Reconceptualizing Punishment: Understanding the Limitations on the Use of Intermediate Punishments

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The failure of intermediate punishments to replace imprisonment as a sanction for many criminal offenders in the United States may not surprise many people. The failure of policymakers to adopt—or at least to explore—the concept of the “interchangeability” of punishments, advocated by Norval Morris and Michael Tonry in 1990, may reflect the view that punishments must be more severe than any form of “interchangeability” will allow. If people mistakenly believe that harsh punishment corrects or that imprisoning large numbers of criminals will make the rest of the population safer as a whole, then it is unlikely that intermediate punishments will be seen as sensible replacements for imprisonment.

But the severity problem is only part of the issue. An examination of the failure of intermediate punishments to reduce the use of imprisonment in Canada is useful beyond Canada’s borders in large part because there may be lessons that other jurisdictions with different criminal justice traditions can learn. Canada has a different crime problem and a different criminal justice climate from that found in the United States. Over the past twenty-five years,

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1. Morris and Tonry propose that “[T]he measure of punishment is not its objective appearance but its subjective impact. Our goal is to achieve a system of interchangeable punishments that the state and the offender would regard as comparable in their punitive effects on him. . . . [W]e believe that nonincarcerative . . . sentences can be devised that can meaningfully be said to be equivalent to imprisonment, and that these can be deployed within a system of guided discretion that maintains proportionality and rough equivalence among the punishments imposed on different offenders.” Norval Morris and Michael Tonry, Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System 93 (Oxford, 1990).
the two federal political parties that have been in power have endorsed the view that Canada imprisons too many people.\(^2\) Furthermore, there have been a succession of national reports critical of Canada's high imprisonment rate.\(^3\) Nevertheless, imprisonment rates in Canada have risen slowly but consistently during this same period of time. Criminal justice budgets have increased in Canada at a rather high rate, particularly in the area of adult and youth corrections.\(^4\)

There is another reason why Canada should be an ideal jurisdiction to make use of intermediate punishments and to substitute community punishments for imprisonment: our prison sentences appear to be relatively short in comparison to those in the United States. Thus, in theory, it should not be difficult to find appropriate substitute punishments for imprisonment.

We suggest that an examination of the reasons why Canada has been remarkably unsuccessful in substituting intermediate punishments for imprisonment may be instructive not only for understanding why Canada wastes human and economic resources by imprisoning large numbers of people, but also for providing some lessons that can be applied elsewhere. The failure of intermediate punishments, we suggest, relates to the nature of the punishments themselves, not solely to their severity.

Those advocating the increased use of intermediate punishments have assumed that punishments can be placed along a single continuum, and therefore, at least in theory, a certain amount of one punishment should, within limits, substitute for another. Such an approach, though rational, fails to take into account the fact that punishments serve a variety of functions. In particular, we suggest that imprisonment may be seen as accomplishing the traditional sentencing goal of denunciation more effectively than intermediate sanctions can, independent of questions of severity. Thus, some offenses may be seen—by judges and by members of the general public—as "requiring" imprisonment. In other words, punishments may differ qualitatively as well as quantitatively. Certain intermediate sanctions, though punitive, do not appear to be capable of serving certain purposes. Hence, it should not be surprising that judges do not impose them and that the public does not advocate their use. Therefore, in order to understand which punishments are appropriate, one has to examine them within the particular social context in which they are imposed.\(^5\)

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\(^2\) See text accompanying notes 22-54.

\(^3\) Id.

\(^4\) We are not suggesting that Canada is free of right-wing political pressures advocating "toughening up" of the criminal justice system. Unfortunately, Canada has many individuals, groups, and now, a national political party whose crime agenda is to imprison more people. Nevertheless, in recent years the federal government—which has the responsibility for criminal justice legislation—has resisted, for the most part, pressures to endorse a "lock them up" strategy. See notes 24, 28, 33, and 43.


\(^6\) For a full discussion of the social context of punishment, see David Garland,
I. Canada and the United States: Different Crime Problems, Similar Punishment Problems

Given high levels of serious violence and a political atmosphere that suggests that imprisonment is an efficient means of crime control, it may not be difficult to understand why the United States has been unsuccessful in addressing its high level of imprisonment. It is somewhat less obvious, however, why the same problem should be so intractable in Canada. Other than the United States, Canada has one of the highest levels of imprisonment in the western world. From 1980-81 to 1990-91, adult prison admissions and adult prison populations increased by 22 percent. This increase would have been larger were it not for an increase in the maximum age for young offenders in some provinces (from sixteen or seventeen to a uniform age of eighteen) that took place in 1985. Crime, particularly violent crime, is as central a political issue in Canada as it is in the United States. Yet, generally speaking, governments, both at the federal and the provincial level, have not been overtly supportive of a “get tough on crime” approach to the problem. The proximity of Canada to the United States may provide one explanation of why we cannot control our use of imprisonment. Canadians frequently compare their country to the United States, and crime policies like “three strikes, you’re out,” capital punishment, more police on the streets, and longer sentences have become part of our criminal justice debates. However, a focus on proximity alone leads one to ignore some profound differences in the criminal justice climates in the two countries.

