



AMERICAN BAR ASSOCIATION

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STATEMENT OF

JOHN M. GREACEN, VICE-CHAIRPERSON
CRIMINAL JUSTICE SECTION

ON BEHALF OF
THE AMERICAN BAR ASSOCIATION

BEFORE THE
UNITED STATES SENTENCING COMMISSION

CONCERNING
SENTENCING OPTIONS IN ADDITION TO INCARCERATION
AVAILABLE AND APPROPRIATE FOR THE INDIVIDUAL
CONVICTED OF A FEDERAL OFFENSE

JULY 15, 1986

Mr. Chairman and Members of the Commission:

I am pleased to appear before you on behalf of the 315,000 members of the American Bar Association to address the general topic of the role of alternative sanctions in sentencing guidelines construction. My name is John M. Greacen. I am Clerk of the United States Court of Appeals for the Fourth Circuit at Richmond, and Vice-Chairperson of the American Bar Association's Criminal Justice Section. I am here today as a representative of the American Bar Association; in no fashion should my remarks be interpreted as representing the views of the United States Court of Appeals for the Fourth Circuit.

I spent five years at the National Center for State Courts, where I was actively involved in its evaluation of the initial voluntary sentencing guidelines experiments (published in Sentencing By Mathematics: An Evaluation of the Early Attempts to Develop and Implement Sentencing Guidelines). I also previously served as Deputy Director of the National Institute of Law Enforcement and Criminal Justice (now the National Institute of Justice), and as first Director of the National Institute for Juvenile Justice and Delinquency Prevention served as a member of the Board of Directors of the National Institute of Corrections. I have chaired and served for many years on the ABA Criminal Justice Section's Committee on Corrections and Sentencing.

My testimony reflects the official policies of the American Bar Association, as set forth in Chapter 18 (Sentencing Alternatives and Procedures) of the ABA Standards for Criminal Justice.

Accompanying me today is Laurie Robinson, Director of the ABA Section of Criminal Justice in Washington, D.C. for seven years. She is intimately familiar with Association policies dealing with crime and criminal justice.

American Bar Association sentencing policy emphasizes the use of nonincarcerative sanctions wherever possible. Accordingly, we urge the United States Sentencing Commission to incorporate throughout its sentencing guidelines provisions for nonincarcerative sanctions. Very broad use of alternative sanctions will best meet the needs of most offenders, satisfy the public's need for appropriate punishment of most wrong-doers, and protect the public fisc. In our view, it is also the only way that the Commission can accomplish the legislative requirement that your guidelines "shall ... minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons," as set forth in 28 U.S.C. § 994(g).

The subject of alternative sanctions is covered extensively in Chapter 18 (Sentencing Alternatives and Procedures) of the Second Edition Standards for Criminal Justice.

Standard 18-2.1(b) calls on legislatures to provide sentencing authorities with "a range of alternatives, including nonincarcerative sanctions and gradations of supervisory, supportive, and custodial facilities, so as to permit an appropriate sentence in each individual case." Standard 18-2.2 sets forth the keystone principle that should guide every aspect of sentencing decision-making -- the "least restrictive alternative."

The sentence imposed in each case should call for the minimum sanction which is consistent with the protection of the public and the gravity of the crime.

Commentary to the Standard explains this sentencing principle:

The "principle of parsimony" in the use of punishment -- that is, that the individual's liberty should be restrained only to the minimum degree necessary to achieve the essential needs of society -- today enjoys broad support. . . . [T]he concept has been codified

in virtually every recent model code, including the Model Sentencing and Corrections Act, the NAC standards, S. 1437, and the proposed Federal Criminal Code drafted by the Brown Commission. In addition, it has received the support of most commentators, including the proponents of retributive models.

Standard 18-2.3, calls for the availability of nonincarcerative sentences for virtually every crime.

The legislature should authorize the sentencing authorities to consider a sentence of probation or a similar sentence not involving confinement for all crime categories. Limited exceptions to this principle may be appropriate, but only for the most serious offenses.

When probation is not appropriate, the least restrictive alternative principle directs the sentencing authority to search for another solution short of total confinement. Standard 18-2.4(a) calls for creativity in the construction of "intermediate sanctions," and suggests three examples of them.

Attention should be directed to the development of a range of sentencing alternatives which provide an intermediate sanction between supervised probation on the one hand and commitment to a total custody institution on the other. Examples of the types of dispositions which might be authorized are:

- (i) commitment on an intermittent basis to a local facility which permits the offender to hold a regular job or to receive education or vocational training while subject to supervision or confinement on nights and weekends;

- (ii) commitment to an institution for a short, fixed term, followed by automatic release under supervision;

- (iii) a required term of community service, such as in a hospital or other public or charitable facility, or a sentence involving the performance of restitutionary services.

Standard 18-2.7(a) recognizes that a fine can also be an alternative sanction.

Although fines should not be routinely imposed on most offenders and seldom should be used in addition to a substantial period of incarceration, their use is recommended as a less drastic alternative to confinement, as a means of funding restitutionary programs, and as an appropriate deterrent where the defendant has gained money or property through the commission of the offense.

The principle of the least restrictive alternative recognizes that there are some instances in which incarceration is necessary. Standard 18-2.5(c) provides the sentencing authority with some examples of factors that legitimize or fail to legitimize sentences of total confinement. Specifically, the standard provides:

(c) A sentence not involving total confinement is to be preferred in the absence of affirmative reasons to the contrary. Examples of legitimate reasons for the selection of total confinement in a given case are:

(i) Confinement is necessary in order to protect the public from further serious criminal activity by the defendant; or

(ii) Confinement is necessary so as not to unduly depreciate the seriousness of the offense and thereby foster disrespect for the law.

On the other hand, neither community hostility to the defendant nor the apparent need of the defendant for rehabilitation or treatment provides acceptable reasons for imposing a sentence of total confinement.

Finally, and of particular importance to the work of the Commission, Standard 18-3.1(c) recognizes that alternative sanctions must be integrated into sentencing guidelines -- both to assure that the least restrictive alternative principle will be implemented, and to see that it will be implemented consistently and fairly.

In recognition that deserved punishment need not necessarily take the form of institutional confinement, a system of guidelines should take into account a variety of sentencing alternatives, including probation, "split sentences," fines, community service, and other intermediate sanctions.

The Commission's solicitation of views for this hearing requested general suggestions for the place of alternative sanctions in sentencing guidelines and posed a number of specific and difficult questions concerning the appropriateness of particular alternative sanctions. Let me address the general questions first, and then the most specific (to the extent that the American Bar Association has established policy bearing on them).

° What alternative sanctions should be recognized by the Commission?

As many as possible. The Commission has noted probation, intensive supervised probation, fines, restitution, community service, and house arrest. ABA policy endorses another category of sanctions: intermediate sanctions falling between total confinement and supervised probation. Such intermediate sanctions could include "split" or "shock" sentences -- short terms of incarceration, well below the authorized minimum jail or prison sentence, coupled with a longer term of probation (and perhaps other sanctions), designed to get the offender's attention -- and "half-way house" or "released time" programs in which an offender is free to work during the day but confined on nights and weekends.

We would also encourage the Commission to devise a means by which the creativity of federal judges in developing unique alternatives tailored to an individual case would continue to be enlisted in a guidelines-based sentencing process. Allowing a broad range of possible conditions of probation, terms of restitution, and forms of community service would fulfill most of this need. In short, the American Bar Association supports the creation and use of the broadest possible forms of alternative sanctions and challenges the Commission to find ways in which the guidelines process can stimulate, rather than retard, this quest.

° For what crimes should alternative sanctions be allowed?

ABA policy is eminently clear on this point: Standard 18-2.3 calls for the availability of alternatives for "all crime categories," with "limited exceptions . . . only for the most serious offenses." As commentary to this standard points out: "Judicial consideration of sentencing alternatives should begin with the assumption that a nonincarcerative sentencing alternative is to be preferred unless persuasive reasons exist to the contrary."

