

THE UNITED STATES SENTENCING COMMISSION
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William W. Wilkins, Jr. Chairman
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Ronald L. Garner (ex officio)



July 16, 1986

MEMORANDUM

TO: All Commissioners
Kay Knapp
Bill Rhodes
Denis Hauptly
Senior Staff

FROM: Cathy P. Cross *CP*

SUBJECT: Hearing Attendance

For your information, attached is a copy of the visitor attendance list from the July 15th hearing on Sentencing Options.

Attachment

Visitors' Register

DATE	NAME	FIRM	ADDRESS	TO SEE
7-15-86	Susan Smith	US Probation	STREET CITY Richmond STATE Va.	Public Hearing 7/15/86 TIME IN TIME OUT
7/15/86	William D Graves	U.S. Probation	STREET CITY Denver STATE Colo.	TIME IN TIME OUT
7/15/86	Greg Hunt	US Probation	STREET CITY DC STATE	TIME IN TIME OUT
7/15/86	RALPH ARDITO	U.S. PROBATION	STREET D.C. CITY STATE	TIME IN TIME OUT
7/15/86	Newt Leach	U.S. Probation	STREET CITY Tulsa STATE Ok	TIME IN TIME OUT
7/15/86	Sally Tillman	Versa Institute	STREET CITY NYC STATE	TIME IN TIME OUT
7/15/86	Michael P. Pava	TAX DIVISION U.S. DEPT OF JUSTICE	STREET CITY WASH STATE DC	TIME IN TIME OUT
7/15/86	Russky Schmitt	NIC	STREET CITY DC STATE	TIME IN TIME OUT
7/15/86	Toby Slawsky	AOUSCO	STREET DC CITY STATE	TIME IN TIME OUT
7/15/86	David Adair	A.O. U.S. Cts	STREET CITY D.C. STATE	TIME IN TIME OUT
7/15/86	Bart Gelberg	Univ of Minnesota	STREET CITY STATE	TIME IN TIME OUT
7-15-86	Don Chamber	Fed. Prob.	STREET D.C. CITY STATE	TIME IN TIME OUT
7/15	David Irvine	Digital Prod.	STREET CITY Ft Lauderdale STATE FL	TIME IN TIME OUT
7/15	Philip Ross	Dallas Morning News	STREET CITY 1012 NPB STATE	TIME IN TIME OUT
7/15	Michael Keenan	U.S. Probation	STREET WASH D.C. CITY STATE	TIME IN TIME OUT

Visitors' Register

DATE	NAME	FIRM	ADDRESS		TO SEE	
1/15	BILL VAN SCOY	U.S. PROB. BORTI, MD	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	MARC FLIEDNER	Natl. Criminal Justice Assoc.	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	LICHARD WRIGHT	U.S. PROB. A.O.	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	SUSAN KRUP GRUNIN	P.D. A.O.U.S.C.	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	LAURIE ROBINSON	ABA	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	JOAN CREALLEN	ABA	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	Edgar Haynes	US Bureau of Prisons	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	Harvey M. GOLDSTEIN	APPA	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	Malcolm Young	The Sentencing Project Washington, D.C.	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	MARCIA STEIN	NAT'L Legal SERVICES	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	Herb Heller	NCIA	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	Brenda Ellis	Sentencing Services.	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	Max Mauer	AFSC	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	Scott Wallace	NACDL	STREET			
			CITY	STATE	TIME IN	TIME OUT
1/15	EO Brueske	Wash. Post	STREET			
			CITY	STATE	TIME IN	TIME OUT

Visitors' Register

DATE	NAME	FIRM	ADDRESS	TO SEE
	Steven J. Metalitz	Senate Judiciary Committee	STREET CITY STATE	TIME IN TIME OUT
	L. W. YELTON	NISBEO	STREET CITY STATE	TIME IN TIME OUT
	Tim Matthews	NCJRS	STREET CITY STATE	TIME IN TIME OUT
	Sally Dorfman	NCJRS	STREET CITY STATE	TIME IN TIME OUT
	Charlie Sullivan	CYRE	STREET CITY STATE	TIME IN TIME OUT
	Andy Smart	Natl. Assn. Manufacturers	STREET CITY STATE	TIME IN TIME OUT
	Leonard Berman	Public Welfare Foundation	STREET CITY STATE	TIME IN TIME OUT
	Art. Frost	ACLU Fed.	STREET CITY STATE	TIME IN TIME OUT
	C. Wilkins	US Radio Network	STREET CITY STATE	TIME IN TIME OUT
	J. CARTY	NAM	STREET CITY STATE	TIME IN TIME OUT
	Abrahamson, L.	NPR	STREET CITY STATE	TIME IN TIME OUT
	SAM SASTON	PRince George DEPT OF CORR	STREET CITY STATE	TIME IN TIME OUT
	Kenn Morten	Cornalment Rensselaer	STREET CITY STATE	TIME IN TIME OUT
	Daniel B. B.	A.O. Probation	STREET CITY STATE	TIME IN TIME OUT
	Alte McLean	Congressman Pat Swindell	STREET CITY STATE	TIME IN TIME OUT

Visitors' Register

[illegible]

QUESTIONS FOR WITNESSES

Douglas Ginsburg
Assistant Attorney General
Antitrust Division

(Submitted no prepared statement)

The statutory sentencing provisions to take effect with the guidelines differ from present law in that they do not authorize a court to fine an offender in an amount equal to double the gain or loss resulting from the offense. Is that a significant omission from the law? Absent a provision like that, how should we gauge the appropriate size of a fine?

John Greacen
American Bar Association Criminal Justice Section

In your prepared statement, you suggested the possibility of equivalencies between certain types of sanctions. Has the ABA considered equivalency rates between sanctions, e.g., between prison time and probation time, or prison time and fine amount? Do you have any suggestions for us in this regard?

Herb Hoelter, Marcia Shein
National Association of Criminal Defense Lawyers

Do you consider probation a punitive type of sentence? What sorts of conditions or restrictions make probation an effective form of punishment?

Jerry Miller
National Center on Institutions and Alternatives

(No prepared statement)

What sanctions should be imposed against a probationer who fails to comply with the terms of his probation? Or against an offender who fails to perform community service?

Alvin Bronstein
American Civil Liberties Union National Prison Project

On the basis of your long experience in this field, can you recommend any particular sentencing option as having particularly strong rehabilitative value?

BREAK

Harvey Goldstein
Chief of Probation, State of New Jersey, and current Chairman,
American Probation and Parole Association

Under a guidelines system, how could we give the sentencing judge the authority to place an offender on Intensive Supervised Probation without "widening the net" to include offenders not truly suitable for ISP?

Anne Schmidt, National Institute of Justice and Samuel Saxton,
Director, Prince George's County, Md. Department of Corrections

Apart from the actual cost of the electronic hardware itself, what other up-front costs, like training and computer equipment, are involved with an electronic surveillance program?

What types of offenders are typically placed under electronic surveillance?

Burt Galaway, Director of Graduate Studies, University of
Minnesota School of Social Work

In your experience, what arguments, if any, have the courts accepted as legitimate defenses to the payment of restitution?

Sally Hillsman
Research Director, Vera Institute of Justice

What objections are typically raised to the day-fine system? Should there be time limits on installment plans?

Don Chamlee, Director of Federal Probation; William Graves, Chief Probation Officer, Federal District of Colorado; and Newt Scott, Chief Probation Officer, Northern District of Oklahoma
Chief Probation Officer, Northern District of Oklahoma

What sort of "admissions" criteria or restrictions would be the most important in determining whether a probationer should be placed in an Intensive Supervised Probation program?

Do Federal probation officers frequently have problems obtaining reliable financial information about an offender for use in a presentence report?

OPENING REMARKS FOR
SENTENCING OPTIONS HEARING
JULY 15, 1986

I. This is our fourth hearing

1st hearing: Offense Seriousness (April 15)

2nd hearing: Prior Record (May 22)

3rd hearing: Organizational Sanctions (June 10)

5th and final topical hearing: Plea Negotiations (Sept. 23)

II. Projected Timetable

Plan to publish proposed guidelines in late September

Tentatively plan for hearings in 6 cities in October thru

December: Chicago, New York, Atlanta, Denver, San

Francisco, Washington

Review and revise guidelines with expectation to send to

Congress before April 13, 1987 deadline

Sentencing Options, July 15, 1986

This hearing will address the range of sentencing options available to the court besides imprisonment. Researchers and practitioners with expertise in the range of possible options have been asked to share their knowledge with the Commission.

Testimony will be provided by Douglas Ginsburg, Assistant Attorney General for the Antitrust Division of the Justice Department; Sally Hillsman of the Vera Institute of Justice, who has done substantial research in the use of fines in sentencing; Don Chamlee and a panel of Federal probation officers; representatives of the American Bar Association, the ACLU National Prison Project, the National Association of Criminal Defense Lawyers, the National Center on Institutions and Alternatives, and the American Probation and Parole Association; and experts on the subjects of electronic monitoring and restitution.

Our respondents were asked for their views on the following questions:

Probation: Should some form of intensive supervised probation be imposed on certain types of offenders? If so, what roles should the Commission, the court, and the probation office have in determining which offenders are placed on intensive supervised probation? What kind of conditions not expressly listed in the probation statute should the Commission consider in drafting the guidelines?

Fines: Are there certain crimes for which fines should be the preferred sanction? What elements should be considered in calculating the actual amount of a fine? How should the offender's ability to pay be determined? What sanctions should be imposed if an offender fails to pay the fine?

Restitution: Under what conditions should restitution be ordered? How should a hearing be structured to efficiently determine the appropriate amount of restitution without unduly complicating or prolonging sentencing? Are there ways in which restitution could be effectively combined with imprisonment or community service?

Community Service: How should an effective community service program be structured? What types of offenders would benefit most from this type of sanction? Are there certain types of offenders for whom community service will not serve the goals of sentencing?

House Arrest: Is this a viable alternative to incarceration? If so, under what circumstances?

AGENDA

United States Sentencing Commission Hearing on Sentencing Options

July 15, 1986

10 a.m. Chairman William W. Wilkins, Jr.
Opening Remarks

10:05 a.m. Mr. Douglas Ginsburg
Assistant Attorney General, Antitrust Division

10:20 a.m. Mr. John Greacen
American Bar Association Criminal Justice Section

10:35 a.m. Mr. Herbert J. Hoelter, Ms. Marcia G. Shein
National Association of Criminal Defense Lawyers

10:50 a.m. Mr. Jerry Miller
National Center on Institutions and Alternatives

11:05 a.m. Mr. Alvin J. Bronstein
American Civil Liberties Union National Prison Project

Break

11:30 a.m. Mr. Harvey Goldstein
Chief of Probation, state of New Jersey

11:45 a.m. Panel - Electronic Monitoring
* Ms. Annesley K. Schmidt
National Institute of Justice
* Mr. Samuel F. Saxton
Director, Department of Corrections, Prince George's County

12 noon Professor Burton Galaway
University of Minnesota School of Social Work

12:15 p.m. Ms. Sally Hillsman
Vera Institute of Justice

12:30 p.m. Panel - U.S. Probation Office
* Mr. Donald L. Chamlee
Director, Probation Division, Administrative office of the
U.S. Courts
* Mr. Newt Scott
Chief U.S. Probation Officer - Tulsa, Oklahoma
* Mr. William D. Graves
Chief U.S. Probation Officer - Denver, Colorado

1 p.m. Chairman Wilkins
Closing Remarks



Department of Justice

STATEMENT OF

DOUGLAS H. GINSBURG
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE
UNITED STATES SENTENCING COMMISSION
HEARINGS
CONCERNING
ALTERNATIVES TO INCARCERATION

JULY 15, 1986

market allocation. In exceptional instances, monopolization or attempted monopolization also is prosecuted criminally. While the antitrust laws may also be invoked civilly by the government or private plaintiffs to challenge open and notorious business conduct that may have the effect of restraining competition, only intentional conduct that is clearly harmful to consumers and clearly illegal under established precedent is prosecuted criminally. For the sake of brevity, I shall refer to conduct subject to criminal antitrust prosecution simply as "price fixing."

