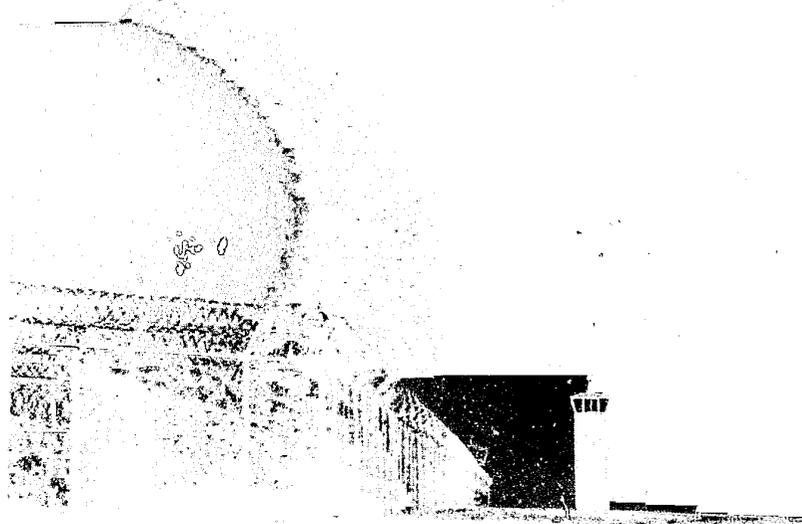


Federal Prisons

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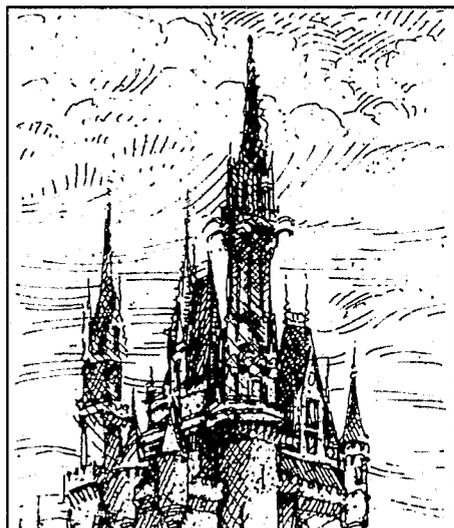
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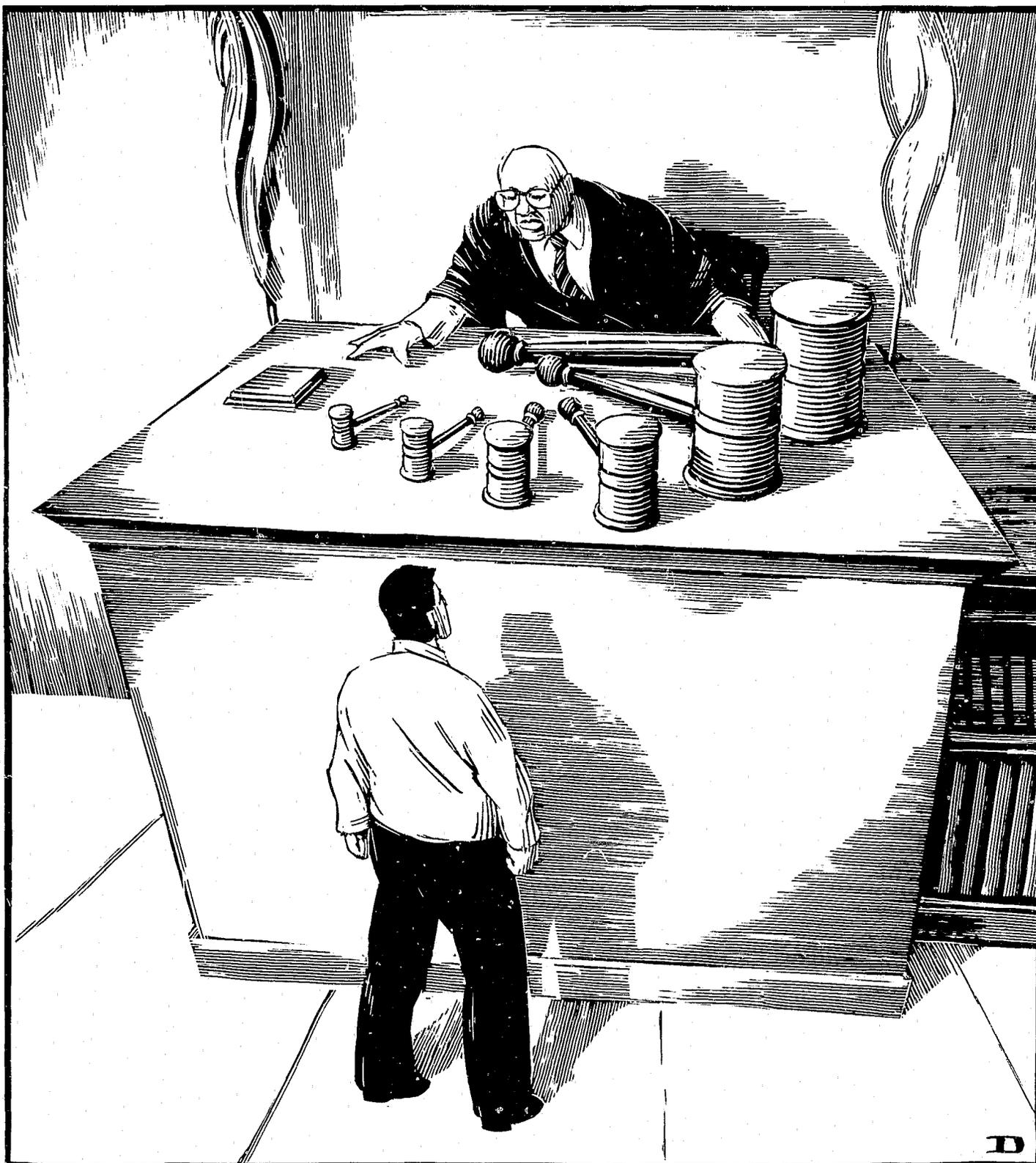
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The Case for Intermediate Punishments

