

ALTERNATIVE SENTENCING: A PROPOSED STATE MODEL

INTRODUCTION

Punishment¹ is a concept that has existed as long as man has recorded his history.² Children are taught that breaking rules or failing to conform to social norms, whether imposed by parents or by society, will result in punishment. Courts impose criminal punishment³ when a person is convicted of a crime. The punishment may be in the form of probation, a fine, or imprisonment.

Criminologists, psychologists, sociologists, and legal scholars have long debated the purpose of punishment.⁴ Scholars have identified four different rationales for punishment: incapacitation, retribution, deterrence, and rehabilitation.⁵ Most people disagree, however, as to which rationale best justifies imprisonment. Most would agree that incapacitation, removing the convict from society,⁶ and retribution, society's desire for revenge,⁷ are satisfied by imprisonment. While it had been accepted that imprisonment fulfilled the deterrence rationale, the restraint which fear of criminal punishment imposes on those likely to commit crime,⁸ scholars now seriously question the accuracy of this theory.⁹ In addition, most scholars believe that incarceration does not satisfy the rehabilitative rationale,¹⁰ that of reforming the criminal's behavior to conform with society's laws.¹¹

1. Punishment is "an evil inflicted by public authority, on him that hath done, or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience." T. HOBBS, *LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL* 229 (Collier Books ed. 1962).
2. Perhaps the first example of punishment, whether literal or symbolic, is found in the Bible where God gives one law to Adam, "You shall not eat of the fruit of the tree which is in the midst of the garden, neither shall you touch it, lest you die." GENESIS 3:3 (Revised Standard Version 1952). Later Adam violated God's law. "[A]nd she also gave some [of the apple] to her husband, and he ate." *Id.* at 3:6. God then punished Adam for his offense. "[T]herefore the Lord God sent him forth from the garden of Eden, to till the ground from which he was taken. He drove out the man; and at the east of the garden of Eden he placed the cherubim, and a flaming sword which turned every way, to guard the way to the tree of life." *Id.* at 3:23-24.
3. Any fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgement and sentence of a court for some crime of offense committed by him, or for the omission of a duty enjoined by law. BLACK'S LAW DICTIONARY 646 (Abridged 5th ed. 1983).
4. See, e.g., Cavender, *Justice, Sanctioning, and the Justice Model*, 22 CRIMINOLOGY 203 (1984); Grupp, *The Punishment Dilemma*, J. OF OFFENDER COUNSELING, SERVICES, & REHABILITATION, Spring 1984, at 63-74; Rubin, *Psychoanalytic Theory and Some Considerations on Punishment*, 11 ANNUAL OF PSYCHOANALYSIS 257-276 (1983); Deigh, *On the Right to be Punished: Some Doubts*, ETHICS, January 1984, at 191-211; Warr, Meier, & Errekson, *Norms, Theories of Punishment, and Publically Preferred Penalties for Crimes*, 24 SOCIOLOGICAL Q. 75 (1983); READINGS IN PHILOSOPHY OF LAW 187-242 (J. Arther & W. Shaw eds. 1984); CRIMINAL LAW AND ITS PROCESSES 181-210 (S. Kadish, S. Schulhofer & M. Paulsen eds., 4th ed. 1983).
5. See generally F. PRASSEL, *CRIMINAL LAW, JUSTICE, AND SOCIETY* 18-19 (1979); CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 39-227 (R. Gerber & P. McNanny eds. 1972); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35-61 (1968).
6. F. PRASSEL, *supra* note 5, at 19.
7. *Id.* at 18.
8. CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS, *supra* note 5, at 93; NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, *DETERRENCE AND INCAPACITATION: THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 57 (1978).
9. See F. PRASSEL, *supra* note 5, at 18; CRIM. JUST. NEWSLETTER, July 19, 1982, at 1; EDNA MCCONNELL CLARK FOUNDATION, *OVERCROWDED TIME: WHY PRISONS ARE SO CROWDED AND WHAT CAN BE DONE* 13-14 (1982).
10. F. PRASSEL, *supra* note 5, at 19; EDNA MCCONNELL CLARK FOUNDATION, *supra* note 9, at 18-19; Martinson, *What Works? Questions and Answers About Prison Reform*, THE PUBLIC INTEREST, no.

Because imprisonment neither rehabilitates offenders nor deters crime, an alternate means of punishment is needed to fulfill these rationales.¹²

Current problems facing the American prison system aggravate the inadequacies of penal incarceration. The incarceration rate in the United States is rising.¹³ American prisons are seriously overcrowded¹⁴ and often do not provide humane conditions for their inmates.¹⁵ Moreover, the cost of housing those incarcerated is staggering¹⁶ and will increase as more and more people are sent to prison.¹⁷

Recognizing these practical problems with incarceration as well as its apparent failure to satisfy some of the theoretical underpinnings of punishment, society, and its elected representatives in particular, must find an alternate means of punishment. Many states have enacted statutes which provide for some sort of alter-

35, (1974), at 22-54 (evaluation of 231 studies of correction programs in and out of prison which concluded that an equal number of prisoners who go through "rehabilitative" programs will return to crimes as those who do not participate in the programs). See also NATIONAL RESEARCH CENTER, NATIONAL ACADEMY OF SCIENCES, *NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS* (1981) (in general agreement with the Martinson study).

11. F. PRASSEL, *supra* note 5, at 19; H. PACKER, *supra* note 5, at 53.
12. See M. LEVIN, *URBAN POLITICS AND THE CRIMINAL COURTS* 158-98 (1977); Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 155 (1978); Hoelter, *Make the Sentence Fit the Felon*, JUDGES' J., Winter 1982, at 49.
13. *The Criminal Justice Construction Reform Act, Hearings on S. 186 Before the Senate Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 372 (1981) (statement of Alvin J. Bronstein and Irving L. Joyner of the National Prison Project of the American Civil Liberties Union). Statistics show that the incarceration rate has steadily increased — from 79 people incarcerated per 100,000 population in 1925 to 244 per 100,000 in 1981. *Id.* This represents an average annual growth rate of 2.4% in the prison population while the average annual growth rate for the general population is only 1.2%. CRIM. JUST. NEWSLETTER, Jan. 17, 1983, at 5 (quoting the Bureau of Justice Statistics).
14. In 1982, 39 states, the District of Columbia, and the Virgin Islands were under court order to reduce overcrowding. Silas, *Lock 'Em Up? There's No More Room*, 69 A.B.A.J. 1351 (1983). The final report of the Attorney General's Task Force on Violent Crime, issued in August 1981, listed overcrowding as the single most important problem facing corrections. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME 10 (1981). The United States incarcerates a greater percentage of its population than any other western democracy. The only countries with higher incarceration rates are the Soviet Union and South Africa. Waller & Chan, *Prison Use: A Canadian and International Comparison*, 17 CRIM. L. Q. 47, 58 (1974).
15. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN — PRISONERS IN 1981, 1-4 (1982). When prisons are overcrowded, complaints of illness rise, suicide and death rates increase, and discipline declines. U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, THE EFFECTS OF PRISON CROWDING ON INMATE BEHAVIOR 1 (1980). The American Medical Association has stated that long term crowding accelerates the spread of communicable disease and promotes heart attacks and high blood pressure. The psychological pressures of crowding as well as the density of germs break down the body's defenses to diseases. Many inmates, particularly older inmates, die prematurely of "natural" causes. Brief of the American Medical Association and the American Health Association, *Rhodes v. Chapman*, 452 U.S. 337 (1981). More people are committed to psychiatric treatment the longer they are kept in overcrowded prisons. 4 ADVANCES IN ENVIRONMENTAL PSYCHOLOGY 285 (A. Baum & J. Singer eds. 1982).
16. The average annual cost of housing one inmate in a federal prison in 1982 was \$13,000. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 93 (1983); Silas, *Doing Time Outside Of Prison*, 69 A.B.A.J. 1813 (1983) (average annual cost \$13,700). The average annual cost of housing an inmate in a state prison ranges from \$5,100 to \$22,750 depending upon such factors as regional variations in salaries for prison workers, differences in utility costs, the number of prisoners in (high-cost) maximum security, and whether a system uses prisoners to perform maintenance services or hires nonprisoners. BUREAU OF JUSTICE STATISTICS, *supra*.
17. At the present rate, the federal government will have to build a new prison every two months to avoid the overcrowding present in the state prisons. Armstrong, *Prudent Use Of Prison Space: The Sentencing Improvement Act*, 11 J. LEGIS. 237, 239 (1984). Historically, voters have been reluctant to appropriate money for prison construction. Rodino, *Federal Criminal Sentencing Reform*, 11 J. LEGIS. 218, 226 (1984). In 1981, New York voters rejected a bond issue for prison reconstruction. In 1980, Michigan voters turned down a tax increase for such construction. Estimates of the cost of new prison facilities run from \$7,500 to more than \$50,000 per bed. OFFICE RESEARCH PROGRAMS, NATIONAL INSTITUTE FOR JUSTICE, U.S. DEP'T OF JUSTICE, CONDITIONS AND COST CONFINEMENT 119 (1980).