In the first place, most measures of violent crime—the type of crime of greatest concern to most Canadians—suggest that violence is much more prevalent in the United States than it is in Canada. Murder rates in the two countries have, in the past twenty-five years or so, moved more or less in parallel, with the rate in the United States being about four times that in Canada. The data for 1993, for example, provide a rather clear picture. There were 2.2 homicides per hundred thousand residents in Canada as

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8. Id at 14.
compared to 9.5 in the United States. Furthermore, homicide rates in Canada have not changed much in the past eighteen years. In Canada, homicide rates are not dramatically higher in large cities than they are in smaller centers or in rural areas. The nine largest census metropolitan areas in Canada had an average homicide rate of about 2.4 per hundred thousand. The census metropolitan areas with populations between one hundred thousand and a quarter of a million residents had an average homicide rate of about 2.1 per hundred thousand residents. Smaller municipalities had an average rate of about 2.0 per hundred thousand.

In recent years, it appears that actual victimization rates in Canada have not changed appreciably, or if anything, it appears that they have decreased somewhat. Canada entered late into the national victimization survey business. A 1993 survey by Statistics Canada repeated victimization questions that had been asked in 1988. For violent crimes where estimates were available from the 1988 survey (i.e., assault and robbery), rates were comparable or lower in 1993 than they had been five years earlier. The data were similar for property crimes.

A large portion of the Canadian population, however, appears to believe that crime today is worse than it was five years ago. Forty-six percent of Canadian adults believe that crime in their own neighborhoods has increased. Crime is certainly a political issue. In fact, when the 1993 victimization survey results were released, the far right-wing and the right-wing press publicly attacked the results, Statistics Canada, and the authors of the report. High crime rates appear to be important to a portion of the politically active Right in Canada, although the two political parties that have ruled Canada since it became a country in 1867 have not had distinguishable views about crime or how to deal with it. More importantly, neither political party

11. Id.
12. Capital punishment was officially abolished in Canada in 1976, when Canada's homicide rates hit their highest level in modern history (1975 rate per hundred thousand population: 3.0; 1976: 2.8; 1977: 3.0). Id at 5.
13. Id at 8-9.
14. Id at 8.
15. Id.
16. Id.
18. Id at 6-7.
19. Id at 6.
20. Forty-three percent think it has stayed the same, and 4 percent think it has decreased; the remaining respondents indicated that they did not know. Id at 15.
21. See, for example, Don Wanagas, It's Criminal! Cops Blast Fed Study That Claims Crime's Not Getting Worse, Toronto Sun 4 (June 14, 1994); Kevin Michale Grace, One Adult in Four, Victimized: Statscan Concludes That Actual Crime Is 10 Times More Common Than Police Tallies Show, Alberta Rep 21 (July 4, 1994) (quoting the general counsel for the Canadian Police Association as suggesting that the survey was a waste of time and money).
has made a consistent attempt to argue that more police, more prisons, or a little more of each would do much for the crime problem in Canada. Nevertheless, imprisonment rates have increased, prison overcrowding is commonplace, and there appears to be no serious attempt to deal with the ever-increasing numbers of people sent to prison.

II. A Short History of Recommendations to Reduce the Use of Imprisonment in Canada

The idea of reducing the use of imprisonment by use of intermediate sanctions is not new to Canada. In fact, federal committees and commissions have repeatedly made the recommendation. In addition, the “overuse of imprisonment” has been mentioned as a problem in a number of government policy statements and proposals. In 1969, for example, the federally appointed Canadian Committee on Corrections recommended an increased use of non-prison sanctions, in particular the fine. This high-level Committee wrote a comprehensive report on the justice system—a report that was frequently referred to for at least ten years after it was written.

The committee's discussion of fines, however, suggests that they saw them operating in much the same way as imprisonment:

There is no doubt that a substantial rather than a nominal fine, however, may operate as a deterrent to the offender and other potential offenders in appropriate cases. The Committee considers that deterrent fines may be appropriately imposed with respect to casual offenses committed by people with general law abiding tendencies, for example, with respect to such offenses as dangerous driving.

The imposition of a substantial fine appears to be particularly appropriate where the offender has benefited financially from the commission of the offense. In such cases fines may be imposed either in lieu of or in addition to any other punishment depending on the circumstances of the case.

More generally, in a section of its report entitled “Excessive use of prisons in Canada,” the Committee recommended that alternatives to imprisonment be found:

22. For examples, see text accompanying notes 23-43.
24. Id at 197.
25. Id. The Committee’s discussion of fines is interesting in light of the suggestion that we are making. Although they recommend an increased use of fines, it is clear that the Committee viewed fines as appropriate only for certain kinds of offenses or offenders. The Committee did not expand upon its apparent reluctance to endorse fines as a punishment of choice for most minor crimes.
Throughout this report the Committee has stressed the importance of dealing with the offender in the community. We have suggested changes in sentencing policy to provide for the use of alternatives to prison as much as possible. . . We are of the opinion that through these measures a major decrease in Canada's prison population would prove possible, without increased danger to the public and with greater success in terms of rehabilitated offenders. A considerable saving in public money would also result.26

Similar sentiments can be found in the first report of the Law Reform Commission of Canada (tabled in Parliament in 1976), which suggested restraint in the use of the criminal law.27 The Commission recommended restraint in the criminalizing of problematic behavior, restraint in the decision to prosecute, and restraint in the imposition of sentences of imprisonment:

The major punishment of last resort is prison. This is today the ultimate weapon of the criminal law. As such it must be used sparingly. . . .28

Restricting our use of imprisonment will allow more scope for other types of penalties. One penalty our system should use more extensively is the restitution order. . . .29

