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# The Importance of Purpose in Probation Decision Making

Wayne A. Logan†

Now and again we should take time out to speculate on the essence of the thing called probation. What is the purpose of our efforts, the *sine qua non* of our service?<sup>1</sup>

## INTRODUCTION

Purpose can and should play a central role in any governmental endeavor, including most certainly the disposition of convicted criminal offenders. Each year tens of millions of dollars are expended by the U.S. correctional system apparatus, and millions of lives are seriously affected by the decisions made by justice system actors. Given these fiscal and human costs, it would stand to reason that clarity of purpose would weigh heavily in correctional strategies, determining both the allocation and varieties of sanctions imposed on offenders. However, as the undifferentiated expansion of U.S. corrections over the past twenty years vividly attests, the justice system has been anything but careful in its assessment and application of purpose.

This symposium on the Model Penal Code's sentencing provisions provides an ideal opportunity to take stock of the importance of purpose in the sentencing process. Published in 1962, yet based on work conducted during much of the 1950s, the tenor and substance of the Code's sentencing provisions plainly bespeak the penological and legal views of

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† Professor of Law, William Mitchell College of Law. I thank Professors Richard Frase, Marc Miller, Michael Smith, and Ron Wright for helpful comments and suggestions on prior drafts; the William Mitchell College of Law Faculty Research Fund for financial support; Meg Daniel for editorial expertise, and Sarah Boswell-Healey for research assistance.

1. Charles L. Chute, *Ye News Letter*, Apr. 1932 (weekly publication of the National Probation and Parole Association) (reprinted in 61 *Fed. Probation* 58 (1997)).

their time of origin, an era when indeterminate sentencing and the optimistic promise of rehabilitation held central sway. The widespread abolition of parole, the advent of mandatory sentencing, and other similarly harsh measures underscore the changed circumstances marking the current criminal justice landscape—one that is far less discretionary, individualized, and optimistic about the prospects for rendering offenders law-abiding.

Probation, however, represents a singular exception to this massive shift. Just as in 1962, probation today mainly remains a discretionary enterprise, predicated on the individualized assessment of offenders, and dedicated to the use of community-based resources to assist in their reform. It continues to seek, as the Supreme Court stated seventy years ago, the “comprehensive consideration [of] the particular situation of each offender. . . .”<sup>2</sup> This constancy, however, should not belie the significant changes occurring in probation.<sup>3</sup> No longer is probation synonymous with the “soft” enterprise of rehabilitating offenders. Rather, in tandem with the expanded array of techniques coming into use over time, which by design and effect have considerably more onerous effects, probation today is animated by a far richer gamut of purposes—including the punishment, deterrence and incapacitation of offenders, and the restoration of victims and communities to their pre-crime status.

Despite these massive changes, the articulated purposes of probation have not kept pace, creating a rudderless system that fails to provide meaningful

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2. *Burns v. United States*, 287 U.S. 216, 220 (1932).

3. “Probation,” as used here throughout, refers to the broad gamut of sanctions short of “total” or “active” imprisonment. The term has always been variously defined and with changes in the field this definitional uncertainty has grown, with phrases such as “community corrections,” “compliance programs,” “noncustodial sanctions,” and the like coming into active use. Nonetheless, the historic term is employed here for ease of reference and fealty to the Code’s terminology, as well as its continued common usage in statutes and case law. Also, the discussion here focuses on probationary decisions regarding individual offenders, not organizations, although its essence can be taken to apply in that context as well.

guidance on instances when probation is warranted and, when applied, the terms and conditions appropriate for given offenders.<sup>4</sup> This deficit, of course, also besets decision making with respect to prison-bound offenders.<sup>5</sup> Probation decisions, however, present a more pressing need for articulated purpose, for at least three reasons.

First, with prison the essential question is “how much time?”<sup>6</sup> which today is largely driven by retributive and incapacitative concerns. With probation, and its broad gamut of non-incarcerative sanctions, by contrast, the decision maker is faced with a far richer and more nuanced gamut of purposes. Second, unlike the basic philosophical question of warranted prison time, historically probation has been considerably more pragmatic. This pragmatism has allowed probation to endure and even flourish amid the radical shift toward punitiveness over the past several decades. This very resilience, however, is jeopardized by the failure to speak with specificity to the intended purposes of particular probation decisions. Finally, the sheer practical realities that probation today accounts for the majority of criminal justice dispositions, and that fiscal concerns will likely lead to its ever greater use,<sup>7</sup> create a corresponding need to craft a rational, purpose-based framework to inform probation decisions.

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4. See 1 Neil P. Cohen, *The Law of Probation and Parole* § 7:1, at 7-4 (2d ed. 1999) (noting that despite their widespread use “surprisingly little judicial or legislative attention has been devoted to analyzing the purposes of probation . . . conditions”).

5. Professor Marc Miller has been one of the most persistent advocates of this view, with particular respect to the creation and implementation of the U.S. Sentencing Guidelines. See Daniel J. Freed & Marc Miller, *Taking “Purposes” Seriously: The Neglected Requirement of Guideline Sentencing*, 3 *Fed. Sent. Rep.* 295 (1991); Marc Miller, *Purposes at Sentencing*, 66 *S. Cal. L. Rev.* 413 (1992). As Professor Miller observes, “[s]entencing in most systems seems unconnected to the traditional purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation.” *Id.* at 414.

6. See Michael E. Smith, *Designing and Implementing Noncustodial Penal Sanctions: What Purposes Will Real Alternatives Serve?*, 4 *Fed. Sent. Rep.* 27 (1991) (noting same).

7. See generally Daniel F. Wilhelm & Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, 15 *Fed. Sent. Rep.* 41 (2002).

This article addresses the role of purpose in probation decision making, in two contexts. The first concerns the threshold determination of whether prison or probation is warranted, characterized by the Code's Commentary as a "stark choice," but one nonetheless capable of being guided by criteria.<sup>8</sup> The second concerns the decision over what probation conditions are warranted for particular offenders, a domain where "it is much more difficult to state some useful legislative criteria," which the Code therefore declined to address.<sup>9</sup>

The article begins with an overview of the historical origins of probation and an analysis of the Code's several probation-related sections. Part II surveys the many changes occurring in probation over the past forty years, including the many innovations in techniques employed, with their varied goals and purposes. As will be apparent, concerns over the generality of the substantive law governing probation, evident at the time of the Code, have only been accentuated by the major changes occurring in probation over the past forty years. In part III, the article addresses the importance of purpose in decisions to grant probation and to impose probation conditions, and examines some possible ways that purpose might be incorporated in the current reevaluation of the Code's probation provisions.

## I. A BRIEF HISTORY OF PROBATION AND THE MODEL PENAL CODE'S PROBATION PROVISIONS

### A. *History*

The U.S. probation system is the progeny of John Augustus, a Boston cobbler, who in 1841 altruistically took it upon himself to intervene on behalf of "common drunkards" and petty criminals, rescuing them from

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8. Model Penal Code § 7.01 cmt. at 223 (Official Draft and Revised Comments 1985).

9. *Id.* at 223-24. The Commentary hastens to add, however, that "the Code's premises would favor any further development that can usefully be made along this line." *Id.* at 224.

squalid houses of correction.<sup>10</sup> To Augustus, the object of the law was “to reform criminals, and to prevent crime and not to punish maliciously, or from a spirit of revenge.”<sup>11</sup> During his eighteen years of work he intervened on behalf of over two thousand offenders; of the initial 1100, only one forfeited bond.<sup>12</sup> In the ensuing years, probation caught on in popularity, with Massachusetts enacting the nation’s first probation statute in 1878 (for juveniles),<sup>13</sup> and New York enacting the nation’s first probation for adults in 1901.<sup>14</sup> Soon thereafter adult probation laws appeared in Missouri, Vermont, Illinois, Minnesota, Rhode Island, and New Jersey.<sup>15</sup> In the absence of express statutory authority, the movement was hobbled by uncertainty over the common law authority of courts to suspend the execution or imposition of sentences.<sup>16</sup> The question was answered definitively in *Ex Parte United States (Killits)*,<sup>17</sup> when a unanimous Supreme Court held that federal courts (and by inference state courts) lacked inherent authority to suspend sentences for indefinite periods.<sup>18</sup>

The Court’s decision prompted jurisdictions nationwide to enact laws conferring express authority on courts to suspend jail or prison terms and impose

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10. See generally David Dressler, *Practice and Theory of Probation and Parole* 11-18 (1959). Although Augustus is credited with the first use of the term probation and the spread of probation in the U.S., similar efforts were being undertaken in England at that time and shortly before. *Id.* at 11-12.

11. *Id.* at 17 (citing John Augustus, *First Probation Officer* 23 (1939)).

12. *Id.* at 18.

13. Joan Petersilia, *Probation in the United States*, in 22 *Crime & Just.* 149, 156 (Michael Tonry ed., 1997).

14. *Id.*

15. Dressler, *supra* note 10, at 20.

16. *Id.* at 21. Chief Justice Marshall, while on circuit duty in 1808, upheld an “extralegal” term of probation, in keeping with the prevailing judicial assumption that courts enjoyed common law authority to suspend sentences. See J.M. Master, *Legislative Background of the Federal Probation Act*, 14 *Fed. Probation* 9, 10 (1950).

17. 242 U.S. 27 (1916).

18. According to the Court, while “common law courts possessed the power by recognizances to secure good behavior, that is to enforce the law,” this did not compel acceptance of “the proposition that those courts possessed the arbitrary discretion to permanently decline to enforce the law.” *Id.* at 29.

probationary conditions.<sup>19</sup> What began as an altruistic endeavor, spearheaded by a few hearty souls often harshly criticized for what was seen as their indulgence,<sup>20</sup> came to play a central part in Progressive Era efforts to humanize, and individualize, criminal justice.<sup>21</sup> As noted by David Rothman:

The Progressives were anti-institutional, not in that they intended to break down buildings and walls or even to return the majority of deviants to the community, but rather in that, by implementing open-ended, informal, and highly flexible policies, they were devising an individual, case-by-case strategy for rehabilitation.<sup>22</sup>

The increasing popularity of probation, and other Progressive reforms such as the juvenile justice system, parole, and indeterminate sentencing, owed much to the emerging influence of social science. Armed with advances

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19. At the time of the Court's decision, at least sixty federal districts in thirty-nine states were suspending sentences, in the absence of statutory authority. Victor H. Evjen, *The Federal Probation System: The Struggle to Achieve It and It's [sic] First 25 Years*, 61 *Fed. Probation* 81 (1997). By 1933, all but two states allowed probation for juveniles, and thirty-four states, plus the District of Columbia and federal government, authorized probation for adults. *Probation and Criminal Justice* 228 (Charles L. Chute & Sheldon Glueck eds., 1933).

20. The statement in 1916 of one federal judge directed to Charles Lionel Chute, head of the National Probation Association, captured views of many critics:

I most sincerely hope that you will fail in your efforts . . . . In England, and in Canada a man is either at liberty after a trial and acquittal, or with a discolored ring around his neck dead within thirty days after he has sent some one into eternity . . . . In this country, due to people like yourselves, the murderer has a cell bedecked with flowers and is surrounded by a lot of silly people.

Charles Lionel Chute & Marjorie Bell, *Crime, Courts, and Probation* 106 (1956). The U.S. Attorney General opposed enactment of the federal probation law in 1925, referring to probation as "part of a wave of maudlin rot of misplaced sympathy for criminals that is going over the country." Ronald L. Goldfarb & Linda R. Singer, *After Conviction* 215 (1973).

21. For a concise overview of the early intellectual origins of probation see Edward W. Sieh, *From Augustus to the Progressives: A Study of Probation's Formative Years*, 57 *Fed. Probation* 67 (1993).

22. David J. Rothman, *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America* 43 (1980).



in psychology, criminological theory, and statistics, corrections policy came to focus less on the offense and more on the offender, borrowing from the diagnostic tenets of medicine.<sup>23</sup> As noted by one leading Progressive reformer: “Our new attitude . . . toward the criminal is not one of forming moral judgments against him, but it is intelligently finding out what the trouble is and putting into operation those influences and agencies . . . that will restore him to society.”<sup>24</sup> In 1933, Thorsten Sellin characterized the “struggle for the individualization of penal treatment on the basis of the character of the criminal instead of the character of his offense [as] one of the most dramatic in the history of thought.”<sup>25</sup>

This case-by-case approach to criminal justice required flexibility and discretionary authority; the courts used the expansive statutory authority granted them to channel offenders into one of two categories: “those who will and who will not reform without punishment.”<sup>26</sup> Likely candidates for prison included both those who were thought simply too dangerous to be at-large and those who should be imprisoned “for their own good” inasmuch as prison held the rehabilitative promise of discipline and training.<sup>27</sup> Good candidates for probation were those criminal offenders who evinced a strong likelihood of repair and low risk of recidivism.<sup>28</sup>

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23. *Id.* at 56-57.

24. *Id.* at 57 (citation omitted).

25. Thorsten Sellin, *The Granting of Probation: The Trial Judge's Dilemma: A Criminologist's View*, in *Probation and Criminal Justice: Essays in Honor of Herbert C. Parsons* 99, 101 (Sheldon Glueck ed., 1933). See also John H. Wigmore et al., *General Introduction to the Modern Criminal Science Series*, in Raymond Saleilles, *The Individualization of Punishment* v, vii (Rachel Szold Jastrow trans., 1911) (“modern science recognizes that penal or remedial treatment cannot possibly be indiscriminate and machine-like, but must be adapted to the causes, and to the man as affected by those causes. Thus the great truth of the present and the future, for criminal science, is the individualization of penal treatment. . .”).

26. Rothman, *supra* note 22, at 63.

27. *Id.*

28. *Id.*

For their part, judges relished the unfettered discretionary authority afforded by probation statutes. Under prevailing legal doctrine, their decisions regarding which offenders warranted probation and the conditions deemed appropriate were virtually unfettered.<sup>29</sup> Prosecutors, as well, embraced probation, which Sheldon Glueck called the “flower” among the weeds of the “barren soil of penology.”<sup>30</sup> For them, probation constituted a valuable plea negotiation tool that allowed expeditious processing of unprecedented volumes of offenders inundating urban courts during the first quarter of the century.<sup>31</sup>

The data underscore the increasing popularity of probation. In a statistical pattern that continues to this day,<sup>32</sup> during the first decades of the 1900s the number of probationers came to surpass that of prisoners.<sup>33</sup> This predisposition in favor of probation was reflected in opinions of the U.S. Supreme Court during the first half of the century that increasingly noted the necessity of

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29. *Id.* at 75. See also Sellin, *supra* note 25, at 100, 102. Cf. Sam Bass Warner & Henry B. Cabot, *Judges and Law Reform* 159 (1936) (noting that “the law gives the judge wide discretion in sentencing, but furnishes him no assistance in exercising that discretion”).

Professor Rothman notes that courts especially embraced broad discretionary authority because it assisted in the processing of the increasingly heterogeneous mass of offenders coming before them in the early twentieth century. As he notes, “[i]t may not be coincidental that sentencing practices became most flexible just when immigration reached unprecedented proportions. Now judges could distinguish among criminals not in terms of what they had done but in terms of who they were—and they may have found this leeway necessary in dealing with a bewildering variety of aliens.” Rothman, *supra* note 22, at 77. See also *id.* at 103 (“[u]nder these circumstances, judges may well have been particularly enthusiastic about a procedure that allowed them ample room for distinctions among offenders, not on the basis of the crime, but on the basis of the person.”). Rothman surveys probation eligibility criteria identified by judges of the time and concludes that socio-economic and cultural discrimination was at work. *Id.* at 104-06.

30. Sheldon Glueck, *The Significance and Promise of Probation*, in *Probation and Criminal Justice: Essays in Honor of Herbert C. Parsons*, *supra* note 25, at 3.

31. Rothman, *supra* note 22, at 78.

32. See *infra* notes 80-82 and accompanying text.

33. See Max Grunhut, *Penal Reform: A Comparative Study* 297 (1948) (citing data from New York and California).

individualized discretionary justice,<sup>34</sup> culminating with its acknowledgment in *Williams v. New York* that “[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”<sup>35</sup> By 1956, when Mississippi became the last of the continental states to enact a probation statute,<sup>36</sup> individualized discretionary justice had become a defining feature of U.S. corrections.

