CASES

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Alternatives to Incarceration:

A Bibliographic Essay

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. . . before we decide where we're going, we first must decide where we are. . .

Cheshire Cat to Alice in Wonderland

How does CASES fit into the Wonderland of Alternatives to Incarceration?

The landscape: Prisons and jails are overfilled; the costs of new prison construction are rising; corrections now cost the nation $13 billion annually.[1] In less than two decades, there has been a tripling of our federal and state prison population and the average length of confinement is increasing. Even though the rate of crime is declining, we lock up more people on a per capita basis in the United States than any other modern industrial nation in the world, except the Soviet Union and South Africa.[2] Public policy has shifted from rehabilitation to an emphasis on incapacitation, punishment, and deterrence; sentencing policies have undergone major alterations in recent years with the introduction of sentencing guidelines, mandatory minimum sentences, and determinate sentencing schemes; alternative program development is fragmented. The criminal justice system is strained to its limits.

The task: As Andrew Klein observes:

> "There is no more difficult task than sentencing. The task is made all the more difficult by the lack of credible sentencing alternatives. American corrections are, to put it succinctly, in a shambles. On the one hand, a majority of states have acted to impose stiffer terms of incarceration for certain classes of offenders or offenses. On the other, a majority are also presently being sued, often successfully, to reduce jail overcrowding. As a result, many of the same jurisdictions that are putting more offenders into prisons, are releasing others under court order."[3]

Judges across the country praise alternative sentencing programs for providing them with new options -- options that fall between traditional probation, which often does not provide sufficient punishment or supervision, and incarceration, which is viewed as overly harsh for many offenders -- but not enough has been done. The United States criminal justice system has not yet developed a range of sanctions to correspond to the existing range of criminality. It is imperative that we develop a continuum of credible, cost-effective, enforceable intermediate sanctions which can be used systematically by judges in their efforts to sentence offenders responsibly.

This essay will: (1) introduce some of the issues and concerns which are involved in addressing this task; (2) review some alternative programs which currently exist, both established and experimental, to see how they are or can be integrated into the present system; and (3) explore what role the Center for Alternative Sentencing and Employment Services (CASES) plays in this effort. I have drawn extensively from the articles, monographs, and books listed in the End Notes (Section F of the bibliography); I encourage you to read the documents in full.

What Are The Issues?

What is an alternative to incarceration?: Quite literally, an alternative to incarceration (ATI) or alternative to detention (ATD) is a program concerned with targeting and providing services and/or punishment for offenders who otherwise would be serving time in jail or prison. The primary difficulty for ATIs is determining who those offenders are. While laudable in their intent, existing alternative programs too often provide options which serve as substitutes for outright release or probation, rather than as alternatives for otherwise jailbound offenders. The general expansion of community programs across the nation has not resulted in an overall corresponding decrease in the use of correctional institutions; rather, it appears to have "widened the net" of social control so that an ever larger proportion of the population is under some form of supervision. Few community-based programs are providing actual diversion from jail. Michael Smith, in "Will the Real Alternatives Please Stand Up?".[4] articulates how difficult it is to: (1) determine whether a program's participant profile is an otherwise jailbound group; (2) create an appropriate quality alternative to incarceration which will benefit a targeted category of offenders; and (3) ensure program enforcement.

What is an alternative sentence?: An intermediate sanction, or alternative sentence, is a penalty which exists somewhere on the correctional continuum between probation and incarceration; it may or may not be an alternative to incarceration. An intermediate sanction may involve a different form of confinement (e.g., house arrest, boot camp, residential treatment program); it may include a short period of imprisonment combined with a non-custodial sentence (e.g., shock probation); it may include a program with some incapacitative element (e.g., a day center program); it may involve a punishment that has no custodial element (e.g., a day fine). An alternative sentence can retain the punitive, deterrent, incapacitative and/or rehabilitative aspects of traditional sentencing while avoiding the high social and economic costs of incarceration.

How do they relate?: Alternative-to-incarceration programs (targeting those who otherwise would be in jail or prison) constitute one category in the field of intermediate penalties. ATIs and alternative sentences are not interchangeable, but they have complementary roles to play. There is a need to relate a continuum of alternative sentences (intermediate penalties) to those programs which are serving as actual alternatives to incarceration. Although CASES, by name, is the Center for Alternative Sentencing and Employment Services, the agency's current focus is on providing alternative-to-incarceration programs for otherwise jailbound offenders.

How well can alternatives relieve correctional overcrowding?: Relief from prison overcrowding can come both from ATD/I programs (where actual numbers of jail beds are saved) and from the development of a system of graduated, scaled intermediate penalties which allow sentencing judges more responsible options than probation or prison (including shorter periods of imprisonment combined with non-custodial sanctions). At the moment, overcrowding and pending litigation too frequently dictate which offenders are incarcerated and for how long. Alternative programs hope to return to judges the means and authority by which they can determine appropriate, responsible, cost-effective and just punishments which fall short of custodial sentences.

While some relief from overcrowding can result from effectively run ATI programs, these same programs generate a risk. Intensive monitoring of offender compliance for community-based programs is likely to increase identification of technical violations which otherwise would go unobserved. If offenders are punished by institutionalization -- not for new crimes, but for these violations -- then we may have increased, not lessened, the rate and time of incarceration for the offender. If an offender fails to comply with the requirements of a program and is returned to court for resentencing, there is an added risk that a judge will impose a sentence which is longer than the original term of imprisonment from which the offender was diverted, even though the offender's return to court was for failure to comply with program supervision requirements rather than for committing new crimes. Under this scenario, offender failure in the ATI program might erode all of the jail displacement achieved at intake. ATI programs must remain aware of this potential imbalance.

Can alternatives punish?: Many agree with Gilbert and Sullivan's admonishment in *The Mikado* that the punishment should fit the crime. The task, however, remains difficult to perform when the court's primary choices are probation or prison. The reflex reaction in American corrections has been to equate punishment with incarceration; hence, the phrase "alternatives to incarceration" seems to imply alternatives to punishment. The public and judicial perception that incarceration is the only true punishment must be changed. In his excellent book, Alternative Sentencing: A Practitioner's Guide, Andrew Klein reminds us of this country's single-minded love affair with prisons ever since American Quakers invented them in their modern form shortly after the founding of the Republic. The criminal justice system has become so accustomed to all-or-nothing sentences for cases ranging from petty thievery to mass murders, that it has come to accept the proposition that sentences can address either punishment or rehabilitation, but never both. The system needs to fashion sanctions and controls - from the least to the most punitive, from the least to the most confining - which both satisfy the public desire for retribution and assuage public fear of crime. We must be educated to see that a single sentence can be multifaceted -- partially punitive, rehabilitative, and possibly incapacitative.

