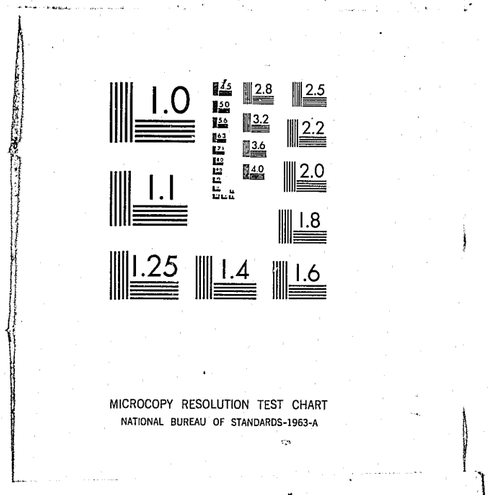

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NATIONAL ASSESSMENT OF ADULT RESTITUTION PROGRAMS

COURT ORDERED COMMUNITY SERVICE IN CRIMINAL LAW

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CHAPTER I: INTRODUCTION

One of the more widely discussed aspects of criminal justice reform in the past decade has been the need to control or structure the extensive discretionary power exercised by decision-makers throughout the system.[1] Attention has focused in particular upon various ways to reduce what is perceived to be unjustifiable disparity in the length of criminal sentences as well as in decisions whether such sentences should be served in the community or in custody.[2] Such concern over disparity in sentence-length and sentence-type, however, contrasts with the wide variety of sentence-conditions increasingly being made available to today's criminal courts.[3]

Largely as a result of a recent proliferation of federally funded initiatives, a sentencing judge may be exhorted to direct offenders to programs offering intensive probation supervision, drug or alcohol therapy, employment counseling, restitution services, or countless other experimental or established "sentencing alternatives."[4] As any program administrator or evaluator is aware, moreover, as the number of alternatives within a particular jurisdiction grows, different program staff may even find themselves in the position of competing for a judge's attention, to procure clients for their own particular form of intervention.

One of the most recent interventions that highlights the potentially conflicting interests of reducing disparity and expanding sentencing alternatives is the practice of requiring offenders to perform some type of unpaid public work or community service, usually for governmental or non-profit agencies, as a condition of their disposition. Community service sanctions have recently drawn favorable attention from such prestigious organizations as the American Bar Association,[5] and they are recognized as a proposed condition of probation in a recent working draft of the Federal Criminal Code Revision Act of 1979.[6] In addition, community service has received overwhelmingly favorable attention in the popular[7] and academic[8] literature, and experimentation with community service has become a funding target for federal agencies.[9]

Despite an apparently growing enthusiasm for the use of community service dispositions in the above circles, however, it has recently been noted that "case law concerning the legality of requiring an offender to perform community service as a condition of probation has not yet been established."[10] Similarly, in their recent report for the National Institute of Law Enforcement and Criminal Justice, Beha, Carlson and Rosenblum conclude that: "Community service seems to be in an experimental stage legally. As far as can be determined to date, no litigation has contested its use and there is almost nothing in the literature dealing with potential legal or constitutional conflict . . . ."[11]

Although isolated opinions may be found in which the appelate courts have considered the use of community service by sentencing

judges,[12] and although explicit statutory authorization is becoming more common,[13] case law and legislative activity in the area both remain negligible indeed in comparison to the extensive use of the sanction in numerous jurisdictions throughout the United States. In the absence of explicit authorization, for example, individual sentencing judges have widely publicized their support for and use of community service under their broad discretionary powers to require conditions of probation or conditional discharge.[14] In addition, formal programs to implement and administer community service provisions are spreading rapidly throughout the United States, usually under similar non-explicit, discretionary statutory authority.[15]

The purpose of this report is to examine some of the assumptions underlying the expansion of community service sentencing, and to provide legislators and criminal justice practitioners with a review of statutes, case-law, and related developments in the law, as well as a critical appraisal of some of the 'potential legal or constitutional conflicts' that community service may provoke. By way of an organizational framework, discussion can be conveniently divided into two general areas; the first of these involves consideration of the basic authority of the courts to impose community service, and the second area embraces specific issues in the implementation and administration of community service penalties.

CHAPTER II: COMMUNITY SERVICE SENTENCING AUTHORITY

ANALOGOUS PROVISIONS

The idea of requiring offenders to perform some kind of work or service as part of the penalty for their crimes is of course not a new one. The Thirteenth Amendment to the United States Constitution affords solemn recognition of a longstanding national acceptance of the practice of involuntary servitude as a punishment for crime.[16] Similarly, uncompensated labor by inmates of penal institutions, sentenced to 'hard labor' or put to work on 'chain-gangs,' is one of the more widely portrayed aspects of American penal history.[17]

An 1891 West Virginia Statute, still in force, provides that if an offender is confined for violation of a municipal ordinance, whether for failure to pay a fine or as part of the sentence, he may be ordered by the court "to work on the public streets and alleys of (the) city, town or village . . . . And the council of such city, town or village may make proper allowance to the marshall or sargeant to take charge of such person or persons while so at work, and allow and pay a reasonable compensation for the services rendered, out of the treasury of such city, town or village."[18] More recently, a 1975 California probation law provides that:

> In counties or cities and counties where road camps, farms, or other public works is available the court may place the probationer in such camp, farms, or other public work instead of in jail . . . and the court shall have the same power to require adult probationers to work at public work . . . and supervisors of the several counties are hereby authorized to provide public work and to fix the scale of compensation of such adult probationers in their respective counties.[19]

An act that in many ways captures more closely the spirit of community service as the concept is in vogue today, however, is a 1949 Alaska probation law prohibiting littering in public recreational facilities or on or from public highways.[20] After declaring the offense to be a misdemeanor punishable by a fine of not more than $500, or by imprisonment in jail for not more than one year, or by both, the statute adds that the sentence may be suspended and that: "The defendant may be required, as a condition of probation, to pick up garbage and rubbish from the nearest highway, highway right-of-way, or public recreation facility for not more than four hours a day on each of two days."[21] Similar provisions exist in other jurisdictions, such as in California where picking up litter may also be made a condition of probation in addition to fines, for not less than four and eight hours upon a second and third littering conviction, respectively.[22]

The penalties for littering contain the seeds of recent developments in community service as a more generally applicable

sentencing provision in two important, overlapping respects. First, although not explicitly stated, the work involved in picking up rubbish is presumably intended to be performed without compensation. Second, just as the task of picking up litter, for the offense of littering, can obviously be considered a reparative penalty, so also the recent growth of community service has been very closely linked in theory and practice to monetary reparation or restitution by criminal offenders.[23] The concepts frequently complement each other, for example, in operating programs in which community service is often a secondary focus, used with offenders for whom financial restitution is not possible.[24] In addition, the concepts are also often treated together in recent statutes,[25] and the term restitution is sometimes used to signify both financial restitution and community service.[26] Similarly, in a recent Mississippi statute the terms are granted essential equivalence under the rubric "restitution to society."[27] In Minnesota, the expression "work in restitution" appears in the State code,[28] and the idea of a reparative relationship between the service and the offense may also underly a New Hampshire law requiring that the service must be "of the sort that in the opinion of the court will foster respect for those interests violated by the defendant's conduct."[29]

COMMUNITY SERVICE SENTENCING STATUTES

Statutes such as the New Hampshire, Mississippi and Minnesota laws just cited are among a rapidly growing body of legislation that has been enacted in recent years, augmenting the more traditional sentencing powers of the courts by making explicit statutory provision for the use of community service as part of a criminal disposition. Specific statutory authorization of community or public service as a dispositional option for criminal sentencing judges now exists in approximately one-third of the jurisdictions in the United States. Table 1 summarizes the purposes and major provisions of these laws, the type and amount of service authorized, and highlights any provisions of special interest.

Although laws from only fifteen states are included in Table 1,[30] the variety of approaches towards authorizing courts to impose community service is notable. Proceeding down column two of the table, for example, service has received legislative approval as a sentence in its own right, as a condition of suspended sentence, probation, and conditional discharge. It has been authorized in Maryland and Illinois as a condition of probation prior to judgment,[31] and in New Jersey the fact that an offender will participate in a community service program may be considered a factor in mitigation of the court's sentence.

Further reading of the second column of Table 1 shows that community service is authorized sometimes in addition to other penalties such as jail, fines, reparation or restitution, or, in the case of Florida, any other punishment. At other times, service is statutorily listed in lieu of or in satisfaction of

TABLE 1: ADULT COMMUNITY SERVICE LEGISLATION IN THE UNITED STATES, 1979

JURISDICTION AND STATUTE	SUMMARY OF STATUTORY PURPOSE	SERVICE TYPE	SERVICE AMOUNT	SERVICE RECIPIENT/ LOCATION	SUMMARY OF SIGNIFICANT PROVISIONS	SPECIAL NOTES
ARIZONA REV.STAT. ANN. s. 13-1805 (G) (1978)	Authorizes service sentence in addition to or in lieu of fine for misdemeanor or felony shop-lifting	Public services	Not specified	Designated by court	The court may, in imposing sentence upon a person convicted of shoplifting, require any person to perform public services designated by the court in addition to or in lieu of any fine which the court might impose.	Service for specific offense only.
CALIFORNIA PENAL CODE s. 490.5(c) (Deering 1979)	Authorizes service sentence in lieu of fine for first conviction of petty theft of retail merchandise or library materials	Public services	No less than required to satisfy fine at minimum wage	Designated by court	In lieu of $50 - $1,000 fines for a first conviction of petty theft of merchandise taken from a merchant's premises or a book or other library materials taken from a library facility, any person may be required to perform public services designated by the court, provided that in no event shall any such person be required to perform less than the number of hours of such public service necessary to satisfy the fine assessed by the court at the minimum wage prevailing in the state at the time of sentencing.	Service for specific offense only. Service for first offender only.
DELAWARE CODE ANN. tit. 11, s. 4105(b),(c) (Cum. Supp. 1979)	1) Authorizes service sentence in lieu of fine or costs if offender is unable or fails to pay. 2) Authorizes development of guidelines for permissible amounts of service in Justice of Peace Court. 3) Establishes program selection and offender assignment procedures. 4) Authorizes civil contempt penalty for service failure by offender.	Public work assignments	1) Amount required to satisfy fines and costs at minimum wage. 2) According to guidelines to be set by Deputy Administrator of J.P. Courts.	Public projects submitted by state, county or municipal agencies and certified by Division of Corrections	Where a person sentenced to pay a fine, costs or both, on conviction of a crime is unable or fails to pay at the time of sentence or in accordance with terms of payment set by the court, the court may order the person to report at any time to the Director of the Division of Corrections, or a person designated by him, for work for a number and schedule of hours necessary to discharge the fine and costs imposed. For purposes of this section, an hourly rate equal to minimum wage for employees shall be used in computing the amount credited to any person discharging fines and costs. In cases involving J.P. Courts, the Deputy Administrator thereof shall establish guidelines for the number of hours of work which may be assigned and the courts shall adhere to said guidelines. The Division may approve public work assignments submitted for certification for convicted persons, whereupon the Director or a person designated by him may assign the convicted person to work under the supervision of any state, county, or municipal agency on any project or assignment specifically certified for that purpose. The D.O.C. shall not compensate any convicted person assigned to work but shall credit such person with the number of hours of satisfactory service. When the number of hours equals the number imposed by the court, the D.O.C. shall certify this fact to the appropriate court, and the court shall proceed as if the fines and costs had been paid in cash. In the event that a person serves the maximum sentence for civil contempt for failure to comply, the court in its discretion may order that any fines and costs totaling less than $1,000 shall be cancelled.	Service is explicitly uncompensated.
FLORIDA STAT.ANN. s. 775.091 (West Cum. Supp. 1979)	Authorizes service sentence in addition to any punishment.	Specified public service	Not specified	Not specified	In addition to any punishment, the court may order the defendant to perform a specified public service.	

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JURISDICTION AND STATUTE	SUMMARY OF STATUTORY PURPOSE	SERVICE TYPE	SERVICE AMOUNT	SERVICE RECIPIENT/ LOCATION	SUMMARY OF SIGNIFICANT PROVISIONS	SPECIAL NOTES
FLORIDA STAT. ANN. s. 812.015(2) (West Cum. Supp. 1979)	Authorizes service sentence in lieu of fine for second or subsequent petit retail theft.	Public service	No less than required to satisfy fine at minimum wage.	Designated by court	Upon a second or subsequent conviction for petit retail theft, in lieu of a fine of not less than $50 not more than $1,000 the court may require the offender to perform public services designated by the court. In no event shall any such offender be required to perform less than the number of hours of public service necessary to satisfy the fine at the minimum wage prevailing in the state at the time of sentencing	Service for second or subsequent offense only.
HAWAII REV. STAT. s. 706-605(1) (f) (Supp. 1978)	Authorizes community service as a sentencing alternative or as a condition of probation.	Services for the community	Stated in the court's judgment	Governmental agency or benevolent or charitable organization or other community service group or under other appropriate supervision.	The court may sentence a person convicted of a crime to perform services for the community under the supervision of a governmental agency or benevolent or charitable organization or other community service group or under other appropriate supervision, or to perform such services and to probation, as the court may direct, provided that the convicted person who performs such services shall not be deemed to be an employee for any purpose. The extent of services required shall be stated in the judgment. The court shall not sentence the convicted person only to perform such services unless, having regard to the nature and circumstances of the crime and to the history and character of the defendant, it is of the opinion that such services alone suffice for the protection of the public.	Section 706-605(1)(e) authorizes a sentence to make restitution or reparation to victims in addition to any community service. Offender not an employee for any purpose.
ILLINOIS ANN. STAT. ch. 38, ss. 1005-6-3(b)(10), 3.1(c)(10) (Smith-Hurd Cum. Supp. 1979)	Authorizes service conditions of probation and conditional discharge (3(b)(10)) Authorizes service conditions of court supervision, upon deferred judgment (3.1(c)(10)).	Reasonable public service work such as but not limited to picking up litter, or maintenance of public facilities	Not specified	Public parks, public highways, public facilities	The court may in addition to other reasonable conditions relating to the nature of the offense or the rehabilitation of the defendant as determined for each defendant in the proper discretion of the court require that the person perform some reasonable public service work such as but not limited to the picking up of litter in public parks or along public highways or the maintenance of public facilities.	Sections 1005-6-3(b)(9), 3.1(c)(9) authorize restitution under same conditions of probation or court supervision.
ILLINOIS ANN. STAT. ch. 38, s. 204-4(6) (Smith-Hurd Cum. Supp. 1979)	1) Defines duties of probation officers to develop and operate service programs. 2) Restricts P.O.'s liability for offender's tortious acts	Reasonable public service work	Not specified	Not specified	Duties of P.O.s shall be to develop and operate programs of reasonable public service work for any persons placed on probation or supervision, providing, however, that no probation officer or any employee of a probation officer acting in the course of his official duties shall be liable for any tortious acts of any persons placed on probation or supervision as a condition of probation or supervision as a condition of probation or supervision, except for wilful misconduct or gross negligence on part of the P.O. or employee.	P.O. not liable for tortious acts of probationer
ILLINOIS ANN. STAT. ch. 38, s. 204a (1) (Smith-Hurd Cum. Supp. 1979)	1) Authorizes county boards to establish and operate agencies to develop and supervise programs of public service employment for persons placed on probation or supervision by court. 2) Restricts liability of county employees for offender's tortious acts.	Public service work such as but not limited to picking up litter, or maintenance of public facilities	Not specified	To be developed in cooperation with the circuit courts for respective counties	County boards are authorized to establish and operate agencies to develop and supervise programs of public service employment for those persons placed by the court on probation or supervision; the programs shall be developed in cooperation with the circuit courts for the respective counties developing such programs and shall conform with any law restricting the use of public service work; the types of public service employment programs which may be developed include but are not limited to the picking up of litter in public parks or along public highways or the maintenance of public facilities. Neither the county nor any official or employee thereof acting in the course of his official duties shall be liable for any tortious acts of any person placed on probation or supervision as a condition of probation or supervision, except for wilful misconduct or gross negligence on the part of such governmental unit, official or employee. No person assigned to a public service employment program shall be considered an employee for any purpose, nor shall the county board be obligated to provide any compensation to such person.	Obligation to provide compensation explicitly denied. Offender not considered an employee for any purpose.

