# WILL THE REAL ALTERNATIVES PLEASE STAND UP?

MICHAEL E. SMITH*

## I

## INTRODUCTION

A few weeks ago, the Attorney General of the United States remarked that, because traditional responses such as double celling "are frequently no longer available, sometimes because of over-reaching decisions by the Federal courts . . . [w]e simply cannot afford to ignore alternative forms of punishment."[1] The Attorney General is hardly the first law enforcement official to hope for relief from jail and prison overcrowding through the expanded use of alternative sentencing. But if he is serious about this, he will have to dig through a lot of useless rhetoric and a lot of wishful thinking by probation officials and private-sector program entrepreneurs before coming to the smattering of useful experiences upon which sound practice in this field must be built.

There is no denying that, in response to overcrowding and to the more enduring commitments to justice and humane social policy, heartening and occasionally illuminating examples of creative alternative sentencing occur around the country in cases subject to jail and prison sentences. Everywhere there are skilled program operators, judges, probation officers, prosecutors and defense counsel making inspired, albeit numerically insignificant, contributions toward the systematic introduction of alternative sentencing. Some of the most promising current work is being done by colleagues who are present at this colloquium. I salute them, for I know something about the difficulties—political as well as practical—that they face day to day. However, my task here is to strike a cautionary note.

The question before us[2] is to what extent can we look to alternative sentencing for relief from the jail and prison overcrowding that is already perceived as a crisis throughout the country? My answer is—not much. Moreover, if advocates of alternative-sentencing, including myself, permit

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* Director, Vera Institute of Justice. Mr. Smith has been Director of the Vera Institute since 1978.

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1. N.Y. Times, Mar. 4, 1983, at A21 col. 1.

2. The question before us is not whether it is possible to fashion an alternative sentence for a particular offender—or even for a particular class of offenders—who would otherwise draw jail or prison time under current sentencing practices in a particular jurisdiction. The answer to that question is—it is possible.

crisis managers to ask too much too soon from the alternative-sentencing field, we will debase and destroy it. We should not get so intoxicated by the sudden surge of support for "alternatives" that we forget the reasons why the development of sound practice in this field is a daunting challenge.[3] Let me remind you of three general points before plunging into detail.

First, it is perfectly clear that most convicted offenders receive, and for a long time have received, alternative sentences. That is, their guilty pleas are not followed by incarceration. Instead, they are fined (in much larger numbers than anyone seems to realize), they are asked to report occasionally to probation officers, and they are discharged on the condition of good behavior or with exhortations to find steady employment or to seek treatment for substance abuse problems. Probation, fines and conditional discharges are already the rule, not the exception.

Second, when contemplating a major effort to apply alternative sentencing in a way that draws offenders out of prison-bound and jail-bound dispositional tracks, it must be remembered that jurisdictions and individual judges vary dramatically in their sentencing habits. I am not referring to the issue of disparate results here, for sentencing outcomes are remarkably, and depressingly predictable;[4] rather, I am referring to the disparate reasons and motives that drive dispositional decision-makers to reach these outcomes in individual courtrooms across the country. If we want programs that draw offenders away from jail and prison sentences, we will have to design, offer and deliver programs that respond directly to the needs of the judges and prosecutors who are sending them there. We cannot assume, however, that a program that meets this threshold and is really used as an alternative in one courtroom will displace jail sentences in another.

Third, for a variety of reasons the breakpoint in a particular jurisdiction between cases that now draw time and those that end with some noncustodial alternative is likely to be thought of in these terms: "Some offenders must be punished and others must be incapacitated, and because we are responsible public officials, for these offenders we have no alternative but to lock them up; the offenders we don't lock up don't need to be punished and their behavior doesn't need to be controlled."

Serious efforts to introduce the systematic use of alternative sentencing in cases now drawing jail and prison time must attack directly the deeply entrenched view that equates punishment and control with incarceration, and that accepts alternatives as suitable only in cases where neither punishment nor control is thought necessary. Where penal policy is caught in this dichotomy—and I suggest that this is the situation in most jurisdictions—

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3. *See* Doleschal, *The Dangers of Criminal Justice Reform,* 14 CRIM. JUST. ABSTRACTS 133 (1982).

4. *See* D. MCDONALD, ON BLAMING JUDGES: CRIMINAL SENTENCING DECISIONS IN NEW YORK COURTS: ARE GUIDELINES NEEDED TO RESTRAIN JUDGES? (1983).

resources devoted to alternative sentencing will fail to draw jail- and prison-bound offenders unless at least one of two preconditions is met: either judges and prosecutors develop more parsimonious views about who has to be punished and who has to be controlled (a fundamentally political process in which alternative-sentencing programs might, but need not, play a part) or something (such as a well-designed alternative-sentencing program) changes their views about the capacity of alternative sentencing to punish or control the offenders they are now jailing.

There are some who disagree, who think that the punitive instinct must be confronted and resisted, not accommodated, by alternative-sentencing programs, and that efforts to control individual behavior are anathema to the human spirit. My view is that a workable strategy to displace jail and prison sentences with alternatives must respond in good faith to the demands of dispositional decision-makers for sentences that punish or control.[5] If I am right, overcrowding will not be relieved by simply expanding the resources devoted to existing alternatives or expanding the menu of alternatives offered to the courts. Without something precisely tuned to the particulars of the jurisdiction and the concerns arising at the sentencing of particular classes of offenders, current dispositional patterns will not budge: those for whom punishment or incapacitation is thought necessary will still do time, and those at whose offenses we have learned to blink will fill up the new alternative-sentencing programs.

Finally, it is too easy and too common to attribute the overcrowding problem to a presumed reluctance of politicians, bureaucrats, judges and prosecutors to believe in alternatives. It is much more important to acknowledge that we are presently virtually without credible capacity to punish[6] or incapacitate offenders except by imprisoning them. In short, I believe that a substantial amount of jailing today results, not from judicial preference for imprisonment, but from judges' and prosecutors' perception, for the most part well grounded in experience, that there is no other way to make

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> Scanning the literature, it quickly becomes evident that the phrase "alternatives to incarceration" has two distinct meanings. An alternative can be either an alternative means to the same objectives or an alternative goal. In the current discussions, it becomes clear that some authors reject most of the usual objectives of the criminal justice system . . . . From this perspective the search for alternatives should be abandoned. . . .
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> The debate on the alternatives gets mired when, by elfin coincidence, one partner argues for defining new goals and the other for defining new means. For convenience of distinction, the positions should be made explicit.

Heijder, *Can We Cope with Alternatives?*, 26 CRIME & DELINQ. 1, 2 (1980).

6. I am simply excluding from discussion here the host of cases (e.g., first-time offenders on relatively minor charges) in which the need for punishment seems, at least on the basis of current practice and attitudes, satisfied by the process of arrest, appearance before the court, and imposition of various hortatory sanctions (conditional or unconditional discharge, and their equivalents), and the large number of cases in which fines are now being imposed and collected.

punishment certain in cases where it as unconscionable for an offender to "walk" yet one more time, or to protect the community from further offenses in cases where an offender's unconstrained liberty seems too threatening to community safety.

While it is apparent that alternative punishments can be devised for those for whom jail is thought to be the only available punishment, and while techniques of surveillance and control might be developed for the supervision, in noncustodial settings, of offenders whose future behavior is of real concern, I think it easy to do injury to the orderly development of workable alternatives for these types of offenders. For example, it would be injurious if the overcrowding crisis suddenly required the alternatives field, in its present primitive state of development, to take on major new responsibilities for effective punishment and control. There is a great deal of hard work ahead before the field can respond to such a demand.

