REFORM OF THE FEDERAL CRIMINAL LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 1437

AND

S. 31, S. 45, S. 181, S. 204, S. 260, S. 888, S. 979, and S. 1221

JUNE 7, 8, 9, 20, AND 21, 1977

PART XIII

[Sentencing and general codification]

Printed for the use of the Committee on the Judiciary

REFORM OF THE FEDERAL CRIMINAL LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 1437

AND

S. 31, S. 45, S. 181, S. 204, S. 260, S. 888, S. 979, and S. 1221

JUNE 7, 8, 9, 20, AND 21, 1977

PART XIII

[Sentencing and general codification]

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
92-465 WASHINGTON : 1977

COMMITTEE ON THE JUDICIARY

JAMES O. EASTLAND, Mississippi, *Chairman*

JOHN L. McCLELLAN, Arkansas
EDWARD M. KENNEDY, Massachusetts
BIRCH BAYH, Indiana
ROBERT C. BYRD, West Virginia
JAMES ABOUREZK, South Dakota
JAMES B. ALLEN, Alabama
JOSEPH R. BIDEN, JR., Delaware
JOHN C. CULVER, Iowa
HOWARD M. METZENBAUM, Ohio
DENNIS DE CONCINI, Arizona

STROM THURMOND, South Carolina
CHARLES McC. MATHIAS, JR., Maryland
WILLIAM L. SCOTT, Virginia
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
MALCOLM WALLOP, Wyoming

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

JOHN L. McCLELLAN, Arkansas, *Chairman*

JAMES O. EASTLAND, Mississippi
EDWARD M. KENNEDY, Massachusetts

STROM THURMOND, South Carolina
ORRIN G. HATCH, Utah

PAUL C. SUMMITT, *Chief Counsel*
D. ERIC HULTMAN, *Minority Counsel*

CONTENTS

PART VIII—S. 1 AND S. 1400

(Tax law, insanity defense, firearms, and obscenity)

PART IX—S. 1 AND S. 1400

(General codification and provisions relating to abortion, business law, civil rights, death penalty, elections, Indian law, insanity defense, and sentencing)

PART X—S. 1 AND S. 1400

(Provisions relating to attempt, complicity, conspiracy, drugs, government operations, insanity, intoxication, jurisdiction, national security, obscenity and offenses against the person)

PART XI—S. 1 AND S. 1400

(Civil rights offenses, corporate and business offenses, public duty offences sentencing and other provisions)

PART XII—S. 1

(Jurisdiction over Indian reservations, national security, and sentencing provisions)

PART XIII—S. 1437 and S. 31, S. 45, S. 181, S. 204, S. 260, S. 888, S. 979, and S. 1221

(Sentencing and general codification)

Exhibits—Continued

REFORM OF THE FEDERAL CRIMINAL LAWS

TUESDAY, JUNE 7, 1977

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:05 a.m., in room 2228, Dirksen Senate Office Building, Senator Edward M. Kennedy [acting chairman of the subcommittee] presiding.

Present: Senators Kennedy, Thurmond, and Hatch.

Staff present: Paul C. Summitt, chief counsel; D. Eric Hultman, minority counsel; Paul H. Robinson, counsel; Kenneth Feinberg, counsel to Senator Kennedy; and Mabel A. Downey, chief clerk.

Senator KENNEDY [acting chairman]. The committee will come to order.

At this point I will place in the record the statement of Senator McClellan, the chairman of the subcommittee, who is unable to be with us today.

OPENING STATEMENT OF CHAIRMAN JOHN L. McCLELLAN

Senator MCCLELLAN. Today we start another phase, and hopefully the final one, in the effort to enact a modern Federal Criminal Code. On May 2, 1977, I introduced, with Senator Kennedy as a cosponsor, S. 1437, a bill to codify, revise, and reform title 18 of the United States Code, and for other purposes. Today we begin hearings on that bill.

The Federal Criminal Code reform effort formally began on November 8, 1966, when Congress established the National Commission on Reform of the Federal Criminal Laws. Much of S. 1437 can trace its heritage to the final report of that Commission, called the "Brown Commission" after its distinguished Chairman, former Governor of California, Edmund G. "Pat" Brown. It is particularly appropriate, therefore, that we are honored today with the presence of Governor Brown. We are also pleased to have as witnesses the Staff Director of the Commission, Prof. Louis Schwartz, and a consultant to the Commission, Prof. Robert Blakey.

The Commission's work and final report have served as a work basis for legislative reform efforts. Within a month or two after their report, the subcommittee opened the first of a 4-year series of hearings on the Brown Commission work and on the whole question of criminal law codification and reform.

During the course of those hearings, testimony was received from judges, lawyers, bar associations, and from private citizens and groups

of every political persuasion and point of view culminating in over 8,500 pages of testimony and exhibits in 15 volumes of printed hearings.

After several preliminary drafts were studied and analyzed, the Criminal Justice Reform Act of 1975 evolved and was introduced by me on January 15, 1975, with 10 cosponsors. It undertook to incorporate the best of the earlier versions and the recommendations made by those who submitted their views to the subcommittee.

Obviously, a bill of that nature, covering the whole spectrum of criminal law, could hardly be expected to receive unanimous acceptance and approval. It was not primarily drafted to please, nor did it reflect, the exclusive views, conclusions, or judgments of any one person—not of myself, or of any other individual Senator. We have always known that there would be honest differences of opinion about some of its provisions, and, in the spirit of compromise, that concessions, and accommodations would have to be made in order to achieve the goal of criminal law reform earnestly sought by so many for so long. With this objective and in this spirit of compromise, Senator Kennedy, the administration—particularly Attorney General Bell and his staff—and I, working from the compromise suggested last Congress by Senator Hruska and myself, have produced the bill now before us.

Given his important help in this effort, we are particularly pleased that Attorney General Bell is able to appear before the subcommittee today.

While most of the issues in S. 1437 have been examined at great length and in great detail during the extensive hearings on previous code reform bills, the sentencing system in the bill is significantly different from past bills. It adopts the use of sentencing guidelines and creates the potential for more determinant sentencing. It may be useful to insert in the record at this point a brief summary of the provisions of the proposed sentencing system.

[The summary follows:]

CRIMINAL CODE REFORM ACT OF 1977—SENTENCING SYSTEM

The major reforms proposed in the sentencing area include adoption of a sentencing guideline system and a partial move toward determinant sentencing.

The bill would create a Sentencing Commission and direct it to establish guidelines to govern the imposition of sentences for all federal offenses, taking into consideration factors relating to the purposes of sentencing, the characteristics of the offender, and the aggravating and mitigating circumstances of the offense. If a judge considered the guideline range inappropriate for a particular case he would be free to sentence above or below the guideline range as long as he explained his reasons for doing so. If an offender were sentenced above the range specified in the guidelines he would be able to obtain appellate review of his sentence; if he were sentenced below the range specified in the guidelines the government would be able to obtain appellate review of the sentence. In addition to the guidelines, the Commission would be authorized to promulgate policy statements touching on many other aspects of sentencing, including the proper use of the guidelines.

A judge would be authorized to specify a term during which the offender would be ineligible for parole, but such a term could not extend into the last tenth of the sentence imposed. Guidelines for the imposition of terms of parole ineligibility would be promulgated by the Sentencing Commission. The Parole Commission and all recent reforms to the parole system would be retained. Maximum authorized terms of imprisonment would be modestly reduced.

The Sentencing Commission is proposed to be a permanent body which is a part of the Judicial Branch. Its members would be appointed by the Judicial Conference for fixed, staggered terms, and there would be no restrictions on who may be appointed a member. Guidelines promulgated by the Commission would become effective within 180 days unless vetoed by Congress before that time.

Other revisions include such things as the explicit recognition and statement of the purposes of sentencing (deterrence, protection of the public, assurance of just punishment, and rehabilitation). The maximum authorized fines are substantially increased; the special statutory provisions of current law for special dangerous offenders, youth offenders, and narcotics offenders are eliminated under the theory that the Sentencing Commission guidelines and policy statements can better provide appropriate sentencing in these cases; a provision is added to require notice to fraud victims in order to facilitate class actions for recovery of losses; a provision is added which permits an order of restitution to be part of any sentence; and the death penalty provisions are eliminated (except for the existing death penalty for aircraft hijacking which is retained in title 49 of the United States Code). Each offense in the Code is described as a certain grade of felony or misdemeanor, or as an infraction, a shorthand method, used in most modern state codes, of referring to the sentencing provisions which apply to the offense.

Senator McClellan. The importance of the sentencing provisions and recent changes and advances in the philosophy and procedures for sentencing criminal offenders make it imperative that this subcommittee draw upon the expertise of authorities in the area to consider all aspects of the proposed sentencing reform.

In that respect this series of hearings will be historic. At a time when the need for some sentencing reform is apparent to all, and when many jurisdictions are considering reform, we will have the benefit of perhaps the most distinguished and comprehensive group of witnesses in the sentencing area ever assembled. Already scheduled to appear on the matter of sentencing reform are such noted authorities as: Judge Marvin E. Frankel, a Federal district court judge who is daily engaged in the sentencing business and is author of the book "Criminal Sentences: Law Without Order"; Prof. Ernest van den Haag, a practicing psychiatrist and author of the book "Punishing Criminals"; Mr. Andrew von Hirsch, author of the Report of the Committee for the Study of Incarceration, published as a book entitled "Doing Justice: The Choice of Punishments"; Mr. Pierce O'Donnell, a practicing attorney and author of the book "Toward a Just and Effective Sentencing System"; Mr. Ronald L. Gainer, Acting Assistant Attorney General of the Office for Improvements in the Administration of Justice; Mr. Norman A. Carlson, Director of the U.S. Bureau of Prisons; Judge Harold R. Tyler, former Deputy Attorney General and now a practicing attorney who is Chairman of the Advisory Corrections Council (a body established by 18 U.S.C. 5002); Judge Gerald B. Tjoflat, Chairman of the Judicial Conference Committee on the Administration of the Probation System; Judge Alfonso J. Zirpoli, Chairman of the Judicial Conference Committee on the Administration of the Criminal Law; Mr. Harold D. Koffsky, consultant to that committee; Judge William H. Webster of the Judicial Conference Advisory Committee on Criminal Rules; Judge Morris E. Lasker of the Southern District of New York; and Dean Don M. Gottfredson, Dean of the Rutgers School of Criminal Justice and codirector of the Criminal Justice Research Center in Albany, N.Y., which has done much significant research on sentencing guidelines and their feasibility.

These gentlemen will appear before this subcommittee tomorrow and the next day, June 8 and 9. At a later date we hope to hear from the U.S. Parole Commission; Prof. Alan M. Dershowitz, author of the report of the Twentieth Century Fund Task Force on Criminal Sentencing, published as a book entitled "Fair and Certain Punishment"; Dean Norval Morris of the University of Chicago Law School, author of the book "The Future of Imprisonment"; Prof. James Q. Wilson, author of "Thinking About Crime"; and others.

With this diverse group of distinguished authorities, I believe that the record we will produce here will serve as a classic source of invaluable information and expertise on sentencing reform, a record which will serve all legislatures that may undertake such a challenge.

While today's hearing will concern an overview of the Federal Criminal Code reform effort, with tomorrow's hearing beginning the series on sentencing reform, we are pleased to begin today's hearing with the appearance of three of my distinguished colleagues—Senators Bentsen, Domenici, and Hart—who, as authors of sentencing bills now before this subcommittee, have a special interest in effective sentencing reform.

Senator Kennedy. We open hearings this morning on S. 1437, the recodification of the Criminal Code, introduced by the chairman of this committee, Senator John McClellan and myself.

We commence these hearings with the high hope that we will be able to meet our responsibilities to the American people and finally succeed in recodifying the Federal Criminal Code.

There is no question that the Criminal Code, which has not been codified since the earliest days of this Republic is in dire need of codification. We see various criminal laws scattered throughout 50 titles, with endless differences and degrees of culpability. We have a criminal justice system which breeds inequity and unfairness; and, in many instances, we see a Criminal Code which allows those involved in the criminal justice system to effectively play the odds and avoid the sure and fair judgment of our criminal justice system.

It has been most unfortunate that, even though the issue of crime rouses great interest among the American people, it has been tied up with the political sloganeering and shibboleths of the past decade.

This country is facing an energy crisis. We cannot see a day go by when there is not a healthy debate and discussion on what the Congress, what the Executive, what local communities and local government subdivisions can do about the problem.

But when it comes to crime, we have silence. We have waited too long to address what I consider to be the most important Criminal Code improvement effort in the history of this country. I am hopeful that during the course of these hearings we can eliminate the sloganeering of the past and come to grips with the essential challenge of effective criminal justice in our society.

One of the very important aspects of this recodification effort is the chapter dealing with fairness and equity in sentencing and the establishing of a sentencing commission, which, hopefully, will report back to the Congress with guidelines for various Federal crimes. In addition, the bill requires written reasons be stated by the court at the time

of sentence and provides for appellate review in cases where the sentence is above or below the prescribed guidelines. The bill thus deals with the critical problem of sentencing disparity. We will be insuring a greater sense of fairness and equity in the criminal justice system. This is an extremely important aspect of the recodification bill.

Another extremely important aspect of the recodification bill is the gradual phasing out of the Federal parole release function of our criminal justice system.

Parole release has not been administered evenhandedly in our Nation. It seems quite clear that the time has come in our society for determinate sentencing. We need fairness, both in terms of the prisoner and society. We need fairness in terms of public understanding as to how the criminal justice system works.

I think the American people have basic misconceptions as to how the system works in practice. When a sentence is given for 12 to 15 years or 4 to 8 years, a prisoner does not basically serve that term. In any review of the past, we can see in instance after instance the prevailing pattern of release after completion of one-third of the sentence.

In order for the public to understand what the actual sentence is going to be, as well as to provide more certainty in the system, I believe it is important to phase out the parole release function. We will have a chance to examine that in greater detail with the Attorney General here this morning.

I will insert into the record at this time the statement of Senator Thurmond and any statement that may be submitted by any other member of the subcommittee.

STATEMENT BY SENATOR STROM THURMOND

Mr. Chairman, today the Subcommittee commences another series of hearings on the revision of the Federal Criminal Code. In addition to S. 1437, which has already been referred to by the Chairman, there are a number of other bills on sentencing reform that have been introduced in this session of the Congress and referred to the Subcommittee.

The bill before us today, S. 1437, is the product of not only the efforts of the National Commission on Reform of the Federal Criminal Laws, but also a four-year series of hearings by the Subcommittee. The bill incorporates the best of earlier versions and recommendations that have been gleaned from hours and hours of testimony.

Mr. Chairman, a bill of this magnitude, covering the entire federal criminal law, could not possibly gain universal acceptance. There are provisions in the bill that I strongly support. There are other provisions that I do not support, but in the spirit of compromise and accommodation might accept if the overall bill would achieve the goal of reforming our Federal criminal law.

During this further set of hearings a number of witnesses with varying views will be heard from, particularly on the issue of sentencing reform. I am looking forward to hearing from these witnesses, especially Attorney General Bell and Governor Brown, and I want to welcome them to our hearings this morning.

Senator KENNEDY. Senator McClellan has been a tireless champion in the area of Criminal Code reform. He is strongly committed to this legislation. I am very hopeful that we will see early consideration of S. 1437 by the full committee and by the Senate.

Senator Bentsen?

Senator Bentsen, we are glad to have you here. You have been more than patient in listening to me when I appear before the Finance Committee.

We welcome you here. We know how interested you are with this subject matter.

STATEMENT OF HON. LLOYD BENTSEN, A U.S. SENATOR FROM TEXAS

Senator BENTSEN. Senator Kennedy, I appreciate the leadership that you and Senator McClellan have shown in this legislation.

I am delighted to appear in support of legislation I have long advocated: reform of sentencing and rape laws. I have to admit to you, Mr. Chairman, I have not read this whole bill yet but I expect to. I believe that the modernized Criminal Code, as proposed by you and Senator McClellan will rightfully win the broad support that it deserves.

It is indeed appropriate that when Attorney General Bell endorsed this effort he referred to the Roman Emporer Caligula, who deliberately posted the law in very fine print, at a high level where the populace would not be able to see it and understand it. Today, when regulations and laws often proliferate and complicate, a simplification and modernization is well in order.

Mr. Chairman, I want to commend the changes this bill would make in rape laws. In 1975, I first introduced legislation to restrict the use of evidence regarding the rape victim's sexual history; to allow cases to go before the jury without corroboration of the victim's testimony; and to eliminate the requirement of evidence of resistance.

Current rape laws often treat the victims in an unconscionable way at the very time we should be showing compassion and concern. What we find too often is the question of who is really on trial in these rape cases: Is it the attacker or is it the woman who has been violated in the instance?

Current laws discourage reporting of the crimes. They hinder the fair prosecution of the accused. I believe that the changes proposed in the code bill will be a step forward for the fair and effective administration of justice in these rape cases.

The second provision I want to support is sentencing reform. In recent years, the credibility of our criminal laws has come under attack from diverse sources. Indeterminate sentencing has lost respect. Our parole system has lost respect.

Citizens read of habitually violent criminals receiving little or no punishment. Charles Manson is now being considered for parole. As the Twentieth Century Fund report points out, when it comes to punishing, we have become a nation of extremes.

We see a situation where a judge in one part of the country gives them a tap on the wrist. In another part of the country, they may be sentenced for an exceedingly long period of time for, in effect, the same crime.

There is justifiable public anger when convicted criminals escape unpunished. One study found that 73 percent of convicted armed robbers with substantial prior records received no prison terms in Los Angeles in 1970. Other studies report varying findings; but, regardless of the numbers involved, current sentencing practices too often grant amnesty to the violent.

At the other extreme, the indeterminate sentence has led to different prison terms that are unfair and contrary to our notions

of equal justice. Often these differences constitute injustice in the name of the law, and for that reason they are even more unacceptable.

Mr. Chairman, to eliminate the great and unguided discretion now vested in the judges and parole boards, I have introduced the Fair and Certain Punishment Act. This bill generally follows the format of the Twentieth Century Fund proposal and related works by others in the field, some of whom will testify before this committee. It will establish presumptive sentencing and provide standards to guide discretion.

Each crime would have a presumptive sentence. For first offenders, it should be short but certain, with prison for the dangerous and alternative punishment considered for the nondangerous. This presumptive sentence should increase for repeatedly violent offenders. For the most violent, the primary purpose of imprisonment should be detention of the guilty and protection of the public.

Judicial discretion should be structured but not eliminated. I agree with Alexander Hamilton in the "Federalist No. 78" that judicial discretion must be defined in order to be fairly exercised.

To allow discretion, besides the presumptive sentence itself, there should be two sentence ranges. One should be a small percentage variance, perhaps 20 or 30 percent above or below it.

The second should allow for a maximum sentence, or a suspended sentence, for extraordinary cases in which the presumptive sentence or range would not be fair.

Sentences that vary from the presumptive should be accompanied by a reasoned written opinion. Sentences that deviate from the small presumptive range should be subject to appellate review. I would limit review because to extend it further would create severe stresses on already overburdened courts.

A sentencing hearing should be held to determine the existence of aggravating or mitigating circumstances or extraordinary factors. To reduce the burden on courts, I would suggest provisions for stipulation of facts, reports by referees, and other means of expediting agreement between the parties.

Aggravating and mitigating circumstances, which under the code proposal would be delineated by the commission, should be spelled out and uniformly applied. They should relate to the conduct of the criminal and the seriousness of the crime. The prior record of criminal convictions should be a factor. Gun crimes should be considered aggravated.

I hope that offender characteristics would be very carefully applied. We are punishing for past conduct, violence, and crime. We are not punishing for predictions about the future, joblessness, or lack of education. We can rarely predict future criminal behavior; yet past violence is an important guide.

So, as we resolve to severely punish the most dangerous, we should insure that punishment looks to what the offender has done; for what we predict about the future is not his crime.

I would support the idea of a Sentencing Commission, with the hope that it would involve all three branches of government. Specifying sentencing laws is a legislative duty; applying them to convicted defendants is a judicial duty; parole and the administration of corrections is an executive duty.

I believe that some members could be appointed by the Judicial Conference, with others and perhaps the Executive Director chosen by the President. All would be approved by the Senate. This would insure full judicial participation, yet at the same time, it would provide a perspective including all three branches.

The time has come for a thorough review and overhaul of the parole system. This complicated topic alone is worthy of lengthy hearings. There should be some provision for early release in those cases where new evidence emerges that would be relevant to the sentencing decision.

Generally, inmates should not be released early except for good time allowances, which should be liberalized. Inmates should not remain in a state of agonizing uncertainty about the time of their release.

Perhaps there is a need for an increased postrelease service for those released from prison. They should be helped in finding jobs and furthering their education, in adjusting to lawful life.

Rehabilitation should play a role, after considerations of justice establish a fair term of imprisonment. We should not sentence to rehabilitate. After we sentence, we should try to rehabilitate. Those who participate in these programs should do so because they want to better their opportunities, to stake a claim in American life—not to seek early release.

We must also carefully consider prison capacity and needs. I join those of the National District Attorney's Association, who believe that humane prisons could provide increased protection for the public and law enforcement personnel.

No violent criminal should remain unpunished because of inadequate prisons. No criminal should be sent to a prison so inadequate and ineffective that it actually increases the likelihood of future criminal conduct.

William Shaffer of MIT, after an extensive analysis of the Massachusetts criminal justice system, concluded that of all variables, the shortage of prison capacity is the critical one affecting the ability of the system to lower crime rates. Chief Justice Burger has time and time gain urged a major improvement of prison conditions. Groups as diverse as the National Sheriff's Association and civil rights activists have called for upgraded corrections.

Mr. Chairman, I believe that the sentencing reforms could go far in making justice more just and law enforcement more effective. We can balance the needs of our prisons with society's need to see that punishment is fair and certain, and that punishment of the highly dangerous is more severe.

I intend to follow these hearings closely, because I see you have some very excellent and distinguished witnesses. I want to commend the work of those who are involved. Certainly there is a lot yet to be done. It is not going to be easy; it is not going to yield to simple answers.

I do believe it provides this Congress and the Nation a real opportunity to walk one step further down the road to simple justice.

Mr. Chairman, I appreciate this very much.

Senator KENNEDY. I want to thank you, Senator, very much for your comments and your testimony.

There is very little that I find that I am not in strong agreement with. You establish in your own legislation the various criteria for sentencing; we set out such criteria for the Commission to consider in terms of making its recommendations. There is some difference in terms of approach, but I think we have a similar concern as to what should be done.

Certainty of punishment and limitations on parole are issues which I think are essential. You have outlined the reasons for these changes.

I think that at the time of sentencing it must be made clear to the defendant and to the public as to what the sentence imposed is actually going to be. That is an essential aspect of this recodification bill.

The Shaffer study makes one point very clear; when talking about our growing prison population, it points out that we have the wrong people in prison. The great majority of inmates in State prisons, in maximum security, should not actually be there. We have too many people that are being sentenced for victimless crimes, such as alcoholism, while the hardened criminal is placed on probation.

Senator BENTSEN. It really was an informative study.

Senator KENNEDY. Yes. And with the kind of approach spelled out in our bills, I think it would make an important difference in terms of the prison population.

I just want to thank you. We will keep you informed. We welcome any additional suggestions as we move along.

Senator BENTSEN. Thank you, Mr. Chairman.

Senator KENNEDY. Senator Hatch?

Senator HATCH. I want to thank the distinguished Senator from Texas. Thank you for coming.

Senator BENTSEN. Thank you.

I congratulate you on this effort and this work.

Senator KENNEDY. Thank you very much.

Senator Domenici, we are glad to welcome you here this morning.

STATEMENT OF HON. PETE V. DOMENICI, A U.S. SENATOR FROM NEW MEXICO

Senator DOMENICI. Mr. Chairman, it is my pleasure to appear before you and testify before this committee on a subject, you know better than I, needs serious attention. Our criminal sentencing system needs improvement. I believe that several of the bills that you will be considering during these hearings offer a positive probability for such improvement.

Lowering the crime rates in this country deserves a high priority by this Congress. As with many of our complex problems, this huge problem is extremely complex and encompasses many elements. We must not, in my opinion, be afraid of the issue just because it is an enormous problem and has some overall dimensions that we might not understand.

I believe that we can make positive progress towards solving the overall problem by considering and enacting into laws those proposals that offer incremental improvement to our current criminal justice system. The criminal sentencing element of the system certainly can stand improvement. I commend you, Mr. Chairman and the committee, for approaching that aspect of our judicial system. I believe you have before you several measures which offer a distinct possibility to improve it.

As you are aware, I am sponsor of one of the measures and cosponsor of two of the other measures now under consideration. I would like to begin with just a few brief thoughts on two bills that I have cosponsored and then conclude with an observation about one that I have authored myself.

Mr. Chairman, I have cosponsored S. 181, one of several bills before you which deals with the concept of sentencing guidelines. I certainly commend you, Mr. Chairman, for your efforts in that regard.

This type of bill focuses on the great disparity we now find in sentences imposed in criminal cases of a similar nature committed under similar circumstances. In some of these cases, sentences imposed are perceived by the public as unduly lenient. I believe that, when the public has little confidence in the impartiality and effectiveness of its criminal sentencing system, the respect for that system may be seriously compromised.

Mr. Chairman and members of the committee, I will not dwell on the specific details of this measure or the others that are under consideration other than to say that the general concept has my wholehearted support. Obviously, care must be exercised in the specifics of the implementing legislation.

In this regard, I would urge specifically that careful consideration be given to the factors relating to the severity of sentences. While under this bill a sentencing commission would establish the guidelines, I would say, Mr. Chairman, that I am somewhat concerned that the specific guidelines not be too short.

I believe that a vast majority of the law-abiding public has the perception that convicted criminals are back on the street far too quickly after conviction. We must be careful if we adopt the guidelines approach because we can build up public confidence here, but we could cause that confidence to drop to an even lower level than it is today if we adopt this approach and then, through it, allow the resulting guidelines to impose sentences which are unduly lenient.

I am sure that we are all concerned about that possibility.

We must be particularly careful in this regard, and I urge the committee to focus on this aspect perhaps even to the extent of being specific in this regard in any legislation that you report out.

In concluding my remarks on this particular subject, I would note that I believe there is widespread support for this general concept. I would note that Chief Justice Burger, while not proposing any specific remedy, has joined the ranks of those concerned about the judicial system and the correction officials who deplore the substantially different sentences meted out to criminals charged with similar crimes and having similar records.

Lastly, but very important, Mr. Chairman, I would note that I believe this general concept will go a long way toward reducing the tensions that are very high and resentment that occurs among prisoners over widely differing sentences and the perceived vagaries in the parole operations.

Mr. Chairman, I am also cosponsoring——

Senator KENNEDY [acting chairman]. You would consider, then, abolishing parole?

Senator DOMENICI. Mr. Chairman, if the bill comes out with the notions that I have expressed here, where we can count on a judge having a very easily interpreted game plan from these guidelines, then I would think it has served its purpose.

As to S. 260, which is a proposed amendment to title 18 of the Federal Code, which would require the imposition of mandatory minimum terms with respect to certain criminal offenses, I am cosponsor of that, also. My only reservation about this specific bill is that specific minimum sentences imposed in section 4 through 7 may be too short.

As I have mentioned, with respect to S. 181, I would strongly urge the committee to carefully consider that issue.

Again, I believe we must be particularly careful not to undermine public confidence in our efforts by making sentences too lenient.

Section 3 of S. 260 is similar in concept to S. 31, which I introduced early this session. S. 31, is a measure to amend the Gun Control Act of 1968 to provide separate offenses and consecutive sentences in felonies involving the use of firearms. This is a concept which I introduced last year. I urge the committee's favorable consideration.

I am pleased that Senators Pell, Curtis, Stevens, Thurmond, and Schmitt have cosponsored my particular bill.

I would like to note that there is widespread interest, Mr. Chairman, in this bill in the House also. While there are several bills there that take different approaches to the problem, I would observe that one-fourth of the House Members have cosponsored Congressman Glenn Anderson's bill, H.R. 1559, which proposes this concept.

I believe that this type of legislation is not only ripe for passage, but is the type of legislation that will make a definite positive contribution towards improvement of our criminal justice system.

I believe that by imposing a minimum mandatory sentence for firearms-related offenses, a bill such as mine will make the certainty of punishment more of a reality. We are seeing more and more agreement as to the need for this type of legislation.

I agree with you, Mr. Chairman, on the introduction of S. 260, wherein you stated that such need is "to deter potential offenders from criminal conduct while at the same time keeping the violent offender in jail and off the street for at least a limited period of time."

The concept of the measure I have introduced is made up of several key elements. First, a specific minimum sentence is established for the first offense. I believe this minimum should be no less than 1 year, but the committee may find that a longer minimum is necessary.

Second, a provision must be made for a more severe mandatory minimum sentence for each succeeding offense after the first.

Last, there must be a provision that would mandate that the mandatory minimum sentences not be served concurrently with the substantive offense and that they not be suspended or should the sentenced individual be eligible for parole or probation during that mandatory term.

I would urge the committee to include these elements in any mandatory minimum sentencing legislation that they report out.

I believe, Mr. Chairman, that the soaring crime rate in this country, particularly those involving firearms-related crimes, mandate that we try this approach at this time.

I need not bore you with the statistics, some of which are outlined in the introduction to S. 31, so I will not repeat them. But I believe that the approach found in S. 31 is the most satisfactory of all those with which I am familiar. I believe that such an approach is the least controversial, both within the Congress and from the public's standpoint.

This type of legislation has been endorsed by groups spanning a wide range of political philosophy and ideology.

I believe penalties for firearms-related crimes should be placed on the wrongdoers. We should not punish the law-abiding parts of our society for the crimes of a few.

Mr. Chairman, I have only a few remaining remarks. I know of your busy schedule.

Only by putting the criminal on notice that his misdeeds will cost him dearly can we hope to correct this critical problem. Accordingly, I strongly urge this committee to act favorably on this type of measure.

I thank the chairman and members of the committee for giving me this opportunity. I commend you for the hearings.

The three areas I have covered I think are of extreme importance. They are not easy. They will take a lot of sensitivity and concern for the overall judicial system and people.

I just hope we will get something done this year, Mr. Chairman.

Senator KENNEDY. Thank you very much, Senator. We appreciate your interest and concern and your comments here this morning.

They are very much along the lines of the testimony heard earlier and Senator McClellan's and my own views.

Senator Hatch?

Senator HATCH. I would like to commend you for your viewpoints here this morning, Senator Domenici.

I would like to look over S. 181 and S. 260 and consider those personally. I would like to be listed at this time as a cosponsor on S. 31. I think that is an excellent approach. I think that puts a premium on not using a weapon in the commission of a crime.

Senator DOMENICI. Thank you, Senator Hatch.

Senator HATCH. I commend you as usual for your great perception here in the U.S. Senate.

Senator KENNEDY. Thank you, Senator Domenici.

Senator DOMENICI. Thank you, Mr. Chairman.

Senator KENNEDY. Senator Hart?

We welcome you here.

TESTIMONY OF SENATOR GARY HART

Mr. HART. Mr. Chairman, members of the subcommittee, I appreciate the opportunity to appear before you to offer some thoughts on legislation to restructure our Federal criminal laws. The need for improving our system of criminal justice is apparent to anyone familiar with how the system operates. I am particularly concerned that we devise the means to provide clear standards for criminal sentencing.

Sentences imposed in criminal cases are often perceived by the public as unduly lenient or unduly severe. When the public has little confidence in the impartiality and general effectiveness of its judicial system, respect for the law is seriously compromised.

Together with Senator Jacob Javits, I introduced Senate bill 204, the Federal Sentencing Standards Act of 1977. The bill would apply a general definition of justice under which like cases are treated alike and unlike cases are treated proportionately to their differences.

I should note at the outset the numerous and invaluable contributions to this bill by Senator Javits and his staff. His role in helping to foster and develop this piece of legislation from its inception was irreplaceable, and he should be commended for continuing his longstanding interest in enhancing the quality of our juidicial system.

The bill Senator Javits and I have offered contains four main elements. First, it would narrow the discretion which can be exercised by sentencing judges by employing the presumptive sentencing device. For each gradation of seriousness of criminal behavior, a definite penalty—the presumptive sentence—would be set. Individuals convicted of crimes of that degree of seriousness would receive the presumptive sentence, unless there were special, carefully defined circumstances of aggravation or mitigation. Under our bill, a second serious offense would automatically be considered an aggravating circumstance, requiring a more severe sentence than the presumptive sentence.

Second, the presumptive sentences and the permitted aggravating and mitigating circumstances would be prescribed by a Federal Sentencing Commission. The Commission's guidelines would take effect within 45 calendar days of issuance, unless both houses of Congress adopted a resolution of disapproval. The Federal Sentencing Commission would have an initial life of 6 years.

Third, the bill sets forth the rationale which the Commission must follow in prescribing its sentences: namely, a just deserts rationale. The severity of a sentence would have to based on the seriousness of the individual's offense, rather than on his likelihood of recidivism or need for treatment. Imprisonment, as a severe penalty, would be restricted to serious crimes. For lesser offenses, penalties other than imprisonment would be prescribed, such as intermittent confinement, supervision in the community, fine or forfeiture, curfew or other travel restrictions, and community service.

Finally, since the sentence will be based on the seriousness of the offense, indeterminancy of sentence will be phased out. By insuring that the offender serves the sentence determined by the sentencing judge, the public and the offender are assured of both the certainty of punishment and the date of its completion.

This bill was based on the recommendation of the Report of the Committee for the Study of Incarceration, "Doing Justice, the Choice of Punishments." Prof. Andrew Von Hirsch, the principal author of "Doing Justice," aided substantially in the drafting of this legislation. The bill was also based in part on the work done by other experts in the field of crime and punishment, including Richard Singer, Alan Derschowitz, Marvin Frankel and Norval Morris, some of whom will be testifying before you in the next couple of days.

Mr. Chairman, the Hart-Javits bill—S. 204—is very similar to proposals put forth by Senator Bentsen and by Senators Kennedy and McClellan. I know that several members of this subcommittee are sponsors or cosponsors of proposals relating to criminal sentencing.

I am happy there is so much interest in this issue. Together, these various proposals provide an excellent framework within which to reevaluate the way we deal with those convicted of criminal conduct.

The major difference between our bill and Senator Bentsen's bill, S. 979, is that while the Bentsen bill incorporates the sentencing guidelines within the text of the bill, our bill—as well as the Kennedy-McClellan bill—delegates this task to a Federal Sentencing Commission.

The concept of a sentencing commission is a good one. Issues relating to criminal sentencing can best be considered in an orderly, dispassionate fashion by a group intimately familiar with crime and punishment and somewhat insulated from the politics of the situation. Both the Hart-Javits bill and the Kennedy-McClellan bill require the commission to hold public hearings and to insure an acceptable degree of public participation.

Traditionally, the promulgation of Federal sentencing standards has been the responsibility of the Congress. This has not changed. Under both the Hart-Javits bill and the Kennedy-McClellan bill, the sentencing guidelines suggested by Sentencing Commission would not go into effect if Congress disapproves.

There are three important points which distinguish the Hart-Javits bill, S. 204, and the sentencing provisions contained in the Kennedy-McClellan bills, S. 181 and S. 1437. The three basic differences are: (1) The way in which the standards are developed by the Commission; (2) how closely the sentencing judge must adhere to the Commission's standards; and (3) the mode of appointing members to the Sentencing Commission.

S. 204—the Hart-Javits bill—requires the Commission, in determining the presumptive sentences, to consider only the seriousness of the offense and factors which directly relate to how the offense was perpetrated. The Kennedy-McClellan bills, on the other hand, allow the Commission—and would allow sentencing judges—to consider not only the seriousness of the offense but also (quoting from page 303 of S. 1437), "age; education; vocational skills; mental and emotional condition . . . previous employment record; family ties and responsibilities; community ties; role in the offense; . . . prior criminal activity *not resulting in convictions* (emphasis added) . . . and degree of dependence upon criminal activity for a livelihood."

Mr. Chairman, I have serious reservations about these provisions. I am especially troubled by the idea of judges considering reports relating to an offender's past, apart from prior convictions. I fear certain of these provisions might compromise the foundation of our rules of courtroom procedure, the presumption of innocence. I am also concerned about the threat to civil liberties inherent in employing evaluations of an offender's "state of mind," "previous employment record," "need for treatment" or likelihood of recidivism in determining a sentence commensurate with the seriousness of the offense.

Under the provisions of the Hart-Javits bill, the discretion allowed sentencing judges is strictly defined by the presumptive sentences and permitted aggravating and mitigating circumstances. The Kennedy-McClellan bills would allow the sentencing judge to sentence outside the guidelines established by the Sentencing Commission. I have serious reservations about this provision. I realize many feel strongly that it is impossible to anticipate the circumstances surrounding criminal behavior enough to warrant reducing judicial discretion to the degree required by the Hart-Javits bill.

My support for the sentencing scheme outlined in S. 204 rests on the belief that the potential risk of harm to any one offender is more than offset by the potential harm to many under a more open-ended scheme as proposed by S. 181 or S. 1437, or by the harm done to many every day under the so-called "individualized" sentencing we have today.

I want to emphasize that our bill, by requiring that the severity of a sentence be commensurate with the seriousness of the offense, in no way ignores the importance of deterring crime or of meeting the offender's need for education or vocational training, medical care, or other correctional treatment.

S. 204 recognizes the need to protect the public. It reflects the judgment that this is best done by equalizing punishments for similar crimes and by ensuring that anyone convicted of a serious crime will in fact receive a term of imprisonment. The proposals offered by Senators Kennedy and McClellan do not provide this assurance. Under those bills, a sentencing judge is allowed to sentence outside the sentencing guidelines. While this is grounds for appeal, the fact remains that under such a scheme a serious offender may receive probation or a suspended sentence, while a non-serious offender may receive a lengthy term of incarceration.

It should be clear that there is a basic philosophical difference between the Kennedy-McClellan bill and the Hart-Javits bill. The sentencing provisions under the former allow an individual to be imprisoned for reasons unrelated to the seriousness of the offense. For example, a person could be imprisoned and forced to participate in educational or vocational programs as a condition of his or her release.

Under the Hart-Javits bill, no one would be imprisoned for a period of time beyond that which could be commensurate with the seriousness of the offense.

It is true that the sentencing scheme outlined in S. 204 might be viewed as a punitive model. But this does not mean the end of rehabilitative programs within prisons. It does not declare rehabilita-

tion a failure. It does declare widespread judicial discretion—in the name of rehabilitation—a failure, and it declares that rehabilitation, as the primary purpose or justification for depriving someone of his or her civil liberties, is both inappropriate and unfair.

We should work to expand and improve rehabilitative programs within prisons. We need to do what we can to provide alternatives to imprisonment, and to understand the "why's" of criminal behavior so we can attack the crime problem at its roots. But rehabilitative programs, generally speaking, should be voluntary. Tying a prisoner's release to someone's evaluation of his or her state of mind or likelihood of recidivism can be more cruel than a frankly punitive model for sentencing.

Mr. Chairman, rank-ordering crimes and assigning appropriate sentences is a difficult task which requires a good bit of subjective judgment and arbitrary line-drawing. My hope is that the subcommittee will carefully determine the right amount of flexibility to allow the Sentencing Commission—should the Congress choose to establish such a body—in carrying out its responsibilities.

The Commission will need to develop a coherent, internally-consistent set of sentencing standards. The members of the Commission should be given a clear direction to follow, but should not be hamstrung in their deliberations by too many constraints. I hope that the factors to be considered by the Commission suggested in S. 1437, for example, are for illustrative purposes, and that the Commission would not be required to account for the weight given each one in developing its standards.

The other major difference between S. 204 and the Kennedy-McClellan bills is the way the Sentencing Commission is established. S. 204 provides for the President to appoint its members, and envisions the Commission as an independent rulemaking agency, technically a part of the executive branch. S. 181 and S. 1437, by contrast, provide for the Judicial Conference of the United States to select Commission members and envisions the Commission as part of the judicial branch.

There might be some merit in placing this Commission more or less in the judiciary. But considering the importance of this issue, and the magnitude of the problems the Commission will confront, perhaps some of the Commission members should be appointed by the President, by and with the consent of the Senate. Certainly this question merits careful study.

Mr. Chairman, it has been suggested that a society can best be judged by how it treats those who do not conform to its rules. We should recognize that, by any standard, the reality of our criminal justice systems falls far short of the values it is designed to promote. Recodifying the criminal code will not solve all of the problems, but it will go a long way toward simplifying the administration of justice and providing coherent standards by which it can be judged.

In so doing, the subcommittee, its staff and all who have contributed to the proposals you are now considering will have done much to restore respect for the law. You should be commended for the hard work that will go into holding these hearings and developing appropriate legislation.

The sentencing provisions of S. 204, S. 181, and S. 979—as well as the sentencing provisions of S. 1437, the "Criminal Code Reform Act of 1977"—are all a step in the right direction. They each narrow the discretion which can be exercised by sentencing judges. Surely reducing the disparity in sentences imposed in similar cases is an essential component of any meaningful reform in this area.

But there is a good deal of disagreement as to whether imprisonment is intended to punish, protect law-abiding citizens, rehabilitate criminals, or to accomplish a combination of these goals. We must address ourselves to these uncertainties in any new sentencing standards we might adopt, or else we will simply add to the confusion.

Mr. Chairman, I want to thank you again for the opportunity to appear before the subcommittee. I would be happy to answer any questions you might have, and I am eager, as I am sure my cosponsor, Senator Javits, to help the subcommittee in any way I can. Thank you.

Senator KENNEDY [acting chairman]. Thank you very much.

We welcome Senator Javits, a former member of this committee. His interest in criminal justice continues. He has always been an active member in this field. We welcome your comments.

Obviously, the differences between your and our approach are important; but they are minimal. I think some of the points that you made here are important for us to think through. For example, you take the Presidential route in the formation of the Commission; we do it through the Judicial Conference. We will evaluate closely the reasons why you felt that variation was important. I do not think that is a serious difference. I would like to give some consideration to it. Also, concerning the presumptive sentences, in whatever is going to be recommended by the Commission, there will be some minor degree of flexibility. You would rather have a flat presumptive sentence, as I understand it, while we favor some additional flexibility.

It seems that we are certainly in the same ballpark, in terms of meeting the challenges.

Senator Javits?

STATEMENT OF HON. JACOB K. JAVITS, A U.S. SENATOR FROM NEW YORK

Senator JAVITS. Mr. Chairman, I would like to express my admiration for Senator Hart. I think he devoted himself to this measure in a very effective way.

Drawing on my own experience as attorney general of the State of New York, I was impelled to go on this bill, especially considering the grave difficulties we have had in the prisons in New York. At Attica we had a prime demonstration of what happens when frustration and despair have reached their end; terrible tragedy resulted.

Senator Hart has testified very ably on the details of the bill and the philosophy which animated it. I would like to make just two observations.

I am as interested as the chairman and Senator McClellan in rehabilitation and the reconstruction of a life. Our record, however, shows that the rate of recidivism is extremely high. An estimate of

75 percent is not excessive. Hence, the problem which inheres in that induced me to go with Senator Hart on this bill.

I believe that sentences are likely to be shorter when they are definite. The speculation and gamble about parole, once removed, will result in a much better administration of prisons and a much greater dedication by the prisoner and the authorities to the matter of rehabilitation, education, training, et cetera. That will be that. Every inmate will know that he must serve a definite sentence.

Today, we have a complete guessing game. No matter how long you sentence an individual for, the moment he goes to jail he is already speculating about what is going to be the outcome at the other end, how the parole commission is going to deal with him.

The second point is the confidence of the public. The public has lost a great deal of its faith in the American criminal justice system. This bill is designed in a very real way to firmly reestablish the public's faith in the criminal justice system.

I welcome, Senator Kennedy, your suggestion that the parameters between your bill and Senator Hart's and mine are relatively narrow. I, too, look forward to the reconciliation of those differences by the committee.

Senator HART. Mr. Chairman, I would only support the points made by Senator Javits here and by the chairman.

The similarity and philosophy between the bills introduced by the subcommittee chairman Senator McClellan and Senator Kennedy and Senator Javits and myself are much greater than the dissimilarities. The dissimilarities are narrow but, I think, important. I am sure the subcommittee will keep those in mind in its deliberation.

I also want to thank Senator Javits again for his support of this measure. His long background and concern about the judicial system in this country and the system of crime and punishment is extremely important to the measure, and I think it adds considerable weight and merit.

I know the subcommittee will give this bill its consideration in the future.

Senator KENNEDY. Thank you very much.

Senator Thurmond?

Senator THURMOND. Mr. Chairman, I would like to join in welcoming Senator Hart and Senator Javits. We are very pleased to have you distinguished gentlemen come in and give us your opinion on the bills.

This criminal code is something that has been worked on for years and years. We thought we had it nailed down several times, and matters keep coming up.

We are very pleased to have your opinion. Thank you for coming.

I am sorry, Mr. Chairman, but I have got to leave in just a minute to go to the Foreign Relations Committee. We have a new ambassador to Saudi Arabia; he is from my State. I have to be over there. Also there is a conference committee meeting on the Armed Services bill.

Thank you very much, Mr. Chairman.

Senator KENNEDY. Senator Hatch?

Senator HATCH. I would just like to thank Senators Javits and Hart for their appearance here today.

Senator KENNEDY. We will be moving on this legislation, Senators, and we hope that you and your staffs will stay in close touch with us because we very much value your comments.

Thank you very much.

Senator JAVITS. Thank you.

Senator HART. Thank you.

Senator KENNEDY. Attorney General Bell?

We want to point out at the outset that this proposal has really moved as far and as fast because of your interest in working very closely with the members of this committee and obviously because of the President's interest.

I know you are very well aware, as all of us are, of the complexities of it and the very substantial amount of work that has been done prior to this latest effort.

We welcome you here and commend the efforts you have made to date.

STATEMENT OF HON. GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ACCOMPANIED BY PETER FLAHERTY, DEPUTY ATTORNEY GENERAL; AND RONALD L. GAINER, DIRECTOR, TASK FORCE ON CRIMINAL CODE REVISION

General BELL. Thank you, Mr. Chairman.

I am appearing here today with high expectations, expectations that the bill now before you, S. 1437, marks the final stage of the long effort to obtain a modern Federal Criminal Code, an effort that has the full support of this administration.

In 1962, the Model Penal Code of the American Law Institute pointed the general direction for reform of American criminal laws. Numerous States have since revised their laws accordingly.

In 1971, the Final Report of the National Commission on Reform of Federal Criminal Laws showed the way in which such reform could be adapted to the Federal criminal justice system. The Chairman of that Commission, former Gov. Pat Brown of California, and the Commission's staff director, Prof. Louis Schwartz of the University of Pennsylvania, deserve major credit for that innovative accomplishment.

After 6 years of further work, marked by the compilation of a hearing record exceeding 8,500 printed pages, there is now before you a detailed new Federal Criminal Code that is ready for enactment.

The Members of the Senate who have been the principal contributors to the shaping of this new code have been, of course, Senators McClellan and Kennedy, former Senator Hruska, and the late Senator Philip Hart. I am pleased to have participated with the Members of the Senate in the extensive reviews and negotiations that took place earlier this year and that led to the joint drafting of S. 1437.

Almost all of us in this hearing room know firsthand that existing Federal criminal laws are in serious need of revision. Their deficiencies are particularly apparent to those of us who must work with them on a daily basis. Two and a half centuries ago, an English judge noted that "an act of Parliament can do no wrong, though it may do several things which look pretty odd." We have some things which look "pretty odd" in our existing Federal statutes.

Side by side, we have statutes that are well drafted and statutes that are ambiguous; statutes that meet current needs and statutes that are outmoded; statutes that work as intended and statutes that are unenforcible. In some areas where there should be statutory coverage there is nothing; other areas are papered with overlapping and often inconsistent provisions.

The sentencing process is a prime example of an area that needs reform. Under present law the punishment levels for similar offenses vary irrationally, thus raising questions about the rationality of the Federal criminal justice system itself.

It is partly because of this confusing state of our law that so much attention is focused in individual cases upon attempting to unscramble and rationalize the law. This causes an expenditure of precious time on the part of judges and lawyers that would be unnecessary under a more modern criminal code.

It also introduces unfairness into our Federal criminal justice system—unfairness because of the delay caused by the confusion in the present system, and unfairness because the current law is almost incomprehensible to ordinary citizens.

By inadvertence rather than by design, we have almost reached the situation that existed in Rome at the time of the Emperor Caligula when the laws were deliberately posted on columns so far above eye level that the citizens could not read them.

S. 1437 provides a remedy for these problems by establishing for the first time an integrated code of virtually all statutes and rules concerning Federal crimes and the Federal criminal justice process. Probably its single most important contribution is in setting forth the law in a far more comprehensive, orderly, and simple manner than the statutes existing today.

This itself is a major, progressive step. It will make the law far more understandable to professionals and laymen alike. It incorporates most major areas of judge-developed law into associated statutory provisions, leaving uncodified only a few areas—such as defenses to prosecution—where compromise has made necessary, for the time being, the continuance of the practice of deferring to judges on the exceptions to criminal liability. Thus, the new code provides, with the exception of the statement of defenses, a single, basic source of Federal criminal law.

The new code's value goes far beyond its simplicity and comprehensiveness. It contains literally hundreds of improvements over the existing state of the law. Certainly it will make the criminal justice system more efficient, permitting the Department of Justice and the courts to respond to crime—from organized crime to white-collar crime—in a more effective manner.

Moreover, it will make the system more fair—more fair in providing clearer notice of what is considered criminal conduct, and more fair in providing for greater rationality and equity in sentencing. The code's sentencing system will apply guidelines to determine objectively what kind of sentence would be appropriate for a particular case and will grant appellate review of sentences outside the range specified in the applicable guidelines.

This system provides an ingenious means of assuring sentences that are not only fair to individual defendants but fair to the public as well.

As this committee proceeds with its work on the new code, one thing must be kept in mind. This bill is a compromise—a very good compromise. An editorial in the New York Times even referred to it as a "masterly" compromise. A tremendous amount of time on the part of the congressional sponsors and on the part of the Department of Justice has gone into the drafting of the bill.

I firmly believe that the result is as fair and workable a Federal criminal code as has yet been devised. It is a careful, yet progressive, balance; and care must be taken to assure that this is not upset by well-intended attempts to shift the code's emphasis either toward the views of those who would emphasize the need of our communities for more effective law enforcement, or toward the views of those who would emphasize the equally important need for strong assurance of individual liberties.

Severable issues should be just that—severable. There will be time enough in the future to make further changes in individual provisions of the code when the need is sufficiently apparent to achieve a consensus.

S. 1437 has my strong personal support and the support of the Department of Justice. As I said earlier, it also has the support of the administration. It is now cleared through the Office of Management and Budget and all the offices that must approve of proposed legislation before the administration can be said to support it.

We will be pleased to be of further assistance during your continuing work on the bill. I look forward to its early passage.

Senator KENNEDY [acting chairman]. Thank you very much, General Bell, for your comments here and for your support for this comprehensive approach.

One of the most important, if not the most important, aspects of this legislation deals with the sentencing provisions. I think you would agree with me on that.

General BELL. I do agree.

Senator KENNEDY. One of the essential purposes of this bill's sentencing provisions is the desire to eliminate disparity—the real as well as the apparent disparity—in sentencing.

We believe that, with the commission and the enactment of other provisions, that goal will be achieved.

But other disparity also exists. That is in the area of parole.

I wonder if you would agree with me—and I understand from your recent comments that you might—that it is also essential, because of past abuses and the promise of continued abuse, that we eliminate parole release and establish at the time of sentence the amount of time that individuals will spend in prison for given crimes.

General BELL. I do agree with that. I think it will follow, after we set up the sentencing system under S. 1437, that the parole authority ought to be removed prospectively. I do not know how we can do it retroactively for the people already in prison.

Several things would be accomplished by that. It would make the system more rational in the eyes of the public. It would restore the confidence of the public in the legal system. We see these aberrations of juries who sentence people to 1,433 years in Texas, for example, because they think they will have to serve longer before they can get out on parole.

I think it would be a deterrent to crime if a person knew that his sentence was going to be fair but that he would have to serve the sentence. He would still have the opportunity to earn good time in prison. Also, probation would still be a large part of the law for the first offender.

In the end, we are going to have to get away from the parole system; I agree with you.

Senator KENNEDY. Is it your sense that, in reviewing the current status of parole release and how it is used, that the record is clear that we really do a very poor job in being able to readily predict the rehabilitation of criminals?

General BELL. We do.

Senator KENNEDY. This is troublesome, in terms of both the appearance and the reality of injustice in our criminal justice system. In so many instances parole is based on factors which bear little relevance to whether or not the criminal has been rehabilitated.

Can one really coercively rehabilitate someone? I suppose that is the question.

General BELL. You cannot. You exacerbate the disparity through the parole system because one person will be paroled and another one will not be.

It has been necessary to set parole guidelines that indicate the factors which the parole commission is to consider in determining the parole release date. But there is still disparity.

I do not know how the parole release system rehabilitates anyone. In fact, I do not know of anyone that has really been rehabilitated by being put in prison. You rehabilitate people by putting them on probation. It might be, in a rare case, that somebody is rehabilitated by being in prison. But the American prison system is in such desperate shape that that will have to be a subject to be discussed with your committee later on, this fall, perhaps.

There is not much rehabilitation in the prison system; I will put it like that.

Senator KENNEDY. I think most would agree with that statement.

What we are really attempting, as I understand, in terms of sentencing is that we do not believe that a prison term should be based on the idea of rehabilitation. Rehabilitation is an important goal. It is an essential one, I believe. It is one that must have the support of Congress and the administration.

But what we are basically saying is that rehabilitation is not a purpose of sentencing. They have been blended in the past. What I am saying, what you are saying, and what this legislation is saying is that, when a sentence is declared by the judge, that is the sentence to be served.

General BELL. That is it, and that is the way it ought to be.

Senator KENNEDY. Under the current system, when you have a 12- to 15-year sentence—maybe some of the public thinks that the defendant is going to be in for 15 years. Yet he is paroled in 5 years. This the public cannot understand. They read about this.

All of those factors contribute to both injustice, unfairness, and misuse in terms of the individual as well as the public's perception of the criminal justice system.

General BELL. That is correct.

Senator KENNEDY. I would like to ask you about the marihuana provisions in the bill. There is great interest in the Congress and great concern by parents and by younger people.

I think it is important that your position be extremely clear. As I have heard it in the past, it is the belief that the most troublesome aspects of the drug issue in our society involve hard drugs such as heroin, and the trafficking in such hard drugs. The resources of the Federal Government ought to be devoted and targeted in these areas which cause such tragic damage to individuals, families, and our American society.

I think it is important that we understand clearly your position and that of the administration.

General BELL. The provision in S. 1437 essentially reflects the practice that we follow now. As I testified at the confirmation hearings, we devote Federal resources to apprehending traffickers. We do not devote Federal resources to apprehending people in possession of small amounts of marihuana. We leave that to the states.

We consider that to be essentially a state and local problem. So, this bill really codifies what our practice has been.

Senator KENNEDY. You think that makes a good deal of sense from a law enforcement point of view in dealing with that aspect of the drug trade which is the most dangerous to our society.

General BELL. Exactly.

Senator KENNEDY. Could you, General Bell, review very briefly why you think that this legislation is important from a law enforcement point of view?

General BELL. It is important to have a code of laws that the courts and law enforcement officials can understand. It is important from the standpoint of deterrence that the public understand what the law is.

We have a crazy quilt of laws now in many areas.

That is important. As you have noted, the sentencing part of the bill is very important. We certainly have got to bring some stability and rationality into the criminal justice system. We do not have that now.

The law now, in many ways, can be described as a nonsystem or nonset of laws because there is so much overlap. It is important to have a code of laws that makes sense and that the people can understand.

I think that that would be the best answer.

The fact that we are so far behind the states is something that is of great concern to me.

Senator KENNEDY. Thirty-five states have either completed or are working on this.

General BELL. They have codified the laws or are working on it. We in Georgia long ago recodified our criminal laws. Since then we have even recodified our criminal procedural law. The Federal Government is just out of step and behind; that is what it gets down to.

Senator KENNEDY. It seems to me that the public might get the impression that either we are not serious about improving and strengthening our criminal justice system or that we are indifferent about it.

You are satisfied that this bill also does add some important additional protections for the civil liberties of the American people?

General Bell. There is no question about that.

The best protection for individual liberties is to have specific laws. This does that. And it also improves civil rights, for example.

Getting back to the question before this, I think that this code will enable the Department of Justice to make better efforts in the area of organized crime and white-collar crime.

Senator Kennedy. White-collar crime provisions have been added, as well as election offense provisions, extensions of the civil rights laws, and the provisions on rape.

General Bell. I think that is an improvement.

Senator Kennedy. Let me ask this question. There have been those that say, well, this bill is too comprehensive, it is too all-inclusive. It is too vast and too complex. Why shouldn't we do this piecemeal? Why shouldn't we take this bit by bit? Every one of these provisions is complex. Why shouldn't we just take our time and do it bit by bit and not address this in a comprehensive way?

How do you answer that?

General Bell. There are two reasons.

One is that it is not that difficult to master this code. I thought the working draft was fairly long myself. But I had people working on it with me, and initially I spent about half a day with them going over it. I did further reading after that. We came up with a few things that we did not agree with and a great deal that we did. We found it easy to amend. It is not so difficult that it cannot be comprehended or managed.

The second and more important reason is that this is a comprehensive approach to recodifying the law. It really involves a balance. You get law out of balance if you change one part of the law without changing all of it.

I do not think it is a reasonable way to proceed to do just part of it now and some more next year and some more the year after next. I think it ought to be done at one time. You might end up with greater inconsistencies or greater irrationalities than you have now if we do it piecemeal.

Senator Kennedy. You would agree that the interrelationship of the various titles is essential? It is difficult to do one title and perhaps not do the others in terms of definitions, reorganization and terms of culpability.

General Bell. Right.

Senator Kennedy. If we are going to reduce the 80 different definitions of culpability to 4, which we are doing, it is important and essential that this be done throughout the criminal code. It would not make such sense to do one title here and one title there. It seems that we would just be adding again to the mishmash of current provisions.

General Bell. I think that it is especially important not to split off the sentencing provisions. I do not think you can set up this sentencing system unless you change the substantive law to go along with it.

Senator Kennedy. They are really interrelated.

General Bell. Yes.

Senator Kennedy. In terms of equity and fairness both.

General Bell. I do not know any other way to proceed to recodify the law except by having a long bill. If the bill is not so long that it cannot be understood, then there is nothing wrong with that approach.

Senator Kennedy. There is a vote on the floor on the Eagleton amendment.

Senator Hatch?

Senator Hatch. Thank you, Mr. Chairman.

I want to compliment you and your staff, General, for the leadership that you have taken in trying to formulate a better criminal code in the United States.

I think it is important to point out for the people here today that this bill does not decriminalize marihuana.

General Bell. Right.

Senator Hatch. What it does is put the emphasis on apprehending traffickers. As I read the bill, it does make a person guilty of various class felonies, for possessing 10 grams or more. Ten grams is a little more than a third of an ounce of marihuana.

It has been indicated in testimony here in the past that 65 to 75 marihuana cigarettes could be made from 1 ounce. So, I have to admit that I like this bill better than what has been advocated here in the past. I suspect you do, also.

General Bell. I am not familiar with that past testimony; I take my own position.

Senator Hatch. You bet.

Do you feel as I do, then, that marihuana is something for which repeated possession of substantial quantities should be categorized as something more than just a minor offense with a decriminalized penalty?

General Bell. I do take that position. We are not decriminalizing.

Senator Hatch. That is right.

General Bell. We are not making possession of a small amount a Federal crime. It is still a local crime or a State crime. We cannot enforce all the local laws on the Federal level.

Senator Hatch. I understand.

General Bell. We want to devote our resources to catching the traffickers in hard drugs and marihuana also.

Senator Hatch. I commend you for that.

I want again to say that I think you have provided some energetic leadership—you and your staff—in this particular area. I, for one, want to congratulate you for it.

General Bell. Thank you.

Senator Kennedy. General, we will perhaps submit additional questions to you. We appreciate very much your presence here. I want to work very closely with you and the Administration in expediting this.

I note Mr. Flaherty's and Mr. Gainer's presence here. Mr. Gainer also has been very, very helpful to us.

General Bell. It is a pleasure for us to work with you. Thank you.

Senator Kennedy. Thank you.

We are going to suspend now. I will not be here when we reconvene. Before we do suspend, I want to give a warm word of welcome

to the former Governor of California, Governor Brown. He has probably been more concerned about this issue than any single individual.

It has been a long, hard, and persistent matter of interest and concern to Pat Brown. He has come all the way from Indonesia. He arrived just a few hours ago to be with us here this morning.

Governor, we are going to hear from you shortly when we reconvene. We are going to recess.

But I want to add a very warm personal welcome to you. Your very signal work in this area does not go unnoticed.

Senator HATCH. Likewise.

I will be back soon, Governor Brown, to begin your testimony.

[Recess taken.]

Senator HATCH [acting chairman]. The subcommittee hearing will come to order.

Governor, welcome to our committee. We are happy to have you with us today and we thank you for the efforts which you have put forth with regard to this bill.

We are pleased to welcome you to our committee.

Mr. BROWN. Thank you very much, Mr. Chairman.

I have asked Professor Schwartz, who is the executive officer of our commission, to sit beside me. He has studied all of these code revisions and has written several articles on them. I know he is going to testify after I testify.

Senator HATCH. We are happy to have you here also, Professor Schwartz. We welcome you.

Mr. SCHWARTZ. Thank you, Mr. Chairman.

STATEMENT OF EDMUND G. BROWN, FORMER CHAIRMAN, NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS

Governor BROWN. Thank you, Mr. Chairman, and members of this committee.

I want to thank you for permitting me to testify. I am a member of the State bar of California and a partner in the law firm of Ball, Hunt, Hart, Brown, and Baerwitz. I am former Governor of California and former attorney general of California.

In 1966, President Johnson appointed me Chairman of the National Commission on Reform of the Federal Criminal Laws, and I served in that capacity until the Commission filed its report with the Congress and the President in 1971. Since then, I have continued my interest in the revision of title 18 of the United States Code. I am here today to urge the Senate Judiciary Committee to report favorably on the new bill, S. 1437, introduced by Senators McClellan and Kennedy. I believe that the broad subject matter embraced by this bill is of importance to the whole country and that Congress should address itself to the problem of revision with the least possible delay.

I had some reservations with regard to the wisdom of certain provisions contained in the former bill, S. 1, although I was convinced that a very substantial part of that bill constituted sound legislation and a great improvement over the existing provisions

of title 18. Last year I urged Senators McClellan, Hruska, Kennedy, and Hart to adopt a compromise which would eliminate certain of the more controversial sections of the earlier bill and retain the existing law in place of those provisions. Senators Mansfield and Scott, then majority and minority leaders of the Senate, evidently thought well of the suggestions and urged the adoption of a compromise which might speed the legislation toward passage by the Senate. A prodigious effort was made by the four members of the committee toward that end, and substantial agreement was reached concerning elimination of the more controversial sections of the bill. While our hopes were not wholly fulfilled, the staff work on the legislation continued, and I sincerely congratulate Senators McClellan and Kennedy and their respective staffs on their ability to join in the introduction of S. 1437. I am particularly gratified that Attorney General Bell is lending his support to a bill that constitutes a balanced compromise and yet, at the same time, is progressive legislation.

I cannot claim total familiarity with all of the revisions of this new bill, but I believe that it incorporates many of the recommendations which the National Commission made to Congress 6 years ago.

When you consider that we took 3½ years to write the original recommendations that were presented in our report, it will take some time to go through this new bill and find the differences between the report that we made and the bill that was introduced. I am very proud of the work that our Commission accomplished, and I am glad to see that it is given recognition in this bill.

I recognize, of course, that before the enactment of comprehensive legislation such as that before this committee, some opposition will be encountered from those whose concern focuses primarily on strong law enforcement, and, likewise, from others whose approach to the problems of crime relate solely to the goal of protecting the civil liberties of our citizens. I have usually found myself within the ranks of the civil libertarian group. At this particular time, however, I would urge Members of Congress and all other protagonists for change in our criminal laws to set to one side their preoccupation with their own views as to all—and I emphasize "all"—needed change regardless of direction. Instead, I would urge that we join together and fix our sights on the vital and transcending need for a general revision of the law.

It is certainly unnecessary for me to enumerate the deficiencies of title 18 of the United States Code as it presently stands, since they have been thoroughly documented and are matters of which I am sure this committee is already fully aware.

Nor do I believe that there is any need for me to point out the unlikelihood that anyone will proclaim that the revisions of S. 1437 constitute the best criminal code that could be devised. No one has yet put together a document that could reach such a broad goal. I suspect that a bill of that nature would have so little chance of enactment that we would be wasting our time if we were discussing it today. A consensus could not be obtained.

I suggest that Congress has three possible courses which it might pursue in the modernization and revision of title 18.

First, it could make a serious and detailed attempt to deal with each section or chapter needing revision in separate bills. Paren-

thetically, I submit to you that every chapter ultimately needs such treatment. That course would have the advantage of educating the Congress and the public with regard to all the intricacies of the criminal law. But it would obviously take forever. One hundred years from now when the last chapter might be addressed, it would be time to start all over again. Meanwhile, an endless amount of effort would have taken the time of the Congress away from other important affairs.

A second course would be for Congress to seek a single, comprehensive revision of the whole code on a unified basis, embracing therewith a determination to settle all disputes with regard to every section. In the usual effort to update and amend the Federal laws in a particular area, that may seem the obvious solution. In a matter so packed with difficulties, honest disagreement and serious controversy as to the administration of the criminal laws, however, an attempt to iron out all disputes in a single piece of legislation would almost inevitably doom the revision to frustration and final defeat.

S. 1437 seems to me to follow the middle ground which is eminently sensible and pragmatic. There are certain broad areas in the scope of title 18 which can be revised on a modern and acceptable basis, without stirring deep controversy. The bill addresses itself to those broad areas. There are, however, certain additional areas which do arouse strong differences of opinion and controversy, but which might be resolved without jeopardizing the success of the whole revisionary effort. The proposals for decriminalization of marijuana possession and a modern sentencing structure might be cited as obvious examples. Immediate changes in those laws would seem to be imperative. One might realistically expect that differences in approach might be ironed out.

In other areas, however, the difficulties were too deepseated to have permitted joint sponsorship of this bill and any attempt to deal with them in broad legislation, such as S. 1437, would only have resulted in seriously jeopardizing any chance of passage of this much-needed legislation. Such matters as the secrecy provisions, which were contained in S. 1, gun registration and wire tapping, could only have been resolved after struggles which almost inevitably would have destroyed any chance of passage. I believe this was the primary difficulty faced by S. 1.

Separate bills addressing themselves to narrow, specific controversial problems, seem to me to be the obvious way of handling those matters. When enacted, they will, of course, become part of the new code.

I, therefore, urge all my friends in the American Civil Liberties Union, as well as those who are convinced that some form of more effective criminal justice is absolutely critical, to direct their efforts toward securing what is immediately possible and realistic in the way of revision and improvement in the criminal laws.

It is obvious that S. 1437 represents a delicate balance between the separate viewpoints of what might be termed conservatives and liberals. Any attempt to upset that balance by piling on the special concerns of one group or the other may doom the legislation to almost certain defeat. In my opinion, it should be pressed towards

passage with its provisions virtually intact. Thereafter, there will be enough time to secure through separate bills all the changes that either group may deem desirable.

Thank you again for allowing me to testify.

Senator HATCH. Thank you, Governor.

We will hear now from Professor Schwartz, and then I will have some questions for both of you.

STATEMENT OF PROF. LOUIS B. SCHWARTZ, FORMER DIRECTOR, NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS

Mr. SCHWARTZ. Thank you, Senator.

There is very little left to say after what you have already heard this morning. I have said it in writing, and a copy has been filed.

[Material follows:]

SUMMARY OF TESTIMONY OF LOUIS B. SCHWARTZ, BENJAMIN FRANKLIN PROFESSOR OF LAW, UNIVERSITY OF PENNSYLVANIA, AND DIRECTOR, NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS

I am grateful for the opportunity to testify in favor of prompt reform of the Federal criminal code, and to support the McClellan-Kennedy bill, S. 1437. S. 1437 proposes numerous important improvements in existing law, following in the main the recommendations of the National Commission on Reform of Federal Criminal Laws, hereinafter referred to as the "National Commission". It would enhance the effectiveness aid fairness of law enforcement without undermining constitutional rights. It will help to make the law respectable, and thus promote respect for law. It has it's shortcomings from my point of view; and some issues such as capital punishment, gun control, insanity and other defenses have been passed over as politically insoluble for the present. Some of my concerns are listed in an appendix to this summary, and many of my views are more completely stated in Reform of the Federal Criminal Laws: Issues, Tactics and Prospects, 1977 Duke Law Journal 173. But in a democracy all legislation must compromise among countending points of view. Insistence by any faction on complete adoption of its program is the surest way of blocking any progress.

ADVANCES OVER PRESENT FEDERAL CRIMINAL LAW

1. Organization; Simplification; Modernized Definitions of Crime; Elimination of Obsolete Offenses.

2. Sentencing—Introducing Order and Reason Into the Chaos of Sentencing.—There are two central aspects of any penal code: (i) what activity is penalized, and (ii) what punishments are authorized and how much discretion is allocated to judges, parole officials and others in relation to the imposition and service of sentences. Present Federal law is notoriously defective in the looseness with which sentencing is regulated. Prosecutors have enormous power over sentence although sentencing is generally thought to be a judicial function. They have this power because of virtually uncontrolled discretion in selecting the charges to bring against the accused, in bargaining to drop charges in exchange for pleas of guilty, and in making sentence recommendations which are often deferred to by the sentencing judge. The Federal prosecutor can cumulate charges arbitrarily, as in the notorious instance of mail fraud, where a single fraud can be treated by the prosecutor as one crime or as 10 or 20 crimes depending on how many letters the prosecutor decides to put into separate counts of the indictment. The judges have virtually uncontrolled discretion to fix a term of imprisonment anywhere within very broad maxima set by present Federal criminal laws or to impose no imprisonment whatever. Outrageous differences in treatment of similar offenses and offenders have been reported among different Federal judicial districts and among judges of the same district. The judge's discretion (and opportunities for arbitrary action) are enlarged by his freedom to chose between consecutive and concurrent

sentencing when defendant has been convicted of a number of offenses. There is no existing provision for appellate review of arbitrary sentences. The Parole Commission's discretion, under indeterminate sentences with very long maxima, is virtually boundless, although, to its credit, the Commission has often used its discretion to temper the unjust discrepancies in judicially imposed sentences and, in recent years, has sought to put the exercise of discretion on a rational basis by formulating a set of Guidelines.

S. 1437 addresses itself to these problems constructively:

(1) Prosecutorial overcharging based on the technicalities of mail fraud and other Federal jurisdictional niceties is restrained by section 201(b): "Proof of more than one [Federal jurisdictional peg] does not increase the number of offenses that may be found to have been committed."

(2) Judicial discretion to give consecutive sentences is restrained by section 2304 permitting consecutive sentences to aggregate no more than (roughly) double the longest sentence for any one of the offenses.

(3) Sentencing arbitrariness will be notably restrained by providing for appeal from sentence. Section 3725.

(4) Parole discretion would be subjected to congressional guidance by specifying considerations to be taken into account, by limiting the duration of parole, by mandating parole for at least the final one-tenth of the prison term imposed, by providing for administrative appeals from denial or revocation of parole, and by regulation of parole procedure.

(5) An innovative proposal to develop a national sentencing policy is embodied in Part E of the bill, establishing a Sentencing Commission to develop Guidelines for the judges as well as the Parole Commission. Although the Federal judges would not be bound to sentence within the range suggested by the Commission's guidelines, they would have to state their reasons for not doing so, and sentences outside the guidelines would be appealable. One can admire the creative power of this proposal without being certain, at this stage, that it is preferable to or combinable with other options, e.g., intensification of the reform of parole.

3. The Rigidities of Mandatory Minimum Sentencing Are Avoided.—Where prior legislation has mandated prison sentences, e.g., for narcotics and weapons offenses, S. 1437 opens the gate to some guided exercise of judgement. Sections 1811, 1823. The commendable desire of Congress to express national penal policy is far better served by declaring policy preferences or guidelines than by seemingly absolute requirements which are easily evaded by prosecutors and others.

4. Offenses Are Reasonably Graded.—The principle that big thieves deserve harsher treatment than petty thieves is embodied not only in the provision on theft, but also in tax and other laws. A modernized treatment of arson gets away from grading (inherited from feudalism) that makes burning a dwelling or an "outhouse" thereof the most serious offense; section 1701 deals with burning or exploding "public facilities and structures", i.e. schools, theaters, office buildings, systems of communication, energy, water, sanitation, etc. Antique and perverse grading of homicide is eliminated. No longer will killing by an agonizing parent or spouse to end the tortures of a dying loved one be treated as "first degree" (potentially capital) murder—because it is "deliberate"—while a wanton slaying on impulse "for kicks" is second degree murder because it lacked "premeditation". No longer will a killing provoked by vile racist insults be treated more harshly than a killing provoked by a slap.

5. Civil Liberties Are Extended.—Perhaps the greatest extension of civil liberties inheres in the sentencing reforms mentioned above, insofar as they guard against arbitrary deprivation of liberty. Care has been taken to avoid penalizing "leaks" of information from the government, except in a few categories of vital defense secrets and private information furnished to the government in confidence. Discrimination based on sex becomes criminal. Section 1504. The Smith Act with its notorious threat to freedom of speech and membership in radical political organizations has been eliminated. Dropped also are the relic of World War I hysteria directed against circulating false rumors in wartime (18 U.S.C. sec. 2388), and the obsolete 18th century act purporting to restrain American citizens' contacts with other nations. Disobedience of a clearly invalid judicial injunction is excluded from punishable contempt (but that does not palliate the unfortunate upgrading of contempt to the level of felony). Section 1335. Sex offenses have been appropriately narrowed, e.g., by limiting criminality in both heterosexual and homosexual relationships to force

and imposition on children; so-called statutory rape is relieved of some of its absurdities by excluding sexual incidents between juveniles of approximately the same age.

Probably a major target of the American Civil Liberties Union and others will be the obscenity law, which is indeed unsatisfactory (see Appendix) although not more unsatisfactory than present judge-made law.

6. Corporate Crime-Control Is Meaningfully Strengthened.—Officers are made responsible if their "reckless failure to supervise" contributes to corporate criminality, section 403(c). Convicted corporations may be required to advertise their disgrace. Section 2005. Restitution to "victims" may be ordered. Section 2006. Fines may go as high as twice the gain from the crime or the loss caused by the crime. Section 2201(c).

7. Minor Marijuana Offenses Are Decriminalized.—Possession of less than 10 grams is decriminalized in section 1813. This is a hopeful beginning in the dismantling of a widely disregarded system of controls that has failed as notoriously as liquor prohibition. S. 1437 does not go far enough in decriminalizing marijuana: to buy, transfer, possess with intent to transfer, or to grow—all these constitute felonious "trafficking", however petty the quantity involved and however free of commercialism. Section 1812. Nevertheless, S. 1437 marks progress.

The achievement of such gains would be magnificent progress, even if many of us would like to se additional reforms, including some mentioned in the following list of concerns which I still have about S. 1437.

Appendix

Concerns about S. 1437; agenda for further reforms

1. Scope of the Bill.—Public comprehension might be facilitated by splitting off the substantive code (plus a few items like appeal of sentence, parole, victim compensation, and sentencing commission) from the remainder of the bill. The substantive code would then amount to only 200 pages.

On the other hand it is vital not to yield to pressures to reform the code piecemeal. The code is integrated. One cannot define crimes without knowing what the general definitions are. One cannot set maximum terms of imprisonment except in the light of consecutive sentence provisions and parole arrangements. One cannot in grading tax offenses or property damage offenses disregard the grading of theft by amount stolen.

2. Defenses.—See sections 501, 502 ("common law"). The draftsmen have abandoned all attempt to define exculpating insanity, self-defense, privilege to use force in law enforcement, etc. My reasons for opposing this are set forth in Reform of the Federal Criminal Laws: Issues, Tactics and Prospects, 1977 Duke Law Journal 173.

3. Harsh Sentence Maxima.—Although the statutory maxima are generally not higher than under existing law, they are effectively higher insofar as the parole period is added to the specified prison sentence, section 2303, 3834(b), whereas under present law and the National Commission's recommendations the parole period is deducted from the specified prison sentence. Restoring parole as a deductible would be a simple way to ameliorate the sentence structure of S. 1437. Examples of harsh maxima in S. 1437 include: (i) section 1611, "maiming", carrying 12 years imprisonment plus 3 years parole, and defined so loosely as to include cases where the victim lost the use of a finger or toe, or was slightly but permanently deafened by a slap on his ear. (ii) section 1612, "aggravated battery", carrying up to 6 years for a fist fight if one combatant is knocked unconscious. Moreover, departing from the National Commission's code, upper ranges of authorized maxima are not reserved for defined classes of specially dangerous offenders. The proposed Sentencing Commission Act provides that "a substantial sentence of imprisonment shall be provided in the guidelines for most [such] cases."

4. Undesirable Short-Term Imprisonments.—The National Commission provided for a lowest-level offense that should carry no imprisonment, but fine only: the "infraction". It was peculiarly suitable to unwitting, non-dangerous breach of traffic rules, administrative regulations, and the like. The penalty has been increased in S. 1437 to 5 days in jail, an expensive, useless indignity, which will inevitably be imposed in a selected few of the innumerable cases in which it is applicable.

It can be defended as an improvement over the 30-day and 6-month penalties thoughtlessly authorized in much extant legislation. But it would be better eliminated.

Above the "infraction", S. 1437 provides three classes of misdemeanors, with maxima of 30 days, 6 months, and 1 year, respectively. Section 2301(b). Short term imprisonment is probably essential for some minor crimes, but the deterrent effect that can be gained from it is fully realized in a 30-day sentence. Additional jail up to a year is gratuitous and socially costly cruelty. Only recidivists should be subject to substantial sentences. Cf. National Commission section 3003.

5. Legislative Policy on Probation and Parole Is Not Established.—The bill states what factors shall be "considered" in making these crucial decisions, but fails to adopt the National Commission proposal that non-jail alternatives be favored unless the deciding official believes that imprisonment better serves the public interest.

6. Conspiracy.—The bill in effect continues existing law requiring merely that two persons "agree" and do "any conduct" to effectuate the agreement. The conduct need not be such as "indicates intent that the crime be completed", as in the case of attempt. It is time for a more radical cut-back on conspiracy. Since conspirators are accomplices if the crime is carried out or in any attempt to carry it out, the only need is for a narrowly defined offense of organizing or leading a substantial and continuous criminal business. Cf. section 1005 of the National Commission's Study Draft and the Racketeering provisions of the present bill. Sections 1801 et seq.

7. Obscenity.—The attempt at federal enforcement of morals in this area is a shambles, makes the law look ridiculous, and operates with extreme unfairness as between publishers of like material. Insofar as section 1842 penalizes "commercial dissemination" to adults where nothing is thrust upon an unwilling person, it ought to be dropped. The felony classification is in any event excessive. The reliance on "community standards", originally introduced in the American Law Institute's Model Penal Code as a restraint on efforts to penalize widely accepted material, has been converted by Supreme Court decisions into a weapon by which the most prudish local prosecutor can jeopardize a nationally-distributed publication. There is in section 1842 not even an exemption for material going to a state where it is lawful, although section 1843 dealing with prostitution makes it a defense to federal prosecution that the activity is lawful in localities where it is carried on.

8. False Oral Statements to Investigating Officers.—Section 1343 is too broad. It makes it a crime even to deny guilt under interrogation by an officer. Family, friends, informants and others can be convicted under this section on the basis of statements in private interviews with officers, if the officer is prepared to testify later that the false statement was "volunteered" or made after advice that it is an offense to lie to policemen. The National Commission was much more circumspect. Final Report sections 1352(3), 1354 (penalizing false oral statements only when made in the protective context of an "official proceeding", except for fire alarms, bomb scares, false incrimination of innocents).

9. Dispersal and Other Police Orders in Riots and Emergencies.—Disobedience of "public safety orders" was proposed by the National Commission as a non-jail infraction to facilitate discrimination between mere presence at a riot and participating or law obstructive behavior. Safeguards included the requirement that the order be authorized by a supervising officer. Infractions in S. 1437 are punishable by 5 days imprisonment, a penalty that should not be within the power of a single policeman to allot to someone he is prepared to say "disobeyed" him. The infraction should in any event be limited so that police cannot prevent representatives of the press and elected officials from attending, observing, photographing, and reporting confused events of high public interest.

10. Disorderly Conduct.—In response to mistaken pressure of civil liberties groups, the National Commission's carefully delimited infraction, publishable by fine only, has been dropped. The effect of this is precisely the opposite of what was intended. Disorderly conduct is not thereby eliminated as a federal crime, in federal enclaves for example. On the contrary, it is retained as an adoption from neighboring states and communities, section 1862, with varying, notoriously loose definitions and with penalties up to one year's imprisonment.

11. Possessing Burglary Tools.—Section 1715 penalizes possession of objects "commonly used" for burglary, if the possessor "intends" to use them for that purpose. This is a common state statutory provision that too easily lends itself

to arrest without real probable cause and to unjust convictions. Instruments commonly used for burglary include screw-drivers, hammers and other tools which are just as commonly used for innocent purposes. Section 1715 does not even require that the circumstances are favorable to imminent use, or that the intention to use be manifest in the conduct of the accused. This is punishment of "mere preparation" run riot. A federal code, on which many states will pattern themselves, should get rid of this concept, and content itself with banning attempts.

12. Weapons Offense.—The issue of effective national hand gun control has been pretermitted as to violently controversial. Instead S. 1437 has adopted "mandatory" consecutive sentences for engaging in a crime and for using or displaying a weapon in committing the offense. Since crimes in which weapons are employed, e.g., robbery, aggravated battery, carry heavier maximum sentences precisely because of that circumstance, there is no need for mandatory consecutive sentences, no added deterrent value, and no justification for what amounts to punishing twice for the same behavior.

13. Espionage.—Important defects in this area have gone unremedied, as existing legislation is reenacted. E.g., sections 1121(a), 1122. The defects relate to such matters as overcomprehensiveness and vagueness of "information related to national defense," and failure to distinguish adequately for penalty purposes between intent to injure the United States, intention to "aid a foreign power" (without hostile intent against the U.S.), and various degrees of negligence.

14. Regulatory Offenses.—S. 1437 fails to adopt a proposal of the National Commission, Final Report section 1006, which would begin to tame the unreasonable and chaotic penalties (often imposable without regard to culpability) found in existing regulatory legislation.

15. Racketeering.—The provisions, sections 1801 et seq., taken from existing law, are needlessly complex as compared with alternatives (see Conspiracy above). They are also perverse insofar as they purport to make investment (of "tainted" money) in lawful enterprises a felony. Section 1803. The provision is probably ineffectual anyway since it operates only when accused are shown to be guilty of other severely punishable offenses, and since conviction requires very difficult tracing of the source of funds back to a "racketeering" activity.

16. Federal State Relations.—S. 1437 fails to adopt a proposal by the National Commission, Final Report section 207, which would make local authorities primarily responsible for essentially local law enforcement, even if federal jurisdiction exists technically, e.g., because of the incidental use of the mails or interstate communications. S. 1437 does not address the important issue of federal and state prosecutions duplicating each other. Cf. National Commission, Final Report section 703 et seq. Finally, S. 1437 needlessly complicates and lengthens the code by repetitious federal jurisdictional sections, e.g., sections 1601(e), 1621(c)(4), 1731(c). The problem was neatly solved by the National Commission's use of a single "catalogue" of jurisdictional bases to which succinct cross-references were made.

17. Burden of Proof.—Problems occur in relation to "affirmative defenses", on which the burden of proof is put on the defendant. Section 111. There are occasions when this may be appropriate, e.g., defense of renunciation of conspiracy or attempt, sections 1001(b), 1002(b), because a new defense is being extended where no defense at all has previously been available and the facts are peculiarly within the knowledge of a defendant who has, by hypothesis, been engaged in a criminal course of conduct. But it is inadmissible to shift the burden to defendant on the issue like owner's consent to a property deprivation. Section 1703(a).

Mr. SCHWARTZ. I will only emphasize my own feeling, as an academic reformer with some practical background, that this is a magnificent democratic synthesis. While there remains an agenda for reform in the future, as there will always remain an agenda for future reform, it would be a miraculous gain if the McClellan/Kennedy bill would pass.

In my statement, I have enumerated the principle scores on which this bill is to be commended. I pass over obvious matters of organization and simplification and modernization and elimination of obsolete defenses. The Attorney General testified about that and I think nothing needs to be added.

The core of any criminal code is the definition of what shall be penalized and what kind of behavior subjects you to treatment by the official establishment. Secondly, who makes the critical decisions about how much punishment shall be handed down. That is the critical civil liberties issue in any penal code: the distribution of discretion to subject to the indignities of imprisonment and other punishment. This code makes magnificent advances in the regularization of this discretion.

We have to look back to the time when, in the English ancestor of our law, punishment was totally discretionary. One can envision a criminal code which says that anybody who does anything wrong shall be punished at the discretion of the judge. That was virtually the state of the law at one time in England. The whole development of specific offenses on the one hand and of controlled discretion on the other hand is the progress of civilization in this area.

The way this bill promotes order in what has been described as a regime of law without order—that is to say, our present sentencing system—is, first of all, by defining offenses distinctly, second, by grading offenses rationally, and, third, by providing judicial review of sentence. It is a scandal that at present sentencing is not subject to review in the Federal system. The very introduction of judicial review will lead to a considerable improvement in the equality of justice handed out in the Federal courts.