Society too has a claim to reparation—a claim not satisfied by 'payment in the hard coinage of imprisonment.' The claim is better met by more creative penalties like community service orders compelling the offender to do something positive to make up for the wrong he has done society.30

Positive penalties like restitution and community service orders should be increasingly substituted for the negative and uncreative warehousing of prison.31

Until 1982, Canada did not have any formal statement of policy in its criminal law. In mid-1982, however, the then (Liberal) Minister of Justice of Canada Jean Chrétien, now Prime Minister of Canada, released a booklet, The Criminal Law in Canadian Society,32 which was described by the government of the day as being its criminal law policy. The statement has an ambiguous status since it was never given any parliamentary endorsement. Nevertheless, two years later, in 1984, when the Liberal Government was replaced by the Progressive Conservatives, the Department of Justice continued distributing the

26. Id at 309.
28. Id at 24.
29. Id at 25.
30. Id.
31. Id.
booklet. The only difference in content was that the name of the Minister of Justice was deleted from the preface. Since The Criminal Law in Canadian Society is the only statement of criminal law policy in existence, policymakers still refer to it.

In this statement of policy, we find, once again, restraint in the use of imprisonment being listed as an important principle: "[I]n awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances."\(^3\)

The report also suggested that, in order to accomplish the goal of equality of treatment and accountability, "guidelines applicable to sentencing and post-sentencing processes would be developed, with a view to reflecting such concerns as . . . preventing increased demands on prison capacity or increased average time served in prison as a result of the use of such policies, by establishing that imprisonment should be used only when lesser sanctions are inadequate or inappropriate. . . ."\(^4\)

In 1984, a few months before it was voted out of office, the Liberal government established a small policy-recommending commission (The Canadian Sentencing Commission) whose purpose was to report back to the government on how Canada's sentencing might be improved. The 1987 report of the Canadian Sentencing Commission\(^5\) recommended a comprehensive overhaul of sentencing in Canada. Not surprisingly, for example, it recommended the creation of a small permanent commission whose job would be, among other things, to develop guidelines.\(^6\)

In its report, the Canadian Sentencing Commission reviewed federal and provincial reports that had been written over a one hundred-fifty-year period beginning in 1831.\(^7\) The authors of these official reports had repeatedly recommended restraint in the use of imprisonment, largely because imprisonment was seen as being ineffective, if not harmful.\(^8\) Not surprisingly, therefore, in listing the "Effects of the Structural Deficiencies in Sentencing," the Commission listed "An Over-Reliance on Imprisonment" as one of the major problems (immediately after "Disparity").\(^9\) In its statement of principles, the Commission advised that limits be placed on the imposition of imprisonment.\(^10\) Consistent with reports written over the past one hundred-fifty-years, the Canadian Sentencing Commission recommended that the federal and provincial governments "ensure that community programs are made available and

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33. Id at 53.
34. Id at 65.
36. Id at 437-42.
37. Id at 40-44.
38. Id.
39. Id at 71-78.
40. Id at 154.
encourage their greater use."\textsuperscript{41}

In 1988, an all-party Parliamentary committee, chaired by a member of the Conservative party reviewed the report of the Canadian Sentencing Commission. The Committee counted among its members the sponsor of a bill to reintroduce capital punishment that had failed one year earlier. Consistent with previous examinations of the use of intermediate punishments, "[t]he Committee reached a consensus early in its deliberations about the desirability of using alternatives to incarceration as sentencing dispositions for offenders who commit non-violent offenses. Using incarceration for such offenders is clearly too expensive in both financial and social terms."\textsuperscript{42} At the same time, the Committee cautioned that,"[t]he Committee does not wish to give the impression that it considers property offenses trivial. It knows that such offenses may be extremely upsetting to the victims who are affected by them. Moreover, not sanctioning such behavior seriously can give the impression that such conduct is tolerable. In the Committee's view, it is not."\textsuperscript{43}

The Conservative government, which was in power at the federal level from 1984 until 1993, was not to be outdone by the federal Liberals. In July 1990, the then Minister of Justice (three years later Prime Minister), Kim Campbell, along with her colleague, the Solicitor General, issued a pre-legislative set of proposals on sentencing and parole.\textsuperscript{44} The report noted that:

\begin{quote}
[v]irtually all official reports on sentencing and corrections have declared that we rely too heavily in Canada on imprisonment as a criminal sanction.\textsuperscript{45}

Imprisonment is generally viewed as of limited use in controlling crime through deterrence, incapacitation and reformation, while being extremely costly in human and dollar terms. . . .\textsuperscript{46}

Reducing this dependency on prisons is needed to achieve greater effectiveness, balance and restraint in our system. . . .\textsuperscript{47}

Surveys show Canadians are willing to look at alternative sanctions, but those alternatives must be developed, available, credible, and known to judges. . . .\textsuperscript{48}

We must also ensure that the end result is not a 'widening of the net.'
\end{quote}

\begin{thebibliography}{9}
\bibitem{41} Id at 361.
\bibitem{43} Id at 50.
\bibitem{45} Id at 10.
\bibitem{46} Id.
\bibitem{47} Id.
\bibitem{48} Id.
\end{thebibliography}
The objective is to divert less serious offenders from prison to community-based programs, not to invent new sanctions for those who would not have been sent to prison anyway.\textsuperscript{49}

Perhaps the most surprising statement consistent with the idea of limiting the use of imprisonment came from a House of Commons committee in the last year of the recent Progressive Conservative era in federal politics. The Committee was charged with the responsibility of making recommendations on how to reduce crime. Because the Conservatives were in power, they dominated the Committee. The Committee chair, a former Royal Canadian Mounted Police officer known for his far-right views on criminal justice matters, stunned many observers by explicitly rejecting, in the report and in public interviews, the view that increased imprisonment would reduce levels of crime in Canadian society:

From the evidence presented to the Committee, which is discussed in this report, the members of the Committee are convinced that threats to the safety and security of Canadians will not be abated by hiring more police officers and building more prisons. . . . If locking up those who violate the law contributed to safer societies then the United States should be the safest country in the world.

