SENSIBLE JUSTICE: ALTERNATIVES TO PRISON, David C. Anderson (New York: The New Press, 1998)

David Anderson's *Sensible Justice*[1] is a good book with significant limitations. Its value lies in the issues it raises, rather than in sustained scholarly argument. It is, however, well worth reading as an introduction to the real world of sentencing alternatives. I will review Anderson's argument, then discuss some of the challenges Anderson does not fully address.

I. THE ARGUMENT

Sensible Justice is a work of sentencing and correctional policy advocacy, set in the American criminal justice context. It is not concerned with the roots or causes of crime or with plumbing the social significance of modes of crime and punishment.[2] As a policy document, it is concerned with identifying penal techniques that both could and should be adopted in preference to currently employed techniques. Anderson's argument, in summary, is as follows: Imprisonment and standard probation are over-used sentencing tools for minor offenders. They result in punishment that is either too harsh or too lenient. Despite commonly-held views, rehabilitative sentencing options implemented outside prison are both practical and morally appropriate for many minor offenders. These options can be organized into a "ladder of sanctions," of graduated detail, restrictiveness, and intrusiveness; these options may be matched, singly or in combination, to offenders' needs and behaviour. Deploying these options does not guarantee rehabilitative success. The options must be accompanied by supportive administration and institutional cooperation. Anderson's argument has four main elements: (A) minor offenders as an appropriate target for policy development; (B) criteria for judging penal alternatives; (C) rehabilitation as a viable policy option; and (D) the ladder of sanctions and its supports.

A. MINOR OFFENDERS AS A POLICY TARGET

Anderson addresses part of a problem identified by Morris and Tonry: "We are both too lenient and too severe.... Too lenient with many on probation who should be subject to tighter controls in the community, and too severe with many in prison and jail who would present no serious threat to community safety if they were under control in the community."[3] He does not focus on those minor offenders who do not receive custodial dispositions. While he writes, for example, that probation "is the most widely imposed criminal sanction: some 3 million convicts are under court supervision,

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1 D.C. Anderson, *Sensible Justice: Alternatives to Prison* (New York: The New Press, 1998) [hereinafter *Sensible Justice*].

2 On the root causes analysis/policy making distinction, see J.Q. Wilson, *Thinking About Crime* (New York: Vintage Books, 1977) at 55, 59.

3 *Sensible Justice*, *supra* note 1 at 144, quoting N. Morris & M. Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (New York: Oxford University Press, 1990) at 3.

compared with about 1.6 million in prisons and jails,"[4] he is more interested in the 1.6 million than the 3 million. Neither does he focus on serious offenders, for whom incarceration may be demanded by their offences and by the public's need for protection. Anderson is primarily concerned with a subset of offenders, "people arrested for behavior that, while often nonviolent, still violates the law seriously enough to incur a sentence to county jail or state prison."[5] Imprisoned minor offenders make up a large proportion of the total prison inmate population.[6] Anderson reports that a survey of state prisons published in 1993 found that 32 percent of inmates had been convicted of non-violent offences.[7] Many of these offenders were young adults.[8] Many of these

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[4] *Sensible Justice, ibid.* at 4. In Canada in 1997-98, the most serious sentences following findings of guilt for federal offences were as follows: fine (33 percent), prison (33 percent), probation (30 percent) (Statistics Canada, *Adult Criminal Court Statistics, 1997-98* by C. Brookbank & B. Kingsley, Catalogue No. 85-002-XIE, vol. 18 no. 14 (Juristat: Canadian Centre for Justice Statistics, 1998) at 8). If combined sentences are counted, probation (coupled with fines or prison) is imposed in 43 percent of cases, and fines (coupled with probation or prison) are imposed in 41 percent of cases (*ibid.* at 10, table 6). What may strike one as remarkable is that "[t]he most frequently imposed sentence in 1997-98 was 'other.' This sentence category includes absolute discharge, conditional discharge, suspended sentence, conditional sentence, payment of legal costs, suspension of driver's licence, firearms restrictions, motor vehicle operation restrictions, community service order, treatment order, prohibition order, seizure and forfeiture, and other sentences..." (*ibid.* at 9). Because of the nature of reporting, this category overlaps with probation (*ibid.* and at 11). Reed and Roberts advise that "[o]n any given day in 1996-97 an average of 151,850 adult offenders were in prison or under community supervision. Of this total, the majority (65%) were offenders on probation. A further 18% were in provincial/territorial or federal custodial facilities, 12% were on conditional release and the remainder (4%) were on remand...": Statistics Canada, *Adult Correctional Services in Canada, 1996-97* by M. Reed & J.V. Roberts, Catalogue No. 85-002-XPE vol. 18, no. 3 (Juristat: Canadian Centre for Justice Statistics, 1997) at 4.

[5] *Sensible Justice, ibid.* at 17.

[6] "Fully 84 percent of the increase in state and federal prison admissions since 1980 was accounted for by *nonviolent* offenders"; S.R. Donziger, ed., *The Real War on Crime: The Report of the National Criminal Justice Commission* (New York: HarperPerennial, 1996) at 16 [footnote omitted] [emphasis in original].

[7] *Sensible Justice, supra* note 1 at 18. The Canadian Centre for Justice Statistics, in collaboration with federal, provincial, and territorial corrections authorities, conducted a census of inmates in all adult correctional facilities in Canada on 5 October 1996 ("Snapshot day"). The census disclosed that in provincial/territorial institutions, 37 percent of inmates were incarcerated for property offences (primarily break and enter (18 percent) and theft (8 percent)), and 30 percent were incarcerated for "other *Criminal Code* and federal statute offences" (typically non-violent offences, including weapons offences, administration of justice offences, impaired offences, and drug offences) (Statistics Canada, *A One-Day Snapshot of Inmates in Canada's Adult Correctional Facilities* by D. Robinson, Catalogue No. 85-002-XIE vol. 18, no. 8 (Juristat: Canadian Centre for Justice Statistics) at 7-8). In federal institutions, 28 percent were incarcerated for property offences and 23 percent for "other" offences (*ibid.* at 7).

