

# PRUDENT USE OF PRISON SPACE: THE SENTENCING IMPROVEMENT ACT

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On July 20, 1983, Senator Sam Nunn (D-Ga.) and I introduced the Sentencing Improvement Act.<sup>1</sup> This bill would create a rebuttable presumption that persons convicted of specified "dangerous" offenses should be imprisoned, while certain "non-violent" offenders should be subject to non-incarcerative sanctions such as community service and restitution.<sup>2</sup> The Sentencing Improvement Act reflects an emergent policy consensus among criminal justice professionals, social commentators, economists, and public officials across the country who recognize the necessity of sentencing alternatives.<sup>3</sup>

This article will examine the background and purposes of the Sentencing Improvement Act. First, it will analyze the history of incarceration as a criminal punishment. Second, it will detail the current problems of prison overcrowding and excessive operating costs. Third, an analysis of the Sentencing Improvement Act of 1983 will demonstrate how society can punish wrongdoers without punishing itself. Last, it will suggest alternatives to incarceration which would reduce the waste of human and economic resources inherent in the present penal system.

## PRISON AS A SENTENCING ALTERNATIVE

Historically, the punishment of criminal offenses has taken various forms, some more brutal than others.<sup>4</sup> Punishments have included physical torture, banishment, slavery, and deportation of criminals to the new world.<sup>5</sup>

In the United States, the Quakers of colonial Pennsylvania introduced imprisonment as the primary means of criminal punishment.<sup>6</sup> The first American prison was established in Philadelphia in 1790, and many other Eastern cities quickly followed this lead.<sup>7</sup> The Quaker's visualized imprisonment as a more humane alternative to harsh physi-

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1. S. 1644, 98th Cong., 1st Sess., 129 CONG. REC. S10371-77 (daily ed. July 20, 1983).

2. S. 1644, 98th Cong., 1st Sess. § 2 (1983) (adding 18 U.S.C. § 3672).

3. *State Prisons Around Nation Scramble for Relief as Overcrowding Mounts*, N.Y. Times, Sept. 29, 1983, at A18, col. 1.

4. H. BARNES & N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 343-48 (1954).

5. *Id.* at 343-47, 362-64.

6. *Id.* at 378.

7. Prisons were established in New York City in 1797 and in Trenton, New Jersey, in 1799. *Id.* at 394-97.

cal punishments.<sup>8</sup> Offenders, called "penitents," were kept in solitary confinement to reflect on their crimes, confess before God, and reform themselves through spiritual rehabilitation.<sup>9</sup> In 1790, Pennsylvania enacted laws making imprisonment the standard criminal punishment.<sup>10</sup> By 1850, every state had adopted similar laws.<sup>11</sup> This trend eventually spread to virtually every Western nation.<sup>12</sup>

### Prison Overcrowding

Currently, the United States has a higher imprisonment rate than any country in the world, with the exceptions of the Soviet Union and South Africa.<sup>13</sup> With 244 of every 100,000 persons imprisoned,<sup>14</sup> the U.S. imprisonment rate is ten times that of the Netherlands, seven times that of Japan, and four times that of West Germany.<sup>15</sup> Moreover, the U.S. prison population has doubled in the last decade, rising from 204,000 in 1973 to 432,000 in 1983.<sup>16</sup> In fact, the prison population is increasing fifteen times faster than the general population.<sup>17</sup> Unfortunately, this country's prison capacity is not growing nearly as fast.<sup>18</sup> Forty states and the Federal Government report that their prison populations exceed their capacity.<sup>19</sup> Twenty-eight states and the District of Columbia are currently under court order because of overcrowding and other prison conditions.<sup>20</sup> In eighteen of those states, inmates are sleeping on floors, and, in some cases, in chapels and gymnasiums within the prison walls.<sup>21</sup>

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 today.<sup>22</sup> The report cited a June, 1977, survey that disclosed a nationwide deficit of twenty thousand prison beds, and noted that since that time, prison population has in-

8. *Id.* at 376.