TABLE 1: ADULT COMMUNITY SERVICE LEGISLATION IN THE UNITED STATES, 1979

JURISDICTION AND STATUTE	SUMMARY OF STATUTORY PURPOSE	SERVICE TYPE	SERVICE AMOUNT	SERVICE RECIPIENT/ LOCATION	SUMMARY OF SIGNIFICANT PROVISIONS	SPECIAL NOTES
KANSAS STAT. s. 21-4610(3)(m) (1978)	Authorizes services as condition of probation or suspended sentence.	Community or public service work.	Not specified	Local governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community.	Court may include among conditions of probation or suspension of sentence: the defendant shall perform community or public service work for local governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community.	Section 21-4610(3)(h) authorizes restitution or reparation to aggrieved parties. See also s. 21-4610(3)(m), below.
KANSAS STAT. s. 21-4610(3)(n) (1978)*	Authorizes service condition of probation or suspended sentence, under day fines system to satisfy monetary fines, costs, reparation	Not specified (but see s. 21-4610(3)(m))	Service for a period of days determined by court, to satisfy fines or costs, reparation or restitution on the basis of ability to pay, standard of living, support obligations and other factors.	Not specified (but see s. 21-4610(3)(m))	Court may include among conditions of probation or suspension of sentence: the defendant shall perform services under a system of day fines whereby the defendant is required to satisfy monetary fines or costs or reparation or restitution obligations by performing services for a period of days determined by the court on the basis of ability to pay, standard of living, support obligations and other factors.	Authorizes service to satisfy monetary obligations, including restitution, on basis of ability to pay.
MAINE STAT. ANN. tit. 17-A, s. 1204(2-A)(L) (1978)	Authorizes work as condition of probation	Specified work	Not specified	State, county, municipality, school administrative district, other public entity, or a charitable institution.	As a condition of probation, the court in its sentence may require the convicted person to perform specified work for the benefit of the state, a county, a municipality, a school administrative district, other public entity or charitable institution.	Section 1204(2-A)(B) authorizes restitution as a condition of probation, to each victim, or to the county if victim not found or not interested.
MAINE STAT. ANN. tit. 34, ss. 1007(1)(F), (2) (1979)	Authorizes court sentencing offender to county jail to allow inmate to leave jail during necessary and reasonable hours to perform services.	Voluntary services	Not specified	Within county where jailed	Any person sentenced or committed to a county jail for crime, non-payment of a fine or forfeiture or court order, or criminal or civil contempt of court, may be granted the privilege of leaving the jail during necessary and reasonable hours to give voluntary services within the county in which the jail is located. The court may grant such privilege at the time of sentence or commitment or thereafter. The court may withdraw the privilege at any time by order entered with or without notice or hearing.	Authorizes voluntary service. Section 1007(1)(G) authorizes similar privilege to work or provide service to the victim with the victim's express approval.

*Day-fine service only

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JURISDICTION AND STATUTE	SUMMARY OF STATUTORY PURPOSE	SERVICE TYPE	SERVICE AMOUNT	SERVICE RECIPIENT/ LOCATION	SUMMARY OF SIGNIFICANT PROVISIONS	SPECIAL NOTES
MARYLAND STAT. ANN. art. 27, s. 641(a)(1) (Cum. Supp. 1978)	Authorizes service as condition of probation prior to judgment.	Parks program or voluntary hospital program	Not specified	Parks or hospital	The terms and conditions of probation, after determination of guilt or nolo contendere plea but prior to entering judgment, may include any type of rehabilitation program or clinic, including but not limited to the driving while intoxicated school, or similar program, or the parks program or voluntary hospital program.	Authorizes voluntary service. Authorizes service prior to judgment Section 64.1(a)(1). Also authorizes restitution as a condition of probation prior to judgment.
MARYLAND STAT. ANN. art. 27, s. 726A (Cum. Supp. 1979)	Authorizes counties and Baltimore City to establish community service programs. Authorizes service as condition of probation, suspended sentence or in lieu of fines and costs. Specifies eligibility criteria and administerative procedures for service programs.	Community Service	Not specified	Private charitable and nonprofit institutions and agencies of government.	Each county and Baltimore City may establish a community service program. Court may order community service as a condition of probation, as condition to suspended sentence or in lieu of payment of any fines and court costs imposed: IF: defendant consents, defendant is not compensated, and has not been convicted of a violent crime. County executives and Mayor of Baltimore shall request private charitable and nonprofit institutions and agencies of government to provide work projects. Agencies to provide information about projects on form prepared by Administrative Office of Courts, to be sent to Clerks of Court. Service program to be administered by Division of Parole and Probation which shall prepare general guidelines that allow modification to meet local condtions. County may elect to have local program monitored by D.O.P.P. or by county. County shall pay for local monitoring, supervising, transportation, tools and other items necessary to implement program. County shall report to D.O.P.P. which shall file annual report to A.O.C. Public or private agency that requests service is responsible for supervising worker and must accept the assignment on terms and conditions imposed by court. Public or private agency may report unsuitability of worker to court. Court may reassign or take other action allowed by law. Section not to limit court's authority to order restitution or service to victim.	Service assignment must be made with defendant's consent. Service is explicitly uncompensated. Defendants convicted of violent crime excluded. D.O.P.P. to prepare administrative guidelines. Recipient agency is responsible for worker's supervision. Service does not limit court's power to order restitution or service to victims.
MINNESOTA STATE ANN. s. 244.09(s)(2) (West Cum. Supp. 1979)	Establishes sentencing guidelines commission. Authorizes guidelines including community work orders.	Community work	Not specified	Not specified	Any guidelines promulgated by the commission for offenders for whom imprisonment is not proper shall make specific reference to noninstitutional sanctions, including but not limited to community work orders.	Guidelines also to include day fines and restitution.
MINNESOTA STAT. ANN. s. 3.739 (Cum. Supp. 1979)	Establishes claims procedure and limitations on liability for injury to service worker.	Uncompensated work. Work in restitution.	Not specified	State agency, political subdivision or public corporation of state, or nonprofit educational, medical, or social service agency.	Claims to be paid pursuant to legislative appropriation following evaluation of each claim by appropriate house and senate committees, for: injury or death of inmate conditionally released from state correctional facility and ordered to perform uncompensated work for a state agency, political subdivision or public corporation of state, or nonprofit educational, medical, or social service agency, as a condition of his release, while performing the work; or injury or death of probationer performing work in restitution pursuant to court order; or injury or death of person, including a juvenile diverted from court system and performing work in restitution pursuant to a written agreement signed by himself, and if a juvenile, by his parent or guardian. Compensation will not be paid for pain and suffering. This procedure is exclusive of all other legal, equitable and statutory remedies against the state, its political subdivisions, or any employees thereof.	Service is explicitly uncompensated. Liability for injury during work in restitution excludes compensations for pain and suffering.

TABLE 1: ADULT COMMUNITY SERVICE LEGISLATION IN THE UNITED STATES, 1979

JURISDICTION AND STATE	SUMMARY OF STATUTORY PURPOSE	SERVICE TYPE	SERVICE AMOUNT	SERVICE RECIPIENT/ LOCATION	SUMMARY OF SIGNIFICANT PROVISIONS	SPECIAL NOTES
MISSISSIPPI CODE ANN. s. 47-7-47(4) (1978)	Authorizes service as condition of probation or earned probation.	Restitution to society through reasonable work for benefit of community.	Not specified	Community	Judge of any circuit court may place offender on program of earned probation after a period of confinement and shall direct that such defendant be under supervision of department of corrections. In event that court should place any person on probation or earned probation, the court may order appropriate restitution to any victim of his crime or to society through the performance of reasonable work for the benefit of the community.	Authorizes restitution to society. Authorizes service after period of confinement.
NEW HAMPSHIRE REV. STAT. ANN. s. 651:2(vi-a) (1977)	Authorizes service sentence for destruction of property or unauthorized entry.	Uncompensated public service that will foster respect for interests violated by defendant's conduct.	Not more than 50 hours	Public service under supervision of elected or appointed official of city or town in which the offense occurred.	Person convicted of destruction of property or unauthorized entry may be required as a condition of discharge to perform not more than 50 hours of uncompensated public service under the supervision of an elected or appointed official of the city or town in which the offense occured, such service being of the sort that in the opinion of the court will foster respect for those interests violated by the defendant's conduct.	Service for specific offenses only. Maximum amount of service specified. Service is explicitly uncompensated. Service related to offenders conduct.
NEW JERSEY STAT. ANN. s. 2C:44-1(b)(6) (West Cum. Supp. 1979)	Includes service among circumstances in mitigation of sentence.	Community service	Not specified	Not specified	In determining appropriate sentence to be imposed on a person convicted of an offense, court may properly consider as a mitigating circumstance that the defendant has compensated or will compensate the victim or will participate in a program of community service.	Service considered in mitigation of sentence. Compensating victims is also considered in mitigation.
NEW YORK PENAL LAW s. 65.10(2)(f-1) (McKinney 1979)	Authorizes service as condition of probation or conditional discharge for misdemeanor or violation.	Services	Not specified	Public or not-for-profit corporation, association, institution or agency.	When imposing a sentence of probation or conditional discharge, the court may, as a condition of the sentence, require that the defendant perform services for a public or not-for-profit corporation, association, institution, or agency, only upon conviction of a misdemeanor or violation and where defendant has consented to the amount and conditions of such service.	Service is authorized among conditions of conduct and rehabilitation service for specific offenses only. Service authorized with explicit requirement of consent by offender. Section 65.10 also authorizes restitution.
OKLAHOMA STAT. ANN. tit. 22, s. 991a (West Cum. Supp 1979)	Authorizes service as condition of probation and suspended sentence, except for offenders of third or subsequent felony. Makes Department of Corrections responsible for monitoring and administration of service program	Community service	Schedule consistent with employment and family responsibilities of offender	Not specified	Court may, at time of sentencing or at any time during the suspended sentence, in conjunction with probation order the person convicted to engage in a term of community service without compensation, according to a schedule consistent with his employment and family responsibilities. The court shall first consider a restitution program for the victim as well as imposition of a fine or incarceration of the offender. Suspended sentence under this section shall not be given to persons being sentenced upon third or subsequent felony conviction. D.O.C. shall be responsible for monitoring and administration of restitution and service programs under this section, and shall insure that service assignments are properly performed.	Service is explicitly uncompensated. Court must first consider restitution as well as imposition of fine or incarceration. Offenders sentenced for third or subsequent felony are exluded.

NOTE: Since preparation of Table 1 the New Criminal Code of Alaska has added privision for community service. See note 30 supra.

monetary obligations.[32] Similarly, several of the statutes authorize community service for specific offenses such as petty theft, shoplifting, destruction of property, and unauthorized entry, or for classes of offense such as misdemeanors, violations, or non-violent crimes. Still other provisions apply specifically to certain types of offenders, such as those convicted of a particular crime for the first or second time.

In addition to the provisions in Table 1 authorizing the imposition of community service, several of the statutes listed deal with the creation and administration of formal service programs. Others address ancillary questions such as liability for injury to and by the offender performing community service work. These and the remaining provisions covering such areas as type and amount of service will be discussed further below in connection with other specific issues concerning the implementation and administration of community service programs.[33]

IMPLICIT PROBATION POWERS

As intimated earlier, the imposition of community service sanctions by sentencing judges and the development of community service programs has greatly outdistanced legislative activity explicitly authorizing its use. In the absence of such explicit authorization many judges and programs have simply assumed comparable,[34] and arguably broader powers,[35] under probation laws couched in more general discretionary terms. The discretionary language in the Federal Probation Act,[36] for example, has prompted the use of unpaid community service in several jurisdictions.[37] The Act allows probation "upon such terms and conditions as the court deems best, (provided that) the ends of justice and the best interest of the defendant will be served thereby."[38]

Three of the most frequently encountered assumptions advanced in support of assuming power to require community service are: a) it provides a viable alternative to incarceration, b) it is a voluntary undertaking on the part of the offender, and c) it represents a rehabilitative experience for offenders. Similar claims have been successfully proferred in justifying other conditions of probation that were also not specifically countenanced by statute; a recent decision by the Pennsylvania Supreme Court, for example, in Commonwealth v. Walton,[39] clearly demonstrates the power of the alluring notions that a probation condition, in this case restitution, may be rehabilitative, consensual, and an alternative to imprisonment:

> Although we have indicated that an order placing a defendant on probation must be regarded as punishment for double-jeopardy purposes, there is in our view, a significant distinction between restitution required in addition to a statutory punishment, such as imprisonment, and restitution required in lieu of such punishment. While such an order

> must be strictly scrutinized in conjunction with a primarily punitive sentence, conditions of probation, though significant restrictions on the offender's freedom, are primarily aimed at effecting, as a contructive alternative to imprisonment, his rehabilitation and reintegration into society as a law-abiding citizen; courts therefore are traditionally and properly invested with a broader measure of discretion in fashioning conditions of probation appropriate to the circumstances of the individual case . . .
>
> From the viewpoint of the offender, of course, there is a further significant distinction. In exchange for his acceptance of the probationary condition, he is permitted to avoid imprisonment and obtain his freedom, though in a somewhat restricted form.[40]

Whether applied to restitution or community service, however, available evidence casts considerable doubt upon the validity of all three assumptions, and makes the propriety of proceeding without explicit statutory approval extremely dubious.