[8] *Sensible Justice, ibid.* at 18. The Juristat census disclosed that "younger age groups are over-represented in custodial populations, particularly adults between the ages of 20 and 39.... On Snapshot day, in provincial/territorial facilities, males aged 20-24 were the most over-represented," by a factor of about 2.4 to 1 — this group constitutes about 22 percent of the inmate population and about 9 percent of the Canadian adult male population (Robinson, *supra* note 7 at 5). In federal institutions, males age 25 to 29 (18 percent of federal inmates and 10 percent of the adult population) and 30 to 34 (21 percent of federal inmates and 12 percent of the adult population) were the most overrepresented (*ibid.*) For female inmates in provincial/territorial institutions, those age 30 to 34 were the most over-represented, constituting about 25 percent of the inmate population and 11 percent of the adult female population (*ibid.*). In federal institutions, females

offenders' crimes were connected with drug and alcohol abuse. In fact, 30 percent of offenders sent to state prisons each year were convicted of drug offences. These are typically low-level offences, such as possession or small-scale retail trafficking.[9] A further 30 percent of offenders delivered to prisons were "technical violators"[10] of terms of probation or parole. As Anderson comments, "[s]uch people are locked up not because they have committed new crimes of violence, but because they stayed out too late, got drunk, failed a drug test or otherwise violated rules set as conditions for their supervised release from a prison sentence for an earlier crime."[11] Anderson does not deal with race or class disparities in custodial sentences.[12] Neither does he deal with the particular issues of young offenders.

Why does Anderson's selected group deserve our policy attention? Would we do better to look to our penal responses to serious offenders, such as murderers, international gun or drug traffickers, or major polluters? There are good reasons for devoting attention to the less spectacular range of the criminal spectrum. To begin with, paying attention to sentencing and corrections makes perfect sense in a world in which many persons accused of crimes either plead guilty or are convicted.[13] The sheer size of Anderson's group, compared to the total number of imprisoned offenders, attracts our attention. Anderson's group exposes a terrain for policy options since it is not intuitively obvious — as it may be for serious offenders — that minor offenders should

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age 25 to 29 (22 percent of the inmate population and 10 percent of the adult female population) were the most overrepresented (*ibid.* at 5-6). The median age for Canadian adults is 41 years; the median is 31 for provincial/territorial institutions and 34 for federal institutions (*ibid.* at 5). According to Brookbank and Kingsley, "[t]he offences most frequently committed by 18-24 year olds include break and enter (55% of all cases), possession of stolen property (47%), robbery (45%), mischief/property damage (40%), and possession of drugs (40%)" (Brookbank and Kingsley, *supra* note 4 at 7).

9 *Sensible Justice*, *ibid.* A 1993 Texas study disclosed that imprisonment was imposed most frequently for drug possession (Donziger, *supra* note 6 at 16). Canada incarcerates fewer drug offenders. Only about 7 percent of provincial/territorial inmates and 8 percent of federal inmates were serving for drug offences on Snapshot day (Robinson, *supra* note 7 at 7, table 3).

10 *Sensible Justice*, *ibid.*

11 *Ibid.*

12 Respecting Aboriginal overrepresentation in Canadian penitentiaries and prisons, see Robinson, *supra* note 7 at 6 and *R.* v. *Gladue*, [1999] S.C.J. No. 19, para. 58ff, Cory and Iacobucci JJ. (QL); and, respecting African-American overrepresentation in American penitentiaries and prisons, see J.G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (Cambridge: Cambridge University Press, 1996) and Donziger, *supra* note 6 at 99-129.

13 "In theory, the function of the courts is to determine the guilt or innocence of the accused. In fact, it is to determine what to do with persons whose guilt or innocence is not at issue.... [M]ost of the time, for most of the cases in our busier courts, the important decision concerns the sentence, not conviction or acquittal" (Wilson, *supra* note 2 at 182). Brookbank and Kingsley tell us that "[a] finding of guilt for at least one charge in the case was reported in ... 62% of the cases tried in participating adult criminal courts during 1997-98. The conviction rate has remained relatively stable over four years, ranging from 63% in 1994-95 to 64% during the subsequent two year period" (Brookbank & Kingsley, *supra* note 4 at 7). Interestingly, only 3 percent of cases resulted in an outright acquittal; 31 percent of cases were disposed of by means of a stay, withdrawal of charges, or dismissal of charges at the preliminary inquiry (*ibid.*).

be imprisoned. Anderson does not deny that crimes deserve a response; but why, he asks, should prison be the response for so many minor offenders?[14]

Anderson believes that social circumstances have achieved an alignment in which penal options for minor offenders can be confronted. He argues that the current high rate of incarceration of minor offenders was the product of real and contrived factors. Between 1965 and 1975, the murder rate, a good indicator of broader societal violence, nearly doubled — from 5.1 to 9.8 per 100,000.[15] A widespread fear of crime grew, fanned by the media and the market development efforts of the fear industry (including insurance companies and security firms). In the mid-1980s, the crack epidemic struck American cities, bringing with it an increase in firearms violence.[16] Politicians responded with laws increasing penalties, mandating imprisonment, and limiting the discretion of judges and parole boards.[17] Anderson's view is that this tough approach was based not so much on a judgment that sentencing should be used to incapacitate,[18] but on the desire to punish, to harm: "[w]hether or not government could reduce crime, it at least could balance the emotional scale."[19] Prison became a favoured tool of penal vengeance through an "iron triangle" of "Republicans who hoped to attack hesitant Democrats as soft on crime, the prison construction industry and the National Rifle Association, which tried to deter direct regulation [of firearms] with proposals to increase sentences for crimes committed with guns."[20] Violent crime rates, however, are now falling.[21] The crack epidemic has begun to die down, for both demand and supply reasons: the number of addicts is diminishing, and the criminal organizations

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14 *Sensible Justice*, *supra* note 1 at 18.