Now I come to that remarkable innovation in the legislation—the sentencing guidelines proposal. As you know, this means that a commission will develop catalogs of offenders and catalogs of offenses. The offender catalog will take into account the usual circumstances—youth, mental defect, dependency—all the things that any intelligent judge would take account of in the personal situation of the convict. The catalog of offenses will reflect in general civilized views of what is more serious and what is less. Out of this there will develop a set of guidelines. I emphasize, not a dictation to the judges as to what sentence shall be, but a range of permissible sentences. If the judge imposes a sentence within the permissible range, there will be no appeal. If it is outside the permissible range, the judge is required to state his reasons, which in itself will induce rational action. With good or bad reasons, the sentence will then become appealable.

I note with pleasure another innovation in the bill. In place of absolutely mandatory sentences prescribed in certain instances under current law, the bill provides a limited escape in the basis of judicial discretion. The improvement has to do with two things: the proper role of the legislature and the proper role of the judge. The Congress of the United States, the elected representatives, should define penal policy. It is entirely appropriate that Congress should say: In such and such a class of offenses, it is our policy that prison should be preferred, leaving it then to the judge to carry out that policy as he must carry out many other policies.

On the other hand, it is always a mistake to mandate sentences absolutely, because it is necessary to take into account—as the Supreme Court has held in the case of capital punishment—vast differences among people who commit what are superficially similar offenses. Therefore, this aspect of the bill seems to me commendable.

I note with pleasure the considerable extensions made in the protection of constitutional rights and guarantees of civil liberties. Not only are the secrecy provisions deleted, but we have extended protection of the criminal law to discrimination based on sex and alienage. In many other respects, we have strengthened constitutional liberty while at the same time tightening up law enforcement.

I was particularly happy, as a teacher of criminal law and as a former practitioner in the Department of Justice, to note the strengthening of white collar provisions, particularly the subjection of corporate crime to effective sanctions. Among these are notably an invention of the Brown Commission, the declaration that reckless default in supervision is enough to implicate a corporate officer when that default contributed to the occurence of the corporate crime.

Another thing that is done is to provide for notice to the public when a corporation has been involved in dirty business. Part of the penalty which the judge may order—and you can't send a corporation to prison—is a little blow to the corporate image. That is to say, appropriate publicization of the corporate default. There is also provision for ordering restitution to victims. I should have preferred to see a class action outlined as a consequence of corporate conviction, but I know that class action gets into the field of civil law, and I don't claim any expertise as to that.

Finally, I will mention the marihuana improvement. It is the beginning of a reform that is long overdue. Almost everybody who has studied this subject has had to compare the marihuana sumptuary controls to that notorious failed experiment, alcohol prohibition. The bill decriminalizes possession of small quantities of marihuana. As I point out in my agenda for further reforms, which is an appendix to my statement, that this is a very meager beginning indeed. Although possession, as such, is decriminalized, under some of the definitions of trafficking, possession with intent to transfer—which might mean intent to hand over just a petty quantity to somebody else even without pay—could still be prosecuted.

The Attorney General has testified that it is not the present practice of the Department to prosecute in such cases, but I would prefer to see more effective restraints in the statute itself.

I conclude, Senator Hatch, because I have referred to some areas in which I have reservations, by repeating my very strong plea to the Congress to move us a great step forward by enacting the McClellan/Kennedy bill.

Senator Hatch. We appreciate your testimony. You have covered a lot of areas.

Governor Brown, what do you feel about some of the new provisions not contained in the previous bills? You might care to remark on this also. Give me some of your thoughts about the areas not covered in previous bills, such as victims of crime, rape, political offenses, and civil rights.

Mr. Brown. I think if you get into some of those things, you are going to make the bill a very controversial one.

Senator Hatch. They are in there now.

Mr. Brown. Some of them are, but a great many have been eliminated.

I thought you asked the question of whether or not they should have been included. I think the important thing is the adoption of this code, because there is nothing in the days ahead that we can't either add to or eliminate other sections as we go along.

As I tried to state in my statement, if we are ever going to get a code, we are going to have to leave something to specific bills after the adoption of the code itself.

Senator HATCH. I see.

Professor, would you care to remark?

Mr. SCHWARTZ. With regard to the victim compensation fund particularly?

Senator HATCH. Sure. Or the rape provisions.

Mr. SCHWARTZ. The rape provisions, I think, are a splendid forward movement. It brings us up to date by treating all kinds of forceful and impositional sexual relations alike, whether they are heterosexual or homosexual. I think that is—I was going to say the wave of the future, but it is already present in the criminal laws of many States which followed the Model Penal Code.

Senator HATCH. As I understand it, the offense of rape, as described in the bill will no longer require separate corroboration of the victim's testimony.

Mr. SCHWARTZ. Yes; there is also a provision, somewhat ambiguous, that "except as required by the Constitution," there is to be no inquiry into the sexual practices of the victim before or after the alleged crime. In my opinion, that constitutional caution is quite appropriate. There have been, of course, many, many abuses by police and in the courts of this cross-examination regarding sexual behavior of the complaining witness. Questions as to whether the complaining witness was a virgin or had had sexual relations before. These are outrageous, in my opinion, and really should have been ruled out as irrelevant.

On the other hand, I would be quite opposed to a total ban on cross-examination about all types of sexual experience. I say that because I had in mind Brady versus Maryland, a decision of the Supreme Court of the United States of about 10 years ago in which the facts were that the complaining 16-year-old told a story of violent ravishment by two black men. They received death penalties on the basis of her testimony. It was only years later that it was established that she had regularly had sexual relations with anybody on any occasion, and with whole classes of people. How any jury, judge, or society could sentence the death of two men on testimony of somebody who was known to be sick like this I can't answer.

Therefore, it is obvious to me that some degree of inquiry, carefully controlled by the judge, is constitutionally necessary as the bill itself indicates.

Senator HATCH. I think those are astute comments.

With regard to the section on labor bribery, and I don't mean to be picking isolated sections, but recognizing your authority and allowing for all the time you need to spend on this, I would just like to ask one question.

I notice that with regard to labor bribery, it seems to impose penalties on the employer. Are there any penalties imposed on the employee?

Mr. SCHWARTZ. I disclaim any expertise on this section. It was drafted subsequent to our work on the Brown Commission. Would you be satisfied if I say that my own position is that corruption by anybody ought to be penalized?

Senator HATCH. I agree with that, but this section appears to read only that the employer can be found criminally liable for labor bribery. I think it should go both ways if we're going to be objective here.

Mr. SCHWARTZ. I will examine it more fully and write you, Senator.

Senator HATCH. I would appreciate that because I need to examine it also.

I would like your expert opinion after you do examine it, because I am concerned that it be fair.

Mr. SCHWARTZ. If it failed to penalize corruption or bribery on the Union side, it would not be the only compromise embodied in this bill. I understand the pressures for that.

Senator HATCH. It might not be constitutional, however, if it imposes criminal liabilities on one side of the dispute, but not on the other.

Mr. SCHWARTZ. You mean the denial of equal protection, or something of that sort?

Senator HATCH. That, plus there may be some other constitutional problem.

Mr. SCHWARTZ. I will write to you, Senator.

Senator HATCH. I would appreciate it.

With regard to marihuana, the intent of this bill, it seems to me, is to decriminalize the mere possession of marihuana of less than 10 grams which is a pretty small amount. This means that an indiscrete young person who might have a marihuana cigarette in his hands when he is picked up, or something like that. But that's considerably less than an ounce.

Do you, as a top criminal law professor, agree with that particular section?

Mr. SCHWARTZ. I agree with it as a beginner. I don't think it goes far enough, as I say in my memorandum. It is a very conservative beginning.

Senator HATCH. I see.

With regard to the political offenses, did you participate in the writing of those provisions?

Mr. SCHWARTZ. We had the section on political offenses but they have been considerably changed in this bill.

Senator HATCH. I see.

Do you basically endorse this section?

Mr. SCHWARTZ. Yes; I do.

I had some twinges with regard to some features of it. I remember, for example, an aspect of it that made it a crime, or perhaps a felony for any alien to make a contribution to a political campaign. I wasn't sure that I thought that was totally consistent with my notions. I can understand not wanting foreign powers financing our campaigns, but we have resident aliens who have interests in legislation; for example, in immigration and denaturalization legislation. I thought it went a little far to say that a resident alien might not make any po-

litical contributions. And I have other reservations. But I think they are peripheral.

None of these reservations cause me to hesitate about the McClellan/Kennedy compromise, which it is. It is a compromise in the highest tradition of democratic legislation.

Senator HATCH. We appreciate the testimony of both of you, and we are happy to have had you before us this morning.

Our concluding witness is Prof. G. Robert Blakey, former consultant to the National Commission on Reform of the Federal Criminal Laws. Welcome.

STATEMENT OF PROF. G. ROBERT BLAKEY, FORMER CONSULTANT TO THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS

Mr. BLAKEY. My name is G. Robert Blakey. I am a professor of law at the Cornell Law School. I am also director of its Institute on Organized Crime.

My appearance here today, however, is personal. Nothing that I say should be attributed to any organization with which I am associated.

It is a pleasure to return to the committee. As Senator Hatch may be aware, I was its chief counsel between 1969 and 1973. In a sense, this is a coming home rather than an appearance before a strange forum.

Oliver Cromwell in 1656 told the Second Protectorate Parliament:

> The truth of it is, there are wicked and abominable Laws which it will be in your power to alter. To hang a man for Six-and-eight pence, and I know not what; to hang for a trifle, and acquit murder—is in the ministration of law, through the ill-framing of it. * * * And I wish it may not lie upon this Nation a day longer than you have an opportunity to give a remedy. [Quoted in "Essays in the History of Early American Law," at 182 (Flaherty ed. 1969).]

This quote, from some 300 years ago establishes, I think, the enduring need for the reform of the criminal laws.

Cromwell's position on law reform was commented on by Jeremy Bentham, the English reformer, in these words:

> Behold what was said in his day by Cromwell! In my eyes, it ranks that wonderful man higher than anything else I have read of him:—it will not lower him in yours. [IV Works 501 (1858 ed.).]

Any issue of public policy that can bring together men so diverse as Cromwell and Bentham is surely one that should command the support of the majority of the American people. Indeed, if we look through history, we can see an illustrious list of names associated with the reform of the criminal law: Caesar, Theodosius, Tribonian, Justinian, Beccoria, Bentham, Napolean, McCauley, Stephen, Livingston, Field, and, in recent times in the United States, Prof. Herbert Wechsler, of Columbia and Prof. Louis B. Schwartz of the University of Pennsylvania.

If each of these men so diverse in time, place, and ideology could come together and agree on the need for the clarification and simplification of law, it establishes beyond any real question, I think, that what faces this committee is not a question of ideology—not a question of liberal or conservative—but it is a question of a tradition that

stems from our Roman heritage—it is not less than a question of the rule of law.

In the last several weeks, I have had the opportunity to examine the draft of the criminal code now pending before the committee, S. 1437. I found much in it that I am familiar with that stems from the Model Penal Code. I found much in it that I am familiar with based on the work of the Brown Commission. I found much in it that I am familiar with based on the work of the subcommittee in the 92d and 93d Congress when I was intimately involved in its draftsmanship. I found much in it, also, that is new, particularly its sentencing scheme. It would be wrong to suggest, however, that the sentencing scheme is really new. It is not terribly different from that which was suggested by Beccaria in his seminal essay "On Crime and Punishment," which was first published in the 18th century.

But I suppose the last entry in a ledger on the examination of a bill that is this long and complex is the one expressed by Professor Schwartz.

I can put it to you perhaps best in this way: If I were a Senator and this bill were presented to me on final passage in its present form, I would vote for it.

If I were the President and this bill in its present form was presented to me for signature, I would sign it.

I might add, Senator Hatch, that I have little expectation that I will either be a Senator or a President. My role, as a law professor, will be limited to commenting on what others do.

In that spirit, I have to also say that I do have some individual comments on the bill. Some of them are technical in nature, and I will not bore you with them or clutter your record with them. I will make them available to the very able staff of this committee for their own consideration.

Senator HATCH. We would be happy to incorporate anything in the record that you would desire to have included in the record.

Mr. BLAKEY. There are, however, certain policy questions that I think merit at least brief mention in a public forum. If I may, I would like, given your limitations of time and endurance in a long hearing of this kind, to briefly mention them.

The first is apparently a technical amendment, but I think it goes to the very heart of what should characterize the draftsmanship of this code.

My suggestion to you is that the state-of-mind requirement for the crime "complicity" be changed from "knowingly" to "intentionally." [See sec. 401.]

My argument is essentially that of the drafters of the Model Penal Code. The scope of liability embraced by the term "knowingly" is simply too wide. It would include within it, for example, a cab driver could be held to be an accomplice in the crime of running a house of who, on one occasion, drove a patron to a house of prostitution. He could be held to be an accomplice in the crime of running a house of prostitution because he knowingly engaged in the conduct that aided it. [See sec. 1843.]

Similarly, a statement of complicity so broadly drafted would incorporate in criminality the Hertz Corp., which rents a car to two

executives, who stand before the car rental desk discussing a price fixing meeting to be held at a hotel or a motel on a mountain.

If that car was a necessary means of transportation to the motel or hotel, and it was knowingly provided, Hertz could find itself as a corporation in complicity with the executives in price fixing.

Obviously, I have given you two extreme cases illustrating a broad statement of liability. I would not expect that the new Code would be enforced at this breadth. Nevertheless, if it were not enforced at this breadth, it would not be enforced as a matter of prosecutive discretion and not as a matter of law. [But see *Wilcox* v. *Jeffery*, 1 All Eng. Rept. 464 (Kings Bench 1951) (Spectator Newspapermen at concert held liable for violation of player).]

I would prefer to see a statement of complicity developed by Judge Learned Hand—"a stake in the venture"—reflected in the code's draftsmanship.

I would like now to comment on two series of provisions in the code. First, in the order of time, are those dealing with smuggling. Section 1411, 1412, and 1413. They are paralleled in section 1731, 1732, and 1733, which deal with theft.

I was very pleased to see, in examining the draftsmanship of the statute, that the provisions in the various sections are, indeed, parallel and can and should be interpreted in pari materia.

Essentially, my comments grow out of work I did for the National Association of Attorneys General in the last several years in drafting model antifencing legislation.

Mr. Chairman, I would ask at this point that the committee incorporate in my testimony pages 1614 through 1626 of an article that I published in the Michigan Law Review, volume 74, 1976. The article includes statistics on theft and fencing in the United States from 1960–1975; it also includes the text of the model statute supported by the National Association of Attorneys General. I might add that Florida and Arizona have recently adopted legislation modeled on this proposal.

[Article appears at end of Prof. Blakey's testimony, p. 8623.]

The essence of that study is that the role of the fence in theft must be recognized as more significant than the role of the thief. Nevertheless, the grading provisions in theft and fencing make the trafficker in stolen property only equal to the thief.

I would suggest that the trafficker in stolen property should be graded at a level higher than the thief and that that class of fence who is both a thief and a receiver of stolen property should be graded at an even higher level.

I would also suggest to you that parallel amendments be made in the smuggling sections—(sections 1411, 1412, 1413).

I would also suggest that the committee give consideration to adopting a new criminal prohibition—probably at a low level—against the possession of altered property. By altered I mean property where the identifying physical characteristics have been changed as a means of hiding stolen property in the stream of commerce.

I would also suggest to you the adoption of additional evidentiary inferences that would facilitate proof in fencing cases, that is, raising an inference of risk-taking where property is bought out of the regular course of business.

The text of the suggestions are included in the law review article, and I would refer the staff and the committee to it there.

Next, I would like to commend the committee in its bill on the major improvements reflected in the crime of rape. Certainly, they are major improvements over the suggestions that appeared in the Brown commission document.

The Brown commission document, as you know, saw rape as two crimes—one dealing with aggravated involuntary sodomy—which is homosexual rape—and the traditional rape—or heterosexual rape.

It included some suggestions for evidentiary restrictions in rape trials.

I am glad that the committee has consolidated these two crimes into one offense called rape, and it has made an effort to eliminate some of the special evidentiary restrictions found in present law. I would suggest, however, that you haven't gone far enough.

I would suggest, for example, that it should be put on the face of the statute that lack of consent in a rape case can be proved without resistance to the utmost.

Here I would also direct the committee's attention to the recent reforms in this area, both in the state of California and in Michigan. These two States have developed comprehensive approaches to the very sophisticated problem alluded to by Professor Schwartz, that is, the prior sexual conduct or reputation of a woman complainant. Clearly, it is a question of balancing between the woman's right to privacy and the defendant's right of fair trial. The legislation in Michigan and California has made an excellent effort to do this. I would commend it to the committee's attention.

Next, I would draw the committee's attention to its gambling provision, appearing as section 1841 and raise this general issue with you.

The statute is apparently designed to codify the present gambling policy of the United States. Careful analysis of it would indicate, however, that the model the committee had in mind was private, illicit gambling. The potential application of the statute to publicly owned or publicly controlled legal gambling was not carefully considered.

For example, the definition of "enterprise"—sec. 111—does not include a government. Similarly, "person" and "organization" do not include a "government"—sec. 111. If the definitions of "enterprise," "person," and "organization" do not include a "government," it might not be possible to enforce federal gambling policy against government corporations that will appear and are now in operation engaged in various forms of legal gambling.

This is certainly a major issue in the area of state run lotteries. A number of states, in fact, are engaged in lotteries and the Federal Government has articulated a number of policy judgments as to how those lotteries should be run consistent with the policy of sister States.

I would hope that the committee would carefully examine the scope of this gambling statute to see to it that there is no doubt but that it applies to state-run or state-owned gabling acivities.

At the same time, I would suggest that if the law is clarified in this area, it should be clarified to indicate that only civil remedies would be appropriate in dealing with state agencies.

92-465 O - 77 - 4

It seems to me wholly inappropriate to raise the spector of a criminal prosecution of a governor of a State or even State employees who are following what they believe in good faith to be the policy of that State.

The committee has already embodied in its bill a similar remedy for fraud in section 4021. I would suggest that it be expanded in a parallel way to authorize the enforcement of the gambling section, section 1841, by civil remedies, at least in the area where it deals with government agencies.

Next, I would make this general comment on the obscenity section, section 1842.

As I read it, it would not prohibit the noncommercial dissemination of obscenity among consenting adults.

While much can be said for that general proposition, I would raise with the committee whether we ought to extend that measure of the decriminalization of obscenity to what is properly known as kiddie porn.

I would suggest that whatever interest our society may have in maintaining the right of individnals to do whatever they want as long as it harms no one other than themselves perhaps that ought not to extend to what has come to be called kiddie porn. The committee might wonder whether that is too great a degree of decriminalization in this area.

Next, I would draw the committee's attention to the problem of sentencing in organized crime cases. While I was chief counsel for this committee, it conducted a study of sentencing in organized crime cases and came up with some rather shocking statistics that indicated that federal judges simply did not sentence adequately what we ultimately came to call dangerous special offenders. [See S. Rept. No. 91–617, 91st Cong., 1st Sess., at 84–85 (1969).]

This is the other half of the disparity problem mentioned by a number of previous witnesses. If it is true—and indeed I think it is—and I would associate myself with those remarks—that in many situations, sentencing in our federal courts is outrageously high, unjust, and discriminatory.

At the same time, it is, in other cases, outrageously low, unjust, and discriminatory.

At this point, Mr. Chairman, I would like to incorporate in the record a copy of the GAO study of the experience of organized crime sentencing and mention a few of the statistics to you to bring out in a more dramatic way their impact.

[Material at end of Prof. Blakey's testimony, p. 8741.]

The GAO studied the sentencing experience in organized crime cases in some six Federal strike forces. They indicated that in 52 percent of the organized crime cases, no jail time was given at all.

In those cases in which jail time was given, 58 percent of the cases had jail time imposed of less than 2 years.

If we examine, out of the general category of organized crime, just those identified members of the Costa Nostra, we have 128 sentences out of a possible 241. They found that 51 percent received no jail or that less than 2 years.

In the period 1974 to 1975, they examined 56 cases. Again, only a small fraction of the authorized maximum was given.

Indeed, five of the six strike forces had not employed the dangerous special offender sentencing in title 10 of the Organized Crime Control Act.

Frankly, Senator Hatch, I find this a shocking failure on the part of the Department of Justice to implement the statute and of the Judiciary to sentence appropriately in regular cases.

They certainly have the power in many ways under present law to deal with this problem.

To indicate the scope of that power, I would like to incorporate in my testimony at this time a memorandum prepared by the staff of the Cornell Institute on Organized Crime, dealing with the power of the courts, consistent with due process, to impose adequate sentences.

Senator HATCH. Without objection, it will be entered in the record, as will your prior submissions.

[Material follows at conclusion of Professor Blakey's testimony, p. 8834.]

Mr. BLAKEY. I would also like to incorporate at this time a copy of a brief I prepared on behalf of the Americans for Effective Law Enforcement, dealing with the constitutionality of title 10 sentencing. It was submitted to the eighth circuit in *United States* v. *Duardi*, 529 F.2d 123 (8th Cir. 1975).

Senator HATCH. Without objection, it is so entered.

[Material follows at conclusion of Professor Blakey's testimony, p. 8818.]

Mr. BLAKEY. The basic constitutionality of title 10 sentencing has been sustained so far in three circuit court opinion: *Stewart* in the sixth circuit (531 F.2d 326 (1967), cert. denied, 96 S. ct. 2629 (1977), *Bailey* in the fifth circuit (537 F.2d 845 (1977), and *Neary* in the seventh circuit (————————).

If its constitutionality is clear, I would see no reason for not making an effort to making it a part of this bill.

The committee has insofar as you are dealing with upper range sentencing under class C and B sentences reflected the concept of dangerous special offender sentencing, suggesting—and, indeed, mandating—for the sentencing commission upper range sentencing. Where you are dealing with the possible 12- or 25-year penalty, this is appropriate.

I am concerned, however, with the situation at the lower range of the penalties. I am speaking now of the class D and E crimes, for which 6 and 3 years are authorized.

It may well be that in lowering the general penalty level—a particular goal with which I associate myself in the codification effort—we may well have foregone an opportunity to secure that degree of incapacitation that might be appropriate in the area of the dangerous special offender.

I would suggest, therefore, that the concept of the extended term, as opposed to the concept of the upper range penalty, that is present now in title 10 be preserved and carried forward, at least in class D and E felonies.

I would also make another suggestion. Given the demonstrated failure over a significant period of time of the federal judiciary to

implement high sentencing for the serious offender and of the Department of Justice to speak in behalf of the public interest for more appropriate sentencing at the higher range, I would suggest that there be a requirement on the face of the code that in each case the attorney for the government should make its recommendation—not necessarily an argument—but a recommendation for sentence, in order that the public can hear from the Department as to what it thinks is appropriate. Maybe we can also do at least some good in stimulating them to think through the problem of sentencing and to express their views on it.

Normally, the only time you hear from prosecutors on the question of sentencing is when they complain later that the judge didn't impose a high enough sentence. The reality of it is that in most cases, the sentence is something that the prosecutor accepts or makes no comment on at all and then merely second-guesses the judge. I think that practice should stop.

Lastly, I note that in a comment on the guidelines that incorporate the DSO sentencing provisions (sec. 994(e)) you have omitted the requirement of present law, 18 USC 3575(e)(2), dealing with "special skill or expertise."

You have also omitted the requirement of present law in section 3575(e)(3), dealing with bribery or violence as it plays a part in organized crime conspiracy. I would suggest that they be incorporated back in to the statute's provisions.

Let me turn my comments next to a provision that first became law in the Organized Crime Control Act of 1970 in title II, which authorized for the first time on the Federal level what is called "use" immunity.

At that time, it was objected to by many people as a departure from sound constitutional theory. Candidly, Senator Hatch, I never really understood the bases for the objections.

Let me quote two passages from two leading scholars in the law of evidence that I think sum up the position that one ought to take on the issue of use immunity.

Dean Wigmore said, and I quote:

> The constitutional efficacy of use statutes was well expounded in earlier opinions written at a period nearer to the era of constitutional making when the cobwebs of artificial fantasy had not begun to obscure its plain meaning. [IX Wigmore at 523 (3d ed. 1942).]

Charles McCormick, another leading expert in the law of evidence, commented on the Supreme Court's decision in *Counselman* [142 U.S. 547(1892)]. It struck down use immunity at the turn of the century. He said:

> Surely (*Counselman*) * * * was a wrong turning at a critical point. Perhaps few decisions in history have resulted in freeing more rascals from punishment. * * * Surely * * * protection (from use plus fruits) is all that (should) * * * reasonably be demanded, and the insistence upon complete immunities for punishment is an unjust and unnecessary obstruction to law enforcement. [McCormack, at 285-86 (1954).]

I set out that background, Senator Hatch, because I think it is time for this committee to consider whether "use" immunity ought not to be extended to the defense as well.

It is commonly assumed that use immunity is a concept useful only for the prosecution in obtaining evidence. What many people

fail to recognize is that the defense has an equal need for evidence in criminal cases.

I recognize that title 2 is not inconsistent with the granting of use immunity for defense witnesses. Indeed, in drafting it, the staff and the committee was very careful not to prejudge the issue and it wasn't discusssed or decided either way. I also note that the seventh circuit in *United States* v. *Allstate Mortgage* [507 F.2d 494-95 (7th Cir. 1975).] has correctly interpreted the statute to say that it is not required as a matter of law that defense witnesses receive use immunity.

I would suggest, however, that that issue should be clarified on the face of title 2.

Use immunity is a theory that will reconcile the sixth amendment privilege of a defendant to compulsory process for witnesses in his behalf. With those witnesses' legitimate and appropriate fifth amendment claim against self-incrimination. Use immunity would permit both the witness not to be prosecuted based on what he said and the defendant to be freed based on their testimony. I see no reason in a society characterized by even-handed justice not to extend use immunity to the defense under appropriate safeguards, including approval by court order after the prosecution has had an opportunity to be heard and to protect its evidence in order that subsequent prosecution could be brought on independent grounds.

I would commend that extension of the present law to your attention.

Next, I would like to raise this issue with you, Senator Hatch.

I recognize the realities of political compromise. I have been associated with some political compromises in the work of this committee in the past. Nevertheless, as a scholar and as one concerned with the reform of the Federal criminal law, I must say that I cannot accept a political compromise and associate myself with the integrity of a code that omits a statement of defenses.

I find it sad, but perhaps necessary, that the defenses be omitted.

Similarly, I felt it was sad, but perhaps necessary, that the issue of privilege be omitted when the Federal Rules of Evidence went through.

What I am concerned about is the long-term implications for reform. It seems to me issues like privilege and defenses are capable of being resolved by our legislative bodies. The failure to do so calls into question the power of the Congress to govern.

What I am suggesting to you, therefore, is that this committee should institutionalize the process of reform that ultimately led to the drafting of this bill and that it incorporate in the text of the bill a permanent Criminal Law Reform Commission.

This idea is not new. Plato, the Greek philosopher, in his essay on the laws [*Laws*, pp. 515 et seq. (Penguin Classic 1970).] suggested such a commission after he had sketched out what was for him an ideal set of laws for his own ideal republic.

It is a practice widely followed in continental jurisprudence, and it would provide a mechanism to feed back to the Congress on nonpartisan, nonideological basis recommendations for each of the major defenses: insanity, mistake of law, and the like.

Perhaps Congress could digest, one by one, what it is apparently unable to digest as a whole.

I would hate to see this reform go through and no mechanisms for future reform be put in place.

That body might be a particularly well-suited body to formulate a set of uniform jury instructions that should ultimately be promulgated to implement the new code.

I would like to make one additional suggestion to you for reform.

Much has been said—and, indeed, in these hearings—of the degree to which this new code takes into consideration the lessons of Watergate. The lessons of Wategate, I take it, are reflected in campaign contribution limitations and the obstruction of elections provisions.

Let me add one further lesson that I think comes from Watergate. That is the obstruction by the legal profession of investigations.

John Dean's role in orchestrating the obstruction of justice that led to the recent incarceration of the Attorney General of the United States and some others teaches us a lesson that we should learn, that is, that extreme care must be taken in regulating the representation by lawyers of witnesses in grand jury investigations.

I have prepared and ask that it be incorporated in the record a memorandum that is given out at the Institute on Organized Crime for prosecutors facing the problem of obstruction of justice by unethical and disreputable attorneys.

I am sure the committee will find the memorandum of interest.

Senator HATCH. Without objection, it is so ordered.

[Material follows Professor Blankey's testimony, p. 8811.]

Mr. BLAKEY. I would also suggest to you that the committee should take the bull by the horns and formulate an additional statute, in its 1300 series, dealing with the obstruction of grand jury investigations. The type of statute I have in mind would prohibit any counsel from representing more than one witness who had been served with a grand jury subpoena. No lawyer would be permitted to represent two witnesses in the same grand jury investigation.

I would also extend that prohibition against multiple representation to lawyers in his firm or associated with him in practice.

I would also raise with you the very difficult issue of fees being paid by corporate, union, and other organizations for witnesses in grand jury investigations.

I recognize that extremely serious and sensitive freedom of association issues are raised by a restriction on third parties from paying fees. I would resolve them by suggesting that no lawyer should accept a fee from one other than the client he deals with without prior approval by a court, where all of the various values—including interest the interest of the appearance of justice—can be evaluated by an independent body.

Let me conclude with a quote from Edmund Burke, who in 1780 addressed the House of Commons on the issue of electoral reform:

> Consider the wisdoms of a timely reform. Early reformations are amicable arrangements with a friend in power; late reformations are terms imposed upon a conquered enemy; early reformations are made in cool blood; late reformations are made under a state of inflammation. In that state of things, the people behold in government nothing that is respectable. They see the abuse, and they will see nothing else. They fall under the temper of a furious populace provoked at the disorder of a house of ill fame; they never attempt to correct or to regulate; they go to work by the shortest way; they abate the nuisance, they pull down the house. [E. Burke: Selected Writings and Speeches, at 287 (P. Stanlis ed. 1963).]

What Burke said of reform of the electoral process in 1780, can be said of the criminal justice system in this country today, including criminal justice on the Federal level.

People in this country are fed up with the way the criminal justice system does not work. It does not work in behalf of society's interest; it does not work in behalf of the individual's interest.

If Congress does not have the courage and the will to carry forward this reform, it will be carried forward by other people who follow us. I suggest to you it will probably not be carried forward with the care for civil liberties that might be expected at this time.

I am seriously concerned that unless we bring a sense of justice to our system of justice, the reformations that come later will be at the price of our liberties. And that is a price too high for me to pay.

Thank you, Senator.

Senator HATCH. Thank you, Professor.

I think that you have given us some tremendous insights into some of the difficulties and some of the good aspects of this bill.

I'm sure our staff will look this over very carefully, especially since you have had such a tremendous background with the committee and in this particular area.

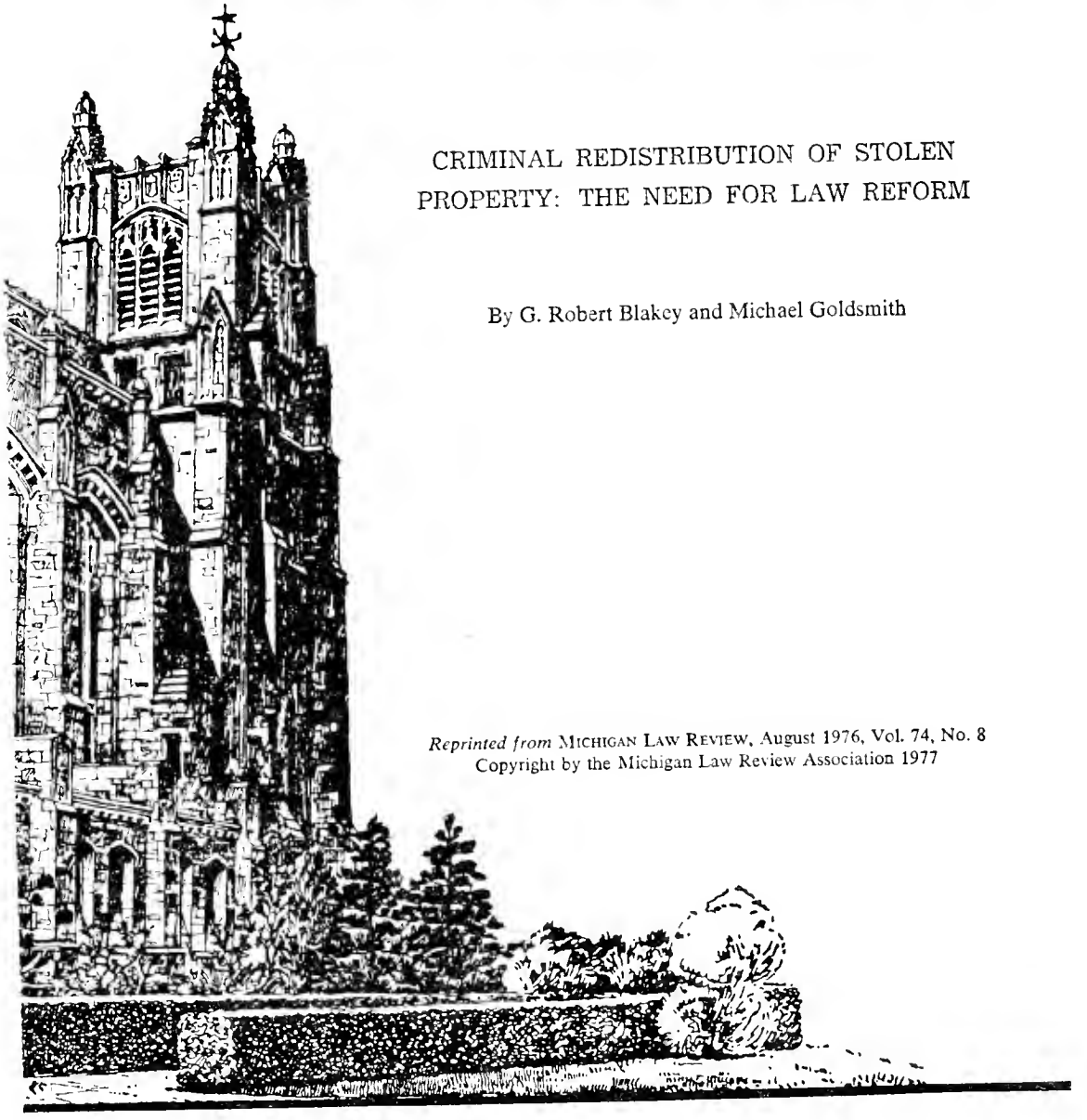
We will continue these proceedings tomorrow morning at 10 o'clock.

We appreciate those who have testified today.

[Whereupon, at 11:45 a.m., the committee stood in recess to meet Wednesday, June 8, 1977.]

[Material submitted for the Record by Professor Blakey follows:]

Michigan
Law Review



CRIMINAL REDISTRIBUTION OF STOLEN PROPERTY: THE NEED FOR LAW REFORM

By G. Robert Blakey and Michael Goldsmith

Reprinted from MICHIGAN LAW REVIEW, August 1976, Vol. 74, No. 8

CRIMINAL REDISTRIBUTION OF STOLEN PROPERTY: THE NEED FOR LAW REFORM

G. Robert Blakey and *Michael Goldsmith*

TABLE OF CONTENTS

CRIMINAL REDISTRIBUTION OF STOLEN PROPERTY: THE NEED FOR LAW REFORM

G. Robert Blakey and Michael Goldsmith**†*

Our society is permeated by a consciousness of theft: triple-locked doors of city apartments, guard dogs prowling stores and warehouses at night, retail prices and insurance rates based on the assumption that large quantities of merchandise are simply going to disappear. But our consciousness of theft tends to be limited. It is easy to imagine the act itself—the forced lock or smashed window in the dead of night, the hijacker ordering the driver out of his truck cab at pistol point. It is harder to keep in mind that these acts aren't random or self-contained but are usually practical ways of acquiring goods for an established buyer. As for the dealer in stolen goods—the "fence"—there our imagination seldom goes beyond the owner of a seedy pawnshop or the character who sidles up on the street and mutters, "Hey buddy, wanna buy a watch?"[1]

THE development of sophisticated fencing systems for the sale of stolen property to consumers has paralleled the industrialization of society. Although crimes against property and attempts to control them have ancient origins,[2] most theft before the Industrial Revolution was committed for immediate consumption by the thieves and their accomplices rather than for redistribution in the marketplace.[3] Society's small population, inadequate transportation and

---

* Professor of Law, Cornell Law School, and Director of the Cornell Institute on Organized Crime.—Ed.

** Deputy State Attorney, Burlington, Vt. A.B. 1972, J.D. 1975, Cornell University.—Ed.

† These materials originated in work begun during the processing of S.13, 93d Cong. 1st Sess. (1973); S. REP. No. 93-80, 93d Cong., 1st Sess. (1973). The bill passed the Senate by a vote of 81 to 0 in 1972 as S.16, 92d Cong., 2d Sess. (1972) (118 CONG. REC. 29379 (1972)) and passed again in 1973 by a voice vote (119 CONG. REC. 10319 (1973)). No action was taken in the House Judiciary Committee, "not . . . [because of] a lack of support for the bill but . . . [because of] the committee's heavy work load." N.Y. Times, May 5, 1974, at 69, col. 3 (late city ed.). New legislation was not introduced in the 94th Congress.

1. Chasan, *Good Fences Make Bad Neighbors*, N.Y. Times, Dec. 29, 1974, § 6 (Magazine), at 12.

2. Biblical tradition has it that disobedience began with God's first command to man. *See Genesis* 2:16-17, 3:4-6. Laws concerning theft and robbery may be found in many sections of the Old Testament. *See, e.g., Exodus* 22:1-4; *Leviticus* 6:1-5, 19:13; *Proverbs* 29:24. For a discussion of theft in primitive society, see A. DIAMOND, THE EVOLUTION OF LAW AND ORDER 12, 35, 50-51, 108-15 (1951).

3. "Until the seventeenth century the amount of movable property available for theft and the opportunities to dispose of this property except by personal consumption

communication systems, and technological inability to mass produce identical goods constrained large-scale fencing because there were few buyers and because stolen property could be readily identified.[4] The unprecedented economic[5] and demographic[6] growth in eighteenth-century Europe, however, removed these practical constraints and made possible the profitable fencing operations[7] that are now firmly institutionalized in industrial societies.

Although these social and technological developments are important, they do not provide a complete explanation for the rising theft rate or for the tremendous amount of property successfully redistributed annually.[8] Instead, these problems must be attributed in large part to our society's failure to identify properly the economic relationship underlying theft and redistribution and, consequently, to our inability to develop successful methods of legal control.[9]

An understanding of the economic causes of property theft requires brief consideration of the relationship between the two major participants in redistribution systems. First, there are the fences who often find it both profitable and not very risky[10] to purchase

---

were limited." Chappell & Walsh, *"No Questions Asked," A Consideration of the Crime of Criminal Receiving*, 20 CRIME & DELINQUENCY 157, 160 (1974) [hereinafter Chappell & Walsh, *"No Questions Asked"*].

4. Prior to the development of mass production techniques, a fence was faced with "the situation of highly individualized property owned on a limited scale . . . ." *Id.* at 168. Limited production and limited ownership foreclosed the possibility of fencing stolen goods on a large scale because there were too few buyers, and property could be too readily identified. *See generally* P. MANTOUX, THE INDUSTRIAL REVOLUTION IN THE EIGHTEENTH CENTURY 108-12 (rev. ed. 1961).

5. Eighteenth century England experienced an expansion of trade that was of "geometric proportions." J. HALL, THEFT, LAW AND SOCIETY 77 (2d ed. 1952). *See* P. MANTOUX, *supra* note 4, at 99-108. *See generally* H. BEALES, THE INDUSTRIAL REVOLUTION 1780-1850: AN INTRODUCTORY ESSAY 48-56 (1958).

6. *See* M. FLINN, AN ECONOMIC AND SOCIAL HISTORY OF BRITAIN, 1066-1939, at 115 (1965) and B. MURPHY, A HISTORY OF THE BRITISH ECONOMY 1086-1970, at 61-62, 100-01, 229-33, 324-34 (1973) (describing dramatic growth of British population). During this period the world population experienced similar growth. *See* K. CHEN, WORLD POPULATION GROWTH AND LIVING STANDARDS 64 (1960).

7. "[T]oday's fence . . . faces an economy in which imperceptibly differing consumer goods are mass-produced and mass-owned and for which there seems to be an insatiable desire." Chappel & Walsh, *"No Questions Asked,"* 168. "The relative impersonality of property items, and the lack of adequate identifying marks on most categories of goods, frequently prevents the establishment of a nexus between the fence and stolen property items, or the return of recovered property to its original owner." Chappell & Walsh, *Receiving Stolen Property: The Need for Systemic Inquiry into the Fencing Process*, 11 CRIMINOLOGY 484, 490 (1974) [hereinafter Chappell & Walsh, *Receiving Stolen Property*].

8. *See Hearings on Criminal Redistribution (Fencing) Systems Before the Senate Select Comm. on Small Business*, 93d Cong., 1st Sess., pt. 1 (1973) [hereinafter *Hearings on Fencing*].

9. *See* section II *infra*.

10. *See* text at notes 22-29 *infra*.

stolen goods from thieves and resell them at retail and wholesale levels. Frequently masquerading as legitimate businessmen,[11] sophisticated fences not only use cheap stolen merchandise to increase their profits and to undercut legitimate competitors,[12] but also operate without much risk of detection since they can easily remove identifying labels from the goods, falsify records to hide illegal purchases, or otherwise "legitimize" the goods, and then quickly dispose of them in the marketplace.[13] Second, there are the thieves who, with the growth of viable fencing schemes, have available purchasers for their stolen property. Thus, they too can rapidly dispose of the evidence of their crimes and are then presumably better able to avoid arrest and conviction.[14] In general terms, a symbiotic relationship between fences and thieves appears to have developed.

Any sketch of this relationship must recognize the primary role played by receivers. Such recognition is crucial if proper legal techniques for controlling theft are to be developed. Unfortunately, law enforcement efforts in the United States have traditionally focused on capturing the thief rather than on eliminating the fence.[15] This "theft-oriented" approach was perhaps sufficient in preindustrial society but is inadequate and seriously misdirected today because it fails to recognize that thieves steal primarily for profit rather than for personal consumption.[16] Fencing systems play a vital role in

---

11. *See* note 126 *infra*. Although criminal redistribution systems function with varying degrees of sophistication, all successful fences, regardless of caliber, must develop sufficient business acumen and marketing skills to maintain the continued profitability of their operations. *See* notes 64-88 *infra* and accompanying text. *See generally* J. HALL, *supra* note 5, at 156-57.

12. This competitive advantage, however, does not necessarily assure the fence a greater profit margin. *See* C. KLOCKARS, THE PROFESSIONAL FENCE 77 n.2 (1974).

13. *See* text at notes 115-53 *infra*.

14. "[A] ready market for stolen goods is the thief's most urgent need." Chappell & Walsh, *"No Questions Asked"* 167. Obviously, thieves are anxious to dispose of their goods, since prolonged retention increases the possibility of detection. *See Hearings on Fencing* 160. *See generally* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 682-91 (1972).

15. Chappell and Walsh have maintained "that the historical neglect of the criminal receiver has led to a shortsighted view of his actual and potential role in property crime and to an undeserved relegation of his activities to a category of insignificance . . . ." Chappell & Walsh *"No Questions Asked"* 158. *See* STAFF OF SENATE SELECT COMM. ON SMALL BUSINESS, 92d Cong., 2d Sess., AN ANALYSIS OF CRIMINAL REDISTRIBUTION SYSTEMS AND THEIR ECONOMIC IMPACT ON SMALL BUSINESS 2 (Comm. Print 1972) [hereinafter STAFF REPORT ON SMALL BUSINESS]. *See* notes 16-21 *infra* and accompanying text.

16. "Nearly all professional theft is undertaken with the aim of selling the goods thereafter." PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 99 (1967) [hereinafter TASK FORCE REPORT, AN ASSESSMENT]. *See* C. CONWELL, THE PROFESSIONAL THIEF BY A PROFESSIONAL THIEF 146 (1937); W. LAFAVE & A. SCOTT, *supra* note 14, at 682.

theft activity because most thieves are unable to deal directly with the consuming public and must therefore operate through middlemen who have the financial resources to purchase stolen goods and the contacts to help in their redistribution.[17] Although thieves usually receive only a small fraction of the retail value of their goods,[18] the ability of most fences to make prompt payment[19] facilitates rapid disposal of stolen property and reduces the risk of detection that prolonged possession entails. Without fences, few thieves could survive[20] because fences both satisfy their motive for stealing and provide an incentive for future theft.[21] Thus, the first step in combat-

---

It was recently noted that, at least according to some researchers, "virtually nothing is stolen today without a prearranged market for its disposal." Chasan, *supra* note 1, at 12. "[N]ot even an inexperienced junkie will steal something without being assured of a ready market." *Id.* at 17. *See generally Hearings on Fencing*, 30-34.

17. *See* TASK FORCE REPORT, AN ASSESSMENT 99.

18. "[A] norm that has governed the asking price of thieves for centuries says simply, 'When you take something to a fence you should try to get a third of the value of the goods.'" C. KLOCKARS, *supra* note 12, at 114. The thief asks for a third of the retail price because he knows that he cannot get a half, which is the standard wholesale value. Typically, even though bargaining may begin at the one-third price level, few fences ever pay this much. *Id.* at 114 n.6. Most, in fact, pay much less. *See Hearings on Organized Crime, Stolen Securities Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 92d Cong., 1st Sess., pt. 1, at 39, 212 (1971) [hereinafter *Hearings on Stolen Securities*]; C. KLOCKARS, *supra* note 12, at 114 (analyzing fencing from a marketing perspective). Frequently, payment may simply take the form of drugs. *See, e.g.*, Chasan, *supra* note 1, at 14; U.S. DEPT. OF JUSTICE, STRATEGIES FOR COMBATTING THE CRIMINAL RECEIVER (FENCE) OF STOLEN GOODS 16-18 (August 1976) [hereinafter STRATEGIES] (barter transaction typical of West Coast). Thieves are frequently ignorant of the value of their goods, and have little bargaining power against the fence. *See* C. KLOCKARS, *supra* note 12, at 115-26. To avoid paying the one-third price, the more sophisticated fences have developed a variety of methods to deceive their suppliers. *Id.* at 115-27. To combat these practices some of the smarter thieves appear to be taking courses (such as gemmology) so that fences will no longer be able to "exploit [their] ignorance." Chasan, *supra* note 1, at 16.

When a fence negotiates a price he must be aware of his economic costs which include the risk of detection, storage and transportation expenses, cash outlay, repairs, and other middlemen services. *See* Roselius & Benton, *Stolen and Fenced Goods: A New Laboratory for Marketing Theory* [hereinafter Roselius & Benton, *Stolen Goods*], in *Hearings on Fencing* 182.

19. *See* Roselius & Benton, *Marketing Theory and the Fencing of Stolen Goods* in 50 DENVER L.J. 177 (1973) [hereinafter Roselius & Benton, *Marketing Theory*].

20. *See* R. BARNES, ARE YOU SAFE FROM BURGLARS? 142 (1971). At least one critic, however, has rejected this explanation as too simplistic:

> A history of attentions to criminal receiving and the trade in stolen property could be written about the saying "if there were no receivers there would be no thieves." . . . [T]he observation itself is better understood as an hyperbolic plea for attention to the criminal receiver than as an accurate statement of his relationship to theft. . . . In brief, if there were no receivers, there would still be all sorts of thieves, and possibly more thieves of sorts we don't like than we have now.

C. KLOCKARS, *supra* note 12, at 164-66 (citations omitted).

21. "It seems that fencing schemes provide the profit motive for the original theft." *Hearings on Fencing* 2 (opening statement of Senator Alan Bible). *See also*

ing the theft problem is to realize that law enforcement efforts should be primarily directed at the fence.

A major obstacle to dealing effectively with theft is that, despite the institutionalization of criminal redistribution systems, receiving is a so-called invisible crime largely free from public scrutiny.[22] It is difficult to identify stolen property under any circumstances; the task is made virtually impossible after a fence sells those goods to unsuspecting customers, for evidence of the crime is then effectively destroyed.[23] In short, once stolen property is successfully fenced no "smoking gun" remains. This invisibility has several undesirable consequences. Police investigations of fencing activity usually are unsuccessful because the crime is not readily detected by conventional police surveillance techniques.[24] Moreover, the crime of receiving generally has not been subject to comprehensive academic analysis[25] because police enforcement problems are reflected in the absence of accurate statistics exposing methods of redistribution and

---

id. at 41-43 (statement of Franklyn H. Snitow, Assistant District Attorney, New York County).

22. Since the 1700s "[t]he fence has . . . been recognized as a very important part of the theft problem and as a crucial figure in the support and maintenance of the thief." Chappell & Walsh, *Receiving Stolen Property* 485. *See Observations on the Buyers or Receivers of Stolen Goods—A Letter to a Member of Parliament*, 3 LAW PAMPHLETS No. 5 (1751).

23. "This is in sharp contrast to . . . 'conventional crimes' such as murder, assaultive offenses, and theft. These activities, even when successful for the perpetrator . . . still leave substantial proof of their occurence." Chappell & Walsh, *Receiving Stolen Property* 494. Consequently, the only data that directly document fencing activity are those that become available when a particular fencing operation has been discovered by the police.

24. *See* notes 207-20 *infra* and accompanying text.

25. *See* Chappell & Walsh, *Receiving Stolen Property* 486; C. KLOCKARS, *supra* note 12, at 1-2; THE IMPACT OF CRIME ON SMALL BUSINESS—PART VI (CRIMINAL REDISTRIBUTION (FENCING) SYSTEMS), S. REP. No. 93-1318, 93d Cong., 2d Sess. 29-30 (1974) [hereinafter REPORT, THE IMPACT OF CRIME].

Chappell and Walsh suggest that one reason for this situation is that the fence has never been viewed as an appropriate subject for criminological research:

> Criminology's search for crime causality, bolstered by inputs from the disciplines of psychology and sociology, has greatly influenced the choice of research topics for students of the field. . . . The quest to develop a psychological and sociological competence in the study of crime causation meant . . . the rejection of the simplicity which economics had introduced. It came also to mean, however, the virtual rejection of the discipline of economics with its rational explanations, as irrelevant and inappropriate. . . . Lacking any obvious psychological difficulties and remaining a well-integrated participant in the socionomic structure, the fence could hold little interest for criminologists who were searching for more deviant personalities to study. The same is true of the white-collar criminal, those individuals associated with organized crime, and many professional thieves. It seems clear that until economics is again accepted as a legitimate input into the criminological research process, the rational criminal—in particular the criminal receiver—will remain little studied and even less understood.

Chappell & Walsh, *Receiving Stolen Property* 487-88.

measuring the amount of property actually redistributed.[26] Understandably, researchers have directed their attention to more visible crimes such as theft itself or violent crimes against persons for which statistics are available.[27] Further, surprisingly carefree public attitudes that insurance will cover theft losses[28] and that the purchase of stolen goods is acceptable social conduct[29] reinforce the neglect afforded fencing operations. Partly as a result of inadequate research, society's theft-oriented approach has long remained free from rigorous scrutiny, and the development of effective and creative legal techniques for controlling the problem has been delayed.

The absence of accurate statistics directly measuring fencing activity, however, has not foreclosed other, sometimes intuitive, means of estimating its significance; this in turn allows appreciation of theft's economic basis and makes it possible to devise reasoned solutions. Crimes against property have increased 230.5 per cent since 1960,[30] and by conservative estimates property crimes cost American businesses, and ultimately American consumers,[31] 20.3 billion

---

26. There is a "relative paucity of data" to support fencing research. Chappell & Walsh, *Receiving Stolen Property* 492. "Most of the information that does exist is of an anecdotal, historical, or 'police intelligence' nature." *Id.* at 493. Further, police "[i]ntelligence information is rarely made available for public scrutiny . . . ." *Id.* For a comprehensive discussion of the difficulties involved in researching fencing activity, see C. KLOCKARS, *supra* note 12, at 197-226.

27. *See* Chappell & Walsh, *Receiving Stolen Property* 494-95.

28. *See* REPORT, THE IMPACT OF CRIME 25-26. This view is shortsighted because rising rates are now making insurance premiums for many businesses and individuals prohibitively expensive. *See* note 51 *infra* and accompanying text.

29. Chappell & Walsh, *Receiving Stolen Property* 491; Chasan, *supra* note 1, at 17; notes 45-47, 511 and accompanying text *infra*. One discount store in Chicago was so well known for bargains in stolen goods that the owner even removed labels from legitimately acquired goods to make his customers think they were getting hot articles. *See* U.S. NEWS AND WORLD REPORT, March 17, 1969, at 44. Similar practices have become commonplace in the underworld. *See* V. TERESA & T. RENNER, MY LIFE IN THE MAFIA 70 (1974) [hereinafter V. TERESA]; C. KLOCKARS, *supra* note 12, at 79. *See generally* Roselius & Benton, *Marketing Theory* 177, 189.

30. UNIFORM CRIME REPORTS FOR THE UNITED STATES, 49 (1976) (data for 1960 through 1975).

31. There is little question that the consuming public must ultimately shoulder the burden of paying for the increased costs that are engendered by theft and fencing activity. *See* U.S. DEPT. OF JUSTICE (LAW ENFORCEMENT ASSISTANCE ADMIN.) & DEPT OF TRANSPORTATION, CARGO THEFT AND ORGANIZED CRIME: A DESKBOOK FOR MANAGEMENT AND LAW ENFORCEMENT 8 (1972) [hereinafter CARGO THEFT AND ORGANIZED CRIME]. It is not clear, however, that the consumer, who so quickly pays for theft, would just as quickly reap the benefit of an anti-theft and fencing effort. The immediate effect would be on insurance claims. This could affect rates and consequently profits, prices, or both. How far down the line the benefits would actually flow is not evident. But it seems obvious that, while the effect of an increasing theft rate on the consumer tends to be immediate and adverse, the effect of a decreasing theft rate would, in all likelihood, be gradual and only potentially positive.

dollars annually.[32] Of this amount ordinary crimes, including burglary, robbery, vandalism, shoplifting, employee theft and passing bad checks, account for approximately 16.1 billion dollars.[33] Presented with similar statistics, a recent Senate investigation concluded that since "[t]he magnitude of theft is so great . . . the only reasonable outlet must be to legitimate consumers."[34] Obviously, stolen goods must be channeled through criminal redistribution systems.[35]

One original study of property theft and recovery rates appears in appendix A to this article. Research shows that, for every one hundred persons, the value of property annually stolen, measured in constant "1960" dollars to account for inflation, jumped from 502 dollars in 1960 to 1061 dollars in 1975, an increase of 111 per cent.[36]

---

32. The 20.3 billion dollar figure for 1974 was broken down into the following categories:

Estimates in This Study	*1974 (Billions)*
Retailing	$ 5.8
Manufacturing	2.8
Wholesaling	2.1
Services	3.5
Transportation	1.9
Arson	0.3
Preventive	3.9
	$20.3

U.S. DEPT. OF COMMERCE, THE COST OF CRIMES AGAINST BUSINESS 7 (1974) (update of 1972 study). The ratio of losses to total capital expenditures is equal to about 17 per cent of total corporate profits. *Id.* For the 1972 Study, see U.S. DEPT. OF COMMERCE, THE ECONOMIC IMPACT OF CRIMES AGAINST BUSINESS, PRELIMINARY STAFF REPORT 5 (1972) [hereinafter COMMERCE DEPT. REPORT]. "In almost every case, the estimates are conservatively stated, inasmuch as they do not attempt to include unreported crimes, which are considered to be high." *Id.* at 4. Significantly, "small business suffers an impact that is 3.2 times the average, and 35 times that of businesses with receipts over $5 million." *Id.* at 9. *See* CARGO THEFT AND ORGANIZED CRIME 5-6.

33. U.S. DEPT. OF COMMERCE, THE COST OF CRIMES AGAINST BUSINESS 7 (1974).

34. STAFF REPORT ON SMALL BUSINESS 3. *See* CARGO THEFT AND ORGANIZED CRIME 28. *See generally* Roselius & Benton, *Stolen Goods* 174; *Hearings on Stolen Securities* 210-213.

35. Los Angeles authorities have reported, for example, that 95 per cent of stolen property is ultimately redistributed. *Hearings on Fencing* 3. Chappell and Walsh state:

> Reflected in each auto theft, in each burglary, and in many robberies and muggings is evidence of fencing. No goods, whether created through the productive process or acquired by theft, have value to the possessor unless they are distributed and sold—and that is the fence's job. Fencing, then, represents a major proportion of the nation's yearly crime figures . . . .

Chappell & Walsh, *Receiving Stolen Property* 495. Chappell and Walsh, however, may overstate the case, at least in the auto theft area. Most auto thefts are apparently made not for resale but for short term transportation. Young people (under 18) represent a major portion of those arrested for the offense (55 per cent in 1975). Similarly, a high proportion (62 per cent in 1975) of stolen autos are recovered. *Id.* at 178. UNIFORM CRIME REPORTS FOR THE UNITED STATES 37 (1975) [hereinafter U.C.R. 1975].

36. *See* Table 2, Appendix A.

Moreover, during the same period the percentage of stolen property recovered declined from 52.4 per cent to 29.9 per cent.[37] Rising theft rates and declining recovery rates, especially of goods recently manufactured for sale to consumers, are consistent with the theory that theft is the by-product of sophisticated fencing schemes that quickly redistribute stolen goods and frustrate police procedures currently employed to control them.

These conclusions are supported by other observations reported in appendix A. First, the increase in personal property thefts is primarily accounted for by a rapid increase in thefts of "miscellaneous" property,[38] as classified by the Federal Bureau of Investigation in its Uniform Crime Reports. "Miscellaneous" property includes office equipment, televisions, radios, stereophonic equipment, firearms, household goods, consumable goods and livestock,[39] goods which are constantly in high demand by consumers. These goods also are usually quite easy to conceal and transport, and can often be "legitimized" simply by removing identifying labels since they are rarely not marked with serial numbers; they are thus easy to fence.[40] Second, the increase in the value of property recovered kept pace with the increase in the value of property stolen until 1966 when the recovery rate droped dramatically. This drop coincides with the acceleration of thefts of miscellaneous property.[41] Finally, the statistics indicate that although the overall recovery rate declined, the ability of law enforcement authorities to recover most types of stolen property did in fact improve.[42] Nevertheless, improved police procedures for recovering such items as automobiles, furs, and jewelry have been more than offset in the overall recovery rate by the inadequacy of existing investigative techniques to recover miscellaneous property.

This study supports other commentary that postulates a high correlation between merchandise frequently stolen and that readily demanded by consumers.[43] It also reinforces more intuitive observations that thieves do not hijack truck loads of razor blades, tires or tuna fish for personal consumption.[44] Redistribution for profit is always the ultimate objective of these thefts, and the consumer mar-

37. *See* Table 4, Appendix A.
38. *See* section A, Appendix A.
39. *See id.*
40. *See* section B(6), Appendix A.
41. *See* section B(3), Appendix A.
42. *See* section B(4), Appendix A.
43. Roselius & Benton, *Stolen Goods* 182; *see* text at note 71 *infra.*
44. *See* V. TERESA, *supra* note 29, at 141-42 (theft of razor blades).

ket is generally quite willing to absorb stolen goods.[45] Although consumers are often unaware they are purchasing stolen property,[46] many bargain hunters have displayed a marked proclivity to buy such merchandise when it is available.[47] In this regard, reference already has been made to the importance of apparently legitimate businessmen who seek a competitive edge by selling stolen merchandise[48] and whose cash resources facilitate redistribution. Clearly, therefore, the survival of criminal redistribution systems depends upon the continued propensity of consumers and businesses to buy illegal goods.[49]

The ultimate consequences of theft and fencing for both the national economy and American society is not completely reflected in the estimated 20.3 billion dollar cost of property crimes.[50] On one level, rising theft rates for many legitimate businesses mean higher in-

---

45. "[M]any of these things are stolen for order and they are handled by organized crime. The markets are already established and the property is absorbed into our economic system just like a huge dry sponge. It just sucks it all up and it disappears . . . ." REPORT, THE IMPACT OF CRIME 3; *see id.* at 13-14, 23-24; Roselius & Benton, *Stolen Goods* 174.

46. STAFF REPORT ON SMALL BUSINESS 7.

47. *See* note 29 *supra.*

48. *See* C. KLOCKARS, *supra* note 12, at 62, 111-12; REPORT, THE IMPACT OF CRIME 3, 13-14, 23-24; notes 117-25 *infra* and accompanying text. Some establishments may be reluctant "to buy from irregular, noninstitutionalized sources of supply," but will ultimately wind up obtaining stolen property because of their failure to check the purchasing practices of their buyers, or because a fence has successfully established a quasi-legitimate front. *See* Roselius & Benton, *Stolen Goods* 183; Emerson, *They Can Get It for You Cheaper Than Wholesale*, NEW YORK MAGAZINE, Nov. 22, 1971, at 37.

The greed of legitimate businessmen is a prime support of fencing activity. *See generally Hearings on Fencing* 4. Thieves often feel "completely safe in making an offer to an apparently legitimate store." *Id.* Pure greed may not be the only factor. "Given current economic conditions, many small businessmen are only too glad to get merchandise at low swag [stolen property] market prices." Emerson, *supra*, at 37. "[I]n poor areas of the inner city, where small businesses have an enormous rate of failure, fencing may make the difference between survival and failure." Chasan, *supra* note 1, at 17. Finally, in other situations, organized crime may be coercing businessmen to trade in stolen goods. *See* note 119 *infra* and accompanying text.

49. By analogy, it has been said that "the American confederation of organized crime thrives because a large minority of citizens demand illicit goods . . . that it has for sale." Cressey, *Methodological Problems in the Study of Organized Crime as a Social Problem*, 374 ANNALS OF THE AM. ACADEMY OF POL. & SOC. SCI. 101, 107 (1967). *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT, ORGANIZED CRIME 2 (1967) [hereinafter TASK FORCE REPORT, ORGANIZED CRIME] For a discussion of the role of organized crime in fencing activity, see notes 150-69 *infra* and accompanying text.

50. *See* CARGO THEFT AND ORGANIZED CRIME 3 (actual dollar value of lost cargo does not reflect other consequences of the theft); *Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 309, 356 (1972) [hereinafter *Hearings on Criminal Laws*].

surance rates[51] and administrative costs,[52] strained customer relations,[53] and lost profits.[54] In many cases, the free flow of commerce may be impeded.[55] On another level, although the sophistication of fencing schemes varies considerably, the typical fence operates as a businessman, often selling goods at discount and undercutting legitimate competitors. Ultimately, therefore, widespread and sophisticated theft and fencing threatens the free enterprise system[56] as tax revenues decline[57] and legitimate businesses are forced to lay off employees,[58] to relocate, to use other methods of shipping goods, or, perhaps, to declare bankruptcy.[59]

There is a clear and pressing need, therefore, to recognize the undesirable consequences of fencing operations and to deal with them forcefully. An important factor in our society's neglect of the fence's role in the theft problem, however, has been his singular success in avoiding prosecution and conviction.[60] To a limited extent,

---

51. *See* SENATE SELECT COMM. ON SMALL BUSINESS, THE IMPACT OF CRIME ON SMALL BUSINESS—PART III, S. REP. NO. 91-1547, 91st Cong., 2d Sess. 3-4 (1970) [hereinafter SELECT COMM. ON SMALL BUSINESS]; *Hearings on Stolen Securities* 66.

52. *See* SELECT COMM. ON SMALL BUSINESS 3; CARGO THEFT AND ORGANIZED CRIME 4.

53. *See* CARGO THEFT AND ORGANIZED CRIME 4.

54. *See, e.g., id.* at 4-5.

55. *See id.* at 5.

56. Ironically, since most stolen goods are eventually resold in the stream of consumer commerce, they are often used in direct competition against the very businessmen who originally attempted to import them. *See Hearings on Criminal Laws* 356; CARGO THEFT AND ORGANIZED CRIME 8.

57. CARGO THEFT AND ORGANIZED CRIME 8.

58. *See generally* note 31 *supra.*

59. *See generally* CARGO THEFT AND ORGANIZED CRIME 5. When a particular carrier or port of entry establishes a poor safety record with respect to the security of its cargo facilities, a poor image may be acquired that would motivate shippers to divert their cargo to alternative routes or modes of transportation. *Id.* at 7-8. A poor image, once acquired, is difficult to lose. *Id.*

A recent report issued by the Waterfront Commission of New York Harbor reveals that airline theft may be valued at a figure as high as $16 million per year at Kennedy, La Guardia and Newark airports (more than in the rest of the country combined); it also casts doubt on previous evidence given to Congress that the theft problem was being brought under control. WATERFRONT COMMN. OF N.Y. HARBOR, REPORT ON THE TRUE EXTENT OF CARGO THEFT AT THE NEW YORK-NEW JERSEY AIRPORTS 2-3 (1975). The Commission concluded:

> The thefts at our airports are really only symptomatic of the more basic problem of criminal control of the air freight industry. Large-scale theft of gold, silver, platinum, rare metals, furs, jewelry, diamonds, etc. are not thefts of individual impulse, but rather require sophisticated planning in advance by organized groups as well as previously arranged distribution channels to get such commodities into manufacturing and consumer markets.

Id. at 31.

60. *Hearings on Criminal Laws* 309-10. *Compare* REPORT, THE IMPACT OF CRIME 10, *with* J. HALL, *supra* note 5, at 197-98. Nationally, the crime of receiving stolen property has had a conviction rate (offense charged) of 38 per cent for a num-

this success is a product of current law enforcement practices that tolerate fencing as a *quid pro quo* for information concerning theft[61] and other crimes that police consider more important. While these law enforcement priorities reveal a failure to recognize receiving as a cause of other crime, they also reflect deficiencies both in techniques used to detect fencing and in the substantive law that frustrates the prosecution of alleged fences.[62] Thus, partial responsibility for the rising theft rate and the tremendous amount of property successfully redistributed annually may be attributed to a failure of the legal system to recognize the character and consequences of modern theft and fencing operations.[63] Section I of this article describes various theft and fencing operations. As will be evident from that discussion, the most sophisticated fences are far removed from those receivers who are owners of seedy pawnshops or who indiscriminately select potential customers on the street, and thus they pose peculiar problems for law enforcement. Section II then identifies inadequacies in existing investigative techniques and in the substantive laws of receiving in light of modern theft and fencing operations. It proposes changes in the law and suggests appropriate law enforcement strategies to facilitate the detection and conviction of alleged fences. Needed changes in the civil law are also discussed. Throughout these sections of the article, reference will be made to the provisions of a Model Theft and Fencing Act set forth in appendix B.

---

ber of years. *See, e.g.*, U.C.R. 1975, at 174. Historically, gaps in the substantive law have made it difficult to convict fences. *See* J. HALL, *supra* note 5, at 173. There have also been other barriers to successful prosecution:

> It has always been difficult to convict professional receivers. . . . [T]hey have been shrewd enough to devise methods of operation which [escape] public notice. They dress their illegal traffic in all the paraphernalia of lawful enterprise; they conduct their businesses secretly; they are equipped both mentally and financially to take full advantage of the weaknesses in the administrative machine, should prosecution be initiated.

J. HALL, *supra* note 5, at 195. At least some law enforcement officials today feel that the substantive law related to fencing activity is satisfactory, believing that the "difficulties arise in the practical application of the law especially in the evidentiary and procedural area." *Hearings on Fencing* 46. Chappell and Walsh have stated that "fencing should be considered and attacked as a problem of legal revision, of updating the law to the contemporary situation." Chappell & Walsh, *Receiving Stolen Property* 489.

61. *See* Chappell & Walsh, "*No Questions Asked*" 166-67; C. KLOCKARS, *supra* note 12, at 27-28, 194-95. *See generally* J. HALL, *supra* note 5, at 201-02.

62. *See* notes 175-467 *infra* and accompanying text.

63. Chappell and Walsh attribute partial responsibility for the legal system's inadequacies to society's inaccurate perception of the fence: "[T]o deal effectively with the fence, we must first alter our perceptions of him. . . . The law, after all, can only proscribe and protect against that which *we* can describe and demonstrate for it." Chappell & Walsh, "*No Questions Asked*" 168 (emphasis original).

I. The Realities of Modern Fencing Systems

Although patterns of redistribution differ in sophistication, all fences are essentially businessmen engaged in "[t]he performance of business activities that direct the flow of goods . . . from producer [thief] to consumer or user."[64] As middlemen, fences must locate supplies of stolen goods, contact purchasers, provide transportation and storage facilities,[65] and finance the entire process.[66] During redistribution, therefore, fences confront two major risks: the risk of detection while performing the middleman functions and the risk of financial loss if the particular stolen goods cannot be marketed profitably.[67] As this section of the article will show, the extent of both these risks varies inversely with the sophistication of the fencing operation. Risks are minimized for the most successful fences who have leadership ability, business acumen, established contacts with thieves, broad operation bases, tight organizational control, and legitimate facades.[68] It is, of course, these sophisticated receiving operations that pose the greatest challenge to our society. A brief study of the most common fencing techniques is, therefore, necessary to understand the changes that are desirable both in the substantive law of receiving and in its enforcement.

A. *Marketing Theory and the Fence*

Successful fences frequently minimize their risks by adopting the

---

64. Committee on Definitions, Am. Marketing Assn., Marketing Definitions 15 (1960). This is the conventional definition of the term marketing. *See* Roselius & Benton, *Marketing Theory* 177-78. Some commentators argue, however, that

> a broader definition is often used to give more specific direction to the persons charged with performing the marketing functions. Thus, "[m]arketing is a total system of interacting business activities designed to plan, price, promote, and distribute want-satisfying products and services to present and potential users." This definition assumes that much of the behavior related to the distribution of stolen goods consists of rational, economically guided decisions. It also indicates that such distribution requires conscious effort and decision making by the thief and fence.

Id. at 179 (citations omitted). Other authorities have recognized the business nature of a fencing operation: "The business of dealing in stolen goods requires a trained personnel. It requires most of the qualifications necessary to carry on any business and a number of additional ones." J. Hall, *supra* note 5, at 156-57.

65. *See* Roselius & Benton, *Marketing Theory* 187.

66. Financing the transfer process actually involved paying the producers for their labor and taking care of both transportation and storage arrangements. Roselius and Benton maintain that of these three functions, providing the thieves with their payment is the most important marketing service performed by the fence. *See* Roselius & Benton, *Marketing Theory* 186; Staff Report on Small Business 6-7.

67. *See* Roselius & Benton, *Marketing Theory* 187; Staff Report on Small Business 7.

68. Arguably, "image-building" is no longer an important aspect of a fencing operation. *But see* Chappell & Walsh, "*No Questions Asked*" 165.

same marketing techniques used by legitimate businessmen.[69] For example, fences frequently use elementary supply and demand principles to determine which goods can be moved safely and quickly through the redistribution chain.[70] This information is then passed to thieves who usually use it in determining the types of merchandise to steal.[71] Although virtually any item can be fenced,[72] many fences prefer high value, low volume goods that produce handsome profits and can easily be hidden and transported.[73] Most fences, however, deal in high volume goods of lower value that are not easily identified by police[74] because of the large quantitites of physically indistinguishable products manufactured today. Thus, the list of commonly fenced "safer" goods includes clothing, stereos, radios, home appliances, cigarettes, liquor, pharmaceutical drugs, building supplies, office equipment, and securities.[75] Shoplifters,[76] employees,[77] and bur-

69. *See* Roselius & Benton, *Marketing Theory* 178, 185-88; STAFF REPORT ON SMALL BUSINESS 6; *Hearings on Criminal Laws* 309.

70. *See Hearings on Criminal Laws* 309; Roselius & Benton, *Marketing Theory* 184. *See generally* J. HALL, *supra* note 5, at 160.

71. Hall has remarked that, "[o]f all these factors [influencing fencing activity], fluctuations in the general market are the most important conditioning forces upon the receiver's purchases and consequently upon professional theft." J. HALL, *supra* note 5, at 160. *See generally Truck Hijacking: Fastest Growing Racket*, U.S. NEWS AND WORLD REPORT, Sept. 14, 1970, at 27; *Hearings on Fencing* 150-51; note 74 *infra* and accompanying text.

72. "Almost anything seems to lure today's thieves: Hotpants are a hot item for today's department store shoplifters. Typewriters, adding machines, electric clocks, and xerox copiers—anything that isn't securely nailed down—are disappearing from offices and warehouses." Dietsch, *Theft: The Hidden Tax*, Washington Star, July 12, 1971, pt. 1.

73. Antique pieces, expensive paintings, jewelry, and even certain kinds of construction equipment (e.g., giant heavy equipment tires) are good examples of high value, low volume goods. "Consumer goods such as guns, gems, autos, television sets, and liquor . . ." also fit into this category. Roselius & Benton, *Marketing Theory* 196-97.

74. One of the prosecutor's chief obstacles in gaining convictions is the identification of the goods as stolen. *See* notes 223-32 *infra* and accompanying text. Accordingly, "identification of goods is the chief risk to be avoided" by any fence. J. HALL, *supra* note 5, at 160.

75. *See* STAFF REPORT ON SMALL BUSINESS 6; *Hearings on Fencing* 3-4, 22-23, 43, 149-53; *Hearings on Stolen Securities* 38, 547; Chasan, *supra* note 1.

76. "Total inventory losses which result almost entirely from shoplifting and employee theft are estimated as high as four to five per cent of sales at some stores. This is virtually equal to the normal profit margins in retailing." COMMERCE DEPT. REPORT 11. Over-all, shoplifting accounts for 28 per cent of retail loss due to property crimes. *Id.* at 9. "Shoplifting in some metropolitan areas is highly organized, with the stolen goods handled only by certain fences." Furstenberg, *Violence and Organized Crime*, 13 CRIMES OF VIOLENCE: A STAFF REPORT TO THE NATIONAL COMMN. ON THE CAUSES OF VIOLENCE 911, 922 (1969). *See generally Shoplifting: The Pinch That Hurts*, BUSINESS WEEK, June 27, 1970, at 72; *Shoplifting, Long a Plague of Urban Stores, Is Now an Increasing Menace in the Suburbs*, Wall Street J., Dec. 23, 1971, at 22, col. 1.

77. In the cargo industry, employees are participants in 80 per cent of theft ac-

glars,[78] who together account for most commercial theft,[79] often steal these high-demand products and sell them to fences for redistribution.[80] Even though fences usually deal in high-demand products, the use of standard marketing principles is, nevertheless, often imperfect because the demand for and supply of stolen property are extremely heterogeneous;[81] the only fences consistently successful in matching supply and demand are those with reliable and well-connected informants[82] who can direct the fences to thieves able to supply particular goods and customers willing to purchase them.

Once supply and demand have been estimated, a fence must price his stolen merchandise. As in legitimate marketing operations, pricing involves a consideration of current market prices, available

---

tivity. "Cartons [are] stolen by those who have easy access to shipments." CARGO THEFT AND ORGANIZED CRIME 19. It is estimated that "70 to 80 per cent of the cargo stolen as the result of employee theft . . . is converted into cash through the use of fences." *Id. See Hearings on Fencing* 39, 144-46. For excellent examples of such theft activity, see C. KLOCKARS, *supra* note 12, at 61-62, 75, 85-88, 107-08, 143-44. A detailed summary of employee theft techniques is provided in CARGO THEFT AND ORGANIZED CRIME 37-38.

A similar situation prevails in the retail industry. Employee theft is estimated to account for 13 per cent of the losses resulting from property crimes, but the Commerce Department and other sources feel that this percentage is greatly understated because businesses are reluctant "to admit the magnitude of their employee theft problem . . . ." COMMERCE DEPT. REPORT 9-11. There is little reason to believe that these employees retain their stolen goods for personal consumption. *See generally Hearings on Fencing* 4; Gregory, *Why Workers Steal*, SATURDAY EVENING POST, Nov. 10, 1962, at 68.

78. Burglaries account for 23 per cent of property crime losses incurred by retail businesses. The over-all national burglary rate increased 256.6 per cent between 1960 and 1975. *See* U.C.R. 1975, at 49. This activity cost business and noncommercial victims a loss of $1.4 billion in 1975. *Id.* at 28. The goods obtained by burglarizing both residential and commercial establishments are commonly passed on to fences. *See Hearings on Fencing* 161.

79. *See generally* U.C.R. 1975, at 25-31.

80. *See* notes 75-77, *supra*. "To make the original theft profitable, it seems evident that the huge amounts of goods stolen from carrier vehicles, stores, docks, terminals, and warehouses must be passed along to unscrupulous buyers for eventual resale." *Hearings on Fencing* 1.

81. Roselius & Benton, *Marketing Theory* 184.

82. Roselius & Benton state:

> The dominant form of market information about stolen goods is word-of-mouth communications between consumers, fences, information brokers such as bartenders, and thieves. [Our] study [in Colorado] found no evidence of sophisticated data gathering and analysis similar to the very effective techniques used by legitimate businessmen. However, it is likely that syndicated crime [in other areas] does use such techniques on large volume transactions.

Id. at 188. In addition, tips supplied by company employees are an important source of marketing research information. *See* notes 140, 144-45 *infra* and accompanying text. To the extent that a fence is able to buy goods on order for customers who have already indicated a willingness to purchase designated stolen merchandise, his marketing research difficulties with respect to the demand function are eliminated. Buying on order is a frequent occurrence. *See* notes 111, 121 *infra* and accompanying text.

capital resources, promotional costs, personnel disbursements, and storage and transportation expenses.[83] The price of stolen property, however, also includes the costs of precautionary measures taken to avoid detection, such as removing identifying labels from the goods, surreptitiously handling the merchandise and, frequently, paying bribes.[84] Ultimately, the price of stolen merchandise reflects both the length of the redistribution chain and the costs of legitimizing the product.[85] If fences must charge prices approximating legitimate wholesale or retail prices, stolen goods will lose their competitive appeal and demand will diminish.

One approach taken by certain cost-conscious fences is to trade only in particular goods. By specializing in art, jewelry, or automobiles, for example, a fence can eliminate many costly and risky transactions. Specialization, however, does not guarantee success,[86] and

---

83. *See* Roselius & Benton, *Marketing Theory* 192.

84. *See* J. HALL, *supra* note 5, at 159-60; F. IANNI, BLACK MAFIA 131-32 (1974).

85. Roselius & Benton, *Marketing Theory* 191. When the purchaser is aware that the goods have been stolen, the goods may be sold at a lower price. *Id.* Indeed, the aware consumer actually expects to purchase stolen goods at bargain rates. In contrast, when the consumer is unaware that

> the goods are stolen, an effort must be made within the channel of distribution to legitimize the transaction by disguising the fact that the property is stolen. Differences in channels will entail differences in the number and type of middlemen involved.
>
> The thief may sell directly to the consumer but must take steps to give the transaction an aura of legality. If he cannot legitimize the transaction or perform some middleman marketing function, he must utilize one or more intermediaries in the channel of distribution, generally a fence. Legitimation is best accomplished if the fence operates a cover or front institution of some kind.

Id.

86. C. KLOCKARS, *supra* note 12 at 188:

> [T]he would-be successful dealer in stolen property may find that forces beyond his control prohibit him from buying both profitably and regularly. This is particularly true if he has decided to become a specialist dealer. The would-be successful dealer in fine art for example, may buy and sell profitably, but may find that not enough fine art is stolen to permit him to deal regularly. Similarly, the would-be jewelry specialist may find that generalist fences . . . and "occasional receiver" legitimate jewelers take up the small regular trade, leaving him only with opportunities to buy large quantities of very expensive jewelry which nonspecialists are not prepared to handle. The would-be specialist in men's suits, on the other hand, may find that he can buy small quantities of suits regularly but not profitably, because thieves manage to sell them to "lay receivers" at prices which are close to or equal to what he would pay for them legitimately. Specialist dealers are generally under economic pressure to deal in large quantities of their particular item. They are also likely to plan each highly profitable individual transaction days, weeks, or even months in advance.

In contrast,

> [t]he generalist dealer may find himself subject to quite different pressures from the economics of theft. These pressures may permit him to deal regularly but may tax his ability to do so profitably. The advantage which the generalist dealer offers to generalist thieves is a ready market for those things which are commonly stolen. Like the department store or shopping center, his attraction is convenience. He is willing and able to buy most things that are stolen, often without special preparations. Two forces are likely to play upon him economically. On the one hand, there is a tendency for him to become more "conveni-

the extent to which a fence can successfully specialize and reduce his risks depends on the sophistication of his operation.

Thus, the use of established marketing principles to analyze fencing behavior, although somewhat imperfect, permits two rather intuitive observations. First, measures that increase a fence's difficulty in matching supply and demand prolong redistribution and increase his risks of detection. Second, as these risks increase so too do the costs of minimizing them, and thus stolen goods begin to lose their competitive advantage as their prices rise. Once the risks of financial loss and detection become sufficiently great, fencing activity may be curtailed. Suppose, for example, that most manufacturers of high-demand goods were to label their products with conspicuous serial numbers and were accurately to record those numbers.[87] Such measures might prolong redistribution and increase a receiver's risks of detection and financial loss. They would have these effects by deterring, to some extent, purchasers who knowingly buy stolen property, since the goods of these manufacturers would be readily identifiable; facilitating detection of fencing activity unless added precautionary measures were taken; and increasing the cost of legitimizing stolen merchandise. Additionally, such measures might prolong redistribution for similar goods not so labelled by preventing fences from arranging their resale far in advance because they were uncertain as to whether they could obtain unlabelled goods, and, similarly, by making fences reluctant to refuse to purchase such scarce goods even though they did not yet have buyers.

It is important always to keep in mind, however, that the extent to which such measures would increase fencing risks would also depend on other factors, such as the sophistication of the fence's operation. Although simple serial numbering of products may help in the detection and conviction of relatively unsophisticated "neighborhood" and "outlet" fences, more comprehensive measures may be needed to help detect large, well-financed fences who can easily shoulder the costs of legitimizing stolen goods and the added risk

---

ent," that is, to handle a wider and wider variety of items. Because specialist items are likely to be working with specialist dealers, the unusual items that the generalist dealer is pressed to handle may be small amounts of items taken by chance by generalist thieves. Unless the generalist dealer has an unlimited number of buyers or develops other means of disposing of exotic merchandise, he must find ways of limiting what he buys so as to match his capacities to sell. The specialist dealer must also limit what he buys to what he is prepared to handle readily, but the intermittent character of his trade may make it possible for him to prepare to sell what he knows he is going to buy.

Id. at 188-89.

87. *See* text at notes 227-31 *infra*.

of detection.[88] Attention, therefore, must focus briefly on the major types of fencing systems.

B. *Patterns of Redistribution*

The extremely successful eighteenth century fencing operations of Jonathan Wild[89] provide a preliminary framework for the analysis of modern criminal redistribution systems. Sometimes called the "Father of Professional Fencing,"[90] Wild's "astonishing organizational sophistication"[91] enabled him to develop a large-scale system of redistribution that "[controlled] the London underworld for more than a decade . . . ."[92]

Although his redistribution system was constrained by economic and demographic factors that made the resale of most stolen property impractical,[93] Wild still managed to make a fortune by opening an office for the "recovery of lost property,"[94] a subterfuge through which he established contacts with thieves and, in effect, fenced stolen goods by selling them back to their original owners and collecting rewards. The success of this system depended upon Wild's ability simultaneously to gain the confidence of thieves with whom he dealt and yet to maintain a clean public image,[95] an understandably delicate balancing process that he accomplished by applying elementary marketing principles and by taking advantage of the then current English law. Wild built good relations with thieves by paying the best prices in London for stolen goods,[96] and he created and

88. *See* note 229 *infra*.

89. A vast literature is available which examines the life of Jonathan Wild in great detail. *See, e.g.*, D. DEFOE, THE KING OF PIRATES (1901); H. FIELDING, THE LIFE OF MR. JONATHAN WILD THE GREAT (1926); G. HOWSON, THE THIEF-TAKER GENERAL: THE RISE AND FALL OF JONATHAN WILD (1970); P. PRINGLE, THE THIEF-TAKERS (1958).

90. C. KLOCKARS, *supra* note 12, at 3.

91. Chappell & Walsh, "*No Questions Asked*" 165.

92. C. KLOCKARS, *supra* note 12, at 3. At his peak Jonathan Wild directed the activities of approximately 7000 thieves. *Id.* at 13. He divided London into districts, each administered by carefully selected assistants whom Wild controlled by the threat of legal prosecution under the Transportation Act. *Id.* at 17. Wild ran his operation in a business-like manner. Indeed, he referred to it as a "corporation." Chappell & Walsh, "*No Questions Asked*" 165. Thieves were often skillfully trained, responsibilities were delegated, and even advertising was employed. *See id.* at 157, 159, 165-67; C. KLOCKARS, *supra* note 12, at 13-19.

93. *See* Chappell & Walsh, "*No Questions Asked*" 167; notes 2-7 *supra* and accompanying text. Items that could not be resold in England were frequently smuggled out of the country. *See* C. KLOCKARS, *supra* note 12, at 13; Chappell & Walsh, "*No Questions Asked*" 167-68.

94. *See* C. KLOCKARS, *supra* note 12, at 14-15.

95. *Id.* at 16-17.