While some, perhaps many, public officials may be skeptical about whether intermediate penalties can be sufficiently punitive, criminal offenders see them as severe. In jurisdictions where offenders are given a choice between higher levels of surveillance and control in the community and shorter terms in prison, it is not uncommon for them to opt for the shorter, surer terms of imprisonment. As Malcolm McDonald, former President of the American Probation and Parole Association, put it: "They are choosing the easy way out - time in incarceration where they do not have to learn responsibility for their crime."[5]

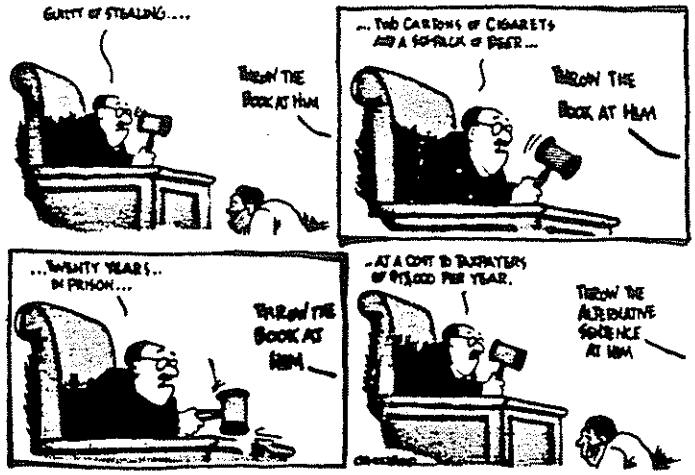
Can alternatives ensure public safety?: Hand-in-hand with the perception that incarceration is the only true punishment is the perception that incarceration is the only safe option for serious offenders. While jails and prisons do incapacitate people for the short term, there is evidence that in the long term prisons can be criminogenic -- that prisons are breeding grounds for crime. In California, a recent study which examined the comparative failure rates of matched groups of convicted felons in prison and felons on probation supported the notion that imprisonment may increase the likelihood of future offending. Petersilia and Turner reported that prisoners had a significantly high recidivism rate (72 percent) than a similar

group of felons on probation (63 percent). They found no significant differences between groups in the seriousness of crimes committed or in the time before failure (6 months for both).[6]

Perhaps the greatest problem that proponents of alternative sentencing face is the tendency to categorize crime policies as either "tough" or "soft." As columnist Colman McCarthy has written, though, the issue is not quite so simple: "Nothing is hard-line about the so-called get-tough judges who think jail is the only punishment and stiff sentences the only justice. They only deal in weakness. They put off to another time and probably for another court the obligation of treating the criminal as something other than a hopeless case. They postpone until another day the danger created when the offender is released as a greater menace than when he went in."[7]

Recent national statistics show that the majority of offenders admitted to prison each year are not convicted of violent crimes. While non-violent crimes must be taken seriously, it is not obvious that they require a prison term. Experts argue that whole classes of offenders, e.g., those convicted of property crimes, can be diverted to alternative punishments with relatively little risk.

Are alternatives cost-effective?:



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Although programs which divert only a small number of offenders will not have major impact on overall prison administrative costs, major savings can be achieved if alternative sentences for truly jailbound offenders, by impacting overcrowding, help reduce the pressure to build new prisons. However, there are cautions: house arrest, if used to widen the net of social control, costs more than doing nothing; intensive supervised probation brings added costs if caseloads are drawn from the ranks of regular probationers; increased community supervision, resulting in offender incarceration for technical violations rather than for new crimes, might

add to the cost of the correctional system, especially when the costs of reprocessing offenders in court are factored in; money used to purchase electronic surveillance equipment might have gone to initiate more effective counseling programs. Cost, social control, and justice issues need to be carefully balanced and evaluated as intermediate sanctions are developed. Some intermediate penalties may not save money, but they may contribute to society's sense of more just punishments.

Will the public accept alternatives?: The Public Agenda Foundation, in a study funded by the Edna McConnell Clark Foundation, took an intensive look at Alabama citizens' views on prison overcrowding and alternatives to incarceration, before and after they were exposed to information about specific sentencing options and their relative costs.[8] When respondents were presented with sentencing choices beyond prison and probation, when they were given facts about the relative costs of various punishments, their views shifted from identifying imprisonment as the preferred punishment for certain classes of offenders. The survey was undertaken as one of several activities the Clark Foundation is supporting in Alabama to help policy makers at all levels in the state become more informed about all aspects of alternative sentencing. The results may be instructive to public officials who think that advocating anything short of prison for convicted felons is political suicide. However, as Ken Schoen of the Clark Foundation points out: "As encouraging as the findings are for those who seek to reduce reliance on prison, a program that uses alternative punishments may be hard to maintain in the face of the nation's extraordinary crime rate and a steady barrage of frightening crime reports in the media. Rapes, killings, and street muggings are standard fare on the evening news. Tempering our visceral reaction to crime and criminals takes leaders with courage."

Where Are We Going?

Sanctioning framework: Most discussions of the purposes of sentencing focus on four correctional objectives: retribution ("just deserts"), deterrence, rehabilitation, and/or incapacitation. Confusion and disagreement over the objectives and their relative merits as sanctioning rationales contribute to the "crisis" in corrections as much as does the crowding of correctional institutions. What are correctional policymakers trying to achieve when they choose from among existing sentencing options?[9] What is the basis for their sanctioning policy?