Let me try to illustrate some of my points by reference to a class of offenders sentenced to short jail terms in New York City. It appears that New York City judges annually impose about 8,000 jail sentences of ninety days or less.[7] If these offenders serve an average of forty-five days on Rikers Island, they will occupy about 1,000 cells a year—roughly half the cell space available for sentenced prisoners in the city's overcrowded jail. Although the 8,000 sentences include quite a spectrum of current offenses and prior criminal records, it appears that the bulk are petty thieves. Such offenders have long records, but they were convicted and jailed for stealing, for example, a twenty-dollar pair of pants, copper pipes from an abandoned building, disco tapes from Crazy Eddie's, or sneakers from Hudson's. The aggregate injury of their crimes is great, but the risk of violence is low and the magnitude of the injury in most of their individual thefts borders on the trivial.

If we want to reduce the overcrowding that arises from the jailing of these petty recidivists, we need first to inquire why they are being jailed. Because most of our judges are aware of the conditions and regimen at Rikers Island, the purpose of these short jail terms cannot be to rehabilitate persistent petty thieves. Because so many of these prisoners served short jail terms for similar offenses, it would take a very optimistic judge to try to halt a persistent offender's thieving by relying on another short jail term to achieve specific deterrence. Because there are so many thefts of the kind these offenders commit, because such thefts are so seldom followed by arrest, and because first offenders are almost never jailed upon conviction of petit larceny, it is unlikely that judges who impose these short jail terms

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7. This is my best guess after examining data collected by the city's Department of Correction and data collected by New York State's Office of Court Administration. Neither source permits more than a guess.

are hoping for greater crime control through general deterrence. Also, because the terms imposed are short, it is hard to believe they are intended to achieve crime reduction by incapacitating these thieves for the duration of their active criminal careers. If these short jail terms are not used for rehabilitation, deterrence or incapacitation, then why impose them? My hypothesis is that the purpose of these short jail terms is punishment, and that it is principally the persistence of petty recidivists that eventually provokes judges to punish by dishing out thirty-, sixty- and ninety-day jail terms. And I think the felt need to punish in these cases arises from a widely shared notion of rough justice that however ineffective these short jail terms may be as a crime control measure, they do satisfy our gut feeling that repeated flouting of the laws against theft cannot go unpunished.

To the extent my hypothesis is right, we cannot expect displacement of the jail sentences imposed on this group by the offer of an alternative sentence that delivers rehabilitative counselling or that restricts freedom for a few months. While a court might welcome such benefits, an alternative sentence is not going to displace jail for these persistent petty thieves unless it delivers, and is perceived to deliver, punishment.

## II

## Can There Be Punishment Without Jail?

First, it is useful to ask why the existing array of alternative sentences does not prevent the systematic use of short jail terms to punish the petty thieves described above. The simple answer is that judges and prosecutors do not view any of the current alternatives as workable punishments in these cases, principally because they have no confidence that the sentences would be enforced.

### *A. Fines*

Fines are viewed by some as punitive, and fines are imposed with surprising frequency and with much greater success than is commonly thought. The Vera Institute of Justice staff has recently compiled a great deal of data about the imposition and collection of fines in New York City. Although we have not finished analyzing this data, it appears that about one-third of the sentences imposed by the criminal courts are fines; their use ranges from 15% of the sentences in theft cases, to 33% in drug, disorderly conduct and loitering cases, to 65% in gambling cases. Surprising to some, only 20% of the sentences for prostitution were fines.

Fines are not only imposed more frequently than we thought, but also collected more often than not—a real surprise to those accustomed to the cynicism of courtroom wisdom. It appears that 75% of the criminal fines levied in New York City are actually paid within twelve months of sentencing. Collections run at 80%, excluding Manhattan where the low rate of fine collection in prostitution cases distorts the picture. Even more surprising is

that after twelve months only about 20% still owe fines, 67% paid their fines, and 12% were punished by jail terms.[8]

Fines seem pretty effective as punishment. Maybe they could be used more widely. However, it would be difficult to extend their use without diminishing the probability of exacting the punishment; it would be especially difficult to conceive of the amounts and the enforcement procedures that would make fines a rational or an effective alternative punishment for the class of offenders now consuming scarce jail resources on thirty-, sixty- and ninety-day sentences in cities like New York—the high-rate, less serious recidivists. These offenders are characterized by extreme poverty, poor prospects for gainful employment, illiteracy, a lack of linkage to familial, voluntary or government supports, short time-horizons, little sense of obligation, and poor responsiveness to threats of jailing for noncompliance with obligations. If fined, they could not legitimately and would not willingly pay. Enforcement against defaulters would be difficult to achieve through the procedures now used to monitor and compel compliance by those currently fined. More often than not, punishment could be exacted only by resentencing to jail after arrest on a warrant issued for failure to pay—an eventuality not likely to occur, given the Police Department Warrant Squad's backlog of felony warrants and the inherent difficulty of finding individual members of this transient group on the streets. For most of the petty thieves now sentenced to jail, fines could effect punishment only if, after arrest for a new offense, a court were to impose consecutive terms—a result that would clearly frustrate the overriding policy preference to conserve scarce jail resources.

It has been suggested that fines (or financial restitution) could become workable punishments for these offenders if programs are developed and financed to put unemployed offenders into paid jobs so that their wages can be garnished or the conventional fine enforcement machinery can be used. Although such programs would put legitimate income into the hands of those from whom we wish to extract it, the net economic gain to the offender is hard to square with our punitive intent, particularly in areas and in times of labor market shrinkage.

In short, in at least the large urban jurisdictions where too many indigent offenders present themselves repeatedly before sentencing judges, the potential for displacing short jail terms through the expanded use of financial penalties is very limited. If this is true for fines, it is also true for monetary restitution—currently more popular in the alternatives field, but plagued with the same operational difficulties and performance improbabilities as fines.

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8. Zamist, *Report on New York City Empirical Research on Fines,* in FINES IN SENTENCING 2 (1982).

I believe that there are jurisdictions where fines and monetary restitution could be used more or enforced better than they are now. I suspect, however, that most of the offenders who would be effectively punished by fines are employed first-time offenders for whom the experience of arrest and criminal processing is often more punitive than and as much of a deterrent as payment of a fine, and whose punishment by the alternative would not, in fact, reduce the demand for jail cells.

### *B. Probation and Conditional Discharge*

If fines and monetary restitution are out as alternative punishments for the large class of offenders now drawing short jail terms, what potential is there in probation and conditional discharge, the remaining conventional alternative punishments? New York law, like the law of most jurisdictions, authorizes a broad enough range of conditions which can be made part of a probation order or conditional discharge to allow punishments to be fashioned to fit almost any circumstance. Also, in theory, attaching punitive conditions to a probation order should be more effective than attaching them to a conditional discharge, if only because probation officers are employed precisely to enforce such conditions. However, without substantial new resources and the development of new techniques for monitoring and enforcing conditions, these apparent opportunities for innovative punishments are illusory; furthermore, to the extent that the potential for alternative punishments exists in these devices, it is more likely to be realized if the overloaded probation bureaucracies are bypassed where they exist and new structures, drawing their authority from conditional discharge and like powers of the courts, are created to perform the tasks necessary for monitoring, supervising and enforcing punitive conditions.[9]

Probation supervision caseloads are now running at close to 200 per officer in New York City. In some other jurisdictions they were reported to have reach 500 per officer by 1980.[10] In New York City, the only condition that can realistically be monitored is the requirement that the offender report periodically to the probation office, usually, once a month. Recently, differential supervision was adopted in this city, so that a relatively small group of offenders are subjected to intensive probation—a misnomer under which they are required to report once a week. Although it is undeniably burdensome to show up for probation interviews (and, no doubt, some probationers view the requirement as a punishment imposed with punitive intent), there is a view held deeply by those in the dispositional process and

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9. *But see* Gettinger, *Intensive Supervision: Can It Rehabilitate Probation?*, CORRECTIONS MAG., Apr. 1983, at 7.