Community Service as an Alternative to Incarceration. Community service in the United States is frequently referred to as an "alternative" sentencing concept.[41] Occasionally the use of the word "alternative" is quite general, meaning no more than that community service is an option available to sentencing judges in addition to all the more traditional sanctions of fine, probation, and incarceration.[42] Perhaps due to the widely recognized phenomenon of "overselling" new ideas in criminal justice,[43] however, community service is often optimistically portrayed as a sentence that is used widely for offenders who would otherwise have been incarcerated. The result has been that community service is commonly perceived in the media and in academic literature as primarily an alternative to incarceration.

Headlines in a recent LEAA newsletter, for example, for an article summarizing the results of a review of selected community service programs, declared that: "Offenders Avoid Imprisonment by 'Volunteer' Work."[44] Less emphatically, in an announcement for the first large-scale federal funding initiative in the area of community service sentencing, one of the results sought by LEAA was that: "The program seeks to create an innovative alternative to the typical correctional processing of selected offenders . . . . The criminal justice system is expected to benefit from the lowered costs of non-incarceration . . . ."[45]

The image of community service as an alternative to incarceration is also fostered by criminal justice practitioners. A San Francisco judge, for example, in explaining how he uses "alternative sentencing," notes that one of the values is that: "It saves taxpayers the cost of food, clothing, bedding, clothing and medical services at the county jail, where the daily cost of maintaining a prisoner is about $27."[46] Similarly, an Arizona probation chief states that: "The community service restitution program as operated by the Pima County Adult Probation

Department is a sentencing alternative available to the courts, and is a viable alternative to incarceration, the imposition of a fine, or the imposition of monetary restitution."[32]

In the academic literature on community service, one of the more sweeping assertions is contained in a recent article by Newton:

> Sentencing to community service or restitution provides an alternative to imprisonment which is positive from every point of view: It avoids the destructiveness of imprisonment, it is less costly than imprisonment, it holds the possibility of helping the offender, and it helps compensate the victim of crime for his loss.[48]

In order to test the validity of claims that community service is a viable alternative to incarceration, one would turn ideally to a body of evaluative research demonstrating whether or not offenders sentenced to perform a service would, in fact, have received an incarcerative disposition in the absence of the service option. Unfortunately, no such body of research is available in the United States. Based upon inferences drawn from a variety of less direct sources, however, it is possible to conclude with considerable assurance that the offender sentenced to community service does not typically avoid incarceration thereby; instead the service is imposed in addition to his normal penalty, or, at best, in lieu of monetary sanctions.

Limitations on Program Eligibility: Examination of the programs and procedures upon which many of the "alternative-to-incarceration" pronouncements are based, suggest strongly that even within those programs it is likely to be the rare exception rather than the rule that an offender would have been incarcerated without the program's intervention. The text accompanying the LEAA headline that "Offenders Avoid Imprisonment by 'Volunteer' Work,"[49] for example, is based upon a report by Beha, Carlson and Rosenblum, which is largely devoted to explaining the need to monitor programs, and ways in which to evaluate them in order to discover whether they truly operate as alternatives to incarceration.[50] Indeed, in their cautiously optimistic report the authors note explicitly that:

> [J]udges have not shown consistent interest in such alternatives where serious and/or felony charges are involved . . . The record of community service programs to date in the United States indicates that they have been used primarily for cases that might otherwise be handled by fine or probation, rather than for cases in which a jail sentence is the traditional alternative. In some situations this is an explicit facet of the program; elsewhere, it is simply a characteristic of the caseload . . . Some programs were set up as an avenue to "work off" fines; even those with a broader mandate show a high proportion of their caseload convicted of code violations and parking infractions rather than misdemeanors.[51]

The record of community service programs dealing predominantly or exclusively with offenders who seem extremely unlikely candidates for incarceration is reinforced by examination of a large majority of the programs that have been reviewed.[37] Where formal eligibility criteria exist for admission to such programs, they most commonly gravitate towards the minor property offender or others for whom some form of community-based disposition might usually be expected.[53] Similarly, a review of the community services statutes in Table 1 does very little to bolster the alternative to incarceration view of community service. In none of the statutes listed is service explicitly to be a complete alternative to incarceration. It certainly seems unlikely, moreover, that such a result is generally intended in those laws in which service penalties are provided for petty thefts and other misdemeanors or violations.

Community Service and Punishment Theory: One indication of the ways in which community service might be expected to develop in the United States may be inferred from an assessment of its relative value under different theories of punishment. From a deterrence perspective, for example, although it might be argued that community service may be as effective or more effective than probation and/or fines, it would be considerably more difficult to dispute that it is not less effective than imprisonment. Similarly, if the supervision involved in community service makes it a more incapacitative measure than fines or probation, it nevertheless offers less of a guarantee of societal protection than does total confinement.

Within the utilitarian sentencing theories, only from a rehabilitative perspective is there much question about the relative standing of community service and confinement, with popular sentiment appearing to give community service the edge.[54] In a political and professional climate of hostility towards rehabilitation,[55] however, and support for more, not less deterrent and incapacitative penalties,[56] advocates of community service as an alternative to incarceration might do well to resort to other lines of argument.

One such approach to community service is one that proceeds primarily from a desert-orientation; this argument suggests that within the context of the traditional sentence options of fines, probation and confinement some offenders are being punished more than they deserve, and others less.[57] In the former case, the target population for a community service program might be selected offenders now being imprisoned for lack of an acceptable alternative, any combination of existing alternatives such as fines and/or probation presumably being less than this class of offenders really deserves. From the second desert-orientation, community service might be seen as a way of increasing the severity of punishment for selected offenders for whom the present options of probation and/or fines are not thought to be enough punishment. Both approaches suggest defensible eligibility criteria for selecting offenders as community service candidates,

but, once again, the latter approach is likely to be considerably more politically appealing to elected officials in and out of the system in a period in which political wisdom dictates adherence to a 'law and order' toughness.

A balanced consideration of the four traditional theories of punishment, therefore, leads to the firm implication that justification of community service must proceed from or be significantly bolstered by other points of strength if it is to be widely accepted as an alternative to incarceration rather than a simple increase over present levels of social control.

The British Experience: A great deal of the current interest in the United States stems directly from experimentation with and subsequent widespread use of community service orders (CSOs) by courts in England and Wales.[58] Accordingly, the way in which service penalties have developed in the British system may be material to consideration of the sanction as it has been transplanted to the United States, especially insofar as support for the concept is predicated upon expectations of reducing incarceration rates.

Under the practice now prevalent in Britain, unpaid CSOs are imposed by the court as a sentence in their own right.[59] As construed by the Home Office, "the primary purpose of the Community Service Order must be seen as an alternative to custodial sentences . . . ."[60] Even after several years of experience with CSOs this statement of purpose remains: "Whatever the views of individual officers upon the matter . . . [i]t has been the Home Office view throughout that the order was intended primarily as an alternative to short sentences of imprisonment and that has been the 'official' view of Inner London, Nottingham and Shropshire."[61] In addition, when the statute authorizing CSOs was considered by Parliament: "Ministers stipulated that the community service order was intended primarily for persons who might otherwise be sentenced to short terms of imprisonment."[62]

In fact, under the Criminal Justice Act 1972, in which authorization for the CSO is contained, an offender need have been convicted of an offense only <u>punishable</u> by imprisonment.[63] Just as the Home Office view is not entirely supported by the statute, moreover, it appears to be growing increasingly divorced from actual practice in Britain. Doubts that CSOs serve primarily as an alternative to imprisonment were voiced in the earliest study conducted by the Home Office Research Unit in the experimental areas in which the program was first introduced in Britain.[64] Although the study was not designed to determine how many of the cases which resulted in a service order would otherwise have led to incarceration, it did demonstrate that: "[W]hen a judge did not accept a probation recommendation for a community service sentence, a custodial sentence was imposed in only a minority of cases. This practice was found even in those jurisdictions where the Probation Service clearly viewed community service as an alternative to imprisonment, and not as a general sentencing tool."[65]

Although the findings of the early Research Unit are open to a number of competing interpretations, the possibility that the experiment with community service might not be proceeding exactly according to the Home Office's expectations was strengthened by a later study, reported in 1977.[66] In this later study of cases processed in several of the experimental program regions, four approaches were taken to address the question: "[I]f community service had not been available to the courts which dealt with these offenders, what other sentences would they have received?"[67] First, probation officers were asked for their judgments of what sentences would otherwise have been passed on those sentenced to community service. Second, dispositions were examined for offenders who breached the requirement of a CSO and were then resentenced. Third, sentences were studied for cases in which the court asked the probation department for an assessment of suitability for community service, but in which service was not ordered. Finally, sentences were examined for those recommended for a CSO by probation officers, but who did not receive such an order.[68]

On the basis of methods one, two and four, the authors of the Home Office research report concluded that:

> In assessing the proportion of those given community service orders who were displaced from custody three of the four methods used produced estimates within the range 45% to 50%. The similarity is seductive . . . . However, there are a number of arguments which cast doubt on such a conclusion. In two of these three estimates, there may be factors which would tend to reduce the proportion of those diverted from custody. It is not likely that all those given custodial sentences after a . . . breach of community service order would originally have received a custodial sentence. Further, it is possible that probation officers tended to recommend community service orders in many cases where such a recommendation was a forlorn hope in the face of an offense for which imprisonment was almost certain. To the extent that these considerations are true, they tend to reduce the estimated proportion of those diverted from custody.[69]

The fourth method used in the study produced considerably different results. Of 102 cases in which the court initiated consideration of community service, but did not order it, more than 80 percent did <u>not</u> receive sentences of active imprisonment.[70]

The Home Office report was based in most instances on very small numbers, and each of the methods used to infer the effects of CSOs on sentencing practice is obviously circumstantial at best. The most optimistic estimates available, however, suggest that a majority of CSO cases would not have been incarcerated under traditional sentencing practices. Consequently, descriptions of the British experience may be considerably overstating the benefits of community service sentences, if they are couched

predominantly in terms of the Home Office's conception of CSOs, as being primarily an alternative to incarceration.[71]

Even as a matter of principle, the alternative-to-incarceration interpretation of community service was not required by members of the Advisory Council on the Penal System who were its original proponents:

> We have considered whether it should be legally confined to imprisonable offenses, and while in general we would hope that obligation to perform community service would be felt by the courts to constitute an adequate alternative to a short custodial sentence, we would not wish to preclude its use in, for example, certain types of traffic offenses which do not involve liability to imprisonment. Community service should, moreover, be a welcome alternative in cases in which at present a court imposes a fine for want of a better sanction.[72]

More recently, another Advisory Council report proposes that even the limitation to imprisonable offenses be lifted eventually.[73]

The Restitution Experience: In addition to the influence of the British CSO, the development of community service in the United States is frequently inseparable from the related concept of restitution by criminal offenders. The overlapping development of community service and restitution in the United States is of particular interest in this part of the present discussion, insofar as restitution is also extensively, and usually unjustifiably, portrayed by many writers and in cases such as Commonwealth v. Walton, supra as a sanction which serves as an alternative to incarceration. Once again, in an LEAA news release about restitution programs in 1977, the headline announced: "Restitution--An Alternative to Jail."[74] Similarly, in a related release it was declared that: "Restitution as opposed to jail sentencing and heavy fines . . . saves taxpayers large sums of money and helps ease overcrowding in jails and prisons . . ."[75] In reality subsequent evaluation of the programs about which such claims were made suggests very strongly that very few offenders, if any at all, avoided being sentenced in incarceration because they were instead ordered to pay restitution.[76]

The optimistic expectations of an agency funding restitution programs, and those of administrators running such a program[77] are matched by similar alternative-to-incarceration portrayals of restitution, and by association, community service, in the academic literature. Newton, for example, appears to perpetuate such an impression, first in an article wishfully entitled "Alternatives to Imprisonment: Day Fines, Community Service Orders, and Restitution,"[78] and second in a follow-up piece in which the previously quoted assertion is made that "[s]entencing to community service or restitution provides an alternative to imprisonment which is positive from every point of view . . . ."[79]

Although restitution, and almost any other sentencing condition for that matter, might in theory provide an alternative to imprisonment, experience so far demonstrates quite convincingly that when a victim's claim to restitution conflicts with more traditional perceptions of the need to incapacitate certain offenders, the possibility of restitution will not often induce a non-incarcerative sentence.[80] As appears to be the case for community service, restitution programs in the United States are almost exclusively designed either explicitly not to divert offenders from custodial dispositions, or to deal only with offenders who, by virtue of their offense, usually of a minor property type, are extremely unlikely candidates for imprisonment to begin with.[81]

In short, any general characterization of restitution in the United States as an alternative to incarceration has even less support in practice than appears to be the case with the community service order in Britain. Similarly, just as a reading of the Criminal Justice Act 1972 does not require that CSOs be reserved primarily for offenders who would otherwise be imprisoned, it would be far from accurate to suggest that such intent is conveyed in the dozens of state and federal laws authorizing restitutive dispositions.[82]

Whether the major source of influence, therefore, is from the British CSO or from the widespread interest in restitution in the United States, the foregoing review provides support for the view that early expectations that community service may act as an alternative to incarceration may be largely unwarranted. An obvious corollary inference is that community service sanctions may act as a more intrusive penalty added to traditional sentencing dispositions such as probation, or possibly as an alternative to non-custodial options such as fines or monetary restitution.[83] In either case, such a conclusion has considerable implications for arguments in support of community service based upon the idea that the offender consents to the sanction.

Voluntary Service. Almost as pervasive as the notion that community service acts as an alternative to incarceration, is the image that offenders participating in such programs are "volunteers." Under the British scheme, for example, the consent of the offender is statutorily mandated, prior to the imposition of a CSO.[84] Similarly, in the United States, many of the community service programs are housed in 'volunteer centers,' 'volunteer bureaus,' 'volunteer service agencies,' or 'voluntary action centers,' with program titles such as the Solano Volunteer Work Program.[85]

Reliance upon the concept of voluntariness or consent in criminal justice had traditionally been subject to critical scrutiny in every part of the system.[86] For community service sentences in particular, Harris has pointed out that the term "volunteer' "is a misnomer for persons under court order to perform assigned tasks."[87] Nevertheless, the reasoning of consent is

often advanced in defense of challenged conditions or probation or parole, especially those imposed under broadly drafted discretionary statutes.[88] Such arguments have been raised frequently in cases involving restitution,[89] and it seems reasonable to anticipate similar reactions in defense of a court's power to impose community service, or a particular amount or type of service.

