

TESTIMONY: JULY 15TH
HEARING ON
SENTENCING OPTIONS

. 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

24 June 1986

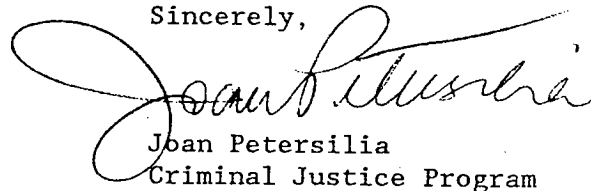
Mr. William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

I appreciate your invitation to testify before the United States Sentencing Commission on the subject of sentencing alternatives. Unfortunately, I will not be in the D.C. area at that time.

I have enclosed a recent article I wrote on the subject of house arrests. I hope it will be of some use to you and your Commission.

Sincerely,



Joan Petersilia
Criminal Justice Program

JP:ar

Enclosure: Reprint, "Exploring the Option of House Arrest."

Exploring the Option of House Arrest

BY JOAN PETERSILLIA

Senior Researcher, the Rand Corporation, Santa Monica, California

Introduction

IN DECEMBER 1985, Maureen Murphy was sentenced by a Federal judge in New York to house arrest. The rarity of this sentence in U.S. criminal justice is suggested by the judge's remarks:

The sentencing of Maureen Murphy requires, in the court's opinion, a sentence not heretofore used in this District and almost never used in the country in the federal court. It is used elsewhere in the world and is considered by some to be highly objectionable. The difference, however, is that in other countries it is used to repress political dissent and before trial. Here it will be used after a full trial where the defendant has been found guilty of a serious offense. The penalty is house arrest.¹

With that pronouncement, Judge Weinstein ordered Ms. Murphy to remain in her apartment for the next 2 years. She is allowed to leave her apartment only for medical reasons, employment, religious services, or to conduct essential food shopping. If she violates these conditions, the probation department is ordered to commit her to prison, where she will be required to serve out her suspended (not cancelled) prison term.

Ms. Murphy was not a minor offender. She was convicted of a large insurance fraud and faced a maximum 50 years in prison and \$50,000 fine for her crimes. In most instances, the Federal court would have imposed at least a year in custody.

What motivated Judge Weinstein to make such an important departure from traditional sentencing practice? Judge Weinstein says he was trying to balance the competing aims of public safety, humaneness, and accountability—against a backdrop of seriously crowded prisons. Probation didn't seem like "enough" for this 35-year old woman who willfully committed a major theft. On the other hand, prison for this relatively young person with no prior criminal record seemed "too severe" and "would help destroy her." Given those conditions, he felt an alternative punishment was "essential."

Judge Weinstein and a growing number of his colleagues are searching for reasonable middle-range sentencing options—programs tougher than probation but less harsh (and less expensive) than prison. Variations on the theme include intensive probation supervision, shock incarceration, community diversion centers, police-probation surveillance teams, community sponsors, and, increasingly, house arrest.

Florida has the most ambitious house arrest program in the country, with more than 4,750 inmates "locked up" in their residence. As one Florida judge put it: "If the State can't afford to provide constitutionally acceptable prison space for all those who deserve it, why not utilize the offender's home instead? It may well be that the best place for a convicted offender, given current prison conditions, may be confined to his own home."

¹ From Judge Jack Weinstein's Sentencing Memorandum in the Maureen Murphy case (United States District Court, Eastern District of New York, December 1985).

Many in the judiciary are echoing similar thoughts, and house arrest programs are beginning to spread not only in the Federal system but in state and local corrections as well. A recent survey of "Innovation in Probation" shows that several states—including Oklahoma, Alabama, Connecticut, Delaware, Indiana, Georgia, Texas, and South Carolina—currently operate state-run home detention programs. Similar programs exist at the county level in several others. In total, 30 states are implementing some form of house arrest program, and a dozen more are planning programs to be implemented in the next year.²

This article summarizes the characteristics of house arrest programs and discusses their advantages and several important unresolved issues. It concludes by noting that probation's long-term survival may well depend on whether it succeeds in implementing house arrest and other intensive surveillance programs. If it can adapt its methods of supervision and service to deal with higher risk offenders in the community, probation may well find itself back in favor with the public and again the center of modern corrections policy.

Characteristics of House Arrest

While the goal of "house arrest" is easily understood—to restrict freedom—the mechanisms used to confine an offender to his home vary considerably. In some instances, curfews are simply added on to the offender's court-ordered parole or probation conditions.³ Typically, offenders participating in an intensive probation supervision program are required to be in their residence during the evening hours and on weekends. For example, evening curfews are mandatory for participants in Georgia's intensive probation program. While curfews permit individual freedom in the community except for particular hours, more direct home incarceration programs totally restrict the offenders freedom in all but court approved limited activities. The latter is much more intrusive than the former.

But even with the latter type of house arrest program, stringency varies considerably. House arrest programs without electronic equipment to monitor compliance tend to be less severe. These programs rely, for the most part, on probation officers' telephone calls and random home visits.⁴

² Rand conducted a small survey entitled "Innovations in Probation" which was completed by 120 chief probation officers in fall, 1985. These particular individuals were selected to represent a nationwide sample of chiefs from large counties. Follow-up telephone interviews were conducted with about 30 of these persons who reported operating particular innovative surveillance-oriented programs, including house arrest. In addition, the chiefs recommended others in parole or the private sector who operated similar programs. Complete results of this survey, sponsored by the Edna McConnell Clark Foundation, will be published in fall, 1986.

³ While house arrest could be used pretrial, our discussion is limited to its use for convicted felons, either as a condition of probation or parole, a direct sentence, or a condition of release after some period of incarceration (e.g., on work-release from jail).

⁴ Some counties are using nonprobation employees to monitor offenders. In Tulsa, Oklahoma, for example, the police are given weekly lists of all parolees on house arrest, their addresses, and curfew conditions. In addition, pictures of house arrestees are posted at the local police station. Police are encouraged to make random visits to the parolee's home and survey the offender's neighborhood to make certain offenders are in their residences. Other counties have used neighbors and community volunteers as "informants."

Some house arrest programs have begun to use computers to help monitor compliance. In New Jersey, for example, the telephone numbers of house arrest participants are programmed into an automatic telephone call-back system. The computer continues to call the offender until contact is made. Some telephonic systems even ask the offender a prerecorded question. If the individual is not there to answer the computer generated phone call, or fails to provide the correct answer to the question (verified by a probation officer), then a violation is recorded.

The most stringent of the house arrest programs are those using electronic monitoring devices. One form of the technology—popularly referred to as “active” monitoring—requires the probationer to wear a small transmitter. The transmitter emits a radio signal which is picked up by a receiver attached to the probationer’s telephone. During curfew hours, the computer automatically dials the offender’s phone at random intervals to determine whether the receiver is receiving a signal from the transmitter. If so, the computer assumes the probationer is at home. If not, the computer registers a potential curfew violation.

Another version of the technology uses a passive wrist band instead of a transmitter. In this case, a computer dials the probationer’s home during curfew hours, the probationer then inserts an identification bracelet worn on the wrist into a receiver attached to the phone, and the receiver sends a signal back to the computer. If the telephone is not answered, or the bracelet is not inserted into the receiver, the computer notes a potential violation.⁵

Who is Doing What?

The Rand “Innovations In Probation” survey revealed that about 28 states are operating formal intensive probation supervision (IPS) programs, of which house arrest is generally considered the most stringent type.⁶ Georgia’s IPS program is the oldest, begun in 1982, and our survey revealed that over half of the IPS programs nationwide report modeling themselves after Georgia’s program. Intensive supervision in Georgia mandates curfews and offender employment, community service, routine alcohol and drug testing, and two to five weekly staff/probationer contacts.⁷

⁵ For a more detailed discussion of electronic monitoring, see Charles Fyfe and Joseph Vaughn, “A Consumer’s Guide to the Electronic Surveillance of Probationers,” forthcoming, National Institute of Justice, U.S. Department of Justice, 1986; and “Monitoring Offenders at Work and at Home Through Electronics,” *NIJ Reports*, November 1983.

⁶ Nearly all states reported having intensive (or maximum) probation conditions. We distinguish here between operating a formal IPS program and simply placing select offenders in reposed conditions. The latter has been routine probation practice historically.

⁷ For a description of Georgia’s IPS, see Billie Erwin’s article in this issue of *Federal Probation*, entitled “Turning Up the Heat On Probationers in Georgia.”

As of this writing, several agencies are using active electronic monitoring. These include correctional agencies and private service corporations in Florida, Idaho, Kentucky, Michigan, New Jersey, Oregon, Utah, and Indiana. California and Virginia are planning to implement programs in summer, 1986.

All house arrest programs attempt to identify “low risk” prison-bound candidates. Some use formal screening devices (e.g., New York, Florida, New Jersey); others simply exclude defendants convicted of particular (usually violent) crimes. Some actively solicit the involvement of the community, whereas others hesitate about publicity for fear of community resistance. In most instances, offenders are charged a fee to cover some of the added expenses of house arrest, usually ranging from \$15 to \$200 a month, although in Oklahoma, no fee is collected. Most of these programs have been set up without formal legislation, although several states are attempting to develop a legal basis for house arrest (e.g., Kentucky, California, Maine). All house arrest programs stress surveillance and employment, and most require community service and victim restitution.

While these programs have received a great deal of media publicity, in actuality, house arrest has probably been used with less than 10,000 adult offenders nationwide. A large proportion of those participants have resided in Georgia, Florida, and Texas. Most of the participants have been property offenders, although Florida and Oklahoma admit offenders convicted of personal crimes. Persons convicted of “driving under the influence” are particularly favored house arrest targets, since keeping them at home, away from their cars, seems effective in forestalling their future crimes.

The Advantages of House Arrest

House Arrest is Potentially Cost Effective

While no definitive cost studies have been done of house arrest, it is thought to be highly cost effective. If the offender were truly prison bound, then the state would save not only the yearly cost of housing the offender (about \$10-15,000 per year), but also the pressure to construct new prison facilities (at about \$50,000 per bed).

If electronic monitoring equipment is used, house arrest is not as immediately cost effective. Because companies are trying to recoup some of the development costs, purchasing the initial equipment is currently quite expensive. For instance, Kentucky spent about \$30,000 to purchase 12 electronic monitors. A cost evaluation of the program after 6 months concluded that the electronic monitoring had cost the county \$10,000-\$20,000 more than it would have spent if the 23 persons monitored had been sent to jail instead. However, if the system is used for 12 persons for an entire year, the cost comparisons reverse, and the county would save about \$65,000.⁸ Most agree with the manufacturers that in the long run home incarceration will be less expensive than institutional incarceration.

⁸ “Home Incarceration with Electronic Monitoring in Kenton County, Kentucky,” A Preliminary Report, by Robert Lilly and Jennifer Wright, unpublished draft, 1986.

Evelyn—GPO657
920-434-57
P.O. 8
U.S. Courts(57-58)

Evelyn—GPO657
920-434-58
P.O. 8
U.S. Courts(58-59)

Using cost figures provided by some of those who completed our survey, we computed a rough comparison of costs per program type (see table 1).

TABLE 1.—ANNUAL COST OF HOUSE ARREST VS. ALTERNATIVE SENTENCES

Routine Probation	\$300—\$2,000
Intensive Probation	\$2,000—\$7,000
House Arrest (w/o electronics)	\$2,000—\$7,000
With Telephonic Call Back System	\$2,500—\$5,500
With Passive Electronic Monitoring	\$2,500—\$6,500
With Active Electronic Monitoring	\$4,500—\$8,500
Local Jail	\$8,000—\$12,000
Local Detention Center	\$5,000—\$15,000
State Prison	\$9,000—\$20,000

Not only are operating costs lower for house arrest than for jail or prison, but there are indirect cost savings as well. Offenders with families can contribute to their support, thus saving the state welfare costs the offender's family may have required. Most house arrest programs require the offender to be employed. Consequently, he continues to pay taxes and may be required to pay victim restitution and probation supervision fees as well. Georgia probationers paid \$650,000 in probation fees last year, which was enough to totally offset the cost of the intensive probation program. Florida reported collecting \$9.2 million in fees from its home detainees, although this was not enough to cover the costs of supervising them.

However, the figures in table 1 ignore an important cost component: the cost of reprocessing any recidivists. If house arrest participants are being rearrested and retried, then the system bears those reprocessing costs.⁹ Recent estimates show that it costs an average of \$2,500 to dispose of an arrest (Haynes and Larsen, 1984).

In short, we really don't have information to compute the full costs of various probation programs. At this point, all we know is that the cost of administering house arrest is less than confinement in either state or local facilities. But particularly with electronic monitoring, we must be skeptical of the claims supporting house arrest on the grounds that it is *much* less expensive.

A house arrest program in Contra Costa, California was cancelled, despite glowing reviews from all concerned, primarily because of expenses. After a 1-year trial, the house arrest program (without electronics) was deemed too expensive. "It turned out that it costs more to keep them in home detention than in jail," said Cecil Lendrum of the probation department. Jail overcrowding was not seriously relieved, and the sheriff's department was unable to reduce its staff. According to Rudy Webb, the program coordinator, the net cost to the county for 1 year of the program was \$95,000.

⁹ These operating costs also ignore the victim's cost, e.g., hospitalization, unemployment.

House Arrest Can Be Tailored to Meet Local Needs

One attraction of house arrest is its flexibility. It can be used as a sole sanction or part of a package of sentencing conditions. It can also be used at almost any point in the criminal justice process. It can also be used as a diversion before an offender experiences any jail time, after a short term in jail, after a prison term (usually joined with work release), or as a condition for probation or parole revocations. It can be used to cover particular times of the day or particular offender types. Because the offender is usually on some type of suspended sentence, he can be quickly revoked and sentenced to prison if he fails to meet the conditions of his participation. House arrest programs, for the most part, do not require legislative changes and can be set up with administrative memoranda. They usually include rather easy to communicate conditions, enhancing implementation ease.

House arrest also has potential applications for offenders with special needs, e.g., the terminally ill, mentally retarded, those with AIDS. Connecticut is exploring its use for pregnant women. Currently, when women come to jail or prison pregnant, the facilities must have special arrangements to assure the physical well-being of both mother and child. Depending on the level of risk involvement, such a woman might be released to her home or the home of a relative during pregnancy. This would likely result in cost savings, as well as provide a healthier atmosphere for mother and child.

House Arrest Minimizes the Social and Psychological Costs of Incarceration

Most believe that house arrest programs are "socially cost effective." House arrest can prevent the breakup of the offender's family and family networks, with its consequent psychological and physical disruption that may traumatize the offender's family as well as himself. And if the defendant had a job, he could keep it.

Furthermore, any "criminogenic effects" associated with prison would be avoided. This benefit is particularly attractive, especially for first offenders who may not have committed themselves to a life of crime. They would not learn from career criminals in prison, nor would they be physically assaulted. Most of those operating house arrest programs view this as an important advantage. While prisons are not designed to scar inmates psychologically, that is an unfortunate concomitant effect of most prisons today. As the New York house arrest guidelines noted:

Imprisonment returns a man to society with a scarred psyche, unpaid debts and financial losses, a highly disruptive if not irreparably broken family, children who lose respect for their parent, no job, and a gap in his life history that is hard to explain when he seeks a new job.

If we could devise a sentence that would not compromise public safety, and at the same time avoid such devastation, surely it would be preferable on this and other grounds as well. For example, prisons today are unable to provide extensive social and rehabilitative services. Offenders who remain in the community can be ordered (as a condition of their release) to undergo particular types of community based treatments. It is also probably true that rehabilitation taking place in the offender's own community has a higher probability of long-term success.

Unresolved Issues

Most people believe that house arrest is less intrusive and less expensive than prison and thus worth trying. Yet, there are concerns about this trend. Victims' advocates argue that placing convicted offenders back in the community, however stringent the conditions, trivializes the nature of their crimes. MADD—Mothers Against Drunk Driving—has been particularly critical of house arrest and sees such sentencing as a step backward in efforts to stiffen penalties for drunk drivers. (Drunk drivers are frequent house arrest participants.)