10. *See* Krajick, *Probation: The Original Community Program*, CORRECTIONS MAG., Dec. 1980, at 7.

by the public that persons are either punished (jail) or let off with a slap on the wrist (probation). That perception is hard to change. An essential first step in changing it would be to enforce the reporting requirement vigorously, however trivial the burden it represents. According to a recent audit by the comptroller of the city of New York, almost one-half of the required visits were not kept, and probation records reflect that "more than 70% of probationers . . . violated the terms of their probation an average of 4.7 times."[11] In one-third of the cases where probationers failed to report for required visits, the court was not informed of the violation; in another 10%, the court was informed, but not until six months had passed, by which time all of these offenders had absconded. The Department of Probation responded to these audit observations: "It is inconceivable that the Department would contact the court on the first missed appointment. The courts and the prison system couldn't possibly handle the volume."[12] It is a sad but true statement for those who want to see probation quickly adapted as an alternative mechanism to exact certain punishment.

Part of the problem, of course, can be attributed to the huge probation caseloads in New York City and the 34% reduction in probation staff levels between 1974 and 1981. The more serious problem, however, is that in cities like New York the enforcement side of probation is simply not taken seriously. It follows that if probation is imposed for the purpose of punishing, it must be by judges who have not yet learned the rules of the game and the realities of probation and police practice. Punishment by probation order is typically given only if (a) a new offense brings the offender back before the court during the term of the probation sentence, (b) the court is requested to revoke the prior probation sentence, and (c) the court resolves to punish the offender with jail time in addition to the time it imposes for the new offense.

Clearly, if probation were taken seriously, if violations were vigorously pursued and violators returned to court for missing their appointments, and if courts were prepared to back up the reporting requirement by jailing violators, there could be mild punishment by probation orders and courts might be induced to make systematic use of it. However, it seems obvious that the punitive appeal of probation would be greatly enhanced if the enforced conditions went beyond the required office visits; if, for example, performance of some specified number of hours of unpaid labor for the benefit of the community were made a condition. The community-service sentence is an alternative much discussed in relation to probation these days. I believe probation will require, if it is to earn wide usage as a punishment or

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11. OFFICE OF THE COMPTROLLER OF THE CITY OF NEW YORK, BUREAU OF AUDIT AND CONTROL, AUDIT REPORT ON FINANCIAL AND OPERATING PRACTICES AND PROCEDURES OF THE NEW YORK CITY DEPARTMENT OF PROBATION, JULY 1, 1977 TO APRIL 30, 1980 (1981).

12. *Id.*

as a framework for punitive conditions in cases where punishment matters, an entirely new focus on, and possibly a radical reorganization of, its supervision and enforcement functions.

### C. *"Community-Service" Sentencing: The New York City Experience*

I suggested above that compelling the performance of a certain number of hours of unpaid labor for the benefit of the community may be the most promising concept available today for nonincarcerative punishment. Before detailing some of the lessons learned in an apparently successful New York City effort to displace short jail terms by imposing community-service sentences on petty recidivists, I must offer a few caveats. However promising it may be, community-service sentencing is a dangerous concept as well. It is dangerous because it is so attractive and because it is no more than involuntary servitude if it is enforced. Because it is so attractive, it tends to win rather uncritical endorsement and to be imposed as an alternative punishment even when no resources are devoted, and no attention is paid, to its enforcement. Under those conditions the concept is quickly diluted; in my view, those conditions prevail in almost all American jurisdictions where it has been introduced. Because it is not in fact used in cases where punishment is a serious concern but is used where white, middle-class, first-time offenders are relied upon to enforce their own punishment, it becomes useless as a framework for punishing the chronic, low-level recidivists who are now occupying a large volume of jail cells on short, punitive terms of incarceration. Using a new alternative punishment for cases to which the courts would not ordinarily attach punishment makes it unenforceable when offenders refuse to comply. This quickly becomes obvious to offenders and judges alike and, in turn, makes it all the more difficult to move the courts towards using the alternative sanction in cases that are serious enough for enforcement to be an issue and jail a likely outcome.

For a hint of how destructive it can be to introduce any alternative punishment without ensuring integrity in the monitoring, supervision and enforcement functions, we need only to look to the results of a Law Enforcement Assistance Administration's (LEAA) effort to introduce restitution and community-service sanctions in New Jersey:

> Three types of restitution were to be used: monetary, community service, and direct victim service. The program began in September, 1979 in 14 counties. . . .
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> The record of performance in some counties can only be described as shocking. In Hudson, 2263 hours of community service were ordered but only three hours performed. In Essex, $23,386 in restitution was ordered, and $756 paid; 570 community service hours were ordered, and 121 performed. In Middlesex, Atlantic, Cape May, Cumberland, Hunterdon, and Ocean, not one hour of

community service was performed. In Cumberland, Ocean and Salem, not one dollar was paid in restitution.[13]

I do not believe community service must fail as an alternative to jail for chronic short-term offenders, but it is difficult, slow work to build around the concept a framework of operations and of expectations that support even part of the punitive requirements for the displacement of short jail terms in most large urban jurisdictions. To illustrate these difficulties, and the technique used in a moderately successful attempt to overcome them, I must rely on the work of some of my colleagues at the Vera Institute.

In the New York City Community Service Sentencing Project, Vera has been trying to help the city induce the systematic substitution of community-service sentences in cases otherwise bound for short jail terms. These cases typically involve unskilled, unemployed blacks and Hispanics who have accumulated records of prior criminal conviction. These offenders frequently face multiple personal problems and, because they are difficult for the noncustodial staff to handle and are perceived by sentencers to deserve punishment, they have always seemed beyond the reach of alternatives. By excluding first-time offenders, by directly enforcing and supervising every hour that offenders are required to perform their service obligations, and by proving to the court that the staff could and would secure the resentencing of offenders who refuse to perform their community service or who disobey the rules for behavior at the community sites, the New York City project has won recognition from many of the judges and prosecutors that it is possible to exact punishment, in some jail-bound cases, without jailing.

The initial pilot project ran in the Bronx from the end of February, 1979, through September, 1980.[14] In this pilot phase, 260 offenders were sentenced by the Bronx Criminal Court to perform seventy hours[15] of

13. *Restitution Program Goes Wrong,* News and Views, Oct. 1981, at 5.

14. The initial pilot project was supported by grants from the Ford Foundation, the Edna McConnell Clark Foundation, the German Marshall Fund of the United States, and the City of New York.

15. The choice of a one-size-fits-all 70-hour term for the first community-sentencing project was arbitrary in some respects, and it was made with the knowledge that (a) for many cases drawing short jail terms, 70 hours of unpaid labor would be viewed by judges and prosecutors as insufficiently onerous to be substituted for the jail time, and (b) some judges and prosecutors would be unlikely to view 70 hours of unpaid community service as punitive, period. The Vera staff decided to try the 70-hour term because (a) certain administrative advantages, important in a pilot project, could be expected from a uniform and tightly limited term which could be finished in two working weeks of seven-hour days if performed perfectly; (b) if 70 hours proved to be too short to displace many jail terms, the project could be retooled to offer longer terms, but it was thought unlikely that the project could ever reduce the length of its shortest term of community service if the initial first offer turned out to be more punitive than required to displace the shortest jail sentences; and (c) if 70 hours proved sufficient to displace the shortest jail terms, it would be possible (without reaching terms of absurd lengths) to target longer terms of community service at offenders who are thought by the court to require greater punishment.

That this choice was not wildly off the mark is evidenced by the jail-displacement results of the 70-hour sentence, discussed below, and by the receptivity of prosecutors and judges in

unpaid service for the benefit of the community, under the direct supervision of the project staff. Working seven hours each day, offenders cleaned up badly neglected senior citizens' centers, youth centers and neighborhood parks; they repaired appliances and installed smoke alarms for the elderly; they helped to staff recreational programs for retarded children; and they performed other useful work in some of the most service-needy areas of the city.