96. *Id.* at 11-12.

maintained his untarnished public reputation by "thief-taking"—that is, aiding in the capture of thieves or providing evidence to convict them.[97] Incidentally, the self-proclaimed "Thief-Taker General of Great Britain and Ireland"[98] also accomplished a more subtle goal by helping to convict thieves: Through such activity, he actually tightened his control over the approximately 7,000 thieves in London by giving him means to punish those thieves who would not deal with him.[99]

This brief description of Wild's operation is instructive for at least two reasons. First, it demonstrates that Wild's success depended upon his tight organizational control and, perhaps more importantly, upon his ability to project two apparently contrasting images—an ability that minimized his risks of detection. Thus, " '[b]efore a thief, he was a fellow thief; before a gentleman, a gentleman.' "[100] Second, it demonstrates in a rather simple fashion the extent to which inadequacies in the law may promote fencing. In fact, Wild's operation continued to expand until he succumbed to a law (the so-called "Jonathan Wild's Act") specifically designed to defeat him.[101] As will be evident in the following discussion, the most sophisticated and the most dangerous modern fences also successfully project contrasting images and exploit inadequacies in the substantive law.[102]

1. *The "Neighborhood Connection"*

> *[S]ome fences may deal directly with a thief and openly sell to a buyer. This type of fence is usually found in every neighborhood, and he deals primarily with small amounts of property. He is the "neighborhood connection."*[103]

---

97. *Id.* at 9-10. *See* J. HALL, *supra* note 5, at 73; Chappell & Walsh, *"No Questions Asked"* 159.

98. C. KLOCKARS, *supra* note 12, at 16-17.

99. *Id.* at 17. It was alleged that "notwithstanding his [Wild's] pretended services in detecting and prosecuting offenders, he procured such only to be hanged as concealed their booty, or refused to share it with him." J. HALL, *supra* note 5, at 71-72. *See* Chappell & Walsh, *"No Questions Asked"* 159. Although Wild generally limited his thief-taking activities to those who did not recognize his authority, his public reputation grew because the assistance he offered did, in fact, lead to the capture and destruction of many of London's most powerful criminal gangs. *See* C. KLOCKARS, *supra* note 12, at 17-19.

100. C. KLOCKARS, *supra* note 12, at 12.

101. *Id.* at 25-26. *See* J. HALL, *supra* note 5, at 73-76.

102. The typology of fences found in the text is only one of many possible. For a typology based on sources of property dealt with, see STRATEGIES 14-23. It is important to emphasize, too, that one individual may play many different roles in many different transactions; the types in the text, therefore, should not be viewed as mutually exclusive.

103. *Hearings on Fencing* 44. Perhaps saying that the "neighborhood connection" exists in "every neighborhood" goes too far. But if the fence himself is not

By definition, the neighborhood fence is a small-time operator. He may, on occasion, actually steal merchandise for resale, but more often he is supplied by local thieves, such as small-time shoplifters or dishonest cargo company employees.[104] Although neighborhood fences tend to specialize, they often buy whatever stolen property is available if the price is reasonable and the item is in demand.[105] Once the thief is paid, the goods are frequently stored in unimaginative and insecure hiding places, for instance, in the trunk of a car or the receiver's basement.[106]

Although the neighborhood fence has no permanent place of business, stolen goods are almost never hustled on the streets because of the risks involved.[107] Instead, the goods are sold in living rooms, local bars, or garages, or to local retail stores and pawnshops.[108] The neighborhood fence rapidly acquires a reputation as a dealer in stolen property because little effort is made to legitimize the goods and because his operation is essentially local. As he develops a regular clientele of thieves,[109] a neighborhood fence may occasionally expand his operation by organizing thefts for customers,[110] by working closely with other fences,[111] and by serving as one of many distributors for property stolen by organized crime syndicates.[112]

There are several reasons why neighborhood fences represent considerably less of a threat to our society than do large-scale fences.

---

in the neighborhood, there is usually someone in every neighborhood who knows where such a fence can be found. For a good account of a neighborhood fencing operation, see Emerson, *supra* note 48, at 311-17.

104. *See* Emerson, *supra* note 48, at 34-38. *See generally Hearings on Fencing* 44. For a good example of the working relationship between a neighborhood fence and his boosters, see Emerson, *supra* note 48, at 313.

105. *See* Emerson, *supra* note 48, at 35-36. *See generally Hearings on Fencing* 6.

106. Hiding places for the temporary storage of stolen goods are known in the street language of the "trade" as "drops." *See* note 146 *infra* and accompanying text.

107. In reality, street hustlers often peddle legitimate merchandise which has been characterized as " 'store-bought' swag." Emerson, *supra* note 48, at 37.

108. *See id.* at 35-38.

109. *See id.* at 35-38. For a neighborhood fence, the development of a local reputation may be equated with Jonathan Wild's concern with "image-building." *See* notes 95-100 *supra* and accompanying text. *See also* note 129 *infra* and accompanying text.

110. *See* Emerson, *supra* note 48, at 36-37.

111. The neighborhood fence may work with a professional fence who specializes in wholesaling. "[A] wholesale . . . dealer . . . sells only in large quantities to other hustlers but does no hustling himself." *Id.* at 38. A wholesaler may be a middleman "in the chain of distribution for mob-controlled thefts . . . ." *Id.* For an analysis of the professional fence, see notes 126-28 *infra* and accompanying text.

112. *See* Emerson, *supra* note 48, at 34. On the concept of "organized crime," see note 154 *infra*.

First, they are more easily detected by conventional police investigative techniques because they often retain actual possession of the goods until redistribution is complete,[113] make little effort to disguise the illegal nature of their goods, and are frequently well-known to both thieves and police. Second, neighborhood fences rarely expand because they usually have limited financial resources and marketing opportunities that prevent their establishing a broad operational base or developing long-term relationships with a significant number of thieves. Finally, although a small-scale fencing operation may generate substantial personal income, neighborhood fences probably only distribute a small percentage of the stolen property redistributed annually.[114]

2. *The Outlet Fence*

Many businesses that primarily market legitimate merchandise also serve, knowingly or unknowingly, as convenient outlets for large quantities of low-cost stolen goods,[115] and gain obvious competitive advantages from such marketing.[116] These so-called outlet fences, especially the large, prestigious establishments, usually do not deal directly with thieves.[117] Instead, transfers of illicit merchandise to these merchants are engineered by so-called professional or master fences whose functions are similar to those of legitimate wholesalers. Before delivery to outlet fences, these wholesalers of stolen goods repackage the merchandise and remove all identifying features.[118]

---

113. Possession is strong circumstantial evidence of guilt in a prosecution for the crime of receiving stolen property. Further, in most states, possession raises a presumption that the fence had knowledge that the goods were stolen. *See* notes 335-42 *infra* and accompanying text. For this reason, other more sophisticated fences generally attempt to avoid actual possession. *See* notes 143-47 *infra* and accompanying text.

114. On the other hand, an anti-fencing strategy that was concerned with local burglaries or thefts committed primarily by addicts and juveniles might well decide to focus on the "neighbor fence." *See* STRATEGIES 14-16.

115. *See* CARGO THEFT AND ORGANIZED CRIME 22; notes 45-48 *supra* and accompanying text. "It seems paramount that these businesses must be named for what they really are, a part of this country's criminal system and not what they think they are, 'good' businessmen interested in making a 'good' profit." *Hearings on Fencing* 37.

116. For example, a retailer may purchase goods at relatively low prices and then sell them at the standard retail level (or just a bit below). The result is a higher mark-up and obviously a greater profit margin. *See, e.g.*, V. TERESA, *supra* note 29, at 141. In some cases, a retail outlet may be unaware that it is buying stolen goods, and in those circumstances the bulk of the excess profit is reaped by third parties, often the fence and a store's buyer.

117. *See* Roselius & Benton, *Stolen Goods* 183.

118. Note that this is in sharp contrast with the procedures utilized by a neighborhood fence who generally makes no effort to disguise the swag identity of his goods. *See* text at note 109 *supra*.

The stolen merchandise then not only is ready for its reentry into traditional streams of commerce, but also is difficult for police and honest businessmen to identify.

In contrast to neighborhood fences, therefore, sophisticated outlet fences pose more serious challenges to law enforcement efforts. First, the merchandise these apparently legitimate businesses receive is usually the product of sophisticated theft and redistribution operations,[119] and the prospect of high retail profits often provides sufficient incentive for retailers to develop a long-term relationship with supplying fences.[120] Thus, outlet fences have a greater adverse impact on society than do neighborhood fences simply because they market large quantities of stolen merchandise that otherwise could not be readily redistributed. Indeed, once such retailers begin to expand their dealings in stolen property they may become professional fences.[121]

Second, although any establishment handling stolen property is technically a fence, criminal liability in most jurisdictions attaches only if authorities can prove the establishment knowingly dealt in stolen property, a *mens rea* difficult to prove if, as is often the case, either the business had no direct contact with thieves or the merchandise when delivered already had been legitimized.[122] One way to prove an outlet fence actually had the requisite *mens rea* is to examine the circumstances surrounding its transaction with the wholesaling fence. For example, as discussed in section II, there is strong evidence of the requisite knowledge if authorities can prove that the wholesaling fence offered the goods at a price substantially lower than the legitimate wholesale market price, had no evidence of ownership beyond mere possession, or demanded cash when the usual practice is to accept a check and issue a receipt.[123]

Finally, even if a knowledge standard is not unduly burdensome for the prosecution in cases involving small retailers whose propri-

---

119. *See* notes 159-60 *infra* and accompanying text.

120. For this reason, and because of the sophisticated thefts involved, fencing operations involving legitimate businesses probably stimulate considerable "buy-on-order" theft activity. *See Hearings on Fencing* 42; REPORT, THE IMPACT OF CRIME 3.

121. "Most professional receivers seem, indeed, to be offshoots from legitimate businesses." J. HALL, *supra* note 5, at 156. *See Hearings on Fencing* 161. The characteristics of a professional fence are discussed in greater detail in notes 141-54 *infra* and accompanying text.

122. *See* notes 274-409 *infra* and accompanying text.

123. *See* J. HALL, *supra* note 5, at 224-25 n.72. Many sophisticated purchasers of stolen goods, however, take precautionary measures to disguise the illegality of their transactions. For example, phoney checks or fake receipts may be used for these purposes. *See* notes 132-38 *infra* and accompanying text.

etors control all aspects of the purchase and resale, it has serious deficiencies when applied to large-scale retailers. For example, upper-level management of a department store chain often has no actual knowledge of illegal transactions because most purchasing decisions are made at lower levels. By not participating in purchasing decisions, upper-level management may knowingly promote the purchase of stolen goods by the chain's buyers seeking a cost advantage over their competitors and yet avoid criminal liability by intentionally remaining ignorant of relevant transactions.[124] As in the case of smaller retailers, proof of purchases at unusually low prices is strong evidence that store buyers knowingly acted illegally, although frequently the illegal offer itself is even more overt.[125]

3. *The Professional Fence*

So-called professional fences frequently front as legitimate retail businesses[126] and may be either specialist or generalist fences, depending, in large part, on the nature of their retail establishments.[127] Although professional fences thus appear to be similar to outlet fences, they are different in two important respects.

First, unlike outlet fences who may only occasionally handle stolen property,[128] professional fences are primarily criminal distributors specializing in stolen merchandise, though they may also do a substantial amount of legitimate business. Interestingly, since professional fences require a steady flow of substantial amounts of stolen

---

124. *See* C. KLOCKARS, *supra* note 12, at 111-12; *Hearings on Criminal Laws* 310; Chasan, *supra* note 1, at 15.

125. For example, direct bribes may serve as monetary incentives inducing a buyer to purchase stolen goods. In addition, the buyer may also be rewarded by management for purchasing his merchandise at a good price. *See Hearings on Criminal Laws* 310.

This discussion of the *mens rea* problem, more fully pursued in the text at notes 259-73 *infra*, should note that since a significant number of businesses dealing in stolen property are pressured by organized crime to participate in redistribution schemes, their participation is considerably less culpable than that of willing participants. *See* STAFF REPORT ON SMALL BUSINESS 8.- For a good example of organized crime exerting pressure on legitimate businesses through the use of gambling and loansharking techniques, see *Hearings on Fencing* 148-49. *See generally* CARGO THEFT AND ORGANIZED CRIME 28, 39; TASK FORCE REPORT, ORGANIZED CRIME 4-5.

126. The seemingly legitimate business may be a retail discount center, bargain-basement shop, pawnshop, junk dealership, or even a wholesaling enterprise. *See* Emerson, *supra* note 48, at 37. Naturally, the more respectable the front, the more security it affords.

127. *See* J. HALL, *supra* note 5, at 156-57; notes 86-89 *supra* and accompanying text. The relationship between the professional thief, the professional fence, and organized crime is carefully documented in PENN. CRIME COMMN. 1971-72 REPORT 107-37.

128. *See* notes 115-21 *supra* and accompanying text.

merchandise and thus often need to deal directly with thieves, they must simultaneously develop two contrasting images to a greater extent than outlet fences: they must appear sufficiently legitimate to satisfy law enforcement agencies, or at least to frustrate investigations, yet must actively promote their illegitimate operations to attract both thieves wishing to sell and consumers wishing to purchase stolen merchandise.[129] Thieves are naturally inclined to deal with professional fences because they do not have ready access to outlet fences, who are supplied by master fences, and because the extensive capital resources of professional fences make them more attractive purchasers than neighborhood fences. A professional fence, moreover, can frustrate police surveillance techniques and conviction even though he retains actual physical possession or control over the stolen merchandise.[130] In many cases, for example, the merchandise can be resold within hours of its delivery.[131] Otherwise, a professional fence often can easily make his illegitimate conduct indistinguishable from his legitimate activities.[132] Thus, identifying characteristics may be removed to the fullest extent possible[133] by disposing of incriminating cartons,[134] removing labels,[135] and altering or destroying serial numbers.[136] Further, many brand name products frequently can be successfully commingled with the fence's legitimate stock without any alteration.[137] In any case, false sales receipts are drafted and the fence's personal check for the purchase price is cashed so that he has a receipt and a cancelled check,

129. *See* C. KLOCKARS, *supra* note 12, at 172, 190-91. Obviously, the modern professional has many of the problems that faced Wild. *See* notes 95-101 *supra* and accompanying text.

130. For an analysis of the legal problems posed by possession of stolen property, see note 113 *supra*. These legal risks may be reduced by storing the goods in a warehouse, but this is often not practical and this precaution does not necessarily eliminate the possibility of a tracing process. "Secret locations under fictitious names are simply not normal business procedures; if trouble developed, explaining a hidden storage area might prove to pose more problems than the advantages such an area offered." C. KLOCKARS, *supra* note 12, at 93. Tracing can be avoided only if the fence takes measures to ensure that the warehouse itself cannot be directly linked to him. Even where a warehouse is available, the stolen goods must ultimately be transferred to the retail establishment; consequently, actual possession cannot be avoided interminably.

131. *See* C. KLOCKARS, *supra* note 12, at 85-86; *Hearings on Fencing* 26-27. *See generally* V. TERESA, *supra* note 29, at 143.

132. C. KLOCKARS, *supra* note 12, at 89; J. HALL, *supra* note 5, at 195.

133. *See, e.g.*, C. KLOCKARS, *supra* note 12, at 81, 87.

134. *Id.* Sometimes, instead of disposing of the carton, the fence simply removes its original label and replaces it with his own. *Id.* at 88.

135. *See id.* at 81. *See* note 138 *infra*.

136. *See id.* at 83 n.6.

137. *See id.* at 81; J. HALL, *supra* note 5, at 192-93.

thereby making his conviction extremely difficult even if the goods are identified.[138]

A second distinction is that as the operation of the professional fence grows in sophistication, he may supply vital information to thieves planning a theft[139] or may himself organize thefts for customers.[140] Arranging successful thefts requires both an extensive system of informants who provide inside information detailing the location of particular property and security measures taken to protect it, and a pool of potential thieves. A professional fence frequently may satisfy both needs by using the shoplifters, dishonest employees, and burglars with whom he regularly deals. Alternatively, the professional fence may satisfy his customers' needs by contacting a so-called master fence who wholesales stolen goods.

4. *The Master Fence*

The master fence directs a big-time operation and either organizes large-scale thefts or serves as a middleman for other organizers.[141] While other fences may perform similar services, the master fence is distinguished by his ability to insulate himself from the actual theft and subsequent redistribution process.[142] The master fence operates as a broker, buying and selling stolen goods valued

---

138. *See id.* at 82, 90-91; J. HALL, *supra* note 5, at 189-91; *Hearings on Fencing* 4. All of this must, of course, be evaluated in the context of the "beyond a reasonable doubt" rule in a criminal case. *See, e.g., In re* Winship, 397 U.S. 358 (1970). If the prosecution fails to convince any member of the jury beyond a reasonable doubt a conviction is not possible. There is some evidence that as a result of recent reform legislation the quality of juries, at least in federal cases, is not as high as it might be. *Cf.* 28 U.S.C. § 1861 (1970) (uniform jury selection). In addition the expertise of the government in prosecuting complicated cases has diminished. *See Hearings on Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess., pt. 4, at 3709-11 (1972). These two factors may combine to make convictions even less likely.

139. Professional fences frequently provide thieves with detailed information concerning the location of items for theft. *See, e.g., Hearings on Fencing* 162. Even so, although many professional fences undoubtedly have teams of thieves, most do not personally arrange large-scale heists. *Id.* at 135-37.

140. *See* J. HALL, *supra* note 5, at 162.

141. *See Hearings on Fencing* 135-38; note 153 *infra*.

142. Hence, "fences may . . . purchase the property from another fence, sight unseen, and never go near the 'drop' where the merchandise is kept. Their transactions are all consummated over the telephone. This type of fence is known as the 'master fence.'" *Hearings on Fencing* 44. *Cf.* Chasan, *supra* note 1, at 15. For a good description of a master fencing operation, see CARGO THEFT AND ORGANIZED CRIME 40-42. Most professional fences do not qualify as master fences since they inevitably come into contact with the stolen goods. *See* note 131 *supra* and accompanying text. Even so, a professional fence may, on occasion, do some master fencing by arranging a transaction in which he is completely insulated.

in the hundreds of thousands of dollars that are always the product of large-scale theft, yet rarely, if ever, seeing or touching any of it.[143]

To be successful, therefore, a master fence must have an extensive system of contacts including both informants and potential large-scale purchasers. For example, as an organizer of thefts, a master fence relies upon his paid connections, such as a dock employee of a manufacturing company or a dispatcher of a trucking outfit, to provide detailed information on shipments of valuable merchandise.[144] The master fence then contacts potential buyers,[145] but does not actually arrange the theft until he has a firm agreement for resale. Once such an agreement is concluded, he plans in great detail the theft itself and arrangements for storing, legitimizing, and delivering the stolen goods.[146]

Although these activities are more daring than those of most outlet and professional fences, who do not regularly arrange thefts and often receive stolen property already legitimized, master fences avoid detection and conviction in two ways. First, they move stolen merchandise rapidly through their redistribution chains because they never steal unless a resale has been arranged. Second, and perhaps more significantly, master fences rarely have actual physical contact with either the stolen goods or their purchasers. They deal with thieves and purchasers indirectly, usually through agents or by telephone. These practices present obvious problems for law enforcement authorities who must gather evidence. As a result, to convict master fences, authorities must use sophisticated surveillance techniques and must offer immunity from prosecution to other members of the redistribution chain.[147] Intensive surveillance, however, is costly and subject to significant legal restraints; further, even immunity grants may not be sufficient to pierce the master fence's legal

143. *See Cargo Theft and Organized Crime* 21; note 145 *infra* and accompanying text.

144. Law enforcement officials believe that the truck hijackers all too often "know exactly what type of property is to be in that truck." *Hearings on Fencing* 136-37. *See* J. HALL, *supra* note 5, at 158.

145. *Hearings on Criminal Laws* 310.

146. A good description of the detail in modern hijacking operations may be found in *Hearings on Fencing* 136-38, 146-54 and CARGO THEFT AND ORGANIZED CRIME 38-39.

147. *See* notes 277-94, 310-25 *infra* and accompanying text. "Most offenses come to the attention of the police by reports from citizens." LAW ENFORCEMENT IN THE METROPOLIS 3 (D. McIntyre ed. 1967). Since citizens will not usually come into contact with a fence's activities except as purchasers, there are no complaining witnesses. A "complaint only" policy in fencing will result in few fencing prosecutions. Consequently, there is a need to institute carefully thought out police programs. Alternative police strategies, primarily from the perspective of a local police agency, are discussed in STRATEGIES 74-112.

shield since thieves are reluctant to testify against their fences,[148] and, in any event, their testimony alone may be insufficient for conviction in those jurisdictions that have adopted the "accomplice rule," which requires independent corroboration of such testimony.[149]

Successful master fences usually require access to the extensive capital resources, personnel and connections of organized crime syndicates.[150] The degree of assistance a master fence receives, of course, depends on the nature of his relationship with the syndicate. While some master fences may actually be syndicate members,[151] and consequently may receive considerable additional assistance in the form of information, personnel, equipment, and storage space, most are content to function outside the syndicate and simply to participate in the redistribution process, reaping a share of the profits.[152]

Because they deal in large quantities of stolen goods, the activities of master fences have a sharp impact on the national economy.[153]

---

148. Successful fences often enjoy very good relationships with their thieves. *See* C. KLOCKARS, *supra* note 12, at 152-55; J. HALL, *supra* note 5, at 157, 196. Fences have been known to provide thieves with bail money and legal assistance. *See* C. KLOCKARS, *supra* note 12, at 153; STAFF REPORT ON SMALL BUSINESS 4. These factors combine with the thief's natural economic dependence upon his fence to produce a general reluctance to testify against fences. *Cf. Hearings on Fencing* 34. This disinclination is reinforced when the fence is a member of an organized crime syndicate or in some way associated with one. In such cases, potential witnesses may be intimidated by the threat of physical harm. *See* TASK FORCE REPORT, ORGANIZED CRIME 14; V. TERESA, *supra* note 23, at 326-42; Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in TASK FORCE REPORT, ORGANIZED CRIME 80, 83; Furstenberg, *Violence and Organized Crime*, CRIMES OF VIOLENCE: A STAFF REPORT TO THE NATIONAL COMMN. ON THE CAUSES OF VIOLENCE 918-19. Finally, in many cases the thief may not know the actual identity of his master fence.

149. *See* notes 216-308 *infra* and accompanying text.

150. Even where he has not organized the theft, the master fence must have enough cash to meet his personnel, storage, and transportation costs. Naturally, where the fence has actually organized the theft, his initial cash outlay is even higher. The costs of large-scale theft run high; for hijacking a shipment worth $100,000, $20,000 or more may be needed for payoffs to informants, drivers, thieves and other participants. *See Hearings on Fencing* 152-53; CARGO THEFT AND ORGANIZED CRIME 26-27. *See generally* STAFF REPORT ON SMALL BUSINESS 5; Emerson, *supra* note 48, at 37-39. Significantly, testimony has recently been given that in New York City alone "[f]our big fences . . . can come up with $100,000 in cash, no sweat." *Hearings on Fencing* 153.

151. *See* CARGO THEFT AND ORGANIZED CRIME 28; *Hearings on Fencing* 135. These fences receive the benefit of access to capital and manpower resources. *See* CARGO THEFT AND ORGANIZED CRIME 27; *Hearings on Fencing* 134-35.

152. "Fences, especially 'master' fences, are usually not members of 'organized crime' *per se*. However, organized crime figures will often 'stake' a fence with a large amount of money if he will use his connections to move stolen property for them. This is usually the relationship that exists, since a fence especially a 'master' fence, of necessity has the required legitimate contacts and travels in the highest business circles." REPORT, THE IMPACT OF CRIME 27. *See* J. HALL, *supra* note 5, at 164.

153. *See* CARGO THEFT AND ORGANIZED CRIME 25-28, 38-42; *Hearings on Fencing* 43-45, 151-54.

More significantly, however, since master fences must rely upon outside sources for support because of their high overhead costs, their growth and success is a good indicator of the extent to which organized crime syndicates control theft and fencing activity.

5. *The Role of Organized Crime*

Organized crime is a society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive but rather the result of intricate conspiracies, carried on over many years and aimed at gathering control over whole fields of activity in order to amass huge profits.[154]

---

154. TASK FORCE REPORT, ORGANIZED CRIME 1.

The concept of "organized crime" is much like the fictional crime portrayed in Akira Kurasawa's 1951 film, *Rashomon*, in which a ninth century nobleman's bride is raped by a bandit and the nobleman is killed. This double crime is then acted out in the film in four versions, as seen by the three participants and a witness. Each version is not quite like the others.

The vision of those who have looked at "organized crime" has been much like that of the witnesses whose stories were told in *Rashomon*. Some have seen nothing and hence have decided that nothing is there. *See, e.g.*, Hawkins, *God and the Mafia*, 14 THE PUB. INTEREST 24-51 (Winter 1969). Compare the summaries of wiretaps reprinted in H. ZEIGER, THE JERSEY MOB (1975). Others have looked only at press accounts and have seen little more than a public relations gimmick. *See* D. SMITH, THE MAFIA MYSTIQUE (1975). Others have looked at it through the eyes of an organizational theorist, and have seen the special character of organized crime to be its functional division of labor. *See* D. CRESSEY, THEFT OF A NATION (1969). Some have examined the phenomenon from the perspective of an anthropologist and have seen not a "conspiracy" but a "social system." *See, e.g.*, F. IANNI, A FAMILY BUSINESS (1972). Others have examined it as a lawyer would, and have seen it as "conspiracy." *See, e.g.*, Blakey, *supra* note 148 at 80, 81-83. The President's Crime Commission, too, adopted this view (La Cosa Nostra was recognized only as the "core" of organized crime. *Id.* at 6); the Crime Commission termed conspiratorial crime "organized crime" when its sophistication reached the point where its division of labor included positions for an "enforcer" of violence and a "corrupter" of the legitimate processes of our society. *Id.* at 8.

A good summary of this view of "organized crime" was composed by the Departments of Justice and Transportation in a study of cargo theft:

> [T]he predominant group and inner core of organized crime is . . . a Nationwide group divided into 24 to 26 operating units or "families" whose membership is exclusively men of one ethnic group and who number 5,000 or more. The Task Force [on Organized Crime of the President's Crime Commission] quoted the FBI's director, who evaluated this core group as "the largest organization of the criminal underworld in this country, very closely organized and disciplined . . . it has been found to control major racket activities in many of our larger metropolitan areas, often working in concert with criminals representing other ethnic backgrounds."
>
> Heading each operating unit, or family, is the boss, whose authority is subject only to the rulings of a national advisory commission, which has the final word on organizational and jurisdictional disputes and is comprised of the more powerful bosses. Beneath each boss, in chain-of-command fashion, is an underboss, several captains (caporegime), who supervise lower-echelon soldiers, who in turn oversee large numbers of nonmember street personnel. One such family is said to number 1,000—half members, half nonmember street-level workers—with 27

In recent years, organized crime syndicates have expanded their fencing operations to exploit the growing demand of consumers and businesses for stolen goods.[155] This expansion has been made possible by the ability of organized crime to marshall its tremendous resources to solve the complex financial and logistical problems that

---

captains and stretches from Connecticut to Philadelphia. Bosses have access to a variety of "staff men," including attorneys, accountants, business experts, enforcers, and corrupters. Many individuals, while not family members in a formal sense, work closely with these inner-core groups and may be called associates (to distinguish them from mere street workers) and, as is the case with street personnel, should be considered an integral part of organized crime. Some associates are highly respected by family members and are very powerful in their own right.

Through interceptions of phone conversations and other oral communications at different times and places between members and associates of this large criminal nucleus of the organized underworld, its existence, structure, activities, personnel, and such terminology as "boss," "captain," "family," "soldier," "commission" have been confirmed and reconfirmed beyond rational dispute.

Loosely allied with this large criminal nucleus are several other organized crime syndicates or groups, those members can also be distinguished among ethnic lines—just as most neighborhoods can, and probably for much the same sociological reasons. The various organized crime groups call upon the services and special skills of one another frequently enough for them to be characterized as a loose confederation, a designation reflecting the absence of a boss of bosses at the top. Sometimes these groups are referred to individually or collectively as the "outfit," "mob," or "syndicate."

Taking into account the political organizations, unions, businesses, and other groups directly or indirectly under the thumb of organized crime, the manpower available to the confederation could conceivably run into the hundreds of thousands. Because they are relatively well organized and disciplined and because they possess the demonstrated superior ability to protect themselves from prosecution through corruption and other means, organized crime groups have a strength and permanency beyond the reach of conventional partners in crime.

The difference to management between cargo theft committed under the direction of organized crime and cargo theft executed under the direction of nonmember employees is analogous to the difference between a company's market share being challenged by a multibillion conglomerate and being challenged by a three- or four-man partnership. Both the conglomerate and partnership are engaged in business, just as organized crime groups and other nonmember criminal elements are both engaged in organized criminal activity. But there is a world of difference between a conglomerate and a partnership, just as there is between organized crime and less organized and disciplined individuals who may cooperate in crime.

CARGO THEFT AND ORGANIZED CRIME 23-24. The phrase "organized crime" is used throughout this article to refer to this type of conspiratorial criminal behavior. For an analysis of the concept of "organized crime" that further breaks it into "enterprises," "syndicates," and "ventures," see ELECTRONIC SURVEILLANCE: REPORT OF THE NATIONAL COMMN. FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 189-92 (1976) [hereinafter WIRETAP REPORT] (concurrence of Commissioner Blakey). *See generally* D. CRESSEY, THEFT OF THE NATION (1969); R. SALERNO & J. TOMPKINS, THE CRIME CONFEDERATION (1969); G. TYLER, ORGANIZED CRIME IN AMERICA (1962); M. MALTZ, *Defining "Organized Crime,"* 22 CRIME & DELINQUENCY 338 (1976).

155. *See* V. TERESA, *supra* note 29, at 143-45; notes 150-52 *supra* and accompanying text. Organized crime offers "goods and services that millions of Americans desire even though declared illegal by their legislatures." TASK FORCE REPORT, ORGANIZED CRIME 2. In addition to theft and fencing, those illegal goods and services include gambling, loansharking, narcotics, labor peace, and illegal alcohol. *Id.* at 2-4. See Pileggi, *The Mafia Is Good for You*, SATURDAY EVENING POST, Nov. 30, 1968, at 18.

are inherent in large-scale theft and fencing activity.[156]

The participation of organized crime in many truck hijackings and the evolution of sophisticated hijacking techniques are evidence of its increasing role in large-scale fencing.[157] Illustratively, syndicate members engineer as many as seventy-five per cent of all truck hijackings in some areas of heavy organized crime activity.[158] In fact, the prototype "stick-up" hijacking is essentially a relic of the past,[159] for most hijackings today are more appropriately characterized as "give-ups" in which drivers, in accordance with prior arrangements, deliver the merchandise to thieves and then claim they were hijacked.[160] Sometimes the drivers and other insiders are rewarded for their duplicity,[161] but in most cases syndicate members coerce their participation by threatening to foreclose their gambling and loan sharking debts.[162] Members of the syndicate usually re-

156. *See* notes 150-52 *supra* and accompanying text.

157. Most (top ten) truck hijackings occur in the following areas: New Jersey, New York City, Massachusetts, New York State, Indiana, Pennsylvania, Ohio, Rhode Island, Tennessee and California. SOURCE BOOK OF CRIMINAL STATISTICS 320 (L.E.A.A. 1974). These are areas of high organized crime activity. TASK FORCE REPORT, ORGANIZED CRIME, 7. For a detailed analysis of cargo theft in the motor and air industry, see A REPORT TO THE PRESIDENT ON THE NATIONAL CARGO SECURITY PROGRAM 36-43 (1976).

158. A prime example is New York City. *See* CARGO THEFT AND ORGANIZED CRIME 26; *Hearings on Fencing* 191. The syndicate's role, however, is not obvious to everyone:

> Whether because of such indirect involvement by organized crime in cargo theft or because of public-image reasons—or both—there is the temptation to downgrade or deny the presence of organized crime at facilities where cargo is transported or otherwise handled. For example, at a southern location, a shipping executive did not believe organized crime was connected to pier thefts. However, other sources in the area revealed the following information: (1) the local crime family boss has held meetings with warehousemen, grocers, truckers, etc.; (2) this boss offered his assistance in establishing another local of a waterfront union; (3) a shylock has solicited loans, at 5 for 4 (25 percent weekly interest), from longshoremen and has been in collusion with a local waterfront union, which permitted the presence of the loan shark on payday and held back the wages of those indebted to him; (4) a syndicate-connected gambler is quoted as saying he expects to get "a lot of action off longshoremen"; (5) the president of a local dock workers union wrote a Federal judge about the fine character of the area's mob boss, who was about to receive a sentence from the jurist; (6) the same union president at one time utilized the services of a syndicate-connected bodyguard.

CARGO THEFT AND ORGANIZED CRIME 27. Americans, in general, have not been aware of the nature and extent of organized crime activity. *See* TASK FORCE REPORT, ORGANIZED CRIME 1-2.

159. *See Hearings on Fencing* 136, 145, 151; V. TERESA, *supra* note 29, at 144.

160. *See Hearings on Fencing* 136-37, 151-54; V. TERESA, *supra* note 29, at 144.

161. *See Hearings on Fencing* 151-53.

162. *See id.* at 42; CARGO THEFT AND ORGANIZED CRIME 27; *Hearings on Stolen Securities* 64, 73.

Organized crime members have been able to obtain inside information and place selected employees in sensitive positions by successfully infiltrating many labor unions. Emerson, *supra* note 48, at 312. *See generally* TASK FORCE REPORT, OR-

main completely insulated from the hijacking[163] because nonmembers,[164] often persons aspiring to join the syndicate[165] or persons indebted to it,[166] carry out the crime.

Once the theft is finished, the syndicate efficiently and effectively legitimizes and redistributes the goods.[167] The syndicate's connections with master and professional fences,[168] and the influence it exerts over many legitimate businesses,[169] have enabled it to develop a redistribution system capable of funneling stolen goods through interstate commerce with great ease.[170] Goods hijacked at 4:30 p.m. may be on retail shelves by 5:15 p.m. that same day.[171] The growth of such a redistribution network inevitably stimulates large-scale theft.

Although organized crime groups have not, of course, monopolized theft activity,[172] the considerable profits derived from redistributing large quantities of stolen goods assures their continued participation in large-scale thefts.[173] Moreover, syndicate activity in

---

GANIZED CRIME 5; *The Mob: It Racks Up Overtime on Government Payroll*, LIFE, Feb. 14, 1969, at 52.

163. A crime syndicate leader, particularly, tries never to come in contact with the stolen goods. *See, e.g.*, V. TERESA, *supra* note 29, at 144-45; *Hearings on Fencing* 152. The sophisticated structure of an organized crime syndicate, its relatively tight internal controls, and its usually enforced code of *omerta*—the code of conduct which mandates silence and loyalty—all serve to reinforce this insulation. *See, e.g.*, TASK FORCE REPORT, ORGANIZED CRIME 7-9; Cressey, *The Functions and Structure of Criminal Syndicates* in TASK FORCE REPORT, ORGANIZED CRIME 41.

164. *See* CARGO THEFT AND ORGANIZED CRIME 26; V. TERESA, *supra* note 29, at 144-45; REPORT, THE IMPACT OF CRIME 4, 26. *Hearings on Fencing* 42, 364; *Hearings on Criminal Laws* 310.

165. *See Hearings on Fencing* 42; V. TERESA, *supra* note 29, at 144-45.

166. *See* V. TERESA, *supra* note 29, at 144-45.

167. This service is essential because, in its absence, large-scale thieves would not be able to find a market for their goods. With financing supplied by syndicate sources, a sophisticated theft and fencing operation is made possible.

168. *See* note 152 *supra*.

169. Organized crime members have utilized their loansharking and gambling activities as a means of compelling indebted businessmen to handle stolen goods. In other situations, businesses directly controlled by organized crime handle the goods. *See* CARGO THEFT AND ORGANIZED CRIME 28-29 (25 per cent of stolen goods estimated to be handled in syndicate outlets).

170. "Organized Crime . . . also controls the underworld disposal systems where bootlegged goods are rapidly fenced and distributed in the city and across the country." Emerson, *supra* note 48, at 315-16. *See* CARGO THEFT AND ORGANIZED CRIME 39-40; *Hearings on Fencing* 7. Speed of distribution is made possible by finding buyers before the theft is carried out. *See id.* at 42; note 140 *supra*.

171. CARGO THEFT AND ORGANIZED CRIME 38-39.

172. "Organized crime is both stealing and [controlling] the disposition. But they don't have the sole market in stealing. The amateurs and organized crime are stealing. Everybody is stealing. Organized crime is handling the disposition." *Id.* at 28. *See Hearings on Stolen Securities* 73.

173. Organized crime does appear to have more than its share of the disposition

narcotics, gambling and loansharking is indirectly responsible for a large number of smaller property crimes committed by burglars, shoplifters and employees,[174] and it gives syndicate members a means to acquire information useful for planning major thefts. Thus, organized crime is a pervasive influence in theft and fencing activities.

II. Social Control Through Law

A. *Criminal Sanctions*

Despite the growth of large-scale criminal redistribution systems with their widespread adverse economic consequences, our society has been unable to develop correspondingly sophisticated legal measures to control the problem. As the following brief historical account will demonstrate, although fencing has been illegal since the era of Jonathan Wild, conceptualization of the crime has failed to keep pace with changes in the nature of the criminal activity.

1. *The Development of the Law*

Receiving property knowing it to be stolen is an offense whose "origin can be traced to medieval England['s prohibition] . . . against 'harboring stolen cattle,' "[175] but fencing activity at that time was seen merely as an aspect of theft itself, not as a crime deserving of any independent recognition. In fact, early English law did not even impose criminal sanctions upon receivers as accessories after the fact unless they were guilty of sheltering the thieves.[176] Because economic conditions effectively precluded the possibility of large-scale theft for resale, receiving was not considered a major incentive to theft requiring separate criminal punishment.[177] But with ensuing economic developments[178] that spurred the growth of fencing ac-

---

process:

> The bulk, quantity, specialized nature, or other characteristics of much stolen cargo presents incontrovertible evidence—circumstantial as it is—of facilities, contacts, and know-how of a coordinated underworld. Referring to a series of sizeable cargo thefts, the head of a State investigation unit asserts that "the merchandise involved must be disposed of by the thieves and it is equally obvious that it can only be disposed of through organized crime channels."

Cargo Theft and Organized Crime 27. *See* notes 24, 150, *supra* and accompanying text; *Hearings on Stolen Securities* 2. *See generally* V. Teresa, *supra* note 29, at 259-89.

174. *See* notes 162-63 *supra* and accompanying text.

175. J. Hall, *supra* note 5, at 52.

176. *Id.* at 53. *See* W. LaFave & A. Scott, *supra* note 14, at 682.

177. *See* notes 4, 93 *supra* and accompanying text.

178. *See* notes 5-7 *supra* and accompanying text.

tivity, legislation was enacted in 1692 to criminalize the mere receipt of stolen property.[179] Even then, however, a receiver was only subject to prosecution as an accessory after the fact to the larceny. Consequently, under established English procedure, he could not be brought to trial before the principal was convicted of theft.[180] This measure, which ironically gave receivers an additional incentive to assist their thieves in evading detection, was subsequently amended in part,[181] but the distinctions drawn between theft and fencing had been firmly ingrained in English law: "The tradition remained throughout the eighteenth century and early nineteenth that the receiver was an accessory to the crime rather than a principal."[182] Despite the success of Jonathan Wild, which clearly demonstrated the errors of this approach,[183] receiving stolen property remained an "appendage of theft" until 1827, when it was finally treated as a separate substantive offense.[184]

The 1827 English receiving statute served as a prototype for subsequent American legislation,[185] and although traces of the ap-

179. 3 & 4 W. & M., c.13, § 3 (1692).

180. This reflected prevailing English attitudes which viewed theft as a major crime and receiving as simply a secondary activity. Since the receiver was only considered to be an accessory, English law would not punish him more severely than his principal and not at all if the thief escaped conviction. Since "the thief might avoid a conviction for larceny by dying, or by not getting caught, or by winning an erroneous acquittal," the statute was not an effective enforcement device. W. LAFAVE & A. SCOTT, *supra* note 14, at 682. *See* J. HALL, *supra* note 5, at 54-55.

181. 2 Anne, c.9, § 2 (1701). *See* J. HALL, *supra* note 5, at 55.

182. Chappell & Walsh, "*No Questions Asked*" 160.

183. *See id.*

184. *See* 7 & 8 Geo. IV, c.29, § 54 (1827); W. LAFAVE & A. SCOTT, *supra* note 14, at 682; J. HALL, *supra* note 5, at 55-56.

185. J. HALL, *supra* note 5, at 58. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 682. Title 18 of the United States Code contains at least twelve provisions which could be used to prosecute the receipt of stolen goods. 18 U.S.C. § 659 (1970) (receipt of property stolen from an interstate or foreign carrier or depot); 18 U.S.C. § 662 (1970) (receipt of stolen property within the special maritime or territorial jurisdiction of the United States); 18 U.S.C. § 842(h) (1970) (receipt of stolen explosives); 18 U.S.C. § 1660 (1970) (receipt of property taken by an act of piracy or robbery); 18 U.S.C. § 1708 (1970) (receipt of property stolen from the U. S. mails); 18 U.S.C. § 2113(c) (1970) (receipt of property stolen from a bank that is federally chartered or a member of the Federal Reserve System or stolen from a federally insured credit union or savings and loan association); 18 U.S.C. § 2313 (1970) (receipt of a stolen vehicle moving in interstate or foreign commerce); 18 U.S.C. § 2314 (1970) (transportation of stolen goods, securities, moneys or fraudulent state tax stamps); 18 U.S.C. § 2315 (1970) (receipt of stolen goods, securities, moneys or fraudulent state tax stamps); 18 U.S.C. § 2317 (1970) (receipt of stolen cattle moving through interstate commerce); 18 U.S.C. § 371 (1970) (outlaws any conspiracy to violate any of these provisions, and accordingly may be classified as an anti-fencing statute). Receiving stolen property is also outlawed in every state. State legislation is comprehensively analyzed in THE NATL. ASSN. OF ATTORNEYS GENERAL, COMMN. ON THE OFFICE OF ATTORNEY GENERAL, LEGISLATIVE RESPONSES TO DEALING IN STOLEN GOODS 33-37 (Dec. 1975).

pendage theory still survive,[186] most jurisdictions today conceptualize receiving stolen property as an independent statutory crime.[187] But while the conceptual difficulties that plagued eighteenth-century England have largely been solved, they have been replaced by new failures to recognize the need to draw even more sophisticated distinctions. Whereas eighteenth-century English society had to learn to make legal distinctions between thief and receiver, our society must be prepared to distinguish among different classes of receivers and diverse patterns of fencing activity.[188] Law enforcement strategy and tactics must be designed to reflect modern differences in *modus operandi* and to accord special emphasis to the important role of organized crime syndicates.

Although there is evidence that our legal system has begun to recognize differences in fencing schemes,[189] recent proposals that treat fencing as a subordinate part of the theft problem simply continue outdated formulations.[190] A more advanced intellectual

186. For example, several of the federal provisions deal with receiving activity simply by listing the prohibition as part of a larger section outlawing a particular type of theft. *See* 18 U.S.C. §§ 641, 659, 1708, 2113 (1970). Several of the states, too, have recently consolidated receipt of stolen property as part of a general anti-theft classification reform. *See* note 190 *infra*. Examples of state statutes are: CONN. GEN. STAT. ANN. § 53a-119(8) (Supp. 1975); ILL. REV. STAT. ch. 38, § 16-1(d) (Supp. 1975); KAN. STAT. ANN. § 21-3701(d) (1972). Unless sophisticated grading schemes are also adopted that distinguish different types of receipt, such reform is unwise. *See, e.g.*, N.H. REV. STAT. ANN. 637:11 (1971).

187. *See* THE NATL. ASSN. OF ATTORNEYS GENERAL, *supra* note 185, at 33-37; ATTORNEY GENERAL, LEGISLATIVE RESPONSES TO DEALING IN STOLEN GOODS 33-37 (Dec. 1975).

188. *See* notes 103-74 *supra* and accompanying text. The need to distinguish among different kinds of receivers was first proposed in Hall's classic work. *See* J. HALL, *supra* note 5, at 155-64; 189-99; 211-25. Since Professor Hall's initial study, patterns of redistribution have become even more sophisticated, and the role of organized crime has become more pronounced. Accordingly, the need for reform today is more apparent than ever, especially in light of the failure to implement Professor Hall's original proposals.

189. The judiciary has been primarily responsible for most of the legal developments that have facilitated the conviction of fences. *See* J. HALL, *supra* note 5, at 173-89.

190. For example, both the Model Penal Code and the National Commission on Reform of Federal Criminal Laws have advocated the consolidation of receiving into a general offense category which broadly outlaws theft activity. By characterizing receiving as merely a subordinate part of theft, the proposed legislation inadvertently de-emphasizes the significance of fencing activity. *See* MODEL PENAL CODE, § 223.1 (1) (Proposed Official Draft 1962); SENATE COMM. ON THE JUDICIARY, SUBCOMM. ON CRIMINAL LAWS AND PROCEDURES, REPORT OF THE NATIONAL COMM. ON REFORM OF FEDERAL CRIMINAL LAWS, 92d Cong., 1st Sess., pt. 1, § 1732(c), at 359 (1971) [hereinafter REFORM COMMN.]. Consolidation may be an appropriate way to deal with the receiver who obtains stolen property merely for personal consumption, but it is an awkward way to attack the multifaceted fencing activity that is carried on throughout the nation today. Both the Model Penal Code and the Reform Commission have, however, made some attempt to distinguish among different types of receivers for the

framework that fundamentally changes evidentiary rules, state of mind requirements, and criminal sanctions, is at least one prerequisite to a modernization of investigative techniques. Until this has been accomplished, our laws will remain unable to help control effectively criminal redistribution systems.

2. *Receiving Stolen Property: A Modern Perspective*

Legislation criminalizing fencing activity has traditionally been drafted to outlaw the *knowing receipt of stolen property*.[191] To convict a receiver under such a statute, the prosecution must establish: (1) receipt of the goods by the fence; (2) the merchandise was stolen property at the time of the receipt; and (3) the fence knew the property was stolen.[192] When defined strictly in these terms, each element of the crime poses major obstacles to successful prosecution. Once these elements are considered from a twentieth-century perspective that recognizes the increasing sophistication of redistribution systems, however, appropriate modifications can be made to remove those obstacles.

a. *The "receipt" of property.* As in the first English fencing statute passed in the seventeenth century, the *actus reus* prohibited by most of the early federal and state statutes drafted in this country was the *buying* or *receiving* of stolen property.[193] Since this de-

---

purpose of grading. *See* MODEL PENAL CODE §§ 223.1(2)(a), 223.6(2) (Proposed Official Draft 1962); REFORM COMMN. § 1735(2)(f) at 362. Nevertheless, the potential impact of § 223.1(2)(a) of the Model Penal Code and § 1735(2)(f) of the Reform Commission is limited, and unless their significance is carefully noted, reform based on these recommendations can err. *See, e.g.*, N.H. REV. STAT. ANN. § 637.11 (1971) (grading distinction not adopted).

191. The offense is commonly referred to as "receiving stolen property." *See* note 185 *supra*.

192. W. LAFAVE & A. SCOTT, *supra* note 14, at 683. In addition, some statutes explicitly require the prosecution to establish that the defendant intended to deprive the owner of his interest in his property. *See, e.g.*, COLO. REV. STAT. § 18-4-401 (Supp. 1975); ILL. REV. STAT. ch. 38, § 16-1(d) (Supp. 1975); N.Y. PENAL LAW §§ 165.45, 165.60 (McKinney 1975). This requirement is designed to eliminate the potential liability of one, such as a policeman or innocent finder, who knowingly possesses the stolen property, but intends to return it immediately. *See* MODEL PENAL CODE § 223.6 (Proposed Official Draft 1962). In any event, this element is not considered a major impediment, since it is readily established by direct or circumstantial evidence. Generally, in the absence of specific language setting forth this requirement, its establishment is not a prerequisite to conviction. *See* STAFF REPORT ON SMALL BUSINESS 17.

193. *See* 3 & 4 W. & M., c.9, § 4 (1692). Approximately 20 jurisdictions still retain this emphasis on the buying or receiving of stolen goods. *Hearings on Fencing* 164-71. *See, e.g.*, MD. ANN. CODE art. 27 § 466 (1957); N.J. STAT. ANN. § 2A:139-1 (Supp. 1974). *See generally* MODEL PENAL CODE § 206.8, Comment (Tent. Draft No. 2, 1954).

194. *See* notes 142-43, 145, 152 *supra* and accompanying text.

scription of the proscribed conduct proved ineffective in controlling fences who avoid physical contact with stolen goods and never make purchases for their own use,[194] many states have expanded the scope of the prohibited conduct to include withholding, concealing or aiding in the concealment of stolen property.[195] Likewise, Congress has adopted measures to correct similar deficiencies in federal receiving statutes, but no uniform formula has yet been developed at the federal level. Thus, current state and federal legislation, reflecting the inability of law enforcement authorities to formulate an effective and consistent approach to fencing, broadly proscribe conduct ranging from the traditional purchase or receipt to the sale, barter, concealment, retention, transportation, disposal, storage, or possession of stolen goods.[196]

It is doubtful that the inclusion of many of these terms actually promotes more efficient law enforcement. Language such as "disposal" or "sale" may help reach the fencing techniques of modern receivers, but, in the absence of appropriate gradation distinctions, the remaining language merely creates additional confusion in the substantive law. In contrast, the clear description of the proscribed conduct in the Criminal Justice Reform Act of 1975, S.1, the most recent Congressional proposal for reforming the federal criminal code, makes possible a realistic effort to deal with modern fencing activity.[197] According to the fencing provisions of that proposed Act, "[a] person is guilty of [receiving stolen property] . . . if he buys, receives, possesses, or *obtains control* of property of another that has been stolen."[198] By focusing on the *control* of stolen prop-

195. *Hearings on Fencing* 164-71. *See, e.g.*, CAL. PENAL CODE § 496 (West Supp. 1975). These additions, however, are only an indirect way of dealing with the problem, and considerable judicial effort has been required to apply the modified versions to fences who have avoided physical contact with the goods. *See* note 202 *infra* and accompanying text. Significantly, the terms "conceal" or "withhold" were probably adopted merely to reach the situation where the defendant, upon initial receipt, had no knowledge of the goods' stolen character but subsequently acquired the requisite knowledge and decided to keep the goods. As the statutes were initially drafted, such a defendant had technically committed no crime since he did not *knowingly receive* the goods. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 688-89. Subsequently, however, the terms "withhold" and "conceal" received appropriately broader application. *Id.* at 684.

196. *See, e.g.*, 18 U.S.C. §§ 641, 662, 659, 842(h), 2113(c), 2313, 2315 (1970). These statutes are discussed briefly in note 185 *supra*. Specific state legislation dealing with specialized aspects of fencing is outside the scope of these materials. Examples of provisions that are common throughout the United States, but are too particularized to merit examination here, are ARIZ. REV. STAT. ANN. § 44-1621 to 1627 (1967) (pawn brokers); COLO. REV. STAT. ANN. § 42-5-102 (1973) (stolen auto parts).

197. The Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. (1975) [hereinafter S. 1].

198. S. 1, § 1733a (emphasis added).

erty, the statute concisely covers a broad range of modern fencing activities that do not require physical possession.[199] The proposed federal legislation, however, does not contain a definition of control.[200] In any event, it is, of course, not yet law, and only a few states have adopted a simple control-oriented definition of the *actus reus* by defining receiving to be the equivalent of acquiring possession *or* control of stolen goods.[201]

Despite failures at the legislative level, modernization of fencing statutes has in effect been accomplished in many jurisdictions by judicial statutory construction. By viewing the offense in broad terms, a number of courts have construed statutes to include any conduct that might be considered to be constructive possession, effective control, or an exercise of dominion over the stolen property.[202] Still, many courts steadfastly refuse to make this broad interpretation. Moreover, in those jurisdictions that are willing, case-by-case determinations, requiring close judicial scrutiny of the relationship between the defendant and the stolen goods, suffer from a lack of predictability as to whether proof of constructive possession or control is sufficient to convict alleged fences and, if it is, as to what conduct amounts to sufficient control.[203] This lack of uniformity and predictability can only be alleviated by carefully tailored legislative reform.

This article, therefore, recommends that legislatures enact statutes similar to the Model Theft and Fencing Act (Model Act) set

---

199. *See generally* notes 142-50 *supra* and accompanying text. The Model Penal Code also reflects the view that *control* of stolen property is the essence of modern fencing activity. *See* MODEL PENAL CODE § 206.8, Comment (Tent. Draft No. 2, 1954).

200. S.1, § 1733(a) simply mentions the word control without explicating the factual basis that would support such a finding. In all likelihood, the courts would follow previous decisions. For a discussion of prior decisions, see United States v. Casalinuovo, 350 F.2d 207, 209-10 (2d Cir. 1965).

201. *See Hearings on Fencing* 164-71. An example of such legislation is COLO. REV. STAT. § 18-4-401 (1973). This approach has been advocated by the Model Penal Code. MODEL PENAL CODE § 223.6 (Proposed Official Draft 1962).

202. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 683. Both state and federal cases stress that control or dominion is the essential element to be established. *See, e.g.*, United States v. Casalinuovo, 350 F.2d 207, 209 (2d Cir. 1965) ("such a nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it were actual possession"); Commonwealth v. Davis, 444 Pa. 11, 15, 280 A.2d 119, 121 (1971) ("in possession of stolen goods only when it is proved that he exercised conscious control or dominion over those goods").

203. *See* People v. Fein, 292 N.Y. 10, 53 N.E.2d 373, 39 N.Y.S.2d 999 (1944); People v. Colon, 28 N.Y.2d 1, 267 N.E.2d 577, 318 N.Y.S.2d 929, *cert. denied*, 402 U.S. 905 (1971). The *Fein* decision was rejected by the legislature in 1967. N.Y. PENAL LAW § 10.00, Practice Commentary (McKinney 1975).

forth in appendix B, which modifies the basic approach employed by the drafters of S.1. According to the Model Act, the defendant has exhibited the proscribed conduct if he "obtains or uses" stolen property.[204] The proposal defines "obtains or uses" as "any manner of . . . taking or exercising control . . . making an unauthorized use, disposition, or transfer of property . . . or obtaining property by fraud . . . ."[205]

Even if suggested substantive reforms are initiated, however, because of critical inadequacies in existing techniques for gathering evidence, control or constructive possession may be difficult to establish if the fence is not apprehended in physical possession of the goods. Conviction simply is not possible unless the stolen merchandise can in some way be linked to the fence. An investigation may be facilitated by informants[206] or by testimony from accomplices who have received immunity.[207] To tap these sources of information, the Model Act provides that accomplice testimony alone is sufficient to establish receipt if it is believed beyond a reasonable doubt.[208]

The rule in many jurisdictions, however, is that, unless it is independently corroborated, an accomplice's testimony is insufficient for conviction.[209] As a tactical matter, then, the prosecution's task in

---

204. *See* MODEL THEFT AND FENCING ACT § 2(a), Appendix B.

205. *See* MODEL THEFT AND FENCING ACT § 7(b)(1), (2), (3), Appendix B.

206. In 1972, for example, FBI informants provided information which led to the recovery by the FBI of $35 million in stolen property and contraband. *Hearings on the Depts. of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for 1974 Before a Subcomm. of the House Comm. on Appropriations*, 93d Cong., 1st Sess., pt. 1, at 879 (1973). This information was disseminated to other federal, state, and local agencies, resulting in the recovery of an additional $95 million. *Id.*

207. The use of immunity grants is discussed in notes 277-94 *infra* and accompanying text.

208. *See* MODEL THEFT AND FENCING ACT § 5(b), Appendix B.

209. *See* notes 296-303 *infra* and accompanying text.

Different problems are involved when the informant is not a thief. First, the police may be reluctant to reveal his identity, since such a disclosure would destroy his future effectiveness and jeopardize his physical safety. Second, an informant by his very nature may not make a credible witness. Finally, in some cases, the use of an informant may result in allegations of entrapment. *See, e.g.*, C. KLOCKARS, *supra* note 12, at 98-100. On the federal level, the traditional notion of entrapment focuses on the predisposition of the defendant to commit the crime. *See* Sorrells v. United States, 287 U.S. 435 (1932). In United States v. Russell, 411 U.S. 423 (1973), where the defendant was offered an essential ingredient for the illicit manufacture of drugs, the Court's language in formulating the defense suggests that a "sell and bust" program in the fencing area might not run afoul of entrapment if targets were carefully selected. What might have been only inferred from *Russell* seems to be beyond question in Hampton v. United States, 19 CRIM. L. RPTR. 3039 (4-27-76) (sell to and buy back heroin if predisposed not entrapment). "Attempted receipt," not "receipt," of course, would be the charge. *See* note 237 *infra*. Such a program might, however, run into judicial opposition at the state level. *See* Young v. Superior Court, 253 Cal. App. 2d 838, 61 Cal. Rptr. 355 (1967).

those jurisdictions is appreciably lightened only when it has apprehended the defendant in actual possession of the goods, which seldom occurs at the more sophisticated levels of fencing activity, or has otherwise obtained independent corroboration of the facts establishing control or constructive possession.[210]

The use of a search warrant is all too often an inadequate investigative tool for fencing crimes since the warrant may be issued only after probable cause has been established, a process that tends to be both cumbersome and time-consuming.[211] For example, although the personal observations of a police officer would establish probable cause, in situations where an informant has provided the critical information—the typical case in fencing investigations—police must demonstrate to a judge their basis for considering the information reliable and reveal the informant's source of information.[212] There is sufficient corroboration if the informant, shown to be reliable, states he has personal knowledge of the information he has provided.[213] If the informant does not have such personal knowledge, police must independently corroborate his testimony.[214] Sophisticated fences are too often able to dispose of their stolen goods before police can acquire probable cause and obtain and execute a war-

---

210. Even in those states where there is no rule requiring the corroboration of an accomplice's testimony, an accomplice's account of the crime often lacks the credibility necessary to persuade a jury beyond a reasonable doubt. This is particularly so when the defense effectively emphasizes to the jury that the witness is testifying under a grant of immunity or promise of leniency. *See* C. KLOCKARS, *supra* note 12, at 99-100.

211. The warrant must set forth sufficient detail of underlying circumstances to enable the federal magistrate or a judge of the state within which the search is to take place to evaluate independently whether probable cause exists. *See* United States v. Harris, 403 U.S. 573, 578-83 (1971); Spinelli v. United States, 393 U.S. 410, 415-16 (1969).

212. *See* Spinelli v. United States, 393 U.S. at 416-17; Aguilar v. Texas, 378 U.S. 108, 110-15 (1964).

213. Spinelli v. United States, 393 U.S. at 416.

214. Spinelli v. United States, 393 U.S. at 416-18. *Spinelli*'s demand for corroboration has been weakened by the holding of United States v. Harris, 403 U.S. 573 (1971). Two concurring justices went as far as to call for the overruling of *Spinelli*. 403 U.S. at 585-86 (Black & Blackmun, JJ., concurring). It may be only a short time before it is overruled. As it stands, it is a significant road block in fencing investigations.

Note that prior to *Spinelli*, Draper v. United States, 358 U.S. 307 (1959), upheld the validity of a warrantless arrest under circumstances where the corroboration consisted simply of police observations of activity which, while not itself illegal, served to confirm so many of the details supplied by the informant that it would have been reasonable for a magistrate to conclude that the information supplied was accurate. The validity of this approach to probable cause, however, underwent a significant development in *Spinelli*, which found that the *Draper* information was based on personal knowledge, so that corroboration of the criminality was not required.

rant.[215] Alternatively, the use of the "buy-bust" technique,[216] which deploys undercover agents who pose as dealers of illegal goods, may offer a more viable solution, at least in gathering evidence against neighborhood, outlet, or professional fences. It obviously offers little hope of success against well-insulated master fences.

In any case, investigations are often also complicated by the general absence of conduct that clearly bespeaks its own illegality: A sophisticated fence utilizes the legitimate aspects of his business to disguise any underlying criminal conduct.[217] Even so, this veil of legitimacy may in some cases be pierced by intensive physical and electronic surveillance, which allows police to show the probable cause they are not otherwise able to establish by conventional methods of enforcement. Police might not then be required to obtain a warrant for an immediate arrest[218] and search[219] where the fence is known to be in criminal possession, thus greatly reducing the risk the fence will transfer the stolen merchandise, thereby disposing of the evidence of his crime. Although admittedly time-consuming, expensive, and an obvious drain on manpower,[220] once the authorities have learned (from an informant, captured thief, or electronic surveillance) of the operations of a particular fence, intensive sur-

---

215. *See, e.g., Hearings on Fencing* 27; note 131 *supra*.

216. The "buy-bust" or "sell-bust" technique may be utilized against both thieves and fences. When thieves are the target of the technique, the undercover officer assumes the identity of a fence who is willing to buy stolen goods. At an appropriate time, arrests can then be made. *See generally*, 122 CONG. REC. S12222-25 (daily ed. July 22, 1976) (LEAA support for anti-theft programs). For a fence, the process would involve an attempt by an undercover officer to sell goods to, or purchase them from, a suspected fence. If the fence is responsive, an arrest would be made. *See* STRATEGIES 74-113.

217. *See* notes 132-38 *supra* and accompanying text.

218. The right to arrest without a warrant was recognized prior to the development of the warrant procedures and was never supplanted by them. *See* Wilgus, *Arrest Without a Warrant* (pts. 1-2), 22 MICH. L. REV. 541, 548-50, 673, 685-89 (1924). Historically, arrest warrant procedures arose solely out of a desire to protect the arresting officer from tort liability. 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 190-93 (1883). The right to search without a warrant, however, received no such independent favorable development. *See generally* LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT 23-50 (1937). The current teaching of the Supreme Court on arrests without warrants is contained in United States v. Watson, 423 U.S. 411 (1976) (not necessary in public area).

219. Once an arrest has been made, the police can conduct a limited search of the area to ensure that the goods are not subsequently moved. The Supreme Court has limited the scope of this potential search, however, to the suspect's body and areas within his immediate reach. Chimel v. California, 395 U.S. 752 (1969). Even so, if the goods are not initially obtained in that way, the police could protect against the loss of evidence by posting a guard and returning later with a search warrant. *See* Vale v. Louisiana, 399 U.S. 30 (1970); Shipley v. California, 395 U.S. 818 (1969).

220. *See Hearings on Fencing* 4.

veillance as part of an aggressive enforcement program offers the only realistic hope of acquiring sufficient evidence of the proscribed *conduct* to justify an arrest. Whether a conviction is subsequently obtained depends upon the prosecution's ability to establish the remaining elements of the offense.

b. *The goods must be stolen.* Since receiving statutes are designed to criminalize only conduct that is socially unacceptable, a basic element of the offense is the requirement that the goods have been stolen and have retained their stolen character throughout the redistribution process.[221] This element initially posed definitional problems for prosecutors since courts were inclined, at least at one time, to describe as "stolen" property only those items that were obtained by common law larceny.[222] They thus excluded the receipt of property obtained by embezzlement or false pretenses from the scope of fencing statutes. In recent years, however, the potential for a technical defense based on the narrow common law definition of the term "stolen" has been eliminated by judicial[223] and legislative[224] action that has expanded the scope of the prohibition to include property obtained by any type of felonious taking.[225]

Although this development has successfully eliminated a troublesome technical defense to fencing crimes, conviction is often impossible anyway either because prosecutors are unable to prove that the goods are stolen[226] or because the goods are no longer technically "stolen property" when obtained by the fence. Typically, stolen merchandise lacks any distinctive identifying indicia, and whatever identifying marks are provided can easily be removed by fences.[227]

---

221. W. LAFAVE & A. SCOTT, *supra* note 14, at 684-85.

222. *Id.* at 684 & nn. 23 & 24.

223. *See, e.g.*, United States v. Turley, 352 U.S. 407 (1957).

224. *See, e.g.*, 18 U.S.C. §§ 641, 659 (1970); CAL. PENAL CODE § 496 (West Supp. 1975).

225. The Model Act eliminates any similar confusion by specifically providing that goods obtained by a variety of means are considered "stolen property." *See* MODEL THEFT AND FENCING ACT § 7(b), Appendix B. S. 1, § 111 proposes a very broad definition of "stolen": "[s]tolen property means property that has been the subject of *any* criminal taking, including theft, executing a fraudulent scheme, robbery, extortion, blackmail, and burglary . . . ."

226. This is due in large part to the prosecution's need to identify stolen property with "some precision." STAFF REPORT ON SMALL BUSINESS 15. The true owner is generally required to identify his goods. An analysis of the cases holding that identification is not necessary suggests only that the owner's identification is not always necessary for *indictment* purposes. *See* Annot., 99 A.L.R.2d 382 (1965). Because the owner's identification is required for trial, however, most prosecutors are reluctant to initiate indictment proceedings if a precise identification cannot be made. *See* notes 228, 231, 259 *infra*.

227. Members of the New York City Police Department have regularly conferred with various manufacturers of clothing and small appliances in an attempt

Manufacturers could deter theft and fencing somewhat by serially numbering their products and recording those numbers.[228] Such a procedure would presumably impede illicit resale efforts by facilitating both the recovery of stolen property and the prosecution of guilty parties.[229] Unfortunately, few manufacturers are willing to incur the production and record-keeping expenses that this process unavoidably entails.[230] In the absence of a reliable identification system, therefore, fungible stolen goods can be easily commingled with legitimate merchandise[231] to preclude precise identification by police.[232]

Conviction of fences is further hampered in many jurisdictions by the requirement that the goods retain their stolen character throughout the redistribution process. Quite often, police catch the thieves with the stolen property or otherwise recover the merchandise before it comes into the possession of a fence, and, frequently with the cooperation of the apprehended criminals, they then proceed to complete delivery to the property's purchasers. By utilizing this approach, police can minimize identification problems and directly trace the goods to a professional fence or other seemingly legitimate business.[233] In contrast to analogous investigatory "set-ups" used to break up distribution networks for narcotics, however, once authorities recover stolen property, the goods immediately lose their stolen character, and subsequent receivers cannot be prosecuted for receiving stolen property.[234] Although this result may be

---

to have all products serialized for identification purposes. However, the position of many manufacturers is that identification would be extremely costly in terms of labor and record keeping and might conceivably price their products out of the market. In most cases, identification can be made by markings on outer cartons where consignee names and order numbers are stenciled. Unfortunately, the thieves also have this knowledge and their first act after coming into possession of "swag" is to "strip the cartons" or remove the information from the cartons.

REPORT, THE IMPACT OF CRIME 18. *See* notes 133-35, 146 *supra* and accompanying text.

228. Without a reliable recording system, serialization would be a wasted effort. Many large corporations do not maintain reliable recording systems for their inventories. *See* REPORT, THE IMPACT OF CRIME 18.

229. *See* Roselius & Benton, *Marketing Theory* 203.

230. This is a purely economic decision based on a simple cost-benefit analysis. *See* note 227 *supra*.

231. *See* REPORT, THE IMPACT OF CRIME 17-18; *Hearings on Fencing* 49-50, 54; note 137 *supra* and accompanying text and note 228 *supra*.

232. *See* notes 228, 231 *supra* and accompanying text.

233. After the goods are traced to a warehouse, a professional fence, or a "legitimate" business outlet, investigation could work upstream in an effort to apprehend (or at least identify) the organizer or master fence. This process could be achieved, *inter alia*, through the careful use of immunity grants. *See* note 277-94 *infra* and accompanying text.

234. The authorities uniformly agree on this point. *See, e.g.*, W. LAFAVE & A.

legally sound, a valuable investigative technique is largely emasculated if authorities are also unable to prosecute receivers for *attempted* receipt of stolen property.

In the federal system, the question of whether fences may be prosecuted for attempted receipt of stolen property in these situations is not reached because there is no attempt provision of general application in the federal criminal code.[235] At the state level, a number of jurisdictions with criminal attempt provisions have not yet decided whether an attempt conviction is appropriate in this instance. When the issue was squarely presented in the leading case of *People v. Jaffe*,[236] however, the New York Court of Appeals held that an attempt conviction in the fencing context presented a question of legal impossibility, and accordingly reversed a conviction for attempted receipt of stolen property.[237] New York followed this ap-

---

SCOTT, *supra* note 14, at 685; United States v. Cawley, 255 F.2d 338, 340 (3d Cir. 1958); People v. Rojas, 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961).

235. *See* REFORM COMMN. 220-21; Keck v. United States, 172 U.S. 434 (1899) (no atempt to smuggle); 18 U.S.C. §§ 641 (1970) (embezzlement and receipt of public money, property or records, but no attempt); 18 U.S.C. § 659 (1970) (theft and receipt of interstate shipment, but no attempt).

236. 185 N.Y. 497, 78 N.E. 169 (1906).

237. The Court of Appeals reasoned that "if the accused had completed the act which he attempted to do, he would not be guilty of a criminal offense," and on this basis concluded that he could not be guilty of attempt. 185 N.Y. at 502, 78 N.E. at 170. In reality, however, Jaffe's conviction should have been upheld since the case actually involved a question of factual, not legal, impossibility. Jaffe had made a mistake with respect to a factual attendant circumstance; he had thought that property that was not stolen was, in fact, stolen. Although under the circumstances of the case, the property had legally lost its stolen character, this transition should only have served to preclude a conviction for the substantive offense but not for a conviction for attempt. The authorities are in general agreement that factual impossibility is not a defense to attempt. W. LAFAVE & A. SCOTT, *supra* note 14, at 438-42. As evidenced by *Jaffe*, the distinction between legal and factual impossibility is unclear. The appropriate distinction is outlined by LaFave and Scott: "If the case is one of legal impossibility, in the sense that what the defendant set out to do is not criminal, then the defendant is not guilty of attempt. On the other hand, factual impossibility, where the intended crime is impossible of accomplishment *merely* because of some *physical impossibility* unknown to the defendant, is not a defense." *Id.* at 439 (emphasis added). When analyzed in this context the distinction is apparent, but confusion has developed because of a tendency by some courts to classify certain cases as legal impossibility simply because an attendant circumstance simultaneously involved what appears to be a question of law. For example, in *Jaffe* there had been a prior interception, which made the question whether the property was stolen one of law. But as to the defendant, the question was really one of fact, and the mistaken belief did not make his conduct any less blameworthy. Analyzing the issue in precisely this manner, the Supreme Court of California rightly rejected the *Jaffe* decision: "Even though we say that, technically, the [goods] . . . were not 'stolen' nevertheless the defendant did attempt to receive stolen property." People v. Rojas, 55 Cal. 2d 252, 258, 358 P.2d 921, 924, 10 Cal. Rptr. 465, 468 (1961). Accordingly, mistake as to attendant circumstances should never be a defense to attempt. This is the view taken by the Model Penal Code and sophisticated legislatures and jurists. *See* notes 239-41 *infra*. Other decisions that have incorrectly applied the impossibility theory

proach for many years,[238] but other states adopted a more pragmatic approach in similar situations and, either by judicial interpretation[239] or statutory enactment,[240] authorized convictions for attempting to receive stolen property. Although the primary rationale for the more pragmatic approach is the blameworthy character of the fence's conduct and his state of mind,[241] such an approach also facilitates law enforcement efforts. Rather than requiring police to resort to impracticable techniques that would necessitate their tracking stolen goods from a distance as they pass through a complex redistribution chain,[242] recognition of the propriety of attempt convictions in these circumstances allows authorities to intervene immediately and to maintain direct control as the property passes through the chain.

By legislation, New York has abandoned the impossibility de-

---

include State v. Guffey, 262 S.W.2d 152 (Mo. App. 1953) (shooting a stuffed deer believing it to be alive); State v. Porter, 125 Mont. 503, 242 P.2d 984 (1952) (attempting to bribe a person mistakenly believed to be a juror).

The apparent confusion surrounding the impossibility defense and the crime of attempt has attracted the attention of numerous scholars. *See, e.g.*, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 586-99 (2d ed. 1960); Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20 (1968); Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665 (1969); Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005 (1967); Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 848-55 (1928).

The impossibility doctrine still continues to trouble the courts. For two recent cases decided on questionable grounds see United States v. Hair, 356 F. Supp. 339 (D.D.C. 1973) (defendant told that television set was stolen property) and United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973) (refusal to allow conviction of "attempt to smuggle mail in or out of prison without warden's knowledge or consent" when warden knew of smuggling). *See also* United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976) (sale of substance not heroin not attempt).

238. *See* People v. Jelke, 1 N.Y.2d 321, 329, 135 N.E.2d 213, 218, 152 N.Y.S.2d 479, 484-86 (1956); People v. Rollino, 37 Misc. 2d 14, 21-22, 233 N.Y.S.2d 580, 587-88 (Sup. Ct. 1962).

239. People v. Rojas, 55 Cal. 2d 252, 257-58, 358 P.2d 921, 923-24, 10 Cal. Rptr. 465, 468-69 (1961); Faustina v. Superior Court, 174 Cal. App. 2d 830, 833-34, 345 P.2d 543, 545-46 (1959). *But see* Booth v. State, 398 P.2d 863, 868-72 (Okla. Crim. App. 1965); Young v. Superior Ct., 253 Cal. App. 2d 848, 853-54, 61 Cal. Rptr. 355, 359-60 (1967).

240. These statutes have not focused specifically on the crime of receiving stolen property but instead have paralleled the approach of the Model Penal Code by authorizing attempt convictions whenever an actor "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be." MODEL PENAL CODE § 5.01(1)(a) (Proposed Official Draft 1962). *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-49 (1971).

241. "In all of these cases (1) criminal purpose has been clearly demonstrated, (2) the actor has gone as far as he could in implementing that purpose, and (3) as a result, the actor's 'dangerousness' is plainly manifested." MODEL PENAL CODE § 5.01(a), Comment, at 31 (Tent. Draft No. 10, 1960).

242. *See, e.g.*, Copertino v. United States, 256 F. 519 (3d Cir. 1919) (property merely watched by police retains stolen character).

fense,[243] but the law of other states in this area generally remains unsettled.[244] Since an approach authorizing attempt convictions in receiving cases reflects an appropriate standard of blameworthiness and supports a necessary investigative technique, it is to be hoped that legislation eliminating the impossibility defense in fencing situations will be quickly enacted without the delay associated with general penal reform. The Model Act, illustratively, expressly authorizes attempt convictions in the receiving context.[245] Further, since similar investigative techniques would facilitate control by federal authorities of large-scale, interstate fencing activity,[246] there is a need for congressional enactment of an appropriate special attempt provision that would obviate the possibility of a technical defense based on legal impossibility.[247]

Additional legislation could also be drafted to facilitate investigations and help reduce the difficulties prosecutors confront in proving the goods are "stolen."[248] Since legitimate wholesale and retail

---

243. N.Y. PENAL LAW § 110.10 (McKinney Supp. 1975).

244. Because very few jurisdictions have specifically dealt with the question of legal impossibility in the receipt of stolen property context, the issue has not been satisfactorily resolved. Accordingly, there is the danger that other jurisdictions will consider *Jaffe* well reasoned. *See Annot.*, 37 A.L.R.3d 375 (1971); note 237 *supra*.

245. *See* MODEL THEFT AND FENCING ACT §§ 2, 4(a)(1), 4(a)(2), Appendix B.

246. *See* note 170 *supra*.

247. S. 1, § 1001 proposes the creation of a general attempt offense and the elimination of the defense of legal or factual impossibility whenever the crime would "have been committed had the circumstances been as the actor believed them to be."

248. The need for federal legislation goes beyond reform in the area of attempt. Presently, federal theft legislation is usually tied to some aspect of interstate commerce; the defendant must be shown to have so transported, or at least so caused the transportation of, the stolen goods. *See, e.g.*, 18 U.S.C. § 2314 (1970); United States v. Scandifia, 390 F.2d 244 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969). This causes additional proof problems at trial. It also causes virtually insurmountable probable cause problems during the process of investigation, particularly investigation of fences. Informants will supply intelligence of fencing activity, but they are not often attuned to the proof requirements of federal law. Under present practices and legal limitations, it is difficult to convict a fence on federal grounds, even with the aid of such extraordinary tools as electronic surveillance. *See generally* Testimony of Special Agent Robert G. Sweeney, *Hearings of the National Comm. for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance*, Vol. 2, at 860-61 (May 20, 1975). The need here is for comprehensive federal fencing legislation patterned after either 18 U.S.C. § 892 (1970) (loansharking) or 18 U.S.C. § 1955 (1970) (syndicated gambling), neither of which makes commerce an integral part of the offense. *See* Perez v. United States, 402 U.S. 146 (1971) (holding that § 892 is constitutional); United States v. Sacco, 491 F.2d 995 (9th Cir. 1974) (§ 1955 held constitutional). The need for independent federal legislation is underscored by the interplay of other aspects of the problem. Often the states that have comprehensive theft and fencing legislation do not have the necessary investigative tools (*e.g.*, wiretapping); in addition, because of restrictive court decisions, federal-state cooperation is seriously inhibited. *See, e.g.*, People v. Jones, 30 Cal. App. 3d 852, 106 Cal. Rptr. 749, *cert. denied*, 414 U.S. 804 (1973) (lawful federal wiretap inadmissible in state proceedings).

dealers apparently play an important role in theft and fencing,[249] it would be helpful to impose on them a duty of inquiry as to the source of the goods they purchase and to criminalize, under appropriate standards, the possession of merchandise with altered identification marks. An appropiate duty of inquiry would permit undercover police to offer for sale allegedly stolen goods[250] and at least to arrest dealers who purchased without making a proper inquiry. Assuming sufficient corroborative evidence is available, noncomplying merchants might be convicted of both an attempt to purchase stolen property and a failure to inquire, regardless of the innocent character of the property in question.[251] Of course, the failure to inquire might be appropriately graded as a lesser offense than attempted receipt of stolen property.[252]

---

249. *See* notes 45-49, 115-39, 145, 169-71 *supra* and accompanying text.

250. The investigation would have to be carried out with great care, since entrapment is an obvious potential difficulty. *See* note 209 *supra*. A suggested method would include the use of agents or cooperative informants who would be wired with appropriate electronic surveillance devices. Since the "wired" individual consents to the use of such a device, no fourth amendment problem is posed. *See* Lopez v. United States, 373 U.S. 427, 437-40 (1963) (wire recorder); On Lee v. United States, 343 U.S. 747, 753-54 (1952) (transmitter); United States v. White, 401 U.S. 745 (1971). *Cf.* Rathbun v. United States, 355 U.S. 107 (1957) (telephone). For an illustration of the creative use of a wired informant in a fencing investigation where the informant died before trial, but the tapes were still used, see United States v. Lemonakis, 485 F.2d 941, 948-49 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974). A merchant who fails to adhere to the duty could also be caught through the use of legislatively authorized electronic surveillance measures issued pursuant to a court order. 18 U.S.C. §§ 2516-2519 (1970). *See* notes 310-28 *infra* and accompanying text. Under such circumstances a "wired" agent could establish the initial probable cause for the court order.

251. Since the purpose of such an enactment would be to facilitate investigative efforts, the mere failure to make inquiry would constitute a separate offense, and the character of the goods would be immaterial. Consequently, a merchant who fails to make appropriate inquiry with respect to the source of goods would act at his peril.

Hall points out that New York initially utilized a similar approach by enacting legislation that required diligent inquiry into the character of the goods and later created a rebuttable presumption of knowledge of the goods' stolen character whenever there had been failure to make diligent inquiry. J. HALL, *supra* note 5, at 211-12. New York's statute did not, however, make the mere failure to inquire a separate substantive offense. *Id.* at 212-13. *See* People v. Rosenthal, 197 N.Y. 394 (1910), *affd.*, 226 U.S. 260 (1912) (failure to inquire in receipt of stolen property by junk dealer not violation of liberty of contract or equal protection). Apparently, Hall did not recognize the investigative significance that such a statute might have, for although he proposed to make the failure to inquire a separate offense applicable to designated retail and wholesale dealers, he apparently would not have allowed a conviction if the items were not, in fact, stolen. J. HALL, *supra* note 5, at 224.

252. As an alternative to making failure to inquire an offense, a statutory presumption could be enacted which would give rise to a presumption of knowledge of the goods' stolen character upon proof of a dealer's failure to make inquiry with respect to source. *See* notes 344 *infra* and accompanying text. There are, however, constitutional limitations surrounding presumptions of this type. *See* notes 351-54, 360-88 *infra* and accompanying text.

A law proscribing the possession of altered merchandise would function in a somewhat different manner. As provided by section 3 of the Model Act,[253] possession of altered property itself would be considered a separate crime; in addition, it could be treated as a strict liability offense.[254] The Model Act also provides appropriate gradation distinctions since possession of altered goods may be less blameworthy than possession of stolen property.[255]

Obviously, such a proposal is useful only if sufficient numbers of products are manufactured with distinctive identification marks. For this reason, legislatures should seriously consider requiring serialization of products where technologically feasible.[256] In the past, state legislatures have not refrained from imposing similar requirements upon businessmen to protect state revenues. For example, the stamping of cigarette packages is routinely required in most states.[257] State revenues are similarly threatened by theft and fencing, since fences frequently sell stolen goods without collecting or reporting a sales tax and victimized merchants inevitably report lower profits for income tax purposes.[258] If mandatory serialization is too far-reaching, legislatures might consider offering businesses tax credits in return for voluntary serialization.

In any case, both prosecutors and police are in desperate need of a modernized approach to help them prove receipt of "stolen" property. Serialization accompanied by accurate recording procedures would help in the identification of stolen property, and especially in jurisdictions that do not recognize a crime of attempted receipt of stolen property, would also help police trace property

253. *See* MODEL THEFT AND FENCING ACT § 3, Appendix B. Note that the Model Act would not make possession of altered property a strict liability offense. *See* note 2, Appendix B.

254. Strict liability has traditionally received constitutional approval in the regulatory offense area. For a detailed discussion of the constitutional limitations on strict liability offenses in general, see notes 412-25 *infra* and accompanying text. Note that the proposed legislation should provide an exemption for cases when the dealer has received the manufacturer's express permission to make alterations or when such activity is considered impliedly approved by prevailing commercial standards.

Similar legislation, but of a more limited character, has been enacted in California and Illinois. California's statute does not provide for strict liability, and Illinois' is directed at a very limited range of activity. *See* CAL. PENAL LAW § 537e (West Supp. 1975); ILL. ANN. STAT. ch. 38, § 50-31 (Smith-Hurd 1970).

255. *Compare* MODEL THEFT AND FENCING ACT § 3(b), *with* §§ 2(b), 4(b), Appendix B.

256. Legislation could be designed that would create a hearing board structure to review questions of technological and economic feasibility.

257. *See, e.g.*, CAL. REV. & TAX CODE §§ 30161, 30162 (West 1970).

258. *See* CARGO THEFT AND ORGANIZED CRIME 8.

through complex redistribution systems without actually intervening, and thus without depriving the goods of their "stolen merchandise" status. In addition, since sophisticated receivers can remove serial numbers, the passage of statutes criminalizing either the possession of altered merchandise or the failure to inquire is necessary.

c. *The state of mind requirement.* In addition to establishing that the property was received and stolen, the prosecution must also establish that the fence knew the goods were stolen.[259] In the federal courts the prosecution need not prove that the defendant knew the stolen goods were part of interstate commerce,[260] since this element has uniformly been regarded as a purely jurisdictional requirement.[261] Although for many years the circuits were split over whether knowledge of the jurisdictional element must be established in conspiracy cases,[262] the Supreme Court recently facilitated con-

259. W. LaFave & A. Scott, *supra* note 14, at 685-88.

260. The interstate character of the transaction must be established under several of the federal theft statutes. There is, however, a difference between the character of the interstate element in several of the statutes. In 18 U.S.C. § 659 (1970), for example, the goods must be taken from interstate commerce, while in 18 U.S.C. § 2313 and § 2315 (1970) the goods must have moved in interstate commerce after having been stolen.

261. *See, e.g.*, United States v. Jennings, 471 F.2d 1310, 1312 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); United States v. Tannuzzo, 174 F.2d 177, 180 (2d Cir.), *cert. denied*, 338 U.S. 815 (1949).

262. The underlying argument of those decisions that have required proof of the defendant's knowledge of the jurisdictional elements in conspiracy cases was originally stated by Judge Learned Hand: "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past." United States v. Crimmins, 123 F.2d 271, 273 (2d Cir. 1941). Accordingly, "[t]he distinction between the scienter component of the conspiracy and substantive charges arises from the notion that although an individual may commit some crimes unwittingly he cannot conspire to commit a specific crime unless he is aware of all the elements of the crime." United States v. DeMarco, 488 F.2d 828, 832 (2d Cir. 1973).

The Hand approach, however, was widely criticized by both the courts and the commentators. *See* Model Penal Code § 5.03, Comment at 110-13 (Tent. Draft No. 10, 1960); *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 937-39 (1959); 1 Working Papers of the National Commn. on Reform of the Federal Criminal Laws 388-89 (1970) [hereinafter Working Papers]; Reform Commn., §§ 203, 204, 1004; United States v. Polesti, 489 F.2d 822, 824 (7th Cir. 1973).

The Model Penal Code, while recognizing the conceptual basis underlying the Hand formulation, proposed an easy legislative solution to the problem. The draftsmen suggested that the interstate requirement be viewed "not as an element of the respective crimes but frankly as a basis for establishing federal jurisdiction." Model Penal Code § 5.03, Comment at 116 (Tent. Draft No. 10, 1960). In this manner, the problem is overcome by simply omitting the jurisdictional requirement from the definition of the basic crime. The jurisdictional elements are listed in separate sections. The Reform Commission accepted this proposal, and accordingly proceeded to segregate the interstate commerce requirement from the remaining elements of the federal statutory offenses. *See, e.g.*, Reform Commn., §§ 201, 203, 204, 1732, 1740. This principle has been followed in S.1. *See, e.g.*, §§ 201(c), 1731(c), 1733.

spiracy prosecutions by rejecting the older analysis that required such proof.[263] Despite this reform in the federal courts, federal and state prosecutors still face the difficult task of proving the remaining state of mind requirements.