In some cases the theory of consent is extended to the point that such conditions are treated as contractual, forming "an integral part of the treaty or covenant which the defendant voluntarily entered into with the court."[90] This line of argument, however, has been quite soundly discredited,[91] and the better view seems to be expressed by Rubin:

> Although the defendant's consent to probation should (or must) be obtained, consent alone is not sufficient to establish probation status where the statute does not authorize it. The consensual status cannot serve as the basis for sanctions.[92]

and by Cohen:

> Adherence to the strained concept of consent merely impairs our ability to deal with the real issue. All of us recognize that probation and parole involve a legal situation where the government, presumably by prior lawful procedures, has the legitimate authority to exercise some control over the liberty of an individual. While the offender should be afforded a more active role and greater procedural and substantive protections, ultimately it is those in authority and not the offender who select between a community or institutional disposition; the offer of freedom, however conditional, normally will be more attractive than the alternative. Thus, our major concern should be for determining the appropriate limits on the exercise of authority, and not for a chimerical right of rejection.[93]

Under the British program, it seems questionable whether offenders would truly consent to perform unpaid services if they were informed on a case-by-case basis of what seems apparent in aggregate; that is, that the typical CSO is not an alternative to incarceration, but an additional burden, or at best an alternative to some other non-custodial penalty such as a fine. Instead it seems probable that only implicit, and as the research reviewed above shows,[94] mostly unwarranted assumptions of impending incarceration induce such 'consent' in a majority of cases: "The situation now is that in no case can it be shown what other sentence a community service order is replacing, either to the offender or to the court which may be called upon to revoke the order . . . ."[95]

To the extent that the court's right to require a particular community service sentence may be challenged in an American court,

counter arguments based upon the offender's consent to the penalty are likely to be equally strained fictions. This is true whether consent is explicitly required in community service statutes such as the Maryland and New York laws in Table 1, or merely argued to support community service orders in jurisdictions in which no explicit statutory authority exists. It would seem to be a mockery of due process for the court to permit a defendant to consent to a community service order due to fear of a penalty of which he is not in danger. Consent under such circumstances should hardly be considered an effective waiver of legal rights; yet such an occurrence is not difficult to imagine where the feared alternative constitutes a severe deprivation in the mind of the defendant, such as loss of license in a driving offense prosecution, or more generally, the threat of incarceration.

If the implicit threat of the above type of deprivation were removed, however, by informing offenders, for example, that failure to consent would not lead to incarceration, continued reliance upon consensual community service raises two further problems. Most obviously, as the British Advisory Council on the Penal System notes: "The question inevitably arises whether that consent is likely to be forthcoming in the absence of imprisonment as an alternative sentence."[96] Second, where the alternative takes the form of a financial sanction such as a fine or costs,[97] the specter is raised of indigent offenders 'volunteering' because of inability to pay, while wealthier offenders are permitted to buy their way out of the community service penalty.[98]

Community Service as Rehabilitation. Approval of community service on the grounds that it is voluntarily entered into by the offender is frequently buttressed by companion claims about the potentially rehabilitative value of service penalties. Speaking of the British experience with the CSO, for example, Bergman suggests that: "This device, probably more than any other, provides a way by which the offender and the community may become reciprocally involved and reconciled. This is, after all, one of the ideals of the rehabilitation process."[99] Similarly, it is often said by program administrators that participation in a service program "offers the probationer the opportunity to develop a sense of responsibility, to learn work habits, to improve work habits, and to learn job skills."[100]

In addition to its role in marshalling such general support for the concept, the rehabilitative appeal of community service is also relied upon specifically in justification of judicial authority to require its performance without explicit statutory authority.[101] Based on a formal opinion from the General Counsel of the Administrative Office of the United States Courts, for example, the Chief Judge of the United States District Court in Memphis, Tennessee, has concluded that under the discretionary powers granted by the Federal Probation Act:

> The imposition of a special condition of work without pay would not violate the constitutional or statutory rights of the probationer provided that the condition was

reasonably related to the rehabilitation of the probationer and to the protection of the public and that the probationer had reasonable notice of what was expected of him. More specifically, if such conditions were met, there would be no denial of substantive or procedural due process, no involuntary servitude, and no violation of the minimum wage laws.[102]

In contrast is a 1972 New York Attorney General's opinion about the use of a community service disposition under Section 65.10 of the State's Penal Law.[103] After listing a variety of permissible probation conditions, not including community service, the statute contained a general provision under which the defendant might be required to "[s]atisfy any other conditions reasonably related to his rehabilitation."[104] Arguing that this provision did not authorize a court to require as a condition of probation or conditional discharge that the defendant work on city projects without pay, the Attorney General's opinion declared: "Such a condition, if it could legally be imposed, should be specifically authorized by law and not rest on the authority of a court to impose a condition "reasonably related to rehabilitation."[105]

A similar view was taken more recently in the New York case, People v. Mandell,[106] in which the defendant entered guilty pleas to charges of bribery and briberous receiving; on the latter charge Mandell received five years probation, with a condition that he provide volunteer services to a charitable foundation. A three-judge panel found, without further explication, that:

> It appears that, prior to sentence, defendant volunteered for service with the Tay-Sachs and Allied Diseases Foundation and on this appeal he does not question the propriety of that condition of his probation. There is no authority in law for mandating such service as a condition of probation (Penal Law, s 65.10). Therefore on this court's own motion, the condition of such volunteer service must be stricken. However, defendant's continuance of such service on his own initiative will undoubtedly inure to his benefit vis-a-vis his conduct evaluation by the Probation Department.[107]

Assumption of broad discretionary power to order community service in the interest of rehabilitation is problematical in several respects, especially in the absence of explicit statutory authority. Norval Morris, for example, has argued that: "[P]ower over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes"[108] and, elsewhere, that: "Few now doubt that large abuses of power under the criminal law may well flow from adjusting power over the criminal's life to the presumed necessities of his cure, time without end, bureaucratic benevolence without sensitivity or self doubt."[109]

Case-law in the related area of restitution demonstrates repeatedly that reliance upon rehabilitative expectations by sentencing judges can give rise to the types of abuses alluded to by

Morris. In particular it can lead to greatly reduced due process protections for an offender. Perhaps no better example exists than the heavily criticized California case, People v. Miller.[110] In Miller the defendant was a building contractor who was convicted on one court of grand theft. He was ordered to pay restitution to two victims, the Keefes, from whom he had accepted $821 as an advance for home-remodeling work which he failed to perform. Eight months after the original probation order, on the basis of summary review of a memorandum by a probation officer, the court raised the restitution for the Keefes to $2,000 and added a further $6,600 to other customers of the defendant's "borderline operations."[111]

Although the district attorney in Miller testified that there was considerable evidence in the criminal trial that the defendant had cheated persons other than the original two victims,[112] the appellate court concluded that "there is no indication that any of the claims other than those of the Keefes were based on criminal conduct, nor is there any showing that they were based on fradulent representations to the claimants of the sort made to the Keefes, resulting in defendant's conviction."[113] Nevertheless, the amended restitution order was upheld on the grounds that: "Probation is granted in hope of rehabilitating the defendant and must be conditioned on the realities of the situation without all of the technical limitations determining the scope of the offense of which defendant was convicted."[114] In so ruling, it has been said that the court "merely pays lip service to the [statutory] requirement that the injury serving as a basis for the restitution must 'result from' the criminal act, by casually noting that the rehabilitative value of the conditions of probation involved 'belies the remoteness' of the injury from the criminal conduct of which Miller was convicted."[115]

Even where reliance upon the rehabilitative rationale is less casual than may have been the case in Miller, resort to such 'benevolent purpose' argument to justify the imposition of community service raises several other difficulties. It seems reasonable for example, to ask how long judges may continue to justify their imposition of community service on this basis, before requiring some empirical evidence that suggests that their expectations about its rehabilitative value have any merit. After several years of employing community service as a sentencing option, all claims about its rehabilitative efficacy continue to be perpetuated by impressionistic and anecdotal accounts by judges[116] and probation officers,[117] more than by the results of rigorous scientific evaluation.[118] As one participant at a recent trial judges' conference on community service noted:

> I'd like to say that in combatting the wave for totally removing judicial discretion and establishing flat sentences and mandatory sentences, you cannot combat it with anecdotal stories on how one particular innovative sentence seemed to work. Any number of interesting anecdotal stories cannot combat that wave and cannot be persuasive on legislatures. You need hard data on recidivism; you need hard data on changes in offender attitudes; changes in court attitudes;

changes in prosecution attitudes; and hard-nosed program evaluations for those few programs that seek to implement community service sentencing on a regular basis. That's the only way that the judges' case can be brought to the legislature. And I think that's what's sorely lacking in every jurisdiction that I know of, including my own.[119]

Additionally, there is conflicting evidence as to whether community service is even used primarily, or even at all, for its possible rehabilitative effects, as much as it is for its punitive impact.[120] Reporting on a program in Canada, Newton states that: "The community work sentence was perceived above all as a means of rehabilitation by the judges, attorneys, and probation officers who participated in the experiment."[121] By comparison, in interviews conducted with prosecutors and judges in a recent study of a restitution and community service program in Portland, Oregon, all of the respondents made it very clear that they saw community service mainly as an opportunity to "give teeth" to a probation order. Otherwise, the consensus was that expressed by judges elsewhere, viewing probation alone as "little more than a release of the defendant without sanction."[122]

Regardless of the actual intentions of the court, however, the primary difficulty with defending the imposition of community service on the basis of rehabilitation, especially in the complete absence of explicit legislative mandate, is expressed by Jacobson:

> [T]he inherent vagueness of the concept of rehabilitation would provide little substantive constraint on the court's discretion. As a rule of law, rehabilitation may mean all things to all courts . . . . [A]llowing the trial courts to impose any condition they subjectively believe to be of rehabilitative value, offers, in fact, no legal guidelines and would increase the likelihood of abuses of discretion. The fact that appellate tribunals most often defer to the discretion of trial judges in probation matters heightens the need for substantive guidelines.[123]

SUMMARY

From the foregoing discussion, the New York position in People v. Mandell requiring explicit statutory authorization of community service dispositions appears to have much to commend it. Community service seems in general to be neither an alternative to incarceration, nor a truly voluntary endeavor on the part of most offenders. In addition, there is doubt about the role, if any, which the possible rehabilitative effects of community service may plan in sentencing decisions, and about the merit which rehabilitative claims for service penalties may have. Rather, stripped of its euphemistic terminology, the "volunteer service alternative" bears a striking resemblance to the Thirteenth Amendment concept of involuntary penal servitude as a punishment for crime. As such, the distinction in Commonwealth v. Walton, supra between the

court's discretionary control over probation conditions and the legislative primacy in matters of punishment becomes extremely questionable if applied to community service. Whatever vehicle is used to impose the sanction: "The design of penalties for crime is a legislative and not a judicial function and authority to impose punishment must be found in statutory law."[124]

A requirement of explicit legislative approval of community service orders has two major advantages. First, it may force consideration of the desirability of widespread use of community service, as a matter of public policy. Especially, in view of the discriminatory potential if used as an alternative to financial sanctions,[125] serious thought must be given to the propriety of replacing one class of people bound to involuntary servitude on the basis of race by another class similarly bound on the basis of a criminal conviction and economic status.

If community service is found to satisfy the test of public policy consideration, the second advantage of statutory authorization may be to provide impetus toward defining the appropriate limits on its exercise. It has been argued that broad discretion over the amount and type of community service is necessary in order properly to individualize sentences.[126] Concern for equitable distribution of sanctions, reduction of unjustified disparity, and control of excessive or inappropriate penalties, however, all point towards the need for development of a body of rules addressed towards defining the substantive and procedural constraints under which community service programs might be implemented and administered.

Recent enactments, however, are disappointing. Most of the statutes included in Table 1 are more notable for what they do not contain than for the guidance they offer to criminal justice practitioners charged with the imposition and enforcement of community service penalties. The following Practice Commentary accompanying the New York community service probation law typifies the minimal direction under which many judges and programs are operating:

> As drafted, the instant provision contains sparse details and furnishes little guidance to its implementation. It would have been helpful for it to contain an indication of the kinds of public and not-for-profit agencies and organizations intended to be included and specified who is to have authority and responsibility for selecting those to be approved for participation and for the monitoring of the program. With respect to the probationers and conditional discharges who are to participate, there is no indication whether they are to be compensated for their work or whether their services are expected to be rendered without pay as part of their punishment. As it stands, therefore, this provision furnishes only the barest statutory authority. It is to be hoped that the unanswered elements can be filled in by cooperative administrative action.[127]

As is no doubt true in other cases, the New York statute was enacted with a particular program in mind. It was sought by the City of New York, to overcome the holding in People v. Mandell, to permit a specific rehabilitation program for convicted misdemeanants.[128] Obviously, however, the statute also affects the use of community service by judges throughout the state, many of whom no doubt wonder about the wisdom of restricting it to misdemeanants. Many others may be operating under widely different assumptions with respect to such critical decisions as who should be required to perform community service, to whom, for how long, and with what anticipated results. Confusion and gross disparities in the operational interpretation of community service authority must obviously be minimized if the penalty is to be administered with any semblance of consistency, or even rational variation, that will withstand legal and political scrutiny in the future. Several specific aspects of implementation and administration of community service merit particular attention.

CHAPTER III: SPECIFIC ISSUES

ELIGIBILITY CRITERIA

The decision as to who may be an appropriate candidate for community service raises both programmatic and legal questions. From both perspectives, concern is obviously focused upon attaining the fundamental purpose of the program as fully as possible, while at the same time guaranteeing consistent application of selection standards that are neither arbitrary nor discriminatory under the due process and equal protection mandates of the Constitution.[129]

In order to select offenders whose participation in community service is most likely to permit attainment of the primary aims for using the sanction in the first place, and to provide a basis against which to assess the program's progress towards those aims, a clearly conceptualized statement of primary goals and objectives at the outset of any program becomes imperative. Indeed, at a time when accountability of correctional programs, and rehabilitative programs in particular,[130] has become a familiar precept, the long-term future of community service penalties may well depend on the speed and extent to which legislators and/or practitioners are able to articulate, achieve and document attainment of the sanction's purposes.

The almost total absence of purposive direction in the area of community service, however, emphasizes the continuing accuracy of H. L. A. Hart's observation that: "No one expects judges or statesmen occupied in the business of [punishment], or in making (or unmaking) laws which enable this to be done, to have much time for philosophical discussion of the principles which make it morally tolerable . . . . A judicial bench is not and should not be a professorial chair."[131] Although this reality might be a passable indulgence in the context of the ageless dilemma of why we punish at all, it becomes in many respects a callous injustice if applied to the narrower and more manageable question of why we punish in a particular way, such as by requiring community service.

Especially because of the prospect that community service may become a major shift in our entire style of punishment, as it has in Britain,[132] it seems sensible to attempt to benefit from the historical lessons of other major punitive innovations. Imprisonment is a timely example. The introduction of the penitentiary was considered by reformers of the period and for long afterwards in much the same light as community service is today, "as a marvelous opportunity to promote the welfare of the society along with the welfare of the offender . . . . For its proponents, the system was elegant in that it benefited both the society and the offender."[133] Already there are warning signs that community service may be substituted readily for incarceration, not so much in fact, as many reformers would hope, but more in the sense that support for both sanctions exhibits many of the same weaknesses.