Probation philosophy reflected the individualized and curative tenets of the field’s origin. Probation officers were initially regarded as instructive “friends” of the probationer and starting in the 1920s as “social workers.”<sup>37</sup> The “relationship” between probationers and probation officers served as the defining element in the enterprise, with structured “visits and interviews” serving as the primary means of intervention.<sup>38</sup> One influential text of the era urged

social-psychological treatment, to be achieved largely through interviewing and counseling. In some situations the officer may employ suggestion, persuasion, and the presentation of alternative courses. The offender needs clarification of his conduct and of his weaknesses and strengths and some measure of directive guidance in meeting the problems that are crucial in his striving to become a law-abiding individual. . . . Conceivably there is some merit in the prevalent idea that the office should

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34. See, e.g., *Burns v. United States*, 287 U.S. 216 (1932).

35. 337 U.S. 241, 248 (1949). See also *Morissette v. United States*, 342 U.S. 246, 251 (1952) (noting “ a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution”).

36. Andrew R. Klein, *Alternative Sentencing, Intermediate Sanctions and Probation* 68 (2d. ed. 1996).

37. Rothman, *supra* note 22, at 64-67. Illustrative of this view was the exhortation to probation officers heard at a 1928 meeting of the National Probation Association: “If there is any probation officer here . . . who does not consider himself or herself to be a social worker, . . . you are either going to change your mind and develop a social work consciousness, or you are a member of a passing race.” Phillip A. Parsons, *The Selection and Training of Probation Officers*, 1928 Proceedings of the National Probation Association 37, 38.

38. Paul W. Tappan, *Crime, Justice and Correction* 569-70 (1960).

constitute an idealized father image with whom the probationer can identify. . . .<sup>39</sup>

In 1957, the National Probation and Parole Advisory Council on Judges spoke to the many benefits of probation:

Probation enables the offender to reshape his life in the framework of normal living conditions; it preserves family life and other normal social relationships; it enables the offender to carry out his responsibilities by supporting himself and his family.

Probation avoids the shattering impact of imprisonment on personality; it avoids imprisonment's stimulation of hatred and law-abiding society; it avoids confining the reformable offender with hardened criminals who might have a contaminating effect on him; [and] it avoids the stigma attached to imprisonment.<sup>40</sup>

In terms of specific services, probation afforded a considerable variety, including help with employment, public relief, and medical care; "special diets"; institutional placements for needy family members; legal aid; help in finding options for education, vocations and recreation; and psychotherapeutic and religious services.<sup>41</sup> Underscoring the reformist tenor of probation, a literature review canvassing writings on probation between 1910 and 1960 identified "case work" and "treatment" as the dominant methodologies.<sup>42</sup>

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39. *Id.* at 572-73.

40. National Probation and Parole Association Advisory Council for Judges, *Guides for Sentencing* 16 (1957).

41. Tappan, *supra* note 38, at 573 (citing David Dressler, *Probation and Parole* 160-65 (1951)).

42. See Lewis Diana, *What is Probation?*, 51 *J. Crim. L., Criminology & Pol. Sci.* 189, 192-97 (1960). The author concluded that

in all cases probation is seen as a social as well as a legal process, as a method of supervision and guidance in which all available community resources are used, and as a process which should aim at the total adjustment of the offender.

As culled from the professional literature, then, probation may be thought of as the application of modern, scientific case work to specially selected offenders who are placed by the court under the personal supervision of a

*B. The Codification Efforts of the Model Penal Code*

The Model Penal Code's probation provisions, taking nascent form in the 1950s,<sup>43</sup> bear the unmistakable earmarks of the foregoing history. Part I, section 7.01 of the Code addresses the critically important threshold question of whether probation rather than imprisonment should be imposed.<sup>44</sup> Underscoring the central sway of probation within the Institute, section 7.01(1) prescribes that a court "shall" not impose a term of imprisonment unless

having regard to the nature and circumstances of the crime and history, character of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public because:

- (a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
- (b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
- (c) a lesser sentence will depreciate the seriousness of the defendant's crime.<sup>45</sup>

The probation-as-default approach, in the words of Sanford Bates, Special Consultant for the Code's sentencing provisions, would "be found to be new in most states."<sup>46</sup> Indeed, the original drafts of section 7.01(1)

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probation officer . . . and given treatment aimed at their complete and permanent social rehabilitation.

Id. at 197. See also id. at 202 (noting that "[i]nsight by the probationer into the reasons for his behavior is the major goal of treatment").

43. See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 *Harv. L. Rev.* 1097, 1097 (1952) (noting that the Institute's efforts commenced in 1951).

44. See Model Penal Code § 7.01 (Proposed Official Draft 1962) (entitled "Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation").

45. Id.

46. Sanford Bates, *Treatment and Correction of Criminals as Proposed by the Model Penal Code*, 39 *Notre Dame L. Rev.* 288, 289 (1964). On this point Reporter Herbert Wechsler stated around the time of the Code's publication:

provided only that a court “may” impose probation “if, having regard to the nature and circumstances of the crime and to the history and character of the defendant, it deems that his imprisonment is unnecessary for protection of the public,”<sup>47</sup> based on identified criteria relating to the offense and offender (similar to those in the final Code).<sup>48</sup> The criteria found their way into the ultimate version despite worries that their codification would discourage use of probation,<sup>49</sup> spawn challenges by defense counsel, and possibly lead to their “routine, mechanized use.”<sup>50</sup> Ultimately, according to Sanford Bates, the criteria were inserted to “avoid criticism of this part of the Code as being

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Were it not for the accident of history that prisons emerged as a humane substitute for death or transportation . . . would the sense that imprisonment is somehow the right penal sanction, rather than the grave exception, ever have attained the influence it has? In many jurisdictions, practice is approaching the correction of this most unfortunate inversion. The Code provisions would articulate and ratify what the best practice already has achieved.

Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. Pa. L. Rev. 465, 472 (1961). For a contrary view on the presumptive use of probation see William B. Herlands, *When and How Should a Sentencing Judge Use Probation*, 35 F.R.D. 487, 497 (1964).

47. See Model Penal Code Tentative Draft No. 2, § 7.01(1) at 3 (May 3, 1954); Tentative Draft No. 4, § 7.01(1) at 47 (Apr. 25, 1955). See also Will C. Turnbladh, *A Critique of the Model Penal Code Sentencing Proposals*, 23 Law & Contemp. Probs. 544, 548 (1958) (asserting that “[t]he Code originally articulated what amounted to a presumption in favor of imprisonment. . .”).

48. Mindful of the enormous discretionary authority afforded courts in the probation decision, the drafters explained that the criteria should serve to promote both the thoughtfulness and the consistency of dispositions, while distributing responsibility between the legislature and the court. This is the normal procedure in other fields involving large discretionary powers; there seems no reason why it should not be attempted here.

Model Penal Code Tentative Draft No. 2, *supra* note 47, § 7.01 cmt. at 34. The drafters offered that the criteria “should strengthen the hand of the Court in ordering [non-prison] dispositions when it deems them proper, a result we would hope to bring about.” *Id.* at 35.

49. *Id.* The 1985 Commentary observes that the Tentative Draft was “substantially revised” at the Council’s March 1958 meeting to reflect explicit priority for non-imprisonment “unless there is a special reason for an institutional commitment.” Model Penal Code § 7.01 cmt. at 221 (Official Draft and Revised Comments 1985).

50. Turnbladh, *supra* note 47, at 549.

too lenient.”<sup>51</sup> To Bates, “the prima facie use of probation . . . as the normal method of disposition, rather than confinement, represents an outstanding change in philosophy. It is to be expected that its operation would materially reduce the number of persons being sent to prison and jail, and, consequently, lead to the more humane treatment of criminal offenders.”<sup>52</sup>

Section 7.01(2) added an extensive list of considerations that, while neither mandatory nor exclusive, should be weighed by the court in favor of granting probation:

- (a) the defendant’s criminal conduct neither caused nor threatened serious harm;
- (b) the defendant did not contemplate that his criminal conduct would cause or threaten serious harm;
- (c) the defendant acted under strong provocation;
- (d) there were substantial grounds tending to excuse or justify the defendant’s criminal conduct, though failing to establish a defense;
- (e) the victim of the defendant’s criminal conduct induced or facilitated its commission;
- (f) the defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;
- (g) the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
- (h) the defendant’s criminal conduct was the result of circumstances unlikely to recur;
- (i) the character and attitudes of the defendant indicate that he is unlikely to commit another crime;
- (j) the defendant is particularly likely to respond affirmatively to probationary treatment;

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51. Bates, *supra* note 46, at 289.

52. *Id.* at 290. See also *id.* at 289 (observing that the Code provisions provide a “clear indication that the guilty defendant should be sentenced to imprisonment only as a last resort”).

- (k) the imprisonment of the defendant would entail excessive hardship to himself or his dependants.<sup>53</sup>

While providing more guidance than then-existing laws,<sup>54</sup> the Code's probation provisions afforded scant insight into the purpose(s) thought to be served in the threshold decision of whether prison or probation is warranted. The main guidance is found in section 7.01(1), posing the question of whether a prison term is "necessary for the protection of the public."<sup>55</sup> In subsection (3), the only affirmative language relating to the grant of probation, the Code vaguely provides that in the event prison is not imposed "the Court shall place [an offender] on probation if he is in need of the supervision, guidance, assistance, or direction that the probation service can provide."<sup>56</sup>

The Commentary to section 7.01, without apparent reference to probation, adds that the "criteria for

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53. Model Penal Code § 7.01(2) (Proposed Official Draft 1962).

54. See, e.g., Ariz. Stat. § 13-1657 (1960) (authorizing probation "[i]f it appears that there are circumstances in mitigation of the punishment, or that if the ends of justice will be subserved thereby"); Del. Stat. § 39-16-6 (1960) (authorizing probation "[w]hen it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be best served thereby"); Kan. Stat. Ann. § 62-2203 (1958) (providing no criteria); Mich. Stat. Ann. § 28.1131 (1954) (authorizing probation if "it appears to the satisfaction of the court that the defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant shall suffer the penalty imposed by law"); Va. Code § 53-272 (1958) (authorizing probation "if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest"); Wis. Stat. Ann. § 57.01(1) (1957) (authorizing probation when "it appears to the court from his character and the circumstances of the case that he is not likely again to commit crime and that the public welfare does not require that he shall suffer the penalty of the law").

55. The final text of section 7.01, it bears mention, marked an improvement over the Tentative Draft, which directed merely that probation should be used only if prison is "unnecessary for protection of the public," without providing any criteria. See Model Penal Code Tentative Draft No. 2 Code § 7.01, at 33 (May 3, 1954). The Comment to the Tentative Draft added that the enumerated factors militating against prison "relate primarily to the question whether the defendant is a source of danger to the public but they have some bearing also on the relative necessity of a strong sanction for deterrent purposes." *Id.* at 34. The drafters also mention that "[s]ince the exercise of discretionary power is involved," section 1.02(2), containing the broad "general purposes" of sentencing, "is relevant." *Id.* at 35.

56. Model Penal Code § 7.01(3) (Proposed Official Draft 1962).



sentencing offenders to prison are obviously closely related to broader principles regarding the appropriate aims of criminal punishment,” set forth in section 1.02(2).<sup>57</sup> Having disavowed retribution (characterized as “unwarranted and inhumane”) and “vengeance pure and simple,”<sup>58</sup> section 1.02(2) identifies the following as “general purpose[s]” to guide sentencing dispositions:

- (a) to prevent the commission of offenses;
- (b) to promote the correction and rehabilitation of offenders;
- (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment;
- (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense;
- (e) to differentiate among offenders with a view to a just individualization in their treatment. . . .<sup>59</sup>

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57. Model Penal Code § 7.01 cmt. at 227 (Official Draft and Revised Comments 1985).

58. *Id.* Elaborating on the Code’s philosophical framework, Code Reporter Herbert Wechsler observed in 1961:

Deterrence (both general and specific), incapacitation, and correction are all possible objectives of the sanctions that may be employed in dealing with offenders; all are means to crime prevention and as such are entitled to be weighed. But not even crime prevention is the sole value to be served. The rehabilitation of an individual . . . is in itself a social value of importance, a value . . . that is and ought to be the prime goal of correctional administration and that often will be sacrificed unduly if the choice of sanctions is dictated only by deterrence.

Wechsler, *supra* note 46, at 468.

In 1970, the American Bar Association offered that “[s]entencing is in large part concerned with avoiding future crimes by helping the defendant learn to live productively in the community which he has offended against.” American Bar Association Project on Standards for Criminal Justice, Standards Relating to Probation 1 (Approved Draft 1970). See also President’s Commission, Corrections 28 (1967) (“The correctional strategy that presently seems to hold the greatest promise, based on social science theory and limited research, is that of reintegrating the offender into the community . . . . There is little doubt that the goals of reintegration are furthered much more readily by working with an offender in the community than by incarcerating him.”).

59. Model Penal Code § 1.02(2) (Proposed Official Draft 1962). In the subsequent provisions (omitted), the Code proceeds to identify broader institutional goals, such as the coordination of the functions of courts and agencies in the sentencing process. See Model Penal Code § 1.02(f)-(h) (Proposed

The drafters elaborated on the Code's core sentencing purpose:

The section is drafted in the view that sentencing and treatment policy should serve the end of crime prevention. It does not undertake, however, to state a fixed priority among the means to such prevention, i.e., the deterrence of potential criminals and the incapacitation and correction of the individual offender. These are all proper goals to be pursued in social action with respect to the offender, one or another of which may call for the larger emphasis in a particular context or situation.<sup>60</sup>

Taken together, sections 1.02 and 7.01, contained in Part I of the Code, provided a confusing standard on which to base the important threshold decision of whether probation is warranted. While the architecture of the provisions purports to regard probation as the default option, the pivotal considerations set forth in 7.01(1) incongruously pertain to whether prison is advisable. While perhaps explainable as a political compromise amid the wrangling that doubtless occurred in Institute deliberations, the approach plainly disservices the affirmative and purposive consideration of probation. Similarly, the Code's recognition, buried in the Commentary, that the "appropriate aims of criminal punishment" (the "general purposes" contained in section 1.02(2)) are "closely related" to sentencing decisions, provided precious little more guidance, given the loose connection between the considerations set forth in 7.01 and 1.02.<sup>61</sup> Adding to this indeterminacy, the Code disclaims any requirement that

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Official Draft 1962).

60. Model Penal Code Tentative Draft No. 2, Code § 1.02(2) cmt. at 4 (May 3, 1954).

61. For instance, while section 7.01(1)(c) expresses concern that probation might "depreciate the seriousness" of a crime, the closest apparent corollary provision is found in section 1.02(2)(a), identifying a general purpose of sentencing and treatment as "prevent[ing] the commission of offenses." See Model Penal Code § 1.02(2)(a) (Proposed Official Draft 1962).

judges “state the reason for their sentence” or that appellate review of probation be required.<sup>62</sup>

Finally, the Code’s provision (in Part III) intended to provide guidance on the conditions that might be imposed in the event probation is imposed is almost entirely devoid of any guiding purpose. Section 301.1(1) counsels only that the court “shall attach such reasonable conditions . . . as it deems necessary to insure that [the probationer] will lead a law-abiding life or likely to assist him to do so.”<sup>63</sup> Section 301.1(2) proceeds to specify a series of potential conditions,<sup>64</sup> adding that the court can impose “any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience.”<sup>65</sup>

Whether owing to the Code or not, probation became ever more popular in the ensuing decades.<sup>66</sup> However,

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62. Model Penal Code § 7.01 cmt. at 223 n.1; § 301.1 cmt. at 145 (Official Draft and Revised Comments 1985).

63. Model Penal Code § 301.1(1) (Proposed Official Draft 1962). See also Model Penal Code § 301.1, cmt. at 203 (Official Draft and Revised Comments 1985) (stating that “[c]onditions are to be set by the sentencing judge in light of what is appropriate for the individual defendant”).

64. The specified potential conditions include such things as requiring the offender “to meet his family responsibilities” and undergo vocational training, or forego carrying weapons or interactions with “disreputable” persons. See Model Penal Code § 301.2(a)-(k) (Proposed Official Draft 1962).