Probation officers are often critical because such programs focus on guarding people instead of helping them. Civil rights groups fear that the technology will be abused and that the private sector will begin selling the equipment to extend surveillance not only to convicted criminals, but to undesirables (e.g., persons with AIDS). And nearly everyone is concerned with the public safety issue—will offenders simply escape or use their homes as the base for criminal operations?

These and related issues discussed below are becoming important, as counties begin to consider the pros and cons of implementing house arrest programs.

Widening the Net of Social Control

Non-violent and low risk offenders are prime candidates for house arrest and are least likely to have been sentenced to prison in the first place. As judges become more familiar with house arrest, they may well use it for defendants who would normally have been sentenced to routine probation. Hence, a sentence originally intended to reduce prison crowding might instead "widen the net" of social control without reducing prison and jail populations appreciably.

Alvin Bronstein, head of the American Civil Liberties Union's National Prison Project, said: "We should be looking for ways to place fewer controls on minor offenders, not more. If these devices are used as alternatives to jail, then maybe there's no problem with them. If you're sending the same people to jail and putting people who otherwise would be on probation on them, it's a misuse. We're cautiously concerned."¹⁰

Alternatively, house arrest may be used as an "add on" to the sentence the judge would normally have imposed, thus lengthening the total time the offender is under criminal sanction. According to a probation officer who operates a house arrest program in Rock County, Illinois,

Probation could not convince the judges that home detention is a good program. It is being done, but it seems that judges are doubling the length of jail sentences imposed in order for offenders to put in the actual time the judge had wanted served in the first place.

¹⁰ As quoted in [Krelich, Kevin], "The Computer Age" in *Corrections Companion*, September 1983.

In the long run, "widening of the net" with house arrest programs is a realistic possibility. Research has shown that prison capacity drives prison commitments, as well as vice versa.¹¹ In other words, judges will sentence offenders to prison as long as capacity exists, and as capacity expands, so may prison commitments. If we begin to regard homes as potential prisons, capacity is, for all practical purposes, unlimited. Such possibilities have widespread social implications: who is to say how wide the "social net" would stretch.

But while we certainly don't want to "widen the net" irresponsibly, more intensive interventions may be necessary to curb the high recidivism rate of some felony probationers. In tracking 1,700 adults granted probation in California, Petersilia et al. (1985) found that two-thirds were rearrested in the 3 years following sentencing. Moreover, 75 percent of the official charges filed against those sampled involved burglary/theft, robbery, and other violent crimes—the crimes most threatening to public safety.¹² In searching for solutions to what is widely regarded as a serious problem—crimes committed by felons on probation—we recommended intensive supervision probation programs. House arrest is regarded as a form of intensive supervision.

Focusing Primarily on Offender Surveillance

Some worry that house arrest, particularly if coupled with electronics, will be the final blow to the "rehabilitation ideal." As probation officers focus more heavily on surveillance, rehabilitation-type activities are diminished. Most probation officers monitoring house arrest participants admit they have little time for counseling.

While it is true that counseling is reduced in most house arrest programs, employment or enrollment in school is often required. And, to my way of thinking, having a job or a high school diploma may do more to increase chances for a law abiding life.

Intrusiveness and Possible Illegality

Some people object outright to the state's presence in individuals' homes, long regarded as the one place where privacy is guaranteed and government intrusion severely restricted by law. If electronic devices are used, some fear we may be headed towards the type of society Orwell described in 1984. In 1984, citizens' conversations and movement were strictly monitored and used as a tool of government oppression. However, house arrest, with or without electronics, is quite different from the 1984 scenario. House arrest is used as a criminal sentence and only imposed on offenders after they have been legally convicted. It is imposed with full consent of the participant. It is intended to be used as an alternative to incarceration; and surely a prison call is more intrusive to the individual's privacy than even strict confinement to one's home.

¹¹ Carlson, Kenneth (ed.), *American Prisons and Jails*, Vol. II, National Institute of Justice, Washington, D.C., 1980.
¹² Joan Petersilia et al., *Granting Felons Probation: Public Risks and Alternatives*, The Rand Corporation, January 1985.

Evelyn—GPO657
920-434-63
P.O. 8
U.S. Courts (63-64)

Evelyn—GPO657
920-434-64
P.O. 8
U.S. Courts(64-65)

Turning Up the Heat on Probationers in Georgia

BY BILLIE S. ERWIN*

INTENSIVE is a relative term. Intensive probation supervision (IPS) applies the term in varying degrees. The basic idea behind intensive probation supervision, which is sweeping the country, is to increase the heat on probationers in order to satisfy the public demand for just punishment. Can prison-bound offenders be diverted into IPS without posing serious threat to public safety? That is the pivotal question. If the answer is yes, IPS can be said to satisfy two goals that have long appeared mutually contradictory: restraining the growth of prison populations (and budgets) through diversion, while satisfying the public's demand that criminals be punished for their misdeeds. Not surprisingly in these budget-conscious times, the IPS concept is gaining popularity. This article describes Georgia's IPS program and summarizes preliminary research that suggests that IPS is both safe and cost-effective.

Background of IPS in Georgia

Like other states, Georgia experienced explosive growth in prison admissions and sentence lengths during the 1970's. Despite massive funding for new facilities, prison population continued to outstrip capacity, resulting in gross overcrowding, huge backlogs of state inmates in local jails, Federal lawsuits, and terrible budgetary overruns. A "three governors during this period (Lester Maddox, Jimmy Carter, and George Busbee) described the chronic prison crises as the worst problem of their administrations, one that sapped their energy and soaked up money desperately needed for other worthy projects.

The judges tended to be very conservative: the per-capita incarceration rate in Georgia was then the highest in the country, higher even than in the Soviet Union or South Africa. Some judges expressed the feeling that it was their responsibility to impose sentences reflecting just punishment for crime, while overcrowding was the responsibility of the corrections department (which in Georgia oversees both prison and probation). As the crisis deepened, however, the judiciary became more sympathetic and began using regular probation for more serious offenders. In spite of the fact that more serious offenders were being placed on regular caseloads, the crisis in prison overcrowding continued unabated. An alternative was needed that could be used for a still more serious category of offender—that was as "punishing" as prison without being costly and without the undesirable side effects of forcing innocent families onto welfare or plunging lesser offenders into prisons full of hardened criminals. Georgia's Intensive Probation Supervision program emerged from this decade of crisis and frustration, conceived and formulated by probation staff with direct input from judges.

*Billie S. Erwin is on the staff of the Office of Research and Evaluation for the Georgia Department of Corrections and served as principal evaluator for the intensive probation supervision pilot. She was assisted in data analysis by Dr. Edward M. Beckner, assistant professor at Georgia State University.

Who Should Fund: State Reimbursement to Counties?

If offenders who would normally be serving time in state prisons are diverted to local communities to serve intensified probation sentences, who should bear the cost? The state saved a prison or jail bed and operating costs, which at a minimum are \$10,000 per year, per offender. But probation picked up an additional client who requires intensive, costly community supervision.

In states with centralized probation departments, reallocating a portion of the overall corrections budget to correct this imbalance is rather straightforward (although not necessarily easy to accomplish). But in many states, prisons are state funded and probation is county funded. Hence, a savings in the state level prison budget does not necessarily translate into an "add on" to the county level probation budget.

Shouldn't the state reimburse the county to offset some of the additional costs incurred? This is a central question, and if they don't address it, probation officials are likely to find themselves again in a no-win situation: responsible for supervising high risk felons with too few resources to do the job adequately. Recidivism rates will likely rise, and probation will again come under fire for its ineffectiveness.

Can Probation Itself Adapt?

In my opinion, the most important "unresolved issue" concerns whether probation itself can adapt to house arrest and other intensive surveillance programs. In moving from primarily rehabilitative to restrictive supervision, structural and organizational changes must inevitably follow.

Most dramatically, probation departments may need to shift from 8 a.m. to 5 p.m. organizations, closed on weekends, to 24-hour, 7-days-a-week services. Donald Cochran, Commissioner of Probation in Massachusetts, says 24-hour probation is just around the corner:

It is naive to assume that the more serious probationers can be effectively supervised on a 9-5 basis. Criminals don't work bankers' hours. Ironically, probation is the only component in the criminal justice system that has historically thought of itself as immune from 24-hour availability. The police, correctional officials, and recently judges are called upon for around-the-clock service... Why not probation? Essentially, the argument is that the activities and schedules of probation officers ought to more closely reflect the activities and schedules of those they presume to service and deter. (APPA Perspectives, fall 1986)

Furthermore, probation as an organization will need to staff and monitor surveillance programs differently. It will need new screening criteria, perhaps recruiting and training different types of personnel, devising guidelines for length of stay, and determining what response will be made to violators. In house arrest, the first violations will be with respect to curfew. How will probation choose to respond? These issues are not minor, and probation officials need to give them considerable forethought.

The next few years are critical for the survival of probation. With virtually every state facing severe prison crowding, probation continues to dominate contemporary corrections policy. Departments that can reorient their services to handling serious offenders outside of prison are likely to find themselves back in favor with the public and those who provide their funding. House arrest programs show promise in this regard.

NDG—GPO531
920-434-71
U.S. Courts(71-72)
P.O. 8

Jericho, National Moratorium on Prison Construction, Washington, D.C., Spring, 1981.

bpt.

Evelyn—GPO657
920-434-68
P.O. 8
U.S. COURTS

light face
(to match other
article titles)

House
Arrest

s/a

Donald

5

There have been no formal challenges to date concerning the legality of house arrest. But legal opinions written by officials in Utah and Florida argue that house arrest, with or without electronic monitoring, will withstand constitutional challenge as long as it was imposed to protect society and/or rehabilitate the offender and the conditions set forth are clear, reasonable, and constitutional.¹³

These officials believe it can be reasonably argued that house arrest is both protective of society and rehabilitating to the offender. And since offenders sign consent forms, it makes it difficult to argue that the conditions were not clear. "Reasonable" generally implies that the conditions are fair. If prison was the alternative, given that house arrest is less intrusive, it can therefore be justified as being fair. Further, house arrest as currently implemented does not appear to violate any constitutional guarantee.

Experts agree that the most plausible constitutional challenges pertain to the 4th and 14th amendments. The 4th amendment prohibits unreasonable search and seizures, and some question whether installation and subsequent monitoring by electronic transmitters constitutes an unreasonable "search." The 14th amendment guarantees equal protection under the law. If offenders are being required to pay a fee in order to be eligible for the program, and those who can't afford to pay are being denied probation or parole, house arrest may be liable to 14th amendment constitutional challenges.

Thus, while house arrest does not seem overly intrusive or threatening to constitutional rights, the situation needs to be closely monitored as the technology grows more sophisticated. Manufacturers of the electronic transmitters are already considering the potential of including home video and audio surveillance and remote-control testing of blood alcohol content. If these possibilities ever become reality, our assessment might change.

Race and Class Bias in Selecting Participants

Because house arrest programs are in the experimental stage, administrators are being extremely cautious in selecting participants. Most programs limit participation to offenders convicted of property crimes, with minor criminal records and no history of drug abuse. Such strict screening makes locating eligible offenders difficult, and those who are eligible tend to be disproportionately white collar offenders.

American Civil Liberties Union officials say the programs may discriminate against young, poor, and black people because to qualify for most house arrest programs, a person must be able to pay a "supervision fee," which runs about \$15 to \$50 a month. If electronic monitors are used, the fee is higher (about \$200 a month), and the offender must have a home and a telephone. Persons without these resources may have no alternative but prison.

¹³ For a complete review of legal issues, see Richard V. del Carmen and Joseph Vaughn, "Legal Issues in the Use of Electronic Surveillance in Probation," National Institute of Corrections, Washington, D.C., 1982 and "Legal Issues in the Use of Electronic Surveillance in Probation," *Federal Probation*, this issue.

As noted above, this situation raises possible "equal protection" issues as well as overall fairness concerns. Some programs have begun instituting sliding scale fee schedules, and a few others are providing telephones for offenders who don't now have them.

Compromising Public Safety

Some people seriously question whether house arrest programs adequately protect the public. Regardless of stringency, most admit that house arrest cannot guarantee that offenders will go "straight" and that it relies for the most part on the offender's willingness to comply. Can a criminal really be trusted to refrain from further crime if allowed to remain in his home? What is to stop him from simply using his home as a base of criminal operations, for example, drug deals, fraud, and prostitution?

To date, both the recidivism and escape rate for house arrest participants is quite low. Florida's Community Control Program reports a revocation rate of about 15 percent and an escape rate of less than 1 percent.¹⁴ While current statistics on recidivism and escapes don't cause particular alarm, the low rates are due in part to the fact that programs select the best risks. As house arrest becomes more widespread and incorporates other offender types, the public safety question might resurface.

Another caution bears mentioning. It is true that every house arrest program now operating attempts to select individuals with a low probability of recidivating. While that is reasonable in theory, predicting individual recidivism is difficult in practice. Research has shown time and again that the system's ability to successfully predict recidivism hovers around 70 percent accuracy—meaning that predictions for one in four offenders will be incorrect.¹⁵ While predictions are more accurate for low risk offenders, some of those predicted to succeed will undoubtedly fail. House arrest programs should not promise absolute success; they will undoubtedly fail to deliver.

Are We Guaranteeing Failures?

Some believe that despite good intentions, successfully completing a house arrest sentence may actually be tougher than serving a prison term. As Cecil Steppe, chief probation officer in San Diego, California noted: "In some ways house arrest can be tougher than being in jail. You come home and your kids beg you to go to the park or get some ice cream. You're not free to do that."

Everyone agrees that it takes a very disciplined person to act as his own warden. Given the impulsiveness of many offenders, expecting house arrest compliance over a long period of time may be unrealistic. While there have been some lengthy house arrest sentences, most have been for 6 months or less. Generally, offenders are trading 3 to 5 days at home for 1 in jail.

Setting expectations that offenders can reasonably meet seems important. Unrealistic conditions simply guarantee failure. The system will then have to reprocess and (perhaps) reincarcerate the recidivists, negating the cost savings associated with house arrest.

¹⁴ "Community Control Update," Florida Department of Corrections, May 1983.
¹⁵ Pomeroy et al., 1983.

Electronic

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

PROBATION OFFICE

JERONE A. SAVAGE
CHIEF PROBATION OFFICER

251 FEDERAL COURTHOUSE
1800 FIFTH AVENUE, NORTH
BIRMINGHAM, ALABAMA 35203
COM. (205) 731-1746
FTS 229-1746

POST OFFICE AND FEDERAL BUILDING
P. O. BOX 38, TALLADEGA 35160
COM. 362-3892

Birmingham

June 30, 1986

U. S. POST OFFICE AND COURTHOUSE
P. O. BOX 69, FLORENCE 35631
(205) 766-2566
FTS 229-0180

FEDERAL BUILDING AND COURTHOUSE
P. O. BOX 1097, GADSDEN 35902
COM. (205) 547-5722 - FTS 229-6950

FEDERAL BUILDING AND COURTHOUSE
P. O. BOX 2629, TUSCALOOSA 35403
COM. (205) 755-6621 - FTS 229-2927

P. O. BOX 368, HUNTSVILLE 35804
COM. (205) 534-2454 - FTS 871-1360

Mr. William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Ave., N.W. Suite 1400
Washington, D.C. 20004

Dear Mr. Wilkins:

The following is in response to your letter of June 17, 1986:

PROBATION

There should be intensive supervision for those who commit violent crimes, involved in selling drugs, sex offenders, drug and alcohol abusers, and second offenders who are involved in fraud. This supervision in many cases would follow a period of custody.

The intensive supervision should be in the form of frequent personal contacts, but equally important is collateral contacts with significant others. Special conditions limiting activities also should be imposed to fit the crime or the conduct that is to be prevented.