native to a prison sentence.¹⁸ Forty-one states have enacted statutes allowing courts to order the criminal to make monetary restitution to the victims of his crimes.¹⁹ Moreover, twenty-eight states provide for part-time or intermittent incarceration.²⁰ Besides reducing overcrowding, this allows inmates to work in order to support their families or to pay court-ordered restitution to their victims.²¹ Thirty-five states allow the sentencing court to impose some form of community service obligation on the criminal in addition to, or in lieu of, a prison sentence.²²

18. See generally 2 PANEL ON SENTENCING RESEARCH, NATIONAL RESEARCH COUNCIL, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 246-58 (A. Blumstein, J. Cohen, S. Martin, M. Tonry, eds. 1983). Former Attorney General William French Smith also called for the use of alternatives to imprisonment. Address by Attorney General Smith to students at Vanderbilt University *excerpted in* CRIM. JUST. NEWSLETTER, Mar. 14, 1983, at 5. Members of Congress have also recognized the need for alternatives and sentence reform. See, e.g., Rodino, *supra* note 17; Armstrong, *supra* note 17; Merritt, *Corrections Law Development: Restitution under the Victim and Witness Protection Act of 1982*, 20 CRIM. L. BULL. 44 (1984).
19. ALA. CODE §§ 15-18-65 to 15-18-78 (1982 & Supp. 1984); ALASKA STAT. § 12.55.045 (1984); ARIZ. REV. STAT. ANN. § 13-603(c) (West Supp. 1984-1985); COLO. REV. STAT. § 16-11-204.5 (Supp. 1984); DEL. CODE ANN. tit. 11, § 4106(a) - (c) (Supp. 1984); FLA. STAT. ANN. § 775.089 (West Supp. 1984); GA. CODE ANN. §§ 27-3003 to 27-3005 (1983); HAWAII REV. STAT. § 706-605 (1)(e) (Supp. 1983); IDAHO CODE § 19-5302 (Supp. 1984); ILL. ANN. STAT. ch. 38, § 1005-5-6 (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 35-38-2-2(a)(5) (West Supp. 1984-1985); IOWA CODE ANN. §§ 910.1 to 910.15 (West Supp. 1984-1985); KAN. STAT. ANN. § 22-3717(j); KY. REV. STAT. ANN. § 431.200 (Baldwin 1984); LA. CODE CRIM. PROC. art. 895.1 (West Supp. 1985); ME. REV. STAT. ANN. tit. 17-A, §§ 1321 to 1330 (1983 & Supp. 1983-1984); MD. CRIM. LAW CODE ANN. § 640 (Supp. 1984); MICH. STAT. ANN. 28.1133(2)(d) (Callaghan Supp. 1984-1985); MINN. STAT. ANN. § 609.10(5) (Supp. 1984-1985); MISS. CODE ANN. §§ 99-37-1 to 99-37-23 (Supp. 1984); MO. ANN. STAT. § 559.021(2)(1) (Vernon Supp. 1985); MONT. CODE ANN. § 46-18-201(2) (1983); NEB. REV. STAT. § 29-2262(2)(j) (1979); N.H. REV. STAT. ANN. § 651:63 (Supp. 1983); N.J. STAT. ANN. § 2C:43-3, 2C:46-4 (West Supp. 1984-1985); N.M. STAT. ANN. § 31-17-1 (1981); N.Y. PENAL LAW § 65.10(2)(g) (McKinney Supp. 1984); N.D. CENT. CODE § 12.1-32-02(1)(e) (Supp. 1983); OKLA. STAT. ANN. tit. 22, § 991(a)(A)(1)(a) (West Supp. 1984-1985); OR. REV. STAT. ANN. § 137.106 (1983); PA. STAT. ANN. tit. 18, § 1106 (Purdon 1983); S.C. CODE ANN. § 17-25-120 (Law. Co-op. 1984); S.D. CODIFIED LAWS ANN. § 23A-28-1 (1978); TENN. CODE ANN. § 40-35-303(d)(10) (1982); UTAH CODE ANN. § 76-3-201(3) (Supp. 1983); VT. STAT. ANN. tit. 28, § 252(b)(6) (Supp. 1984); VA. CODE § 19.2-305.1 (Supp. 1984); WASH. REV. CODE ANN. § 9A.20.030(1) (Supp. 1985); W. VA. CODE § 61-11A-4 (1984); WIS. STAT. ANN. § 973.09(1)(b) (West Supp. 1984-1985); WYO. STAT. § 7-13-308 (Supp. 1984).
20. ARIZ. REV. STAT. ANN. § 13-901(F) (West Supp. 1984-1985); ARK. STAT. ANN. § 41-1204 (1977); CAL. PENAL CODE § 1203.1 (West 1982); COLO. REV. STAT. § 16-11-202 (1978); FLA. STAT. ANN. § 951.24 (West Supp. 1984); GA. CODE ANN. § 27-2506(d) (1983); HAWAII REV. STAT. § 706-624 (Supp. 1983); ILL. ANN. STAT. ch. 38, § 1005-7-1 (Smith-Hurd 1982); IND. CODE ANN. § 35-38-2-2(2)(c) (West Supp. 1984-1985); KY. REV. STAT. ANN. § 533.030(5) (Baldwin 1984); MD. CRIM. LAW CODE ANN. § 639 (Supp. 1984); MASS. GEN. LAWS ANN. ch. 279, § 6A (West 1980); MICH. STAT. ANN. § 28.1133(2)(a) (Callaghan Supp. 1984-1985); MINN. STAT. ANN. § 631.425(4) (1983); MONT. CODE ANN. § 46-18-701 (1983); NEB. REV. STAT. § 29-2262(2)(b) (1979); N.H. REV. STAT. ANN. § 651:20 (Supp. 1983); N.Y. PENAL LAW § 85.00 (McKinney 1975); N.C. GEN. STAT. § 15A-1351 (1983); N.D. CENT. CODE § 12.1-32-02(1)(c) (Supp. 1983); OR. REV. STAT. ANN. § 137.520 (1983); PA. STAT. ANN. tit. 42, § 9755 (Purdon 1982); R.I. GEN. LAWS § 12-19-2 (1981); TENN. CODE ANN. § 40-20-117 (1982); TEX. CRIM. PROC. CODE ANN. § 42.03(5)(a); VA. CODE § 53.1-131.1 (Supp. 1984); W. VA. CODE § 62-11A-1 (1984); WIS. STAT. ANN. 973.09(4) (West Supp. 1984-1985).
21. Parisi, *Part-time Imprisonment: The Legal and Practical Issues of Periodic Confinement*, 63 JUDICATURE 385 (1980).
22. ALASKA STAT. § 12.55.055 (1984); ARIZ. REV. STAT. ANN. § 13-1805(H) (West Supp. 1984-1985); CAL. PENAL CODE § 490.5(d) (West Supp. 1985); COLO. REV. STAT. § 16-11-212 (Supp. 1984); DEL. CODE ANN. tit. 11, § 4105(b) (Supp. 1984); FLA. STAT. ANN. § 775.091, 812.015(2) (West Supp. 1984); HAWAII REV. STAT. § 706-605 (1)(f) (Supp. 1983); ILL. ANN. STAT. ch. 38, §§ 204-4(6), 1005-6-3(b)(9), 1005-6-3.1(c)(10) (Smith-Hurd Supp. 1984-1985); IND. CODE ANN. § 35-38-2-2(a)(13) (West Supp. 1984-1985); IOWA CODE ANN. § 907.13 (West Supp. 1984-1985); KAN. STAT. ANN. § 21-4610(3)(j) (Supp. 1984); KY. REV. STAT. ANN. § 533.030(3) (Baldwin 1984); ME. REV. STAT. ANN. tit. 17-A, § 1204(2-A)(L) (1983); MD. CRIM. LAW CODE ANN. § 726A (1982); MICH. STAT. ANN. § 28.1133(2)(e) (Callaghan Supp. 1984-1985); MINN. STAT. ANN. §§ 609.135(6), 609.583 (Supp. 1984-1985); MISS. CODE ANN. § 47-7-47(4) (Supp. 1984); MO. ANN. STAT. § 559.021(2)(2) (Vernon Supp. 1985); MONT. CODE ANN. § 46-18-201(1)(a)(ix) (1983); NEB. REV. STAT. § 29-2262(2)(n) (1979); NEV. REV. STAT. § 176.087 (1983); N.H. REV. STAT. ANN. § 651:2(VI-a) (Supp. 1983); N.J. STAT. ANN. § 2C:44-1(b)(6) (West Supp. 1984-1985); N.M. STAT. ANN. § 31-20-6(E) (Supp. 1984);

This note contends that in order to meet the needs for alternatives to imprisonment and to correct the current implementation problems of alternative sentencing, state legislatures must pass more detailed legislation which provides judges with more direction on the use of alternative sentences. This note will briefly discuss two alternatives to incarceration. It then examines the implementation problems of current alternative sentencing legislation. Finally, it proposes a model state act, incorporating the alternatives discussed, which state legislatures may either accept or modify to satisfy their own state's needs and desires.

