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Alternative Penal Sanctions

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I. INTRODUCTION

The United States has a dual court system, one at the national level and the other at the state level. Like the federal system of government, each judicial system is legally supreme within its own jurisdiction. However, there are also shared or overlapping responsibilities. For example, possession of narcotics can violate both federal and state law. The accused is therefore subject to prosecution in either a state or federal jurisdiction.¹ Where an offender is charged will depend on where he committed his act, what act he committed, and who arrested him.

State courts try the vast majority of criminal cases filed in the United States, hearing almost 100 million matters each year. In fact, the courts in a single, medium-sized state may handle more cases than the entire federal judiciary.² Each state has its own independent penal code and method of sentencing. If the defendant has been convicted under a criminal statute promulgated by a state legislature, her sentence will most likely be determined by a state judge who will impose a sentence somewhere within a wide, statutorily fixed range. However, some states have promulgated sentencing guidelines which severely restrict judicial discretion. In a few states, the legislature has provided for jury sentencing.

If the defendant has committed a crime which subjects her to the jurisdiction of the federal government, she will be tried in a federal court and the sentence will be imposed by a federal district judge who will use the sentencing guidelines to determine the defendant's sentence. Federal courts have jurisdiction to hear all cases arising under

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1. At times the defendant may be charged by both. Because they are independent sovereigns, the double jeopardy provision of the Eighth Amendment to the Constitution is not violated. See, *Bartkus v. Illinois*, 359 U.S. 121 (1959).

2. David W. Neubauer, *America's Courts and the Criminal Justice System* 47 (1992). "At least ninety-four percent of the nation's criminal cases are state cases and ninety-one percent of all prisoners are housed in state institutions." Reitz, "Sentencing Reform in the States," 64 *U. of Colo. L. Rev.* 645 (1993).

the Constitution and the laws of the United States.³ There are no common-law offenses against the United States, only those acts which are made criminal by an act of Congress may be prosecuted.⁴ This system of sovereignties in the United States — state and federal — is easy to define. The criticism of the system, particularly regarding penal sanctions, is far more complex and troubling. Before considering recent, innovative alternatives in penal sanctions, an overview of this criticism is necessary.

II. CRITICISM OF THE SYSTEM OF PENAL SANCTIONS

Traditionally, federal and state judges were given wide discretion to impose a sentence anywhere below a statutory maximum.⁵ These sentences could be based on virtually any factor that the judge deemed important, no explanation was needed to be given for a judge's decision, and the decision was virtually non-appealable if within statutory limits. Before its guidelines went into effect, Congress passed statutes that established sentencing limits for different offenses in the federal courts. However, these statutes almost always delegated broad discretion to the judge in setting an appropriate sentence in a specific case.⁶ Under this system, a judge could consider each case individually and choose a sentence that she felt would best serve society and the offender. A sentence imposed on a convicted individual could depend on any factor "concerning the defendant's life and characteristics."⁷

However, there are problems with this traditional system of sentencing. Allowing judges to impose sentences based on their own political philosophies and concepts of justice lead to demonstrably disparate treatment of similarly situated defendants. A sentence imposed on a convicted individual might have depended more on the personality and background of the individual judge than the characteristics of the individual defendant.⁸ Disparate sentences were, in large part, the result of differing judicial philosophies about the purpose of sentencing. One judge might have imposed a long prison sentence while another might have decided probation was a more

3. U.S. Const. art. III, § 2, cl. 1.

4. *United States v. Eaton*, 144 U.S. 677 (1892).

5. Burns, "The Presentence Interview and the Right to Counsel: A Critical Stage Under the Federal Sentencing Structure," 34 *Wm. & Mary L. Rev.* 527, 537 (1993).

6. See S. Rep. No. 98-225, 98th Cong., 1st Sess., reprinted in 1984 U.S. Code Cong. & Admin. News at 3182, 3222.

7. *Williams v. New York*, 337 U.S. 241, 247 (1949).