The project staff devoted most of their energies to establishing and maintaining credibility of the sentence as punishment. Through on-site supervision, they kept strict accounting of the hours served, until the terms of service were completed; they went into the community to find and confront offenders who failed to appear at the assigned service sites; they worked closely with the Police Department Warrant Squad to ensure execution of arrest warrants issued at the project's request for those offenders whose failure to comply required resentencing; and they shepherded these resentencing cases through the labyrinth of the criminal court to ensure that, if the punishment of compulsory community service was avoided, the punishment of jail was not.[16]

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Brooklyn to a recent experiment with 105-hour (three week) terms of community service in lieu of jail terms for recidivists convicted of property crime at the felony level. *See* VERA INSTITUTE OF JUSTICE, THE NEW YORK COMMUNITY SERVICE SENTENCING PROJECT: DEVELOPMENT OF THE BRONX PILOT PROJECT (1981); VERA INSTITUTE OF JUSTICE, THE NEW YORK CITY COMMUNITY SERVICE SENTENCING PROJECT: THIRD INTERIM REPORT (1983).

16. Project staff also developed court routines to increase the likelihood that the community-service sentence would draw principally from the jail-bound dispositional track. The screening process, as it has evolved, begins when the project's court representatives cull cases from the daily court calendars on the basis of appropriate charges, i.e., the basic range of property and theft offenses which lack elements of threat or violence against the person. Court papers for the selected cases are then searched for a variety of factors which help to determine first-cut eligibility: indicia of jail-boundness (e.g., at least one prior conviction, pretrial detention status, markings by judges or assistant district attorneys indicating jail time on the plea offer); indicia of reliability (as indicated by community ties); and indicia of suitability (absence of a recent and significant record of violent criminal behavior). Discussions are then held with the defense attorneys, assistant district attorneys and defendants in cases selected from screening the court papers. Paper-eligible defendants are rejected for many reasons. Assistant district attorneys may indicate that a case is not substantial enough to warrant a community-service sentence or may so strongly insist on a heavier sentence that community service is effectively barred. Some defendants are dropped because they have pending supreme court cases which ultimately yield a negotiated settlement to cover the criminal court case. Other defendants, or their counsel, turn down the suggestion of community service because they prefer to try for a more favorable disposition. Probation officers may object to a community-service plea offer if the defendant is already on probation and may demand that the court impose a stiffer sanction. Judges sometimes reject plea recommendations involving community service and impose other sentences, both lighter and heavier. The project's court representatives themselves may decide to reject a defendant because, upon further investigation, they decide the defendant has a pattern of past violence or a current problem with drugs or alcohol that is severe enough to pose an unacceptable risk on the work sites. Throughout this screening process, the project's court representatives aim to screen out cases that appear, for whatever reason, destined for nonjail dispositions.

Although no formal research was done at this point, the evidence was strong that the pilot project went some distance towards meeting its goal of restricting the use of the new sentence to those who would have served short jail terms. The pilot project's eligibility criteria ensured that all 260 participants had been convicted previously as adults. As a group they averaged 2.5 prior convictions and one-third had been convicted of a felony some time in the past. Over one-half received the community-service sentence in a prosecution commenced by arrest on felony charges (all property offenses). About 95% were black or Hispanic, and almost all offenders were unemployed at the time of the arrest and conviction. This profile has the earmarks of a jail-bound group.

As a result of the pilot project, the city financed a formal demonstration project beginning October 1, 1980, by slightly expanding the Bronx operation and by laying the groundwork for a Brooklyn replication. The Brooklyn office opened in December 1980. In mid-1981, when the swelling volume of short-term prisoners on Rikers Island presented the city with an overcrowding crisis, the project was expanded further and adapted to the Manhattan Criminal Court as well.

Like the Bronx pilot, this expanded demonstration was intended to target the community-service sentence for cases where the courts' decisions whether to jail require difficult individualized decision-making, and where decisions to jail might be changed by a credible offer of an enforceable non-incarcerative punishment. The expectation was that if the project's aim was good, at least one half of those getting community-service sentences would otherwise have been on the jail side of the dispositional decision. It was expected that this half would have served an average of sixty days, and that (after averaging with those who would not have gone to jail) each person sentenced to community service would represent a savings to the city of thirty cell-days. For every 500 offenders sentenced to the project the city would avoid the need for 15,000 cell-days, or forty cells over the course of a year.

From the beginning of the pilot project in February, 1979 through March, 1983, 1,800 offenders were sentenced to perform community service under the project's supervision, and intake is now stabilizing at the desired rate of just about 1,200 offenders per year. The profile is still that of a jail-bound group: those sentenced to community service average 8.7 prior arrests and 5.3 prior convictions, and 44% received a jail or prison term on their last conviction. Most of those who have not fulfilled the community-service condition of their sentences have been returned to court and resentenced to jail.[17] By conventional measures, this program has been a success. But does it displace jail sentences?

17. Although caseloads have tripled over the past two years, the rate at which project staff have secured participants' compliance with the terms of the community-service sentence is holding in the 85 to 90% range. To protect the integrity of the community-service sanction

Knowing that the profile is similar to the profile of offenders who draw short jail terms is not enough to answer this crucial question. The most certain method of determining how the courts would have disposed of the cases of offenders sentenced to community service if the community-service sentence had not been available would have been to establish randomly selected experimental and control groups. Although this method would have yielded the least ambiguous results, it would have required randomizing the sentencing options available to judges in paper-eligible cases. In the criminal court sentencing context, such a procedure raises problems that would be difficult to overcome, and might so distort the normal decision-making process as to render any findings useless.

In lieu of a classical experimental approach, Douglas McDonald of Vera's Research Department undertook a retrospective analysis to determine how the courts reached the decision to jail or not to jail in cases similar to those in which community-service sentences were in fact imposed. With the aid of a computer, a number of statistical models were developed which yielded remarkably accurate predictions of the proportion of defendants who were actually jailed, out of test samples of defendants who were, on paper, eligible for sentencing to the program. These models were then used to estimate the proportion of community-service participants who would have received a jail sentence if the community-service sentencing option had not been available to the court.[18]

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and to ensure its usefulness to the courts, project staff are vigorous in their enforcement efforts. First, all reasonable assistance is offered to offenders to aid them in completing their 70-hour terms (e.g., emergency lodging, detoxification, nutrition and health services). Phone calls, warning letters and visits to the homes of participants who fail to report as ordered to the service sites exact compliance in most cases; when these efforts fail, a letter is presented to the court alleging a violation of the sentence, detailing the enforcement efforts and the offender's noncompliance, and asking that the case be restored to the calendar for resentencing. Close cooperation from the Police Department Warrant Squad helps to bolster the project's ability to return most violators to court. In the majority of delinquent cases, project staff are able to arrange to have the offender brought back before the original sentencing judge.

Once violation of the community-service obligation has been established, the judge resentences; the new sentence may be chosen from the full array of sentencing options the law provides for the original conviction. Because almost nine out of ten offenders sentenced to community service complied, because at least two-thirds of the offenders who failed to comply were returned to the court for resentencing, and because eight out of ten of those so returned received jail terms, the program's enforcement record continues to encourage compliance by a difficult-to-manage offender group and this, in turn, encourages continued use of the sentence in cases where punishment is a priority for the court. So far only 6% of the offenders sentenced to perform community service under project supervision during the period studied have escaped full punishment; 94% have either completed their term of unpaid, supervised community service or have been jailed after being returned to court to answer for the violation.