9. Colson & Benson, *Restitution As An Alternative to Incarceration*, 1980 DET. C.L. REV. 523, 539.

10. BARNES & TEETERS, *supra* note 4, at 380.

11. *Id.* at 398.

12. *Id.*

13. *The Criminal Justice Construction Reform Act, Hearings on S. 186 Before the Senate Subcomm. on Criminal Law of the 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) [hereinafter cited as *Reform Act Hearings*].

14. *Id.* at 348, 355.

15. *Id.*

16. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS AT MIDYEAR 1983, 2 (Bulletin) (1983) [hereinafter cited as PRISONERS].

17. G. Merry, *A Housing Boom Comes to U.S. Prisons*, Christian Sci. Monitor, Dec. 12, 1981, at 3, col. 1.

18. *State Prisons Around Nation Scramble for Relief as Overcrowding Mounts*, N.Y. Times, Sept. 29, 1983, at A18, col. 1.

19. *Id.* at col. 4, 5.

20. Newman, *A Critique of Prison Building*, 8 NEW ENG. J. ON PRISON L. 121 (1982).

21. *State Prisons Around Nation Scramble for Relief as Overcrowding Mounts*, N.Y. Times, Sept. 29, 1983, at A18, col. 6.

22. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME 10 (1981) [hereinafter cited as TASK FORCE].

creased faster than prison construction.<sup>23</sup> Even more startling was the report's estimate that more than ten billion dollars in construction is needed to establish sufficient space for the current prison population.<sup>24</sup>

The adverse effects on prisoners subject to overcrowding is well documented. Complaints of illness rise, suicide and death rates increase, and discipline declines.<sup>25</sup> Inmate violence and other misconduct is commonplace. These problems occur whether in state or federal prison.<sup>26</sup>

Prison overcrowding also effects the general public. The Task Force on Violent Crime found that a substantial number of defendants who otherwise would be incarcerated are put on probation because the sentencing judge is aware that no prison space is available.<sup>27</sup> Public safety is thereby jeopardized.<sup>28</sup>

The federal prison system is a prime example of prison overcrowding. Although conditions vary from prison to prison, the total population exceeds the rated prison capacity of 23,936 by twenty-six percent.<sup>29</sup> New prisons are being constructed to hold 450 to 500 inmates.<sup>30</sup> Nevertheless, if the rate of increase of federal prisoners remains constant, the Federal Government will be forced to construct a new prison every two months to avoid the overcrowding crisis that states now face.<sup>31</sup> This could mean a prison construction budget of approximately \$180 million per year simply to keep pace with the increasing prison population.<sup>32</sup> Moreover, these construction costs cover only the initial capital expense.

### Prison Costs

For every dollar currently spent on prison construction, American taxpayers will spend an additional \$12.50 in operating costs over the next thirty years.<sup>33</sup> These costs are attributable to annual inmate main-

23. *Id.*

24. *Id.*

25. U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, *THE EFFECT OF PRISON CROWDING ON INMATE BEHAVIOR I* (1980).

26. Farrington, *Prison Size, Overcrowding, Prison Violence, and Recidivism*, 8 J. CRIM. JUST. 221, 223-24 (1980).

27. TASK FORCE, *supra* note 22, at 76.

28. *Id.*

29. As of June 30, 1983, federal institutions held 32,142 prisoners. PRISONERS, *supra* note 16, at 2. See also TASK FORCE, *supra* note 22, at 10, 76.

30. See, e.g., *Reform Act Hearings*, *supra* note 13, at 31 (statement of Hal Farrier, Director, Division of Adult Corrections, Iowa); *id.* at 36 (statement of Perry M. Johnson, Director of the Michigan Department of Corrections).

31. State prison systems have had to accommodate an increase of 60,000 beds over the past few years. TASK FORCE, *supra* note 22, at 76. Some states are operating prison systems at as much as thirty percent over capacity. PRISONERS, *supra* note 16, at 3.