8. See generally, Lee, "The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement," 23 *Ind. L. Rev.* 681 (1990), quoting Lowe, "Modern Sentencing Reform: A Preliminary Analysis of the Proposed Sentencing Guidelines," 25 *Amer. Crim. L. Rev.* 1, 11 n. 54 (1987).

appropriate sentence for the same individual if that judge believed the primary goal of sentencing was rehabilitation.⁹

An additional problem emerged as well. The sentence imposed on an offender rarely, if ever, reflected the actual time served. Commonly a defendant served only one-third of the sentence before the Parole Commission ordered release. Victims' groups echoed public sentiment that while sentences imposed on convicted individuals may have reflected the seriousness of their crimes, the length of the sentence actually served did not.¹⁰

III. THE FEDERAL RESPONSE

To remedy the disparity and uncertainty in federal sentencing, Congress created the Federal Sentencing Commission whose main goal was to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." A few states have developed guideline sentencing in response to the same concerns.¹¹ In designing a system to replace individualized sentencing, Congress required several factors to be taken into consideration in formulating the sentencing guidelines. These include the nature of the offense, mitigating and aggravating circumstances, deterrent effects of the sentence on the convicted individual and others, and the incidence of the particular offense in the community and in the nation.¹²

The Commission designed the guidelines to focus more on the crime, rather than the individual defendant.¹³ Empirical evidence had cast doubt on the rehabilitative model by suggesting that correctional rehabilitation programs were ineffective in reducing criminal behavior.¹⁴ In an attempt to achieve more effective sentencing, the primary goals of sentencing shifted to retribution and deterrence, making most individual offender characteristics far less important. To achieve honesty in sentencing, the Commission required that any

9. See, Weigel, "The Sentencing Reform Act of 1984: A Practical Appraisal," 36 *U.C.L.A. L. Rev.* 83, 98-99 (1988). In addition, serious questions were raised as to disparities based upon race, gender and economic background of the offender. See, panel discussion, "Equality Versus Discretion in Sentencing," 26 *Am. Crim. L. Rev.* 1813 (1989).

10. See Polito, "The Rights of Crime Victims in the Criminal Justice System: Is Justice Blind to the Victims of Crime?," 16 *New Eng. J. on Crim. & Civ. Confinement* 241 (1990).

11. See, e.g., Andrew von Hirsch et al., *The Sentencing Commission and Its Guidelines* 18-26 (1987), which examines the experience of six states.

12. 18 U.S.C. § 3553(b).

13. Hunsaker, "Are Departures From the Sentencing Guidelines Undermining the Goals of Congress: *United States v. Lara*," 8 *Cooley L. Rev.* 119 (1991), quoting, 1984 *U.S. Code Cong. & Admin. News* 3182, 3235.

14. See, e.g., Douglas Lipton, Robert Martinson & Judith Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (1975).

sentence imposed be served completely, less minor credit for good time served.¹⁵

The guideline range takes into account the crime of conviction, particular characteristics of the crime and the defendant, as well as the offender's past convictions. Because all persons convicted of similar crimes who exhibit similar characteristics would become subject to the same guideline range, the sentencing guidelines are designed to reduce disparity and uncertainty in sentencing by confining the judge's discretion to the guideline range. However, because the Commission recognized "the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision,"¹⁶ a departure provision was included in the guidelines.

IV. DEVELOPING PROBLEMS

Although guidelines sentencing both in the federal and state systems may reduce disparity and uncertainty in sentencing, it has aggravated other problems and failed to provide solutions. A key concern has been that sentencing people to longer terms with no possibility of parole increases the prison population. The United States now imprisons a greater percentage of its population than any other country.¹⁷ By 1990, over 750,000 people were in state or federal prisons. When the over 400,000 citizens in local jails is included, the total incarcerated population is well in excess of one million.¹⁸ Every year the population of our jails and prisons increases faster than the increase in the general population.¹⁹

15. 18 U.S.C. 3624(b).