In the context of justifying the use of community service, analogy with the following view of incarceration is striking: "[If we] subject all premises to a simple but often devastating question--How do you know that? or, Why do you want that?--it turns out that, with regard to punishment in general and incarceration in particular, myth masquerades as fact and value choices frequently remain unexamined."[134]

For society to justify such a potentially far-reaching swing towards community service penalties, myths must be quickly dispelled and dominant value choices must be surfaced; otherwise, state control over individual liberty threatens to be extended on the basis of a politically convenient eclecticism, replete with a mindlessly fuzzy assortment of unarticulated or under-articulated rationales. If community service is intended as an alternative to imprisonment, whether as an adjustment of existing scales of desert or simply in an effort to cut costs, this purpose should be stated in the enabling statute, and eligibility criteria should be drafted to reflect the purpose.[135] Similarly, if community service is authorized among the rehabilitative conditions of probation, as is the case in New York, then the theory underlying the rehabilitative assumptions should be made explicit; it should also be reflected eventually in diagnostic eligibility criteria and subjected to empirical verification within a given period of time or reconsidered.[136] If it is argued, for example, that the community service "offers the probationer the opportunity to develop a sense of responsibility, to learn work habits, to improve work habits and to learn job skills,"[137] it remains to be asked why paid employment might not be equally or more effective.

If clarifying the purpose of community service, and thereby the criteria for its use, is considered a microcosm of the more global task of justifying punishment in general, an analytical framework may be very loosely adapted from Hart:

> [W]hat is most needed is not the simple admission that instead of a single value or aim (Deterrence, Retribution, Reform or any other) a plurality of different values and aims should be given as a conjunctive answer to some single question concerning the justification of punishment. What is needed is the realization that different principles (each of which may in a sense be called a 'justification') are relevant at different points in any morally acceptable account of punishment. What we should look for are answers to a number of different questions such as: What justifies the general practice of punishment? To whom may punishment be applied? How severly may we punish? In dealing with these and other questions concerning punishment we should bear in mind that in this, as in most other social institutions, the pursuit of one aim may be qualified by or provide an opportunity, not to be missed, for the pursuit of others.[138]

As applied to community service, Hart's prescriptions are much more than philosophical niceties to be pondered from the

usually overestimated luxury of a professorial chair; rather, they have immediate legal and political relevance to the everyday implementation and administration of the sanction. Precedent is ample in other areas of criminal justice decision-making, showing that a failure to define and demonstrate adherence to a defensible rationale for action is an open invitation for political and legal reproach, and ultimate imposition of externally devised controls on the exercise of discretion.

The legal attack on corrections,[139] the abolition of parole in some jurisdictions[140] and adoption of guidelines as a survival measure in others,[141] all attest to the incentive for proponents of community service to work towards the development of explicit decision-making policies as a means of averting eventual external interference or control. The logic behind taking such preemptive measures seems to be dawning belatedly in the field of sentencing in general; faced with the prospect of legislatively imposed flat-sentencing,[142] several jurisdictions have adopted or are experimenting with sentencing guidelines of various kinds.[143] Judges in Philadelphia, moreover, are experimenting with the idea of empirically derived guidelines as a means of improving bail-setting decisions.[144] A vital preliminary to such activities in the area of community service is the clear conceptualization of the purposes for which the sanction is being used and corresponding criteria for selecting offenders to participate.

Discriminatory Criteria. Adopting explicit policies and criteria for imposing community service may in the short-term increase a program's susceptibility to challenge. Offenders may feel that the standards themselves are unwarranted or that they have been applied discriminatorily in their particular cases. Careful justification for each criterion, however, will minimize the chances of difficulty under the former approach, and a requirement of explicit reasons for going outside the stated criteria will reduce the probability of a successful challenge of the latter type.[145] Through periodic review of such reasons, moreover, a self-regulating mechanism is created to allow routine modification of those criteria that prove to be most frequently negated.

Review of recent community service sentencing laws provides scant indication of an overriding purpose behind the statutes,[146] and comparably little specific guidance as to who might be an appropriate service candidate. Examination of the second column of Table 1 shows that community service is usually authorized as a general condition of sentence, suspended sentence, probation or conditional discharge. Where particular offenses or offenders are specified, the reasons for their selection is not immediately apparent, beyond a common focus upon avoiding all but the less serious cases.[147]

One aspect of selecting offenders to perform community service that may lead to immediate legal difficulties is the practice of selecting offenders on the basis of their inability to pay monetary

penalties. In Delaware, for example, courts are permitted by statute to require community service by offenders sentenced to pay fines, costs or both, where the offender is unable to pay at the time of sentence or in accordance with terms of payment set by the court. This, of course, raises a situation in which offenders who can afford to pay may buy themselves out of a work assignment, while those without financial resources must submit to the service penalty or be incarcerated. Whether such a result violates the equal protection clause of the Fourteenth Amendment rests upon one's reading of the Supreme Court's decisions in Tate v. Short[148] and Williams v. Illinois.[149]

In Tate the Supreme Court adopted the view announced in an earlier case that: "[T]he Constitution prohibits the state from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."[150] The premise of this conclusion was stated in Williams to be that "the equal protection clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."[151] Consequently, it might be argued that automatic conversion of fines into community service for indigent offenders unconstitutionally raises the ceiling of punishment for those offenders when the penalty for others who are able to pay is limited to a fine. Several points raised by Justice Brennan's opinion for the Court in Tate, however, might be construed to attenuate the Equal Protection argument.

In striking down the automatic conversion of fines to imprisonment for indigent offenders, Justice Brennan observed that "numerous alternatives" exist to which legislators and judges may constitutionally resort to serve the State's valid interest in enforcing payment of fines.[152]

Similarly, in Williams, the Court had noted that:

> The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.[153]

In addition, even if the practice of converting fines or restitution to service at the time of sentencing proves to be an unconstitutional alternative on the authority of Tate, it may be more difficult to press similar arguments if the conversion is made only after a suitable period of time has lapsed during which an offender is given the option of paying the fine. For, as Justice Brennan stated in Tate:

> We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case.[154]

SERVICE PARAMETERS

Need For Standards. When determining the types and amounts of community service that criminal offenders may be required to perform, two general issues merit attention. First what criteria should service penalties be required to meet? And, second, who should devise and apply those criteria? For although the scope and focus of regulatory authority over service placements may be a matter for debate, an undeniable need to assure their quality, fairness, and accountability is created, as a minimum, by a) concern for whatever beneficial purposes the service is expected to accomplish, and b) considerations of potential legal liability for injury to and by the offender during the course of the service assignment.

Especially where community service dispositions are developed on an ad hoc, non-statutory basis, at the discretion of individual sentencing judges and probation officers, the possibility is great that there will also be lax and widely varying standards governing all or part of the imposition, enforcement, and evaluation of service penalties. Even in those jurisdictions with explicit statutory provision for community service sentencing, only a few offer much specific guidance as to the policies and procedures under which service dispositions are to be carried out.

Service Amount. Most of the statutes listed in Table 1 supra do not set either upper or lower limits on the amount of community service that can be required; nor by and large do they suggest factors that should be taken into account by the sentencing judge in his or her relatively unbridled discretion. In the few exceptions in which standards are set, however, there is surprising variation in the approaches taken. The only jurisdiction in which the number of hours is given a specific statutory ceiling, as in the British scheme, is New Hampshire, where no more than fifty hours is permitted as a condition of discharge upon conviction of destruction of property or unauthorized entry. No standards are given in the New Hampshire law to govern the imposition of less than the maximum of fifty hours.

In four of the states in Table 1, the amount of community service is statutorily required to be based upon the work-equivalent of a monetary disposition. In California and Florida, the amount of community service is to be no less than would be required to

satisfy a $50 to $1,000 fine if converted at the minimum wage at the time of sentencing.[155] No criteria or limits are set for going beyond the maximum related to a fine. In Delaware, a similar formula is used to calculate the number of hours required to satisfy fines and costs;[156] in cases involving Justice of the Peace courts in Delaware and the number of hours of work which may be assigned is to be based upon guidelines established by the deputy administrator of those courts.[157] Only in one of the statutes in Table 1 is any attention paid to the issue of the schedule within which the service amount is to be completed. Under the Oklahoma law the offender's term of service is to be set by the court "according to a schedule consistent with his employment and family responsibilities."

Because the statutes in Table 1 provide little limitation upon the discretion of sentencing judges, and because, of course, even less restraint is present where the judge simply assumes power to impose service penalties without explicit statutory authorization, two very real dangers must be addressed. The first of these involves the problem of defining the outer limits of service amounts and scaling within those boundaries; failure to set at least presumptive limitations during the early stages of developing community service penalties has already led to difficulties. Commenting upon a disposition involving 2,920 hours of service, Harris raises a most critical question:

> A sentence involving 2,920 hours of service could be worked off by putting in eight hours a day every day for a year, or four hours every Saturday for almost 14 years. This would be more than ten times the [240] hours that a felony offender in Britain could be asked to perform . . . . In the absence of upper limits on hours of work that can be required, minor offenders are being sentenced to perform service hours that could require years to complete. If these sentences are viewed as a penalty that is commensurate with relatively minor crimes, will it be possible for community service to receive the consideration it deserves as a means of punishing more serious offenses?[158]

The fact that community service amounts in the United States may far exceed the permissible limits in Britain is consistent with the much greater reliance upon incarceration and upon more severe penalties in general in America. As a matter of political reality, therefore, if community service can ever become a major alternative to incarceration in the United States, it seems reasonable to expect that the number of hours required is likely to be very large: "Just as Americans dish out imprisonment in bucketfuls rather than in spoonfuls, there is a danger of drowning the community service sentence as a reasonable option."[159]

In addition, there are signs that it may take a considerable educational effort before even extended service will be accepted by the general public and practitioners as a penalty comparable in severity to any period of incarceration.[160] By being absorbed

with other more traditional assistance-oriented conditions of probation, it is possible that community service may suffer, by association, an unwarranted image-problem of being another 'slap-on-the-wrist' proposition.[161] By divorcing the two concepts as much as possible, and making community service a distinct sentence as the British have done, it may be that not only would authority to order it stand on a sounder statutory basis, but also that service work might gain wider acceptance as a punishment in its own right.[162]

A second risk inherent in allowing community service to develop at the initiative and discretion of individual judges or program administrators is that gross disparities are likely to arise in the amount of service required of similarly situated offenders. Indeed, indications from available program descriptions show that such disparity is already present.[163] The practice of community service, however, is so new in most jurisdictions that the opportunity exists to innovate in a rational manner for change; to anticipate disparity and attempt to minimize it from the outset, rather than being pressed later into defensive reactions to criticism by researchers, politicians, and legal commentators. Just as it is advisable to attempt to develop explicit eligibility criteria to assure consistency in deciding whether or not a particular offender will be required to perform community service,[164] in the same way it is vital that guidelines be developed to instruct the decision as to how much service will be ordered.[165]

Service Type. As indicated in column three of Table 1 supra, most of the community service statutes do not specify the precise types of service that are to be performed. Instead, the vast majority of the statutes refer to the type of work envisaged simply as 'public' or 'community' service. Only occasionally are examples given such as picking up litter in parks or maintenance of public facilities. Similarly, only the statutes in Delaware, Illinois, Maryland, Minnesota, New Hampshire and New Jersey explicitly require that the community service be uncompensated.

Beyond general requirements that the community service work should be "reasonable" (Mississippi), or that it should foster respect for interests violated by the offender's conduct (New Hampshire), the statutes in Table 1 express no preference as to how the type of service should be decided. Although many proponents of community service have stressed the idea that the punishment should "fit the crime," for example, none of the statutes in Table 1, with the possible exception of the New Hampshire provision, suggests that the type of work need in any way be related to the offense. Similarly, there is no indication in any of the statutes reviewed as to whether attempts should be made to match the type of service with the offender's particular skills, whether factors such as job location and convenience are more important, or whether the decision should be made on the basis of random selection.[166]

In determining what is a "reasonable" type of service, both the safety and Constitutional rights of the parties involved must obviously be considered. Commenting upon public service work as

a condition of probation, for example, a 1978 Illinois Attorney General's Opinion concluded that "public service work for a private nonprofit organization, where the religious nature or affiliations of such organization violate the probationer's beliefs, might violate guarantees of religious freedom under the constitution."[167] Although it seems likely that even the most unpleasant and arduous tasks would fail to offend the cruel-and-unusual standards of the Eighth Amendment, moreover, most practitioners experienced in community service dispositions adamantly oppose the use of menial or degrading types of work as being contrary to the constructive spirit of the sanction.[168]

Insofar as avoiding services that pose a risk to the safety of the offender or the recipient is concerned, typical examples include assigning an offender with drug problems to work in a hospital, nursing home, or other placement where narcotics are likely to be available, or requiring an offender with alcohol problems to perform services involving driving an automobile or operating heavy machinery.[169] Although such illustrations may seem trite at first glance, they suggest that whoever is responsible for approving the type of service to be performed also bears a sizeable responsibility for checking into the offender's background most carefully. Because criminal justice information systems dealing with an offender's prior record are so notoriously unreliable,[170] even the most glaring oversights are possible. Especially in regions marked by heavily transient populations, for example, the practice of many officials of only checking local records may fail to uncover serious prior offenses or other information showing propensities that might make a particular choice of service unwise.

Service Recipients. Just as statutory guidance as to the amount and types of permissible service is scant, so also examination of column five of Table 1 shows that many of the laws either do not specify who is to receive the service at all, or leave the matter to be "designated by the court." The few statutes that do specify recipients, and/or locations for the intended service most commonly mention state, county and municipal governmental agencies, followed by benevolent, charitable, or other private nonprofit organizations.[171] Services for particular communities are required in the New Hampshire law restricting the work to the city or town in which the offense occurred, and in the Maine statute allowing offenders sentenced to jail to provide voluntary services within the county in which the jail is located. Whether or not specific recipients are included in the statute, the general intent seems to be that the work should not confer private benefits upon individuals, except where such benefits are incidental to the primary public benefit.[172]

Very few of the statutes in Table 1 even fix the responsibility for assuring that service recipients are available for the courts' use.[173] In Illinois the development and operation of "programs of reasonable public service work" is listed among the duties of probation officers. In addition, Illinois county boards are also

authorized to establish and operate agencies which, in turn, are to develop and supervise public service programs for offenders; the programs are to be developed in cooperation with the circuit courts for the respective counties. Under Oklahoma law the State's Department of Corrections is made responsible for monitoring and administering restitution and service programs.