In fact, the United States affords a glaring example of the limited impact that criminal justice responses may have on crime.\textsuperscript{50}

The chair of the Committee was quoted in the newspaper as saying, “If anyone had told me when I became an MP nine years ago that I’d be looking at the social causes of crime, I’d have told them they were nuts. I’d have said, ‘Lock them up for life and throw away the key.’”\textsuperscript{51}

More recently, in legislation introduced in 1994,\textsuperscript{52} the present (Liberal) government recommended limited use of imprisonment for both adults\textsuperscript{53} and for young offenders (ages twelve to eighteen).\textsuperscript{54} For young offenders, the law would require that certain hurdles be cleared before a young person could be placed in custody. For example, the youth court judge would “take the following into account”:

1. An order of custody shall not be used as a substitute for appro-

\textsuperscript{49} Id.
\textsuperscript{50} House of Commons, Crime Prevention in Canada: Toward a National Strategy 2 (Feb 1993).
\textsuperscript{51} David Vienneau, Canada Must Fight Crime’s Social Causes Panel of MPs Urges, Toronto Star A1 (Feb 13, 1993).
\textsuperscript{52} At the time this Article was written (early 1995), the legislation had not completed the legislative process.
\textsuperscript{53} An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof, Bill C-41, 1st Sess, 35th Parliament, 42-43 Elizabeth II § 718.2 (1994).
\textsuperscript{54} An Act to Amend the Young Offenders Act and the Criminal Code, Bill C-37, 1st Sess, 35th Parliament, 42-43 Elizabeth II § 15 (1994).
appropriate child protection, health, and other social measures

2. A young person who commits an offense that does not involve serious personal injury should be held accountable to the victim and to society through non-custodial dispositions whenever appropriate.

3. Custody shall only be imposed when all available alternatives to custody that are reasonable in the circumstances have been considered. Where a youth court judge [orders custody], the youth court shall state the reasons why any other disposition or dispositions . . . would not have been adequate.55

For adults, the hurdles that must be cleared before an offender could be imprisoned are somewhat lower. The Bill includes a statement, to be included in the Criminal Code that, “[a]n offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”56

However, in most cases, the Bill will attempt to reduce the use of imprisonment in less serious criminal matters. Interestingly, in the public discussion of both of these bills, these aspects of the proposed changes have not been mentioned. Neither bill has had an easy time in Parliament, and the Minister of Justice has received considerable criticism about some aspects of both sets of amendments.57 We are not aware of any criticism, however, that is directed at the proposed reduction of the use of imprisonment.

It would appear that most influential statements coming from the government in power or from independent committees and commissions established by the federal government are consistent. Canada overuses imprisonment as a criminal sanction. As mentioned earlier, Canada's rate of imprisonment is one of the highest in western countries.58 This fact has been noted from time to time in the mass media—almost always in a manner that explicitly condemns Canada's high rate of imprisonment. However, official good intentions are not enough. Canada appears to have had good intentions to "do something" about its prison population. The only difficulty is that it has not been successful in dealing with the problem.59

One problem, of course, is that successive Canadian governments have done nothing to ensure that sanctions are used sensibly, consistently, or, in the

55. Id (amending the Young Offenders Act at § 24(1), (3)).
56. Bill C-41 § 6, amending the Criminal Code § 718.2(d), (e).
57. See, for example, Sandro Contenta, Harsher Laws Not Answer Rock Says: Justice Minister Defends Young Offenders Act, Toronto Star A9 (Sept 30, 1994).
58. See Mihaorean and Lipinski, 12 Juristat at 8 (cited in note 6).
59. For a discussion of this problem, see Anthony N. Doob, Community Sanctions and Imprisonment: Hoping for a Miracle but Not Bothering Even to Pray for It, 32 Canadian J Criminology 415 (1990).
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... case of imprisonment, sparingly. Although Canada has very active Courts of Appeal in each province and territory that hear hundreds of sentence appeals each year, these courts seldom issue judgments that give unambiguous guidance to the lower courts. Canada has no comprehensive sentencing guidelines, and it seems unlikely that it will be getting any in the foreseeable future. Furthermore, territories and provinces (which have the responsibility of administering the criminal law) have not been as diligent as some might have hoped in establishing non-prison punishments in all parts of the country. The Supreme Court of Canada has made it clear that there is no constitutional need to have “equal” access to sentencing options in all parts of each province; consequently, Courts of Appeal may be reluctant to set down strong presumptions in favor of intermediate punishments in particular cases if those intermediate punishments will not be delivered.