16. United States Sentencing Commission, *Guidelines Manual 1988* at 1.7.

17. Dailey, "Prison and Race in Minnesota," 64 *U. of Colo. L. Rev.* 761 (1993); Associated Press, "5 year old sentencing law sends more to prison longer," *The Times Union*, June 22, 1992, A6. The Bureau of Justice Statistics of the U.S. Justice Department reviewed federal criminal prosecutions since 1986. The percentage of sentenced defendants going to prison increased from 52% to 74%. The average length of sentences served increased 29% from 1986-1990. One observer refers to the increase in growth in prison populations in the United States as "astonishing." Blumstein, "Racial Disproportionality of U.S. Prison Populations Revisited," 64 *U. of Colo. L. Rev.* 743 (1993).

18. Louis W. Jankowski, *Correctional Populations in the United States*, Bureau of Justice Statistics, July 1992, at 8, 78.

19. Dean J. Champion, *Felony Probation: Problems and Prospects*, at 77 (1988). Between the years 1976 and 1986, the adult resident population in the United States increased about 17%. During the same time period corrections populations increased by the following percentages:

Adults in jail	85% increase
Adults in prison	100% increase
Adults on probation	121% increase
Adults on parole/conditional release	98% increase

The rising financial cost of our overcrowded jails and prisons can be seen everywhere.²⁰ The consensus of most experts is that the federal prisons are between 50% and 60% over design capacity,²¹ and the problem is not limited to the federal system. No state seems to be immune from overcrowding. Two states that initiated alternative sentencing programs, Oregon and Delaware, did so only when their jails and prisons were almost at a crisis point.²² Construction costs now average \$70,000 a bed in the United States.²³ The costs are not simply in construction. By virtually every estimate, jails and prisons are by far the costliest form of punishment.²⁴ The Federal Bureau of Prisons estimates incarceration to be almost fifteen times more expensive than standard probation in the federal system.²⁵ Depending on the region, maintenance costs of jails and prisons range from \$10,000-20,000 per year, per inmate.²⁶

The problems with the American penal system are not simply statistical or cost related. On a humanitarian basis, tremendous concerns have been raised with the penal sanction here. Conditions in most United States prisons are grim. For both violent and non-violent offenders, jails and prisons foster inmate gangs and long-term coalitions. These coalitions often have a greater influence over inmates' lives, the choices they make, and their future conduct than prison officials and programs. Moreover, it is clear that inmate

20. Jankowski, *supra* n. 18, at 10:

	1978	1983	1988	1989
# of inmates	158,394	223,551	343,569	395,553
rated capacity	245,094	261,556	339,633	367,769
% of rated cap. occupied	65%	85%	101%	108%

21. The Bureau of Prisons reported that the federal prison system was operating at 158% of design capacity in 1988. *Federal Sentencing Reporter*, July-Aug. 1988, at 105.

22. When the Sentencing Accountability Commission was appointed in 1984, only two states incarcerated more people, per capita, than Delaware. The state had 274 inmates for every 100,000 citizens. du Pont, IV, "Expanding Sentencing Options: A Governor's Perspective," *NIJ Reports*, Jan. 1985, at 2.

Oregon developed its sentencing guidelines facing 18 of its 33 county jails being under federal court orders related to population. Kathleen Bogan, *Oregon's Sanction Units Exchange System for Felony Sentencing Guidelines*, *Federal Sentencing Reporter*, July-Aug. 1991, at 36.

23. Andrew R. Klein, *Alternative Sentencing: A Practitioner's Guide* iv (1988).

24. Weinstein, Symposium, "Alternative Punishments Under the New Federal Sentencing Guideline," *Federal Sentencing Reporter* July/Aug. 1988, at 96, 98. See generally, Symposium, "A Decade in Sentencing Guidelines: Revisiting the Role of the Legislature," 28 *Wake Forest L. Rev.* 181-507 (1993).