The Commission's enabling legislation instructs it to make some such exceptions -- those crimes warranting a guidelines requirement of imprisonment. See 28 U.S.C. §§ 994(h) and (i). The legislation provides the most general advice for crimes not included in those two subsections. Section (j) of 28 U.S.C. § 994 notes the two extremes -- that a sentence other than imprisonment is appropriate in cases in which "the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" and that imprisonment is appropriate for a "crime of violence that results in serious bodily injury." The American Bar Association urges the Commission to authorize nonincarcerative alternative sentences in every instance in which it is not compelled by the language of the enabling legislation to require incarceration.

° How should alternative sanctions be integrated into a sentencing guidelines schema or structure? Not knowing, at this point, how the Commission intends to approach the construction of its guidelines, it is difficult for us to answer this question other than by exhorting the Commission itself to find a way appropriate to its chosen structure. As noted previously, complete integration of alternative sanctions -- both in terms of guiding the sentencing judge's choice of incarceration versus an alternative, and, if so, what alternative (or alternatives) -- is

essential in order to effect a sentencing policy that (a) implements the least restrictive alternative principle, (b) provides consistency over the range of federal criminal sentences, and (c) produces an overall sentencing policy that can be accommodated within the capacity of federal prisons and other correctional resources.

Nonetheless, we can offer a few suggestions for accomplishing the objectives we promote. First, the Commission should articulate in the guidelines the principle of the least restrictive alternative as an overarching canon of construction for sentencing judges. Second, if a matrix format is used, alternative sanctions can be specified in the same manner as incarcerative ones. See Table 18.8, "Sample Matrix for Armed Robbery" from the commentary to the Standards, attached as Appendix A. Third, the Commission might devise a table of equivalencies by which most criminal incidents could have both incarcerative and nonincarcerative alternatives as authorized sanctions. For example, if each criminal incident could be assigned a numerical "seriousness rating" by application of the guidelines to the circumstances of the incident, and units of various authorized sanctions were to be assigned "atonement values" on an equivalent scale, a sentencing judge could construct a sentence appropriate to the individual case composed of a variety of different sanctions.

Consider the possibility that the Commission could, for instance, conclude that a month of total imprisonment is equivalent to "X" months of probation, "Y" months of intensive supervised probation, "Z" months of "released time," or "W" hours of community service. For a crime for which the guidelines specified a six month sentence, a sentencing judge could instead impose "X" years' probation, or "Y" years of intensive supervised probation plus "W" hours of community service.

We turn now to the Commission's specific questions.

• Probation

Should some form of intensive supervised probation be imposed on certain types of federal offenders? Yes, if federal district judges will use it in lieu of incarceration for some offenders for whom they would not otherwise consider probation to be appropriate.

If so, what kind of offenders should be placed on intensive supervised probation and what forms of control and supervision should be imposed? While Association policy does not refer specifically to "intensive supervised probation," Standard 18-2.3 contemplates a wide range of probationary conditions and intensive supervision could fit within that range. Our standards would generally support judicial consideration of intensive supervised probation or an intermediate sanction for all offenses save for those convicted of the most serious offenses.

What roles should the Commission, the court and the probation office have in determining who are placed on intensive supervised probation? We see no reason why the roles of the Commission, court and probation office should be different in determining this sanction than they are in determining any other sanction.

What type of probation conditions not expressly listed in 18 U.S.C. 3563(b)(1-19) should the Commission consider in drafting the guidelines? Standard 18-2.3(b) through (f) (see Appendix B) sets forth useful principles that the Commission should consider in drafting guidelines (or standard probation conditions), such as the limitation of fines, restitution, reparation, or family support to the probationer's ability to pay. This standard does not include specific sorts of conditions going beyond the itemization in 18 U.S.C. § 3563(b)(1-19).

• Fines

Are there certain crimes for which fines should be the preferred sanction? If so, list the offenses. Standard 18- 2.7(a) provides that "fines should not be routinely imposed on most offenders and seldom used in addition to a substantial period of incarceration." Their use is recommended "as an appropriate deterrent where the defendant has gained money or property through the commission of the offense." A fine, with or without other sanctions, is often appropriate when the offender is an organization rather than individual. See Standard 18-2.8.

What elements should be considered in calculating the actual amount of a fine? Standard 18-2.7(f) recommends that the maximum amount of a fine be set according to an "index other than a dollar amount in cases where it might be appropriate."

For example, a fine relative to the amount of the gain might be appropriate in cases where the defendant has profited by his or her crime, or a fine relative to sales, profits, or net annual income might be appropriate in some cases, such as business or antitrust offenses, in order to assure a reasonably even impact of the fine on defendants of variant means.

Standard 18-2.7(c) provides:

In determining whether to impose a fine and its amount, the court should consider:

- (i) the financial resources of the defendant and the burden that payment of a fine will impose, with due regard to the defendant's other obligations;
- (ii) the ability of the defendant to pay a fine on an installment basis or on other conditions to be fixed by the court;
- (iii) the extent to which payment of a fine will interfere with the ability of the defendant to make any ordered restitution or reparation to the victim of the crime; and
- (iv) whether there are particular reasons which make a fine appropriate as a deterrent to the

offense involved or appropriate as an alternative to confinement of the defendant.

Revenue production is not a legitimate basis for imposing a fine.

Should the amount of the fine bear a particular relationship to the offender's gain or the victim's loss? Yes. See above.

How should the offender's "ability to pay" be determined? The commentary to Standard 18-2.7 supports this priority of claims against "the offender's often limited resources: (1) restitution to the victim, (2) support for the offender's dependents, and (3) payment of fines." An offender's ability to pay should be based on what he or she "is or will be able to pay" over a period of time limited by the maximum authorized term of probation (two years for misdemeanors and five years for felonies, according to Standard 18-2.3(b)(ii)). With this minimal guidance, federal judges should have little difficulty applying an "ability to pay" standard, given their familiarity with its application with respect to appointment of counsel, granting in forma pauperis status, and providing a transcript at government expense.

What sanctions should be imposed if an individual offender fails to pay the fine? See Standard 18-7.4:

(a) The sentencing court should have the power at any time to revoke or remit a fine or any unpaid portion, or to modify the terms and conditions of payment. When failure to pay a fine is excusable, such authority should be exercised.

(b) Incarceration should not automatically follow the nonpayment of a fine. Incarceration should be employed only after the court has examined the reasons for nonpayment. It is unsound for the length of a jail sentence imposed for nonpayment to be inflexibly tied, by practice or by statutory formula, to a specified dollar equation. The court should be authorized to impose a jail term or a sentence involving intermediate sanctions (standard 18-2.3) for nonpayment, however, within a range fixed by the

legislature for the amount involved, but in no event to exceed one year. Service of such a term should discharge the obligation to pay the fine, and payment at any time during its service should result in the release of the offender.

(c) The methods available for collection of a civil judgment for money should also be available for collection of a fine, and should be employed in cases where the court so specifies.

(d) In the event of nonpayment of a fine by a corporation, or other violation of any sanction imposed against an organization pursuant to standard 18-2.8, the court should be authorized to proceed against specified corporate officers or organizational officials under paragraph (b) or against the assets of the corporation or organization under paragraph (c).

An organizational offender? See (d) above.

• Restitution

Under what conditions should restitution be ordered? Subject to the limitation of an offender's ability to pay within a reasonable period of time, restitution is appropriate in virtually any instance in which victims have suffered loss as a result of a criminal act, subject to these limitations set forth in Standard 18-2.8(a)(i):

(A) At the sentencing hearing, the defendant should be entitled to assert any substantive defense against any claimant that the defendant could have raised in a civil action for the damages allegedly caused by the crime (except defenses barred under traditional principles of res judicata and collateral estoppel and the defense of the statute of limitations where such statute has expired since the date of the filing of the criminal indictment or information);

(B) To prevent double recovery, the defendant should be permitted to set off amounts paid to any claimant pursuant to any such restitution order against any civil judgment obtained by such claimant for losses arising out of the same transaction;

(C) The findings in any such sentencing hearing and the fact that restitution was ordered or paid should not be admissible in evidence, or otherwise given legal weight, in any civil action, except one seeking enforcement of the restitution order; and

(D) Recovery in such a proceeding should be limited to verifiable pecuniary losses, including out-of-pocket expenses, sustained by a specific claimant or claimants before the court, the extent of which damages can be efficiently ascertained by the court without a disproportionate burden on its time or resources. Claimants seeking general, exemplary or punitive damages, or asserting losses which require estimation of lost profits, should be limited to their civil remedies. In determining compensable losses, the court should be entitled to rely upon the findings of special masters appointed by it, subject to subparagraph (b)(ii) below.