15 *Ibid.* at 7.

16 *Ibid.* at 9.

17 *Ibid.*

18 "We know that confining criminals prevents them from harming society, and we have grounds for suspecting that some would-be criminals can be deterred by the confinement of others ...": Wilson, *supra* note 2 at 234, 235-36.

19 *Sensible Justice*, *supra* note 1 at 9-10.

20 *Ibid.* at 10. See Miller's description of the "crime control-industrial complex": Miller, *supra* note 12 at 228 and Donziger, *supra* note 6 at 73-81 (role of government), 81-84 (the N.R.A.), and 85-97 (the "prison-industrial complex").

21 *Sensible Justice*, *ibid.* at 11. "After peaking in the early 1990s, Canada's crime rate has been falling steadily. In 1997, the police-reported crime rate dropped for the sixth consecutive year (-5%).... Over these six years, the crime rate has decreased by 19%, making the 1997 rate the lowest since 1980...." Statistics Canada, *Canadian Crime Statistics, 1997* by R. Kong, Catalogue No. 85-002-XPE vol. 18, no. 11 (Juristat: Canadian Centre for Justice Statistics, 1998) at 3. In 1997, "the violent crime rate declined by 1.1% ... marking the fifth consecutive annual decrease...." (Kong, *ibid.* at 5) ("violent crime" includes homicide, attempted murder, assault, sexual assault, other sexual offences, abduction, and robbery). Kong reports that "[t]he homicide rate has generally been declining since the mid-1970s and is at the lowest point since 1969. In 1997, this trend continued with a 9% drop in the rate (54 fewer homicides than in 1996)" (*ibid.*). For general statistical information concerning homicide, see Statistics Canada, *Homicide in Canada, 1997* by O. Fedorowycz, Catalogue No. 85-002-XIE vol. 18, no. 12 (Juristat: Canadian Centre for Justice Statistics, 1997).

involved have weakened.[22] People have reason to feel safer. At least the objective conditions for the tough-on-crime, send-them-to-prison approach have been undermined. The time is right for re-examining our penal treatment of minor offenders.

A further, fascinating reason to focus on minor offenders is "a strategy of attacking minor crimes in order to control major ones."[23] In part, this is an obvious strategy. Many minor offenders are young and not irrevocably set in criminal ways. If, through an appropriate disposition, a young offender can be diverted from a criminal lifestyle, society is spared the later, possibly more serious offences that the young offender might have committed.[24] Anderson also connects penal reform with a recent development in community policing — the "broken windows" strategy[25] — which concentrates police attention on quality of life crimes. In some large cities, police efforts to control low-level offences have been correlated with a decline in serious offences.[26] A causal linkage may not exist between enhanced attention to low-level offences and a decline in serious offences; the decline might have been caused by other factors, such as the aging of the criminal population. But the causal linkage just might be there (as complicated as that linkage might be) — and Anderson thinks we should try to exploit it. Addressing minor offenders and offences may be a good way of fixing broken windows.

B. CRITERIA FOR JUDGING PENAL OPTIONS

Since Anderson's suggestion is that minor offenders are not currently receiving appropriate types of dispositions, he must set out the criteria by which we may judge current and proposed penal tools. Anderson obliges with three main criteria: penal options may be judged by the degree that they promote public safety, by their fiscal implications, and by the opportunities for change they present to offenders.[27]

Public safety is readily comprehensible: for criminal justice purposes, we are safe to the extent that we are not preyed upon by criminals.[28] For Anderson, public safety

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22 *Sensible Justice*, *ibid.* at 12. In Canada, cocaine offences have been on a downward trend since 1992; in 1997, a further drop of 1.6 percent was measured (Kong, *supra* note 21 at 10). In Canada, most drug convictions are for possession offences (62 percent in 1997), and the drug possessed is usually cannabis *(ibid.)*.

23 *Sensible Justice*, *ibid.* at 14.

24 *Ibid.*

25 *Ibid.* at 13. Wilson is a proponent of the "broken windows" strategy: see J.Q. Wilson & G.L. Kelling, "Broken Windows" (1982) 249:3 Altantic Monthly 29. The basic idea is that evidence of social decay (*e.g.* broken windows in vandalized buildings) should be eliminated, so that further and more serious decay (*e.g.* gang violence) is not encouraged. On the "broken windows" strategy, see also Donziger, *supra* note 6 at 173-75.

26 *Sensible Justice*, *ibid.* at 13.

27 *Ibid.* at 158.

28 Section 718 of the *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter the *Criminal Code*] describes the promotion of public safety as one of the fundamental purposes of sentencing: "The fundamental purpose [*sic*] of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society...." There seems to be not a single purpose here, but a collection of purposes, which are not necessarily consistent.

appears to be the paramount objective of penal measures.[29] Penal measures may promote public safety through deterring potential offenders from offending, through incapacitating offenders from committing further offences during the term of their sentences, and through rehabilitation, which should lower offenders' recidivism rates.[30]

The fiscal implications of a penal option can be determined in a fairly straightforward way (to the extent that accounting is straightforward). Fiscal implications include not only State expenditures on penal projects but also revenues generated directly from offenders to offset program costs, revenues generated by offender labour, savings realized through offender labour (as when offenders perform work at no or little remuneration for community or non-profit organizations), savings realized by not employing other penal options (such as prison), and amounts paid by offenders to victims. One might object to the use of cost as criterion for judging institutions of justice. Policy, however, must work in the real world, and in the real world infinite funds are not available. In the words of the National Criminal Justice Commission, "[c]riminal justice spending must be cost-effective, so it does not drain resources from other civic activities."[31] Anderson does not suggest that cost is determinative, but only that it should be considered in the design of penal policy.