The most systematic approaches towards service programming in any of the statutes reviewed are found in the Delaware and Maryland laws. In Delaware, before an offender is assigned to a project, the statute requires that work assignments are to be submitted for certification at the approval of the State's Division of Corrections. In Maryland, the Mayor of Baltimore and the executives for each county are authorized to require various sources to provide work projects. Those agencies are responsible for supervising workers and are required to provide information about the projects to the Clerks of Court, on a form prepared by the Administrative Office of the Courts; the items to be included in such a form are not specified. The Maryland program is to be administered by the Department of Parole and Probation which is responsible for the general guidelines of the program, although modifications are allowed to meet local conditions. Counties may elect to have a local program monitored by the D.O.P.P. and each county is required to report to the D.O.P.P. which must then file an annual report to the Administrative Office of the Courts.

Even where administrative responsibilities and procedures for selecting service recipients are set out in Table 1, there remains an almost total lack of substantive criteria upon which selection, and in the case of Delaware, certification must proceed. The Illinois statute gives more guidance than most, for example, simply by requiring that the programs "shall conform with any law restricting the use of public service work." Although the Maryland law requires guideline development, no indication is given in the statute of even the broadest concerns that such guidelines should attempt to meet.

If community service is to be an innovation that can be accountable and tested against whatever its aims are stated to be in a particular jurisdiction, and if sensible work assignments are to be made consistent with those aims, minimum standards must obviously be devised for screening and monitoring potential service recipients. The historical exploitation of prison contract labor by private enterprises[174] is ample warning, for example, that service recipients must be monitored for signs that paid employees are being displaced by community service workers. Other conditions of approval for service recipients might include provision of routine monitoring, supervision and evaluation information, and detailed information concerning skill-levels and other factors to be considered in making particular assignments.

A criterion that is often raised by program staff and service recipients alike is whether or not sufficient insurance coverage exists in the event that the offender is injured or injures a third party.

TORT LIABILITY

One of the most frequently raised issues surrounding site selection in general, and for assignment of specific offenders, has been the question of liability coverage for injuries to and by the offender during the course of the service period. Liability for both third party injuries and harm to the offender will obviously vary from one jurisdiction to the next, depending upon statutes regulating workers' compensation, governmental immunity, and local tort practices. Consequently, criminal justice agents and staffs of private community service programs are best advised to seek assistance on specific liability and insurance issues from the appropriate State or County Attorney's Offices. Several general areas must be considered.

If the offender is injured traveling to and from, or while participating in community service activities, an immediate concern is the expense of any medical treatment.[176] Two major possibilities exist for coverage. First, the defendant may be eligible for compensation under a state's workers' compensation law. In a 1978 opinion, for example, on the practice of Solano County judges placing defendants on direct probation without sentence, conditioned upon community service in lieu of jail or a fine,[177] the Attorney General of California concluded that:

> The criminal defendant in such a situation would have the status of a "volunteer." Therefore, the county would not be liable for workers' compensation since no employer-employee relationship could exist. The public entity or charitable corporation for whom the volunteer worked would be liable for workers' compensation if they adopted the appropriate resolution provided for in sections 3361.5, 3363.5, 3363.6 or 3365.5 of the Labor Code.[178]

In Massachusetts, by comparison, a 1980 Senate Bill (No. 873) provides, in relevant part, that:

> Any person, whether a juvenile or an adult, or the legal representative of such person who is charged as a defendant with an offense or offenses against the commonwealth may, if permitted by the court having jurisdiction of such offense or offenses, consent to being placed on probation, with a stay of proceedings, a continuance without a finding or, after a finding by the court, a condition of which probation being that said defendant performs certain work or participates in certain community services for a stated period of time.... Said defendant shall, while engaged in such performance or participation, be considered an "employee" of the commonwealth, as defined in section one of chapter one hundred anf fifty-two [of the Workmen's Compensation section of the Labor and Industries Code], and entitled to all the benefits of said chapter, and shall be entitled to compensation thereunder.[179]

In the Hawaii and Illinois statutes presented in Table 1, however, it is provided that the offender shall not be considered an employee for <u>any</u> purpose.

Denying a community service worker the benefits of workers' compensation, especially on the grounds of voluntarism, seems to be a questionable practice. Reliance upon the voluntary nature of the offender's participation to preclude compensation denies the reality that most offenders are simply ordered to perform community service by the court. In one sense, denying compensation for service-related injuries constitutes a perverse form of double-penalty; as such, a policy of imposing the expense of injury upon the defendant and the defendant's family, when the injury is sustained during what is supposed to be an attempt to repair the harm of the original offense, has little to commend it. As a practical matter, placing the obligation to cover the offender for workers' compensation upon the recipient agency may lead to some reluctance to become involved; such reluctance, however, has not been a major impediment to recruiting service placements:

> In fact about the only objection or question raised by any agency had to do with its possible liability for workmen's compensation payments for work-related injury to a probationer. The objection, however, was withdrawn when it was pointed out that the free services of the probationed should much more than offset any increase in premium for workmen's compensation insurance to cover the probationer.[180]

A second source of compensation for injury to the offender is, of course, private insurance. In addition to any policy carried by the offender, or his or her regular employer, accident insurance for medical expenses, death, and dismemberment might be purchased on the offender's behalf by the community service program, or by the service recipient. As with workers' compensation the value of free labor to the recipient should more than compensate for the insurance premiums involved. And, if community service can operate as an alternative to prison the cost of premiums to the state should be a welcome reduction of expenditure over the cost of incarceration. If offenders in community service programs may legitimately be classed as "volunteers" for purposes of employment status, coverage is available through organizations such as the "Volunteers Insurance Service Association," which was formed <u>inter alia</u>, to research available and feasible insurance relating to volunteers, compile underwriting information, and design and administer insurance for volunteers.[181]

Whether or not the offender is insured for injuries sustained during the course of a community service disposition, program administrators and service recipients frequently express concern that they may nevertheless be subject to an action for damages by the offender. In response to a question about Solano county's potential liability of this kind, the above mentioned California Attorney Generals' opinion goes on to say that:

> If such a criminal defendant is injured, and he is not covered by workers' compensation, no liability could arise against the county unless the injury was inflicted by an officer, employee or contractor of the county so as to give rise to a cause of action under sections 815 et seq. of the Government Code. No facts have been presented which would indicate any such possibility.[182]

The Minnesota statute in Table 1, however, explicitly provides a mechanism for claims against the State for injury or death of an offender performing uncompensated work or "work in restitution." Under the Minnesota law, compensation for pain and suffering is precluded, and the procedure provided is said to be "exclusive of all other legal, equitable and statutory remedies against the state, its political subdivisions, or any employee thereof." And, while neither the California opinion nor the Minnesota law address the lingering issue of the liability of the community service recipient, it was faced squarely in a bill submitted to the Massachusetts' legislature at the beginning of 1980; after providing that a defendant may "consent" to being placed on probation with a condition of community service, Senate Bill 873 adds that:

> Said defendant shall, at the time of his initial consent, waive in writing any and all rights of action based on claims for personal injury or death arising out of or in the course of said employment or participation, except his said rights under said chapter one hundred and fifty-two [of the Workmen's Compensation section of the Labor and Industries Code] granted herein, against the court which granted said probation, the officers and personnel supervising said probation, and the employer or community service organization for whom or for which said defendant so worked or so participated.[183]

Perhaps even more than concern about injury to the community service worker, program administrators and service recipients frequently express fear that a third party will be injured by the offender resulting in an action for damages. Staff of community service programs report that representatives of entire political subdivisions such as townships or municipalities have refused to accept community service workers, due to fear of third-party personal injury or property damage actions. Similarly, although less frequently, judges have voiced concern, not so much about eventual legal liability, but about the political and personal undesirability of being at the center of publicity surrounding such a suit, especially if it is based on a new criminal offense by the service worker.[184]

From the standpoint of the offender and the private service recipient the problem is, of course, one defined by individual state tort law and insurance practices.[185] Of more general interest is the issue of statutory immunity from tort liability of governmental employees and officials. In Illinois, for example, liability of probation officers, their employees, and its officials

or employees acting in the course of official duties is limited by the community service statutes in Table 1; except in the case of willful misconduct or gross negligence, liability is precluded under the statutes for the tortious acts of any person placed on probation or supervision as a condition of probation or supervision. In California, the 1978 Attorney General's opinion on community service in Solano County concluded that:

> If the criminal defendant were to inflict an injury upon a third person, the county would be generally immune from liability either under section 820.2 of the Government Code which grants immunity for the discretionary acts of its "employees," or under section 845.8 of the Government Code relating to injuries resulting from a decision to release or parole prisoners.[186]

The precise scope and rationale of California's governmental tort-immunity laws was recently highlighted in the United States Supreme Court case of Martinez v. California.[187] The case involved a claim for damages against state officials responsible for the parole release decision of a parolee who, five months after release, murdered the 15-year-old daughter of the appellant. Prior to release, the parolee had been serving a one-to-twenty year term for attempted rape for which he had first been committed to a state mental hospital as a "Mentally Disordered Sex Offender not amenable to treatment." At the time of sentencing there had been a recommendation that the offender not be paroled. The California trial judge sustained a demurrer to the complaint and his order was upheld on appeal. After the California Supreme Court denied appellant's petition for a hearing, the United States Supreme Court affirmed the judgment.[188]

The Martinez case is of interest to practitioners involved in community service in part because of the particular purpose accepted as a rational policy-basis for enactment of absolute tort-immunity statutes. In ruling that the California immunity law did not violate the due process clause of the Fourteenth Amendment, Mr. Justice Stevens delivered the opinion of a unanimous court, declaring that:

> [T]he State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational. We have no difficulty in accepting California's conclusion that there "is a rational relationship between the State's purpose and the statute." In fashioning state policy in a "practical and troublesome area" like this, the California Legislative could reasonably conclude that judicial review of a parole officer's decisions "would inevitably inhibit the exercise of discretion." That inhibiting effect could impair the State's ability to implement a parole program designed to promote rehabilitation of inmates as well as security within prison walls by holding out a promise

of potential rewards. Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it furthers a policy that reasonable lawmakers may favor. As federal judges we have not authority to pass judgment on the wisdom of the underlying policy determination.[189]

Similarly, in the earlier opinion for the California Court of Appeal, the Presiding Justice had also stated that:

> There is no sure formula for the members [of the Adult Authority] to know when a convict is rehabilitated and ready to re-enter society. Yet it is important for the well-being of both society and the individual, to release persons as soon as they are rehabilitated. It is to society's advantage to try a variety of rehabilitative efforts and to use the maximum flexibility in facilitating the individual's re-entry into society. In order to accomplish these aims it is necessary for public officials to make these decisions without fear they will be liable if they are wrong.[190]

Despite the apparent sweep of the decision in Martinez, however, several caveats apply. First, different state courts are free to deny blanket immunity based upon competing reasons of public policy.[191] Second, immunity for officers and employees may be waived by a government entity, thus removing the bar to tort action.[192] Third, although the complaint in Martinez also referred to a failure to supervise the parolee after his release, and a failure to warn females in the area of potential danger, the litigation focused entirely on the original release decision; the individual appellees were not alleged to have responsibility for post release supervision of the parolee.[193] As "ministerial" rather than "discretionary" acts, however, both negligent failure to warn of dangerous propensities and to provide supervision have been held to fall outside immunity statutes.[194] Additionally, the Martinez decision explicitly reserves the question of what immunity, if any, could have been claimed in an action under section 1983 of the Federal Civil Rights Act if a constitutional violation had been made out by the allegations.[195] Making note that "the parole board was not aware that appelants' decedent, as distinguished from the public at large, faced any danger," the Martinez Court held only "under the particular circumstances of this parole decision" that the girl's death was "too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law."[195]

As community service is presently used mostly for minor non-violent offenders, the issues raised by cases such as Martinez remain relatively academic. If community service is ever truly to become an alternative to incarceration, however, and higher "risk" offenders are admitted, the task of site selection and placement will have to be approached mindful of whether other persons at the

site are then specially known to face danger, whether they must be warned of the offender's propensities, and whether the placement offers adequate supervision to avoid liability in the event that the offender injures someone. More immediately, although there seems little doubt that the sentencing judge will rarely, if ever, be held liable for exercising the discretion to place an offender in community service placement,[196] it appears that in many instances the judge may actually know little or nothing about the actual service placement;[197] instead the decision on placement is often made by a probation officer or community service program staff member, whose immunity from liability will often be less secure.[198]

CHAPTER IV: SUMMARY AND CONCLUSIONS

The use of community service penalties in the United States, influenced by the British experiences with CSOs and by the rapidly increasing use of financial restitution, seems likely to grow rapidly in the near future. Infusion of large amounts of federal funds to support service programs,[199] and endorsement by prestigious organizations such as the American Bar Association[200] strongly support such a conclusion. Financial restitution programs, moreover, are operating at every stage of the criminal justice system, from pre-trial diversion to parole;[201] inevitably, community service has begun to follow. Correctional authorities are being statutorily instructed to develop community alternatives to traditional incarceration,[202] and community service is being performed by inmates while still confined.[203] Services may also be required in some states as a condition of pre-trial diversion[204] all the way through to temporary release[205] or special leave[206] from correctional institutions.

Overwhelmingly, the basis for current interest in the concept of service penalties has been that it is an alternative to incarceration that may help to relieve present overcrowding and substandard conditions of confinement. In his preface to a recent ABA sponsored report on community service, for example, the chairman of ABA's BASICS program (Bar Association Support to Improve Correctional Services) declared that: "My own positive attitude about community service sentencing may have best been summarized by the British observer who ... said, 'community service has yet to prove that it is more effective but as an alternative to custody it is at least more humane as well as cheaper.'[207] In addition, much of the support for expansion of community service penalties, especially where they have developed the absence of explicit legislative authorization, has been based on assumptions that offenders voluntarily incur such penalties, and that the service experience is a therapeutic or rehabilitative one.[208]

The present discussion, however, has examined each of these assumptions/expectations and found them to be an extremely frail foundation on which to base such a significant departure from our present forms of punishment. Resort to benevolently conceived and nobel sounding euphemisms is not uncommon in the history of criminal and juvenile justice; the potentially non-benevolent impact of optimistic self-deception is manifest in the enduring legacy of the adult "penitentiary" and the juvenile "training center."[209] Where untested rehabilitative assumptions and the largely misleading jargon of "voluntary alternatives" is relied upon to promote the extension of social control in an almost total absence of procedural and substantive rules, and, more often than not, without direct statutory approval, the hard-learned lessons of earlier innovations cannot be ignored; one such lesson in juvenile justice, for example, has been noted by Mr. Justice Fortas in <u>In Re Gault</u>:[210] "Juvenile court history has again

demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure .... Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."[211] For a number of reasons, therefore, legal developments in voluntary community service alternatives may benefit from a frank recognition of their consonance with the constitutionally sanctioned practice of involuntary penal servitude as punishment for crime.