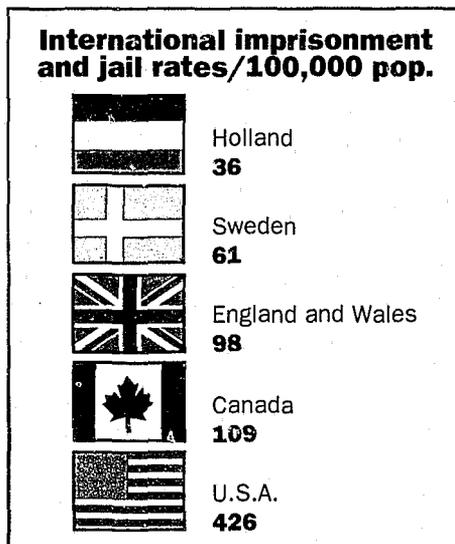
Norval Morris

My task as the keynote speaker at the conference on "Intermediate Punishments as Sentencing Options," convened by the National Institute of Justice and the National Institute of Corrections, and held in Arlington, Virginia, from the 4th to the 7th of September, 1990, was one of peculiar difficulty. The sponsors had invited to the conference only those who were already informed on intermediate punishments and were persuaded of their value. They were obviously not interested in hearing a keynote speaker rehash arguments for the expansion and institutionalization of intermediate punishments—they had heard all that often before.

So I decided to risk the boredom that philosophic reflections usually generate, to outline only briefly the utilitarian case for intermediate punishments, and then to suggest that it is unpersuasive. The justification for the expansion of those punishments that in severity and degree of social control lie between imprisonment and ordinary probation is to be found on other grounds—applicable to all punishments and too often neglected.