32. This figure is based on an average construction cost of \$50,000 per bed. TASK FORCE, *supra* note 22, at 76. This is multiplied by 450 beds per prison. See discussion at *supra* note 30. At a total cost of \$22,500,000 for each prison, the cost to build eight prisons annually would be \$180,000,000. See also PRISONERS, *supra* note 16, at 3. It is estimated that as of July 1983, prison projects totalling nearly \$2 billion were underway in at least 39 states. *Id.*

33. The capital cost is about eight percent of the total amount of funds which would be spent

tenance.<sup>34</sup> Furthermore, these costs do not reflect the ultimate financial impact on society of incarcerating a man or woman, which minimally includes lost employment taxes and welfare payments to the families of prisoners.<sup>35</sup>

### THE SEARCH FOR SENTENCING ALTERNATIVES

The prohibitive costs of prison construction, the questionable benefits to society of indiscriminate incarceration, and the ill effects of prison overcrowding clearly evidence a need to develop prison alternatives. The search for an alternative must begin with an analysis of our current criminal sentencing system and its objectives.

#### The Present System

The objectives of criminal sanctions differ greatly from other legal remedies,<sup>36</sup> and originate in America's historical definition of "crime" and the relative gravity of various criminal offenses.<sup>37</sup> Criminal sanctions assume that the individual has committed an evil act against society which should be punished to deter further similar behavior.<sup>38</sup> This purpose contrasts with other legal remedies which seek to restore an individual to his pre-injury status, or to prevent or resolve disputes.<sup>39</sup>

Many leading criminal justice professionals and social commentators have stressed the need to alleviate prison overcrowding by sentencing nonviolent offenders to restitution and community service.<sup>40</sup> Political leaders have made similar calls for alternative criminal sanctions. Anthony P. Travisono, Executive Director of the American Correctional Association,<sup>41</sup> has concluded that:

[T]he capacity in our Nation's prisons and jails to receive increased court-ordered commitments is nonexistent. Corrections does not have a say in the number of clients sent for confinement and never has.

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with respect to the facility over 30 years. Operating costs comprise approximately 90 percent. *Reform Act Hearings*, *supra* note 13, at 103 (statement of Frederic Moyer, President, Moyer Associates, Criminal Justice Planners and Architects).

34. Expenditures for yearly operating costs are generally cited as being between \$10,000 and \$20,000 per cell. *See* TASK FORCE, *supra* note 22, at 76.
35. Nationwide, 72 programs exist which help prisoners' families during the period of incarceration. Most of these are part of private social service agencies and rely heavily upon volunteers. *Services for Inmates' Families Described*, 12 CRIM. JUST. NEWSLETTER 6 (July 6, 1981).
36. S. SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME 119 (1970).
37. *Id.* at 118.
38. LAFAYE & SCOTT, CRIMINAL LAW 23 (1972).
39. G. FRIDMAN & J. MCLEOD, RESTITUTION 40-41 (1982).
40. *See, e.g.*, Colson & Benson, *supra* note 9; Newman, *supra* note 20; *Reform Act Hearings*, *supra* note 13, at 87 (statement of Anthony Travisono, Executive Director of the American Correctional Association).
41. The American Correctional Association is an association of 10,000 members representing diverse areas of the corrections profession. Among the most significant purposes of the association are to exert a positive influence on the shaping of national correctional policy and to promote the professional development of persons working within all aspects of corrections. *Reform Act Hearings*, *supra* note 13, at 91 (statement of Anthony Travisono, Executive Director of the American Correctional Association).

. . . Even without a further increase in crime, if the present clearance rate were increased and greater numbers were sentenced and for longer periods of time, the system would be in total chaos.