65. Model Penal Code § 301.1(2)(l) (Proposed Official Draft 1962). The “detailed Comment” referenced in the Commentary, contained in Tentative Draft No. 2 at 141, 145 (1954), elaborates that “[s]ince no specification of permissible conditions can exhaust the measures that may be appropriate in what is meant to be a flexible device for dealing with offenders, the section includes a residual clause creating broad authority.” “To guard against abuse that sometimes has occurred, the clause excludes conditions ‘unduly restrictive’ of the offender’s liberty or ‘incompatible with his freedom of conscience.’” *Id.* The Draft adds that it foresaw “no reason why conditions which are thus abusive should not be subject to review,” but as noted refrained from incorporating an express right of appeal. *Id.*

66. See Margaret Werner Cahalan & Lee Anne Parsons, Historical Corrections Statistics in the United States, 1850-1984 tbls. 7-7B to 7-8B (1987). For additional information on probation during the era see Robert Dawson’s report for the American Bar Foundation, part of its comprehensive Survey of the Administration of Criminal Justice in the 1950s and 1960s. Robert O. Dawson, Sentencing: The Decision as to Type, Length, and Conditions of Sentence 67-141 (1969).

starting in the mid-1960s, concern arose over the broad authority of courts in their probation decisions. This concern stemmed not so much from standard conditions often mandated in state laws, such as the requirement of law-abidingness and restrictions on physical movement that also appear in the Code, but rather the gamut of discretionary conditions that courts were free to impose. Writing in 1963, for instance, two commentators canvassed the many creative conditions, including limits on procreation, freedom of association, and speech, and expressed alarm:

Because the trial courts are under very little restraint as to the conditions which they may impose as concomitants of the probation grant, because all too few procedural safeguards are provided the offender, and because there is a general reluctance on the part of reviewing courts to inquire into the purpose of conditions already imposed, probation may be used as a vehicle for ends wholly unrelated to the reformation of the offender. Of even greater concern, moreover, is the danger that in permitting such latitude in imposing conditions, the purpose and effect of probation may be negated.<sup>67</sup>

This judicial authority derived from expansive grants of discretion afforded by statutory law, evidenced before<sup>68</sup>

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67. Judah Best & Paul I. Birzon, *Conditions of Probation: An Analysis*, 51 *Geo. L.J.* 809, 811 (1963).

68. See, e.g., 18 U.S.C. § 3651 (1958) ("for such period and upon such terms and conditions as the court deems best"); *Ariz. Rev. Stat. Ann.* § 13-1657 (1956) ("upon such terms and conditions as the court determines"); *Del. Code Ann. tit. 11, § 4321* (1953) ("upon such terms and conditions in conformity with this article as [the court] may deem best"); *Idaho Code* § 19-2601 (Supp. 1961) ("under such terms and conditions as the court deems necessary and expedient"); *Ind. Ann. Stat.* § 9-2210 (1956) (conditions the court "may deem best"); *Md. Code Ann. art. 27, § 639* (1957) ("as may be deemed proper by the court"); *Mass. Gen. Laws Ann. ch. 276, § 87* (1959) ("for such time and upon such conditions as [the court] deems proper"); *R.I. Gen. Laws Ann.* § 12-19-8 (1956) ("for such time and on such terms and conditions as the court may fix"); *Vt. Stat. Ann. tit. 28 § 1008* (1959) ("upon such terms and conditions as the court determines"); *Va. Code Ann.* § 53-272 (1958) ("for such time and under such conditions of probation as the court shall determine"). For further examples, see Note, *A Trial Judge's Freedom and Responsibility in Administering Probation*, 71 *Yale L.J.* 551, 554-56 (1961).

and after the Code's adoption,<sup>69</sup> which the Code's modest admonition in section 301.1(2)(1) that conditions be "reasonably related to the rehabilitation of the defendant" did nothing to remedy.<sup>70</sup> Indeed, by 1967 only one state (Louisiana) had codified even this broad limiting principle relating to purpose.<sup>71</sup>

Nor was the specter of abuse ameliorated by the prospect of appellate review, which, again, was not something contained in the Code. Even when undertaken, appellate review was limited by three factors: (1) deference to the expansive statutory authority afforded sentencing courts; (2) the ambiguity of the expectation that conditions be "reasonable"; and (3) the view that probationers should not be permitted to contest conditions because they "consented" to them.<sup>72</sup>

## II. PROBATION WEATHERS THE "GET TOUGH" REVOLUTION

For roughly a decade after the Code's publication in 1962, its view that corrections should be individualized and serve rehabilitative and preventive purposes held central sway. All this changed in the mid-1970s, of course, with Robert Martinson's *What Works* (1974), a meta-analysis of

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69. See, e.g., Ark. Code Ann. § 43-2324 (1964) (such "conditions as the [court] shall deem proper and reasonable as to the probation of the person convicted"); Minn. Stat. Ann. § 609.135 (1964) (authorizing probation "on such terms as the court shall determine"); Mich. Stat. Ann. § 28.1133 (Supp. 1965) (such conditions "as the circumstances of the case may require or warrant"); Ohio Rev. Code Ann. § 2951.02 (1971) ("Upon such terms as judge or magistrate determines"); Pa. Stat. Ann. tit. 19, § 1081 (1964) ("on such terms and conditions as it may deem right and proper"); Tenn. Code Ann. § 40-2902 (Supp. 1964) (conditions the court "shall deem fit and proper"); Vt. Code R. 17 § 1008 (1960) ("upon such conditions and for such time as [the court] may prescribe"); Va. Code Ann. § 53-272 (1958) (such "conditions . . . as the court shall determine"). See also Dawson, *supra* note 66, at 117 (noting that "[t]he latitude afforded the trial judge to devise and impose probation conditions on a case-by-case basis is virtually unlimited, because statutes typically grant him broad discretion to impose any condition he thinks proper").

70. See Model Penal Code § 301.1(2)(1) (Proposed Official Draft 1962).

71. Note, *Judicial Review of Probation Conditions*, 67 Colum. L. Rev. 181, 186 (1967).

72. Best & Birzon, *supra* note 67, at 831-32.

recidivism studies indicating widespread ineffectiveness of rehabilitative efforts.<sup>73</sup> Although Martinson later tried to qualify his conclusion that “nothing works,”<sup>74</sup> the gloomy assessment quickly caught on with the public and politicians. Soon the “rehabilitative ideal” receded<sup>75</sup> and criminal justice policy unabashedly dedicated itself to punishment and incapacitation;<sup>76</sup> corrections decisions, rather than focusing on the redeemability of offenders, came to turn largely on severity of offenses.<sup>77</sup> Jurisdictions rushed to embrace determinate sentencing in lieu of the discretionary, indeterminate approaches endorsed by the Code. Testament to this shift is a single remarkable statistic: from 1962 to 2001 the U.S. prison and jail population increased six-fold in number.<sup>78</sup> In June 2002, the number of incarcerated individuals exceeded two million.<sup>79</sup>

Given this sea-change it would stand to reason that the discretionary, rehabilitation-based traditions of probation would have met their end. The data, however,

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73. Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 42 *Pub. Int.* 22 (1974) (concluding that “[w]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism”).

74. See Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 *Hofstra L. Rev.* 243, 252 (1979).

75. See generally Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (1981); Martin R. Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 *Wis. L. Rev.* 781. See also *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 13 (1979) (stating that “anticipations and hopes for rehabilitation programs have fallen short of expectations of a generation ago”).

76. See generally Lawrence M. Friedman, *Crime and Punishment in American History* 304-08 (1993). For discussion of the “revival” of retributivism after its reported death in the 1950s and 1960s, see Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 *Nw. U. L. Rev.* 843 (2002); Michelle A. Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 *Am. Crim. L. Rev.* 1313 (2000).

77. See Friedman, *supra* note 76, at 305-06.

78. *Sourcebook of Criminal Justice Statistics 2001* tbl. 6.23 (Kathleen Maguire & Ann L. Pastore eds., 2002).

79. Paige M. Harrison & Jennifer C. Karberg, *Prison and Jail Inmates at Midyear 2002*, at 1 (2003).

reveal a far different reality. In 2001, of the almost 6.6 million adults in the U.S. subject to correctional supervision, 60% were on probation, 30% were in prison or jail, and the remainder on parole.<sup>80</sup> The proportion of adult probationers increased nationwide 2.8% 2000-2001, a 3.4% increase over 1995.<sup>81</sup> Fifty-three percent of probationers in 2000 were convicted of a felony, a 5% increase over 1990.<sup>82</sup>

The survival—indeed flourishing—of probation, however, was not mere happenstance; rather, it occurred as a result of probation adapting to the unabashedly more punitive times in which it was obliged to operate.<sup>83</sup> In the 1980s the “Justice Model” of probation became popular,<sup>84</sup>

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80. Lauren E. Glaze, *Probation and Parole in the United States, 2001*, at 1 (2002).

81. *Id.* at 3. See also Bureau of Justice Statistics, *Prison and Jail Inmates, 1995* (1996) (noting 177% increase in use of adult probation 1980-1995).

82. Glaze, *supra* note 80, at 4. See generally Richard J. Kohler & Charles Linder, *Alternative Incarceration: An Inevitable Response to Institutional Overcrowding*, 56 *Fed. Probation* 12 (1992).

83. As noted by one veteran of the Los Angeles corrections community, his department “both survived and thrived” by redressing a central “credibility” problem:

We stopped the “probation as pendulum” syndrome (swinging between social work and criminal justice, depending on the mood of the times). We placed probation once and for all in the context of criminal justice. Probation is a form of criminal sanction, defined by Webster as a coercive intervention intended to enforce the law. Under this definition, our work, whether we are rehabilitating probationers or incarcerating them, is clearly that of sanction, not social work.

Barry J. Nidorf, *Surviving in a “Lock Them Up” Era*, 60 *Fed. Probation* 4, 5 (1996). For a similar expression of the public relations need to change with the times see Walter L. Barkdull, *Probation: Call It Control and Mean It*, 51 *Fed. Probation* 50 (1987). The author, an employee of the California Department of Corrections, offered:

Community control affords a broad range of sanctions short of prison. Community control provides a degree of offender isolation. Community control can be incapacitating. Community control punishes. Not only is there nothing wrong in thinking of probation or community corrections in these terms—it is absolutely essential that we do so. Moreover, we must assist the public to view community control in these terms. Punitive terms.

*Id.* at 53. For more on this shift, see Peter J. Benekos, *Beyond Reintegration: Community Corrections in a Retributive Era*, 54 *Fed. Probation* 52 (1990).

84. See Dean J. Champion, *Probation and Parole in the United States 19* (1990) (describing Model as one that “stresses fair and equitable treatment as well as punishment to fit the offense(s)”). See also Klein, *supra* note 37, at 74



and the field came to be populated with a variety of more aggressive probation strategies, collectively known as intermediate sanctions inasmuch as they constitute a middle ground between unsupervised release and imprisonment. In an influential 1985 report Rand Corporation researchers made the case for intermediate sanctions:

We believe the criminal justice system needs an alternative, intermediate form of punishment for those offenders who are too antisocial for the relative freedom that probation now offers, but not so seriously criminal as to require imprisonment. A sanction is needed that would impose intensive surveillance, coupled with substantial community service and restitution. It should be structured to satisfy public demands that the punishment fit the crime, to show that crime really does not pay, and to control potential recidivists.<sup>85</sup>

Consistent with this orientation, probation sanctions in ensuing years assumed an increasingly punitive character, including “split sentences” and “shock” probation (involving brief prison or jail terms); boot camps; intensive supervision; house arrest and electronic monitoring; halfway houses; day-reporting centers; community service; restitution; day fine programs; weekend sentencing; and enhanced monetary penalties.<sup>86</sup> Eventually, many of the approaches were criticized, in part because of the high volumes of “technical” violations (e.g., drug or alcohol use) generated as a result of the more intensive surveillance associated.<sup>87</sup> Others, however, especially those with ample

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(recounting Model’s rise in popularity).

85. Joan Petersilia et al., *Granting Felons Probation* ix (1985) (citation omitted).

86. See generally *Intermediate Sanctions in Overcrowded Times* (Michael Tonry & Kate Hamilton eds., 1995); Michael Tonry, *Sentencing Matters* 100-33 (1996); Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 *Crime & Just.* 99 (1996).

87. See Joan Petersilia, *Reforming Probation and Parole in the Twenty-First Century* 68-70 (2002); Janet L. Jackson et al., *A Critical Look at Research on Alternatives to Custody*, 59 *Fed. Probation* 43 (1995).



funding for treatment and services, received positive reports and enjoy continued use.<sup>88</sup> Testament to the increased harshness of the techniques are data indicating that, if provided with a choice, many offenders will choose a prison term over the prospect of being subject to intermediate sanctions.<sup>89</sup>

“Shaming” sanctions, likewise, captured the attention of community corrections in the early-mid 1990s.<sup>90</sup> Designed to bring public ridicule to offenders in their communities, the sanctions assumed innovative forms including requiring that bumper stickers be affixed to the cars of drunk drivers proclaiming their conviction, wearing of “sandwich board” signs proclaiming guilt of specified crime, and public apologies in newspapers.<sup>91</sup> Shame in itself of course was not in the least new to the correctional arsenal, being the direct descendant of Nathaniel Hawthorne’s 1850 novel *The Scarlet Letter* and techniques applied centuries before.<sup>92</sup> To the public and many sentencing judges, however, shame sanctions proved enormously popular. Writing in 1991, Toni Massaro traced the popularity of the sanctions to the “profound and widespread dissatisfaction with existing methods of

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88. Petersilia, *supra* note 87, at 70.

89. *Id.* at 71-73.

90. For examples of popular commentary on their emergence, see, e.g., Jonathan Alter & Pat Wingert, *The Return of Shame*, *Newsweek*, Feb. 6, 1995, at 20; Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, *N.Y. Times*, Jan. 16, 1997, at A1; Henry J. Reske, *Scarlet Letter Sentences*, *A.B.A. J.*, Jan. 1996, at 16.

91. For academic commentary on shame sanctions, much of it critical, see, e.g., Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 *Vand. L. Rev.* 2157 (2001); Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 *Duke L.J.* 1357; Jeffrey C. Filcik, Note, *Signs of the Times: Scarlet Letter Probation Conditions*, 37 *Wash. U. J. Urb. & Contemp. L.* 291 (1990). In what has become a standard resource in the area, Professor Dan Kahan vigorously defended shame sanctions on just this basis, arguing that shame sanctions enjoy superior public condemnatory value over options such as fines and community service. See Dan Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. Chi. L. Rev.* 591 (1996).

92. See generally Alice Morse Earle, *Curious Punishments of Bygone Days* (1896).

punishment.”<sup>93</sup> In practical terms, the sanctions had appeal because they promised to free up increasingly scarce (and expensive) prison and jail space<sup>94</sup> and resonated with a public partial to the “gotcha” value of subjecting criminal offenders to public ridicule.<sup>95</sup>

Taken altogether, the changes in American criminal justice over the past forty years have been deep and wide.<sup>96</sup> Today, a far richer variety of sentencing options is available to probation decision makers. No longer does the decision to grant probation mean, as one commentator observed in 1969, “the difference between almost total freedom in the community and almost total control in the typical maximum security prison.”<sup>97</sup> Rather, sentencing courts have at their disposal any number of non-incarcerative sanctions, including those of a decidedly more intrusive nature, reflecting the “continuum of sanctions” advocated by Norval Morris and Michael Tonry in 1990.<sup>98</sup>

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93. Toni M. Massaro, *Shame, Culture, and the American Law*, 89 Mich. L. Rev. 1880, 1884-86 (1991). To a considerable extent, this dissatisfaction stemmed from public disappointment over the seeming futility of not just prison but also community-based sanctions. In 1933, Sheldon Glueck warned against the “boomerang” effect of overselling probation in particular:

When probation first became an organized movement, and even now as it reaches maturity, grossly unwarranted claims as to the miracles it can work were and are being made. Propagandist methods borrowed from mercantile fields, instead of dignified educational programs, have too often been used “to sell” probation to various judges and communities . . . . Every overstatement . . . will sooner or later prove a boomerang; and if claims for probation are carried too far, the popular resentment over instances of its failure will be all the more unbridled.

Sheldon Glueck, *The Significance and Promise of Probation, in Probation and Criminal Justice: Essays in Honor of Herbert C. Parsons*, supra note 25, at 9-10.

94. See Brilliant, supra note 91, at 1370.

95. See *Developments in the Law, Alternative Punishments: Resistance and Inroads*, 111 Harv. L. Rev. 1967, 1981-83 (1998) (surveying positive public response to shaming sanctions imposed by Texas District Court Judge Ted Poe).

96. For a discussion of how these changes are reflected in the work of contemporary probation officers, with special emphasis on the federal system, see Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 Yale L.J. 933 (1995).