(i). *The appropriate mens rea.* Although the term "knowledge" suggests an actual awareness of attendant circumstances,[264] if "receiving statutes required absolute certainty, there would be few convictions, for one seldom knows anything to a certainty, and the receiver in particular is careful not to learn the truth."[265] Accordingly, most jurisdictions require the prosecution to show only that the defendant believed the goods were stolen, not that he knew this fact with certainty.[266] Even when framed in these terms, however, jurisdictions have been unable to agree whether an objective test[267]

---

263. United States v. Feola, 420 U.S. 671 (1975). The Supreme Court held "that where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit the offense." 420 U.S. at 696. Justice Blackmun quoted the Government's response to the traffic light analogy: "The Government rather effectively exposes the fallacy of the *Crimmins* traffic light analogy by recasting it in terms of a jurisdictional element. The suggested example is a traffic light on an Indian reservation. Surely, one may conspire with others to disobey the light but be ignorant of the fact that it is on the reservation." 420 U.S. at 690 n.24.

In his opinion for the majority, Justice Blackmun emphasized that the first issue is the proper characterization of the element, but that once it is characterized as jurisdictional, then the requirement is irrelevant to the dual purposes of conspiracy theory: (1) the "protection of society from the dangers of concerted criminal activity," and (2) the initiation of "preventive action" against the commission of crimes that are still in a relatively inchoate stage. 420 U.S. at 693-94. Accordingly, Justice Blackmun concluded that, "[g]iven the level of criminal intent necessary to sustain conviction for the substantive offense, the act of agreement to commit the crime is no less opprobrius and no less dangerous because of the absence of knowledge of a fact unnecessary to the formation of criminal intent." 420 U.S. at 693.

264. "A person acts knowingly with respect to a material element of an offense when:

(1) if the element involves the nature of his conduct or the attendant circumstances, he is *aware* that his conduct is of that nature or that such circumstances exist . . . ." MODEL PENAL CODE § 2.02(b) (Proposed Official Draft, 1962) (emphasis added). Note that the Model Penal Code modifies its scienter requirement in receipt of stolen property cases. *See* MODEL PENAL CODE § 223.6(1) (Proposed Official Draft, 1962) ("or believing that [the property] has probably been stolen"). Courts are split as to whether suspicion is sufficient. *Compare* Commission of Pub. Safety v. Treadway, — Mass. —, 330 N.E. 468, 472 (1975) (suspicion enough), *with* State v. Goldman, 65 N.J.L. 394, 398, 47 A. 641, 643 (1900) (suspicion not enough).

265. W. LAFAVE & A. SCOTT, *supra* note 14, at 685.

> The receivers of stolen goods almost never "know" that they have been stolen, in the sense that they could testify to it in a court room. The business could not be so conducted, for those who sell the goods—the "fences"—must keep up a more respectable front than is generally possible for the thieves. Nor are we to suppose that the thieves will ordinarily admit their theft to the receivers: that would much impair their bargaining power.

United States v. Werner, 160 F.2d 438, 441 (2nd Cir. 1947).

266. W. LAFAVE & A. SCOTT, *supra* note 14, at 685.

267. A number of states have adopted legislation which expressly sets out an "ob-

or subjective test[268] of knowledge or belief is appropriate.

Since prosecutors face difficult evidentiary burdens, some mitigation of the stringent subjective test is warranted. Indeed, the sophistication of modern fencing operations compounds the difficulties already inherent in proving even a defendant's *belief* as to whether his goods are stolen.[269] A possible response to these difficulties would be the adoption of the less confining objective test. Such a standard for criminal liability might be appropriate if it were limited to retail and wholesale dealers.

A better reform, however, would be the adoption of a recklessness standard,[270] under which a defendant would have a culpable state of mind if it were established that he purchased goods despite being aware of a substantial risk that the property had been stolen.[271]

---

jective" standard of state of mind. Under this approach, the defendant is said to have knowledge if he knew or *should have known* of the goods' stolen character. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-621 (Supp. 1975). A few courts have acknowledged that an objective test is appropriate. *See, e.g.*, Seymour v. State, 246 S.2d 155 (Fla. App. 1971). This standard involves the imposition of a strict form of liability based on what a reasonable person would have known. That a reasonable person would have known is evidence that a particular person did know. But there is a world of legal difference between circumstantial evidence of a fact and actual knowledge of the fact itself. *See* United States v. Werner, 160 F.2d 438, 441-42 (2d Cir. 1947). Of course, in trial, this difference would tend to blur during the process of proof and the jury deliberations. The distinction, however, would have to be stated in the judge's instruction.

268. The majority of jurisdictions have adopted the subjective approach articulated by Judge Hand:

> [S]ome decisions even go so far as to hold that it is enough, if a responsible man in the receiver's position would have supposed that the goods were stolen. That we think is wrong; and the better law is otherwise, although of course the fact that a reasonable man would have thought that they have been stolen, is some basis for finding that the accused actually did think so. But that the jury must find that the receiver did more than infer the theft from the circumstance has never been demanded, so far as we know; and to demand more would emasculate the statute, for the evil against which it is directed is exactly that: i.e., making a market for stolen goods which the purchaser believes to have probably been stolen.

United States v. Werner, 160 F.2d 438, 441-42 (2d Cir. 1947) (footnotes omitted). While recognizing that knowledge may be inferred from circumstances that would give a hypothetical reasonable man knowledge of the goods' stolen character, these jurisdictions nevertheless require a finding of *actual* knowledge on the part of the particular defendant involved. Any instruction suggesting the contrary is considered to be reversible error. *See, e.g.*, Schaffer v. United States, 221 F.2d 17, 23 (5th Cir. 1955).

269. The difficulties involved in proving knowledge are discussed in notes 274-328, 389-97 *infra* and accompanying text.

270. *See* MODEL THEFT AND FENCING ACT § 2 n.2, Appendix B.

271. The Model Penal Code defines recklessness as follows:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross devia-

Use of a recklessness test would permit partial reconciliation of two somewhat conflicting aims of the criminal law. First, by applying a subjective test, a recklessness standard would hold the prosecution to a higher burden of proof than would an objective test, thus limiting criminal punishment to only particularly blameworthy conduct. Second, such a standard, although not as favorable to the prosecution as an objective test, would facilitate the prosecution and conviction of fences since authorities would not be required to prove actual knowledge.

An even more sophisticated refinement would be to incorporate the recklessness standard into a continuum that would vary the prescribed punishment with the state of mind proved by the prosecution. Since a defendant who knowingly purchased stolen property is more blameworthy than a defendant who made a reckless purchase, distinctions in the penalties imposed might be appropriate.[272] More importantly, such a gradation of punishment would facilitate both plea bargaining and the successful prosecution of fences whose cases are taken to trial. For example, in exchange for lighter punishment, a defendant could plead guilty to a lesser fencing offense than that for which he might have been convicted had the case gone to trial. Further, in cases actually tried, jurors would no longer have to elect between convicting a fence of one offense or not convicting him at all. By permitting prosecutors to bring separate charges alleging actual knowledge and recklessness, similar to the procedure in many jurisdictions where prosecutors charge a defendant with both first-degree and second-degree murder, verdicts could more closely reflect the facts; jurors presumably would be less likely to acquit a defendant who made a reckless purchase because they would no longer have to mete out the same punishment as they would to a person who knowingly purchased stolen goods.

Thus far, however, although a few courts have used the language of a recklessness standard,[273] no jurisdiction has expressly modified its state of mind requirement to include a recklessness standard or

---

tion from the standard of conduct that a law-abiding person would observe in the actor's situation.

MODEL PENAL CODE § 2.20(c) (Proposed Official Draft, 1962). Under S. 1, "[a] person's state of mind is reckless with respect to: (1) an existing circumstance if he is aware of a risk that the circumstance exists but disregards the risk . . . ." § 303(c).

272. For a more detailed discussion of gradation principles, see notes 450-67 *infra* and accompanying text.

273. *See* United States v. Brawer, 482 F.2d 117, 126-27 (2d Cir. 1973), *aff'd.*, 496 F.2d 703 (2d Cir. 1974) (defendant acted with reckless disregard by consciously avoiding learning the truth).

legislated a comprehensive state of mind continuum correlating punishment and blameworthiness. Consequently, prosecutors are usually left with the unenviable task of proving defendants had an actual belief the goods purchased were stolen.

(ii). *The availability of direct evidence establishing mens rea.* Proof of guilty knowledge under existing statutes is an inherently difficult task because a sophisticated fence is able to "erect the most elaborate defenses."[274] A professional fence, for example, "legitimizes" stolen property in his possession to make its positive identification more difficult and falsifies sales receipts for use in rebutting prosecutorial attempts to establish his knowledge that the goods were stolen.[275] Similarly, a master fence is well-insulated from the complex redistribution process he operates, and thus rarely leaves readily detectable direct evidence that can be used to establish the requisite state of mind.[276]

Although this situation is dismaying, legislative action can, and sometimes has, provided law enforcement officials with potentially powerful evidence-gathering techniques. Most important are various devices to encourage informants to come forward and the expanded use of electronic surveillance. For example, the use of immunity grants may provide a viable means of compelling testimony from informants, despite the widespread reluctance of thieves to testify against their fences.[277] At the federal level, title II of the Organized Crime Control Act of 1970, permits judicial, administrative, and congressional bodies to issue orders granting immunity in exchange for testimony with appropriate safeguards for individual liberties.[278] A grant of immunity is authorized whenever a recalcitrant witness refuses to divulge information important to the public inter-

---

274. *Hearings on Fencing* 4.

275. *See* notes 132-38 *supra* and accompanying text. False receipts, in particular, afford the offender the opportunity to create his own evidence by establishing that he paid the market value price for the merchandise. *See generally* C. KLOCKARS, *supra* note 12, at 82 n.6.

276. *See* notes 142-49 *supra* and accompanying text.

277. "The commentators, and this Court on several occasions, have characterized immunity statutes as essential to the effective enforcement of various criminal statutes. As Mr. Justice Frankfurter observed, . . . such statutes have 'become part of our constitutional fabric.'" Kastigar v. United States, 406 U.S. 441, 447 (1972) (citations and footnotes omitted). *See* 8 J. WIGMORE, EVIDENCE § 2281 (3d ed. 1940).

For a good summary of the development and potential effectiveness of immunity grants, see Blakey, *supra* note 148, in TASK FORCE REPORT, ORGANIZED CRIME 85-88.

278. 18 U.S.C.A. §§ 6001-6005 (Supp. 1975). *See* Kastigar v. United States, 406 U.S. 441 (1972). For an analysis of the use of § 6002, see *Testimony of H. Petersen, Hearings Before a Subcomm. of the House Comm. on Appropriations,* 92d Cong., 2nd Sess. 544 (1972).

est and claims his privilege against self-incrimination.[279] Once immunity has been granted, the witness is required by law to disclose whatever information is requested, but none of his testimony may be used directly or indirectly against him in a subsequent criminal prosecution.[280] This so-called use immunity of the federal statute is an effective investigative technique, for a witness testifying under it has a strong incentive to provide the prosecution with as much information as possible. In effect, the more information a witness provides under the compulsion of an order to testify, the more difficult it is for the prosecution to gather independently, and to show it gathered independently, evidence to convict the witness of the underlying crime.[281] Failure to comply with the order to testify is punishable as contempt, subjecting the witness to a potentially prolonged period of imprisonment,[282] and a grant of immunity does not protect

279. 18 U.S.C.A. §§ 6002, 6003, 6004, 6005 (Supp. 1975).

280. 18 U.S.C.A. § 6002 (Supp. 1975). The negative implication of section 6002 is that the witness's testimony can be used against him in a civil suit. *See* United States v. Cappetto, 502 F.2d 1351, 1359 (7th Cir. 1974). For a detailed discussion of civil remedies in the fencing context, see notes 499-544 *infra* and accompanying text. Civil consequences were encompassed under the former standard transaction immunity language ("penalty or forfeiture"). *See, e.g.*, Lee v. Civil Aeronautics Bd., 225 F.2d 950 (D.C. Cir. 1955).

281. In a criminal proceeding brought against such a witness, the prosecution may only utilize evidence that has been obtained independently of the subject's testimony. *See* note 280 *supra* and accompanying text. Generally, a use-immunized witness is entitled to a copy of the immunized testimony. *In re* Minkoff, 349 F. Supp. 154 (D.R.I. 1972). Access may also be had to the minutes of an indicting grand jury. United States v. Dornau, 356 F. Supp. 1091 (S.D.N.Y. 1973). The prosecution's burden to show no subsequent use may not be met with conclusionary assertions. United States v. Seiffert, 463 F.2d 1089 (5th Cir. 1972). Proof must be offered. United States v. Seiffert, 357 F. Supp. 801 (S.D. Tex. 1973). Mere exposure to a prosecutor has been held to warrant dismissal of an indictment. *See* United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); United States v. Dornau, 359 F. Supp. 684 (S.D.N.Y. 1973). This seems to go too far since other prosecutors who had not been exposed to the testimony could handle untainted evidence. Obviously, the government's burden is heavy, but it is not insuperable. *See* WATERGATE: SPECIAL PROSECUTION FORCE REPORT 208 (1975) (filing of "taint" papers in reference to John Dean).

282. Federal legislation provides that a noncomplying witness may be confined for a period not to exceed 18 months. 28 U.S.C. § 1826. The witness may obtain his release at any time by purging himself of his contempt. His confinement may be renewed if he is subsequently called upon to testify, for example, before a new grand jury, and he again refuses to comply. *See* Shillitani v. United States, 384 U.S. 364 (1966) (dicta); *In re* Grand Jury Subpoena of Alphonse Persico, 522 F.2d 41 (2d Cir. 1975). At least one federal court, however, has expressed dicta to the effect that, at some point, prolonged confinement may violate a person's due process rights. *See* United States v. Doe, 405 F.2d 436 (2d Cir. 1968). New Jersey, too, has upheld prolonged confinement (four years), but has recognized that the facts of each case must determine its resolution. Catena v. Seidl, 65 N.J. 257, 262, 321 A.2d 225, 228 (1974) stated: "The legal justification for commitment for civil contempt is to secure compliance. Once it appears that the commitment has lost its coercive power, the legal justification for it ends and further confinement cannot be tolerated." The test used by the court to determine whether confinement should end was whether there

a witness from prosecution for perjury.[283]

Immunity grants are also routinely authorized by state legislation.[284] Nevertheless, despite the Supreme Court's decision in *Kastigar v. United States*,[285] which held that the federal "use immunity" statute is coextensive with the scope of the fifth amendment's privilege against self-incrimination,[286] most state legislation only authorizes prosecutors to grant witnesses "transaction immunity," or protection from prosecution for any crime to which the compelled testimony relates.[287] Transaction immunty offers considerably broader protection than that required by the fifth amendment privilege and is less effective than use immunity as an investigative tool. Transaction immunity provides no inducement to the witness to provide maximum information since it acts as an "immunity bath": A witness is always immune from prosecution for the underlying offense once he testifies, regardless of how much useful evidence he provides.[288] Further, a grant of transaction immunity in a fencing investigation may

was "no substantial likelihood" that the witness would testify. 65 N.J. at 262, 321 A.2d at 228. For subsequent developments in *Catena* see N.Y. Times, Aug. 20, 1975, at 1, col. 5 (late city ed.) (Gerardo Catena ordered released from confinement for civil contempt) and 17 CRIM. L. RPTR. 2497 (1975).

283. *See* 18 U.S.C.A. § 6002 (Supp. 1975). Until recently, the perjury sanction has been of limited effectiveness because of the traditional difficulties involved in proving a violation. *See* Blakey, *supra* note 148, in TASK FORCE REPORT, ORGANIZED CRIME 88-91. This problem has been ameliorated by the passage of legislation that requires only "proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question . . . ." 18 U.S.C.A. § 1623 (Supp. 1975). The cases also make it clear that the immunity attaches only to truthful testimony; untruthful responses may be used against the witness, for example, to cross-examine and incriminate him under another charge. *See, e.g.*, United States v. Tramunti, 500 F.2d 1334 (2d Cir. 1974).

284. A comprehensive list of state immunity legislation is provided in 8 J. WIGMORE, *supra* note 277, § 2281, at 495 n.11. Thirty three states now provide for immunity in the fencing area. THE NATIONAL ASSN. OF ATTORNEYS GENERAL, ORGANIZED CRIME CONTROL LEGISLATION 133-41 (1974).

285. 406 U.S. 441 (1972).

286. 406 U.S. at 453.

287. *See, e.g.*, CAL. PENAL CODE § 1324 (West 1972). Only three states currently provide for the granting of "use immunity." LA. REV. STAT. ANN. § 15.468 (1973); N.J. STAT. ANN. § 2 A. 81-17.3 (1968); OHIO REV. CODE ANN. § 2945.44 (Page 1975). The New Jersey approach has been sustained as constitutional. *See* Zicarelli v. New Jersey State Commn. of Investigation, 406 U.S. 472 (1972).

288. Once a witness has been granted transactional immunity, his cooperation is by no means assured. *See, e.g.*, Giancana v. United States, 352 F.2d 921 (7th Cir.), *cert. denied*, 382 U.S. 959 (1965). The reluctant witness may provide the government with some evidence, but not enough to sustain a conviction. He is, of course, subject to the contempt sanction, but it is effective only if the government can establish that he is still withholding information. For a discussion of how some of those who attended the infamous Appalachian gathering handled subsequent immunity grants through evasive answers, see United States v. Bufalino, 285 F.2d 408, 418 n.27 (2d Cir. 1960).

require a decision to forego prosecuting a thief and instead to convict a fence, a decision many law enforcement agencies appear reluctant to make.[289] No doubt this aversion reflects outmoded priorities that should be changed,[290] but since police often can independently gather sufficient evidence to prosecute thieves successfully, the dilemma could be eliminated altogether by enacting legislation authorizing the granting of "use immunity,"[291] as is provided by Section 12(b) of the Model Act.[292]

Whether testimony elicited through the use of an immunity grant can provide direct evidence establishing a fence's culpable state of mind depends upon the thief's ability to give a detailed account of his transactions with the fence. Sometimes thieves do not know the identity of their fences,[293] but this obstacle can be overcome by a series of immunity grants used to climb the chain of command of sophisticated fencing operations. Inevitably, even a well-insulated master fence can be convicted.[294]

Regardless of their potential as investigative tools, the effectiveness of immunity grants is considerably hampered in many jurisdictions by courts suspicious of the credibility of testimony favorable to the prosecution given by a witness with an obvious interest in escaping punishment.[295] These courts have created the so-called cor-

289. The reluctance of law enforcement authorities to make this policy decision is suggested by the widespread practice of tolerating fencing operations in exchange for information concerning theft activity. *See* note 61 *supra* and accompanying text. This may be because "the most commonly used measure of police performance is the rate at which crimes are 'cleared' by arrest." C. KLOCKARS, *supra* note 12, at 28. Given the importance of clearance by arrest statistics, the police may not be inclined to grant a thief immunity, since the fence who might be convicted is usually capable of producing a greater number of theft arrests.

290. *See* notes 15-49 *supra* and accompanying text.

291. *See* note 280 *supra* and accompanying text.

292. *See* MODEL THEFT AND FENCING ACT § 12(b), Appendix B.

293. *See* notes 142-43, 163-66 *supra* and accompanying text.

294. In organized crime cases, however, witnesses may be completely intimidated by the threat of physical injury. *See* note 148 *supra*. Fear of "underworld reprisals," however, will not warrant refusal to testify before a grand jury. *See* Latona v. United States, 449 F.2d 121 (8th Cir. 1971). On the federal level this situation has been somewhat ameliorated by provisions of the Organized Crime Control Act of 1970 that were designed to afford maximum protective cover to potential witnesses. 18 U.S.C. §§ 6001-005 (1970) and 28 U.S.C. § 1826 (1970). The program is administered by the United States Marshall Service. The number of witnesses under protection runs to approximately 100 per day. The "increasing number of major crime figures who are volunteering to serve as witnesses is an indication of the success of this program." *Hearings Before a Subcomm. of the House Comm. on Appropriations*, 93 Cong., 1st Sess. 1072 (1973). *See How Business Shelters Witnesses from the Mob*, NATION'S BUSINESS, August, 1973, at 20.

295. The Supreme Court has characterized accomplice testimony as "inevitably suspect" and unreliable. Bruton v. United States, 391 U.S. 123, 136 (1968).

roboration rule that requires either a cautionary jury instruction calling for care in evaluating such testimony or a directed verdict of acquittal whenever the testimony of an accomplice has not been corroborated.[296] Although initially conceived as "merely . . . a [discretionary] *counsel of caution* given by the judge to the jury,"[297] the practice has evolved into a strict rule of law in some jurisdictions.[298] Fortunately for prosecutors, however, a number of jurisdictions have narrowly circumscribed application of the corroboration rule by technically limiting the term "accomplice" to those criminals subject to indictment for the same crime with which the defendant is charged. In some receiving cases, this reasoning continues, the corroboration rule is not applicable since a thief is not a receiver's accomplice; he has instead technically committed a separate offense of theft and therefore is not subject to indictment for the crime of receiving. According to other courts, however, this view is patently superficial since the conduct of both criminals is necessary for successful commission of the theft and the receiving, and the testifying witness still has an interest in escaping punishment by providing testimony favorable to the prosecution.[299] Regardless of which approach is taken, the ultimate result on the evidentiary issue is frequently the same, however, because even those jurisdictions that narrowly define "accomplice" recognize an exception and apply the corroboration rule whenever there has been a prior relationship between the fence and the thief.[300] Given the number of fences who have regular contacts with thieves and the high volume of the "steal-to-order" business,[301] the corroboration doctrine is obviously a potential problem in the prosecution of all large-scale fencing activity.[302]

---

296. W. LaFave & A. Scott, *supra* note 14, at 691; 7 J. Wigmore, *supra* note 277, § 2056. An early discussion of this problem in the fencing context is provided in J. Hall, *supra* note 5, at 176-85. Massachusetts has gone one step further. Accomplice testimony need not be corroborated. Commonwealth v. French, 357 Mass. 356, 395 (1970). But by statute, Mass. Ann. Laws ch. 233, § 201 (1970), immunized testimony must be. *See* Commonwealth v. DeBrosky, — Mass. —, 297 N.E 2d 496 (1973).

297. 7 J. Wigmore, *supra* note 277, § 2056, at 315 (emphasis original).

298. *Id.* at 319-21.

299. *See* Annot., 53 A.L.R.2d 817, 832-38 (1957).

300. *See id.* at 838-46. Federal law is reviewed in Stephenson v. United States, 211 F.2d 702, 704-05 (9th Cir. 1954) (plain error to fail to give instruction).

301. *See* notes 110, 139, 140, 145-46 *supra* and accompanying text.

302. More than theft or receiving is involved. If there is a prior relationship, it is possible that the receiver is guilty of conspiracy to steal and receiving rather than theft or receiving. *See* State v. VanderLave, 47 N.J. Super. 483, 487, 136 A.2d 296, 298 (1957), *affd.*, 27 N.J. 313, 142 A.2d 699 (1958), where the court said:

> The conspiratorial role of appellant, alleged and proven by the State, transcended the function of a receiver of stolen goods, even one with foreknowledge

These difficulties could be avoided if courts and legislatures would recognize that, although an accomplice's testimony is often deserving of skeptical treatment, the considerations that gave rise to the corroboration rule no longer carry much force,[303] and that credibility should be an issue ultimately left to the jury.[304] The federal courts, for example, have correctly decided that an absolute bar against convictions based upon an accomplice's uncorroborated testimony is inappropriate since the defendant's rights are adequately protected by the required cautionary instruction.[305] Similar action by state legislatures would facilitate the conviction of fences by removing a major obstacle to the prosecution's use of insiders to establish the requisite state of mind.[306] Fencing reform legislation that abolishes the corroboration rule to the extent that it requires a directed verdict of acquittal would obviate the need for the judiciary to draw what are solely formal distinctions. But if such reform legislation is to be effective, it must not preserve the directed verdict where there has been a prior conspiracy or some participation by the receiver in the larceny.[307] Such an exception is a potentially embarrassing loophole

---

of the intended theft. The conspiracy plan here was one of continuity; the primary thief and the appellant agreed upon details of the unlawful design and its *modus operandi;* it is not an exaggeration to say that the proof was susceptible of a finding that appellant had participated in supervising the detail, particularly the timing, of certain larcenies, and showed a selectivity in pointing out the type and quantity of material which should be stolen for his use, complaining at one time that drums of stolen material were not filled to his liking . . . and in other respects the conspirators were shown to have been *en rapport,* not in the naked buy and sell relationship of a thief and his receiver, but in the clandestine and consultative concert of planned action which is the hallmark of the criminal conspiracy.

303. The doctrine originated at a time when defendants were not permitted to take the stand and the accomplice's testimony was admitted as an exception to the rule of incompetence. *See* 7 J. WIGMORE, *supra* note 277, § 2057.

304. *See id.* § 2056. The Supreme Court has suggested that it is in basic agreement with this position. *See* Hoffa v. United States, 385 U.S. 293, 303-04 (1966); On Lee v. United States, 343 U.S. 747, 757-58 (1952).

305. In the federal courts, a typical jury instruction simply warns the jury that "such testimony is always to be received with caution and weighed with great care." E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE INSTRUCTIONS § 12.04, at 256 (2d ed. 1970). The government may also obtain, however, an instruction that the jury is not to evaluate informant testimony in terms of their approval of this use and that the government "must take the witnesses to the transactions as they are," particularly in conspiracy cases. United States v. Corallo, 413 F.2d 1306, 1322 (2d Cir.), *cert. denied,* 396 U.S. 958 (1969).

306. *See* MODEL THEFT AND FENCING ACT § 5b, Appendix B.

307. New York, for example, has purportedly eliminated the corroboration rule, but the legislation has had a limited impact in enhancing the government's ability to deal with major fences because of the exception applicable where the receiver has "participated in the larceny." N.Y. PENAL LAW § 165.65 (McKinney Supp. 1974). *Cf.* People v. Valinoti, 26 N.Y.2d 553, 260 N.E.2d 541, 311 N.Y.S.2d 910 (1970). The New York corroboration rule had been established in People v. Kupperschmidt, 237 N.Y. 463, 143 N.9.2d 256 (1924) (thief held accomplice of receiver for corroboration purposes). *See* J. HALL, *supra* note 5, at 181-85. As a result of business pres-

since it ironically protects sophisticated receivers who organize thefts or who are otherwise involved in the larceny.[308]

Nonetheless, it is another investigative device, electronic surveillance, that clearly affords law enforcement authorities the most direct access to reliable evidence establishing culpable *mens rea*,[309] although it has raised constitutional objections.[310] In 1967, the Supreme Court found no *per se* constitutional objection to the use of electronic surveillance,[311] and Congress responded by enacting legis-

---

sure, the *Kupperschmidt* decision was legislatively set aside. *Id.* at 184-85. Ironically, however, the corroboration rule still applies in theft prosecutions, so that the reversal has had impact on a limited class of receivers; those who may be accomplices of the thieves are still protected by the corroboration rule. THE N.Y. COMMN. ON THE ADMINISTRATION OF JUSTICE, THIRD SUPPLEMENTAL REPORT 16 (1937) aptly characterized the general rule as "a refuge of organized crime [that] protects the principles [*sic*] in racketeering cases." Their recommendation that the general rule be abolished, however, was not adopted, and it remains today an unwarranted obstacle in the fencing area whenever prearranged theft or a continuous relationship is present.

308. "[T]he moment that the fence enters into the actual conspiracy to steal the property, thereby becoming legally culpable for the larceny itself . . . the People can only obtain a conviction against the fence for the larceny or possession of the stolen property if there is corroborative evidence." *Hearings on Fencing* 6. When characterized in these terms, it is apparent that many fences do participate in the larceny process. *See* notes 139-140, 143-46 *supra* and accompanying text. In the case of a master fence who arranges the actual theft, the corroboration rule—or the exception in conspiracy cases—adds another layer of insulation to his protective network. *See* notes 143, 146-49 *supra* and accompanying text.

It must be stressed, however, that legislative reform should not shelter from credibility attack the testimony of either accomplices or informants. Such an attack is properly part of the adversary process.

Finally, it should be emphasized that a thief generally cannot be convicted for receiving the fruits of his own theft. Consequently, where a relationship exists between the "thief" and the "receiver," it is sometimes necessary to indict in the alternative, permitting the jury to convict for theft or receipt, but not both. *See* United States v. Gaddis, 18 CRIM. L. RPTR. 3079, 3081 (Sup. Ct. 3-3-76).

309. *See* MODEL THEFT AND FENCING ACT § 12(b)(2), Appendix B.

310. Electronic surveillance has raised first, fourth, fifth, and sixth amendment constitutional questions. *See* Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969); Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969). Prior to the enactment of Title III (*see* notes 311-23 *infra* and accompanying text), it was felt by some that these constitutional problems could be largely overcome. *See* Blakey, *supra* note 148, in TASK FORCE REPORT, ORGANIZED CRIME 95-104. *See also* A.B.A. PROJECT ON STANDARDS RELATING TO ELECTRONIC SURVEILLANCE (1974).

311. Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).

A *per se* fifth amendment argument based on the privilege against self-incrimination had been rejected in 1928 in Olmstead v. United States, 277 U.S. 438 (1928), and this aspect of *Olmstead* has not been overruled. In addition, an analogous argument, based on using an informant rather than a wiretap, was held to be without merit in Hoffa v. United States, 385 U.S. 293 (1966). A sixth amendment violation could occur only if electronic surveillance were used during a post-indictment period, Massiah v. United States, 377 U.S. 201 (1964), or in such a fashion so as to intrude on the attorney-client relationship itself, Roberts v. United States, 389 U.S. 18

lation, modeled after the Court's own guidelines, specifically designed to meet the constitutional problems that had been raised in earlier decisions.[312] The enacted legislation, title III of the Omnibus Crime Control and Safe Streets Act of 1968,[313] authorizes federal and state electronic surveillance upon a court's finding of probable cause and "sets up a system of strict judicial supervision that imposes tight limitations on the scope of the investigation."[314] Title III has received widespread judicial approval in various federal circuit courts[315] and state courts;[316] there seems to be little question that it authorizes an investigative technique well-designed to attack both organized crime[317] and sophisticated hijacking and fencing systems.[318] By directing electronic surveillance at a professional fence's place of business, investigators can overhear and record incriminating remarks. Such evidence is completely reliable so there is little danger of a credibility attack at trial.[319] Numerous prosecutions have been facilitated in this manner,[320] and it is apparent that

---

(1967). *See* Note, *Government Interceptions of Attorney-Client Communications*, 49 N.Y.U. L. REV. 87 (1974).

312. *See* S. REP. No. 1097, 90th Cong., 2d Sess. 66 (1968).

313. 18 U.S.C. §§ 2510-13, 2515-20 (1970).

314. United States v. Cox, 449 F.2d 679, 684 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972).

315. *See, e.g.*, United States v. Doolittle, 507 F.2d 1368 (5th Cir. 1975).

316. *See, e.g.*, Commonwealth v. Vitello, — Mass. —, 327 N.E.2d 819 (1975). Much of the litigation is reviewed in Cranwell, *Judicial Fine-Tuning of Electronic Surveillance*, 6 SETON HALL L. REV. 225 (1975).

317. *See* S. REP. No. 1097, 90th Cong., 2d Sess. 72 (1968); Blakey, *supra* note 148, in TASK FORCE REPORT, ORGANIZED CRIME 92-95.

318. The federal legislation, however, authorizes an interception order in fencing investigations only when violations of 18 U.S.C.A. §§ 659, 2314, and 2315 are involved. *See* 18 U.S.C.A. § 2516 (Supp. 1975). Authorization should be extended to cover other federal fencing violations. *See* note 185 *supra*. There is also a certain unfortunate lack of clarity in the current draft of S.1. Section 3101(b) does not explicitly authorize state surveillance in the theft and fencing area, and its general language reads "crime of violence." *See* S.1, § 111. The legislative history indicates that this phrase is used "in the broad sense as comprehending the present language" of 18 U.S.C. § 2516 ("dangerous . . . to . . . property"). SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., 3 REPORT ON CRIMINAL JUSTICE CODIFICATION, REVISION AND REFORM ACT OF 1974, at 942 (Comm. Print 1974) [hereinafter S.1 REPORT] Obviously, there is no intent to eliminate this area of investigation from the use of state surveillance, but it might have been hoped that this intent could have been more clearly expressed.

319. The only possible credibility argument would concern whether the recording has been tampered with in any way. Careful police enforcement procedures and the use of a seal would completely obviate this defense. *See* 18 U.S.C. § 2518(8)(a) (1970); S. REP. No. 1097, 90th Cong., 2d Sess. 104-05 (1968); United States v. Falcone, 505 F.2d 478, 483 (3d Cir. 1974) (seal to "insure integrity").

320. The following case study demonstrates the effectiveness of such techniques in the fencing context:

if this method were widely implemented professional fences would run a substantially higher risk of conviction.

In addition to establishing the requisite state of mind, successful electronic surveillance can also help establish "receipt," can locate and identify other stolen property,[321] and can provide authorities

---

Case Study
Kings County, New York—Forgery, Criminal Possession of Forged Documents, Grand Larceny, Criminal Possession of Stolen Property, Criminal Usury

Background

This was a "target investigation," begun in 1971, directed against a high level member of an organized crime "family" operating in Brooklyn. Physical surveillance and two gambling wiretaps on public telephones in a local bar which the target's associates frequented had pinpointed the target's headquarters as the trailer office of a nearby busines.

Physical surveillance of the trailer was conducted for several months. During this time, a pattern was established for meetings in the trailer between the target and other persons with criminal histories. During this period of observation, it was also learned that the FBI was engaged in an independent investigation of the gambling activities of several of the target's associates. Following a meeting between the District Attorney and FBI agents, it was decided to proceed with a joint investigation.

At this time, the FBI produced an informant who had personally overheard criminal conversations in the trailer and who described a stolen car racket, using forged documents, which was being conducted there. Orders were then sought to place wiretaps on the three telephones in the trailer and to place a "bug" within the trailer itself.

Operation of the surveillance devices

The three wiretaps were installed on the day that the orders were signed. It took a week, however, to install the bug, as the trailer was inside the lot, surrounded by an eight foot high cyclone fence and guarded by a watch dog.

The wiretaps were initially approved for thirty days, but one extension on each was granted, allowing each to run for sixty days. The order on the bug was extended three times, giving it an authorized operational period of 120 days. During this period, conversations apparently relating to a variety of criminal activity, including bribery, were overheard.

Results

The investigation ultimately resulted in the arrest of seventy-one individuals, including the target of the original investigation and several other alleged members of the same organized crime family. Of this number, thirty-seven pleaded guilty to minor charges and were given $100 fines. Of the thirty-four persons indicted, three have been convicted of perjury or criminal contempt and thirty-one cases are pending.

Evaluation

This is an excellent example of the sophisticated use of electronic surveillance by law enforcement agencies to combat organized crime. It points out the value of federal-state agency cooperation, the interplay between electronic and non electronic surveillance techniques, and the usefulness of an investigation targeted against a specific organized crime figure, with the availability of reliable informants close to the target.

NAT'L. COMMN. FOR THE REVIEW OF FED. AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, STAFF STUDIES AND SURVEY 277-78 (1976). Finally, the use of electronic surveillance recently led to the successful prosecution of Jack Mace, one of New York's most sophisticated fencing operators. *See* United States v. Tortorello, 480 F.2d 764, 770-71, 773-76 (2nd Cir. 1973); V. TERESA, *supra* note 29, at 258-89. By intercepting conversations and tapping telephones at Mace's place of business, the "Rio Coin Shop," investigators were able to secure his conviction, as well as the convictions of several major organized crime figures.

321. DEPT. OF JUSTICE RELEASES 13, 17 (May 2, 1974) (statement of Kevin T. Maroney, Deputy Assistant Attorney General, Criminal Division, Before the Select

with evidence and leverage to induce the testimony of potential witnesses. For example, the apparently legitimate businessman who initially denies his association with a major fence may be more willing to cooperate once he has been confronted with a tape recording of his self-incriminating remarks.[322] At this point, the stage is set for granting the businessman immunity in exchange for testimony that may help trace the complex redistribution system of a master fence.

Yet despite its demonstrated success, electronic surveillance has rarely been used in the investigation of fencing cases. Only twenty-three jurisdictions have enacted electronic surveillance statutes pursuant to title III authorization,[323] and of the 701 orders authorizing wiretapping issued in 1975, only thirteen were issued to detect suspected possession of stolen property.[324] Instead, most so-called intercept orders concern probable gambling and narcotics violations.[325] Thus, because of both legislative omission or investigative oversight, law enforcement authorities generally have failed to take advantage of the most effective evidence-gathering device available to combat large-scale fencing activity.[326]

Nevertheless, even if this were not the case, it must be acknowledged that electronic surveillance is no panacea for existing deficiencies in evidence-gathering techniques. Electronic devices are particularly difficult to use where, for instance, a master fence does not

---

Committee on Small Business, United States Senate, Concerning the Criminal Redistribution System).

322. The then Chief Counsel of the McClellan Committee, Robert F. Kennedy, makes the point: "The kind of proof makes a difference. He can say very forcefully someone's a liar—that's easy, but here we had his own voice on the tapes. He couldn't deny it." *Quoted in* J. MAGUIRE, EVIDENCE OF GUILT 247 n.16 (1959).

323. U.S. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS II (1975) [hereinafter ANNUAL REPORT 1975]. Among those populous states identified by the ORGANIZED CRIME TASK FORCE: PRESIDENT'S COMMN. ON LAW AND ENFORCEMENT AND ADMINISTRATION OF JUSTICE 7 (1967) as having organized crime problems, but that do not authorize surveillance, are the following: California, Texas, Illinois, Michigan, Pennsylvania, and Ohio. Even among those states with surveillance legislation, the statutes leave something to be desired in the fencing area. *See* WIRETAP REPORT 200-01 (concurrence of Commissioner Blakey).

324. ANNUAL REPORT 1975 VIII. Out of the 13 intercept orders issued for the investigation of possession of stolen property, nine were federal, two were granted in New York, one was granted in New Jersey, and one was granted in Kansas. *Id.* at VIII-IX. In addition, 3 orders were issued for burglary, 5 for larceny and theft, and 6 for robbery. *Id.* Some of these may, in fact, have been issued in fencing investigations.

325. *Id.* at VIII.

326. The National Wiretap Commission has called for "more extensive" use of surveillance in theft and fencing investigations. WIRETAP REPORT 5.

operate from a fixed place of business but instead conducts his transactions from randomly selected telephone booths.[327] Such a receiver is vulnerable only if his purchaser's telephone has been tapped or if for some reason his buyer decides to cooperate with police. In addition, as with search warrants, logistical considerations may delay or completely preclude a successful wire,[328] and once installed, reception is often marred by mechanical difficulties or background noises. These problems, combined with the demonstrated reluctance of legislators and law enforcement authorities to use electronic surveillance, have caused investigators and prosecutors to attempt the more difficult task of proving the requisite state of mind by circumstantial, rather than by direct, evidence.

(iii). *The use of circumstantial evidence to establish mens rea.* A prosecutor who cannot present direct testimony establishing guilty knowledge must instead recreate circumstances surrounding the fence's receipt of stolen property from which a jury might infer the requisite *mens rea.*[329] Some courts have held that evidence establishing that the defendant purchased goods at extremely low prices, removed identification marks, or attempted to conceal the merchandise upon receipt, is sufficient to support a finding that the defendant knew the goods were stolen.[330] In order to show that the defendant's conduct was not the product of innocent mistake, successful prosecutors often supplement this circumstantial evidence with proof that the defendant has acted similarly in other transactions or has previously been convicted of receiving.[331]

327. It is questionable that many master fences take such extraordinary precautions. *See generally* DEPT. OF JUSTICE RELEASES, *supra* note 321, at 13. Certainly, the professional fence who is also involved in master fencing may tend to use the phone at his place of business. This practice led to the downfall of one of New York City's most sophisticated fences. *See* note 320 *supra.* On the other hand, the master fence's work tends to be episodic rather than regular, in contrast to the activities of those engaged in gambling and narcotics transactions. This sharply curtails the opportunities to establish the probable cause necessary to obtain a court order. Indeed, the best hope of getting at the master fence through wire surveillance lies in overhearing his calls to a professional fence, when the professional needs the superior resources and contacts of the master.

328. *See* note 320 *supra*; WIRETAP REPORT at 7-8, 55-62.

329. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 686.

330. *See, e.g.*, Torres v. United States, 270 F.2d 252, 259 (9th Cir. 1959). For discussion of this issue, see W. LAFAVE & A. SCOTT, *supra* note 14, at 686-87; 2 J. WIGMORE, *supra* note 277, § 327.

331. *See* J. HALL, *supra* note 5, at 186-89, W. LAFAVE & A. SCOTT, *supra* note 14, at 687; 2 J. WIGMORE, *supra* note 277, §§ 324-26. Evidence of this nature is admissible because it tends to establish intent by negating the possibility of an innocent mistake or by demonstrating the existence of an on-going plan. Jurisdictional rules vary concerning whether the same type of property must have been involved, whether the goods must have been received from the same thief, and the requisite

Persuasive circumstantial evidence establishing the guilty knowledge of the most sophisticated fences, however, is usually not available. Instead, prosecutors must attempt to convict professional receivers masquerading as legitimate businessmen by introducing somewhat less powerful evidence of conduct by the defendant that deviates from normal business practices. By skillfully comparing a fence's conduct with normal business practices, prosecutors may be able to establish the requisite *mens rea* on the basis of such circumstantial evidence as proof of poor bookkeeping procedures, unrecorded secret transactions, the failure to retain itemized receipts, unusual methods of payment, or the failure of the accused receiver to make proper inquiry concerning the source of his seller's goods.[332]

---

sufficiency of the link between the present offense and the prior illegal transactions sought to be offered into evidence. *See Hearings on Criminal Laws* 550. Hall argues that rules requiring delivery by the same thief are inappropriate, since "the larger the business done, the greater are the probabilities that different thieves have been dealt with, that the property was stolen from different places and persons, and hence, that the receiving in question was with criminal knowledge." J. HALL, *supra* note 5, at 187. Wigmore states that it is usually "necessary and sufficient to show (a) former receipt and possession (and, perhaps, under suspicious circumstances) (b) of goods similar as to the person bringing them or as to their kind or otherwise." 2 J. WIGMORE, *supra* note 277, § 324, at 228.

Evidence of prior criminal transactions, because of its highly prejudicial nature, may only be introduced if "the evidence is substantially relevant for some other purpose than to show a probability that [the accused] committed the crime on trial because he is a man of criminal character." MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190, at 447 (E. Cleary ed. 1972) (footnote omitted) [hereinafter MCCORMICK]. Accordingly, such evidence may be admitted for purposes of demonstrating the existence of a plan or for establishing that receipt was not without guilty knowledge. *Id.* at 448-50. For a detailed listing of authorities which have analyzed the prior similar act doctrine, *see id.* at 447 n.32.

332. *See, e.g.*, United States v. Lambert, 463 F.2d 552, 555 (7th Cir. 1972) (manner, timing and price of sale justified inference of knowledge); Henry v. United States, 361 F.2d 352 (9th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967) (failure to give or request *customary* bill of sale justified jury inference).

The Association of Grand Jurors of New York County has summarized these characteristics as follows:

> When a commodity is offered for sale to a business-wise merchant, firm or corporation it is reasonable to presume that he or it knows or will ascertain, before buying, certain things. These are:
>
> 1. The market value of the commodity.
> 2. The cause for its price being disproportionately low.
> 3. That certain identification marks usually appearing on the article or its container have not been removed or altered.
> 4. That the seller has the legal right to sell and conforms to the customs of the trade in so doing.
> 5. That the seller represents a firm known to the trade or is personally known to the buyer.
> 6. That the seller has a permanent address.
> 7. If the seller is a stranger to the buyer that he can furnish trade and other reliable references as to his good standing.
> 8. That nothing connected with the seller or his goods indicates fraud.

PRISON COMM. OF THE ASSN. OF GRAND JURORS OF NEW YORK COUNTY, CRIMINAL RECEIVERS IN THE UNITED STATES 69-70 (1928).

In this way, prosecutors can turn a fence's legitimate facade into a weapon against him.

Yet the availability of such circumstantial evidence does not guarantee conviction, for two accepted judicial doctrines restrict its use and thus diminish its potency. First, most states restrict a trial judge's right to comment on the evidence; consequently, jurors are often unable to draw inferences of guilty knowledge they would otherwise consider if the judge could share his expertise with them.[333] Second, the quantum of incriminating circumstantial evidence deemed necessary to establish an element of a crime beyond a reasonable doubt is often high: In "the absence of direct evidence on a controverted issue, almost all jurisdictions require the prosecution to prove that all the circumstances are consistent with guilt and inconsistent with any reasonble hypothesis of innocence."[334] Although this rule is not applied in the federal courts,[335] it has had a profound impact at the state level because it "imposes an unjustifiably heavier burden on the state than does the reasonable doubt standard."[336]

The Association of Grand Jurors also took notice of the additional recommendations of experts in the fencing area:

"Mr Leon Hoage of the New York office of the Holmes Electric Protection Company . . . holds that an alleged Fence should be required to explain to the jury acts or omissions, such as the following:

1. Failure to keep bona fide books of account in connection with a business enterprise.

2. Neglect of dealer to keep bills received with goods delivered to him, for a reasonable period, such as two years.

3. Omission of the dealer to demand and keep as bills the receipts given in his commercial transactions.

4. Lack of itemized bills of job lots of standard goods purchased, apart from the balance of the items.

5. Inability or unwillingness of the possessor of goods ostensibly covered by a bill of sale from a reputable firm, to communicate with the firm, at the time the purchase is made, to corroborate the sale.

6. Presentation of a bill of sale, the billhead of which gives the name and address of a non-existent firm.

7. Purchase of valuable merchandise from a push cart, or similarly unreliable vendor."

J. HALL, *supra* note 5, at 224-25 n. 72.

333. *See* A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY 121-22 (1968) [hereinafter TRIAL BY JURY]. Although the rule against commentary grew out of an early American distrust of judicial power, Wigmore has maintained "[t]hat the preservation of the pristine power of the Court to comment and advise the jury is essential to the efficient working of the jury system, and that the deprivation of that power is highly injurious." 9 J. WIGMORE, *supra* note 277, § 2551a, at 509. For a detailed list of authorities who have advocated such restoration, see *id.* at 512 and TRIAL BY JURY 122 n.[illegible]. The power to comment must be seen in light of the possible decline in the ability of average jurors to understand complex fact situations.

334. Note, *Sufficiency of Circumstantial Evidence in a Criminal Case*, 55 COLUM. L. REV. 549, 549-50 (1955).

335. Holland v. United States, 348 U.S. 121, 139-40 (1954).

336. Note, *supra* note 334, at 551.

Courts and legislatures recognizing the difficulties inherent in using primarily circumstantial evidence to establish knowledge have attempted to facilitate convictions by developing several common-law and statutory presumptions favorable to the prosecution.[337] A presumption (permissible inference) in the criminal law reflects a determination that a certain set of circumstances should be given special treatment because it tends to establish a particular element of the crime, although such an inference might not otherwise have been drawn by the trier of fact.[338] In receiving cases, the most important presumption is that of guilty knowledge, which is triggered by proof of the defendant's unexplained recent possession of stolen property: "Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence."[339] Originally a common-law rule designed to aid the prosecution in larceny cases,[340] the so-called recent possession doctrine has been codified in several

337. *See* J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES, § 303[01], at 303-08 (1975) [hereinafter J. WEINSTEIN]. For an excellent discussion of the presumptions contained in recent federal legislative proposals directed toward organized crime, see Note, *Presumptions and Due Process: Congress Attacks Organized Crime*, 68 NW. L. REV. 961 (1974).

Traditionally, these rules have been called presumptions, and that term will be used here. Nevertheless, it might be more accurate and less confusing in criminal cases to call them permissible inferences, and to distinguish them sharply from what is best described as a mandatory or irrebutable presumption. A permissible inference arises when *A* is thought normally to infer *B*. Prove *A*, and absent other proof, *B* may be inferred and is thus proven. A mandatory presumption arises when *A* is treated as proof of *B*, and, when *A* is proven, *B* must be found absent other proof. An irrebuttable presumption arises when *A* is treated as the equivalent of *B*, and the contrary may not be shown.

338. C. TORCIA, WHARTON'S CRIMINAL EVIDENCE, §§ 90-91 (13th ed. 1972); 9 J. WIGMORE, *supra* note 277, § 2491, at 288; J. WEINSTEIN § 300[02], at 300-07. WORKING PAPERS 936, observes: "Use of the procedural device is appropriate when Congress [or the state legislature] on the basis of special expertise and amassed empirical evidence decides that certain facts are strong evidence of a crime and that these facts should be given proof significance to assist the government in prosecuting the crime." The best way to conceptualize a presumption is to see that by creating a presumption the law is acting as an expert witness, because it is providing the jurors with the basis for drawing an inference that is not necessarily compelled from the ordinary experiences of their everyday lives. *See* notes 366-68 *infra* and accompanying text. Since the law is injecting its own expertise into the fact-finding determination, any judicial or legislative presumption must comport with due process standards. *See* notes 360-88 *infra* and accompanying text.

339. Wilson v. United States, 162 U.S. 613, 619 (1896) (murder case where property of victim found on defendant used to prove guilt of murder).

340. 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 289 (1778 ed.); J. HALL, *supra* note 5, at 175; 9 J. WIGMORE, *supra* note 277, § 2513, at 417.

jurisdictions,[341] and extended to receiving cases in most jurisdictions.[342] The Model Act contains a presumption of recklessness, the *mens rea* required by that proposal, on proof the defendant possessed recently stolen property.[343] Other presumptions that have been developed to facilitate proof of guilty knowledge are raised on evidence that the defendant purchased the stolen goods from a minor, failed to make a reasonable inquiry of proof of ownership, purchased at a price substantially below reasonable market value, or has purchased stolen property before.[344] Unlike the recent posses-

341. *See, e.g.*, KY. REV. STAT. ANN. § 433.290 (1972); OKLA. STAT. ANN. tit. 21, § 1713 (Supp. 1975). The Oklahoma provision, however, has been declared unconstitutional in a decision that incorrectly applied guidelines set down by the United States Supreme Court. *See* note 380 *infra* and accompanying text.

342. *See* 9 J. WIGMORE, *supra* note 277, § 2513, at 422. Only Georgia and North Carolina have specifically refused to make this extension. *See* Gaskin v. State, 119 Ga. App. 593, 168 S.E.2d 183 (1969); State v. Hoskins, 236 N.C. 412, 72 S.E.2d 876 (1952). Nevertheless, despite seemingly clear language in the Georgia opinion that suggests that the recent possession rule does *not* apply to receiving cases, the law in Georgia still seems confused. *See* Comment, *Criminal Law—Receiving Stolen Goods—No Presumption in Recent Possession*, 22 MERCER L. REV. 481 (1971).

"Without the inference it would be difficult, if not impossible, to convict knowing possessors or fences of stolen goods . . . ." New Jersey v. DiRienzo, 53 N.J. 360, 374, 251 A.2d 99, 106 (1969). A comprehensive list of decisions that have applied the rule to fencing cases may be found in 76 C.J.S. *Receiving Stolen Property* § 17, at 34 n.67 (1952), and 9 J. WIGMORE, *supra* note 277, § 2513, at 422 n.6 (C.J.S. *Receiving Stolen Property* § 17, note 65 (Supp. 1976), lists a Colorado and a Montana decision that rejected the presumption in receiving cases. The Colorado decision, however, is incorrectly cited, and the Montana case seemed to turn on a matter of statutory interpretation.

The Pennsylvania Supreme Court has rejected the presumption's applicability in receiving cases because of its purported irrationality. *See* Commonwealth v. Owens, 441 Pa. 318, 271 A.2d 230 (1970). The Pennsylvania decision, however, may be limited to its facts. *See* Note, *Criminal Law—Presumption That Unexplained Possession of Recently Stolen Goods Is Sufficient Evidence of Guilt of Receiving Stolen Goods Held Unconstitutional*, 75 DICKINSON L. REV. 544 (1971). In any event, the Supreme Court has recently given the doctrine constitutional approval in a case involving the receipt of stolen property. *See* Barnes v. United States, 412 U.S. 837 (1973). The question of rationality and the appropriate constitutional tests to be applied in this context is analyzed in notes 360-84 *infra* and accompanying text.

343. *See* MODEL THEFT AND FENCING ACT § 5(a)(1), Appendix B.

344. CAL. PENAL CODE § 496(2) (West Supp. 1975) (presumption upon secondhand dealer's failure to make inquiry); MICH. COMP. LAWS ANN. § 750.535 (Supp. 1976) (presumption upon personal property dealer's failure to make inquiry); MONT. REV. CODES ANN. § 94.2721 (1969) (presumption upon purchase from a minor, unless sold at fixed place of business); N.M. STAT. ANN. § 40A.16.11 (1972) (possession of other stolen property; purchase at price far below reasonable value; dealers presumed to know reasonable market value); N.Y. PENAL LAW § 165.55 (1975) (presumption upon pawnbroker's or dealer's failure to make reasonable inquiry); OKLA. STAT. ANN. tit. 21, § 1713 (Supp. 1975) (presumption from failure to make reasonable inquiry).

California's statute creating a presumption upon the purchase of property from a minor not operating at a fixed place of business was declared unconstitutional in People v. Stevenson, 58 Cal. 2d 794, 376 P.2d 297, 26 Cal. Rptr 297 (1962). A similar, but more narrow, statutory presumption has recently been repealed by the Arizona legislature. *See* Ariz. Laws of 1974, ch. 144, § 2.

sion doctrine, however, these criminal-law presumptions are strictly statutory creations that, despite their potential utility, have not been enacted in most jurisdictions.[345]

Considerable confusion has long surrounded the role of the recent possession rule and other evidentiary presumptions in a criminal case.[346] McCormick characterized the term "presumption" as one of "the slipperiest member[s] of the family of legal terms,"[347] and concluded only that "a presumption is a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."[348] Unfortunately, both courts and legislatures initially experienced difficulty determining what this "uniform treatment" should be.[349] As a result, criminal presumptions at one time had a range of legal effects: some enabled the prosecution to escape a directed verdict of acquittal; others allowed a judge to give jury instructions as to what might permissibly be inferred from the evidence; and a few effectuated a complete shift in either the burden of producing evidence or the risk of nonpersuasion as to the presumed element.[350]

This wide range of potential legal effects was, however, eventually narrowed as constitutional constraints were recognized to preclude the operation of a so-called "true presumption" in criminal cases.[351] In civil cases, a true presumption shifts the burden of pro-

345. *See Hearings on Fencing* 164-71.

346. *See* McCORMICK § 346. For example, one fencing case involving the recent possession rule was erroneously decided partially because the court mistakenly assumed that the presumption was effecting a shift in the burden of proof. *See* Carter v. State, 82 Neb. 246, 249-50, 415 P.2d 325, 327 (1966). *Carter* was criticized in State v. DiRienzo, 53 N.J. 360, 375-77, 251 A.2d 99, 107-08 (1969). In another case, the recent possession rule was struck down, partially because of legislative language that clearly suggested that the burden of going forward with the evidence was being shifted upon the defendant's shoulders. *See* Payne v. State, 435 P.2d 424, 428 (Okla. Crim. App. 1967); note 380 *infra*. For a discussion outlining the extent to which a criminal presumption may shift the various burdens, see notes 350-54 *infra* and accompanying text.

347. McCORMICK § 342, at 802-03.

348. *Id.* at 803. *See* Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 196-207 (1953).

349. *See* Note, *Constitutionality of Rebuttable Statutory Presumptions*, 55 COLUM. L. REV. 527, 528 (1955); Comment, *Tennessee Criminal Law—Larceny—Effect of Possession of Recently Stolen Property*, 3 MEMPHIS STATE L. REV. 294, 297-99 (1973); Comment, *The Constitutionality of Statutory Criminal Presumptions*, 34 U. CHI. L. REV. 141 (1966).

350. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 147-48; Comment, 34 U. CHI. L. REV. 141, *supra* note 349, at 141-42.

351. A "true presumption," otherwise known as a mandatory presumption or a presumption of law, "has the effect of forcing the jury to find the presumed fact if the proved fact is believed *and* no evidence rebutting the presumed fact is produced by the opposing party. However, the presumed fact may be disputed and need not

ducing evidence by requiring the jury to find the presumed fact in the absence of rebutting evidence if the proved fact is believed.[352] In such a situation, the effect of a true presumption is mandatory and requires a directed verdict for the proponent as to the presumed fact. In a criminal case, however, a verdict cannot be directed against the accused[353] because such a procedure would violate a defendant's constitutionally-protected rights to a jury trial and to have the prosecution burdened with establishing each element of the crime beyond a reasonable doubt. Accordingly, although the language of presumption is still frequently used in criminal cases, its actual effect has been reduced to that of what may be called a "permissible inference": The jury is instructed that it may infer the presumed fact from the fact proved, but that it is not required to do so.[354]

Even though the burden of proof constitutionally must remain on the prosecution,[355] "[t]he practical effect of the inference is to pressure the defendant into going forward with [exculpatory] evidence," since once an instruction has been given "[a] silent defendant assumes the risk that the jury will follow the natural probative force of the proven facts."[356] The source of this pressure is the

---

be found by the jury if evidence is introduced to rebut it." Note, *The Unconstitutionality of Statutory Criminal Presumptions*, 22 STAN. L. REV. 341, 342-43 (1970). *See* MCCORMICK § 342, at 803; C. TORCIA, *supra* note 338, §§ 90-91; 9 J. WIGMORE, *supra* note 277, § 2491, at 289.

352. *See* authorities cited note 351 *supra*. In addition, McCormick points out that "many authorities state that a true presumption should not only shift the burden of producing evidence, but also require that the party denying the existence of the presumed fact assume the burden of persuasion on the issue as well." MCCORMICK § 342, at 803. *See generally id.* at 824-26.

353. J. WEINSTEIN, *supra* note 337, § 303[04], at 303-22. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); MCCORMICK § 346, at 831.

354. *See* MCCORMICK § 342, at 804; MODEL PENAL CODE § 1.12(5) (Proposed Official Draft 1962) (presumption defined in terms of inference). For an excellent example of a decision that applied this analysis in the context of a fencing prosecution, see State v. DiRienzo, 53 N.J. 360, 375-77, 251 A.2d 99, 107-08 (1969).

355. MCCORMICK § 346, at 831; 1 H. UNDERHILL, CRIMINAL EVIDENCE § 50 (5th ed. 1956); J. WEINSTEIN § 303[04], at 303-24 to 303-25.

356. Note, *Due Process Requirements for Use of Non-Statutory Inferences in Criminal Cases*, 1973 WASH. U. L. Q. 897, 900 (1973). *See* J. WEINSTEIN § 303[04], at 303-26. The Supreme Court has acknowledged the "practical effect" of a criminal law presumption in the recent possession context:

> It is true that the practical effect of instructing the jury on the inference arising from unexplained possession of recently stolen property is to shift the burden of going forward with evidence to the defendant. If the Government proves possession and nothing more, this evidence remains unexplained unless the defendant introduces evidence, since ordinarily the Government's evidence will not provide an explanation of his possession consistent with innocence.

Barnes v. United States, 412 U.S. 837, 846 n.11 (1973). Note that the Court's discussion subsequently mentions that the burden of going forward may be shifted upon the defendant. Once again, this statement must be analyzed in context. The Court

judge's instructions to the jury concerning the effect of a judicial or statutory inference, which permit, but do not compel, finding the presumed fact beyond a reasonable doubt even though jurors may not have otherwise made such a finding.[357] This effect is especially pronounced where a statute authorizes a jury instruction to the effect that the law regards the proved fact as "strong evidence" of the presumed fact.[358] At least on the state level, then, presumptions can mitigate the adverse impact on a criminal prosecutor's case that flows from the rule prohibiting judges from commenting on the evidence.[359]

To safeguard the rights of defendants, the Supreme Court has, over time, formulated due process guidelines for criminal law presumptions. In *Tot v. United States*,[360] the Court held a statutory presumption constitutional only if there is a reasonable connection in common experience between the basic fact and the presumed fact:

> [A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.[361]

---

is speaking in terms of "practical effect," and not in terms of a formal shift that would require a directed verdict in the absence of rebutting evidence. *See* note 346 *supra*. Justice Black, however, has argued that even a shift in terms of practical effect is unconstitutional. *See* Turner v. United States, 396 U.S. 398, 429-34 (1970) (Black, J., dissenting); United States v. Gainey, 380 U.S. 63, 74-88 (1965) (Black, J., dissenting). *See generally* J. WEINSTEIN § 303[01], at 303-08.

357. For a discussion of the relationship between presumptions and jury instructions in the criminal law, see notes 346-54, 369-75, 405-12 *infra* and accompanying text.

358. For example, S.1 provides that "although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards the fact giving rise to the presumption as *strong evidence* of the fact presumed." Rule 25.1(4)(ii). When phrased in such terms, "the existence of a statutory presumption will probably enhance the value of a basic fact for the prosecution beyond its purely inferential significance." J. WEINSTEIN § 303[02], at 303-18. For a more detailed discussion of the potential impact of different jury instructions, see text at notes 406-12 *infra*.

359. In the absence of a presumption, most states do not permit the judge to comment on the evidence. *See* note 333 *supra* and accompanying text. While the presumption does not give him a right of comment, he is at least permitted to inform the jury of the inferential weight which may be attributed to certain fact patterns.

360. 319 U.S. 463 (1943) (footnotes omitted).

361. 319 U.S. at 467-68. In United States v. Gainey, 380 U.S. 63 (1965), the

The Court further developed the "rational connection" test in *Leary v. United States*,[362] which held that "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend."[363] In *Leary*, the Court overturned a statute that authorized conviction of a person for possession of marijuana with knowledge it was illegally imported and that presumed such knowledge solely on proof of unexplained possession.

When a presumption is not involved, due process, of course, requires that the prosecution establish each element of a criminal offense beyond a reasonable doubt.[364] One plausible reading of the *Leary* Court's rational-connection analysis, however, would find it constitutionally proper to submit a case to the jury when the evidence supporting the presumed fact satisfied the "more likely than not" test but was insufficient to permit a finding that the element existed beyond a reasonable doubt. At least one commentator has suggested that a less restrictive evidentiary standard for presumptions is defensible since "[t]here is ordinarily no need for a presumption where the basic fact would, under ordinary methods of utilizing circumstan-

---

Court applied the *Tot* test in upholding a statute that provided that a defendant's unexplained presence at an illegal still was sufficient evidence to authorize a conviction for carrying on "the business of a distiller." 380 U.S. at 64. The Court reasoned that the rationality test had been met, since "Congress was undoubtedly aware that manufacturers of illegal liquor are notorious for the deftness with which they locate arcane spots for plying their trade . . . [and] that strangers to the illegal business rarely penetrate the curtain of secrecy." 380 U.S. at 67-68. An identical presumption, but one that attempted to authorize a conviction for *possession* of an illegal still, was subsequently struck down under the *Tot* analysis. *See* United States v. Romano, 382 U.S. 136 (1965).

Significantly, although *Gainey*, *Romano*, and other Supreme Court decisions applied the rational connection test to statutory presumptions, the Court's recent decision in Barnes v. United States, 412 U.S. 837 (1973), suggests that an identical analysis is appropriate for judicial presumptions. 412 U.S. at 845 n.8. *See* notes 378-84 *infra* and accompanying text.

362. 395 U.S. 6 (1969).

363. 395 U.S. at 36 (emphasis added). On this basis, the Court held constitutional a statutory presumption providing that unexplained possession of marihuana "shall be deemed sufficient evidence to authorize conviction" for receiving, concealing, buying, selling, or transporting the substance with knowledge of its illegal importation. 395 U.S. at 30 (quoting from 21 U.S.C. § 176a). "The Court concluded that in view of the significant possibility that any given marihuana was domestically grown and the improbability that a marihuana user would know whether his marihuana was of domestic or imported origin, the inference did not meet the standards set by *Tot*, *Gainey*, and *Romano*." Barnes v. United States, 412 U.S. 837, 842 (1973). *See* 395 U.S. at 52-53.

364. *In re* Winship, 397 U.S. 358, 364 (1970).

tial evidence, result in a jury finding the presumed fact."[365] This argument appears to be misconceived, however, because the primary purpose of modern presumptions is not to lower the standard of proof but only to facilitate the fact-finding process by providing jurors with information concerning a possible relationship between the fact proved and the presumed fact that may be beyond their common experience.[366] By creating a presumption, the legislature, in effect, serves as an expert witness offering testimony through the judge's instructions regarding the evidentiary significance of a particular fact pattern.[367] There is no reason for affording this particular type of "expert testimony" special treatment by subjecting it to a different standard simply because it is a legislative or judicial presumption. Indeed, although *Leary* and subsequent cases have not directly decided whether a presumption must satisfy the reasonable doubt standard, one commentator has argued that the Court has in fact adopted that evidentiary standard.[368]

---

365. J. WEINSTEIN § 303[02], at 303-12. "Requiring a lesser quantum of evidence is, of course, the prime reason for resorting to presumptions." *Id.*

366. Legislatures are "permitted to create presumptions based, not only upon inferences that might naturally be derived from the facts, but also upon information that will never be given to the jury." MCCORMICK 816. "[Criminal] presumptions are based on empirical evidence that may be outside the expected knowledge of the average juror . . . ." S.1 REPORT 1094. *See* note 338 *supra* and accompanying text. "Unless the jurors are told of the value of the basic facts, which by hypothesis is not readily available to them, they may acquit when conviction is justified." WORKING PAPERS 21. Nevertheless, since a presumption in the criminal law context operates only as a permissive inference, notes 351-54 *supra* and accompanying text, it often serves as an evidentiary device that "merely formalizes a natural inference which one might expect reasonable jurors to draw on their own." S.1 REPORT 1904. *See* C. TORCIA, *supra* note 338, § 90; 9 J. WIGMORE, *supra* note 277, § 2491, at 288. For this reason, S.1 proposes the use of stronger jury instructions for statutory presumptions that embody the special expertise of the law. WORKING PAPERS 20-21, 24-25. *See* notes 406-12 *infra* and accompanying text.

367. Thus "[i]n United States v. Gainey, 380 U.S. 63 (1965), the Court suggested that in empirical matters 'not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.' 380 U.S. at 67." WORKING PAPERS 20 n.52. *See* notes 338, 366 *supra*.

368. W. LAFAVE & A. SCOTT, *supra* note 14, at 149. *See* J. WEINSTEIN § 303[02], at 303-12 to 303-13. Although the Supreme Court, in Turner v. United States, 396 U.S. 398 (1970), did not expressly adopt the beyond a reasonable doubt standard, commentators have suggested that "the Court's frequent reference to that standard in *Turner*, coupled with its decision in *In re Winship* [397 U.S. 358, 364 (1970)] recognizing that such a measure of proof is constitutionally required in criminal cases, makes it likely that the reasonable doubt standard will be applied to test the validity of presumptions in the future." MCCORMICK 816. *See* Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919, 923. Since the Supreme Court's initial draft of the Proposed Federal Rules of Evidence contained a section that seemed to incorporate the reasonable doubt standard, the commentators' forecasts did not seem unreasonable. PROPOSED FEDERAL RULES OF EVIDENCE, 56 F.R.D. 183, § 303(b) (1973). *See* J. WEINSTEIN § 303[02],

A more fundamental and potentially more important question, however, is whether the federal courts have indeed been correct in analyzing presumptions in terms of the due process requirements. A presumption in the criminal law is not mandatory; it only triggers a jury instruction concerning inferences that may be made if particular evidence is believed.[369] Accordingly, in the federal courts, where the trial judge still retains his common-law privilege to comment on the evidence,[370] a presumption, in fact, adds nothing to the substance and impact of a jury instruction. The discretionary right to comment on the evidence permits the judge to " 'analyze and dissect the evidence . . . in order to give appropriate assistance to the jury,' "[371] and it is well within the traditional scope of this privilege to comment on the significance of certain fact patterns.[372] The judge's discretion is, of course, not arbitrary and uncontrolled,[373] but once a statutory presumption in the criminal context is viewed as an exercise of discretion, the appropriate question concerns the propriety of the commentary or, more specifically, whether it infringes upon the jury's role as factfinder, and not whether a particular criminal presumption, however tested, comports with due process. The results often will be the same regardless of which analysis is applied, but this will not always be so since the standard of review is more flexible when the question is one of judicial discretion rather than one of due process.[374]

Currently, however, state restrictions on the trial judge's right to

---

at 303-16 to 303-18. Nevertheless, when the Court was subsequently given the chance to adopt this standard, it declined to exercise this option. *See* Barnes v. United States, 421 U.S. 837, 843 (1973).

Thus far, the reasonable doubt standard has not been adopted by Congress. Section 303 of the Proposed Federal Rules of Evidence was excised from the draft which was ultimately enacted into law. *See* J. WEINSTEIN 303-1 to 303-6. S.1, however, has proposed the enactment of this evidentiary standard. Rule 25.1(a)(4). S.1 REPORT 1093-94.

369. *See* notes 346-54 *supra* and accompanying text.

370. *See* note 333 *supra*

371. TRIAL BY JURY 125 (quoting Quercia v. United States, 289 U.S. 466, 470 (1933)). Since jurors naturally tend to equate the judge with their concept of "the law," there is little practical difference between the effect achieved by a jury instruction concerning what "the law" regards as a permissible inference and the trial judge's commentary regarding the significance of certain fact patterns.

372. In "exceptional cases," current federal law even permits "an expression of belief in the defendant's guilt." *Id.* at 127.

373. *Id.* at 125.

374. "It would appear that the comment privilege of federal judges is not abused. One study covering 12 years noted that of 5,781 federal criminal cases tried to juries and appealed, in only 85 cases was any complaint made about the judge's comments. The comments were held to be reversible error in but 30 of these cases, and were criticized in but two others." *Id.*

comment on the evidence inhibit the adoption of this approach at the state level;[375] at the federal level, unfortunately, the Supreme Court has shown no tendency to depart from the well-established rational-connection line of analysis. Thus, legislative bodies must enact statutory presumptions that are consistent with a due process line of analysis, with the probable result that only those inferences that enable a jury to find the presumed fact beyond a reasonable doubt will ultimately be held constitutional.

Yet, even though the trend is to a more rigorous constitutional standard, the Supreme Court has indicated courts may defer in some instances to the expertise or judgment of legislatures in enacting presumptions. In *United States v. Gainey*,[376] the Court stated that in empirical matters "not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."[377] This approach was reiterated in *Leary* and, more recently, appears to have been adopted in *Barnes v. United States*,[378] where the Court considered the constitutionality of the recent possession doctrine.[379] Before *Barnes*, several state courts had held the doctrine constitutionally deficient under the *Leary* standard,[380] even though it had been considered virtually a universally rec-

375. Since most states prohibit or restrict any judicial commentary, note 333 *supra*, any guidance to the jury concerning the significance of a particular fact pattern must be accomplished through the use of criminal presumptions. Even this goes too far in some jurisdictions. For example, Arkansas has traditionally equated comment and presumptions and condemned both as an invasion of the province of the jury. *See* Lott v. State, 223 Ark. 841, 268 S.W.2d 891 (1954); Blankenship v. State, 55 Ark. 244, 247-48, 18 S.W. 54, 55 (1891).

376. 380 U.S. 63 (1965).

377. 380 U.S. at 67.

378. 412 U.S. 837 (1973).

379. Many decisions involving criminal presumptions related to fencing activity have been concerned with the sale of property by minors. *Compare* People v. Stevenson, 58 Cal. 2d 794, 376 P.2d 297, 26 Cal. Rptr. 297 (1962) (en banc), *with* State v. Bundy, 91 Ariz. 325, 372 P.2d 329 (1962) (en banc). *See generally* Note, *Statutory Criminal Presumptions: Judicial Slight of Hand*, 53 VA. L. REV. 702, 723-29 (1967).

380. *See* Carter v. State, 82 Nev. 246, 248-50, 415 P.2d 325, 326-27 (1966); Payne v. State, 435 P.2d 424, 427-28 (Okla. Crim. App. 1968); Commonwealth v. Owens, 441 Pa. 318, 323-26, 271 A.2d 230, 233 (1970). *Contra*, Steve v. DiRienzo, 53 N.J. 360, 251 A.2d 99 (1969). The *Carter* and *Payne* decisions may have been made in part on the basis of a judicial concern with what was perceived to be an unconstitutional shifting of the burden of persuasion. *See* note 346 *supra*. Nevertheless, a similar concern did not furnish the basis for the *Owens* decision. There, the Pennsylvania supreme court seemingly focused on the general insufficiency of the prosecution's evidence and on statistics suggesting that the presumption was arbitrary in the particular context applied (a stolen handgun). 441 Pa. at 324-25, 271 A.2d at 233-34. The court erroneously cited authority purportedly demonstrating that a majority of jurisdictions have rejected the recent possession doctrine. 441 Pa. at 326

ognized presumption.[381] The *Barnes* Court, however, recognized the "impressive historical basis" underlying the recent possession rule and considered "[t]his longstanding and constant judicial approval of the instruction, reflecting accumulated common experience, [as providing] . . . strong indication that the instruction comports with due process."[382] Nevertheless, the Court considered historical considerations alone insufficient to warrant automatic constitutional approval, and thus proceeded independently to examine the presumption "in light of present-day experience,"[383] holding the presumption comports with due process regardless of the evidentiary standard applied.[384]

The analysis offered in *Barnes* has at least three important components. First, it suggests that legislatures enacting criminal presumptions should gather extensive empirical data and hold hearings examining all issues involved. Legislatures can make such studies more efficiently than can courts, and if an adequate record is developed, courts should be willing to defer to legislative determinations. Second, by testing the constitutionality of criminal presumptions with reference to the modern context, the Court has seemingly introduced the potential for much needed flexibility in law enforcement efforts. It is constitutionally permissible for legislatures to draft new presumptions to handle ever changing, increasingly sophisticated fencing techniques[385] provided the appropriate evidentiary standard is satisfied. Third, the Court has reaffirmed the principle that a presumption in a criminal case does not violate a defendant's fifth amendment privilege against self-incrimination provided the jury is instructed that the accused has a constitutional right not to take the stand and that the basic incriminating fact "could be satisfactorily explained by evidence independent of petitioner's testimony."[386] The tendency of a presumption to implicate the defendant and increase the pressure on him to testify was considered a consequence of the

---

n.5, 271 A.2d at 234 n.5. The cited authority, however, merely states the well accepted principle that the recent possession rule is inapplicable in the absence of additional incriminating circumstantial evidence. *See* note 391 *infra* and accompanying text.

381. Christie & Pye, *supra* note 347, at 925. *See, e.g.*, United States v. Jones, 418 F.2d 818, 821 (8th Cir. 1969).

382. 412 U.S. at 844.

383. 412 U.S. at 844.

384. 412 U.S. at 844-45.

385. Note, *supra* note 379, at 702. The sophisticated techniques employed by modern fences are discussed in notes 137-52 *supra* and accompanying text.

386. 412 U.S. at 846-47.

adversary process not in violation of fifth amendment privilege.[387] If the defendant is the only party with access to facts capable of rebutting the inference, his misfortune is "inherent in the case" and not necessarily created by the evidentiary presumption.[388]

The *Barnes* approach to criminal presumptions is especially welcomed, for it has become increasingly apparent that the long-used recent possession doctrine alone is unable to cope with sophisticated receivers.[389] Prosecutors have the task of establishing that the defendant had *unexplained, exclusive* possession of stolen property.[390] The difficulties they encounter in doing this are inherent in the very formulation of the rule. First, proof of recent possession, in the absence of other affirmative evidence tending to establish guilt, is not sufficient in many jurisdictions to sustain a conviction.[391] Second, although not every explanation a defendant offers precludes a jury instruction,[392] the more sophisticated fences can take precautionary measures that enable them to give reasonable explanations consistent with innocence.[393] Third, even when no such explanation is forthcoming, some jurisdictions hold that the rule does not apply where the prosecution is able to establish only constructive possession.[394] This approach directly impedes, for example, the successful prosecu-

387. 412 U.S. at 847. Nor would the Court consider the trial judge's instruction concerning the effect of the recent possession rule to constitute an impermissible "comment on the defendant's failure to testify." 412 U.S. at 846 n.12, *quoting* United States v. Gainey, 380 U.S. 63, 70-71 (1965).

388. The Court here cited with approval Yee Hem v. United States, 268 U.S. 178, 185 (1925), which said that a statutory presumption does not compel a defendant to be a witness against himself.

389. *See* J. HALL, *supra* note 5, at 189-93.

390. 9 J. WIGMORE, *supra* note 277, § 2513, at 422.

391. *See, e.g.*, State v. Long, 243 Ore. 561, 565, 415 P.2d 171, 173 (1966). "Whether possession plus additional circumstances is sufficient to show knowledge is a matter which must be considered on a case to case basis." Torres v. United States, 270 F.2d 252, 258 (9th Cir. 1959). *See also* Annot., 68 A.L.R. 187, 187-88 (1930).

392. "[T]he mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is 'satisfactory.'" Barnes v. United States, 412 U.S. 837, 845 n.9 (1973).

393. *See* note 138 *supra* and accompanying text.

394. *See, e.g.*, United States v. Russo, 123 F.2d 420, 422 (3rd Cir. 1941). Some courts have held that constructive possession merely serves to weaken the presumption's inferential strength, while others have seemingly ignored this question completely. *Compare* United States v. Casalinuovo, 350 F.2d 207, 211 (2d Cir. 1965), and United States v. DeSisto, 329 F.2d 929, 935 (2d Cir. 1964), *cert. denied*, 377 U.S. 979 (1966), *with* Boehm v. United States, 271 F. 454, 457 (1921). It is easy to see how a reconsideration of the presumption field in light of the power of judges to comment on the evidence would facilitate the proper resolution of this split. Sophisticated analysis of "inference on an inference" would be inappropriate; the issue would be abuse of discretion. *See* TRIAL BY JURY 125. *See generally* C. TORCIA, *supra* note 338, § 91, at 148-51.

tion of master fences who avoid physical contact with stolen goods.[395] Fourth, the recent possession doctrine is not applicable where the defendant establishes that the possession was nonexclusive because other persons, not involved in the theft or fencing, also had access to the goods.[396] Finally, since courts recognize the inferential value of proof of possession of stolen property weakens as the time of the theft becomes more remote, the doctrine's effectiveness as a prosecutorial tool is always limited by the fence's potential ability to conceal the goods until the court "must hold that as a matter of law possession is no longer 'recent.' "[397]

These deficiencies in the recent possession rule, combined with the increasing sophistication of the modern fencing process and the declining ability of present-day jury panels to deal with complex issues,[398] necessitate the enactment of more effective criminal presumptions to help establish the *mens rea.* The Model Penal Code, for example, includes a presumption that would apply to any retailer or wholesaler who acquires property "for a consideration which he knows is far below its reasonable market value."[399] Such a presumption, which appropriately focuses upon a designated class of individuals whose fencing activities have had a profound impact on the national economy,[400] is included in section 5 of the Model Act.[401]

---

395. *See* notes 142-47 *supra* and accompanying text.

396. *See* C. TORCIA, *supra* note 338, § 139, at 237 n.40. Some courts have refused to recognize the inference where the stolen goods were found "in a place where persons other than the defendant had an equal right and facility of access thereto." Annot., 51 A.L.R.3d 727, § 48(b), at 811 (1973). In general, however, "the requisite of 'exclusive possession' is anything but strictly applied in the defendant's favor. In case after case, the courts have considered all the circumstances in determining whether a jury might raise an inference of guilt from whatever degree of possession might be attributed to the defendant." *Id.* § 2, at 732. Thus, the "jointness" approach is widely applied, *id.* § 48(a), at 810 and possession is often considered exclusive where other persons have equal access under circumstances that suggest that the defendant knew that their right to access would probably not be exercised. *See* United States v. Casalinuovo, 350 F.2d 207, 210-11 (2d Cir. 1965).

397. STAFF REPORT ON SMALL BUSINESS 9-10 (footnote omitted). *Cf.* C. TORCIA, *supra* note 338, § 139, at 239. Most fences naturally prefer to dispose of their goods quite quickly, which they are generally able to do. *See* notes 131, 171 *supra* and accompanying text. Nevertheless, when necessary, "[c]ertain types of property like jewelry and securities can be easily concealed for an indefinite period of time." J. HALL, *supra* note 5, at 191. Even when long-term concealment is not contemplated, modern tracing techniques are so rudimentary that the interval between theft and recovery is frequently quite long. *Id.*

398. *See* authorities cited note 138 *supra.*

399. MODEL PENAL CODE § 223.6(2)(c) (Proposed Official Draft 1962). The Code defines "dealer" as "a person in the business of buying or selling goods." *Id.*

400. *See generally* notes 31-60, 48-49, 115-16, 118-20, 188 *supra* and accompanying text. The Code's proposal would apply to professional fences and to all so-

Nevertheless, since this provision would require the prosecution to establish a purchase price far below market value, a more sophisticated criminal presumption might be necessary to handle, for example, those situations where adequate business records are not available to help establish the purchase price. Accordingly, the Model Act contains a companion presumption that would give rise to an inference of recklessness whenever a dealer has made an unexplained purchase out of the ordinary course of business.[402] This presumption would apply on proof of unrecorded transactions, the retention of nonitemized or bogus receipts, the possession of altered merchandise, unusual methods of payment, purchases from noninstitutional sources, or similar conduct, that is viewed as purchasing behavior not in the "usual course of trade."[403] Since normal trade practices tend to vary by business, the presumption is cast in generalized terms to include the five preceding examples, yet also to retain sufficient flexibility to cover other unusual practices.[404] Similar presumptions should be enacted to help prosecutors establish the guilty state of mind in those jurisdictions that retain the stricter standard of criminal liability.

These statutory presumptions would, it is hoped, encounter little or no difficulty receiving judicial approval regardless of which evidentiary standard is applied.[405] In drafting such presumptions, it must be recognized that the constitutional constraints that preclude the operation of so-called true presumptions in criminal cases[406] do not prohibit legislatures from authorizing jury instructions that give additional strength to any particular statutory presumption.[407] Thus, although Congress[408] and state legislatures have been reluctant to

called "legitimate" businesses. Master fences would be indirectly affected, since they frequently funnel stolen goods to these establishments.

401. MODEL THEFT AND FENCING ACT § 5(a)(2), Appendix B.

402. *See* MODEL THEFT AND FENCING ACT § 5(a)(3), Appendix B. A similar proposal was initially suggested over twenty years ago in Hall's classic study. *See* J. HALL, *supra* note 5, at 224.

403. *Id. See* notes 331-33 *supra* and accompanying text. In particular, note 332 *supra* contains Hall's detailed list of circumstances that are often out of the ordinary course of business. On occasion, with respect to certain types of dealers (*i.e.*, junk merchants or pawnbrokers), the law may require that certain procedures, such as record-keeping, be made part of the ordinary course of business, and attach specific consequences for failure to comply. *See, e.g.*, FLA. STAT. ANN. § 812.051 (Supp. 1975).

404. By analogy, note that the drafters of the Uniform Commercial Code did not consider it necessary to provide a detailed definition of the term "buyer in the ordinary course of business." *See* UNIFORM COMMERCIAL CODE § 1-201(9).

405. *See* note 330 *supra* and accompanying text.

406. *See* notes 350-54 *supra* and accompanying text.

407. *See* WORKING PAPERS 23.

408. Currently, none of the federal statutes concerned with fencing provide any

exercise this power, it ought to be held constitutionally proper to provide that a jury be instructed, for example, that "although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards the fact giving rise to the presumption as *strong evidence* of the fact presumed."[409]

This carefully-worded charge to the jury ought to be held satisfactory under the relevant constitutional limitations. First, an instruction that "the evidence as a whole must establish the presumed fact beyond a reasonable doubt" assures that the presumption is not given undue significance and protects a defendant's right to have the prosecution establish all elements of the alleged crime beyond a reasonable doubt. Second, a defendant's constitutional right to jury trial of all elements of the crime is guaranteed since the jury is not required to find the presumed fact on proof of the proved fact. Third, even though the "strong evidence" portion of the jury instruction certainly creates more pressure on the defendant to come forward and testify, his fifth amendment privilege against self-incrimination still

---

criminal presumptions to assist in proof of *substantive* elements of the offense. The only statutory presumption included in any of these statutes is concerned exclusively with interstate commerce, a jurisdictional element. 18 U.S.C.A. § 659 (Supp. 1976). *See* WORKING PAPERS 26-31. S.1 has finally proposed that, in the absence of a reasonable explanation, both "possession of property recently stolen" and the "purchase . . . of stolen property at a price substantially below its market value," constitute prima facie evidence of the knowledge element. S.1, § 101, at 148 (proposed § 1738 (b)). Nevertheless, since S.1 distinguishes between prima facie evidence and statutory presumptions by attributing strong inferential weight and authorizing a strong jury instruction only for presumptions, characterizing these fact patterns merely as prima facie evidence subordinates their evidentiary significance and eliminates a real opportunity for facilitating the prosecutorial effort. *See* S.1, § 102, at 345 (proposed Rule 25.1(a)). The present congressional proposal represents a reversal from the position initially advocated by the original drafters. *See* WORKING PAPERS, *supra* note 262, at 22, 935-37.