The Commission should establish some basic guidelines for offenses that should have intensive supervision with the court imposing special conditions on the recommendation of the probation officer.

The special condition of submitting to reasonable search by the probation officer should be included. The imposition of this condition should be based on the offense or background information contained in the presentence report.

FINES

Fines should be the sentence of choice in first offense misdemeanors and in embezzlement cases of less than \$5000.00 where restitution has been made. The alternative fines (18 USC 3623) and factors relating to imposition of fines (18 USC 3622) sets out adequately the things to be considered in imposing fines.

The sanctions in 18 USC 3621 is appropriate for failure to pay.

RESTITUTION

Restitution should be considered in all cases where there is a financial loss to any individual, group, business, organization, or agency. Also, restitution for compensation for physical and emotional harm and death should be considered.

The probation officer should, to the extent possible, resolve any disputes relative restitution prior to final sentencing. If there are unresolved elements, the probation officer should report to the court the areas of dispute and the attempts that have been made to resolve the controversy. The court should make a final determination through an appropriate hearing prior to sentencing so defendant can be aware of the maximum limits of punishment.

The making of the victim whole should be of primary concern in any sentencing. If the defendant is void of financial resources, in some cases services provided to the victim might be imposed to help compensate the victim. Also, moneys received from prison industries, during work release, or government checks received by the inmate might be payed to the victim.

COMMUNITY SERVICE

For community service to be effective the probation department will have to establish a list of basic agency resources. The agency and specific hours needs to be spelled out in the Judgment and Commitment. If possible, the service should be related to the crime. However, before this can be truly successful the issue of liability needs to be settled.

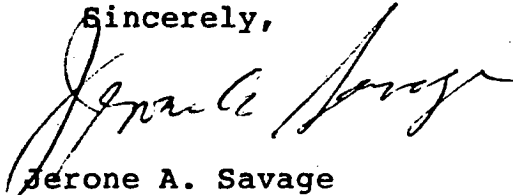
This type of special condition would have more impact on a white collar offender. It should not be used on violent and sex

offenders. Third party risk should always be a consideration. Also, present occupation can interfere with scheduling. For example a long distance truck driver who is away 60 to 80 hours a week.

HOUSE ARREST

House arrest may be appropriate in some unique situation. However, this type of sanction is very difficult to monitor and is subject to abuse. Nevertheless, this could be very cost effective when someone requires extensive medical treatment and the individual keeps the responsibility for their care.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jerone A. Savage".

Jerone A. Savage
Chief U.S. Probation Officer

JAS/jd

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
PROBATION OFFICE

JAMES A. FETZER
CHIEF PROBATION OFFICER
U.S. COURT HOUSE
ROOM 725
450 MAIN STREET
HARTFORD 06103
203-722-2649

June 26, 1986
New Haven

U.S. COURT HOUSE
P.O. BOX 1335
NEW HAVEN 06505
203-773-2100
U.S. COURT HOUSE
ROOM 429
915 LAFAYETTE BLVD
BRIDGEPORT 06604
203-579-5707

Honorable William L. Wilkins, Jr.
Chairman, U. S. Sentencing Commission
1331 Pennsylvania Avenue, N. W.
Washington, D. C. 20004

Dear Chairman Wilkins:

This letter is being sent to you with the belief that the Commission would appreciate input from the field.

In recent months, I have become involved in the area of community service as a sentencing alternative. I have been amazed at what a flexible sentencing tool community service is. If the court desires to punish a defendant, the community service order can be tailored to that end. If however, the court wishes to obtain a form of restitution to the community, the court can construct the judgment to that goal.

A condition of probation requiring community service can be imposed where the court might order financial restitution, but the defendant lacks the means to make restitution. It can be used in a borderline case where incarceration might be appropriate, but the court is reluctant to impose a prison sentence.

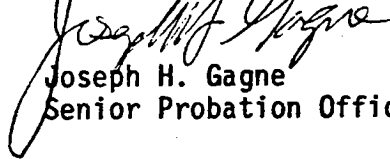
Community service is cost effective. A defendant remains in the community and supports himself and his family. He pays taxes and does his share to keep the economy going. The community also benefits by receiving service from the individual.

It would seem to be of great benefit to society if in all appropriate cases, community service were a standard condition of probation. I stress "appropriate" cases, because some individuals would not be acceptable individuals to perform community service. Included would be persons with active psychiatric or drug problems, and those with a history of violence. Any such condition should be flexible enough that it would not be automatically imposed in all situations, but only in all instances where the court/probation department felt the individual was an acceptable individual.

- 2 -

I appreciate the opportunity for this input, and would welcome sharing further discussion of this topic with the Commission.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Joseph H. Gagne", written over the typed name.

Joseph H. Gagne
Senior Probation Officer

JHG/r

CC: CUSPO Fetzner
Hartford, CT

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHAMBERS OF
HUGH H. BOWNES
JUDGE

FEDERAL BUILDING
85 PLEASANT STREET
CONCORD, N. H. 03301

June 30, 1986

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

Dear Judge Wilkins:

I am writing in reply to your letter of June 17.

Your probing questions deserve a lot more consideration and research than I have had the time to give them. With this caveat, I respond as follows.

Probation

I do not think a form of intensive supervised probation should be imposed on certain types of federal offenders. If a defendant is put on probation, I think that he ought to receive the type of supervision that is necessary based on his background, the type of crime, and the type of individual he is. I do not see how meaningful guidelines can be drafted to cover "intensive supervised probation." It seems to me that 18 U.S.C. § 3563(b) pretty well covers the entire gamut of probationary conditions. Instead of writing additional guidelines, I would suggest that more discretion be given to the sentencing judge.

Fines

I am sure there are certain crimes for which fines should be the preferred sanction, but I am not prepared to list them at this time. As a general rule, however, I think that fines should be restricted to corporate defendants. I do not consider a fine to be the same as restitution, which is an entirely different matter. My opinion is that, as far as deterrence and punishment is concerned, a fine is not nearly as effective as putting an individual behind bars.

June 30, 1986

Restitution

I think restitution should be seriously considered in crimes involving mail fraud, larceny, stock fraud, etc. - those types of crimes in which the victim has suffered an ascertainable loss of money. If the amount is ascertainable, then the amount of restitution can be determined without unduly complicating or prolonging sentence. Restitution could be effectively combined with imprisonment or community service if the defendant is wealthy enough to make the restitution. If he is not or the sum is so large that restitution is not possible, then I do not see how there can be any combination.

Community Service

I think the best approach to community service is to leave it largely to the discretion of the sentencing judge. I think that the type of offenders sentenced to community service should be restricted to those who act on firmly held beliefs of conscience. During the Vietnam War when I was sentencing draft evaders, if I felt that such a person had acted out of conscientiously held beliefs rather than an attempt to avoid serving in the Army, I gave him a choice of working in a hospital for two or three years or imprisonment. Most, of course, took the hospital service option. The types of offenders for whom community service will not serve the goals of such sentencing are those who have committed crimes of violence, greed, and passion - most of the criminal offenders.

House Arrest

This may in certain restricted cases be a viable alternative to incarceration. I think house arrest could well be combined with a community service sentence. This should be an option within the discretion of the district court.

Sincerely,



HUGH H. BOWNES

United States Circuit Judge

CLEARY & SEVILLA

JOHN J. CLEARY
CHARLES M. SEVILLA

ATTORNEYS AT LAW
1010 SECOND AVENUE, SUITE 1601
SAN DIEGO, CALIFORNIA 92101-4906

TELEPHONE
(619) 232-2222

30 June 1986

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

Re: Alternative to Confinement

Dear Judge Wilkins:

Thank you for your letter dated 17 June 1986 concerning the various options for the federal trial judge in determining the appropriate sentence for any individual offender. Although a structure which will provide uniform sentencing is desirable, it must also recognize the goal of individualizing the sentence. To this end, I strongly urge that you provide federal trial judges with reasonable discretion within the statutory frame work.

Our experience in the California state courts has been difficult: one of the few saving features of the 1976 Determinate Sentence Law was that it continued discretion to judges in the grant of probation. The federal approach would now seem to adopt the California approach. Given that orientation, I hope the U.S. Sentencing Commission will focus on a structured approach on commitments to prison (i.e., in excess of one year) and provide judges the maximum range of discretion on those offenses for which probation would be available.

Probation

Probation should be provided on the basis now available. It would be horrendous if the new "reform" system provided a "back-handed" approach to accelerated and increased confinement. The Senate consensus was that there should be consideration of the existing rates of probation now, so that there would be no radical change in the denial of probation causing an increase in our over-taxed prison facilities.

To adapt a phrase from the U.S. Supreme Court, I would suggest that there be a "cost-benefit" analysis of the use of intensive supervised probation. An argument could be made that

William W. Wilkins, Jr.
30 June 1986
Page Two

the alcoholic who passes bad checks or the shoplifter on a military reservation could be subjected to intensive probation supervision, but in many cases this would be a waste of federal funds.

Rather than create an intensive supervision unit that would Balkanize the already divided resources of local probation offices, the scheme of probation supervision should be adaptable to the individual. Monthly reports seem to be the standard technique now with occasional visits in many cases. Perhaps this is appropriate in the majority of instances.

Something more should be required for those who have committed a very serious or violent offense. In addition to "supervision" there should be some official assistance so that the individual will not be propelled back into the circumstances in which he committed the offense.

In a borderline case where the court has reservations about the grant of probation, the court should have the discretion to structure more intensive requirements (i.e., weekly contacts with the probation officer, daily phone calls, weekly visits by the probation officer to place of residence or work, drug tests, etc.). The intensive probation program should not be for those who are on parole, as we often have this in "mixed sentences" where the court imposes a term of confinement on one count and followed by a term of probation. This means the prisoner will be on parole and probation at the same time. That is an unnecessary use of probation (in California it is illegal to impose probation after a term of confinement because it is inconsistent with the purposes of probation and parole). It is a clear duplication of federal services.

The probation conditions now listed are so extensive, I would not see the advantage of listing other novel conditions. More importantly, the program should be structured to carry out the existing conditions in an effective and efficient fashion. Many of the probation offices are overloaded with cases and too ill-funded to provide even the simplest types of control. If the defendant needs psychiatric counseling, for example, the local probation officer should be funded to provide psychiatric care for those who cannot afford it (this is probably very prevalent among those convicted of the offense of threatening the President).

Before structuring regulations, I would urge a survey and evaluation of the resources available within the federal

William W. Wilkins, Jr.
30 June 1986
Page Three

probation system. Also, I cannot emphasize and repeat often enough that you should survey the type of federal offenses and gear your techniques of probation to that category of offense.

Fines

Fines have traditionally been imposed where there is little or no incarceration. The fine option should be maintained, but the U.S. Sentencing Commission has a serious responsibility to see that the enormous fine maximums are tailored to the wrongs done. There should be some type of review to insure proportionality of any fine to a particular offense. Approximately 70 percent of those charged with federal crimes are financially unable to employ counsel, and they receive the services of a federal defender or appointed attorney under the Criminal Justice Act (18 U.S.C. 3006A).

For those without funds, it would be a useless gesture to impose a fine, and it could be very counter-productive in seeing the individual become financially self-sufficient. Again I would suggest a survey of the fines now imposed as a general guideline of information for the imposition of such fines. I would be slow to recommend regulations which would interfere with the trial judge's discretion in this matter. However, I have some ideas as guidelines.

If the offender has counsel appointed under the Criminal Justice Act there should be a regulatory presumption that the individual does not "have the ability to pay." If the defendant has the funds for counsel, the court may direct such payment by the defendant. (18 U.S.C. 3006A(f).) The court now has to imposed the mandatory penalty assessment which, at \$50, is too much for the poor Mexican charged with an immigration violation.

The machinery on fines has not yet been fully refined, but I think a great deal of relief could be provided if a certain category of cases were excluded presumptively from fines. This might ease the administrative burden of collecting fines in those cases where they are appropriate.

Many of those who are now subject to fines would have to litigate their "ability to pay" in either civil or criminal proceedings, which is a counter-productive use of our limited judicial resources. I would urge an administrative mechanism similar to that used by the Bureau of Prisons for those charged with fines that would permit offenders to establish their inabil-

William W. Wilkins, Jr.
30 June 1986
Page Four

ity to pay and thereby offset the mandatory statutory enforcement or in the alternative be a basis for asking the court to re-evaluate the imposition of the fine. This may cause a problem after the 120 days runs on Rule 35.

Restitution

Restitution should have priority over any fine. In addition to a determination of a specific loss related to the offense there should be some general guidance that if the cause of the loss or the amount of the loss is beyond efficient determination, then the limited resources of the court should not be exhausted in satisfying what might otherwise be the basis for civil litigation. If the loss is easily recognized, then the court can make it a requirement to be combined with probation and short terms of confinement. Protracted confinement usually precludes effective restitution enforcement.

If the individual has no assets or they are limited to support his or her family, then community service should be preferred if it would permit the individual to maintain or obtain employment. Restitution should be highly favored by the regulations, and should even take priority over the need for confinement save in serious and violent offenses.

Community Service

For the U.S. Sentencing Commission to devise regulations on community service is a classic example of putting the cart before the horse. You should sit down and talk to the Bureau of Prisons to determine the type of facilities that are now used and the available appropriations. The Gramm-Rudman legislation has seriously curtailed the use of community services by the Bureau of Prisons. Many contractors have lost their contracts with the Government to operate these essential and vital alternatives to confinement.

As a goal, 50 percent of all federal inmates should be in community treatment facilities. This is not an unreasonable expectation given the number that are already in federal prison camps (Level 1 security -- lowest level). The principle resistance has been from communities which do not want these facilities.

Again, I would strongly urge that a survey be done of the facilities operated by the Bureau of Prisons to get some insight as to those which are effective. Community Service

William W. Wilkins, Jr.
30 June 1986
Page Five

needs to be substantially expanded, but not at the cost of taking those who would otherwise receive probation and placing them into "token confinement." It provides effective supervision and in a sense is a form of "intensive probation supervision."

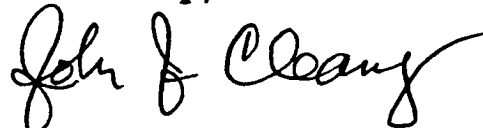
House Arrest

This alternative to incarceration is being explored by many local and state jurisdictions. The federal government could learn much from the experiment, and some innovative federal judges have already used it. It is very applicable in the case of mothers with children, invalids, those with serious medical problems, the elderly and others. The difficulty is in insuring that there is a form of "deterrence" attached to this "loss of liberty." The public would not take lightly the advantage of a corporate official living in a palatial estate while under "house arrest." The military has used this mechanism for many years, and much could be learned from their use of it.

The U.S. Sentencing Commission is in a unique position to reformulate the direction of our federal correctional system. Before it can go forward, it has to know what exists today and what was previously tried. It is also very important to identify the class of federal offenders in determining the rules and regulations that you will propose.

Thank you for the opportunity to comment.

Sincerely,



JOHN J. CLEARY
Attorney at Law

JJC:dd



UNIVERSITY OF MINNESOTA
TWIN CITIES

School of Social Work
400 Ford Hall
224 Church Street S.E.
Minneapolis, Minnesota 55455

(612) 624-1367

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, reading "Burt Galaway".

BURT GALAWAY
Director of Graduate Studies

lh

Enclosure

L8-12



UNIVERSITY OF MINNESOTA
TWIN CITIES

School of Social Work
400 Ford Hall
224 Church Street S.E.
Minneapolis, Minnesota 55455

(612) 624-1367

TO: United States Sentencing Commission

FROM: Burt Galaway, Ph.D.
University of Minnesota
400 Ford Hall
224 Church Street S. E.
Minneapolis, Minnesota 55455
(612) 624-1367

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.