97. See Dawson, supra note 66, at 71.

98. Norval Morris & Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* 40-41 (1990). As noted by the authors: “There is a pernicious tendency to think of criminal

These new probation options suggest the presence of a far richer gamut of goals and purposes as well,<sup>99</sup> consistent with the increasingly punitive and control-oriented cast of American justice.<sup>100</sup> While of course even in 1962 rehabilitation was not the unalloyed *raison d'etre* of probation (e.g., in many states “split sentences” were permitted<sup>101</sup> and “surveillance” and “control” were accepted

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sanctions as either punishment or treatment, either pain or beneficent assistance, either the prison and the jail or the psychiatrist and the social worker.” Id. at 176. The reality of this expansiveness is illustrated by the American Bar Association’s use of the more inclusive term “compliance programs” in lieu of probation. American Bar Association, *Standards for Criminal Justice, Sentencing*, stnd. 18-3.13 & cmt. (3d ed. 1994). See also Klein, *supra* note 37, chs. 4-9 (surveying varieties of non-incarcerative strategies); David B. Rottman et al., *State Court Organization 1998* tbl. 47 at 303 (U.S. Dept. of Justice 2000) (providing state-by-state overview of varieties of sanctions available).

99. In 1960, for instance, a review of the probation literature over the preceding fifty years revealed only a single writer who “made punishment the *dominant* note in his theory of probation.” Diana, *supra* note 42, at 190 (citing Almy, *Probation as Punishment*, 24 *Survey* 657 (1910)). The review noted that a survey of twenty probation officers conducted three years before revealed that only one officer stated that punishment was “even an aspect” of probation, and that only one other offered that “supervision alone was the real aim of probation.” Id. at 201. Despite these findings, it is acknowledged that probation officers themselves have long felt role conflict between the public safety and rehabilitative purposes of probation. See Thomas Ellsworth, *Identifying the Actual and Preferred Goals of Probation*, 54 *Fed. Probation* 10 (1990).

A more recent examination of the specified statutory functions of probation officers sheds further light on the evolution: officers today are more likely to be statutorily mandated to perform law enforcement-related tasks than tasks relating to the reform of offenders. Marcus Purkiss et al., *Probation Officer Functions—A Statutory Analysis*, 67 *Fed. Probation* 12 (2003). The study also found that, compared to a previous 1992 review of probation statutes, the duties of officers were becoming “more heterogeneous—the task of rehabilitation is beginning to reappear in statutes.” Id. at 13. On this basis the authors conclude that “[a]ll told, it appears that the goals of probation are becoming more balanced than they were in 1992,” a shift they attribute to the possible tempering influence of restorative justice and political efforts by probation officers in state legislatures. Id. at 23.

100. See generally David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 *U. Chi. L. Rev.* 1 (2003); Joachim J. Savelsberg, *Cultures of Control in Contemporary Societies*, 27 *Law & Soc. Inq.* 685 (2002).

101. See, e.g., Mich. Stat. Ann. § 28.1133 (Supp. 1954); Wis. Stat. Ann. § 56.08 (1957).

purposes<sup>102</sup>), today the de facto purposes of probation extend well beyond the paternalistic care and treatment of offenders.<sup>103</sup> While many such strategies have positive effects in reducing recidivism,<sup>104</sup> and thus have rehabilitative merit, there is no mistaking that they are also serving, purposefully so, retributive, deterrent, and incapacitative goals.<sup>105</sup>

Given that probation is a creature of statute, one would hope to see such massive changes reflected in the statute books. A review of the laws establishes, however, that little has changed since 1962. The discretion of courts to grant probation is as expansive as it was at the time of the Code, and purpose remains wanting. Laws commonly provide merely that courts have the authority to grant

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102. Dawson, *supra* note 66, at 123-26. See also Heinz R. Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. Chi. L. Rev. 483, 494 (1962) (expressing concern over "increased use of probation as a modern substitute for traditional forms of legal punishment").

103. R.A. Duff recently urged recognition of a perhaps more pragmatic view of probation:

probation, properly understood, should ideally constitute not an alternative to punishment, a non-punitive cuckoo in the penal nest, but a paradigm of punishment—of what punishment ought to be.

[P]robation should be justified and administered as punishment: as something that is imposed on or required of offenders, for the offences they have committed, and that it is intended to be burdensome or painful. The very purpose or intention of probation should, that is, be punitive: but once we get clear about the nature and the significance of the burden or pain that such punishment should involve, we will be able to see that its purpose is not "merely punitive" . . . .

R.A. Duff, *Probation, Punishment and Restorative Justice: Should Al Turism Be Engaged in Punishment*, 42 *Howard J. Crim. Just.* 181, 182-83 (2003).

104. See, e.g., James Byrne & April Pattavina, *The Effectiveness Issue: Assessing What Works in the Adult Community Corrections System*, in *Smart-sentencing: The Emergence of Intermediate Sanctions* at 281-306 (James Byrne et al. eds., 1992).

105. As noted by the leading treatise in the field, "[i]t cannot be doubted that some probation terms . . . , imposed as a sanction for criminal activity, involve the infliction of punishment and are designed to do so." Cohen, *supra* note 4, § 7:6, at 7-10. See also James Byrne & Mary Brewster, *Choosing the Future of American Corrections: Punishment or Reform?*, 57 *Fed. Probation* 3, 5-8 (1993); Richard D. Sluder et al., *Guiding Philosophies for Probation in the Twenty-First Century*, 58 *Fed. Probation* 3, 4-5 (1994).

probation<sup>106</sup> or provide only the vaguest of criteria to guide decisions.<sup>107</sup> The Federal Probation Act, for instance, provides that

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court . . . when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation. . . .<sup>108</sup>

Others laws, much like Code section 7.01(1), allude to general considerations favoring the use of prison,<sup>109</sup> and enumerate specific offense and offender traits favoring probation.<sup>110</sup> Even when limits are in place, however, as one treatise notes, their influence is “more apparent than real” given that consideration of the factors is not mandated and jurisdictions typically do not require that courts specify their reasons on the threshold question of probation availability.<sup>111</sup>

The statutory situation is no more illuminating relative to the purposes of particular conditions. While very often statutory law (like Code section 301.1) enumerates conditions that might be imposed,<sup>112</sup> it is usually silent on purpose.<sup>113</sup> Very often, again as in the

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106. See, e.g., Ariz. Rev. Stat. § 13-901 (2003); Okla. Stat. tit. 22 § 991a (2003); Vt. Stat. Ann. tit. 28 § 205 (2000); Va. Code Ann. § 19.2-303 (2003); Utah Code Ann. § 77-18-1(2) (2003); W.Va. Code secs. 62-12-1, 62-12-2 (2000); Wash. Rev. Code § 9.95.200 (2003).

107. See, e.g., Ga. Code Ann. § 42-8-34(c) (2003) (when the “ends of justice and the welfare of society” do not require imprisonment); N.H. Rev. Stat. § 651:2(V) (2003) (if defendant is “in need of the supervision and guidance that the probation service can provide”); N.Y. Penal Law § 65.00(a) (2003) (when probation “not inconsistent with the ends of justice”); Or. Rev. Stat. § 137.533(2) (2003) (if probation “in the interests of justice and of benefit to the person and the community”).

108. 18 U.S.C. § 3651 (2002).

109. See, e.g., Ark. Code Ann. § 5-4-301(b) (1999).

110. See, e.g., Colo. Rev. Stat. § 16-11-203 (1998); Haw. Rev. Stat. Ann. § 706-620 (2003); Ohio Rev. Code Ann. § 2951.02(a) (2003).

111. Cohen, *supra* note 4, § 2:24 at 2-24.

112. *Id.* §§ 7:13 to 7:14 at 7-22- to 7-27.

113. As noted by Professor Cohen, “few statutes specify the goals to be served

Code,<sup>114</sup> statutory law contains very broad grants of authority without much guidance. Missouri law, for instance, provides only that “the conditions of probation shall be such as the court in its discretion deems reasonably necessary to insure that the defendant will not again violate the law.”<sup>115</sup> Arkansas states that conditions should be “reasonably necessary to assist the defendant in leading a law-abiding life.”<sup>116</sup> Idaho prescribes that a court can impose probation subject to “such terms and conditions as it deems necessary and expedient.”<sup>117</sup> Virginia law provides that a court “may place the accused on probation under such conditions as the court shall determine.”<sup>118</sup>

To the limited extent that statutory law identifies purpose in conditions, it sounds in the traditional purposes of rehabilitation and public safety,<sup>119</sup> very often advanced in tandem.<sup>120</sup> Although a handful of jurisdictions ambiguously identify “doing justice” as a goal,<sup>121</sup> punishment is rarely

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by conditions.” *Id.* § 7:1 at 7-4. See also *id.* at 7:32 at 7-63 (noting that “few probation . . . laws specifically describe the ends which conditions should address”).

114. See Model Penal Code § 3.01(1) (Proposed Official Draft 1962) (authorizing “reasonable conditions . . . as [the court] deems necessary to insure that [the probationer] will lead a law-abiding life or likely assist him to do so”).

115. Mo. Ann. Stat. § 559.021 (2002).

116. Ark. Code Ann. § 5-4-303(a) (2002). See also N.D. Cent. Code § 12.1-32-07(2) (2003) (“reasonably necessary to ensure that the defendant will lead a law-abiding life or to assist the defendant to do so”).

117. Idaho Code § 19-2601(2) (2002).

118. Va. Code Ann. § 19.2-303 (2000). See also Mass. Gen. Laws ch. 279, § 1A (2003) (“place [offender] on probation for such time and on such terms and conditions as it shall fix”).

119. See, e.g., Or. Rev. Stat. § 137.540(2) (2003) (conditions designed “for the protection of the public or reformation of the offender or both”); Tex. Code Crim. Proc. art. 42.12 § 11(a) (2004) (“the judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant.”).

120. See, e.g., Iowa Code § 907.6 (2003); Or. Rev. Stat. § 137.540 (2003). Montana’s catch-all provision provides that courts can impose conditions that serve rehabilitation or “protection of the victim or society.” Mont. Code Ann. § 46-18-201(4)(n) (2003). The commentary adds that “[t]he conditions which may be imposed are left entirely to the imagination of the individual judge.” *Id.* at cmt.

121. See Cal. Penal Code § 1203.1(j) (2004); Ohio Rev. Code Ann. § 2951.02(C)(1)(a) (2003).

expressly identified, a glaring omission given the array of avowedly punitive probationary sanctions in use today.

This absence of statutory guidance has created understandable difficulties for the appellate courts over the years. Most recently, judicial discretion to impose shame sanctions has dominated critical commentary and concern.<sup>122</sup> Before that, criticisms were voiced over the imposition of creative conditions that infringed on the constitutional rights of probationers,<sup>123</sup> a concern that endures today.<sup>124</sup>

Without statutory guidance and any requirement that sentencing courts specify the reasons supporting imposition of particular conditions, reviewing courts have resorted to a variety of methods. One common criterion, in keeping with the spirit of the Code's catch-all language in section 301.1(2), is that conditions be "reasonable."<sup>125</sup> Given the

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122. See, e.g., Douglas Litowitz, *The Trouble with "Scarlet Letter" Punishment: Subjecting Criminals to Public Shaming Rituals as a Sentencing Alternative Will Not Work*, 81 *Judicature* 52 (1997); Courtney Phaedra O'Hara Kelly, *Comment, The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet Letter Probation Conditions*, 77 *N.C. L. Rev.* 783 (1999); Leonore H. Tavill, *Note, Scarlet Letter Punishments: Yesterday's Outlawed Penalty is Today's Probation Condition*, 36 *Clev. St. L. Rev.* 613 (1988).

123. Best & Birzon, *supra* note 67, at 811; Richard F. Doyle, *Conditions of Probation: Their Imposition and Application*, 17 *Fed. Probation* 18 (1953); Hink, *supra* note 102; Carl H. Imlay & Charles R. Glasheen, *See What Condition Your Conditions Are In*, 35 *Fed. Probation* 3 (1971); Harry J. Jaffe, *Probation With a Flair: A Look at Some Out-of-the-Ordinary Conditions*, 43 *Fed. Probation* 25 (1979); Louis K. Polonsky, *Note, Limitations upon Trial Court Discretion in Imposing Conditions of Probation*, 8 *Ga. L. Rev.* 466 (1974); *Comment, Another Look at Unconstitutional Conditions*, 117 *U. Pa. L. Rev.* 144 (1968); *Note, Judicial Review of Probation Conditions*, 67 *Colum. L. Rev.* 181 (1967). See also Model Penal Code § 301.01, cmt. (Tent. Draft No. 2, 1954) (noting the "abuse that sometimes has occurred").

124. See, e.g., Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 *Wm. & Mary L. Rev.* 75 (2000); Janet W. Steverson, *Stopping Fetal Abuse with No-Pregnancy and Drug Treatment Probation Conditions*, 34 *Santa Clara L. Rev.* 295 (1994); Jaimy M. Levine, *Comment, "Join the Sierra Club!": Imposition of Ideology as a Condition of Probation*, 142 *U. Pa. L. Rev.* 1841 (1994).

125. See Cohen, *supra* note 4, § 7:34 at 7-60. Another common test asks whether the condition bears no relationship to the crime of conviction, relates to conduct that is not in itself criminal, and does not reasonably relate to the likelihood of future criminal conduct. See, e.g., *People v. Dominquez*, 64 *Cal. Rptr.* 290, 293 (*Cal. Ct. App.* 1977); *State v. Shepherd*, 554 *N.W.2d* 821 (*N.D.*



dearth of express guidance on purpose, however, this rubric has presented obvious difficulties. In times past, appellate courts could draw an inference easily enough, given the dominant place of rehabilitation in probation.<sup>126</sup> The significantly expanded arsenal of probation conditions, however, has made judicial efforts at divination far more indeterminate and strained.<sup>127</sup>

In short, the decisional framework for probation has been and certainly remains in a bad state, due initially to highly generalized laws, and more recently to the failure of laws to keep pace with the profound changes occurring in probation. Forty years after the Code's publication, it is clear that its codification impetus, while of major importance to the criminal law more generally,<sup>128</sup> has fallen short of the mark when it comes to the purposes of

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1996); *Lacy v. State*, 875 S.W.2d 3 (Tex. App. 1994). For other formulations see Cohen, *supra* note 4, §§ 7:34; 7:35.

126. As noted by the Ninth Circuit in 1975:

The theme that rehabilitation underlies probation is mirrored not only in the probation systems established under state law, but also in the Model Penal Code, which expressly recognizes rehabilitation by authorizing the imposition of any conditions of probation "reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience."

*United States v. Consuelo-Gonzalez*, 521 F.2d 259, 263 (9th Cir. 1975). See also *Higdon v. United States*, 627 F.2d 893, 898 (9th Cir. 1980) (deeming punishment an impermissible purpose of probation).

It bears mention that other courts, however, were not so willing to ascribe a singular purpose, which afforded greater latitude in the review of the reasonableness of conditions. As noted by the New Jersey Supreme Court: "Probation assumes the offender can be rehabilitated without serving the suspended jail sentence. But this is not to say that probation is meant to be painless. Probation has an inherent sting, and restrictions placed on the freedom of the probationer are realistically punitive in quality." *In re Buehrer*, 236 A.2d 592, 596 (N.J. 1967). See also *State v. Fuentes*, 549 P.2d 224 (Az. Ct. App. 1976); *Bienz v. State*, 343 So. 2d 913 (Fla. Dist. Ct. App. 1977); *Stare v. Labure*, 427 So. 2d 855 (La. 1983). For more on the abiding uncertainty over the meaning of the penological purposes in the context of conditions see *infra* notes 179-204 and accompanying text.

127. See, e.g., *Villery v. Florida Parole and Probation Commission*, 396 So. 2d 1107 (Fla. 1980) (deeming prison term imposed as probation condition a "rehabilitative device" because it might deter future criminal activity); *Nuckoles v. Comm.*, 407 S.E.2d 355 (Va. Ct. App. 1991) (holding similarly).

128. See Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes: Cases and Materials* 894 (7th ed. 2001) (noting same).



probation. With the coming revision, it is imperative that drafters heed the place of purpose in probation. The next section examines why doing so is important and the role that purpose can and should play in probation decision making.