There can be no doubt that price fixing is a serious crime. It cannot be inadvertently committed, it causes substantial social harm, and it creates no redeeming social benefits. Unfortunately, while we have at least some tools to punish and deter it, current sentencing has not made most effective use of those tools.

As amended in 1974, the Sherman Act provides for prison sentences of up to three years for individuals and fines for corporations of up to a million dollars. The Criminal Fine Enforcement Act of 1984 increased the maximum fine for individuals to \$250,000 and provided for the possibility of an alternative maximum fine for individuals and corporations of the greater of twice the pecuniary gain or loss arising from

the offense. The newer maximum fines are applicable only to offenses committed after 1984, but the felony jail sentence has been in place throughout the last decade, during which numerous price-fixing conspiracies have been discovered and vigorously prosecuted. These substantial penalties could have a substantial deterrent effect, but the deterrent effect of the actual sentences that have been meted out by the courts is far less and, in my view, grossly inadequate.

During fiscal years 1984 and 1985, 126 individual defendants were sentenced in criminal antitrust cases. We recommended incarceration for 107 of them, about 85 percent, and for all but one of the rest we made no sentencing recommendation. Only 40 of these individuals--about 32 percent--actually were sentenced to even a single day in prison. The average time imposed, averaged over all 126 defendants including those not incarcerated at all, was only about 30 days.

Fines imposed on defendants sentenced during fiscal years 1984 and 1985 also were rather modest, averaging less than \$16,000 over all 126 individuals. The average fine for the 180 corporations sentenced was about \$133,000.

Of the 126 individuals, 36--about 28 percent--received some form of community service as part of their sentence. Of these 36, the Division had recommended incarceration in 34 instances and, as part of a plea agreement, made no sentencing recommendation for the other two. Only 7 of the 36 felons who received community service as part of their sentence also received any actual jail time, however.

Deterrence is the primary goal of criminal antitrust enforcement, and we are convinced that accomplishing this goal requires the use of very substantial penalties in the form of both fines and imprisonment. The penalties currently being imposed by the courts are simply insufficient to curb price fixing.

The failure of our sentencing system to achieve deterrence is evident from our continuing discovery of significant numbers of price-fixing conspiracies each year. The explanation for this is also obvious. Price fixing offers the opportunity to extract huge sums from consumers, and there is a good chance that price fixers will escape detection despite our best efforts. To deter so potentially lucrative an enterprise requires much higher levels of fines and imprisonment than are currently imposed.

Before addressing fines and imprisonment, however, I would like to explain why four kinds of alternative sentences or sanctions--community service, probation, debarment, and restitution--are not adequate substitutes for imprisonment and heavy fines. Such alternative sentences or sanctions often impose little hardship on offenders, and their very availability leads all too often to their substitution for more meaningful sanctions, thus undermining deterrence.

First, many of the community service sentences imposed in recent years were not punishment at all. One defendant's community service involved coordinating an annual rodeo for a charity. A defendant in another antitrust proceeding was required to organize a golf tournament fund raiser for the Red Cross. This experience proved so pleasant that he quickly agreed to organize the golf tournament again the next year! In yet another case, the defendant was sentenced to give thirty hours of speeches explaining the economic effects of his criminal activities--punishment that in practice is more likely to frustrate than to advance the purposes of the antitrust laws. Such penalties can do nothing but trivialize the offense in the eyes of the business community and the public.

Second, probation for individuals or corporations is inappropriate as an antitrust penalty because it provides

little deterrence, and serves no real countervailing purpose in the typical antitrust context. Price fixing is an intentional offense committed by individuals whose background or reasons for committing it evoke little sympathy. In antitrust, using probation to "go easy" on first offenders is equivalent to eliminating entirely any effective penalties and deterrents. Probation is sometimes used to help ensure future compliance by those who have been convicted of breaking the law. In the case of antitrust violations, this function can and should be adequately served by fines and imprisonment alone. Neither individual nor corporate defendants need assistance from the government in learning how to "go straight" or, more specifically, how to avoid future criminal antitrust violations. Further, as to corporate defendants, "probation" implies unwarranted judicial regulation of the defendant's business activities.

Third, debarment generally also is an inappropriate sanction for price fixing. Ironically, by eliminating competitors, it can impose on society the same harm as does the crime it is designed to punish. Indeed, there could be situations in which all potential suppliers might be debarred, making the product, at least for a while, totally unavailable.

Fourth, restitution can be a meaningful sanction in many circumstances, but in a criminal antitrust case it is usually duplicative; those injured already can collect treble damages through private suits. Since any restitution would be credited against treble-damage awards, restitution would not significantly enhance deterrence where a follow-on private civil case could be expected anyway. The absence of a follow-on private civil case, moreover, is likely to indicate that the defendant is financially unreachable, or that there are severe difficulties with identifying the victims and the extent of their injuries. Thus, restitution is not a meaningful remedy. Moreover, it may significantly and unnecessarily increase the cost of criminal prosecution and might even "unduly complicate or prolong the sentencing process," and thus be statutorily barred.

Alternative sentences being ineffective or even counterproductive, fines and imprisonment should be the primary, if not the exclusive penalties for price fixing. For organizations, incarceration is not an option, so a fine clearly is the proper penalty. Objections to fining organizations are insubstantial in the case of price fixing. Since the firm's owners are the major beneficiaries of price fixing, there should be no concern about shareholders also bearing the cost of fines. Shareholders should no more be

insulated from the gains and losses from price fixing than from the gains or losses from any other risky management decision. Indeed, it is essential that shareholders have the incentives to institute appropriate safeguards to prevent criminal behavior.

The optimal fine for any given act of price fixing is equal to the damage caused by the violation divided by the probability of conviction in that particular case. Because the harm caused by price fixing to the rest of society is always greater than the benefits to the price fixer, such a fine would result in the socially optimal, i.e., zero, level of price fixing. Unfortunately, we cannot impose the uniquely appropriate fine in each case, since that would require knowledge of the perceived probability of conviction in each case. We can, however, estimate as an appropriate proxy the average probability of detection and conviction. We can get some idea of the probability of detection by looking at how long conspiracies that we eventually detected have typically managed to avoid detection. For example, though there has been substantial highway construction since World War I, with many thousands of contracts per year, we did not learn about and thus did not prosecute a highway bid-rigging case until 1972. Cases we have prosecuted have often involved continuous conspiracies more than 10 years old. It is quite probable that

many conspiracies operated for decades without ever being discovered.

In general, evidence on how long conspiracies have typically been in place leads us to believe that the probability of detection of price fixing generally is less than one in ten. Combined with the fact that not all of those detected may be indicted and then convicted, this indicates that the appropriate multiple is at least ten. Based on our experience that price fixing typically results in price increases of at least 10 percent, such a multiple would indicate that the appropriate fine must be at least equal to the total amount of sales made by the defendant entity pursuant to the price-fixing scheme.

There are, however, limits on the utility of setting antitrust fines on the basis of the sales made by a defendant. In many if not most cases, sales subject to the conspiracy will exceed the Sherman Act statutory maximum of \$1 million. The "twice the gain or loss" alternative currently in effect under the Criminal Fine Enforcement Act could yield larger maximums, but in the unique antitrust context entails great potential complexities and should only be approached with caution. Where optimal fines substantially exceed \$1 million, or where defendant firms are otherwise unreachable because of

insufficient corporate assets, the best course would appear to be to impose what fine is practically available, and emphasize even more the importance of deterring the individuals whose conduct inculcates their corporate employers.

In the case of individuals both fines and incarceration are available, and the Antitrust Division supports the use of both. Fines alone simply cannot do the job. Even fines large enough simply to deter most price fixing would be huge, often far greater than the statutory maximum, because the potential gains from price fixing are very large and the likelihood of detection is, regrettably, fairly small. Few individuals or even corporations have the resources needed to pay fines large enough to deter price fixing. The typical cases in recent years have involved individuals and corporations who would have found it difficult or impossible to pay even a fine equal to the damage from the violations, much less the amount--perhaps ten times the damages--that would have been necessary to deter the violation. Thus, neither individuals nor corporations can be deterred adequately by fines alone--no matter how high--because they know that their limited resources make the true cost of being caught far less than the nominal fine.

In fashioning a schedule of specific penalties for price fixing, a number of guiding concepts are relevant. The first

is that the punishment should be directly related to the harm caused. Punishment that increases as harm increases will provide additional deterrence for more socially undesirable behavior.

Second, when deterrence has failed, the penalty scheme should impose more severe penalties. Thus, recidivists should be dealt with more harshly than first offenders. I must emphasize, however, that I am not saying that we should go easy on first-time price fixers, but rather that we should deal even more harshly with subsequent offenses.

Third, the enforcement costs of maintaining a given level of deterrence should be minimized. This implies, first, that there needs to be some mechanism for rewarding both pleas of guilty and, even more important, cooperation with the government's investigation or prosecution of the offense. A second implication of the need to keep down enforcement costs is that all offense and offender characteristics on which sentences are based should be objective and fairly easy to ascertain. This is necessary in order to minimize the costs of sentencing--discovery of the facts, hearing, and appeal--as well as to minimize the potential for error. For example, while sentences should vary according to the harm caused, the measure of harm should be a simple one. I would suggest that

the amount of sales affected is an appropriate way to measure harm in price-fixing cases.

Finally, there are strong arguments for reducing judicial variance with respect to both fines and imprisonment. Substantial variance in fines for the same offense exacerbates the problem of unreachability. For example, two \$500,000 fines imposed in two equivalent price-fixing cases are likely to result in a greater total amount of money being paid--and thus are likely to have a greater deterrent effect--than would a single \$1 million fine imposed on one convicted price fixer while no fine is imposed on the second. Deterrence depends on the expected fine, but when this expected fine has a large variance at least some of the large fines that would be imposed on the few are likely to cross the threshold of ability to pay, and thus not be imposed at all.

There is an even more compelling reason to strive for certainty with respect to imprisonment. There is general agreement among antitrust analysts that the deterrent effect of certain prison sentences is far greater than the effect of less certain, but possibly longer, sentences. I believe that certainty as to the likelihood of a jail sentence is the key to antitrust deterrence. Given the type of individual likely to be involved in an antitrust felony--an executive in a large

firm or an owner or manager of a smaller company--even a modest jail sentence is likely to have a significant adverse effect on his or her reputation, social status, and future earning power. Thus, a certain jail sentence would be a strong deterrent to potential antitrust violators. This argues strongly for a substantial minimum term of imprisonment for all first-time price fixers--except perhaps those whose cooperation with the government leads to the conviction of others.

In conclusion, Mr. Chairman, we recommend that corporations and individuals be fined amounts that increase in direct relation to the harm caused by their antitrust violations; that all individuals receive, in addition, a certain term of ~~and~~ imprisonment that begins with some fixed minimum and increases to some degree with harm; and that the sales affected by price fixing serve as the measure of the harm caused.

I would be happy to address any questions the Commission may have.



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

2509P

ATTACHMENTS
TO TESTIMONY OF
JOHN M. GREACEN
ON BEHALF OF
THE
AMERICAN BAR ASSOCIATION
BEFORE THE
UNITED STATES SENTENCING COMMISSION

- 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	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).

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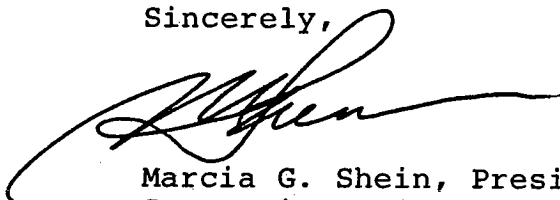
Dear Chairman Wilkins:

I am herein submitting an outline for the joint testimony I will be delivering with Mr. Herb Hoelter, Director of the National Center on Institutions and Alternatives, on July 15, 1986.