The utilitarian argument

Prison and jail populations, Federal and State, have doubled over the past decade; well over 1 million of our adult fellow citizens are now in prison or jail, and 4 million are under the control of the criminal justice systems of this country. The adverse consequences of the resultant overcrowding of our prisons and jails on conditions in those institutions and on the acute problems of their governance are well-known.



Likewise, though this is less frequently mentioned, our probation systems, particularly in the inner city areas where the scourge of crime is most destructive, are as overcrowded as our prisons and jails. It is not unusual to find probation caseloads of hundreds, which makes a sentence to probation an unsupervised, unreal punishment.

When the sentencing choice facing the judge is between imprisonment and the token punishment of ordinary probation, the result is that too many criminals are sent to prison who could better be handled in community-based punishments, and too many criminals who could better be handled in more controlled, community-based punishments are put on ordinary probation.

It is important to note that the present overuse of both imprisonment and probation has not had a measurable effect on crime rates. Over the same decade of the doubling of prison and jail populations, the rate of crime first declined appreciably for 5 years and then probably increased for 5 years to about the level it was at the beginning of the 1980's. Over

the last 5 years of increased reported and recorded crime rates, greatly increased attention has been paid to drug offenses and to familial and sex offenses, which has played a substantial part in the numbers of offenders convicted and punished.

The above facts are well known. How other countries stand in these matters is less well known. Here, drawn from a variety of official reports, are recent imprisonment and jail rates per hundred thousand for five countries (see figure). This is an astonishing contrast and is not explained by the differences in rates of serious crime in these countries.

As to a comparison of probation caseloads in these countries: I lack precise figures, but observation of their probation practices leads me to the view that a similar stark difference exists here too.

Hence, the criminal justice systems of the United States would seem to be prime targets for a massive expansion of all those punishments that lie between the two punishments now being overused. Further, there has already been, in the complex criminal justice systems of our States and localities, extensive experimentation with all those punishments—programs of "day fines" or "equity fines" as some prefer to call them; community service orders; home confinement; halfway houses; and a wide variety of community-based treatment and control programs, most sailing under the banner of "intensive probation" and many buttressed by electronic and telephone monitoring techniques.

Given prison and jail overcrowding and this extensive and generally successful experimentation with intermediate punishments, the argument goes, now is the time for the institutionalization of these punishments, for building them into a comprehensive, graduated punishment system.

And the punchline: to create such a graduated, comprehensive system, to fill the vacuum between prison and probation, will:

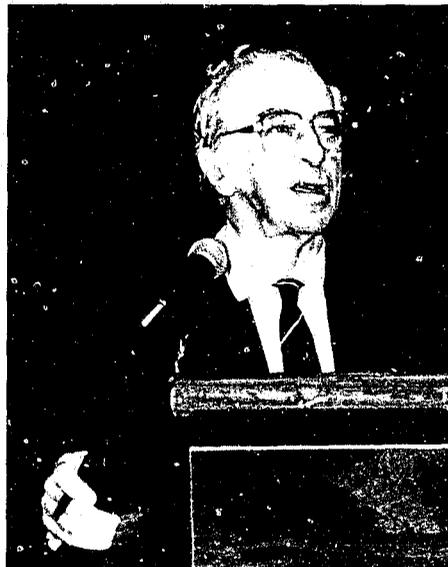
- Lessen prison and probation overcrowding.
- Be cheaper than imprisonment and jailing.
- Be more or equally crime-preventive.

But, but, but.... (Bertrand Russell once suggested if he had one word to take to a desert island with him, together with the usual one book and one record, the word he would take is "but.")

Would such a comprehensive punishment system achieve those three desirable results? In our *Between Prison and Probation*, Michael Tonry and I surveyed the available studies and were skeptical that it would. Subsequently published serious scholarship, in particular the recent study by the General Accounting Office and two excellent reports by agencies of the Canadian Government, also raise real doubts regarding all three claims. So do studies by Joan Petersilia for the Rand Corporation.