### III. THE IMPORTANCE OF PURPOSE

Since at least 1968, with the publication of Henry Hart's *Punishment and Responsibility*, it has been thought useful to distinguish the "general justifying aims" of punishment from its "distribution."<sup>129</sup> Professor Hart encapsulated the former with the query "What justifies the general practice of punishment?"; the latter combined two essential questions: "To whom may punishment be applied?" and "How severely may we punish?"<sup>130</sup> More recently, Michael Smith has refined this important distinction, drawing attention to the distinction between purposes "at sentencing" and purposes "of sentencing."<sup>131</sup> Bearing in mind these important distinctions, this section examines the importance of articulated purpose with respect to the threshold question of whether probation should be imposed in the first instance on a statutorily eligible offender, and second, if imposed, the decision to assign particular conditions.<sup>132</sup>

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129. H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of the Law* 3-13 (1968).

130. *Id.* at 3.

131. Michael E. Smith, *Designing and Implementing Noncustodial Penal Sanctions: What Purposes Will Real Alternatives Serve?*, 4 *Fed. Sent. Rep.* 27, 27 n.1 (1991). According to Professor Smith:

The latter (retribution or desert, incapacitation, general deterrence, specific deterrence, and rehabilitation) may be an exhaustive list of permissible purposes for the state's imposition of penal measures. The former is the objective that is sought—or might permissibly be sought—by the state at the point in a criminal prosecution when guilt has been established and the judiciary is poised to exercise state power.

*Id.*

132. See Cohen, *supra* note 4, at 1:5 n.1 (noting that "[t]he theoretical bases for granting probation must be distinguished from the bases for assigning probation conditions").

*A. The Importance of Purpose in Choosing Prison or Probation*

Due in significant part to the Code, penal theory has come to play a central role in criminal justice policy discourse. Before 1962, state penal codes were largely devoid of statutory statements of purpose and courts opined on purpose only to a limited extent.<sup>133</sup> Since then, it has become commonplace for legislatures to speak directly to penal purpose in laws,<sup>134</sup> and purpose has become a staple in judicial pronouncements, including those of the Supreme Court.<sup>135</sup>

The benefits of explicit articulation of sentencing purpose are considerable. First, simply as a matter of social contract, the deprivation of liberty associated with criminal sentences warrants some articulation of purpose by government. Relatedly, express statements of purpose lend transparency, which can instill confidence that the government is engaged in straight-dealing and encourage system actors to be more open and visible in their exercise of discretion. Finally, articulation of purpose allows trial and appellate courts to critically evaluate the “fit” between avowed objectives of punishment and their achievement,

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133. See Cotton, *supra* note 76, at 1313 & 1318-19. As noted in the Code Commentary, “[a] statement of objectives has been rare in American penal codes and when attempted far too general to be of service.” Model Penal Code § 102 cmt. at 5 (Tent. Draft No. 2 1954).

134. Professor Cotton observes that while no state adopted the Code’s particular verbiage on purposes, contained in section 1.02(2), about half of the states

adopted a statutory statement of purpose based on, inspired by, or provoked by that in the [Code]. No state adopted the [Code’s] particular wording on purposes, but about a dozen of those that did adopt some statement of purposes adopted one reflecting the utilitarian, nonretributive perspective of the Code, specifying the purposes of punishment as deterrence, rehabilitation, and incapacitation, and omitting retribution.

Cotton, *supra* note 76, at 1319.

135. See, e.g., *Ewing v. California*, 123 S. Ct. 1179, 1187-88 (2003) (noting Court’s willingness to defer to penological justifications of state criminal justice initiatives); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (noting that if the death penalty is to be constitutional it must have “penological justification,” and identifying retribution and deterrence as the sanction’s core justifications).

leading ideally to what has been called a “common law of purposes.”<sup>136</sup>

Efforts directed at the codification of purpose, however, have been criticized by some. George Fletcher, for instance, has suggested that “[p]hilosophical truths are . . . beyond the competence of the legislature. There is something ridiculous about a legislature intermeddling in a philosophical dispute—say, by deciding whether Immanuel Kant’s moral theory is superior to Jeremy Bentham’s.”<sup>137</sup> Qualified or not, it is unavoidably the job of government to articulate rationales for the application of its penal laws. Responsible democratic governance demands that purposes be identified and that these purposes be delineated with sufficient clarity to guide decision making. Without self-critical examination, as Markus Dubber has rightly observed, “American penal law will continue its drift into an unreflected acting out of self-protective impulses.”<sup>138</sup>

Although a difficult endeavor, fraught with major political ramifications, purpose must nonetheless be

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136. Miller, *supra* note 5, at 478. Cf. Norval Morris, *Toward Principled Sentencing*, 37 Md. L. Rev. 267, 284 (1977) (urging appellate review of sentences in order to develop a “common law of sentencing”). An illustration of this important self-critical undertaking was provided by Judge Marvin Frankel almost thirty years ago. If required to articulate why rehabilitative purpose would be served in a particular instance a judge would be forced to reflect upon the very essence and practical effect of purpose:

Compelled to focus on what he thinks he means by rehabilitation, the sentencer should be better able to know whether he really means it at all. He should be able to see with some clarity whether and why the sentence should be indeterminate. He should be moved to ask insistently where the defendant will be taken from the courtroom, what will be done for him, and why that course is thought to present realistic prospects of rehabilitation.

Marvin E. Frankel, *Criminal Sentences: Law Without Order* 111 (1973). See also *id.* at 108 (asserting that legislative specification of permissible sentencing objectives, in tandem with the requirement that judges specify which objectives are appropriate in individual cases, “would compel the judge to think connectedly about his reasons and to justify explicitly decisions now taken on unarticulated hunches”).

137. George Fletcher, *Truth in Codification*, 31 U.C. Davis L. Rev. 745, 745-46 (1998).

138. Markus Dirk Dubber, *Penal Panopticon: The Idea of a Modern Penal Code*, 4 Buff. Crim. L. Rev. 53, 100 (2000).

stated.<sup>139</sup> While from the perspective of offenders the choice between imprisonment and community-based dispositions is no longer a zero-sum question, guidance on the threshold disposition question of whether imprisonment is warranted is needed. And such guidance must be as clear-eyed as is possible. As Norval Morris has written with respect to imprisonment in particular, “[t]here is a sharp distinction between the purposes of incarceration and the opportunities for the training and assistance of prisoners that may be pursued within those purposes. The system is corrupted when we fail to perceive this distinction and this failure pervades the world’s prison programs.”<sup>140</sup>

Almost as a rule, however, the law fails to afford purpose-based guidance to facilitate the decision. The Code itself refuses to “state a fixed priority” among the means to secure its amorphous crime prevention goals, instead urging “the just harmonizing” of objectives.<sup>141</sup> Current law in most U.S. jurisdictions is a direct intellectual descendent of this approach. However, federal statutory law, 18 U.S.C. sec. 3553(a), and related parts of the Sentencing Reform Act of 1984, illustrate how a purpose-based framework, one not necessarily seeking harmony, might be formulated. Section 3553(a) provides that the court, in addition to considering relevant offense and defendant-related factors, shall consider:

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139. Purpose, of course, can emanate from legislative bodies or agencies designated to fulfill the responsibility. There is much to be said in favor of the view, as the ABA notes in its most recent Standards, that “such foundational decisions should be made by a democratically chosen and politically accountable organ of government.” American Bar Association, ABA Standards for Criminal Justice Sentencing std. 18-2.1 cmt. at 15 (3d ed. 1994). Indeed, the abdication of the U.S. Sentencing Commission in carrying out its statutory mandate in this regard, see *infra* notes 142-51 and accompanying text, lends support to this position. This Article takes no position on the question of which body is best suited to perform the important task, only that purpose be delineated. As Professor Cotton illustrates in her survey of case law over the past forty years, in the absence of express guidance on purpose (and even at times in its presence), courts engage in an unaccountable, highly idiosyncratic and result-driven analysis, usually in favor of retributive rationales. See Cotton, *supra* note 76, at 1324-57.

140. Norval Morris, *The Future of Imprisonment* 14 (1974).

141. Model Penal Code Tentative Draft No. 2, § 1.02 cmt. at 4 (May 3, 1954).

- (2) the need for the sentence imposed—
- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant;
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . . .<sup>142</sup>

As pointed out by others, Congress, rather than expecting that all four enumerated purposes be served in each offender's case,<sup>143</sup> expected that judges would be directed to critically evaluate the place of each purpose in individual cases.<sup>144</sup> For instance, although Congress explicitly ruled out rehabilitation as a purpose supporting a decision to imprison,<sup>145</sup> the Senate Report accompanying

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142. 18 U.S.C. § 3553(a)(2) (2002).

143. Kate Stith & Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 53 (1998); Miller, *supra* note 5, at 438-39.

144. See S. Rep. No. 98-225, 98th Cong., 2d Sess. 38, 77 (1984), reprinted in 1984 U.S.C.C.A.N. 3183, 3260:

In setting out the four purposes of sentencing, the Committee has deliberately not shown a preference for one purpose of sentencing over another, in the belief that different purposes may play greater or lesser roles in sentencing different types of offenses committed by different types of defendants. The Committee recognizes that a particular purpose of sentencing may play no role in a particular case. The intent of subsection (a)(2) is to recognize the four purposes that sentencing in general is designed to achieve, and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case.

See also *id.* at 59, 1984 U.S.C.C.A.N. at 3242 (“the bill sets forth the four basic purposes of criminal sanctions. It requires the Sentencing Commission to consider these purposes in developing sentencing guidelines and policy statements. It further requires sentencing judges to consider them in imposing sentences.”).

145. 18 U.S.C. § 3582(a) (2002). See also 28 U.S.C. § 994(k) (2002) (instructing Sentencing Commission to “insure that the guidelines reflect the inappropriateness of . . . imprisonment for the purposes of rehabilitating the defendant . . .”). This is not to say, however, that persons imprisoned for another purpose(s) would not be provided with rehabilitative services. See S. Rep. No. 98-225, *supra* note 144, at 76, reprinted in 1984 U.S.C.C.A.N. at 3259 (stating that “[p]rograms within the prison setting should be available and encouraged to enhance the possibility of rehabilitation”). For an attempted rebuttal of the view

the Act is at pains to state that rehabilitative purpose should be weighed “in determining whether a sanction other than a term of imprisonment is appropriate in a particular case.”<sup>146</sup> In discussing the relationship between probation and purposes, for instance, the Report acknowledged that:

[t]he placing on probation of an embezzler, a confidence man, a corrupt politician, a businessman who has repeatedly violated regulatory laws, an operator of a pyramid sales scheme, or a tax violator, may be perfectly appropriate in cases in which, under all the circumstances, only the rehabilitative needs of the offender are pertinent; such a sentence may be grossly inappropriate, however, in cases in which the circumstances mandate the sentence’s carrying substantial deterrent or punitive impact.<sup>147</sup>

The Guidelines themselves, however, are silent on rehabilitation, providing only that “[p]robation may be used as an alternative to incarceration” if conditions imposed “promot[e] respect for the law, provid[e] just punishment for the offense, achiev[e] general deterrence, and protect[] the public from further crimes by the defendant.”<sup>148</sup>

While much of the purpose-based critical commentary directed at the Commission has concerned its failure to articulate a coherent sentencing rationale,<sup>149</sup> more

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that the central purpose of prison is not rehabilitative, see Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 *Law & Ineq.* 343, 364 (2001). For an extended defense of rehabilitation more generally, see Edgardo Rotman, *Beyond Punishment: A New View on the Rehabilitation of Criminal Offenders* (1990).

146. See S. Rep. No. 98-225, *supra* note 144, at 76-77, 1984 U.S.C.C.A.N. at 3273. See also 18 U.S.C. § 3553(a)(2)(D) (specifying that “in determining the particular sentence to be imposed” the court “shall consider” *inter alia* “the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

147. S. Rep. No. 98-225, *supra* note 144, at 92, 1984 U.S.C.C.A.N. at 3275. See also *id.* at 76 (stating that “[r]ehabilitation is a particularly important consideration in formulating conditions for persons placed on probation . . .”). For examples of other federal statutes that specifically direct courts to consider sanctions in light of purposes see, e.g., 18 U.S.C. §§ 3562, 3563, 3584(b).

148. U.S. Sentencing Guidelines ch. 5, pt. B, intro. cmt.

149. See, e.g., Andrew von Hirsch, *The Federal Sentencing Guidelines: Do They*

significant to the discussion here is the Commission's presumption that only two purposes ("crime control" and "just deserts") exhausted the permissible purposes of punishment, and that as a "practical matter" the competing aims lead to the "same result."<sup>150</sup> As discussed earlier, while such a sentiment might be accurate if the sole sentencing option available to a court is imprisonment, it is of little help when it comes to deciding between prison and the numerous non-incarcerative sanctions.<sup>151</sup>

The Commission's disappointing failure to incorporate Congressional directive should not obscure the significance of section 3553, however. It, and the accompanying Senate Report, provide a useful template for the incorporation of purpose into threshold sentencing decisions. Again, the point is not that all purposes must be served in each case. As Michael Tonry has accurately observed, multipurpose sentencing systems are difficult to operationalize.<sup>152</sup> They fail, as he states, to provide any "guidance whatever in sentencing particular cases."<sup>153</sup> When making the

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Provide Principled Guidance?, 27 Am. Crim. L. Rev. 367, 370-73 (1989).

150. The Commission, feeling that it had to choose between competing "crime control" and "just deserts" approaches, ultimately demurred:

[a] philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. . . . A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation. As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result.

U.S. Sentencing Comm'n, Sentencing Guidelines and Policy Statements 1.3-1.4 (Apr. 13, 1987), reprinted in 52 Fed. Reg. 18,046-138 (May 13, 1987).

151. Ultimately, however, these concerns proved to be of little practical trouble to the Commission because the guidelines contain presumptive prison terms for all offenders and impose substantial limits on the capacity of sentencing courts to impose non-prison sanctions. See U.S. Sentencing Commission, 1997 Sourcebook of Federal Sentencing Statistics tbl. 12 (1998).

152. Michael Tonry, Intermediate Sanctions in Sentencing Guidelines, 23 Crime & Just. 199, 242 (1998) ("Most modern sentencing systems purport to be multipurpose, but it has proven difficult to give operational meaning to that idea.") [hereinafter Tonry, Intermediate].

153. Id.



threshold disposition decision, courts might instead be guided by a “series of presumptions about purposes relevant to individual cases.”<sup>154</sup> “Any sentence inconsistent with the presumption would be a departure and require provision of reasons that could be reviewed on appeal.”<sup>155</sup>

Although its progression has been regrettably stunted, the federal system has, nonetheless, shown some capacity to incorporate purpose in the prison/non-prison determination. Because federal law excludes rehabilitation as a reason to commit offenders to prison,<sup>156</sup> when courts wish to depart from presumptive prison terms contained in the guidelines, they have shown a willingness to cite rehabilitation as a purpose justifying departure.<sup>157</sup> This nascent case law, developing amid guidelines clearly not predisposed to such explicitness, affords hope that such a system can be effectuated.

Also holding promise is the approach of Pennsylvania, which has adopted a “layered” approach to its presumptive, guidelines-based system. Pennsylvania courts are directed to

consider and select one or more of the following alternatives, and may impose them consecutively or concurrently:

- (1) An order of probation.
- (2) A determination of guilt without further penalty.
- (3) Partial confinement.
- (4) Total confinement.
- (5) A fine.
- (6) Intermediate punishment.<sup>158</sup>

When imposing a term of imprisonment, sentencing courts are guided by the “general principle” that “the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it

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154. *Id.* at 243.

155. *Id.*

156. See *supra* note 145 and accompanying text.

157. See Richard S. Frase, Defendant Amenability to Treatment or Probation as a Basis for Departure under the Minnesota and Federal Sentencing Guidelines, 3 *Fed. Sent. Rep.* 328 (1991) (discussing decisions).