This testimony will be on behalf of the National Association of Criminal Defense Lawyers.

If you have any questions during the course of our testimony, we have allowed for enough time in our presentations to answer same.

Sincerely,



Marcia G. Shein, President
Sentencing and Parole Consultant
NATIONAL LEGAL SERVICES

MGS/gn

Enclosure

NACDL Sentencing Alternatives

Testimony Outline

July 15, 1986

- I. The Need to Increase the Use of Alternatives to Incarceration in the Federal System
 - A. Societal Re-education
 - B. Prison Overcrowding
 - C. Social Benefits of Alternatives
- II. Overcrowded Prison Conditions Mandate Relief.
 - A. Federal Statistics from Bureau of Prisons
 - B. Scarcity of Prison Resources
- III. Security Rated Offenders Eligible for Alternatives
 - A. Eligible Offense and Offender Categories
 - B. Inappropriate Use of Incarceration
- IV. Alternative Punishment Options.
 - A. Community Service/Volunteer Services
 - B. House Detention
 - C. Fines/Restitution

IV.(continued)

D. Split Sentences

E. Alcohol/Drug Programs

F. Intensive Probation Supervision

G. Other

V. Research and Statistical Information

A. Cost Effectiveness Comparisons

B. Case Examples

VI. The Need for Judicial Flexibility and Sensibility

A. Fox Case Example

B. Presidential Quotation

C. The Myth of Deterrence

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

THE NATIONAL PRISON PROJECT

TESTIMONY

of

ALVIN J. BRONSTEIN
Executive Director

**The National Prison Project
of the
American Civil Liberties Union Foundation**

Before the

United States Sentencing Commission

Concerning

SENTENCING OPTIONS

July 15, 1986

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I am pleased to appear before the Commission, at the invitation of the Chairman, to comment on sentencing options other than incarceration that may be available to federal courts. I am appearing in my capacity as Executive Director of the National Prison Project of the American Civil Liberties Union Foundation.

The National Prison Project since 1972 has sought to strengthen and protect the civil and constitutional rights of adult and juvenile prisoners, to improve conditions in the nation's prisons and jails, and to develop rational, less costly and more humane alternatives to traditional incarceration. We have also engaged in efforts to devise model sentencing codes, prison procedures and regulations.

In furtherance of the activities described above, the Project's staff attorneys and other staff members are engaged in the representation of prisoners incarcerated in penal institutions throughout the country. The Project has been and is presently involved in many important cases concerning the rights of prisoners. In addition, the Project's staff has been consulted by correctional officials and legislative committees in various states. I personally have been a consultant to various state legislatures, the National Institute of Corrections of the Department of Justice, various state Departments of Corrections, and to the American Bar Association's Joint Committee on the Legal Status of Prisoners, as well as others.

Other witnesses, more knowledgeable than I, will address specific alternative sentencing options (e.g., probation, fines,

restitution, community service, house arrest). I will therefore confine my remarks to the broad policy concerns which should dictate a greater use of alternative sentencing options as part of an overall sentencing strategy.

Prison is the largest power that the state exercises in practice, on a regular basis, over its citizens. The excessive use of incarceration in this country has been expensive, criminogenic, and unkind. Professor Marvin E. Wolfgang, Director of the Center for Studies in Criminology and Criminal Law at the University of Pennsylvania, eloquently raised these issues:

It is the prison that is the last resort (except for the death penalty), and it is here that the most troublesome aspect of democracy pricks our conscience. The prison remains with us as a necessary, noxious aberration of one of democracy's most cherished values--liberty. Because we cannot clearly and accurately attribute cause to each crime and its author, prisons represent society's failure. Whether we blame the criminal citizen, his family, educational, economic or other institutions, or the entire social system, the prison remains symbolic of pervasive, systemic failure. It offends our sense of equality and equity, it reflects our lack of successful socialization, it cripples our confidence in good genes or the good society. It is the opposite of love, friendship, and harmony. It is the very antithesis of freedom. The prison remains because we are imperfect specimens of our own visions of proper humanity. As an end product and as a temporary solution to our imperfections, the prison continues to pose perennial questions: Who should go to prison? for what crimes? for how long? under what living conditions?

Prisons: Present and Possible, p.1
(Lexington, Mass., D.C. Heath, 1979)

Because deprivation of an individual's physical freedom is such a severe interference with a democratic society's concept of

liberty, and because imprisonment is harsh, frequently counterproductive, and costly, there should be a heavy burden of justification on the imposition of a prison sentence. Parsimony, the least restrictive punitive sanction necessary to achieve defined social purposes, should be the guiding principle.

The Commission must reject the current mythology, perpetrated by political rhetoric, that this country is "soft on crime." That is just not true. We already have, and have for some time had, the harshest sentencing practices in the free world. Our current per capita rate of incarceration is substantially over 200 per 100,000 of population, more than twice the rate of almost every Western European country. (Appendix A). It is ironic that the only countries that have incarceration rates similar to ours are Warsaw Pact nations. (Appendix B). And, after imprisoning these large numbers of our citizens, we keep them behind bars for two to ten times longer than any other democratic country.

Justice E. Leo Milonas, Deputy Chief Administrative Judge of the New York City courts, has written: "It cannot be asserted too strongly that the problem of crime -- which is as disturbing to judges as it is to everyone else -- cannot be solved by an approach that relies primarily on punishment by incarceration." And yet that is our approach, despite overwhelming evidence that it should be used sparingly. Incarceration is a destructive and dehumanizing experience which further alienates the inmate from society and breeds more crime. As Norman Carlson, Director of the Federal Bureau of Prisons, has stated: "Jails are tanks, warehouses. Anyone not a criminal when he goes in will be one

when he comes out." And most prisoners do come out. Unless we are prepared to put people away for thirty or forty years for all crimes, which even the most zealous law and order advocates are not calling for, we are going to continue to see a stream of damaged, embittered and criminalized human beings emerging from our prisons.

This Commission, because its work will be examined closely and, indeed, emulated by the states, is in the unique position of being able to reverse the recent trend towards longer and harsher sentencing schemes.

The range of possible alternative sanctions, some of them standing alone and some in conjunction with others, is limited only by our imagination. They include probation, fines, restitution, community service, house arrest, intensive community supervision, work and education release, and community treatment programs. Working models of each exist throughout the country.

The Commission should require that the following preconditions be met before a prison sentence is imposed:

1. Imprisonment is the least restrictive sanction appropriate in this case because:

- a. any lesser punishment would depreciate the seriousness of the crime committed, and

- b. imprisonment of some who have done what this person did is necessary to achieve socially justified deterrent purposes, and the punishment of this offender is an appropriate vehicle to that end, or

c. other less restrictive sanctions have been applied to this offender frequently or recently.

2. Imprisonment is not a punishment which would be seen by current mores as undeserved or excessive in relation to this last crime.

In the aftermath of the tragic New Mexico Penitentiary riot in February, 1980, the state legislature mandated the then Attorney General, now United States Senator, Jeff Bingaman, to report on the events which took 37 lives. He concluded his September, 1980, report by saying:

A final message which our investigation has made clear to me, my staff and the Citizens' Panel: Prisons simply do not deal with the basic problems of crime in our society. Prison is a dehumanizing experience, and most persons come out the worse for being in. Nearly all criminals, even under the strictest sentencing practices will return to society. Even a well managed bureaucracy, necessary to run prisons, cannot change these basic truths that have become clear from the more than 300 interviews my staff has conducted.

If New Mexico's heritage of rich and deep familial and community roots is to be realized, communities must play a part in housing, resocializing and accepting persons who have violated the community's laws. If New Mexico does not dramatically change its philosophy and practices about how to deal with criminals, there will be more tragedies and the need for more reports by Grand Juries, by Citizens' Panels, and by the Attorney General. Ultimately, there will be more bureaucracy, more waste of taxpayers' money for architects and buildings, more crime and more human waste.

This Commission has a most difficult job. I hope that, guided by the principles set forth above and by a sense of fundamental fairness, decency and justice, it will provide the

leadership so long lacking in our approach to criminal sanctions in the United States.

International Rates of Imprisonment

(February 1985)

<u>Country</u>	<u>Rate of Imprisonment</u> (per 100,000)
Austria	111.5
Belgium	66.9
Cyprus	33.3
Denmark	68.0
France	79.9
Germany (FDG)	99.7
Greece	37.4
Ireland	47.3
Iceland	33.7
Italy	77.5
Liechtenstein	---
Luxembourg	69.3
Malta	28.4
Netherlands	34.0
Norway	50.7
Portugal	87.0
Spain	50.7
Sweden	58.0
Switzerland	68.3
Turkey	147.0
United Kingdom	90.0
England and Wales	87.8
Scotland	97.4
Northern Ireland	135.0

Source: Prison Information Bulletin, June 1985, p. 22 (Council of Europe)

AVERAGE ONE DAY COUNTS FOR ADULT AND
JUVENILE PRISON POPULATIONS FOR 1980

Country	Prison Population	Rate Per 100,000 Total Population	Sentenced Per 100,000 Population
U.S.	520,122	241.2*	202.2*
Belgium	5,797	58.8	43.5
Czechoslovakia	...	...	232.1
Denmark	3,439	67.1	48.3
Finland	5,032	105.3	93.7
France	45,655	85.0	55.2
FRG	85,053	94.3	70.7
Greece	3,135	32.7	25.8
Ireland	1,214	36.7	33.8
Italy	31,765	56.6	19.2
Netherlands	3,873	27.4	17.3
Norway	1,797	44.0	34.3
Poland	95,696	269.0	226.0
Spain	18,263	48.8	22.0
Sweden	4,795	57.7	49.0
United Kingdom	49,451	88.4	79.6
Yugoslavia	...	...	74.2

Main international information from the Second United Nations Survey on Criminal Justice Systems in Europe as compiled by the Helsinki Institute for Crime Prevention and Control, publication series No. 5., 1985.

- * U.S. data taken from the Source Book of Criminal Justice Statistics - 1982, U.S. Dept. of Justice.
- * U.S. juvenile data from 1979 one day count, U.S. jail data from 1978 one day count.

Testimony of
Annesley K. Schmidt
Research Analyst
National Institute of Justice

before the

U.S. Sentencing Commission

July 15, 1986

Note: This testimony is excerpted from "Electronic Monitors" by Annesley K. Schmidt and Christine Curtis in Intermediate Punishments: Intensive Supervision House Arrest and Electronic Surveillance edited by Belinda McCarthy (forthcoming).

This testimony should not be reproduced prior to the submission of the Sentencing Commission's report to Congress.

Electronic monitors are new telemetry devices designed to verify that an offender is at a specified location during specified times. This technological option is stimulating a great deal of interest, in the literature,* from jurisdictions considering the approach, and from manufacturers entering the market. While the concept of electronic monitoring has been discussed in the literature and small experimental efforts have been undertaken since the sixties, the earliest of the presently operating programs only started in December 1984 (Schwitzgebel, 1968, Ford & Schmidt, 1985).

In the short time since that first program began in Palm Beach County, Florida, many jurisdictions have considered whether to implement monitoring programs and some have ordered equipment. Programs have been established in locations as geographically diverse as Kenton County, Kentucky and Clackamas County, Oregon and by criminal justice organizations as diverse as the Administrative Office of the Courts in New Jersey and the Utah Department of Corrections.

The rapid development of equipment and programs has led to a number of questions. Some of these will be discussed, following a brief description of the various monitoring devices.

* For a review of the literature, see Schmidt and Curtis (forthcoming) and other articles in that volume. Also, see the bibliography and references at the end of this testimony.