25. *Id.* at 98. The Bureau of Prisons puts the cost to the federal system at \$40.64 per inmate, per day, for prison; \$34.24 per resident, per day, for a halfway house; and, \$2.74 per day, per probationer, for probation.

26. Bureau of Justice Statistics, U.S. Dept. of Just., *Sourcebook of Criminal Justice Statistics 1990*, at 87 (Kathleen Maguire & Timothy J. Flanagan eds. 1991). Average cost, per inmate, of operating expenses in U.S. jails is \$10,639. Average cost in the urban Northeast is \$17,710. Maintenance costs for prisons are in excess of \$20,000 per year, per inmate. Klein, *supra* n. 23, at iv.

safety is a daily concern, and modern prisons have evolved into a kind of violence ridden condition of life.²⁷ Sadly, the stress brought about by living in constant physical danger exacerbates the psychiatric symptoms that many inmates have before they ever enter prison.

Finally, the failure of the United States may be seen in its inability to stem the tide of violent criminal behavior.²⁸ America's prisons and jails do not keep its streets safe. Regardless of how many people are locked up, Americans still feel unprotected.²⁹ The standard approach of the criminal justice system to offenders has been either to lock them up and expect time to change their behavior, or do almost nothing with the unconfined offenders.³⁰ There has been little in the way of alternatives until recently.

For some, the critical failure of penal sanctions in the United States is that defendants become educated in "schools of crime." United Nations Crime Prevention and Criminal Justice Section Chief Gerhard O.W. Mueller wrote:

The specific direction of motives and drives is learned from definitions of the legal code as favorable or unfavorable. A person becomes delinquent because of an excess of defini-

27. See, Justice Blackmun's statement, dissenting in *United States v. Bailey*, 444 U.S. 394, 420-21 (1980):

. . . . But we do not live in an ideal world "even" (to use a self-centered phrase) in America, so far as jail and prison conditions are concerned. The complaints that this Court, and every other American appellate court, receives almost daily from prisoners about conditions of incarceration, about filth, about homosexual rape, and about brutality are not always the mouthings of the purely malcontent. The Court itself acknowledges that the conditions these respondents complained about do exist. . . .

The atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking. The dissent in the *Bailey* case in the Court of Appeals acknowledge that "the circumstances of prison life are such that at least a colorable, if not credible, claim of duress or necessity can be raised with respect to virtually every escape." . . .

A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates. . . .

28. See, e.g., Bureau of Justice Statistics, *supra* n. 26. In the 1980's, the Total Crime Index increased every year except 1982-84. The total increase from 1979 to 1989 was 12.2 million to 14.2 million. Violent crime showed an increase every year but four (1976, 1982-1983, 1987).

29. *Id.* at 171. Every year, for the last ten years, a majority of Americans report feeling that crime has remained the same or increased from the previous year. Moreover, the repeat offender is increasingly dangerous even after incarceration. In one famous study sponsored by the RAND Corporation, the researchers matched probationers with prisoners and found prisoners and higher recidivism rates, both across crime type and in an aggregate, two-year follow up period. Joan Petersilia, et al., *Prison versus Probation in California: Implications for Crime and Offender Recidivism*, at 23 (1986).

30. *Id.* at 2.

tions favorable to violation of the law and an absence of definitions unfavorable to violation of the law.³¹

Prison provides many of these "definitions favorable to violation of the law." Inmates see their more violent peers achieve power, respect, and notoriety through illegal means. In fact, prison may be the perfect environment to reinforce any encouragement to law-breaking which exists in the inmate's outside life.