The "opportunities for change" criterion may be the least familiar. Anderson believes that penal options should promote offender rehabilitation. This criterion is a call to humane, humanitarian, human-centred sentencing. It is through and through a moral criterion. It has a four-part background. It relies on a belief in the dignity and worth, on the essential goodness, of all individuals, including offenders. It relies on a correlative belief that criminality is not an essential part of being human. People may commit offences, but that is not inevitable; that is not their destiny (either genetically or theologically). It relies on a further correlative belief that criminality is a product of choice, of — may we still say it? — free will. People are responsible for their criminal actions. This belief does not minimize the effects of environment, upbringing, and opportunity: circumstances can make criminal choices easy and non-criminal choices hard. Finally, it relies on a correlative belief that, with time and the provision of adequate resources, people can change for the better: "[A] belief that man is malleable and that lost souls can be reclaimed shaped the American republic's approach to crime and punishment from the earliest days; it does not deserve to be lightly dismissed."[32] In a remarkable passage, Anderson writes as follows:

> An ethical society can choose to use criminal justice for more than maintaining domestic peace and reinforcing values codified in law. It may also, in the spirit of John Augustus,[33] use criminal justice to acknowledge a belief that good lurks in the heart of people who act bad; that even the worst-seeming criminals have the capacity, in time and with help, to change for the better.

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29 *Sensible Justice*, *supra* note 1 at 157-58.

30 *Ibid.*

31 Donziger, *supra* note 6 at 204.

32 *Sensible Justice*, *supra* note 1 at 2-3.

33 The founder of probation, in 1840s America (*ibid.* at 4); Donziger, *supra* note 6 at 190.

> The process is as imperfect and unpredictable as humanity itself: some are helped by programs; some find salvation on their own, and some never find it at all. But it is unenlightened in the extreme to deny the capacity for change or prohibit the chance to exercise it.[34]

Anderson's comments make good sense when his target group of minor offenders is kept in mind. With effort on our part, we might see how his comments apply even to serious offenders. None of this denies that there are people who suffer from mental disorder, whose capacity to choose (and therefore whose capacity for criminal responsibility and liability for criminal punishment) differs from those who do not suffer from mental disorder. Rehabilitation for them, if it is possible, may be quite different from rehabilitation for others. Neither does this deny that there are stone cold criminals who will not change, no matter what their opportunities. As Wilson reminds us, "[w]icked people exist. Nothing avails except to set them apart from innocent people."[35]

A further criterion used by Anderson, perhaps implicit in the previous criterion, is the promotion by a sentencing option of offender accountability, of offenders' realization of the harm that they have caused, inclining them to take responsibility for the harm that they have caused.[36]

Different penal options can be expected to satisfy or promote the different criteria in different degrees. How are alternative options to be judged? Without making it explicit, Anderson employs a "minimization principle." If two or more penal options are available, and each promotes public safety more-or-less equally, that option is preferable which provides the greatest opportunity for change to offenders, so long as its costs are not disproportionate to its results. This is a version of the general constitutional principle that rights and freedoms should be protected to the greatest extent possible consistently with the promotion of a legitimate overriding social objective,[37] and of the sentencing principle that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances."[38] Hence, Anderson claims that recidivism should not be the only measure of success of a program.[39] Opportunities for change and cost savings may justify the use of alternatives to prison, so long as persons in and graduates of these alternatives "do not commit new crimes at a greater rate than those who are traditionally incarcerated and released."[40]

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34 *Sensible Justice*, *supra* note 1 at 16-17.

35 Wilson, *supra* note 2 at 235.

36 *Sensible Justice*, *supra* note 1 at 106, 157; see *Criminal Code*, *supra* note 28 at s. 718(f).

37 This principle is protected, for example, under the second branch of the "proportionality of the means" subtest of the "*Oakes* test" interpretation of s. 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canoda Act 1982* (U.K.), 1982, c. 11: see *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 138-39, Dickson CJ.

38 *Criminal Code*, *supra* note 28 at s. 718.2(d).

39 *Sensible Justice*, *supra* note 1 at 157.

40 *Ibid.* at 157-58.

One might find Anderson's set of criteria deficient, in that he makes no provision for "desert" — for apportioning sentences to the "gravity" of an offence and the "degree of responsibility" of the offender,[41] for making sure that punishment is what offenders "deserve." Neither does he make room for the kindred notion of "denunciation," the public signifying of offenders' fault, the public condemnation and lesson delivered through punishment.[42] Anderson, of course, is not ignorant of these sentencing objectives.[43] He does not, however, provide any discussion of their place or lack of place.

Anderson's silence is explicable on two levels. First, he could be silently assuming the application of desert. Anderson's target group is minor offenders. They doubtless deserve some deprivation of liberty as a consequence of their offences, but the issue is whether that deprivation need take place within the confines of a prison or through supervised release on conditions.[44] For these offenders, desert and its measure are not so much the problem as the form that the deserved deprivation of liberty should take. In contrast, in relation to serious offenders, Anderson seems to rely on a desert principle: "[R]eserve the most serious confinement and punishment for the most serious criminals."[45]

Second, Anderson could be silently rejecting desert. His failure to give desert any profile at all may bespeak an implicit recognition of the deep incompatibility of the attitudes accompanying talk of desert and talk of rehabilitation. Desert concerns the past and the penal response that corresponds to the offence. Rehabilitation may involve some reference to the past, but it is forward-looking; it concerns transformation and the alteration of future conduct. Desert concerns the act; rehabilitation, the offender. Desert concerns the imposition of some form of burden or deprivation on the offender; rehabilitation concerns the offering of opportunities to the offender. Desert shapes the minimum and maximum extent of penal interventions, but otherwise, desert and rehabilitation are not complementary concepts.