ELECTRONIC MONITORING DEVICES

The idea of using electronic monitoring devices to track the locations of mental patients, probationers, and parolees in the community was first discussed by Dr. Ralph K. Schwitzgebel in the early 1960's (1964). He then developed and tested such a device on research volunteers in Massachusetts (Schwitzgebel, 1967, 1968).

Recently, technology has been developed by which signals are transmitted over greater distances using telephone lines or radio relays. The accompanying table provides a list of the known manufacturers. Some responded to a solicitation in the Commerce Business Daily for manufacturers willing to participate in the NIJ-Sponsored testing program at the Law Enforcement Standards Laboratory of the National Bureau of Standards (U.S. Department of Commerce, 1985). Others answered requests for bids made by jurisdictions seeking to purchase equipment. This list reflects information current as of the date it was prepared. However, given the rate of development thus far, additional manufacturers may have entered the field by the time this is printed.

As can be seen on the table, there are four basic technologies presently available: two use the telephone at the monitored location, one uses the cellular telephone system and one does not use a telephone. Each of the technologies reflects a different approach to the problem of monitoring offenders in the community.

In fact, even products within the same general technological group have important differences. These differences, and the cost and desirability of particular features are a small part of the decisions that must be made when establishing a monitoring program.

Electronic Monitoring Equipment

(Purpose: To monitor an offender's presence in a given environment where the offender is required to remain)

Devices that use a telephone at the monitored location

Device that does not use a telephone

Continuously signaling

A miniaturized transmitter is strapped to the offender and it broadcasts an encoded signal at regular intervals over a range.

A receiver-dialer, located in the offender's home, detects signals from the transmitter and reports to a central computer when it stops receiving the signal from the transmitter and when it starts receiving the signal again; it also provides periodic checks.

A central computer or receiver accepts reports from the receiver-dialer over the telephone lines, compares them with the offender's curfew schedule, and alerts correctional officials to unauthorized absences.

Manufacturers/Distributors:

BI Home Escort. BI Incorporated, 6175 Longbow Drive, Boulder, CO 80301. Telephone 303-530-2911.

Supervisor. CONTRAC, Controlled Activities Corp., 93351 Overseas Highway, Tavernier, FL 33070. Telephone 305-852-9507.

In-House Arrest System. Correctional Services Inc., P.O. Box 2941, West Palm Beach, FL 33402. Telephone 305-683-7166.

Conlac. Monitech, 419 Wakara Way, Salt Lake City, UT 84108. Telephone 801-584-2543.

Prisoner Monitoring System. Contelec, Inc., Box 48132, Niles, IL 60648. Telephone 312-966-8435.

ASC II b.* Advanced Signal Concepts, P.O. Box 1856, Clewiston, FL 33440. Telephone 813-983-2073.

Home Incarceration Unit.* American Security Communications, P.O. Box 5238, Norman, OK 73070. Telephone 405-360-6605.

Programmed contact

Each of the three devices in this column uses a central computer which functions similarly. But each uses a different system to verify the presence of the offender.

A computer is programmed to call the offender during the hours being monitored either randomly or at specifically selected times. It prepares reports on the results of the calls.

1) Strapped on the offender's arm is a wristlet, a black plastic module.

When the computer calls, the wristlet is inserted into a verifier box connected to the telephone to verify that the call is being answered by the offender being monitored.

Manufacturer/Distributor:

On Guard System. Digital Products Corporation, 4021 Northeast 5th Terrace, Ft. Lauderdale, FL 33334. Telephone 305-564-0521.

2) Voice verification technology assures that the telephone is answered by the offender being monitored.

Manufacturer/Distributor:

ProvoTron. VoxTron Systems Inc., 190 Seguin St., New Braunfels, TX 78130. Telephone 512-629-4807.

3) The offender wears a wrist watch which is programmed to provide a number unique to that offender at that time. The number is entered into a touch-tone telephone in response to the call.

Manufacturer/Distributor:

Crypto TeleMonitor System. Western Consec, 3244 Camino Diablo, Suite D, Lafayette, CA 94549. Telephone 415-939-4080.

Cellular telephone

The link is a small transmitter worn by the offender.

The locator unit, placed in the offender's home or other approved location, receives the signal from the link, records it, and relays the information by regular or cellular telephone to the local area monitor.

The local area monitor is a microcomputer and information management system. This equipment is placed with the network manager (the leader of a small group of people in the offender's neighborhood who supervise him and encourage him to succeed). It receives information from the offender and coordinates communications among the network members. Each local network can supervise 15 to 20 people.

If required, a remote management center located in a correctional agency can be added to provide increased security and back-up functions.

Manufacturer/Distributor:

SCAN System. Life Science Research Group, 515 Fargo Street, Thousand Oaks, CA 91360. Telephone 805-492-4406.

Continuously signaling

A transmitter is strapped to the offender which sends out a constant signal.

A portable receiver, in the car of the officer who is monitoring the offender, is tuned to receive the signal from the specific transmitter when the officer drives within one block of the offender's home.

Manufacturer/Distributor:

Cost-Effective Monitoring System. Dr. Walter W. McMahon, 2207 Grange Circle, Urbana, IL 61801. Telephone Day 217-333-4579 or Evening 217-367-3990.

*This device can transmit to the central unit over either telephone lines or long-range wireless repeater system.

The technology is so new and the research is, thus far, so limited that there are many questions about monitors of all kinds, on all levels. Some of these questions are: Should equipment be purchased? Can it be used legally? On whom should it be used? Will the community accept it and under what circumstances? And, will monitoring provide the community with additional protection? The National Institute of Justice, through its Fiscal Year 1986 Solicited Research Programs, is seeking to support experimental projects that will provide some answers to some of these and other important questions. In the meantime, the discussions continue and programmatic and technological questions remain.

PROGRAMMATIC QUESTIONS

Monitors, at least in theory, could be used on any number of offender groups. They could be used on sentenced or unsentenced offenders. They could be used before sentencing, immediately after sentencing, or at a later point in the sentence when problems appear. They could be used to monitor house arrest, as an alternative to jail, as part of an intensive supervision program, or in the context of a work release program. All of these program possibilities have been discussed, and most of them are presently operational. However, we do not yet know if monitors are effective in these program applications much less where they are most effective.

We also do not know which offenders should be the focus of the program. There are clearly some offenders that nobody wants in the community. These offenders should be incarcerated. However, there are other offenders who are not so clearly dangerous and are not so obviously candidates for confinement. Can they be punished or deterred by other means? Can they be monitored in the community? Should they be monitored in the community? We do not know.

Whether particular types or groups of offenders can be monitored in a given community will depend, in part, on what that community, its judges, and its elected and political officials consider acceptable and appropriate punishment. For example, in some communities there may be strong pressure to jail drunk drivers; other communities may be satisfied if drunk drivers are required to stay home during their non-working hours with monitors used to assure that they do so.

In addition to elected and appointed officials, there are other groups in the community who may feel special concerns about the establishment of a monitoring program. These might include groups such as the defense bar, MADD (Mothers Against Drunk Drivers), and the ACLU (American Civil Liberties Union). Each of these groups potentially could be strong supporters of the program if its ends are compatible with theirs. They could also be vocal adversaries if it is seen as incompatible. Whether or not these groups are notified before the program is started and has had time to establish a record needs to be consciously decided.

Type of offense is clearly one factor that should be considered when determining who should be eligible for electronic monitoring. However, it is not the only factor. Should the program be limited to volunteers whose family members agree to participation by the offenders? In some instances, having the offender confined in the home could create conflicts and exert pressures on all family members. Also, are drug users, alcohol abusers, and individuals who have previously escaped from incarceration poor risks and therefore ineligible? And will employment be a requirement of participation?

Another consideration related to who can and should be monitored in the community may depend on the type of equipment selected and the structure of the program in which it is used. Some types of equipment monitor the offender continually while other types do so

only intermittently. Some devices send a signal if tampered with and some do not, so that removal of or damage to the equipment is only detected with visual inspection. And, if the equipment indicates that the offender is not where he is supposed to be or that some other problem has occurred, has the program been designed so that there will be an immediate response or does the program staff review these indicators on weekdays during the day? A few present programs have the base computer located in a facility that is staffed 24-hours a day, seven days a week. They then know immediately that a problem has occurred and can send staff to the offender's house to check and, if necessary, attempt to locate him. In other programs, the print-out is reviewed in the morning and offenders are contacted to explain abnormalities found the previous night.

Program administrators must also determine what the consequences for violations will be. Will the offender be charged with escape? loss of good time credits? or, returned to a minimum, medium or maximum security facility? Next, how long will the offenders be monitored by the equipment? Here again the equipment is too new and the experience too limited to provide an answer. Officials at Pride, Inc., in West Palm Beach, Florida, believe that offenders can tolerate the monitors for about 90 to 120 days (Rasmussen and Rothbart, 1986). After that, they feel, offenders begin to chafe under the restriction. And, how long should they be kept on the equipment? This question must be answered in the context of why the program is being operated. The answer would be quite different if the goal is retribution as opposed to fulfilling the requirement of the law. In Palm Beach County, it has been decided that three days on the monitor is the equivalent of one day in jail to fulfill the required mandatory sentence for a second conviction for driving while intoxicated. For other offenses, the prescribed sentence is a range and, therefore, the appropriate time on the monitor is not so clear.

Can electronic monitors solve or alleviate prison and jail crowding? The answer to this question is probably "no" for a variety of reasons. First, in addition to issues related to what a community can, will and should be expected to tolerate, it should be reiterated that monitors are technological devices potentially useful in a variety of program contexts. The population selected as the focus of monitoring programs may or may not be one that might otherwise be sent to jail or prison if monitors were not available. Second, consideration needs to be given to the likely impact on the total crowding problem. In a thousand man jail, the release of twenty monitored inmates would reduce the population by only 2%. One hundred monitored inmates would have to be released before the population would be affected by 10%. In a smaller jail, more impact would be achieved by using a system with a capacity for monitoring twenty inmates, the typical size of the initial purchase being made by many jurisdictions. In the prison systems of many states with their much larger populations, more monitored inmates would have to be released before a significant reduction in population could occur. Furthermore, the cost of a monitoring program cannot be directly compared to per diem cost of incarceration. The largest component of per diem costs is staff salaries. Therefore, until the number of released inmates is large enough to affect staffing of the facility, the only savings achieved are in marginal categories such as food.

The inverse to the question about the effect of monitors on jail crowding is the question of net widening. Will offenders be sanctioned who otherwise would not be? Will offenders be more severely sanctioned? These issues deserve attention. If offenders are being monitored who would not otherwise have been incarcerated, the cost benefit equation on the use of the equipment is changed. If, on the other hand, offenders are monitored who might otherwise receive probation with little direct supervision, the question becomes "Is the community being better protected?" At present, the answer to that question is also unknown.

Taken together, the questions of reducing prison population and net-widening lead to the more basic question: Why is a monitoring program being established? Any jurisdiction establishing a program should be able to answer this. Clearly there are a wide variety of possibilities. Reduction of prison or jail population is only one. Net-widening is a possibility but is more likely an unintended by-product. Another possible answer is to better protect citizens from those offenders who are already in the community on some form of release. If the question cannot be answered, then the situation is really one of equipment in search of a program, which is perhaps the most inappropriate way for program development to proceed.

Whatever the rationale for the monitoring program, another issue that must be considered is the legality of the use of monitors. Thus far, there have been no known test cases. Furthermore, the question of legality obviously would differ in each jurisdiction depending on statute and appellate decisions. It would also probably differ depending on whether the monitors are being used pre-trial or on sentenced offenders. (See: del Carmen and Vaughn, 1986; Christensen, 1986; Calvello, 1985).