409. S.1, § 102, at 12 (proposed Rule 25.1(a)(4) (A)(ii)) (emphasis added). Although the Supreme Court in United States v. Gainey, 380 U.S. 63, 71 n.7 (1965), has suggested that "the better practice would be to instruct the jurors that they may draw the inference unless the evidence in the case provides a satisfactory explanation . . . omitting any explicit reference to the statute itself in the charge" this has not been viewed as a constitutional requirement. *See* J. WEINSTEIN § 303[07], at 303-36. The drafters of S.1 viewed rule 25.1 and its required jury instruction as "a careful reconciliation of the prosecution's and the defendant's interests." *See* WORKING PAPERS 24. Since the "strong evidence" language used by the section does not achieve a significantly greater inferential effect than the statute approved by the Court in Gainey (providing that certain evidence "shall be deemed sufficient . . . to authorize conviction"), the proposed instructions probably do not go beyond the scope of current fifth amendment limitations. *But see* MCCORMICK 832. Significantly, Justice Black, dissenting in *Gainey*, maintained that "[f]ew jurors could have failed to believe that it was their duty to convict under" a jury instruction to the effect that proof of the basic fact shall be deemed sufficient to authorize conviction. United States v. Gainey, 380 U.S. 63, 77 (1965) (Black, J., dissenting).

has not been violated.[410] If a trial judge commenting on the evidence could, in the exercise of discretion, opine that a particular fact pattern is strong evidence of incriminating conduct, the legislature should have the right to make a similar observation through a statutory presumption read to the jury.[411] The pressure that would be exerted upon the defendant is essentially the same as that which would be applied if the inferential significance of the proved facts had been explained by an independent expert witness during the course of the trial, although where a witness testified it is true that the defendant would have an opportunity for cross-examination. In effect, once a statutory presumption has satisfied the relevant due process test, the fifth amendment challenge necessarily dissolves.

(iv). *Strict liability.* Although the enactment of more modern criminal presumptions should facilitate proof of guilty knowledge, legislatures might alternatively abandon the state of mind element and treat possession of stolen property as a strict liability offense.[412] Imposition of strict liability for the receipt of stolen property on all classes of potential violators might encounter serious policy and due process objections, but it does not necessarily follow that similar objections would preclude a strict liability statute from being applicable only to retail and wholesale dealers.[413] While the Supreme

410. *See* United States v. Gainey, 380 U.S. at 70-71; J. WEINSTEIN § 303[07], at 303-36.

411. While it is still generally thought that the older common law-position supporting comment obtains in the federal courts, note 333 *supra*, the issue was clouded by the Supreme Court's opinion in Quercia v. United States, 289 U.S. 466 (1933), a decision soundly criticized by Wigmore. 9 J. WIGMORE, *supra* note 277, § 2551, at 508 n.7. The traditional rule of the Supreme Court was correctly stated in Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545, 553 (1886) (discretion to comment on evidence that is ultimately submitted to jury).

412. Strict liability for fencing offenses was considered and rejected by the federal government in 1930. *See* J. HALL, *supra* note 5, at 228-29. Currently, S.1, "recogniz[ing] the force of arguments against the imposition of criminal liability where a person engages in conduct without culpability," has required that any legislation creating a title 18 strict liability offense "be manifest." S.1 REPORT 54. A provision that simply omits any reference to state of mind will not be considered a strict liability offense. *See* S.1, § 303, at 15. This formulation is probably consistent with the policy behind the Supreme Court's statutory construction decision in Morissette v. United States, 342 U.S. 246 (1952), where the Court essentially said "that *mens rea* was presumptively to be implied in the statutory redefinition of offenses taken over from the common law." Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 120. It is probably fair to say that receipt is a "common law" offense, even though it developed late and only through statutory enactment.

413. One New York decision struck down on due process grounds a statute that imposed strict liability upon junk dealers. People v. Estreich, 272 App. Div. 698, 75 N.Y.S.2d 267 (1947), *affd. mem.*, 297 N.Y. 910, 79 N.E.2d 742 (1948). This position, however, seems to be inconsistent with the Supreme Court's modern approach to the question of strict liability. *See* notes 415-17 *infra* and accompanying text. *But see* State v. DiRienzo, 53 N.J. 360, 376, 251 A.2d 99, 107 (1969) ("vulnerable to constitutional attack").

Court has acknowledged that the concept of *mens rea* is a well-established ingredient of the common law,[414] the principle does not yet have independent constitutional significance. Instead, the Court has characterized the strict liability issue as a question of legislative policy[415] and, in the absence of constitutional infringements,[416] has stated that "[t]here is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition."[417]

The power to legislate strict liability crimes has been repeatedly upheld in a series of so-called public welfare cases.[418] Emphasizing

414. *See* Morissette v. United States, 342 U.S. 246, 250 (1952): "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Similarly, it has been said that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500 (1951). *But see* Packer, *supra* note 412, at 145-46 (deeply imbedded "principle that ignorance of the law is no excuse" is fundamentally "inconsistent with the asserted universality of *mens rea*").

415. Supreme Court decisions involving questions of strict liability have consistently focused on questions of legislative intent. *See* United States v. Park, 421 U.S. 658, 666-73 (1975); Morissette v. United States, 342 U.S. 246, 263 (1951); United States v. Dotterweich, 320 U.S. 277, 279-85 (1943); United States v. Balint, 258 U.S. 250, 252-54 (1922); W. LaFave & A. Scott, *supra* note 14, at 218-19. Legislative intent has generally been subordinated only when strict liability has threatened the exercise of first amendment freedoms. *See* note 416 *infra* and accompanying text.

416. The Court has stated that, on occasion, "doctrines, in most applications consistent with the Constitution . . . cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." Smith v. California, 361 U.S. 147, 150-51 (1959).

Thus, in *Smith*, a strict liability obscenity statute was struck down because it infringed upon the first amendment rights of booksellers and the public by inducing sellers to be extremely cautious with regard to the books they make available for public consumption. 361 U.S. at 152-55.

417. Lambert v. California, 355 U.S. 225, 228 (1957). *See* United States v. International Minerals & Chem. Corp., 402 U.S. 558, 564 (1970).

418. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933), observes: "[W]e are witnessing today a steadily growing stream of offenses punishable without any criminal intent whatsoever. Convictions may be had for the sales of adulterated or impure food, violations of the liquor laws, infractions of anti-narcotic acts, and many other offenses based upon conduct alone without regard to the mind or intent of the actor." *See* United States v. Dotterweich, 320 U.S. 277 (1943) (shipment of adulterated drugs); United States v. Balint, 258 U.S. 250 (1922) (improper sale of narcotics); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910) (cutting of timber on state lands). *See also* United States v. International Minerals & Chem. Corp., 402 U.S. 558 (1971) (application of *ignorantia legis* to transportation of dangerous acids); United States v. Freed, 401 U.S. 601, *rehearing denied*, 403 U.S. 912 (1971) (application of *ignorantia legis* to registration of dangerous firearms); United States v. Park, 421 U.S. 658 (1975) (strict and vicarious liability of president of food chain for rodent contamination). Strict liability statutes have generally received constitutional approval. *See* W. LaFave & A. Scott, *supra* note 14, at 221-22. Even so, the constitutionality of such legislation has been a favorite subject of debate among

the need to protect important public interests, these decisions have considered it appropriate for legislatures to require selected individuals to take extreme precautions against illegal acts and to assume the risk of a strict liability conviction for "innocent" wrongdoing.[419] Conviction under these statutes usually carries relatively light punishment,[420] although this is not always the case.[421]

---

leading scholars. *See*, e.g., Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 422-25 (1958); Packer, *supra* note 412, at 147-52.

Thus far, however, the only Supreme Court decision that has raised serious constitutional questions concerning the validity of strict liability legislation is Lambert v. California, 355 U.S. 225 (1957). In declaring unconstitutional a city ordinance that penalized the failure of ex-felons to register with police authorities, the Court distinguished the *Dotterweich*, *Balint*, and *Shevlin-Carpenter Co.* line of authority: "But we deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." 355 U.S. at 228. This rationale, however, is inapplicable to fencing cases involving dealers, because such situations generally involve both affirmative conduct and circumstances that would alert the purchaser that he was buying stolen goods. *See* notes 123-25, 329-33 *supra* and accompanying text. Moreover, in applying the principles articulated in *Dotterweich*, even in the absence of such circumstances, a corporate officer could be held vicariously liable for the illegal conduct of one of his department store's buyers, where that buyer himself was being held strictly liable. Finally, the *Lambert* decision may be completely inapplicable to the question of strict liability with respect to attendant circumstances, since the case arguably involved an exception to the principle of *ignorantia legis;* the defendant had no knowledge of the law in question and could not, the court thought, be reasonably expected to inform himself. 355 U.S. at 229.

419. The Supreme Court's language in United States v. Dotterweich, 320 U.S. 277, 280-81 (1943), is precisely on point:

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in *responsible relation* to a public danger. United States v. Balint. And so it is clear that shipments like those now in issue are "punished by the statute if the article is misbranded [or adulterated], and that the article may be misbranded [or adulterated] without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares . . . ." (citation omitted) (emphasis added).

See United States v. Balint, 258 U.S. 250, 253-54 (1922). The court's explanation of *Dotterweich* in United States v. Park, 421 U.S. 658, 672-73 (1975), merits attention:

> The [Food and Drug] Act does not, as we observed in *Dotterweich*, make criminal liability turn on "awareness of some wrongdoing." . . . The duty imposed by Congress on responsible corporate agents is, we emphasize, one that requires the highest standard of foresight and vigilance, but the Act, in its criminal aspect, does not require that which is objectively impossible. . . . If such a claim [of objective impossibility] is made, the defendant has the burden of coming forward with evidence, but this does not alter the Government's ultimate burden of proving beyond a reasonable doubt the defendant's guilt, including his power . . . to prevent or correct the prohibited condition.

420. *See* S.1 REPORT 54-55.

421. In United States v. Balint, 258 U.S. 250 (1922), "the Court showed no concern about the imposition of *severe criminal sanctions* without proof of blameworthiness. There was not a whisper in the opinion about the maximum penalty under the Act: five years' imprisonment . . . ." Packer, *supra* note 412, at 114 (emphasis added).

The felony-muder doctrine and statutory-rape provisions are examples of instances where strict liability principles are extended to more traditional crimes and where severe penal sanctions are provided.[422] Thus, there is precedent for developing a strict liability approach to a nonregulatory offense such as fencing. The imposition of strict liability, however, even upon a limited category of individuals, is somewhat of an anomaly in a criminal justice system that generally punishes only blameworthy individuals.[423] Since the constitutionality of such an approach does not necessarily mean that the approach is wise,[424] legislators must carefully evaluate whether the supposed increase in effective law enforcement, if any, will be won at the expense of society's normative standards. The Model Act does not adopt a strict liability approach, for the Act's provisions already greatly facilitate control of fencing schemes without abridging basic principles of criminal punishment.[425]

---

422. Misdemeanor-manslaughter and bigamy are also traditionally strict liability crimes that carry heavy penalties. Parker, *supra* note 412, at 140-42. *See* W. LaFave & A. Scott, *supra* note 14, at 220.

423. The role of *mens rea* in the criminal law has been the subject of much discussion. The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or a retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*.

Packer, *supra* note 412, at 109. *See* Model Penal Code § 2.05, Comment, at 140 (Tent. Draft No. 4, 1955). For an interesting discussion that attempts to reconcile these difficulties by limiting the applicability and impact of strict liability offenses, see Brady, *Strict Liability Offenses: A Justification*, 8 Crim. L. Bull. 217 (1972). Significantly, since strict liability may not achieve any deterrent effect if the penalty imposed is too slight, Bradey proposes the adoption of a gradation continuum that would impose sanctions according to the degree of culpability proved. *Id.* at 222-24. For a more detailed discussion of gradation principles, see notes 450-67 *infra* and accompanying text. While general Supreme Court jurisprudence would seem to argue that a strict liability offense here would be constitutional, there is authority pointing the other way. *Compare* People v. Estreich, 272 App. Div. 698, 701, 75 N.Y.S.2d 267, 270 (1947) ("illegal and arbitrary interference with a lawful business"), *affd. mem.*, 297 N.Y. 910, 79 N.E.2d 742 (1948), *with* Kilbourne v. State, 84 Ohio St. 247, 95 N.E. 824 (1911). *Estreich*, however, is of questionable modern authority, since it is a "liberty of contract" due-process decision.

424. *See* Dennis v. United States, 341 U.S. 494, 555-56 (1951) (Frankfurter, J., concurring).

425. A gradation scheme that imposes minimal penalties upon strict liability offenders could potentially be more effective if special sanctions were provided for recidivists. Thus, the recidivist could be subjected to increased penal sanctions and to revocation of his operating license. Moreover, even under a modified gradation system, strict liability might serve as a powerful incentive to take preventative steps, since a criminal prosecution would have an important collateral estoppel effect in the event of a subsequent civil suit for treble damages. *See* note 481 *infra* and accompanying text.

(v). *Affirmative defense.* A final possible approach to the *mens rea* problem would adopt the strict liability definition of receiving for retailers and wholesalers, but would provide an affirmative defense of due diligence.[426] Under such a statute, the prosecution would have a sufficient case for conviction on proof of the receipt of stolen property, but the defendant could still be acquitted by demonstrating his compliance with a legislatively-defined standard of care when purchasing the goods. Legislatures have traditionally been accorded considerable latitude in defining the elements of criminal conduct,[427] and since strict liability criminal statutes have received judicial approval,[428] a strict liability statute that provides an affirmative defense arguably should receive similar treatment.

Nevertheless, the affirmative defense technique in the past has been attacked as an unconstitutional shift of both the burden of producing evidence and the risk of nonpersuasion to the defendant[429] in violation of due process.[430] While it has now been clearly decided that states may constitutionally place the burden of producing evidence on the defendant, since it would be unreasonable to require the prosecution to introduce evidence negating every possible affirmative defense,[431] considerable controversy still surrounds allocation of the risk of nonpersuasion.[432] The Supreme Court's traditional position on whether the burden of persuasion may be shifted has been quite flexible:

> The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defend-

426. Due diligence could be defined as adherence to reasonable commercial standards, or, if this is still too demanding, as the absence of recklessness (defined in note 271 *supra*). Note, however, that even the reasonable commercial standards formulation may be too relaxed an approach, since prevailing commercial standards may be quite low. Accordingly, consideration should be given to imposing an even higher standard of care. *See generally* Bradly, *supra* note 423, at 224-26.

427. "[T]he courts have long been loath to interfere with the power of legislatures to define criminal conduct." S.1 REPORT 1092 (footnote omitted). *See* note 412 *supra* and accompanying text. *But see* Mullaney v. Wilber, 421 U.S. 684 (1975) (impermissible to shift burden of persuasion on issue of passion in homicide case); Robinson v. California, 370 U.S. 660 (1962) (impermissible to punish status of drug addiction).

428. *See* notes 415-22 *supra* and accompanying text.

429. MCCORMICK, *supra* note 331, at 800-02, 830; MODEL PENAL CODE § 1.13, Comment, at 110-12 (Tent. Draft No. 4, 1955).

430. *See* MCCORMICK 801; Christie & Pye, *supra* note 368, at 933-38.

431. *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 47; C. TORCIA, *supra* note 338, § 19.

432. W. LAFAVE & A. SCOTT, *supra* note 14, at 47-48. For an extensive listing of cases pro and con, see *id.* at 47 nn. 24 & 25.

> ant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.[433]

Until recently, the leading decision on the constitutionality of shifting the burden of proof was *Leland v. Oregon*,[434] which manifested this flexibility. In *Leland*, the Court approved a state statute that required the defendant to prove beyond a reasonable doubt his affirmative defense of insanity to a first-degree murder charge. *Leland*'s precedential value is less certain, however, after *In re Winship*,[435] which held that the prosecution must establish each element of the crime beyond a reasonable doubt, and *Mullaney v. Wilbur*,[436] which held that the state cannot shift to the defendant the burden of persuasion on the issue of "heat of passion" as a mitigating factor in a homicide prosecution. An affirmative defense that denies the existence of an essential element of the prosecution's case would appear to be governed by *Winship*:[437] "For example, it is clearly a

---

433. *See* Morrison v. California, 291 U.S. 82, 88-89 (1934). *See* MODEL PENAL CODE § 1.13, Comment, at 110-11 (Tent. Draft No. 4, 1955). It is unclear whether Morrison's approach is still good law. *See* note 435 *infra*.

434. 343 U.S. 790 (1952).

435. 397 U.S. 358, 364 (1970). *See* W. LAFAVE & A. SCOTT, *supra* note 14, at 48. It has been observed:

> However, *Leland* does suggest that the constitutionality of a defense on which the defendant has the burden of persuasion is measured under a broad, due process standard. Thus, the ultimate question is whether the allocation of proof is reasonable. In an appropriate case it should be possible to make a strong showing of legality. If such an affirmative defense is an integral part of a reasonable legislative solution to a difficult problem, and the evidence on the matter is particularly within the control of the defendant, it is submitted that due process standards are met.

WORKING PAPERS 18-19 (footnote omitted). On the continuing validity of *Leland*, see People *ex rel.* Juhan v. District Ct., 165 Colo. 253, 260-61, 439 P.2d 741, 745 (1968) (insanity preponderance rule violated state constitution's due process clause); Commonwealth v. Vogel, 440 Pa. 1, 9, 268 A.2d 89, 93-94 (1970) (Jones, J., concurring); 440 Pa. at 14-15, 268 A.2d at 90 (Roberts, J., concurring).

436. 421 U.S. 684 (1975). Mr. Justice Rehnquist, with whom the Chief Justice concurred, joined in the *Mullaney* majority opinion and observed: "I see no inconsistency between . . . [*Winship*] and the holding of Leland v. Oregon." 421 U.S. at 705 (citations omitted). Presumably, they would see no inconsistency between *Mullaney* and *Leland*. On *Mullaney* and affirmative defenses, *compare* People v. Balogun, 17 CRIM. L. RPTR. 2486 (N.Y. Sup. Ct. Aug. 19, 1975), *with* People v. Long, 18 CRIM. L. RPTR. 2031 (N.Y. Sup. Ct. Aug. 25, 1975).

437. W. LAFAVE & A. SCOTT, *supra* note 14, at 48. The most recent attempt of the Supreme Court to essay the scope of *Winship* is *Mullaney*. The State argued that *Winship* should be limited to elements that bear on guilt, but not degree of guilt. The court rejected this distinction, observing that *Winship* was concerned with substance and not form, and illustrated its point by noting that otherwise the state would be wholly free "to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." 421 U.S. at 698. The Court then held that the defendant's stake in liberty outweighed the state's inter-

denial of due process to characterize alibi as a defense and then place the burden of persuasion on the defendant, for an alibi defense is nothing more than a denial that the defendant committed the crime."[438] It would be consistent, under this reasoning, to argue that the risk of nonpersuasion on the issue of insanity ought to remain on the prosecution since the defendant is in fact denying the requisite *mens rea* exists.[439] Yet the *Winship* rational need not necessarily be applicable where the affirmative defense does not deny the existence of an essential element of the crime but rather is more appropriately characterized as an excuse or justification for it—that is, as a form of confession and an avoidance. In this case, it may be constitutional to shift the burden of persuasion to the defendant since all elements of the crime have been established beyond a reasonable doubt.[440]

Although the distinction between affirmative defenses denying an element of the crime and those purporting to justify it is not always clear,[441] this approach has been adopted by several proposals to reform the criminal code and approved by some commentators. The Model Penal Code, for example, requires "the defendant to prove by a preponderance of the evidence"[442] any affirmative de-

---

est in facilitating its prosecutive burden. 421 U.S. at 701-02.

It is not clear how *Mullaney* would affect an affirmative defense of lack of knowledge of the stolen character of the property in a fencing prosecution. Clearly, the history of the due process clause would argue that knowledge is the essence of the "crime" of receiving. *See* 421 U.S. at 696. Shifting the burden of persuasion on that issue to the defendant would be hard to distinguish from *Mullaney*. Ironically, it may well be, therefore, that the Constitution here seen in an historical perspective is consistent, as presently interpreted, with strict liability on the issue of knowledge, but is not consistent with an affirmative defense on that issue. *See* State v. Giordano, 121 N.J.L. 469, 3 A.2d 290 (1939), where affirmative defense language of a New Jersey statute was construed to be a clarification of a common-law presumption in order to avoid declaring the statute an unconstitutional shift of the burden of persuasion. This demonstrates the general difficulty that is experienced when an effort is made to integrate the Supreme Court's strict liability cases with traditional notions of due process. It is ironic, too, that *Mullaney* and United States v. Park, 421 U.S. 658 (1975), the Supreme Court's most recent reaffirmations of the concept of strict liability, were handed down on the same day. This, in turn, argues for a different reading of *Mullaney* keyed to the distinction between a defense seen as a negation of an element of the offense and an affirmative defense seen as a form of confession and avoidance. *See* text at note 440 *infra*.

438. W. LaFave & A. Scott, *supra* note 14, at 48. *See* McCormick, *supra* note 331, at 801; 9 J. Wigmore, *supra* note 277, § 2512, at 415; S.1 Report 1091.

439. *See* W. LaFave & A. Scott, *supra* note 14, at 48.

440. *See* Model Penal Code § 1.13, Comment, at 110-11 (Tent. Draft No. 4, 1955). This argument, however, has not gone uncriticized, and may represent a minority view. *See* McCormick 801-02.

441. Model Penal Code § 1.13 Comment, at 111 (Tent. Draft No. 4, 1955).

442. Model Penal Code § 1.12(2)(b) (Proposed Official Draft, 1962).

fense which "involves a matter of excuse or justification peculiarly within . . . [his] knowledge . . . on which he can fairly be required to adduce supporting evidence."[443] A similar affirmative defense provision is contained in S.1, the proposal to reform the federal criminal code.[444] Although the S.1 proposal is not expressly limited to cases of excuse or justification, the bill's legislative history clearly indicates the burden of persuasion is to be shifted only when these defenses are involved.[445] Interestingly, both the Model Penal Code and S.1 require that a defendant prove his affirmative defense by only a preponderance of the evidence. This formulation apparently is partly the product of tension between proponents of shifting the burden of persuasion beyond a reasonable doubt and those who would require that the prosecution establish beyond a reasonable doubt every element of the defendant's guilt, which includes proving all elements of its case as well as the lack of any affirmative defense once the defendant's production burden has been satisfied.

As an alternative to the negation-excuse or justification distinction, at least one commentator suggests it is constitutionally permissible to shift the risk of nonpersuasion where it is a "sensible middle position between a much broader statute or strict-liability-type of statute, on the one hand, and, on the other, a statute recognizing the defense and placing an impossible burden on the prosecution to establish the existence of facts within the special knowledge of the defendant."[446] Such an approach merits consideration because it properly recognizes the underlying substantive issues—the due process rights of the defendant and the need to facilitate effective law enforcement—often masked by the somewhat artificial negation-excuse or justification distinction. Under this approach, a strict liability statute for dealers coupled with an affirmative defense should receive constitutional acceptance because of the difficulties in proving guilty knowledge, the defendant's ready access to any exculpatory evidence, and the likelihood that statutory penalties will be light.

---

443. MODEL PENAL CODE § 1.12(3)(c) (Proposed Official Draft, 1962). The Code's Commentary, however, indicates that its drafters did "not favor such a shifting of the burden in the absence of the most exceptional considerations." MODEL PENAL CODE § 1.13 Comment, at 112 (Tent. Draft No. 4, 1955).

444. S.1, Proposed Rule 25.1. Under S.1, any defense designated as an affirmative defense involves a shifting of the burden of persuasion. All other defenses merely require the defendant to go forward with evidence "to support a reasonable belief as to its existence." *Id.* In this case, once the defendant has successfully raised a reasonable belief, "the government has the burden of proving the nonexistence of the defense beyond a reasonable doubt." *Id.*

445. *See* S.1 REPORT 1091.

446. W. LAFAVE & A. SCOTT, *supra* note 14, at 49. *See* WORKING PAPERS 17-19.

One argument against the use of an affirmative defense approach is that it may be a legislative subterfuge functionally equivalent to an impermissible statutory presumption that effects an unconstitutional shifting of the burden of persuasion.[447] A response to this criticism can be made on both analytical and policy grounds. While the courts surely will not hesitate to expose a subterfuge for what it is, there should be different due process tests for a substantive approach that involves redefining the elements of the crime on the one hand and for a merely procedural approach on the other. Accordingly, in the case of affirmative defenses, the appropriate judicial focus for due process should concern whether the relevant provision is impermissibly designed to negate an element of the offense, and not whether it achieves the same procedural consequences as a statutory presumption.[448] More fundamentally, since legislatures have a large measure of freedom to abandon the *mens rea* element,[449] an analysis that applies the procedural due process test may leave defendants "materially worse off" by forcing the enactment of strict liability statutes with no provision for affirmative defenses.[450] Although the affirmative defense approach ought to satisfy due process, no such approach is taken in the Model Act because of serious doubts as to its constitutionality under prevailing analysis.

3. *Sentencing Convicted Receivers*

Redefining the substantive and procedural criminal law of fencing is a necessary first step but it will not bring about improved law

447. *See* J. WEINSTEIN § 303[04], at 303-23-24. Indeed, courts have construed apparent "affirmative defenses" as "permissible inferences" to avoid constitutional difficulties. *See* State v. Giordano, 121 N.J.L. 469, 3 A.2d 290 (1939); Mantell v. Jones, 150 Neb. 785, 36 N.W.2d 115 (1949). In addition to effecting a shift in the burden of persuasion, an affirmative defense provision may not have to comply with the rational connection test. *See* note 430 *supra*. *But see* Mullaney v. Wilbur, 421 U.S. 684 (1975).

448. In other words, a different due process test ought to be applicable, depending upon whether a procedural or substantive enactment is involved. Nevertheless, while it is clear that statutory presumptions are procedural devices, affirmative defenses may be in somewhat of an intermediary position, particularly in light of their procedural consequences. It is not without significance, therefore, that the Supreme Court in *Mullaney*, 421 U.S. at 702 n.31 saw fit to rely on the presumption cases in striking down an affirmative defense. The Court seemed to feel that a "more exacting standard" was required in the affirmative defense area than in the presumption area.

449. *See* notes 259-63 *supra* and accompanying text.

450. Although this argument is sound on policy grounds, the Supreme Court has twice indicated that the mere fact that Congress has the "greater" power to define criminal conduct in a certain way is not determinative. The Court's constitutional analysis has traditionally focused on what Congress *has done* rather than on what that body *could have done*. *See* United States v. Romano, 382 U.S. 136, 144 (1965); Tot v. United States, 319 U.S. 463, 472 (1943).

enforcement unless accompanied by revision in sentencing procedures. Legislative and judicial attitudes to the punishment of convicted receivers exhibit the same fundamental misunderstanding of the significance of fencing that characterizes society's definition of the substantive crime.[451] In almost every state, criminal receivers and thieves are subject to the same penalties,[452] an approach that continues "to denigrate the role of the fence in the theft microcosm."[453] Further, there is evidence that in exercising their discretion under sentencing statutes, most judges frequently treat receivers leniently.[454] Fundamental to an effective criminal law of receiving, however, is a realization that fences are a major cause of theft,[455] that fencing is a more serious crime than theft, and that, accordingly, the law ought to impose more severe penal sanctions upon criminal receivers,[456] at least where the goods are not received for personal consumption.

New legislation providing stiffer penalties for receivers would convey to judges the legislature's determination that fencing crimes are, indeed, serious and that lighter sentences for receivers are no longer appropriate.[457] Although modernization of sentencing provisions along these lines is a necessary reform, it alone is not sufficient. The criminal law of receiving must also make sophisticated distinc-

---

451. *See* notes 174-90 *supra* and accompanying text. For example, in eighteenth century England, thieves were punished more severely than fences. *See* Chappell & Walsh, "*No Questions Asked*" 162-63.

452. *See* REPORT, THE IMPACT OF CRIME 21; *Hearings on Fencing* 163-71. S.1 would continue this practice for those who traffic in stolen property (§ 1732) and lessen the penalties for those who merely possess it (§ 1733), presumably for personal consumption. Only the special sentencing provisions of § 2302(b) would work to impose higher penalties on certain offenders. *See* note 465 *infra*.

453. REPORT, THE IMPACT OF CRIME 21.

454. *Id.* Convicted fences are too often given suspended sentences, put on probation, or merely fined. "[I]ronically, 'burglars like to plead guilty to being receivers. Apparently, they are not as stigmatized by being receivers.'" *Id.* at 22 (quoting Los Angeles District Attorney).

455. *Id.* See notes 16-21 *supra* and accompanying text.

456. *See* REPORT, THE IMPACT OF CRIME 21.

457. One possibility is the use of mandatory sentences. Mandatory sentences, though often believed to be unwise, are generally thought to be a matter of legislative judgment. *See, e.g.*, People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S. 2d 471 (1975) (mandatory life for drug offender upheld). Appellate review by the prosecution would probably not be unconstitutional under the double jeopardy clause in light of the Supreme Court's recent decision in United States v. Wilson, 420 U.S. 332 (1975) (appeal possible except where retrial of facts required). Nor would general due process considerations seem to militate against it. *See generally* Blackledge v. Perry, 417 U.S. 21, 27 (1974); Colten v. Kentucky, 407 U.S. 104 (1972). The policy considerations supporting a "mutual review" concept are ably set out in Testimony of Professor Livingston Hall on behalf of the A.B.A., *Hearings on Reform of the Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 5364-69 (1973). On balance, appellate review seems preferable to mandatory sentencing.

tions among fences according to the degree of their culpability.[458] Illustrative of such a scheme is the Model Act, which sanctions differently receivers who purchase for consumption only,[459] those who purchase for resale,[460] and fences who both initiate thefts and arrange the redistribution of stolen merchandise.[461]

These suggested penal provisions have at least two somewhat interrelated advantages. First, by drafting three sets of penalty provisions instead of one, legislatures can better communicate to judges their determination of the relative seriousness of various fencing crimes. Second, multiple penal provisions would give judges more flexibility to tailor punishment to the crime, thereby presumably maximizing incapacitation, increasing deterrence, and reducing the risk of nullification by a jury not wishing, for example, to subject a consumer of stolen goods to the harsh sanction more properly reserved for a master fence.

Attempts to distinguish among receivers solely on the value of the stolen property received, the traditional approach to grading punishment in theft crimes, is inadequate for several reasons. First, establishing precisely how much stolen property a particular receiver has handled is often difficult, thus undermining the very basis of this approach to sentencing. Second, a scheme that emphasizes the particular economic function of the fence is a more accurate method of allocating punishment since, on the whole, it is highly probable that the value and volume of stolen property handled by a master fence is greater than that redistributed by a professional fence even though this may be difficult to prove. Third, a scheme that allocates punishment according to the value of the property stolen obscures distinctions based on personal blameworthiness. The occasional consumer of stolen goods is not generally an organizer of theft activity, and, by definition, his purchase is not for resale purposes. Consequently, his overall conduct is less blameworthy than that of an outlet fence or master fence because his adverse impact on society is considerably smaller. This difference in culpability, however, may not as a practical matter result in different penal treatment in a criminal code that looks only at value of the property handled. Thus, while it may often be true that distinctions based on value furnish

458. This proposal was initially made by Hall, but there has been little action on either the state or federal level. *See* J. HALL, *supra* note 5, at 155-57, 217-19. Hall, however, never went further to distinguish between a fence who was a mere dealer and one who was engaged in the trafficking of stolen goods.

459. *See* MODEL THEFT AND FENCING ACT § 2, Appendix B.

460. *See* MODEL THEFT AND FENCING ACT § 4(b)(1), Appendix B.

461. *See* MODEL THEFT AND FENCING ACT § 4(b)(2), Appendix B.

a preliminary means for evaluating the gravity of criminal conduct, value alone should not be determinative. Instead, the law ought to use distinctions based on value as a basis for differentiating sanctions *within* each category of receiver.[462]

Despite the obvious benefits of a scheme that grades criminal offenses more discriminatingly, most recent proposals for reforming the criminal laws have eschewed such an approach. Ironically, the Model Penal Code may have contributed to this failure. That proposal consolidates theft and receiving and then distinguishes various classes of thieves and receivers,[463] but treats identically thieves and receivers who are consumers, dealers, or brokers of stolen goods once a minimum level of value ($500) is involved.[464] Similar deficiencies are present in S.1, which generally provides equal penal treatment for thieves and fences and makes no enhancing distinction for penal purposes between categories of receivers for resale.[465] Ironically, S.1 does recognize a functional distinction between receiving and trafficking in stolen property,[466] but little effort is made to reflect the distinction in penal sanctions.

At the federal level, under current law such deficiencies are not as serious as they otherwise would be because title X of the Organized Crime Control Act of 1970 provides for sentences of up to

---

462. *See* MODEL THEFT AND FENCING ACT § 2(b)(2), Appendix B.

463. MODEL PENAL CODE § 223.1(2) (Proposed Official Draft, 1962) provides as follows:

> *Grading of Theft Offenses.*
>
> (a) Theft constitutes a felony of the third degree if the amount involved exceeds $500, or if the property stolen is a firearm, automobile, or other motor-propelled vehicle, or in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.
>
> (b) Theft not within the preceding paragraph constitutes a misdemeanor . . .

This provision singles out dealers for particular treatment only when less than $500 is involved; the proposed statute also makes no attempt to impose heavier penalties on big-time fences when larger amounts are involved. Unfortunately, a similar, although more complicated, proposal was made by the National Commission on Reform of Federal Criminal Laws. *See* REFORM COMMN., *supra* note 190, § 1735(2)(f). The Model Penal Code, at least, has already lead, albeit unintentionally, to unwise reform at the state level. *See* note 190 *supra*. It remains to be seen whether the recommendations of the reform commission will be carried into law in a similarly unsophisticated fashion. *See* note 465 *infra*.

464. *See* MODEL PENAL CODE § 223.1(2) (Proposed Official Draft, 1962); notes 190, 452 *supra* and accompanying text. Provision is made, however, for an extended term. *See* MODEL PENAL CODE § 6.07 (Proposed Official Draft, 1962) (authorizing extended terms), § 7.03 (Proposed Official Draft, 1962) (criteria for extended terms).

465. *See* S.1, §§ 1731-1733. Provision is made, however, for an extended term. S.1, § 2301(c) (authorizing extended terms); S.1, § 2302(b) (criteria for extended terms). *See also* S.1, § 1801 (operating a racketeering syndicate); S.1, § 1802 (racketeering).

466. *Compare* S.1, §§ 111 & 1732, *with* § 1733.

twenty-five years for certain "special offenders," a category that would include professional fences and large-scale organizers.[467] Not all criminal dealers are covered, however, and title X is, of course, not applicable to those convicted in state courts on state charges. Until reformers of the criminal law of receiving recognize and correct the existing inadequacies of our penal codes, therefore, the full benefits of any substantive and procedural reforms will not be realized.

B. *Civil Remedies for Fencing Crimes*

The only adequate approach to the criminal receiver is that which deals with him as an established participant in the economic life of society, whose behavior has been institutionalized over a span of more than two centuries in Anglo-American experience.[468]

Although modernization of the criminal law of fencing should facilitate enforcement, an exclusively criminal law approach to the problem is insufficient because it ignores the opportunities for improved social control offered by civil sanctions. Appropriate provisions for civil liability can both directly reinforce the effects of newly-enacted criminal statutes and add new dimensions to law enforcement efforts. As discussed in earlier sections, a comprehensive redefinition of the substantive criminal law of theft and fencing is necessary to make redistribution financially less profitable.[469] Civil statutes can play an important supplementary role in this process in at least two ways. First, by permitting and encouraging victims of theft to initiate civil suits under fencing statutes to recover damages against purchasers of their stolen goods, appropriately drafted civil provisions will increase the likelihood a violator will be discovered and will thus greatly enlarge his penalties. Second, at least to the extent that punitive damages are awarded, civil suits provide a means for sanctioning those receivers who cannot be convicted under criminal statutes. Private plaintiffs seeking damages from receivers enjoy important substantive and procedural advantages not available to the prosecution in criminal actions since most of the constitutional protections accorded a criminal defendant are not applicable in civil litigation.[470]

---

467. 18 U.S.C. § 3575-3578 (1970) provides procedures by which designated special offenders may be sentenced to a maximum of 25 years' imprisonment. *See* J. McCLELLAN, *The Organized Crime Control Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 146-88 (1970).

468. J. HALL, *supra* note 5, at 155 (emphasis added).

469. *See* text at notes 191-273 *supra*.

470. STAFF REPORT ON SMALL BUSINESS 13. *See generally* Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 124 (1975).

In most jurisdictions, only the common-law action for conversion is available to theft victims seeking recovery. A successful suit for conversion permits recovery of the market value of the goods at the time and place of their conversion on proof the defendant interfered with the plaintiff's control of the property.[471] Actions in conversion, however, have significant deficiencies in receiving cases that seriously impair the role of private enforcement as a method of control. The most significant obstacle to civil actions in conversion is the problem of proof that permeates many criminal fencing cases: A civil plaintiff generally finds it difficult to establish that his property has been converted since receivers legitimize and dispose of the goods rapidly. As a practical matter, therefore, if a civil suit is at all possible, a plaintiff's recovery is limited to the market value of those goods actually found in the defendant's possession.[472] Further, since plaintiffs in conversion cannot recover expenses of the suit, such as the costs of investigation and attorney's fees, victimized plaintiffs are never fully compensated. Punitive damages, although theoretically recoverable, are rarely awarded because of the difficulties in establishing the requisite aggravated state of mind.[473] The unfortunate result is that theft victims increasingly recover on insur-

471. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 403 (1973); C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 123, at 463 (1935) [hereinafter MCCORMICK ON DAMAGES]. Under the market value formula, the defendant would most often be liable for the wholesale value of the goods. Retail value would only apply when the goods were stolen from a noncommercial victim. To do otherwise would automatically give the commercial victim a guaranteed profit on every item converted. This would not be appropriate, since every merchant purchasing goods at wholesale prices incurs a risk that he will not be able to sell the items for a profit. Assuming that problems of proof could be overcome, *see* note 472 *infra*, the victim would, however, be able to recover the selling price of those goods that a commercial defendant had sold for profit. Although sometimes limited to the bad faith converter, this rule is an application of the common law doctrine of "waiver of the tort and suit in assumpsit," that is designed to prevent unjust enrichment. D. DOBBS, *supra*, § 5.15, at 414. *See* RESTATEMENT OF RESTITUTION § 154 (1937).

Finally, since the typical commercial defendant is normally not able to recover money from the thief or fence who made the initial sale, some deterrent effect is achieved because the receiver is effectively forced to pay twice for the same goods.

472. Immediate resale is an important attribute of any successful fencing operation. *See* note 131 *supra* and accompanying text. If the business purposefully avoids maintaining detailed records of its transactions, tracing the stolen goods that have already been resold may be impossible. Even when records have been maintained, if the stolen goods have been mixed with legitimate merchandise, tracing the goods so that the plaintiff can recover the defendant's sale price (waiving the tort and suing *in assumpsit*, *see* D. DOBBS, *supra* note 471, § 5.15, at 414) may be an equally difficult task. *See* notes 137, 226-32 *supra* and accompanying text.

473. *See* D. DOBBS, *supra* note 471, § 3.9, at 205; W. PROSSER, HANDBOOK OF THE LAW OF TORTS 9-10 (4th ed. 1971). In at least one case, however, purchase at a price substantially below market value and at an unusual hour of the night was considered sufficient to result in a jury award of punitive damages. *See Hearings on Criminal Laws* 310.

ance contracts, a convenient, less expensive alternative to civil litigation, and pass along increased insurance costs to consumers.[474] Thus, the increase in deterrence expected from private law enforcement is not realized.

Clearly, then, a new cause of action more favorable to plaintiffs needs to be created if private civil litigation is to play a substantial role in curbing fencing operations. The Model Act provides such a civil action by adopting an approach used by the federal antitrust statutes[475] and imposing civil liability on proof of the elements of a criminal violation.[476] Under the proposed statute, a receiver is liable for damages if the plaintiff establishes the receipt, requisite *mens rea*, and ownership of the property by a preponderance of the evidence. This lower evidentiary standard is especially important in cases where the prosecution decides not to file criminal charges against a purchaser of stolen goods because of the difficulties in establishing guilty state of mind beyond a reasonable doubt. The provisions for civil liability make it less likely that receivers will escape sanction since it is usually considerably easier for plaintiffs to establish the *mens rea* by a preponderance of the evidence.[477] To ease the burden of proof in civil cases, the statute extends to the civil context the presumption of recklessness[478] on proof of the possession of recently stolen property, of the purchase or sale of stolen property at a price substantially below fair market value, or of the purchase or sale of stolen property out of the regular course of business.[479] Finally, the proposed statute tolls the civil statute of limitations dur-

474. The Department of Commerce has recognized that "small firms are less able to afford the overhead required for extensive protective measures to absorb . . . losses [attributed to theft and fencing]." *Hearings on Criminal Laws* 374. Eventually, the pressure of increased insurance rates, which these competitive smaller firms cannot pass along to the public, may force many businesses to close. *See* note 51 *supra* and accompanying text. Unfortunately, insurance policies themselves do not achieve any deterrent effect. *See* CARGO THEFT AND ORGANIZED CRIME 12 (money paid by insurers enriches criminal element of society).

475. Clayton Act § 4, 15 U.S.C. § 15 (1970).

476. *See* MODEL THEFT AND FENCING ACT § 10(a), Appendix B.

477. *See* MCCORMICK 793; *Hearings on Criminal Laws* 310.

478. Although the civil remedy provision may incorporate the same state of mind requirement contained in the criminal statute, this is not an absolute prerequisite. Liability could be imposed on the basis of a civil negligence standard, that is, a failure to exercise due care. *See* STAFF REPORT ON SMALL BUSINESS 13. Indeed, strict liability in a civil context should be given serious consideration. *See generally* W. PROSSER, *supra* note 473, at 493-95. In reality, the law already imposes strict liability with respect to attendant circumstances in conversion actions. *Id.* at 83. Significantly, a series of recent statutes authorizes the recovery of treble damages against any receiver of stolen property. For the source of this legislation see 33 SUGGESTED STATE LEGISLATION 111 (Council of State Governments 1974).

479. *See* MODEL THEFT AND FENCING ACT § 10 (incorporating § 5) Appendix B.

ing criminal prosecutions[480] and gives collateral estoppel effect to issues resolved against the defendant in a prior criminal trial on the same facts.[481] The effect of these last two provisions is to ensure that civil damage suits follow successful criminal prosecutions.

This statutory cause of action is not designed to replace the common law action in conversion, which would still be available to plaintiffs who could not prove the requisite state of mind by a preponderance of the evidence but could show a substantial interference with control of their property. Nevertheless, a most significant difference between the two causes of action that makes the statutory one more desirable is the measure of damages. As a financial incentive to sue, section 10 of the Model Act authorizes recovery of treble damages, reasonable attorney's fees, and costs of investigation and litigation.[482] The treble damages provision, a concept borrowed from

480. *See* MODEL THEFT AND FENCING ACT § 11(c), Appendix B.

481. Although most courts rejected extension of a collateral estoppel effect to a subsequent civil case because of the absence of mutuality, a few jurisdictions have refused to follow this reasoning. *See* F. JAMES, CIVIL PROCEDURE § 11.35, at 607 (1965). In any event, mutuality should no longer be a bar to the application of collateral estoppel because the doctrine of mutuality itself has declined considerably. *See* R. FIELD & B. KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 859 (1973). Even so, many jurisdictions have been reluctant to apply collateral estoppel in this context. Consequently, a prior criminal conviction will often have no effect. Nevertheless, although not yet the majority rule, the trend of decisions "manifest[s] an increasing reluctance to reject *in toto* the validity of the law's factfinding processes outside the confines of res judicata and collateral estoppel." FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES rule 803(22), Advisory Committee Notes, at 132 (West 1975). Accordingly, these cases have permitted prior criminal judgments (or particular issues decided therein) to be admitted in evidence for consideration by the fact-finder. *Id.* *See* F. JAMES, *supra*, § 11.35, at 607; MCCORMICK, *supra* note 331, at 740; Annot., 18 A.L.R.2d 1287, 1299-1307 (1951).

482. The concept of treble damages for theft is not new. Its origins lie in Roman criminal law. *See* 1 J. STEPHENS, A HISTORY OF THE CRIMINAL LAW 10 (1888). It can also be found in early American law. *See, e.g.*, Commonwealth v. Andrews, 2 Mass. 13 (1806). More is required, however, than the mere authorization of recovery. Although the spur provided by the possibility of treble damage suits would motivate many individual victims to institute civil proceedings, their ability to do so would be constrained by resource limitations. The investigation of theft and fencing activity and any subsequent litigation efforts would inevitably entail expending considerable time and resources. Since not every investigation or litigation effort will successfully result in a judgment awarding treble damages, costs, and fees, the individual victim may not be willing to risk his limited financial resources. Consequently, an industry-wide approach would seem to provide a more realistic way of coping with the inevitable investigatory and legal expenses inherent in any litigation effort. For example, an association of common carriers or shippers could maintain a separate fund to finance this type of litigation. Wherever successful, most of the resulting proceeds would be paid to the individual victim, while the remainder, a predetermined percentage, could be returned to the fund to finance future investigation and civil proceedings. Insurance companies would also have the resources necessary to investigate illicit activity and to bring suit against retail or wholesale receivers. An important question is whether an insurer, suing under subrogation principles, would be entitled to those damages that go beyond the amount paid in compensation to the insured—that is, whether an insurance company is entitled to the additional

federal antitrust statutes,[483] provides for triple recovery of actual damages, including consequential and incidental losses,[484] instead of the mere market value of the converted goods.

Yet as a practical matter, this financial incentive to sue would not be adequately realized in many cases if a defendant's potential liability were limited to three times the value of stolen goods actually received.[485] Such an approach would permit networks of thieves

---

gains of a treble damages action. Five different rules, ranging from one that gives the insurer the complete addition to one that grants the insured the complete addition, have been discussed by the courts. *See* R. KEETON, BASIC TEXT ON INSURANCE LAW, § 3.10(c), at 160-62. For obvious policy reasons, however, in the context of theft and fencing, the insurance company should be allowed to retain the additional gain. To do otherwise would remove the insurer's incentive to sue, an undesirable result since private parties may lack the resources necessary for this type of litigation. Moreover, if insurance companies were granted the profits of a treble damages action, they would be given the motivation to initiate prosecutions against fences instead of, as is the prevailing practice today, attempting to buy the goods back from them at a good price.

483. Clayton Act § 4, 15 U.S.C. § 15 (1970).

484. Of course, special damages must be proven, but in view of the extensive indirect costs that theft and fencing activity generate, the potential recovery will always be quite large. *See* notes 50-56 *supra* and accompanying text. Under the language of some legislation, business competitors who have suffered no theft loss could conceivably bring suit on unfair competition grounds against an establishment dealing in stolen goods. *See* S.13, 93d Cong., 1st Sess. § (2)(i) (1973); CAL. PENAL CODE § 496 (West Supp. 1975). In such a case, the plaintiff would be entitled to three times his lost profits. Most often, however, problems of proof would preclude recovery, since the plaintiff must be able to establish both his relative share of the market in comparison to the defendant's and the extent to which the defendant's sales at lower prices resulted in decreased profits. Such an effort would only be worthwhile when the amount of lost profits was high. The plaintiff committed to this mode of action would attempt to apply an antitrust-type measure of damages. *See Hearings on Criminal Laws* 328-31.

In many cases, the size of the recovery will simply reflect a measure of threefold the wholesale value of the stolen goods, a direct application of the conversion market value formula. *See* authorities cited note 471 *supra*. Currently, once a loss has occurred, the prevailing practice is for the shipper to file a claim with his insurer. The insurer pays the claim and then proceeds against the carrier or the carrier's insurance company. The matter is then settled by these parties, by court action or otherwise. Under the treble damages approach, any of these parties—the shipper, his insurer, the carrier, or its insurance company—depending on which one incurs the ultimate loss, could sue the receiver on a conversion theory. The shipper's right to sue would be based simply on its status as the owner of converted property. The right of the shipper's insurance company to sue would be based on traditional subrogation principles. *See generally* R. KEETON, *supra* note 482, § 3.10 (1971). If necessary, the carrier's right to sue could be based on his status as a bailor. *See* MCCORMICK ON DAMAGES, § 123, at 463-65; The Winkfield, Court of Appeal, 1901 [1902], at 42. Finally, his insurance company's right to sue could also be based on subrogation principles. In the event that the carrier's liability to the shipper is limited to a designated amount by law or by contract, the thief or criminal receiver would not be able to limit his liability to this amount, since well-established bailment principles hold that this is a matter strictly between the bailor and bailee. The Winkfield, Court of Appeal, 1901 [1902], at 42.

485. At least two potential measures of damages could be applied, depending on the statutory language. If the statute authorizes a recovery based on the value of the goods, and the law limits the defendant's liability merely to goods received rather

and fences to avoid the impact of the treble-damages provision by channeling the stolen merchandise through a large number of receivers. Thus, there would be little incentive to sue unless a substantial number of these receivers were located. One possible solution to this problem is to hold each receiver jointly and severally liable for the value of the entire shipment on proof it redistributed some of the stolen goods. Under this approach, a producer need only locate one large receiver with sufficient assets to satisfy a judgment. A drawback to such an approach, however, might be the apparent unfairness of imposing treble-damages liability on a receiver of only a small part of the total shipment.

The proposed statute attempts to provide the financial incentives needed to realize the deterrence value of private enforcement and yet minimize the inequities of excessive liability. For purposes of analysis, it is necessary to consider, on the one hand, receivers who purchase stolen property for personal consumption, and those who purchase for redistribution, and, on the other, receivers who both participate in the theft and redistribute the property. According to section 10 of the Model Act, receivers who purchase for personal consumption or redistribution, and who did not participate in the theft, are treated similarly: they are liable in treble damages for the value of the property actually received or redistributed. On the other hand, receivers who both participate in the theft and purchase for redistribution are liable for three times the value of the *total* amount stolen. These receivers are treated as joint tortfeasors with their thieves and are therefore jointly and severally liable for the entire theft.[486] One crucial determination for purposes of liability,

---

than all of the goods stolen, the measure of damages would be three times the value of the goods received. If the statute authorizes a recovery based on actual damages, but imposes liability only to the extent of goods received, the measure of damages would be based on the plaintiff's actual losses on a prorated basis reflecting the defendant's proportionate share of responsibility for the victim's damages. Either formulation based on limited liability is so impractical, from a societal viewpoint, that no serious legislative consideration should be given to it. In the absence of a specific legislative directive authorizing such limited liability, the contrary legislative intent should be presumed. Anti-trust damages are joint. *See, e.g.*, Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference, 166 F. Supp. 163 (E.D. Pa. 1958), *revd. on other grounds*, 365 U.S. 127 (1961). A similar rule should be followed here. In addition, given the role played by receipt, particularly receipt for resale, it does not seem unreasonable to hold him who receives as a joint tortfeasor, for the full value of what was stolen, rather than merely for the part that was received. It would not be necessary to apportion damages among joint tortfeasors. W. PROSSER, *supra* note 473, § 52, at 314. Here, it is only necessary to conceptualize the tort as "theft-receipt" rather than "receipt" to achieve this result. Clearly, this is the better view both economically and legally.

486. *See* W. PROSSER, *supra* note 473, § 46, at 291-92. The traditional rule was that there could not be contribution between joint tortfeasors. *Id.* § 50, at 306.

therefore, is whether the receiver "initiates, organizes, plans, finances, directs, manages, or supervises the theft."[487] A professional fence, however, may also be liable for the entire theft if he has established a working relationship with the thieves, even though he was unaware of the particular theft beforehand. This aspect of civil liability under the Model Act recognizes that as a practical matter an established fencing relationship is an incentive for theft. Hence, it follows that if the thief and receiver deal at "arm's length," the fence will not be liable for the entire theft. This would be the case for a legitimate businessman who only infrequently trades in stolen goods and never has an interest in a particular theft.

If the model statute is enacted, the prospect of treble-damages recovery and corresponding large legal fees will probably spur the growth of a substantial body of private attorneys specializing in plaintiffs' fencing claims, similar to the growth of plaintiffs' antitrust attorneys. A private fencing bar may develop improved litigation and investigation techniques and thereby help facilitate enforcement of the fencing laws. By the same token, plaintiffs' attorneys may supply law enforcement officials with information to help convict receivers in the hope of benefiting by collateral estoppel from a criminal prosecution. While law enforcement officials might not be as able or as willing to reciprocate with valuable information until they have successfully prosecuted the defendants, the evidence should eventually be turned over in the interest of achieving maximum deterrence,[488] as is frequently done by the Justice Department after an investigation into criminal antitrust violations. Ultimately, once the full deterrent effect of this dual approach to the problem of theft and fencing is recognized, prosecutors will probably routinely name retail and wholesale businesses in prosecutions for receiving, even if their successful prosecution may not be possible, since merely list-

---

Among conscious wrongdoers, the law would not help the parties share the damages. *Id.* § 46, at 291-92. A full recovery, for example, for treble damages against one department store for the entire value of a theft would obviously end the matter. Yet it seems clear that the others who received part of the goods stolen should be given an incentive not to participate in the trade in stolen property. Suit by the first store against the others would provide the extra push that is needed. Consequently, here, if not elsewhere, the "no contribution" rule should be relaxed.

487. *See* MODEL THEFT AND FENCING ACT § 4(a)(2), Appendix B.

488. Since a lower burden of proof governs civil cases, note 477 *supra*, prosecutors may turn materials over to private parties at an early stage, because a criminal conviction may be too difficult to attain under the beyond-a-reasonable-doubt standard. Such material is not always easy to uncover, even by public bodies. *See* Application of State of California to Inspect Grand Jury Subpoenas, 195 F. Supp. 37 (E.D. Pa. 1961).

ing them will give private attorneys notice of their potential vulnerability to a civil suit.[489]

Realizing the potential benefits from private law enforcement, a few states have, in fact, recently enacted legislation that subjects criminal receivers to a civil liability for treble damages, court costs, and reasonable attorney's fees.[490] At the federal level, congressional enactment of title IX of the Organized Crime Control Act, which provides that any person or entity whose business is injured by so-called racketeer-inflenced organizations may recover treble damages, costs and fees,[491] indicates at least a preliminary acknowledgement of the role of civil suits in controlling serious crime problems. In addition to allowing treble damages, title IX authorizes the attorney general to institute civil proceedings for the purpose of obtaining injunctive relief against any act that violates the statute.[492] If necessary to restrain violations of this act, the court may order any person (or entity) "to divest himself of any interest . . . in any enterprise" and may prohibit any individual from engaging in any business activity that comes within the scope of the legislative prohibition.[493] The statute further provides that prior criminal convictions are to be given a collateral estoppel effect "in any subsequent civil proceedings brought by the United States."[494] Finally, to remove unduly burdensome jurisdictional and procedural constraints to civil actions by the attorney general, the statute contains liberal venue and subpoena-power provisions and permits nationwide service of process.[495]

---

489. *See* note 488 *supra*. The traditional practice of some prosecutors of securing the names of unindicted co-conspirators may present legal problems. *See* United States v. Briggs, 514 F.2d 794 (5th Cir. 1975) (beyond the power of the grand jury). It may be necessary in light of *Briggs* to name the unindicted person as "John Doe" and to reveal his name, if at all, only through the bill of particulars.

490. *See, e.g.*, CAL. PENAL CODE § 496 (West Supp. 1976). Arizona passed similar legislation providing for costs and fees, but only for a sum twofold the market value of the property. It is also not apparent whether the measure of loss in Arizona is limited to those stolen goods actually received by the defendant, or whether liability extends to the entire stolen shipment. ARIZ. REV. STAT. ANN. § 13-621B (Supp. 1975).

Some states have authorized the recovery of damages without providing any treble damage incentive to sue. *See, e.g.*, N.C. GEN. STAT. § 99A-1 (Supp. 1975); Note, *Torts—Recovery of Damages for Interference with Property Rights Under G.S. 99A-1*, 10 WAKE FOREST L. REV. 340 (1974).

491. 18 U.S.C. §§ 1961-68 (1970). *See* King v. Veseo, 342 F. Supp. 120 (N.D. Cal. 1972).

492. 18 U.S.C. § 1964(a)(b) (1970). *See* United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974) (constitutionality upheld).

493. 18 U.S.C. § 1964(a) (1970).

494. 18 U.S.C. § 1964(d) (1970).

495. 18 U.S.C. § 1965 (1970).

Title IX, however, is primarily concerned with curbing the infiltration of legitimate businesses by organized crime.[496] Consequently, any derivative civil attack on fencing activity under this statute can be accomplished only in an oblique manner.[497] Nevertheless, the statute's extensive substantive and procedural provisions for civil relief have provided a basic model for recent congressional proposals designed to deal more directly with the problem of theft and fencing.[498]

Prior to the drafting of S.1, a bill called S.13 was introduced in an attempt to amend both 18 U.S.C. § 1964, the civil remedies section of title IX, and 18 U.S.C. § 659, the most commonly used federal anti-fencing provision.[499] The bill proposed that section 1964 retain its basic provisions authorizing treble damages and appropriate judicial relief to prevent violations of title IX, and that section 659 be amended to provide treble damages recovery and injunctive relief and include liberal venue and process procedures.[500] Other proposed amendments to both sections would have allowed the federal government to sue for actual damages whenever it has been "injured in its business or property by reason of any [statutory] violation;"[501] permitted the attorney general to "intervene in any [privately initiated] civil action or proceeding" that he considers to be of "general public importance;"[502] authorized private injunctive relief, including divestiture, "to prevent and restrain violations" of either sec-

496. Despite this principal orientation, neither the civil nor the criminal provisions of this legislation are limited to the infiltration of legitimate business by organized crime. Notwithstanding a recent federal decision to the contrary, Barr v. WUI/TAS, Inc., 66 F.R.D. 109 (S.D.N.Y. 1975) (limited to organized crime), these provisions encompass "any person" who comes within their prohibition. *See* United States v. Campanole, 518 F.2d 352, 363 (9th Cir. 1975) (not limited to organized crime). This is why the term "person" was so broadly defined. *See* 18 U.S.C. § 1961(3) (1970). *See* United States v. Altese, 19 CRIM. L. RPTR. 2319 (2d Cir. July 21, 1976) (not limited to legitimate business).

497. 18 U.S.C. § 1962 (1970) (emphasis added) makes it unlawful for any person, through a *pattern of racketeering activity* or any income derived therefrom, to acquire any interest or control of any enterprise engaged in interstate commerce. Racketeering activity is defined to include any conduct that is indictable under three federal statutes dealing with theft and fencing. *See* 18 U.S.C. § 1961(1) (1970). *See generally* note 185 *supra*. " '[P]attern of racketeering activity' requires at least two acts of racketeering activity . . ." within a ten-year period. 18 U.S.C.A. § 1961 (5) (1970).

498. For example, the treble damage concept is embodied in S.2221, 94th Cong., 1st Sess. (1975). *See* 121 CONG. REC. S14383 (daily ed. July 30, 1975).

499. S.13, 93d Cong., 1st Sess. (1973). *See Hearings on Criminal Laws* 323-36 (comparing S.13 and antitrust laws).

500. S.13, 93d Cong., 1st Sess. §§ 1, 2(e), (f), (i), (j), (k), (l) (1973).

501. S.13, 93d Cong., 1st Sess. §§ 1(d), 2(h) (1973).

502. S.13, 93d Cong., 1st Sess. §§ 1(f), 2(n) (1973).

tion;[503] and given collateral estoppel effect to previous criminal convictions of defendant in civil actions instituted by private parties.[504] Nevertheless, because of inaction by the House Committee on the Judiciary, S.13 never became law despite unanimous approval by the Senate.[505]

The proposals contained in S.13 are potentially important means for controlling criminal activity through civil litigation, and they have been adopted in modified form by the Model Act.[506] The availability of injunctive relief to "any person"[507] threatened by theft activity, for example, would allow businesses to take steps to avoid theft. Thus, under the broad language of these amendments, shippers could conceivably obtain injunctions requiring carriers to take appropriate security measures against theft, and carriers could seek injunctive relief directing shippers to identify their goods with appropriate markings.[508] Although S.1 would authorize injunctive relief upon petition by the attorney general, as well as the recovery of treble damages, costs, and fees by victims of crime, neither the four amendments contained in S.13, nor the proposed extension of procedural benefits to private parties suing under section 659, are contained in the new proposal.[509] The failure to give collateral estoppel effect to criminal convictions in private litigation and to provide for private injunctive relief may not be of major significance since they are arguably available under the present common law.[510] But the failure

503. S.13, 93d Cong., 1st Sess. § 2(e) (1973).

504. S.13, 93d Cong., 1st Sess. §§ 1(g), 2(o) (1973).

505. S.13, 93d Cong., 1st Sess. (1973) (119 CONG. REC. 10319 (1973)).

506. *See* MODEL THEFT AND FENCING ACT §§ 9, 11(a), 11(b), Appendix B.

507. *See* MODEL THEFT AND FENCING ACT § 9(c), Appendix B.

508. In seeking injunctive relief, both the carrier and the shipper would base their arguments on parallel grounds. The shipper would argue that his business could not survive if his goods could not be shipped. Since there are only a limited number of carriers, all of whom have demonstrated their failure to take adequate security precautions, the court should require that appropriate precautionary measures be taken as a condition of doing business. Similarly, the carrier seeking injunctive relief would argue that since he is required to accept all goods delivered to him for shipment, the court should require proper packaging and identification as a condition for any shipper doing business with the carrier.

509. S.13, 93d Cong., 1st Sess. § 4101 (1973).

510. For a discussion of the current common law with respect to the collateral estoppel effect of issues decided in a prior criminal case, see note 481 *supra*. Whether there is a right to private injunctive relief in this context is not clear. A well-established rule is that equity will not enjoin criminal conduct. D. DOBBS, *supra* note 471, at 115-16. This reluctance was based on the theory that an adequate remedy was available at law in the form of a criminal prosecution, and that an injunction, enforceable by contempt, will usually be granted only after a nonjury trial. *Id.* at 117-18. An early exception developed in both public and private nuisance cases "where a plaintiff sought to enjoin a crime that invaded his *property* interest." *Id.* at 116 (emphasis added). When a public nuisance was involved, plaintiff had stand-

to extend liberal venue and process rules to private parties will inevitably hamper their litigation efforts.

III. Conclusion: Basic Tactics and Strategy for Law Enforcement

Successful control of crimes against property ultimately requires a realization that the redistribution of stolen property is not a victimless white-coilar crime.[511] Current misunderstandings concerning the impact of theft and fencing understandably reflect the same shortsighted economic view of receiving long conspicuous in our substantive laws. The private business sector must voluntarily undertake reforms on an industry-wide basis to supplement public enforcement efforts,[512] and consumers must not remain indifferent to the

---

ing to sue only if he could demonstrate "special damage, in addition to that suffered by the public at large." Note, *Equitable Devices for Controlling Organized Vice*, 48 J. Crim. L.C. & P.S. 623, 627 (1958). Today, injunctions against crime seem to be granted whenever the court is willing to characterize the conduct as a nuisance. D. Dobbs, *supra* note 471, at 116. Since there has been no hesitancy in allowing the state to enjoin the operation of houses of gambling and prostitution, it would seem that a private citizen asserting special damages to a property interest could similarly obtain injunctive relief against such a public nuisance. *See* Note, *supra*, at 624-27. By characterizing fencing activity as a public nuisance, it would not be inappropriate for a court, drawing an analogy between fencing and a continuous trespass, to enjoin this type of conduct. *See generally* D. Dobbs, *supra* note 471, at 59-60, 348-49.

In the case of a shipper seeking an injunction against a carrier, or vice versa, the case for private injunctive relief is even stronger, since the court would not be enjoining the commission of a criminal act, but, rather, would be prohibiting conduct that *facilitates* the commission of theft and fencing activity. The party subject to the injunction obviously would not be a criminal defendant; he would be a shipper, or a carrier who is responsible for transporting the goods. Note that in either case, adequate relief might not be available at law, since stolen goods are often impossible to locate or identify. In the absence of proper identification, criminal prosecutions are doomed to failure and civil relief will not be available. *See* notes 226-34 *supra* and accompanying text.

511. *See* Report, The Impact of Crime 28. The public may tend to view the fence as "providing a much-needed social service for the hard-pressed consumer." Chappell & Walsh, *Receiving Stolen Property* 492. *See* notes 45-47, 49 *supra* and accompanying text. Expressions of public approval, demonstrated by the consumer's continued willingness to buy stolen goods, have caused at least some fences to view their activity as a victimless crime. *See* C. Klockars, *supra* note 12, at 147-50.

512. For example, recent Senate committee hearings, investigating criminal fencing systems, elicited the following observation:

> No greater truism has been highlighted in this committee's extensive hearings on cargo theft and fencing than the fact that law enforcement working alone cannot get the job done in this area of crime. The transportation industry must assume the responsibility for preventing thefts and accounting for the goods left in its care for transfer. Without industry's help, law enforcement's job of apprehending and successfully prosecuting thieves—not to mention the fences who induce and encourage thievery—is a most difficult task at best.

Report, The Impact of Crime 12.

Appropriate industry reforms should be initiated in at least the following areas: hiring practices, personnel policies, packaging techniques, cargo verification procedures, inventory control, accounting and bookkeeping, employee supervision, and

economic consequences of their illegal purchases.[513]

Legislatures should assume responsibility for encouraging new attitudes[514] and give private citizens a significant financial stake in detecting and reporting fencing activity. Thus, a modernization of our fencing laws to recognize that redistribution systems operate on traditional economic principles and vary considerably in sophistication and impact is a prerequisite to more effective control of modern theft and fencing operations.

Nevertheless, legislative reform alone will not guarantee success because these reforms, however well-designed, will have to be properly implemented. For instance, since fencing is now to a significant extent an interstate crime, effective investigations require increased cooperation between federal and state enforcement agencies.[515] More fundamentally, however, law enforcement agencies must restructure their priorities so that emphasis is placed on convicting the fence rather than the thief. This will frequently mean granting so-called use immunity to thieves in order to gather incriminating evidence against major fences. Additionally, law enforcement agencies must assign different priorities to the different types of receivers. No special effort should be made against neighborhood fences, since their economic impact is relatively slight and they are often detected in the course of other investigations anyway. Master fences have the gravest consequences for our society, but they are by far the most

---

physical plant security. A detailed discussion of security-oriented proposals for industry-wide adoption is beyond the scope of this study. Nevertheless, extensive recommendations have been made for the transportation and securities industries. *See* CARGO THEFT AND ORGANIZED CRIME 43-61; Dept. of Justice Release, Suggestions by the Dept. of Justice for Safe Handling of Marketable Securities by Financial Institutions, Including Hints for Detecting Counterfeit, Forged, Worthless, and Spurious Securities (Dec. 23, 1974); A REPORT TO THE PRESIDENT ON THE NATIONAL CARGO SECURITY PROGRAM 4-6 (1976).

To the extent that industry is unwilling to implement the necessary reforms, legislative consideration should be given to establishing administrative controls. Compliance with administrative regulations could be made a condition of doing business. On the federal level, agencies currently regulating the transportation industry and the security field provide an existing structure from which controls could be imposed.

513. *But see* C. KLOCKARS, *supra* note 12, at 150.

514. Gallup Polls have repeatedly indicated that Americans consider crime one of the most important national problems, even more important than economic issues. *See, e.g.*, Richmond Times Dispatch, July 27, 1975, at A-20, col. 1 (number one). Political leadership seems unable to translate that concern into more effective crime control programs. For a number of concrete proposals, see J. WILSON, THINKING ABOUT CRIME (1975).

515. "[F]ences . . . are no respectors of boundaries established by local and State criminal justice agencies. Vast amounts of stolen property are regularly transported across State and even National borders . . . as part of a redistribution system developed by fences." REPORT, THE IMPACT OF CRIME 11. *See* Chappell & Walsh, "*No Questions Asked*" 167. The National Wiretap Commission called for such cooperation. WIRETAP REPORT 6.

difficult to convict. To gather the evidence necessary to convict these receivers, police must frequently employ extensive undercover and electronic surveillance operations. As a practical matter, therefore, enforcement efforts are best directed at professional fences since their apparently legitimate operations can be pierced relatively easily with the help of informants and with electronic surveillance.[516] Preliminary investigation is obviously needed to obtain the probable cause required for a court order authorizing electronic surveillance, but this should not be a major barrier because professional receivers lack the protective insulation of master fences. Concentrating on professional fences also should result in the apprehension of their suppliers, who are themselves a potentially valuable source of information about other fences. Consequently, by establishing priorities along these lines, authorities can employ their limited resources in the most efficient manner.

This review of the history and development of theft and fencing has documented the need for reform in the substantive law and in law enforcement practices. The current state of the law is simply not equipped to cope with a problem that is already extremely serious, and that can only get worse. America has too much crime of all kinds. It is time that action be taken to control it. What needs to be done is relatively clear. All that stands in the way of reform is political will.

---

516. A "bug," rather than a wiretap, should be used because the professional fence usually conducts his illegal transactions on a person-to-person basis in his store. the telephone is not as frequently used for fencing matters.

APPENDIX A
Analysis of Uniform Crime Reports Statistics: Stolen and Recovered Property 1960-75

For a number of years, the Federal Bureau of Investigation (F.B.I.) has collected, on a limited basis, statistics on the amount of property stolen and recovered annually. This information, however, has apparently never been comprehensively analyzed. This appendix, based on F.B.I. statistics for the years 1960 through 1975,[1] attempts to identify the major trends in the incidence of crimes against property and to evaluate the effectiveness of existing law enforcement efforts to recover stolen property.

The F.B.I. statistics analyzed in this appendix were collected each year from various local and state law enforcement agencies.[2] Six categories of statistics are reported: clothing, currency, fur, jewelry and precious metals, locally stolen automobiles, and "miscellaneous." The "miscellaneous" category includes all property not included in the other categories, such as office equipment, televisions, radios, stereophonic equipment, firearms, household goods, consumable goods, and livestock.

For purposes of this appendix, the statistics have been grouped into three broad categories: (1) automobiles; (2) miscellaneous; and (3) "all other," which includes clothing, furs, currency, and jewelry. To facilitate comparison of yearly figures, the absolute dollar amounts first have been adjusted to report the dollar value per 100 persons, in order to account for increases in population, and then converted into "constant 1960 dollars" to account for inflation.[3] Where appropriate, however, values are

---

* The assistance of Mr. Gregory Baldwin (J.D. 1975, Cornell Law School), Mr. Robert Elmore (J.D. 1975, Cornell Law School), Mr. William Waller (J.D. 1976, Cornell Law School) and Mr. Mark Sargent (Cornell Law School) in the preparation of this appendix is hereby acknowledged.

1. These statistics are reported annually by the F.B.I. in its series of Uniform Crime Reports under the title CRIME IN THE UNITED STATES (as part of the Uniform Crime Reporting Program which was initiated in 1930). All figures are taken from the table, entitled "Type and Value of Property Stolen and Recovered."

2. During the fifteen year period under study, the number of local enforcement agencies reporting to the F.B.I. increased significantly. In 1960, reporting agencies represented a population base of only 120.8 million people; by 1975, this population base had increased to 162.4 million. Before 1969, only statistics from cities with a population of at least 25,000 were reported, but the F.B.I.'s yearly statistical reports since then have included data from cities of at least 2,500 persons. It is also possible to use these F.B.I. data to estimate a total crime against property figures. The population for the United States in 1974 was, for example, 211.9 million people. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1975 Table No. 2, at 5 (U.S. Bureau of the Census, 95th ed. 1974). This projects to a total figure of $336,285,300. It is less than the estimate employed by the Department of Commerce. *See* note 32 *supra.* Its estimate included more factors. F.B.I. figures are limited to index offenses (burglary, robbery, larceny over $50, and auto theft); the Commerce Department made an effort to be comprehensive. Finally, it is recognized that the F.B.I. figures are subject to substantial understatement. *See* Appendix A, note 4 *infra.*

3. These factors were derived from the information pertaining to consumer prices reflected in U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1975, at 414 (96th ed. 1975) (Purchasing Power of the Dollar: 1940 to 1975, Table No. 678).

quoted in both "current 1975 dollars," that is, dollar amounts *not* adjusted to reflect inflation, and "constant 1960 dollars."

A. *The Statistics Presented*

Graph 1 and tables 1 and 2 report that the current 1975 dollar value of property stolen per 100 persons rose from 502 dollars in 1960 to 1979 dollars in 1975, an increase of approximately 294 per cent. Measured in terms of constant 1960 dollars, the value of property stolen per 100 persons increased from 502 dollars to 1061 dollars, or approximately 111 per cent. Table 3 gives percentage composition of total goods stolen.

The increase in the value of stolen property reflects an across-the-board increase in all three categories reported in tables 1 and 2. Very significantly, however, the data in table 2 show the increase in the value of miscellaneous items stolen was by far the most pronounced. The value of miscellaneous property stolen in constant dollars per 100 people increased from 112 dollars to 435 dollars, or 288 per cent, during the fifteen year period. In sharp contrast, the increases in the value of stolen automobiles and "all other" items were, respectively, 60 per cent and 59 per cent.

Table 4 represents the percentage of stolen property recovered during the fifteen-year period. It shows a decline from 52.4 per cent to 29.9 per cent. Between 1960 and 1966, however, the recovery rate actually increased to a high of 55 per cent; but since then the rate has dropped by an average of more than 2.5 per cent per year.

Table 5 illustrates that the relative composition of stolen property recovered has remained remarkably similar. In 1960, automobiles accounted for 87 per cent of stolen property recovered, miscellaneous items accounted for 8.3 per cent, and "all other" property accounted for 4.7 per cent. In 1975, these percentages were 77.3 per cent for autos, 16.6 per cent for miscellaneous, and 6.1 per cent for "all other" property stolen.

B. *Observations*[4]

(1) There is a high correlation between increases and decreases in the value of miscellaneous property stolen and increases and decreases in

4. When analyzing this material, several factors necessarily qualify any conclusions. First, it can safely be assumed that since 1960 improvements in crime detection techniques and in the collection of statistics are responsible for some part of the apparent increase in crime, although the F.B.I. has tried to minimize this factor. Second, since F.B.I. figures necessarily reflect only those crimes that are actually reported to law enforcement agencies, the data used are not completely accurate indicators of the incidence of particular crimes. Recently, the Law Enforcement Assistance Administration and the Bureau of the Census have endeavored to calculate the extent of unreported crime, but until their work is completed and carefully analyzed it must be assumed that the theft of personal property is one area where this phenomenon is most apparent. *See* CRIMINAL VICTIMIZATION: SURVEYS IN 13 AMERICAN CITIES (U.S. Dept. of Justice: LEAA 1975). The rate of reported crime in Boston was, for example, robbery, 33 per cent; theft, 28 per cent, burglary, 56 per cent; and auto theft, 68 per cent. *Id.* at 22. Finally, statistics are gathered from only the most heavily populated and highest crime areas. This means the results may overstate theft rates and understate recovery rates.

the total value of property stolen. This correlation is most dramatically revealed by the data since 1966, which shows that a sharp rise in the theft rate for miscellaneous property accounts for a substantial, simultaneous increase in the overall property theft rate.

(2) By 1973, the value of miscellaneous property stolen was almost as large as the value of automobiles stolen. This is a significant reversal of a trend observable in the first half of the period studied, when the value of automobiles stolen was approximately twice as large as the value of miscellaneous items stolen. Significantly, this reversal may be largely explained by the very rapid increase in the theft of miscellaneous items.

(3) The recovery rate was constant until 1966, when it began to drop significantly. This continuous decline in the recovery rate during 1967-1975 coincides with the sharply increasing theft of miscellaneous property stolen.

(4) Despite the changes in the composition of stolen property between 1960 and 1975, the composition of property recovered has remained relatively similar. The primary explanation for this difference is the inability of law enforcement agencies to recover a substantially greater amount of stolen miscellaneous and other property even though thefts of this type of property have increased significantly.

(5) The recovery of automobiles consistently accounts for the greatest percentage of recovered property. The relative success of police in recovering stolen automobiles, however, is a misleading indicator of the ability of authorities to deal with theft for resale purposes. Very few automobiles are in fact taken with an intent permanently to deprive their owners of possession, and F.B.I. statistics include automobiles taken by joyriders or other persons needing quick, temporary transportation. After a brief time, these vehicles are abandoned and recovered. Further, stolen automobiles cannot be easily concealed because of their size; cannot be easily legitimized because they are required by statute to be marked with several permanent serial numbers; and can be relatively easily identified because they must be registered with state agencies and because there exists a national system to identify and recover stolen vehicles.[5]

(6) The theft of miscellaneous and other property is a better indicator of the incidence of theft for resale. The sudden upsurge in the theft of these items is undoubtedly the result of many factors.[6] Unlike automobiles, most miscellaneous and other items are small and therefore easy to conceal and to transport; most are not marked with serial numbers and therefore can be easily legitimized and resold without detection. Further, most of these kinds of thefts are not reported to the National Crime Information Center.

5. These observations are not meant to underrate the increasing problem of auto theft for profit. Statistics indicate that only 62 per cent of the cars stolen in 1975 were recovered, whereas more than 90 per cent were recovered in 1960. The sharp decrease in percentage of recovered stolen autos would seem to be related largely to two factors: the smaller percentage of joy ride thefts that has accompanied the installation of wheel locks and the growing practice of theft by professionals of autos for stripping that has accompanied the use of computer assisted auto part sales.

6. Of course, different factors will not affect all items (*e.g.*, firearms, stereo equipment, etc.) in the same way.

Table 1

Stolen Property in Dollars per 100 People in Current Dollars

Year	Total	Auto	Misc.	All Other
1960	502	246	112	144
1961	508	249	112	147
1962	535	267	124	144
1963	679	346	159	174
1964	824	445	190	189
1965	840	445	190	205
1966	831	457	190	184
1967	991	535	276	180
1968	1152	588	305	259
1969	1287	656	375	256
1970	1356	637	445	275
1971	1483	653	525	305
1972	1349	588	490	271
1973	1375	558	549	268
1974	1587	579	664	344
1975	1979	737	812	428

Table 2

Stolen Property in Dollars per 100 People in Constant "1960" Dollars

Year	Total	Auto	Misc.	All Other
1960	502	246	112	144
1961	503	247	111	146
1962	524	262	121	141
1963	657	335	154	168
1964	787	425	181	180
1965	789	418	178	192
1966	759	417	173	168
1967	879	475	245	160
1968	981	501	260	221
1969	1040	530	303	207
1970	1035	486	340	209
1971	1084	477	384	223
1972	956	417	344	192
1973	917	372	366	179
1974	952	347	398	206
1975	1061	395	435	229

Table 3

Percentage Composition of Total Goods Stolen

Year	Auto	Misc.	All Other
1960	49.0	22.4	28.6
1961	49.0	22.4	28.6
1962	50.0	27.0	28.0
1963	51.0	23.5	25.5
1964	54.0	23.5	22.5
1965	52.0	23.1	24.0
1966	55.3	23.7	21.0
1967	53.5	25.1	21.4
1968	51.2	27.3	21.5
1969	51.0	28.9	20.1
1970	47.4	32.6	20.0
1971	44.3	35.6	20.1
1972	43.1	36.4	20.5
1973	40.6	39.9	19.5
1974	36.5	41.8	21.7
1975	37.3	41.1	21.6

Table 4

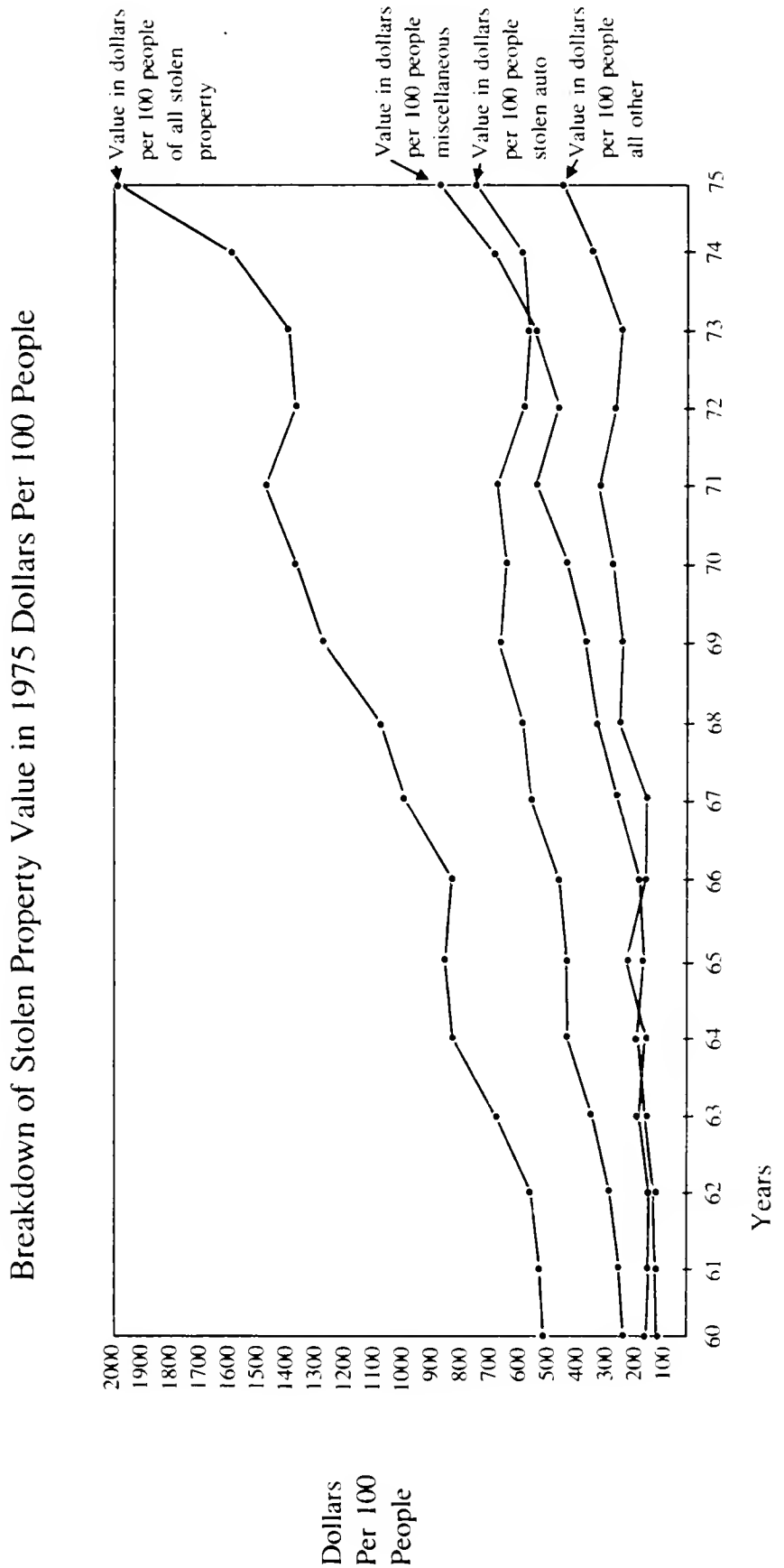
Yearly Percentages of the Total Recovery of Stolen Property

Year	%	Year	%	Year	%
1960	52.4	1965	52.0	1970	42.0
1961	52.0	1966	55.0	1971	39.0
1962	51.0	1967	51.0	1972	38.0
1963	54.0	1968	50.0	1973	37.0
1964	52.0	1969	47.0	1974	31.0
				1975	29.9

Table 5

Percentage Composition of Total Goods Recovered

Year	% Auto	% Misc.	% All Other
1960	87.0	8.3	4.7
1961	87.0	8.6	4.4
1962	88.0	7.6	4.4
1963	86.0	9.7	4.3
1964	89.0	7.3	3.7
1965	89.0	6.8	4.2
1966	89.0	6.9	4.1
1967	90.0	6.4	3.6
1968	89.0	6.6	4.4
1969	88.0	8.0	4.0
1970	87.0	8.8	4.2
1971	84.0	11.2	4.8
1972	84.0	10.7	5.3
1973	79.6	14.6	5.8
1974	76.5	17.2	6.2
1975	77.3	16.6	6.1


Breakdown of Stolen Property Value in 1975 Dollars Per 100 People
Value in dollars per 100 people of all stolen property
Value in dollars per 100 people miscellaneous
Value in dollars per 100 people stolen auto
Value in dollars per 100 people all other
Dollars Per 100 People
2000
1900
1800
1700
1600
1500
1400
1300
1200
1100
1000
900
800
700
600
500
400
300
200
100
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
Years

APPENDIX B

MODEL THEFT AND FENCING ACT[1]

[Insert appropriate enacting clause].

[Statement of Purpose and Intent]

[It is the purpose of this Act to curtail theft and dealing in stolen property through the imposition of appropriate criminal sanctions and the provision of suitable civil remedies.]

[It is intended that this Act be construed neither strictly nor liberally, but in light of its purpose, and that its moderate sanctions be fully utilized.] Sec. 1 [Short Title] This Act shall be known and may be cited as the "Theft and Fencing Control Act of [insert date]."

Part A

Sec. 2 [Theft]

(a) [Offense] A person is guilty of theft if he obtains or uses [, or endeavors[2] to obtain or use,] the property of another, with intent:[3]

(1) to deprive the other person of a right to the property or a benefit of the property; or

(2) to appropriate the property to his own use or to the use of another person.

(b) [Grading] A person who commits theft:

(1) shall be fined not more than $10,000 or imprisoned not more than 10 years, or both, if the property stolen has a value in excess of $100,000;

(2) shall be fined not more than $5,000, or imprisoned not more than 5 years, or both, if the property stolen has a value in excess of $500 but not more than $100,000 or, regardless of its value, the property consists of:

(i) a firearm, ammunition, or a deadly weapon;

(ii) a vehicle, except as provided in subsection (b)(4);

(3) shall be fined not more than $1,000, or imprisoned not more than one year, or both, if the property stolen has a value in excess of $100 but not more than $500; or

(4) shall be fined not more than $500 or imprisoned not more than 6 months, or both, if:

(i) the property has a value of $100 or less; or

(ii) the property is an airplane, a motor vehicle or a vessel, the defendant is less than eighteen-years-old, and the defend-

---

1. The legislation proposed here in a slightly different form has been endorsed by the National Association of Attorneys General for inclusion in its program of recommended legislation.