C. REHABILITATION AS A VIABLE POLICY OPTION

Rehabilitation might appear not to be a viable policy option. The conventional wisdom, in Anderson's view, is that rehabilitation has been tried, but it has failed and it will fail.[46] Anderson freely admits that rehabilitation programs attempted in prison settings have had little or no impact on recidivism rates: "[T]he story of rehabilitation in America's prisons ... is too often a story of failure and frustration. Despite the substantial expenditure of money, energy and faith over the years, the goal of locking

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41 See the *Criminal Code*, *supra* note 28 at s. 718.1.

42 *Ibid.* at s. 718(a).

43 See the references to Morris & Tonry in *Sensible Justice*, *supra* note 1 at 144.

44 See Wilson, *supra* note 2 at 202.

45 *Sensible Justice*, *supra* note 1 at 18-19.

46 *Ibid.* at 157; see Wilson, *supra* note 2 at 58-59, 189.

people up in order to reform their characters remains elusive on any meaningful scale."[47] This is a proper admission. Prisons have not tended to be good venues for reforming offenders and creating good citizens; they have tended to promote rather than reduce criminality. For over one hundred and fifty years, prisons have been recognized as schools for crime.[48] Prisoners have absorbed prison culture and developed associations with other offenders. Life in prison is "unnatural, useless, and dangerous."[49] These conditions have contributed to offenders' alienation from society and have increased their aggression and dangerousness.[50]

Anderson is no doubt right about the conventional wisdom, and he is also no doubt right that rehabilitation in prisons has not been overwhelmingly successful. An issue, though, is whether the failure has rested in prison rehabilitation itself or in its implementation. In Miller's view, the difficulty with prison rehabilitation is that it has never really been tried:

> The great myth of the 1990s debate on crime and corrections — a myth that justified the country's investment in policies of deterrence and incapacitation — was that we had tried rehabilitation in the 1960s and 1970s and it hadn't worked.... [O]ne can only conclude that, even in the heyday of putative permissiveness, the bulk of criminal justice budgets went to arrest, prosecute, and imprison offenders. Alternative diversionary and rehabilitative programs were, at best, small appendages to the massive state institutional budgets geared to incapacitate and deter.[51]

Grant, however, the accuracy of the view that rehabilitation in prison tends not to work. Anderson's key point is that this conclusion does not determine whether rehabilitation *outside* the prison is doomed to failure. He decries the stigmatization of the concept of rehabilitation by judgments about the failure of rehabilitation in prison.[52] Anderson believes that rehabilitation can work outside of prison.

One might respond that rehabilitation efforts made outside prison walls, in conjunction with probationary sentences, have not done much to reduce recidivism rates. Anderson's rejoinder is like Miller's rejoinder to the critics of rehabilitation in prisons: rehabilitation outside prison has never been properly tried. While some

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47 *Sensible Justice*, *supra* note 1 at 3. See D. Cayley, *The Expanding Prison: The Crisis of Crime and Punishment and the Search for Alternatives* (Toronto: Anansi, 1998) at 97: "The problem is that the prison environment tends to counteract and neutralize rehabilitation. This is not to say that no one is ever rehabilitated in prison, just that the prison environment as it stands militates against it."

48 M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (New York: Vintage Books, 1979) at 267. "Gaols managed as most of ours are, as Lord Brougham well remarks, are seminaries kept at the public expense for the purpose of instructing His Majesty's subjects in vice and immorality, and for the propagation and increase of crime" (Journal of the House of Assembly of Upper Canada (1831), quoted in M. Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983) at 27).

49 Foucault, *supra* note 48 at 266.

50 L. Gosselin, *Prisons in Canada*, trans. P. Williams (Montreal: Black Rose Books, 1982) 34, 35, 132, 133.

51 Miller, *supra* note 12 at 168-69.

52 *Sensible Justice*, *supra* note 1 at 4.

individuals and organizations have made remarkable efforts and have had remarkable rehabilitative results, on the whole, "community supervision remains seriously under-resourced; probation officers typically carry caseloads that number in the hundreds — burdens that appear to preclude meaningful control of their clients' behavior."[53] Anderson's hypothesis is that rehabilitation outside prison can work if it is pursued with the proper thought, administration, resources, and commitment.

D. THE LADDER OF SANCTIONS

Anderson's prescription for viable rehabilitation programs outside prison has three elements: (1) a menu of penal options — the ladder of sanctions; (2) administration; and (3) institutional cooperation.

1. THE LADDER OF SANCTIONS

Recall Anderson's moral commitments: offenders should be assumed to be good; they should be offered an opportunity to change. Offenders have made bad choices, but we should not assume that they are bad people. Offenders can be understood to have made their bad choices because, for whatever reasons, they did not understand law-abiding courses of action to be available; they considered law-abiding action not to be meaningful, effective or rational; or they did not appreciate the consequences of their actions. One might say that the moral horizons of offenders are limited, because their horizons of behaviour have not been fully developed. The lack of development varies: some offenders have never had an opportunity to learn useful social skills; some offenders have had every privilege but have locked into selfishness. What rehabilitation offers is a set of law-abiding ways of behaving, of life possibilities that do not entail criminal injury to others. A basic idea behind the ladder of sanctions is that different offenders will require different levels of rehabilitation to address their different degrees of moral and social development.

The rehabilitative options Anderson discusses have some common features. The options are all examples of "Panoptic" discipline, operating through compulsory surveillance and individualized training.[54] Each is administered in a coercive setting — rehabilitation is part of a sentence or state-enforced program. The main techniques of coercion are not physical confinement but surveillance and training. Surveillance might be conducted through probation officers, who actually view or talk to offenders more or less often; it might be conducted through electronic means, as when an offender wears an electronic monitoring bracelet. Training may range from the relatively minor discipline of house arrest, through full-time work, to the highly intrusive multi-level discipline of boot camp. Rehabilitation forces offenders' behaviour into new channels, channels down which offenders would not go were they not forced. The point of imposing a new set of behaviours is not to mould offenders' behaviour by the sheer repetition of actions. Rather, it is to show the rationality, the effectiveness,

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53 *Ibid.* at 5.