Another question is: "How much will it cost?" The answer, of course, depends on the type of equipment, the number of units and whether the equipment is purchased or leased. In addition, there may be telephone charges and personnel costs. The In-House Arrest Work Release Program of the Sheriff's Stockade in Palm Beach County, Florida charges participants in the voluntary program \$9.00 per day (Garcia, 1986). Within the first fourteen months of program operation, their investment in equipment had been returned by offender fees. However, if the initial amount invested is more or less, if fees are charged at a lower or higher rate, or not at all, or if the equipment is in use a greater or lesser proportion of the time, then the pay-back period will change. Some programs have incorporated a sliding scale for fees paid by offenders, based on income, to

provide equal access to monitors. This can affect program revenues. Also, the pay-back period can be increased if the number of inmates or probationers eligible for monitors is insufficient to ensure that the units are in use most of the time. Program administrators should consider estimating the number of offenders meeting eligibility requirements in advance to avoid the situation faced by one California County where home detention proved to be more costly than jail partly because the number of participants was small (Contra Costa County, undated).

Additionally, there is the issue of who will pay for telephone equipment if it is required. Can the offender, who otherwise would qualify for electronic monitoring, be excluded because he does not have a telephone? In New Jersey, arrangements were made with the telephone company to assure that overdue bills would be paid by the offenders so that telephone service could be reinstated allowing participation in the program (Goldstein, 1986).

Programs using monitors in the community function as part of the criminal justice system. Therefore, they require the cooperation of the courts and probation and parole, at a minimum. Additionally, many times, they also may involve the sheriff, other law enforcement agencies and others. As with any multi-agency effort, the lines of responsibility must be clear and the cooperation between them developed. For example, if the results of the monitoring are to be reviewed around the clock, then the base is optimally located where 24-hour staffing is already present. This facility might be a jail or a half-way house. The program, on the other hand, might be operated by the probation office. If more than one agency is involved, the division of responsibilities and expectations should be specified, preferably in writing.

A related issue is the question of who authorizes placement in an electronic monitoring program. Should it be a judge, the local parole board, the sheriff's department, the local department of corrections, or probation staff? Conversely, which entity should be responsible for removing offenders from the program when violations occur?

Finally, what criteria will be used to assess the effectiveness of monitoring programs? A key issue is protection of the community while the offender is in the program. However, rehabilitation could also be an outcome, measured in terms of recidivism rates, continued employment and adjustment in the community after release. The indicators of effectiveness will vary among the types of program and should be related to the overall purpose for instituting electronic monitoring of offenders.

TECHNOLOGICAL QUESTIONS

The questions above can be viewed at a theoretical, philosophical, or program planning level. However, there are also questions or potential problems that should be considered related to the functioning of the equipment itself. These questions emanate from the preliminary results of a study conducted at the Law Enforcement Standards Laboratory, of the National Bureau of Standards supported by the National Institute of Justice. Information also has been gained from the experience of some of the monitoring programs. It should be noted that the comments are preliminary and often reflect results of testing of what is now the previous generation of equipment, since the technology itself is developing so rapidly.

One problem found was telephone line incompatibility. Telephone lines carry electric current, and the characteristics of the current can vary with different telephone systems. Additionally, some telephone exchanges use very modern switching equipment and can handle pulses such as those from touch-tone phones. Others use older equipment that may have trouble handling the electronic signals transmitted by some of the monitoring systems. Whether this is a problem can only be determined specifically through a test of the local system and local exchanges and/or consultation with the local telephone company.

Another problem that appears remediable, and has been addressed by some manufacturers, is the effects of weather conditions. During wind storms and thunderstorms, both electric lines and telephone lines are whipped around and may come into contact with other lines. This may lead to arcing of the power and power surges. In the same way that most users of home computers have surge protectors on the incoming power lines, these monitoring devices may have surge protectors placed on the incoming electrical and telephone lines. It appears that most manufacturers have installed surge protectors on their current equipment. In addition, uninterruptable power supplies are also provided by some manufacturers to guarantee power to the system even during power outages.

Many devices use radio frequency signals for communication between components of the system. In some locations, radio landing beacons from airports and radio station broadcasts can interfere with the functioning of the device. Whether this is a problem is dependent on the other radio transmissions in the area where the equipment is being used and the radio frequency that the device uses.

Another potential problem noted is the effect of iron and steel which may block signal transmission or create an electromagnetic field. This can occur in steel trailers or in houses where the stucco exterior is attached over a steel, chicken wire frame. Large appliances, such as refrigerators, and cast iron bathroom fixtures may also interfere with the signal. In some places, the problems can often be dealt with by moving the receiving equipment. In other settings, it may limit the offender's mobility to less than had been expected. At least one manufacturer provides repeater stations within the house to forward and amplify the signal.

These are some of the technological problems that have come to light and many of them have been solved. In other cases, ways to avoid them and minimize their effects have been noted. It is not surprising that they have developed, given the newness of the technologies. It would also not be surprising if additional problems come to light as broader experience with these devices is gained. It seems reasonable to assume that manufacturers will seek to solve any future problems as they have in the past.

In summary, monitors are new technological devices that offer exciting possibilities for controlling offenders in the community. However, there are still many unknowns, many issues which should be considered by those establishing programs, and many questions yet to be asked and answered.

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UNIVERSITY OF MINNESOTA
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July 2, 1986

Mr. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue N. W.
Washington, D. C. 20004

Dear Chairman Wilkins:

I am pleased to accept the invitation to present a statement to the Commission on July 15. Enclosed is a copy of my statement along with some supporting documents.

A limited available time and my heavy summer commitments have made it impossible for me to develop as comprehensive or integrated statement as I would like. My thinking is expanded, however, in the documents attached to the statement should the Commission Members desire additional background material.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Burt Galaway'.

BURT GALAWAY
Director of Graduate Studies

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Enclosure

L8-12



UNIVERSITY OF MINNESOTA
TWIN CITIES

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TO: United States Sentencing Commission

FROM: Burt Galaway, Ph.D.
University of Minnesota
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224 Church Street S. E.
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DATE: July 15, 1986

I have been asked to respond to three questions:

1. Under what conditions should restitution be ordered?
2. How should a hearing be structured to efficiently determine the appropriate amount of restitution without unduly complicating or prolonging sentencing?
3. Are there ways in which restitution could be effectively combined with imprisonment or community service?

My response to these questions is based on the position that restitution should be considered as a sentence available to the court for use either alone or in combination with other non-incarceration sentences. I have dealt with some of the objections to this concept of restitution as a sentence in the attached article (1985) but will briefly try to dispatch two of the objections before moving to the questions.

One objection is that restitution is inherently a civil law concept and that victims should not be able to use the criminal process for their own gain. Introducing restitution as a sentence does not deny the fundamental notion of the crime as a wrong against the state but, rather, respects the unique and symbolic position of the victim in both the crime and the sentencing. While the crime is a wrong against the state, the victim has borne the brunt of this wrong and has stood as every person. Since the victim has symbolized all of us in bearing the harm of the wrong, it is reasonable that the victim, as every person, may symbolize all of us in receiving benefits from the sentencing of offenders.

A second objection to restitution as a sentence is that it may create inequities and markedly different sentences for offenders who have been convicted of the same offense. Legal definitions of offenses, however, are abstractions which apply to very differing sets of circumstances. Harm done is a reasonable element in determining the seriousness of an offense; therefore a burglary which results in a one-hundred dollar loss to the victim is a less serious offense,

other things being equal, than a burglary resulting in a one-thousand dollar loss to the victim. Restitution, because it relates to damages which are a reasonable element of seriousness, may increase equity and fairness in sentencing.

Conditions Under Which Restitution Should be Ordered. Restitution is the preferred penalty for property offenders because it logically relates to the offense, holds the offender directly accountable, and results in the restoration of victim losses. The question then becomes, under what circumstances should other penalties be combined with restitution for property offenders. Other non-incarceration penalties (fines, community service, or probation supervision) may be used with restitution when the offense is considered so serious that restitution is an insufficient penalty. Restitution is the basic penalty with other non-incarceration penalties used to secure proportionality between seriousness of offense and severity of penalty.

Determining the Appropriate Amount of Restitution. If restitution is considered a sentence, then determining the appropriate quantity of this sentence will no more unduly complicate or prolong sentencing than determining the appropriate quantity of any other sentence. The issue, however, usually hinges on the question of arriving at a fair estimate of the damages done. The experience of restitution programs to date indicate that this is a fairly straightforward undertaking and can be done, probably as a part of the pre-sentence investigation, before sentencing. Gathering information from victims, information from offenders, and mediating any differences is generally sufficient to arrive at a restitution figure acceptable to both victim and offenders. A number of pilot projects around the country (Galaway, 1986) are using face-to-face victim offender meetings as a mechanism for arriving at an acceptable restitution figure. The experience to date suggests that issues of determining restitution amounts are not as difficult as might be feared, although the necessary investigations and mediation efforts need to be undertaken prior to the sentencing hearing and with a specific recommendation made available to the court.

Can Restitution be Effectively Combined with Imprisonment or Community Service? Restitution can be combined with community service where the restitution obligation alone would be an insufficient severe sanction given the seriousness of the offense. Community service is also a restorative sentence in-as-much as the offender is required to engage in activities which bring about an improvement or restoration to the community. Thus, there is some logic in combining these two sentences. The sentences, however, are different in nature and community service should not be substituted for restitution. Restitution is to be the first choice penalty and community service added under circumstances where restitution is not sufficiently severe.

Restitution can not be effectively combined with a sentence of imprisonment. Imprisonment impedes the ability of the offender to make restitution and delays the process for restoring victim losses. Imprisonment does not serve the interest of offenders or victims and should be reserved for the relatively few offenders whose acts are so serious that the interests of the state in removing the offender from society must take precedence over other interests.

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PLEASE NOTE:

I have the above mentioned
documents on file if anyone
is interested in seeing them.

Thanks.
Cathy

**WRITTEN STATEMENT
OF
DONALD L. CHAMLEE
CHIEF, DIVISION OF PROBATION
ADMINISTRATIVE OFFICE, UNITED STATES COURTS**

ON

SENTENCING OPTIONS

**PREPARED FOR THE
UNITED STATES SENTENCING COMMISSION
WASHINGTON, D. C.**

JULY 15, 1986

Chairman and Members of the United States Sentencing Commission

Mr. Chairman, I am Donald L. Chamlee, chief of the Division of Probation of the Administrative Office of the United States Courts. Thank you for the invitation to appear before you today and address sentencing options in addition to incarceration that are available to the court when sentencing an offender for a Federal violation.

Inasmuch as I appeared before the Commission on May 22 of this year, I shall not review my background in detail again. Suffice it to say that I have 25 years of progressively more responsible experience with the U. S. Probation System and an additional 3 years experience as a county and state probation and parole officer. My academic credits include a master's degree in criminology from the University of California at Berkeley and a fellowship at Harvard Law School.

The Federal Probation System is one of the largest community correctional systems in the United States. As such it represents the principal alternative to incarceration in the Federal criminal justice system. Currently there are 68,500 persons under the supervision of our 1,902 officers and 40 probation officer assistants serving in 300 offices nationwide. In a year's time those officers will also prepare 36,000 presentence investigation reports to aid in pronouncing sentence on the 38,500 criminal defendants sentenced by U. S. district judges.

The pertinent statutory charter for our activities are found in several chapters of title 18. Sections 3651-56 authorize the grant of probation to a defendant and spell out the duties of probation officers and the Director of the Administrative Office with respect to probation. Sections 3579-80 outline the procedures for making an order of restitution. Chapter 311, sections 4201-4218 authorize release on parole for inmates of Federal institutions.

Our drug aftercare program, which I will speak to later, is codified at section 4255. Finally, another of our major responsibilities, pretrial services, is set forth at section 3152-56. This latter activity receives a good deal of our attention, but it is not directly relevant to the discussion today.

Our function of most direct assistance to the courts is the preparation of presentence investigation reports. The general statutory authorization is set forth in Rule 32(c) of the Federal Rules of Criminal Procedure. More specific guidance for probation officers in preparing reports is contained in our publication Publication 105, The Presentence Investigation Report, Administrative Office of the United States Courts, 1984 (Revised). This document lays out the detailed procedures for investigation and verification that I referred to in my May 22 statement concerning the uses and reliability of prior criminal record information.