ATTACHMENTS:

Galaway, Burt (1986). Implementing a penal-corrective process with juvenile penal-corrective process with juvenile burglary offenders and their victims. Paper prepared for the Second World Congress for Victimology, Orlando, Florida, July 1986.

Galaway, Burt (1985). Victim participation in the Penal-Corrective Process
Victimology: An International Journal 10:1-4, C17-C30.

Hudson, Joe, Galaway, Burt, and Novack, Steve (1980). Chapter VIII: Towards a
model monetary restitution project, Natural Assessment of Adult Restitution
Programs First Report. School of Social Development, University of
Minnesota, Duluth.

Galaway (1977). Is restitution practical? Federal Probation 41:3, 3-8

lh

07.02.86

BG8: MEM08

PLEASE NOTE:

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

Thanks.
Cathy

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
TULSA 74101
918-581-7187
FTS-745-7187

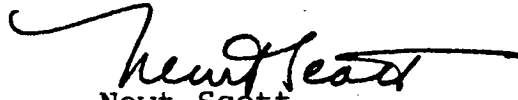
The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue, N. W.
Suite 1400
Washington, D. C. 20004

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

PLEASE REPLY TO:
C-122 U. S. COURT HOUSE
DENVER 80294
303-844-4155

P. O. BOX 3066
HIGH MAR STATION
BOULDER 80307
303-487-5371

HARRIS BUILDING, SUITE 201
115 EAST VERMIJO STREET
COLORADO SPRINGS 80903
303-635-3334

P. O. BOX 3508
GRAND JUNCTION 81501
303-245-5396

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

The Honorable William W. Wilkins, Jr.
July 3, 1986
Page 2

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

The Honorable William W. Wilkins, Jr.
July 3, 1986
Page 3

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

The Honorable William W. Wilkins, Jr.
July 3, 1986
Page 4

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 Honorable William W. Wilkins, Jr.
July 3, 1986
Page 5

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.

The Honorable William W. Wilkins, Jr.
July 3, 1986
Page 6

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

The Honorable William W. Wilkins, Jr.
July 3, 1986
Page 7

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.

The Honorable William W. Wilkins, Jr.
July 3, 1986
Page 8

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

NATIONAL LEGAL SERVICES, INC.

*Providing Special Assistance on
Sentencing Alternatives and Parole Representation*

Central Office:

710 Lake View Avenue, NE
Atlanta, Georgia 30308
(404) 874-9553
1-800-241-0095

Jay L. Shein

Sentencing Investigator,
Florida Office

Jana Jopson, M.S.

Research and Development

Florida Office:

941 N.E. 19th Avenue, Suite 209
Ft. Lauderdale, Florida 33304
(305) 764-6970

Marcia G. Shein, M.S.

President
Sentencing and Parole Consultant

Barbara A. Taylor, M.A.

Vice President
Sentencing and Parole Consultant

Debbie A. Turner

Sentencing and Parole Consultant

July 8, 1986

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

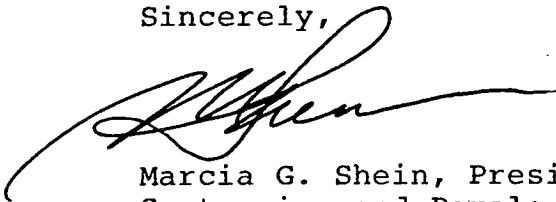
Dear Chairman Wilkins:

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



THE PRINCE GEORGE'S COUNTY GOVERNMENT

Department of Corrections
County Detention Center
5310 Douglass Street
Upper Marlboro, Maryland 20772

July 8, 1986

Mr. William W. Wilkins, Jr.
Chairman
U.S. Sentencing Commission
1331 Pennsylvania Avenue, NW
Washington, D.C. 20004

Dear Mr. Wilkins:

Enclosed is a copy of the policy statement of the Prince George's County Department of Corrections. My testimony will be in accordance with this policy statement.

In addition, I will speak on our specific implementation and provide a demonstration of the equipment used by our organization.

Sincerely,

A handwritten signature in black ink, appearing to read "S.F. Saxton".

Samuel F. Saxton
Director

SFS/jh
enclosure

PRINCE GEORGE'S COUNTY
DEPARTMENT OF CORRECTIONS
HOME DETENTION PROGRAM

I. INTRODUCTION

Within the past several years, overcrowding in jails and prisons has become a nationwide problem. Many jurisdictions, including our own have been or are under court order or consent decree to reduce their inmate population. To alleviate the problem of overcrowding and to promote public safety, many jurisdictions have implemented a Home Detention Program for adult offenders.

Home Detention is a program which allows the offender to remain at home at prescribed times under close supervision. Offenders may hold a regular job but must be at home during their leisure hours unless excused by responsible authority for good cause.

The original idea of Home Detention was first used by the military several years ago. They used the concept, known as House Arrest, as a form of punishment following an infraction of regulations. The idea later evolved into Home Detention and was initially used by several judges sitting in juvenile court to restrict the freedom of youthful offenders.

If we examine the four basic goals of corrections, (a) incarceration/incapacitation,, (b) rehabilitation, (c) deterrence and (d) punishment/retribution, we see that they can easily be applied to the Home Detention Program. For example, our Home

Detention Program will place strict controls on the individual's freedom. Having come to take our freedom of movement for granted, this alone constitutes a major form of punishment.

As a participant in Home Detention, the offender will be required to be at his home at all times unless granted permission to leave. These approved absences have been closely scrutinized and are usually limited to going to and from work, seeking medical treatment or attending religious programs.

In addition to the above described restrictions, there are others which involve a loss of freedom in one's own home. The offender, for example, is prohibited from using alcohol or drugs. Also, visitors are not allowed to come to the home unless permission has been granted. The individual must also agree to the use of electronic monitoring devices which are used as both a positive form of identification and to ensure that the offender remains at home during prescribed hours. Such controls over a person's liberty and freedom of movement alone represents a significant form of punishment.

Incapacitation of the offender, perhaps the major goal of corrections is a key component of the Home Detention concept. In complying with the requirements of the Home Detention Program, the individuals are accountable for their time both inside and outside of the home. They also know that if they violate the rules that they will be returned to jail immediately.

By allowing participants to remain employed, the Home Detention Program fulfills the need to punish while recognizing the importance of allowing the offender to maintain family ties. Also

by limiting the participant's movement, it makes it more difficult to maintain contacts with significant others who may have exercised a negative influence on them.

A long held belief by law enforcement experts is that the most effective long range deterrent to crime is sure, swift, decisive action on the part of the Criminal Justice System. In that regard, the Home Detention Program accomplishes that end in two ways: (a) it is a swift, meaningful form of punishment; and (b) a violation of the rules of the program will result in immediate incarceration. Home Detention has been utilized as an effective population management tool in several states, such as California, New York, Florida, Utah and Washington State. Although the programs in these jurisdictions may vary in methodology and program criteria, all have experienced the same positive outcome. The available information indicates that over 85% of those placed on Home Detention Programs have not re-entered the prison system. Of course, we must realize that this concept is new and that many other variables come into play. However, it is extremely unlikely that the 75-85% recidivist rates attributable to most prison or jail systems will ever be reached.

The Home Detention concept gives individuals desiring a new lifestyle an opportunity to change. As in any new program, there will be those who volunteer to participate in hopes of gaining an early release. However effective screening by trained investigators coupled with the expeditious handling by the courts of those who fail to conform to the rules will reinforce the message

that only those truly committed to the Home Detention concept need apply.

II. BENEFITS OF PROGRAM

The public must be aware that most persons who enter a jail or prison will someday leave the facility to re-enter society. All of the information available shows that those who leave prison will return to prison in 75-85% of the cases. If the offender leaves the confinement setting without a positive behavioral change having taken place, it is very likely that the individual will again come in contact with the law. On the other hand, Home Detention allows the individual to re-enter society in an atmosphere where family unity and positive support systems have not been interrupted.

Currently, the cost of maintaining a person in the County Detention Center is \$44.00 per day. Under a closely monitored home detention program, the total cost of maintaining an individual could be reduced to as low as \$10 to \$15 per day. This cost could be reduced even more if we began a process of levying a fee on each individual to cover the cost of supervision. This fee could be based on the offender's ability to pay and made a part of the program agreement. The alternative would be the construction of additional beds and hiring of a greater complement of personnel.

In addition to the deferral of supervisory costs, the Home Detention Program provides the following ancillary benefits:

1. The individual can maintain employment and continue to provide support for his family. This is obviously more desirable

than having to place the family on public assistance.

2. The family unit remains together.

3. The Program is designed to assist the unemployed offender obtain employment.

4. The number of inmates sent to State Penal Institutions is reduced.

5. The negative impact of confinement is reduced because the offender is not subjected to the negative peer group pressures present in penal institutions. The individual has voluntarily chosen the Home Detention Program and should therefore be motivated to succeed. They are well aware of the consequences of failure.

6. The individual is free to focus on home and family matters, since he is confined to that location.

7. The offender can be held accountable for making restitution to their victims.

8. The burden on the Public Defender's Office could be lessened. That individual is responsible for obtaining their own attorney.

Eligibility

It is the expressed opinion of those who have experimented with the Home Detention Program that the prognosis for persons with alcohol or drug dependencies is not favorable. The overwhelming evidence seems to support the premise that these individuals lack the restraint needed to succeed in such a controlled environment. Mandatory screening for drugs and/or alcohol will be a program requirement. Additionally, another group which

should be excluded at least from initial participation are those who have committed violent crimes against persons. They may, following careful evaluation and intensive supervision, be proper candidates for early release into the program. Exposure to the program at this time would place the individual in an atmosphere where his personal and family support systems could be re-established as the offender is slowly accomplishing community reintegration.

The first-time sentenced offender would be an excellent candidate for the program. He could be sentenced to the Department of Corrections for an initial period of time, then with Judicial approval be removed from the facility and placed in Home Detention until expiration of his sentence. For example, certain Ohio jurisdictions have used a system of "shock incarceration" followed by removal and probation. The individual is sentenced to one (1) year, brought into jail staying 5-30 days and is brought back to Court and placed on probation. This type individual would be an excellent candidate for Home Detention because he will have "tasted the medicine," but not yet built an immunity to it. In other words, the first offender was not incarcerated long enough to be negatively affected by his experience and if returned to a supportive, caring atmosphere, the prognosis for rehabilitation remained good.

For the Pre-Trial status individual, the Home Detention Program has its greatest potential for providing an alternative to incarceration while at the same time providing for the safety and security of the public. The offender in Pre-Trial status presents

a different situation from the sentenced individual. That individual, though not yet convicted of crime would be a part of the program which would affect certain freedoms which we all take for granted. For example, the Judge could release him with the condition that he not leave his home during certain hours. In order to avoid a possible legal issue concerning punishment prior to conviction, the Program should be made available to those on Pre-Trial status on a voluntarily basis only. A person who volunteers for such a program will be made fully aware that a violation will return him to the institution. Therefore, through informed consent, the individual will be aware that an immediate loss of freedom will occur if he violated his release conditions. This differs significantly from the individual who takes a chance on committing a crime in the following ways: (a) before a offender can be sent to jail the crime must be reported, some are not; (b) they must have probable cause to believe that the offender committed the crime; (c) the offender must be brought to Court, stand trial, and be found guilty. Even if he is found guilty, he could get probation or some diversion program. It is easy to see why some offenders play the probability game when they contemplate committing a crime. On the other hand, in a Pre-Trial situation the individual is made to understand that if he violates a condition of release, immediate incarceration occurs until at least the time of trial. The Home Detention Program because of the voluntary nature of the program offers a great deal more flexibility than the unstructured bond release featuring no follow up supervision.

In some cases, the Judge may consider Pre-Trial compliance of an individual as evidence that the Home Detention would be a viable alternative to incarceration in conjunction with a suspended jail sentence.

From a legal and Corrections viewpoint, an individual should not be placed on Home Detention unless the normal disposition would be incarceration. For example, if a person would have been sentenced to probation under previous standards, the same should hold true. If, on the other hand, the sentence would have been jail, Home Detention may be an appropriate sentence. It should be recalled that this is a very severe form of punishment. Home Detention involves both the loss of personal freedom and the need on the part of the offender to avoid temptations not associated with jail. A person in jail, for example, does not have the opportunity to choose between walking off or having a drink of alcohol. The individual in Home Detention faces those choices every day.

We realize that Home Detention is not a panacea which will work for everyone or solve all of our problems. It can, however, be an effective tool which gives the motivated individual an opportunity to modify his behavior. If properly used, Home Detention can be an effective, viable tool of significant value in population management efforts. Furthermore, offender rehabilitation as well as reimbursement to the victim of property crimes are also possibly by-products of this Program.

Supervision

There are several Home Detention Programs throughout the

country. The type of controls and equipment are varied, however, for a program to be effective both in the rehabilitation aspect and cost effectiveness, graduated levels of supervision must be built in.

The Department of Corrections currently has an effective program for persons awaiting trial in the District Court. This program, which represents the first level of supervision, involves an initial interview, extensive criminal background checks and verification of community ties. For example, if a candidate has community ties and is likely to appear in Court, the Department's Pre-Trial Release Unit supervises the individual to ensure that Court imposed special conditions are being honored. As part of the community supervision efforts, the Department maintains continuous communication with the individual reminding the client of upcoming court dates and reinforcing the consequence of failing to appear.

The second level would include closer supervision of the individual. On this level, the individual would be required per the Court to stay at home during specified hours of the day or night. The Court Liaison Division of the Department would then, in addition to interviewing and verifying information about the individual, fit him with a specially designed wristlet. The wristlet along with the accompanying verifier box is utilized in the following manner: When an individual is fitted with the wristlet, his telephone number and hours of Home Detention are programmed into a computer terminal. A member of the Court Liaison Division will transport the individual and the verifier

box to the subject's home. Division personnel will attach the verifier to the subject's telephone and test the equipment by notifying the Division's computer. Once the equipment is properly installed and tested, the computer randomly calls the individual's home to verify his presence at the prescribed times. The individual's voice is placed on tape while the wristlet, which must be put into the verifier, completes the verification/identification process. The information in reference to the call is recorded in the memory of the computer and printed for review by staff personnel. The hardcopy print-out will chronologically list all client information. The hardcopy immediately documents for immediate staff follow up if: (a) the individual does not answer, (b) the line is busy, (c) the subject does not put the wristlet in the verifier or (d) the telephone is malfunctioning.

The third level of supervision will require random visits by specially trained staff investigators to the person's home or to any permitted outside activity. These visits will be made without notice. The visits to places other than home will be conducted when the Court imposed restrictions only allow for home absences to attend certain activities. For example, if a person was supposed to be at home unless he was working, he could verify that he was at work.

The fourth level of supervision involves more sophisticated electronic equipment. For example, the person would be fitted with an ankle or bracelet transmitter. A receiver would be attached to his home telephone. Next, a distance from the tele-

phone would be programmed into the receiver, usually 50-200 feet. The office computer would be programmed to call the receiver and obtain information from it. The receiver in this system would call the office computer if the individual tampered with, unplugged or left at an unscheduled time. If a violation occurs, a special investigator could immediately be dispatched to the scene to investigate. Random personal home and excused absence visits could also be made on this level.

These four levels of supervision will give judges a viable tool to utilize in both Pre-Trial and convicted status cases. For the convicted offender, it would be used as a punishment for those requiring punishment but who do not fit the criteria for probation or a lengthy imprisonment.

In summary, these levels provide a means of punishing those who commit crime by restricting their movement while at the same time relieving the public of the cost of incarceration and in many cases public assistance for the offender's family. Finally, the closer the scrutiny of the offender's movement within the community the less likely they will commit other offenses.