158. 42 Pa. Cons. Stat. § 9721(a) (2003).



relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.”<sup>159</sup>

As a crucial complement to this broad prescription, Pennsylvania’s guidelines entail five sentencing levels, providing a sentencing regime with an avowed “primary focus on retribution, but one in which the recommendations allow for the fulfillment of other sentencing purposes including rehabilitation, deterrence, and incapacitation.”<sup>160</sup> The five levels are arrayed in terms of increasing severity of offense and offender criminal histories, with each level tied to the purposes the sentencing commission seeks to achieve and the sanctions thought most appropriate to those ends. Level I, for instance, has as its primary purpose “the minimal control necessary to fulfill court-ordered options,” and allows that only “Restorative Sanctions” be imposed.<sup>161</sup> On the other extreme, Level 5 seeks “punishment commensurate with the seriousness of the criminal behavior and incapacitation to protect the public,” and requires incarceration in a state facility, possibly with added participation in a “Motivational Boot Camp.”<sup>162</sup>

In sum, criminal justice need not, in the words of Professors Zimring and Hawkins, be driven by “unexamined principles.”<sup>163</sup> Sentencing purposes are surely capable of being prescribed by governments, and such purposes can and must influence decision making on threshold sentencing outcomes.

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159. 42 Pa. Cons. Stat. § 9721(b).

160. Pa. Sent. Guideline § 303.11(1), Pa. Code tit. 204, ch. 303, § 303.11 (2003). Furthermore, all sentences must be accompanied by a statement of the reason(s) justifying their imposition and, in the event the recommended guideline sentence is deviated from, the reason(s) therefor. *Id.* The law further provides that failure to “comply shall be grounds for vacating the sentence and resentencing the defendant.” *Id.*

161. *Id.* § 303.11(b)(1).

162. *Id.* § 303.11(b)(5).

163. Franklin Zimring & Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime* 3 (1995).

*B. The Importance of Purpose in Imposing Probation Conditions*

Purpose is surely no less important when it comes to the question of what conditions might be imposed upon an individual granted probation. As the Code itself acknowledged, specification of purpose in the application of particular probation conditions is much more “difficult” than the “stark” prison versus non-prison decision.<sup>164</sup> If difficult in 1962, the task can only be thought of as considerably more so today in light of the diversified range of conditions and purposes characteristic of modern probation.

This indeterminacy perhaps in part explains, but does not justify, the absence of purpose in current laws governing the imposition of probation conditions.<sup>165</sup> With legislatures showing little capacity (or desire) for cognizance of purposes at sentencing, the discussion here will focus largely upon other sources. The Minnesota Sentencing Commission has taken some preliminary steps in this direction. Although it refrained from developing guidelines for the imposition of non-incarcerative conditions, and urges only that conditions be “permitted by law” and “appropriate,”<sup>166</sup> the Commission acknowledges that:

there are several penal objectives to be considered in establishing conditions of stayed sentences, including but not limited to, retribution, rehabilitation, public protection, restitution, deterrence, and public condemnation of criminal conduct. The Commission also recognizes that the relative importance of these objectives may vary with both the

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164. Model Penal Code § 7.01 cmt. at 223 (Official Draft and Revised Comments 1985).

165. See *supra* notes 112-21 and accompanying text. An equally plausible explanation is that, as with so much in criminal justice administration, the system has simply proceeded in an unreflective way, as it has in enacting criminal laws, without any semblance of coherence or self-reflection. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 512-19 (2001).

166. Minnesota Sentencing Guidelines § III.A.201 cmt. at 44 (2003).

offense and offender characteristics and that multiple objectives may be present in any given sentence.<sup>167</sup>

Accordingly, if “principled standards” for establishing conditions are to drive sentencing, the Commission reasons, sentencing courts must “first consider the objectives served by a stayed sentence and, second, consider the resources available to achieve those objectives.”<sup>168</sup> The Commission provides the following basic considerations to guide courts:

When retribution is an important objective of a stayed sentence, the severity of the retributive sanction should be proportional to the severity of the offense and the prior criminal record of the offender, and judges should consider the availability and adequacy of local jail or correctional facilities in establishing such sentences. The Commission urges judges to utilize the least restrictive conditions of stayed sentences that are consistent with the objectives of the sanction. When rehabilitation is an important objective of a stayed sentence, judges are urged to make full use of programs and resources available to accomplish the rehabilitative objectives. The absence of a rehabilitative resource, in general, should not be a basis for more extensive use of incarceration than is justified on other grounds.<sup>169</sup>

While instructive in a very general sense, the aforementioned language unfortunately offers scant real guidance to courts in drawing distinctions among sanctions in terms of penal purpose, as applied to individual offenders.

Michael Tonry and Norval Morris, in their influential 1990 book *Between Prison and Probation*,<sup>170</sup> gamely attempted to keep purposes in mind, and provided the following scenario to illustrate their position:

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167. *Id.* III.A.2 Comm. at 43.

168. *Id.*

169. *Id.*

170. Morris & Tonry, *supra* note 98, at 177-79.

If, for example, the sole or primary purpose at sentencing is retribution, an appropriately severe package of financial sanctions, including restitution, costs, and a substantial quantum of day fines, may suffice. If the purposes at sentencing include both desert and control, depending on the offender's circumstances, a combination of community service, home detention, mandatory drug treatment and testing, and intensive probation supervision might be enough. In still other cases, responding to public sentiment or deterrent or incapacitative concerns may be the governing purposes at sentencing; if so, the principle of rough equivalence permits imposition of a not-undeserved incarcerative sentence. . . .<sup>171</sup>

In an effort to lend some practicality to their task, Professors Tonry and Morris assigned purpose to particular non-incarcerative sanctions. Conceiving of all punishments as "reductions in autonomy," the authors surveyed a variety of options. House arrest, for instance, has as its primary purposes incapacitation and training for conformity; community service, deterrence and training for conformity; and intermittent imprisonment, deterrence and incapacitation.<sup>172</sup>

While helpful as a starting point, the framework has several shortcomings. First, because it was developed over a decade ago, it fails to examine several recent non-incarcerative sanctions, including boot camps and shame sanctions.<sup>173</sup> More important, the framework gives short shrift to retributive/just deserts considerations in the imposition of non-incarcerative sanctions.<sup>174</sup>

In 1998, Professor Tonry again ventured to set forth a few examples of how a purpose-based sentencing scheme might look in application, offering a few scenarios:

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171. *Id.* at 90-91. The authors' reference to "equivalence" relates to their extended treatment, earlier in the book, of "interchangeable punishments," based on their admittedly "subjective and arbitrary" correlation of non-incarcerative sanctions with prison time. See *id.* at 75-81.

172. *Id.* at 177-79.

173. *Id.* at 178.

174. See *id.* at 177 (disavowing "concern[] with retributive considerations and the limits they impose on the appropriateness of particular sentences in individual cases").

1. For a drug-dependent shoplifter or burglar or a drug dealer, prevention of future crimes and rehabilitation might be the most important purposes at sentencing; compulsory drug treatment . . . might be the optimal primary sentence with restitution or community service as an adjunct.
2. For a bank-teller embezzler, retribution and general deterrence may be predominant purposes at sentencing, and restitution and community service or a fine the optimal sentences.
3. For the perpetrator of a commercial fraud, retribution and general deterrence may be the predominant purposes and restitution, stigmatizing community service, and a very substantial fine the optimal sentence.
4. For an employed blue-collar head of family who has committed a serious assault while intoxicated, retribution and deterrence may be the predominant purposes and a substantial fine and nighttime and weekend confinement the optimal sentence, thereby permitting him to continue to work and support his family.
5. For a third-time street mugger, deterrence and incapacitation may be the predominant purposes, and a short period of confinement followed by intensive supervision the optimal sentence.<sup>175</sup>

While certainly more helpful, given its more complete incorporation of penal purposes, the foregoing still falls short of the mark because it fails to acknowledge the basic definitional uncertainties of penal purposes themselves. Again, when the only available option is prison, the notoriously indistinct quality of the respective purposes, and their common interrelatedness, matter little. With non-incarcerative sanctions, as Professor Tonry himself acknowledges, “[f]undamental normative questions must be faced and resolved if meaningful policies are to be set.”<sup>176</sup>

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175. Tonry, *Intermediate*, supra note 152, at 247-48.

176. *Id.* at 205. For a more expansive charting of non-incarcerative options, albeit without express links to purpose, see Alan T. Harland, *Defining a Continuum of Sanctions: Some Research and Policy Development Implications*, in

Unfortunately, much of the intellectual energy that could have been dedicated to this normative work has been directed at conceiving of a translation rubric based on retributive and just desert principles to enable non-incarcerative sanctions to be imposed with some semblance of metric relation to prison terms. While perhaps helpful in promoting the use of non-incarcerative sanctions, inasmuch as it has made them more politically palatable, the effort has ultimately shed very little light on the penal purposes that might guide imposition of such sanctions, other than those sounding in retribution/desert.<sup>177</sup> The crucial question that remains unaddressed is not “how much” but “why,” the key inquiry if an informed decision on “what” sanction is to be imposed.<sup>178</sup>

However, if consensus is to be reached on this front progress will have to be made on some definitional matters of foundational importance. Deontological theories, such as retribution and just deserts, pose difficulties for purpose analysis. This is because they largely focus on culpability and hence of necessity rely mainly upon subjective assessments of displeasure associated with particular sanctions. Informative work has been done on the perceived effects of non-incarcerative sanctions, compared to one another and not prison, which will be instrumental

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The Intermediate Sanction Handbook: Experiences and Tools for Policymakers 35, 38 (U.S. Dep't of Justice 1993) [hereinafter Handbook]; Alan T. Harland, *Correctional Options That Work: Structuring the Inquiry in Choosing Correctional Options That Work: Defining the Demand and Evaluating the Supply* 1, 6-7 tbl. 1.1 (Alan T. Harland ed., 1996).

177. Upon assessing the correlation difficulty Professor Tonry concludes that [b]luntly put, retributive and just desert theories allow little room for use of intermediate sanctions. Proportionality concerns require that punishment severity be scaled to the seriousness of crimes, which means the metric is some measure of painfulness or intrusiveness, and offenders convicted of comparably serious crimes must receive comparably serious punishment. Few punishments are as intrusive or burdensome as imprisonment . . . .

Tonry, *Intermediate*, supra note 152, at 206.

178. For an extended treatment of the importance of articulating purpose-related goals in the intermediate sanctions realm in particular see Peggy McGarry, *Agreeing on Goals: The Heart of the Process and Developing a Common Frame of Reference*, in Handbook, supra note 176, at 59, 71.

in the definitional task.<sup>179</sup> Teleological theories, such as rehabilitation, deterrence, and incapacitation, by contrast, largely turn on results; they are consequential in nature and goal-oriented.<sup>180</sup> They are hence more susceptible of empirical evaluation, and future research can be brought to bear by policymakers in clarifying the purposes served by particular sanctions.

Moreover, there remains the enduring difficulty alluded to above of drawing meaningful distinctions among the various penal purposes themselves. Perhaps foremost among the blurred meanings is that of rehabilitation, historically a core purpose of probation.<sup>181</sup> From the origins of the Republic, harsh sanctions with unabashed deterrent and punitive qualities were rationalized on the basis of their supposed rehabilitative effects on offenders.<sup>182</sup> The penitentiary, of course, was largely motivated by this optimistic premise<sup>183</sup> and the Model Penal Code itself

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179. See, e.g., Andrew von Hirsch et al., Punishments in the Community and the Principles of Desert, 20 Rutgers L.J. 595 (1989); Robert E. Harlow et al., The Severity of Intermediate Penal Sanctions: A Psychosocial Scaling Approach for Obtaining Community Perceptions, 11 J. Quant. Criminology 71 (1995); Sue Rex & Andrew von Hirsch, Community Orders and the Assessment of Punishment Severity, 10 Fed. Sent. Rep. 278 (1998). For a ranking of perceived severity from the perspective of actual inmates see Joan Petersilia & Elizabeth Piper Deschenes, What Punishes? Inmates Rank the Severity of Prison vs. Intermediate Sanctions, in Contemporary Community Corrections 240 (Thomas Ellsworth ed., 2d ed. 1996). The effort could also possibly benefit from methodology used to plumb sentiments among the general public on the deservedness of criminal penalties for particular offenders and offenses. See generally Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law (1995); Peter H. Rossi et al., Just Punishment: Federal Guidelines and Public Views Compared (1997); Kenneth W. Simons, The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy, 28 Hofstra L. Rev. 635 (2000).

180. See generally Andrew von Hirsch, Penal Theories, in The Handbook of Crime & Punishment 659-82 (Michael Tonry ed., 1998).

181. Rehabilitation, in the words of one author, "is probably the most overworked word in the correctional lexicon. It is also the least understood and the most misused." Louis P. Carney, Probation and Parole: Legal and Social Dimensions 85 (1977).

182. See Gerald Austin McHugh, Christian Faith and Criminal Justice 39-41 (1978).

183. See generally David J. Rothman, Perfecting the Prison: United States, 1789-1865, in The Oxford History of the Prison 100 (Norval Morris & David J.



attests to the dominant view (at least until the 1970s) that prisons rehabilitate.<sup>184</sup> Hard labor, equally, was extolled as a rehabilitative tool.<sup>185</sup> More generally, as observed by Herbert Packer, the threat of punishment in itself can be justified by rehabilitative purpose.<sup>186</sup>

The abiding confusion over purpose is illustrated in recent appellate decisions on shame sanctions. In *Ballenger v. State*,<sup>187</sup> for instance, a probationer was required to wear a fluorescent pink bracelet inscribed with the words "DUI CONVICT." Noting the broad authority of sentencing courts to impose conditions, the Georgia Court Appeals upheld the condition, concluding that it served the statutory goals of rehabilitation and community protection.<sup>188</sup> "Being jurists rather than psychologists, we cannot say that the stigmatizing effect of wearing the bracelet may not have a rehabilitative, deterrent effect."<sup>189</sup> Similarly, in *Lindsay v. State*,<sup>190</sup> the Florida District Court of Appeal held that requiring a probationer to place in his local paper a mugshot with the caption "DUI-CONVICTED" was rehabilitative. A

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Rothman eds., 1995).

184. Model Penal Code § 7.01 & cmt. (Official Draft and Revised Comments 1985).

185. Rothman, *supra* note 183, at 106-10. Cf. Decision of the State Council Regarding the Question of Rehabilitation Through Labour (approved at the 78th Meeting of the Standing Committee of the National People's Congress [China] on Aug. 1, 1957), rpt. in Nicholas N. Kittrie et al., *Sentencing, Sanctions, and Corrections: Federal and State Law, Policy, and Practice* 11 (2d ed. 2002) (persons "shall be interned for rehabilitation through labour").

186. Herbert L. Packer, *The Limits of the Criminal Sanction* 56 (1968) (noting that "the threat of punishment for future offenses as extrapolated from the experience of suffering the punishment for a present offense may be the strongest rehabilitative force that we now possess"). For an effort to distinguish "reform" from "rehabilitation" see Jack Gibbs, *Crime, Punishment, and Deterrence* 72 (1979) (asserting that rehabilitation seeks to alter behavior by "non-punitive means"; reform seeks alteration through punishment). Despite this overlap, deontology and teleology have been characterized as incapable of principled coexistence. See Larry Alexander, *Deontology at a Threshold*, 37 *San Diego L. Rev.* 893, 908 (2000). Indeed, Professor Packer himself acknowledges that deterrence and retribution "are almost universally thought of as being incompatible." Packer, *supra*, at 36.

187. 436 S.E.2d 793 (Ga. Ct. App. 1993).

188. *Id.* at 794.

189. *Id.* at 794-95.

190. 606 So. 2d 652 (Fla. Dist. Ct. App. 1992).

few years before, the same court held that the avowed rehabilitative purpose behind requiring that a probationer affix a DUI bumper sticker was not “utterly without foundation.”<sup>191</sup>

On the other hand, in *People v. Letterlough*,<sup>192</sup> the New York Court of Appeals overturned a condition requiring that an individual convicted of drunk driving affix to his car a fluorescent sticker reading “CONVICTED DWI.”<sup>193</sup> The *Letterlough* Court, while noting the “inherent overlap and the difficulty in drawing lines between rehabilitative and punitive or deterrent sanctions,”<sup>194</sup> nonetheless found the condition punitive and hence contrary to the avowed statutory goal of rehabilitation.<sup>195</sup> To the Court, separation of powers concerns compelled deference to legislative judgment, despite the overlap.<sup>196</sup> One year later, in *People v. McNair*,<sup>197</sup> the same Court invalidated a condition involving electronic monitoring, reasoning that the condition was motivated by “public safety and surveillance, not rehabilitation.”<sup>198</sup>

The problem has also been evidenced in the review of various monetary-related conditions. For instance, victim restitution, a staple probation condition with the advent of

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191. *Goldschmitt v. State*, 490 So. 2d 123, 126 (Fla. Dist. Ct. App. 1986). See also, e.g., *State v. Bateman*, 765 P.2d 249 (Or. Ct. App. 1987) (finding rehabilitative value in sign reading “Dangerous Sex Offender—No Children Allowed”).