V. ALTERNATIVES TO THE PENAL SANCTION OF IMPRISONMENT

In recent years, strong arguments have been offered in favor of sentencing alternatives. The arguments are grounded in a mix of positive features of alternative programs and negative aspects of prisons. The reasons run the spectrum from the humanitarian, to the financial, to the practical. At a bare minimum, alternatives to incarceration can free financial and personnel resources which are badly needed elsewhere. Even if one is prepared to give up on the idea of reducing the incidence of criminal behavior through rehabilitation in favor of an approach which only seeks to incapacitate criminals, one cannot ignore the possibility of accomplishing this goal by using many less resources. By a fortunate coincidence, many less expensive alternatives to incarceration appear to do a better job than jail or prison at reducing recidivism rates.

A. House Arrest — Home Detention

A sentence of home detention means the defendant may not leave his home except for employment.³² The means of enforcement varies; however, virtually all programs use some type of electronic monitoring. The Florida house arrest program made use of the two most popular methods. A telephone robot calls selected offenders at prescribed time intervals and records the results on a printout which is reviewed by a program officer. Additionally, the calls are recorded so the offender's voice can be verified.³³

The second method involves a tamper-proof bracelet. The bracelet is placed on the offender's wrist. When the telephone robot calls, the offender must insert the bracelet into the special phone equipment where it can send a signal which is unique to the offender. This

31. Gerhard O.W. Mueller, *Sentencing Process and Purpose* 112 (1977).

32. See, e.g., Chi, "House Arrest: Florida's Community Control Program", in *Innovations*, 1 (Council of State Gov't Innovations Report RM764, July 1986). Offenders under Florida's program are only allowed to leave their home at prearranged times for employment or public service work. Specially arranged activities include doctor's appointments, religious services, and self-improvement programs in the community. However, these events must be approved in advance by the community control officer. Some jurisdictions even require the offender to arrange for shopping and laundry to be done by friends and family, when possible. *Id.* at 2.

33. *Id.* at 2.

signal positively identifies the offender as being at home, without the use of a program officer to review printouts. The offender must still record his name, the date, and the time for spot-audits.³⁴ Electronic monitoring may also include a passive version of the electronic bracelet described above. This system does not require a telephone robot. Rather, the bracelet emits a signal which must be picked up by a receiver in the offender's home. If contact is ever broken, the receiver sends an alert, over the phone lines, to the local police or the house arrest program.³⁵

Since its introduction in 1983, use of electronic monitoring has grown rapidly, with a number of states passing legislation authorizing electronic monitoring as a condition of probation or alternative sentence.³⁶ Most often, the targeted offenders are those who would ordinarily go to prison.³⁷ The trend is to use house arrest — with electronic monitoring — as a true alternative to incarceration.³⁸

One great advantage to home detention is financial, as it allows for the diversion of the offender from high-cost incarceration. However, the advantage runs deeper. Offenders under house arrest are not just permitted, but often required, to maintain employment.³⁹ When the offender is unable to secure employment, he is usually assigned public service work and can become a productive citizen.⁴⁰ Another advantage of home detention is its inherent flexibility. Jurisdictions place different restrictions on the times which offenders are confined to their homes.⁴¹ More importantly, the structure of any electronic monitoring program permits the use of a multi-level system linked to the seriousness of the crime. The most serious crimes eligible for house arrest may require constant confinement, with rigid restrictions on exceptions; lesser crimes are accompanied by greater amounts of freedom.

In terms of ultimate societal goals, the program may prove highly beneficial. In handing down a sentence of house arrest, one court noted that a term of incarceration would likely have a destructive effect, and a large fine would create a substantial impediment to

34. *Id.* at 2-3.

35. *Id.* at 6. States such as New Jersey, Oregon, and Kentucky use some version of this passive system.

36. Klein, *supra* n. 23, at 239.

37. Chi, *supra* n. 32, at 2.

38. Klein, *supra*, n. 23, at 239.

39. Chi, *supra* n. 32, at 2.

40. *Id.* at 2.

