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# ALTERNATIVE FORMS OF PUNISHMENT and SUPERVISION FOR CONVICTED OFFENDERS

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If it appears rational, feasible, just and effective (from a crime control perspective) to focus our scarce and expensive prison resources on the few who are identified as dangerous high-rate offenders, what measures can we take toward the many offenders whose crimes or whose rate of criminality do not earn them a stretch of jail or prison time? I think it helps to take this general question, posed by the conference organizers, and break it into two parts. First, could we still exact punishment from less serious or less frequent offenders if our jails and prisons were more perfectly focused on dangerous high-rate offenders than they now are, or would we have to sacrifice the potential deterrent effects of imprisoning and threatening to imprison at the lower levels of crime? Second, are there ways to incapacitate offenders (that is, to exercise effective control over their movement and behavior) without imprisoning them, or must we rely wholly on the doubtful deterrent power of our lower-order punishments, to control the behavior of offenders who do not qualify for "selective incapacitation"?

## Introduction

My own view is that we are at present virtually without any credible capacity to punish* or incapacitate offenders except by imprisoning them.

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* I am simply excluding from discussion here the host of cases (e.g., first 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).

(This is a sad state of affairs, whether or not the system is refocused to target the high-rate dangerous offender more perfectly.) Indeed, I believe that a substantial amount of jailing today results, not from judicial preference for imprisonment, but from the quite reasonable perceptions of judges and prosecutors that there is no other way to make punishment certain in cases where it would be unconscionable to let petty offenders "walk" yet one more time, and that there is no other way to protect the community from further offenses (and to protect the judge's rear end) in cases where the offender's unconstrained liberty seems too threatening to community tranquillity.

While I think it apparent that alternative punishments can be devised for those for whom jail is, at the moment, thought to be necessary for punishment, and while I think techniques of surveillance and control can be developed for the supervision, in non-custodial settings, of offenders whose future behavior is of real concern, I think it easy to do injury to the orderly development of workable "alternatives" of these types. I think it would be injurious if, for example, a policy shift of the kind under consideration at this conference 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 alternatives field can respond to such a demand.

I think I can illustrate the present impoverishment of the "alternatives" field in a way that surfaces an important issue that

might otherwise remain buried in the apparent dichotomy between "high-rate" offenders and the rest. It appears that New York City judges annually impose about 8,000 jail sentences of 90 days or less. If these offenders serve an average of 40 days on Rikers Island, they occupy about 1,000 cells -- roughly half the cell space available for sentenced prisoners. Now, I think these sentences too short to have been inspired by a perceived need to incapacitate the offenders. They are for punishment. Although the 8,000 include quite a spectrum of current offenses and prior criminal records, I believe that the bulk are petty thieves -- they have long records, but are charged with stealing a $20 pair of pants, copper pipes from an abandoned building, disco tapes from Crazy Eddie, or sneakers from Hudson's. I need not offer a lengthy argument to show that there is an awful lot of petty theft going on. The aggregate injury of these crimes is great and the risk of violence is low (but real, as it always is with chronically delinquent behavior), but these offenders are not good candidates for the "focused incapacitation" which is the prime interest of this conference. There are too many of them, and their offenses do not draw sufficient outrage to qualify them for the same treatment as even two-time robbers, for example. Yet they are certainly "high-rate" offenders. It is precisely because of their persistence that our courts feel compelled, eventually, to start dishing out 15, 30, 60 and 90 day jail terms.

As the Vera Institute is presently engaged in a substantial effort to secure systematic use of an alternative punishment for precisely these cases -- to test, in practice, the practical and political difficulties and potential of punishment short of jail -- I would like to dwell further on this corner of the question posed to me, in the hope that doing so will make more palatable some of the general observations to which I must return.

Can There Be Punishment Without Jail?

First, it is useful to ask why the existing array of alternative sentences is insufficient to prevent systematic use of short jail sentences to punish, for example, the petty thieves I have described. The simple answer is that prosecutors and judges do not view any of the current "alternatives" as workable punishments in these cases -- principally because they have no confidence that the sentences, if imposed, will be enforced.

Fines.