18. I am indebted to Douglas McDonald for providing me with preliminary findings from his evaluation of the program, and for describing his methodology to me. Clearly, he is not to be held responsible for any errors I may make in sketching his work here. His research, which is scheduled for publication at the end of 1983, probes questions beyond jail displace-

When the statistical models are applied to the offenders actually sentenced to community service in calendar year 1982, it appears that the community-service sentence replaced a jail sentence in 44% of the cases. From the same data base, estimates were made of the average length of the jail terms that would have been received (and the average time that would have been served on Rikers Island, after taking account of credits for pretrial detention and good time) by those sentenced to community service. In 1982, the program freed up an estimated total of forty-eight cell-years in the Department of Correction's supply of cells for sentenced inmates. The project's operations also reduced demand for detention cells because defendants sentenced to community service spend less time in the system awaiting disposition. In 1982, this freed up an additional seventeen cell-years.

Thus, the total number of cell-years saved by the project's displacement of defendants from Rikers Island can be estimated, with reasonable reliability, at sixty-five cell-years in calendar year 1982. Attaching a dollar value to this reduced demand for jail cells is difficult. With Rikers Island at capacity, the easiest method (but one that inevitably overstates the economic value to the city of this impact) is to assess the costs avoided if sixty-five new cells are not built—at roughly $100,000 per cell, this equals $6.5 million. In addition, the services provided to the community through the unpaid labor of offenders sentenced to the project in 1982 are valued at roughly $200,000.

The 44% displacement rate for community-service sentences in 1982, although short of the 50% target, is encouraging. In spite of initial skepticism from officials in each borough, and many efforts by judges, prosecutors and, sadly, defense attorneys to make use of this essentially punitive sanction for cases which, in the ordinary course, would not end with jail sentences, the project seems to be working on its own terms and to be achieving a modest reduction in overcrowding at Rikers Island. Because there will be far more offenders sentenced to the project in 1983, and because its eligibility criteria have been refined (on the basis of knowledge generated by the research), the displacement rate is likely to be well in excess of 50% and the cell-years saved are likely to exceed 100.

I have dwelt on the story of this program development effort not because it is the only one of merit at the moment. It is just that it is the only one I know about in sufficient detail to illustrate my points. The principal point of the story, so far, is that displacing short jail terms by alternative punishments in the stressed courts of our larger cities, requires building alternatives slowly and with considerable care to avoid the pitfalls of earlier

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ment; he has examined the perceptions of judges, prosecutors and defense counsel in the courts where the community-service sentencing project is operating, the attitudes of offenders receiving the sentence, the post-sentence arrest patterns of those sentenced to community service and those jailed from the same courts, and the conceptual and operational issues raised by this and other efforts to use community service as an alternative to jail.

efforts to divert less serious offenders from jail.[19] If the particular effort I have described ultimately succeeds in establishing in New York City a new punishment short of a jail, then the lessons may prove useful in the creation over time of an array of noncustodial punishments for more offenders who are now being jailed.

However, there is more to tell about the challenges facing those who wish to create alternative punishments to displace jail sentences. The obstacles are not just conceptual and operational. In New York City and probably elsewhere the shift from a crime-control strategy rooted in deterrence (punishment) to one derived from the bright, new selective-incapacitation theory is much in evidence.[20] Despite the expectations and pronouncements of academic advocates of selective incapacitation, the enthusiasm with which some prosecutors now embrace incapacitation as their goal at sentencing has led them to seek incapacitative terms not just for selected serious or dangerous offenders, but for the far more numerous petty recidivists as well. Thus, Vera's attempt to induce the systematic displacement of short jail terms by offering an alternative punishment for petty recidivists in New York City has come directly into conflict with an emerging ideology that demands long jail terms to incapacitate career criminals. Although the persistence of petty recidivists might qualify them for career-criminal status in a descriptive sense, it makes nonsense of selective incapacitation to pick them as the targets; creation of sufficient jail space to confine our hordes of petty thieves for the duration of their criminal careers is unimaginable. Nevertheless, the political atmosphere surrounding New York City's community-service sentencing demonstration project suggests that it will be far from easy to keep the new selective-incapacitation strategy focused on the limited number of dangerous high-rate offenders. The following case from Vera's files may illustrate the tendency of this new penal panacea to lose its selectivity:

> Sebastian had 33 prior arrests and 17 prior convictions—all misdemeanors, and almost all for petit larceny or female impersonation (out-of-state)—when he appeared before the Criminal Court charged once again with petit larceny. He had already served ten short jail terms, the most recent one had been imposed four months earlier for petit larceny. He had the right profile for the community service sentence, but the prosecution tagged his file to indicate "career criminal" status; as he stood before the judge for sentencing, the People demanded a year in jail (the maximum).

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19. *See* S. HILLSMAN & S. SADD, DIVERSION OF FELONY ARRESTS: AN EXPERIMENT IN PRETRIAL DIVERSION (1980); Potter, *The Pitfalls of Pretrial Diversion*, CORRECTIONS MAG., Feb. 1981, at 8.

20. *See* P. GREENWOOD & A. ABRAHAMSE, SELECTIVE INCAPACITATION (1982).

> The judge was not inclined to believe that jail could deter Sebastian or that it was worth trying to incapacitate him. But he could find no suitable grounds for refusing the People's recommendation until, looking up suddenly from his reading of the dry language of the Complaint, he exclaimed, "Absurd—this man stole a teddy bear!" Which, indeed, he had.
>
> So Sebastian was ordered to do community service. He accepted his punishment with good grace; although his rather exotic garb sometimes got in the way, he willingly labored 7 hours a day, alongside the rest of the sentenced crew (and some community volunteers) to help restore to habitable condition some run-down housing that was to be managed by a local community group in Harlem, until he had done 63 hours. On the morning of what would have been his last day of the community service sentence, he was before the court again—for petit larceny. Now, he's doing the year.[21]

The competition between a sentencing strategy for petty recidivists based on incapacitation and just deserts can be given statistical as well as anecdotal expression. The pattern of offenses for the petty recidivists who draw short jail terms in New York City is pretty clear.[22] About one-half are rearrested within six months of release from jail. This recidivism is not affected much by the nature of the punishment imposed; being punished by community service does not make "boy scouts and virgins" out of petty recidivists—but neither does jailing them.

The computerized files of the New York City Criminal Justice Agency were searched for data on any new court cases that were brought against the 494 persons who were sentenced to community service between January, 1981 and March, 1982 in Brooklyn and the Bronx, and between September, 1981 and March, 1982 in Manhattan. All had been at risk of rearrest for at least 180 days at the time data was collected. About 46% had been rearrested during the six month period.[23]

That 46% of those sentenced to community service were arrested again within six months of being sentenced was disappointing, and politically troublesome for the project, but it should not be surprising; it would have

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21. Unpublished case study from the Vera Institute of Justice.

22. The following discussion draws heavily upon Douglas McDonald's preliminary research findings. *See supra* note 18.

23. As would be expected from the types of offenders sentenced to community service, where rearrest occurred it was not likely to be for violent crime: 60% of the rearrest charges were for property and simple theft offenses; only 11% were for offenses that could have involved the direct threat of violence or assault (given the possibilities within the penal law definitions); 28% were for possession or sale of a drug, possession of a weapon, or public order offenses (e.g., gambling, loitering).

been unreasonable to expect a short, punitive alternative sentence to reverse (through some unsuspected, powerful, rehabilitative impact) the underlying pattern of recidivism that characterizes the group of chronic petty offenders who conventionally got short jail term after short jail term and who were targeted by project staff for this sentencing alternative.