41. See, e.g., Chi, *supra* n. 32, at 2-5. The Florida program requires constant confinement, except for employment. Kentucky requires offenders to stay in their homes between 10 p.m. and 6 a.m.

rehabilitation. The court concluded that home detention was more likely to induce reform than either incarceration or a fine.⁴²

The attractiveness of home detention lies in its ability to achieve the goals of incapacitation without the problems associated with incarceration. A sentence which leaves room for a job or community service, increases the role of restitution in the sentencing framework.⁴³ Society is protected when the offender is homebound during the high crime hours of the evening. The offender is punished by both the restitution/fees and the incapacitation. Yet, costs are a fraction of incarceration.⁴⁴ Additionally, the offender is not exposed to an environment which teaches and encourages crime.

42. *United States v. Murphy*, 108 F.R.D. 437 (E.D.N.Y. 1985). The defendant there was subject to \$56,000 in fines and 50 years in prison. The court explained its decision.

All agree that longer prison terms, and imprisonment for more and more persons cannot be borne indefinitely. Other controls to prevent crime, social policies to avoid criminality and alternative punishments are essential.

The goals of punishment are incapacitation, rehabilitation, specific deterrence of the individual defendant, general deterrence of those who might commit crimes without the threat of punishment and, finally, the related goals of providing an outlet for the expression of strong disapproval of unacceptable conduct together with the catharsis of a specific statement of public condemnation together with punishment.

Incapacitation of those who are dangerous must, of course, continue to be our policy.

Rehabilitation in general takes place more effectively outside prison walls. Federal probation officers in this District have the resources and skill to exercise strict control, supply training and help with jobs. Cutting the person off from family, friends and jobs during this process is counterproductive. . . .

Obviously the maximum fine could never be paid and would accomplish nothing except to make it impossible for the defendant to live and rehabilitate herself. The maximum terms of imprisonment provided by the statutes are much too long to even be considered seriously for this relatively young person who has never, so far as we know, committed another crime.

Putting her in prison for any substantial length of time will undoubtedly help to destroy her. The conditions of imprisonment, even in the best prisons for women, are reprehensible.

She is sentenced to 2 years of home detention on Count One in place of imprisonment. . . .

The defendant will be required to remain in her apartment, or other place of abode. She may not change her residence without the consent of Probation. She may leave only as permitted by Probation for medical reasons, employment and religious services and essential shopping for food and the like. She may go directly to and from her job and may seek a new job only as permitted by Probation. She is at all times subject to strict supervision, to surprise visits by Probation and strict control.

Id. at 438-39.

43. *Klein*, *supra* n. 23, at 237.

44. *Chi*, *supra* n. 32, at 4. Florida's Community Control pilot project cost \$2.86 per inmate, per day, while the prison system costs \$27.54 per inmate, per day. The estimated \$20 million saved in fiscal year 1985-86, from 2,100 fewer prison commitments, was calculated without consideration of the 80% of offenders in the program who "found gainful employment and paid taxes, supervision fees, restitution, and have supported themselves as well as their dependents."

B. *Community Confinement*

Closely related to home detention is community confinement, which has developed in response to concerns over home detention. Two recurring objections to the use of home detention have been offered. First, many offenders cannot afford the cost of the phone line which must be installed.⁴⁵ Second, the sentence may act to confine an offender to an environment which is just as destructive as prison.⁴⁶ Community confinement has all of the positive aspects of house arrest, and it addresses these two concerns.

A sentence of community confinement is essentially a term of house arrest, except it is served in a halfway house or in-patient treatment facility.⁴⁷ In both situations, the offender is confined only by the monitoring system and the threat of jail if she violates the terms of the sentence. Both sentences permit the offender to work and pay for the cost of the sentence. Community confinement, however, has the flexibility of keeping the monitoring equipment in place, even if the offender is at first unable to pay.

Another difference between the two systems is that community confinement is often a more productive environment for the offender. Small, community based settings provide a platform for reintegration.⁴⁸ The offender is removed from a harmful environment and incapacitated — through electronic monitoring — while assisted in building a new, productive support system.