TWO ALTERNATIVE SENTENCING APPROACHES

Of the many "alternatives" presently in use, only a few are truly alternatives to imprisonment. Simply put, an alternative is something which offers a choice between two things.²³ Thus, a true alternative to prison is a punishment that takes the place of incarceration. Fines and probation are not true alternatives to prison because they are imposed upon offenders who did not commit crimes punishable by imprisonment.²⁴ Some may argue that court ordered work and restitution have been imposed as "alternatives" to fines and probation.²⁵ Using court ordered work and restitution as alternatives to fines and probation is improper, however, because it imposes a penalty on selected offenders which is harsher in degree than that set forth in the state's penal codes, and thus is in contravention of them.

The alternatives discussed in this note are appropriate alternatives to imprisonment because they deprive the freedom of the offender in a like amount. Of course, these alternatives do not impose the physical hardships of prison, but physical hardship is not the purpose of punishment.²⁶ While some may view the alternatives as a compromise between imprisonment, on the one hand, and fines and probation, on the other, it offends justice less to impose a lesser penalty when a harsher one is warranted than to impose a harsher penalty when a lesser one is warranted.

States could overhaul the traditional penal system by establishing graduated levels of punishment for all crimes, ranging from probation and fines to restitution and work, and ultimately imprisonment. In that system, restitution and work would not be alternative sentences; rather they would be standard sentences. But since that is not the present practice,²⁷ this note deals with alternatives intended to be substitutes for incarceration.

Alcohol or drug treatment programs are also not "alternatives." When an offender is sentenced to one of these programs it suggests that the cause of his crime is a treatable illness. It would not be correct to categorize these sentences as alternatives to prison because the illness is the problem and a prison sentence

N.Y. PENAL LAW § 65.10(2)(h) (McKinney Supp. 1984); N.D. CENT. CODE § 12.1-32-02(1)(f) (Supp. 1983); OHIO REV. CODE ANN. § 2951.02(H) (Baldwin Supp. 1983); OKLA. STAT. ANN. tit. 22, § 991a(A)(1)(c) (West Supp. 1984-1985); OR. REV. STAT. ANN. § 137.128 (1983); PA. STAT. ANN. tit. 42, § 9754(c)(2.1) (Purdon 1982); S.D. CODIFIED LAWS ANN. § 23A-28-11 (Supp. 1984); TENN. CODE ANN. § 40-35-303(d)(3) (1982); VT. STAT. ANN. tit. 28, § 252(b)(2) (Supp. 1984); VA. CODE § 19.2-305.1 (Supp. 1984); WYO. STAT. § 7-13-303 (Supp. 1984).

23. WEBSTER'S NEW COLLEGE DICTIONARY 34 (1977).

24. It is inequitable and logically inconsistent to impose the same sentence for a major offense as is imposed for a minor offense.

25. See Harland, *Court Ordered Community Service in Criminal Law: The Continuing Tyranny of Benevolence?*, 29 BUFFALO L. REV. 425, 426 (1980).

26. The rationales of punishment identified by scholars are: incapacitation, retribution, deterrence, and rehabilitation. See *supra* note 5 and accompanying text.

27. One state does have a sentencing provision like that described. See OKLA. STAT. ANN. tit. 22, § 991a(A) (West Supp. 1984-1985) which allows the court, upon conviction and when no death sentence is imposed, to impose a sentence of probation, a fine, restitution, community service, or imprisonment.

would be inconsistent with the treatment of this illness.²⁸ Sentencing a person to prison when his crime is motivated by drug or alcohol dependence serves none of the four penal rationales discussed above.²⁹ Sentencing these offenders to a treatment program is not an alternative sentence; it is the proper sentence.

Two true alternatives to incarceration are court ordered work and restitution. The work alternative consists of both community service and restitution to a crime victim in the form of labor. The restitution alternative consists of monetary payment to the offender's victims. By restricting the offender's freedom, these options provide a more severe punishment than that given for minor offenses as well as provide true alternatives to the incarceration that would otherwise would have been imposed under the law.³⁰ In addition, the work and restitution alternatives are superior to another proposal, that of criminal fines as an alternative to incarceration,³¹ because fines do not possess the rehabilitative aspects of the work and restitution alternatives.³² Furthermore, fines do not provide the victim or society as a whole with the tangible benefits which flow from the offender's work or restitution.³³

The work and restitution alternatives each satisfy three of the four rationales of punishment discussed earlier, namely retribution, deterrence, and rehabilitation.³⁴ Short of capital punishment, incapacitation can only be met through incarceration.³⁵ Both alternatives satisfy society's desire for retribution because each allows society to force the offender to do something that he would not otherwise freely do.³⁶ The deterrent rationale is satisfied³⁷ because the offender has been punished for his actions. In theory, any punishment will act as a deterrent if it is swiftly administered, certain to be administered, and severe or undesirable.³⁸ Thus, assuming an alternative sentence will be as swift and certain as any presently imposed sentence, it will have a deterrent effect equal to any other punishment imposed by our criminal justice system.

Finally, the work and restitution alternatives also have rehabilitative potential because they attempt to turn the offender away from crime. In addition, these alternatives provide benefits to the victim and to society as a whole that incarceration does not provide.³⁹ Thus, these alternatives suggest an additional rationale for punishment: societal benefit.

28. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 2.3 which provides that persons with alcohol and/or drug addiction do not fall under the provisions of the act until the condition has been eliminated.

29. See *supra* notes 5 to 11 and accompanying text.

30. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 2.1 which provides that only those offenders who would receive an incarceration sentence as a result of their crime are eligible for the provisions of the Act.

31. See, e.g., Note, *Criminal Fines: A Sentencing Alternative to Short-term Incarceration*, 68 IOWA L. REV. 1285 (1983).

32. See *infra* notes 47 to 48, 56 to 59 and accompanying text.

33. See *infra* notes 49 to 51, 60 and accompanying text.

34. See *supra* notes 5 to 11 and accompanying text. The work and restitution alternatives also meet the criteria of punishment set out by H.L.A. Hart: 1) Both involve pain or consequences considered unpleasant, 2) Both are imposed for an offense against legal rules, 3) Both are imposed on an actual or supposed offender for his offense, 4) Both are intentionally administered by human beings other than the offender, 5) Both are imposed and administered by an authority constituted by a legal system against which the offense is committed. H. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 6 (1968).

35. F. PRASSEL, *supra* note 5, at 19. H. PACKER, *supra* note 5, at 48.

36. See *supra* note 7 and accompanying text.

37. See *supra* note 8 and accompanying text.

38. See F. PRASSEL, *supra* note 5, at 18.

39. See *infra* notes 45 to 51, 55 to 60 and accompanying text.

The Work Alternative

One alternative to incarceration as punishment for criminal conduct is to require the criminal to perform some form of supervised work activity.⁴⁰ The work alternative is particularly appropriate when the offender is a young person, a first time offender who would be emotionally damaged or hardened to crime by the prison environment, or an older person for whom prison would be too harsh.⁴¹ It is also appropriate for a repeat offender who had been showing definite signs of "going straight," but had "slipped up."⁴² The court may believe that the offender would give up crime if he had a skill with which he could get a job. Perhaps the offender already possesses special skills that the court feels should not be wasted in prison.⁴³ Also, the offender's financial support may be crucial to his family's well being. In such cases, and possibly others, the court may perceive a work sentence to be preferable to a prison sentence.⁴⁴

A work alternative sentence also bridges the gap between prison and probation or a fine.⁴⁵ The offender still recognizes that he is being punished, yet the offender is not subjected to the harshness of prison. In addition, the work alternative offers several other potential benefits. For example, the offender's victim might receive restitution from the wages earned by the offender in a community service program or might receive labor directly from the offender. If the offender is sentenced to a community service project, society could receive needed services at a cost less than market cost. Moreover, because fewer persons will be sentenced to incarceration, prison overcrowding would be lessened and costs reduced.⁴⁶

The work alternative is also rehabilitative. The offender is able to express his guilt in a socially accepted manner.⁴⁷ He is able to regain lost self-respect through a sense of accomplishment in his work⁴⁸ and is able to pay his penalty within society rather than isolated from it. Thus, the stigma of crime can be replaced with a positive contribution to the community and society benefits from this productivity instead of being burdened with the cost of incarcerating another offender.

The work alternative further effects rehabilitation because the offender can receive tangible benefits from his work. The court may allow him to keep the

40. Requiring work as a punishment is not new. The United States Constitution provides: "Neither slavery nor involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. Forced labor on chain gangs is a familiar part of penal history. See G. IVES, *A HISTORY OF PENAL METHODS* 155-58 (1914).

41. Of course, there may be times when offenders who fit into these categories are not proper candidates for an alternative sentence. Court discretion is always the deciding factor. See *STATE MODEL ALTERNATIVE SENTENCING ACT*, *infra* at appendix, at § 3.4.