What would have been the effect on crime if, instead of community service, these offenders had been sentenced to conventional short jail terms? To answer this question, a comparison was made between participant rearrest data and rearrest data on similar offenders actually sentenced to jail. A comparison group of 358 jailed offenders, whose profiles displayed similar prior histories and current charges, was assembled for this purpose. Rearrest information was obtained on each offender for the period running 180 days from release. By the end of the six months, the proportion of the city-wide comparison group rearrested (44%) was roughly the same as the proportion of participants rearrested (46%). Although more than one-half of each group was not rearrested, these recidivism rates are high. Such rates suggest that property offenders who have been receiving short jail terms in New York City's criminal courts tend to remain petty recidivists and that being given short jail terms, as opposed to serving community-service sentences, makes no significant difference in the subsequent rearrest pattern.

It is undeniable, however, that when petty recidivists are punished by short jail terms, they are incapacitated for at least a little while. It is impossible to develop an accurate estimate of how much crime would have been averted had the project and its jail displacement effects not been operating. The best that can be done is to project the most unfavorable comparison, the worst case, by contrasting the rearrest pattern of the participant group as before with the rearrest pattern from date of sentence of the offenders who were actually sent to jail. This worst-case comparison of rearrests begins from the time of sentencing so that the short jail sentences get the benefit of their incapacitative effect. The city-wide proportion of jailed offenders rearrested 180 days from sentencing was 35%, as compared to 46% for participants: the difference probably resulted from the fact that all of the jailed offenders in the comparison group had been removed from the streets for at least an initial period of time after sentencing.

This does not end an inquiry into the relationship between community-service sentencing and crime. Two other more difficult questions remain. First, does the apparent crime-reduction effect from incapacitating the jailed offenders persist if the measurement period is extended to twelve months, for example? Second, are those offenders who are rearrested arrested more or less frequently, depending on the initial sentence?

Because the proportion of program participants rearrested was highest in Manhattan, and because the difference 180 days from sentencing was greatest there (51% of participants rearrested, as compared to 39% of jailed offenders), a second look at Manhattan recidivism data was recently undertaken. Contrasting the percentage rearrested a year from the date of sen-

tencing (making, again, the worst-case comparison), we found that 59% of those sentenced to jail, and 69% of those sentenced to community service were rearrested within a year. The gap, presumably caused by the incapacitative effects of short jail terms at the beginning of the year, was narrower than when measured at six months, but it evidenced what appeared to be a continuing crime-control benefit from even short jail terms. This apparent benefit pales, however, when one notices that those who had originally been sent to jail were much more likely to be arrested more than once. The jailed offenders were rearrested an average of 2.1 times each over the twelve months following their release from jail, while the offenders sentenced to community service were rearrested an average of 1.5 times each over the twelve months at risk. As a result of this lower frequency of rearrest among the group sentenced to community service, the average number of rearrests over the year following sentencing was identical for the two groups (1.5 for each), despite the early incapacitation of the jailed offenders.[24]

This rearrest data does not permit certainty of interpretation: the two groups of offenders whose post-sentence behavior is being compared are not, after all, perfectly comparable.[25] Nevertheless, the data gives little comfort to those who assume that the incapacitative effects of short jail terms offer a lasting crime-control advantage over punishing these same offenders through community-service sentences.

There is a certain irony here. The New York City Community Service Sentencing Project was aimed at establishing an enforceable punishment, short of jail, for a class of offenders who were not deemed serious but who could not, given their persistence, go unpunished. But at just the moment when that effort began to show some success and stability as an alternative punishment, the context of crime-control strategy began to shift from punishment to incapacitation. As the data suggests, although short jail terms

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24. It is necessary to add here (although the point does not advance a discussion of alternative punishments very much) that this population of petty recidivists is severely disadvantaged and very short of the educational, financial and familial resources essential for a change in lifestyle to occur. The project attempts to avoid confusing participants, so it tries not to mix the required punishment with help; however, it extends an open offer, to anyone who completes the sentence, of help in finding a job, job training, addiction treatment, welfare advocacy, and so forth. About two-thirds of the 90% who complete the sentence take up this offer; about one-half of these actually follow through on the referrals opened up for them; and about one-half of them (or about 15% of the total) stick with the job, the training, or the treatment. Needless to say, the jailed offenders were simply dumped back on the streets at the end of their terms.

25. Another reason why these comparisons of rearrests must be interpreted with caution is our inability to establish the length of time, within the twelve-month measurement period, for which offenders in either group were actually at risk of rearrest. Rearrested offenders from both groups undoubtedly spent some time in pretrial detention, and some undetermined proportion was sentenced to jail or prison after being rearrested. The time these individuals were off the street should not be counted as time at risk of rearrest, and such time may have differed for the two groups.

offer little if any crime-control advantage over community-service sentences, a community-service sentence is far too mild in its incapacitative impact to survive a requirement that the behavior of petty recidivists be brought under control through sentencing policy. This leads me to the second major question about alternative sentencing as a source of relief from jail and prison overcrowding.

## III

## CAN THERE BE INCAPACITATION WITHOUT JAIL?

For some years I have been fascinated by the lack of serious attention paid by program sponsors and even by evaluators to the in-program offenses committed by persons given alternative sentences. The example that comes to mind is Project New Pride. At the end of the seventies, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) was receiving a great deal of criticism from Congress and from the field for its failure to develop a sufficient program or devote adequate research funds to serious delinquency. In response OJJDP decided to elevate Project New Pride, an admirable Denver program which offered an unusual but not uniquely rich array of remedial and counselling services, to Exemplary Program status, and millions were allocated to its replication.[26] Encouraging other jurisdictions to establish programs like Project New Pride was sound, but the rationale offered by OJJDP was not. First, the national program guidelines specified that replications were to focus Project New Pride intervention at serious delinquents, but initially defined serious delinquents in terms that would have excluded as insufficiently serious roughly one-half of the juveniles who had been enrolled in Project New Pride itself. Second, although the original project had not been dealing with juveniles as serious as the guidelines suggested, over 50% of Project New Pride participants had been rearrested during their participation in that program.[27] The extent to which the program's shortcomings, on the incapacitative side, were overlooked is clear from the OJJDP program announcement inviting replications: "Juvenile justice agencies refer multiple offenders to Project New Pride with confidence that both youth and community interests are protected."[28] Not only had the program not protected community interests but no one had noticed.

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26. *See* Charle, *The Proliferation of Project New Pride*, CORRECTIONS MAG., Oct. 1981, at 28.

27. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTIONS, PROJECT NEW PRIDE: AN EXEMPLARY PROJECT 57-61, 64 (1979) [hereinafter cited as PROJECT NEW PRIDE].

28. *See, e.g.*, Barkdull, *Probation: Call It Control—And Mean It*, FED. PROBATION, Dec. 1976, at 3; Swank, *Home Supervision: Probation Really Works*, FED. PROBATION, Dec. 1979, at 50.

Incapacitation cannot be done with mirrors—they only served to blind the public for a while. Also, the individuals to whom we entrust the sentencing function—prosecutors and judges—have an understandably hard time handing out nonincarcerative sentences (however much community control is promised) to offenders about whom they have real worries about incapacitation.

Incapacitation is expensive and intrusive, whether or not it is achieved with bricks and mortar. There is, therefore, an important question—not addressed in this paper—concerning the kind of future behavior that is disturbing enough to warrant incapacitation. For example, it is not worth the effort to achieve 24-hour-a-day control over the behavior of persistent petty thieves, although, as suggested above, it is worth the less costly effort to punish their thievery. Nevertheless, there are offenders who should not qualify for long-term incarceration in a selective-incapacitation policy environment and whose incapacitation in noncustodial settings would be of practical and political importance, particularly when jails and prisons are overcrowded.

By and large there is astonishingly little that can be offered to either sentencers or the public by way of program techniques and supervisory patterns, much less program models, that have been shown to work substantial reductions in the frequency and seriousness of chronic offenders' in-program crime.