54 Foucault, *supra* note 48 at 226-27, 172-83.

the possibility of law-abiding action. The discipline of rehabilitation is individualistic. It should be addressed to the particular needs of offenders.

Anderson organizes his ladder of sanctions in ascending order of "severity" or "toughness."[55] The ordering is in terms of ascending levels of intrusiveness, frequency of intervention, and comprehensiveness of intervention. Anderson discusses the following rehabilitative options:[56]

a. Probation with Community Service

The community service Anderson has in mind involves real work for public agencies, hospital, nursing homes, social service centres or non-profit organizations.[57] This type of program has triple benefits — it provides free labour, holds offenders accountable and may even teach offenders new job or life skills.[58] It may also be acceptable to victims and their families.[59]

b. Probation with Intensive Supervision and Electronic Monitoring[60]

Intensive supervision probation requires more frequent contact between offenders and probation officers than standard probation — not merely a few times per month but weekly or even daily.[61] Offenders may be subjected to random drug testing as well as curfews or other limitations on their activities. Offenders may also be required to attend counselling.[62] Offenders may be subjected to "home confinement" or "house arrest."[63] Technology, in the form of electronic monitoring, provides the requisite surveillance. Anderson provides a useful discussion of electronic monitoring technology and practices.[64] He quotes the conclusions of researchers Baumer and Mendelsohn, who have found that "the rehabilitative potential of home confinement may have been seriously underestimated."[65] Baumer and Mendelsohn claim that "[t]here is evidence that home confinement actually encourages offenders to work. In addition, the sanction

55 *Sensible Justice*, *supra* note 1 at 19, 143.

56 These options are all possible under Canadian sentencing law, through diversion programs, probation, or conditional release from incarceration. For a brief description of a ladder of sanctions with similar rungs, see Donziger, *supra* note 6 at 55-58.

57 *Sensible Justice*, *supra* note 1 at 23.

58 *Ibid.* at 24.

59 *Ibid.* at 26.

60 See Donziger, *supra* note 6 at 191. Intensive probation of the type Anderson discusses should not be confused with "attack probation" (often referred to as "intensive probation"), which has the goal not of rehabilitating offenders, but uncovering probation violations or minor offences which can be used to justify the revocation of probation and the incarceration of probationers: "The motto for this practice was mounted on the office wall of one of California's chief probation officers: 'Trail 'em, Surveil 'em, Nail 'em, and Jail 'em'" (Miller, *supra* note 12 at 131).

61 *Sensible Justice*, *supra* note 1 at 39.

62 *Ibid.*

63 *Ibid.* at 41.

64 *Ibid.* at 41-44.

65 *Ibid.* at 43. The quotations are drawn from T.L. Baumer & R.I. Mendelsohn, *Final Report: The Electronic Monitoring of Non-Violent Convicted Felons: An Experiment in Home Detention* (Indianapolis, Indiana: Indiana University School of Public and Environmental Affairs, 1990).

appears to stabilize and structure the lives of many offenders while they are being supervised."[66]

c. Day Reporting

Day reporting may be used for offenders on probation or offenders on conditional release from prison. Its terms are similar to but somewhat more onerous than the terms of intensive probation. The key difference between intensive probation and day reporting is that the latter involves a day reporting centre to which offenders must report at least once a day to participate in structured activities.[67] The centre staff coordinate work and other activities. Day reporting programs vary. Offenders may be required to work, perform community service, and participate in counselling. When not required to be at the centre, they may be permitted to be at large, subject to electronic monitoring.[68] The day reporting program of Hampden County, Massachusetts, revolves around a "simple idea" that gives a good account of day reporting generally: "Structure and enforce a positive daily routine to supplant the aimless way of life that lets people run afoul of the law."[69]

d. Specialized Treatment Programs for Drug and Sex Offenders

Anderson makes an obvious point: "Depressing as it is, the continuing evidence that drug abuse and crime are intimately linked also implies a reason for hope. If addiction feeds crime ... then won't reducing addiction also reduce crime?"[70] Anderson describes drug treatment programs available to accuseds diverted from prosecution.[71] Elements of programs may include detoxification in hospital followed by outpatient therapy, counselling, Narcotics Anonymous support sessions, or therapeutic community participation.[72] Of particular interest are Anderson's descriptions of courts dedicated solely to drug offences.[73]

Anderson also discusses treatment for a less sympathetic group than drug addicts — sexual offenders. Anderson's comment is entirely accurate: "To the general public, to the news media and quite often to themselves as well, sex offenders are the worst people in the world."[74] A view exists that sexual offenders cannot be rehabilitated. Anderson, however, describes modes of treatment that may be applied during probation, incarceration, and conditional release. He describes four types of interventions — group

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66 *Sensible Justice*, *ibid.* at 44. A recent study by the federal Solicitor General's department, however, has concluded that electronic monitoring is not cost effective, and that counselling and treatment programs, not intensive monitoring, are the best means for reducing recidivism. (J. Bronskill, "Ankle bracelets costly way to monitor offenders — study" *Edmonton Journal* (7 June 1999) A3).

67 *Sensible Justice*, *supra* note 1 at 54.

68 *Ibid.* at 53.

69 *Ibid.* at 61-62.

70 *Ibid.* at 70. See Donziger, *supra* note 6 at 200-204.

71 *Sensible Justice*, *supra* note 1 at 74, 78.

72 *Ibid.* at 70.

73 *Ibid.* at 74.