Of course, fines are viewed by some as punitive, and fines are imposed with surprising frequency and with much greater success than is commonly thought -- but fines are not a promising alternative to jail for punishing the petty thieves who clog the lower courts and local jails today. We have recently gathered a great deal of data about the imposition and collection of fines in New York City; although we have just begun analysis of these data, it appears that about a third of the sentences imposed in Criminal Court are fines; the use varies from 15% of sentences in theft cases, to 33% in drug, disorderly conduct and loitering cases, to 65% in gambling cases. Surprisingly, only 20% of sentences for prostitution were fines

(but 75% were "time served"). Not only are fines imposed more frequently than we thought, but they are collected more often than not -- a real surprise to those accustomed to the cynicism of courtroom wisdom. From our data it appears that three-quarters of the total fine amount is actually paid within 12 months of sentence. (Collections run at 80%, if we exclude Manhattan where the low rate of fine collection in prostitution cases distorts the picture.) Even more surprising to me is that, after 12 months, only about 20% of individuals fined remain "unpunished"; 67% paid their fines and 12% were punished through the jail alternative.*

Fines look like a pretty good punishment. Maybe they could be more widely used; but I think it would be far from easy to extend their use without diminishing the certainty of extracting the punishment, and I think it would be especially difficult to conceive of fine amounts and fine enforcement procedures that would make fines a rational or an effective alternative punishment for the class of offenders now consuming scarce jail resources on 30, 60 and 90 day sentences -- the "high-rate", low seriousness recidivists.

They are characterized by extreme poverty, no realistic prospects for gainful employment, illiteracy, lack of linkage to familial, voluntary or government supports, short time-horizons, little sense of obligation, and (obviously) less than perfect responsiveness to threats of jailing for non-compliance with obligations. If fined, they would not pay; enforcement against defaulters could not be achieved through the procedures used to monitor and compel compliance by those now fined; and punishment could be exacted only by resentencing to jail -- an eventuality which would not occur,

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*Ida Zamist, "Report on New York City Empirical Research on Fines," Working Paper #10 in FINES IN SENTENCING, VOL. II (Vera Institute of Justice, New York: 1982).

given the Warrant Squad's backlog of felony warrants and the inherent difficulty of finding individual members of this transient group on the streets. The punishment would be exacted only if, upon rearrest, the court were to impose consecutive terms -- a result that would clearly frustrate the overarching policy preference to conserve scarce jail resources for focused incapacitation.

It is sometimes suggested that fines (or financial restitution) become workable punishments if one can conceive and finance programs that put unemployed offenders into paid jobs, and either garnish wages or use the conventional fine enforcement machinery. Although this course would put money 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 jurisdictions where too many offenders either go unpunished now or would go unpunished if we consumed prison and jail resources on an incapacitative crime control strategy, the potential for building or maintaining our punitive capacity through expanded use of financial penalties is, in my view, very limited indeed. 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 impossibilities as fines.

I suspect there are jurisdictions where fines and monetary restitution could be used more than they are now -- or could be enforced better than they are now -- but I suspect that the offenders who could be punished by pursuit of this strategy are employed, first offenders for whom the mere

fact of arrest and experience of criminal processing is often more punitive than payment of a fine (and is a sufficient deterrent) and whose punishment by the "alternative" would not, in fact, free up jail space for implementation of a "focused incapacitation" crime control strategy.

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 the remaining conventional alternative punishments -- probation and conditional discharge? New York law on the conditions that may be made part of a probation order or conditional discharge is, like the law of most jurisdictions, more than broad enough for punishments to be fashioned to fit almost any circumstance. And, in theory, attaching punitive conditions to a probation order ought to be more effective than attaching them to a conditional discharge, if only because probation officers are in theory employed precisely to enforce such conditions. But, without substantial new resources and the development of new techniques for supervising and enforcing conditions, these apparent opportunities for innovative punishments are wishful thinking; further, to the extent that the potential for alternative punishment exists, it is more easily achieved if probation is bypassed altogether and new structure is built up around the bare power of the court, through conditional discharge and like powers, to authorize the necessary machinery for the monitoring, supervision, and enforcement of punitive conditions.