**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.

ROBERT D. LIPSCHER
Administrative Office of the Courts

HARVEY M. GOLDSTEIN
Assistant Director for Probation



PRESENTATION ON THE NEW JERSEY
INTENSIVE SUPERVISION PROGRAM
BEFORE THE UNITED STATES
SENTENCING COMMISSION

July 15, 1986

TABLE OF CONTENTS

A. Introduction	1
B. Overview	1
C. History	2
D. Philosophy	4
E. Process	5
F. Goals and Objectives	7
G. Programmatic Aspects	8
H. Summary Results	12
I. Conclusion	14

APPENDICES

- Appendix A - Sample ISP Assessment Report
- Appendix B - Electronic Surveillance Experiment
- Appendix C - Media Series
- Appendix D - ISP Special Recognition Reports

A. Introduction

The search for intermediate sanctions, less than incarceration but more than traditional probation, that combine appropriate elements of punishment, retribution, control and rehabilitation has been spurred over the past decade by prison crowding and attendant construction and maintenance costs. In 1979, New Jersey passed a new Code of Criminal Justice which provided for increased terms of incarceration, a presumption of imprisonment for selected offenders, and periods of mandatory parole ineligibility at the discretion of the sentencing judge. Both prison and jail capacity figures began reflecting the increased number of inmates. Notwithstanding the construction of new prison space and the leasing of the Fort Dix stockade, the numbers of prisoners rose during the last seven years to approximately 135% of capacity.

Meanwhile, under the leadership of the new Chief Justice of the New Jersey Supreme Court, a major year long effort to redirect probation began. This Judicial Conference on Probation was assisted by an advisory group of citizens in each of our judicial districts. One component of this undertaking was directed at developing an intermediate punishment sanction for selected non-violent offenders --- the Intensive Supervision Program. ISP was immediately supported by the Governor and the Legislature as a part of the statewide program to assist in alleviating prison crowding.

The pages that follow describe the program that has operated since June 1983. ISP has been subject to an NIJ-funded evaluation by the Institute of Criminological Research at Rutgers University. Their final report is expected in January 1987.

B. Overview

The Intensive Supervision Program, a program of conditional release from custody for a select group of prison inmates, was designed in response to the prison overcrowding crisis. It is based on the premise that there presently are a limited number of incarcerated individuals who, if given a highly structured environment, can be released to the community with minimal risk to the public.

The program requires that each released inmate make a significant personal investment in the program. Superficial compliance with externally imposed conditions is not sufficient. Applicants must dedicate themselves to earning the privilege of entering and remaining in the program by continuous adherence to a series of short-term goals and

conformance with the responsibilities which society imposes, such as employment and support of one's dependents.

As developed, the program is open to male and female inmates serving state prison sentences for non-violent offenses, whose participation in the program will not be repugnant to public sensibilities, and for whom there is a reasonable probability of success. Application for admission to the program can be made only after the individual has served a minimum of 30 days in custody and must be made no later than 60 days after the execution of sentence. To be eligible for the ISP program, an applicant must develop a personal plan which will govern his activities upon release. The plan must include provisions for such diverse activities as living accommodations, meeting financial obligations and such special needs as the applicant and the ISP Screening Board have determined are appropriate, for example, drug counselling, vocational education or restitution. The plan must include a series of realistic and relevant goals against which the viability of the applicant's admission and continuation in the program will be assessed.

Each applicant must obtain a Community Sponsor who will be responsible for the applicant's actions while in the community. Such support will be necessary for the applicant's entry and continuation in the program. The program is demanding. It is intended to be. It is an intermediate form of punishment, less onerous than incarceration but much more restrictive than standard probation supervision. There will be continuous monitoring to ensure that the applicant is meeting goals and that compliance with generally accepted standards of behavior is absolute. Failure will result in immediate reincarceration.

The goal of the program is to identify those inmates who are sincerely motivated to change past anti-social behavior and give them the support necessary to enable them to structure their lives to develop attitudes, habits and skills which will provide them with a reasonable opportunity to avoid further criminal activity.

C. History

A comprehensive plan to improve, update and consolidate probation services and to make them more responsive to current needs was presented at the 1982 Judicial Conference. The plan was the work of representatives of the Judiciary, probation staff, the bar, academicians, social service agency personnel, business leaders and the public.

Among the major conference recommendations was to establish a classification system whereby each case could be

analyzed to determine the appropriate level of supervision.¹ Also recommended was the establishment of a state-level program of intensive supervision for a select group of inmates currently incarcerated in the state correctional system. The Conference developed stringent criteria for admission to the proposed program and developed a meticulous screening procedure so that only appropriate inmates would be accepted and the public would be adequately protected. The Conference suggested a target of 375 to 500 program participants.

Simultaneously with the Probation Conference planning effort, members of the Executive Branch were charged by the Governor with the development of a plan to address the problems resulting from the rapidly burgeoning inmate population in both the state and county correctional systems. Largely as a result of the enactment of the Code of Criminal Justice with its longer sentences, mandatory sentences and parole ineligibility terms, the populations of the state and county facilities have increased dramatically. The state system presently houses 2,000 inmates in excess of its designed capacity, putting it at 130% of capacity. During the first quarter of 1983, the county system has housed, on an average, in excess of 140% of its rated capacity. As a result of litigation, the State Department of Corrections has been ordered to accept state sentenced inmates from several counties by specified dates. Additional litigation is expected to result in more inmates being transferred from county to state facilities.

At the urging of the Administrative Office, the Executive Branch planning group included within its report² the recommendation for an intensive supervision program. It was noted that, in addition to removing up to 500 inmates from the state prison system, such a program would result in substantial savings. The average annual cost to maintain a state prison inmate is \$15,000. Intensive Supervision can be provided at an estimated cost of less than \$6,000 per inmate, including funds for vocational training and other purchases of service programming for participants.

The Legislature concurred in the viability and advantages of the program and it appropriated \$1 million to the Administrative Office of the Courts, effective January 3, 1983, to develop and implement an Intensive Supervision Program.

-
- 1 1982 Judicial Conference Planning Committee Final Report at 85.
 - 2 Prison Overcrowding, A Plan of Action, 1982.

To develop the program and guide it after implementation, an ISP Advisory Board was appointed. Chaired by Judge John A. Marzulli, the board is composed of representatives of the bench, the Governor, probation services, Attorney General, Public Advocate, Parole Board, Department of Corrections, prosecutors, public defenders, academicians, public and private employment services, and the public. The advisory board prepared a detailed program plan for the Court's review and approval.

D. Philosophy

The Intensive Supervision Program is an intermediate form of punishment. Available only after an inmate has served 60 days of actual incarceration, the program offers a choice to a select group of inmates: prison or return to society in a tightly monitored and structured setting. It is a realistic and unique form of punishment, designed around a concept of social control within the community. It offers program participants an opportunity to learn the attitudes, habits and skills which will provide them with a reasonable opportunity to avoid further criminal activity and to earn their freedom by continuously demonstrating over time a successful adjustment to acceptable community standards and mores.

The program emphasizes self-motivation. To succeed, each program participant must make a significant personal investment. He must want to change his behavior and he must believe that he can. Superficial compliance with a set of externally imposed conditions will not be sufficient to earn the inmate entry to the program and most certainly will not sustain him to completion. There must be a genuine and continuing desire to succeed. In short, an inmate who wishes to participate in ISP must "buy into" the program by involving himself in it.

It is recognized that this will not be an easy task for most inmates. Inmates applying for the program will have to develop personal plans against which their behavior will be assessed. These plans must establish a series of short-term goals governing the fundamental aspects of their lives. Provisions must be made for such items as living arrangements, employment, meeting financial obligations (including restitution) and, where appropriate, special counselling, educational and treatment needs. Program applicants also must commit to full cooperation with program staff and performing community service.

It is critical that the inmate develop the goals. Their development will be the first indication of motivation and determination to succeed since the development of acceptable goals will involve a critical self-evaluation. It is

important that these goals be realistic and that compliance with them be measurable. Achievement of them will indicate a continuing adjustment to acceptable societal behavior. The goals must also be progressive. Because the program demands strong psychological and behavioral commitment, realization of progressive goals will provide important reinforcement and will strengthen the inmate's determination to succeed.

It is recognized that to succeed, inmates will need a great deal of support, particularly during the initial stages. An important premise of the program is that when support is provided by defense counsel, friends of the family, and ISP staff in appropriate measure, success can be achieved. The applicant's plan, therefore, must identify a Community Sponsor. This individual will be responsible for the applicant's behavior while on release. The sponsor will also assist the applicant in completing the plan.

A program plan also must identify those in the community who will assist the applicant in meeting obligations under the plan. These individuals, referred to as the "Network Team", will have a crucial role in the program. They must assess the applicant's understanding of social and legal problems and then identify the ways in which they can guide and assist the applicant in identifying additional goals and in meeting them. After the Network Team has developed its involvement in the plan, the Community Sponsor must explain it to the applicant and assure appropriate understanding of the responsibilities in the plan.

Both the Network Team and the Community Sponsor will be in close contact with the applicant throughout the program to provide assistance.

ISP staff will help the inmate meet obligations. Although contact will, of necessity, be frequent to monitor carefully the applicant's behavior, the intent will not be to "find" violations. Program emphasis is on success, not failure. Monitoring is to provide positive reinforcement.

E. Process

The program has been designed to include successive phases through which a program participant must pass. During each phase, there must be a continuing dedication and ability to live within the program requirements.

To be considered for entry to ISP, an inmate must have been convicted of a non-violent offense and must not have received a parole ineligibility term. Application may be submitted until after 60 days of incarceration. Thus, each applicant will have experienced some period of confinement

and will have experienced the deterrent benefit which springs therefrom.³

The application form is simple so as not to preclude a lesser educated inmate from applying for the program. It contains a brief description of the program and requires the inmate to complete some personal and criminal history identification information. Importantly, the inmate must identify a Community Sponsor and Network Team at this stage.

An ISP officer will be assigned to interview the applicant at the institution to help the inmate prepare the proposed plan. Simultaneously, ISP staff will compile information concerning the applicant, including his presentence report and judgement of conviction. Statements from the sentencing judge, prosecutor and victim/complainant will be elicited. ISP staff will interview those identified by the applicant as the Community Sponsor and the Network Team. Their responsibilities will be reviewed with them and their suitability, willingness and ability to participate will be assessed.

All of the information compiled will then be submitted to an ISP Screening Board. This board, composed of a representative of the Department of Corrections, the Director of ISP and a public member appointed by the Chief Justice, will review the material and interview the applicant to determine sincerity, motivation and ability to meet the obligations set forth in the plan. The Board will assess the reasonable probability of successful program completion and will consider community expectations and reactions in determining the cases to recommend for entry into ISP.

If the applicant is deemed eligible for the program, the application will be forwarded to a three judge Resentencing Panel. The Panel will review the application for resentencing to determine if the applicant is eligible for entry into ISP. If the Panel determines that the applicant is eligible, it will grant the application for resentencing and adjourn the hearing for 90 days, place the applicant on recognizance to the Community Sponsor and require adherence to the

3 The 1982 Judicial Conference on Probation considered developing ISP as a sentencing alternative to incarceration. This concept was rejected in favor of resentencing so that all ISP participants would be recognized as individuals removed from costly confinement and would have experienced the reality of incarceration.

applicant's plan and conditions of ISP. During this trial period, behavior will be closely monitored.

At the conclusion of this period, the participant may reapply to the Panel for another 90 day release period. The Panel will assess the applicant's continuing motivation and commitment. If the Panel members conclude that the participant remains dedicated to the goals, they will continue the release pending resentencing for a second 90 day period. Successful completion of this period will trigger a resentencing hearing at which the applicant will be resentenced pursuant to R. 3:21-10(b) to the original term of incarceration less the time served. Sentence will be suspended in accordance with N.J.S.A. 2C:45-1 et seq., subject to the program participant's continuing compliance with the plan and conditions of ISP. The maximum period of suspension will be the maximum term which was initially imposed or 5 years whichever is less, minus time served. There will be periodic continuation hearings to assess compliance throughout the period of release. Failure to continue to aggressively fulfill the plan's obligations will result in a referral back to the Resentencing Panel for a violation hearing and possible reincarceration.

All ISP participants must successfully complete a minimum of one year of intensive supervision. Thereafter, they may be transferred from intensive supervision to regular probation supervision or be discharged entirely, at the discretion of the Resentencing Panel.

F. Goals and Objectives

1. Goals

- a. To reduce the number of offenders serving state prison sentences by permitting them to be re-sentenced to an intermediate form of punishment: Intensive Supervision;
- b. To improve utilization of correctional resources by making available additional bed spaces for violent criminals; and,
- c. To test whether correctional supervision of selected offenders in the community can be less costly and more effective than traditional prison sentences.

2. Objectives

- a. To select and place under community supervision inmates sentenced to the state prison and to maintain a running average program case load of 375 to 500 individuals;
- b. To reduce the cost of correctional supervision for each program participant;
- c. To identify and select offenders who can offer a personalized plan, approved by the screening board, that meets the following criteria:
 1. minimal risk to the community; and
 2. opportunity for benefit from supervision offered by the program.
- d. To actively monitor and enforce each participant's ISP plan with the understanding that there will be immediate return to institutional commitment for those individuals who fail to show they have performed as promised under the plan;
- e. To establish specific supervision objectives and assist participants to meet them;
- f. To maintain intensive contact with participants according to program policy;
- g. To respond appropriately and effectively to all emergency or chronic needs; and,
- h. To determine the percentage of successful completions of intensive supervision.

G. Programmatic Aspects

1. Supervision Standards

The minimum standards for participants in the intensive supervision program shall include the following:

- a. Strict adherence to the participant's plan and conditions as approved by the ISP officer;
- b. At least 16 hours of community service per month, if such opportunities are available. The ISP officer will schedule participants to perform group community service on weekends where appropriate. Alternatives and modifications of this requirement may be arranged upon approval of the

regional supervisor;

- c. Multiple weekly contact with the ISP officer and contact with the community sponsor;
- d. Development of a weekly plan and the maintenance of a daily diary showing activities and accomplishments each day;
- e. Police contact and/or arrests must be communicated immediately by the participant to the ISP officer;
- f. Participant will present all pay stubs to ISP officer as verification of employment;
- g. Each participant will be required to participate in weekend evening group counselling/activities scheduled by the ISP officer;
- h. Each participant will maintain employment or be enrolled in vocational training or counselling. Failing to maintain this standard without good cause after the first review period will result in a return to prison;
- i. Each participant may be required from time to time to participate in treatment programs designated by the ISP officer. These treatment programs include: psychological evaluations; drug evaluations; urine monitoring; drug counselling; alcohol counselling; educational counselling; family counselling, vocational counselling; financial counselling; emotional/psychological counselling or any other treatment program deemed necessary; and
- j. Such other standards that may from time to time be approved by the Supreme Court or Administrative Director of the Courts.

2. Field Staff Standards

The following are minimum standards for the staff of the intensive supervision program.

- a. Each ISP officer will be available on a 24 hour basis to the participants by telephone and paging service;
- b. Each ISP officer will complete a risk assessment,

needs assessment, classification, objectives based case plan and a client management classification on each case;

- c. Each ISP officer will write summaries as needed as part of the review process on each case and share that report with participants so that the next plan can be prepared;
- d. Each ISP officer will do risk and need classification and objectives based case plans as needed;
- e. ISP officers must initially establish contact with the chief of police in the town in which the participant will live during the ISP period. This is done so as to inform the police of the participant's release and to develop an ongoing relationship among local law enforcement officials, the program and community sponsors. Follow-up contact should be maintained with other members of the local police as needed; and
- f. Each regional supervisor will be actively involved in aiding the field officers by attending group community service work sites and Saturday evening group activities, holding meetings with community sponsors and network teams, and being available 24 hours for emergent matters.

3. Home Detention

The ISP officer may, with the approval of the regional supervisor, restrict the ISP participant's movement in the community by invoking a period of home detention not to exceed a period of 48 hours. There may be times during the period of supervision that will warrant the limited movement of the participant, e.g., the inability to obtain emergency community treatment resources, the development of a crisis situation having the potential for personal harm to the community or client, etc. Several actions of this type may require complete review of the participant's status in the program by the Resentencing Panel.