. . . .  
We need as well to update and modernize many of our correctional facilities to provide constitutionally humane custodial environments. We need more and better vocational education and work facilities and programs. We need adequate recreation space . . . . We must find better ways to classify who goes to what kind of facility. When possible, community-based correctional alternatives should be the choice of a large number of sentenced inmates; especially the first offender. Restitution and other alternatives should be encouraged.<sup>42</sup>

What proportion of the current prison population *must* we confine for our protection? How many prisoners *should* be given sentences of incarceration as punishment? Although it is difficult to assess each individual case, certain generalizations do provide us with a basis for appropriate legislation. First, only one-half of all state prisoners are incarcerated for committing violent crimes.<sup>43</sup> The Task Force on Violent Crime determined that this percentage ranged from 47% to 57%, depending upon how violence is defined.<sup>44</sup> Second, an examination of federal prisons reveals that only 30% of the prisoners were convicted of committing violent offenses.<sup>45</sup> Of those prisoners remaining, 23% were convicted of property offenses<sup>46</sup> and 47% were convicted of "public order or other" offenses.<sup>47</sup>

Many state and local governments have begun developing alternative punishments for those criminals posing no danger to society.<sup>48</sup> Probation and fines are the most common alternatives.<sup>49</sup> However, the public often perceives these sanctions to be inappropriate because they do not adequately correspond to the seriousness of the offense committed. Therefore, other more stringent alternatives must be found in order to preserve public respect for the legal system.

#### THE SENTENCING IMPROVEMENT ACT

Senate bill 1644 (S. 1644), the Sentencing Improvement Act, recognizes the existence of a serious overcrowding problem in federal prisons.<sup>50</sup> The bill emphasizes that these scarce prison resources should be

42. *Id.* at 94-95.

43. *See Reform Act Hearings, supra* note 13, at 490-91 (response of Michael E. Sherman, Director of Justice and Regulatory Studies, Hudson Institute, to submitted questions of Senator Charles McC. Mathias, R-Md.).

44. TASK FORCE, *supra* note 22, at 10.

45. *Reform Act Hearings, supra* note 13, at 491 (response of Michael E. Sherman, Director of Justice and Regulatory Studies, Hudson Institute, to submitted questions of Senator Charles McC. Mathias, R-Md.)

46. *Id.*

47. *Id.*

48. *See Colson & Benson, supra* note 9, at 523.

49. A. CAMPBELL, *LAW OF SENTENCING* 44, 73-74 (1978).

50. S. 1644, *supra* note 2, § 2 (1983) (adding 18 U.S.C. § 3671(b)). The text of the bill states:

used only where violent and dangerous criminals are involved.<sup>51</sup> For nonviolent, nondangerous offenders, the bill proposes that society's interests are better served through the imposition of alternative sentences, such as restitution and community service.<sup>52</sup>

The basic principle underlying the Act is that penal imprisonment is not always an appropriate punishment for certain types of criminal offenses. It reflects a growing dissatisfaction with American prisons, which are critically overcrowded, waste millions of tax dollars, and do little to rehabilitate the hundreds of thousands of prisoners currently incarcerated.

Senate bill 1644 would establish a presumption that imprisonment is an inappropriate sanction for offenses which do not involve the threat or use of force, endanger national security, or threaten or cause serious physical harm to others.<sup>53</sup> The bill would specifically remove the presumption in cases where: (1) the defendant's livelihood depends upon criminal conduct; (2) the defendant was paid or expected payment to commit the crime; (3) the offense involved narcotics trafficking; (4) the defendant was convicted of violating specified firearms or explosives laws; (5) the defendant was convicted of misusing his public office; or (6) "there are specified substantial and compelling reasons for imposing a sentence of imprisonment."<sup>54</sup>

For offenses not falling within the presumption, the court could impose a prison sentence. For example, under the last exception noted above, the judge could sentence to imprisonment a trusted pension official convicted of embezzling large amounts of money. Although such a crime would probably have involved no violence (thus, not creating a presumption of the appropriateness of imprisonment), the substantial economic injury to large numbers of people would justify imprisonment. In such a case, imprisonment may constitute the only appropriate punishment, particularly since restitution might be impossible.