192. 655 N.E.2d 146 (N.Y. 1985).

193. *Id.* at 147.

194. *Id.* at 149.

195. *Id.* at 150.

196. *Id.* See also *id.* (probation conditions require “state-wide uniformity and the kind of policy choices that only an elected Legislature can make.”).

197. 665 N.E.2d 167, 168 (N.Y. 1996).

198. *Id.* at 169. The Supreme Courts of Illinois and Tennessee, construing their similar probation statutes, have held similarly. See *People v. Meyer*, 680 N.E.2d 315, 320 (Ill. 1997); *State v. Burdin*, 924 S.W.2d 82, 86-87 (Tenn. 1996).

In response to *McNair* and *Letterlough*, the New York Legislature amended the State’s probation law. Unfortunately, its new language was strikingly ambiguous and unhelpful as to purpose: courts can impose any “reasonable condition as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant.” N.Y. Penal Law § 65.10(5) (McKinney 1997).

the victims' rights movement,<sup>199</sup> and backed by the Code,<sup>200</sup> has required courts to awkwardly justify such orders in terms of rehabilitation and public protection,<sup>201</sup> despite the meager evidence supporting such rationales.<sup>202</sup> Similarly, the standard probation condition requiring payment of funds to support dependents has uncertain rehabilitative outcomes, especially for offenders not convicted of support-related crimes.<sup>203</sup> Fines, yet another common condition, have been justified on the basis of rehabilitative purpose, despite the distinct possibility that the increased financial pressures they carry might have just the opposite effect.<sup>204</sup>

The foregoing examples highlight the difficulty of drawing meaningful jurisprudential distinctions, and achieving consensus, among probation purposes at sentencing.<sup>205</sup> Unfortunately, as yet there are few jurisprudential tools available to inform the analysis. One option might lie in case law concerning whether a sanction amounts to punishment sufficient to trigger constitutional protection, which also largely turns on purpose. However, as recent decisions from the Supreme Court have made abundantly clear this body of law is in a very muddled state and unfortunately does not hold much promise to help.<sup>206</sup>

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199. See generally Desmond S. Greer, A Transatlantic Perspective on the Compensation of Crime Victims in the United States, 85 *J. Crim. L. & Criminology* 333 (1994).

200. Model Penal Code § 301.1(2)(h) (Proposed Official Draft 1962).

201. See Cohen, *supra* note 4, § 11:2, at 11-7 to 11-8 (citing and discussing cases).

202. See Alan T. Harland, Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts, 30 *UCLA L. Rev.* 52, 121 (1982) (observing that there are "very few specific indications of the theory underlying such hopes or 'findings' that restitution is either correctional or of benefit to the defendant"). See also G. Fredrick Allen, Fines and Restitution Orders: Probationers' Perspectives, 58 *Fed. Probation* 34, 35-36 (1994) (noting that over two-thirds of probationers surveyed in sample viewed their fines and restitution orders as being imposed for punitive reasons).

203. See Cohen, *supra* note 4, at 12:2, at 12-2 to 12-3; 12:5, at 12-7.

204. *Id.* § 12:8, at 12-27 to 12-28.

205. Reported case law on the use of banishment as a probation condition is similarly divided, with at least one court citing its purported rehabilitative benefits. See *State v. Nienhardt*, 537 N.W.2d 123, 125 (Wis. Ct. App. 1995).

206. For a discussion of the muddle with particular regard to the application of the Ex Post Facto Clause, see Wayne A. Logan, *The Ex Post Facto Clause and the*

An alternative might lie in case law addressing the award of prison or jail “credit” for time served. There a rich body of case law has developed requiring courts to critically examine the nature of particular sanctions. The Minnesota Sentencing Guidelines, for instance, expressly preclude credit for time spent in “residential treatment facilities.”<sup>207</sup> The Minnesota Court of Appeals recently interpreted this provision in a case involving a juvenile probationer who faced revocation after having spent time in a private residential treatment facility (“The Colorado Boys Ranch”). The Court observed that “residential treatment programs, although involving a restriction of liberty and commonly a condition of probation, are not punishment for the offense committed, but are an alternative to punishment.”<sup>208</sup> In answering whether the placement amounted to custody, and hence warranted credit, the court distinguished the facility from the State’s juvenile correctional facility (“Red Wing Correctional Facility”), finding the two facilities “qualitatively different”:

[Red Wing] serves “serious and chronic juvenile offenders.”  
[The Boys Ranch] “admits youth, ages 12 through 18, with severe emotional and behavioral problems.” Red Wing

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Jurisprudence of Punishment, 35 Am. Crim. L. Rev. 1261 (1998). For a time it appeared that such a “purposive approach” might get traction, however. In the Court’s 5-4 decision in *Ingraham v. Wright*, 430 U.S. 651 (1977), which held that the Eighth Amendment does not apply to the corporal punishment of public schoolchildren, the dissent argued strenuously in its favor. Writing for himself, and Justices Brennan, Marshall and Stevens, Justice White argued:

The relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled as criminal, but whether the purpose of the deprivation is among those ordinarily associated with punishment, such as retribution, rehabilitation or deterrence . . . .

If this purposive approach were followed in the present case, it would be clear that spanking in the Florida public schools is punishment within the meaning of the Eighth Amendment.

*Id.* at 687-88 (White, J., dissenting). See also *Higdon v. United States*, 627 F.2d 893, 897 (9th Cir. 1980) (urging a two-step analysis: “[f]irst, we consider the purposes for which the judge imposed the conditions, the second step is to determine whether the conditions are reasonably related to the purposes.”).

207. Minnesota Guidelines, *supra* note 166, III.C.04 cmt.

208. *State v. Bradley*, 629 N.W.2d 462, 466 (Minn. Ct. App. 2001).

residents are in the custody of the Commissioner of Corrections as punishment related to the community without further involvement in the justice system.” [Boys Ranch] residence programs are not punishment, and they treat a variety of emotional and psychological problems that may or may not include delinquent behavior.<sup>209</sup>

Focusing on the different regimes in the respective environments, and pinning importance on the “differences between facilities that treat and those that punish,” the Court held that time in the private residential facility did not warrant credit:

We believe that the more rigid restrictions imposed as punishment in state correctional facilities differ significantly from the restrictions deemed necessary as part of a successful rehabilitation program. Inmates who, as a condition of probation, serve time and receive treatment in state correctional facilities are subject to evaluation by state officials. Offenders who receive treatment in a residential treatment program may not be similarly restricted, are not subject to evaluation by state officials, and, significantly are not receiving treatment in conjunction with punishment for the offense committed, but instead are receiving treatment as an alternative to punishment.<sup>210</sup>

Other courts have reasoned to similar results on other credit questions, evaluating on a case-by-case basis whether particular probation conditions are sufficiently onerous to warrant an award. For example, courts have typically deemed electronic home monitoring to qualify<sup>211</sup>

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209. *Id.* at 467.

210. *Id.* at 467-68. See also *Asfaha v. State*, 665 N.W.2d 523, 528 (Minn. 2003) (courts must “look closely at the facts” and assess whether “the level of confinement and limitations imposed are the functional equivalent” of incarceration).

211. See, e.g., *People v. Moss*, 654 N.E.2d 248 (Ill. App. Ct. 1995); *Comm. v. Chiappini*, 782 A.2d 490 (Pa. 2001). According to the Rhode Island Supreme Court, home confinement “is a form of imprisonment, amounting to merely a “change in the place where he or she is confined.” *State v. Quattrocchi*, 687 A.2d 78, 79 (R.I. 1996). But see *State v. Wilkinson*, 539 N.W.2d 249 (Minn. Ct. App. 1995).

but refused credit for involuntary civil commitment<sup>212</sup> and house arrest.<sup>213</sup> Drug or alcohol treatment, if sufficiently “jail-like,” can also qualify.<sup>214</sup>

If meaningful distinctions are to be drawn, however, policymakers must also keep in mind that even facially identical non-incarcerative sanctions can differ in kind. Just as prisons can differ markedly in their human impact on convicts, based on the nature of different institutions, non-incarcerative sanctions can vary in their particulars. The broad categories belie significant differences, as one commentator has noted:

We hear and speak often about the virtues and deficiencies of boot camps, day-treatment centers, community service programs, intensive supervision, and so on as if each one denoted some self-evident and agreed upon identifying characteristic. The reality, of course, is that some boot camps look more like treatment programs than many treatment centers, and any two of the other options listed are likely to be more different than alike from one jurisdiction to another on critical dimensions such as target populations, length of participation, and in the richness and mix of service or surveillance requirements and resources involved. . . . There are a number of options with particular potential for confusion, insofar as their labels appear to suggest reliance upon a unitary or at least relatively singular sanction and program purpose, whereas the reality is that they are much more multifaceted and, therefore, much more difficult to categorize and evaluate.<sup>215</sup>

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212. See, e.g., *Closs v. South Dakota Bd. of Pardons and Paroles*, 656 N.W.2d 314 (S.D. 2003).

213. See, e.g., *State v. Parks*, 6 P.3d 444 (Kan. 2000); *State v. Swadley*, 526 N.W.2d 778 (Wis. Ct. App. 1994).

214. See, e.g., *State v. Judson*, 45 P.3d 329 (Ak. Ct. App. 2002); *Tennell v. State*, 787 So. 2d 65 (Fla. Ct. App. 2001).

215. Alan T. Harland, *Programs vs. Their Component Sanctions*, in *Handbook*, supra note 176, at 42. Professor Harland also notes the diversity of community service sanctions, which vary quite markedly in terms of rigor, oversight, and physical demands, and might even involve an element of public shaming (e.g., picking up roadside trash). *Id.* at 43. See also Madeline M. Carter, *Program Design*, in *Handbook*, supra note 176, at 113, 118 (noting that “[p]rograms with

Despite these complexities, the difficult job of defining and distinguishing purposes with regard to particular sanctions must at last begin. It is no longer enough to say, as one court did in 1992, that “it is difficult to imagine any condition of probation that does not have some punitive aspect to it,”<sup>216</sup> and leave it at that. Equally unacceptable are broad theoretical suppositions by courts that given probation conditions, even those palpably punitive in cast, have rehabilitative purpose.<sup>217</sup> Rather, despite, indeed because of, the reality that a given condition can serve more than one purpose, courts in imposing conditions must become familiar with their goals and likely effects,<sup>218</sup> and specify the animating purpose(s) behind their sentencing decisions.<sup>219</sup> And appellate courts should conduct careful *de*

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similar names and outlines may actually be designed quite differently to achieve different goals,” and pointing out such differences as regard to day-reporting centers with respective punishment/control and rehabilitative objectives).

216. *Lindsay v. State*, 606 So. 2d 652, 656 (Fla. Ct. App. 1992). See also, e.g., *Consuelo-Gonzalez*, 521 F.2d at 267 (holding that conditions that serve to protect the public from recidivism or contribute to general deterrence of others are consistent with rehabilitation).

217. See notes 187-91 and accompanying text. See also, e.g., *State v. Balsam*, 636 P.2d 1234 (Ariz. Ct. App. 1981) (holding that repayment of extradition costs has rehabilitative value).

218. This familiarization process in itself is a formidable task. As Professor Harlan has noted, “[j]udges and legislators are often woefully unfamiliar with the specifics of many of the options available in their own courts and communities.” Harlan, *Handbook*, supra note 176, at 37. The difficulty can be exacerbated by the localized nature of probation strategies, especially in jurisdictions such as North Carolina, where judges rotate among jurisdictions within the state. See North Carolina Sentencing and Policy Advisory Commission, *Sentencing Practices Under North Carolina’s Structured Sentencing Laws* 26 (2002) (noting uncertainty among judges), available at <http://www.nccourts.org/courts>.

219. As Michael Smith has observed, such clarity of purpose has instrumental benefits beyond the initial probationary disposition. Requiring a probationer to obtain and maintain a steady job, for instance, might at once have quasi-incarcerative effects, inasmuch as it consumes time and energy, and also have rehabilitative value. With violation of the condition, purpose assumes patent importance:

If requiring his participation in the labor market was intended to aid in his long-run rehabilitation, the court (or community supervision agent) ought to look for some other condition having rehabilitative effect if he has not complied with the one initially imposed. But if the condition was imposed to advance a partial incapacitation strategy . . . , violation of the condition



*novus* review of such judgments for consistency with avowed statements of purpose.<sup>220</sup> Marc Miller has envisioned just such a purpose-based sentencing scenario, involving a regime in which judges articulate purposes at sentencing, and these purposes are assessed by appellate courts, mindful of available research on the effects of sanctions:

Different kinds of sentences will be better or worse at achieving different purposes. . . . Accordingly, a judge should evaluate the capacity of sanctions to achieve different purposes and then consider whether that sentence applies to the particular offender. The Commission could provide guidance by exploring the comparative strengths and weaknesses of different sanctions in achieving different goals. Research could be used to bolster or challenge the use of different conditions to achieve particular purposes for particular groups of offenders.<sup>221</sup>

Such an empirical approach, it is important to emphasize, is both critically important to the long-term viability of probation and lies with the grain of its evolution. Since its Progressive-Era origins, probation has been closely linked with social science advances, and its

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ought to be met by a more reliably incapacitating condition, which is likely to look and feel harsher (and less rehabilitative)—because the need for incapacitating conditions in such a sentence is certainly not diminished by the offender's inability to connect with a job and the legitimate income a job produces.

Michael E. Smith, *Let Specificity, Clarity, and Parsimony of Purpose Be Our Guide*, 20 *Law & Pol'y* 491, 511-12 (1998).

220. Historically, meaningful appellate review has been hindered by the contentions that probation is an "act of grace" or an arms-length "contract," which have precluded review or limited it to highly deferential abuse of discretion analysis. See Horwitz, *supra* note 124, at 84-90. Also, meaningful review has been hindered by the absence of any requirement that sentencing courts specify the reasoning behind their decisions. Cf. *State v. Pieger*, 692 A.2d 1273, 1279 n.5 (Conn. 1997) (upholding probation condition of forced charitable donation but suggesting that in future cases "express findings supporting the required nexus would alleviate any concerns on the part of a reviewing court").

221. Miller, *supra* note 5, at 470-71. See also Smith, *supra* note 219, at 495 (advocating a "rule of law"-based approach to sentencing, whereby courts "reason from purpose to sentence, by inferences from the facts and circumstances of each case").

discretionary nature has permitted the utilization of programmatic innovations.<sup>222</sup> Over time, however, this empirical orientation diminished and ideologically inspired “correctional quackery”<sup>223</sup> came to predominate, which, rather than seeking to evaluate effectiveness and tailor strategies to individual offenders, contented itself with supposed panaceas.<sup>224</sup> The Code itself, while giving voice to the need for “advance[s]” in research,<sup>225</sup> failed to take steps to meaningfully tie corrections decisions to such research and provide a basis for self-critical evaluation.

Today, after years of malaise and unreflective experimentation, empirical work has refuted the pessimistic conclusion that “nothing works”;<sup>226</sup> certain interventions do work and those in the field are increasingly mindful of the importance of “evidence-based” correctional strategies.<sup>227</sup> Embedding a sentencing structure that requires careful, empirically based judicial consideration of options will play a

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222. Rothman, *supra* note 22, at 61-68. See also Sheldon Glueck, *The Significance and Promise of Probation*, in *Probation and Criminal Justice: Essays in Honor of Herbert C. Parsons*, *supra* note 31, at 18 (asserting that a “research unit in every large probation office is as necessary as an endocrine system in the human body.”).

223. Edward J. Latessa et al., *Beyond Correctional Quackery—Professionalism and the Possibility of Effective Treatment*, 66 *Fed. Probation* 43 (2002). Cf. D.A. Andrews & J. Stephen Wormith, *Personality and Crime: Knowledge Destruction and Construction in Criminology*, 6 *Just. Qtly.* 289 (1989) (discussing tendency of criminology to downplay research not supportive of favored theories on the causes of crime, while promoting weak evidence supporting traditional theories).

224. See James O. Finckenauer, *Scared Straight and the Panacea Phenomenon* (1982).

225. See Model Penal Code § 1.02(2)(g) (Proposed Official Draft 1962) (stating that a main goal was “to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders”); § 410.9 (urging development of “Division of Research and Training” in departments of correction).