In every instance that an ISP officer invokes home detention, a report must be filed with the program director outlining the reasons for the restrictive action.

4. Counselling

As previously stated in the Supervision Standards section, each participant shall be required to participate in counselling as counselling is a cornerstone of the program. In this regard ISP staff will make use of the latest case

processing technology that identifies specific participant needs. Once needs are identified, staff will aid participants in arranging for appropriate counselling services. These counselling services may be part of the participant's plan or may be identified after the participant's release into intensive supervision. These needs assessments and referrals to counselling will be an ongoing process for all ISP participants. The program has been structured so as to provide significant resources for the purchase of professional services.

5. Family Involvement

Family members will be involved in the intensive supervision program in a number of ways. They may serve as Community Sponsors and/or as part of the Network Team. They may be involved in family counselling or therapy as identified through the participant's plan or through needs assessments conducted by ISP staff.

Family member involvement is structured so as to have each ISP participant assume his/her responsibility to the family. It is also structured to ameliorate family problems so as to provide additional support and meaning to the participant's release under intensive supervision.

6. Curfew

Each ISP participant will be required to be in residence every evening from 10:00 p.m. to 6:00 a.m. Compliance will be monitored randomly twice per month by the ISP officer. The curfew requirement may be relaxed at the discretion of the ISP officer (see appendix on electronic surveillance).

7. Violations

Violations of any of the intensive supervision conditions will result in the processing of a Violation of Intensive Supervision before the Resentencing Panel. Violations will conform to N.J.S.A. 2C:45-(3), (4) and must be approved by the regional supervisor with a copy being forwarded to the director of the program. The Resentencing Panel shall hold a hearing to consider why the participant should not be returned to prison to serve the custodial sentence.

8. Warrants

An expressed term of the resentence is that the defendant/prisoner shall be on bench warrant status during the suspended period and while released to and under the supervision of the ISP. In the event the defendant/prisoner is charged with a violation of any condition of the

suspension, and upon any verbal approval granted by an judge authorized to issue bench warrants, the defendant/prisoner shall be immediately apprehended and detained to await return to the institution to which the defendant/prisoner was committed at the time of the imposition of this resentence. This order shall serve as authority for all law enforcement officers authorized to arrest pursuant to a bench warrant to apprehend the defendant/prisoner in accordance with the terms of this order.

9. Terminations

Participants will not be eligible for early termination until they have served at least one year of intensive supervision. All requests for early termination must be approved by the director of ISP prior to being submitted to the Resentencing Panel.

The process for filing an early termination with the Resentencing Panel requires the ISP officer to make a recommendation to the regional supervisor who forwards the request to the director of ISP who forwards it on to the Resentencing Panel. The guiding criteria for early termination is that maximum benefit has been obtained from the program by the participant. Other criteria for early discharge include maintenance of full-time employment, successful completion of the plan and community service, no new arrests, fulfillment of any special conditions, and full payment of fines and restitution.

If the Resentencing Panel discharges the participant from the ISP program but orders regular probation supervision, that term will be supervised by the county probation department having jurisdiction. All applicable case materials will be made available to the county probation departments.

H. Summary Results

The Intensive Supervision Program has been operational (accepting participants) since September 1983. Monthly reports on program process are prepared by the Research and Evaluation Section. The following summary of results cover September 1983 through June 13, 1986, a thirty-three month period.

1. Caseload

Between September 1983 and June 13, 1986, 4349 prisoners have applied for admission to ISP. Of those applicants, 691 or 16% were selected for the program. Currently, ISP has 374 participants under supervision. A

total of 150 participants have graduated from the program having fulfilled all program requirements.

2. Programmatic Aspects

ISP requires a minimum of twenty monthly contacts per participant with an ISP officer. The actual number of monthly ISP officer contacts currently averages approximately 27. Additional collateral contacts occur with community sponsors and network teams. Counselling contacts are also required for many participants; these can include meetings with Narcotics Anonymous, Alcoholics Anonymous, private psychological counselling and group counselling sessions.

ISP participants are required, as a condition of their participation, to maintain full-time employment. Participants who are newly released into the program have only thirty days in which to obtain such employment. As a result, at any given time, at least 94% of all active ISP participants are employed. Total earnings for all participants is in excess of \$4 million to date. Participant salaries average \$10,500 when annualized.

ISP program participants have made substantial financial contributions to society. Since September 1983 participants have paid a total of \$600,000 in federal taxes and \$125,000 in New Jersey state taxes. In addition, payments for restitution, child support and fines have amounted to \$275,000. Participants must also contribute to the cost of their supervision in the program. As of mid-June 1986 a total of \$18,000 has been collected for this purpose.

ISP participants must complete at least 16 hours of community service per month. Additional hours of service are required during periods of unemployment or if punitive sanctions are warranted. By June 13, 1986, participants had completed more than 70,000 hours of community service. Most community service is performed at weekend group community service sites operated and supervised by ISP. Present site work includes restoration of a historic building, work on a farm operated by the Department of Corrections, restoration of a building for use as an inner city school, and repair of a camp for underprivileged children.

ISP participants are subject to a 10 p.m. - 6 a.m. curfew. More stringent curfews are applied during periods of unemployment or as punishment for minor rule infractions. Curfews are monitored in-person (by ISP officers), by telephone and through the limited use of electronic surveillance equipment (see appendix).

Eighty-five percent of all participants are subjected to routine urine monitoring (two or three times per week) for detection of drug use including marijuana and alcohol use.

3. Outcome

As of June 13, 1986, 691 participants have been released into the program. Of these 150 participants or 22%, have graduated, 374, or 54% are active and 6, or 1%, have had other reasons for terminating the program. ISP has returned 161 participants, 23% of the total enrollment, to the State Prison System: 3% for indictable offenses and 20% for technical program violations and/or disorderly persons offenses.

I. Conclusion

In the fall of 1982, the National Institute of Justice provided funding for an independent evaluation of the New Jersey Intensive Supervision Program by the Institute for Criminological Research. ISP staff have worked closely with Institute researchers to provide information necessary for a comprehensive evaluation. Until that work is completed, the ISP project is still considered experimental.

The results cited earlier in this report, however, were viewed by judicial administrators as evidence of early success. During the noted time period, 691 inmates were released from state prisons and entered into the program. Only 23% were returned, with merely 3% having been arrested for indictable offenses. While average costs do not portray the complete picture, there was a savings in excess of \$10,000 on each participant. More importantly, the current average caseload of the program at over 375 participants is equal to the size of a medium institution. Depending upon security needs, the cost per bed in building a facility to house these inmates would have averaged between \$20,000 and \$100,000 each, with annual costs of \$18,000 for operation. Also, these figures do not include the bonding costs.

In 1985, the Essex County Administrator reviewed ISP's achievements and suggested that a similar program be considered for development at the county level for jail inmates. The Essex County Probation Department, under the leadership of Chief Probation Officer Nicholas Fiore, undertook such an assignment. With the assistance of a local advisory committee, ECLIPSE (Essex County Local Intensive Probation Supervision Effort) was designed to handle approximately 30 jail cases. The Supreme Court approved the project in the fall of 1985 and the first cases entered in December of that year. By June 1986, 32 participants had been accepted into ECLIPSE with only 3 cases returned to county jail.

During the early months of 1986, the New Jersey Bureau of Parole reviewed the accomplishments of ISP. Shortly, thereafter, staff developed a similar project entitled the Intensive Supervision and Surveillance Program (ISSP) for implementation. ISSP will commence within the parole operation this fall.

New Jersey's ISP has been the subject of national interest. More than forty states and three foreign jurisdictions have requested information on the program; and ten states have sent representatives to visit with us and briefly "live" with ISP. Local newspapers (see appendix) have reviewed ISP intensively and national magazines have also found it of interest. New Jersey's ISP and other programs of similar design are innovations of the 1980's and command public and professional interest.

There are numerous reasons accounting for the widespread popularity and development of intensive supervision programs across the country. Clearly, pandemic crowding of institutions is one. Another is presented by budget limitations in many state departments of correction. Perhaps a third is a return to the original principles of probation (small caseloads and intimate contact, community involvement, and an emphasis on appropriate patterns of behavior) in today's more conservative environment. No doubt, all of these reasons and others have their share of responsibility; yet, we suspect another. Intensive supervision as a concept is extremely flexible. In fact, the programs that have developed differ from jurisdiction to jurisdiction. In New York and Texas ISP is a probation function and an initial sentencing decision. New Jersey's ISP is a separate entity within the Administrative Office of the Courts and a resentencing decision. The new ISSP in New Jersey is a parole program. Georgia's ISP require daily supervision contacts; while Texas requires only greater contacts than the normal caseload. This list could well go on for pages. Intensive supervision is simply a concept that can be molded to fit the circumstances that a jurisdiction requires. With the new guidelines being developed by the United States Sentencing Commission, there is little doubt that a Federal Probation ISP could be developed and implemented as a critical component of the correctional system.

TESTIMONY BEFORE
THE UNITED STATES SENTENCING COMMISSION

Submitted by:
Jerome G. Miller, D.S.W.

July 15, 1986

NCIA



NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES
Central Office
814 NORTH SAINT ASAPH STREET
ALEXANDRIA, VIRGINIA 22314
TELEPHONE (703) 684-0373

President
JEROME G. MILLER

Advisory Board Members

SEVERA AUSTIN
*Human Services Planner
Madison, Wisconsin*
LOU BRIN
*Department of Sociology
University of Massachusetts*
AL BRONSTEIN
*National Prison Project
Washington, D.C.*
LARRY BROWN
*School of Public Health
Harvard University*
JOHN M. BURNS
*V.P., Westinghouse Broadcasting
New York, New York*
JUDI CHAMBERLIN
*Mental Patients Liberation Front
Boston, Massachusetts*
ROBERT DRINAN
*Law Center
Georgetown University*
PETER EDELMAN
*Attorney
Washington, D.C.*
SISTER FALAKA FATAH
*Pres./Founder, House of Umoja
Philadelphia, Pennsylvania*
SISTER M. ISOLINA FERRE
*Director, Playa Ponce
Ponce, Puerto Rico*
JAY HALEY
*Family Therapy Institute
Chevy Chase, Maryland*
JIMMY HARGROVE
*Chairman, National Black
Policeman's Association
New York, New York*
CHARLENE HARRINGTON
*Nursing Home Evaluator
Sacramento, California*
JOHN MARTIN
*Department of Sociology
Fordham University*
JOHN MCKNIGHT
*Center for Urban Affairs
Northwestern University*
LLOYD OHLIN
*Center for Criminal Justice
Harvard Law School*
MILTON RECTOR
*National Council on Crime
and Delinquency
Hackensack, New Jersey*
DAVID ROTHENBERG
*Fortune Society
New York, New York*
DAVID ROTHMAN
*Center for Social Policy
Columbia University*
ANDREW RUTHERFORD
*University of Southampton
Southampton, England*
PETER SANDMANN
*Attorney
San Francisco, California*
PETER SCHRAG
*Journalist
Berkeley, California*
ROBERT VINTER
*School of Social Work
University of Michigan*
THOMAS WINSHIP
*Gannett Center for Media Studies
New York, N. Y.*
FRED WISEMAN
*Documentary Filmmaker
Boston, Massachusetts*
MARVIN WOLFGANG
*Department of Sociology
University of Pennsylvania*
CLAIRE WOMPIERSKI
*Department of Social Work
Virginia Commonwealth University*
ROBERT L. WOODSON
*American Enterprise Institute
Washington, D.C.*

I have not come before this Commission with a series of "How to" suggestions as it goes about its task of proposing sentencing recommendations to be attached to the Omnibus Crime Control Bill. Rather, I ask that the commission members and staff view my testimony as a sort of "time-out," an interval less to take notes or listen to legal prescriptions than to pause and reflect a moment or two on a few abiding issues which should never leave the room when this deliberative body meets.

This is not to say I couldn't or wouldn't like to make concrete suggestions. I can and I would. After a decade as an officer assigned to work with the U.S. Military stockade and disciplinary barracks system -- and after two decades working in civilian correctional systems -- many of those years at cabinet-level positions in state government in both Republican and Democratic administration, and after another 8 years heading a private agency staff whose work has been primarily focused on sentencing of felons, I would have a number of specific suggestions. However, I'm sure the Commission will have, or has had opportunity to hear these from others. Moreover, I fear that the recommendations I believe would have the most

OFFICES AND AFFILIATES IN: CALIFORNIA • CONNECTICUT
FLORIDA • INDIANA • NEBRASKA • NEW YORK
NORTH CAROLINA • PENNSYLVANIA • TENNESSEE • VIRGINIA

felicitous effect on sentencing practices and ultimately on the national correctional system -- would probably not be well received by a commission assigned a relatively narrow, technical (dare I say unfortunately, too technical?) mission.

Clearly, the hope and the watchword of those who devised the crime control act was that it would contribute to the commonweal and domestic tranquility of the nation. It was designed and written primarily by lawyers and approved by a body made up near exclusively of lawyers.

As the eminent Norwegian philosopher and criminologist Nils Christie has commented, "Training in law is training in simplification. It is a trained incapacity to look at all values in a situation, and instead to select only the legally relevant ones, that is, those defined by the high priests within the system to be the relevant ones.So few elements of the totality are considered that complete equality is guaranteed. But it is, through its simplifications, a primitive system"¹

The Commission should realize, as it goes about its complicated tasks and adjusts guidelines, grids, and formulae to fit offenses, that at another level, it is still not much beyond the primitive task of those early 19th century European commissions which were given the mission of converting branding and cutting off of limbs into terms of imprisonment -- ten years for a hand, how many for an eye? etc.

As Christie, Foucault and others have demonstrated, there are limits to pain as the means of guaranteeing order. There are even greater problems if we, and particularly you, as Commission members believe that sentencing strictures and time in prison reflect or even have much relevance to the myriad of factors and vagaries which come together to result in the commission of an individual crime of any kind.

The great American philosopher and social psychologist, writing in 1917 on the "Psychology of Punitive Justice" commented that in the legal arena, the social worker is inevitably the sentimentalist. However, in the social settlement, the legalist is an ignoramus. And whether we wish to admit the reality or not, sentencing is in large part, a social settlement -- between offender and society, victim and offender, victim and society, etc. We would deceive ourselves if we really believed that the attaching of set periods of incarceration even minimally met the needs of such a situation. But lawyers with the lost criminal case, much like doctors with the terminal patient, flee from contact and involvement in a task which so clearly reflects the limitations of their professional armamentaria at a most crucial juncture. Retreat to formulae, numbers, and mandatory sentences gives a gloss of rationality and science to a lost cause and makes one's efforts seem more meaningful than facts might otherwise dictate. There are therefore, very real limits to pain in healing or in deterrence in sentencing.

Aldous Huxley, in his classic 1937 book on Ends and Means, noted that progress in civilization has not been progress in technology or

even in justice, but progress in charity. Look to those countries with harsh criminal codes now, or at any time in history -- when held next to their contemporaries. There is little to imitate. We look more to Athens than Sparta, more to Christian Rome than pagan Rome, more to Thomas More than Oliver Cromwell.

The question with the technology of designing a sentencing schema therefore is not simply "what works?" Rather, it is "what can we do which advances a democratic, just and compassionate society?" Obviously, executing first time offenders would probably cut recidivism and serve well the limited needs of specific and general deterrence. But it would be beside the point in our society. Rather, the question is, "How, as you go about your tasks, can compassion be protected in a bill which emanated from a great deal of extreme 'law and order' rhetoric which influenced the kind of passions few would hold as models of civility and temperance?"

It seems to me that you must continually allow that to the degree the individual defendant is sentenced by formulae alone -- and to the degree judicial (human) discretion is removed from the individual case, to that degree we are teaching other less felicitous lessons than the simple message of justice. We are also teaching that the individual matters little, that we prefer not to hear, much less consider unique, eccentric and otherwise troublesome mitigative information in our deliberations. I realize there are limits on these considerations.