74 *Ibid.* at 87.

therapy, the use of inhibiting drugs, aversive conditioning or behaviour modification, and relapse prevention.[75] The last holds promise. It has been successfully used for substance abusers. It works in this way:

> The therapist begins by emphasizing to the offender that he may never be rid of his urges for deviant sex; his goal instead is to learn to control them. To do that, he first needs to identify "precursors" to offending. A list of the most common such preoffence emotional states includes feelings of generalized anger, anger toward women (for rapists), depression, boredom, workaholism, and low self-esteem.
>
> In the next stages leading up to an offense, the offender may fantasize about abusive sex, then turn the fantasies into "cognitive distortions" — rationalizations that make deviance seem acceptable....
>
> In such a state of mind, the offender makes "apparently irrelevant decisions" designed to make [an offence] possible. A rapist fights with his wife or girlfriend, then goes for a drive and picks up a female hitchhiker. A pedophile gets bored and depressed, goes for a walk, and winds up on a park bench near a schoolyard. The task of therapy is to help the offender understand the distortions of his thinking, confront the deep feelings that get him going in the wrong direction, and increase his awareness of the seemingly unconnected decisions leading to trouble.[76]

Offenders may participate in therapy groups and in other forms of behaviour modification.[77]

e. Residential Restitution

Restitution is an ancient means of redressing offences. It remains a sentencing tool and is often imposed as an aspect of non-custodial sentences. Residential restitution goes beyond typical restitution orders by requiring not only that offenders compensate victims for the damage they have inflicted, but by requiring offenders to reside at restitution centres. Anderson quotes Vince Fallin, the head of Georgia's probation division, who claims that residential restitution is "one of the most popular alternatives available to the judiciary. The judges really, really like it. [A centre] gives a person some structure, it focuses on work, it's less costly than prison, and it gets them away from their home environment for a while. It meets all the needs the judiciary has."[78] Centres may offer substance abuse groups, money management classes, anger management programs, or parenting and life skills programs — but work comes first.[79]

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[75] *Ibid.* at 90-91, 96, 98.

[76] *Ibid.* at 98-99.

[77] *Ibid.* at 99-100.

[78] *Ibid.* at 110.

[79] *Ibid.* at 112, 115.

f. Boot Camp[80]

Anderson expressly identifies the completeness of the intrusions of boot camp: it "subject[s] offenders to physical, mental, and emotional challenges designed to teach self-discipline and otherwise prepare offenders for productive lives."[81] In the type of boot camp programs that Anderson favours, physical discipline is coupled with work, the learning of vocational skills, general education, substance abuse training, and classes on "decision making."[82] "The main focus," says Anderson, "is on help rather than discipline."[83]

Any of the foregoing options on the ladder of sanctions can be combined. They can be imposed in lieu of a period of imprisonment or as conditions to be met following a period of imprisonment.[84] Offenders initially sentenced at one rung of the ladder might be moved up or down, depending on their conduct while in a program and their commission of any further offences.

Anderson devotes a chapter to each option, highlighting particular instances in which the rehabilitative options have been successful. He describes his work as a "snapshot" of the operations of non-imprisonment sanctions in a single year, 1995.[85] Each chapter follows a standard format, beginning with a *vignette* about a person sentenced to a non-imprisonment mode of punishment. Each chapter is laced with testimony from justice system participants.

2. ADMINISTRATION

The use of the options themselves does not guarantee rehabilitative success. The rehabilitative programs must be properly managed. On a general level, Anderson cautions that programs require "deliberate, intelligent planning."[86] Issues that must be addressed include the identification of the agency to administer the program (should it be part of the official state apparatus such as the probation authority or the prosecutors' office or an independent agency?); the criteria for the selection of participants; the mechanisms for review of the progress of participants; the mechanisms for enforcing rules, apprehending violators, and responding to violations; and the mechanisms for reporting back to supervisory authorities such as the probationary authority or the courts. Anderson also cautions that programs "remain vulnerable to the perverse complexities of social policy planning."[87] Work elements may be difficult to satisfy

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80 Alberta has the somewhat dubious distinction of pioneering boot camps in Canada: "[T]he Alberta system takes chronic offenders who have expressed a desire to reform and puts them in a rural camp that combines hard work with life-skills training, counselling, and education" (Cayley, *supra* note 47 at 71).

81 *Sensible Justice, supra* note 1 at 20.

82 *Ibid.* at 130-31.

83 *Ibid.* at 131.

84 *Ibid.* at 5, 20, 143.

85 *Ibid.* at 17.

86 *Ibid.* at 157.

87 *Ibid.* at 158.

if local unemployment is high and no work is available. Intensive supervision may initially increase detected offences and lead to increased engagement of the formal probationary and judicial system. Anderson advises that promoters and managers of alternative sanctions programs "need to insist on enough time to work through implementation problems before critics proclaiming failure are allowed to destroy their efforts."[88] He cautions that "scale is important."[89] The cost-savings inherent in alternative sanctions programs can only become evident if enough offenders participate, so that prison cells can be closed. Of course, funding and the provision of adequate resources for programs is very important.[90] Finally, the programs require managers and promoters to be committed to the programs.[91] The programs will be born into a skeptical, hostile environment. The clients are difficult people. Their chances of dramatic success are low. The programs cannot survive unless those who run them believe in the programs and the people.

3. INSTITUTIONAL COOPERATION

A further condition for the success of alternative sanctions programs proposed by Anderson is institutional cooperation: "Alternative sanctions make it possible for law enforcement, courts and corrections to function together as a system, making rational use of costly resources."[92] Alternative sanctions programs work where system participants — police, defence counsel, prosecutors, probations and correctional officials, and judges — work together to identify suitable candidates for alternative measures, ensure that offenders have a real opportunity to benefit from the alternative measures, and to ensure that programs are used and receive support. Judge Jeffrey Tauber, who initiated the Oakland, California drug court, remarked on the difficulties of cooperation in the justice system: "[T]his stuff is not easy. [A successful drug court] requires a different view of the system, a different view of the offender, and a different view of how to deal with the various participants in the system.... It's hard to get people working together when they're most interested in protecting their turf and their resources...."[93]