Senate bill 1644 further provides that a defendant who is convicted of conspiracy, attempt, or aiding and abetting, will be treated as a principal for sentencing purposes.<sup>55</sup> Thus, a party who aids a Presidential assassin would not escape imprisonment because he did not personally pull the trigger.

Pursuant to S. 1644, the local probation department would be required to compile data on the defendant and recommend the appropriate sentence.<sup>56</sup> Thereafter, the prosecution and the defendant would be permitted to contest the merits of these findings and recommenda-

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"Due to the increasing problem of prison overcrowding, available Federal prison space must be treated as a scarce resource in the sentencing of criminal defendants."

51. *Id.*

52. *Id.*

53. *Id.* § 2 (adding 18 U.S.C. § 3672(b)).

54. *Id.*

55. *Id.* § 2 (adding 18 U.S.C. § 3672(d)).

56. *Id.* § 2 (adding 18 U.S.C. § 3672(e)).

tions.<sup>57</sup> If a fine, probation, or imprisonment were found to be inappropriate, the court could suspend imposition of sentence and order an alternative punishment.<sup>58</sup> Alternatives would include restitution or the performance of community service.<sup>59</sup> In its discretion, the court could impose a fine in addition to the primary sentence.<sup>60</sup>

Furthermore, the bill would permit a court to impose both imprisonment and alternative sanctions.<sup>61</sup> Thus, if special and compelling circumstances justifying imprisonment exist, the court could impose any prison sentence permitted by law, suspend execution of that portion of the sentence exceeding sixty days, and order restitution, community service, or both.<sup>62</sup>

Senate bill 1644 would further improve current federal criminal sentencing procedures by providing flexible guidelines for courts to use in imprisoning or otherwise sentencing offenders. Again, the basic principle underlying the guidelines is that violent, habitual, or professional offenders deserve imprisonment, but that nonviolent offenders might merit alternative forms of punishment.<sup>63</sup>

#### RESTITUTION AS AN ALTERNATIVE TO IMPRISONMENT

The principle of restitution requires an offender to repay the victim of his crime for property lost or personal damages sustained as a result of the offender's acts.<sup>64</sup> Because of growing public concern for crime victims, the restitution concept holds great promise of gaining broad public support. Recent surveys indicate that a great percentage of Americans would prefer to have the nonviolent offender repay his victim rather than serve time in prison at public expense.<sup>65</sup> Likewise, the surveys show that offender repayment is preferred over governmental compensation of crime victims.<sup>66</sup>

Restitution, however, is not a new phenomenon. In October, 1982, Congress enacted the Victim and Witness Protection Act of 1982.<sup>67</sup> That Act provides that as a substitute or supplement to any penalty provided by law, the court may order a defendant convicted of specified offenses to make restitution to victims.<sup>68</sup> The court determines the amount of restitution to be made, which will then be offset by compen-

57. *Id.*

58. *Id.* § 2 (adding 18 U.S.C. § 3672 (f)).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* § 2 (adding 18 U.S.C. § 3671(b)).

64. HUDSON & GALAWAY, OFFENDER RESTITUTION IN THEORY AND ACTION 1 (1978). See generally S. SCHAFER, *supra* note 36; Note, *Where Offenders Pay for Their Crimes: Victim Restitution and its Constitutionality*, 59 NOTRE DAME L. REV. 1401 (1984).

65. Dionne, *Running on Crime Can Get Slippery*, N.Y. Times, Oct. 24, 1982, § 4, at 6E, col. 5.

66. Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203 (1978). See also Read, *How Restitution Works in Georgia*, 60 JUDICATURE 323 (1977).