How should a hearing be structured to efficiently determine the appropriate amount of restitution without unduly complicating or prolonging sentencing? See (D) above.

Are there ways in which restitution could be effectively combined with imprisonment or community service? It is difficult to combine restitution and imprisonment for an indigent offender. With this exception, full or partial restitution should be imposed as a part of the sanction in every sentence to which it is appropriate.

° Community Service

How should an effective community service program be structured? The discussion of community service from the commentary to Standard 18-2.4 is attached as Appendix C. That discussion suggests the broad utility of community service as a potential sanction for offenders and offenses of most types, including felonies as well as misdemeanors. It cautions against approaches that would limit this alternative's availability to highly-skilled or white collar individuals. It notes the need for investment of staff time in establishing and adequately monitoring these programs.

What types of offenders will benefit most from this type of sanction? The sanction appears to have very broad potential applicability.

Are there certain types of offenders for whom community service will not serve the goals of sentencing? We have already noted the propriety of limited exceptions to the availability of any alternative sanctions for some crimes. In addition, there are some offenses, such as corruption in public office, where the reinforcement of social norms requires a sentence of greater apparent severity than community service. Finally, some forms of such service imposed by courts in the past -- e.g., giving speeches to Rotary Clubs or serving on the board of directors of a charitable organization -- hardly rank as sanctions.

° House Arrest

Is this a viable alternative to incarceration? If so, under what circumstances? Although the ABA has no specific policy addressing "house arrest," we urge the Commission to explore this and other alternative concepts which would serve to implement the ABA's policy favoring the development of intermediate sanctions to provide sentencing tribunals with alternatives between outright confinement and supervised probation.

* * * *

In closing, we greatly appreciate the Commission's interest in the views of the Association; we will be glad to supplement these comments in any way that the Commission, or individual members, may request.

Attachments

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ATTACHMENTS
TO TESTIMONY OF
JOHN M. GREACEN
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AMERICAN BAR ASSOCIATION
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- Appendix A:** Table 18.8, Sample Matrix for Armed Robbery (from commentary to ABA Standard 18-3.1)
- Appendix B:** ABA Standard 18-2.3(b) - (f)
- Appendix C:** Commentary to ABA Standard 18-2.4

TABLE 18.8
Sample Matrix for Armed Robbery

Offense Characteristics	Offender Characteristics				
	-5 to -1	0-2	3-8	9-12	13+
9-10	1 yr C	2 yr C	4 yr C	6 yr C	10 yr C
7-8	Split: 90 days C 2 yr S 6 mo V	1 yr C	3 yr C	4 yr C	7 yr C
5-6	Split: 90 days C 2 yr S 6 mo V	Split: 90 days C 1 yr S 1 yr V	1 yr C	3 yr C	6 yr C
3-4	Split: 90 days C 2 yr S 6 mo V	Split: 90 days C 1 yr S 1 yr V	8 mo C	2 yr C	4 yr C
0-2	1 yr S 6 mo V	Split: 90 days C 1 yr S 1 yr V 2 yr S 2 mo V	Split: 90 days C 90 days C 1 yr S 1 yr V	1 yr C	3 yr C

Note. — C = continuous confinement, S = supervision in community, V = confinement for violation of conditions.

Offense characteristics:

Deadly weapon used = +10

Several victims = +4

Vulnerable victim = +4

Offender characteristics:

Prior violent offense = +5 per offense

Prior felonies = +2 per offense

Prior revocations = +1 per violation

Made restitution = -1

Under 18 years of age = -1

Standard 18-2.3. Sentences not involving confinement

(a) The legislature should authorize the sentencing authorities to consider a sentence of probation or a similar sentence not involving confinement for all crime categories. Limited exceptions to this principle may be appropriate but only for the most serious offenses. As used in these standards, the term "probation" means a sentence not involving confinement which imposes conditions and retains authority in the sentencing court to modify the conditions of the sentence or to resentence the offender if its conditions are violated.

(b) The following general principles should apply to such sentences:

(i) The court should specify at the time of sentencing the length of any term during which the court will retain power to revoke the sentence for the violation of specified conditions;

(ii) Neither supervision nor the power to revoke should be permitted to extend beyond a legislatively fixed term, which should in no event exceed two years for a misdemeanor or five years for a felony;

(iii) The sentence to be imposed in the event of a violation of a condition should not be fixed prior to a finding that the violation has occurred. Upon revocation of probation, the court should have available the same sentencing alternatives that were available at the time of initial sentencing;

(iv) A sentence to probation should be treated as a final judgment for purposes of appeal and similar procedural purposes;

(v) The court should not be required to attach a condition of supervision by the probation department if in its judgment supervision is not appropriate for the particular case; and

(vi) Whether the defendant pleads guilty, not guilty, or intends to appeal is not relevant to the issue of whether probation is an appropriate sentence.

(c) The imposition and implementation of the conditions upon which probation is granted should comply with the following general principles:

(i) All conditions of probation should be prescribed by the sentencing court and presented to the probationer in writing;

(ii) Probation officers should have authority to implement judicially prescribed conditions, but the conditions must be

sufficiently precise so that probation officers do not in fact establish them; and

(iii) The probationer should have the right to apply to the sentencing court for a clarification or change in conditions.

(d) Probation conditions should not be required by statute, other than for the general condition that the probationer lead a law-abiding life during the period of probation. The sentencing court should be authorized to individualize the conditions of probation to fit the circumstances of each case. Development of standard probation conditions and guidelines concerning their use is desirable and should be addressed by the guideline drafting agency, but the sentencing court should not mechanically impose the same conditions in all cases.

(e) Conditions imposed by the court should be reasonably related to the purposes of sentencing, including the goal of rehabilitation, and should not be unduly restrictive of the probationer's liberty or autonomy. Where fundamental rights are involved, special care should be taken to avoid overbroad restrictions or restraints which are so vague or ambiguous as to fail to give real guidance. The following additional limitations should also apply:

(i) Conditions requiring payment of fines, restitution, reparation, or family support should not go beyond the probationer's ability to pay;

(ii) Probationers should not be required to pay the costs of probation; and

(iii) Performance bonds should not be employed as a condition of probation.

(f) Conditions may appropriately deal with matters such as the following:

(i) cooperating with a program of supervision;

(ii) meeting family responsibilities;

(iii) maintaining steady employment or engaging in a specific employment or occupation;

(iv) pursuing prescribed educational or vocational training;

(v) undergoing available medical or psychiatric treatment, which treatment may include periodic testing for narcotics use;

(vi) maintaining residence in a prescribed area or in a special facility established for or available to persons on probation;

(vii) refraining from consorting with specified types of people, frequenting specified types of places, or engaging in specified business, employment, or professional activities, to the extent

that such restrictions have a reasonable relationship with the prior offense or anticipatable future criminal behavior;

(viii) making restitution of the fruits of the crime or reparation for loss or damage caused thereby;

(ix) refraining from the use of alcohol or illegal drugs or the possession of dangerous weapons; and

(x) requiring a term of community service, such as in a hospital or other public or charitable facility.

Standards governing the procedures for revocation or modification of such a sentence are set forth in standard 18-7.5, standards governing the sentencing alternatives which should be available upon the violation of a condition are set forth in standard 18-7.3, and standards governing probation services are set forth in standard 18-5.6.

History of Standard

This standard has been revised to incorporate those portions of the original Probation standards dealing with the imposition and implementation of a sentence to probation and the determination of appropriate probation conditions. Minor changes have been made to reflect recent case law on probation conditions, to incorporate community service as a probation condition, and to reflect this edition's concept of structured discretion.