Most readers of this journal will know the reasons for skepticism; nevertheless, a summary may be useful: "net widening" and high revocation rates of those

sentenced to intensive probation or to one of the other intermediate punishments is likely to preclude any substantial reduction in prison and jail populations; in the long run there may be a reduction in costs, but for the early years of introducing and implementing such a



Norval Morris

comprehensive system costs will be increased; and research so far has been unable to detect any crime-reductive effect of intermediate punishments beyond that achieved by the punishments that would otherwise be imposed.

If intermediate punishments *don't* reduce prison and jail populations, are *not* cheaper, and *cannot* be shown to be more crime-reductive, why have them? Why should we bother? Why not just stagger along with our overcrowded systems of prison and probation, perhaps trying to build and staff them better, and leave the judges with their present polar choice. I will not in the end accept that view, but let me interpose a comment before trying to refute it.

Punishment and crime control

That intermediate punishments have not been shown to be crime-reductive should come as no surprise—neither has any other punishment or correctional treatment. Neither the lash and the hangman nor the psychiatrist and the psychologist have been shown to provide measurable increments of crime control. As we have so far managed to measure consequences, other than in the individual case, both treatment programs (other than in the child's formative years) and punishment programs seem to have only marginal effects, if any, on gross crime rates.

Simple utilitarianism, the economist's simplistic belief that to increase the price of crime will reduce the demand for criminality, does not seem to work. This is confirmed by the experience of the past decade, to which I have pointed, and by virtually all serious large-scale outcome studies.

Let me be careful about this. I am not arguing that increased severity may not increase deterrence in some cases and for some crimes; I am not arguing that treatment programs may not increase social conformity in some cases and for some crimes. What I am suggesting is that substantial system-wide effects have never been shown *either* for increased severity as a deterrent or increased treatment as an inoculant.

This does not, of course, mean that the criminal justice system itself does not serve to hold down crime rates. No one doubts that it does, and there have been periods of police strikes in some countries and breakdowns of governmental control in others that confirm the crime-reductive effects of the criminal justice system.

What it does mean is that, although system effects are profound and substantial, fine-tuning that system—little reforms either towards severity or leniency—have not been shown to have measurable effects. Sentencing reform as a means of crime control is a *terra incognita*. This is not to deny that one day such effects may be shown to exist—they may—but large-scale experiments to show such effects present enormous ethical problems, and offer very little promise. Anyone who doubts this should reflect on the history of capital punishment research and, if still undecided, read the National Academy of Sciences' study on deterrence and incapacitation.

In this country our criminal justice systems are overwhelmed, swamped beyond bailout, by the criminogenic consequences of an entrenched culture of violence, which tolerates civilian control of the handgun and even automatic weaponry, and the existence of an increasingly locked-in underclass denied the minimum conditions necessary for a productive and peaceful life, with race, ethnicity and class interlocking in a unique way. Booming crime rates are an important part of the cost to society of the creation and continued toleration of these evil conditions.

The criminal justice systems of this country are helpless against such pressures. I have tried to find a sentence of Cardinal Newman's (I believe it is his; it is certainly not mine; but I have not yet found it), which I remember in its outline, though he (if it was he) phrased it more gracefully: "As well try to bind the rage, pride, and passion of man by threat of punishment as try to guide the ship in a storm by strands of silk."

Back, then, to my destructive question: if intermediate punishments don't reduce the pressures on our prisons and jails, if they are not cheaper, and if they are equally ineffective means of crime control, why worry? Why not leave well enough, or bad enough, alone?

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The philosophic case

I mean to inflict the idea of philosophy on you in other than the sense I heard it being used on the Clapham bus: "Let's be philosophical about it, dear. Let's not talk about it."

Simple utilitarianism, the philosophy of the bottom line, may well not justify any greater use of intermediate punishments, except perhaps in the very long run when we shall all be dead. *But...*the controlling proposition for me is not utilitarian. Justice, not crime control, is the major purpose of sentencing, and the failure to recognize this was the central element in the present inadequate and draconian guidelines fashioned by the United States Sentencing Commission. They wrote that they wished to be guided both by

concepts of just deserts and by concepts of crime control, and instead produced guidelines that seem guided only by a preference for incarcerative severity.