Probation supervision caseloads are now running at close to 200 per officer in New York. (In some other jurisdictions they were reported to have reached 500 per officer by 1980.)* In New York, the only condition

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* Kevin Krajick, "Probation: The Original Community Program," Corrections Magazine, Vol. VI, No. 6 (December, 1980), p. 8.

that can realistically be monitored is the requirement that the offender report peroiodically to the probation office: usually, that "contact" is required once a month. (Recently, "differential supervision" was adopted in the City, so that a relatively small group 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 interview (and, no doubt, some probationers view the requirement as a punishment imposed with punitive intent), there is a deep habit of thought in the dispositional process and in the public mind that persons are either punished (jailed) or put on probation (let off with a slap on the wrist). That is hard to change. Essential to 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 half of the required contact visits were not kept, and it appeared from probation records that "more than 70% of the probationers. . . violated the terms of their probation an average of 4.7 times." In a third of the cases of probationers who failed to report for their required office visits, the court was not even informed of the violation; in another 10%, the court was informed, but not until six months had passed -- by which time all these offenders had absconded. The Department's response to these audit observations was: "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."* True, but sad for those who want to see probation used

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*Audit Report on Financial and Operating Practices and Procedures of the New York City Department of Probation, July 1, 1977 to April 30, 1980 (Office of the Comptroller of the City of New York, Bureau of Audit and Control: 1981).

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. But the more serious problem, I think, is that the enforcement side of probation simply isn't taken seriously by anyone. 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. The weight of a probation order is typically felt only if a new offense brings the offender back before the court during the term of the sentence, if the court is requested to revoke the prior probation sentence, and if the court resolves to punish the offender with jail time in addition to the time it feels necessary to impose on the new offense.

Clearly, if probation were taken seriously, if violations were vigorously pursued and violators sought out and returned to the court for missing their appointments, and if the court were prepared to back up the reporting requirement by jailing violators, there could be punishment by probation order and courts might be induced to make systematic use of it. It seems obvious that the punitive appeal of probation would be much enhanced, however, if the enforced conditions went beyond office visiting requirements -- 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. But I believe it would require, if it were to earn wide usage as a punishment in cases where punishment matters, an entirely new focus of probation on its supervision and enforcement functions -- a

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* I do not deal at all in this paper with the possibility of radical reorganization and redirection of probation departments.

focus which would, in my view, be easier to achieve outside the probation bureaucracies. As a hint of how destructive it can be to introduce such an alternative punishment without ensuring integrity in the monitoring, superivision and enforcement functions, we need only to look to the results of an 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. "Restitution Program Goes Wrong", News and Views (New Jersey Association on Corrections: October 1981) p.5.

"Community Service" Sentencing.

As I suggested above, it seems to me that compelling the performance of a certain number of hours of unpaid labor for the benefit of the community is one of the best concepts available today for non-incarcerative punishment. However, community service sentencing -- which is, if the rhetoric is pierced, no more than a form of involuntary servitude when it is enforced -- is a dangerous concept as well. It is dangerous because it is so attractive. Because it is so attractive, it tends to win rather uncritical endorsement -- and to be imposed as an "alternative punishment" -- even when no resources or even attention is paid to its enforcement. Under those conditions — which, in my view, prevail in almost all U.S.

jurisdictions where it has been intrdouced -- the concept is quickly diluted. 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 structure for punishing the chronic, low-level recidivists who are actually the ones now consuming a large volume of jail cells on short, punitive terms of incarceration. Once this pattern of use is established for a new "alternative", I think it nearly impossible to persuade prosecutors and judges to use it in cases where they are serious about punishment.*

I do not believe this idea for an alternative punishment must fail, but I know it is difficult, slow work to build around it a structure of operations and of expectations that support even part of the punitive requirements of most jurisdictions.

Beginning with a small pilot project in the Bronx in 1979, the Vera Institute has now supervised and enforced almost 1,000 community service sentences and -- at the request of a city administration pressed by overcrowding at Rikers Island, the local jail for sentences of a year or less -- Vera last year expanded the project to serve the Criminal Courts in Brooklyn and Manhattan, as well as the Bronx. The program is now operating at a volume of 1,000 sentences per annum. This community service sentence -- 70 hours of unpaid labor, to be performed over 10 working days, in crews, under the direct superivision of project staff at community sites -- is built around the conditional discharge sentence. In order to avoid inappropriate use of the punishment, the Community Service Sentencing Project refuses to

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*See, Sally Hillsman and Susan Sadd, Diversion of Felony Arrests: An Experiment in Pretrial Diversion. (National Institute of Justice: Washington, 1981).

accept any first offenders: courtroom staff select persons charged with property crimes (at felony or misdemeanor level) who have at least one prior adult conviction. (The likelihood of a jail term for convicted property offenders is only about 15% for those without priors, but jumps to almost 50% for those with one or more prior convictions.) Staff also participate in the plea-negotiation process to try to avoid being saddled with cases which are not viewed seriously by the prosecution or which are not being handled competently by the defense.