Related Standards

ABA, Standards for Criminal Justice 10-5.2, 14-1.4

ALI, Model Penal Code §§7.01, 301.1

NAC, Corrections 5.2, 5.4, 16.11

NCCD, Model Sentencing Act §1

NCCUSL, Model Sentencing and Corrections Act §§3-103, 3-301 to

304

NDAA, National Prosecution Standards 22.1-22.3

Commentary

Preference for Probation

The NAC standards begin their discussion of probation with the following statement: "The thrust of this report is that probation will

Standard 18-2.4. Intermediate sanctions

(a) Attention should be directed to the development of a range of sentencing alternatives which provide an intermediate sanction between supervised probation on the one hand and commitment to a total custody institution on the other. Examples of the types of dispositions which might be authorized are:

(i) commitment on an intermittent basis to a local facility which permits the offender to hold a regular job or to receive education or vocational training while subject to supervision or confinement on nights and weekends;

(ii) commitment to an institution for a short, fixed term, followed by automatic release under supervision;

(iii) a required term of community service, such as in a hospital or other public or charitable facility, or a sentence involving the performance of restitutionary services.

(b) The principles set forth in standard 18-2.3(b)-(f) should also apply to a sentence to partial confinement. Procedures applicable inside the institution of confinement are beyond the scope of these standards.

History of Standard

The changes are of a stylistic nature, except that greater emphasis has been given to the use of community service orders and restitution. Original paragraph (c) has been eliminated as redundant, since it overlaps with the more specific statement in standard 18-2.5(c) and with the general statement in standard 18-2.2.

Related Standards

ABA, Standards for Criminal Justice 18-2.8

ALI, Model Penal Code art. 303

NAC, Corrections 5.4, 7.1

NCCUSL, Model Sentencing and Corrections Act §§3-103, 3-601

NDAA, National Prosecution Standards 22.1, 22.2

Commentary

Probation and lesser dispositions are clearly not the appropriate sentencing alternatives in every case where substantial confinement is be-

lieved unnecessary. In a number of instances, particularly involving the repeat offender, a sentence of probation might encourage both the offender and others similarly situated to view the criminal justice system as a "revolving door" without real capacity for administering sanctions.¹ Excessive leniency may mislead the offender to the offender's own eventual peril, and more important, the deterrent threat underlying the law's commands is thereby undercut and a public cynicism about the law engendered, both among offenders and nonoffenders alike. Accordingly, sentencing authorities may reasonably conclude in many such instances that a more significant intervention than probation is necessary in the offender's life in order to administer "shock therapy" to the offender, to permit closer supervision of the offender, or to signal to others that the criminal law, although restrained, is not impotent.

Alternatively, in other cases, particularly those involving the white collar offender, a substantial prison term may be unnecessary to protect society from the offender or to deter others generally, since the stigmatization associated with apprehension and conviction may alone be sufficient to satisfy these preventive needs. To impose a substantial term would therefore seemingly offend the least restrictive alternative principle of standard 18-2.2. As correct as this analysis is, a counterbalancing consideration cannot be ignored: a suspended sentence without more might outrage the community's sense of public morality and bring the law into disrespect by creating glaring inequalities in the treatment of offenders of roughly equal culpability.² For these reasons, it does not

1. See note 6 to standard 18-2.3.

2. Borrowing from ALI, MODEL PENAL CODE §7.01, standard 18-2.5(c) recognizes that confinement may be required "so as not to unduly depreciate the seriousness of the offense." A recent celebrated case has interpreted this phrase as follows: "The idea of avoiding depreciating of the seriousness of the offense implicates two or three thoughts, not always perfectly clear or universally agreed upon, beyond the idea of deterrence. It should be proclaimed by the court's judgment that the offenses are grave, not minor or purely technical. Some attention must be paid to the demand for equal justice; it will not do to leave the penalty of imprisonment a dead letter as against 'privileged' violators while it is employed regularly, and with vigor, against others. There is probably in these conceptions an element of retributiveness. . . . And retribution, so denominated, is in some disfavor as a reason for punishment. It remains a factor, however, as Holmes perceived, and as is known to anyone who talks to judges, lawyers, defendants, or people generally. . . . However the concept is formulated, we have not yet reached a state, supposing we ever should, in which the infliction of punishments for crime may be divorced generally from ideas of blameworthiness, recompense, and proportionality." *United States v. Bergman*, 416 F. Supp. 496, 500 (S.D.N.Y. 1976) (Frankel, J.).

contradict the least restrictive alternative principle to acknowledge that a traditional and legitimate function of punishment has been an expressive one: to reinforce social norms by public condemnation of flagrant breaches.³ For example, in the case of a public official convicted of corrupt activities in office, a sentence of only unsupervised probation could be highly inconsistent with this denunciatory function of punishment.⁴

However, in both of the foregoing cases, what would violate the least restrictive alternative principle would be to impose more punishment than minimally necessary to achieve either "shock therapy" or the symbolic denunciation essential for social cohesion. Thus, in cases involving both potentially dangerous offenders and nondangerous ones, the dilemma of how to avoid an excessive use of criminal sanctions is frequently best resolved by developing an intermediate range of sanctions between incarceration and outright release.

The original edition of these standards responded to this need by recommending that the legislature authorize the sentencing court to impose a sanction of partial confinement. Through a variety of means — halfway houses, work release programs, intermittent release during the week — the basic objective was to limit confinement to the extent necessary to assure reasonable supervision while permitting a gradual reintegration of the offender into the society to which the offender would eventually return. This edition concurs both with the idea that a phased release of the offender is often desirable (provided that the period of confinement is not extended to achieve it) and with the goal of a community-based system of corrections that minimizes the dislocation of the offender while maximizing the availability of local services and resources for the offender. The skepticism about rehabilitation expressed in these standards should not be misinterpreted. It rejects only the use of that justification as a basis for extending confinement or subjecting the offender to coercive forms of therapy. As standard 18-3.2(a)(v) indicates more clearly, the offender's need for services or treatment can be a relevant consideration justifying the use of nonincarcerative alternatives. Critiques of the rehabilitative model, particularly those emphasizing the lack of observable statistically significant results, should not blind us to the advantages of a community-based corrections project: the reduced stress and hardship on the offender and

3. See, e.g., Symposium, *Reflections on White-Collar Sentencing*, 86 YALE L.J. 589 (1977); see also the commentary to standard 18-2.2.

4. Cf. *United States v. Braun*, 382 F. Supp. 214 (S.D.N.Y. 1974).

the offender's family, the useful educational and vocational training that can be afforded, and the possibility of significant individual adjustments, which cannot be measured by the all-or-nothing criterion of reconviction.⁵ In addition, it would be dangerously doctrinaire to cite past failures with rehabilitative programs as a basis for cutting off further innovation. Just as there has been no assurance that rehabilitation has worked in the past, neither can there be any that it will not work in the future if experimentation is permitted to continue.⁶ In general, recent studies of partial incarceration as a sentencing alternative—in the form of either work furloughs or intermittent confinement in community-based facilities—have reported favorable experiences.⁷ Recognizing the potential of these programs, S. 1437 would authorize the sentencing court to impose a sentence under which the probationer could be required either (1) to remain in custody of the Bureau of Prisons for specified "intervals of time . . . during the first year of the term of probation" or (2) to "reside at, or participate in the program of, a community treatment facility for all or part of the term of probation."⁸ Such a flexible mixture of short-term confinement and phased reintegration, a combination the Brown Commission also endorses,⁹ is consistent with the preference expressed by these standards for the use of the least restrictive alternative.