Crime control is indeed important; it is the central purpose of the criminal justice system. *But...*given the present power of the storm of adversity and criminogenic conditioning of large segments of our population, given the emotional pressures thus generated—their "rage, pride, and passion"—the deterrent effects of particular punishments and the regenerative effects of particular treatments are merely strands of silk.

Here, in outline, is the justice case for a massive expansion of intermediate punishments:

- Justice requires proportionality in punishments.
- Proportionality in punishments requires that punishments be fashioned within a limit of what is deserved (that is, they must not be excessive) and they must be attuned to the moral and social circumstances of the offender.
- This requires that the present vacuum between overloaded probation systems and overcrowded prisons and jails be filled by intermediate punishments—community-based punishments sufficiently staffed for effective enforcement.
- This, in turn, requires interchangeability between incarcerative and community-based punishments for equally undeserving criminals. (This last proposition is more fully developed in chapters three and four of *Between Prison and Probation* by Michael Tonry and myself.)

The values that underlie this sequence of propositions are the same values that actuate the eighth and fourteenth amendments to the Constitution.

The larger perspective

These issues can be set in a larger perspective. Last year I toured some correctional and psychiatric institutions, courts, and criminal justice system agencies in the Soviet Union. Believe me, they have nothing to teach us in these fields.

And it is equally clear—to them as to us—that their economic structure and that of the countries of Eastern Europe with similar command, centrally-controlled economies are models of inefficiency. They have embarked on extremely difficult and socially threatening efforts to change their economic ways. Whether this can be done in 500 days or 5 years is far from clear, but the direction of reform is clear and the determination to achieve it has been powerfully expressed.

I take no pleasure in this triumph of our economic system over theirs. There is no doubt at all of the greater efficiency of our market economy in producing goods and services *But...* we risk in our satisfaction overlooking the mote in our own eye. It is, in fact, more than a mote; it is a fundamental threat to our well-being. We fail to recognize the inherent selfishness of an unregulated market economy, particularly one lacking a sufficient "safety net" of social welfare as ours does. Adam Smith did not make this mistake, but too many of his followers lack his prescience.

We have failed to appreciate that our very successful market economy, allied to political values that elevate transient popularity above all else (witness Willie Horton and more recent political races) have given us, for the poor—that is, for one of every four or five children born in this great country (the exact number does

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not affect the point)—grossly inadequate prenatal care, infant care, early childhood care, health care, schools, public housing, public transport systems, employment opportunities for young people—all of these being racially and ethnically discriminatory in their operation—and, finally, grossly high rates of violence and crime.

The criminal justice systems of the United States will not cure these ills; it has little to do with them though they impinge cruelly on it. *But...* part of the cure, a small but important part, will have to be a criminal justice system with punishments proportional to harm, favoring community-based punishments over the disruptive banishment of prison and the futility of overloaded probation systems.

Citizens or professionals?

When one offers a theme like that advanced in this speech, apart from being rejected as a sentimentalist out of touch

with the realities of crime and punishment, one is often heard to be suggesting that if nothing can be done to control crime by fine-tuning the criminal justice system, then all one's efforts should be directed to political action to change the health care system, education, transportation, housing, employment opportunities, and so on.

There is a persuasive reply to this, based on Max Weber's crisp distinction between one's duties as a professional and one's duties as a citizen. As citizens we should, presumably, lend our support to political programs designed to remedy what we see as defects in our social organization; as professionals our duties are narrower. However victims of crime and criminals come on the scene, whatever the causes, whatever the preferred preventive programs, the victims and criminals are there; as professionals we did not put them there, but as professionals it is our duty to handle them as well as we can to minimize the cruel impacts of crime on society. That these ways are unlikely to effect major social changes is not the decisive point; that they minimize suffering and maximize the peace of society, even in a small degree, is what matters.

From this perspective, the case for a massive expansion of intermediate punishments is compelling. ■

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