67. Pub. L. No. 97-291, 96 Stat. 1284 (current version at 18 U.S.C. §§ 3579, 3580 (1982)).

68. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5, 96 Stat. 1248, 1253.

sation which the victim received from third parties or through civil proceedings.<sup>69</sup>

The Sentencing Improvement Act would broaden the scope of the Victim and Witness Protection Act by extending that Act's coverage beyond specific Title XVIII offenses<sup>70</sup> and applying it to any offense if one of the previously discussed presumptions<sup>71</sup> is found to be present. The Sentencing Improvement Act incorporates by reference the appropriate provisions of the Victim and Witness Protection Act and specifies those offenses for which restitution is presumed applicable.<sup>72</sup>

The Sentencing Improvement Act provides that in appropriate cases the court could, with due consideration of the defendant's resources, require him to pay the victim's medical expenses, repay the value of lost or damaged property, and/or return the property.<sup>73</sup> If the victim or victims are not ascertainable, the restitution would be paid into a special fund of the Treasury Department.<sup>74</sup> This fund would distribute monies quarterly on a per capita basis to state victim compensation plans.<sup>75</sup>

#### COMMUNITY SERVICE AS AN ALTERNATIVE TO IMPRISONMENT

An order of community service would provide that instead of receiving a prison sentence, an offender must work for a specific period of time in areas of the community where assistance is needed.<sup>76</sup> Moreover, this alternative would not be limited to white collar offenders. Present community service programs provide work opportunities for both skilled and unskilled workers alike.<sup>77</sup> California, for example, operates some fifty community service alternatives for offenders.<sup>78</sup> England has employed similar community service orders with dramatic success.<sup>79</sup> Notwithstanding these successes, most offenders now "pay their debt to society" in prison. The result is a terrible waste of valuable human resources.

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. Since this particular prison had no resident

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69. *Id.*

70. *Id.*

71. See *supra* notes 53-54 and accompanying text. See also S. 1644, *supra* note 2, § 2.

72. S. 1644, *supra* note 2, § 2 (adding 18 U.S.C. §§ 3672, 3673).

73. *Id.* § 2 (adding 18 U.S.C. § 3673(a), (c)).

74. *Id.* § 2 (adding 18 U.S.C. § 3673(b)).

75. *Id.*

76. U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, COMMUNITY SERVICE BY OFFENDERS 5 (1979) (prepared by the National Council on Crime and Delinquency).

77. *Id.* at 13.

78. *Id.* at 50-53.

79. Bergman, *Community Service in England: An Alternative to Custodial Service*, FED. PROBATION 43, 46 (1975).

doctor, the many inmates with medical needs had to rely on a paid paramedic. All the while, a qualified doctor spent his days cleaning linen. When he later volunteered to help meet a shortage of doctors in the surrounding community by working nights, his warden rejected the offer.<sup>80</sup>

The Sentencing Improvement Act proposes community service as an alternative form of punishment.<sup>81</sup> Pursuant to the Act, the sentencing court would require the performance of a specified number of hours of free work for a governmental, charitable, or volunteer agency.<sup>82</sup> The judge would establish a specific schedule for the community service to be performed.<sup>83</sup> The judge would also have discretion to require a defendant to reside at a community treatment center during his sentence.<sup>84</sup> Intentional default by the defendant would be treated as a violation of probation.<sup>85</sup> Upon default, the court could sentence the defendant to imprisonment for the maximum term allowable for the offense committed.<sup>86</sup>

The Act would allow a defendant to petition the sentencing court to adjust or waive continued payment of ordered restitution or performance of community service<sup>87</sup> upon the petitioner's showing that a change in circumstances or other unfairness has rendered the imposed sentence unjust.<sup>88</sup> Restitution and community service could be extended or reduced, but never extended beyond the maximum term of probation or imprisonment allowable for the offense, whichever is greater.<sup>89</sup>

The Act would establish criteria for the sentencing court to consider in determining the extent of the restitution or community service.<sup>90</sup> Relevant factors would include the victim's loss, the defendant's ability to repay his victim, the defendant's criminal history, the defendant's employment obligations, and the seriousness of the offense.<sup>91</sup> It also would require that each probation office prepare a list of appropriate agencies for public service and that the office supervise each defendant's public service activities.<sup>92</sup> In addition, the Act would permit supplementing community service with counseling, therapy, and

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80. PRISON FELLOWSHIP, *Is There a Better Way?* (address by Charles Colson to the National Association of Evangelicals (1981)).