2. The optional use of the word "endeavor" here and elsewhere in the Act avoids the incorporation of the common-law learning on impossibility. *See* United States v. Osborn, 385 U.S. 323 (1966).

3. Unless otherwise stated, the statute is drafted on the assumption that the state of mind requirement to be implied for conduct is "knowing" and for attendant circumstances is "recklessness." Compare MODEL PENAL CODE art. 2 (Proposed Official Draft 1962); S.1, ch. 3.

ant intended to deprive or appropriate the property only temporarily rather than permanently.[4]

Sec. 3 [Possession of Altered Property]

(a) [Offense] A person is guilty of possession of altered property if he is a dealer in property and he possesses property the identifying features of which, including serial numbers or labels, have been removed or in any fashion altered, without the consent of the manufacturer of the property.

(b) [Grading] A person who commits possession of altered property shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Sec. 4 [Dealing in Stolen Property]

(a) [Offense] A person is guilty of dealing in stolen property if he:

(1) traffics in [,or endeavors to traffic in,]; or

(2) initiates, organizes, plans, finances, directs, manages, or supervises the theft, and traffics in [, or endeavors to traffic in,] the property of another that has been stolen.

(b) [Grading] A person who deals in stolen property in violation of:

(1) subsection (a)(1) shall be fined not more than $10,000 or imprisoned not more than 10 years, or both; or

(2) subsection (a)(2) shall be fined not more than $15,000 or imprisoned not more than 15 years, or both.

Sec. 5 [Evidence]

(a) [Permissible inferences] In an action for theft or dealing in stolen property:

(1) Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property was aware of the risk[5] that it had been stolen or that the person in some way participated in its theft;

(2) Proof of the purchase or sale of stolen property at a price substantially below its fair market value, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property was aware of the risk that it had been stolen;

(3) Proof of the purchase or sale of stolen property by a dealer in property, out of the regular course of business, or without the usual indicia of ownership other than mere possession, unless satisfactorily explained, gives rise to an inference that the person buying or selling the property was aware of the risk that it had been stolen.

(b) [Accomplice Testimony] The testimony of an accomplice, if

---

4. Not all states key the grading of their conspiracy statutes to the substantive offense. Where conspiracy is a misdemeanor, it is recommended that a special felony level conspiracy provision be drafted. In addition, consideration should be given, if necessary, to abolishing any common-law rule that would make the receiver's conviction dependent upon the conviction of the thief.

5. On the constitutionality of this and other similar statutory presumptions, see Barnes v. United States, 412 U.S. 837 (1973), holding that a recent possession inference is constitutional.

believed beyond a reasonable doubt, is sufficient for a conviction for conduct constituting an offense in violation of this Act.[6]

Sec. 6 [Entrapment]

It does not constitute a defense to a prosecution for conduct constituting an offense in violation of this Act that:

(1) strategem or deception, including the use of an undercover operative or law enforcement officer, was employed;

(2) a facility or an opportunity to engage in such conduct, including offering for sale of property not stolen as if it were stolen, was provided; or

(3) mere solicitation that would not induce an ordinary law-abiding person to engage in such conduct was made by a law enforcement officer to gain evidence against a person predisposed to engage in such conduct.[7]

Sec. 7 [Definitions]

As used in this part:

(a) "dealer in property" means a person who buys and sells property as a business.

(b) "obtains or uses"[8] means any manner of:

(1) taking or exercising control over property;

(2) making an unauthorized use, disposition, or transfer of property; or

(3) obtaining property by fraud, and includes conduct previously known as theft, stealing, larceny, purloining, abstracting, embezzlement, misapplication, misappropriation, conversion, obtaining money or property by false pretenses, fraud, deception, and all other conduct similar in nature.

(c) "property" means anything of value, and includes:

(1) real property, including things growing on, affixed to, and found in land;

(2) tangible or intangible personal property, including rights, privileges, interests, and claims; or

(3) services.

(d) "property of another" means property in which a person has an interest upon which another person is not privileged to infringe without consent, whether or not the other person also has an interest in the property.

(e) "services" means anything of value resulting from a person's physical or mental labor or skill, or from the use, possession, or presence of property, and includes:

---

6. Some jurisdictions follow the rule that an accomplice's testimony in a theft or fencing prosecution must be corroborated to be sufficient for conviction. This provision should, if necessary, be included in the Act to preclude the application of this rule to prosecutions under this Act.

7. This provision guarantees that mistaken interpretations of the law will not frustrate legitimate law enforcement efforts to investigate the operations of professional fences.

8. The phrase is broad enough to cover the situation where property stolen in another jurisdiction is brought into a state. It would also include possession.

(1) repairs or improvements to property;

(2) professional services;

(3) private or public or government communication, transportation, power, water, or sanitation services;

(4) lodging accommodations; or

(5) admissions to places of exhibition or entertainment.

(f) "stolen property" means property that has been the subject of any criminally wrongful taking.

(g) "traffic" means:

(1) to sell, transfer, distribute, dispense or otherwise dispose of to another person;

(2) to buy, receive, possess, or obtain control of or use with intent to sell, transfer, distribute, dispense or otherwise dispose of to another person.

(h) "value" means value determined according to the following:

(1) Except as otherwise provided, value means the market value of the property at the time and place of the offense, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the offense.

(2) The value of a written instrument which does not have a readily ascertainable market value shall, in the case of an instrument such as a check, draft or promissory note, be deemed the amount due or collectible on it, and shall, in the case of any other instrument which creates, releases, discharges, or otherwise affects any valuable legal right, privilege or obligation, be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(3) The value of a trade secret that does not have a readily ascertainable market value shall be deemed any reasonable value representing the damage to the owner suffered by reason of losing an advantage over those who do not know of or use the trade secret.

(4) If the value of property cannot be ascertained beyond a reasonable doubt pursuant to the standards set forth above, the trier of fact may find the value to be not less than a certain amount, and if no such minimum value can be thus ascertained, the value shall be deemed to be an amount less than $500.

(5) Amounts of value involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.

Part B

Sec. 8 [Alternative Fine]

(a) [Twice Gain or Loss] In lieu of a fine otherwise authorized by law, a defendant who has been found guilty of conduct constituting an offense in violation of this Act through which he derived pecuniary value or by which he caused personal injury or property damage or other loss, may, upon motion of the [insert appropriate phrase] be sentenced to pay a fine that does not exceed twice the gross value gained or twice the gross

loss caused, whichever is the greater, plus the costs of investigation and prosecution.

(b) [Hearing] The court[9] shall hold a hearing to determine the amount of the fine to be imposed under subsection (a).

(c) [Pecuniary Value] As used in this section, "pecuniary value" means:

(1) anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; or

(2) any other property or service that has a value in excess of $100.

Part C: Injunctions and Damages

Sec. 9 [Injunctions]

(a) [General] In addition to what is otherwise authorized by law, the [insert appropriate phrase] shall have jurisdiction to prevent and restrain conduct constituting an offense in violation of this Act. The [insert appropriate phrase] may issue appropriate orders, including:

(1) ordering any person to divest himself of any interest in any organization;

(2) imposing reasonable restraints on the future conduct of any person, including making investments or prohibiting any person from engaging in the same type of organization involved in the offense; or

(3) ordering the dissolution or reorganization of any organization, making due provision for the rights of innocent persons.

(b) [Application by [insert appropriate phrase]] The [insert appropriate phrase] may institute proceedings under subsection (a). In any such proceeding, the [insert appropriate phrase] shall move as soon as practicable to a hearing and determination. Pending final determination, the [insert appropriate phrase] may at any time enter such restraining orders or prohibitions or take such other actions as are in the interest of justice.

(c) [Application by Private Party] Any person may institute a proceeding under subsection (a). In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits.

Sec. 10 [Damages]

(a) [Suit by the [insert appropriate phrase]] If the [insert appropriate phrase] is injured by reason of any conduct constituting an offense in violation of this Act, the [insert appropriate phrase] may bring a civil

9. Where jury sentencing is in effect, this clause would have to be altered.

action and recover damages as specified in subsection (c) and the cost of the action.

(b) [Suit by a Private Person] If a private person is injured by reason of any conduct constituting an offense in violation of this Act, the private person may bring a civil action and recover damages as specified in subsection (c), attorney's fees and costs of investigation and litigation, reasonably incurred.

(c) [Treble Damages] Damages recoverable in action brought under subsection (a) and (b) shall be threefold the actual damages sustained, and, where appropriate, punitive damages.

Sec. 11 [Procedure][10]

(a) [Intervention] The [insert appropriate phrase] may, upon timely application, intervene in any civil action or proceeding brought under this part if [insert appropriate phrase] certifies that in his opinion the action or proceeding is of general public importance. In such action or proceeding, the [insert appropriate phrase] shall be entitled to the same relief as if the [insert appropriate phrase] had instituted the action or proceeding.

(b) [Estoppel] A final judgment or decree rendered in favor of the [insert appropriate phrase] in any criminal action or proceeding under this Act shall estop the defendant in such action or proceeding in any subsequent civil action or proceeding under this Act as to all matters as to which such judgment or decree in such action or proceeding would be an estoppel as between the parties to it.

(c) [Limitations] No civil cause of action shall be brought under this Act more than five years after such action accrues. If a criminal prosecution, civil action or other proceeding is brought or intervened in by the [insert appropriate phrase] to punish, prevent or restrain any conduct constituting an offense in violation of this Act, the running of the period of limitations provided by this subsection with respect to any civil cause of action arising under this Act, which is based in whole or in part on any matter complained of in any such prosecution, action, or proceeding brought by the [insert appropriate phrase], shall be suspended during the pendency of such prosecution, action or proceeding and for two years following its termination.

Part D

Sec. 12 [General Provisions]

(a) [Severability Clause] [Insert appropriate severability clause.]

(b) [Amendments to Other Acts]

(1) [Immunity] [Whenever, in the judgment of [insert appropriate phrase], testimony or production of other evidence by any person in any criminal prosecution, civil action or other proceeding under this Act is necessary, such [insert appropriate phrase] may make application to [insert appropriate phrase] that the person be instructed to testify or produce evidence, and upon order of the [insert appropriate phrase], such person shall not be excused from testifying or otherwise producing evidence on

10. Consideration should be given to the breadth of the jurisdiction's long-arm statute to insure that out-of-state tortfeasors can be reached easily.

the ground that the testimony or evidence may tend to incriminate him, provided that no testimony or other evidence compelled under such order or any evidence directly or indirectly derived from such testimony or other evidence may be used against such person in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.][11]

(2) [Electronic Surveillance] [Insert, if necessary, an appropriate amendment to existing legislation authorizing electronic surveillance to provide for such surveillance in investigations and prosecutions under this Act.][12]

(c) [Repealers] [Insert appropriate repealers.]

(d) [Effective Date] [Insert effective date.]

---

11. Authorization to grant immunity is essential in complex fencing investigations. Existing legislation does not always make it available. If necessary, this provision should be included in the Act to remedy this defect. For a collection of the laws of the various states, see THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMM. ON THE OFFICE OF ATTORNEY GENERAL, ORGANIZED CRIME CONTROL LEGISLATION 140-48 (Jan. 1975).

12. Authorization to employ electronic surveillance is essential in complex fencing investigations. Existing legislation does not always make it clearly available. *See* THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *supra* Appendix B, note 11, at 34-36. While twenty-three states authorize electronic surveillance in specific instances, surveillance in fencing investigations may not be permitted in all situations. *See, e.g.*, FLA. STAT. ANN. § 934.07 (1974); ORE. REV. STAT. § 133.725(1)(a) (1975). Clarifying and authorizing legislation is needed.

REPORT TO THE CONGRESS

BY THE COMPTROLLER GENERAL OF THE UNITED STATES

War On Organized Crime Faltering--Federal Strike Forces Not Getting The Job Done

Department of Justice

Organized crime still flourishes, despite 10 years of work by Federal strike forces to combat it. Why?

--Consumer demand for organized crime's goods and services provide it with billions of dollars of income each year.

--Federal work against organized crime is not planned, organized, or directed efficiently.

--Most convictions obtained by strike forces have resulted in no prison sentences or sentences of less than 2 years.

The Department of Justice agrees that the Federal effort against organized crime can be better managed.

GGD 77-17

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-178611

To the President of the Senate and the Speaker of the House of Representatives

This report addresses the Federal effort to coordinate the fight against organized crime through the Department of Justice's strike forces and makes recommendations for improvement. Strike forces are located in areas of major organized crime activity and are composed primarily of representatives from Federal investigative agencies and attorneys of the Justice Department. Our report covers the operations of six strike forces located in Cleveland, Detroit, Los Angeles, New Orleans, Brooklyn, and Manhattan.

We made this review to determine the efficiency of the strike force program. Our review was made pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

Copies of this report are being sent to the Director, Office of Management and Budget, and to the heads of the departments and agencies directly involved in the strike force program.

[illegible]
Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

WAR ON ORGANIZED CRIME FALTERING--FEDERAL STRIKE FORCES NOT GETTING THE JOB DONE
Department of Justice

D I G E S T

Organized crime is a serious national problem. The Federal Government is making a special effort to combat it with 13 joint-agency strike forces around the country, whose goal is to launch a coordinated attack against this problem. This goal has not been accomplished. About $80 million is spent each year to investigate and prosecute organized crime figures. Although the Federal Government has made some progress in the organized crime fight, organized crime is still flourishing.

Elimination of organized crime will be difficult, if not impossible. But more could be done if Federal efforts were better planned, organized, directed, and executed.

The escalated war on organized crime began in 1966 when the President directed the Attorney General to develop a unified program against racketeering. The idea was to coordinate the resources of all Federal law enforcement agencies. In 1970 the National Council on Organized Crime was established to formulate a strategy for eliminating organized crime. The Council met for only 1 year and failed to formulate a strategy.

Work at strike forces in Cleveland, Detroit, Los Angeles, New Orleans, and New York (Brooklyn and Manhattan) showed that:

--The Government still has not developed a strategy to fight organized crime. (See p. 9.)

--There is no agreement on what organized crime is and, consequently, on precisely whom or what the Government is fighting. (See p. 8.)

--The strike forces have no statements of objectives or plans for achieving those objectives. (See p. 10.)

--Individual strike forces are hampered because the Justice attorneys-in-charge have no authority over participants from other agencies. (See p. 11.)

--No system exists for evaluating the effectiveness of the national effort or of individual strike forces. (See ch. 3.)

--A costly computerized organized crime intelligence system is, as the Department of Justice agrees, of dubious value. (See ch. 5.)

Strike forces have obtained numerous convictions; however, sentences generally have been light. At the strike forces reviewed, 52 percent of the sentences during a 4-year period did not call for confinement, and only 20 percent of the sentences were for 2 years or more. (See ch. 4.)

GAO presents detailed recommendations that point out the need to:

--Identify what and whom the strike forces are combating.

--Develop a national strategy for fighting organized crime.

--Centralize Federal efforts--give someone the responsibility and authority for developing plans and overseeing their implementation.

--Establish a system for evaluating the effectiveness of the national and individual strike force efforts.

The Department knows the program is in trouble. In a recent study it concluded that although the program had been in operation for nearly a decade, no one could seriously suggest that organized crime had been eliminated or even controlled. The Department of Justice therefore agrees that the Federal effort against organized crime can be better managed. (See app. VII.)

The Department stated that formulating a universally applicable and acceptable definition

of organized crime will be difficult, although necessary, because of the special purpose for which the strike forces were created. In practice, the work done by strike forces has been hampered by this problem of definition. Since strike forces were established for a special purpose, there is little reason why an acceptable definition cannot be agreed upon. (See p. 14.)

The Department also stated that it is making management changes to improve its program and that the National Council on Organized Crime, if convened as recommended by GAO, need not therefore undertake a management function. According to the Department, the Council should serve rather as a forum where general matters are discussed and where an overview of organized crime strategy is developed. (See p. 14.)

Because the Attorney General has the role of coordinating the fight against organized crime, the Department of Justice should continue to manage the strike force program. However, because the Council includes officials from all participating agencies, it could be the vehicle to bring about a more coordinated Federal effort. The Council could produce a clear statement on what is expected of the strike force program, set specific ways to most effectively meet program objectives, and establish the commitment of resources necessary from the agencies to carry out the program's objectives. (See pp. 14 and 15.)

The Department of Justice has been conducting its own review of the program since January 1976 and said that changes in managers of the Organized Crime and Racketeering Section and in the strike forces' operations respond to many of GAO's concerns.

Contents

ABBREVIATIONS

GAO	General Accounting Office
OCRS	Organized Crime and Racketeering Section
IRS	Internal Revenue Service

CHAPTER 1

INTRODUCTION

The President's Commission on Law Enforcement and Administration of Justice characterized organized crime as follows:

> "Organized crime is a society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activity in order to amass huge profits."

Organized crime affects the lives of millions of citizens and derives billions of dollars in illegal income annually from its activities. The Federal Government is currently spending about $80 million each year to investigate and prosecute organized crime figures and their associates.

To combat organized crime nationwide, the Attorney General created 18 Federal strike forces. In this report, our first on strike force activities, we reviewed six strike forces in Cleveland; Detroit; Los Angeles; New Orleans; and Brooklyn and Manhattan, New York. (See app. I.) Specifically, we discuss:

--How strike forces are organized and operated.

--The planning and direction of strike force efforts.

--The need to evaluate the program's success in reducing organized crime.

--The Department of Justice's organized crime intelligence system.

ORGANIZED CRIME IN THE UNITED STATES

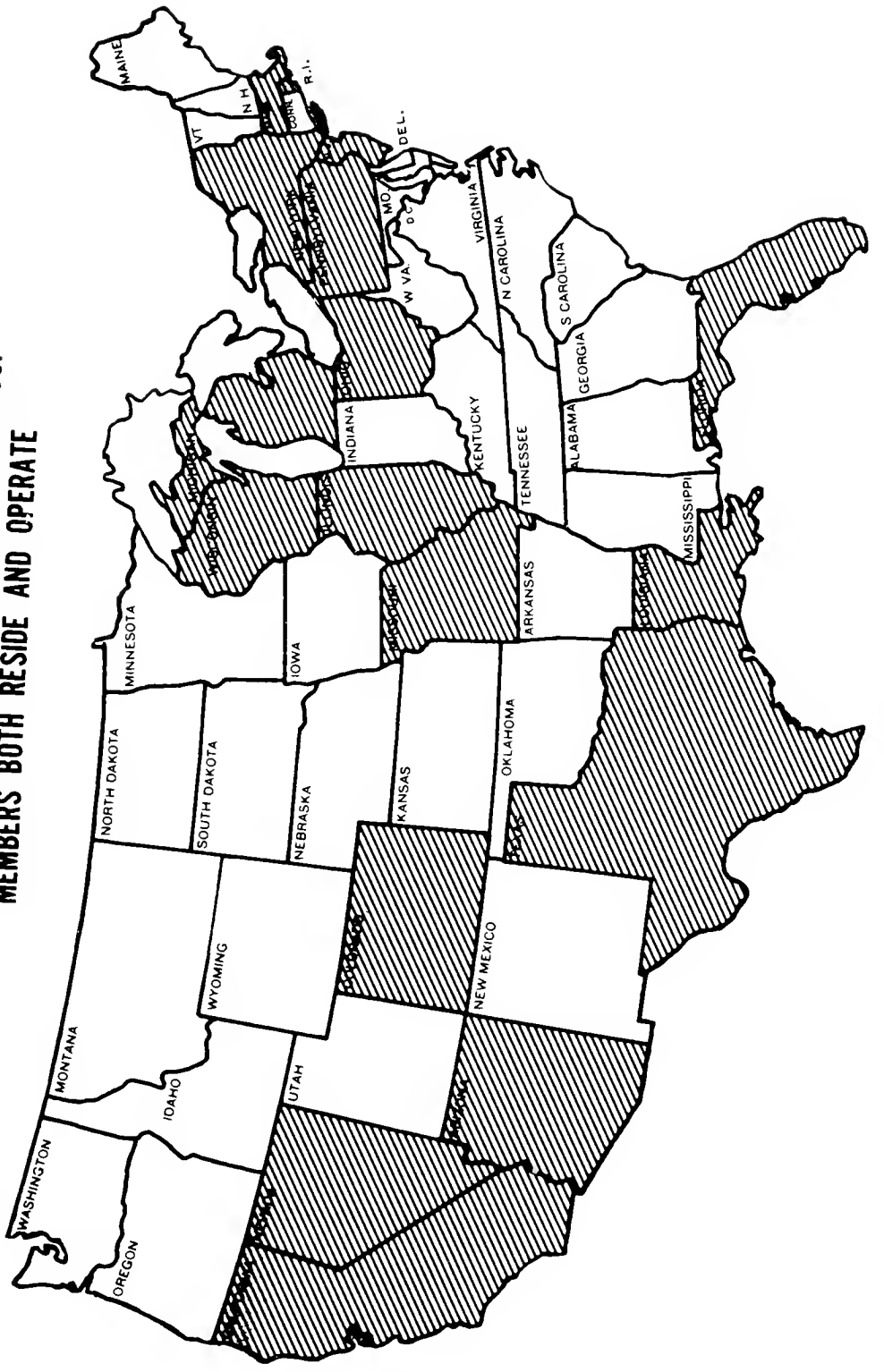
The Organized Crime Control Act of 1970 (Public Law 91-452) states that organized crime threatens the domestic security and undermines the general welfare of the Nation. Although exact figures are not available, the Department of Justice estimated that organized crime derives as much as $50 billion a year from gambling in addition to income from narcotics and loan sharking operations.

Income from organized crime is used to make inroads into legitimate business and labor unions. The President's Commission reported that organized crime uses illegitimate methods--monopolization, terrorism, extortion, and tax evasion--to drive out lawful ownership and leadership and to exact illegal profits from the public. To carry out its activities, organized crime often corrupts public officials. The Law Enforcement Assistance Administration reported that payments for corruption probably represent the largest single expense of organized crime, and without corruption organized crime could not exist.

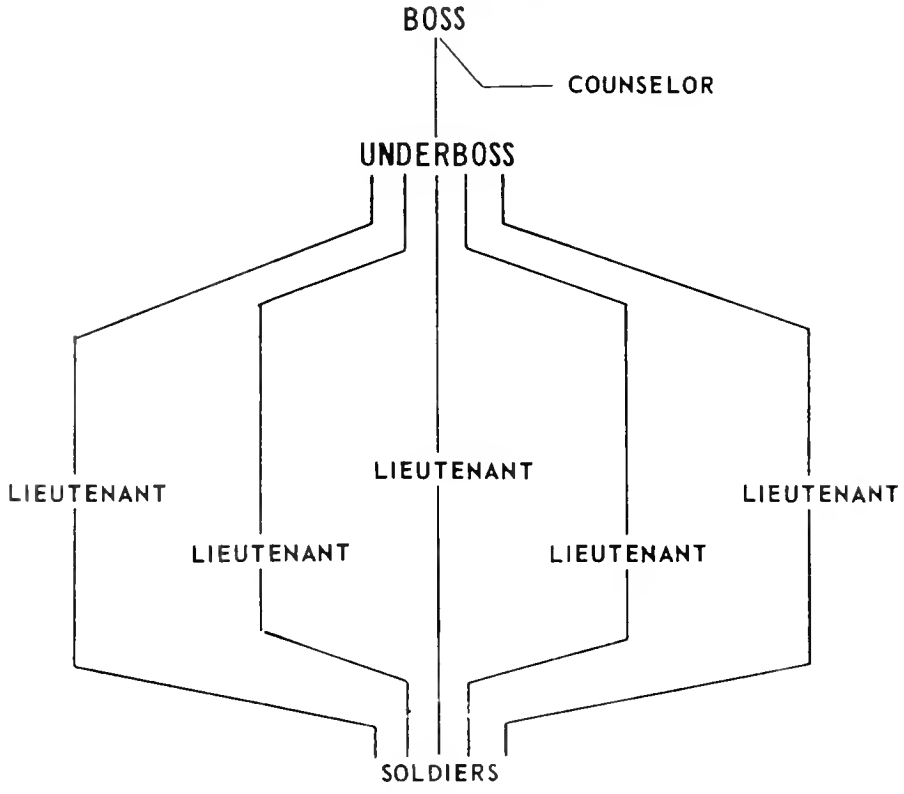
As reported by the President's Commission in February 1967, the core of organized crime, frequently referred to as La Cosa Nostra, consists of 24 "families" located in major cities throughout the country. Each family works with, and often controls, other organized crime groups operating within its area. Membership in the families varies from about 20 to 700.

The following charts were extracted from the President's Commission study and show where organized crime is concentrated, how the families are organized, and the types of activities in which they engage.

STATES IN WHICH ORGANIZED CRIME CORE GROUP MEMBERS BOTH RESIDE AND OPERATE



AN ORGANIZED CRIME FAMILY



FEDERAL EFFORTS AGAINST ORGANIZED CRIME

Federal efforts against organized crime began in the office of the Attorney General. In July 1954 the Attorney General established within the Criminal Division an Organized Crime and Racketeering Section (OCRS) to

--coordinate enforcement activities against organized crime,

--initiate and supervise investigations,

--accumulate and correlate intelligence data,

--formulate general prosecutive policies, and

--assist Federal prosecuting attorneys throughout the country.

In 1966 the President, directing Federal law enforcement officials to review the national program against organized crime, designated the Attorney General to be the focal point for developing a unified program against racketeering.

Because conventional methods of law enforcement had proven ineffective against organized crime, between January 1967 and April 1971 OCRS established 18 Federal strike forces, staffed with Justice Attorneys and representatives from other Federal investigative and law enforcement agencies. As of December 1976, strike forces were operating in Boston, Brooklyn, Buffalo, Chicago, Cleveland, Detroit, Kansas City, Los Angeles, Miami, Newark, Philadelphia, San Francisco, and Washington, D.C. Strike forces were terminated in Baltimore (1974) and, after our review, in Manhattan, New Orleans, Pittsburgh, and St. Louis (1976).

In addition to OCRS, the following Federal organizations participate in the strike force program:

--Bureau of Alcohol, Tobacco, and Firearms

--U.S. Customs Service

--Department of Labor

--Drug Enforcement Administration

--Federal Bureau of Investigation

--Immigration and Naturalization Service

--Internal Revenue Service

--Securities and Exchange Commission

--U.S. Postal Service

--U.S. Marshals Service

--U.S. Secret Service

The Organized Crime Control Act of 1970 provided Federal law enforcement officials and the courts with additional legal weapons to use against organized crime, including the authority to

--establish special grand juries to investigate organized criminal activities within their districts and to issue reports on these investigations at their discretion and

--impose extended prison sentences of up to 25 years for "dangerous special offenders."

In addition, in 1970 the National Council on Organized Crime was established to formulate a national strategy to eliminate organized crime. The Council, chaired by the Attorney General, is composed of high-level representatives of Federal departments and agencies having major responsibilities affecting or affected by the activities of organized crime.

CHAPTER 2

STRIKE FORCE PROGRAM NEEDS A NATIONAL STRATEGY AND CENTRALIZED DIRECTION

Organized crime strike forces were created to launch a coordinated attack against a serious national problem. They were unsuccessful, however, for a number of reasons.

The Department of Justice established the strike force program because it knew that a national approach to combating organized crime was needed. In 1970 the Attorney General stated that he intended to deal with and eventually eliminate organized crime and that this goal could best be achieved through a national strategy implemented by the strike forces.

A national effort, however, has been unsuccessful because

--the National Council on Organized Crime has not developed a national strategy to fight organized crime and has not met since June 1971,

--Justice's Organized Crime and Racketeering Section has not adequately planned and directed the efforts against organized crime and thus has limited any national coordinated effort to fight this problem, and

--limited authority over participating agencies precludes attorneys-in-charge of strike forces from assuming a more active role.

These factors and the lack of agreement as to what "organized crime" is suggest that Federal efforts against organized crime are more the result of individual decisions made at the local level than the result of a national strategy, as originally envisioned. In essence, there is no coordinated Federal effort to fight organized crime. In practice, each participating agency fights organized crime as it sees fit and uses strike force attorneys for advice and prosecution. (App. II describes how a strike force operates.)

A 1976 Justice study of the OCRS intelligence system stated that, although the strike force program had been in operation for nearly a decade, no one could seriously suggest that the problem of organized crime had been eliminated or even brought under control.

NO AGREEMENT ON DEFINITION OF "ORGANIZED CRIME"

Before a problem can be dealt with, it must be adequately defined. Participating Federal agencies cannot completely agree on what the term "organized crime" encompasses.

In 1970, to define the relationship between U.S. attorneys and strike forces, the Attorney General defined organized crime as

> "* * * all illegal activities engaged in by members of criminal syndicates operative throughout the United States, and all illegal activities engaged in by known associates and confederates of such members."

Despite this definition, a study issued by the U.S. Attorneys' Advisory Committee in 1974 noted that 47 of 88 U.S. attorneys said that organized crime was not sufficiently defined to delineate prosecutive responsibility. Some felt that a definition should be based on

--the type of crime involved,

--a list of known organized crime figures, or

--particular statutes.

At the operational level, problems of definition also exist. An internal Justice report issued in 1974 stated that confusion existed over the scope of the strike force's jurisdiction; i.e., the definition of organized crime.

Definitions of organized crime provided by Federal agency personnel participating in the program varied widely. At one extreme the term was defined to include only members of La Cosa Nostra, while at the other extreme organized crime included any group of two or more persons formed to commit a criminal act.

Following are some of the definitions agency officials provided:

--Any organized group involved in the commission of a crime.

--Activities normally associated with La Cosa Nostra figures or with corrupt public officials.

--Any criminal activity performed on a large and sophisticated scale, such as gambling.

--A continuous pattern of criminal activity by the same group or individual which has a monopolistic impact on an industry or area.

The lack of a uniform definition has resulted in problems with prosecutorial jurisdiction and, more importantly, in not applying consistent criteria nationwide for selecting the targets of the strike forces.

NATIONAL COUNCIL ON ORGANIZED CRIME FAILED TO ESTABLISH A NATIONAL STRATEGY

On June 4, 1970, Executive Order 11534 established the National Council on Organized Crime and made it responsible for formulating an effective, coordinated, national strategy to eliminate organized crime.

Although relationships among agencies participating in the strike force program had developed at the operational level, the fight against organized crime under the new Council would now have the necessary strategic as well as tactical planning. The Council, providing impetus to the fight and uniting all agencies in a cooperative venture, established as its goal the elimination of organized crime by 1976.

Chaired by the Attorney General, the Council was composed of high-level representatives of Federal departments and agencies having major responsibilities affecting or affected by the activities of organized crime. The Council established an executive committee and seven working committees. (See app. III.) The executive committee was to direct the Council's work while the working committees were to

--analyze needs,

--identify fruitful areas of endeavor,

--support the various departments on budget and manpower requests, and

--coordinate all departments while attempting to eliminate rackets.

The Council met five times but failed to formulate a national strategy to fight organized crime. It has not met since June 1971. A Justice official said that the Department does not know why the Council failed to develop a national strategy and that there are no plans to reconvene the Council.

The Council has made, thus far, only two achievements. First, proposals were made and accepted to establish strike

forces in Pittsburgh, Baltimore, San Francisco, and Kansas City. Second, one working committee, the Gambling Rackets Committee, initiated an investigation into nationwide sports gambling, which resulted in the arrest of 27 persons and the seizure of over $2.3 million in currency, securities, checks, and notes.

OCRS IS NOT DEEPLY INVOLVED IN PLANNING AND DIRECTING THE STRIKE FORCE PROGRAM

In spite of the Council's lack of overall program planning and direction, OCRS has not (1) developed a national strategy to fight organized crime, (2) adequately defined organized crime, or (3) formulated objectives for its strike forces.

In July 1974 a committee appointed by the Attorney General reported that organized crime activities by their very nature were nationwide and, consequently, that centralized Federal direction and planning were essential.

In 1976 the Office of Management and Finance reported, however, that OCRS and strike force officials generally believed there was no national strategy against organized crime. Strike force agents said they knew of no national strategy promulgated by OCRS or their own agencies. The report noted that field agents seemed to use the traditional reactive approach of investigating individual suspects and specific offenses and that the apparent effort against organized crime was one of attrition.

The Office of Management and Finance further reported that OCRS did not have a unit to conduct, analyze, or produce the information necessary to support the planning or operations of a nationwide program to fight organized crime.

The Office of Management and Finance report pointed out that, to develop a meaningful national strategy, there has to be a reliable information base on organized crime. According to the report, every agency involved in the Federal effort against organized crime admits that such information is not available. If it were, the following unresolved policy issues could be addressed:

--What is society's ultimate objective concerning organized crime? Do we intend to eliminate organized crime, to control it by containing it at some current level or by rolling it back to some lower level, or to accept a tolerable level of organized crime?

--How will the strategy chosen be executed and how will execution be monitored?

OCRS has furnished little formal written direction to its strike forces. An exception to this occurred in August 1974, when OCRS advised the strike forces of the importance of prosecuting gambling violations, because gambling is organized crime's main source of income. OCRS outlined guidelines for reworking all gambling cases for the previous 5 years.

OCRS officials said that planning and establishing objectives were best accomplished by the individual strike forces, although OCRS does not require them to do so. Six strike forces reviewed had not established definitive objectives covering their operations. Further, although we agree that goals for individual strike forces are necessary, we believe that they should be developed within an overall framework encompassing the national problem.

STRIKE FORCE ATTORNEYS-IN-CHARGE CANNOT DIRECT INVESTIGATIVE PRIORITIES

In the absence of a national strategy or overall policy direction from Washington, the responsibility for planning rests with the strike forces. However, strike force attorneys-in-charge do not have authority to direct investigative priorities within their jurisdictions and, as pointed out on page 8, they are faced with various interpretations of the term "organized crime."

In January 1967 Justice established a pilot project in Buffalo, New York--the forerunner to the existing strike force program. The project brought together a team of supervisory attorneys and investigators from Federal law enforcement agencies to mount an attack against local organized crime.

This team jointly

--identified the power structure of the local organized crime "family,"

--targeted individuals whose removal would most severely damage criminal operations, and

--initiated prosecutions in areas in which prosecution would be successful and would seriously curtail the activities of the criminal organization.

The pilot project operated until 1968, and the assistant attorney general in charge of the Criminal Division at that

92-465 O - 77 - 13

time described it as "the most fruitful technique available for major impact on organized crime." On the basis of the success of the Buffalo project, the Attorney General decided to locate strike forces throughout the country.

In establishing the strike force program, however, the Attorney General did not promulgate formal operational guidelines for the participating Federal agencies or define authority and responsibilities of the attorneys-in-charge. The strike force attorney-in-charge has little discretionary power over what is investigated in his jurisdiction and on what activities investigative priorities are established. These decisions are made by the participating agencies, not by the strike force, and the agencies decide at what stage in an investigation strike force attorneys will become involved.

A House Government Operations Committee study (H. Rept. 1574, June 30, 1968) recognized that Justice generally does not have line authority over the investigative and law enforcement operations of other Federal agencies.

The strike force attorney-in-charge cannot require participating Federal agencies to conduct specific investigations or assign additional manpower and other resources to the strike force program. With the exception of the Immigration and Naturalization Service, strike force personnel are not under the control of the attorney-in-charge. Some representatives do not work full time on strike force matters and do not work out of the strike force office.

The program appears dependent to a great extent on the cooperation of participating agencies and development of personal relationships. The degree of cooperation, however, is not mandated. An internal Justice evaluation in 1974 identified as one of the program's weaknesses many instances of uneven participation by the agencies represented on the strike forces. We believe that until participating agencies' roles are delineated--such as objectives defined, cooperation circumscribed, investigative criteria developed, and resources committed--the Federal effort will remain uncoordinated.

CONCLUSION

Because agencies participating on the strike forces cannot uniformly agree on the definitive scope of the term "organized crime," the crime problem cannot be adequately defined nor can progress toward its solution be measured. The National Council did not establish a national strategy for fighting organized crime, nor has Justice filled the void.

There is furthermore no central direction of the strike force program, including established goals and priorities. Limited authority over participating agencies precludes the strike force attorney-in-charge from assuming a more active role in planning strike force efforts. Federal efforts will remain uncoordinated until agencies' roles are delineated and resources committed.

RECOMMENDATIONS

We recommend that the Attorney General:

--Define organized crime so that consistent criteria may be applied nationwide for selecting the targets of the strike forces.

--Reconvene the National Council to develop specific goals as well as a unified approach to fighting organized crime and set specific priorities in a clear mission statement to be used by all strike forces.

--Develop, in conjunction with the other participating agencies, agreements delineating each agency's (1) role in the strike forces, including the role of the attorney-in-charge, and (2) commitment of resources.

--Seek a Presidential order requiring the other agencies' cooperation and commitment, should he not receive satisfaction from these agencies.

AGENCY COMMENTS AND OUR EVALUATION

Department of Justice

The Department of Justice, in commenting on our report (see app. VII), stated it shares our concern that organized crime still flourishes. The Department agrees that the Federal effort against organized crime can be better planned, organized, directed, and executed and said that it is working toward these objectives. The Department, however, stated that law enforcement can deal with only one side of the organized crime equation. Organized crime is a business which depends, as do all businesses, on customer acceptance and patronage. The Department said it must be understood and emphasized that whatever program is designed by law enforcement, that program can only deal with the "supply" side of the equation; the "demand" side is, in the final analysis, dependent on the actions and reactions of the American public. The Department added that even if it perfected an optimum method of "planning, organizing, executing, and directing" an organized crime program, organized crime may well continue to "flourish" in the above sense.

Addressing our recommendation for a workable strike force definition of organized crime, the Department said that to formulate such a universally applicable and acceptable definition of organized crime is difficult. But it recognizes that the special purpose for which the strike forces were created requires a clear and uniform articulation of investigative objectives. Although the strike forces were created for the special purpose of providing a coordinated national effort to fight organized crime, in practice this effort has been hampered because of definitional confusion as noted on pages 8 and 9. And since strike forces were established for a special purpose, there is little reason why an acceptable definition of the strike forces' targets cannot be agreed upon.

The Department initiated a requirement in early 1976 that it review prospective strike force investigations before they are begun rather than after they are completed. We agree with the Department that reviewing case initiation reports will be helpful in determining the legitimacy of cases for strike force efforts.

However, since participating agencies determine at what investigative stage strike force attorneys become involved, an investigation could be nearly completed before the case is presented to the strike force as an organized crime case. Therefore, we believe that for strike force efforts to be more effective, agency investigations should be brought to the strike forces' attention early so that decisions can be made concerning (1) their merit, (2) the need for other agency involvement and coordination, and (3) additional prosecutive requirements.

As a result of management changes in efforts to improve program effectiveness, the Department of Justice believes that if the National Council on Organized Crime is convened, the Council need not undertake a management function. The Department said the Council should serve as a forum where general matters are discussed and where an overview of organized crime strategy is developed.

We believe that, because the Attorney General has the role of coordinating the fight against organized crime, overall management of the strike force program should remain in the Department of Justice. We believe, however, that because the Council includes officials from all participating agencies, it could be the vehicle to bring about a more coordinated Federal effort. The Council could produce a clear mission statement on what is expected of the strike force program; set specific priorities on how to arrive most effectively at meeting program objectives; and establish the

needed agency commitment of resources necessary to carry out the program's objectives. Specifying where the program is going and how it intends to get there is prerequisite to evaluating its progress.

The Department said that the concept of interagency cooperation as originally conceived for strike forces is a good one. However, in practice, the effectiveness of strike forces has been limited somewhat by the inability of the attorney-in-charge to task each agency investigatively. This problem will continue to some extent, since an organizational entity cannot be given responsibility without authority. The Department said, however, that interagency cooperation is increasing. The Department added that if satisfaction is not received, it will seek assistance from progressively higher levels of authority in its efforts to acquire the cooperation and commitment of agencies.

We believe that, to achieve a Federally coordinated effort, the participating agencies need agreements setting forth goals, objectives, and a system for allocating resources to meet program expectations. Such agreements could also promote continuity even when changes in management occur. Although agreements have been reached when disputes have arisen, agreements delineating agency participation will aid in minimizing future disputes and program disruptions. As the coordinator and focal point for the Federal organized crime effort, the Attorney General should know, as a minimum, how each participating agency plans to fight organized crime and the resources it plans to commit.

Internal Revenue Service

In commenting on our report, the Internal Revenue Service (IRS) was concerned that our observations and recommendations could seriously affect IRS' participation in the strike force program. (See app. VIII.) Its concern was that IRS resources assigned to the strike force program would now be controlled by the strike force's attorney-in-charge and the Justice Department.

We believe that control of any agency's resources by another agency is limited by the laws governing that agency's mandate. We therefore are not suggesting that Justice have the authority to control IRS' resources. We believe, however, that since the Attorney General is the coordinator and focal point for the Federal organized crime effort, he should be knowledgeable of each participating law enforcement agency's plans to fight organized crime and the resources it plans to commit to this fight.

Although the IRS-Department of Justice cooperation agreement of January 8, 1976, is important for providing the Attorney General with the information needed to perform coordination functions, several additional factors should be formalized into the agreement to make it more useful and comprehensive. For example, IRS commented that it is preparing an internal manual supplement setting forth its strike force program's objectives and specifying the criteria to be used in determining individuals to be investigated. These objectives and criteria should be formalized into the agreement. Moreover, the present agreement needs a system for allocating resources to help carry out the program. This system could help in program planning by creating a resource base available to execute the program. On page 12 of this report, we have clarified the essential elements we believe necessary for such an agreement.

Department of the Treasury

The Department of the Treasury, in commenting on this report (See app. IX), stated that Justice attorneys do exercise authority in determining which investigation will be conducted under the authority of the strike force. While the strike force attorney can influence an investigation by suggesting the type of evidence needed for conviction or by advising the investigator of the difficulty in getting convictions, he has little discretionary power over what is to be initially investigated or what activities merit investigative priority. Currently, the agency decides at what investigative stage the strike force attorney will become involved.

CHAPTER 3

THE EFFECTIVENESS OF STRIKE FORCES HAS NOT BEEN EVALUATED

The Attorney General is the focal point for Federal efforts against organized crime but, to date, no system has been established to evaluate the strike force program. There are no criteria against which to measure effectiveness nor sufficient data to quantify the results of strike force efforts. As a result, Justice does not know the extent to which the strike force program has reduced organized crime in the United States and what changes are needed to improve the program.

In 1968 the House Committee on Government Operations recognized the need to measure the effectiveness of OCRS' activities. The Committee pointed out that the President's Crime Commission believed it was essential to be able to measure law enforcement's effects on crime so that officials could plan and establish prevention and control programs.

In the absence of a formal evaluation system, the strike forces we reviewed had adopted a number of informal measures, some of which appeared to be relatively superficial for assessing their operations.

OCRS HAS NOT ESTABLISHED AN EVALUATION SYSTEM

OCRS has not (1) clearly defined "organized crime," (2) established quantitative or qualitative goals against which the effectiveness of strike force operations can be measured, or (3) developed a system to accumulate the data needed to assess strike force results. Thus, OCRS cannot determine how effective the program has been in reducing organized crime and, for management purposes, which strike forces have been most effective. We were told that organized crime has become more sophisticated since the strike force program began in 1967, but complete and reliable data is not available on the number of organized crime figures in particular areas, their position within the organization, and the extent of their criminal activity. This lack of data precludes making "past and present comparisons" and establishing a baseline from which trends may be spotted and evaluations performed. The lack of a more specific definition of organized crime, as noted in chapter 2, also makes it difficult to define the problem the strike forces were created to reduce.

OCRS has not established qualitative or quantitative goals for its strike forces, nor has it identified the information needed to assess strike force results. The attorney-in-charge of planning and evaluation said it was mandatory that strike forces send data to OCRS on every person indicted and on every person convicted as a result of strike force activities. However, this information was incomplete and, in some cases, inaccurate. An informal OCRS study showed that in fiscal year 1974 strike forces reported to OCRS only 64 percent of their indictments.

Until 1976 OCRS did not receive data on active strike force investigations until the decision was made to seek an indictment. On March 12, 1976, however, the Assistant Attorney General of the Criminal Division and OCRS instructed all strike forces to submit a case initiation report when an investigation was opened. This report is designed to describe an investigative or prosecutive matter which the attorney-in-charge of the strike force believes merits the assignment of an attorney.

OCRS reports annually on the indictments and convictions obtained by its strike forces but conceded that such statistics do not give a complete picture of overall accomplishments. For one thing, these statistics do not reflect the quality of the convictions. For example, OCRS designates convictions as "high echelon" if they involve a member of a Cosa Nostra family. We believe this designation is misleading, however, because it includes "family" members at any level of authority but fails to include other, perhaps more powerful, organized crime figures who are not members of a family.

The Chief, OCRS, does not believe it is possible to establish overall program goals and then measure progress toward attaining those goals. He stated that goals should be set by individual strike forces. However, this is not being done.

HOW STRIKE FORCES EVALUATE OR PLAN TO EVALUATE THEIR ACTIVITIES

In the absence of a formal evaluation system, strike force attorneys-in-charge were employing various informal procedures to assess their operations. These procedures appeared to be of limited use in determining whether organized criminal activity was declining or in comparing one strike force's accomplishments with another. Generally, the attorneys-in-charge favored a qualitative, rather than quantitative, approach to evaluating effectiveness, although they could not translate this type of evaluation into specific procedures.

None of the strike forces reviewed had established definitive goals which would enable them to determine their impact on organized crime. The evaluations performed were relatively limited, generally subjective, and undocumented. For example, strike force personnel made the following evaluative comments:

--The existence or lack of "good press" can provide a strike force with an indication of whether it is reducing organized crime.

--A strike force is operating effectively if its personnel are adequately discharging their responsibilities, in terms of attitude, enthusiasm, and propensity to work.

--A review of conviction, dismissal, and reversal rates will tell an attorney-in-charge if a strike force is successful.

--A strike force is effective if it convicts key organized crime figures identified by the Federal Bureau of Investigation.

Two attorneys-in-charge proposed qualitative approaches based on the use of intelligence data; however, neither approach has been implemented, although they both appear promising. One approach involves identifying a particular organized criminal activity in the strike force jurisdiction and then, a year or so later, determining what was done in terms of indicting and convicting participants in that activity.

The other approach involves followup based on intelligence data. If a strike force indicts and convicts a key figure or figures in a criminal operation, intelligence sources would find out if the operation was continuing or had ceased to exist. This information could be useful to indicate whether the strike force was disrupting organized crime and indicting and convicting the right people.

Prior reviews of strike force operations

We reviewed three reports discussing the strike force program prepared by the following groups:

--U.S. Attorneys' Advisory Committee to the Attorney General.

--Committee to Evaluate Department of Justice Policy with Respect to Organized Crime Strike Forces.

--Internal Revenue Service Internal Audit Division.

The U.S. Attorneys' Advisory Committee examined the concept and structure of the strike forces with respect to the problems inherent in having these forces functioning relatively independent of the U.S. attorneys' offices in those districts. The 1974 report stated that the concept was sound and that strike forces had been successful but recommended that:

--No additional strike forces be established.

--Existing strike forces in the larger districts be phased out and consolidated into units within the U.S. attorney's office.

--The need for strike forces in other districts be reviewed on an individual basis with cognizant U.S. attorneys.

The report further stated that the entire criminal justice system was well served by competent, energetic, and largely independent U.S. attorneys and any impetus toward eroding their historical prerogatives would only harm the effectiveness of the Federal law enforcement effort.

The committee to evaluate Justice's policy regarding strike force operations was established at the Attorney General's request to address the recommendations set forth in the U.S. Attorneys' Advisory Committee report. The committee concluded in 1974 that the strike force concept was sound in both theory and practice and, accordingly, the strike forces should be continued at their present numbers and present form. Nevertheless, the committee recommended that the Criminal Division:

--Review the need for perpetuating, as presently constituted, the strike forces in each of the cities and geographical regions served.

--Encourage greater participation by agencies represented on the strike forces.

--Review the definition of the term "organized crime."

In addition to the above reports, the Internal Revenue Service reviewed its participation in the strike force program and issued a report in January 1975. Its review disclosed a need to

--clearly define specific goals of IRS strike force efforts,

--establish specific strike force target criteria, and

--review reports of IRS strike force accomplishments to provide more detailed information to management in its evaluation of the program's effectiveness.

CONCLUSION

The failure of Justice to (1) define criteria to measure strike force effectiveness and (2) obtain adequate data on program results makes it difficult to determine what field level changes should be made to make the program more effective. With specific criteria and an evaluation system, program operations could be more easily directed so that increased effectiveness could be achieved with the resources available. In addition, a systematic evaluation would enable Justice to (1) assess participating agencies' contribution toward accomplishing the overall goals set for the strike force program, (2) monitor strike force efforts, and (3) identify alternatives which would contribute to program effectiveness.

RECOMMENDATION

We recommend that the Attorney General develop specific criteria and establish the required information system to evaluate the effectiveness of the national and individual strike force efforts.

AGENCY COMMENTS AND OUR EVALUATION

Department of Justice

The Department of Justice said (see app. VII) that it recognizes the importance of an information system that effectively measures performance but also recognizes the extreme difficulty of measuring quantitatively the success of an organized crime program in purely statistical terms. It does not want to fall prey to demands to measure strike force performance simply by a blizzard of statistics which may, read one way or another, indicate more or less progress is being made. The Department said that some proposed approaches discussed in this report, while not fully providing a qualitative measure of effectiveness, are steps in that direction, and that it is continuing to look for criteria which will aid in measuring the qualitative effectiveness of organized crime programs.

Department of the Treasury

The Department of the Treasury stated (see app. IX) that indictment and conviction numbers could provide a good

basis for evaluating the program and that statistics could be developed to show trends and provide a measure of quality.

Although statistics are useful, we do not believe that quantitative measures alone are a sufficient basis to measure strike force effectiveness. Other factors, such as the importance of the person convicted and the degree of disruption to a criminal activity, are more important in evaluating the program.

As stated on page 17, the Department of Justice has not established, however, qualitative and quantitative goals for its strike forces, nor has it identified the information needed to assess strike force results. Consequently, program effectiveness cannot be measured.

Internal Revenue Service

IRS commented (see app. VIII) that it is completing a manual supplement that:

a. Sets forth the objective for IRS' participation in the Joint Agency Strike Force Program.

b. Delineates the responsibilities of the national office, regional offices, district offices, and individual strike force representatives.

c. Provides for the coordination and states the general procedures which are to be followed in investigations and examinations conducted jointly by the Department of Justice and the Internal Revenue Service in accordance with the guidelines established in the January 8, 1976, agreement between IRS and the Department of Justice on the conduct of joint investigations.

d. Specifies the criteria for IRS' selection of strike force cases for Audit Division examination and Intelligence Division investigation.

IRS recently completed a cost-benefit analysis of the impact of the strike force program on IRS resources. However, this analysis was limited since IRS did not have a comprehensive system that would track the results of Audit Division examinations made on strike force cases.

IRS is currently developing a comprehensive reporting system that will track the results of its Intelligence Division and Audit Division investigations and examinations

made on strike force cases. In addition, IRS is now conducting a study that will track the results of Audit Division examinations and Intelligence Division investigations made on strike force cases during fiscal year 1972. This study will compare dollars assessed with dollars collected from Audit Division examinations. A similar study on the results of Intelligence Division investigations will be made on these cases.

CHAPTER 4

STRIKE FORCE PROSECUTIONS OF ORGANIZED CRIME FIGURES OFTEN RESULT IN LIGHT SENTENCES

Although Justice considers the indictment, conviction, and imprisonment of organized crime figures as one means of disrupting organized crime operations, the sentences imposed in 52 percent of the strike force convictions we reviewed called for no time in jail. A sentence requiring confinement of 2 years or less occurred in 58 percent of the cases. Strike forces do not control sentencing, but light sentences could hinder their attempts to disrupt organized crime.

ANALYSIS OF INDICTMENTS, CONVICTIONS, AND SENTENCES AT SIX STRIKE FORCES

During fiscal years 1972-75, the 6 organized crime strike forces reviewed obtained indictments against 2,967 of the 6,727 persons indicted by all strike forces. While these indictments covered a variety of offenses, about 37 percent were for illegal gambling. (Detailed information on the offenses which resulted in indictments appears in app. IV.) The disposition or status indictments as of September 1, 1975, were as follows:

Disposition or status	Number of defendants
Pled guilty or no contest (note a)	953
Convicted after trial	330
Acquitted	250
Dismissed or prosecution decision not to proceed with case (note b)	736
Convicted-appeal pending	136
Awaiting trail	436
Other	126
Total	2,967

a/Nolo contendere.

b/Nolle prosequi.

Based on cases which had been closed as of September 1, 1975, which includes dismissals but not cases in which an appeal is pending, the six strike forces achieved "conviction" rates of from 38 percent to 71 percent. (See app. V.)

The number of dismissals was significant but dismissals did not always involve a "lost" case. Sometimes the dismissal was beyond the control of the strike force. For example, some dismissals and nolle prosequis involved cases in which the original indictment was not pursued but the strike force obtained a superseding indictment.

The following factors were also cited by strike force attorneys as having resulted in the dismissal of indictments:

--Improperly obtained wire tap evidence.

--Death of defendant.

--Defendant pled guilty to non-strike force charges.

--Defendant granted immunity to return for testimony against other defendants.

--Charges under one indictment dismissed if defendant was convicted under another indictment.

Including all dismissals may not be realistic when calculating the conviction rate. However, considering the large number of superseded indictments and other dismissal factors, the reported number of indictments obtained by the strike forces may be misleading.

Of 1,283 defendants who pled guilty or no contest or were convicted after September 1, 1975, 1,226 had been sentenced. Of these, 48 percent (586) received prison sentences, whereas 52 percent (640) received sentences calling for no confinement.

Of those who received jail terms, 58 percent (338) received 2 years or less. The following is a summary of the sentences imposed.

Sentence	Defendants	Percent of defendants
Less than 6 months	207	35
6 months to 1 year	63	11
More than 1 year to 2 years	68	12
More than 2 years to 5 years	178	30
More than 5 years	70	12
Total	586	100

The length of the prison sentences imposed overstate the periods of incarceration since individuals are eligible for parole after serving one-third of their sentence.

Of the 640 defendants whose sentences called for no jail time, about 79 percent (507) received probation alone or probation with a fine. The remaining 21 percent (133 defendants) received only a fine. About 64 percent of these defendants were fined $1,000 or less. In one case, the fine was $25. (Detailed information on the sentences obtained, by individual strike force, appears in app. VI.)

ANALYSIS OF SENTENCES IMPOSED ON "HIGH-ECHELON" ORGANIZED CRIME FIGURES

The Attorney General reports annually on the number of convicted persons he designates as "high-echelon" organized crime figures to add a quality indicator to overall convictions statistics. Generally, persons designated as high-echelon are believed to be members of La Cosa Nostra. These are individuals whose incarceration would in most instances seriously disrupt organized criminal activities. We could obtain sentencing data on only 128 of the 241 high-echelon strike force convictions during fiscal years 1969-75. Of these, 51 percent received no jail time or sentences of less than 2 years in jail.

We examined 56 high-echelon convictions during fiscal years 1974 and 1975 involving the 6 strike forces in terms of the

--maximum jail sentence possible and

--actual sentence imposed.

The sentences imposed represented only a small fraction of the maximum sentence possible. The following table presents this comparison in more detail.

Comparison of 56
Strike Force "High-Echelon" Convictions
(fiscal years 1974 and 1975)

Number sentenced	Maximum jail sentence possible for each defendant	Average jail sentence received
	(months)	
9	12	2
4	24	2
1	36	2
20	60	22
1	84	6
2	96	18
4	120	42
1	132	12
1	156	12
4	180	29
1	192	7
7	240	32
1	480	36
Total 56		

COMMENTS ON SENTENCES IMPOSED IN STRIKE FORCE CASES

Sentencing is an important yet controversial part of the criminal justice process and, as a result, we obtained wide-ranging views on the reasonableness of sentences imposed in strike force cases.

According to many attorneys-in-charge of strike forces and their special attorneys, the sentences imposed were too light because:

--The judiciary is extremely liberal.

--Organized crime is often considered to be nonviolent. Many defendants were convicted of what are considered "victimless crimes," e.g., gambling.

--There are no mandatory minimum sentences in Federal courts, and prosecutors are rarely asked to recommend sentences.

--Severe sentences are frequently appealed, and the judiciary does not want to clog its court calendars with appeal proceedings.

93-465 O - 77 - 14

Members of the Federal judiciary contacted did not believe that sentences in organized crime cases were inappropriate but that the judiciary attempts to allow a person convicted of a crime to straighten himself out. Thus, judges impose a period of probation rather than confinement. This is especially true for first-time offenders, who are often the defendants in many cases prosecuted by the strike forces. One judge, on the other hand, stated that judiciary members are generally too liberal and resist sending individuals to jail. For this judge, mandatory minimum sentences appeared to be a possible solution.

Prior studies have discussed various aspects of the sentencing process. The President's Commission on Law Enforcement and Administration of Justice reported that gambling is the largest source of revenue for the criminal cartels and that members of organized crime know they can operate free of significant punishment. Judges are reluctant to jail bookmakers and lottery operators. Even when offenders are convicted, the sentences are often very light. Fines, paid by the organization, are considered a business expense.

LIMITED USE OF PROVISIONS OF THE ORGANIZED CRIME CONTROL ACT OF 1970

Under two major provisions of the Organized Crime Control Act of 1970, Federal officials are:

--Required to impanel special grand juries to investigate organized crime in specific areas and to issue reports on these investigations at their discretion.

--Authorized to prosecute individuals as special felony offenders so that they can be given extended sentences of up to 25 years.

Special grand juries

Although the act requires that a special grand jury be summoned at least once every 18 months in each district court located in a judicial district containing more than 4 million inhabitants, none had been impaneled in one district. However, when it was brought to the chief judge's attention, he said he would convene a special grand jury in the near future to investigate organized crime.

The other strike forces reviewed had employed special grand juries to investigate organized crime, but none of these grand juries had issued reports on its investigations.

Special offender provision

Five of the six strike forces reviewed had obtained no indictments under the special offender provision and in the few cases that had been prosecuted, only two resulted in convictions. One of these was being appealed at the conclusion of our review.

Attorneys-in-charge of the strike forces offered various reasons for not using this provision more frequently, including:

--Appropriate cases have not occurred.

--The provision has been attacked as unconstitutional.

--Many organized crime figures have previously been indicted but not convicted and, therefore, cannot be prosecuted under the special offender provision.

CONCLUSION

Strike forces have indicted and convicted numerous organized crime figures and their associates; however, the final sentence generally involved no incarceration. Sentencing is not under the control of the strike forces, but if incarceration is intended to disrupt organized crime, light sentences could preclude their efforts to disrupt organized crime to any great extent.

CHAPTER 5

THE ORGANIZED CRIME INTELLIGENCE SYSTEM IS NOT ADEQUATE

The Organized Crime and Racketeering Section established a computerized intelligence system to collect and store information on organized crime gathered by all Federal agencies. The system, however, has not met initial objectives and its use is limited because of an incomplete data base. A Justice study, issued in March 1976, stated that the system must be improved if it is to fulfill its objectives. The need for the system has also been questioned, since it duplicates data in the intelligence files of other agencies.

WHAT IS THE SYSTEM AND WHAT WAS IT DESIGNED TO DO?

To assist Federal, State, and local law enforcement agencies, the Intelligence and Special Services Unit was created in 1961 to establish within OCRS a centralized source of data on organized crime. The system was computerized in 1969, and in 1972 a racketeer profile sheet was devised to facilitate entering data into the system. The racketeer profile sheet is supposed to be prepared for everyone under investigation by agencies participating in the strike force program.

The system was designed to provide tactical and strategic intelligence. Tactical intelligence contributes directly to the success of an immediate law enforcement objective and affects ongoing cases and investigations. Strategic intelligence, on the other hand, is concerned with broader policy matters and provides an overview of a situation and a definition of the problem's magnitude.

As of November 1976, the system had data on some 24,000 individuals who were or had been under investigation. This information included

--name and address;

--aliases and nicknames;

--vehicles and firearms owned;

--education, military, and employment records;

--hobbies;

--illegal activities;

--known bank accounts; and

--names of associates.

QUESTIONABLE NEED FOR THE SYSTEM AND USEFULNESS OF ITS DATA

The system has not met its initial objectives, and the adequacy of the system has been questioned. The OCRS intelligence unit receives an average of about 2,000 information requests each month, of which about 50 percent originate at the strike forces. Of the total requests, about 95 percent request all information in the system on a particular individual or business. The system could provide data on only 25 percent of the 2,000 requests.

An OCRS official said that some Federal agency representatives on the strike forces are not completing the racketeer profile sheet for all persons under investigation because the process is too time consuming. In 1974 OCRS began assigning intelligence analysts to the strike forces to speed up the input of intelligence data and, as of February 1976, 11 strike forces had full-time analysts. Despite this assistance, the Chief of the Intelligence and Special Services Unit said that less than half of the needed data had been computerized.

In March 1976 Justice's Office of Management and Finance completed a study of the intelligence system. It reported that, except for the Federal Bureau of Investigation, information exchange was haphazard, rarely written or preserved, and heavily dependent upon the rapport established among participating agency representatives. This informal system, the report concluded, resulted in an untimely and incomplete exchange of intelligence information.

Strike force representatives questioned the data's usefulness in the fight against organized crime. Most attorneys and other participants in the strike force program we contacted said that the intelligence system provided little assistance in their day-to-day operations. One attorney-in-charge stated that, during his several years with three strike forces, he seldom had found any data in the intelligence system which could assist him in the investigative process. Personnel at each strike force complained that the information received from the system is often already known and provides only background data on an individual as opposed to "hard" intelligence.

According to the Office of Management and Finance study, strike force personnel generally believed that racketeer

profile data was not necessary for the current program of investigation and prosecution of organized crime figures. In addition, some agencies have their own ingelligence systems and do not need the OCRS system. The OCRS system duplicates much of the information already available in these other data banks, particularly the files of the Federal Bureau of Investigation, which account for about 90 percent of the intelligence data in the OCRS system.

The Office of Management and Finance report also stated that the existing data collection was directed more toward evidence gathering than toward intelligence information which, if properly processed and analyzed, could lead to selecting investigative approaches which would have a greater impact on the organized crime problem. The report said that OCRS data analysis is extremely limited and that analysts assigned to the strike forces are not intelligence analysts but are merely "computer input specialists."

CONCLUSION

OCRS' intelligence system is not adequate because it has not met initial objectives and is of limited use. Additionally, the system duplicates information contained in other agencies' intelligence systems.

RECOMMENDATION

We recommend that the Attorney General reevaluate the need for an intelligence system devoted solely to organized crime figures. If needed, the system's quality and usefulness of data should be improved.

AGENCY COMMENTS AND OUR EVALUATION

Department of Justice

The Department of Justice said (see app. VII) that it agrees with our recommendation. The Criminal Division feels that the intelligence apparatus devised for use in the Organized Crime and Racketeering Section is being maintained at a cost and commitment of resources far in excess of any foreseeable return on its operation. Consequently it is giving serious consideration to altering the scope of the computerized operation consistent with bona fide intelligence needs.

Internal Revenue Service

The Internal Revenue Service told us (see app. VIII) that it is also concerned with the need and utilization of the computerized intelligence system. In June 1976 IRS

requested and received detailed information from Justice concerning the creation, purpose, and utilization of the racketeer profiles maintained in this computerized system. It is currently studying the extent of its role, if any, in participating in this system. One of IRS' considerations relates to the disclosure of confidential information. Of particular concern is the possible unauthorized disclosure of tax-related information. Upon completion of its study, IRS will decide the extent to which it will participate in this computerized intelligence system.

CHAPTER 6

SCOPE OF REVIEW

We performed our review at the Criminal Division's Organized Crime and Racketeering Section, Department of Justice, in Washington, D.C., and at strike forces in Cleveland, Detroit, Los Angeles, New Orleans, and New York City (Brooklyn and Manhattan). We examined agency records and held discussions with agency officials.

We also talked with headquarters and regional officials of Federal agencies participating in organized crime strike force activities and with U.S. Attorneys and members of the Federal judiciary. In addition, we performed limited work at strike forces in Boston, Chicago, and Washington, D.C.

Most of our field work was performed between December 1975 and May 1976.

SELECTED INFORMATION ON THE SIX

STRIKE FORCES REVIEWED BY GAO

	Brooklyn	Cleveland	Detroit	Los Angeles	Manhattan	New Orleans
A. Date established	April 1968	November 1969	February 1968	July 1970	July 1969	May 1970
B. Geographical jurisdiction	Kings, Queens, Richmond, Nassau, and Suffolk counties, New York	Ohio and Kentucky	Michigan	Southern and Central judicial districts of California; Arizona, Montana, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming	Southern and Northern judicial districts of New York	Louisiana, Arkansas, Texas, Mississippi, and Alabama
C. Participating Federal agencies	(a,b,c)	(a,b)	(a,b)	(a,b,c,d)	(a,c)	(a,b)
D. OCRS attorneys						
1. On-board, September 1, 1975	6	6	9	10	10	5
2. Average tenure of attorneys on-board, September 1, 1975 (in months)	27	33	28	33	18	38
3. Average tenure of attorneys who left the strike force from inception to September 1, 1975 (in months)	30	13	36	26	23	23
E. Intelligence analyst located at Strike Force	Yes	Yes	Yes	Yes	Yes	Yes

Notes

a/Bureau of Alcohol, Tobacco, and Firearms

U.S. Customs Service

Department of Labor

Federal Bureau of Investigation

Immigration and Naturalization Service

Internal Revenue Service

United States Postal Service

United States Secret Service

b/Drug Enforcement Adminstration

c/Securities and Exchange Commission

d/United States Marshals Service

APPENDIX I

HOW A STRIKE FORCE OPERATES

Strike forces generally operate in the same manner. Their operations usually involve: (1) initial agency investigation, (2) investigation after strike force involvement, and (3) indictment and prosecution.

INITIAL AGENCY INVESTIGATION

Participating agencies generally initiate investigations, although the strike force attorney-in-charge occasionally suggests investigations. Agency investigations originate after criminal activity has been identified. The investigating agency determines the stage an investigation is brought to the strike force's attention. Sometimes investigations are made known to the strike force shortly after initiation; in other instances, the investigation may already be completed. At times, strike force attorneys may meet with participating agencies to review their ongoing efforts and suggest that promising matters be developed further.

The process of bringing an agency investigation to the strike force is usually very simple. An agency representative discusses the investigation with a strike force attorney, who decides whether or not it is a strike force matter.

INVESTIGATION AFTER STRIKE FORCE INVOLVEMENT

Once an investigation is accepted by the strike force, it is assigned to an attorney(s). The attorney reviews the investigation and identifies whether additional evidence is required to obtain an indictment. He may recommend such things as electronic surveillance, i.e., wiretaps, to obtain needed evidence; or he may request the assistance of other agency representatives if there are indications that violations in their statutory areas have occurred.

After the investigation is completed, the strike force attorneys evaluate whether the offense(s) warrants prosecution. If the attorney believes it does, he prepares a prosecutive memorandum setting forth the particulars in the case, laws involved, statements of facts and evidence, problems of evidence, and conclusions and recommendations.

After review by the attorney-in-charge, prosecutive memorandums are sent to the respective U.S. attorney and to OCRS for review and approval. The assistant attorney general of Justice's Criminal Division makes the prosecutive decision should any conflicts arise on the case's prosecutive merit.

INDICTMENT AND PROSECUTION

After prosecutive approval is obtained, the strike force attorney(s) presents the case before a grand jury, which determines whether to issue indictments, how many, and to whom. This determination is generally made by subpoenaing witnesses, records, and compelling testimony.

If the grand jury issues indictments, the case is prosecuted generally by strike force attorneys who may be assisted by U.S. attorneys or Justice attorneys with special expertise in certain types of cases.

APPENDIX III

APPENDIX III

WORKING COMMITTEES OF THE NATIONAL COUNCIL ON ORGANIZED CRIME

Narcotics Committee

Gambling Rackets Committee

Infiltration of Business Committee

Labor Committee

Counterfeit, Stolen Funds, Securities, and Credit cards Committee

State and Local Effort Involving Organized Crime Committee

Trial Committee

APPENDIX IV

SUMMARY OF U.S. CODE VIOLATIONS

FOR SIX SELECTED STRIKE FORCE INVESTMENTS

OBTAINED OPEN FILES AS OF YEAR 1972-7 - Note a

U.S. Code		Brooklyn		Cleveland		Detroit		Los Angeles		Manhattan		New Orleans		Total	
		Indicted	Convicted	Indicted	Convicted	Indicted	Convicted	Indicted	Convicted	Indicted	Convicted	Indicted	Convicted	Indicted	Convicted
Title - Name	Number - Name														
8 - Aliens and Nationality	1325 - Immigration and Nationality	1	1	1	1	9	8	1	1	1	1	0	0	13	12
Total		1	1	1	1	9	8	1	1	1	1	0	0	13	12
15 - Commerce and Trade	1 - Monopolies and Combinations in Restraint of Trade	5	0	0	0	0	0	0	0	0	0	0	0	5	0
	1A - Securities and Trust Indentures	20	0	0	0	0	0	24	0	29	6	0	0	73	6
	1M - Securities Exchanges	20	8	0	0	0	0	14	0	29	0	0	0	63	8
	2C - Investment Companies and Advisers	0	0	0	0	0	0	0	0	1	0	0	0	1	0
	41 - Consumer Credit Protection	1	1	0	0	0	0	0	0	0	0	0	0	1	1
Total		46	9	0	0	0	0	38	0	59	6	0	0	143	15
18 - Crimes and Criminal Procedure															
	1 - Assault	1	0	16	2	0	0	0	0	1	0	0	0	18	2
	1K - Robbery	1	1	0	0	0	0	2	1	0	0	0	0	3	2
	1L - Robbery and Theft	53	11	1	0	10	1	10	4	11	5	0	0	84	23
	1R - Civil Rights	10	0	0	0	0	0	0	0	0	0	0	0	10	0
	1T - Crimes Affecting United States	0	0	0	0	0	0	1	1	0	0	0	0	1	1
	1W - Conspiracy	332	59	201	69	244	105	127	20	360	146	22	4	1,308	303
	2 - Counterfeiting and Forgery	45	6	16	14	5	2	15	7	21	6	5	0	107	35
	21 - Arms	61	11	0	0	1	1	0	0	0	0	0	0	64	12
	1E - Embezzlement and Theft	114	16	25	11	6	4	2	1	18	5	1	1	165	38
	1I - Embezzlement Insurance and Bank	0	0	2	0	0	0	0	0	0	0	0	0	2	0
	1J - Escape and Rescue	0	0	0	0	1	0	0	0	0	0	0	0	1	0
	1K - Importation, Manufacture, Distribution and Storage of Firearms	3	2	0	0	1	1	2	0	0	0	0	0	6	3
	1L - Extortion and Threat	4	0	0	0	1	1	2	0	0	0	0	0	7	1
	1O - Extortionate Credit Transactions	43	13	9	2	18	5	20	5	48	12	2	2	140	38
	1R - False Personation	0	0	0	0	0	0	1	1	0	0	0	0	1	1
	1W - Firearms	22	6	16	6	6	4	18	5	31	5	2	1	95	27
	1 - Fraud and False Statements	71	20	9	1	11	7	4	-	*	2	2	1	101	33
	1A - Fugitives from Justice	0	0	0	0	0	0	0	0	1	1	0	0	1	1
	1C - Gambling	3	0	8	8	5	0	27	3	5	5	0	0	48	16
	1E - Homicide	1	1	1	1	2	0	0	0	1	0	0	0	4	3
	1I - Kidnapping	11	1	0	0	0	0	0	0	6	2	1	0	18	3
	1K - Mail Fraud	8	0	14	11	18	6	32	6	31	5	9	4	114	32
	1M - Military and Navy	1	0	0	0	0	0	0	0	0	0	0	0	1	0
	1N - Obstruction of Justice	12	1	22	2	42	12	7	1	15	3	15	1	112	20
	1S - Passports and Visas	1	1	1	1	1	1	1	0	1	1	0	0	4	4
	1W - Perjury	45	14	11	-	12	4	8	4	18	4	8	4	104	33
	1X - Postal Service	4	1	3	-	-	-	-	-	11	4	0	0	23	7
	1A - Racketeering (Gambling)	153	11	38	-	22	61	124	51	215	50	89	31	1,058	315
	1A - Racketeer Influenced and Corrupt Organizations	4	-	2	-	-	9	64	15	24	5	3	0	136	20
	1B - Robbery and Burglary	15	3	-	-	1	1	1	1	6	2	0	0	23	6
	1W - Searches and Seizures	15	15	11	4	-	0	0	0	0	0	2	0	48	19
	1X - Stolen Property	52	-	2	2	18	6	73	7	30	1	6	3	182	21
	1Y - Motor Vehicle Traffic - Prostitution	-	1	-	-	-	-	0	0	-	0	0	0	25	5
	1W - Wire Interception and Interception of Oral Communications	-	-	1	-	4	1	-	0	1	0	0	0	4	1
	2nd Release	4	-	-	-	3	1	0	0	-	0	0	0	7	1
	2nd Narcotic Drug and Venue	0	-	-	-	0	-	0	0	1	0	0	0	1	0
	223 - Sentence, Judgment, Execution	0	0	1	0	1	1	0	0	-	0	0	0	2	1
	Appendix - Unlawful Possession or Receipt of Firearms	0	0	25	0	11	1	0	0	-	0	1	1	41	16
Total		1,118	199	654	202	552	228	612	140	861	264	170	95	4,072	1,128
21 - Food and Drugs	1 - Adulterated or Misbranded Food or Drugs	0	0	0	0	20	0	0	0	0	0	0	0	20	0
	4 - Animals, Meats, and Meat and Dairy Products	1	1	0	1	-	0	0	0	0	0	0	0	0	0
	8 - Narcotic Drugs	58	-	-	-	-	0	0	0	0	0	0	0	60	7
	4 - Federal Food, Drug and Cosmetic Act	-	-	-	-	1	-	0	0	0	0	0	0	1	1
	42 - Meat Inspection	24	18	-	0	0	0	0	0	2	0	0	0	124	36
	13 - Drug Abuse Prevention and Control	0	-	18	4	214	106	67	14	24	6	0	0	348	135
Total		183	48	18	5	235	107	67	14	24	6	0	0	555	179
22 - Foreign Relations and International	4 - Material Witness Provision	0	0	0	0	0	0	0	0	0	0	7	0	7	0
Total		0	0	0	0	0	0	0	0	0	0	7	0	7	0
26 - Internal Revenue Code	64 - Regulatory Taxes	8	6	0	0	0	0	0	0	0	0	0	0	8	6
	71 - Falsified Liquor Labels and Weak	6	-	-	-	-	0	0	0	39	12	18	15	63	30
	74 - False Use of Firearm, Possession and Receipt of Firearm	13	-	-	-	1	1	14	10	12	0	0	0	40	15
	Crimes, other Offenses and Firearms	4	-	8	-	25	13	14	15	55	29	30	18	208	111
Total		81	44	13	7	26	14	48	25	106	41	48	33	319	164
29 - Labor	7 - Labor Management Relations	11	-	-	-	-	0	7	0	10	1	1	1	26	4
	8 - Fair Labor Standards	0	-	-	-	-	-	0	0	0	0	0	0	0	1
	11 - Employee Retirement Income Security Program	3	-	-	-	-	-	0	0	0	0	0	0	3	3
	8 - Labor Management Relations Act, 1947	38	-	-	-	-	1	6	0	3	2	2	1	55	9
Total		50	4	-	-	-	1	8	0	13	3	3	2	92	17
50 - Misc and National Defense	Appendix - Military Selective Service Act of 1967	1	1	-	-	-	-	0	0	-	0	0	0	1	1
Total		1	1	-	-	-	-	0	0	-	0	0	0	1	1

a Each line represents the number of persons indicted and convicted in violating the indicated chapter of the title.

SUMMARY OF INDICTMENTS FOR SIX SELECTED
STRIKE FORCES FOR FISCAL YEARS 1972-75
DISPOSITION OR STATUS AS OF SEPTEMBER 1, 1975

Disposition or status	Brooklyn	Cleveland	Detroit	Los Angeles	Manhattan	New Orleans	Total
Pled guilty or no contest (note a)	243	173	165	129	160	83	953
Convicted after trial	39	18	104	22	103	44	330
Acquitted	73	38	44	34	32	29	250
Dismissed or prosecution decision not to proceed with case (note b)	380	58	100	81	95	22	736
Convicted - appeal pending	26	16	11	66	10	7	136
Awaiting trial	127	28	111	63	88	19	436
Other	18	3	50	11	43	1	126
Total	906	334	585	406	531	205	2,967
Conviction rate (note c)	38%	67%	65%	57%	67%	71%	57%

a/Nolo contendere

b/Nolle prosequi

c/"Conviction rate" computed as follows:

$$\frac{\text{Pled guilty or no contest + convicted after trial}}{\text{Pled guilty or no contest + convicted after trial + acquitted + dismissed category}}$$

APPENDIX VI

SENTENCES RECEIVED BY DEFENDANTS

INDICTED BY SIX SELECTED STRIKE FORCES

FISCAL YEARS 1972-75

Category	Brooklyn		Cleveland		Detroit		Los Angeles		Manhattan		New Orleans		Total	
	Defendants	Percent of total (note a)	Defendants	Percent of total (note a)	Defendants	Percent of total (note a)	Defendants	Percent of total (note a)	Defendants	Percent of total (note a)	Defendants	Percent of total (note a)	Defendants	Percent of total (note a)
Jail time:														
6 months or less	46	17	20	11	21	8	22	15	74	30	24	19	207	17
More than 6 months but less than or equal to 1 year	6	2	12	7	10	4	8	5	23	9	4	3	63	5
More than 1 year but less than or equal to 2 years	16	6	8	4	22	9	5	3	13	5	4	3	68	6
More than 2 years but less than or equal to 5 years	47	17	18	10	57	23	19	14	25	10	12	10	178	15
More than 5 years	16	6	1	1	37	15	5	3	7	3	4	3	70	6
Total	131	49	59	32	147	59	59	39	142	57	48	38	586	48
No jail time:														
Fines only:														
$1,000 or less	8	3	46	20	2	1	32	21	5	2	3	2	86	7
More than $1,000 but less than or equal to $2,000	1	-	3	2	1	-	3	2	2	1	1	1	11	1
More than $2,000 but less than or equal to $5,000	4	1	6	3	-	-	10	7	2	1	-	-	22	2
More than $5,000 but less than or equal to $10,000	1	-	-	-	-	-	10	7	-	-	-	-	11	1
More than $10,000	-	-	-	-	-	-	1	1	2	1	-	-	3	-
Probation	125	46	79	43	98	40	35	23	96	39	74	59	507	41
Total	139	51	124	68	101	41	91	61	107	43	78	62	640	52
Total	270	100	183	100	244	100	150	100	249	100	126	100	1,226	100

a Percents may not add due to rounding.

8789

APPENDIX VII

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

[illegible] 14 [illegible]

Mr. Victor L. Lowe
Director
General Government Division
United States General Accounting Office
Washington, D. C. 20548

Dear Mr. Lowe:

This letter is in response to your request for comment on the draft report titled "The War on Organized Crime is Faltering--Federal Strike Forces Are Not Getting the Job Done."

With minor exceptions, we are in general agreement with the findings and recommendations of the report and share GAO's concern that organized crime still flourishes. While our comments express some disagreement with portions of the draft report, it is important to point out that we have gained considerable insights ourselves from the report and, more importantly, from the discussions held with the GAO staff responsible for its preparation.

We find GAO's findings and recommendations to be generally consistent with the findings and recommendations contained in previous internal studies undertaken within the Department of Justice. The GAO draft report refers to these studies in a number of the areas covered by the report. The studies conducted by the Department of Justice include:

- United States Attorneys' Advisory Committee to the Attorney General "Report of the Subcommittee on Department of Justice Field Operations: Organizational Concepts and Relationships with United States Attorneys," 1974

- Report of the Attorney General's Committee on the Evaluation of the Organized Crime Strike Forces ("Hoyle's Committee"), July 1974

APPENDIX VII

- Management Programs and Budget Staff Report, "Organized Crime Intelligence: An Analysis and Management Review of the Organized Crime Intelligence Program," March 1976

We have been aware of management deficiencies in the organized crime area and have been constantly evaluating and implementing organizational improvements within the Organized Crime and Racketeering Section to ensure that our limited resources are being directed against targets of major interest. Since January 1976, we have been conducting our own intensive internal review of the organized crime program and we welcomed the views of the GAO staff in connection with this effort. Changes in management personnel have been made in the Organized Crime and Racketeering Section within the past 3 months. We believe recent changes in Strike Force operations, as well as the management of the Section, are responsive not only to our own concerns about the program but to many of the concerns articulated in the GAO draft report.

As an initial comment, we agree that the Federal effort against organized crime can be better planned, organized, executed and directed and we are working toward these objectives. However, law enforcement can only deal with one side of the organized crime equation. Unlike street crime and other more conventional offenses, organized crime is a business which depends, as do all businesses, on customer acceptance and patronage. Activities such as illegal gambling, narcotics trafficking, loan sharking and fencing transactions, prostitution, pornography, etc., all depend upon willing purchasers or customers for the goods and services which organized crime sells. Organized crime will thus continue to "flourish" until the American citizenry chooses to withdraw its patronage from these multi-million dollar sources of income, and from the influence and power of those who control organized crime in this nation. It must be understood and emphasized that whatever program is designed by law enforcement, it can deal only with the "supply" side of the equation; the "demand" side is, in the final analysis, dependent on the actions and reactions of the American public.

Thus, even if an optimum method of "planning, organizing, executing, and directing" an organized crime program is perfected by the Department of Justice, organized crime may well continue to "flourish" in the above sense. Nonetheless, we must never be deflected from the goal of seeking to improve the method of dealing with the spectre of organized crime by this realization.

92-465 O - 77 - 15

GAO recommends that the Attorney General develop a definition of organized crime so that consistent criteria may be applied nationwide on who the targets of the Strike Force should be. The draft report notes that in 1970 the Attorney General defined organized crime as ". . . all illegal activities engaged in by members of criminal syndicates operative throughout the United States, and all illegal activities engaged in by known associates and confederates of such members." However, GAO did not believe that this definition was specific enough to allow consistent criteria to be applied nationwide on who the "targets" of the Strike Force should be.

We recognize the difficulty of formulating a universally applicable and acceptable definition of organized crime and further recognize that the special purpose for which the Strike Forces were created requires a clear and uniform articulation of investigative objectives. However, because of the subjective nature of perceptions about organized crime, we believe that problems would exist with any definition of organized crime. Like pornography, organized crime is difficult to define, but "you know it when you see it" if each determination is subjected to an appropriate review. The use of a working definition in conjunction with a viable means of applying it appears to offer a reasonable solution.

Prior to 1976, prosecutive and investigative priorities were left to meander and be determined ad hoc on a basis that reflected, more often than not, the relationship between a given Strike Force and the investigative agency with which it was dealing or with the United States Attorney. In early 1976, a requirement was adopted that investigations undertaken by Strike Forces would be reviewed before they were commenced rather than after they were completed. The initiation of the required reports at the outset of investigations provides Strike Force Chiefs and the management of the Organized Crime and Racketeering Section, as well as United States Attorneys, with a viable means by which to actually apply the definition promulgated by the Attorney General.

The GAO report further recommends that the National Council be reconvened to develop a unified approach to fighting organized crime. Organized crime is not a monolithic structure, cast in hierarchial form, and directed by a single "godfather" or Chairman of the Board. In business terms, the more apt analogy would be a conglomerate--a criminal conglomerate--which relies on loose lines of authority between various "business enterprises" in different geographic areas of the country. Moreover, the "line of business" which may be pre-eminent will vary from one section to another. In addition, the participants in the largesse of these enterprises may vary with the area under scrutiny, admitting some ethnic strains in some parts of the country and other ethnic strains elsewhere.

What the above obviously suggests is that the mode of dealing with organized crime must vary from region to region and must take into account the particular activities upon which racketeering figures are concentrating within that area. Thus, programs designed to combat one kind of organized crime in a particular locale are not necessarily desirable or effective to combat different kinds of activity in other locales throughout the nation.

It is these perceptions which guide the present efforts being undertaken within the Criminal Division to make sure that the Strike Forces program is flexible enough to meet these differentiations. Rather than attempting to develop a nationwide, unified approach for all strike forces, the Criminal Division is constantly evaluating the program, in the qualitative sense, to ensure that limited resources are being directed against targets of major interest and concern.

To achieve our goals, we have spent considerable time discussing our deficiencies and methods of overcoming them with the chiefs of the Section, their deputies, and selected Strike Force attorneys-in-charge. While new management has been installed within the past 3 months, we recognize that not all these deficiencies have yet been satisfactorily resolved. Admonitions have been and will continue to be constantly forthcoming to the management of the Section and Strike Force Chiefs that they must insure that every opportunity is taken to see that their resources are focused only on major organized crime investigations. It has been suggested, for example, that Strike Force Chiefs review the cases in their inventories, referring to the United States Attorneys' offices for prosecution those matters which appear to be routine in nature and/or do not involve major organized crime figures. New guidelines have been established by the Attorney General and will appear in the new United States Attorneys' Manual, which will clarify this requirement. The end result desired is to see that Strike Force offices do not become "bogged down" in the trial of a great number of mundane, routine cases, no matter who the defendant may be, but will be able to focus their resources on extensive and sophisticated grand jury investigations of major organized crime enterprises within their districts.