Our second major function, and the one that makes probation a viable alternative to incarceration, is the supervision of offenders. We currently supervise seven different categories of offenders: district judge and magistrate probation, pretrial diversion for U. S. attorneys, parole, mandatory release, military parole for the U. S. Disciplinary Barracks, and special parole. The standards for supervision activities by probation officers are contained in a second publication, Publication 106, The Supervision Process, Administrative Office of the United States Courts, 1983. I have previously provided copies of both documents for the Commission's use.

Publication 106 provides a systematic method of classifying offenders and addresses the need to bring the greatest resources to bear on offenders who

are at greatest risk of being engaged in subsequent criminal activity. The publication sets out a system for utilizing predictive devices to set the level of supervision activity. Two actuarial devices are used in the system to predict likelihood of recidivism - the Risk Prediction Scale (RPS-80), for persons on probation, and the Salient Factor Score (SF-81), for persons on parole. After the predictive device is used, the system requires explicit identification of supervision problems, the establishment of objectives to meet those problems, and the development of a supervision plan which sets forth the methods to reach those objectives, as follows:

There are two levels of supervision - low activity and high activity. The purpose and value of differentially designating persons to one of these two levels is to free probation officers to direct systematically their skills and energies to those in greatest need of services and monitoring.

Low Activity Supervision

Persons in the low activity supervision level, as reflected in their histories, have usually experienced relative success in establishing personal stability. Although occasionally it is necessary for the probation officer to respond to crisis situations, sustained contact is seldom necessary. Probation officers are to manage these cases through the use of referred services and collateral contacts. **The probation officer should not encourage more than one personal contact per quarter and three personal contacts per quarter should be the exception rather than the rule.**

High Activity Supervision

Persons in the high activity supervision level, as reflected in their histories, have usually experienced difficulty in establishing and maintaining personal stability. **Probation officers should direct the greater proportion of their efforts toward persons in the high activity supervision level. There is no upper limit on the number of times a given person may be seen in a month's time. All persons in this supervision level, however, are to be seen at least once a month.** The purpose, frequency, and location of personal and collateral contacts are shaped by the supervision plan.

Overrides

Although the appropriate predictive device ordinarily serves to determine the initial supervision level, particular circumstances may be present in low activity cases which justify raising the supervision level to high activity. **This override of the supervision level established by the predictive device is made only with the approval of a supervisor.** There are three conditions which justify an override. They are:

I. Aggravated Offense/Offender Circumstances

A. Violence

1. Present offense or prior record involving violence
2. Use of weapons in the commission of crime

B. Notoriety of Offense/Offender

1. Violation of trust by high ranking public official
2. Value of crime greater than \$100,000
3. Crimes endangering national security

C. Continuing Criminal Conspiracy

1. Wholesale drug distributor
2. Member of organized crime
3. Major corporate offender

II. Special Conditions

- A. Court or Parole Commission* ordered special supervision
- B. Drug aftercare program ordered

*Special supervision may be ordered by the Parole Commission for the first 6 months of supervision. In such cases the expected minimum contact rate between the probation officer and offender is at least two personal contacts per month.

III. Exceptional Case Circumstances

Exceptional case circumstances are significant social problems characterized by aggravated personal distress which, if left unresolved, would likely subject the community or offender to harm. Exceptional circumstances also include a first-time youthful offender who exhibits multiple areas of extreme instability which requires more than three personal contacts a quarter to carry out the supervision plan. **It is important for the probation officer to recognize that persons who are classified as low activity by the predictive device experience low violation rates. Therefore, overrides based on exceptional circumstances should be rare.** Although events such as loss of job or separation from a spouse are distressing to many, an override is considered only if the person is overwhelmed by these events and unable to cope with such problems.

At present we are supervising 40,800 persons in low activity supervision and 27,700 in high activity. Based on our experience and research, a proper workload for a probation officer who supervises only high activity cases would be 41 offenders whereas for the probation officer who supervises only low activity cases, the figure would be 90 offenders. Although probation offices are not always organized in this way, staff is requested of Congress and allocated using these criteria.

Specific Programs and Functions

To give the Commissioners an idea of what is presently available, I would like to turn now to some of the programs and functions we perform in carrying out court or Parole Commission orders. First, and one of which I personally am most proud, is our drug aftercare program.

DRUG AFTERCARE

Population Served

The drug aftercare program provides drug treatment and urine surveillance services for more than 6,800 drug dependent federal offenders who are under the supervision of the United States Probation System. Clients include probationers, parolees, special parolee term releasees, mandatory releasees and military parolees. Sixty percent of the treatment population are parolees. Treatment services are provided by nearly 300 drug treatment programs under contract to the Administrative Office of the United States Courts, by probation officers, available community resources, or any combination thereof.

Program Philosophy

The goals of drug aftercare are abstinence from illegal drug use and the reintegration of the offender into society as a law-abiding and contributing member. To accomplish this goal, we prefer treatment modalities that favor an abstinence approach over those which use medication as the primary treatment tool. Methadone maintenance is used only as a last resort before revocation and only after abstinence methods have been exhausted.

Urine Surveillance

Urinalysis is a key ingredient of the drug aftercare program and enables the probation officer to determine whether a person under supervision has refrained from, continued, or returned to the use of controlled substances. A three-phase urine collection and treatment system has been established for all drug dependent persons under supervision. Urine testing rates range from six specimens per month in Phase I to two specimens per month in Phase III. Clients move from phase to phase depending on their record of drug free supervision. Failure to remain drug free will result in not only increased urine testing but may also result in the client being placed in progressively more restrictive treatment situations.

The selection of competent laboratories to provide urinalysis services is vital to the success of the aftercare program. The Administrative Office contracts with a national authority on toxicology and urine testing to provide technical assistance in the preaward review and postaward monitoring of laboratory performance. In addition, several hundred test specimens with known quantities of drugs are sent during each year to our contract

laboratories disguised as client specimens. Test results are evaluated to determine if the laboratories perform proficiently. Experience has shown that the level of laboratory proficiency is directly related to the intensity of our monitoring program.

Outcomes

Data have been collected by the Probation Division of the Administrative Office of the United States Courts on 3,991 individuals who were discharged from the program between April 1984 and January 1986. Seventeen percent of the offenders had one criminal conviction prior to treatment and forty percent had two or more prior convictions. Forty-seven percent had been incarcerated at least once for terms exceeding 30 days. The offenses of conviction cover a broad spectrum of offense categories and were not limited to drug offenses.

The patterns of these drug abusers were well established and long standing. Six out of ten had a history of heroin abuse. Half of the participants had been in drug treatment programs on one or more previous occasions. The onset of drug abuse occurred on the average 11 years prior to entry in the drug aftercare program. Twenty-three percent of these individuals had been in methadone based drug treatment on previous occasions.

Although this is a difficult population, fifty percent of the offenders satisfactorily completed treatment. Of those who failed, forty percent were removed from treatment and their supervision revoked because of continued drug abuse or because of technical violations, such as failure to report. Only eight percent were terminated because of new arrests.

Alcohol Treatment

Legislation is currently pending that, if enacted into law, will give the Director of the Administrative Office authority to contract for alcohol abuse treatment. During the 12-month period ending December 31, 1985, over 3,000 clients were received for supervision with a special condition requiring alcohol abuse treatment. A decline in the availability of public programs has left the probation staff with limited resources to provide required treatment services. The authority to contract for services will expand the probation system's ability to provide treatment services and thereby more effectively protect the community.

COMMUNITY SERVICE, FINES, AND RESTITUTION

Although a sentence to community service is not explicitly provided for in the current law, courts impose such orders in one out of six probation orders. They are imposed under the authority of 18 USC 3651 which allows a court to impose probation "upon such terms and conditions as the court deems best." All but five judicial districts have used such orders. The majority of orders require 200 hours or less of service. Data obtained from 10,300 closed cases in the Federal Probation Sentencing and Supervision Information System (FPSSIS) over the last 12 months indicates that 142,850 hours of community service were completed by 1,553 cases. In addition, 7.6 million dollars was collected from 6,000 cases in fines and restitution.

We have guidelines for implementing community service in Publication 106, The Supervision Process. The Judicial Conference Committee on the Administration of the Probation System is currently expanding those guidelines

and expects to approve a monograph on this topic within the next few months. With the support of the National Institute of Corrections, we are also developing instructions and guidelines on better assessing defendants' financial resources with the goal that fine and restitution orders will be more realistic and collectable.

SPECIFIC QUESTIONS FROM THE COMMISSION

Let me turn now to the specific questions set forth in your letter of June 20.

***Should some form of intensive supervised probation be imposed on certain types of federal offenders? If so, what kind of offenders should be placed on intensive supervised probation and what forms of control and supervision should be imposed.**

Let me say at the onset that the Federal Probation System has already made significant inroads toward an intensive supervision program. This has been accomplished both by the categorization of offenders into high risk and low risk groups and by the creation within appropriate areas of the country of specialists to handle high risk groups. These specialists include drug specialists, special offender specialists, and mental health specialists. All these specialists were chosen because of their abilities for handling certain kinds of offenders and in doing so they perform the function of providing more intensive supervision.

We are, as well, working with the Parole Commission on a special curfew program. The purpose of the program is to reduce prison overcrowding through intensive community supervision. Those offenders placed in this program are

subject to stringent requirements, including a curfew, and failure to adhere can mean a quick reincarceration.

On the whole, however, we have tried to avoid the establishment of highly visible programs with titles such as intensive supervision or restitution centers because we consider our officers journeymen, qualified to respond to a broad array of situations. One officer typically performs many functions. He or she may provide intensive supervision for a few high risk offenders and general supervision for low risk offenders, provide drug aftercare services to a few more and conduct presentence investigations for the courts.

The approach we have taken to the supervision does not involve a broad, nationwide program directed from Washington. Our belief is that with the diversity and complexity existing within a nationwide probation system, the most appropriate service we could provide was to support those in the field as they identified problems and sought solutions. Requiring each district to follow a predefined intensive supervision program without regard to their special circumstances might do more harm than good.

Your next question is:

***What roles should the Commission, the court and the probation office have in determining which offenders are placed on intensive supervised probation? What type of probation conditions not expressly listed in 18 U.S.C. 3653(b)(1-19) should the Commission consider in drafting the guidelines?**

I recommend that the Commission discharge its responsibilities with respect to intensive supervision and probation conditions through the issuance of policy statements rather than guidelines. Our present standards for high activity approach the idea of intensive supervision with flexibility.

Officers are called upon to establish as much personal contact with an offender as the situation requires. Our research into that subject, however, shows that the requirement for contact varies in each case as the situation changes. That is why our supervision plans, prepared by the officer every 6 months and reviewed by the supervising probation officer, provide for an approach tailored to the need for supervision at that time. With respect to conditions of probation, there too the specifics of correctional program design are best left to the court and the probation office.

Day to day oversight of a given case should be left to those most intimately involved in the supervision of the case. I feel the Commission should rely on the court and probation officers to carry out your preferences and priorities as indicated in your policy statements. It is impossible to anticipate every situation that will develop during a period of supervision. Supervision of offenders is an evolving process, that is why we call our Publication 106, The Supervision Process.

Your third question is:

***The Commission is interested in ongoing intensive supervised probation programs and has invited Harvey Goldstein, Assistant Director for Probation in New Jersey and Chairman of the American Probation and Parole Association, to testify at the July 15 hearing. We request your evaluation of current state programs and their applicability to the Federal system.**

Approximately thirty states have some form of intensive supervision program. These programs vary widely in design and implementation. Most were motivated by an ever-growing prison population which severely strained the capacity of their prison systems. Mr. Goldstein will, no doubt, inform you of the specific mechanisms his state developed for the release of state prisoners into the community.