Over the course of developing the project, staff devoted most of their energies to establishing and maintaining credibility of the sentence as punishment. They keep strict accounting of the hours worked, until the full 70 are completed; they go into the community to find and confront offenders who fail to appear at the assigned service sites; they work closely with the Police Department's Warrant Squad to ensure execution of arrest warrants issued at the project's request for those offenders whose failure to comply requires re-sentencing; and they shepherd these re-sentencing cases through the labyrinth of the Criminal Court to ensure that, if the punishment of compulsory service is avoided, the punishment of jail is not.

The results are somewhat encouraging. After much initial scepticism in each borough, and many efforts by judges, prosecutors and -- sadly -- defense attorneys to make use of this essentially punitive sanction in cases which, in the ordinary course, would end with non-jail sentences, the project seems to be working on its own terms. Those sentenced to it to date averaged seven prior adult arrests and just over four prior adult convictions. Fifty-eight percent were arraigned on felony charges. Forty-five percent

had been sentenced to jail or prison on their last prior conviction. Virtually all were unemployed at the time of the arrest for which community service was imposed as a sentence. Virtually all were Black or Hispanic. And virtually all of the roughly 10% who have failed to comply with the community service sentence were, when re-sentenced, sentenced to short jail terms.* We seem to have had some success in focusing the use of this alternative on those who would have drawn short jail terms -- these 1,000 display a profile very much like the profile of the 8,000 who get short, punitive jail terms each year.

The point of this story, in this context, is that if we want non-jail punishments in the stressed courts of our larger cities, we will have to build them -- slowly and with considerable care to avoid the pitfalls of earlier efforts to "divert" less serious offenders from jail.** Vera's evaluative research on this community service sentencing effort is in mid-course, but our best guess at the moment is that roughly 45% of those sentenced to community service in New York would have drawn jail terms in the absence of the project, and that the average length of these terms would have been about 100 days. If, in the end, this effort succeeds in establishing a new punishment, short of jail, the lessons may prove useful in the creation -- over time -- of an array of non-custodial punishments.

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*It is necessary to add here, although the point does not very much advance a discussion of alternative punishments, that this population of petty recidivists is severely disadvantaged and very short of the kinds of resources -- educational, financial, familial, etc. -- that would be required for a change in lifestyle to occur. The project attempts to avoid confusing participants, so it tries not to mix the required punishment with "helping" interventions; but it extends an open offer, to anyone who completes the sentence, of help in finding 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 half of these actually follow-through on the referrals opened up for them; and about half of them (or about 15% of the total) stick with the job, the training, or the treatment.

**See Sally Hillsman and Susan Sadd, supra, p. 10; Joan Potter, "The Pitfalls of Pretrial Diversion", Corrections (February, 1981).

The obstacles to creating new punishments are not just theoretical and operational. Even as this conference considers whether it would be wise, practical and just to re-focus each element of the criminal justice system on high-rate serious offenders, practitioners around the country are using the early returns from Rand's research, and the research of others, to provide a rationale for "career criminal" programs. In New York -- and, I would wager, elsewhere as well -- the shift from a deterrence strategy (punishment) to a selective incapacitation strategy is much in evidence, and not just for "serious" or "dangerous" offenders. Many of the petty recidivists who ordinarily draw short jail terms are beginning to be viewed as "career criminals" — which, in a sense, they certainly are. Our attempts to induce systematic use of an alternative punishment for short jail-term cases therefore come directly into conflict with the emerging ideology. Although, in my view, it is difficult to imagine the creation of sufficient jail space to support incapacitative sentences for our hordes of petty thieves, the political atmosphere surrounding our developmental effort is clearly shifting toward the stormy.

I raise this issue at this point, because it would be a serious mistake to think it easy to keep the focus of a "selective incapacitation" strategy on high-rate offenders of the more dangerous type. The following case may illustrate the dilemma:

> Sebastian had 33 prior arrests and 17 prior convictions -- all misdemeanors, and almost all for petit larceny or female impersonation (out-of-state) -- when, in November 1981, he appeared before the Criminal Court charged once again with petit larceny. He had already served ten short jail terms, the most recent one (five months) for petit larceny, imposed in July of the same year. He had the right profile for our community service sentence, but the bad news was that 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 good news was that 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, "A year would be absurd -- this man stole a teddy bear!" Which, indeed, he had.
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> 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.