The role of coordinating the battle against organized crime is centralized in the Attorney General's Office and the Department of Justice. Our prime goal is to maximize the use of the resources available to us and to make as flexible as possible the response of those engaged in the organized crime program to the changing face of organized crime and to its differing manifestations from region to region throughout the country. In view of the new measures we are taking, we believe that if the Council on Organized Crime is convened, it should not undertake to perform any management function. Instead, it should serve as a forum where general matters may be raised and where an overall view of organized crime strategy may be developed.

The report also recommends that the Attorney General in conjunction with the other participating agencies develop agreements delineating each agency's (1) role in the strike forces including the role of the attorney-in-charge and (2) commitment of resources." The report further recommends that the Attorney General "seek an order from the President requiring the other agencies cooperation and commitment, should he not receive satisfaction from the other agencies."

The concept of interagency cooperation as originally conceived for strike forces is a good one. However, as noted by GAO, in practice the effectiveness of strike forces has been limited somewhat by the inability of the attorney-in-charge to task each agency investigatively. This problem will continue to exist to some extent since an organizational entity cannot be given responsibility without authority. However, we believe that this situation is improving and interagency cooperation is increasing. Agreements have, for example, been reached when disputes arose with the Internal Revenue Service over their participation in the Strike Force program. The Criminal Division is called upon everyday to interact with the investigative agencies over their use of resources and allocation of priorities. If, however, satisfaction is not received from the other agencies, we will seek assistance from progressively higher levels of authority in our efforts to acquire the cooperation and commitment of the other agencies.

The report also recommends that the Attorney General develop specific criteria and establish the required information system to evaluate the effectiveness of the national and individual Strike Force efforts. We recognize the importance of an information system that effectively measures performance, but we also recognize the extreme difficulty of measuring quantitatively the success of an organized crime program in purely statistical terms. We do not want to fall prey to demands to measure strike force performance simply by a blizzard of statistics which may, read one way or another, indicate more or less "progress" is being made. To date, we have not found a workable way to measure our accomplishments qualitatively. This is particularly difficult in an area such as organized crime where the conviction of a "quality" defendant can outweigh the effect of a whole mass of minor offenders being brought to the bar of justice. As the GAO report indicates, there are some proposed approaches, qualitative in nature, based on the use of intelligence data. While not fully providing a qualitative measure of effectiveness, they are steps in that direction. We are continuing to look for criteria which will aid us in measuring the qualitative effectiveness of organized crime.

Although the title of the draft report infers that the war on organized crime is faltering, we believe our quantitative statistics indicate that extensive accomplishments have been made in the Government's continuing campaign against the hoodlum element. Among these statistics are the FBI's accomplishments of (1) over 6,000 organized crime convictions during the past 5 years, including top La Cosa Nostra functionaries in New York City, New England, New Jersey, Philadelphia, Buffalo, Cleveland, Detroit, Chicago, St. Louis, Kansas City, Denver, and Los Angeles; (2) confiscation of more than $20,000,000 worth of cash, property, weapons, and wagering paraphernalia in organized crime cases since 1971; and (3) dissemination of criminal intelligence information to other Federal, state, and local law enforcement agencies over the same 5-year span, leading to some 15,000 arrests by the recipient agencies and the recovery or destruction of more than $187,000,000 worth of illicit drugs and narcotics, the seizure of approximately $8,000,000 worth of cash and gambling paraphernalia, and the assessment of tax liens against $19,000,000 worth of property arising out of Federal gambling cases investigated by the FBI.

The report also states that the costly computerized organized crime intelligence system appears to be of dubious value. The recommendation is made that the Attorney General reevaluate whether an intelligence system devoted solely to organized crime figures is needed, and that if it is, steps be taken to improve the quality and usefulness of data in the system.

We are in complete agreement with GAO on this recommendation. It is the present feeling of the management of the Criminal Division that the intelligence apparatus devised for use in the Organized Crime and Racketeering Section is being maintained at a cost and commitment of resources far in excess of any foreseeable return on its operations. As a consequence, we are giving serious consideration to altering the scope of the computerized operation consistent with bona fide intelligence needs.

We appreciate the opportunity to comment on the draft report. We are aware that there are deficiencies in the organized crime program. We are equally aware of the continued threat which organized crime and racketeering poses to the stability of our society and its institutions. Changes which have been effected, those which are on the drawing board, and those which have not yet been accomplished, are all designed to upgrade the quality of the organized crime program--both through the use of Strike Forces, where appropriate, and through service to the investigative agencies and the United States Attorneys' offices. It is our primary endeavor to ensure that a comprehensive effort is being pursued consistently to deal with every aspect of organized crime which comes to our attention.

APPENDIX VII

Should you have any further questions, please feel free to contact us.

Sincerely,

Glen E. Pommerening
Assistant Attorney General
for Administration

Department of the Treasury / **Internal Revenue Service** / Washington, D.C. 20224

Commissioner

OCT 5 1976

Mr. Victor L. Lowe
Director, General Government Division
U. S. General Accounting Office
414 G Street, N. W.
Washington, D. C. 20548

Dear Mr. Lowe:

Mr. Wilbur DeZerne, Director, Office of Audit, Office of the Secretary, Department of the Treasury has forwarded to me a copy of your transmittal letter to the Secretary of the Treasury and the related draft report for such action as deemed appropriate.

We have reviewed the draft of the GAO report to Congress on the Department of Justice's (DOJ) Organized Crime Strike Forces and are forwarding to you our detailed comments. These are included in the attachment to this letter.

The Internal Revenue Service is particularly concerned that this report presents observations and recommendations which could potentially result in serious impact on the IRS participation in the Joint Agency Strike Force Program (Chapter 2). These concerns pertain to the control of IRS resources assigned to the Joint Agency Strike Force Program and the control of IRS over its own operations as part of this coordinated joint investigation effort.

On January 8, 1976, the Internal Revenue Service and the Department of Justice signed an agreement titled "Department of Justice-Internal Revenue Service Guidelines Regarding Cooperation in Joint Investigations." These guidelines, among other things, delineate the roles of IRS and DOJ and cover the commitment of resources in joint investigations. Since these guidelines are an accomplished fact, a Presidential order - a GAO report recommendation contingent on the development of the type of agreement consummated between DOJ and IRS - is unnecesaary and could produce undesirable results.

We want to emphasize that these guidelines provide (1) that the Internal Revenue Service will retain control over its own operations and its own resources assigned in joint investigations with DOJ and other participating agencies and, (2) that the participation of IRS personnel in Strike Force

investigations will be coordinated by the Strike Force attorney who will also assist in the formulation of enforcement policies and the selection of cases for potential investigation. However, final authority concerning taxpayers to be investigated by IRS will be vested in IRS.

We believe that the provisions contained in this agreement accomplish the following objectives:

a. ensure efficient use of IRS resources employed in the Strike Forces;

b. ensure that IRS resources will be employed in cases concerning tax violations which are within the enforcement jurisdiction of the Service; and

c. maintain proper control in the IRS over the use of its resources in the Strike Forces.

We strongly believe that the use of IRS resources as delineated in the DOJ-IRS agreement will not only lead to better coordination of Strike Force efforts in the Joint Agency Strike Force Program but will also tend to ensure that the Service will have control over its workload.

This agreement thus contains necessary safeguards against possible misuses of IRS resources in joint investigations involving other than criminal violations, which are clearly outside the enforcement jurisdiction of the Service.

We believe that the FBI should play the primary role in the organized crime strike forces. Under 18 U.S.C. 533 and 534, the FBI has the responsibility to investigate those Federal offenses which are not specifically assigned by law to another agency. Although certain other agencies have investigative authority over specific offenses (e.g., IRS - tax offenses; Immigration and Naturalization Service - immigration offenses; Secret Service - counterfeiting offenses; Drug Enforcement Administration - drug offenses), the FBI has investigative authority and responsibility over most other Federal offenses involved in racketeering, such as those contained in Titles VIII and IX of the Organized Crime Act of 1970, P.L. 91-452, as well as such organized crime activity as bribery, hijacking, interstate transportation of stolen property, bankruptcy, fraud, unlawful activities with respect to labor unions and pension and welfare funds, and obstruction of Federal law enforcement (see 18 U.S.C. 152, 201, 204, 659, 664, 1461-1465, 1501-1510, 2314, 2315).

The Joint Agency Strike Force Program is designed, through the concerted efforts of participating agencies, to investigate and prosecute persons engaged in organized crime activities who commit criminal offenses (Title 18 and 26 violations). On account of this broad objective, we believe that the

APPENDIX VIII

FBI should be the primary agency for the investigation of organized crime strike forces. At the same time, IRS, because of its special expertise, will furnish all available assistance in the aspect of criminal violations of the tax laws.

Although we do not have complete data on the resources assigned by participating agencies to the organized crime strike forces, we believe that the IRS contribution of resources is as great or greater than any other participating agency's contribution. Table 1 attached to the detailed comments shows the annual IRS contribution of resources, from FY 1971 through FY 1974, to the organized crime effort including the Joint Agency Strike Force Program and Other Racketeer Cases (FY 1974 is the most recent year for which complete statistics are available). By fiscal years, 1,552, 1,783, 2,152, and 2,071 staff years were assigned by IRS to the overall organized crime effort. In FY 1974, for example, approximately 1,800 staff years were devoted to the Joint Agency Strike Force Program.

Thank you for affording us an opportunity to comment on this draft of the GAO report to Congress on the Department of Justice's Organized Crime Strike Forces. We hope that you will give us an additional opportunity to review the final version of this report in advance of its publication.

With kind regards,

Sincerely,

Commissioner

Enclosure

Internal Revenue Service Comments on
GAO Draft of Report to the Congress of the United States
On the Department of Justice's Organized
Crime Strike Force

1. The following portions of the GAO report pertain to observations and recommendations about the authority of the Department of Justice's attorneys-in-charge over the personnel assigned by other participating agencies in the Joint Agency Strike Force Program and over the cases selected for investigation in their jurisdictions:

   a. Page ii of the Digest:

      "The operations of individual strike forces are hampered because the Justice attorneys-in-charge have no authority over the participants from other agencies. (See ch. 2)."

   b. Page 15, Chapter 2:

      "In the absence of a national strategy or overall policy direction from Washington, the responsibility for planning rests with the strike forces. However, strike force attorneys-in-charge do not have authority to direct investigative priorities within their jurisdictions."

   c. Page 16, Chapter 2:

      "In establishing the strike force program, however, the Attorney General did not promulgate formal operational guidelines for the participating federal agencies and did not define authority and responsibilities of the attorneys-in-charge. The strike force attorney-in-charge has little discretion over what is investigated in his jurisdiction and on what activities investigative priorities are established. These decisions are made by the participating agencies, not the strike force, and these agencies decide at what stage in an investigation strike force attorneys will become involved.

      A House Government Operations Committee study (House Report No. 1574 dated June 20, 1968) recognized that Justice generally does not have line authority over the investigative and law enforcement operations of other Federal agencies.

      The strike force attorney-in-charge has no authority to require participating Federal agencies to conduct specific investigations or to assign additional manpower

and other resources to the strike force program. With the exception of the Immigration and Naturalization Service, personnel assigned to strike forces from participating agencies are not under the control of the attorney-in-charge."

d. Pages 17 and 18, Chapter 2:

"We recommend that the Attorney General

...in conjunction with other participating agencies develop agreements delineating each agency's (1) role in the strike forces including the role of the attorney-in-charge and (2) commitment of resources; and

...seek an order from the President requiring the other agencies' cooperation and commitment, should we not receive satisfaction from other agencies."

IRS Comments:

On January 8, 1976, the Deputy Attorney General and the Commissioner of the Internal Revenue Service signed an agreement entitled: Department of Justice-Internal Revenue Service Guidelines Regarding Cooperation in Joint Investigations. This agreement, among other things, delineates the roles of IRS and DOJ, including the role of the attorney-in-charge, in joint investigations undertaken in the Joint Agency Strike Force Program. This agreement also covers the commitment of resources of IRS and DOJ to this program. Since this agreement is an accomplished fact, a Presidential order is unnecessary and could produce undesirable results.

This agreement establishes the general procedures which are to be followed in investigations and examinations conducted jointly by the Department of Justice, including the Office of United States Attorneys, and the Internal Revenue Service. Within this framework of cooperation, this agreement recognizes that the mission of the Internal Revenue Service is the fair and effective administration and enforcement of the tax laws of the United States.

We emphasize that these guidelines provide (1) that the Internal Revenue Service will retain complete control over its own operations and resources in its participation in joint investigations with DOJ and other participating agencies, including those in the Joint Agency Strike Force Program; (2) that IRS agents will be assigned by IRS managers; (3) that the participation of IRS personnel in Strike Force investigations will be coordinated by the Strike Force attorney who will also assist in the formulation of enforcement policies and the selection of cases for potential investigation. However, final authority concerning taxpayers to be investigated will be vested in IRS.

We believe that the FBI should play the primary role in the organized crime strike forces. Under 18 U.S.C. 533 and 534, the FBI has the responsibility to investigate those Federal offenses which are not specifically assigned by law to another agency. Although certain other agencies have investigative authority over specific offenses (e.g., IRS - tax offenses; Immigration and Naturalization Service - immigration offenses; Secret Service - counterfeiting offenses; Drug Enforcement Administration - drug offenses), the FBI has investigative authority and responsibility over most other Federal offenses involved in racketeering, such as those contained in Titles VIII and IX of the Organized Crime Act of 1970, P.L. 91-452, as well as such organized crime activity as bribery, hijacking, interstate transportation of stolen property, bankruptcy, fraud, unlawful activities with respect to labor unions and pension and welfare funds, and obstruction of Federal law enforcement (see 18 U.S.C. 152, 201, 204, 659, 664, 1461-1465, 1501-1510, 2314, 2315).

The Joint Agency Strike Force Program is designed, through the concerted efforts of participating agencies, to investigate and prosecute persons engaged in organized crime activities who commit criminal offenses (Title 18 and 26 violations). On account of this broad objective, we believe that the FBI should be the primary agency concerned with organized crime strike forces. At the same time, IRS, because of its special expertise, will furnish all available assistance in the aspect of criminal violations of the tax laws.

Although we do not have complete data on the resources assigned by participating agencies to the organized crime strike forces, we believe that the IRS contribution of resources is as great or greater than any other participating agency's contribution. Table 1 attached shows the annual IRS contribution of resources, from FY 1971 through FY 1974, to the organized crime effort including the Joint Agency Strike Force Program and Other Racketeer Cases (FY 1974 is the most recent year for which complete statistics are available). By fiscal year, 1,552, 1,783, 2,152, and 2,071 staff years were assigned by IRS to the overall organized crime effort. In FY 1974, for example, approximately 1,800 staff years were devoted to the Joint Agency Strike Force Program.

Finally, in connection with the IRS cooperation with United States attorneys and Department of Justice attorneys in developing cases concerning tax violations which are within the enforcement jurisdiction of the Service, the Service will provide these attorneys with any information obtained, during a tax investigation, relating to the possible commission of nontax crimes to the extent that this information is in accordance with the provisions on disclosure of confidential information contained in Section 6103 of the Internal Revenue Service Code and the regulations thereunder, as recently amended by the Tax Reform Act of 1976. Under this amendment, for example, the Service will continue to furnish the Justice Department upon request tax returns and other tax return information with respect to the taxpayer whose civil or criminal tax liability is at issue. Written request is required in criminal or civil tax cases other than refund cases and in criminal or civil tax cases other than those referred by the IRS.

2. Page 25, Chapter 3: The GAO report states the following:

"In addition to the above reports, the IRS reviewed its participation in the strike force program and issued a report in January 1975. The review disclosed a need to:

--clearly define specific goals and objectives of the IRS' strike force efforts;

--establish specific strike force target criteria; and

--review reports of IRS strike force accomplishments to provide more detailed information to assist management in the evaluation of the effectiveness of the program.

CONCLUSION

The failure of Justice to define criteria to measure strike force effectiveness and obtain adequate data on program results inhibits obtaining knowledge at the field level of those aspects of program operations which could be changed to be more effective against organized crime."

IRS Comments:

The Internal Revenue Service is finalizing a manual supplement that:

a. Sets forth the objectives for the Service's participation in the Joint Agency Strike Force Program.

b. Delineates the responsibilities of the National Office, regional offices, district offices and the individual Strike Force representatives.

c. Provides for the coordination and states the general procedures which are to be followed in investigations and examinations conducted jointly by the Department of Justice and the Internal Revenue Service in accordance with the guidelines established in the January 8, 1976 agreement between IRS and DOJ on the Conduct of Joint Investigations.

d. Specifies the criteria for the Service's selection of Strike Force cases for Audit examination and Intelligence investigation.

With respect to the evaluation of the effectiveness of the Service's participation in the Joint Agency Strike Force Program, the Service has recently made a cost/benefit analysis of the impact of this program on

IRS resources. However, this analysis was limited since IRS did not have a comprehensive system that would track the results of audit examinations made on Strike Force cases from the dollars recommended by its Audit Division, through the assessment stage, and, finally, to collection.

The Service is currently developing a comprehensive reporting system that will allow it to track the results of its Intelligence and Audit investigations and examinations made on Strike Force cases. In addition, the Service is now conducting a study that tracks the results of Audit examinations and Intelligence investigations made on Strike Force cases examined by Audit in FY 1972. This study will track these cases from the audit examination results in terms of dollars recommended, to the assessment results in terms of dollars assessed, and, finally, to the collection results in terms of dollars collected. A similar follow-through on the results of Intelligence investigations will be made on these cases.

[See GAO note 1, p. 61.]

4. Page 26, Chapter 3: The GAO report makes the following recommendation:

"RECOMMENDATION

We recommend that the Attorney General develop specific criteria and establish the required information system to evaluate the effectiveness of the national and individual strike force efforts."

IRS Comments:

We suggest that this information system consider, among other things, the statutory restrictions on the IRS disclosure of confidential information as contained in Section 6103 of the Internal Revenue Code and the regulations thereunder, as amended by the Tax Reform Act of 1976.

For example, this amendment provides that tax information can be disclosed to the Justice Department and other Federal agencies for nontax criminal purposes only by order of a U.S. District Court.

5. The following portions of the GAO report pertain to a discussion of the usefulness of a computerized intelligence system developed, maintained, and operated by the Intelligence and Special Services Unit within OCRS, to collect and store information on organized crime gathered by all Federal agencies.

a. Page ii, Digest

"--A costly computerized organized crime intelligence system appeared to be of dubious value. (See ch. 5)."

b. Page 39, Chapter 5: The GAO report states that:

"In a study of the intelligence system issued in March 1976, Justice's Office of Management and Finance reported that, with the exception of the Federal Bureau of Investigation, information exchange is haphazard, rarely written or preserved and heavily dependent upon the rapport established between participating agency representatives. This informal system, the study concluded, results in an untimely and incomplete exchange of useful intelligence."

c. Page 40, Chapter 5: The GAO report states that:

"The Office of Management and Finance Study report stated that the overall assessment of strike force personnel was that racketeer profile data was not necessary for the current program of investigation and prosecution of organized crime figures."

d. Page 41, Chapter 5: The GAO report makes the following recommendation:

"RECOMMENDATION

We recommend that the Attorney General reevaluate whether an intelligence system devoted solely to organized crime figures is needed. If it is, steps should be taken to improve the quality and usefulness of data in the system."

IRS Comments:

The Internal Revenue Service is also concerned with the need and utilization of this computerized intelligence system. In June 1976, the Service requested and received detailed information from DOJ

concerning the creation, purpose and utilization of the Racketeer profiles maintained in this computerized system. The Service is currently studying the extent of its role, if any, in participating in this system. One of the Service's considerations relates to the disclosure of confidential information which must be in accordance with the statutory provisions under Section 6103 of the Code and the regulations thereunder, as amended by the Tax Reform Act of 1976. Of particular concern is the possible unauthorized disclosure of tax-related information.

Upon completion of the IRS study, a determination will be made as to the extent, if any, that IRS will participate in this computerized system.

Note 1: Deleted comments refer to material contained in the draft report which has been revised or which has not been included in the final report.

APPENDIX VIII

NUMBER OF AVERAGE POSITIONS AND COSTS FOR IRS

PARTICIPATION IN ORGANIZED CRIME PROGRAM

FY 1971 TO FY 1974 (note a)

Audit	FY 1974 Average positions: Agents	Other	Total	FY 1974 Cost dollars	FY 1973 Average positions: Agents	Other	Total	FY 1973 Cost dollars	FY 1972 Average positions: Agents	Other	Total	FY 1972 Cost dollars	FY 1971 Average positions: Agents	Other	Total	FY 1971 Cost dollars
				(000 omitted)				(000 omitted)				(000 omitted)				(000 omitted)
Strike Force	540	238	778	$14,484	576	236	812	$14,634	585	221	806	$14,424	441	187	628	$10,712
Other Justice Related Cases	96	41	137	2,555	116	47	163	2,938	(b)	(b)	(b)	(b)	(b)	(b)	(b)	(b)
Subtotal--Strike Force & Justice Related Cases	636	279	915	17,039	692	283	975	17,572	585	221	806	14,424	441	187	628	10,712
Other Racketeer Cases	105	43	148	2,759	61	27	88	1,586	47	17	64	1,145	40	17	57	972
Total Organized Crime	741	322	1,063	19,798	753	310	1,063	19,158	632	238	870	15,569	481	204	685	11,684
Intelligence																
Strike Force	498	251	749	18,316	480	234	714	15,032	481	222	703	14,244	415	211	626	12,062
Other Justice Related Cases	85	43	128	3,137	96	46	142	2,989	71	45	116	2,350	33	20	53	1,122
Subtotal--Strike Force & Justice Related Cases	583	294	877	21,453	576	280	856	18,021	552	267	819	16,594	448	231	679	13,184
Other Racketeer Cases	87	44	131	3,211	155	78	233	4,905	60	34	94	1,905	122	66	188	3,740
Total Organized Crime	670	338	1,008	24,664	731	358	1,089	22,926	612	301	913	18,499	570	297	867	16,924
Total--Strike Force & Justice Related Cases	1,219	573	1,792	38,492	1,268	563	1,831	35,593	1,137	488	1,625	31,018	889	418	1,307	23,896
Total--Other Racketeer Cases	192	87	279	5,970	216	105	321	6,491	107	51	158	3,050	162	83	245	4,712
Total Organized Crime	1,411	660	2,071	$44,462	1,484	668	2,152	$42,084	1,244	539	1,783	$34,068	1,051	501	1,552	$28,608

a/Earlier years of the Organized Crime Program are incomplete and, consequently, are not shown.

b/Department of Justice Cases included with Strike Force.

Note: In addition average positions devoted to Wagering Tax amounted to 19 in FY 1971, 10 in FY 1972 and FY 1973.

(Schedule as provided could not be reproduced. The above schedule, therefore, was edited and retyped by GAO.)

APPENDIX IX

THE UNDER SECRETARY OF THE TREASURY
WASHINGTON D.C. 20220

OCT 20 1976

Dear Mr. Lowe:

As suggested by your letter of August 12, 1976, to Secretary Simon, we have prepared the following comments on your draft report on the Organized Crime Strike Forces.

Although it is my understanding that the report is an assessment of the activities of the Federal Strike Forces, a large part of the draft is devoted to the activities of the National Council on Organized Crime and the sentencing practices of the Federal courts. While these topics are germaine to a broad analysis of the problem of organized crime in the United States, they are beyond the control of the Strike Forces or the Organized Crime and Racketeering Section of the Department of Justice. Perhaps the discussion of those topics could be included more appropriately in an appendix where it would be ancillary to the report on the Strike Forces. In that way, it would be less likely that what may be perceived as the failings of the Council and the courts would be attributed to the Strike Forces.

The discussion pertaining to the Strike Forces seems to imply that, since they have not eliminated organized crime in the United States, the Strike Forces have been unsuccessful. I do not agree. The mission of the Strike Force program has been to combat organized crime by prosecuting those who violate Federal criminal statutes; an expectation that prosecutions and convictions alone can effect total elimination of organized crime in a large and diverse population, such as we have, is unrealistic.

In my opinion, the number of indictments and convictions secured by the Strike Forces could be used to provide a good basis for evaluating the program. Statistics could be developed to show trends and provide a measure of quality. I am sure that these figures will show that the Strike Forces have constituted the most successful vehicle thus far developed by the Federal Government for combatting organized crime.

APPENDIX IX

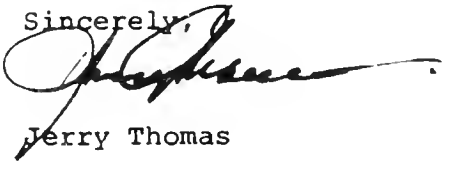
The report states that the operations of the Strike Forces are hampered because the Justice Attorneys-in-Charge have no authority over the participants from other agencies. We disagree with that statement. The Justice attorneys do exercise authority in determining which investigations will be conducted under the authority of the Strike Force. Usually the investigative agencies will propose an investigation that meets with the approval of the Justice attorney. But, the Attorney-in-Charge can decline any investigation that he believes to be inappropriate. Of course, in many instances, the agency still has the option of undertaking such an investigation on its own authority but that investigation would not be a Strike Force case.

We feel that a Strike Force should be a cooperative venture by the agencies involved and should be closely coordinated by the Department of Justice. This, however, does not mean that the Justice Department should exercise administrative supervision of the investigators working with the Strike Forces. Each agency has expertise in its particular field of investigation. It is not reasonable to expect that a small group of Justice attorneys will be more knowledgeable about investigative matters than all of the agency experts who participate in a Strike Force. The Strike Force attorneys supply the prosecutive skills. The division of responsibilities is effective and precludes an unwarranted concentration of authority in any one individual, including the chief Strike Force attorney.

While we believe that the discussion of sentencing would be more appropriately included in an appendix, we would also like to point out that the statistics cited would be more useful if the percentage of convictions that did not result in imprisonment was shown separately rather than having those cases grouped with others that resulted in light sentences as they are on page 31 of the draft report.

Thank you for the opportunity to comment on your draft.

Sincerely,



Jerry Thomas

Mr. Victor L. Lowe
Director, General Government
Division
U.S. General Accounting Office
Washington, D.C. 20548

APPENDIX X

APPENDIX X

PRINCIPAL OFFICIALS RESPONSIBLE FOR ADMINISTERING ACTIVITIES DISCUSSED IN THIS REPORT

	Tenure of office	
	From	To
DEPARTMENT OF JUSTICE		
ATTORNEY GENERAL OF THE UNITED STATES:		
Griffin Bell	Jan. 1977	Present
Edward H. Levi	Feb. 1975	Jan. 1977
William B. Saxbe	Jan. 1974	Feb. 1975
Robert H. Bork, Jr. (acting)	Oct. 1973	Jan. 1974
Elliot L. Richardson	May 1973	Oct. 1973
Richard G. Kleindienst	June 1972	May 1973
Richard G. Kleindienst (acting)	Mar. 1972	June 1972
John N. Mitchell	Jan. 1969	Mar. 1972
Ramsey Clark	Mar. 1967	Jan. 1969
ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION:		
Richard L. Thornburgh	July 1975	Present
John C. Keeney (acting)	Jan. 1975	July 1975
Henry E. Petersen	Jan. 1972	Dec. 1974
Henry E. Petersen (acting	Oct. 1971	Jan. 1972
Will R. Wilson	Jan. 1969	Oct. 1971
Fred M. Vinson	Apr. 1965	Jan. 1969
CHIEF, ORGANIZED CRIME AND RACKETEERING SECTION:		
Kurt W. Muellenberg (acting)	Oct. 1976	Present
William S. Lynch	Aug. 1969	Oct. 1976
Henry E. Petersen	Nov. 1966	Aug. 1969

Disqualification of Attorneys: Multiple Representation

(By Institute on Organized Crime, Cornell University School of Law)

OUTLINE

SUMMARY

1. The basic remedy for a prosecutor faced with a multiple representation situation is a motion to disqualify.

2. The trial court has authority to disqualify an attorney based on the court's inherent power to supervise the attorneys practicing before it.

3. The standard by which the motion is judged is a balancing test weighing the interests of the state against those of the attorney and client.

4. A number of interests have been considered, but of primary importance are the individual's right to counsel and the state's interest in an effective criminal justice system.

5. A decision on these important rights cannot be made without procedural safeguards which generally include a full hearing on the motion accompanied by affidavits as a minimum.

6. The basic problem of prosecutors in the multiple representation situation has been succinctly stated by Earl J. Silbert, U.S. attorney for the District of Columbia:

"Too often, we have seen a lawyer known to represent Mr. Big in narcotics come down to represent one of his lieutenants who has been arrested. The result: the chances of the lieutenant deciding in his interest to cooperate and turn state's evidence against Mr. Big are eliminated. Too often, in cases involving business corporations or labor unions, one lawyer represents targets of the investigation and witnesses, multiple representation, which in our view fosters obstruction of justice, criminally preventing prosecutors from penetrating to the top of organized criminal conspiracies.

"Some lawyers are simply oblivious to the legal and ethical problems of multiple representation. A few, aware of the problems, deliberately ignore them for monetary reasons. Others, also aware of the problems, reject what appears to them to be the efforts of prosecutors to dictate whom they can represent."[1]

It is conceivable that a reminder to the offending attorney of the conflicts of interest created by his multiple representation, or an opinion from the A.B.A. may produce desired changes in some situations.[2] Nevertheless, the basic tactic for a prosecutor faced with the multiple representation situation is a motion to disqualify the offending attorney.[3]

7. The authority to disqualify an attorney comes from the inherent power of the trial judge to supervise the attorneys practicing before him.[4] The order of the trial judge is a matter of discretion based on all the facts and circumstances, and is reversible only as an abuse of discretion.[5] There are relevant statutes in some jurisdictions (e.g. Virginia), and the Code of Professional Responsibility is a standard everywhere (incorporated either by reference or through the court rules). In practice the actual standards for disqualification vary considerably among jurisdictions, but basically rest on a balancing test weighing—

(1) the right of individuals to counsel of their choice:

---

[1] Federal Bar Association Luncheon, Sept. 15, 1976, pp. 9-10.

[2] H. Drinker, Legal Ethics, 106 (1953). Attorneys should not voluntarily put themselves in positions where the conditions of their compensation may interfere with the full discharge of their duty to their clients.

[3] In *In Re Special February 1975 Grand Jury*, 406 F.Supp. 194 (N.D. Ill., 1975), the disqualification attempt took the form of opposition to the admission of an attorney to practice before the District Court.

[4] *Pirillo v. Takiff*, 341 A.2d 896 (Pa. 1975), *cert. denied*, 423 U.S. 1083.

[5] *In Re Gopman*, 531 F.2d 262 (5th Cir., 1976).

(2) the right of individuals to freely associate in order to obtain counsel; and

(3) the right of attorney to practice his profession;

as compared to:

(1) the right of the state to effectively investigate and prosecute criminal activity;

(2) the interest of the state in maintaining the integrity of its courts and the legal profession; and

(3) the obligations of the state to protect the constitutional rights of individuals.

Courts have tended not to define explicitly the weight given to each factor,[6] but rather have either lumped all the considerations together, or focused almost exclusively on one factor. The issues dealt with most frequently are discussed below.

RIGHT TO COUNSEL

8. The right to counsel is guaranteed by the Sixth Amendment, but

"Although the right to counsel is absolute, there is no absolute right to particular counsel.[7] Desirable as it is that a defendant obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desirable public need for the efficient and effective administration of justice."[8]

In *Pirillo* v. *Takiff*, 341 A.2d 896 (PA., 1975), twelve policemen under grand jury investigation for bribery were represented by one lawyer who was paid by the Fraternal Order of Policemen (F.O.P.) thereby creating potential conflicts of interests among the witnesses, and between the witnesses and the F.O.P.[9] The court required each witness to obtain separate counsel not related to the F.O.P.[10] As explained by a lower appellate court following the *Pirillo* decision,

"The Court concluded that the value of a witness' right to counsel of his choice was minimal when chosen counsel was inherently unable to commit himself to act in the best interests of his client."[11]

The court also emphasized that the infringement of the right to counsel was the minimum necessary to protect important state interests in these circumstances.[12]

9. Those courts which have denied a motion for disqualification because of violation of the right to counsel have most frequently based their decision on finding of lack of evidence sufficient to warrant denial of such important rights.[13] These cases raise questions of procedural requirements discussed below,[14] and also frequently deal with the issue of the individual's right to waive conflict-free counsel.[15]

10. In *Glasser* v. *U.S.*, 315 U.S. 70 (1962), the Supreme Court enunciated the right to assistance of counsel free from conflicts of interest. Various lower

---

[6] *Pirillo* v. *Takiff*, 341 A.2d 896 (Pa. 1975), cert. denied, 423 U.S. 1083, gives the most complete analysis of the problem. See also, Remsburg, "Ethics, Judicial Power, and the Sixth Amendment: *Pirillo* v. *Takiff*," 37 U.P.T.T. Law Rev. 577 (1976).

[7] *United States ex rel. Carey* v. *Rundle*, 409 F.2d 1210, 1215 (3d Cir. 1969).

[8] Id. at 1214.

[9] The conflict from representing multiple witnesses is basically that it may be in one witness' interest to turn State's evidence, but the attorney would be unable to advise him or bargain for him without prejudicing his other client(s). The conflict with respect to payment by the F.O.P. while representing witnesses is that it divides the attorney's loyalties (or at least gives the appearance of such impropriety) insofar as the interests of the witness(es) and the F.O.P. diverge. Here this second conflict was particularly apparent because the F.O.P. had actively opposed the investigation, cooperation with which might well have been in a witness' best interest.

[10] *Pirillo* v. *Takiff*, *supra* at 905-906.

[11] *In Re January 1974 Special investigating Grand Jury*, 361 A.2d 325, 328 (Pa. Super. 1976).

[12] *Pirillo* v. *Takiff*, *supra* at 905-906.

[13] *In Re Investigation Before the April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir., 1976); *In Re Grand Jury Empaneled January 21, 1975*, 536 F.2d 1069 (3rd Cir., 1976); *United States* v. *Garcia*, 517 F.2d 272 (5th Cir., 1975); *In Re Special February 1975 Grand Jury*, 406 F.Supp. 194 (N.D. Ill., 1975).

[14] Paragraphs 18-21.

[15] See, for example, *In Re Investigation Before the April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir., 1976); and *United States* v. *Garcia*, 517 F.2d 272 (5th Cir., 1975). Both discussed below.

The Code of Professional Responsibility DR 5-105(c) says:

"A lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure * * *."

This provision is much cited and little discussed in cases apparently reflecting an attitude in courts that the rule is only of general advisory value.

courts have found that right to be waivable[16] (relying primarily on *Faretta* v. *California*, 422 U.S. 806 (1975)).[17] In *Garcia* v. *U.S.*, 517 F.2d 272 (5th Cir., 1975), the question of waiver was given thorough consideration. The court held that the district court's decision to disqualify because of the need to protect defendants from conflicts of interest was premature in that evidence had not been taken as to whether or not they would choose to waive the right to counsel without conflicts. The court (relying on *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and *Brady* v. *U.S.*, 397 U.S. 742 (1970)), then stated:

"Individuals are free to waive the constitutional protections otherwise afforded them, regardless of their motivation as long as the waiver is voluntary, knowing, and intelligent." [18]

The court then elaborated on the required procedure.

"The trial court should actively participate in the waiver decision. The Supreme Court recognized the need for affirmative judicial involvement in the waiver process in *Von Moltke* v. *Gillies*, 332 U.S. 708, 723–24, 68 S.Ct. 316, 92 L.Ed. 309, 320–21 (1948). . . . [A] judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a matter. A judge can make certain counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

"In accordance with the foregoing principles, we instruct the district court to follow a procedure akin to that promulgated in F.R. Crim. P. 11 whereby the defendant's voluntariness and knowledge will be manifest on the face of the record. Most significantly, the court should seek to elicit a narrative response from such defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or, if he wishes, with outside counsel, and that he voluntarily waives his Sixth Amendment protections." [19]

11. Although waiver completely negates the state interest in protecting an individual's right to conflicts-free counsel, the other state interests can still outweigh the competing rights so that disqualification can be granted.[20]

FREEDOM TO ASSOCIATE TO RETAIN COUNSEL

12. This right, derived from the First Amendment, is cited primarily with reference to *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217 (1967)[21] and *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963).[22] As summarized by the *Pirillo* court,

"Both *Button* and *United Mine Workers* specifically addressed the issue of potential conflicts inherent in the selection of lawyers by an organization to

---

[16] *In Re Investigation Before the April 1975 Grand Jury*, 53 F.2d 600 (D.C. Cir., 1976); and *In Re Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009 (3rd Cir., 1976), among others.

[17] Faretta, which recognized the individual's right to direct his own defense, quotes *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 280 (1942) at 322:

"When the administration of the criminal law * * * is as hedged about as it is by Constitutional safeguards for the accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards * * * is to imprison a man in his safeguard and call it the Constitution."

[18] *Garcia*, *supra* at 276–77.

[19] *Id.*, supra at 277-78.

[20] In *Pirillo* the Court found it unnecessary to decide whether there had been effective waiver. In his fundamental work, Legal Ethics (1953), Drinker, then Chairman of the A.B.A. Ethics Committee, cited numerous A.B.A. opinions for the proposition that, in a conflicts situation, "Consent [is] unavailable where the public interest is involved." At 120. See also, *In Re Abrams*, 56 N.J. 271, 266 A.2d 275 (1970); and *Ahto* v. *Weaver*, 39 N.J. 412, 189 A.2d 27 (1963).

[21] The Bar Association's attempt to have prohibited as unauthorized practice of law the union practice of hiring an attorney to represent any member who had a Workman's Compensation claim was denied.

[22] A Virginia law which would have prohibited the N.A.A.C.P. from referring individuals to particular attorneys and sometimes paying their legal fees was held unconstitutional as applied.

represent individual defendants. The selection procedures discussed there were similar to the method by which the F.O.P. recommends and pays qualified attorneys to represent individual members of the Order. The United States Supreme Court recognized that a state may act pursuant to its broad power to regulate the practice of law to prevent a serious conflict of interest from arising in the legal representation of its citizens, but held that the record below, in each instance, failed to demonstrate that any actual danger existed or that the state regulation was sufficiently narrow to meet only the particular form of danger present. The primary objectionable feature of state regulation in the First Amendment area is vagueness and overbreadth which result in regulation. *Commonwealth* v. *Dell Publications, Inc.*, 427 Pa. 189, 233 A.2d 840 (1967); *Smith* v. *Cromlish*, 207 Pa. Super. Ct. 516, 218 A.2d 596 (1966). Thus, if regulations affecting First Amendment rights are no greater than necessary to eliminate the substantive evil and protect the substantial governmental interests and individual rights, then the regulation can be constitutionally tolerated. *McMullen* v. *Wohlgemuth*, 453 Pa. 147, 308 A.2d 888 (1973)."[23]

13. In practice these cases have been cited for the two general propositions (1) that the individual's right to associate for the purpose of obtaining counsel is protected by the First Amendment and is not to be lightly disregarded, and (2) that organizations are not prohibited from providing legal services for their members, but that a balancing test is employed to weigh whether the harm likely to result in particular cases outweighs the value of the right. The conclusion of the *Pirillo* court (quoted above) that proper tailoring of the court's order could avoid most problems is probably a narrower construction of First Amendment requirements than other courts would hold. The court in *In Re Investigation Before the April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir., 1976), on evidence similar to that available in *Pirillo* dismissed a motion to disqualify as premature because important rights of the defendants could not be infringed upon without a full record[24] and until other alternatives had been exhausted.[25]

RIGHT TO PRACTICE LAW

14. Like the freedom of association issue, this right has received substantial reference and minimal discussion in court opinions. The *Pirillo* court observed:

"Unquestionably the right to pursue the occupation of one's choosing may not be curtailed without due process of law. The interest in a profession, being akin to a property right, may not be removed arbitrarily. *Dent* v. *West Virginia*, 129 U.S. 114 (1889); *Moore* v. *Jameson*, 451 P.A. A.T. 308, 306 A.2d A.T. 288."[26]

The *Pirillo* court applied a balancing test, and as explained by the court in *In Re January 1974 Special Investigating Grand Jury*, 361 A.2d 325, 328 (Pa. Super., 1976), found that

"an attorney's right to practice his profession was minimal when such practice at best operated on the margin of ethics."

RIGHT TO INVESTIGATE AND PROSECUTE

15. There is no question as to the state's right to efficiently and effectively operate its criminal justice system, and to move to disqualify an attorney whose multiple representation is impeding that function. Since this right is evaluated by a balancing test, questions do arise as to the degree of likelihood of harm, and the degree of harm likely to result. It is difficult to generalize about court's evaluations of these questions because they are so tied to the circumstances of individual cases which are often subtle and intricate. As extremes on the matter of likelihood of harm *In Re Special February 1975 Grand Jury*, 406 F.Supp. 194 (N.D. Ill., 1975): "I am of the opinion that for the purposes of depriving a person of his choice of counsel, there must be actual conflict, not just the appearance of it," contrasts with *State v. Galati*, 64 N.J. 572, 319 A.2d 220 (1974), "the cause and effect impact upon the public consciousness is almost, perhaps quite, as important as the actual fact."

Most cases take a middle course allowing the court "to nip any potential conflict of interest in the bud,"[27] but requiring more than mere hypotheticals

---

[23] *Pirillo*, supra at 903.
[24] *April 1975 Grand Jury*, *supra* at 607.
[25] Id. at 609. See also, *Grand Jury of January 21, 1975*, *supra*
[26] *Pirillo*, *supra* at 900.
[27] *Tucker* v. *Shaw*, 378 F.2d 304, 307 (2d Cir., 1967) cited in *In Re Gopman*, 531 F.2d 262 (5th Cir., 1976).

and unsubstantiated allegations.[28] The degree of harm is of particular importance with respect to the procedural alternatives discussed below.[29]

THE INTEGRITY OF THE LEGAL SYSTEM

16. It is unquestioned that the general supervisory power of the court to project its integrity includes the power to disqualify an attorney with conflicts of interest. Representation in situations like U.S. Attorney Silbert's example has resulted in suspension[30] and disbarment,[31] but the standards for acceptable conduct appear to be different in a disciplinary proceeding from those used when a client's right to counsel is at stake. In *In Re Abrams*, 56 N.J. 271, 266 A.2d 275 (1970), a disciplinary proceeding to review an attorney's conduct of accepting payment from a numbers banker to represent those runners who got arrested, it was said that:

". . . it is no answer that Canon 6 of the Canons of Professional Ethics permits the representation of conflicting interests 'by express consent of all concerned given after a full disclosure of the facts,' or that Canon 38, restated in affirmative terms, would permit the acceptance of compensation from others with 'the knowledge and consent of his client after full disclosure.' Neither rule is relevant when the subject matter is crime and when the public interest in the disclosure of criminal activities might thereby be hindered. It is inherently wrong to represent both the employer and the employee if the employee's interest may, and the public interest will, be advanced by the employee's disclosure of his employer's criminal conduct. For the same reasons, it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony."

17. The statement from *In Re Abrams*, *supra*, at 278 that: "Appearances too are a matter of ethical concern, for the public has an interest in the repute of the legal profession."[32] has been quoted with approval in *Pirillo* and explicitly rejected in *February 1975 Grand Jury*, *supra*. Between these two outer limits probably lies the majority view, but judging from the quantity and quality of the discussion the integrity of the legal system receives in these opinions on disqualification, it would seem that it is not a matter of great weight.

STATE'S OBLIGATION TO PROTECT INDIVIDUAL RIGHTS

18. This matter has received a considerable amount of attention in the opinions in a variety of forms. The basic application to the multiple representation situation is that if the state recognizes that conflicts of interest exist such that an individual's right to counsel is threatened, it is the state's duty to protect the individual.[33] To fulfill this duty the state can act to disqualify the individual's attorney.[34] As discussed above with respect to *Garcia*, this obligation can be satisfied by the court's proper supervision of a competent waiver. It has also been held that a motion to disqualify on the grounds of protecting a defendant from being deprived of conflict-free counsel cannot be granted unless the defendant has had the opportunity to waive that right. *U.S. v. Armedo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975).

19. Courts have established various procedures to insure that individual's rights will be safeguarded. In *February 1975 Grand Jury*, *supra*, the court rejected a disqualification motion based on allegations in the motion papers and required affidavits as a minimum. In *January 1974 Grand Jury*, *supra*, after reversing a disqualification for lack of evidence when based only on an unrecorded in camera hearing and a single letter from counsel indicating the intent of his three clients to resist any immunity offers. The court said, at 330:

"We do not imply that, in support of his petition to disqualify an attorney, it will be necessary for the special prosecutor to produce the witnesses whose

---

[28] As stated in *Grand Jury of January 21, 1975*, *supra* at 1013:
"Thus confronted with hypotheticals and not evidence, with rhetoric and not fact, the District Court erred in stripping appellants of the counsel of their choice."
[29] Paragraphs 18-21.
[30] *In Re Abrams*, 56 N.J. 271, 266 A.2d 275 (1970).
[31] *In Re Mogel*, 18 App. Div. 2d 203, 238 N.Y.S.2d 683 (1st Dept. 1963).
[32] This statement is based on Code of Professional Responsibility, Canon 9: "A lawyer shall avoid even the appearance of professional impropriety."
[33] *In Re Gopman*, 531 F.2d 262, 265-266 (5th Cir., 1976).
[34] Id.

testimony allegedly supports an inference that multiple representation will lead to contrived "stonewalling" of the grand jury and frustration of its purpose. It would be acceptable if, by affidavit attached to his petition, the special prosecutor set forth the substance of the testimony, the salient facts, supporting his petition for disqualification, without disclosing particulars such as the names of witnesses who provided such testimony. The hearing on the petition could then be limited to whether the allegations are sufficient to justify the disqualification of the attorney in question. At least that procedure would assure the affected parties an opportunity for a meaningful hearing and an effective appeal.

20. The court in *April 1975 Grand Jury, supra*, required far more action on the part of the prosecutor before disqualification could be granted. The prosecutor was faced with a situation where one hundred workers represented by one attorney paid by the union were making blanket assertions of the right to silence. The prosecutor moved to disqualify and require separate counsel. He argued that (1) the current management was denying workers adequate representation,[35] and (2) was impeding investigation by producing unwarranted assertions of the Fifth Amendment privilege, and by promoting "stonewalling." In reversing the district court's grant of the motion the court decried "what is strikingly absent from the record,"[36] explaining,

"* * * there is no testimony or other evidence in the record indicating which of the subpoenaed witnesses consider Mr. Rosen to be their personal legal representative; how the witnesses would characterize the nature of their attorney-client relationship with Mr. Rosen; whether they are personally aware of the potential conflicts of interest inherent in Mr. Rosen's multiple representation; whether given such conflicts of interest they would still prefer to be represented by Mr. Rosen rather than another attorney; and, finally, whether they would expect to continue to assert the privilege against self-incrimination even if, denied Mr. Rosen's services, they elected to dispose with counsel entirely or to retain separate and exclusive counsel."[37]

The court then proceeded to tell the prosecutor how to go about getting the required information.

"These problems with the record might have been avoided had the Government pursued the traditional method of dealing with witnesses who make 'blind, indiscriminate and legally unwarranted assertions' of the privilege against self-incrimination. The Government could have brought each witness before the District Court for a ruling with respect to whether the privilege was properly asserted * * *.

"At a hearing determining the applicability of the privilege to particular questions asked by the grand jury, the District Court would certainly be free to inform itself about the Government's allegations of conflicts of interest and inadequate representation by inquiring whether the witness was represented by Mr. Rosen, whether the witness was aware of the limitation on Mr. Rosen's ability to negotiate immunity in exchange for testimony, whether given that limitation the witness would prefer counsel other than Mr. Rosen, and whether the witness proposed to continue to assert the privilege under all circumstances."[38]

21. The above procedure is essentially the same requirement of a formal hearing on a motion to disqualify for conflicts of interest as applied in other cases.[39] With respect to the stonewalling problem, however, though the court recognized the difficulty, it left the prosecution with the grant of immunity as its almost exclusive remedy in the situation.

"It seems to us that the circumstances of this case present precisely the type of situation for which Congress intended to provide the Government with an effective tool for discovering the truth without risking violations of the Constitution in the delicate areas of freedom of association and representation by counsel of one's choice. As the Second Circuit has recently observed, '[t]he accommodation between the right of the Government to compel testimony, on the one hand, and the constitutional privilege to remain silent, on the other, is

---

[35] To avoid conflicts among the workers' individual interests, the attorney refused to consult with anyone individually.

[36] *April 1975 Grand Jury, supra* at 607

[37] Id.

[38] Id. at 608.

[39] For example, *Grand Jury of January 21, 1975*, supra; and *United States v. Liddy*, 418 F. Supp. 198 (D.C., 1972).

the immunity statute.' *United States* v. *Tramunti* 500 F.2d 1334, 1342, cert. denied, 419 U.S. 1079, 95 S.Ct. 667, 42 L.Ed.2d 673 (1974). Until accommodation in that manner has been demonstrated to be not feasible or contrary to the public interest, it is surely premature to seek it through disqualification of counsel." [40]

22. The role of the immunity statute in the multiple representation situation is a recurring problem which has not yet been fully discussed in the opinions. The general factual context is one where lawyer (L) represents A and B and the prosecutor is able to get a grant of immunity for either A or B and thereby compel his testimony.[41] Conflicts arise at two stages. The first stage is when the prosecutor approaches L to negotiate immunity. In the normal situation where A and B have interests which are at least somewhat in conflict,[42] it would be impossible for L to have served B's best interests while securing immunity for A.[43] Secondly, once immunity has been granted to A and the case goes to trial, L is limited in his ability to cross-examine A because of A's right to prohibit L's use of information obtained through the attorney-client relationship.[44] Consequently, there is a virtually automatic conflict of interest inherent in every multiple representation situation where an immunity statute is available.

23. In summarizing the general multiple representation problem the Watergate Special Prosecution Force said:

"In almost every investigation which centers on the criminal activity of one or more members of a hierarchical structure—whether a corporation, labor union, a Government agency, or a less formally organized group—the prosecutor is confronted with a witness who has been called to testify about his employers. Many times, the witness is represented by an attorney who also represents the employer and perhaps is compensated by him. Although the legal profession's Code of Professional Responsibility forbids a lawyer from representing conflicting or even potentially conflicting interests, lawyers and judges historically have been reluctant to enforce the Code's mandate strictly. They have taken the position that, so long as the witness understands that his attorney also represents the person or entity about which he will be asked to testify and that he has the right to a lawyer of his own choosing, he cannot be forced to retain new counsel.

"No lay witness, however, can realistically be expected to appreciate all the legal and practical ramifications of his attorney's dual loyalties, and in many cases he will be precluded from giving adequate consideration to the possibility of cooperating with the Government by the fear that the fact of his cooperation will be revealed to his employer. A mere inquiry by the judge in open court concerning the witness' preference is not likely to elicit a truthful response. It is necessary, therefore, for the court to intervene more directly by making a factual determination as to the existence of the conflict of interest and then requiring the witness to retain, or appointing for him, counsel who has no such conflict. Although there will obviously be great reluctance to interfere with the individual's freedom to select his own attorney, the suggested course is the only one that can preserve the equally valid right of the Government to his full and truthful testimony.

---

[40] *April 1975 Grand Jury*, *supra* at 609. Perhaps the problem for the prosecutor of having to grant immunity blindly did not much trouble the court because the facts in this case show that the government would risk little by doing so. Because of the large number of witnesses and the unlikelihood of choosing to grant immunity to an individual who should have been a target, the possibility of frustrating the Grand Jury investigation was small. Presumably, this problem under different facts could be used to demonstrate that a grant of immunity was "not feasible or contrary to the public interest."

[41] The federal statute 18 U.S.C. sections 6002, 6003 provides the prosecutor with this option. Although immunity grants have been around for a long time, this general immunity statute was not enacted until 1970. The newness of the statute may explain the lack of clarity of its application in this context.

[42] As stated in *Baker* v. *State*, 202 So.2d 563 (Fla. 1967) at 566: "Evidence, strategy, and defenses which benefit one co-defendant usually are detrimental to the other."

[43] Even presuming that A and B have interests which are practically identical, A has been served to the exclusion of B.

[44] This presumes what is probably the normal situation, that A has been granted immunity because he has damaging information to disclose, and that A is called in B's trial to reveal that information. See *United States* v. *Armedo-Sarmiento*, 524 F.2d 591 (2d Cir., 1975) (disqualification reversed because defendant must be given the opportunity to waive the right to an attorney not limited in cross-examination by a prior attorney-client relationship) and the A.L.R. annotation "Propriety and Prejudicial Effect of Counsel's Representing Defendant in a Criminal Case Notwithstanding Counsel's Representation or Former Representation of Prosecution Witness," 27 A.L.R.3d 1431.

"Both the courts and the various bar groups should be alerted to the serious issues of professional responsibility arising out of the representation of multiple interests during grand jury investigations, and Government counsel should press on every justiciable occasion for a judicial ruling on the question of conflict of interest and, where a conflict is found, for the replacement of the attorney involved." [45]

BRIEF FOR AMERICANS FOR EFFECTIVE ENFORCEMENT AS AMICUS CURIAE IN SUPPORT OF THE UNITED STATES IN UNITED STATES V. DUARDI, NO. 75-1454, U.S. COURT OF APPEALS FOR THE EIGHTH DISTRICT

INTEREST OF THE AMICUS

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. AELE has received a tax exempt ruling from the Internal Revenue Service as an educational corporation. As stated in its by-laws the purposes of AELE are: 1. To explore and consider the needs and requirements for the effective enforcement of the criminal law. 2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law-abiding citizens. 3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal law.

AELE has appeared as amicus curiae in support of the average citizen's concern for the effectiveness of proper law enforcement on at least fourteen occasions in the Supreme Court of the United States, twice in the Fourth, Seventh and Eighth Circuits and the Supreme Court of Illinois, and once each in the United States Courts of Appeals for the Ninth, Tenth, and District of Columbia Circuits, and once each in the United States District Courts for the Eastern District of Virginia and the District of Maryland, and once each in the Missouri Court of Appeals, the Kentucky Court of Appeals, the Circuit Court of Cook County, Illinois, and the Supreme Court of California.

The interest of the amici in the instant appeal stems from the importance of the legal and constitutional issues here presented, the resolution of which will have a direct and immediate impact upon the ability of law enforcement to respond to the unique challenge of the dangerous special offender through a policy of incapacitation. The amici hope in this appeal to speak now for those who might otherwise be future victims of crime.

STATEMENT OF THE FACTS

The defendants were convicted under 18 U.S.C. § 371 of conspiring to violate 18 U.S.C. § 1952 by promoting and establishing an unlawful business enterprise involving gambling, prostitution and bribery in violation of the laws of the State of Oklahoma. The facts established by the United States in the defendants' jury trial are summarized in an opinion of another panel of this court affirming the conviction in *United States v. Bishop*, 492 F.2d 1361, 1362–64 (8th Cir. 1974), *cert. denied*, 417 U.S. 942 (1974). That panel termed the evidence of guilt "overwhelming." 492 F.2d at 1365.

Prior to the trial, the United States filed with the court [1] a pleading to notify the defendants and the court that the government would seek to have the court

---

[45] Watergate Special Prosecution Force, *Report* 140-41 (1975).

A final reminder to prosecutors is worthy of mention because it is important to note that some of the same sorts of facts which argue for disqualification also apply to an individual's motion for a new trial. Thus, a prosecutor who chooses to ignore, or fails to notice, a defense attorney's multiple representation and succeeds in his prosecution may find that his efforts were largely wasted when the conviction is reversed because the defendant was denied his right to effective assistance of counsel. The standards for decision in this area are not very clear, varying from *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 210 (3d Cir., 1973), where:

"Upon a showing of possible conflict of interest or prejudice, however remote, we will regard joint representation as Constitutionally defective."

To *State v. Montgomery*, 15 Mo. App. 7, 288 A.2d 628 (1972), where a determined judge managed to explain away obvious conflicts. See also, the A.L.R. annotation "Circumstances Giving Rise to Conflicts of Interest Between or Among Criminal Co-Defendants Precluding Representation by Same Counsel," 34 A.L.R.3d 470.

[1] The pleading was not filed with the presiding judge. Instead, it was served on the defendants and filed with another judge of the court, who sealed it until the return of the jury verdict, when it was then made available to the presiding judge for proper disposition. See, 18 U.S.C. §3575(a).

sentence the defendants as "dangerous special offenders" under 18 U.S.C. §3575. Following the trial, the court entered a series of orders in connection with the original pleading and the United States' request for a dangerous special offender hearing. Initially the court ordered the government to file with the court the evidence it intended to rely upon. The court then found the original pleading inadequate and ordered the United States to amend its pleading. It then ordered the defendants examined under 18 U.S.C. §4208(b). The defendants appealed their conviction at this point, but it was affirmed. See, *United States v. Bishop, supra*. Following this affirmance, the court again found the United States' pleading inadequate, denied leave to amend, found that a dangerous special offender sentence could not consitutionally be imposed based on the type of information the prosecuting attorney proposed to rely upon, and held that 18 U.S.C. §3575(f) was unconstitutionally vague. The United States then sought to mandamus or appeal this decision. Another panel of this court held that mandamus would not lie and that the appeal had to await the imposition of sentence. The court then sentenced each of the defendants, following usual procedures, for a term of two years out of a possible five. See, 18 U.S.C. §1952. The United States now appeals the failure of the court to sentence the defendants as dangerous special offenders under 18 U.S.C. §3575.

ISSUES PRESENTED

(1) Did the United States' pleading of November 28, 1972, give the defendants and the court adequate notice that the United States would seek to have the court sentence the defendants as dangerous special offenders under 18 U.S.C. §3575?

(2) Consistent with due process, may a dangerous special offender sentence be predicated under 18 U.S.C. §3577 on (a) general information or (b) evidence of other criminal conduct not shown by a reasonable doubt to a jury?

(3) Consistent with due process, does the standard of "dangerous" under 18 U.S.C. §3575(f) give adequate guidance to a court to impose a special offender sentence?

(4) Consistent with due process and double jeopardy, may the United States appeal the failure of a court to impose a dangerous special sentence under 18 U.S.C. §3576?

SUMMARY OF ARGUMENT

Point I

Congress intended that dangerous special offender sentencing hearings be initiated by notice, not fact, pleading. The United States' pleading of November 28, 1972, gave to the defendants and the court adequate notice that the United States would seek to have the court sentence the defendants as dangerous special offenders. Because the lower court misread the statute to require fact pleading, it struck the United States' notice as inadequate. This ruling was in error and must now be set aside.

Point II

Due process standards for sentencing hearings do not require trial-type rules and procedures. A dangerous special offender hearing is an inquiry into circumstances of aggravation in the commission of the felony itself, and not an independent proceeding, dealing with a separate charge. However categorized, the statutory standards for the hearing comply with due process. Such a hearing may proceed without special rules of evidence, issues may be determined by the court, and not a jury, and the United States need only meet a burden of preponderance, not beyond a reasonable doubt. The court below wrongfully excluded certain types of information and evidence per se, when it should have admitted and then appropriately evaluated them. This ruling was in error and must now be reversed.

Point III

A statute must be read as a whole in light of its language and legislative history and given, where possible, a constitutional construction. Congress found that special offenders merited, as a class, extended terms. It then provided a safety valve, and authorized courts not to impose such terms, where, on a case by case basis, it was evident that special offenders posed no danger of continued

criminal conduct. The court below misread the statute and then held its misreading unconstitutionally vague. This ruling was in error and must now be reversed.

Point IV

Congress intended that this court have jurisdiction to review failures to impose dangerous special offender sentences at the instance of the United States. Such a review of sentence on the appeal of the United States does not violate the defendant's due process rights, since it cannot be exercised under the statutory scheme in such a fashion that it is vindictive. In addition, such a review does not violate the principle of double jeopardy, since it cannot result in the defendant being retried before the trier of fact on a question of guilt or innocence, rather than punishment. Consequently, this appeal is authorized, and it is constitutional.

The sentence imposed on the defendants below must now be reversed and the lower court given appropriate guidance in the holding of a dangerous special offender hearing.

THE STATUTORY SCHEME

The appeal is one of the first under the dangerous special offender sentencing provisions enacted by the Congress in 1970 as Title X of the Organized Crime Control Act, 84 Stat. 922 et seq. (hereinafter noted as Title X). Consequently, this appeal affords this court a unique opportunity to give an authoritative interpretation to Title X, to examine its constitutional ramifications, and to give helpful guidance to prosecutors and the lower courts. It is appropriate, therefore to preface the argument in this amicus brief with a short background treatment of the statutory scheme itself.

Shortly after Senator John L. McClellan introduced S.30, which ultimately became the Organized Crime Control Act of 1970, he discussed the problem of organized crime in the United States in an extended address on the Senate floor.[2] Part of the address discussed the general problem of sentencing. He observed: "There is no doubt that whatever view one holds about the criminal law its importance in our society cannot be questioned. Here each places his ultimate reliance for security. Nevertheless, we must recognize, too, that the penal law contains the strongest force known to our society, a force which in the past has too often tended toward brutality. Exercised well it accords to each security. Exercised ill, it accords to none security. How that power should be exercised is thus a question of capital importance.

"Traditionally, two tendencies have manifested themselves in the penal law in reaction from the brutality of another day, perhaps best illustrated by the philosophy of Draco, who, it should be recalled, once lamented that he knew of no penalty harsher than death, for he felt the smallest crime merited it.

"The first tendency, going back in modern times to Beccaria's historic 1764 essay, 'On Crime and Punishments,' seeks to fit the punishment to the crime. This tendency was, of course, rooted in a desire to limit the fearful application of the death penalty, at one time the punishment for numerous, some very petty, offenses. Its overall effect has been to narrow not only the application of the death penalty, but also to eliminate long prison terms.

"The second, stemming from contemporary theories of criminology, seeks to fit the punishment to the offender. This tendency, of course, is rooted in a desire to rehabilitate. Those who generally espouse this view, however, have tended to the conclusion that crime can best be dealt with only by broad changes in our society and through intensive work with juveniles. Unfortunately, this view has shown, as an American Bar Association study concluded, 'little realistic concern about the organized and well habituated criminals who incessantly exploit the community.'

"The penal codes of most jurisdictions, however, reflect little of either approach. Indeed, save for attempts to abolish the death penalty, little attention has been given over to the penalty structure of most penal codes since the turn of the century. Penalties vary from one offense to the next without scientific rhyme or reason to sanctions placed throughout".

There is, of course, an exception to the Senator's broad generalizations. The Congress, for example, has moved to deal with the rehabilitation of youthful offenders (see, e.g., 18 U.S.C. §5005 ff.). It has also moved to make special

[1] See S. Rep. 91-617, (March 12, 1969).
[2] 115 Cong. Rec. 772.

provision for the rehabilitation of narcotics offenders.[4] Nevertheless, it remains largely true that the federal system of criminal justice lacks an overall rational sentencing scheme

Testifying before the House Judiciary Subcommittee holding hearings on S.30, Senator McClellan described the present federal court system, particularly as it affects the racketeer, in these terms:

"The basic defect in our sentencing law has been that, for a given crime, every offender has been exposed to a single maximum authorized punishment set by the Congress, while a sentencing court's choice of a particular sentence at or under that maximum has not been reviewable by the appellate courts. This defect has led the Congress, in setting maximum sentences for various crimes, to establish those maximums at compromise levels which reduce the risk of abusively high sentences for ordinary criminals, but are too lenient to protect society by confining recidivists, professionals, and organized criminals.

"Federal and state racket prosecutors for years have been aware of the insufficiency of sentences imposed on organized crime leaders. Their experience was confirmed recently by the results of a staff study by the Senate Criminal Laws Subcommittee based upon sentencing data gathered by the Federal Bureau of Investigation . . . [L]et me simply mention now that we found that two thirds of La Cosa Nostra members included in the study and indicated by the Federal government since 1960 have faced maximum prison terms of only 5 years or less, and that nevertheless fewer than one-fourth have received the maximum sentences, 12 percent have received no jail terms, and the sentences of the remainder have averaged only 40 to 50 percent of the maximums." [5]

It was in this broad context of dissatisfaction with the present penalty structure of the federal penal code that Title X was proposed.

As finally enacted, Title X authorizes a federal prosecuting attorney to notify an adult felony defendant and the court before trial that the United States will seek to have the court impose sentence on the defendant as a dangerous special offender.[6] The types of special offender are defined: recidivist,[7] professional offender,[8] and organized crime offender.[9] The concept of "dangerous" is

---

[4] Senator McClellan was the principal floor manager of the Narcotic Addict Rehabilitation Act of 1966, 80 Stat. 1483, when it passed in the Senate, 112 Cong. Rec. 25414 (October 6, 1966). Urging passage of the bill, he observed.

Mr. President, this legislation is humane and I believe it will prove effective. It can reclaim thousands of lives. It can begin to eliminate the driving hunger for drugs that leads so many of our citizens, particularly young ones, into lives of crime and degradation. Id. at S. 25420.

[5] Organized Crime Control, Hearings before Subcommittee No. 5, Committee on the Judiciary, House of Representatives, 91st Cong., 2nd Sess. (1970), p. 108 (hereinafter cited House Hearings). The staff study referred to by Senator McClellan appears in full at 115 Cong. Rec. 34389-92 (November 17, 1969). A study of state sentencing practices in New York, which shows a similar pattern of inexplicable leniency, is reprinted in Reform of the Federal Criminal Law, Hearings before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, United States Senate, 92nd Cong., 2nd Sess. (1972), pp. 4188-99. Senator McClellan also wrote a popular piece for the Reader's Digest reviewing the facts of a number of the sentences in the federal system that were inexplicably lenient. It is reprinted in House Hearings at 111-15. Typical of the cases discussed in the article is the sentence of Louis Taglianetti, a "soldier" in Cosa Nostra boss Raymond Patriarca's New England crime family. Taglianetti received a seven month sentence for tax evasion. Ironically, for the ordinary citizens convicted that same year for tax evasion, the average sentence was ten months. Id. at 113.

[6] 18 U.S.C. §3575(a).

[7] 18 U.S.C. §3575(e)(1).

[8] 18 U.S.C. §3575(e)(2).

[9] 18 U.S.C. §3575(e)(1). The concept of "organized crime" has been much like the elephant of fable to those who conducted their examination of the beast in a dark room. Some saw nothing, and decided nothing was there. See, e.g., G. Hawkins, "God and the Mafia," The Public Interest No. 14, Winter 1969, pp. 24-51; compare the summaries of wiretaps reprinted in H. Zeiger, The Jersey Mob (Signet ed. 1975). Others examined the phenomenon through the senses of an anthropologist, and saw not a conspiracy, but a social system. See, e.g., F. Ianni, A Family Business (Simon and Shuster 1972). Others looked only at press accounts, and saw it in public relations terms. D. Smith, The Mafia Mystique (Basic Books 1975). Others looked at it as an organizational theorist, and saw its special character in its functional division of labor. D. Cressey, Theft of a Nation (Harper and Row 1969). Some examined it as a lawyer, and saw it as "conspiracy." See, e.g., G. Blakey, "Aspects of the Evidence Gathering Process in Organized Crime Cases," in Task Force Report on Organized Crime, President's Commission on Crime and Administration of Justice (1967), pp. 80, 81-83 (hereinafter cited Task Force). This, too, was the view taken of it by the President's Crime Commission, and it is reflected in Title X. The Crime Commission identified "organized crime," not with the Mafia (La Cosa Nostra was termed only the "core" of organized crime, Task Force at 6; other groups were recognized to be involved), but with conspiratorial criminal behavior, when its sophistication had reached the level where its division of labor included positions for an "enforcer" of violence and a "corrupter" of the legitimate processes of our society. Ibid. at 8. Title X's definition of the "organized crime" offender in 18 U.S.C. §3575(e)(3) reflects the theoretical framework (e.g., "give or receive bribe," "use force"). See, S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969), p. 165 (hereinafter cited Senate Report):

(Continued)

also defined.[9] The court must hold a full hearing on the dangerous special offender notice with a substantial presentence report, disclosure, right to counsel, compulsory process and cross-examination.[10] After findings and a statement of reasons, the court may impose an extended term not disproportionate to the underlying offense and not to exceed twenty-five years.[11] Title X also authorizes appellate review of the sentence at the instance of either the defendant or the United States,[12] and it confers the right of a federal court to consider the fullest information possible in determining an appropriate sentence.[13]

As such, Title X implements the principle recommendations of the American Bar Association,[14] the National Council on Crime and Delinquency,[15] the American Law Institute,[16] the President's Commission on Crime and the Administration of Justice,[17] the National Commission on Reform of Federal Criminal Law[18] and the United States Judicial Conference[19] that the Congress should authorize one maximum sentence for ordinary offenders and a greater maximum for the more dangerous type of offender. Furthermore, it continues in another area the work of such pioneer legislation as the youthful offender and narcotic addict provisions of present law.

ARGUMENT

I. The United States pleading of November 28, 1972, gave the defendants and the court adequate notice that the United States would seek to have the court sentence the defendants as dangerous special offenders under 18 U.S.C. §3575.

Title X authorizes the attorney for the United States to file with the court a "notice," when it seeks to have a dangerous special offender sentence imposed. The language of the statute must be sharply contrasted with Rule 7 of the Federal Rules of Criminal Procedure, which requires indictments to be "a plain, concise and definite written statement of the essential *facts* constituting the offense charged." (Emphasis added.) The contrast between the language of Title X and Rule 7 casts into sharp relief the intent of Congress to utilize a system of "notice" rather than "fact" pleadings to initiate dangerous special offender hearings.

The pleading filed by the United States on November 28, 1972, gave to the defendants and the court all of the "notice" required by Title X. The "notice," in relevant part, read as follows:

"Now comes the United States, by and through its attorneys, Bert C. Hurn, United States Attorney for the Western District of Missouri, and Gary Cornwell, Special Attorney, United States Department of Justice, who are charged

(Continued)

This provision is designed to deal primarily with the organized crime offender. Those who personally play or are to play leadership roles or are the enforcers or executors of violence are singled out for social sentencing treatment. Those who give and those who receive bribes are also covered. The word "bribe" is not used in a narrow or technical sense, and should be interpreted broadly. The degree of aggravation in the sentence in each case must be determined by the court from all the facts and circumstances in the context of these statutory standards and within the outside limits of the penalty range. The sophistication of the organization, its division of labor, the complexity of its goals, and its contemplated time span are all factors to consider.

[9] 18 U.S.C. §3575(f).

[10] 18 U.S.C. §3575(b).

[11] Ibid. The concept of proportionality here is "judicially determined." Final Report of the National Commission on Reform of Federal Criminal Law (1971), p. 143 (hereinafter cited Reform Commission). In the usual case, this would mean that the extended term could not be more than regular term (i.e., in this case where 18 U.S.C. §1952 authorizes 5 years, the extended term could not be more than 5 years, for a total of 10). For a general discussion of the concept of proportionality, see the remarks of Congressman Richard H. Poff in 116 Cong. Rec. 35290-98 (Oct. 7, 1970). Congressman Poff, the second ranking member of the minority on the House Judiciary Committee in 1970, was a major force in the House hearings and his bill, H.R. 19215, 91st Cong., 2nd Sess. (September 15, 1970), served as the model for the amendments made in the House Judiciary Committee to S. 30 as it passed the Senate. Consequently, his statements on the floor of the House take on special meaning in understanding legislative intent.

[12] 18 U.S.C. §3576.

[13] 18 U.S.C. §3577.

[14] ABA Standards Relating to Sentencing Alternatives and Procedures §§3.1 and 3.3 (Approved Draft, 1968) (hereinafter cited A.B.A. Standards).

[15] Model Sentencing Act, §7 (1963).

[16] Model Penal Code §7.03 (Official Draft 1962).

[17] The Challenge of Crime in a Free Society: The Report of the President's Commission on Law Enforcement and Administration of Justice (1967) pp. 143, 203 (hereinafter cited President's Crime Commission).

[18] Reform Commission at 143.

[19] House Report No. 91-1549, 91st Cong., 2nd Sess. (1970), p. 74 (hereinafter cited House Report).

with the prosecution of the above named defendants before the United States District Court for the Western District of Missouri for alleged violations of 18 U.S.C. §§371 and 1952, which are felonies committed when the defendants were each over the age of 21 years, and hereby files this notice with the Court, in compliance with the provisions of 18 U.S.C. §3575(a), stating that upon conviction for said felonies these defendants are each subject to the imposition of sentences under 18 U.S.C. §3575(b) as dangerous special offenders.

"We do believe that said defendants are dangerous special offenders for the reason that such felonies constituted, and were committed by defendants in furtherance of a conspiracy with three or more persons to engage in a pattern of conduct criminal under the laws of the United States, and the State of Oklahoma, and the defendants agreed to and did organize, plan, finance, direct, manage and supervise all or part of such illegal conduct and activities, and agreed to give and receive a bribe and to use force as part of such conduct, all within the meaning of §3575(e)(3) of Title 18, United States Code."

As Title X requires, the pleading gave to the defendants and the court "notice" of the United States' intention to seek the imposition of an extended term. The pleading "specified" that the defendants were dangerous special offenders. It then "particularized," into which of the three categories of dangerous special offenders the defendants fell and the reason why, absent mitigating factors, the United States believed the defendants were dangerous special offenders.

The court below—understandably—misread the intent of Title X.[21] The proceedings envisioned by Title X, of course, were new. Following past practices and modes of thought, the court read Title X as if it authorized the filing of a pleading "in the nature of an indictment." Consequently, the court failed to see the significance of the word "notice" and read the phrase "setting out with particularity the reasons" as if it referred to facts, rather than the categories of different dangerous special offenders under subsection (e). As noted above, of course, this was a misreading of the statute.

Having so constructed Title X to require "fact" pleading, the court then found the November 28 pleading defective, and it ordered the United States to file an "amendment." The statute, of course, permits amendments, i.e., the addition of new specific categories of special offenders,[22] to be filed, "a reasonable time before trial or acceptance by the court of a plea . . ." [23] Since that was no longer possible, this pleading had to be struck.

To say that the court erred in its reading of Title X is not to say that its instincts were unsound. Obviously, the defendants could not be expected to defend themselves in a dangerous special offender hearing based solely on the notice filed by the United States. What the defendants should have done, however, was to move for the filing of a "supplementary pleading in the nature of a bill of particulars." The court was authorized to order such a pleading [24] and the hearing should have then proceeded on that basis. Striking the pleading, on the other hand, was a reversible error which this court must now correct.

II. Consistent with due process, a dangerous special offender sentence may be predicated under 18 U.S.C. §3577 on (a) general information or (b) evidence of other criminal conduct not shown by a reasonable doubt to a jury.

18 U.S.C. §3577 provides that:

No limitation shall be placed on the information concerning the background character and conduct of a person convicted of an offense which a court of the

---

[21] The Court's misreading of the statute was occasioned in part by the similar misreading of Judge Hunter in *United States v. Kellin*, 16 Crim. Law Repr. 2190 (November 8, 1974), an appeal of which is now pending in this court.

[22] For example, suppose after having filed the pleading in this case, but prior to verdict or plea, the United States had learned that one of the defendants also qualified as dangerous special offender because he was a recidivist. It would then have been open to the United States to file an amendment adding paragraph (1) to the notice that then only included paragraph (3).

[23] The legislative history of Title X makes it clear that "the notice is freely amendable" but the right to amend must be made within the framework of the "reasonable time" limitation. Senate Report at 162.

[24] Rule 57(b) of the Federal Rules of Criminal Procedure provides that if "no procedure is specifically prescribed . . . . the court may proceed in any lawful manner not inconsistent with" the Rules themselves. The Organized Crime Control Act of 1970, although carefully drafted, did not specify all of the modes of procedure for its implementation in the courts. For example, the Supreme Court has only recently amended Rule 7(c)(2) (Indictment and Information) and Rule 32(b)(2) (Judgment) to accommodate the new concept of "criminal forfeiture" introduced in the federal system by Title IX of the Act. As the need arises, the Court can be expected to promulgate new rules in this area, too. Until that time, Rule 57(b) can accommodate the necessary procedural innovations required by Title X.

United States may receive and consider for the purpose of imposing an appropriate sentence.

This provision, enacted as part of Title X, is little more than a statutory codification [25] of the due process principles for sentencing enunciated by the Supreme Court's landmark decision of *Williams v. New York*, 337 U.S. 241 (1949).

In *Williams*, the Supreme Court literally faced a life or death issue. The defendant was convicted of first degree murder with a jury recommendation of life. The trial judge reviewed a wide spectrum of information were allegations, supported in part by evidence, but not proven in the context of a criminal trial, that the defendant had committed thirty other burglaries. In addition, the probation report termed the defendant a "menace to society." The judge did not follow the recommendation of the jury; he sentenced the defendant to death. The defendant appealed, challenging his sentence on due process grounds. In an opinion by Mr. Justice Black, the Supreme Court affirmed the sentence. Following are key quotes from the Court's opinion:

"Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders. A recent manifestation of the historical latitude allowed sentencing judges appears in Rule 32 of the Federal Rules of Criminal Procedure. That rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant, including such information 'as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant * * *.' 337 U.S. at 246.

* * * * * * *

"In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly revelant to the particular offense charged. These rules rest in part on a necessity to prevent a time-consuming and confusing trial of collateral issues. They were also designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning te defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial. . . . The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. *Id.* at 247.

* * * * * * *

"Under the practice of individualizing punishments, investigational techniques have been an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences

[25] Senate Report at 167; House Report at 63.

would be unavailable if information were restricted to that given in open court by withesses subject to cross-examination. *Id.* at 249-50.

"The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." *Id.* at 251.

Williams v. New York was followed in the Supreme Court ten years later by *Williams v. Oklahoma;* the Supreme Court once again had a death case, Williams was convicted of murder, 358 U.S. 576 (1959), and sentenced to life. He then pled guilty to kidnapping growing out of the same transaction. At the time of sentencing, the State's Attorney outlined Williams' background in an unsworn statement. It included an extensive criminal record. The court sentenced Williams to death. He appealed, challenging his sentence on due process grounds. The Supreme Court affirmed the sentence. Included among the alternative grounds on which the Court relied was *Williams v. New York*, 358 U.S. at 584.

More recently, *Williams v. New York*, 538 U.S. at 584 in *Specht v. Patterson*, 386 U.S. 605, 608 (1967).

The principle of *Williams*—that a sentencing judge is not limited by trial-type due process standards—is, of course, not without limitations. Informal procedures may be consistent with due process, but they must not be infected with 'materially untrue assumptions," *Townsend v. Burke*, 334 U.S. 736 (1948) (reliance on materially false prior record challenged by defendant); and no reliance may be placed or a fact established by informal procedures based on another proceeding that was fundamentally defective on constitutional grounds, *United States v. Tucker*, 404 U.S. 443 (1972) (reliance on previous convictions to establish prior robberies where defendant was unconnseled). The *Williams* principle, therefore, goes to the type of evidence on which a court may permissibly rely under the due process clause, where no challenge is made to the accuracy of the information. Significantly, such a challenge was not made in *Williams v. New York*, 358 U.S. at 244, or in *Williams v. Oklahoma*, 358 U.S. at 580. Where such a challenge is made, presumably the duty of the court is to hold a hearing to resolve it, but not to exclude the evidence altogether on the grounds that it *might* be "inaccurate."

While not challenging the continuing validity of *Williams v. New York* as indeed it could not—the court below sought to classify the dangerous special offender sentencing hearing with the sort of proceeding condemned by the Supreme Court in *Specht v. Patterson*, 386 U.S. 605 (1967). In *Specht*, the Court had before it the Colorado Sex Offenders Act, *Colo. Rev. Stat. Ann.* §§39-19-1 to 10 (1963). It provided that where one was convicted of a sex offense, he could be held for an indeterminate term from one day to life "without notice and full hearing," 386 U.S. at 607. The post-conviction allegations in *Specht* were held to constitute a new criminal charge, separate and distinct from the criminal conviction, which only triggered the new sex offender proceedings. The Court observed: "The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing." 386 U.S. at 608. In Title X, in contrast, the dangerous special offender criteria measure facts, which aggravate the penalty for the offense itself.[26] Under Title X, the conduct embraced within the criteria must be factually related to the felony for which sentence is imposed, and the Supreme Court has indicated in numerous cases that such facts do not relate to a separate criminal charge. *Gryger v. Burke*, 334 U.S. 728, 732 (1948); *Graham v. West Virginia*, 224 U.S. 620, 625 (1912); *Moore v. Missouri*, 159 U.S. 673, 677 (1895). Title X poses, in *Specht's language*, "a distinct issue," 386 U.S. at 610, quoting *Graham*, 224 U.S. at 625, but it does not constitute a separate charge. Consequently, Title X falls within the sentencing rationale of *Williams* and not the independent proceeding rationale of *Specht*.

Even assuming *Specht* applies to Title X, it does not follow that Title X would be much the worse for the encounter. Strictly speaking, all *Specht* held was that the absence of any provision for notice and hearing made the Colorado statute unconstitutional. Its dicta, moreover, are not as expansive as the lower

---

[26] The legislative history on this point is overwhelming. See Senate Report at 163: "The requirements of *Specht* v. *Patterson* . . . are inapplicable, since no separate charge triggered by an independent offense is at issue. Only circumstances of aggravation of the offense for which the conviction was obtained are before the court." (Emphasis added). See House Report at 61 ("aggravating factors"). The question is considered at length in J. McClellan (with Blakey and Coombs), "The Organized Crime Control Act (S. 30) or Its Critics, Which Threatens Civil Liberties?" 46 Notre Dame Lawyer 55, 164-74 (1970) (hereinafter cited McClellan).

court assumed. *Specht* says nothing about a jury trial or the reasonable doubt standard, and it is not clear that its reference to confrontation need be read to mean trial-type confrontation.[27] The crucial dicta of the Court were:

"Due process . . . requires that . . . [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross examine and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed." 386 U.S. at 610.

Tested by this language, Title X passes constitutional muster. Even though *Specht*—type due process standards were not constitutionally compelled, they were statutorially adopted. Title X provides for notice, hearing, counsel, compulsory process, cross examination, findings of fact, statement of reasons and appeal.

The judgement reflected in Title X, that the Court and not the jury should sentence on the basis of all available information, evaluated against a preponderance of the information test, moreover, reflects the best judgment of those who have spent the better part of their professional lives studying how to make our nation's system of sentencing more rational.

In 1967, the President's Crime Commission called for "extended prison terms" for convicted "supervisory or other management" personnel in an "illegal business" based on "the evidence, presentence report or sentence hearing."[28] Its Task Force on the Courts recognized the need for "fuller participation" by counsel on the "question of sentence," but explicitly rejected the notion of a "full trial" and sought to achieve the goal "without encumbering the sentencing proceedings with rigid evidenciary rules and formal procedures."[29]

The American Law Institute's Model Penal Code in Section 7.03 would authorize extended terms for certain types of offenders. The extended term issue would be tried to the court rather than a jury.[30] The standard for proof would be to the satisfaction of the court, and not beyond a reasonable doubt.[31]

The A.B.A. Standards on Sentencing follows a similar approach. When it adopted the informal sentencing model and rejected the trial-type analogy, it observed:

"[T]he Advisory Committee fails to see why the method of the criminal law as employed at trial must be carried over into the sentencing phase, or if it must, why the procedure for sentencing repeat or dangerous offenders is the only case where this must be so. No constitutional questions are raised in the normal sentencing case where the trial judge considers the contents of a presentence report without providing the defendant with direct confrontation of all who contributed background information. See *Williams v. New York*, 337 U.S. 241 (1949). And factual disputes which arise in the imposition of a normal term are resolved daily by the judge without the creation of any such difficulty.

---

[27] See the testimony of then Professor Henry Ruth of the University of Pennsylvania Law School, now Special Prosecutor, when he testified before the Subcommittee on Criminal Laws and Procedures: Justice Douglas' opinion for the Court in *Specht* used the word "confrontation" but it "did not equate 'confrontation' the same in the sentence hearing with confrontation at a trial." Organized Crime Control, Hearings before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 91st Cong., 1st Sess. (1969) at 345 (hereinafter cited Senate Hearings).

[28] President's Crime Commission at 203.

[29] Task Force: Courts, Task Force on Administration of Justice, The President's Commission on Law Enforcement and Administration of Justice, p. 20 (1967).

[30] The Commentary to Tentative Draft No. 2, p. 42 (A.L.I. 1954) observes:

In so far as [the Code] calls for a court determination rather than a jury verdict on the question of . . . [the grounds for the extended term], the draft departs from the most usual procedure under the present habitual offender laws. Some states now provide, however, for determination of the issue by the court. And since the issue bears entirely on the nature of the sentence, rather than on guilt or innocence, we see no reason why a jury trial should be accorded in a system where questions of sentence otherwise are for determination by the court.

At least eight states, moreover, now follow the practice of having the court, rather than the jury, determine the facts on which an extended term is predicated. See *Yates v. State*, 245 Ark. 460, 33 S.W.2d 777 (1944); Kan. Stat. Ann. § 21-450 (1973); Ind. Rev. Stat. Ann. § 9-2207 (1956); Minn. Stat. Ann. § 609.16 (1964); Mo. Rev. Stat. § 556.280(2) (1959); Neb. Rev. Stat. § 29-2221(2) (1972); Nev. Rev. Stat. § 207.010(4) (1971); Ore. Rev. Stat. § 161.725, 161.735 (1973).

[31] Model Penal Code § 7.03(4) (Official Draft 1962). See Commentary to Tentative Draft No. 4, p. 144 (1955): "[T]o the extent that it permits a finding that will result in increase of sentence upon less than proof beyond a reasonable doubt * * * [it nevertheless] affords an adequate protection * * *."