5. See D. DRESSLER, *PRACTICE AND THEORY OF PROBATION AND PAROLE* 263-264 (2d ed. 1969).

6. See notes 19-26 to standard 18-2.2 and commentary thereto.

7. Probably the best accessible overview of halfway houses is in R. GOLDFARB & L. SINGER, *AFTER CONVICTION* 552-589, 594-595 (1973). See also Schoen, *PORT: A New Concept of Community-based Correction*, 36 *FED. PROBATION* 35 (Sept. 1972); Rudoff & Esselstyn, *Evaluating Work Furlough: A Follow-up*, 37 *FED. PROBATION* 48 (June 1973); Note, *Community Based Corrections: Some Techniques Used as Substitutes for Imprisonment*, 2 *CAL. U.L. REV.* 101 (1973); O. KELLER & B. ALPER, *HALFWAY HOUSES* (1970); Kirby, *Crofton House: An Experiment with a County Halfway House*, 33 *FED. PROBATION* 53 (March 1969); United States Bureau of Prisons, *THE RESIDENTIAL CENTER: CORRECTION IN THE COMMUNITY* (1968). For statistical data on the rate of recidivism and the frequency of escape from such facilities, see R. GOLDFARB & L. SINGER at 563. The impact of community facilities on prison populations has been dramatic in some jurisdictions. *E.g.*, Minnesota has reported a 30 percent reduction in the number of adults and a 40 percent reduction in the number of juveniles sent to state institutions since the passage of its Community Corrections Act in 1973. See Schoen, *The Community Corrections Act*, 24 *CRIME & DELINQUENCY* 458, 462 (1978).

8. S. 1437, §2103(b). See also *Criminal Code Reform Act of 1977: Report of the Committee on the Judiciary, United States Senate, to Accompany S. 1437*, S. REP. NO. 605, 95th Cong., 1st Sess. 905-906 (1977).

9. Low, *Preliminary Memorandum on Sentencing Structure*, in 2 *NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS* 1245, 1300 (1970). See also *PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY* 165 (1967).

Legislative Limitations

At the time the original edition of these standards appeared, the ability of the sentencing court to impose a sanction involving intermittent or partial confinement was frequently limited by legislatively imposed restrictions on the availability of intermediate sentencing alternatives.¹⁰ Commonly, the use of partial confinement was restricted to misdemeanor cases or those involving juvenile offenders.¹¹ Sometimes a specific finding, such as that of extreme hardship to the dependents of the offender, was a necessary precondition, thus denying discretion to sentencing authorities in a number of otherwise appropriate cases.¹²

This problem of legislative restrictions remains a serious one and seems particularly unfortunate given the alternative of sentencing guidelines as a means of specifying more precisely any necessary limitations. Nonetheless, since the original edition, there has been a substantial legislative trend toward the use of intermittent confinement. At least seventeen states now have statutes authorizing such intermediate sanctions.¹³ In addition, forty-two states and the Federal Criminal Code now

10. See ABA, SENTENCING ALTERNATIVES AND PROCEDURES, commentary at 76-77 (1968).

11. See, e.g., MASS. ANN. LAWS ch. 279, §6A (Michie/Law. Co-op Cum. Supp. 1979) (intermittent incarceration limited as an authorized disposition to misdemeanor cases); R.I. GEN. LAWS §12-19-2 (Cum. Supp. 1978) (work or study release authorized for first-time felony offenders); GA. CODE ANN. §27-2506 (1978) (misdemeanants only); IOWA CODE ANN. §907.3 (West 1979) (restricted to first-time offenders); TENN. CODE ANN. §40-2719 (1975).

12. VA. CODE §19.1-300 (repealed 1975) (restricting partial release to circumstances where dependents would otherwise become "public charges"). Alternatively, other statutes limited the release to actual working hours; see R.I. GEN. LAWS §12-19-2 (Cum. Supp. 1978).

13. ARIZ. REV. STAT. §13-901(E) (1978); ARK. STAT. ANN. §41-1204 (1977); CAL. PENAL CODE §1203.1 (West Cum. Supp. 1978); COLO. REV. STAT. §16-11-202 (1978); CONN. GEN. STAT. ANN. §53a-30 (West Cum. Supp. 1979); GA. CODE ANN. §27-2506 (1978); IOWA CODE ANN. §907.3 (West 1979); ILL. REV. STAT. ch. 38, §1005-7-1 (Cum. Supp. 1978); KY. REV. STAT. §533.030 (1975); MO. ANN. STAT. §559.026 (Vernon Supp. 1979); N.Y. PENAL LAW §§85.00 et seq. (McKinney 1975); MASS. ANN. LAWS ch. 279, §§1, 1A, 6A (Michie/Law. Co-op Cum. Supp. 1979); NEB. REV. STAT. §29-2262 (Cum. Supp. 1978); PA. STAT. ANN. tit. 18, §§1355, 1324 (Purdon Cum. Supp. 1979-1980); TENN. CODE ANN. §40-2719 (1975) (sentences of less than one year in jail or workhouse allowed to be served on nonconsecutive days); TEX. CRIM. PRO. CODE ANN. art. 42.12(B)(6) (Vernon 1979); WIS. STAT. ANN. §973.09 (West 1971 & Cum. Supp. 1979-1980).

This list is not exhaustive. The line between partial confinement as a sentencing option and work release, which has far broader statutory acceptance, as noted below, is frequently hazy. Also, in some jurisdictions, sentences to intermittent confinement have

authorize work release programs for felons.¹⁴ With respect to "true" partial confinement statutes (as opposed to work release programs), two basic patterns are evident. The more common pattern is to include authorization for partial confinement within a list of legislatively approved probation conditions.¹⁵ Thus, although the offender is formally sentenced to probation, the court may attach conditions imposing incarceration in a local jail or community detention facility during certain periods of the day (e.g., nonworking hours) or at nonconsecutive intervals (e.g., weekends).

The second pattern is to recognize the sentence to intermittent confinement as a distinct form of sentence, halfway between total confinement and probation. Both New York and Pennsylvania use this approach.¹⁶ Under the New York format, the sentence is imposed for a definite period measured from the date on which the sentence is imposed (and not in terms of the intervals during which confinement is served).¹⁷ The Pennsylvania statute is indeterminate, with a minimum

been imposed without statutory authority and have withstood attack. *See* United States *ex rel.* Spellman v. Murphy, 217 F.2d 247 (7th Cir. 1954). *But see* State v. Bigelow, 76 Ariz. 13, 258 P.2d 409 (1953).

14. For a citation to the statutory authority in these forty-two jurisdictions (all except Arizona, California, Georgia, Kentucky, Idaho, New Hampshire, Ohio, and Rhode Island), *see* Comment, *Wyoming Penitentiary Work Release Act*, 13 LAND & WATER L. REV. 997, 999 n.19 (1978). *See also* 18 U.S.C. §4082 (1976). Under some statutes, "work release" amounts in effect to phased release, since neither work nor education is necessarily required. *See* S.C. CODE §24-3-210(4) (1977) (authorizing release for "any other compelling reason consistent with the public interest"). Hawaii includes furloughs for "social reorientation" (HAW. REV. STAT. §353.22.5 (1976)), and Maryland permits work releasees to take weekend furloughs after completion of two months in the program (MD. ANN. CODE art. 27, §700A(b-1) (1976)). In thirty-one of these forty-two jurisdictions, selection of the releasees is given to correctional authorities; elsewhere, the board of parole or corrections decides. *See* Comment, *supra* at 1001.

For other reviews of work release programs, *see* Root, *State Work Release Programs: An Analysis of Operational Policies*, 37 FED. PROBATION 52 (Dec. 1973); Project, *Temporary Release in New York State Correctional Facilities*, 38 ALB. L. REV. 693 (1974); Rudoff & Esselstyn, *supra* note 7; Smith, McKee, & Milan, *Study-Release Policies of American Correctional Agencies*, 2 J. CRIM. JUST. 357 (1974).

15. The Arizona, Arkansas, California, and Connecticut statutes cited at note 13 *supra* provide examples.

16. *See* statutes cited at note 13 *supra*.

17. N.Y. PENAL LAW §§85.00 *et seq.* (McKinney 1975). Eligibility under the New York statute is restricted to offenders convicted of class D and E felonies and misdemeanants without a prior felony conviction. Section 85.00(4) requires the court to specify the manner in which the sentence is to be served (e.g., on weekends), and §85.05 authorizes the court to revoke or modify such a sentence.

term that cannot exceed one-half of the maximum term, which is, in turn, governed by the general sentencing provisions.¹⁸ The New York statute provides that the court specify the manner in which the sentence is to be served (*e.g.*, weekends, nonworking hours, etc.), while the Pennsylvania statute gives this determination to correctional authorities subject to general instructions from the court as to the general purposes for which the defendant shall be released from confinement.