This "career criminal" problem can be given statistical as well as anecdotal expression. The pattern of offending for the petty recidivists who draw short jail terms in Manhattan is pretty clear. About half are re-arrested within four months of release from jail. Because about a quarter are re-arrested within 30 days of release from custody, and because this population draws short jail terms (six months or less), the picture changes only a little when rearrests are computed without regard to real "time at risk". Thus, even when those sentenced to jail are assumed to be "at risk" from the date of sentencing, about 40% have been re-arrested within four months. In this context, it should not be surprising that those sentenced to community service sentences in Manhattan show a 44% rearrest rate within four months of sentencing. (There is not the early bulge in rearrests during the first month "at risk", which was evident for these offenders when released from jail; this is in part the result of their being under supervision 7 hours a day for the first two weeks or so of the period at risk. But being punished by community service does not make boy scouts and virgins out of petty recidivists.)

There is a certain irony here. The project aimed at establishing a workable enforceable punishment 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 is beginning to show some success and stability, the context of crime control strategy is shifting from punishment to incapacitation. As the data to date suggest, 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 question posed to me by the conference organizers.

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 evaluative researchers to the in-program offenses committed by persons sent, for whatever reasons, to "alternatives." The best example that comes to mind is Project New Pride. At the end of the '70's, under criticism from Congress and from the field that the Office of Juvenile Justice and Delinquency Prevention was not devoting sufficient program or research funds to serious delinquency, it was decided that this admirable Denver program, which offered an unusual but not uniquely rich array of remedial and counselling services, would be elevated to Exemplary Program status, and millions were allocated to its replication.* Replication was sound, but the rationale was not. First, the OJJDP program guidelines specified that replications were to focus New Pride intervention at serious delinquents, but initially defined "serious delinquents"

*See Suzanne Charle, "The Proliferation of Project New Pride," Corrections Magazine (New York, October, 1981).

in terms that would have excluded (as too "light") roughly half the persons who had been enrolled in New Pride itself. Second, over 50% of New Pride participants had been re-arrested during their participation in that program.* 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." (Program Announcement, page 1.) Not only had the program not protected community interests, no one noticed.

We can't incapacitate with mirrors -- they only serve to blind the public for a while. And the individuals to whom we entrust the sentencing function -- prosecutors and judges -- have an understandably hard time handing out non-incarcerative sentences (however much "control in the community" is promised) to offenders about whom they have real worries on the incapacitative side.

Incapacitation has to be expensive, and intrusive, whether or not it is achieved with bricks and mortar. There is an important question -- not addressed in this paper -- about whose future behavior (of what kind) is disturbing enough to warrant incapacitation. For example, I do not, personally, consider it worth the effort to achieve 24 hour-a-day control over the behavior of persistent petty thieves, although, as suggested above, I think it worth the (less costly) effort to punish their thievery. Nevertheless, there are offenders who would not qualify for incarceration in a "focused incapacitation" policy environment, whose incapacitation in the noncustodial setting would be of practical and political importance.

By and large, there is astonishingly little that can be offered to sentencers -- or to 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.

*See Project New Pride: An Exemplary Project (OJJDP, Washington, 1979), Table 4, p. 57; Table 5, p.59; Table 6, p.60; Table 7, p. 64; and pp. 58-61.

Probation.

If probation, as we know it, lacks the burdens we associate with punishment and the machinery we know to be necessary to enforcing any punitive condition, the probation sentence is even less promising as a 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 wtihout missing a step. Even in special "intensive" probation programs, where caseloads are reduced to 15 or 20 offenders per officer, contact supervision is too sporadic to be plausible as a system for control -- almost all of the offender's hours belong to him, 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,* the literature still abounds with discussions of the hoary dilemmas arising from the dual functions of probation -- care and control. There are few places to 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 inform the design of a program

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*See, e.g., Walter Barkdull, "Probation: Call it Control -- And Mean It," Federal Probation, Vol. 40, No. 4 (1976); William D. Swank, "Home Supervision: Probation Really Works," Federal Probation, Vol. 43, No. 4 (1979); Adrian James, "Sentenced to Surveillance," Probation, Vol. 26, No. 1 (1976); John Paul Bonn, "A Proposed Model for Probation Supervision," Journal of Probation and Parole (Fall, 1978).

giving reasonable assurances to sentencers that probationers' opportunities to commit crime would be reduced to a meaningful extent.*

Intensive Supervision.