### *A. Probation*

Probation, as we know it, lacks the burdens associated with punishment and the machinery necessary to enforce any punitive condition. The probation sentence is even less promising as an administrative framework for exercising even a modest degree of control over the offenders we choose not to send to jail. If obeyed, the routine requirement that an offender spend an hour a month, or an hour a week, in the presence of his supervising officer leaves an offender more than enough time to continue his criminal career without missing a step. Even in most special intensive probation programs, where caseloads are reduced to fifteen or twenty offenders per officer, supervision is still too sporadic to be plausible as a system for control because almost all of the offenders' hours belong to them, and to the streets.

Although the rhetoric of probation may be changing in response to the spreading interest in incapacitation as the basic strategy for crime control,[29] the literature still abounds with discussions of the hoary dilemmas arising from the dual functions of probation: care and control. There are few places

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29. PROJECT NEW PRIDE, *supra* note 27, Program Announcement at 1.

where one can find informative discussion of the practical problems that must arise in any serious attempt to take responsibility for controlling the behavior of the chronically delinquent. I am not aware of any very useful experiences from this field which could be used to develop a program which would reasonably assure sentencers that the program would significantly reduce probationers' opportunities to commit crime.[30]

### *B. Intensive Supervision*

Intensive probation usually signifies an unusual intensity of services from probation officers—not an unusual intensity of supervision, surveillance or control by probation officers. As far as I am aware, one has to look outside the formal probation field for supervision programs that feature caseloads low enough to permit staff to take responsibility for direct control of offenders' behavior. The real problems surface, as do some hints of programmatic solutions, where caseloads are reduced to five or fewer, and where program managers are courageous enough to tackle the surveillance and control functions head on.

If we are ever to have the benefits of programs that do offer a degree of incapacitation without recourse to jail (and, in my view, we must have them whether or not we adopt a selective-incapacitation strategy for crime control), it will take a lot of time and a lot of tolerance for failure in high-risk, intensive-supervision programs which test staffing and management techniques that take maximum advantage of very low caseloads. These experiments will be expensive when compared to programs with high caseloads and little supervision; however, the staffing cost looks less prohibitive when one considers that incapacitating offenders in many of our jails requires, in addition to the capital plant and the operating costs, one corrections officer for every two prisoners. Given our current policy dilemmas and programmatic ignorance, it is regrettable that we have not seriously tried to deliver nonjail incapacitative effects through programs having caseloads of two offenders.

Yet, it hardly suffices to sound a call for low caseloads. The real problem is that program operators would not know what to tell their caseworkers to do if they were suddenly blessed with staff resources to match the incapacitation mandate. I remember sitting through hours of meetings in one special probation unit where the officers, who had particularly strong social work training and had been encouraged for years to experiment with case-work techniques, suddenly had their caseloads reduced to five and were directed to make every effort to control clients' behavior and to avoid re-

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30. *But see* B. LEWIN, A REVIEW OF PAST AND CURRENT EFFORTS BY THE CRIMINAL JUSTICE SYSTEM TO COMBINE CONTROLS AND SERVICES IN THE HANDLING OF OFFENDERS (1979); Gettinger, *supra* note 9, at 7.

arrests. They argued and they despaired because they could not think of how to productively use the time now available to develop therapeutic relationships with clients. The unit broke up after a while because the intensity of these staff disputes began to disrupt the larger bureaucracy out of which the intensive-supervision unit had been carved.

A similar problem arose last year when the Court Employment Project (a not-for-profit agency in New York City) established a special intensive-supervision unit, after years of creditable work with delinquent sixteen to twenty-one year olds, in an attempt to give sentencing judges good reason to expect that convicted offenders' behavior would be directly controlled by project staff. Experienced, street-wise counselors were given caseloads of five offenders, whose sentences to jail or state prison were effectively suspended pending outcome of a trial period of intensive-supervision, and who were required to be with their supervisors seven hours a day, five days a week, for an initial six week period. It took very little time for this staff to become desperate for some way to structure the hours when the offenders were being controlled. Fortunately, the agency at that time had units funded to provide direct employment, employment training, and remedial education. In what seemed to be a hopeful development, daily use was made of the employment and education resources, with the intensive-supervision staff directly supervising the work crews, and additional hours of direct supervision were created by concentrating group and individual counseling sessions in the after-work or after-class hours. Rather unusual circumstances permitted the creation of this ad hoc program design which made a very controlling form of supervision at least tolerable to both sides. Before much could be learned, however, the federal funds supporting this agency's job creation, vocational training and remedial education units were cut off.

### *C. Employment and School*

It would be helpful if we could look to existing supervised structures for the incapacitative effects we seek, rather than go through a laborious research and development effort to create new ones. Conventional wisdom buttressed by some empirical evidence tells us that the devil makes work for idle hands, that truancy is associated with delinquency and unemployment with adult crime, that obtaining and holding a paid job averts crime for at least some high-crime groups, and that a return to regular school attendance, particularly if coupled with paid after-school and summer jobs, reduces the incidence of delinquency for at least some high-risk youth.

Job creation programs and alternative schools alone, however, do not offer sufficient incapacitative potential to provide alternative sentence for chronic offenders who are now imprisoned for incapacitative purposes. Even a nine-to-five job leaves a lot of time for crime. For a group whose criminality is wholly or partly an income-producing activity, paid employment will be less than a perfect crime-control measure: some will simply

supplement their illegitimate income with their new legitimate pay; some will increase their criminality by adding theft-on-the-job to their other delinquencies; others will change the frequency or the type of crimes they commit; a few will, of course, develop a stake in the legitimate life-style and abandon their former behavior.[31]

Despite evidence that well-supervised employment programs can suppress crime rates among high-risk groups,[32] and despite anecdotal evidence from various police departments, including New York City's, that patrol strategies which focus on returning truants to the supervision of their schools reduces the incidence of street crime during school hours, we are left uncomfortable by the knowledge that it takes only a few hours of actual criminal conduct over the course of a year to make someone a very high-rate offender. In my view, then, it is important to refine our understanding of how to facilitate entry into and retention in the labor force for the supposedly unemployable urban youth; it is of related importance to bring back into the education system those youths who have become alienated from it. Supervision programs aiming for incapacitative effects can, and probably must, take advantage of the supervision and control that are part of quality jobs and schooling. Although schooling and employment are clearly of use in programs aimed at incapacitating high-risk groups, they are hardly sufficient for that purpose and if the need to incapacitate is taken seriously, they must be combined with a mix of other measures of control which, taken together, represent very great burdens.[33]

Neither economy nor justice is likely to tolerate application of such systems of control over extended periods of time. In the end, the principal crime-control benefit of employment and educational elements in supervision programs is not likely to be their short-term and less-than-perfect incapacitating impact, but their long-term rehabilitative impact. In short, a supervision program that fails to come to grips with attitudes and values has a Sisyphean task.

Before leaving this topic, I must point out that there is a disturbing self-defeating quality to the idea that supervised work programs can incapacitate. At Vera, where we have designed and run quite a number of employment programs targetted at various populations whose noncustodial

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31. *See* J. THOMPSON, M. SVIRIDOFF & J. MCELROY, EMPLOYMENT AND CRIME: A REVIEW OF THEORIES AND RESEARCH (1981).

32. *Id.*; *see also* P. ROSSI, R. BERK & K. LENIHAN, MONEY, WORK AND CRIME: EXPERIMENTAL EVIDENCE (1980); L. FRIEDMAN, THE WILDCAT EXPERIMENT: AN EARLY TEST OF SUPPORTED WORK IN DRUG ABUSE REHABILITATION (1978). *But see* MANPOWER DEMONSTRATION AND RESEARCH CORP., SUMMARY FINDINGS OF THE NATIONAL SUPPORTED WORK DEMONSTRATION (1980).