81. S. 1644, *supra* note 2, § 2 (adding 18 U.S.C. § 3672(f)).

82. *Id.* (adding 18 U.S.C. § 3674(a)).

83. *Id.* (adding 18 U.S.C. § 3674(d)).

84. *Id.* (adding 18 U.S.C. § 3674(b)).

85. *Id.* (adding 18 U.S.C. § 3674(d)).

86. *Id.* Since the imposition of a sentence is suspended when a court requires a defendant to perform community service, it follows that upon a failure to adhere to the schedule of community service performance (default), a court may sentence the defendant to the maximum term allowable for the offense committed.

87. *Id.* (adding 18 U.S.C. § 3675).

88. *Id.*

89. *Id.*

90. *Id.* (adding 18 U.S.C. § 3676).

91. *Id.* (adding 18 U.S.C. § 3676(a)(b)). *See also* 18 U.S.C. § 3580(a) (1982).

92. *Id.* (adding 18 U.S.C. § 3676(c)).

vocational or medical rehabilitation.<sup>93</sup>

### NEW SENTENCING ALTERNATIVES AT WORK

Restitution and community service programs have passed the theoretical stage in several communities. A survey completed in November, 1978, identified 289 such projects.<sup>94</sup> These programs have reported varying degrees of success in diverting nondangerous offenders from prison to alternative means of correction.

Two key factors have been identified which increase the probability that restitution and community service will provide true alternatives to imprisonment and not merely enhancements to probation.<sup>95</sup> First, judges should supervise those programs of alternative corrections in which they can have confidence.<sup>96</sup> Second, judges must be prodded by the legislature into changing sentencing patterns.<sup>97</sup>

Minnesota provides an excellent example of both of these factors.<sup>98</sup> It has developed a statewide community corrections program which provides funds to counties to establish restitution and community service programs.<sup>99</sup> The state concurrently deducts funds for all petty felons sent to prison instead of being diverted to community corrections.<sup>100</sup> Although this particular fiscal incentive failed to change judges' sentencing habits,<sup>101</sup> a more drastic measure did. Minnesota became the first state to adopt sentencing guidelines<sup>102</sup> which include presumed sentences from which judges can deviate only under "substantial and compelling" circumstances.<sup>103</sup> These presumptions range from probation or fine for certain property offenses<sup>104</sup> to imprisonment for most violent offenders and career property offenders.<sup>105</sup> Since the introduction of these guidelines, Minnesota's prison population has remained under capacity.<sup>106</sup>

Oregon has experienced similar trends. In 1977, the Community

93. *Id.* (adding 18 U.S.C. § 3676(d)).

94. U.S. DEPT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, NATIONAL ASSESSMENT OF ADULT RESTITUTION FINAL REPORT 16 (1980).

95. Umbreit, *Community Service Sentencing: Jail Alternative or Added Sanction?*, FED. PROBATION 3, 5, 10-11 (1981).

96. *Id.* at 5, 10-11.

97. *Id.* at 10-11.

98. MINNESOTA DEPARTMENT OF CORRECTIONS, MINNESOTA COMMUNITY CORRECTIONS ACT EVALUATION (1981).

99. *Id.* at 1.

100. *Id.*

101. *Id.* at 82. See also *Has Minnesota's Community Corrections Act Reduced Prison Population As Intended?*, 12 CRIM. JUST. NEWSLETTER 5 (May 25, 1981).

102. 1978 Minn. Laws, ch. 723, art. 1, § 9.

103. MINN. STAT. ANN. § 244 app. § IID (West 1984).

104. *Id.* §§ IIC, IV. See also Research Project, *Minnesota Sentencing Guidelines*, 5 HAMLIN L. REV. 292, 309 (1982).