Such limits were all encompassing even in the heyday of judicial discretion. So I don't think we need be overly fearful of individual considerations routinely undermining the imposition of sentences under our criminal laws.

But it seems to me, the Commission must attempt to maintain as much discretion in sentencing as politically possible -- precisely because it keeps the human and the fallible involved on both sides of the legal and social settlement. We will be in great crisis as a society when we are able to make infallible decisions based on computer models of sentencing -- for with such decisionmaking we lose the interchange, argument, roughhousing, and doubt, which is crucial to the evolution and development of a democratic society.

In this sense, one can in part see mandatory sentencing itself as a flight from certain realities. In the words of British anthropologist Edmund Leach, it is an example of the "imposition of discipline by force; it is the maintenance of the values of the existing order against threats which arise from its own internal contradictions..."² In a sense, that is one of the unfortunate tasks of this sentencing commission.

I realize of course that this commission has a limited role -- to recommend parameters of pain -- possible "time" to be served for given criminal offenses. May I presume to make some recommendations:

- 1) -- As you set the parameters, let your thinking and moral judgement wander a bit afield from exacting justice, retribution, pain and deterrence -- to include the possibility of healing, reconciliation and forgiveness.

- 2) For those who see criminal justice sentences as absorbed primarily and only in meting out punishment -- at least give equal consideration to pain that is less likely to debilitate, isolate and harden. Reliance on "time" alone (even for deterrent purposes) as the best or even primary means of righting wrongs, guaranteeing justice or giving redress, betray -- if nothing else -- a curious lack of imagination.

May I propose that the Commission members take time for reflection -- look at themselves and ask a simple question -- What would I recommend were I, or a guilty son or daughter, brother or sister, friend or relative before the bench for sentencing? If we have a minimum of insight and humility, surely most in this room could conceive of the possibility of such an eventuality. Those who can't, can of course be harsh. But in such a situation, what would we want a just sentence to reflect?

- o We would not want an errant friend or relative to break the law again.
- o We would be cautious -- but would maintain involved and personal concern
- o We would want individual consideration of, and attention to, the specifics of the offense as well as the vicissitudes and individual characteristics of the offender -- and how the sentence might affect them.
- o We would allow the possibility of leavening justice with mercy on the basis of those unique human qualities in a uniquely human event -- a crime.

I realize it is not the role of the sentencing court to be a loving parent or concerned sibling. But neither is its role alone to be a detached computer -- grinding out sentences to fit plans based in selective inattention and studied ignorance of cantankerous human realities.

The ultimate irony of the crime control act and this commission is that both were created just as the nation is entering an era where we have the possibility and technology to know and store millions of bits

of information about individuals -- with the potential of finally fitting the sentence and rehabilitation to the offender and the crime, -- that at this crucial time in our history we retreat to the meat axe of the set formula mandatory sentence which ultimately disregards, denigrates and degrades the individual under a banner of upholding the majesty of the law.

I would hope therefore that the Commission would keep as much flexibility in the sentencing system as the current irrational climate will allow.

You are inventing a tradition which will set the national course for many decades. More importantly your decisions will affect thousands of individuals whose own identities will be much determined by the outcome of your deliberations.

So I ask, as you reflect on the numbers -- a "year" here, "20 years" there, "life" there, remember the contingent state we share in the all too short lives we have on this earth. Then make the firm decisions.

¹ Nils Christie, The Limits of Pain, p. 57, Martin Robertson Ltd.,
Oxford, United Kingdom, 1982

² Edmund Leach, A Runaway World, (BBC Reith Lectures, 1967), New
York, Oxford University Press, 1968

Statement of Sally T. Hillsman
Research Director of the Vera Institute of Justice
before the
United States Sentencing Commission
July 15, 1986

FINES AS CRIMINAL SANCTIONS

Sentencing policy in the United States has undergone major alteration in recent years with the introduction of sentencing guidelines, mandatory minimum sentences, and determinate sentencing schemes. With these changes, mainstream sentencing theory and legislative activity have shifted away from the concepts of individualized justice and rehabilitation that have dominated American sentencing philosophy during most of the twentieth century, and toward an emphasis on incapacitation, deterrence, and punishment. While the full impact of these shifts is not yet certain, it appears they have contributed to growing strain on the society's correctional resources. This is at least partially because American policymakers tend to view imprisonment not only as the paramount means available for the effective punishment and deterrence of crime but also as virtually the only means. Within the realm of alternatives, policy attention has tended to focus on sanctions that are relatively new, especially restitution and community service and, more recently, enhanced probation and techniques of electronic surveillance. However, in the last several years there has also been renewed attention from those concerned with expanding the repertoire of non-custodial penalties to what is one of the oldest, and certainly the most widely used, ways of punishing people without

relying on incarceration--the criminal fine.

Fines are, and have been for some time, an important sentencing tool in American criminal courts. In recent years, almost a third of the sentences imposed in U.S. District Courts have involved a fine, either as the sole sanction or in combination with probation (and occasionally with prison). This represents over \$50 million in criminal penalties to be collected annually at the federal level, a figure that is rising steadily. This pattern finds a parallel in state and local trial courts across the entire country. Indeed, in American trial courts of limited jurisdiction, fines are the predominate form of punishment, and in state general jurisdiction trial courts they appear to be used more frequently than is generally recognized, both alone and in combination with other non-custodial sanctions.

The advantages of the fine as a criminal sanction are well recognized: it is unmistakably punitive in its aim and can deprive offenders of ill-gotten gain; it can be adjusted to a level that is both appropriate to the offender's resources and to the seriousness of the offense; it can be coupled with other non-custodial sanctions when multiple sentencing goals are sought; it does not further destroy the offender's ties to family and community; it is relatively inexpensive to administer, relying primarily on existing administrative agencies and procedures; and it can be financially self-sustaining and provide revenue for related social purposes such as victim compensation.

It is the perception of important disadvantages to a fine sentence that gives pause to some policymakers. The degree of punishment imposed by a fine is thought to be limited because fine amounts tend to be low. For the same reason, fines are often considered unfair because they advantage the more affluent offender who is perceived as having "bought his way out" of a more

punitive sanction. If fines are high enough to avoid these problems, they are thought to be uncollectable, difficult and expensive to enforce, or to result in imprisonment for default. Fines are also not considered a deterrent to future crimes and, indeed, they are sometimes thought to be criminogenic. The intent of the sentence to punish and to deter is thought to be undermined if the fine is paid by a third party. Finally, it is sometimes feared that the imposition of fines will impede restitution to victims. While there is undoubtedly some merit to each of these concerns, the increased availability over the last five years of research on courts' experiences imposing and enforcing criminal fine sentences both here and abroad provides an empirical challenge to most of them.

Research evidence on the use of fines in American trial courts at the local, state and federal levels suggests not only that fines are used more widely and for a broader range of non-trivial offenses than has been recognized, but also that in many different types of courts they are collected and enforced more successfully and expeditiously than commonly assumed even by courts themselves. While statutory fine maxima have tended to be low, legislatures are increasing them, especially at the federal level; nevertheless, fines actually imposed by judges still tend to be well below the limits provided by statute. However, the experiences of several Western European countries suggest that tested methods are available--particularly in the form of day-fine systems--to tailor fine amounts with more precision to variations in the severity of offenses and in the means of offenders than is currently done in the United States. And, when this is done, fine amounts rise significantly, especially for more affluent offenders, without imposing costly demands on the enforcement system. In addition, if a recent survey of

American judges who handle criminal cases in state trial courts is any indicator, judges in this country tend to view fines sentences positively and many express considerable interest in exploring innovative fining methods, particularly day fines. Indeed, this survey suggests the time may be ripe for focusing more carefully on the place of fines in sentencing schemes and for federal leadership in experimenting with new approaches to their use. Despite American judges extensive use of fines and positive attitudes, they apparently have not yet formulated strong views about the proper place of fine sentences and await further experience and guidance in this area.

One barrier to this process is the concern that, while fines may punish, they may not be an effective deterrent to future criminality. While the evidence available about the deterrent effects of fines compared to other sanctions is as limited as the evidence about the deterrent value of most other sentences, including imprisonment, the evidence that exists is not discouraging. Research in West Germany suggests that, controlling for offense and offender characteristics (including prior record), day fines are no less effective than sentences of short-term incarceration in preventing reconviction among traffic offenders (who are most representative of the general population) and among professional petty thieves, and that fines are considerably more effective than either imprisonment or probation in theft, embezzlement, and fraud cases. In England, where fines are also the sentence of choice for most minor and many non-trivial offenses, research evidence about the deterrent value of fines, although methodologically weaker, nonetheless parallels that from West Germany. Combined with widespread skepticism about the deterrent effects of incarceration, this evidence has encouraged the prevailing view in both countries that fining is probably

penologically effective, or that it is at least less ineffective as a deterrent than are other penalties. Moreover, these data do not encourage the fear that fines are criminogenic, that is, that fined offenders will commit crimes to pay the fine. Indeed, what little evidence there is on how people pay fines suggests that they are paid from regular sources of revenue coming into the offender's household, whatever they may be. While third parties, therefore, may bear some of the burden of the punishment, insofar as members of the offender's household are forced to economize, this may also encourage them to exercise informal but effective social control upon the future behavior of the offender. We know this process occurs under other circumstances, and it is reasonable to assume fines may also activate it.

Finally, fines do not necessarily impede restitution; indeed they may enhance its use. Research in England, whose sentencing policies encourage reliance upon monetary rather than other types of penalties, reveals that restitution typically accompanies a fine sentence and that payment of the victim takes precedence over payment to the crown. In addition, in most jurisdictions, imposition of a fine routinely activates the formal collection and enforcement mechanisms of the state, something that does not always happen when restitution to a private citizen is the only monetary penalty imposed. Criminal fines also provide communities with the opportunity to enhance existing victim compensation funds, an opportunity that has been seized by recent federal legislation that changes the disposition of revenues from federal fines.

These brief remarks summarizing some of the things we have learned from recent research on criminal fining practices both here and abroad are intended to encourage the Sentencing Commission to view criminal fines as an important

non-custodial option, one that is already widely used and accepted by judges but one that also needs reappraisal as to its appropriate place among sanctions and consideration of new ways for it to be imposed. Before turning to some specific thoughts on these issues, I would like to call attention to several very important statutory changes that have taken place in the federal system in the last three years, changes that have created the necessary preconditions for such a reappraisal to take place. As recently as 1983 when I was first invited to Washington to testify about federal fining practices, I and others identified a variety of problems of a statutory and administrative nature that impeded the use of fine sentences in the federal system. Since that time, most of these issues have been addressed by statutory reforms; as a result, remaining administrative difficulties, of which there are several important ones, have a much greater potential for resolution if there are incentives to do so. I think it is worth touching on the most important of these changes because the new statutory provisions address many of the concerns judges and other policymakers raise in discussing the feasibility of improving, and possibly expanding, the use of fines as a federal criminal penalty.

Recent Statutory Reforms as a Basis for Further Change

First, federal fine ceilings have been substantially increased, giving judges much greater flexibility to use fines effectively to punish more affluent defendants and to deprive them of illegally acquired assets. This, combined with the new statutory requirement that judges consider a defendant's ability to pay (including any restitution obligations imposed by the court) in setting the fine amount, provides the court with a strong incentive to assist

the Probation Division improve its heretofore inadequate procedures for collecting and assessing financial information on federal defendants facing sentencing. This is particularly important because federal judges are now charged with having to determine, at sentencing, the terms of payment as well as the amount; previously either the Probation Division or the U.S. Attorney's Office decided upon the terms of payment, including installments, when faced with a sentenced defendant who could not pay the fine immediately. The requirement that setting payment terms be part of the sentencing process itself will help focus the sentencing judge directly upon the offender's capacity to pay; this in turn will bring greater demands from the bench for more complete and accurate presentence reports. Research on fining practices in the United States and Europe indicates strongly that if fines are properly set in relation to means as well as offense, and if the terms of payment are strict but realistic, the likelihood of full payment within the time period set by the court is significantly improved.

In addition, new federal statutory provisions for the routine imposition of interest and penalties on unpaid balances will further encourage prompt payment. There is virtually universal agreement among those who have studied fining that pressure on defendants to pay expeditiously is effective in ensuring full enforcement of the penalty imposed by the court.

Second, statutory improvements now provide judges with the ability to modify the original fine sentence if the offender's circumstances have altered significantly or if the original amount appears to have been set improperly. Again, this generates an incentive for the Probation Division both to improve its collection of relevant financial information and to bring up-dated information to the court in a timely fashion rather than, as has been the

practice in the past, waiting until the period of probation supervision was nearing completion. If this process works as it should, the routine feedback to judges, from both probation officers and U.S. Attorneys in charge of fine collection, of information on the payment performance of fined offenders should increase. This will help judges be more systematic and rational in their original decision-making, as well as provide them with a means they did not have previously of addressing unexpected problems faced by fined offenders, thereby improving the credibility and effectiveness of the sentence.

Third, whether criminal fines are large or small, their efficacy as a criminal penalty rests upon the ability of the court to enforce them: that is, to compel payment if the offender fails to meet his obligation to the court. Evidence has accumulated that, although the great majority of federal fines are collected, a substantial minority are not, and this cannot help but erode the confidence the court has in using this sentence. Recent legislation dramatically improves the tools at the disposal of the court and the government to enforce federal fines. By statute, administrative responsibility for fine collection has been centralized in the U.S. Attorneys' Offices. While many problems of detail and structure remain to be resolved, this key principle of rational administration has finally been established replacing, at least in concept, the acute fragmentation characteristic of the federal system in the past.

Furthermore, new and important statutory tools have also been added to make a potentially more efficient enforcement process a more effective one as well. Once again, the findings of recent research on fine enforcement practices is unambiguous: credible threats work. The primary form such

threats take in virtually all jurisdictions, including the federal system, is the imposition of coercive enforcement strategies--either the seizure of property or, more commonly, imprisonment. More informed initial decisions as to the amount and terms of the fine sentence, combined with greater feedback to the court when problems arise and greater flexibility for the court to modify the sentence, mean that it should be easier for the court to identify truly willful defaulters and then activate new statutory provisions for prosecuting nonpayment with greater assurance than is now possible that there is no other recourse.

Even more important, I believe, are the new federal provisions for property seizure. The decision to fine is generally a decision that a non-custodial punishment should be achieved by depriving the offender of property (money or otherwise). New statutory provisions that create a lien on an offender's property at the time a fine is imposed in federal court and that permit the lien to be enforced by the efficient administrative procedures now used in tax cases provide the court, for the first time, with an opportunity to view the seizure of property, rather than imprisonment, as the appropriate coercive device toward which the fine enforcement process should move. And, if the concept of centralized responsibility for fine administration now embedded in legislation is translated into sound, coordinated enforcement procedures, intermediate enforcement steps can proceed with swift and personal responses to nonpayment characterized by a steady increase in the threat of more coercive methods. Research suggests this will ensure that the need actually to impose those coercive methods--property seizure or imprisonment--will be relatively rare; the new statutory provisions make it far more likely that the threat necessary for this process to proceed effectively will be credible.

Day-Fines as a New Approach to Fine Sentencing

It is clear from research on fining here and abroad that once the decision to fine has been made, setting the amount of the penalty is the key to successful sentencing. Fining must be viewed as a process in which the imposition and enforcement of the sanction are inextricably linked. If the court cannot assume the fine will be collected, the attractiveness of this flexible device to punish and deprive offenders is seriously eroded; but whether it can be collected and enforced without resorting to uncomfortably high levels of coercion appears to depend in large measure on the amount of the original fine in relation to offenders' means. This is a major issue for American judges in considering the expansion of their already fairly extensive use of fine sentences.