The dominant themes of the 1980s have been punishment (retribution) and community protection (incapacitation). Deterrence has received relatively little support as a sanctioning rationale for imprisonment from the recent research of criminologists; although death penalty enthusiasts believe in deterrence, incarceration seems to have little consistent or predictable impact on the behavior of sentenced or potential offenders.[10] Faith in rehabilitation, the dominant theme of the 1960s and 1970s, has also declined. The proliferation of community-based programs -- diversion and pretrial release programs, halfway houses, work and study release, and furloughs -- was seen as the best strategy to meet individual offender needs,

promote reintegration, and reduce crime; as an added bonus, they cost less than incarceration. But now, as Belinda McCarthy points out in Intermediate Punishments, the economic advantages of community corrections has shifted from the status of an ancillary selling point to a principal rationale for those concerned about the cost of new prison construction.[11]

Whatever the political realities and economic necessities are for a particular time, whatever guiding theme for program design prevails during any decade, our system has never had a sufficiently broad range of sanctions to meet the diversity of criminal behavior and the needs of society. In fact, while the community can be the most economical site for punishment, it is also, more importantly, the most humane setting and the richest environment in which to meet offender needs. One of the strengths of the alternative sanctions movement is its potential for encompassing different sentencing components which address both multiple offender needs and various sentencing goals. One of the challenges for the movement is how to actualize that potential. As Klein points out, when fashioning sentences, defense attorneys, prosecutors, probation officers and judges must consider five factors: the offender, the offense, the victim, the community at large, and the individual court environment. The latter is included because each sentence becomes part of the precedents the court must live with for years to come.[12] How do those involved in sentencing know which components in what combinations to include in their alternative sentence?

One view: scaling noncustodial sanctions: In "Punishments in the Community and the Principles of Desert," von Hirsch, Wasik, and Greene argue that the time has come to apply a coherent penal rationale to the development of, and choice among, punishments in the community.[13] While creative noncustodial options are being tested across the country, these sanctions will serve as replacements for probation, not imprisonment, until principles governing their use are developed. The article argues that only severe crimes need be dealt with by incarceration; for other, less severe crimes, noncustodial sanctions should be the sanction of choice. It argues that imprisonment is being used inappropriately for crimes that are not serious and that community sanctions are being used inappropriately for less serious crimes, when they should be being used for middle-level offenses. The authors advocate that such mechanisms as day fines, community service, and partial custody, involving varying degrees and levels of punitiveness, should be penalties in their own right. The authors present a model for non-custodial penalties which can be scaled and interrelated in a far more consistent manner than is the case at present; included in this is a "limited substitution" model of back-up sanctions for wilful defaulters.

Sentencing policy: The National Institute of Corrections has identified twelve large local jurisdictions with which they plan to work over the next year to help design and institute system-wide sentencing policies. They will be consulting with sentencing judges, district attorneys and others to see how decisions are being made in their particular courts, how they are or are not using existing intermediate sanctions, and how they might better implement a structure which would strengthen their policy decisions. In New York City, the Bronx is one of the target areas.

The System

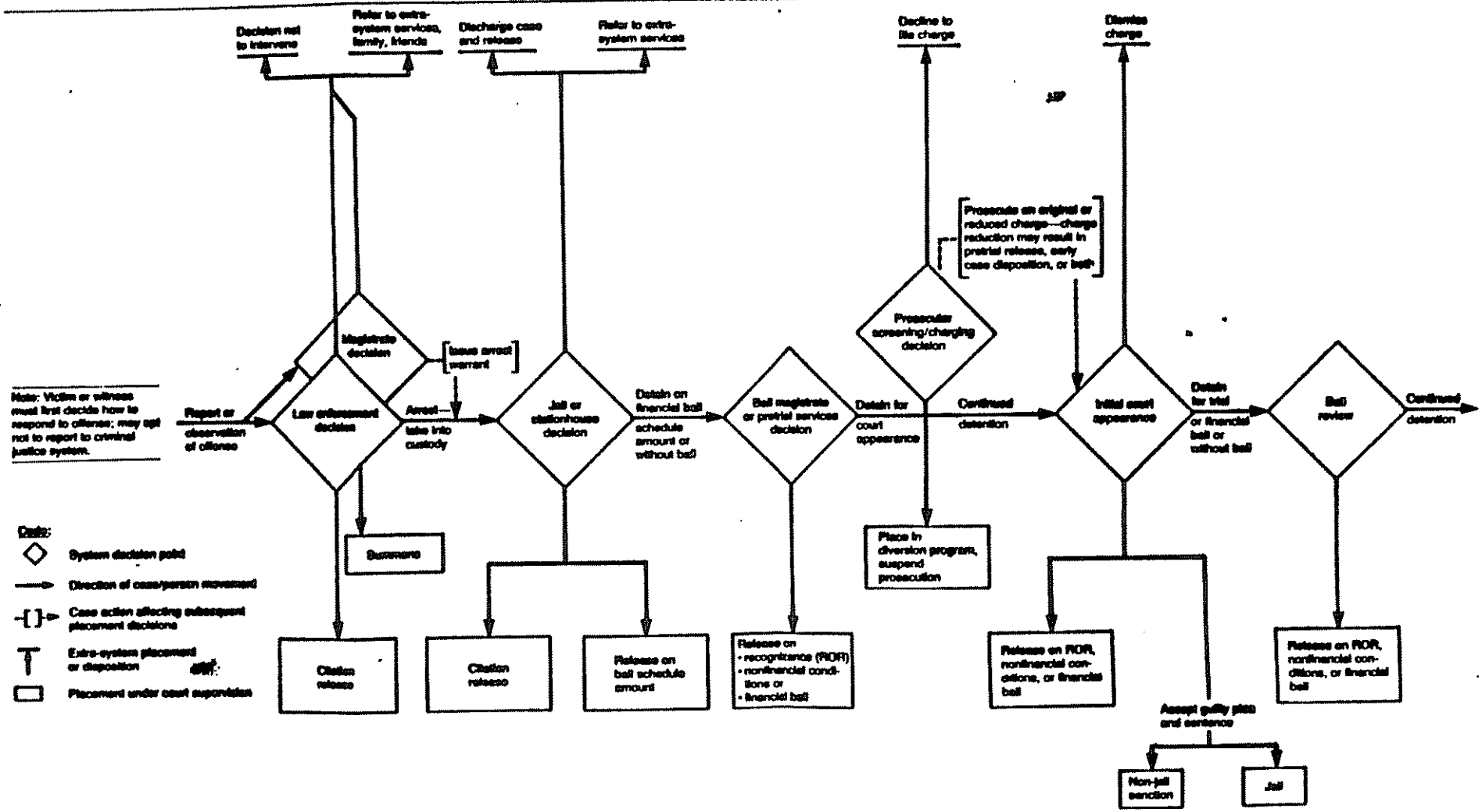
Flow chart: The above provides us with one conceptual framework for an examination of the role of CASES. We now turn to a more structured look at the system as it actually exists. Attached is a flow chart of a representative criminal justice system, identifying twelve decision points at which incarceration may be an option.[14] I have included this, not to highlight the complexity of any system, but rather to show the *opportunities* which exist along the way for resolving jail or prison crowding situations: options to intervene pre-trial; chances to reduce length of confinement pre-trial (much overcrowding at the jail level is caused by the high number of pretrial detainees); opportunities to provide alternative sentencing plans.