III. An Alternative Perspective: Understanding the Function of Punishment

The question we are trying to answer might be formulated as follows: how is it that a country that does not appear to have a crime problem that is “out of control” and that has a long tradition of recommending the limited use of imprisonment manages to be unsuccessful in its stated goal? We suggest that part of the answer is a failure to understand adequately the function of punishments in our society.

David Garland suggests that “underlying any study of penality should be a determination to think of punishment as a complex social institution.” He suggests that punishment should be thought of as:

a ‘total social fact,’ which on its surface appears to be self-contained, but which in fact intrudes into many of the basic spheres of social life. . . . [P]unishment is a distinctive social institution which, in its routine practices, somehow contrives to condense a whole web of social relations and cultural meanings.

The question of how sensibilities are structured and how they change over time is important here because it has a direct bearing upon punishment. We have seen already that crime and punishment are issues which provoke an emotional response on the part of the public and those

60. The case of Regina v S(S), 57 CCC(3d) 115 (1990), revolved around whether provinces were required to establish programs of “alternative measures” under Canada’s Young Offenders Act. The Act stipulates, “Alternative measures may be used to deal with a young person alleged to have committed an offence instead of judicial proceedings” if certain conditions are met. Id at 119 (quoting Young Offenders Act, SC 1980-81-82-83, ch 110 § 4(1)). The Supreme Court indicated that there was no requirement to have such programs. Id at 128-30. Provinces could set up such programs if they wished, but did not need to do so. Id at 130.


62. Id.
involved. Feelings of fear, hostility, aggression, and hatred compete with pity, compassion, and forgiveness to define the proper response to the law-breaker. Moreover, to the extent that punishment implies the use of violence or the inflicting of pain and suffering, its deployment will be affected by the ways in which prevailing sensibilities differentiate between permissible and impermissible forms of violence and by cultural attitudes toward the sight of pain. In effect, Garland argues that we must understand punishment in a larger social context, and not try to understand it solely in terms of its criminal justice functions (e.g., the traditional goals of sentencing, such as deterrence, rehabilitation, denunciation, and incapacitation). In terms of understanding the use of particular punishments, perhaps the most important point that Garland makes is the following:

The ways in which we punish depend not just on political forces, economic interests, or even penological considerations but also on our conceptions of what is or is not culturally and emotionally acceptable. Penal policy decisions are always taken against a background of mores and sensibilities that, normally at least, will set limits to what will be tolerated by the public or implemented by the penal system's personnel. Such sensibilities force issues of 'propriety' on even the most immoral of governments, dictating what is and is not too shameful or offensive for serious consideration. There is thus a whole range of possible punishments (tortures, maimings, stonings, public whippings, etc.) that are simply ruled out as 'unthinkable' because they strike us as impossibly cruel and 'barbaric'—as wholly out of keeping with the sensibilities of modern, civilized human beings. Such judgments, based on the prevailing sensibilities, define the outer contours of possibility in the area of penal policy. Usually this boundary line has the unspoken, barely visible character of something that everyone takes for granted. It becomes visible, and obvious, only when some outrageous proposal crosses the line, or else when evidence from other times or other places shows how differently that line has been drawn elsewhere. It is therefore stating the obvious—but also reminding us of something we can easily forget—to say that punishments are, in part, determined by the specific structure of our sensibilities, and that these sensibilities are themselves subject to change and development.

Garland points to the "the generalized refusal of Western societies to utilize what can, in some respects, be an efficient form of sanctioning, namely corporal punishment" in illustrating the importance of understanding "sensibilities" when looking at types of punishments used by a community. He notes that corporal punishment is inexpensive, easy to manage, capable of precise calibration in such a way that its impact is relatively similar across offenders,

63. Id at 213-14.
64. Id at 281-83.
66. Id at 148.
and can be administered with few side effects. Nevertheless, in the late twentieth century corporal punishment is not even considered as an intermediate punishment in most Western countries. Pain, it appears, must take on a particular form in order to be acceptable: "The crucial difference between corporal punishments that are banned, and other punishments—such as long-term imprisonment—that are routinely used, is not a matter of the intrinsic levels of pain and brutality involved. It is a matter of the form which that violence takes, and the extent to which it impinges on public sensibilities."68

Garland argues that punishments cannot be understood solely by looking at their instrumental utility. He points out that one of our most popular punishments, imprisonment, fails most utilitarian tests. He notes that:

[c]rime control—in the sense of reforming offenders and reducing crime rates—is certainly one of [the] objectives [of imprisonment], but by no means the only one. . . . Most important, the prison provides a way of punishing people—of subjecting them to hard treatment, inflicting pain, doing them harm—that is largely compatible with modern sensibilities and conventional restraints on open, physical violence. In an era when corporal punishment has become uncivilized, and open violence unconscionable, the prison supplies a subtle, situational form of violence against the person that enables retribution to be inflicted in a way that is sufficiently discreet and 'deniable' to be culturally acceptable to most of the population. Despite occasional suggestions that imprisonment is becoming too lenient—a view that is rarely shared by informed sources—it is widely accepted that the prison succeeds very well in imposing real hardship, serious deprivation, and personal suffering on most offenders who are sent there.