C. *Restitution*

Restitution of victim losses is increasing as jurisdictions seek to involve victims more in the criminal justice process. To some, restitution contains the best features of punishment and clinical treatment. Restitution is unlike any other criminal sanction because it requires the offender to *do* something, as opposed to something being *done to* him.⁴⁹ Use of restitution results in a concentration on the victim-offender relationship, instead of the government-offender relationship. Since victim and offender are the two most intimate parties involved, this focus increases social harmony and the sense of com-

45. Chi, *supra* n. 32, at 3-4.

46. *Id.* at 1.

47. *Id.* at 1.

48. See, e.g., Belinda Rogers McCarthy & Bernard J. McCarthy, *Community Based Corrections* (1984). Reintegration is an idea born in the experience of post World War II veterans affairs. Officials discovered many veterans had difficulty adjusting to life back home. Time spent in veteran's hospitals made them more dependent on institutional help. Community based programs oriented toward training the veteran to live on his own proved to be most successful.

49. See, e.g., Stephen Schafer, *Compensation and Restitution of Crime Victims* (2d ed. 1970).

munity. It personalizes both the effects of crime and the need for compensation.⁵⁰

One technique which increases the success rate of restitution is victim-offender meetings. Forcing the victim and offender to sit down, face to face, in a controlled environment is another result in the growing trend of victim involvement in the process.⁵¹ These meetings give the victim the opportunity to express how the crime affected her. The Department of Justice studied the records of 17,000 juvenile offenders, from 1977-1979. They found that those who participated in victim-offender meetings had consistently higher rates of restitution payments and lower recidivism rates.⁵²

D. Community Service

Community service programs are appropriate wherever restitution would normally be used, but there is no specific victim to be reimbursed. Crimes injure society at large, regardless of whether a specific individual is injured. Embezzlement, for example, does not solely injure the party defrauded, but also injures the public trust. In addition to reimbursing the stolen funds, the offender owes a debt which must be repaid to the community.

Like restitution, community service personalizes the effects of crime by requiring action on the part of the offender.⁵³ Another advantage to community service is the financial savings. In New York, the Genessee County Sheriff created a community service program in order to avoid the cost of constructing a new jail. In one year, the program supervised 15,000 hours of work. This service saved 2,500 hours of jail time, or \$75,000 of incarceration costs.⁵⁴

E. Standard Probation

Probation is the basic root of alternative sentencing.⁵⁵ One characteristic element of probation is the power of the judge to tailor conditions of probation to the offender.⁵⁶ Most jurisdictions apply a reasonableness test to the conditions.

50. Klein, *supra* n. 23, at 141-42.

51. *Id.* at 159.

52. *Id.* at 160. These results held true even when the study was controlled for variables such as seriousness of the offense, past crimes of the offenders, and, amount of restitution.

53. *Id.* at 73, and accompanying text.

54. *Id.* at 178. The savings were even greater, as the numbers do not include the funds which would have been spent to pay someone to do the work that the offender performed.

55. *Id.* at 2.

56. In North Carolina, in 1984, a 40-year-old doctor drove drunk and killed the family breadwinner. The judge sentenced him to 5 years probation. In addition, he was ordered to pay the deceased's family \$25,000 per year, for 30 years — totalling

A condition of probation is invalid for not serving the stated goals of probation if it:

- 1) Has no relation to the crime of which the offender was convicted,
- 2) Relates to conduct which is not, in itself, criminal, *and*
- 3) Requires or forbids conduct which is not reasonably related to criminality, does not serve the statutory ends of probation and is invalid.⁵⁷

As the probation alternative became more popular the system overloaded. From about 1975 to 1985, California saw a 15% increase in the number of citizens on probation, but a 10% decrease in funding for probation departments.⁵⁸ Even worse, the same period saw a 29% decrease in personnel in California's probation departments.⁵⁹ Despite its flexibility, probation developed a bad reputation in this country. The average American is aware that probation caseloads are quite large so that supervision may amount to little more than one contact per month.⁶⁰