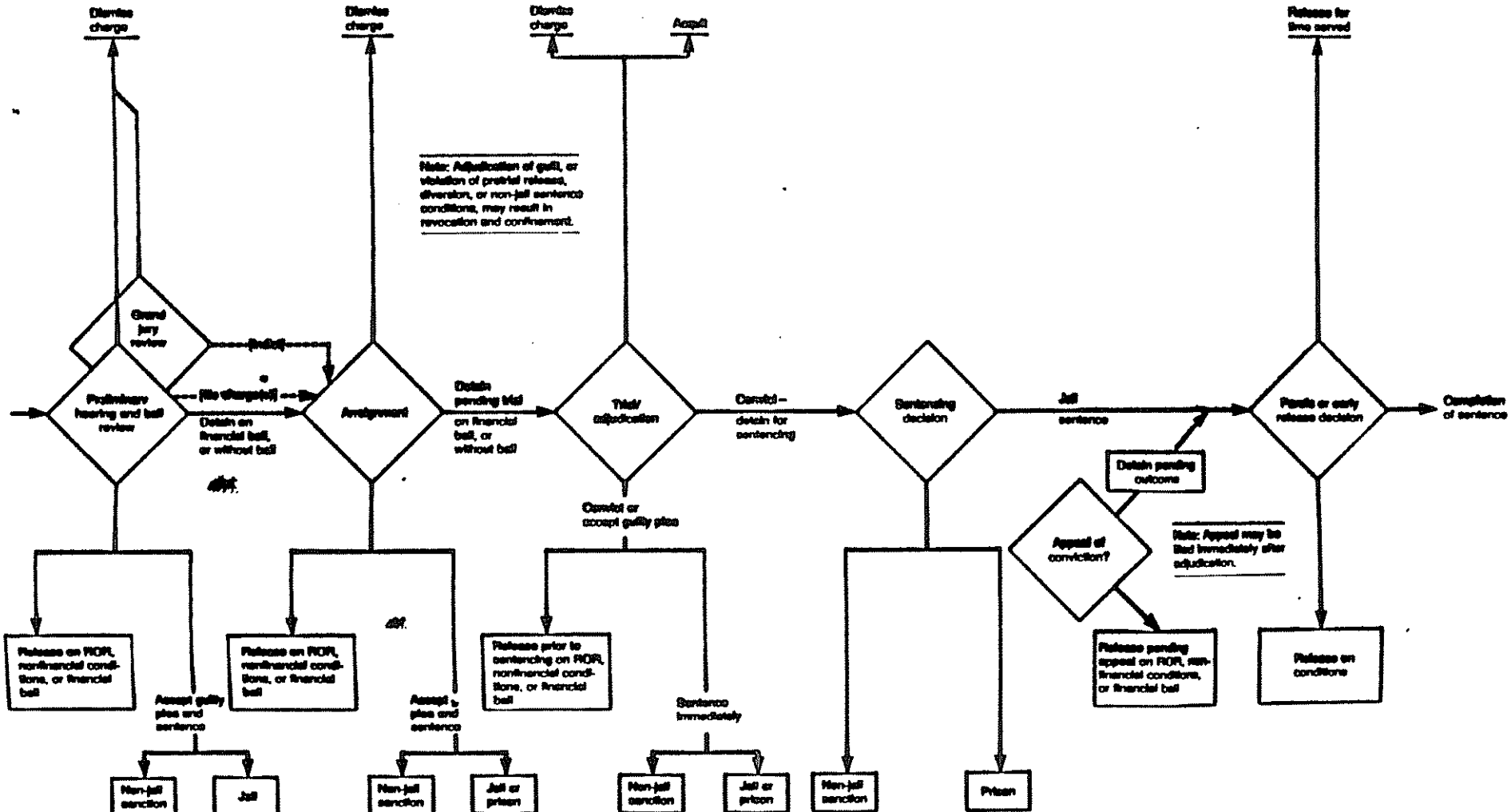
Pre-trial and post-conviction: I will be focusing on two points in the system. I will review programs that operate pre-trial to provide alternatives to detention (ATD), specifically pretrial release and nonprofit bail bond, and I will explore alternatives to incarceration (ATI) that operate post-conviction, which provide sentencing options such as community service, day fines, defender-based advocacy, and intensive supervised probation (ISP). (Our Court Employment Project (CEP) functions as both an ATD and an ATI program and works in conjunction with probation.) I do not plan to discuss incapacitation alternatives such as boot camps, residential drug treatment programs or halfway houses, since CASES is more likely to be involved with non-residential programs; I do touch on home surveillance, primarily as it relates to ISP. Some of the programs discussed below may or may not provide true diversion from jail and/or prison; some may, in fact, serve to widen or expand the net of social control; some may not be any more cost-effective than incarceration -- but we need to be aware of these options and their place in the spectrum of intermediate penalties as it exists and as it is developing.

Service providers: As you read on, keep in mind that many of the intermediate programs currently available are add-ons to traditional probation and are operated as part of the official criminal justice system. Questions need to be raised and answered about how independent, nonprofit organizations, such as CASES, can provide more creative responses to system needs than has happened in the past. What are the ways CASES can facilitate the institutionalization of a range of alternative programs? What role can CASES play in the reform of criminal sentencing? We must also examine what role for-profit groups have to play in the alternative movement and how they can be held accountable.