In terms of penological objectives then, the prison supports a range of them, and is "functional" or "successful" with respect to some, less so with respect to others. . . . Consequently . . . if one wishes to understand the prison as an institution—and the same arguments apply to the fine, probation, the death penalty, and the rest—it does little good to do so on a single plane or in relation to a single value. Instead, one must think of it as a complex institution and evaluate it accordingly, recognizing the range of its penal and social functions and the nature of its social support.71

IV. The Limits of Interchangeability

We would like to take Garland's analysis of criminal justice punishments one step further. We agree completely that any criminal justice punishment must be understood in a larger social context. However, part of that social

67. Id.
68. Id at 149 (emphasis in original).
69. Id at 117.
70. Id at 159.
71. Id at 159-60.
context is the act for which the offender is being punished. Thus, we agree with Garland that there are qualitative differences in addition to quantitative differences (i.e., levels of severity) among punishments. Whether a punishment is acceptable to a particular society depends, then, not only on whether it is appropriately severe (to serve a denunciatory function, for example), or whether it offends societal sensibilities (such as whipping in most western countries in the late twentieth century), but also on whether it is appropriate as a punishment for the particular act that is being punished.

There may be a symbolic component attached to certain punishments that affects their ability to accomplish the functions that we may want them to serve. It is possible that the use of money, such as the fine, as punishment fails symbolically to denounce harm against the person, at least in the eyes of the general public. In the same light, perhaps fines are more easily accepted for offenses involving the damage or loss of property. The notion of the symbolic value of punishment is a neglected feature of proposals for interchangeable sanctions. If this is correct, it appears that we must consider the symbolic elements attached to different sanctions when considering sentencing reform and the way in which sentences are perceived by members of the public.

Some punishments, therefore, may be appropriate for some offenses but inappropriate for others. A fine itself may be inappropriate under certain circumstances not because a fine of an appropriate size cannot be imposed. Rather, society may view a fine as inappropriate because it does not serve the functions that a punishment is supposed to serve for that particular offense.

This view of punishments has important implications for those who advocate the increased use of intermediate punishments. It suggests, first of all, that the goal of creating a "universal" interchangeability table that can be used for all offenses within a jurisdiction is likely to fail. Some punishments may simply not be appropriate for certain kinds of offenses. Second, it suggests that all intermediate punishments may not be created equal. Some may be "more equal" to imprisonment than others for certain offenses.

The prevailing view among those who have written about criminal punishments appears to be that punishments vary only in the dimension of severity. The idea of the "interchangeability" of punishments, discussed in detail by Morris and Tonry, assumes quite clearly that different types of punishments have the same "value" in society as long as they have equivalent severity. Morris and Tonry refer explicitly to the idea that the courts should have available "a continuum of punishments." At the same time, they make it clear that different punishments can serve different purposes at sentencing.

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73. See Morris and Tonry, *Between Prison and Probation* at 30-31 (cited in note 1).

74. Id at 40.

75. Id at 176-80.
They point out, for example, that house arrest is meant to incapacitate the offender, just as probation is designed, at least in theory, as an aid in "training for conformity." Therefore, although "equivalences" can be created (in terms of loss of autonomy or punishment value of the sanction), different punishments can be seen as attempts to accomplish different purposes at sentencing.

Morris and Tonry do, of course, discuss the limits of interchangeability. They suggest, however, that these limits are practical ones having to do with the severity of the sanction. As they point out,

[t]here is a point at which imprisonment and other punishments cease to be interchangeable. Exactly where this point is must be determined in each jurisdiction in light of prevailing normative views of policymakers and prevailing public attitudes. This is true at both ends of the punishment continuum. . . . [T]here are some offenses for which any amount of imprisonment would be too severe. There are other offenses for which any punishment less than a term of imprisonment would be too lenient and tend to depreciate the seriousness of the offender's conduct. These observations do no more, however, than restate the outer bounds of non-undeserved punishment that are set by concern for the canons of desert. . . .

Generally, then, it seems that the simple—and probably optimistic—view of intermediate punishments is that they are, roughly speaking, equivalent and can be made to be equivalent to imprisonment. As Morris and Tonry suggest, "[t]he prison is a punishment exacted against freedom of movement and association; the fine is a punishment exacted against money and what money can buy; the community service order is a punishment exacted against time and energy. Some see the community service order as a fine on time."

A. A HINT OF SOME PROBLEMS WITH SIMPLE INTERCHANGEABILITY

In the context of some other research that we were doing, we noticed that intermediate sanctions for young offenders in Canada (those ages twelve through seventeen charged with federal offenses—largely Criminal Code or drug offenses) appeared to be used in rather uneven ways. In particular, we looked at cases where the most severe component of the punishment given to a young person found guilty by Canada's youth courts was a fine, compensation order, or community service order. The Canadian Centre for Justice Statistics considers

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76. Id at 177-78.
77. Id.
78. Id at 78-79.
79. Id at 78.
80. Id at 150.
probation and custody orders to be more severe than these three intermediate punishments. Discharges and "other" punishments (e.g., writing an essay describing the harm done to the victim) are considered to be less severe.  

In the table below, we have chosen some of the more common offenses committed by young persons. We have indicated the proportion of those found guilty of each offense (or offense grouping) who received one of the three intermediate sanctions (fine, compensation order, or community service order) and the proportion of these who received a fine.