"Intensive Probation" usually signifies an unusual intensity of services -- not an unusual intensity of supervision, surveillance or control. So 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 try to take responsibility for direct control of offenders' behavior. Where caseloads are reduced to 5 or fewer, and where program managers are courageous enough to tackle the surveillance and control functions head-on, the real problems surface -- as do some hints of programmatic solutions.

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 but little supervision; but the staffing cost looks less prohibitive when one considers that incapacitating offenders in many of our jails -- Rikers Island, for example -- requires, in addition to the capital plant and the operating OTPS costs, one corrections officer for every two prisoners. Given our current policy dilemmas and programmatic ignorance, it is to be regretted that we have not seriously tried -- outside of jails and prisons -- to deliver incapacitative effects through programs having supervision of caseloads of two.

* But see, Bonnie P. Lewin, A Review of Past and Current Efforts by the Criminal Justice System to Combine Controls and Services in the Handling of Offenders (Vera Institute, New York: 1979).

Yet, it hardly suffices to sound a call for low caseloads. The real problem is that program operators would be at a loss to know what to tell their caseworkers to do, if they were suddenly blessed with staff resources that 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 had been directed to make every effort to direct clients' behavior and avoid re-arrests. They argued and they despaired, because they couldn't think how to make productive use of the time now available in the therapeutic relationships with clients that were growing very deep indeed. The unit broke up after a while because the intensity of these staff disputes began to disrupt the larger bureaucracy from which the intensive supervision unit had been carved.

A similar problem arose last year when a not-for-profit agency in New York City, after years of creditable work with delinquent 16-21 year olds, established a special intensive supervision unit to give sentencing judges good reasons to expect convicted offenders' behavior to be directly controlled by project staff. Experienced, street-wise counselors were given caseloads of five, and the offenders (whose sentences to jail or state prison were effectively suspended pending outcome of a trial period of intensive supervision), 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 me to be a hopeful development, daily use was made of the employment and educational 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 this ad hoc creation of a program design that made a very controlling form of supervision at least tolerable to both sides. But before much could be learned, the federal funds supporting this agency's job creation, vocational training and remedial education units were cut off.

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 employment with adult crime, that obtaining and holding a paid job is crime-averting 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.

But job creation programs and alternative schools do not, by themselves, offer sufficient incapacitative potential to provide a solution to the problem posed by the conference organizers. Even a 9-to-5 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, some will change the frequency or the type of crimes they commit, while a few will, of course, develop a stake in the legitimate life-style and abandon their former behavior.*

Despite evidence that well-supervised employment programs can suppress crime rates among high-risk groups,** and despite anecdotal evidence from various police departments (including New York City's) that patrol strategies focused 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 indeed.

In my view, then, it is important to refine our understanding of how to facilitate entry into and retention in the labor force for "unemployable" urban youth; it is of related importance to bring back into the educational system those youth who have become alienated from it; and supervision programs aiming for incapacitative effects can (and probably must) take advantage

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*See, James W. Thompson, Michelle Sviridoff and Jerome E. McElroy, Employment and Crime: A Review of Theories and and Research (Vera Institute: New York, 1981).

**Id. See also, Peter H. Rossi, Richard A. Berk, and Kenneth J. Lenihan, Money, Work and Crime: Experimental Evidence (New York, Academic Press: 1980); Lucy N. Friedman, The Wildcat Experiment: An Early Test of Supported Work (National Institute on Drug Abuse, Rockville Md.: 1978); Robert Taggart, "The Crime Reduction Impacts of Employment and Training Programs (Testimony before the Subcommittee on Crime of the House Committee on the Judiciary and the Subcommittee on Employment Opportunities of the Committee on Education and Labor, October 27, 1981); and the testimony of Michael Smith before the same Committees, October 28, 1981. But see, Manpower Demonstration and Research Corporation, Summary Findings of the National Supported Work Demonstration (Cambridge, Mass.: Ballinger, 1980).

of the supervision and control that are part of quality jobs and schooling. But, although schooling and employment are clearly of use in programs aimed at incapacitating high-risk groups, they are hardly sufficient to that purpose and, if the need to incapacitate is taken seriously, they will have to be combined with a mix of other measures of control which, taken together represent very great burdens indeed. 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 -- do we dare say it in this context -- 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 be used to incapacitate. At Vera, where we have designed and run (reasonably well, I think) quite a number of employment programs targeted at various populations whose incapacitation would be of interest to this conference, we have never done it with incapacitation in mind. Our programs have their roots in ideas about changing the lifestyle opportunities and values of high-risk groups. As a result, we have developed techniques for worksite supervision, choosing worksites, and finding supervisors with the street smarts to handle disruptive behavior while getting productive work out of a crew unaccustomed to the demands to the workplace.