In general, restrictions on the authority of courts to impose sentences to partial confinement appear to be decreasing. In a growing number of jurisdictions any offender eligible for probation may be sentenced instead to periodic confinement at intervals specified by the court.¹⁹ A number of states, however, still limit partial confinement as a sentencing alternative to misdemeanors.²⁰

Several jurisdictions have placed limits on the amount of continuous confinement that may be imposed between intervals of release (*e.g.*, thirty days in Illinois and ninety days in Nebraska).²¹ Some also limit the total length of a sentence to intermittent confinement within ceilings well short of the five-year outer limit recommended by standard 18-2.3(b).²² Miscellaneous restrictions are also common. For example, in some jurisdictions the offender can only be released for employment purposes,²³ or must expressly accept the penalty,²⁴ or must continuously reside in a community-based facility.²⁵ In all cases, however, these

18. PA. STAT. ANN. tit. 18, §§1324, 1355 (Purdon Cum. Supp. 1979-1980). Section 1355 provides that the details of release are to be left to the correctional authorities. Under the New York statute, there do not appear to be any special restrictions on eligibility.

19. *See, e.g.*, ARIZ. REV. STAT. §13-901(E) (1978). The California, Colorado, and Connecticut statutes cited at note 13 *supra* follow a similar pattern.

20. The Georgia, Massachusetts, and Tennessee statutes cited at note 13 *supra* contain such restrictions.

21. The Colorado statute cited at note 13 *supra* restricts jail time under such a sentence to a maximum of ninety days for a felony, sixty for a misdemeanor, and ten for an offense. The Illinois statute cited at note 13 *supra* provides that not more than thirty days of continuous confinement can be imposed and places an outer ceiling of four years on the duration of such a sentence (thirty months and eighteen months for lesser grades of felonies). Similarly, the Nebraska statute cited at note 13 *supra* imposes a ninety-day limit on such confinement. *See also* Note, *Limitations upon Trial Court Discretion in Imposing Conditions of Probation*, 8 GA. L. REV. 466, 472-473 (1974); *cf.* *Milligan v. State*, 465 S.W.2d 157 (Tex. 1971) (disallowing imposition of ninety days of confinement as a condition of probation).

22. *See* ILL. REV. STAT. ch. 38, §1005-7-1 (Cum. Supp. 1978).

23. *See* R.I. GEN. LAWS §12-19-2 (Cum. Supp. 1978).

24. *See* IOWA CODE ANN. §907.3 (1979).

25. *See* TEX. CRIM. PRO. CODE ANN. art. 42.12(B)(6)(k) (Vernon 1979).

restrictions, although often based on legitimate considerations, are more appropriately the subject of administrative rules or guidelines rather than inflexible legislative commands.

Community Service as a Sentencing Alternative

Since the original edition of these standards, the concept of community service as an alternative to prison for the nondangerous offender has emerged as the newest and most promising means of developing intermediate sentencing sanctions.²⁶ Spurred by British experience since the Criminal Justice Act of 1972, which authorized a nationwide program of community service orders for a broad cross-section of offenders, the idea of permitting offenders to work off their "debt to society" rather than serve it in costly and unproductive confinement has attracted wide support from commentators and has received the endorsement of both the Model Sentencing and Corrections Act and S. 1437.²⁷ Several jurisdictions have amended their probation statutes to authorize community service orders roughly paralleling the British practice.²⁸ The addition of subparagraph (a)(iii) to this standard is intended to add the support of the ABA to this trend.

Since community service is an unfamiliar concept for many, its potential might best be illustrated with some examples of the diversity of individualized options it gives sentencing authorities. The following examples are intended mainly to point out the latitude and advantages of this highly flexible sentencing alternative, but they are also representative of sentences now in fact being imposed in some jurisdictions: (1) A taxi driver might be required to provide a specified number of hours of free transportation for needy persons to a medical facility. (2) An electrician could install wiring at a home for the elderly; an account-

26. For the most thorough overview of this developing area, see J. BEHA, K. CARLSON, & R. ROSENBLUM, *SENTENCING TO COMMUNITY SERVICE* (LEAA 1977). See also Bergman, *Community Service in England: An Alternative to Custodial Sentence*, 39 *FED. PROBATION* 43 (March 1975); BROWN, *Community Service as a Condition of Probation*, 41 *FED. PROBATION* 7 (Dec. 1977).

27. NCCUSL, *MODEL SENTENCING AND CORRECTIONS ACT* §3-302(a)(3); S. 1437, §2103(b)(13).

28. See N.C. GEN. STAT. §15A-1342 (1978 & Interim Supp. 1978). Effective July 20, 1978, New York State amended performance of services "for a public or not-for-profit corporation, association, institution or agency." This provision, however, requires the defendant to consent to the "amount and conditions of such service" and is limited in applicability to misdemeanors and violations. N.Y. PENAL CODE §65.10 (McKinney Cum. Supp. 1978-1979).

tant, bookkeeping services for the same organization; a hairdresser, free services for its patients. (3) Less skilled offenders can frequently provide clerical or maintenance services for charitable organizations. (4) Juvenile vandals might be assigned cleanup chores at the site vandalized or maintenance duty for a parks department, or work in a volunteer recycling program. (5) Owners of businesses and the self-employed can be required to hire a specified number of paroled felons and provide vocational training.²⁹

Experience in the United States with community service orders has largely been limited to its use in misdemeanor cases. Such experience has, however, been highly successful. Over the last three years, the most highly developed community service program — the Alameda County, California, Court Referral Program — has made some 13,000 placements of offenders with a wide variety of public agencies and private charities.³⁰ Over 400,000 hours of service have already been provided to local agencies. The majority of these placements have been for clerical or maintenance work. Significantly, unskilled workers have not been excluded; indeed, they have been placed in a broad range of positions, ranging from night guards and maintenance workers to volunteers in libraries, free clinics, convalescent homes, and multipurpose social service agencies (such as the Red Cross). Over 98 percent of those offenders requesting participation in the program have been found placements. Following the lead of Alameda County, at least forty-five other court referral programs are now in operation elsewhere in California, and a statewide association of court referral programs has been formed.³¹ A similar Alternative Community Service Program has been in operation in Multnomah County, Oregon (which includes the city of Portland), for the past six years, and in contrast to the California programs, which are independently administered, has been run from within the criminal justice system.³² One positive impact of the program has been the alleviation of caseload pressure on the county probation staff because cases not requiring supervision or counseling are now being diverted to the Alternative Community Service Program.

The British experience with community service orders appears to be

29. SENTENCING TO COMMUNITY SERVICE, *supra* note 26, at 1-3, 8, 12-13, 18.

30. *Id.* at 5.

31. *Id.* at 10.

32. *Id.* at 12-15.

distinctive in the effort made to employ such sentencing alternatives not simply for misdemeanants and low-risk offenders but also for felons and for offenders who otherwise would not have been recommended for probation.³³ The premise seems to be that judges would be willing to impose sentences involving substantial services where they would resist release on probation as overly lenient. Early experience with community service in Great Britain shows that as many as 50 percent of the offenders given community service in some jurisdictions have served a prior criminal sentence. Anticipated judicial resistance to such extensive use has apparently not materialized, since probation department recommendations for a community service sentence are accepted about 75 percent of the time.³⁴

From the experience of these various programs, several conclusions about community service as a sentencing alternative seem justified:

1. It can be implemented on a high-volume scale and need not be limited to cases involving white collar or skilled offenders. However, expansion of such programs will necessitate careful coordination among agencies and the creation of a full-time placement agency.
2. It can provide useful services, particularly of a clerical or maintenance work nature, for charitable groups otherwise unable to afford such services to the extent needed. Where there is thorough planning and systematic canvassing of potential beneficiary organizations, a substantial demand for useful services can be anticipated. For example, the Alameda County Court Referral Agency in one year placed its clients with over 600 different agencies.
3. Its use can lighten probation department caseloads and thus enable closer supervision of other offenders posing greater risks.
4. Public resistance may be a less serious obstacle to the implementation of community service programs than to further expansion of other nonincarcerative sentencing alternatives, since there is an intuitive sense, widely shared by all parties involved in such programs (including not least of all the offender), that the offender is indeed paying his or her "debt to society." Thus, its employment can serve to reduce often excessive rates of incarceration.
5. As speculative as judgments about rehabilitation are, it at least

33. *Id.* at 15-20; see also Kaufman, *Community Service Volunteers: A British Approach to Delinquency Prevention*, 37 *FED. PROBATION* 35 (Sept. 1973).