42. For a case history see Klein, *Earn It*, JUDGES' J., Winter 1982, at 39.

43. See *infra* note 71 and accompanying text.

44. A habitual traffic offender may have an alcohol problem that causes his offenses but refuses treatment. Prison would not treat the problem. Community service in a hospital room might be appropriate for its shock value and encourage the offender to seek treatment. If the offender still will not seek treatment, requiring the offender to take antabuse, a chemical that makes a person sick when they drink, might be another method to attack the true cause of the problem. See Silas, *supra* note 16, at 1813.

45. Judge Coy Brewer of the Fayetteville, N.C. Superior Court has stated, "Normally, [judges] either sentence for a term in prison or put [offenders] on parole. For some it's a choice between a slap on the wrist and knocking them in the head with a two-by-four." Silas, *supra* note 16, at 1814.

46. Imprisonment is the most expensive sentencing option. BUREAU OF JUSTICE STATISTICS, *supra* note 16, at 93.

47. See, e.g., Bergman, *Community Service in England: An Alternative to Custodial Sentence*, 39 *FED. PROBATION* 43, 46 (1975).

48. In one study the community service subjects showed higher estimates of their sense of redemption or sense of having paid their debt to society than did subjects who had been fined or had been sentenced to probation. See Thorvaldson, *Does Community Service Affect Offenders' Attitudes?*, in *VICTIMS, OFFENDERS AND ALTERNATIVE SANCTIONS* 71, 79 (J. Hudson and B. Galaway eds. 1980).

wages he earns through his work in order to support himself and his family.⁴⁹ Should the offender learn a new skill in a community service program,⁵⁰ he will gain the potential to better support his family in the future. Because he will have the ability to obtain a meaningful job, there is less chance that he will become a repeat offender.⁵¹

The Restitution Alternative

A second alternative to incarceration as punishment for criminal conduct is to require the criminal to make monetary restitution to his victim.⁵² The purpose of restitution is to make the victim whole for the damage caused by the offender's acts.⁵³ As with the work alternative, restitution would be appropriate for youthful or first time offenders or others whom the court feels would be damaged by prison or for whom prison would serve no purpose.⁵⁴

Like the work alternative, restitution offers a choice between prison and probation.⁵⁵ Punishment is still present because the offender must pay the victim for the damage that he caused. Again, as in the work alternative, restitution is also rehabilitative.⁵⁶ The offender has a sense of atonement for his crime due to his

49. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at §§ 5.2, 5.3.

50. See *id.* at § 5.6 which directs the court to attempt to assign tasks which teach new skills.

51. See Pritchard, *Stable Predictors of Recidivism: A Summary*, 17 CRIMINOLOGY 15, 17 (1979) (stability of employment is the third most frequently related variable to recidivism, following the type of offense and prior adult convictions).

52. The concept of restitution dates back to the Middle Ages. Philosophers have proposed various ways in which the victims of crime would be compensated. Sir Thomas More suggested the use of restitution in connection with imposed labor on public works projects. T. MORE, UTOPIA 51-52 (P. Tirner ed. 1965). Jeremy Bentham is said to have proposed mandatory restitution by convicted offenders and publicly funded compensation for victims whose offenders went unapprehended. CONSIDERING THE VICTIM: SELECTED READINGS IN RESTITUTION AND VICTIM COMPENSATION 3-4 (J. Hudson & B. Galaway eds. 1975). Bonneville de Marsengy is said to have asserted society's duty to crime victims arising from social contract. Like Bentham, de Marsengy believed that if offenders were not available to provide restitution, society must. *Id.* at xx.

See also Jacob, *The Concept of Restitution: An Historical Overview*, in RESTITUTION IN CRIMINAL JUSTICE 45 (J. Hudson & B. Galaway eds. 1977). Jacob points out that in the late nineteenth century, penologists argued over proposals to order prisoners to pay earnings to their victims, to condition sentence suspensions on restitution, or to employ publicly funded compensation programs to benefit those victims unable to obtain payments from offenders through the criminal justice system. *Id.* at 49-50. In 1927, Enrico Ferri noted the demoralizing position of victims forced to seek restitution in the civil courts. E. FERRI, CRIMINAL SOCIOLOGY 154-55 (1927). Ferri recommended that the state impose a strict obligation on offenders to pay victim's damages especially since society had the greater interest in prosecuting criminals. *Id.* at 152. Restitution of some type is currently used in 41 states. See *supra* note 19 and accompanying text. Restitution is also used in Australia, Canada, France, Germany, Great Britain, Holland, India, Israel, Mexico, New Zealand, Norway, Pakistan, and Sweden. Note, *Where Offenders Pay For Their Crimes: Victim Restitution and its Constitutionality*, 59 NOTRE DAME L. REV. 685, 692 (1984). Also, see generally S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME (2d ed. 1970). For a concise but informative overview of the history of restitution see Note, *supra*, at 686-694.

53. Restitution by the criminal to his victim implies making the victim whole by direct action of the criminal. Casson, *Restitution: An Economically and Socially Desirable Approach to Sentencing*, 9 NEW ENG. J. CRIM. & CIV. CONFINEMENT 349, 353 (1983).

54. See *supra* note 41 and accompanying text.

55. L. FORER, CRIMINALS AND VICTIMS 12 (1980); Galaway, *Restitution as an Integrative Punishment*, in ASSESSING THE CRIMINAL 331, 336-37 (R. Barnett & J. Hagel eds. 1977). See also statement of Judge Brewer, *supra* note 45.

56. See generally Edelhertz, *Legal and Operational Issues in the Implementation of Restitution Within the Criminal Justice System*, in RESTITUTION IN CRIMINAL JUSTICE 63, 64 (J. Hudson & B. Galaway eds. 1977); Hudson, Galaway & Chesney, *When Criminals Repay Their Victims: A Survey of Restitution Programs*, 60 JUDICATURE 313, 314 (1977) (10 out of 19 restitution programs studied had rehabilitation as their primary goal); Eglash, *Creative Restitution: Some Suggestions for Prison Rehabilitation Programs*, AM. J. CORRECTION, Nov.-Dec. 1958, at 20; Viano, *Victims, Offenders, and the Criminal Justice System: Is Restitution an Answer?*, in OFFENDER RESTITUTION IN THEORY AND ACTION 91,

renewed contact with his victim.⁵⁷ By repaying his victim, the offender expresses his guilt in a socially accepted manner.⁵⁸ He is also able to regain some sense of self-esteem because he is attempting to make amends for his misdeed.⁵⁹ Perhaps most importantly, the victim is not left damaged, as he is when the offender is incarcerated, but rather receives funds so that he can be made whole.⁶⁰

Proper Sentence Implementation

Before the court decides whether an offender should be sentenced to one of the alternatives, it must order an offender profile⁶¹ and a victim profile⁶² be prepared and submitted to the court.⁶³ The court uses the offender profile to determine whether the offender is a good candidate for an alternative and the type of work,⁶⁴ or the amount of restitution, that should be imposed. The victim profile also assists the court in determining the amount of restitution to be imposed⁶⁵ and whether the offender should be sentenced to perform labor directly for the victim.⁶⁶

98 (B. Galaway & J. Hudson eds. 1978); Keve, *Therapeutic Uses of Restitution*, in OFFENDER RESTITUTION IN THEORY AND ACTION, *supra*, at 59.

57. To the offender's pocket it makes no difference whether what he has to pay is a fine, costs or compensation. But to his understanding of justice it may make a great deal. M. FRY, ARMS OF THE LAW 124 (1951). See also NAT'L L. J., Aug. 23, 1982, at 28, col. 3. "Restitution. . . serves as a continuing reminder to the offender of his crime and its impact. If, instead, you just put offenders in jail for 30 or 60 days, they often just block it out of their minds." (statement of Judge Ricardo Urbina of the Superior Court of the District of Columbia).
58. See Eglash, *supra* note 56, at 2. There are two ways an individual can alleviate the guilt or distress he feels when he hurts others: through compensation or through justification and denial of responsibility. See also Macauley & Walster, *Legal Structures and Restoring Equity*, in CONSIDERING THE VICTIM 291 (J. Hudson & B. Galaway eds. 1975) (Restitution provides a constructive outlet for guilt).
59. "Restitution is seen as specific and allowing for a clear and sense of accomplishment as the offender completes concrete requirements. [T]hrough it the offender who makes restitution is likely to elicit a more positive response from persons around him than the offender sent to prison or receiving some other correctional sanction. In short, restitution is perceived as a sanction which enhances self-respect." Galaway, *Towards the Rational Development of Restitution*, in RESTITUTION IN CRIMINAL JUSTICE 77, 83 (J. Hudson & B. Galaway eds. 1977).
60. This is also why restitution is superior to proposals for large fines imposed upon offenders in order to disgorge their gain from the crime. For a proposal in favor of criminal fines, see Note, *supra*, note 31. Restitution could be paid to a specific state agency which would then forward it to the victim in a fashion similar to some state child support payment agencies. Also, the court might enter a garnishment order requiring the offender's employer to make deductions from the offender's wages and pay them to the victim, the state agency, or into court.
61. The profile would detail such things as his medical and emotional condition, his level of education, his financial condition and surrounding circumstances, his family situation, and any special skills or trades he may know. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 3.3.
62. The victim profile would detail the financial, social, psychological, and physical harm done to any victim. Note, *supra* note 52, at 695. "Victim" also includes indirect victims, e.g., a homicide victim's family, a teller in a bank robbery (cause of action for intentional infliction of mental distress), or the owner of an automobile wrecked during an offender's getaway attempt. See also STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 2.4.
63. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 3.1.
64. The profile allows the court to consider the offender's physical and mental strengths and weaknesses, any special skills or training he may possess, and his own preferences if a choice of programs is available. The profile also assists the court in determining whether the offender can be placed in a situation with limited or no supervision, such as in a hospital or community recreation center, or whether he must have armed supervision in a non-recreational work facility. For an informative overview of this work alternative, see Balkin, *Prisoners by day: a proposal to sentence non-violent offenders to non-residential work facilities*, 64 JUDICATURE 154 (1980).
65. The offender profile and the victim profile should be used in tandem by the court. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 6.4.
66. See *infra* note 70 and accompanying text.