Figure 1

Criminal justice decision points and options




Dismiss charge
Dismiss charge
Dismiss charge
Acquit
Release for time served
Note: Adjudication of guilt, or violation of pretrial release, diversion, or non-jail sentence conditions, may result in revocation and confinement.
Grand jury review
[no bill]
Preliminary hearing and bail review
[No charge(s)]
Detain on financial bail, or without bail
Arraignment
Detain pending trial on financial bail, or without bail
Trial/ adjudication
Convict – detain for sentencing
Sentencing decision
Jail sentence
Parole or early release decision
Completion of sentence
Detain pending outcome
Appeal of conviction?
Note: Appeal may be filed immediately after adjudication.
Convict or accept guilty plea
Release on ROR, nonfinancial conditions, or financial bail
Accept guilty plea and sentence
Release on ROR, nonfinancial conditions, or financial bail
Accept guilty plea and sentence
Release prior to sentencing on ROR, nonfinancial conditions, or financial bail
Sentence immediately
Release pending appeal on ROR, nonfinancial conditions, or financial bail
Release on conditions
Non-jail sanction
Jail
Non-jail sanction
Jail or prison
Non-jail sanction
Jail or prison
Non-jail sanction
Prison

Review of Existing Programs

I. Pre-Trial

A. Pretrial Service Programs

Among the most important and widespread reforms in the criminal justice system over the past 20 years has been the establishment of formal pretrial release programs throughout the United States. The Criminal Justice Agency serves this function in New York City. Reacting to the social inequality inherent in the use of cash bail to obtain a defendant's release pretrial, the Vera Institute of Justice conducted the Manhattan Bail Project from 1961 to 1964 to test whether indigent defendants could be released safely on a simple promise to appear for trial. The vast majority of defendants who were "released-on-recognizance" (ROR) did appear for trial, and soon every major city had some variations of ROR, supervised release, and third-party custody programs.[15] Third-party custody (when defendants are released to the custody of another individual or agency which assumes responsibility for their appearance in court) is no longer a high-use option; there has been increased reliance on diverse alternative programs, such as CEP, to provide equivalent levels of supervision. Likewise, the role played by for-profit bondsmen has greatly diminished over the past twenty years.[16] The majority of defendants today, over 85 percent, are released in some manner before trial; some 70 percent of those released are freed with no financial conditions.[17]

While pretrial programs have played and continue to play a major role as ATDs, a recent monograph from the Pretrial Services Resource Center (PSRC) points out that the current pretrial release field as a whole is falling short of its potential to help initiate new improvements in the pretrial process, especially in the area of pretrial detention.[18]

Why?

-Many programs have incomplete or inadequate screening procedures which contribute to the unnecessary detention of defendants: 70% do not interview and 87% do not recommend for ROR certain groups of defendants, mostly on the basis of charge alone. While these exclusions may appear reasonable, research has shown that initial charges often are not good predictors of future court appearances or of future re-arrests.

-Half the existing programs have not used empirical research to objectively assess and update their screening and recommendation criteria, thereby perpetuating prediction inefficiency.

-Most programs fail to: (1) question the implications of the continued practice of setting money bail, and (2) initiate movement toward program and system changes which would help reallocate resources more appropriately (e.g., increased use of citation, stationhouse release).

Pretrial programs share the unique capacity for collecting information that cuts across the various aspects of pretrial release decisionmaking. PSRC cautions: "Jails should not be crowded with pretrial defendants who are releasable; scarce public resources should not be wasted on agencies that are unwilling to assess their impact. Program practices indicate that these and other questions remain insufficiently addressed by pretrial agencies or by policy makers. The agenda for action is thus clear and will determine whether the pretrial release field continues to be viable or becomes another reform that went astray."

B. Bail Bond

Defendants who do not gain release through ROR programs, through conditional and supervised release, or by posting money bail, are generally perceived by decision-makers to pose a relatively high risk of pretrial misconduct. Many of them face lengthy pretrial detention and account for the largest proportion of the jail days served by pretrial detainees in local facilities.

After examining various populations that were contributing significantly to increased jail crowding throughout metropolitan New York, Vera Institute planners concluded that an alternative release program specifically directed at long-term detainees, if successful, could have a significant impact on the problem. The Nassau Bail Bond Agency, a not-for-profit bail bonding program of the Vera Institute of Justice, began operating in suburban Nassau County, New York, in late February 1988. The project is the first effort in the country to meld the substantial statutory and common-law powers of the bail bondsman with intensive community surveillance and services.[19]

At no cost to the defendant, the agency provides bail for its "principals" who have remained in pretrial custody primarily because the level of community supervision most programs provide is viewed by the courts as too limited to ensure their appropriate pretrial conduct. The agency is not designed to generate a profit through its bonding activities; rather it takes advantage of the powers of the bondsman (1) to release defendants for whom judges have set bond, (2) to require their adherence to supervision that is as restrictive as the agency deems necessary, and (3) to return defendants to jail forthwith if they do not prove amenable to such supervision.

The track record established by the agency during its first seventeen months working with the seventy-four defendants it kept included a court appearance rate of 99% and a re-arrest rate of 2.7%, although twenty-three of these principals were returned to jail for violations of their supervision contracts or agency rules. Program planners are encouraged by these results of the start-up period and are looking for funds to conduct an evaluation of the agency. They have just received funding to develop programs in the Bronx and New Jersey.

II. Post-Conviction

C. Probation/Intensive Supervised Probation

From the day in 1841 when shoe cobbler John Augustus entered the Boston Police Court and persuaded it to release into his custody a drunkard, probation stood as an alternative to incarceration. In fact, the work of John Augustus, the nation's first unofficial probation officer, was bitterly opposed by police, court clerks and turnkeys who received payments only when defendants were incarcerated.[20] Probation was the original alternative community supervision sentence and, until a decade ago, was virtually the only sentencing alternative available. Although functioning as an alternative to incarceration, probation was long perceived as primarily rehabilitative in purpose and was intended for offenders who posed little threat to society. However, as Klein points out, probation has been used increasingly as token punishment in lieu of doing nothing in cases where the court would not commit the offender anyway, thus diminishing traditional probation's role as an alternative to incarceration.

The probation system is stretched to its limit. Although prison crowding draws both national attention and increased resources, "probation crowding" poses a more immediate threat to the criminal justice process and to community protection; nearly three times as many convicted offenders are placed on probation each year as are sentenced to prison and jail combined. Overburdened probation staffs are often unable to provide much, if any, supervision.[21] Too, felony probation is on the rise (one-third of the adults on probation in the U.S. are convicted felons).[22] This has caused many jurisdictions to restructure at least part of their probation department to serve as an intermediate sanction for high-risk offenders, including such forms of intensive supervision as house arrest and electronic monitoring. This has resulted in dramatic changes in the supervision styles and strategies of some probation officers. For these felony offenders, punishment and community protection have taken precedence over rehabilitation as a purpose of sentencing.