Judge Tauber is right — a cooperative model *does* require a different view of the justice "system."[94] We tend to believe that the participants in the justice system should have relative institutional autonomy: the prosecutors are not lawyers for the police; defence counsel should not get too cosy with prosecutors — in an adversary system, the defence and the prosecution should be institutional opponents; judges should not develop special links to prosecutors, defence counsel, or the police — judges should be and be perceived to be independent. From this perspective, cooperation seems neither practically possible nor conceptually appropriate. The problem of the institutional desirability of non-cooperation cannot be finessed by claiming that different

88 *Ibid.* at 159.
89 *Ibid.*
90 *Ibid.* at 157.
91 *Ibid.*
92 *Ibid.* at 160.
93 *Ibid.* at 75-76.
94 It is often less a "system" than a waivering network of resultants of warring forces.

rules should apply just because the sentence stage has been reached. We cannot say that independence and institutional adversity should stop at the point of conviction. The most important independent advocacy may be necessary for a client facing a serious sentence. Yet, where liability is not in issue and where consensus can be reached on the fitness of a non-custodial disposition, participants should be open-minded enough to consider all of the relevant sentencing options and to work together to craft a punishment that satisfies justice, public safety, and the needs of the offender. Such punishments will work for the benefit of all.

II. CHALLENGES

A. EMPIRICAL WEAKNESS

Sensible Justice has a weak empirical base. The evidence relied on in the text is primarily anecdotal, rather than statistical. Much of the research relied on in the book is original, the product of Anderson's interviews with various offenders and justice system personnel. This research has some limited qualitative value and may at least be employed to respond to the claim that no rehabilitative alternative to imprisonment can work.[95] The limitation of the scope of the research to a single year does, to an extent, limit the value of the conclusions that might be drawn. While the age of the research is not particularly problematic (frequently data are several years old before social science review may be conducted, and not all disciplines have the fetishism of the current exhibited by the law), Anderson nowhere offers a justification for selecting 1995 as the particular year for data collection (we do not know whether it was a representative year). The research, moreover, is unashamedly selective. The book is expressly about "success stories" of non-imprisonment sanctions.[96] Anderson does not consider contrary data. Hence, *Sensible Justice* is more like a portrait than a snapshot — its subjects have been carefully posed.

B. ADVERSE CONSEQUENCES

Since Anderson wants to exhibit success stories, he does not devote much time to potential adverse consequences of rehabilitative alternative sanctions. He does mention at several points the possibility of "net widening" — the possibility that the availability of more lenient, non-custodial, supervisory sentencing options will encourage courts to impose these options, rather than non-custodial, non-supervisory options such as fines; and the possibility that the existence of the additional rules attached to the rehabilitative options will result in further rule-breaking and further legal difficulties for offenders.[97] He does not, however, explore the evidence that rehabilitative options allow the State to extend its surveillance and control across ever-broader expanses of the public and

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95 *Ibid.* at 157.

96 *Ibid.* at 19.

97 *Ibid.* at 31, 118, 126.

into ever-more intimate details of persons' lives.[98] He shows some latent discomfort with electronic monitoring, referring to the "big brother level of supervision," but manifests no express suspicion of or distrust for State surveillance and its growth. Furthermore, Anderson does not examine at any length the racial or other discriminatory abuses of rehabilitative programs. Anderson admits that, at many boot camps, "what goes on ... is an anachronism, and in some cases an ugly caricature";[99] he raises the possibility but does not adequately pursue the notion that boot camps may be scenes from a theatre of cruelty. Finally, Anderson does not consider whether attempts at rehabilitation may actually harm offenders, leave them less socially adapted and personally sound than before the attempts.[100]

C. THE PRESUPPOSITIONS OF REHABILITATION THROUGH PUNISHMENT

Anderson might be judged to be too optimistic about the prospects of rehabilitation. He again displays an awareness of difficulty. In particular, he refers to the prejudicial effects of program-graduates' return to environments that encourage criminal behaviour and discourage discipline, the return to "dysfunctional families and chaotic neighborhoods."[101] This worry points to a fundamental weakness of any rehabilitative alternative sanction — it does not last long. It may provide education, training, new life possibilities. But it competes with the education, training, and life possibilities ground into offenders from earliest childhood.[102] The worry leads to another fundamental weakness of any rehabilitative alternative sanction — it cannot go deep enough. Rehabilitation can address some habits and disciplines. It can encourage hygiene, timeliness, productivity, responsibility, pride in work. Yet personalities may be argued to be the products of many layers and interconnections of small and larger disciplines, the habits and techniques of living absorbed and adopted from infancy.[103] Rehabilitation cannot (ethically) cut down deeply enough into the lessons of family, neighborhood, and media to make all the adjustments necessary to ensure success.

One might respond that this criticism bespeaks a *de facto* determinism, a predestinationism. This criticism urges that we cannot help, only at best mitigate; we cannot change, only at best compel, the adoption of a fleeting role. The critics' pessimism has its dangers. The pessimism can easily be rested on social or racial grouping. It supports the indentification of those whose life habits are alleged to make them unsuitable for non-criminal life. For them, rehabilitative programs would be inappropriate. They need only incarceration and incapacitation; lock them up and forget about them. One might also respond that the pessimism denies our responsibility. If we have sufficient choice to be held responsible for criminal offences, we should have sufficient choice to act differently, to change our ways.

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98 The fallacy of composition may be alleged to be at work in Anderson's argument: rehabilitative alternative sanctions may be highly beneficial for particular offenders. That does not entail that such measures work to the benefit of offenders generally, to the benefit of offenders as a class.

99 *Ibid.* at 123.

100 See Foucault, *supra* note 48 at 255, 301.

101 *Sensible Justice*, *supra* note 1 at 121; see 137-38.

102 See Wilson, *supra* note 2 at 190.

103 See *ibid.* at 52-53, 57.

Until we are forced to conclude otherwise, we should be entitled to assume with Anderson and Augustus that those who commit offences are not, at heart, so very different from those who obey the law; that criminality is not destiny; and that many offenders can, with help and with sincere effort, learn from their mistakes.

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