<table>
<thead>
<tr>
<th>Offence Category</th>
<th>% Receiving Intermediate Punishment</th>
<th>% of Intermediate Punishments That Were Fines</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Offenders</td>
<td>21</td>
<td>35</td>
</tr>
<tr>
<td>All Violence</td>
<td>17</td>
<td>21</td>
</tr>
<tr>
<td>All Property</td>
<td>20</td>
<td>25</td>
</tr>
<tr>
<td>Sexual Assault</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>Assault: Highest Two Levels</td>
<td>13</td>
<td>12</td>
</tr>
<tr>
<td>Assault: Lowest Level</td>
<td>21</td>
<td>23</td>
</tr>
<tr>
<td>Break and Enter</td>
<td>11</td>
<td>9</td>
</tr>
<tr>
<td>Theft over $1,000</td>
<td>12</td>
<td>17</td>
</tr>
<tr>
<td>Theft under $1,000</td>
<td>27</td>
<td>21</td>
</tr>
<tr>
<td>Mischief (Vandalism)</td>
<td>24</td>
<td>20</td>
</tr>
<tr>
<td>Disorderly Conduct</td>
<td>34</td>
<td>56</td>
</tr>
<tr>
<td>Possession of Narcotics</td>
<td>35</td>
<td>68</td>
</tr>
<tr>
<td>Failure to Comply with a Disposition/Undertaking</td>
<td>26</td>
<td>49</td>
</tr>
</tbody>
</table>

There are two points to be made about this table. First of all, as the apparent severity of the offense decreases, the proportion of those receiving intermediate punishments increases. Those who committed less serious assaults were more

82. It is clear that many young people are given fines, community service orders, or compensation orders in conjunction with other punishments (especially probation). For our purposes, however, we were most interested in those cases where the most severe component was one of these intermediate punishments.

83. These data are derived from Canadian Center for Justice Statistics, *Youth Court Survey, 1992-1993* 22-27 tbl 8 (July 1994), which contains data from the 77,256 cases where a disposition was handed down in Canada to young offenders.

84. The offense that is listed in table 1 is the most serious charge for which a finding of guilt was made.

85. Overall, 7 percent had a fine as their most severe component of the disposition; fewer than 1 percent had a compensation order, and 13 percent had a community service order as the most severe component. Id at 22.
likely to receive a fine or a community service order\textsuperscript{86} than were those who committed more serious assaults. Those who committed sexual assaults were very unlikely to receive an intermediate punishment. This finding is neither surprising nor very interesting.

More interesting is the shift in the proportion of cases involving one of these three intermediate punishments (fine, compensation order, or community service order) where a fine was imposed. It appears that Canadian youth court judges have a theory of when fines are appropriate and when community service orders are appropriate as intermediate sanctions. Fines seem to be particularly "appropriate" as intermediate sanctions where the most serious offense is possession of narcotics, disorderly conduct, or failure to comply with a disposition. Generally speaking, it appears that fines may be more appropriate as intermediate sanctions in less serious property or violence offenses.

Some of these differences are quite large. It is possible, although we suspect unlikely, that these differences reflect only the perceived ability of the youth to pay a fine.\textsuperscript{87} The more interesting hypothesis is that judges simply do not view fines as an appropriate type of punishment for certain kinds of offenses. We will now examine some data dealing more directly with this hypothesis.

B. THE LIMITS ON THE USE OF THE FINE: A CASE STUDY OF THE LIMITS ON INTERCHANGEABILITY

Canada makes heavy use of fines. In fact, fines are the most heavily used disposition in Canadian Criminal Courts.\textsuperscript{88} The Canadian Sentencing Commission, like Morris and Tonry, recommended increased use of fines and suggested that a day or unit fine system be developed.\textsuperscript{89} Interestingly, however, the Canadian Sentencing Commission never addressed itself to the purposes that fines might or might not be able to serve at sentencing. In particular, although the Commission referred to some work on intermediate sanctions, it did not explore directly the limits on the use of intermediate punishments generally or the fine in

\textsuperscript{86} Since compensation orders were so rare, we will ignore them in the discussion.

\textsuperscript{87} In the Young Offenders Act, SC 1980-81-82-83, ch 110 § 21(1), fines are limited to one thousand dollars. The court must take into account the young person's ability to pay the fine. Id § 21(1). If a province has such programs, a fine can be discharged "in whole or in part by earning credits for work performed." Id § 21(2).

\textsuperscript{88} Canadian Centre for Justice Statistics, \textit{Sentencing in Adult Criminal Provincial Courts: A Study of Six Canadian Jurisdictions}, 1991 and 1992 iii (Nov 1993). A fine is the "most serious" sanction imposed for criminal code convictions (within the limits of the survey of six provinces contained in this report) in 21 percent of cases, and, as the "most serious" sanction, it is less frequent than either prison (most serious sanction in 29 percent of cases) or probation (27 percent of cases). Id at ii. However, as a sanction \textit{imposed alone or in combination with other sanctions} it is by far the most frequently used with 51 percent of Criminal Code cases receiving a fine (alone or with other punishments). Id at iii. Prison, as already noted, was imposed in 29 percent of cases; probation in 37 percent of cases. Id. Community service orders (along with various prohibitions and forfeitures) were imposed in 35 percent of cases. Id.