In short, some probation has become an alternative intermediate form of punishment in the sense that judges increasingly have attached conditions, often punitive conditions such as community service or restitution, to straight probationary, suspended, or split sentences. Combinations of prison and probation usually take one of four forms:

> -*Split Sentence:* The court specifies a period of incarceration to be followed by a period of probation.
>
> -*Modification of sentence:* The original sentencing court may reconsider an offender's prison sentence within a limited time and modify it to probation.
>
> -*Shock probation:* An offender sentenced to incarceration is released after a period of time in confinement (the shock) and resentenced to probation.
>
> -*Intermittent incarceration:* An offender on probation may spend weekends or nights in a local jail.

Intensive Supervised Probation Programs (ISP):

Intensive supervised probation (ISP) programs are being considered or are in place in almost every state. The first state-wide program was developed in Georgia, initiated in 1981 to deal with prison overcrowding; Georgia's target group is the nonviolent offender who, without the state's Intensive Probation Supervision (IPS) option, would be sentenced to prison. The Florida legislature created a similar program called the Community Control Program in 1983. New Jersey's program is more selective: the offender is sentenced, incarcerated, and then allowed to "apply" to a resentencing panel for placement in ISP; this ensures that the program is dealing with a jailbound group.

ISP programs invoke strict curfews and, at least formally, often require offenders to maintain employment, receive counseling, provide community service, remain drug and alcohol free, and make restitution to their victims. Advocates cite the significant prison cost savings and the thousands of hours of community service from offenders as factors in support of ISP success. Critics argue that many programs, while very good at surveillance, are very poor at providing services. Many programs return a high percentage of participants to prison; most are returned for violation of program supervision requirements rather than for new criminal activity. This high percentage is a direct result of the frequent drug use monitoring and curfew checks performed by ISP officers without commensurate service support to help the offender improve his behavior. There is reason to be concerned that this kind of technical violation punishment is a particularly pernicious form of net-widening.

Experiments in intensive supervision, incorporating varying levels and types of surveillance along with support service delivery, must continue in tandem with more effective evaluation of the programs.

D. *Home Surveillance/Electronic Monitoring*

ISP and home confinement may be used as joint or independent sanctions. At present, most intensive supervision programs are targeted for felony offenders; many home confinement programs are designed for misdemeanants.[23] House arrest can be used pretrial, as an adjunct to probation or as a sentence imposed in its own right by the court. Offenders are ordered by the court to remain confined in their own residences and are permitted to leave only for court-approved employment, rehabilitation, or community service activities; they may also be required to pay victim restitution and/or probation supervision fees. Electronic "bracelets" and video monitoring are used to detect violations of house arrest. Advocates see this as both a financially cost-effective intermediate form of punishment (it is less costly than construction and maintenance of jails and prisons) and a socially cost-effective sanction (the offender can keep his job; the family network remains intact; the person is not corrupted or stigmatized by prison). In short, advocates see the programs as providing an intermediate set of sanctions that combine the monitoring, punishing and incapacitation features of prison with the offender rehabilitation prospects and economic savings of probation. Critics, on the other hand, fear that house arrest will strike the final blow to the rehabilitative ideal. They see surveillance

as replacing counseling. Other issues include concerns about intrusions on civil liberties; equipment costs; race and class bias in screening; impact on the offender's family; and the risk of house arrest as widening the net of social control. House arrest has potential applications for offenders with special needs -- such as the terminally ill (including AIDS patients), the mentally retarded, and the elderly.[24]

E. Community Service Sentencing and Restitution

Punishment for crimes has traditionally been thought of as "paying a debt to society," but in the case of community service and victim restitution, this is more than a figure of speech. Unlike other criminal sanctions, individual restitution requires the offender to do something for the victim of his crime as opposed to having something done for or to him. Likewise, a community service sentence demands that the offender perform a specific number of hours of work on community projects without receiving monetary compensation.

Restitution fell into disuse when victims lost their central role in the penal process, a development that occurred when formally organized governments emerged and asserted their authority. In the 12th Century, kings and their ministers defined a crime against an individual as a crime against the state, and the machinery of the state assumed the responsibility for administering criminal penalties. Victims desiring compensation were referred to the civil courts. Contemporary restitution ideas resurfaced in the mid-1960s. Penal reformers advocated the use of two different types of restitution-oriented sanctions: direct compensation of the victim by the offender, usually with money although sometimes with services ("victim restitution"), and unpaid service given not to the victim but to the larger community ("community service", "community restitution", or "symbolic restitution").[25] This is not to be confused with victim compensation, which is paid by taxpayers and is available to eligible victims whether or not the offender has been convicted or even apprehended.[26]

Victim Restitution: Offender restitution to crime victims is receiving renewed consideration as a sanction within the justice system; indeed, the incorporation of references to restitution in legislation has been on the rise.[27] While victim restitution is currently used most frequently as a condition of probation, some states require it for certain classes of crime (e.g., misdemeanors in Texas; crimes that result in property damage in Missouri, Kentucky, and Virginia).[28] In New York City, the Victim Services Agency (VSA) is responsible for the collection and disbursement of restitution in Criminal and Supreme Court cases whenever restitution is imposed as a condition of an ACD, conditional discharge or jail sentence. The NYC Probation Department is responsible for handling restitution when it is imposed as a condition of probation and when a jail sentence is combined with a sentence of probation. While restitution allows the defendant to pay back his victim and, if payment is used in lieu of jail, to remain integrated into the community, there are potential negative consequences: (1) requiring restitution can increase the offender's length of contact with the criminal justice system and thus result in an increase in the degree of social control exercised over the offender; and (2) assignment of restitution amounts in excess of what the offender's means reasonably allows him to pay could expose him to additional punishment for non-payment.

Community Service: Community service sentences were formalized in the United States in the 1960s. Their proliferation was given impetus when the British government instituted a nationwide program in 1973 which sentenced tens of thousands of offenders throughout the United Kingdom to community service obligations; orders ranged by statute from forty to two hundred and forty hours; work was monitored by probation. Similar programs sprang up in other countries, including Australia, New Zealand, and Canada.