33. For a good scare see *Wearing a Jail Cell Around Your Ankle*, NEWSWEEK, March 21, 1981, at 53:

incapacitation would be of interest to this colloquium, we have never done programs with incapacitation in mind. Our programs have their roots in ideas about changing the life-styles, opportunities and values of high-risk groups. As a result, we have developed techniques for choosing work sites, for work-site supervision, and for finding supervisors with the street smarts to handle disruptive behavior while getting productive work out of a crew unaccustomed to the demands of the workplace.

What is worrisome in the present context is that, even if we were to figure out how to structure employment to achieve the maximum incapacitative effects—which assumes, as suggested above, melding it with other forms of supervision and control in nonworking hours—the very virtues of good job supervision are in conflict with the incapacitative effects we are seeking. Our programs taught us that the working environment must be highly disciplined.[34] Discipline is maintained by having strict but absolutely clear rules of conduct, so constructed that obedience to them virtually guarantees no serious trouble for the community, for fellow workers, or for supervisors. This works fine so long as violations are met with immediate suspension from work and forfeit of pay. The penalty makes sense because those who are not interested in the pay or who are unwilling to conform to work-site standards will either withdraw quickly from such an environment or will be fired. With them gone, a good job of incapacitating the others can be done. Of course, workers who quit or are fired are not incapacitated at all. If workers were required to meet the regimen, and be at work, upon real threat of jail, work-site management would be more difficult. Programmatically, the response probably would be to have special work-sites for the bad actors, and to make the work, the supervision or the pay less rewarding than at the regular sites—possible, difficult, interesting, but probably fatal. The quality, the values, the peer interaction, and the feelings of personal commitment to a noncriminal life-style that might flow from a real workplace are probably more important in controlling behavior during unsupervised moments than anything else. Turn a job into a prison and maybe you get the worst of all possible results—loss of the crime-averting characteristics of employment status, without the capacity to monitor behavior twenty-four hours a day.

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> It's waterproof, two inches wide, worn on the ankle and it tells your probation officer when you've left home. Beginning this week in Albuquerque district court, small-time criminals will have no choice: go to jail or agree to wear an electronic device that will alert authorities when they are more than 200 feet from their home phones. . . . And the company that makes them . . . hopes that the 30 units New Mexico has purchased will lead to sales of 200,000 nationwide.

I think the sales projections are modest: few parents of teenagers will want to be without the device. Perhaps the market for remote cordless telephones has already surged in New Mexico.

34. I am addressing the requirements of employment programs designed specifically for unemployable ex-offenders, not the requirements of the private-sector work place, where there are rather different imperatives.

### *D. House Arrest and Surveillance*

There remain a few program ideas that aim expressly to control participants' behavior so effectively that a true incapacitative impact is achieved. I have heard various reports of successful house-arrest programs, but find the concept difficult to credit as useful for incapacitating offenders now jailed in, for example, New York City. For instance, there is a delightful account of a home-supervision program from William Swank, Supervising Probation Officer of San Diego County.[35] Because of overcrowding in the juvenile detention facility there, the court remanded a number of juveniles to house arrest; a unit of probation officers was given the general assignment of seeing to it that the juveniles stayed put. The officers would make daily visits and more frequent phone calls, both scheduled and unscheduled, to create an atmosphere of surveillance that would keep their charges at home. Failure of these youth to be where they were supposed to be led to their return to secure custody.

Swank's account is extremely interesting because he gives a sense of the trial-and-error process by which these probation officers developed techniques, pretty much from scratch, to suit their innovative assignment. It is also impressive that 22% of the youth were returned to court for violation of the simple, highly restrictive rules of house arrest, that about two-thirds of these were in fact removed to juvenile hall, and that only 1% were arrested for new offenses while under this restrictive supervision. This seems even more impressive because the officers' caseloads were twenty-five. However, my doubts about the applicability of this program to the run-down, impoverished inner-city communities I know better than I know San Diego (which is, sadly, not at all) can be illustrated by Swank's account of one of the program's failures:

> A Home Supervision officer was chasing a violator who scaled a wall. When the officer also went over the wall, he realized that he had stumbled into a nude swimming party. The quick-thinking youth apparently shed his clothes and disguised himself as one of the guests. He was apprehended the following day (fully clothed and grinning ear-to-ear).[36]

More relevant was a short-lived program launched a few years ago by the Hartford Institute of Criminal and Social Justice, to test a comprehensive program for controlling the behavior of chronic delinquents, with major felonies in their histories, while retaining them in the community and providing them a full menu of services. It was very ambitious and, for those of us hungry for practical lessons about programs of this kind, very interesting.

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35. Swank, *supra* note 28.
36. *Id.* at 51.

The Hartford program operated by taking responsibility for the behavior of these chronic delinquents on early release from the state's secure facility, and graduating them through a series of security classifications characterized by gradually less restrictive rules that were designed to protect the community by making it impossible for these youths to commit a crime. Upon entering the program in the first and most restraining classification, which applied for the first four or five weeks, participants were required to comply with a curfew beginning at about 8:30 in the evening. During the time outside of curfew, participants were either with program workers, at school, or at home, and every half hour or so the workers would place a call or put in a visit to monitor the participants' whereabouts and conduct. Continued compliance with the rules permitted entry into the second, less restraining classification. The process was repeated through four levels of security until, at the end of the program, participants were responsible for controlling their own behavior. Failure along the way resulted in participants being placed back into a more restraining classification where their behavior could be more directly controlled by the staff. Failure to get out of classification one in the time permitted by program rules led back to the state training school. There was much more to the program than this, but this is enough detail to give the basic idea.

Obviously, the security provided by the program had to be more than a nine-to-five concern. For example, the staff workers became worried about one youth shortly after he entered the program. The worker assigned to the case stationed himself outside the boy's house at about 10:00 in the evening to check on the curfew. He saw the boy climb out a window and down a drainpipe and followed him as he went into a nearby park and began to stalk a young woman. The youth had some rape accusations earlier in his offense history, and when he closed in on the woman at a remote spot in the park, the staff worker seized him, brought him out of the park, put him in his car, and drove him back to the training school.

There are very few programs in this country, if any, that can deliver such certainty of control. This was one of the very few that has tried. It is easy, however, to see how important it is to be able to deliver such control, where incapacitation is a real concern. A serious crime was prevented, the youths in the program (including the one who was caught) were shown that there are consequences to their actions, and by controlling the behavior of the particular boy, the program avoided incurring the wrath of the community. Such wrath would have made it difficult if not impossible for the program to continue its efforts to work with other chronic delinquents in a community setting where it is possible to hope for adjustment to a crime-free adulthood.

The Hartford program offered some wonderful opportunities to experiment with staffing patterns to avoid burn-out, supervisory and surveillance techniques to monitor behavior, and management techniques to avoid destructive conflict between the program's incapacitative and rehabilitative

objectives. However, the opportunity disappeared when one of the participants eluded the network of controls and shot someone. Political and economic difficulties followed. It quickly became a less risky, and less interesting program.

There are other, scattered program efforts (particularly the tracking programs that experimented with surveillance and control in the juvenile field in the late seventies) from which lessons might be teased with which to start constructing intensive-supervision programs that offer a modicum of incapacitation outside of secure facilities. However, in my view the field is at a primitive stage.

## IV

## CONCLUSION

No society is wise which provides only two choices for dealing with offenders: imprisonment or nothing at all. Whether our jails remain overcrowded or not, we need to develop enforceable punishments, short of jail. Also, we need to develop strategies for social control, short of jail. To pursue these objectives, we need political courage, program finance, and quality research aimed as much at program process as at program impact. Our need for these things is clearly much greater if, as the convenors of this colloquium seem to imply, development of a full spectrum of alternative sentences, to be used systematically in cases now bound for jail and prison, is prerequisite to final relief from our overcrowding crisis. I would be unhappy if the alternatives field promised too much relief, too soon. However, I hope my generally cautionary tale leads to more, not less, investment in the creation of real alternatives.