First, the authority for punishing criminals may be returned to its traditional statutory footing, rather than the present "judicial legislation" upon which most community service programming is currently based. Second, accepting community service as a punishment, first and foremost, could be construed as reasonable grounds for removing it from the avowedly non-punitive rehabilitative umbrella of probation, to stand as a sentence in its own right.[212] As a result, it is to be hoped that the lack of guidance presently available to criminal justice decision makers may be remedied, through legislative attention to issues of administrative detail, liability protection, procedural regularity, and substantive propriety in areas such as avoiding disparity in who is required to serve, for how long, in what types of service, and for what types of recipient.

In addition to the advantages of added specificity and visibility to be derived from removing community service from the conditions of probation, into the more visible and routinely recorded context of an active sentence, a corollary benefit might be reduction in the present practice of many judges of placing offenders on probation as a token-punitive gesture for want of any other option. Freed of caseloads consisting of absurd numbers of offenders many of whom neither need nor could possibly receive more than the most perfunctory supportive or supervisory attention, probation officers might be in a better position to make a contribution that would be more rewarding to them and, one can hope, more useful to their remaining clients. This philosophy is strongly adhered to in the British probation service where it is projected that community service will supercede probation as the most frequently imposed sanction during 1980.[213]

In particular it is conceivable that even if community service itself might not now be seen as an alternative to incarceration, it may achieve the same end indirectly; by reducing probation caseloads to such a level that offenders now sentenced to custody might be released to intensive probation supervision, or comparable community-based programs made possible through increased time-availability on the part of probation staff, community service may yet satisfy the primary goal of many of its proponents. In the meantime, community service would be allowed to establish an identity as a punishment distinct from probation, and perhaps both would be taken more seriously by the courts and community as a result.

One final advantage of requiring statutory authorization for community service is the greater likelihood that the pressure of informed opinion might be brought to bear to induce a relatively few legislators (as opposed to scores of judges and program staffs) to tackle the critical task of making explicit the purposes and expectations behind the promotion of community service sentencing. The importance of such pressure, and the consequences of failing to apply it in the past, are stated clearly by Frankel:

> (O)ur legislators have not done the most rudimentary job of enacting meaningful sentencing "laws" when they have neglected even to sketch democratically determined statements of basic purpose. Left at large, wandering in deserts of unchartered discretion, the judges suit their own value systems insofar as they think about the problem at all.[214]

If one aim of community service is to supply an alternative to imprisonment, legislative support may enbolden sentending judges to use it in that way. Adherence to such an objective, however, is neither easy to secure nor to measure. The British, for example, rejected several approaches, including a declaration by judges that a community service case would otherwise have been incarcerated, in the belief that judges would almost inevitably rubber-stamp such a declaration and find ways around almost any procedure designed to compel them to change their practices.[215] A possible strategy would involve the use of an amended sentence procedure after an offender has already been sentenced to incarceration.[216] Even then, however, it is possible that judges would quite quickly adapt their practices by sentencing more offenders to incarceration for the shock value, in the full realization that certain identifiable ones will almost certainly be returned for an amended sentence to community service.

One further approach to securing greater use of community service as an alternative to incarceration would be to induce greater involvement of defense attorneys in the preparation and presentation of alternative proposals for their clients whom they otherwise believe to be destined for imprisonment. This approach has the advantage of reducing the need for judicial delegation of service sentencing details to probation or program staffs, increasing the likelihood that the service will be as "voluntary" as possible, and minimizing the likelihood that the service will be advocated where a less intrusive penalty already seems likely in the professional judgment of the defense attorney.[217]

Finally, it must be emphasized that all of the foregoing analysis of existing and potential dangers in the development of community service penalties is not intended to discourage progress towards their refinement. Norval Morris has stated that: "Optimism is an unfashionable intellectual posture. Gloomy foreboding, buttressed by analytical demolition of accepted doctrine is a surer path to academic reputation."[218] He might have added,

however, that it might also be a path towards more justifiable optimism in the long run if proferred and accepted in a constructive fashion. Community service may ultimately achieve the diversionary goals of many of its advocates; whether or not it does, it may still prove to be a useful rehabilitative or at least incapacitative[219] sentencing provision; it may even save the system expenses in untold numbers of ways. It does represent in many ways an exciting opportunity to approach an innovative sentencing option with all of the evaluative and administrative advantages that recent advances in research methodology and system technology can offer.[220] With a history of one criminal justice innovation after another producing counterproductive and often inhumane side-effects and unintended consequences, however, the exciting opportunity to innovate also carries with it a responsibility to do so cautiously and with a sensitivity to what has gone before.

> The most melancholy of human reflections, perhaps, is that, on the whole, it is a question whether the benevolence of mankind does more harm than good.
>
> (Walter Bagehot, PHYSICS AND POLITICS, 1869)

FOOTNOTES

[1]See e.g. M. FRANKEL, CRIMINAL SENTENCING: LAW WITHOUT ORDER (1973); see also American Friends Service Committee, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971).

[2]Wilkins, et al., "Sentencing Guidelines: Structuring Judicial Discretion" (U. S. Dept. Justice, February 1978).

[3]Strictly speaking, most of the conditions referred to are either affixed as part of a probation term or as requirements of suspended sentence or conditional discharge.

[4]See e.g. Nelson, Ohmart and Harlow, "Promising Strategies in Probation and Parole" (U. S. Dept. Justice, November 1978).

[5]See e.g. Harris, "Sentencing to Community Service" (A.B.A. BASICS Program, Washington, C. D. 1979). During March 14-16, 1980 the Young Lawyers Division of ABA sponsored a workshop on community service in Detroit, Michigan, funded by a grant from the National Institute of Corrections (NIC).

[6]Section 3324(b)(9) COMMITTEE PRINT, Working Draft of House Subcommittee on Criminal Justice, August 24, 1979.

[7]See e.g. Greenhouse, "Alternative Sentencing: A Way Out?" STATE LEGISLATURES 12 (Vol. 5 No. 2, February 1979).

[8]See e.g. Newton, "Sentencing to Community Service and Restitution" Criminal Justice Abstracts 435 (September 1979); Brown, "Community Service as a Condition of Probation" 34 FEDERAL PROBATION 7 (1977).

[9]See e.g. 43 FED. REGISTER 326 (July 27, 1978) (announcing availability of funds to support communtiy service programs by the Law Enforcement Assistance Administration (LEAA); see also note 5 supra for involvement of NIC.

[10]Harris, supra note 5 at 22.

[11]"Sentencing to Community Service" 31 (U. S. Dept. of Justice, 1977).

[12]See e.g. People v. Mandell, 377 N.Y.S. 2d 563, 50 A.D. 2d 907 (1975); see also United States v. Chapel, 428 F.2d 472 (9 Cir 1977) (work at hospital or other charitable institution).

[13]See Table 1, infra at 6a-6c.

[14]See e.g. Brown supra note 8; see also McCarty, "How One Judge Uses Alternative Sentencing" 60 JUDICATURE 316 (1977).

[15]See Harris, supra note 5; see also Beha, Carlson and Rosenblum, supra note 11.

[16]U. S. CONST. amend. XIII, s. 1:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

[17]See e.g. IVES, A HISTORY OF PENAL METHODS (Stanley Paul & Co., 1914).

[18]W. VA. CODE s. 62-4-16.

[19]CAL. PENAL CODE s. 1203.1.

[20]ALASKA STAT. s. 11.20.590.

[21]Id.

[22]CAL. PENAL CODE s. 374b.5 (Deering Cum. Supp. 1979).

[23]See generally OFFENDER RESTITUTION IN THEORY AND ACTION (Galaway and Hudson, eds., 1977).

[24]Id.

[25]See statutes cited infra 6a-6c in column seven of Table 1.

[26]See e.g. FLA. STAT. ANN. s. 775.089(1) (West Cum. Supp. 1979) (restitution may be monetary and non-monetary); cf. FLORIDA YOUTHFUL OFFENDER ACT Ch. 78-84 s. 4(2) (1978) (restitution in money or in kind or through public service).

[27]MISS. CODE ANN. s. 47-7-47(4) (1978).

[28]MINN. STAT. s. 3.739 (1979).

[29]N. H. REV. STAT. ANN. s. 651:2(vi-a) (1977).

[30]Since preparation of Table 1 a 1980 addition to the Alaska Criminal Code has appeared. ALASKA STAT. s. 12.55.055 provides that:

> (a) The court may order a defendant convicted of an offense to perform community work as a condition of a suspended sentence or suspended imposition of sentence, or in addition to any fine or restitution ordered. If the defendant is also sentenced to imprisonment, the court may recommend to the Department of Health and Social Services that the defendant perform community work.
>
> (b) Community work includes work on projects designed to reduce or eliminate environmental damage, protect the public health or improve public lands, forests, parks, roads, highways,

facilities, or education. Community work may not confer a private benefit on a person except as may be incidental to the public benefit.

[31]Compare OR. REV. STAT. s. 135.891 (1977) (community service as condition of pre-trial diversion).

[32]For a discussion of potential constitutional problems with statutes of this sort, see infra at 34-36.

[33]Infra at 30 et seq.

[34]See Brown supra note 8.

[35]See Beha Carlson and Rosenblum supra note 11 at 34.

[36]18 U.S.C. s. 3651 (1974).

[37]Brown supra note 8.

[38]18 U.S.C. s. 3651 (1974).

[39]397 A. 2d 1179 (Pa. Super. 1979).

[40]Id. at 1184.

[41]See e.g. Newton supra note 8; see also McCarty supra note 14.

[42]See e.g. Keldgord "Community Restitution Comes to Arizona." In OFFENDER RESTITUTION IN THEORY AND ACTION supra note 23 at 161.

[43]See Glaser, "Correctional Research: An Elusive Paradise" 2 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY 1 (1965).

[44]7 LEAA Newsletter 1, 9 (No. 5, 1978).

[45]FED. REGISTER supra note 9.

[46]McCarty supra note 14.

[47]Keldgord supra note 42 at 166.

[48]Supra note 8 at 437. Community service in many instances deprives the victim of financial compensation when service is used instead of financial restitution.

[49]Supra note 44.

[50]Supra note 11 at chapter 4.

[51]Id. at 25.

[52]See generally Harris supra note 5, and Beha Carlson and Rosenblum supra note 11.

[53]Id.

[54]But see MURRAY AND COX, BEYOND PROBATION (Sage 1979).

[55]See e.g. Martinson, "What Works? Questions and Answers about Prison Reform" 35 PUBLIC INTEREST 22 (1974).

[56]See e.g. WILSON, THINKING ABOUT CRIME (1975); VAN DEN HAAG, PUNISHING CRIMINALS (1975).

[57]This is essentially an exercise in scaling penalties. All other things being equal, it is interesting to speculate at what point an amount of community service becomes comparable in desert-terms with an amount of incarceration.

[58]See e.g. Bergman, "Community Service in England: An Alternative to Custodial Sentence" 40 FEDERAL PROBATION 43 (1976).

[59]Griffiths, "Community Service By Offenders-I" New Law Journal 169, 170 (February 12, 1976).

[60]Pease, Community Service and the Tariff" Crim. L. Rev. 269, 270 (1978).

[61]Griffiths, "Community Service By Offenders-II" New Law Journal 193 (February 19, 1976).

[62]Beha, Carlson and Rosenblum, supra note 11 at 16.

[63]CRIMINAL JUSTICE ACT 1972 ss. 15-19; see also POWERS OF THE CRIMINAL COURTS ACT 1973 ss. 14-17.

[64]Pease, et al., "Community Service Orders: Home Office Research Study No. 29" (HMSO: London, 1975).

[65]Beha, Carlson and Rosenblum, supra note 11 at 17.

[66]Pease, Billingham and Earnshaw, "Community Service Assessed in 1976: Home Office Research Study No. 39" (HMSO: London, 1977).

[67]Id. (foreword by I. J. Croft).

[68]Id. at 3-9.

[69]Id. at 9.

[70]Id. at 7.

[71]See e.g. Bergman, supra note 58; see also Cromer, "Doing Hours Instead of Time: Community Service as an Alternative to Imprisonment" 11 A.N.Z.J. Crim. 54 (1978).

[72]Advisory Council on the Penal System, "Non-Custodial and Semi-Custodial Penalties" 9 (H.M.S.O.: London, 1977), (emphasis added).

[73]Advisory Council on the Penal System, "Powers of the Courts Dependent Upon Imprisonment" (H.M.S.O.: London, 1977).

[74]6 LEAA Newsletter (No. 7 1977); cf. "Restitution by Juvenile Offenders: An Alternative to Incarceration" (U. S. Dept. Justice Program Announcement, February 15, 1978).

[75]Correction Digest 4 (February 16, 1977).

[76]See generally, Harland, Warren and Brown, "Restitution Programs in Six States: Policies and Procedures" (available on request from Criminal Justice Research Center, 1 Alton Road, Albany, N. Y. 12203).

[77]See e.g. Keldgord supra note 42.

[78]8(1) CRIME & DELINQUENCY LITERATURE 109 (1970).

[79]Supra at 10, text at note 48.

[80]In interviews that I conducted recently, for example, with nine judges, eight deputy district attorneys and five probation officers in Multnomah County, Oregon, all the respondents were adamant in this position.

[81]See generally OFFENDER RESTITUTION IN THEORY AND ACTION, supra note 23.

[82]Harland, "Restitution Statutes and Cases: Some Substantive and Procedural Constraints." in VICTIMS, OFFENDERS, AND ALTERNATIVES SANCTIONS (Hudson and Galaway, eds., Lexington 1980).

[83]See the discussion of community service as an alternative to monetary penalties infra at 34-36.

[84]See statutes cited supra note 63.

[85]The Solano program and numerous others with similar titles are listed in Harris supra note 5 at 140-48.

[86]See e.g. Cohen, F., "Corrections and Legal Change: Probation and Parole." In PROBATION, PAROLE AND COMMUNITY CORRECTIONS 654, 660-1 (Carter and Wilkins, eds. 2d ed.).

[87]Supra note 5 at 8.

[88]Cohen supra note 86.

[89]See cases cited in Harland supra note 82.

[90]State v. Smith, 233 N.C. 68, 70, 62 S.E. 2d 495, 496 (1950).

[91]See Note, "Judicial Review of Probation Conditions" 67 COLUM. L. REV. 181,192 (1967).

[92]RUBIN, S., THE LAW OF CRIMINAL CORRECTION 185 (1st ed. 1963).

[93]Cohen supra note 86.

[94]Supra at 14-17.

[95]Pease, supra note 60 at 273.

[96]Supra note 73 at para. 24.

[97]For discussion of a Canadian program that operates specifically to avoid incarcerating offenders who are unable to afford to pay fines, see "Saskatchewan's Fine Option Experiment" 1(11) LIAISON 5 (1976).

[98]See infra at 34-36.

[99]Bergman, supra note 58 at 46.

[100]Keldgord, supra note 42 at 162; cf. Huggett v. State, 83 Wis. 2d 790, 266 N.W. 2d 404 (1978) (restitution can aid rehabilitation by strengthening sense of responsibility).