226. See, e.g., *What Works in Preventing Crime? Systematic Reviews of Experimental and Quasi-Experimental Research*, 578 *Annals Am. Acad. Pol. & Soc. Sci.* 8 (David P. Farrington & Brandon C. Welsh eds., 2001); Francis T. Cullen, *Rehabilitation and Treatment Programs*, in *Crime: Public Policies for Crime Control* at 253-89 (James Q. Wilson & Joan Petersilia eds., 2002); Lawrence W. Sherman et al., *Preventing Crime: What Works, What Doesn't, What's Promising* (1998).

227. See Faye S. Taxman, *Supervision—Exploring the Dimensions of Effectiveness*, 66 *Fed. Probation* 14 (2002) (surveying literature on successful techniques and endorsing an “evidence-based model of supervision”).

critically important and complementary part in this evolution, forging a salutary bond between the bar and corrections researchers. It will also function as a check on the tendency of rehabilitation to be conceived in unrealistic terms. As Alan Harland has observed, “[c]larity of purposes/goals is an obvious precursor to any meaningful assessment, comparison, and evaluation of the strengths and weaknesses of different sanctions.”<sup>228</sup> “Making decisions about correctional options in terms of kitchen sink or black box programs rather than in relation to the multiple and often conflicting intervention measures that they comprise . . . can lead to overprogramming and wasteful and possibly counterproductive application of correctional resources.”<sup>229</sup> The data, in short, should serve to inform the permissible bounds of purpose-based decision making, with purpose, in turn, informing the decisions on the use of competing sentencing options in particular situations.<sup>230</sup>

An illustration of a legislative framework that can serve as a starting point for the purpose-based approach advocated here can be found in North Carolina, which, along with a handful of other states, has expressly incorporated non-incarcerative sanctions into its sentencing guidelines. North Carolina’s Structured Sentencing Act<sup>231</sup> broadly divides penal sanctions into three

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228. Harland, Handbook, supra note 176, at 37.

229. Alan T. Harland, Correctional Options That Work: Structuring the Inquiry in Choosing Correctional Options That Work: Defining the Demand and Evaluating the Supply 1, 5 (Alan T. Harland ed., 1996).

230. Professor Harland offers a “Rational Assessment Matrix” that, while intended as a thought exercise for broader programmatic correctional decisions, itself might aid efforts to rationalize the sentencing process. The matrix entails several steps:

1. Specify decision goals.
2. Define decision options.
3. Develop information to assess the relative merit of each option.
4. Select, according to articulated decision rules, the option(s) thought to be most congruent with the stated goals.
5. Reassess decisions on a periodic basis based on feedback from prior outcomes.

Id. at 13 & 17 n.3.

231. See N.C. Gen. Stat. § 15A-1340.10 et seq. (2002). See generally Stevens H. Clarke, The Law of Sentencing, Probation and Parole in North Carolina 41-119

categories: (1) “active punishment”;<sup>232</sup> (2) “community punishment”;<sup>233</sup> and (3) “intermediate punishment.”<sup>234</sup> A chart sets forth the applicability of the penal options, based on class of offense and the criminal history of offenders.<sup>235</sup> The chart prescribes that for the most serious offenders (those convicted of A-D felonies), only active imprisonment is authorized; for offenses of mid-level seriousness (those convicted of E-G felonies), either active imprisonment or an intermediate punishment can be imposed; and for least serious felonies (H-I felonies), all three options are available.

Unfortunately, the Legislature failed to afford any guidance on the threshold question, when dispositional discretion exists, of whether imprisonment or a non-incarcerative sanction might be warranted.<sup>236</sup> Equally unfortunate, but again entirely consistent with experience, the Legislature failed to afford any guidance whatsoever on the purposes to be served in choosing between the two

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(2d ed. 1997); Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, 29 *Crime & Just.* 39 (Michael Tonry ed. 2000).

232. N.C. Gen. Stat. § 15A-1340.1(1) (2002) (defined as a “sentence in a criminal case that requires an offender to serve a sentence of imprisonment and is not suspended”).

233. N.C. Gen. Stat. § 15A-1340-11(2) (2002) (defined as a “sentence in a criminal case that does not include an active punishment . . . [or] . . . an intermediate punishment . . .”).

234. N.C. Gen. Stat. § 15A-1340.11(6) (2002) (defined as a “sentence in a criminal case that places an offender on supervised probation and includes at least one of the following conditions”: special probation as defined in 15A-1351(a); assignment to a residential program; house arrest with electronic monitoring; intensive probation; and assignment to a day-reporting center).

235. N.C. Gen. Stat. § 15A-1340.17 (2002). Departures are permitted, unless expressly prohibited, in the courts’ discretion. See N.C. Gen. Stat. § 15A-1340.13(f)(g).

236. North Carolina law, as is common, only identifies a broad spectrum of avowed purposes to guide particular sentencing dispositions:

The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender’s culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as lawful citizens; and to provide a general deterrent to criminal behavior.

N.C. Gen. Stat. § 15A-1340.12 (2002).

broad categories of non-“active punishment” (i.e., non-incarcerative) sanctions, and the many types of sanctions contained within them. Thus, while North Carolina succeeded in imposing some measure of rationality upon its sentencing enterprise, showing an appreciation of the basic types of sanctions populating the non-“active imprisonment” world, the State failed to afford courts any meaningful basis to implement the sanctions permitted, thus undercutting the enhanced rationality promised by purpose-based sentencing.<sup>237</sup>

As the foregoing discussion makes clear, much work remains to be done in the area of constructing purpose-based schemes for probation decision making. Presuming the appropriateness of the approach, there remain at least two potential practical concerns relating to implementation. The first relates to those situations in which purpose-driven decisions on particular conditions are potentially at odds with another, e.g., when a given offender’s background suggests a need for treatment yet public safety and retributive goals call for punitive outcomes. Here, again, the legislature should be called upon to devise a hierarchy of purpose values, mindful of Henry Hart’s recognition that in transacting justice “the pursuit of one aim may be qualified by . . . the pursuit of others.”<sup>238</sup> A possible legislative approach, in a system motivated by broad concern for desert and public safety, has been suggested by Michael Smith:

1. The court shall impose the sentence it finds more likely to advance the penal purpose it specifies for the case than the alternatives brought to its attention;
2. Public safety is the primary purpose to be specified, though just punishment should be an element of and a constraint upon every sentence;

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237. Pennsylvania’s guidelines contain a helpful structure consisting of five offense levels with attendant purposes and available dispositional outcomes. See *supra* notes 160-62 and accompanying text. However, the guidelines speak only in very broad and underinclusive terms with respect to purpose, do not make any effort to link particular sanctions with purposes, and provide for only modest appellate review.

238. Hart, *supra* note 129, at 3.

3. Public safety trumps desert when the court finds the magnitude of deserved punishment would interfere with the most plausible penal strategy for advancing public safety; but
4. Desert is the only permissible purpose when a court finds no strategy plausible for advancing public safety through imposition of any penal measures authorized for the offense.<sup>239</sup>

Such a legislative scheme, in turn, could be informed by the Institute's preference in the proposed new Code for limiting retributivism and parsimony,<sup>240</sup> affording courts a principled basis to select among possible conditions in instances when (i) purposes potentially conflict and/or (ii) the aggregate severity of combined conditions is thought excessive.<sup>241</sup>

A second possible concern might stem from an argument that common law judges are not sufficiently expert in penal purposes to reach reliable outcomes.<sup>242</sup> On

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239. Smith, *supra* note 219, at 517 n.16. Professor Smith elaborates on how such an approach might be operationalized:

when imposing sentence, the court shall specify the primary purpose (just desert or public safety), specify facts relevant to its finding of desert, specify any penal strategy by which the public safety purpose is to be advanced, specify the penal measures by which it expects the sentence to serve the strategy, specify the facts upon which it finds the sentence more likely to advance its purposes than the alternatives known to it, and specify the facts justifying any exchange of desert for public safety.

*Id.* at 497-98.

240. See American Law Institute, Model Penal Code: Sentencing, Report 36-41 (April 11, 2003). The concepts of limiting retributivism and parsimony have their intellectual genesis in the work of Norval Morris. For more on Professor Morris's major influence on modern punishment theory and policy see Richard S. Frase, Limiting Retributivism: the Consensus Model of Criminal Punishment, in *The Future of Imprisonment in the Twenty-First Century* (Michael Tonry ed., forthcoming 2004) (manuscript on file with the author).

241. I am indebted to Professor Richard Frase for this suggestion. In a forthcoming chapter, Professor Frase discusses the instructive approach used in the Oregon guidelines, which impose presumptive upper limits on the maximum array of probation conditions, based on "sanction units." See Frase, *supra* note 240, at 40-41 (citing and discussing Oregon Sentencing Guideline Rules 213-005-0001 et seq.).

242. For an argument to this effect see Leonard J. Long, *Miller's Algebra of Purposes at Sentencing*, 66 S. Cal. L. Rev. 483, 494 (1992).

the contrary, judges, actors intimately involved in the daily work of dispensing justice, would appear optimally suited to assess and implement purposes.<sup>243</sup> Their purpose-based judgments, complemented by available research on the effects of particular sanctions, and evaluated by appellate review, would lend enormous aid to the development of a critically important shared meaning of penal purposes.<sup>244</sup>

The inevitable discretion entailed in such an approach is also potentially subject to the argument, most prominently voiced by Paul Robinson,<sup>245</sup> that it risks disparity and unfairness because individual judges will weigh purposes, with all their potential indefiniteness. Such concern, however, as at the threshold decision discussed earlier, can be lessened by requiring that courts undertake “targeting”—“identifying offender groups by their profiles—those features that distinguish one group of offenders from another—in order to choose appropriate sanctions for them.”<sup>246</sup> Moreover, by forcing courts to self-critically specify purpose with respect to each condition imposed, the approach lessens the prospect for abuse.

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243. As the Commentary to the revised ABA Standards observes, “sentencing courts are the best-positioned governmental actors to make such case-specific judgments. By institutional training, judges have long experience in rendering particularized outcomes within a legal framework . . .” ABA Standards std. 18-2.6 cmt. at 35. See also Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 *Stan. L. & Pol’y Rev.* 93, 96 (1999) (urging greater judicial involvement in guidelines-based system, justified by judiciary’s unique expertise wrought by case-by-case application of policy and practice); Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 *Nw. U. L. Rev.* 1441, 1455 (1997) (same).

244. What Henry Hart said of the judicial process applies more generally to the process envisioned here: “it permits principles to be worked pure and the details of implementing rules and standards to be developed in the light of intensive examination of the interaction of the general with the particular.” Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401, 429-30 (1958). See also *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (opining that “general criteria . . . will acquire more meaningful content through case-by-case application at the appellate level”).

245. Paul H. Robinson, *Hybrid Principals for the Distribution of Penal Sanctions*, 82 *Nw. U. L. Rev.* 19, 20-21 (1987).

246. Kay A. Knapp & Madeline M. Carter, *An Analytical Approach to Targeting*, in *Handbook*, supra note 176, at 101, 110.



Appellate review and empirical evaluation, in turn, will exercise additional control.<sup>247</sup>

In the end, the purpose-based approach advocated here has several major benefits. First, and perhaps foremost, it ensures a more principled approach to sentencing, with attendant benefits of governmental transparency and accountability. In more practical terms, the tying of purpose to sanctions, and vice versa, will ultimately assist in avoiding application of particular sanctions to inappropriate criminal offenders, which in the past has undermined the credibility of non-incarcerative sanctions. This benefit extends to all sorts of conditions, including those of a "standard" nature enumerated in statutes (e.g., refrain from alcohol or drugs); programmatic innovations (e.g., boot camps and electronic monitoring); and even novel probation conditions imposed by courts pursuant to their traditionally broad statutory authority (e.g., limits on the freedom to associate and shame sanctions). Ultimately, by forcing courts to think critically about options, a purpose-based approach promises more thoughtful application of non-incarcerative alternatives,<sup>248</sup> which today proportionately

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247. Importantly, reviewing courts must take seriously their supervisory role, contrary to common practice. See Joseph W. Luby, Reining in the "Junior Varsity Congress": A Call for Meaning Judicial Review of the Federal Sentencing Guidelines, 77 Wash. U. L.Q. 1199, 1233 (1999) (noting that "[o]n the rare occasion that criminal defendants challenge particular guidelines as inconsistent with the SRA, courts generally give such challenges short shrift").

248. This power to innovate is indispensable to probation decision making, permitting courts to fit conditions to individual offenders. As important, it permits the justice system to remain receptive to dynamic innovations in the field of probation. See Livingston Hall, Reduction of Criminal Sentences on Appeal: II, 37 Colum. L. Rev. 762, 767 (1937) (expressing concern over unduly rigid codification "lest further development be hindered by precedents embodying in the law the incomplete knowledge of the present"). For an argument that conditions should be limited to those specifically authorized by the legislature, based on evaluation and study, see Horwitz, *supra* note 124, at 158-60. According to Professor Horwitz, such an approach "reduces the possibility that individual trial judges will respond inappropriately to public pressures and places constraints on the ability of trial judges to act upon their personal biases and prejudices, personal morality, or pop-psychological issues." *Id.* at 160. For an example of an appellate court invalidating a probation condition (home detention) because it was not expressly authorized by statute see *Bailey v. State*, 734 A.2d 684 (Md. 1999).

account for the majority of correctional outcomes, and will doubtless continue to predominate given fiscal pressures.<sup>249</sup> Such judicial clarity, in turn, will hopefully carry the ancillary benefit of promoting among probation field personnel an increased clarity of purpose that is currently lacking, a deficit considered the “greatest threat” to the effective operational capacity of probation.<sup>250</sup>

#### CONCLUSION

In 1988, Michael Tonry rightly observed that, while the Code’s “sentencing provisions represented a major advance over pre-Code practice,” its “sentencing provisions address the problems and institutions of the 1940s and 1950s and much has changed since then.”<sup>251</sup> This is surely no less true today, especially with respect to probation, an area of corrections that has changed dramatically over the past forty years.<sup>252</sup> Nevertheless, many of the basic probation-related questions that concerned the drafters of the Code in 1962 abide to this day,<sup>253</sup> as does an all-

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249. See *supra* note 7 and accompanying text.

250. U.S. Department of Justice, Office of Justice Programs, *Rethinking Probation: Community Supervision, Community Safety 2* (1998).

251. Michael Tonry, *Sentencing Guidelines and the Model Penal Code*, 19 *Rutgers L.J.* 823, 823 (1988).

252. One of the many tasks in the revamped Code sentencing provisions will involve an expanded menu of non-incarcerative sanctions, compared to the very limited list set forth in 1962. See Model Penal Code § 6.02(3) (Proposed Official Draft 1962). The Commentary’s assertion that subsection (3) provides a “complete catalogue” of sentencing alternatives is plainly no longer accurate. Model Penal Code § 6.02 cmt. at 87 (Official Draft and Revised Comments 1985). Clearly, the expansion should include conditions such as community service and the range of intermediate sanctions that have come into use over time. Such a list should not, however, be exclusive. Rather, it should serve as a guide to courts in their conditions-related decisions, permitting application of new and perhaps novel strategies coming into use, consistent with the evolutionary development of probation and its local character. See Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 *U. Colo. L. Rev.* 679, 702 (1993) (identifying two values in formulation of guidelines: “First, they must provide for local variability in types and levels of available programs. Second, they must legitimate a variety of sentencing purposes, although these purposes can be prioritized in different ways for different offenses.”).

253. Writing in 1952, at the dawn of the Institute’s work on the Code, Herbert

important matter they addressed only in the vaguest way: the animating purpose(s) of grants of probation and the conditions attending its imposition.

The discussion here has tried to highlight the significance of this deficit and to advance the effort toward purposeful probation decision making. If taken to heart, the approach holds promise for doing more than encouraging the reflective and hopefully optimal use of probation. By thinking deeply about, developing, applying, and testing purposes in the complex arena of non-incarcerative sanctions, the field of corrections as a whole can benefit, allowing a more principled (and perhaps parsimonious) use of criminal sanctions over time.

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Wechsler referred to probation as “perhaps . . . the most important modern contribution to the treatment field,” and catalogued a series of unresolved questions, including: “What criteria should govern a determination to employ probation . . . ? What conditions ought to be permissible in a probation order . . . ? Should a defendant have a right to review of an invidious condition?” Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 *Harv. L. Rev.* 1097, 1124-25 (1952).