34. SENTENCING TO COMMUNITY SERVICE, *supra* note 26, at 17, 25-26.

offers a context created outside the dreary institutional setting where individual change, maturation, and growth seem more possible and where the offender's frequent self-absorption with personal grievances may be dissipated by interaction with those experiencing even greater difficulties.

Thus, these standards urge the expansion of community service programs and their gradual extension to felony offenders as well. Guidelines concerning eligibility for such programs should be given priority by the guideline drafting agency discussed in part III of this chapter. No single sentencing alternative is a panacea, however, and some difficulties and unresolved problems with the use of community service programs need to be realistically acknowledged:

1. A significant percentage of offenders (20 percent in the Alameda County program) fail to fulfill their assigned terms of service, and this percentage might be expected to grow as more serious offenders are introduced into the program. In part, this default rate may be attributable to the independent character of the placement agencies administering the California programs and their lack of resources or inclination to engage in follow-up monitoring. Although the proper location and status of the referral agency — whether it is inside the criminal justice system, as in the Portland program, or independent of it, as in California — present sensitive questions on which these standards take no position, there must be greater coordination among agencies and more supervision of offenders before many courts can be expected to use community service for felony offenders.

2. The transition to the systematic use of community service as the preferred means of dealing with a substantial number of felony offenders has not yet been made in any United States jurisdiction. Some reluctance on the part of courts can be anticipated. Observers have reported that judges tend to see community service as appropriate only for " 'essentially law-abiding' individuals who have committed a single, serious criminal act."³⁵ Although the British experience (where 90 percent of court-referred participants had a prior criminal record)³⁶ suggests that a broader use is feasible and desirable, it may prove necessary to combine community service with other components (a period of incarceration, partial confinement, and/or continuing probation supervision) into an integrated package before judicial acceptance of a broad-

35. *Id.* at 25.

36. *Id.* at 25-26.

ened use of this sentencing alternative can be achieved. Here again, the guideline drafting agency could have an important role in promulgating such an integrated concept as the preferred disposition for various categories of offenders.

3. The unstructured, uneven use of community service will aggravate the problem of sentencing disparities. If the community service alternative is made available as a practical matter only to offenders possessing valuable skills or having middle-class backgrounds, the goal of sentencing equality will be frustrated. Although there will always be some tension between the goal of equality and the least restrictive alternative principle, their conflict can be minimized by a more extensive use of the community service option. In short, to avoid inequalities, it is necessary to make either very limited use of this alternative in basically minor offenses or very extensive use in most cases where the offender poses little danger to the community. Existing programs have shown that a demand for blue collar and unskilled workers can be developed, and the British experience indicates that a prior criminal record need not be an automatic bar. However, where the community service alternative is implemented only by those courts willing and able to take the initiative in finding placements for offenders, it is unrealistic to expect that a broad inventory of placements for unskilled defendants will be developed or maintained.

4. A related criticism is that it is beyond the delegated institutional role "of an appointed judge, in a democratic society, to devise and impose novel punishments about which there is certain to be a fundamental diversity of views."³⁷ There is some undeniable merit to the argument that unguided innovations by individual judges may contribute to sentencing disparities. But the best solution to this problem seems again to lie with the guideline drafting agency. The legislature could authorize the agency to develop guidelines for the range of forms of community service that are appropriate. Considerable opposition has, for example, been expressed to the use of orders that require a white collar offender convicted of a regulatory violation to give a specified number of speeches before civic or business groups on the importance of observing the antitrust laws and impose no other sanction.³⁸ Such sentences have drawn fire from both directions, some critics believing that they amount to a degrading ceremony of public humiliation and

37. Dershowitz, *The Paper Label Sentences: An Evaluation*, in Symposium, *supra* note 3, at 626.

38. Liman, *The Paper Label Sentences*, in Symposium, *supra* note 3, at 631.

others feeling that such a sanction is no more than an ineffective "slap on the wrist" that only aggravates already substantial sentencing inequalities among defendants of different financial resources and depreciates the gravity of the offense. Both sides have their point, and legislative definition of what should constitute "community service" therefore appears desirable. One sensible line of division has been suggested by Judge Marvin Frankel, who, in rejecting one proposed plan of community service, drew a distinction between sanctions that "involve work of an honorific nature" (in that case serving as a director of a philanthropic enterprise) and work of a less distinguished nature capable of satisfying the community's sense of what punishment entails.³⁹

5. A final and hopefully short-lived obstacle to the achievement of community service as a sentencing alternative is the general absence of statutory authorization. A few cases have invalidated community service as a condition of probation on the grounds that there exists "no authority in law for mandating such service as a condition of probation."⁴⁰ While such results seem questionable, it is indisputable that legislative action would be desirable not only to authorize such a sentencing alternative but also to set a ceiling on the amount of service that can be required and to establish formally the relationship between the placement agency and the court.

Restitution

The sanction of restitution is currently receiving unprecedented legislative and scholarly attention, as the focus of criminal justice reform has begun to shift to the victim of the crime.⁴¹ A 1978 survey found that some sixteen states had either enacted restitution legislation during

39. *United States v. Bergman*, 416 F. Supp. at 500-501.

40. *People v. Mandell*, 50 A.D.2d 907, 377 N.Y.S. 2d 563 (1975). This New York decision, which deleted the probation condition that the defendant provide volunteer services to a specified medical foundation, appears to have been legislatively reversed. See N.Y. PENAL LAW §65.10 (McKinney Cum. Supp. 1978-1979). See also note 28 *supra*. Cf. cases cited at notes 13 and 21 *supra*.

41. Among the significant recent works are the following: *RESTITUTION IN CRIMINAL JUSTICE* (J. Hudson & B. Galaway ed. 1977); *CONSIDERING THE VICTIM* (J. Hudson & B. Galaway ed. 1975); R. MEINERS, *VICTIM COMPENSATION* (1978); H. EDELHERTZ *et al.*, *RESTITUTIVE JUSTICE* (1975); S. SCHAFER, *COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME* (1970); I. DRAPKIN & E. VIANO, *VICTIMOLOGY* (1974); Laster, *Criminal Restitution: A Survey of Its Past History and an Analysis of Its Present Usefulness*, 5 U. RICH. L. REV. 71 (1970).

1976-1977 alone or had pending in their legislatures bills that would establish some mechanism by which offenders would make good the losses caused their victims.⁴² More than fifty localities have undertaken experimental programs involving restitution,⁴³ and a new form of penal institution has come into use — the restitution shelter at which the offender resides while "working off" the offense.⁴⁴ Another survey employed a random sample which found that 86 percent of juvenile court judges favored the frequent use of restitution. At least one jurisdiction — Minnesota — has implemented restitutionary programs on a significant scale.⁴⁵

S. 1437 recognizes this trend toward the increased use of restitution both by listing restitution as one of its approved conditions of probation and by authorizing the court to require restitution of any loss to the victim as an independent sanction in addition to any other sentence imposed.⁴⁶ The Model Sentencing and Corrections Act adopts a similar approach and also creates a victim compensation fund to be financed by fines imposed by the court.⁴⁷ Following the model of the Brown Commission,⁴⁸ S. 1437 further authorizes the sentencing court to require the offender to give "notice and explanation of the conviction, in such form as the court may approve, to the class of persons or to the sector of the public affected by the conviction or financially interested in the subject matter of the offense."⁴⁹ So enforced, restitution may prove to have a formidable deterrent effect.

The policy arguments in favor of an expanded use of restitution are persuasive. Uniquely, restitution focuses on making the victim whole while other sanctions reduce the offender's ability to compensate the

42. Chesney, Hudson, & McLagen, *A New Look at Restitution: Recent Legislation, Programs and Research*, 61 JUDICATURE 348 (1978).

43. *Id.* at 352-353.