If the court⁶⁷ determines that the work alternative is the appropriate punishment for the offender, it must determine whether the work to be performed is to be directed towards the victim or towards the community. Service rendered to the victim should be related to the crime, when possible,⁶⁸ in order to remind the offender why he is being punished.⁶⁹

If the victim is unwilling to allow the offender to work for him,⁷⁰ or if for some reason the offender cannot render the work directly to the victim, the court could impose a sentence of community service. Defendants with special skills could be given work sentences utilizing their areas of expertise.⁷¹ In the cases of unskilled offenders, courts can work with local government departments and agencies or volunteer organizations to locate tasks which need to be performed.⁷² Again, when possible, the work assigned should have some relation to the offense committed.⁷³

67. Because of the sensitive and complex nature of the decision, the judge should make the decision even in those states that allow the jury to determine the length of sentence or impose probation.

68. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 5.4.

69. For example, a car thief might be sentenced to washing, waxing, and repairing the stolen car each weekend for a year. Or a burglar of an elderly person's home might be sentenced to cutting grass and making repairs in the spring and summer, raking leaves in the fall, and shoveling snow and ice in the winter.

70. Rendering service to the victim will probably only be possible when the offender's acts did not involve violence to the victim since most persons would probably be unwilling to maintain contact with the offender in those circumstances.

71. Offenders who are doctors or dentists could be sentenced to donate their time for a specified number of hours in a free clinic in a depressed neighborhood or in local jails. For example, the prisoner who operated the washing machine next to Charles Colson, former Special Counsel to President Nixon, at Maxwell Federal Prison had been a prominent doctor before being convicted of stock fraud. He was not allowed to practice, however, and since this particular prison had no resident doctor, the many inmates with medical needs had to rely on a paid paramedic while a qualified doctor spent his days cleaning linen. When the doctor later volunteered to help meet a shortage of physicians in the surrounding community by working nights, his warden rejected the offer. Armstrong, *supra* note 17, at 245 citing address by Charles Colson to the National Association of Evangelicals (1981).

Lawyers, whose offense is unrelated to their profession (thus not affecting confidence in their professional skills) could be sentenced to working weekends at the legal aid clinic or helping reduce the workload for the public offender's office by filing motions or pleadings and performing other tasks which require a lawyer but do not require the offender to represent the client.

72. Where many offenders are sentenced under the work alternative, large municipal projects could be undertaken. For example, if the city needs a new building, offenders could be used to provide some of the labor. Such a project could be ideal for teaching unskilled offenders marketable skills. The city benefits by receiving labor at less than market cost. If a project of this type is not available or feasible, then offenders might be sentenced to clean and renovate city parks. A group might be trained to operate the city's snow removal equipment and used as a relief crew during round-the-clock snow emergencies.

For those offenders whose offense merits a large number of service hours, an "industry related work alternative" might be appropriate. There, public spirited volunteer local industries would "hire" a work alternative offender. The industry would train them in a specific skill and the offender would work for the company for the duration of the sentence. He would be paid a nominal wage — below that of a "regular" worker — in order to provide an incentive to the employer to participate in such a program. The court would determine whether he could keep the wages for himself and his family, must pay the wages to the victim as restitution, or must donate them to a court approved charity. Some people argue, however, that the use of a court approved charity might give rise to the appearance of impropriety. See NAT'L L. J., Apr. 23, 1984, p. 25, col. 2. See also Imlay & Glasheen, *See What Condition Your Conditions Are In*, in PROBATION, PAROLE AND COMMUNITY CORRECTIONS 432, 434 (R. Canter & L. Williams eds., 2d ed. 1976). Some courts have held that restitution may only be ordered paid to the victim. See *infra* note 79 and accompanying text.

At the end of the offender's sentence, the industry would have the option to hire the offender as a regular employee. In either case, the offender acquires a marketable skill, thus is less likely to commit a crime again, (see Pritchard, *supra* note 51) the employer has received inexpensive labor and has had a chance to do something good for another person and his community, and society receives a newly productive worker.

73. For example, a drunk driver who refuses treatment might be required to be a worker on weekends in a hospital emergency room and thus see the results of drunk driving. A robber might be required to give talks on ways to stop crime to local citizen's watch groups.

Some sentences imposed as work alternatives in the past should be avoided. Sentencing an offender to attend church regularly,⁷⁴ even if to a church of his choice, to do mission work,⁷⁵ or to work for an organization with religious or political affiliations may violate the free speech and establishment clauses of the Constitution.⁷⁶ Sentencing an offender to donate blood⁷⁷ may be an invasion of personal privacy.⁷⁸

Courts must also use caution when imposing a restitution sentence. The court must ensure that the restitution payment is made to the victim of the offender's crime.⁷⁹ Courts must also not attempt to use restitution as a disguise for a fine or to give a windfall to a victim.⁸⁰ Restitution may be inappropriate when the offender is a wealthy person because in easily paying the restitution imposed, he avoids feeling any punishment.⁸¹ In such situations, the court may wish to use a work alternative sentence together with the restitution order.⁸² Moreover, restitution may be inappropriate⁸³ in situations when the "loss" to the victim is too great for the offender to pay.⁸⁴

74. NAT'L L. J., Apr. 23, 1984, at 24, col. 1. See also NAT'L L. J., Feb. 6, 1984, at 47, col. 2 describing an offender who was sentenced to confess his crime before a church congregation on Sunday as a condition of probation even though the offender did not attend church.

75. NAT'L L. J., Apr. 23, 1984, at p. 24, col. 2.

76. See, e.g., 132 Op. Att'y Gen. (Ill. 1978).

77. NAT'L L. J., Apr. 23, 1984, *supra* note 74, at 24, col. 1.

78. In *Springer v. United States*, 148 F.2d 411 (9th Cir. 1945), two of the three circuit judges held that to require an offender to report to the local Red Cross Blood Bank and donate a pint of blood as a condition of probation was, "[an invasion of] the physical person and void on its face." 148 F.2d at 416 (Denman and Stevens, Circuit Judges, concurring). This decision was reaffirmed by the Ninth Circuit in *United States v. Consuelo-Gonzales*, 521 F.2d 259, 264 (9th Cir. 1975) and was noted with approval by the Second Circuit in *Fiore v. United States*, 696 F.2d 205, 208 (2nd Cir. 1982).

79. The government has maintained that payments to parties other than those aggrieved violate the Probation Act, 18 U.S.C. § 3651 (1982). In *United States v. Clovis Retail Liquor Dealers Trade Association*, 540 F.2d 1389 (10th Cir. 1976), the court overturned a district court's ruling that liquor dealers convicted of violations of the Sherman Anti-Trust Act in connection with retail liquor prices had to donate money to a council on alcoholism. The court stated, "We are compelled to reverse the trial court's sentencing because we are unable to conclude that the [council on alcoholism] or persons which it helps were 'aggrieved' in the amount of [the restitution ordered] for which the conviction was had." 540 F.2d at 1390. Similarly, in *United States v. Missouri Valley Construction Co.*, 741 F.2d 1542 (8th Cir. 1984), the defendant plead guilty to charges that it violated the Sherman Anti-Trust Act when it conspired with other highway contractors to rig bids and allocate highway construction contracts. The defendant was sentenced (upon the defendant's own suggestion) to endow the University of Nebraska with a \$1.4 million chair in ethics. The court stated:

[W]here a defendant has been charged with crimes against several persons, but convicted on only some of the counts, the court may not order the defendant, as a condition of probation, to make payments to any persons who were not aggrieved by the precise acts charged in those counts on which conviction was had. 741 F.2d at 1547.

Accord *United States v. Wright Contracting Co.*, 728 F.2d 648 (4th Cir. 1984).