Increased availability of intermediate sanctions may be the key to breaking this impasse. Currently in most places we see only two fundamentally different choices available in dealing with criminals: incarceration or probation. Considering the public's distaste for the virtual unlimited freedom of routine probation described above, it should be no surprise that incarceration is the prevailing choice. More and more criminal justice experts are calling for a middle ground for offenders who are neither low-risk nor serious threats.⁶¹

F. Intensive Probation Supervision (IPS)

Inspired by standard probation, intensive probation supervision (IPS) goes well beyond the traditional programs. IPS probationers are required to work, instead of merely encouraged to do so. More importantly, there is greater supervision by the probation officer, and even technical violations of IPS rules result in jail time. Since the increased supervision is considered vital to the success of IPS, some programs have probation officers to probationer ratios written into the enabling legislation.⁶²

\$750,000 — and to donate a pint of blood every two months for the entire term of his probation. Klein, *supra* n. 23, at 129-131.

57. *Id.* at 74.

58. Champion, *supra* n. 19, at 22.

59. *Id.* at 83.

60. *Id.*

61. See, Petersilia, "Evaluating Alternative Sanctions: The Case of Intensive Supervision," *Federal Sentencing Reporter*, July-Aug. 1991, at 30.

62. One of the first IPS programs began in Illinois in 1984. In addition to employment, drug testing, curfew, and arrest checks, the Illinois program requires a *minimum* of five face-to-face meetings between officer and probationer per week.

As with all the alternative sanctions discussed, IPS may offer substantial financial savings.⁶³ Examples of savings with IPS range from 75% of the cost of incarceration (at the worst) to 15% of the cost of incarceration (at the best).⁶⁴ The true savings lie in the population from which IPS probationers are drawn. When the program limits consideration to those who are ineligible for standard probation and who are headed for prison, the savings mount.

If IPS programs are to continue successfully, they must meet several challenges. First, IPS must not suffer the same fate as standard probation, system overload. Criminal justice executives and administrators must observe the design limits of the programs. The central key to IPS is intense supervision. Increased caseloads due to fiscal cutbacks would defeat this central objective. Another problem encountered by some IPS projects is being too far ahead of available treatment resources.⁶⁵ Although more punitive than standard probation, IPSs still seek to provide for the proper clinical treatment needs of the offender. It is, of course, self defeating if programs are unable to get offenders into drug, alcohol, and other necessary treatment projects, even when mandated as a condition of IPS.

IV. CONCLUSION

As the crime rate in the United States rose, frustration with the criminal justice system also rose. In response, dramatic changes were made in sentencing and incarceration patterns for both the state and federal systems. Americans have seen a move toward more fixed sentencing and far higher incarceration rates. Serious crime has not, however, generally declined. As a result, for the first time in many years, jurisdictions throughout the United States are considering alternative penal sanctions. Some of the more important alternatives have been reviewed here.⁶⁶ This trend toward innovation — and cost saving — is likely to accelerate in the future as we look to more effective and efficient means of combatting crime, while at the same time rehabilitating offenders.

Champion, *supra* n. 19, at 22-23. This intense monitoring was made possible by limiting caseloads to no more than 25 probationers per officer.

63. The initial program in Illinois was set up to monitor 750 offenders, at a cost of \$1.6 million, a considerable savings from the \$10 million it cost Illinois to incarcerate 750 offenders. *Id.* at 23.

64. Petersilia, *supra* n. 61, at 32.

65. Petersilia, *supra* n. 61, at 31.

66. But not the only alternatives. Others include mandatory drug treatment programs; required counseling or education in lieu of prison; prison boot camp; victim-offender reconciliation programs; abolition of incarceration for all first time offenders (except violent offenders); and innovative sentencing by individual judges to make "the punishment fit the crime" or to "teach criminals a lesson."