44. Nineteen residential programs were found to be in operation at the time of the above survey. *Id.* at 352.

45. For a summary of the Minnesota experience, see Fogel, Galaway, & Hudson, *Restitution in Criminal Justice: A Minnesota Experiment*, 8 CRIM. L. BULL. 681 (1972). For the 86 percent figure with respect to juvenile courts, see P. SCHNEIDER, A. SCHNEIDER, P. REITER, & C. CLEARY, *RESTITUTION REQUIREMENTS FOR JUVENILE OFFENDERS* 6 (1977).

46. S. 1437, §2006 (order of restitution), §2103(b)(3) (restitution as a condition of probation).

47. NCCUSL, *MODEL SENTENCING AND CORRECTIONS ACT* §3-402 (establishing trust fund). See also §3-601.

48. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *FINAL REPORT* §3007.

49. S. 1437, §2005.

victim. In recognition of this principle, several states have now made restitution an expressed policy of corrections that sentencing authorities are instructed to seek in all appropriate cases.⁵⁰

Evaluation of the potential of restitutionary programs is still premature. Some serious issues do exist: (1) There is a possibility of demographic bias in terms of those selected for such programs. (2) Extending the span of the state's control over the offender to the degree necessary to achieve full compensation to the victim also presents serious policy questions. (3) Valuation of the services performed by the offender under restitutionary service programs presents an even more difficult issue, since the risk of an institutionalized bias in favor of those having more marketable skills is obvious.

In light of these problems, it is not recommended that the five-year limit on the duration of probation in standard 18-2.3 be relaxed at this time. To subject the probationer to a long-term restitution obligation that cannot be realistically satisfied within the five- and two-year limits established by standard 18-2.3(b) may be counterproductive, since it can create too strong an incentive to rob Peter to pay Paul. Even where this danger does not exist, a longer-term restitutionary obligation could offend the central proportionality principle of these standards by holding the probationer in an extended state of economic servitude. It is too simple an answer to this objection to say that restitution asks the offender only to undo the damage that he or she has created. Commentators have generally concluded that the measure of proportionality cannot simply be the harm actually caused (a standard that would, e.g., hold Mrs. O'Leary accountable for the value of the city of Chicago if the use of lanterns in barns had been illegal) but instead should be the harm intended or reasonably foreseen.⁵¹ To be sure, the offender may be civilly liable to the extent of the harm caused, but such civil liability is not enforced by the threat of penal sanctions if payment is not made.

A number of issues surround the scope and implementation of an order of restitution. Basically, case law has established that to be eligible to receive restitution, a claimant must be within the class of persons injured by the crime. As to the breadth of this class, courts have disagreed, although both sides of the debate recognize that a remoteness

50. See, e.g., IOWA CODE ANN. §907.12 (1979); PA. CONS. STAT. ANN. tit. 18, §1106 (Purdon Cum. Supp. 1979-1980); ME. REV. STAT. ANN. tit. 17-A, §§1204, 1321-1328 (Supp. 1978).

51. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974); Allen, *Criminal Law and the Modern Consciousness: Some Observations on Blameworthiness*, 44 TENN. L. REV. 735 (1977); Allen, *Retribution in a Modern Penal Law: The Principle of Aggravated Harm*, 25 BUFFALO L. REV. 7 (1975).

standard should be employed to disqualify some claimants whose injuries can only be said to have resulted from the defendant's conduct under a purely "but for" test.⁵² A second well-recognized limitation is that restitution must not exceed the actual damages or loss caused by the offender.⁵³ Traditionally, the claimant had to be named in the indictment,⁵⁴ and restitution could only be awarded with respect to those counts in a multicount indictment that resulted in conviction.⁵⁵ More recently, courts have split on whether restitution might be ordered with respect to counts that did not result in conviction but were dropped as a result of plea bargaining.⁵⁶ It is not the function of these standards to resolve these questions, but their existence shows the need for special legislative attention to the topic of restitution, particularly in jurisdictions where it is to be elevated from a condition of probation to an independent and alternative sanction. Related questions also exist: What kinds of losses should be recognized for purposes of restitution (*i.e.*, only out-of-pocket losses, as most existing legislation now stipulates, or some broader definition)?⁵⁷ What consideration should be given to the other financial and family obligations of the offender, either in establishing a payment schedule or in determining the penalty for a default?⁵⁸ What defenses should the offender be permitted to assert and

52. For a discussion of this issue, see Kutcher, *Looking at the Law*, 42 FED. PROBATION 61 (March 1978).

53. The phrase "actual damages" is used in 18 U.S.C. §3651 (1976). See also *United States v. Buechler*, 557 F.2d 1002 (3d Cir. 1977); *United States v. Tiler*, 602 F.2d 30, 33-34 (2d Cir. 1979).

54. *Karrell v. United States*, 181 F.2d 981 (9th Cir.), *cert. denied*, 340 U.S. 891 (1950).

55. *United States v. Follette*, 32 F. Supp. 953 (E.D. Pa. 1940); *People v. Funk*, 193 N.Y.S. 302 (1921).

56. Compare *United States v. Buechler*, 557 F.2d 1002 (3d Cir. 1977); *United States v. Landay*, 513 F.2d 306 (5th Cir. 1975); see also Kutcher, *supra* note 52, at 61-62.

57. NCCUSL, MODEL SENTENCING AND CORRECTIONS ACT §3-601(e), defines the "pecuniary loss" for which restitution may be received. Punitive damages and damages for pain and suffering are not generally recoverable under existing restitution statutes. See Ms. Rev. STAT. tit. 17-A, §1322(3) (Supp. 1978) (defining "economic loss" for which restitution may be required). See also IOWA CODE ANN. §907.12 (West 1979).

58. A limitation based on the ability to pay is included in Ms. Rev. STAT. tit. 17-A, §1325(2)(c) (Supp. 1978), and IOWA CODE ANN. §907.12(2) (West 1979). Such a limitation may also be a prerequisite of constitutionality. See *People v. Kay*, 36 Cal. App. 3d 759, 111 Cal. Rptr. 894 (1973); *State v. Harris*, 70 N.J. 586, 362 A.2d 32 (1976). See also NCCUSL, MODEL SENTENCING AND CORRECTIONS ACT §3-602 (providing for modification of a restitution order) and §3-603(b) (permitting the offender to show that default in the payment of restitution was not willful or the result of "a failure . . . to make a good faith effort to obtain the necessary funds for payment").

how should such a system relate to civil law actions for damages?⁵⁹ Many of these questions are addressed by the Model Sentencing and Corrections Act, S. 1437, and standard 18-2.8. Here, two limitations are required by these standards: (1) as explained in standard 18-2.3, the restitution obligation should be tailored to the offender's ability to pay, and (2) it should not be enforced by the criminal justice system over a period that exceeds the maximum permissible period of probation under standard 18-2.3.

Standard 18-2.5. Total confinement

(a) For each of the categories of offenses designated pursuant to standard 18-2.1(a), the legislature should specify the term, if any, for which a sentence of commitment to a correctional institution can be imposed. Such sentences should be authorized in accordance with the structure detailed in part IV of this chapter.

(b) As stated in standard 18-2.1(e), many sentences authorized by statute in this country are, by comparison to other countries and in terms of the needs of the public, excessively long for the vast majority of cases. Their length is in part the product of concern for protection against exceptional cases, most notably the particularly dangerous offender and the professional criminal. Rather than shape its penal code with a view focused on this minority of offenders, the legislature should instruct its guideline drafting agency to develop detailed and narrow criteria by which sentencing courts may distinguish the professional or dangerous criminal from the broader population of offenders. Existing statutory structures which authorize special additional terms for dangerous or habitual offenders should also be revised so as to integrate provisions for such offenders into a unitary penalty framework having a single statutory maximum for each offense but providing for a continuum of interior categories to be established by guidelines. Under this approach, the legislature would provide that a sentence in excess of a specified percentage of such maximums could not be imposed in the absence of a specific finding by the court that the offender constituted a dangerous or persistent offender as defined by it. Although a statutory structure having a single outer maxi-

59. See standard 18-2.8(a)(i)(A), (b)(i).