80. See *United States v. Weldin*, 568 F. Supp. 516 (N.D. Ala. 1983) striking down as unconstitutional the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 51 U.S.L.W. 139 (codified at 18 U.S.C. §§ 3579-80 (1982)). The opinion raises a myriad of issues. For a concise discussion of the case and its findings see Note, *supra* note 52, at 700-15.

81. See S. SHAFER, *supra* note 52, at 126.

82. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 5.12, 6.7.

83. If the restitution alternative is not an appropriate sentence, the victim may still be able to recover for his damages by resorting to civil causes of action. The government may also bring a cause of action under the Racketeer Influenced and Corrupt Organizations Act (RICO), when applicable, in order to disgorge the offenders ill-gotten gains. See generally Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies Symposium on White Collar Crime*, 53 TEMP. L. Q. 1009 (1980); Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 NOTRE DAME L. REV. 945 (1984); Miller & Olson, *The Expanding Use of Civil RICO*, CAL. LAW., June 1984, at 12, col. 3.

84. In this situation, if the victim is covered by insurance, the restitution ordered might be the amount of the insurance payments that the family paid up to and during hospitalization and any costs not covered by insurance. "Payments" is here used to mean both the monthly premiums and the deductible under the insurance policy. The offender might also be forced to pay for any increase in the victim's

One commentator also foresees problems with Supreme Court decisions⁸⁵ in situations where an offender is unable to pay a restitution sentence.⁸⁶ In those cases, the Court held that inability to pay a fine cannot result in imprisonment.⁸⁷ The court did realize that inability to pay is not the same as failure to pay,⁸⁸ but care must be taken to draft a restitution provision to show that imprisonment would be the result in either case without the restitution sentence.⁸⁹

SOME EXISTING MEASURES

Present "alternative sentencing" legislation does not give enough direction to sentencing courts, leaving open the possibility of abuse and disparity of sentences for the same crime.

As presently implemented, these "alternative sentencing" approaches have several problems.⁹⁰ When courts are given the discretion to implement an alternative sentence, or when the state code is not specifically written, judges have few, if any, guidelines to follow in imposing sentence.⁹¹ For example, few alternative sentencing statutes describe the type of offender eligible to receive an alternative sentence.⁹² Only eight of the forty-one states that authorize judges to impose "community service" further define the phrase "community service" in suggesting what forms the sentence might take.⁹³ Furthermore, most statutes do not discuss who or what group or agency is eligible to receive service from offenders sentenced to community service.⁹⁴ Also, these statutes rarely contain any provisions on whether the state will be liable for the torts committed by a participant in a community service program and seldom any provision on whether a community service participant may qualify for benefits under the state worker's compensation laws.⁹⁵ Moreover, most community service statutes offer no limit on the number of hours of work that may be assigned nor guidance as to the kinds of work that

premiums due to the filing of the claim resulting from the offenders acts. This might only be feasible in insurance which is eventually "paid up" because otherwise the victim may carry the policy indefinitely.

Only in special circumstances should the offender be required to subrogate the insurer because it gives a windfall to the insurer since the insurer bases the premiums charged on the possibility of having to pay a claim and also makes a profit from the use of the premiums charged. When the victim is made whole by the insurer the court should impose a different type of sentence. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 6.5.

85. *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971). In both of these cases the offender was indigent and was unable to pay the fine imposed by the sentencing court.

86. See Casson, *supra* note 53, at 376-78.

87. 399 U.S. at 242; 401 U.S. at 397-98.

88. "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." 401 U.S. at 400-01.

89. Thus, if an offender cannot or will not pay, and imprisonment results, there will be no Constitutional problems. To be safe, restitution should only be implemented when the offender has a reasonable opportunity to pay. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 6.5. If the offender cannot pay, and the court feels imprisonment should not be imposed, then the work alternative should be used.

90. Other "alternatives" such as intensive probation supervision, fines, drug or alcohol abuse therapy, and employment counseling are used in some states. Harland, *supra* note 25, at 426. But see *supra* notes 23 to 33 and accompanying text.

91. Harland, *supra* note 25, at 467-69.

92. *Id.* at 432-39.

93. ALASKA STAT. § 12.55.055 (1984); ILL. ANN. STAT. ch. 38, §§ 1005-6-3(b)(9), 1005-6-3.1(c)(10) (Smith-Hurd Supp. 1984-1985); KAN. STAT. ANN. § 21-4610(3)(j) (Supp. 1984); KY. REV. STAT. ANN. § 533.030(3) (Baldwin 1984); ME. CRIM. LAW. CODE ANN. § 726A (1982); NEB. REV. STAT., § 29-2262(2)(n) (1979); OHIO REV. CODE ANN. § 2951.02(H) (Baldwin Supp. 1983); TENN. CODE ANN. § 40-35-303(d)(3) (1982).

94. Harland, *supra* note 25, at 472-74.

95. *Id.* at 474-81.

may be required.⁹⁶ Likewise, statutes authorizing restitution usually fail to limit the amount a criminal may be required to pay to his victim.⁹⁷

Alternative sentences are also often imposed incorrectly. Rather than being imposed as an "alternative" to incarceration, courts often impose these alternative sentences in addition to incarceration.⁹⁸ At other times they are imposed upon individuals who would not have been incarcerated, but instead would only have received a fine or probation.⁹⁹ In other instances a proper type of sentence is imposed but the amount of sentence is inappropriate.¹⁰⁰

Three examples of current state alternative sentencing legislation demonstrate these problems in varying degrees. The Florida community service sentencing statute¹⁰¹ provides: "In addition to any punishment, the court may order the defendant to perform a specified public service."¹⁰² By failing to specify what type of offender is eligible for an alternative sentence, the statute presumes that all offenders are eligible. Thus the statute does not prohibit sentencing persons convicted of violent crimes to work in the community.¹⁰³ Moreover, since the statute allows courts to impose the penalty in addition to any other punishment imposed, not in lieu thereof, there is a potential for abuse and discrimination because courts could punish some offenders more than others even though the offenders were convicted of the same crime. The statute also fails to limit the type or amount of work which courts may impose, again leaving open the possibility of great disparity in sentencing for the same offense. Furthermore, the statute offers no guidance to courts as to the appropriate beneficiaries of the "public service" which the offender is required to perform.¹⁰⁴

Although Florida's companion restitution statute¹⁰⁵ is more complete than its community service measure, it too has problems. Like the community service statute, the restitution statute allows the imposition of restitution in addition to other punishments,¹⁰⁶ thereby opening the door to potential abuse. Also, the statute does not give any guide as to the amount of restitution which courts can impose. Although section 1 appears to require an amount of restitution equal to the amount of the victim's loss,¹⁰⁷ section 2 allows the court to take into account the offender's ability to pay.¹⁰⁸ Because the purpose of restitution is to make the victim whole,¹⁰⁹ it should not matter whether or not the offender can easily pay.

96. *Id.* at 432-39.

97. *See supra* note 19.

98. Harland, *supra* note 25, at 443.

99. Umbreit, *Community Service Sentencing: Jail Alternative or Added Sanction?*, 45 FED. PROBATION 3, 5, 10-11 (1981); NATIONAL INSTITUTE OF CORRECTIONS, U.S. DEP'T. OF JUSTICE, COMMUNITY SERVICE BY OFFENDERS (1979) (prepared by the National Council on Crime and Delinquency); U.S. DEP'T OF JUSTICE, SENTENCING TO COMMUNITY SERVICE 31 (1977).

100. *See* Harland, *supra* note 25, at 468-69.

101. FLA. STAT. ANN. § 775.091 (WEST SUPP. 1984).

102. *Id.*

103. While this note does not contend that these offenders should be excluded from community service, this contingency should be addressed in the statute.

104. *See* STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 5.5 which provides a suggested hierarchy of possible recipients from which the court may select in deciding who is to receive the work that is to be ordered preformed by the offender.

105. FLA. STAT. ANN. § 775.089 (WEST SUPP. 1984).

106. *Id.* at (1).

107. (1) In addition to any punishment, the court may order the defendant to make restitution to the aggrieved party for damage or loss caused by the defendant's offense, if monetary or nonmonetary restitution. The court may make the payment of restitution a condition to probation in accordance with § 948.03. *Id.*

108. (2) In determining the amount and method of payment of restitution, the court shall consider the financial resources of the defendant and the burden the payment of restitution will impose on the defendant. *Id.*

109. *See supra* note 58 and accompanying text.

Thus, limiting the amount imposed because of hardship to the offender is inappropriate and to do so would discount the rationale for restitution. The measure also states that the restitution may be "monetary or nonmonetary,"¹¹⁰ but it does not explain the distinction. A sentencing judge does not have time to review the legislative history, if any exists, to see what the legislature meant by its use of certain terms.

The measure also discounts the rationale for restitution as a penalty¹¹¹ by allowing courts to grant remission of the restitution sentence if the offender cannot pay.¹¹² Consequently, only those offenders who have not spent the "fruits" of their crime will have to pay and the possibility exists that the offender who quickly does away with his booty may avoid punishment altogether. Since restitution to punish the offender make the victim whole, then there is no logical reason to allow such distinctions.