Is community service in the United States being used as an alternative to jail or is it just another add-on?[29] Community service programs often advertise themselves as providing an alternative to jail or prison, but critics argue that most U.S. programs, despite their ambitious intentions, are not serving as alternatives to jail but rather as substitutes for fines, probation, and even discharges and dismissals. In addition, many community service orders in the U.S. are given before conviction -- while the defendant is in a pretrial status. Many jurisdictions do not allow court-ordered community service as a sentence unto itself; instead, community work service orders are ordered as part of probation, especially as part of intensive probation supervision programs. Generally, the length of community service orders are determined commensurate with the severity of the crime. Some jurisdictions, such as the Dallas County Juvenile Department, have developed a formal grid based on both the offender and the offense to establish the number of community service restitution hours appropriate for each client. Other jurisdictions correlate work service hours with fines and jail time, generally providing that eight hours of community work service is the equivalent of a day's wages at minimum wage or a day in jail.[30]

CASES' Community Service Sentencing Project (CSSP) is unique in that it is designed as a flat punishment, not as a form of symbolic restitution. A legislative amendment was sought and won which enabled the court to impose the sanction as a stand-alone punishment, using the legal vehicle of the conditional discharge; upon completion of 70 hours of work, the offender fulfills the terms of the sentence. The project differs from others in that it aims to serve as a means of punishing both (a) chronic property offenders who would otherwise have been sentenced to short jail terms and (b) offenders who would have received less onerous sentences but who have been convicted of crimes, typically many times, deserving of a response from the system. To keep the sentence from being used only for those who would have avoided jail, CSSP has strict selection requirements. Indeed, first offenders are excluded since research showed that first offenders convicted of misdemeanors are not apt to get jail sentences in the Bronx, Brooklyn and Manhattan. (The Vera Institute of Justice is just completing a reevaluation of the predictors for jailboundness used by CSSP in selecting its target population.) CSSP also differs in the way its work sites are organized. Instead of being assigned to work for public or private employers, as in most programs, offenders are sentenced to CSSP and are required to work in teams supervised directly by CSSP personnel at sites located at service-needy public and nonprofit agencies.

Community service and victim restitution are important additions to the American courts' list of sentencing options, with the potential of providing a spectrum of sanctions responding to the severity of an offense, but they will probably only be institutionalized if there is greater clarification about why judges should impose them as sentences, for what categories of offenders, under what conditions, and within what limits.

F. *Monetary Sanctions*

Monetary sanctions can include fines, court costs, various fees, bonds, forfeitures against defendant gains, restitution for victim losses, support payments, and donations where permissible. As Klein points out, monetary sanctions offer defense attorneys bargaining chips to be used in obtaining alternative sentences. They offer the prosecution a creative, flexible, fair, but punitive sanction that not only avoids the high cost of incarceration, but adds to the public coffers. With the introduction of the day fine concept to calculate the amount of a monetary sanction, courts can ensure that all defendants, notwithstanding their financial status, are visited with proportional punishment.

Day Fines: The fine is one of the oldest forms of punishment, its history predating Hammurabi. Although fines are used more widely in the United States than many recognize (over a billion dollars in fines are collected in criminal courts each year), fines have been perceived as a lenient sanction due to failure on the part of authorities to emphasize their collection and to alleviate inequities that result from most American courts' reliance on a system of fixed fines.[31]

Working under a very different type of fining system -- the "day fine" system, first developed in Scandinavia in the 1920s and 1930s -- Western European courts provide evidence of the untapped potential of the criminal fine. The court systems of Sweden, England, and West Germany impose fines as the sole penalty in 80 to 85 percent of all convictions. Fine-alone sentences are not restricted, as is common in American courts, to traffic offenders and petty offenders. On the contrary, in West Germany, for example, fines are used as the sole penalty for three-quarters of all offenders convicted of property crimes, and two-thirds of those convicted of assault.[32] West Germany underwent a major reform of criminal law in the 1960s whereby fines were substituted for short terms of imprisonment; the impact of the policy shift was major. Between 1968 and 1971 the proportion of incarcerative sentences in West Germany dropped from twenty-three to seven percent, while the rate of incarceration fell from approximately 100 prisoners per 100,000 population to sixty-six per 100,000.[33]

This expansion of fine use was possible because of the enhanced credibility provided by the introduction of the day fine system as a method of setting equitable, collectible fine amounts. The underlying philosophy is simple: a monetary penalty should be equally burdensome for both rich and poor, imposing equal severity of punishment regardless of financial position for crimes of the same gravity. To achieve this, the court sentences the offender to a certain number of day fine units according to the gravity of the offense (ranging from 1, for the most trivial, to 360, for the most serious), but without regard to his or her means. Then the value of each unit is set at a share of the offender's daily income (hence the name "day fine"), and the total fine amount is determined by simple multiplication.

> *Example: If two offenders with similar prior records were convicted of crimes of equal gravity, they might each be assigned a 5-day fine. If one earned only minimum wage, he or she would be fined $135. If the other earned 10 times as much, the fine would be $1,350. If both failed to pay the fine, each defaulter would serve the same number of days -- 5 -- in jail.*

The benefits of fines are many: they have an unmistakably punitive impact; they can combine with other noncustodial sanctions to meet multiple sentencing goals; they can be set equitably; they can be administered without overburdening collection and enforcement efforts and without resorting to high levels of imprisonment for default.

To explore the viability of using the day fine approach in an American court, a collaborative planning process was undertaken by the Vera Institute of Justice in conjunction with the Richmond County Criminal Court (Staten Island, New York). The program has been in operation since August 1988, and preliminary data shows that judges are using the day fine for a broad range of criminal cases and that the new system has a revenue-enhancing effect.[34] Once the feasibility of such a reform has been demonstrated, the potential for substituting day fines for terms of incarceration for certain categories of offenders should be recognized as a credible, enforceable, cost-effective alternative.

