-offenders as well as offenders could come for help. When I asked in amazement how they were able to continue to garner support for such non-coercive measures in such conservative times, the answer was, "Well, it allows the government to show that they still have a caring side."

One of the things that troubles me about developments in probation and parole in the United States is that there seems to be increasing reluctance to suggest that there is still a caring side. In my professional lifetime, I have seen dramatic shifts in what many probation and parole personnel define themselves as being about. Formerly they described themselves as advocates for their clients, offering the last hope for avoiding incarceration for those for whom there might be a better way, a way of meeting needs and offering attractive alternatives to future crime. Today I encounter probation and parole personnel who have become the avowed enemies of their charges, operating as the first to incarcerate and, failing that, as unabashed urine takers, money collectors, compliance monitors, electronic surveillance gadget readers, and law enforcers. As exemplified by the motto of one probation office I visited—"Trail 'em, nail 'em, and jail 'em"—the themes of probation today seem to involve far more concern about coercing, controlling, containing, and collecting than about caring.

I recognize I am in the territory of personal values. But I think many Americans would agree with me that we progress as a society to the extent that we find it increasingly less necessary to resort to formal social controls, especially the most drastic form of domestic social control, the criminal sanction. Drastic social controls conflict with our deep commitment to individual liberty and threaten the belief that we can make progress with our problems through more constructive, cooperative, and caring means.

I don't think the path to greater domestic tranquility and justice is paved with ankle bracelets, breathalyzers, boot camps, unpaid labor, guns, bars, and all the other control measures that can be devised. And I have maintained a belief that those who work in community corrections would serve as a main source of resistance to the tendency to embrace the seemingly simpler, but ultimately far less hopeful, repressive responses to crime and criminals. Recently the voices being raised from that quarter against the cries for law and order through severe penal measures have been much weaker than I expected. I hope that those involved in probation and parole increasingly will stand up to reaffirm that they offer a fundamentally different path—something different in kind, intent, experience, and aspirations. In that sense, probation and parole can offer a real alternative to incarceration, an alternative vision and direction for the future.