California's alternative sentencing statute¹¹³ also demonstrates some weaknesses of current alternative sentencing legislation. Only first time offenders convicted of theft from a retail merchant or a library can be sentenced under this statute.¹¹⁴

The statute does impose a true "alternative" sentence because the community service is imposed in lieu of a fine. It also does provide an upper limit on the number of hours of community service which is no more than the number of hours that would be required to pay the fine at minimum wage.¹¹⁵ However, the penalties are hardly equal in the amount of punishment imposed. For example, it would take 74 hours of work to equal a \$250 fine. The possibility of discrimination or disparity of sentence for the same crime exist. By limiting the alternative to only one type of offender, the statute fails to acknowledge the fact that repeat offenders may benefit as much, if not more, by the socially rehabilitative aspects of community service¹¹⁶ than the first time offender. Furthermore, the statute fails to consider persons convicted of other crimes who might benefit from an alternative sentence.¹¹⁷ In addition, by so limiting the scope of the statute, any attempt to use community service as a tool to teach skills to chronically unemployed offenders, as mentioned earlier in this note,¹¹⁸ might be construed as a violation of the existing statute and therefore void. It might be better to have no statute and allow courts to impose community service on an ad hoc basis with all the

110. FLA. STAT. ANN. § 775.089, *supra* note 107.

111. See *supra* notes 57 to 64 accompanying text.

112. (3) Any defendant ordered to make restitution may petition the court which ordered him to make such restitution for remission from any payment of restitution or from any unpaid portion thereof. If the court finds that the payment of restitution due will impose an undue hardship on the defendant or his family, the court may grant remission from any payment of restitution or modify the method of payment. *Id.* at (3).

113. CAL. PENAL CODE § 490.5 (WEST SUPP. 1985).

114. The statute provides:

(a) Upon a first conviction for petty theft involving merchandise taken from a merchant's premises or a book or other library materials taken from a library facility, a person shall be punished by a mandatory fine of not less than fifty dollars (\$50) and not more than one thousand dollars (\$1,000) for each such violation; and may also be punished by imprisonment in the county jail, not exceeding six months, or both such fine and imprisonment. *Id.*

115. (d) In lieu of the fines prescribed by subdivision (a), 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 as provided by subdivision (a) at the minimum wage prevailing in the state at the time of sentencing. *Id.*

116. See *supra* notes 47 to 51 and accompanying text.

117. See *supra* notes 40 to 44 and accompanying text.

118. See *supra* notes 50 to 51 and accompanying text.

problems that would accompany it than to so restrict the use of community service.

The state of Maine has enacted a statute¹¹⁹ that is more likely to conform to the guidelines for alternative sentencing set out by this note above.¹²⁰ The statute allows the court to impose requirements for the probation of an offender who has been sentenced to imprisonment.¹²¹ The statute appears to offer the penalty in lieu of imprisonment and not upon a person who deserves to be sentenced to probation. The statute provides for restitution to the offender's victims¹²² and sets forth the code provision where guidelines for imposing restitution are to be found.¹²³ It also permits imposition of community service¹²⁴ and makes specific references as to who is eligible to receive work from the offender.¹²⁵ It does not, however, set a limit upon the number of hours of work that can be imposed.

The statutes described above have other significant problems. None of the statutes (with the exception of the Florida¹²⁶ and Maine¹²⁷ restitution provisions) has a provision for default by the offender on his sentence.¹²⁸ The community

119. ME. REV. STAT. ANN. tit. 17-A, § 1204 (1983).

120. See *supra* notes 40 to 89 and accompanying text. See also MODEL STATE ALTERNATIVE SENTENCING ACT, *infra* at appendix.

121. 2-A. As a condition of probation, the court in its sentence may require the convicted person:

- A. To support his dependents and to meet his family responsibilities;
- B. To make restitution pursuant to chapter 54 to each victim of his crime, or to the county where the offense is prosecuted if the identity of the victim cannot be ascertained or if the victim voluntarily refuses the restitution;
- C. To devote himself to an approved employment or occupation;
- D. To undergo, as an out-patient, available medical or psychiatric treatment, or to enter and remain, as a voluntary patient, in a specified institution when required for that purpose. Failure to comply with this condition shall be considered only as a violation of probation and shall not, in itself, authorize involuntary treatment or hospitalization;
- E. To pursue a prescribed secular course of study or vocational training;
- F. To refrain from frequenting specified places or consorting with specified persons;
- G. To refrain from possessing any firearms or other dangerous weapon;
- H. To remain within the jurisdiction of the court, unless permission to leave temporarily is granted in writing by the probation officer, and to notify the probation officer of any change in his address or his employment;
- I. To refrain from drug abuse and excessive use of alcohol;
- J. To report as directed to the court or the probation officer, to answer all reasonable inquiries by the probation officer and to permit the officer to visit him at reasonable times at his home or elsewhere;
- K. To pay a fine as authorized by chapter 53;
- L. To perform specified work for the benefit of the State, a county, a municipality, a School Administrative District, other public entity or a charitable institution; or
- M. To satisfy any other conditions reasonably related to the rehabilitation of the convicted person or the public safety or security.

ME. REV. STAT. ANN. tit. 17-A, *supra* note 119.

122. Revised § 1323 now requires the court to consider imposing restitution in all cases and if not imposed requires the court to state the reasons why. ME. REV. STAT. ANN. tit. 17-A, § 1323 (Supp. 1984).

§ 1323. Mandatory consideration of restitution

1. Inquiry as to victim's financial loss. The court shall, whenever practicable, inquire of a prosecutor, police officer or victim with respect to the extent of the victim's financial loss, and shall order restitution where appropriate. The order for restitution shall designate the amount of restitution to be paid and the person or persons as to whom the restitution will be paid.

2. Reasons for not imposing restitution. In any case where the court determines that restitution should not be imposed in accordance with the criteria set forth in section 1325, the court shall state in open court or in writing the reasons for not imposing restitution. *Id.*

123. See *supra* note 121. The very specific requirements for the imposition of restitution are found at § 1321-1329.

124. ME. REV. STAT. ANN. tit. 17-A, § 1204(L).

125. *Id.*

126. FLA. STAT. ANN. § 775.091 (WEST SUPP. 1984).

127. ME. REV. STAT. ANN. tit. 17-A, § 1323 (Supp. 1984).

128. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 7.1 which provides that

service statutes do not have any provisions for tort liability caused by the offender's acts¹²⁹ or for injuries sustained by the offender while performing work.¹³⁰ They do not state whether the community service is to be supervised.¹³¹ The restitution statutes do not have any provision for the ways in which restitution is to be delivered to the victim.¹³² Finally, none of these statutes reaches the lengths to which alternative sentences can and ought to be used.¹³³

These statutes are representative of legislation presently enacted in the United States. As a whole the statutes are too general or too restricted in their scope. They do not provide the proper guidance for sentencing judges and at best allow individual judges to go beyond the sentence guidelines enacted by the state legislatures. At worst they allow the possibility of abuse, discrimination, and disparity in sentencing.

CONCLUSION

Punishment restricted to incarceration currently suffers theoretical and practical problems. Alternative sentencing, in the form of court ordered work and restitution, can solve many of those problems. Most states, however, have improperly drafted alternative sentencing legislation.

To assist state legislators in properly implementing alternative sentencing measures, a proposed Model State Alternative Sentencing Act is set forth in the appendix. It is drafted to be flexible enough so that state legislators may use it in the form as set forth or modify it to fit into the state's existing penal system. The model is drafted to eliminate the ambiguity of existing legislation and to offer judges clear guidelines in imposing alternative sentences. At the same time, it provides judges with sufficient discretion so that each alternative sentence can be properly fitted to the offender and his offense while still fitting into the parameters of the statute. It is hoped that the use of this statute or a modified version will benefit victims, offenders, and society as a whole.

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when an offender fails to cooperate (i.e. make a good faith effort) under an alternative sentence, the original incarceration sentence is to be imposed less an amount in consideration of any time spent in compliance with the alternative sentence. Under § 7.2, the offender is not to be adjudged in default if the reason for his noncompliance is wholly or largely beyond his control. For example, if the work alternative program itself is terminated through no fault of the offender's; or if the person for whom the offender is to perform work refuses to cooperate not due to the fault of the offender; or if the offender cannot pay the restitution sentence imposed by the court due to injury, or to layoff that was not the result of action by the offender, the offender is not in default.

129. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 5.10.

130. See *Id.*, at § 5.9.

131. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 4.4.

132. They do not specify if the offender is to deliver monetary restitution to the victim face-to-face, whether it is to be paid to the court, or paid in some other fashion. See STATE MODEL ALTERNATIVE SENTENCING ACT, *infra* at appendix, at § 6.2.