G. *Defender-Based Advocacy Programs*

Defender-based advocacy programs allow defense attorneys to fashion and propose to the court an individualized sentencing package for each defendant which suggests an array of components to address victim, offender, and community needs while providing for offender control in the community. The defense-based sentencing model began twenty years ago when social workers assisted attorneys in finding social services for their clients that could be used to argue for reduced prison terms. Its most immediate impetus, however, dates from the introduction of the client-specific planning (CSP) model of sentencing, pioneered by the National Center on Institutions and Alternatives (NCIA) in 1979.[35] The CSP model provides staff and consulting services to assist defense attorneys in the preparation of individualized alternative sentencing proposals. In consultation with counsel and client, NCIA prepares detailed alternative sentencing plans for criminals convicted of offenses ranging from embezzlement to murder that the defense then submits to the court as an option for sentencing. The sentencing plan is developed from an intensive assessment of an offender's personal and criminal history and gives careful consideration to appropriate kinds of supervision, service, and punishment available. The plan typically includes elements of supervision, fines or restitution, community service, treatment, residence, employment and education. NCIA bills convicts who can afford the cost of developing an alternative sentence and uses the money to provide the same services for poor clients; white-collar cases make up about half of the Center's workload. Of more than 6,000 cases handled by NCIA since its inception, over two-thirds have resulted in sentencing plans being accepted by the courts.[36]

Since the introduction of the CSP model, defense-based sentencing programs have been developed by NCIA, public defenders, and private sentencing services. There are now over one hundred such programs throughout the country. A survey conducted by The Sentencing Project found that more than eighty programs existing in 1986 handled over 11,000 cases in one year. The figure is substantially larger today. At least twelve evaluations have been

conducted of these programs, all but one of which concluded that the programs were extremely successful in diverting prison-bound felony offenders.[37] NCIA functions in New York, as well as Consultants for Criminal Justice Alternatives (CCJA) and the Osborne Association's Assigned Counsel Alternatives Advocacy Project (ACAAP). The latter is unique in its advocacy not only for ATD and ATI defendants, but also for ATRs (alternatives to re-incarceration for parole violators, cited for technical violations, who might otherwise be returned to prison). Although some concern has been registered that these highly individualized alternatives violate the implicit American principle that sentences be proportionate, clear of purpose, and broadly applicable, many feel this individualized treatment allows for greater fairness and should be institutionalized.

Enforcement/Accountability

As Klein points out, no matter what alternative is imposed by the court, whether it includes day fines, house arrest, mandatory treatment, or the community service, employment and education requirements of CASES, the program will only be as effective as its enforcement. Hard-headed, strictly enforced alternative sentences are critical. Unenforced alternative sentences jeopardize the entire alternative sentencing movement, undermining its credibility and its potential to address serious sentencing concerns. The moment the word goes out that an alternative sentence is unmonitored is the moment the court loses another sentencing option.

To be enforced, alternative sentences must be strictly monitored; an effective alternative sentence should have a built-in monitoring capability. Fortunately, alternative sentences are frequently based on easily measurable behavior. Either the offender pays the monetary sanction or he does not, remains drug free or not, completes community work service or not. However, failure to comply with violations need not necessarily involve resentencing to prison. As we need intermediate sentencing sanctions between probation and prison, we also need incremental penalties to deal with program violators. Delaware has developed a ten-level sentencing matrix that stresses accountability of the offender to the State and the victim as well as the accountability of the correctional system to the State and the victim. The matrix is based on the tenet that the offender should be sentenced to the least restrictive (and least costly) sanction available, consistent with public safety. Once sentenced, the offender can move up or down the matrix depending upon his/her behavior. The matrix gives the offender an incentive to comply with the sentence and gives the judge options other than prison which increase the certainty of appropriate, proportional punishment.[38]

Evaluation

Evaluation of intermediate and alternative sentences, like evaluation of sentencing in general, is not always easy. There are a multitude of uncontrolled and often uncontrollable variables. However, as McCarthy notes, the *objectives* of the necessary research are clear: "to establish how these programs are being used and how they can best be used; to determine whether these programs are effective punishments, community control strategies or possibly even therapeutic tools; to identify the mix of retribution and community protection strategies that can best meet our correctional needs; and to identify the issues which make or break programs in different community and correctional contexts."[39] We need to keep in mind:

Program objectives: Alternative programs must give serious thought to the criteria upon which they wish their programs to be evaluated. If community safety is a goal, then identification and quick revocation of a violator may be seen as a success, not a failure; if crime prevention is a goal, recidivism rates will be of interest; if rehabilitation is a goal, some behavioral indicators of success need to be defined.

Diversionary goals: Evaluation of how well intermediate penalties, the ATD/I programs in particular, are meeting their diversionary goals, although difficult, is critical. We must continually monitor and question our own programs. Are our ATIs truly identifying jailbound groups? Are we targeting the right group of offenders for the appropriate programs? What do we do with failures? Are failures running the risk of being sentenced to more time than they would have served without the programs? If large numbers of program failures are being returned to court for resentencing, does this have a positive or negative impact on the way judges view alternative sentencing? Under what conditions can programs accomplish their stated objectives?

Replication: Evaluation is also complicated by differences in jurisdictions. What is considered a serious or "middle-range" offender in one state may be seen as a minor offender in another. Developing adequate comparison groups for studies is difficult in any environment. Multi-program analyses are necessary if we are to separate what works in one jurisdiction from what can work as a model for all jurisdictions.

Research: Several studies have been done which provide models of the kinds of evaluation which must take place, e.g., McDonald's Punishment Without Walls and the Criminal Justice Agency's evaluation of CEP. Vera Institute's rigorous evaluation of its Day Fine program is currently underway; it will yield research which should have major impact on how the courts look at expansion of this kind of intermediate sanction. Vera has also just contracted to undertake a year-long research project - the Jail Population Management Consultant Survey (JPMC) - to provide a detailed profile of the New York City jail population, predictors of jailboundness, and information on aspects of case processing and court decisionmaking that affect who is in detention and how long they stay. This research will help formulate recommendations on better uses of alternatives to impact on the jail population and thus will potentially have major bearing on how alternative programs locally are structured and viewed.

Summary

Our traditional sentencing approaches are fragmented and inadequate. Whether it is the victim who goes uncompensated, the public that feels unprotected, the judge who suffers from a paucity of sentencing options, or the offender who is dehumanized by his prison experience, all are critical of the criminal justice system - and with justification. McCarthy concludes: "In the future, intermediate punishments may be different from the programs we now see developing, but their place in correctional policy should be secure. Having learned that alternatives are possible, traditional 'probation or prison' decision-making begins to appear not only simplistic, but unnecessary and unwise."[40] The window of opportunity is here, but we need to proceed with care. If we fail to design programs which hold offenders accountable, cost less than prison, and provide public safety, the public is apt to further embrace incarceration.

CASES can provide leadership for the movement to reform criminal sentencing. Because the agency's position outside the traditional criminal justice structure affords it a unique self-reflective capacity, CASES has the potential to (a) evaluate and assess honestly how well its programs are serving the needs of offenders, the criminal justice system and the larger community, and (b) serve as an umbrella organization for the development and institutionalization of a continuum of alternative and intermediate sentencing options which are programatically and fiscally responsible and which provide research components which will allow other communities to evaluate potential replication.

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