What worries me in the present context is this. Even if we were to figure out how to structure employment to achieve the maximum incapacitative

effects -- which assumes, as I suggested above, melding it with other forms of supervision and control in non-working hours -- the very virtues of good job supervision are in conflict with the incapacitative effects we are seeking. One of the lessons from our programs is that the working environment must be highly disciplined.* 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 are unwilling to conform to worksite 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. But, of course, workers who quit or are fired are not incapacitated at all. If workers were required to meet the regime, and be at work, upon real threat of jail, worksite management would be more difficult. Programmatically, the response would be, I guess, to have special worksites for the bad actors, and to make the work, the supervision, or the pay less rewarding than at the regular site. Possible. Difficult. Interesting. But probably fatal. The quality, the values, the peer interaction, the feelings of personal commitment to a non-criminal lifestyle that <u>might</u> flow from a <u>real</u> 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 a capacity to monitor behavior 24 hours a day.

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

House Arrest and Surveillance.

There remain a few program ideas that aim expressly to control participants' behavior so effectively, around the clock, that a true incapacitative impact is achieved. I have heard various reports of successful "house arrest" programs, but find the concept difficult to credit because I cannot see how it could be applied to the New York City population whose incapacitation would be important if the selective incapacitation policy under consideration at this conference were adopted. For example, there is a delightul account of a Home Supervision program from William Swank, Supervising Probation Officer of San Diego County ("Home Supervision: Probation Really Works," Federal Probation Vol. 43, No. 4 (1979)). Because of overcrowding in the juvenile detention facility there, the court remanded a number of juveniles to house arrest; a unit of probation officers were given the general assignment of seeing to it that they stayed put. They would make daily visits and more frequent phone calls -- 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 one of the most interesting, because he gives a sense of the trial and error process by which these probation officers developed techniques -- pretty much from scratch -- suitable to their innovative assignment. And we can be impressed to read that 22 percent 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 one percent were arrested for

new offenses while under this restrictive supervision. This seems even more impressive, when we see that the officers' caseloads were 25. My doubts about the generalizability of this program to communities I know better than I know San Diego (which is, sadly, not at all) can be illustrated by this account by Swank of one of the program's failures:

> [T]he job can have its embarrassing moments, too. 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).

More relevant, in my view, 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.

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 designed to protect the community by making it impossible for these youth to commit a crime. Upon entering the program, in the first and most restraining classification which applied for the first four or five weeks, the participant was required to comply wtih a curfew beginning at about 8:30 in the evening. During the time outside of curfew, the participant was either with a program worker,

at school, or at home, and every half hour or so the worker would place a call or put in a visit to monitor the participant's 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, a participant was responsible for controlling his own behavior. Failure along the way resulted in a participant's being placed back into a more restraining classification where his 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 such a program must be more than a 9 to 5 concern. Let me give an example. The staff workers got 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 o'clock, to check on the curfew. He saw the boy climb out a window and down a drain-pipe and followed him as he went into a nearby park and started to stalk a young woman. He had had some accusations of rape 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 that can deliver that kind of security, if any. This is one of the very few that have tried. But it is easy to see how important it is to be able to deliver that kind of security, where incapacitation is in fact 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 which would have made it difficult or impossible 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. But 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 1970's) from which lessons can be teased with which to start constructing intensive supervision programs that offer a modicum of incapacitation outside of secure facilities. But the field is, in my view, at a primitive stage.

Concluding Observations -

No society is wise which provides only two choices for dealing with offenders -- imprisonment or nothing at all. We need to develop enforceable punishments, short of jail. We need to develop strategies for social control, short of jail. To pursue these objectives, we need some political courage, some 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 conference organizers anticipate, adoption of a focused incapacitation strategy for crime control will consume jail and prison resources with incapacitating the dangerous few. Should this come to pass soon, the "alternatives" field would be, in my view, hard-pressed to accommodate.