[101]But see People v. Mandell, 377 N.Y.S. 2d 563, 50 A.D. 2d 907 (1975) (infra at 23-4).

[102]Brown, supra note 8 at 7. Interestingly, the General Counsel who supplied the memorandum cited by Judge Brown has elsewhere categorized as "questionable conditions of probation" requirements to contribute to or work for a charitable cause. Imlay and Glasheen, "See What Conditions Your Conditions Are In." In PROBATION, PAROLE AND COMMUNITY CORRECTIONS, supra note 86 at 432,434.

[103]N.Y.S. OP. ATTY. GEN. 234 (October 16, 1972).

[104]N.Y. PENAL LAW s. 65.10(2). The New York Law has subsequently been amended to permit community service as a condition of probation under very limited circumstances. See Table 1 supra at 6e.

[105]Supra note 103 at 236.

[106]Supra note 101.

[107]Id. at 377 N.Y.S. 2d 564.

[108]MORRIS and HOWARD, STUDIES IN CRIMINAL LAW 175 (1964).

[109]MORRIS, THE FUTURE OF IMPRISONMENT 18 (1974).

[110]256 Cal. App. 2d 348, 64 Cal. Rptr. 20 (1967).

[111]Id. at 356, 64 Cal. Rptr. at 25.

[112]Id. at 352, 64 Cal. Rptr. at 23.

[113]Id. at 355, 64 Cal. Rptr. at 25.

[114]Id. at 356, 64 Cal. Rptr. at 25.

[115]Note, "Use of Restitution in the Criminal Process: People v. Miller" 16 UCLA L. Rev. 456, 462 (1969).

[116]See e.g. Challeen and Heinlen, "The Win-Onus Restitution Program." In OFFENDER RESTITUTION IN THEORY AND ACTION, supra note 23 at 151.

[117]See e.g. Coker, "Community Service in Hampshire (England) INTERNATIONAL J. of OFFENDER THERAPY and COMPARATIVE CRIMINOLOGY 114 (1976).

[118]See e.g. Pease, Billingham and Earnshaw, supra note 66.

[119]Statement of Judge Paul A. Chernoff, District Court of Newton, Massachusetts. TRIAL JUDGES' CONFERENCES, sponsored by Creative Alternatives to Prison. Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciars United States Senate 95th Congress 2d Session. COMMITTEE PRINT 50 (October 14, 1978).

[120]But see FLA. STAT. ANN. s. 775.091 (West Cum. Supp. 1979) supra Table 1 at 6a, which implies by its language that community service is not a punishment (in addition to any punishment, the court may order the defendant to perform a specified public service).

[121]Newton, supra note 8 at 445.

[122]Supra note 80; SENTENCING AND PROBATION 259 (Revelle ed. Nat'l. College of State Judiciary 1976 ed.).

[123]Note, supra note 115 at 462.

[124]State v. Wright, 156 N.J. Super. 559, 384 A.2d 199, 201 (1978).

[125]See e.g. Beha, Carlson and Rosenblum, supra note 11 at 38-40; see also infra at 34-36.

[126]Pease, supra note 60 at 274.

[127]Practice Commentary, N. Y. PENAL LAW s. 65.10(2)(f-1) (McKinney 1979).

[128]Id.

[129]Eligibility decisions also must of course be made with an eye towards the political and legal liability that might ensue if a high-risk offender is admitted and injures someone. For a discussion of some of the tort-liability issues in this regard see infra at 44-52.

[130]See e.g. Martinson, supra note 55.

[131]HART, H.L.A., PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 2 (Oxford 1968).

[132]George Pratt, Deputy Chief of the Inner London Probation Service reported at the recent ABA conference on community service (supra note 5) that community service will surpass probation this year as the most frequently used disposition by British courts.

[133]VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENT xxxi (1976) (from Introduction by Gaylin and Rothman).

[134]Id. at xxxiii.

[135]But see 56-57 infra for the difficulties involved.

[136]In a recent report on the first seven years of community service in Inner London, for example, it is noted that: "It was soon demonstrated that some offenders were unsuitable for community service. These included inter alia, alcoholics, drug addicts and the long-term unemployed who were not only unreliable in attendance and performance but unable to sustain their efforts even over a relatively short period." Inner London Probation and After Care Service, "Community Service by Offenders" 1(1980) (unpublished mimeo provided by George Pratt, Deputy Chief Probation Officer).

[137]Supra at 22, text at note 100.

[138]Supra note 131 at 3.

[139]See generally, FOGEL, "WE ARE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS" (1975).

[140]Von Hirsch and Hanrahan, "Abolish Parole" (U.S. Dept. Justice 1978).

[141]See generally, Gottfredson, D., et al., "Classification for Parole Decision Policy" (U.S. Dept. Justice 1978).

[142]See "Determinate Sentencing: Reform or Regression" (Proceedings of Special Conference on Determinate Sentencing, June 2-3, 1977. U.S. Dept. Justice March 1978).

[143]Wilkins, et al., supra note 2.

[144]Grant Proposal funded by National Institute of Corrections, on file at the Criminal Justice Research Center, Albany, New York 12203.

[145]See Gottfredson, D., et al., supra note 141; see also Gottfredson, M.R., "Parole Guidelines and the Reduction of Sentencing Disparity" 16 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY 218 (1979).

[146]Many of the statutes, however, include community service among what have traditionally been held to be the rehabilitative conditions of probation. See, in particular, the New York statute in column seven of Table 1 supra at 6e.

[147]Shoplifting (Arizona); petty theft (California, Florida); property destruction and unauthorized entry (New Hampshire); misdemeanors and violations (new York); no violent offenders (Mary-Land).

[148]401 U.S. 395 (1971).

[149]399 U.S. 235 (1970).

[150]401 U.S. at 398; citing Morris v. Schoonfield, 399 U.S. 508 (1970).

[151]399 u.s. at 244.

[152]401 U.S. at 399; but see Beha, Carlson and Rosenblum supra note 11 at 40-41.

[153]399 U.S. at 244-45 (footnotes omitted).

[154]401 U.S. at 400-401; but see In re Antarzo, 473 P.2d 999 (1970).

[155]Basing community service on a fine may give an unwarranted appearance of rationality if fines themselves are imposed without standards or guidelines to avoid disparity. See e.g. State v. Ross, 55 Or. 450, 106 P. 1022, app. dismissed 227 U.S. 150 (1910) (offender ordered to pay fine over 1/2 million dollars, or be imprisoned at $1.00 per day, which is approximately 800 years); see also Thornstedt, "Day-Fine System in Sweden" CRIM. L. REV. 307 (1975).

[156]Compare KAN. STAT. s. 21-4610(3)(n) (1978) (court may include among conditions of probation or suspension of sentence that defendant shall perform services under a system of day-fines).

[157]It is unclear whether the guidelines referred to in the Maryland law in Table 1 relate to the amount of service or more general administration.

[158]Harris, supra note 5 at 40 and 70-71.

[159]Id. at 70.

[160]In testimony before the Subcommittee on Criminal Justice of the Senate Judiciary Committee on October 15, 1979, Ira M. Lowe reported on a Virginia case known as the Fort Hunt High School Arson Case in which each of the defendants was required to pay $10,000 dollars in restitution and perform 3,000 hours of community service work. Initial reaction in the media was that the sentences were too lenient. (Mimeo supplied by John Simson, Creative Alternatives to Prison, Washington D.C.).

[161]See SENTENCING AND PROBATION supra note 122 at 259. The fiction of "voluntarism" may also be dysfunctional in similar respects, to the extent that the general public perceives giving offenders the freedom of choice to be an indication of leniency.

[162]It might also reduce the present unnecessary overburdening of probation officers by removing offenders from their caseloads who do not need probation services but are given probation as a declaration that they are not "getting off free."

[163]Harris supra note 5 at 69. Similar risks appear at the revocation stage of service enforcement if no consistent standards are developed to guage successful or unacceptable performance levels.

[164]See discussion of eligibility criteria, supra at 30-36.

[165]For a very lucid discussion of the general practice of empirical construction of decisionmaking guidelines, see Gottfredson, D., et al., supra note 141.

[166]Advantages and disadvantages of each method of selecting the type of service are presented in Harris, supra note 5 at 56-58.

[167]1978 OP. ATT'Y. GEN. No. S-1369.

[168]See e.g. Brown supra note 8 at 9.

[169]Harris gives as an illustration placing an offender convicted of child-molesting in a child-care agency. Supra note 5 at 58. The more real danger, of course, is assigning an offender convicted, say, of reckless driving to such an agency without knowing that the offender also has a history of child molesting in other jurisdictions.

[170]See e.g. Chelimsky, "The Need for Better Data to Support Crime Control Policy" (Mitre Corp. July 1976).

[171]Some programs also use profit-making agencies for assignment, but only to provide services that would not otherwise be available such as visitation with residents of private nursing homes. Harris, supra note 5 at 33.

[172]See ALASKA STAT. s. 12.55.055 (1980 Supp.)

[173]In states such as Arizona in which service may be designated by the court, but no provision is made for developing programs, the responsibility presumably rests with the probation services or whatever other sources the court can muster.

[174]See generally 60 Am. Jur. 2d "Penal and Correctional Institutions" ss. 34-40 (Labor by Inmates).

[175]Programs also occasionally restrict eligibility to exclude religious organizations, agencies that engage in partisan political activities, and fraternal or social groups with limited membership. Harris supra note 5 at 33.

[176]Lost wages from the offenders paid employment may also be involved; these will usually be at least partially covered by his or her employer's routine disability insurance policy.

[177]This practice is independent of the petty theft community service provision in section 490.5 of the California Penal Code, which is not covered by the Attorney General's Opinion. 1978 OP. ATT'T. GEN. No. CV 78/18 (June 1, 1978) at 2 n. 1.

[178]Id. at 1.

[179]S.B. 873 amending GEN. LAWS ch. 276 s. 104.

[180]Brown, supra note 8 at 8.

[181]"Insurance Program for Members of Volunteers Insurance Service Association" (Corporate Insurance Management 4200 Wisconsin Ave., N.W., Washington D.C. 20016).

[182]Supra note 177 at 1-2.

[183]S.B. 873 supra note 179.

[184]Interviews with Circuit Court judges, Multnomah County, Oregon.

[185]See generally Gurfein and Streff, "Liability in Correctional Volunteer Programs: Planning for Potential Problems" (American Bar Association 1975).

[186]Supra note 177 at 2.

[187]__ U.S. __ (1980) (No. 78-1268. Jan. 15, 1980).

[188]Id.

[189]Id. at __.

[190]85 Cal. App. 3d 430, 436-47, 149 Cal. Rptr. 519, 524 (1978).

[191]Grimm v. Arizona Board of Pardons and Parolees, 115 Ariz. 260, 564 P.2d 1227 (1977).

[192]See Gurfein and Streff, supra note 185.

[193]__ U.S. at __.

[194]See Semler v. Psychiatric Institute of Washington, D.C., 538 F2d 121 (1976).

[195]__ U.S. at __.

[196]The question was raised hypothetically in the Martinez case by Mr. Justice Rehnquist, who asked counsel for the plaintiffs during oral argument: "What if the judge had decided to grant probation to a rapist, rather than impose a sentence, and subsequently that person commits another rape, should the judge be held liable?" Counsel responded that perhaps he should. Martinez v. California, No. 78-1268 (argued Nov. 15, 1979).

[197]See Brown supra note 8 at 8 (at sentencing, judge imposes the work requirement to be performed for such agency as is designated by the probation office).

[198]Particular difficulties may arise where delegation of the service placement is an abuse of discretion by the sentencing judge. Most of the statutes in Table 1 supra explicitly require that the service be specified or designated by the court. The Hawaii law, by comparison requires only that the extent of the service be so fixed. See also Harris, supra note 5 at 41 (court usually does not describe specific assignments, leaving that to program staff).

[199]Supra note 9.

[200]See Harris, supra note 5.

[201]See Harland supra note 82.

[202]FLA. STAT. ANN. s. 20.315(d) (West Cum. Supp. 1979).

[203]Inmates in Massachusetts Houses of Corrections (Jails) were occasionally assigned, for example, to stuff envelopes for charitable organizations while confined as a condition of participation in an LEAA funded restitution program. See Harland, Warren and Brown supra note 76.

[204]OR. REV. STAT. s. 135.891 (1977).

[205]N.Y. CORREC. LAW ss. 851, 855 (Consol. Cum. Supp. 1978).

[206]GA. CODE ANN. s. 77.342 (1979).

[207]Harris, supra note 5 at vi (Preface by R. Hughes).

[208]Supra at 19-27.

[209]See MURPHY, OUR KINDLY PARENT--THE STATE: THE JUVENILE JUSTICE SYSTEM AND HOW IT WORKS (Penguin 1977); ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971).

[210]387 U.S. 1 (1967).

[211]Id. at 18-19.

[212]This is not to imply that offenders sentenced to community service could not also be placed on probation if some reason for probation services exists.

[213]Supra note 132.

[214]FRANKEL, CRIMINAL SENTENCING: LAW WITHOUT ORDER 5 (1973).

[215]Remarks of George Pratt at ABA workshop, supra note 5.

[216]Such a procedure is used by the PACT (Prisoner and Community Together) Community Service Restitution Program in Porter County, Indiana. (Personal communication with program staff.)

[217]In his testimony before the Senate Judiciary Committee (supra note 160) Ira Lowe proposed the following amendments to the proposed New Federal Criminal Code (S. 1722):

> Section 2002(d): Lawyer's Duty to Present Alternative Proposals to Incarceration.
>
> 1) Unless where prohibited in Section 2101, the defendant's lawyer has an obligation to prepare and present to the Court specific concrete programs of non-prison punishment. Such alternatives may include any combinations of the discretionary conditions contained in Section 2103(b) (1-20), and such other conditions as may be appropriate, regarding the individual characteristics of that defendant, and of that offense.
>
> 2) This obligation in no way shall affect the lawyer's current role of allocation of recommending probation or requesting a more lenient sentence in appropriate cases.
>
> Section 2002(e): Court's Obligation to Consider Alternatives Proposed.
>
> 1) Where a proposal has been submitted to the Court, in accordance with Section 2002(d)(1), the Court is obligated to consider in writing its reason for rejecting any such proposal. Nothing in this section shall prohibit the

> Court, or probation office from proposing its own alternative plan of probation as provided in Section 2103, on its own initiative, or from imposing any other sentence contained within this bill.

[218]Morris supra note 109 at 12.

[219]In a recent interview with a probation officer in Multnomah County, Oregon, he expressed his support for requiring offenders to work for the following reason: "If [an offender's] working, he ain't stealing. At least not stealing much." Many of the other practitioners expressed similar, if less eloquent, views.

[220]See O'Leary, Editor's Comments 17 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY 1 (1980) (noting increased sophistication of methodological technique in contemporary criminological research).

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