105. *Id.*

106. Under the sentencing guidelines, the rate of imprisonment has decreased by four to five percent. Knapp, *Impact of the Minnesota Sentencing Guidelines on Sentencing Practices*, 5 HAMLIN L. REV. 237, 256 (1982).

Corrections Act<sup>107</sup> was passed and in 1979 \$5,000,000 was appropriated to develop alternatives to imprisonment of Class C felons.<sup>108</sup> A report issued in 1981 found that counties which participated fully in the program reduced their commitment rate of Class C felons from twenty-one to seventeen percent.<sup>109</sup> Burglars, a group of particular focus in the Act, were clearly diverted.<sup>110</sup> In 1977, forty percent of all convicted burglars were sent to prison.<sup>111</sup> By 1979, this figure had fallen to seventeen percent.<sup>112</sup> In addition, the net cost of community corrections was lower than the estimated costs of prisoner maintenance without the program.<sup>113</sup>

### CONCLUSION

Federal criminal law does not require the incarceration of criminals. Nevertheless, judges must be encouraged to use restitution and community service as alternatives to imprisonment for nonviolent offenders. Such a sentencing policy will help ensure that prison space is available for violent offenders. If this policy results in empty federal prison beds, additional state prisoners can be accommodated, particularly from those states in which federal judges have held overcrowded and unsanitary prison conditions to be unconstitutional.<sup>114</sup> In addition, restitution and community service will provide benefits for victims and for the community which would not otherwise exist. In Georgia, for example, a residential restitution program resulted in \$62,500 in payments to victims, \$177,500 in state and federal taxes paid, \$256,800 in room and board charges, \$113,100 in financial support to offenders' families, \$61,600 in personal savings, and \$336,300 in purchases in the communities of the restitution centers, all in only one year.<sup>115</sup>

Community service also provides free labor to the community. In 1977, more than 31,000 persons performed an estimated 1.3 million hours of community service in California.<sup>116</sup> The value of these services is quite substantial, particularly when compared to the alternative of subsidized idleness in prison. As tax revenues decrease, governments could find community service increasingly helpful in maintain-

107. OR. REV. STAT. § 423.500 (1981).

108. *Oregon Community Corrections Act May Be Reducing Prison Commitments*, 12 CRIM. JUST. NEWSLETTER 6 (May 25, 1981).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Implementation of the Community Corrections Act cost an estimated \$14.1 million in 1979. *Id.* The estimated cost without the Community Corrections Act was \$15.7 million. *Id.*

114. Courts have declared 26 state correctional systems or major institutions as failing to meet constitutional standards. *Reform Act Hearings*, *supra* note 13, at 304 (statement of Jeffrey Harris, Deputy Associate Attorney General, Department of Justice).

115. Read, *How Restitution Works in Georgia*, 60 JUDICATURE 323, 327 (1977).

116. U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, COMMUNITY SERVICE BY OFFENDERS 10 (1979) (prepared by the National Council on Crime and Delinquency).

ing services.<sup>117</sup>

The benefits of legislation promoting the use of alternative sanctions for nondangerous offenders are numerous: (1) costs are reduced; (2) courts give punishments which are productive for both the victim and the community and much less destructive to the offender; (3) the prison overcrowding crisis is immediately eased, while providing space for dangerous criminals; and (4) rehabilitation of criminals is promoted since those receiving alternative sentences demonstrate lower recidivism rates than those sentenced to prison terms.<sup>118</sup>

If enacted into law, the Sentencing Improvement Act will alleviate the chronic overcrowding problems which plague our prisons, and provide a more appropriate and effective alternative for certain categories of nonviolent offenders. This alternative recognizes that prisons and jails are expensive and scarce resources with a highly specialized purpose: to confine only those who pose a threat to society.

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117. See Umbreit, *supra* note 95, at 5.

118. MINNESOTA DEPARTMENT OF CORRECTIONS, MINNESOTA COMMUNITY CORRECTIONS ACT EVALUATION 48-56 (1981).