As I understand the situation in New Jersey, in order to accomplish the goal of intensive supervision a separate unit was established. The officers charged with the supervision of these offenders are required to see them several times a week and the probation officers are potentially on duty 24 hours a day. The requirements of the program are stringent and salary enhancements were offered to induce probation officers to participate.

I believe careful consideration should be given to the prison populations served. That which is appropriate to the state prison population may not be appropriate to those in the Federal system. We developed our system of high activity supervision to address those cases that need intensive supervision. The program addresses the broad spectrum of high risk offenders, such as the drug addict and the organized crime offender, who both require intensive supervision but call for quite different supervision techniques. I am open to suggestions that will enhance our supervision capabilities but would caution against establishing a system which may not adequately address case problems.

You also asked about electronic monitoring. We do not have experience with this new approach. Because of its recent popularity, the topic is scheduled for discussion by the Probation Committee when it meets in Washington, D. C., this week. We are interested in exploring the potential of electronic monitoring and house arrest. The purposes of both need to be made more clear, and surely that is one of the roles of this Commission.

To conclude, the Federal Probation System has developed supervision methods that work for us. I point to our drug aftercare program as one example of what we are doing. There is more to do. For example, I urge the Commission to examine the need for periods of supervised release - and the law

needs to be strengthened to add some sanction more meaningful than contempt of court. In my mind, supervised release should be imposed for all serious offenders and those who are high recidivist risks. In addition, supervised release should be imposed where drug aftercare services are required, where fines or restitution will have to be paid on an installment plan, and where community service needs to be performed.

We look forward to the leadership this Commission will provide in establishing policy in the area of community supervision of offenders.

Mr. Chairman, this completes my prepared remarks. I will be pleased to respond to any questions the Commission might have.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

PROBATION OFFICE

NEWT SCOTT
CHIEF PROBATION OFFICER

July 3, 1986

460 U.S. COURT HOUSE
P.O. BOX 1287
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The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N. W.
Suite 1400
Washington, D. C. 20004

Dear Mr. Chairman:

Enclosed find notes I have made on the subjects
to be before the Commission at its hearing scheduled
for July 15, 1986.

I am honored by the invitation to testify and
look forward to being with you that day.

Sincerely,



Newt Scott
Chief U. S. Probation Officer

NS:sk

Enclosure

Notes regarding the Sentencing Commission
Hearing on July 15, 1986

Question:

Should some form of intensive supervised probation be imposed on certain types of federal offenders?

Answer:

Yes.

Question:

What kind of offenders should be placed on intensive supervised probation?

Answer:

1. Persons with various addictions, i.e., drugs, alcohol and gambling.
2. Some who need close surveillance, i.e., cooperating criminals, etc. This idea will also apply to organized crime figures and other professional criminals during periods of conditional release following incarceration.
3. For public relation reasons some persons whose offense was highly publicized might be placed under intensive supervision.

Question:

What forms of control and supervision should be imposed?

Answer:

"No Nonsense" - "Thou Shalt Not" conditions that advise the probationer his life will be closely monitored and penalties for violations will be promptly administered. In addition to the normal requirements of good citizenship the probationer's physical movement (travel), physical health (urine sampling), financial condition (mandated disclosure upon request) or associations may have to be closely watched and documented.

Question:

What role should the Commission have in determining which offenders are placed on intensive supervised probation?

Answer:

The Commission should set wide parameters for ordering intensive supervision.

Question:

What role should the Probation Office have in determining which offenders are placed on intensive supervised probation?

Answer:

Probation officers should (as they traditionally have) recommend conditions of intensive supervision in appropriate individual cases based on their knowledge of the offender and the offense. Those recommendations should be realistic considering the probationer's ability to perform and the system's ability to police intensive supervision orders.

Question:

What role should the sentencing court have in determining which offenders are placed on intensive supervised probation?

Answer:

Sentencing courts should have a great range of choice in ordering such supervision. They are the authority which must take corrective action if noncompliance occurs and therefore must have the strongest voice in deciding exactly what intensive supervision should entail in given cases.

Question:

What type of probation conditions not expressly listed in T. 18, U.S.C., 3563(b)(1-19) should the Commission consider in drafting the guidelines?

Answer:

The Commission may want to list house arrest as a possible condition of probation. Otherwise conditions 1-19, plus T. 18, U.S.C., 3653(b)(20) which states, "Satisfy such other conditions as the court may impose," are sufficient. The Commission should leave the courts (in sentencing) and probation officers (in supervision) enough discretionary latitude to carry out their statutory duties.

Comments on Certain ConceptsCommunity Service:

I think community service should never be the determining factor in deciding to incarcerate or not, but rather it is a form of restitution and should be used accordingly.

In ordering community service courts need to consider who will receive services, liability and documentation of services rendered. It seems appropriate as a tool in the supervision of white collar and organization offenders.

House Arrest:

A problem in outlying areas but may have a growing use in population centers. It should be closely monitored.

Fine and Restitution Collection:

We have had good success in policing the payment of fines and restitution. Probation offices should not be responsible for the actual handling of monies and the record-keeping that goes with it. We have no history of performing such accounting tasks.

Electronic Monitoring:

Mixed feelings. May be a cost-effective way to keep track of some people under supervision (house arrest cases and professional criminals). On the other hand, it has a "clockwork orange" flavor to it.



Newt Scott
Chief U. S. Probation Officer
Northern District of Oklahoma

WILLIAM D. GRAVES
CHIEF PROBATION OFFICER

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
PROBATION DEPARTMENT

July 3, 1986

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The Honorable William W. Wilkins, Jr.
Chairman, U. S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1200-A
Washington, D. C. 20004

Dear Judge Wilkins:

Thank you for the continued opportunity to be able to contribute to the Sentencing Commission's work on sentencing guidelines and now, sentencing alternatives. The openness of the Commission to the comments of practitioners is very much appreciated, particularly as regards to those policy issues that will frame the eventual sentencing guidelines to be used in Federal Courts across the country. It is to those policy issues that I would like to address my opening comments, with specific thoughts on the various sentencing alternatives to follow. The contents of this correspondence will form the basis for my testimony before the Committee on July 15, 1986.

First, I think it important to note that the Federal Courts work with a different type of offender than do the state courts. Unfortunately much of the research on sentencing, sentencing disparity, and alternatives to confinement have been based on sentencing in the state courts. Most violent crimes are left to local and state governments for prosecution and Federal prosecutions are for crimes that are nonviolent in nature, except for Bank Robbery, Kidnap and Assimilated Crimes Act cases. In fact, for the year ending June 30, 1983, only 6.4% of all criminal cases filed in U. S. District Courts were for Homicide, Robbery, Assault and Burglary. Some 39.6% of cases filed could be categorized as white collar offenses, with another 14.5% being drug cases. (1984 Sourcebook of Criminal Justice Statistics).

Secondly, I think it important to review the Congressional intent in the creation of the Sentencing Commission. My understanding of that is that the Commission was created to reduce disparity in sentencing. I think it important to note here that, while sentencing judges are criticized for disparity, much of the actual disparate treatment of offenders results from the action/inaction of law enforcement agencies and prosecutors. Most of the disparity occurs long before the sentencing function. Most prosecutions come from investigations that are initiated pursuant to policies which will vary from time to time and from one part of the country to another. Investigations and prosecutions are performed by

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political branches of government and their policies will change as elected officials attempt to perceive the public will. The prosecution makes the decisions on which cases to file and which cases to plea bargain. The prosecution can even present a stipulation for a specific sentence [Rule 11(e)(1)(c) of Federal Rules of Criminal Procedure].

It is interesting to note that much of the concern and debate on disparity comes from inmates. There is a need for concern about inmates' perception of fairness in the System, but there are also legitimate reasons for differences in sentences for what appear to be basically the same offense. We are a unified system because of our acceptance of the basic and fundamental principles of fairness reflected in the Constitution. The United States is also a diverse and complex society that has legitimate divergence in thought based on geography, religion, culture, mores and life-styles. The communities that judges work in hold those judges accountable for sentencing decisions. There are going to be legitimate community concerns about particular offenses and their punishment in different parts of the country. For example, the possession of cocaine is viewed differently in Aspen, Colorado, than it is in Middlebury, Connecticut.

The Sentencing Commission's role in all this should be to provide a basis for the articulation of a national philosophy towards sentencing and the establishment of general goals in pursuit of a fair and just sentencing process. The Commission's adoption of a clear policy on sentencing goals, strategies and programs for achieving those will be a major contribution to the Federal Judiciary's task.

Thirdly, it is my firm belief, based on many years experience working with a group of very dedicated jurists, that judges work extremely hard at formulating a just sentence. They agonize over their decisions, both before and after a sentence is imposed. The sentencing judge is in a very unique position to weigh all of the factors relevant to a sentencing decision. In your development of guidelines there must be a wide enough range to permit sentencing judges to function in their traditional role of balancing the collective interest of the public against the private interest of the defendant. That is necessary to reach a just result that is case specific and which can be perceived by the public and the defendant as both just and human. My recommendation, then, is that the Commission allow as much sentencing flexibility as possible to allow the court to respond to the variables that are inevitable with individual defendants who commit a multitude of diverse crimes in a multitude of ways.

Fourthly, I would recommend that the Commission adopt a philosophic framework for development of a national strategy that recognizes

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that crimes are knowingly and willingly committed by persons who, for whatever reason, chose to abandon the societal mores by taking, through force or guile, what is not earned through their own labor. That position recognizes that individuals are responsible for their behavior and are accountable to the society when they step outside what is acceptable. The establishment of a philosophic position that recognizes that individuals are responsible for their behavior, and accountable to the society, provides a vehicle for the establishment of position statements on how to sentence offenders.

The Comprehensive Crime Control Act, in the section addressing the imposition of sentence [18 USC 3553(a)], quite properly lists the defendant's treatment as last in priority in what is to be achieved with any particular sentence. The law recognizes that offenders that inflict or threaten physical harm to victims must be incapacitated, both for the safety of the society and as a message of deterrence for other would-be violent offenders. Maximum periods of community supervision should follow their incarceration. Individuals who commit isolated, nonviolent property crimes can then be sentenced to allow for reparation to the victim and society and for their own rehabilitation. It is important to note here that rehabilitation is the defendant's responsibility and not the courts or the Probation Service. Probation is meant to provide the opportunity for rehabilitation and it is in this area that alternative sentences such as restitution, fines, community service, etc. are better utilized.

Finally, philosophically, it is my perception that despite the important gains in the Victim Witness Protection Act of 1982, the victim is still a neglected part of the Criminal Justice System. It is my feeling that we have a good ways to go in providing a continuity of information and services to the victim so that they feel more a part of the System. The feelings we get from our interviews of victims is that they are on the outside looking in, with little or no impact on sentencing. Philosophically, I would suggest the adoption of a position that the Sentencing Commission will make every effort, through its policies, to: 1) protect the community; 2) punish, swiftly and surely, the criminal; and 3) involve the victim in the process.

The balance of my comments will address those specific sentencing options requested by the Commission, including incarceration and the probation based alternatives.

It is my belief that imprisonment is a legitimate societal sanction for lawbreaking. That sanction should not be limited to only those violent and serious criminal offenders that pose the most dangerous physical threat. The sense of the Senate resolution (October 12, 1984) on "nonviolent and non-serious offenders" makes

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little practical sense when it fails to recognize that the victim of a nonviolent white collar offender might well have been as traumatized as the victim of an armed robbery. The white collar offender, the drug trafficker or the individual who compromises our nation's secrets are as deservant of confinement as is the violent offender. All of the sentencing options must be available to the sentencing judge, with the degree of punishment based on the offense and the offender's characteristics.