133. See *supra* notes 40 to 89 and accompanying text.

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APPENDIX

MODEL STATE ALTERNATIVE SENTENCING ACT

Section 1

Short Title

Section 1.1 The short title of this act shall be the Alternative Sentencing Act of _____.

Section 2

Persons Who Qualify For The Provisions Of This Act

Section 2.1 Only those persons who have been convicted of an offense which would result in a sentence of incarceration qualify for the provisions of this act. Persons who would not receive a sentence of incarceration, if the provisions of this act were unavailable, are not persons who fall under the provisions of this act.

Section 2.2 Persons who have been convicted of (the highest degree of offense for the taking of another human life) and those persons who have been convicted of (the highest degree of the crime of rape) under the (insert appropriate criminal code provisions) are not persons who qualify under the provisions of this act. All other persons who have been convicted of an offense in violation of the state criminal code, and who meet the qualifications set forth in section 2.1 are persons who are eligible under the provisions of this act.

Section 2.3 Persons who have been convicted of an offense committed while under the influence of drugs or alcohol are not eligible under the act unless the court believes that the person is not a habitual user of the substance. If the court believes that the person is a habitual user of the substance, that person is not eligible under the provisions of this act until the person has successfully completed a qualified program designed to end the use and/or dependency upon the substance. "Successfully completed" shall be defined as the cessation of all use of the substance.

Section 2.4 A "victim" for the purposes of this act shall be any person or entity suffering damages as set forth in section 6.4 as a result of the acts of the offender or as a result of events flowing from the acts of the offender. A "victim" for the purposes of this act shall not include an insurer or surety that has paid any part of a victim's damages within the meaning of this act.

Section 3

Procedure For Admission To The Program

Section 3.1 After conviction and imposition of sentence of incarceration, and up on motion of the prosecuting attorney, or when the court feels that it is in the best interests of justice, the court shall order that a victim profile and an offender profile be compiled by (the Department of Corrections) (the Department of Alternative Sentencing) (the Prosecuting Attorney for the victim and the defending attorney for the offender) (other) (choose one) and submitted to the court for review.

Section 3.2 The victim profile shall include, but not be limited to, the following: the crime committed against the victim and the circumstances thereof (including aggravating circumstances, if any), the relationship of the victim to the offender (if any), damages incurred by the victim as a result of the offense (such as medical bills, stolen property, damage to property, lost wages, funeral expenses, pain and suffering, emotional distress, reasonable out-of-pocket expenses from the filing of charges and/or cooperating in the investigation and prosecution of the offense), financial status, and any other pertinent facts.

Section 3.3 The offender profile shall include the following: the crime committed against the victim and the circumstances thereof (including mitigating circumstances, if any), prior offenses and circumstances thereof when relevant, relationship of victim to offender (if any), medical profile, mental profile (when ordered by the court), financial status, employment status, level of education, family status (including all persons who may rely upon offender for any support), special skills, and any other pertinent facts.

Section 3.4 After review of the victim profile and offender profile, and if the court feels that it is in the best interests of the victim, society, the offender, the offender's family, justice, or otherwise, the court may impose a sentence under the provisions of this act, which will exclude all prior imposed sentences for the same crime.

Section 4

Creation Of Department Of Alternative Sentencing

Section 4.1 This act creates a Department of Alternative Sentencing under the control of the Governor.

Section 4.2 The Department shall consist of a Director, an Assistant Director, and other personnel as needed.

Section 4.3 The Department shall prepare all victim and offender profiles at the direction of the court and shall assist in the recommendation and implementation of alternative sentences imposed under the provisions of this act.

Section 4.4 The Department shall monitor all programs developed by the Department; control (along with the sentencing court) the operations of all programs and the treatment and supervision of all offenders within the programs of the Department; make reports to the sentencing court, when so requested, upon the progress and/or behavior of offenders within the program; and make yearly reports and recommendations to the Governor.

Section 5

The Work Alternative

Section 5.1 When the court believes that the offender should be sentenced under the provisions of this act, it may sentence the offender to a period of work as specified within this section.

Section 5.2 The court may direct that this work be compensated or uncompensated, but if the offender is also sentenced to restitution under section 6 of this act, the work must be compensated.

Section 5.3 When the court directs that the work be compensated, the rate of compensation shall be the prevailing national minimum wage, unless the court directs that a higher amount be paid. The offender shall be compensated by the (Department of Correction) (Department of Alternative Sentencing) (other) (choose one).

Section 5.4 When an offender is sentenced under this section, the court shall make every effort to assign a task that is related to the offense committed and/or to the victim to the extent possible.

Section 5.5 When the sentence direction in section 5.4 is impossible or, in the opinion of the court, unjust or unwise, the court may assign another task. The court should attempt to assign tasks in areas of community need as follows: 1) manpower shortages of local and/or state government; 2) manpower shortages of public-related agencies such as schools, universities, and libraries; 3) manpower shortages of non-profit agencies which work for the good of the community as a whole; 4) manpower shortages of profit making agencies that work for the public good such as hospitals. In cases which, in the opinion of the court, warrant, the court may assign a task not in conformity with the above list.

Section 5.6 When at all possible, tasks assigned should be designed to teach a new skill or trade, or utilize a skill or trade already possessed by the offender, and should avoid, when at all possible, the assigning of tasks considered to be degrading.

Section 5.7 The total number of hours of work imposed under this section shall not exceed the number of hours that would have been imposed had the offender been incarcerated, to be computed as follows: 8 hrs. x number of weeks of incarceration had it been imposed x five. The number of hours as computed may be reduced as warranted.

Section 5.8 The sentence imposed under the provisions of this act may be reviewed by (name of body which determines parole) and nothing in this act is to be construed as limiting the possibility of parole.

Section 5.9 The assigning of tasks that are abnormally dangerous or ultrahazardous is prohibited.

Section 5.10 No offender assigned under the provisions of this section is to be considered an employee of the state for any purpose. The state provisions for workmen's compensation are not applicable to any offender sentenced under this act.

Section 5.11 All persons involved in any way with the programs created under this act are liable under the common law of this state for any intentional torts committed by them. Offenders sentenced under the provisions of this act are not precluded from bringing suit against persons in a supervisory, co-worker, co-offender, or other capacity for negligence resulting from a program created under the provisions of this act but the standard of care to which these

persons are to be held is (slight) (a reasonable man standard) (choose one). A comparative fault standard is to be used for apportioning damages and a plaintiff shall be precluded from recovery if his own fault exceeds 50% of the total fault involved.

Section 5.12 The provisions of this section may be used in conjunction with the provisions of section 6.

Section 6

The Restitution Alternative

Section 6.1 When the court determines that the offender should be sentenced under the provisions of this act, it may sentence the offender to make restitution to the offender's victim (or victim's family, when conditions warrant).

Section 6.2 The court may order the offender to pay the restitution directly to the victim, or to the Department of Alternative Sentencing, or to the court, or it may issue a garnishment order requiring the offender's employer to pay the restitution to the victim, or to the Department of Alternative Sentencing, or into the court for disbursement.

Section 6.3 When the offender is unemployed, the court may direct the appropriate agency to attempt to locate suitable employment for the offender or may assign the offender to a work alternative program under section 5 of this act and require that restitution be made from the wages paid to the offender under that section's provisions.

Section 6.4 The amount of restitution that may be imposed shall be only that amount that in the judgment of the court will make the victim (or the victim's family, when conditions warrant) whole inasmuch as possible for damages resulting from the actions of the offender. The damages may include, but are not limited to, medical bills, stolen property, damage to property, lost wages, funeral expenses, pain and suffering, emotional distress, reasonable out-of-pocket expenses from the filing of charges and/or cooperating in the investigation and prosecution of the offense.

Section 6.5 When the victim of the offender's acts has received insurance payments as a result of the offender's action, the offender may only be required to pay the victim's prior insurance premiums, the deductible paid by the victim, and the amount of increase (if any) in the victim's subsequent insurance premiums in addition to any damages (under section 6.4) not covered by insurance. In exceptional cases, the offender may be required to subrogate the insurance company for its payments to the victim. This section does not preclude the imposition of restitution for any damages not compensated by insurance.

Section 6.6 In addition to that set forth in section 6.4, the amount of restitution imposed shall not exceed that which the offender can reasonably be expected to pay. The imposition of restitution under the provisions of this act as a fine is prohibited.

Section 6.7 The provisions of this section may be used in conjunction with the provisions of section 5.

Section 7

Default

Section 7.1 When an offender sentenced under the provisions of this act has, in the judgment of the court, failed to fulfill the conditions required under this act, the court may revoke the sentence imposed under this act and resentence the offender to the term of incarceration that he would have received had he not been sentenced under this act. In determining the length of the incarceration, the court shall take into consideration the amount of compliance by the offender with the original sentence and limit the incarceration accordingly.

Section 7.2 No offender shall be incarcerated under the provisions of section 7.1 when the reasons for his noncompliance with the original alternative sentence imposed were wholly or largely beyond his control.

Section 8

Repealer

Section 8.1 All prior code sections inconsistent with this act are repealed.