The trend in sentencing philosophy today is retribution, which focuses judges primarily on the severity of the crime itself. But in considering the appropriateness of a fine sentence, judges commonly find themselves with "tariff" systems as their only guide to the appropriate amount--that is, systems of informal understanding that fix fine amounts, generally at the lowest common denominator for typical offenders in the system, to be imposed on all defendants convicted of a particular offense. Lacking guidance on other ways to set fines, judges tend to rely on tariff systems and limit their use of fines because these methods place severe restrictions on a judge's ability to adjust fine amounts simultaneously to crime severity and to means. In some jurisdictions we have studied, and probably in many courtrooms around the country, individual judges have tried to modify tariff systems in order to approximate the more formalized European day-fine systems which attempt to reconcile the two potentially conflicting principles of consistency (or

uniformity) and equity in sentencing. But American judges have been provided with little or no guidance on how to do this in a systematic manner. Indeed, state statutes tend to make a day-fine system difficult to develop not only because of low fine ceilings, but also because they do not formally recognize the principles upon which it is based. Nevertheless, in a recent survey, American judges expressed substantial interest in, but uncertainty about, day-fine systems. Fortunately, I believe, new federal statutory provisions provide the groundwork for developing systematic and appropriate methods of fining individuals of differing means convicted of similar offenses across a wide range of severity.

Federal sentencing law now not only recognizes the sentencing principles of proportionality, consistency, and equity, but it also requires that both severity and means be taken into account in setting the amount of a fine. This is an opportunity and a challenge for the federal system to take leadership in this area. Fortunately, there is relevant experience to draw upon in Europe. But important issues remain, primarily in two areas: first, how to obtain necessary information on defendants' means and how to assess their "ability to pay" from that data; and second, how to relate fine levels to offense severity. Before offering some practical suggestions on these problems, based upon the growing body of empirical research, I should point out that personal interviews and surveys of American judges suggest both that they have developed a lot of interest in using day-fine systems, but also that they anticipate media and public criticism of sentences that will inevitably produce some apparent disparities (an employed, middle-class offender fined a much larger amount than a poverty-stricken offender convicted of the same, or even a more serious, offense) and that they are wary of guidelines and/or

ability to pay formulae that appear to limit judicial discretion.

Day-fine systems were initially developed in Finland and Sweden in the early 1920s and 30s, then in Cuba, Denmark and finally the Federal Republic of Germany in 1975. The penal laws of several other countries (now including the American federal system and the state of Kansas) embody the concept but have not fully implemented it. The basic notion is that the punishment represented by a fine sentence should be proportionate to the severity of the offense, consistent or uniform within severity classifications, and equal across individuals with differing financial resources. To reconcile the potentially conflicting principles of consistency and equity in sentencing, day-fine systems create a two-stage decision process in setting the amount of the fine. First, the number of day-fine units to which an offender will be sentenced is determined with regard to the seriousness of the offense (and, perhaps, extenuating and mitigating circumstances as well as the offender's previous record) but without regard to the means of the offender. Thus, crimes of equivalent gravity may be assigned the same number of units as a sentence. The monetary value of each of these units, however, is determined separately in the second stage of sentencing and is explicitly set in relation to what the offender can afford to pay given his or her financial means and, sometimes, responsibilities. Thus, the total penalty--the degree of punishment--should be in proportion to the gravity of the offense committed across different offenses and consistent within severity categories but, within a given offense, it should cause an equivalent level of economic burden (short of hardship) across defendants of differing means.

1. Setting the fine units for offense categories

The German Tagebussensystem (day-fine system) is probably the most useful

comparison for the American federal system. Relatively recently adopted (1975), its legal and social context is more analogous to the American system than is the more commonly described but more idiosyncratic Swedish day-fine system. The German system is organized around benchmarks: the minimum fine sentence is five day-fine units, and the maximum is 360 for a single offense. Although there is no direct correspondence between the number of day-fine units and terms of imprisonment established by law for the same or similar offenses, the 360 maximum is logically linked to the idea of a one year prison term; indeed, in the German sentencing system, fines are typically seen as alternatives to short-term prison sentences.* Thus while assessment of the gravity of the offense for fining purposes is not strictly or solely determined by a comparison to the permissible prison sentence, statutory prison maxima for certain offenses as well as general sentencing practices in imposing prison sentences for those offenses, do seem to play a part in defining the relative seriousness of offenses for the purposes of selecting the number of day-fine units imposed.**

*In West Germany, the day-fine system was adopted about the same time as legislation providing that custodial sentences of less than six months were to be replaced by fines in all but exceptional cases. Together, these innovations appear to have produced significant changes in sentencing patterns. More than 113,000 sentences to imprisonment of less than six months were imposed by West German courts in 1968 (20% of the total); by 1976, this number had dropped to less than 11,000 (1.8%). During the same period, the proportion of fine sentences rose from 63% of the total to 83%.

**In 1973 the 93rd Congress proposed a day-fine system for the United States which was not passed; it set a minimum fine sentence of 10 day-fine units and a maximum of 1093 units, and set ranges for each of the severity levels in the penal code: a maximum fine sentence of 1000 day-fine units for A and B felonies; 500 for C and D felonies; 100 for E felonies; and 50 for misdemeanors and violations.

Calculation of the number of day-units corresponding to the offense is not narrowly prescribed under German law. Courts, therefore, have themselves evolved guidelines for this decision which vary from region to region. (Data on Germany, Sweden and England, all reveal regional differences in both prison and fine sentences, even within offense categories, but regional variations are greater than the variations among judges within a given court or region, and probably reflect different local norms, values and "judicial cultures.") The judges in the area most thoroughly studied in Germany have produced guidelines for ranges of day-fine units corresponding to broad offense groups. However, the range is so great for particular offense categories (e.g., from 10 to 50 units for theft) as to render the guidelines virtually meaningless. Given this latitude, it is possible for judges to tinker with the figures in such a way as to assign a number of day-fine units within the range based not exclusively on the degree of gravity or culpability involved, but also on a calculation of what the resulting total fine amount would be given the monetary value of each day-unit for the particular defendant. This puts the cart before the horse and can reduce the day-fine system in practice to a post-hoc rationalization for a decision based upon more traditional tariff-based sentencing notions.

For this reason, there has been discussion in Germany of reforming the system either to narrow the ranges or to separate the two stages of decision making so that judges do not know the monetary value of the day-fine unit for defendants at sentencing, or both.

The notion of applying to the United States federal system a fairly strict (that is, narrow range) presumptive guideline system for setting the number of day-fine units would be in keeping with much of the current

sentencing guidelines thinking in this country. Since Germany has also capped the maximum monetary value of any day-fine unit at a fairly high level (10,000 Deutschmarks, or about \$4,000), fines for wealthier offenders convicted of the most serious offense for which a fine would be considered appropriate in Germany can be quite substantial even if, theoretically, they are only linked to a year's imprisonment: 3.6 million D.M. (or about \$1.5 million) for a single offense and multiples for consecutive offenses. And, indeed, under the German day-fine system, fines for affluent offenders have risen rather dramatically.

There are potential variations to this fairly pure day-fine model that might be used in the United States, for example, one that would cap the total fine amount permissible (in dollars) for each level of offense seriousness. But this seems cumbersome and antithetical to the notion of trying to maximize the balance between equity and consistency, because caps limit the range of punishment that can be imposed upon more affluent defendants. Such variations in the basic day-fine system are movements away from the retributive base of the model with its emphasis on the crime rather than the offender.

Furthermore, a purer day-fine method of setting guidelines would also permit, it seems to me, greater ease in the imposition of restitution penalties. If the calculation of the number of suitable day-fine units for a particular crime was fixed and had no monetary cap (other than, perhaps an overall high maximum such as in Germany) then the ultimate dollar amount of the fine that results, once the value of the day-fine unit is established, could be viewed by the court as the maximum total monetary penalty permissible for this defendant on this offense. If restitution payments were then included in the sentence, its amount could be set separately according to

recognized principles of assessing damage, harm or injury; that amount would be paid to the victim up to, but not in excess of, the maximum monetary amount established by the day-fine process. Capping the fine amount for different offense levels would not make this process as easy to accomplish, and restitution would probably have to be considered separately. However, research evidence from England strongly suggests that such separate sentencing assessments often leads to imposing total monetary obligations that are far in excess of the offender's ability to pay; this in turn is highly related to nonpayment and default.

2. Assessing means and ability to pay

Under both old and new federal statutes, the courts are left to rely upon information obtained largely from defendants, validated when possible, to assess a defendant's means and ability to pay. Defendants can be asked by the Probation Division, which is charged with the pre-sentence investigation of their financial status, to cooperate voluntarily by providing access to bank and income tax data, but such information cannot now be compelled. It is likely that, if fining is expanded in the federal system, fine amounts will rise and statutory changes may be needed to provide the court, in at least some instances, with greater levels of legal access to financial information. However, it would appear from the experience of other court systems that already fine extensively and in high amounts that exclusive reliance upon voluntary cooperation should not be considered a priori a barrier to the use of fines, and the use of day fines in particular.

The Federal Republic of Germany relies largely on easily available information which generally can be verified if necessary (as do American courts in setting bail amounts). As a practical matter, data on employment,

public assistance, grants and scholarships are the major sources used by the German courts to establish ability to pay. Only rarely, and only in cases of the gravest offenses fined at the highest levels, do courts seek other data, including information from banks which are obliged, under German law, to assist them. The more typical informal information sources for assessing means do not seem to trouble German judges who report wide satisfaction with the system, substantially greater use of fines, and much higher fine amounts. In addition, research has revealed high collection rates in Germany, including collection of very large fines paid by installments over long periods of time.

In England, as in Germany, the source of information on the offender's resources is largely from self-reports or from counsel or police, and it is limited to relatively easily verified items. However, both research and practical experience has indicated to the British that their courts are not taking means into sufficient consideration in setting fine amounts. As a result, the Home Office is attempting to get magistrates to assess means more thoroughly by encouraging use of a new procedure that would provide the court with more financial information on a regular basis. In some courts around the country, defendants facing conviction are asked to voluntarily complete a means enquiry form that contains information about their income, assets and expenditures. In the breadth of the new information requested--taking expenditures as well as resources into account--this form has more in common with day-fine practices in Sweden than with either German day-fine or previous English sentencing practices. Initial reports on this procedure suggest that, among the limited number of courts using the forms, voluntary compliance varies widely but that overall about a third of the defendants are cooperating. Obviously, much more needs to be known about how the English

courts are implementing these procedures and what accounts for the variation in voluntary compliance, but the preliminary evidence is not discouraging.

It would appear that the U.S. federal courts can substantially improve their efforts to obtain financial information from defendants, even if cooperation remains voluntary. Our own interviews with officers of the federal Probation Division and more systematic data collected by the Government Accounting Office suggest that assessing the financial status of defendants has not been given very high priority by probation officers in preparing presentencing reports. Data are often incomplete or non-existent. The new statutory provisions requiring federal judges to consider ability to pay when setting fines, however, will increase the pressure on probation officers to provide better information. This should be accompanied, however, by procedures to assure they receive far better training in financial investigations, better guidance as to what information is available and required by the courts, and better tools to impress upon offenders that cooperation is in their interests and that providing false information is a crime subject to penalty. It is difficult to know in the absence of American experience reflecting a serious commitment to collecting better financial information just how successful such procedures will be. The experience of other countries, however, suggests that, at least in the bulk of cases, these strategies would be effective; for serious career criminals, however, who have substantial financial expertise and who face very large fines as part of their sentences, more coercive tools for obtaining information on assets may be needed in the future.

Finally, if key items of voluntary financial information can be acquired by a better trained and more motivated Probation Division, federal judges can

be provided with standardized assessments of defendants' ability to pay.

Financial institutions and other lenders who are in the business of risking money make such determinations routinely in American society using relatively few pieces of data, much of which is also provided voluntarily or available through credit bureaus. Furthermore, the recent shift in the statutory responsibility for setting the terms of payment--particularly for establishing installment terms--from those at the end of the fining process who are charged with enforcement to those at the beginning of the process who are charged with sentencing suggests that procedures can be set in place immediately to make large fines, like other large financial obligations, payable over time. This can mitigate, at least somewhat, problems caused by initial errors in assessing ability to pay, problems that can also be addressed by judges through their newly acquired right to modify the terms of fine sentences should payment problems prove persistent. Such new flexibility enhances the likelihood that the fine can be a meaningful penalty and encourages movement in the direct of establishing a formal day-fine system to set them.

Before closing, I would like to offer a brief comment on post-sentencing enforcement issues. As I indicated above, research evidence is unambiguous that fines set properly, even when they are large and are to be collected in installments, are enforceable, generally without much additional cost or the use of undesirable coercive techniques. The conditions that must be met for this to occur routinely are largely administrative. The court must signify at the time of sentencing that it views the fine obligation seriously and unequivocally expects payment or specific coercive means (especially seizure of property) will be employed to ensure the integrity of the sentence. The offender's payments must be closely monitored by people who take their

responsibility for fine collection seriously and who are held professionally accountable for failure. When an offender does not meet the terms for payment set by the court, the enforcement reaction should be immediate and personal, with a steady progression of responses characterized by mounting pressure and increased threat of greater coercion. If these administrative activities occur systematically, there is little reason for concern that large numbers of defendants will face imprisonment for contempt of court or prosecution under new federal statutes for willful default. Research evidence suggests that the majority of nonpayment cases result from improperly set fines, administrative ineptitude, and the failure of enforcement agencies to credibly threaten delinquent offenders in a timely fashion. As I indicated above, recent legislative action has provided the federal bench with the potential for fine enforcement to operate far more smoothly and effectively than it has in the past. This represents an important precondition for developing new sentencing techniques that will enhance the usefulness of the fine; it also presents an unparalleled opportunity for the federal system to attempt to do so.

References

- Albrecht, Hans-Jorg and Elmer H. Johnson (1980) "Fines and Justice Administration: The Experience of the Federal Republic of Germany." 4 International Journal of Comparative and Applied Criminal Justice, 3-14.
- Casale, Silvia S.G. and Sally T. Hillsman (1986) The Enforcement of Fines as Criminal Sanctions: The English Experience and Its Relevance to American Practice. New York and London: Vera Institute of Justice.
- Casale, Silvia S.G. (1981) "Fines in Europe: A Study of the Use of Fines in Selected European Countries with Empirical Research on the Problems of Fine Enforcement." Working Paper #10. Fines In Sentencing. New York: Vera Institute of Justice.
- Cole, George F., Barry Mahoney, Marlene Thornton and Roger A. Hanson (1986) Fines as an Alternative to Incarceration: The Practices and Attitudes of Trial Court Judges. University of Connecticut and Institute for Court Management of the National Center for State Courts (draft).
- Comprehensive Crime Control Act (1984) P.L. 98-473.
- Criminal Fines Enforcement Act (1984) P.L. 98-596
- Gillespie, Robert W. (1980) "Fines as an Alternative to Incarceration: The German Experience." 44 Federal Probation 20-26.
- Hillsman, Sally T., Joyce L. Sichel, and Barry Mahoney (1984) Fines in Sentencing: A Study of the Use of the Fine as a Criminal Sanction. Washington, D.C.: U.S. Department of Justice, National Institute of Justice.
- Hillsman, Sally T. (1983) "Criminal Fine Collection and Enforcement." Statement before the Subcommittee on Energy, Nuclear Proliferation and Governmental Process of the Senate Committee on Governmental Affairs, Washington, D.C., August 3, 1983.
- Sichel, Joyce L. (1982) "U.S. District Court Fine Imposition and Collection Practices." Working Paper #9. Fines In Sentencing. New York: Vera Institute of Justice.
- Softley, Paul and David Moxon (1982) Fine Enforcement: An Evaluation of the Practices of Individual Courts. Home Office Research and Planning Unit Paper #12. London: Her Majesty's Stationery Office.
- U.S. General Accounting Office (1985) After the Criminal Fine Enforcement Act of 1984--Some Issues Still Need to be Resolved. Washington, D.C.: United States General Accounting Office.