Let me clarify an important issue, and that is that probation, in addition to treatment, is punishment. Living under the threat of incarceration is difficult -- our clients constantly reaffirm that to us. Probation conditions require that the individual offender work, support his dependents and stay away from other law violations. Probation supervision works because it monitors that behavior, confronts the client who chooses to live outside acceptable norms and forces his accountability or removal.

The Commission has asked for specific comments on intensive probation supervision. My review of the available literature leads me to conclude that intensive supervised probation was created at the state level in response to prison overcrowding problems or the need to "toughen" the image of probation and parole in the community. Prison overcrowding is a problem at the Federal level, but it is not the severe problem that the states are attempting to cope with. Additionally, as I noted earlier, the Federal Courts deal with a different type of client than do the state courts. The Federal Probation Service currently has a very workable method of classifying cases based on risk to the community and the needs of the individual offender. The Federal Probation Service, although not adequately staffed due to budgetary constraints, is in a much better position, personnel-wise, to properly supervise those persons who are "high activity". We are capable of, and currently provide, a quality supervision product to the Court. That supervision includes the monitoring of defendant's employment, family life, associates, attitude, etc. to either prevent or detect early any violative conduct. It is, therefore, my perception that there appears little purpose to be achieved with development of an "intensive supervised probation" category.

The Comprehensive Crime Control Act (18 USC 3583) does provide for a period of post-release supervision. If there were to be a need for more intensive supervision of any group of clients, it would be with this group. The Court, as an alternative to establishment of a separate supervision category, could order that the first six months or first year of that supervised release be "high activity" and could even mandate the number of personal contacts that the Probation Officer is to have with that particular defendant.

The Commission has also asked if we feel a need for additional probation conditions. The mandatory and discretionary conditions provided for by 18 USC 3563(a) and (b) do include those conditions that are most commonly ordered as special conditions to a probation sentence. We would suggest the addition of two other alternatives for special conditions to supervision. Those would include: 1) a condition for financial disclosure. This condition is used infrequently but can be of major assistance to the Court in the supervision of white collar offenders (for example, mail fraud cases, securities and tax cases, etc.) where information on the individual or corporate defendant's financial condition is essential to the Court to discourage continuing criminal violation. The condition could include, where reasonably related to the offense and the rehabilitation of the offender, the requirement that defendant disclose his tax returns, business and/or personal financial records, etc. to the Court's Probation Department for review. 2) A special condition that provides for disclosure to third parties where the defendant poses a reasonably foreseeable risk to them through employment or otherwise. This could include; e.g., those individuals convicted of embezzlement who seek to continue work in positions of fiduciary responsibility. Probation Officers are coming under closer scrutiny on liability issues and a formal Court order, after due consideration and possibly hearings, would resolve liability issues for the Probation Officer and would clarify the expectations of the Court for that defendant's future conduct.

I would also suggest that some conditions of probation and/or supervised post-release be standard. Those would include the following conditions under 18 USC 3563(b):

1. Support dependents and meet family responsibilities.
5. Work at suitable employment or pursue training.
7. Refrain from frequenting specified places or associating with specified persons.
8. Refrain from excessive use of alcohol or any use of narcotic drugs without prescription.
9. Refrain from possessing firearm, destructive device or dangerous weapons.
15. Remain within the jurisdiction of the Court.
16. Report to the Probation Officer as directed.
17. Permit home visits or visits elsewhere as specified.
18. Answer questions by the Probation Officer and notify him of any change in address or employment.
19. Notify the Probation Officer if arrested or questioned by law enforcement.
20. Satisfy other conditions as the Court may impose.

FINES

I feel that fines should be considered in virtually every case, but suggest that it be a preferred sanction in the following types of cases:

1. Traffic and driving offenses
2. Restraint of trade (15 USC 1) cases involving individuals or corporations
3. Organized crime cases involving illegal gambling, bookmaking or racketeering
4. Drug cases, where the primary motivation is financial gain. Fines imposed in these cases must be punitive to ensure they are not absorbed as merely a cost of doing business.
5. Crimes resulting in financial loss to the Government, for example, income tax violations, false statements and claims, etc.

Fines would be particularly appropriate where individuals victims can't be identified or where attempts to determine restitution would legitimately overcomplicate the sentencing process (per the Victim Witness Protection Act).

DETERMINING THE AMOUNT OF FINE

I believe it appropriate to base the amount of fine on the financial gain to the defendant, loss to the victim(s), and the ability to pay a fine on defendant's part. Again, the Comprehensive Crime Control Act at 18 USC 3572 and Victim Witness Protection Act at 18 USC 3579 provides the Court sufficient latitude to take into account relevant factors in determining the amount of a fine. The essential element here, again, is that the Court must have sufficient latitude to consider relevant factors before arriving at a decision on whether to fine and how large a fine to impose.

The Victim Witness Protection Act, as regards restitution, is well written on this point when it requires the defendant to carry the burden of establishing ability to pay. The Court, after appropriate hearings, can make judgements based on projections for defendant's future earning ability. Those decisions can be based on age, education, intelligence, past employment history, etc.. I doubt there is a formula devised yet that can take into account the various factors that the Court can consider in arriving at the amount of fine to impose. However, there is interesting research available from the National Institute of Justice. I have enclosed a copy of that research, should the Commission wish to peruse it. There is some interesting information there on a "day-fine" system used in Sweden and West Germany that involves

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determining "units of punishment." Those determinations are based on offense severity, offender characteristics and the offender's ability to pay.

A final note on imposing fines needs to be addressed. The caution with fines is that, once imposed, they must be collected. Fines imposed as a condition of probation make the Court the collector and provide for sanctions if there is a wilful failure to pay. Fines not a condition of probation, at least under current law, become the responsibility of the Department of Justice through the U. S. Attorneys Office. It is my observation that there are wide variations among the different districts in collecting fines. It seems to me that without a uniform and aggressive policy in pursuing payment, fines are meaningless.

RESTITUTION

Financial reparation through restitution is a very important element in sentencing, even more so than fines, and should be considered in all cases where there is an identifiable victim who has suffered loss. My perception is that restitution must be a higher priority than either a fine or community service. The Victim Witness Protection Act, currently 18 USC 3579, mandates that the Court consider restitution for victims of the offense regardless of any other sentencing sanctions. The law, and I believe it is well written, requires a combination of sanctions. The Comprehensive Crime Control Act mandates that persons convicted of a felony abide by at least one condition set forth at 18 USC 3563(b)(2) -- fine, (b)(3) -- restitution, or (b)(13) --community service. The best approach, and the one that seems to be mandated by the statutes, is that all the alternatives be considered by the Court in virtually all cases.

COMMUNITY SERVICE

The Administrative Office Monograph, Community Service: A Guide for Sentencing and Implementation, is close to completion and is a well thought out document that will provide adequate direction to the Court and its Probation Department. I do feel that community service is a criminal sanction for the defendant's wrongdoing and because of that the defendant, not the Probation Officer, must be responsible for the development of the community service proposal. The Probation Officer, for the Court, must approve and monitor the approved community service project closely to ensure that the sentencing objectives of the Court are met. I also feel that the cooperating community service agency is going to need to know what the Court's objectives are with a particular sentence and must also know what that individual defendant was convicted of, primarily to avoid third party risk issues.

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The community service alternative to both fine and imprisonment has gained increasing acceptance by the Courts. There are obvious advantages to the community of having a pool of manpower available to use in worthwhile projects. There are also advantages for criminal defendants to be involved in the community. For the person that lacks basic job skills, community service can provide an opportunity for a work-type experience. For the overachieving "yuppie", convicted of securities violation, it can provide an opportunity to work in projects for the handicapped where they can see that daily living is a struggle for survival for many.

HOUSE ARREST

The research materials that I have been able to review suggest that house arrest is used predominately by the states as an alternative to alleviate overcrowding in the prisons for a fairly select group of nonviolent offenders who are motivated to make it work. This sanction would seem appropriate for persons convicted of driving while intoxicated or other similar offenses. We do have a number of those cases, however, have been able to adequately curtail/monitor their activities through use of residential community treatment centers, alcohol treatment programs, etc. We also think it possible to place such persons on the National Crime Information Center computer tracking program so that we could learn immediately of any law enforcement contact. In summary, I believe there are adequate resources already employed in the Federal System without having to utilize house arrest or electronic surveillance.

The opportunity to address the Commission is appreciated, as is the openness of the Commission in seeking input from the field. That communication process will be critical in the future as sentencing guidelines are implemented. As a final recommendation, I would suggest that the Commission continue to utilize the expertise available in the Administrative Office of the U. S. Courts (including the Probation Committee and the Probation Division), selective probation representatives from the field, the Federal Bureau of Prisons and the U. S. Parole Commission so that feedback on the guidelines on all parties can be periodically reviewed and evaluated.

I do hope that the Commission will find some part of this communication helpful. It has been most gratifying to be able to participate. Thank you for this opportunity.

Sincerely,



William D. Graves
Chief U. S. Probation Officer

Enclosure
WDG:RWJ:bg

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JULY 14TH, 1986

MEMORANDUM:

TO: Commissioners and Interested Staff
From: Paul K. Martin
Subject: Washington Post story

The attached news story appeared in the Sunday, July 13th edition of the POST and was brought to my attention in light of the Commission's Tuesday hearing on Sentencing Options. The Prince George's County corrections official quoted in the story, Samuel Saxton, will testify on house arrest and electronic monitoring at Tuesday's hearing.

House Arrest Off to a Rough Felon, First in Program for Nonviolent Offenders

By Matthew Daly
Washington Post Staff Writer

Prince George's County's house arrest program—introduced by officials in April as a possible solution to crowding in the county jail for nonviolent, minor offenses such as shoplifting and nonpayment of child support—is off to a rough start.

The first of five people assigned to house arrest was a convicted felon who was found to be away from home without authorization, a violation of the program. The four

others were placed in the new program while they awaited trial and included a man charged with assault and two men who were denied bond because of previous arrests on theft or drug charges.

That record has raised concerns among prosecutors and the judge who helped establish the program.

Circuit Judge Howard S. Chasanow, who worked with corrections department officials to develop the plan for house arrest and is a strong supporter of the program, said he was concerned about the

THE WASHINGTON POST

Program for Nonviolent Offenders Of

HOUSE ARREST, From C1

breaking the rules—said that Clayborne was the first person to inaugurate the program.

"I told [the judge] in court that if he [Clayborne] was the first one in the program, I could almost guarantee he'd be the first one to flunk out," Harvey said. "I thought he had an attitude problem."

Corrections Director Samuel Saxton, however, said he did not see any reason to revamp the system. "The criteria are solid," he said, adding that "misdemeanor or low-grade felony thefts are not inappropriate for the program."

Prince George's County, which has a court-ordered cap on the number of prisoners in the detention center in Upper Marlboro, is the first area jurisdiction seek-

ing to alleviate crowding problems with house arrests. The relatively new concept, law enforcement officials say, is also being used by more than a dozen jurisdictions across the country, including Norfolk. Fairfax County has a similar program that is awaiting its first participant.

Clayborne, of Glenarden, pleaded guilty in April to stealing more than \$300 worth of tennis shoes, athletic equipment and jewelry from two Hyattsville teen-agers last August. Police said that four men were involved in the robbery and that at least one of the assailants had a gun. But investigators could not determine who had the gun, and weapons charges against Clayborne and another defendant were dropped.

Circuit Judge Audrey E. Melbourne sentenced Clayborne, now 19, to five years in prison, but suspended all but 90 days, which

she ordered him to serve in the new arrest program.

Clayborne is scheduled to appear before Melbourne for a hearing to determine if he should be expelled from house arrest program and jailed for five years.

Melbourne said in an interview last that she placed Clayborne in the program cause corrections department officials recommended it and because "his crime not a violent crime. More importantly was very young and was living at home his mother."

"It was obvious from his background he was not used to following any rule," Melbourne said, citing reports of frequent fights and truancy from school. "I thought [the program] would be a mechanism teaching him responsibility. He needed