\textsuperscript{89} Canadian Sentencing Commission, \textit{Sentencing Reform} at 374-76 (cited in note 35).
Like Morris and Tonry, the Canadian Sentencing Commission saw all punishments as more or less qualitatively similar. This view of the simplicity of punishments was consistent with some very specific Canadian data on the community service order that had been carried out a few years earlier.\(^91\)

In a national public opinion poll, Canadian adults were asked what they thought the most appropriate sentence was for a first-time offender convicted of breaking and entering a private home and stealing property worth $250.\(^92\) They were given various traditional choices: probation, fines, imprisonment, or some combination. Twenty-nine percent chose imprisonment.\(^93\) When these respondents were asked whether instead of imprisonment, they would favor a community service order, almost everyone (90 percent) indicated they would favor it at least sometimes.\(^94\) Forty-one percent would prefer the community service order in all or most cases.\(^95\) An additional 36 percent would want it for "some" cases, with 14 percent favoring it "only in very rare cases."\(^96\)

We and others interpreted these findings to mean that Canadians, in general, support the use of intermediate punishments instead of imprisonment.\(^97\) Perhaps we were partially correct. However, it may simply be wrong that one can automatically substitute any convenient intermediate punishment such as a fine or community service for imprisonment when looking for a way to avoid using prison. Even if true, presumably there are limits: the size of the penalty has to be appropriate, and of course, as Morris and Tonry point out,\(^98\) the penalty must be imposed, and not just pronounced.

Some data recently collected by one of the authors of this Article\(^99\) suggest that the world is not so simple. In this study, a heterogeneous sample of people in Toronto\(^100\) answered a series of questions about fines. A number of conceptually separate sub-studies were embedded in the survey questionnaire. First, respondents were asked to think about a sentence handed down for a minor shoplifting charge.\(^101\) The sentence was described, for different groups of respondents, as being either a fine of two hundred dollars or four hundred dollars,
or a prison sentence of four or eight days. The respondents viewed imprisonment as considerably more effective than fines in "expressing society's disapproval for the harm that was caused." At least as interesting is that the size of the penalty (within the rather constrained limits used in this experiment) did not make any difference in the perceived denunciatory value of the penalty. However, for both fines and imprisonment, those who had the sentence described to them as involving the higher penalty rated this penalty as being more severe. The results, then, do not appear to be a product of simple differences in perceived severity; if they had been, the results of the denunciatory value of the punishment would be parallel to those of the severity of the punishment.

In the experiment, harsher penalties were seen as being more severe, but imprisonment was seen as having a greater denunciatory value than fines. There appears to be something "special" about imprisonment that fines do not possess. Nevertheless, most of the respondents favored the use of a fine as a punishment for the offense. About 19 percent of the respondents saw a fine or imprisonment as being equally appropriate; about two-thirds of those who differentiated between fines and imprisonment favored the fine. Although the two types of penalties have different denunciatory values in the eyes of the respondents, denunciation cannot be too important, since respondents favor the use of the punishment that is not as able to "express society's disapproval for the harm that was caused."

Respondents were additionally asked whether they thought that "first time offenders who have committed the following offenses [should be given] a fine instead of imprisonment." If they thought that a fine was appropriate, they were to indicate the dollar value of the fine that they would recommend. Respondents could set the fine, then, at any amount they thought appropriate. In terms of severity, the sky was the limit.

The data, shown in table 2, demonstrate the limited acceptability of the fine. Even when respondents could set a fine of any size, they were generally unwilling to substitute a fine for imprisonment for minor violent offenses. They were, however, willing to suggest a fine as a substitute for imprisonment for most property offenses, even when the value of the property taken is relatively high. Imprisonment can, of course, be used to incapacitate an offender. Hence it is theoretically possible that respondents may have preferred imprison-
ment for those convicted of violent offenses in order to accomplish this goal. It is unlikely, however, that in the case of "touching a woman in a sexual manner without consent" incapacitation would be seen as an important goal.

There is a final piece of evidence showing that fines had a meaning different from imprisonment. Respondents answered a series of questions in which they were asked to imagine that a particular sentence of imprisonment (expressed in months) was appropriate. They were asked whether they would find a fine of so many months of take-home income as an appropriate substitute. Half of the respondents were told what the cost of imprisonment would be. The critical issue here was whether respondents were affected in their decision by having the cost of imprisonment made salient. It turns out, once again, that the results were offense-specific. For the theft that was described, but not for minor assaults, mentioning the cost of imprisonment led the respondent to favor a fine. Despite being presented with the cost of imprisonment, fines were still viewed as

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113. Id at 19.
114. Id at 20.
being more appropriate for minor property offenses rather than minor instances of violence.

V. Conclusion

The evidence suggests that we must develop somewhat more complex models than those proposed by Morris and Tonry\(^{115}\) if we want to increase the use of intermediate punishments. Starting from the perspective suggested by David Garland\(^{116}\)—that the meaning of a punishment is embedded in the culture in which it is imposed—we have presented data suggesting that it does not make sense to think, conceptually or operationally, in terms of single interchangeability matrices of intermediate punishments and imprisonment.

We must first explore the meaning of a punishment to the public (and perhaps to the offender and victim) before we can decide which intermediate sanctions can be substituted for imprisonment for which offenses. Thus, for example, it may be that fines and community service orders can be seen as accomplishing somewhat different goals, as Morris and Tonry suggest. In addition, the public may see them as qualitatively different sanctions.

Efforts to reduce the use of imprisonment through the use of intermediate sanctions, then, may have to go beyond the wise counsel provided by Morris and Tonry's important plea for rational sentencing. It may be that our world is, in fact, as complex as some sociologists would lead us to believe. If that is the case, intermediate punishments must be devised and implemented in a manner that is sensitive to their complex meanings in our society. In particular, we must further explore the extent to which particular intermediate punishments are perceived as appropriate punishments for certain crimes.

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116. See text accompanying notes 61-71.