"If it can be assumed that there is no constitutional difficulty with the basic structure of a sentencing procedure which uses the presentence report and which proceeds less formally than does the hearing on the question of guilt, the issue can be considerably narrow. Presently the judge is left completely at large in making the sentencing decision, although he is expected to act in a manner that is responsive to a factual picture of the defendant which is conveyed to him by this less formal procedure. The issue thus comes down to whether providing standards by way of findings to precede the imposition of a particularly serious sentence necessarily invokes a change in the required procedure. The Advisory Committee would agree with the conclusion of the revisers of the Minnesota laws that the method of the criminal trial need not be invoked for that reason. See *Minn. Stat. Ann.* §609.155 (1964) (Comments, at 148-49). It would indeed be ironic if procedural due process *required* the absence of legislative guidance in order for the sentencing proceeding to be informal. The Advisory Committee is confident that such a result need not follow." (Emphasis in original).[32]

Presently, state courts set extended sentences without apparent difficulty under statutes similar to Title X. See, e.g., *State v. Losieau*, 184 Neb. 178, 166 N.W.2d 406 (1969); *State v. Piri*, 295 Minn. 247, 204 N.W.2nd 120 (1973). There seems to be no apparent reason why the federal system could not profit by their example.

The United States below offered two types of information to justify its belief that the defendants were dangerous special offenders: (a) general information linking the defendants to organized crime,[33] and (b) evidence of other criminal conduct. The court below excluded both as a matter of law as impermissible types of evidence. This judgment was erroneous and ought now be reversed by this court. Questions of accuracy should, of course, be left for the resolution of the court. The information may be disbelieved by the court, but it is not *per se* inadmissible.

III. Consistent with due process, the standard of "dangerous" under 18 U.S.C. § 3575(f) gives adequate guidance to a court to impose a special offender sentence.

18 U.S.C. §3575(f) provides: A defendant is dangerous for the purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct.

The approach that must be taken in construing a statute charged with vagueness was set forth by Chief Justice Earl Warren for the Court in *United States v. Harriss*, 347 U.S. 612, 618 (1954): "[I]f the general class . . . to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise . . . And if this general class . . . can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction."

Obviously, too, as Chief Justice John Marshall observed in *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1804): "It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered and the intention of the legislature [is] to be extracted from the whole."

How Congress intended subsection (f) to be read becomes clear from an examination of the provision's legislative history in the context of the statute as a whole. Congress had before it the record of experience in the states with enhanced terms for habitual offenders. Two defects stood out in an analysis of

---

[32] A.B.A. Standards at 263-64.

[33] On this aspect of the issue, the court's decision squarely conflicts with the mature judgment of the 2nd Circuit. In *United States v. Schipani*, 435 F.2nd 26,27 (2nd Cir. 1970), cert. denied, 401 U.S. 983 (1971), the Court of Appeals sustained a sentence "far longer than would be expected in a routine tax case" on the trial judge's conclusion that the defendant was "a professional criminal," a conclusion reached on hearsay information obtained in the course of illegal wiretaps. The defendant was a caporegime in the then Magliocco family of the La Cosa Nostra. Organized Crime and Illicit Traffic in Narcotics, Hearings before the Permanent Subcommittee on Investigations, Committee on Government Operations, United States Senate, 88th Cong., 1st Sess., p. 308 (1963). Compare an earlier District Court opinion from the 2nd Circuit, *United States v. Rao*, 296 F. Supp. 1145 (S.D. N.Y. 1969).

Nothing in this analysis, moreover, is undermined by the Supreme Court's recent decision in *Mullaney v. Wilbur*, No. 74-13, decided June 9, 1975. There, the court found inconsistent with due process Maine's placing on a defendant the burden of persuasion to a preponderance of showing heat of passion to reduce the crime of murder to manslaughter. The Court observed: "There is no incompatibility between our decision today and the tradition discretion afforded sentencing bodies." Slip Opinion, p. 13, n. 23.

that experience: (1) the statutes carried mandatory sentences, and (2) no requirement of "dangerous" was set forth.[34] Congress, of course, made Title X discretionary,[35] and it provided that special offenders had to be "dangerous" before an extended term could be imposed.[36]

Ordinarily, however, Congress recognized that the same facts which established that a person was a "special offender" would also establish that he was "dangerous."[37] As Senator McClellan observed in his *Notre Dame Lawyer* article at 158, "[This] is simply a recognition of the possibility that the same facts the establishment of which shows the defendant to fall within one or more of the definitions of 'special offender' may in a given case, also demonstrate that the defendant is 'dangerous.'"

As it deals with each type of special offender, moreover, the legislative history repeatedly elicits this conclusion. Habitual offenders were thought to be future threats, absent extenuating circumstances, because they had committed multiple crimes in the past.[38] Professional offenders were thought to be future threats, absent extenuating circumstances, since skill once acquired makes the possibility of "subsequent us . . . likely."[39] Finally, the organized crime offender was identified to have a life criminal career roughly twice that of the ordinary offender.[40] Like the habitual offender, his past was read to judge his future.[41]

It seems evident then that the concept "dangerous" in Title X had primarily a negative meaning. Congress has determined that special offenders, as a class, merit extended terms, but it has allowed courts on a case by case basis not to impose them, where there is in the individual case of danger of future criminal conduct. In the ordinary situation, therefore, establishing that a defendant is a "special offender" will also establish that he is "dangerous." But this conclusion does not automatically follow and invoke a mandatory penalty, as under some state recidivist statutes. As Senator McClellan noted: "A defendant's most recent felony, for example, may not have been discovered or prosecuted until several years after its commission, and he may have completely reformed in the meantime, or there may be other extenuating circumstances."[42] "Dangerous," then, must be viewed as a safety valve, protecting certain defendants

---

[34] Senate Report at 88-89.

[35] See House Report at 61, ("not to be construed * * * [to create] a mandatory minimum penalty").

[36] There is no serious doubt that dangerousness is an additional element which must be established. See, e.g., Senate Report at 88, McClellan at 158-66.

[37] Senate Report at 166: "'Dangerous' may be inferred, although not necessarily from the requirements of subsection (c)."

[38] See, e.g., House Report at 96, (discussion of the time lag between repeat offenses).

[39] See, e.g., Senate Report at 165.

[40] Id. at 43, (9 years 3 months against 20 years 7 months).

[41] The lawfulness of this statutory conclusion under general concepts of due process and equal protection is fully supported by Minnesota v. Probate Court, 309 U.S. 270, 274 (1940), ("past conduct pointing to probable consequences") (Minnesota Probate was cited with approval in Specht, 386 U.S. at 610) and Marshall v. United States, 414 U.S. 417, 425-30 (1974) (exclusion of recidivist from rehabilitation program upheld).

[42] McClellan at 150. Other illustrations come easily to mind. Assume that a "torch," a professional arsonist, is used in a complicated, multi-party bankruptcy-insurance fraud scheme to incinerate a building. Assume further that the evidence shows that his criminal record qualifies him as a recidivist, that the fire gave evidence of his "special skill and expertise," and that the fire could be fairly described as the work of an "executor of violence." Each of the special offender categories of Title X would thus be satisfied. Under 18 U.S.C. §1952, the maximum penalty normally would be five years, but here surely an extended term up to ten years would be appropriate. Assume further, however, that the "torch" accidentally found himself the victim of his own handiwork, and he is now permanently confined to a wheelchair. He would be a special offender, but is now no longer capable of plying his trade, and thus would not be dangerous.

So viewed, the usual procedure in a Title X proceeding can be quickly sketched. Where the United States believes a defendant to be a dangerous special offender, an appropriate notice is filed. Supplementary pleadings nailing down the issues may be necessary; they are not required. The United States introduces information and evidence indicating the defendant is a special offender, from which it normally follows that he is dangerous. It must also make available under *Brady* v. *Maryland*, 373 U.S. 83 (1963) any favorable evidence it possesses bearing on the sentence. The defendant may then dispute the accuracy of the United States' position or introduce information or evidence of his own; he clearly has the burden of challenging the information or evidence and of coming forward with extenuating circumstances, when they exist. Cf. Model Penal Code §1.12 (4)(a) (Official Draft, 1962) (burden of proving fact on the party in whose interest it is to show it). The ultimate burden of persuasion, of course, rests on the United States, 18 U.S.C. §3575(b) to convince the court of the essential facts and the appropriateness of the imposition of the extended term. Appellate review would then follow at either the instance of the United States or of the defendant.

from unjust and unnecessary long-term imprisonment.[43] As such, it is definite enough to give guidance.[44]

The court below, however, misread Title X, and it then held §3575(f) unconstitutionally vague. The court seemed to feel that "dangerousness" had to be shown by some sort of statistical evidence independent from the showing of "special offender." As noted above, this is a serious misreading of the legislative history[45] and language of the statute. The court then found the concept, as so defined, vague, citing *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

It is not clear that *Lanzetta* sets the benchmark for the definitions here involved. *Lanzetta* dealt with a criminal statute addressed to the ordinary citizen. Here, however, we deal with a statute addressed to counsel and court, setting standards for sentencing. As Senator McClellan observed: "The definitions used in Title X as a group are unusually specific and clear for sentencing standards. It must be recalled that the definitions in Title X are not substantive criminal prohibitions, defining crimes, and do not establish the question of guilt or innocence. They are legislatively specified criteria for sentencing only. They are not only a great improvement over a situation where sentencing is, at the present, guided by no standards at all—they conform to similar standards developed by professional bodies which have studied the problem of special sentencing most thoroughly, and seem to provide excellent guidance and control over the discretion of a sentencing court." [46]

These criteria are governed instead by *Minnesota v. Probate Court*, 309 U.S. 270 (1940). There the Supreme Court faced not dissimilar definitions as part of a "psychopathic law." The statute focused on past conduct to judge future behavior. The Court observed: "These underlying conditions, calling for evidence of past conduct pointing to probable consequences, are as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." [47]

Consequently, the Court sustained the statute against a vagueness objection.

Even if *Lanzetta* should be held to control, it is not clear that the statute would fall. *Lanzetta* dealt with the vagueness of the term "gang." The Court found the term vague because it "condemn[ed] no act or omission." 306 U.S. at 458. Here, in contrast, the whole statute is aimed at conduct, which constitutes circumstances of aggrevation of felonious criminal behavior. As the *Senate Report* noted: "The conduct making the defendant a 'professional' or organized crime' offender under Title X is closely related to the felony for which he is to be sentenced. Title X thus treats such conduct not as separate offenses but as a circumstance of aggravation in the commission of the felony for which the defendant is to be sentenced. Because of this relationship, the 'special offender' conduct may be necessarily or incidentally proven in the course of the full and formal trial on the merits of the felony. Since rules of evidence permit or require the Government, for example, to prove the history and circumstances of a conspiracy with which a defendant is charged, or the existence of which is a predicate for admissibility of evidence, the trial of a conspirator whose conduct makes him a 'special offender' under Title X often will establish that

---

[43] This construction of the concept is more than a reflection of the legislative history and the manifest purpose of the Congress. Title X was modeled after Minn. Stat. Ann. §§609.155, 609.16 (1964). See Senate Report at 88, n. 25 (1969). The Minnesota courts have given their statute the same construction. See State ex rel Hansen v. Rigg, 258 Minn. 388, 104 N.W.2d 553 (1960) (not separate crime, increased sentence for charged crime); State v. Piri, 295 minn. 247, 251, 204 N.W.2d 120, 124 (1973) (proof of recidivism sustains proof of dangerousness). This construction should weigh heavily too in sustaining Title X's constitutionality. Cf. Minnesota v. Probate Court, 309 U.S. 270, 273 (1940) ("This construction is binding * * *").

[44] Moreover, it is not terribly different from similar definitions of the concept sustained in other contexts. See, e.g., Eggleston v. State, 209 Md. 504, 121 A.2d 698 (1956) (Maryland Defective Delinquent Act, Md. Ann. Code, Art. 31 B (1951); Sas v. State of Maryland, 295 F. Supp 389 (D.C. Md. 1969), affirmed sub nom Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971), cert. dismissed sub nom., 407 U.S. 355 (1972) (same act); Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968) (dangerousness" in the context of D.C. Sexual Psychopath Act, 22 D.C. Code §3503(1) (1967)).

[45] The court below apparently believed that the government's reference to the Senate Report at 166 ("dangerousness" inferred from "special offender") was a "single sentence" read "out of context," "directly contrary to the legislative history" and "totally without support."

[46] McClellan at 158-59. There is more than a little irony in the lower court citation of *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), in support of its holdings. *Giaccio* struck down jury assessment of costs against a "not guilty" defendant without standards, but it cast "no doubt" on the power of juries to sentence without standards within fixed limits. 382 U.S. at 405, n. 8.

[47] 309 U.S. at 274.

he is such a 'special offender. In other cases, the formal trial on the merit may establish some but not all of the required elements, and the less formal sentencing proceeding will be necessary to embellish the circumstances of the crime already established, adding information about the defendant, his crime, and the context in which it was committed. Sentencing judges traditionally have relied both upon circumstances proven in the trial and upon information acquired during the sentencing process. . . . The starting point for measuring the appropriateness of a particular sentence and the sentencing procedure used for its imposition, therefore is not confined to the bare essential elements of the offense, but includes all facts established through the full procedure of the 'trial on the merits.'"[48]

Title X, therefore, meets even the higher standards of *Lanzetta*.[49]

IV. Consistent with due process and double jeopardy, the United States may appeal the failure of a court to impose a dangerous special offender sentence under 18 U.S.C. §3576.

a. 18 U.S.C. §3576 authorizes a government appeal of a failure to impose a dangerous special offender sentence.

18 U.S.C. §3576, in relevant part, reads: "With respect to the imposition, correction or reduction of a sentence after proceedings under section 3575 of this chapter, review of the sentence on the record of the sentencing court may be taken by . . . the United States to a Court of Appeals.

The plain language of the statute authorized this appeal. It says "after" a proceeding under §3575. It does not say the sentence must have been "imposed" pursuant to §3575. If there were any doubt of the proper construction of the statute, the legislative history surely dispels it.[50] The defendants have, of course, conceded as much. See *United States v. Duardi*, No. 74-1904 (8th Cir., April 1, 1975).

b. Such an appeal is consistent with due process.

A due process objection to the right of the United States to appeal a sentence might be colorably grounded in *North Carolina v. Pearce*, 395 U.S. 711 (1969). There, the Supreme Court set down careful standards for the imposition of higher sentences following reconviction after appellate reversal. The standards were designed to protect a defendant's right to appeal his won case from "vindictiveness" by the trial judge. 395 U.S. at 725-26.

Here, however, we do not deal with retrial, but appeal, where there is no danger of such vindictiveness. In addition, §3575 has been carefully drafted to insure that the United States must exercise its election to appeal prior to defendant's election and the appellate court is given express power to dismiss an appeal on a showing of abuse of the right to appeal, a routine policy of appeals in all cases. If the United States does not first appeal, and the defendant subsequently appeals, the sentence cannot be made "more severe." Congressman Poff explained the operation of Title X in these terms:

"The review provisions have been carefully framed to meet constitutional requirements. Since it seems clear from the Supreme Court's decision in *North Carolina v. Pearce*, 395 U.S. 711 (1969), that due process of law requires that a defendant must be protected from the possibility that an increased sentence will be imposed upon him by a vindictive court as punishment for his having exercised a right of appeal, Title X has been drafted so as to assure that any change in a sentence to the detriment of the defendant will result solely from the Government's action and not from his own. To this end, the Senate version of S.30 provided that a sentence may be increased only upon review taken by the Government; that the Government's right to take a sentence review must

---

[48] Senate Report at 91.

[49] The Supreme Court, of course, has not yet passed on the validity of Title X. In *Iannelli v. United States*, 43 Law Week 4423 (March 25, 1975), however, the court did have the Organized Crime Control Act before it. Specifically, it considered the proper construction of 18 U.S.C. §1955 (Title VIII of the Act) in relation to the so-called Wharton rule, and it discussed the relationship between 18 U.S.C. §1955, the general law of conspiracy, and Title X. The Court termed the Act "a carefully crafted piece of legislation." 43 Law Week at 4429. The lower court's treatment of the law is hardly consistent with the observation about the Act as a whole.

[50] Senate Report at 166 explicitly states: "The Government may obtain review of the failure to impose any special sentence or the sentence imposed." Title X was also so read in the House by witnesses who testified and by the Committee counsel. House Hearings at 340 (witness), 579 (counsel). Indeed, the amendments made to Title X on this point by the House were designed to insure that review would be comprehensive and could not be circumvented. See Remarks of Congressman Poff, 116 Cong. Rec. 35290-98 (October 7, 1970).

be exercised at least 5 days before the expiration of the defendant's right to seek sentence review or appeal of his conviction; that an increased sentence will be foreclosed if the Government withdraws its review; and that any review taken by the Government will be dismissed upon a showing of abuse of the right to take such a review.

"The Judiciary Committee added clarifying language to assure that the taking of a review of the sentence by the Government will be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. The Senate version was less than clear on this point. Thus, the taking of a sentence review by the United States brings about the same result that would follow if the defendant had exercised his right to take both a review of the sentence and an appeal of the conviction. The danger of retaliation which led the Court to the result obtained in *North Carolina* against *Pearce, supra*, is entirely absent even from the question in the Judiciary Committee version of Title X.

"Subject only to the foregoing limitations upon increased sentences, the appellate review provisions permit the court of appeals after considering the record in the court below, including the entire presentence report on the defendant, information submitted during the trial and at the sentencing hearing, and the court's findings and reasons for the sentence imposed—to affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing." (Emphasis added.)[51]

Nothing in the Supreme Court's subsequent teaching on due process and sentencing indicates that this analysis is faulty. Cf *Colten v. Kentucky*, 407 U.S. 104 (1972) (higher sentence after "appeal" from lower trial court to higher court for *de novo* trial upheld); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) (higher sentence after retrial imposed by jury not shown to be vindictive). In short, the ". . . lesson that emerges from *Pearce*, *Colten* and *Chaffin* is that the Due Process clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of 'vindictiveness.'" *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). For a due process claim here to take hold, it would have to be established that appellate courts would be vindictive after the *prosecutor*, not the defendant, appealed. There is certainly no reasonable claim to be made that appellate courts have shown themselves to be vindictive. Moreover, the appeal is by the prosecutor, not the defendant, and when the case is reversd and possibly remanded for resentencing, it will be to a court that has made an error in favor of the defendant, reversed at the behest of the government. The *Pearce* rationale of vindictiveness could propery apply only when a judge who resentences, was reversed for making an error against the defendant after an appeal brought by the defendant.

c. Such an appeal is consistent with double jeopardy.

During the processing of Title X, much consideration was given to the double jeopardy implications of the recommendation of the President's Crime Commission that: 'There must be some kind of supervision over those trial judges who, because of corruption, political considerations, or lack of knowledge, tend to mete out light sentences in cases involving organized crime management personnel. Consideration should therefore be given to allowing the prosecution the right of appeal regarding sentences of persons in management positions in organized crime activity or groups. Constitutional requirements for such an appellate procedure must first be carefully explored."[52]

Ultimately, the contours of the existing precedents were seen not to constitute a constitutional roadblock to government review.[53]

Whatever concern might have legitimately existed in 1969 and 1970, however, has now been dispelled by recent developments in February and March of this

---

[51] Remarks of Congressman Poff, 116 Cong. Rec. H35296 (October 7, 1970). See also, Senate Report at 166-67; McClellan at 183-88.

[52] President's Crime Commission at 203.

[53] The analysis that led to that conclusion is set out in Senate Report at 93-99. Arguments are also reviewed at length in McClellan at 174-82. State law on the issue of sentence review at the instance of the government is analyzed in the House Hearings at 132-33 (Additional Statement of Senator John L. McClellan). Policy considerations supporting a "mutual review concept" are ably set out in the Testimony of Professor Livingston Hall on behalf of the American Bar Association, Reform of the Federal Criminal Laws, Hearings before the Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, 93rd Cong., 1st Sess., at 5364-69 (1973). On alternatives, see Professor Hall's letter in reply to letter of G. Robert Blakey, chief counsel of the subcommittee, id. at 5377-79.

year in the Supreme Court's teaching in the double jeopardy field. In *United States v. Wilson*, 43 Law Week 4301 (1975), the Court undertook a major effort at analyzing the right of the government to appeal in criminal cases. It began with this observation: "The statutory restrictions on Government appeals long made it unnecessary for this Court to consider the constitutional limitations on the appeal rights of the prosecution except in unusual circumstances." 43 Law Week at 4303.

The Court then considered the history and development of the constitutional principle against double jeopardy. It concluded: ". . . Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact." *Id.* at 4305.

It held: "* * * We therefore conclude that when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause." *Id.* at 4307.

Wilson was quickly followed by *United States v. Jenkins*, 43 Law Week 4309 (1975), which held that when the judge was the "trier of fact" in a bench trial, double jeopardy also attached to his not guilty verdict. Finally, the Court in March decided *Serfass v. United States*, 43 Law Week 4315 (1975), where it held that a pre-trial ruling by a court before the defendant had been put to trial before the trier of fact did not involve jeopardy and could be appealed.

The implications of these cases for this appeal seem beyond question. The defendants here have been put on trial before the trier of fact and have been found guilty. No judgment of this Court will cause them to be tried again. What is at issue here is not a question of guilt or innocence, but of sentencing. A judgment favorable to the United States here will require that the defendants be resentenced, not retried. No question of double jeopardy, therefore, is at issue. "* * * The Double Jeopardy Clause of the Fifth Amendment is written in terms of potential or risk of trial and conviction, not punishment." *Price v. Georgia*, 398 U.S. 323 329 (1970). Consequently, there is no statutory or constitutional bar to this appeal.[54]

CONCLUSION

Traditionally, four purposes have been assigned to the criminal justice system: retribution, deterence, incapacitation and rehabilitation.[55] Many today no longer see retribution as the objective of the law. See, e.g., *Williams v. New York*, 337 U.S. 241, 248 (1949). Some kinds of offenders, moreover, seem to be beyond deterrence.[56] Recent studies offer little hope that we have learned how to rehabilitate; rehabilitation remains, in short, an unrealized hope.[57] For these offenders, incapacitation seems the only meaningful alternative goal.

---

[54] One other item should be raised in this brief in order that it may be disposed of here with guidance given to prosecutors, defense counsel and trial courts in future dangerous special offender hearings. The legislative history of Title X suggests that a trial court should "ordinarily" obtain a study of a defendant in these types of hearings under 18 U.S.C. §4208(b). The trial court in this appeal followed that suggestion. Erroneously, however, an appeal was taken on the question of guilt or innocence at that point. See *United States v. Bishop*, 492 F.2d 1361 (8th Cir. 1974), cert. denied, 417 U.S. 942 (1975). The general legitimacy of an appeal at this point after an examination under 18 U.S.C. §4208(b) was established in Corey v. United States, 375 U.S. 169 (1963). It apparently went unnoticed by counsel and the court that such an appeal may not be taken under 18 U.S.C. §3575(g), when a §4208(b) order is made in connection with a dangerous special offender hearing. The legislative history is quite explicit on this point. Senate Report at 166. "The result reached under *Corey v. United States* . . . under 18 U.S.C. §4208(b) would not obtain here. 'The provision envisions that review of both sentence and conviction will be heard together.'" (Emphasis added). It may well be appropriate to draw to the attention of the bar and bench this mistake, so that in the future multiple appeals are not taken at all conceivable points in these kinds of proceedings. Since, strictly speaking, the opinion of the prior panel upholding the conviction was made without jurisdiction, it may also be well if this panel explicitly reaffirms it.

[55] The President's Crime Commission at 7.

[56] The President's Crime Commission observed:

. . . the most striking fact about offenders who have been convicted of the common serious crimes of violence and theft is how often how many of them continue committing crimes. Arrest, court, and prison records furnish insistent testimony to the fact that these repeated offenders constitute the hard core of the crime problem. Id. at 45.

[57] The evidence is reviewed in Robinson and Smith, "The Effectiveness of Correctional Programs," Crime and Delinquency 67, January 1971.

This appeal is all about the viability and constitutionality of the most comprehensive attempt yet made to move in that direction. This attempt, moreover, has important implications for general penal policy. Most observers agree that American sentences are too long in too many cases.[58] We need to have a general rethinking of our penal structure. Indeed, there are many who couple their policy support of Title X-type proceedings only if it can be accompanied by a general reduction of sentences for the ordinary offender.[59] Nevertheless, that general reduction will not come about until the viability and constitutionality of the extended term concept is assured.[60] There is a certain irony, too, in the blunt fact that there is a constitutional alternative to Title X: high minimum mandatory sentences.[61] Even though they might be unjust in individual cases, they are generally thought to be beyond serious question constitutionally.[62] This appeal, therefore, is no ordinary review of the erroneous sentences imposed on a few bad men by a trial judge who merely misread a statute. In a sense, it represents the last, best hope in our nation's struggle to establish a rational penal structure for our system of criminal justice.

It is, therefore, respectfully urged that the sentence of the defendants be set aside and that the record in this appeal be remanded to the trial court with directions to reinstate the United States' pleading of November 28, 1972, to hold a dangerous special offender hearing, admitting the information and evidence excluded and following this brief's construction of the concept of dangerousness.

Respectfully submitted,

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT,
G. Robert Blakey, Esq.,
Of Counsel.

---

[58] A.B.A. Standards at 13-14.

[59] See, e.g., Letter of Professor Herbert Wechsler, the chief reporter for the Model Penal Code, in House Hearings at 522; Letter of the Judicial Conference of the United States in House Report at 74.

[60] See, Senate Report at 89: "When a statute authorizing extended terms for defined classes of criminals has been enacted and its constitutionality upheld, it will be time enough then to consider proposals to reduce the maximum sentence now authorized for ordinary offenders."

[61] It seems true also that they have a certain political popularity. See 17 Crim. L. Rept. 2158 (May 21, 1975) (President proposes mandatory terms for those convicted of violent crimes).

[62] Cf. *Oyler* v. *Boles*, 368 U.S. 448, 451 (1962).

Sentencing the Racketeer

(By Institute on Organized Crime, Cornell University, School of Law)

Outline

Summary

¶1 The primary goals of a sentence in an organized crime prosecution should be deterrence and incapacitation, not rehabilitation. Traditionally, the prosecutor's task was thought to stop at the conviction. This view is misguided; the prosecutor should seek, through all lawful means, to secure an appropriate sentence in all criminal prosecutions, but particularly in organized crime cases. The presentence report usually provides the sentencing judge with the information essential to his decision in imposing sentence within the statutory range. Few statutory or constitutional requirements limit its scope. Individualized sentencing requires that the judge's scope of inquiry not be limited. The prosecutor, therefore, ought to provide the probation department with all relevant information in organized crime cases. Further, he should actively draw the court's attention to the report's significance, recommending, in the public interest, appropriate sentences in all organized crime prosecutions. His goal should be to obtain, in appropriate cases, the maximum authorized jail time and fine. Statutory and constitutional limits remain on the prosecutor's right to appeal a sentence, but recent decisions have begun to broaden this right; it should be vigorously pursued. When possible, the prosecutor should use recidivist and special dangerous offender provisions to secure extended terms.

I. Introduction

A. The Special Problem

¶2 The sentencing process can be a crucial phase in the prosecution of organized crime. It is here that the risks of involvement in organized crime can be made clear to present and prospective members and associates. Similarly, sentencing can be a key tool for imposing economic burdens on those involved in organized crime.

¶3 Organized crime functions, on the conscious level, as a business. The motives of those engaged in its activities are "rational." Thus, organized crime participants should be influenced by altering the risks of punishment and the rewards of criminal endeavor. At the same time, a sentencing policy designed to render a criminal useless, and possibly burdensome to his associates for substantial periods of time, will strike at the special strength of organized crime. It can force a new cost-benefit analysis; profits will be realized only at a higher price. Membership in an organization may appear less attractive, and the rewards for joining may have to be commensurately greater. The long-term loss of a convicted member's services may not wholly cripple the activities of the organization, but it should render it somewhat less profitable.[1]

---

[1]The Director of the National Council on Crime and Delinquency, Milton G. Rector, aptly observed:

¶4 The special character of organized crime, in short, demands a sentencing policy designed to render its activities more difficult to conduct,[2] and if no other goal is served, the commission of additional crime may be made more difficult through long-term imprisonment.

B. The Traditional Sentencing Pattern: Leniency

¶5 Ironically, studies have shown that stern sentences for racketeers are the exception, not the rule. A Department of

---

1 (continued)

> A presentence investigation of an "unimportant" numbers runner, bookie or gambling operator may reveal him as a stable individual; if it also reveals him as a salaried employee of a criminal organization, he should be incarcerated for as long a time as possible under the law. Maximum imprisonment inflicts heavy costs on the syndicate for his family's support and other "fringe benefits," in addition to legal fees and bail which the organization must provide to maintain its operations. His ties to the organization and his financial needs make it improbable that he will want or be allowed to seek other employment until he himself is too expensive a risk. Despite his otherwise apparent eligibility for a fine, suspended sentence, or probation, he must be regarded as a capillary feeding the heart of organized crime and be committed for the purpose of increasing the operation costs of the business of crime and racketeering. Rector, "Sentencing the Racketeer," 8 Crime and Delinquency 386, 389 (1962).

[2]There is legal support for this policy. In State v. Ivan, 33 N.J. 197, 202-03, 162 A.2d 851, 853-54 (1960), the New Jersey Supreme Court observed:

> . . . [I]f the crime is a calculated one and part of a widespread criminal skein, the needs of society may dictate that the punishment more nearly fit the offense than the offender. There the sentencing judge may conclude he should give priority to punishment as a deterrence to others and as an aid to law enforcement. . . [W]hen the offense serves the interests of a widespread conspiracy, it would be a mistake to think of the defendant as an isolated figure. He is part and parcel of an enterprise. . . . [I]f the crime is part of a larger operation, it merits stern treatment.

Justice study of the years 1960-1969 revealed, for example, that two-thirds of the Cosa Nostra members indicted by the Department faced maximum jail terms of only five years or less. Only 23% of the convicted members subject to indeterminate sentences received the maximum; most of the sentences ranged from 40% to 50% of the maximum.[3]

¶6 Such a pattern of leniency neither deters nor incapacitates. The conclusion seems inescapable: prosecutors should direct their efforts not only to securing evidence and conviction, but also to securing higher sentences.

C. The Prosecutor's Power: Beyond the Recidivist Statutes

¶7 Organized crime offenders may be vulnerable to an increased sentence under an "habitual criminal" or "persistent felony

---

[3] See S. Rep. No. 91-617, 91st Cong., 1st Sess. 85 (1969). For a similar pattern, see Report for 1971 by New York State Joint Legislative Committee on Crime, its Causes, Control and Effect on Society, reprinted in Hearing before the Subcommittee on Criminal Laws and Procedures of Committee on the Judiciary of the United States Senate, 92d Cong., 2d Sess. 4188-90 (1972). A study of 1,762 cases involving organized crime members in New York State courts showed that 44.7 per cent of all indictments against racketeers ended in dismissal; while only 11.5 per cent of indictments against all defendants resulted in dismissal. Organized crime figures were convicted in 193 cases; 46 per cent of those cases ended in suspended sentences or fines. The Committee computed the probabilities for an organized crime figure going to jail; the figures are sobering.

Arrested for:	Probability of going to jail or prison
Larceny	1 in 5
Gambling	1 in 50
Extortion	1 in 3
Narcotics	1 in 4
Assault	1 in 7

For a vivid journalistic description of the leniency problem, see the New York Times, Sept. 25, 1972, p. 1, col. 6, reprinted, the Senate Hearing cited supra.

offender" statute. Such a statute will usually require that the maximum penalty be imposed on such an offender.[4] These special procedures, where appropriate, should be vigorously pursued. There is more, however, that the prosecutor can do in the typical situation where the task is to secure higher maximums within normal ranges.[5] Here, too, there is a need for vigorous action.

II. Function of the Presentence Report

A. Individualized Sentencing and the Presentence Report

¶8 The American judicial system has long recognized the importance of individualizing criminal sentences.[6] The task of matching the sentence to the individual requires the judge to balance a series of factors in the context of the facts of a

---

[4] See, e.g., Mass. Gen. Laws Ann. ch. 279 §25:

> Whoever has been twice convicted of crime and sentenced and committed to prison in this or another state, or once in this and once or more in another state, for terms of not less than three years each, and does not show that he has been pardoned for either crime on the ground that he was innocent, shall, upon conviction of a felony, be considered an habitual criminal and be punished by imprisonment in the state prison for the maximum term provided by law as a penalty for the felony for which he is then to be sentenced.

The constitutionality of this statute was upheld in McDonald v. Massachusetts, 180 U.S. 311 (1901).

[5] See Appendix for bibliography on recidivist and "dangerous special offender" sentencing.

[6] See Williams v. New York, 337 U.S. 241, 247 (1949):

> The belief no longer prevails that every offense in a like legal category calls for an identicial punishment without regard to the past life and habits of a particular offender.

particular case. The judge must rely heavily on the presentence report in making his decision. Influencing the contents of that report is the first step towards influencing the judge's decision.

B. Functions of the Prosecutor and the Probation Office

¶9 The prosecutor must make available to the court any information he has that is material to the determination of the punishment. Information both favorable and unfavorable to the defendant should go to the court.[7] He must, of course, make sure that the sentence is not based on a mistake of fact or faulty information.[8] As a rule, the prosecutor conveys this information to the court through the probation office. It may, in fact, be a violation of due process for the prosecutor to convey information directly to the sentencing judge in absence of the defendant's counsel.[9] The probation department is, therefore, a necessary intermediary. The probation department should seek to obtain all the relevant information the prosecutor possesses; the prosecutor has a duty to respond.[10]

¶10 The probation department summarizes the information it has collected in a presentence report. This report is the sentencing

[7] Brady v. Maryland, 373 U.S. 83, 92 (1963).

[8] United States v. Malcolm, 432 F.2d 809, 818 (2d Cir. 1970).

[9] Haller v. Robbins, 409 F.2d 857, 861 (1st Cir. 1969).

[10] See United States v. Needles, 472 F.2d 652, 654-55 (2d Cir. 1973):

> [N]o defendant can reasonably expect the probation office to refrain from seeking whatever information the prosecutor may have regarding the case then before the court or any other case involving that defendant. In fact, a failure to so inquire or refusal to respond accurately would be a breach of duty (emphasis added).

judge's primary guide.

C. The Right of Allocution

¶11 The presentence report, of course, is not the judge's only source of information. All jurisdictions recognize the defendant's right to make a statement before sentencing--the right of allocution. New Jersey Court Rule 3.21-4(b), for example, provides:

> Before imposing sentence the court shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. . . .

N.Y. Crim. Pro. Law §380.50 (1971) also permits both the defendant and his counsel an opportunity to speak before sentence is set. The judge must ask the defendant whether he wishes to make a statement.

¶12 The general acceptance of the right of allocution, however, does not qualify the central importance of the presentence report. It remains the sentencing judge's primary guide, and its scope should then be a matter of great concern to the prosecutor.

¶13 Section 380.50 also provides the prosecutor with a right to speak before sentencing. The statute reads: "At the time of pronouncing sentence, the court must accord the prosecutor an opportunity to make a statement with respect to any matter relevant to the question of sentence." New Jersey Court Rule 3.21-4(b), however, contains no such provision. In all cases the prosecutor ought to seek to be heard in the public interest.

III. Scope of the Presentence Report

A. General Admissibility of Information

¶14 The pertinent statutes offer only general guidance, but they do indicate the wide range of information which may be included in a presentence report. Rule 32(c)(2) of the Federal Rules of Criminal Procedure, for example, states:

> The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances effecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

The analogous New York statute, N.Y. Crim. Pro. Law §390.30(1)(1971), provides that the presentence investigation should consist of:

> the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic stature, education and personal habits.

This section of the statute also allows the agency conducting the investigation to include any other information it considers relevant to the question of the sentence. Other statutes in New Jersey and Massachusetts are less explicit on what information, beyond the criminal record of the defendant, may be included in the presentence report.[11] The general rule underlying these

[11] See N.J. Court Rule 3:21-2 and Mass. Gen. Laws Ann. ch. 279 §4A, ch. 276 §85, ch. 276 §100. The vagueness of the New Jersey requirements, however, should not lead the prosecutor in that state to underestimate the importance of the presentence report. In New Jersey, the sentencing judge is strictly confined to reliance on material contained in that report. Rule

statutes is that there should be no formal limitations on the contents of presentence reports. This rule reflects the philosophy of the individualized sentence; a judge must have a wide scope of inquiry in determining the proper sentence.[12] The rules of evidence and the due process guarantees of the trial therefore, play no role here.

¶15 Accordingly, the sentencing judge may usually consider information not ordinarily admissible at trial, including hearsay evidence or evidence not related to the crime for which the

---

11 (continued)
3:21-2 requires that, "The report shall be first examined by the sentencing judge so that matters not to be considered by him in sentencing may be excluded. The report, thus edited, shall contain all presentence material having any bearing on the sentence. . . . "

This principle was followed in State v. Leckis, 79 N.J. 479, 487, 192 A.2d 161, 165 (1963), which held that a judge should limit himself in passing sentence to what he learned in the course of the trial or from the presentence report. A New Jersey court has even held that a judge's personal knowledge of the defendant's history must be officially recorded in the presentence report in order for the judge to use it in sentencing. State v. Gattling, 95 N.J. Super. 103, 230 A.2d 157 (1967).

12 See Williams v. New York, 337 U.S. 241, 247 (1949):

> . . . modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

See also United States v. Baratta, 360 F. Supp. 512, 514-15 (S.D.N.Y. 1973):

> No clamp should be placed upon the sentencing judge or barrier created to prevent him from pursuing. . . a reasonable inquiry into a defendant's behavioral pattern over a substantial period of time antedating the criminal act which brought him before the court--for whatever good or bad may come from it.

defendant was convicted.[13] 18 U.S.C. §3577, for example, reflects this principle in federal law:

> No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

New York has a similar statute applicable to persistent felony offenders.[14]

¶16 The prosecutor should use this liberal policy when he seeks a long-term sentence for the convicted racketeer. Upper echelon organized crime figures often face prosecution for nonviolent crimes, such as tax evasion. The prosecutor may, however, use a history of violence associated with the offender to shape the presentence report to obtain a longer sentence. The general character of the sentencing process, therefore, seems well suited to the control of organized crime.

B. General Limits

¶17 There are, of course, certain general due process limits

---

[13] See Williams v. New York, 337 U.S. 241, 246 (1949); Williams v. Oklahoma, 358 U.S. 576, 586 (1959). There is generally no special burden of proof applicable in sentencing. Nevertheless, where the sentencing judge wishes to rely on trial perjury to enhance the sentence, the trend is to require that the fact of perjury be found beyond a reasonable doubt. See United States v. Hendrix, 505 F.2d 1233, 1236-37 (2d Cir. 1974) and authorities cited therein.

[14] N.Y. Crim. Pro. Law §400.20(5) (1971). For this separate problem of the special dangerous offender see section II of the Appendix to these materials.

on what information can be used to determine a sentence.[15] The Supreme Court wrote broad tests for reviewing the sentencing process in Hill v. United States:[15a] Is sentencing infected with fundamental defects resulting in a miscarriage of justice? --Is it consistent with the rudimentary demands of fair procedure? The application of this language usually turns on a determination of whether the report's factual assertions have an appropriate degree of reliability. Sentences founded upon "misinformation of a constitutional magnitude" or "extensively and materially false" information cannot stand.[16] This qualification tempers the general rule that presentence reports need not conform to the rules of evidence or limit themselves to established facts.[17]

¶18 The sentencing judge is free to decide the degree of required factual support on a case-by-case basis. The enormous

---

[15]Note first a special limitation defined in New Jersey. If the defendant may have the presentence report disclosed to him certain irrelevancies, confidential statements, and medical/diagnostic opinions should be excluded if they would harm the defendant's rehabilitation. Such matters may certainly be investigated, but may not be included in the report. See State v. Green, 62 N.J. 547, 303 A.2d 312 (1973).

[15a]368 U.S. 424, 428 (1962).

[16]See United States v. Tucker, 404 U.S. 443, 447 (1972) (sentence founded in part upon misinformation of a constitutional magnitude); Townsend v. Burke, 334 U.S. 736, 741 (1948) (prejudice created by the prosecution's submission of misinformation regarding defendant's prior criminal record or by the court's careless misreading of that record yielded a denial of due process of law; sentence invalid).

[17]For a statement of that general rule, see Farrow v. United States, 373 F. Supp. 113 (S.D.Cal. 1974) (presentence reports are not required to conform to the rules of evidence, and their contents are not restricted to established facts).

variety of information available requires such an ad hoc method.[18] The Ninth Circuit has tried, however, to set certain minimum standards. In United States v. Weston,[19] the defendant received an additional fifteen year sentence on the basis of an unsworn statement of unverified reports, by an anonymous informer, alleging that the defendant engaged in additional and far more serious crimes; the court stated:

> . . . In Townsend v. Burke, the Supreme Court made it clear that a sentence cannot be predicated on false information. We extend it but little in holding that a sentence cannot be predicated on information of so little value as that here involved. A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process.

The Ninth Circuit, however, recently limited Weston in Santorio v. United States,[20] holding that the defendant must make an affirmative showing of direct prejudice (i.e., led to higher sentence) for the court to disregard the hearsay portion of

---

[18] A court may rely on "responsible unsworn or 'out of court' information relative to the circumstances of the crime and to the convicted person's life and characteristics." Williams v. Oklahoma, 358 U.S. 576, 584 (1959).

[19] 448 F.2d 626, 634 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972). The court stated:

> Here the other criminal conduct charged was very serious, and the factual basis for believing the charge was almost nil. It rested upon only two things: the opinion of unidentified personnel in the Bureau of Narcotics and Dangerous Drugs, and the unsworn statement of one agent that an informer had given him some information lending partial support to the charge. Id. at 633.

[20] 462 F.2d 612 (9th Cir. 1973). The District Court of the Southern District of California, part of the Ninth Circuit, applied this qualification in Farrow v. United States, 373 F. Supp. 113, 119 (1974) (absent an affirmative showing of direct prejudice, there is no compulsion to disregard the hearsay portion of the presentence report).

the presentence report. The defendant, therefore, bears the double burden of showing both the falsity of the information and its prejudicial effect. An attempt to use the Weston holding in the First Circuit failed in United States v. Williams.[21] There, the court found that sworn testimony from three individuals concerning the defendant's role in a heroin distribution racket was adequate to justify a sentence in the upper range of the authorized maximum.

¶19 What happens when the defendant challenges the factual basis of a presentence report? The Supreme Court in Specht v. Patterson held:

> The Due Process Clause of the Fourteenth Amendment . . . [does] not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he comes to determine the sentence to be imposed.[22]

Thus, as a general rule, the manner of rebutting hearsay assertions in a presentence report is determined by the informed discretion of the sentencing judge.[23] This policy of reliance upon the judge's discretion keeps the defendant

---

[21] 499 F.2d 52 (1st Cir. 1974).

[22] 386 U.S. 605, 606 (1967).

[23] Farrow v. United States, 373 F. Supp. 113, 118 (1974). See also State v. Green, 62 N.J. 547, 303 A.2d 312, 321 (1973), citing State v. Pohlabel, 61 N.J. Super. 242, 160 A.2d 647 (1960):

> Ordinarily, where there is an issue of prejudice claimed by a defendant, it is presumed that a sentencing judge disregarded incompetent or immaterial evidence in estimating the appropriateness of a particular degree of punishment.

from initiating an endless series of collateral disputes.[24]

C. The Admissibility of Information: Specific Issues

1. Hearsay

¶20 Judges often view hearsay evidence, inadmissible at trial, as sufficiently reliable for sentencing.[25] A court may rely, for example, on pertinent evidence from another case

[24]The Second Circuit, in United States v. Needles, 472 F.2d 652, 657-58 (2d Cir. 1973), remarked on this problem of challenges by the defendant:

> The real question is whether the judge was entitled to credit the statements of unidentified undercover agents over defendant's denials and explanations. It is conceded that "material false assumptions as to any facts relevant to sentencing render the entire sentencing procedure invalid as a violation of due process (citations omitted). It does not follow, however, that an evidentiary hearing must be held whenever a defendant asserts the falsity of some statement in his presentence report. . . . Since sentences should not be based upon misinformation, a defendant should not be denied an opportunity to state his version of the relevant facts (citations omitted) and in some circumstances the probation office or prosecution should be requested to provide substantiation of challenged information submitted to the judge. . . . In appropriate instances the defendant ought to be allowed to present evidence in the form of affidavits, documents, or even oral statements by knowledgable persons on matters the court deems material to its decision on the severity of sentence. But this court has generally left the decision as to the appropriateness in any particular case of these procedures largely to the discretion of the sentencing judge. . . .
>
> Perhaps in a case where the defendant denied everything and there was a chance that an entire incident had been manufactured or that serious charges in the presentence report on which the judge sought to rely were completely false, we would require further corroboration of the report even though the sentencing judge thought it unnecessary. But this is not such a case. . . .

[25]See Williams v. New York, 337 U.S. 241 (1949); Williams v. Oklahoma, 358 U.S. 576 (1959).

in determining sentence, although such evidence is hearsay with respect to the defendant.[26]

2. Polygraph Tests

¶21 A New Jersey court has held that expert testimony interpreting a polygraph test may be used in sentencing.[27] Note that the taking of the test was voluntary, and that the expert testimony could only be used to show facts not decided by the trial jury or material to its deliberations. Even this circumscribed use of the polygraph, however, reflects the liberal standards for the use of evidence in sentencing.

3. Prior Conviction Record

¶22 The prosecutor may also use a prior conviction record to argue for a long sentence for the racketeer. This practice does not create double jeopardy for the defendant since he is not being tried or punished again for the earlier offense.[28] Instead, the judge tries to determine if the record indicates a pattern of criminal behavior aggravating the latest offense.

4. Invalid Prior Convictions

¶23 The judge may not consider previous convictions

[26] United States v. Powell, 487 F.2d 325, 328 (4th Cir. 1973).

[27] State v. Watson, 115 N.J. Super. 213, 218, 278 A.3d 543, 546 (1971).

[28] Cf. Moore v. Missouri, 159 U.S. 673, 677 (1895)(aggravation of present offense by special circumstances).

which are constitutionally invalid.[29] This rule of Tucker may, however, be narrower than it appears. In Lipscomb v. Clark, the Fifth Circuit defined a test for the use of invalid prior convictions.[30] If on review, without consideration of the invalid conviction, the maximum sentence seems appropriate then it may be affirmed. If it does not, then a special evidentiary hearing must be held.[31] Tucker, in short, does not require automatic resentencing. The Eighth and Fourth Circuits have taken an alternate route. They require the defendant to invalidate the disputed prior conviction in the court from which it was originally obtained before using it to seek relief under Tucker.[32] Taking still another approach, the

---

[29] United States v. Tucker, 404 U.S. 443, 444 (1972). Note also that a conviction void under statutory or decisional law, or because of constitutional infirmity, cannot form the basis for the application of a recidivist statute. Burgett v. Texas, 389 U.S. 109, 114 (1967)(". . . to permit a conviction obtained in violation of Gideon v. Wainwright, 372 U.S. 335 (1963), to be used against a person either to support guilt or enhance punishment for another offense. . . is to erode the principle of that case.")

[30] 468 F.2d 1321 (5th Cir. 1972).

[31] The First Circuit followed Lipscomb in United States v. Sawaya, 486 F.2d 890, 893 (1st Cir. 1973)(case remanded to district court for review of the presentence report to determine whether the sentence would be appropriate without consideration of prior constitutionally invalid convictions). The Southern District of California followed Lipscomb in Farrow v. United States, 373 F. Supp. 113, 117 (1974).

[32] Brown v. United States, 483 F.2d 116, 118 (4th Cir. 1973) (if prior state convictions have been invalidated for want of counsel in habeas corpus proceedings begun initially in the convicting state court, then Tucker demands resentencing. If there is no such invalidation in that court the Tucker rule may not be invoked); Young v. United States, 485 F.2d 292, 294 (8th Cir. 1973)(Lipscomb rejected; petitioner invoking the Tucker rule must first invalidate the prior convictions in the jurisdictions where they were obtained).

Ninth Circuit has held that "the mere fact that an invalid conviction has been obtained does not immunize the facts underlying the conviction from consideration by the sentencing judge."[33]

5. Evidence Derived from Arrests not Leading to Convictions

¶24 The law is unclear as to the use of evidence obtained from prior arrests not leading to conviction. The dispute turns on whether the facts underlying the arrest may be considered by the sentencing judge. The Second Circuit, in United States v. Malcolm, stated the general rule:

> A sentencing judge is not so narrowly restricted in imposing sentence that he cannot predicate sentence on habitual misconduct, whether or not it resulted in conviction.[34]

Certain jurisdictions have statutes, however, which limit the judge's power to consider evidence derived from prior acquittals. Examples of such statutes are Mass. Gen. Laws Ann. ch. 276 §85 and Mass. Gen. Laws Ann. ch. 279 §4A, which require that the presentence report "shall not contain as part thereof any information of prior criminal prosecutions, if any, of the defendant wherein the defendant was found not guilty by the court or jury in said prior criminal prosecution."

---

[33] United States v. Atkins, 480 F.2d 1223, 1224 (9th Cir. 1973). Note, however, that in Farrow, a district court within the Ninth Circuit followed the Lipscomb rule (see note 31, supra).

[34] 432 F.2d 809, 816 (2d Cir. 1970). See also Jones v. United States, 307 F.2d 190, 192 (D.C. Cir.), cert. denied, 372 U.S. 919 (1962)(Fed. R. Crim. P. 32(c)(2) interpreted as permitting consideration of criminal charges not leading to convictions).

¶25 The Supreme Court of New Jersey noted that a prior arrest could be relevant in certain circumstances.[35] The sentencing judge may not infer guilt from the mere fact of arrest, but the fact of arrest may lead the court to other admissible facts. The court may, for example, consider factual material which the defendant did not contest and which bears on the question of sentence.[36] The judge may also consider that the earlier arrest failed to deter the defendant from committing the current offense.

¶26 The courts have also held that evidence from pending indictments and from charges dismissed without adjudication may be considered by the sentencing judge.[37] A court may

---

[35] State v. Green, 62 N.J. 547, 571, 303 A.2d 312, 325 (1973) (i.e., the sentencing judge may find it significant that a defendant who experienced an unwarranted arrest was not deterred by that fact from committing a crime thereafter). Here the Supreme Court of New Jersey found that the challenged items in the arrest report did not influence the sentencing court to enlarge the penalties.

[36] Id. at 571.

[37] The Second Circuit held in United States v. Metz, 470 F.2d 1140, 1142 (3d Cir. 1972), cert. denied, 411 U.S. 919 (1973):

> . . . that indictments for other criminal activity are of sufficient reliability to warrant their consideration by a sentencing judge.

Accord, United States v. Doyle, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965):

> [F]ew things could be so relevant as other criminal activity of the defendant.

But see State v. Barbato, 89 N.J. Super. 400, 215 A.2d 75, 80 (1965):

> . . . reliance upon other pending charges as a basis for increasing the penalty for the charge before the court is of highly questionable propriety.

even admit, for sentencing purposes, evidence of crimes for which the defendant has neither been charged nor indicted,[38] and, at least in the Second Circuit, evidence of crimes of which the defendant has been acquitted.[39]

6. Evidence Excluded from Trial because of Fourth Amendment Violations

¶26A In United States v. Verdugo,[40] the Ninth Circuit held that it is not proper to use evidence obtained in violation of the Fourth Amendment to determine the sentence. The court rested its holding on the rationale that the "use of illegally seized evidence at sentencing would provide a substantial incentive for unconstitutional searches and seizures."[41] Verdugo,

[38] United States v. Weston, 448 F.2d 626, 633 (1971), cert. denied, 404 U.S. 1061 (1972):

> We do not desire to transform the sentencing process into a second trial, and we believe that other criminal conduct may properly be considered, even though the defendant was never charged with it or convicted of it.

[39] See United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972):

> Acquittal does not have the effect of conclusively establishing the untruth of all evidence introduced against the defendant. For all that appears in the record of the present case, the jury may have believed all such evidence to be true, but have found that some essential element of the charge was not proved. In fact the kind of evidence here objected to may often be more reliable than the hearsay evidence to which the sentencing judge is clearly permitted to turn, since unlike hearsay, the evidence involved here was given under oath and was subject to cross-examination and the judge had the opportunity for personal observation of the witnesses.

[40] 402 F.2d 599 (9th Cir. 1968), cert. denied, 397 U.S. 925 (1970), cert. denied, 402 U.S. 961 (1971).

[41] Id. at 613.

however, has not resulted in the blanket exclusion of such evidence. In United States v. Schipani,[42] the Second Circuit allowed the use in sentencing of evidence derived from illegal wiretaps. The court observed:

> The information obtained by the wiretaps was highly relevant to the character of the sentence to be imposed. . . .
>
> We believe that applying the exclusionary rule for a second time at sentencing after having applied it once at the trial itself would not add in any significant way to the deterrent effect of the rule. It is quite unlikely that law enforcement officials conduct illegal electronic auditing to build up an inventory for sentencing purposes, although the evidence would be inadmissible on the issue of guilt. . . .
>
> Where illegally seized evidence is reliable and it is clear, as here, that it was not gathered for the express purpose of improperly influencing the sentencing judge, there is no error in using it in connection with fixing sentence.[43]

7. Reputation

¶27 A New York District Court, in United States v. Rao,[44] ruled that "the defendant's alleged underworld associates and his alleged status in the Mafia or Cosa Nostra cannot and do not constitute a predicate or criterion for punishment."[45] This is no longer good law. The Second Circuit decision in Schipani undermined this ruling. There, the court affirmed

---

[42] 435 F.2d 626 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971).

[43] Id. at 28. The Fourth Circuit recently followed Schipani and distinguished Verdugo. United States v. Lee, 19 Crim. L. Rptr. 2194 (4th Cir. June 2, 1976).

[44] 296 F. Supp. 1145 (S.D.N.Y. 1969).

[45] Id. at 1149.

a District Court judge's decision to consider in sentencing the defendant's reputation as a racketeer. The First Circuit followed a similar course of action in United States v. Strauss.[46] In Strauss, the sentencing judge had before him sworn Senate testimony alleging that the defendants were members of a criminal syndicate. Accordingly, he gave them seven years instead of five, out of a possible ten.

¶28 In addition, the New Jersey Supreme Court, in State v. Leverette,[47] affirmed a long-term sentence for a defendant whose presentence report showed no prior criminal record and that he was a responsible husband and father. In so doing, the court upheld the sentencing judge's reliance in making his decision on the defendant's identity as a racketeer.[48] The court amplified this holding in State v. Souss,[49] stating

---

[46] 443 F.2d 936 (1st Cir. 1971). The court stated:

> Although the judge failed to articulate why he thought this evidence warranted an additional two years, we note that membership in a criminal syndicate is clearly relevant to questions of corrigibility and likelihood of reformation in a short period of time. Id. at 990.

The Seventh Circuit recently refused to follow Rao and approved the use of "organized crime connections in imposing a sentence." United States v. Cordi, 17 Crim. L. Rptr. 2363 (7th Cir. July 10, 1975).

[47] 64 N.J. 569, 319 A.2d 219 (1974).

[48] Id. at 571, 323 A.2d at 220. The court observed:

> The sentencing judge, based on the trial record, characterized the defendant as the key figure in a substantial gambling operation. The sentence was bottomed on the foregoing evaluation of the defendant's involvement and warrants the sentence imposed.

[49] 65 N.J. 453, 323 A.2d 484 (1974).

that:

> [A] defendant's connection with organized crime is a most important factor to consider, along with all the other circumstances, in determining the severity of punishment to be meted out.[50]

The prosecutor's ability to use what he knows about the racketeer, therefore, appears to be growing.[51]

8. Defendant's Right to View and Challenge the Presentence Report

¶28A New Jersey, Massachusetts, and the federal system have statutes

---

[50] Id. at 461, 323 A.2d at 488-89.

[51] The recent New Jersey cases echo an earlier decision, State v. Destasio, 49 N.J. 247, 229 A.2d 636, cert. denied, 389 U.S. 830 (1967). There, the New Jersey Supreme Court defended an administrative rule directing a single judge in each county to impose sentence in gambling cases, in the interest of uniformity.

> By and large the defendants who are caught are not vicious and do not menace society in other respects, but they are the hired help of the syndicate without which it could not operate. The difficulty has been that some judges cannot see beyond the individual they are sentencing. If such a judge imposes nothing more painful than a fine, his view is almost certain to become the rule of the county in which he sits. This is so because defendants will wait for that judge, if they can, and plead guilty before him. Moreover, a soft judge can make a sensible one seems harsh and severe, and hence, unhappily, judges tend to abide by the performance of the most unrealistic among them. 49 N.J. at 254-55, 229 A.2d at 640.

The court then concluded:

> Nor is there substance to the claim that the individual is denied equality when the court deals specially with the special evils of syndicated crime. . . . Id. at 260, 229 A.2d at 643.

requiring disclosure of the presentence report.[52] The New York statute leaves disclosure to the judge's discretion.[53] The New York courts have tended, however, to encourage disclosure as the rule of practice.[54] The defendant also has different kinds of statutory protection in New York. He may file a presentence memorandum covering his entire life history.[55] The court, in its discretion, may hold a presentence conference to resolve any discrepancies between the information submitted by the defendant and that received from other sources.[56] The prosecutor must

---

[52]For New Jersey, see N.J. Court Rule 3:21-2. See also State v. Kunz, 55 N.J. 128, 259 A.2d 895 (1969). For Massachusetts see Mass. Gen. Laws Ann. ch. 279 §4A and ch. 276 §85. For the federal courts, as of Dec. 1, 1975, see Fed. R. Crim. P. 32 (c)(3). Note that the Federal Rule has changed from leaving disclosure to the judge's discretion to mandating it. A total refusal to disclose remains a permissible option in certain extraordinary situations. The court in United States v. Long, 19 Crim. L. Rptr. 2201-02 (E.D. Mich., April 29, 1976) found that such an extraordinary situation did not exist in that case and that the sentencing magistrate erred in following such a course. The magistrate should have disclosed the contents of the report to the counsel and instructed him not to pass the information along to his client. The court remarked that this alternative would be helpful in cases involving potential harm to third persons if the defendant learned the contents of the report. This procedure may be of limited use in the organized crime context, in situations where the defense attorney may ignore the judge's instructions.

[53]N.Y. Crim. Pro. Law §380.50 (McKinney 1971).

[54]See People v. Perry, 36 N.Y.2d 114, 120, 365 N.Y.S.2d 518, 522, 324 N.E.2d 878, 881 (1975) (fundamental fairness and the appearance of fairness may be best served by the disclosure of presentence reports, but the refusal to disclose the report does not constitute an abuse of discretion).

[55]N.Y. Crim. Pro. Law §390.40 (McKinney 1971).

[56]Id. §400.10.

have reasonable notice of that conference, and an opportunity to participate.[57] The court may compel the prosecutor to reveal questioned evidence to the defendant at that conference for the purpose of rebuttal.

¶29 A policy of disclosing presentence reports to defendants can help the prosecutor. If the defendant has an opportunity to view and challenge the report, the prosecutor's responsibility to verify the report's allegations may lessen. Those allegations may have to meet a lower measure of reliability.

¶30 In sum, these flexible safeguards provide the prosecutor with clear opportunities to introduce the defendant's connection with organized crime.

IV. Appellate Review of Sentence

A. In General

¶31 The hornbook rule is that an appellate court will not disturb a criminal sentence unless it either exceeds statutory limits or represents a clear abuse of discretion.[58] Most jurisdictions, however, have statutes authorizing the appeal of illegal sentences. Traditionally, these statutes have been construed as not sanctioning the increase of a

---

[57] Id.

[58] Moore v. United States, 357 U.S. 386, 393 (1958)(sentence imposed by federal district judge, if within statutory limits, held normally not subject to review).

sentence on review.[59] In New York, for example, the prosecutor may appeal only those sentences which are invalid as a matter of law.[60] Nevertheless, it might legitimately be argued that a judge, as a matter of law, abuses his discretion when he sets too lenient a sentence.[61] If so, then a sentence substantially too lenient could be characterized as illegal, and it could be reviewed on appeal by the prosecutor. The New York prosecutor may, however, under the usual interpretation, challenge only those sentences which fail to meet the minimum legal terms.

B. Defendant's Right to Appeal and the Danger of an Increased Sentence

¶32 Massachusetts, Connecticut, and Maryland allow the appellate court to increase the sentence when certain defendants appeal.[62]

---

[59] See, e.g., Fed. R. Crim. P. 35; N.J. Court Rule 3:21-10. For a brief description of other such state statutes see McClellan, "The Organized Crime Act (S.30) or its Critics: Which Threatens Civil Liberties?" 46 Notre Dame Lawyer 55, 178-79, note 567 (1970). The leading case propounding this interpretation is Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1874). See also United States v. Benz, 282 U.S. 304, 307 (1931)(to increase the sentence already in service is to subject the defendant to double punishment in violation of the Double Jeopardy Clause of the Fifth Amendment). In United States v. Sacco, 367 F.2d 368 (2d Cir. 1966), the court considered, but finally rejected, the defendant's proposed exception to the rule of Lange, supra.

[60] N.Y. Crim. Pro. Law §§440.40, 450.30 (McKinney 1971).

[61] But see, id., §450.30, Commission Staff Comment. The comment casts doubt on this argument.

[62] Mass. Gen. Laws Ann. ch. 278 §§28A and 28B (Cum. Supp. 1975); Conn. Gen. Stat. Ann. §51-196 (Supp. 1976); Md. Ann. Code art. 27, §§645JA to 645JG (1976). Mass Gen. Laws Ann. ch. 278 §28A reads in part:

> There shall be an appellate division of the superior

The constitutional objection usually raised against such proceedings is that the possibility of an increase in sentence violates the defendant's due process rights. The Supreme Court's decision in North Carolina v. Pearce is the usual base upon which this objection rests.[63] There, the Court held that a defendant who has obtained a retrial after making an appeal should be protected from the imposition of an increased sentence by a vindictive judge. The crux of the Pearce decision

---

62 (continued)

> court for the review of sentences to the state prison imposed by final judgments in criminal cases, except in any case in which a different sentence could not have been imposed, and for the review of sentences to the reformatory for women for terms of more than five years imposed by final judgments in such criminal cases. . . . No justice shall sit or act on an appeal from a sentence imposed by him.

The relevant portions of Mass. Gen. Laws Ann. ch. 278 §28B stipulate:

> A person aggrieved by a sentence which may be reviewed may appeal to the appellate division for a review of such sentence. . . The justice who imposed the sentence appealed from may transmit to the appellate division a statement of his reasons for imposing the sentence and shall make such a statement within seven days if requested to do so by the appellate division.
>
> The appellate division shall have jurisdiction to consider an appeal with or without a hearing, review the judgment so far as it relates to the sentence imposed and also any other sentence imposed with the sentence appealed from was imposed, notwithstanding the partial execution of any such sentence, and shall have jurisdiction to amend the judgment by ordering substituted therefore a different appropriate sentence or sentences or any other disposition of the case which could have been made at the time of the imposition of the sentence or sentences under review, but no sentence shall be increased without giving the defendant an opportunity to be heard. If the appellate division decides that the original sentence or sentences should stand, it shall dismiss the appeal. Its decision shall be final. . . . The appellate division may require the production of any records, documents, exhibits or other things connected with the proceedings. . . .

63 395 U.S. 711 (1969).

was the fear of vindictiveness because of a defendant's appeal. Later cases, however, have read Pearce narrowly.[64] In short, the ". . . lesson that emerges from Pearce, Colten, and Chaffin is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a likely threat of vindictiveness."[65]

¶33 The Supreme Judicial Court of Massachusetts has held since Pearce that its statutory procedure precludes the possibility of vindictiveness.[66] Under Mass. Gen. Laws Ann. ch. 278 §278A, the sentencing judge cannot sit as a member of the appellate division, the court that sets the final sentence. The court also supported its decision by pointing to the record of the appellate division proceedings from July 1, 1955 to June 30, 1969; the record showed a greater than four-to-one ratio of sentence reduction to sentence increase.[67] Finally, the

---

[64] See Colten v. Kentucky, 407 U.S. 104 (1972) (higher sentence after "appeal" from lower trial court to higher court for de novo trial upheld); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (higher sentence after retrial imposed by jury not shown to be vindictive).

[65] Blackledge v. Perry, 417 U.S. 21, 27 (1974).

[66] Walsh v. Commonwealth, 358 Mass. 193, 260 N.E.2d 911 (1970).

[67] Id. at 199, 260 N.E.2d at 915:

Disposition

Appeals Entered	4,201	
Appeals Withdrawn	1,644	
Appeals Dismissed	1,892	
Sentences Reduced	395	(9.42%)
Sentences Increased	87	(2.07%)
Appeals Pending	139	
Appeals Moot	44	

same court suggested that the Pearce holding was actually inapplicable to the Massachusetts statute:

> We note finally that the Pearce rule does not seem suited to Appellate Division proceedings. It does not permit consideration of any factors but the defendant's conduct subsequent to the first trial. Such a rule would seriously hamper the work of the Appellate Division because it would limit it to the brief period that the defendant has been serving the sentence in the State prison or a reformatory awaiting hearing on the appeal. Moreover, the rule would preclude consideration of the very factor which the Appellate Division was established to consider: whether a particular defendant's sentence is excessively short or long compared to other defendants' sentences for the same or similar offenses. Since the Supreme Court was not considering this procedure, we do not believe that it meant the Pearce rule to apply to it. . . .[68]

C. Prosecutor's Appeal for Increased Sentence

¶34 The Massachusetts statute allows an increase in sentence only upon a defendant's appeal. The need remains, however, for a way in which prosecutors can call for an increase in sentence. There should be some means of supervising those trial judges who, because of corruption, political considerations, or lack of knowledge, give light sentences to racketeers.[69]

¶35 The constitutional barriers to such a power do not appear insurmountable. Due process objections present the least difficulty. Pearce, it should be emphasized, turns on the issue of vindictiveness caused by a defendant's appeal. Absent this factor, the due process rationale for denying an increased sentence seems thin, particularly when the prosecutor, not the

---

[68] Id. at 201, 260 N.E.2d at 916.

[69] See The Challenge of Crime in a Free Society, The Report of the President's Commission on Law Enforcement and Administration of Justice, 203 (1967).

defendant, appeals a sentencing decision made in favor of the defendant. The Pearce rationale of vindictiveness should, therefore, be limited to a situation in which a resentencing judge is reversed for making an error against the defendant after an appeal brought by the defendant.

¶36 The Double Jeopardy Clause of the Fifth Amendment also should not pose an insuperable difficulty. As the Supreme Court recently observed, "... [T]he Double Jeopardy Clause of the Fifth Amendment is written in terms of potential or risk of trial and conviction, not punishment."[70] This distinction gains force from other recent Supreme Court decisions expanding the government's right of appeal in criminal cases. In United States v. Wilson,[71] the Court held:

> We therefore conclude that when a judge rules in favor of the defendant [on a legal question] after a verdict of guilty has been entered by the trier of fact, the government may appeal from that ruling without running afoul of the Double Jeopardy Clause.[72]

Under Wilson, only facts going to guilt or innocence resolved by the trier of fact are protected from appellate review.

¶37 The prosecutor should, therefore, be aware of these new possibilities for appealing a sentence thought to be too lenient. Prosecutors in states with statutes like New York's should also take them into account when seeking to define the scope of their states' relatively liberal statutes. These

---

[70] Price v. Georgia, 398 U.S. 323, 329 (1970).

[71] 420 U.S. 332 (1975).

[72] Id. at 352.

recent decisions suggest that there is no constitutional barrier to seeking review of a judge's abuse of discretion in sentencing. A new interpretation of the present appeal statute might also be secured in the right case.

Appendix

I. Recidivist Sentencing

¶38 Recidivist sentencing [Note: works predating Specht v. Patterson, 386 U.S. 605 (1967), and Burgett v. Texas, 389 U.S. 109 (1967), do not reflect the current state of the law].

Note, "Defendant's Right to Protection from Prior Uncounseled Convictions," [1973] Wash. U.L.Q. 197.

Comment, "Constitutional Law--Right to Counsel--Valid Misdemeanor Conviction Cannot be Used as Basis for Recidivist Sentence if Defendant Was Not Represented by Counsel at Misdemeanor Trial," 43 N.Y.U.L. Rev. 1012 (1968).

Annot., "Pardon as affecting consideration of earlier conviction in applying habitual criminal statute," 31 A.L.R.2d 1186 (1953).

Annot., "Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes," 24 A.L.R.2d 1247 (1952).

Annot.,"Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender," 19 A.L.R.2d 227 (1951).

Annot., "What constitutes former 'conviction' within statute enhancing penalty for second or subsequent offense," 5 A.L.R.2d 1080 (1949).

Note, "'Defective Delinquent' and Habitual Criminal Offender Statutes--Required Constitutional Safeguards," 20 Rutgers L. Rev. 756 (1966).

Note, "Recidivist Procedure," 40 N.Y.U.L. Rev. 332 (1965).

Annot., "Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute, enhancing punishment for repeated offenses," 80 A.L.R.2d 1196 (1961).

Annot., "Propriety, under statute enhancing punishment for second or subsequent offense, of restricting new trial to issue of status as habitual criminal," 79 A.L.R.2d 826 (1961).

Annot., "Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction," 11 A.L.R.2d 870 (1950).

(Bibliography obtained from T. Amsterdam, B. Segal, and M. Miller, Trial Manual 3 for the Defense of Criminal Cases, ALI-ABA Joint Committee on Continuing Legal Education (1975), pp. 2-154 to 2-155).

II. Dangerous Special Offender Sentencing

¶39 The Sixth Circuit has recently affirmed the constitutionality of the federal dangerous special offender statute, 18 U.S.C. §3575, a part of Title X of the Organized Crime Control Act of 1973, in United States v. Stewart, 531 F.2d 326 (1976). Section 3575 provides an increased sentence for dangerous special offenders once certain age, frequency of conviction, and time standards are met. Section 3575(b) reads:

> . . . the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony.

The court below had ruled that section 3575(b) was unconstitutionally vague and that a sentence given under its terms would be a denial of due process in violation of the Fifth Amendment. The court similarly held that section 3575(f) was unconstitutionally vague. Section 3575(f) reads:

> . . . a defendant is dangerous for purposes of this section if a period of confinement longer than that required for such felony is required for the protection of the public from further criminal conduct by the defendant.

¶40 The Sixth Circuit reversed both holdings. First, the court listed several procedural safeguards regulating use of the

increased sentence, and found that those procedures were far less arbitrary than those employed in ordinary sentencing practices. For example, section 3575(b) requires a presentence hearing, detailed notice to the defendant, and reasonable time for verification of allegations. The statute expressly guarantees the defendant the right to counsel, compulsory process, and cross examination. The court found these procedural safeguards, extraordinary for a presentence hearing, to reflect Congress's intent to control carefully the use of the statute. The court also pointed to the specific language of the statute ". . . and not disproportionate in severity to the maximum term otherwise authorized. . . " as further manifesting that intent. Finally, the court emphasized that the very broad scope for review of such sentences, allowed under section 3576, would check any abuse of judicial discretion.

¶41 Second, the court distinguished this statute from the New Jersey statute discussed in United States v. Duardi.[73] That New Jersey statute made it a crime to be a "gangster"; Title X, in contrast, did not make it a crime to be "dangerous." Section 3575 is directed, instead, at those who have actually been convicted of a crime. Having made this distinction, the court held, on the basis of United States v. National Diary Products,[74] that when a statute is challenged for vagueness, a court must seek

---

[73] 384 F. Supp. 874 (W.D.Mo. 1974). The statute was held unconstitutional for vagueness by the district court. The Eighth Circuit did not reach the issue of vagueness, however, when it affirmed the district court's decision. United States v. Duardi, 529 F.2d 123 (8th Cir. 1975).

[74] 372 U.S. 29 (1965).

an interpretation which supports the constitutionality of the legislation. Accordingly, the district court's finding of vagueness was reversed, and the constitutionality of section 3575(f) affirmed.

HEARINGS ON REFORM OF THE FEDERAL CRIMINAL LAWS

WEDNESDAY, JUNE 8, 1977

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:30 a.m., in room 2228, Dirksen Senate Office Building, Hon. Orrin G. Hatch [acting chairman] presiding.

Present: Senator Hatch.

Staff present: Paul C. Summitt, chief counsel; D. Eric Hultman, minority counsel, Paul H. Robinson, counsel; Michael M. Hunter, legislative counsel to Senator Hatch; and Mabel A. Downey, chief clerk.

Senator HATCH [acting chairman]. The meeting will come to order.

Yesterday we were privileged to have a number of distinguished witnesses testify before the Committee on the Judiciary with respect to reform of the Federal criminal laws, particularly S. 1437. The witnesses included the Attorney General of the United States, Griffin Bell, and Edmund G. "Pat" Brown, former Governor of the State of California, who served as the Chairman of the National Commission on Reform of the Federal Criminal Laws.

We appreciated the insight which yesterday's witnesses provided in relating the great concern and necessity for revision of the present Federal criminal laws.

This morning we are again privileged to have several equally distinguished authorities who have been most agreeable in arranging their busy schedules to testify before the Subcommittee on Criminal Laws and Procedures.

The testimony today and tomorrow is intended to go particularly to the sentencing provisions of the legislation pending before the Judiciary Committee. We trust that the testimony will provide special insight into the problems which are now present in the Federal judicial system and assist us in providing proper measures to resolve these problems.

Our first witness this morning will be Hon. Marvin E. Frankel, U.S. District Court, New York, N.Y.

Judge, we are very pleased to welcome you before this committee, and we will be most interested in your testimony today.

STATEMENT OF HON. MARVIN E. FRANKEL, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF NEW YORK

Judge FRANKEL. Thank you, Mr. Chairman.

I suppose it is not original to say that I am honored to be here, but I am. I am pleased and honored to be here.

As you indicated, Senator, I am here to speak about the sentencing provisions of S. 1437 and some similar bills and particularly to express the view that these provisions mark a very long and single step toward a rational and more civilized system of sentencing criminal defendants.

Knowing that you have a considerable roster of people today, I want to confine my remarks. I want to speak particularly and most favorably about two aspects of these sentencing provisions.

First is the proposed provision that would create a Sentencing Commission to study sentencing, to prepare guidelines, to formulate policies, to collect data. Second is the provision for appellate review of sentences.

The things I have to say about these two basic aspects of the bill are mostly favorable. I have some criticisms and some suggestions. I will take the liberty of expressing those.

My credentials—if I should state them—are, first, I am a trial judge and have been for nearly 12 years in the business of sentencing people. In the course of that, I have become increasingly unhappy with the awareness that I and people like me have too much power, too little knowledge, and no guidance from any of the organs of the law that normally give guidance to trial judges. We have had essentially none from the Congress and and none from the higher courts and none, to speak of, from any of the standard sources of knowledge and principle to which judges look.

I am sure I have sentenced too many people too harshly; I am not happy with that. I have sentenced some, I am sure, too leniently; and I am not happy with that. But I must confess I worry less about that than about the excessive sentences.

Disturbed by this area and its uncertainties and vagueness, I wrote a book about it a few years ago called "Criminal Sentences." I think it may be permissible to say that some of the ideas in this proposed legislation have some resemblance to some of the things I wrote about.

First off, as I said, I want to speak very strongly in favor of the idea of a sentencing commission. I think it is a reflection of an awareness that we are not going to cure all the difficulties with sentencing all at once.

The Commission, as I understand it, is an agency that will have an ongoing responsibility for studying and formulating new ideas about, and improving the process of, sentencing. In addition, the Commission's task of creating guidelines and policies will be an important step in the direction of narrowing and guiding the discretion of trial judges without attempting the impossible task—impossible in my judgement—of eliminating that discretion.

I think, as many people do, that to have a trial judge or a miscellaneous several hundred trial judges free to decide in any given case whether a defendant should get no prison or 25 years in

prison or something in between, without any controls or criteria or standards, I think that kind of setup—which is what we live with now—is intolerable.

I think, on the other hand, that the effort to have the legislature fix in advance the tariffs for each sentence for each crime without regard to the circumstances of the particular offense or the characteristics or circumstances of the particular defendant—I think that opposite extreme is equally unacceptable.

I think that no civilized system of sentencing could have that kind of mechanical, decreed-in-advance, automatic sentencing arrangement by category of crime.

I think the Commission is a salutary and sensible middle position which will leave, or could leave, a necessary measure of discretion to discriminate among the several defendants and at the same time proceed to guide and regulate the exercise of discretion.

I think the provision for the Sentencing Commission's creation of guidelines for the parole commission is also a good idea. I am aware from reading the newspapers that there was testimony before this committee yesterday suggesting the desirability of abolishing the parole commission or at least abolishing the release function now exercised by the parole agency.

I have felt, from thinking about it and from studying it, that there is a lot to be said for that position. I have, on occasion, spoken for that abolitionist view.

On looking at this bill, I think it is a preferable alternative. I think the effort to have scrutiny of the parole commission and on an overall view of the sentencing process by an agency that will make guidelines for both the parole commission and the courts is a suitable compromise. I think that it might be desirable to let the Sentencing Commission function in this fashion for a period of years and then, on the basis of that effort to have an integrated system of sentencing functions, consider whether abolition of the parole commission is still a desirable course.

I said I had some criticisms. I have two with respect to the proposals concerning the Sentencing Commission.

They relate to the matter of selection of the members of the Commission and—perhaps less importantly, but symbolicaly significant—to the matter of the pay of the Commissioners.

This bill, like some other bills that have been proposed, places the sentencing commission in the judicial branch—which is perfectly agreeable—and provides that the members of the commission are to be selected by the Judicial Conference of the United States. It is that aspect of the selection that I disagree with, for two reasons.

The commission will have functions, obviously, that cut across the three branches. Its guidelines and its policies will affect and, to some degree, even regulate and control the work not only of judicial people but of executive and legislative people as well.

I should not say "control" with respect to the legislature, but certainly an important legislative function is the role of the commission in formulating ideas for new legislation for improvements in the sentencing area.

I think the breadth of the commission's functions, if nothing else, would argue for a selection arrangement not limited to the Judicial

Conference. The fact that all three branches are affected might suggest selection by the three branches, as some agencies are now selected.

But my own vote, which I respectfully submit to the committee, would be for Presidential appointment of the commissioners.

I have that in view because I think that the hope ought to be that this would be an august and significant commission. I think its success, like the success of so many agencies, will depend on the caliber of people it can attract—their own professional and moral attainments—and, not much less importantly, their status and the regard in which they are held in the legal and more general community.

I think Presidential appointment signifies this idea of consequence and of prestige. It would be a mode of attracting the kind of people you would want to attract. I would urge the committee to consider a revision of the appointment process to provide for a Presidential appointment.

Obviously, it is not unprecedented to have the President appoint people whose functions are outside the executive branch. I do not need to burden this committee with the justification for that arrangement.

Similarly, and on a somewhat more crass level, I would urge consideration of some change in the provisions for pay of the commission members.

There is no problem about paying people who are already in Government at the rate of their already-specified pay; that is, giving them no additional pay for serving on the commission.

But then there is a provision in the bill that people who come into the commission from outside the Government—as one certainly hopes at least some commissioners would—are to be paid at the rate of grade 18. I think that is not completely satisfactory.

I mention in my statement and I will repeat that I spent some of the best years of my younger life as a civil servant and never made it up to grade 18. I have only the highest respect for the people who hold and stay in those super grades.

Nevertheless, I am back on the point of prestige, symbolism: I think the provision for pay at a grade 18—a kind of civil service grade—may have a downgrading quality in this setting that we should avoid.

My suggestion, very simply, is that the commissioners who come from outside the Government should be paid at the rate of pay which is now enjoyed by Members of Congress and by judges of the U.S. Courts of Appeals.

It seems to me that gives some reflection of a quality of eminence that ought to be imported into this arrangement.

The second thing I said I would speak about is the provision for appellate review of sentences.

The first proposition I would make about that is that I am very much for such review. It is very grossly overdue. In this country we have lagged way behind every civilized country in the world. All the other countries, as far as I know, that call themselves civilized provide for some kind of review of a sentencing officer's determination of the punishment.

I think it is high time that we did the same. In that, I take no very revolutionary position. I join with the ABA's minimum standards project, which back in 1968, in its Minimum Standards for Appellate Review of Sentences, came out for such review.

While I am in favor of the idea of review, I am not completely in accord, by any means, with the specific provisions for review in S. 1437. I think they are too narrow, too confined, and that there is no real justification for the very severe limitations on review embodied in this bill.

I have no objection to precluding review—as the bill, very generaly described, does—where a sentence is the result of a plea bargain or a sentence bargain—which is probably the correct word for it. But I have serious question about making unreviewable a sentence that is within the guidelines formulated by the sentencing commission and is consistent with policy statements of that commission.

I think—though I am a very staunch supporter of the existence and functioning of that commission—this gives far too much power to the commission and far too little power to the judges, especially the judges of the appellate courts, including the Supreme Court of the United States.

I do not think that a fair approach to the necessarily experimental and tentative character of these guidelines and policy statements would include embedding them in concrete, as it were, to this extent. I think, to put it more simply, that, while the commission's guidelines—one would hope—will be important and will have great weight and will presumptively bind all the judges, I think they should be subject to reconsideration and, on occasion, to revision or even invalidation by the appellate courts, including the Supreme Court, as well as the Congress.

In writing about this and urging the existence of a commission myself, I have envisioned it as a very important agency which would be part of an ongoing dialog about these questions of guidelines and policies, and not a kind of final and unquestioned authority, which is nearly the effect this bill would have by making sentences within the commission's pronouncements unreviewable.

I would refer in this connection to a book that I am told is published today whose authors are here and who I know can speak for themselves. It is a volume called "Toward A Just and Effective Sentencing System." It is by Pierce O'Donnell, Michael Churgin, and Dennis Curtis. It has a foreword by Senator Kennedy and some involvement of my own.

Since you are looking for serious suggestions, without being modest on their behalf or anybody else's, I would suggest that this book has a preferable alternative on that subject, in addition to being an excellent discussion of many other aspects of sentencing.

The book provides, in effect, that sentences of the sentencing commission will be reviewable, but that the question whether they are within or outside the guidelines will affect the scope of review, not reviewability as such.

Very briefly, the Messrs. O'Donnell, Churgin, and Curtis would provide that, if a sentence is within the guidelines, it is reversible only if it is clearly unreasonable. If it is outside the guidelines, it would be reversiable merely on the ground of being unreasonable.

That difference is important.

In both instances—and this is the critical point I make to this committee—the sentence is reviewable. You can get to the appellate court. The question is, what standards will the appellate court follow in deciding whether to affirm or reverse.

My broad position on this—and I will conclude with it—is that I do not think that we should be looking hard for ways to limit access to the court of appeals to get review of sentences.

As I said before, it is high time that this grave and critical aspect of the judicial process in criminal cases was subjected to appellate scrutiny. I do not think that we should be looking for ways to provide for unreviewability any more than we look for ways to do that in the case of a post office truck collision with your automobile or an infringement of a trademark or a breach of contract or anything else.

I think the presumption ought to be in favor of review and not in favor of limited and niggardly and reluctant kinds of review. I have suggested that the tendency of this bill in this respect is toward that latter, less desirable kind of setup.

These are the things I have to say to this committee. I will be happy, to the extent of my ability, to answer questions.

Senator HATCH. Judge, we appreciate your statement here today and have deep respect for you as a judge and as a person.

Do you think that appellate review of a trial judge's sentences will open the door for appellate consideration of matters that have previously been considered wholly evidentiary and best determined by the trial judge who is right there on the scene?

Judge FRANKEL. Well, I think the whole subject will be opened up if we allow review; but that is true, Senator, of all manner of other things that trial judges have primary responsibility for, including evidentiary matters.

The appellate court looks at the sufficiency of the evidence to sustain a conviction. It looks at rulings on evidence. It looks at the sufficiency of evidence to justify all manner of things that the trial judge may have done. The appellate court looks at a lot of things that are peculiarly the business of trial judges. Appellate courts do not empanel juries. They do not keep order in the courtroom. They do not select juries generally. They do not appoint counsel. But they do, in every one of those kinds of situations, have authority to review, revise, reverse what we trial judges have done.

I would say that, insofar as the things that the trial judge does are peculiarly within his competence, insofar as he has seen the witnesses, seen the defendant, and has, supposedly, some special advantage for judgement, that is handled by the appellate court by giving a certain degree of deference to what the trial judge has done.

But it is not handled by closing the door on review altogether.

Senator HATCH. Judge, the bill refers to "rehabilitation" as a possible goal of imprisonment.

What are your views on that particular point?

Judge FRANKEL. Well, my view have been better stated by Norval Morris; but I will repeat them because I agree with them.

I think that the bill makes an error—and it may be an error of some consequence—when it makes rehabilitation one of the purposes

of a sentence. I do not think anybody ought to be sentenced for rehabilitation.

I think we kid ourselves, and I think we lead ourselves into needless cruelties when we say we are locking somebody up for rehabilitation.

There is a widespread recognition of this now. I think Mr. Carlson, who sits back here, and who minds the people that we lock up is among the many people who have come to recognize that.

I think once we sentence somebody, which should be for purposes other than rehabilitation, we should, of course, do everything we can to help the person, if we can. Just as we do with people outside the prison. We should extend to them any kind of service—education, medical, therapeutic—that we can make available.

But the important point—and it is a critical point—is that we ought not to put anybody in prison for so much as one day with the notion that that is good for him and that we are confining him for rehabilitation.

I would prefer to see that portion of the purposes of sentencing in this bill as it is now written deleted.

Senator HATCH. Judge, you have already commented on some aspect of this, but what makeup would you prefer to see in the membership of the sentencing commission? Should it be made up wholly of judges?

Judge FRANKEL. No. I think it very clearly should not be made up wholly of judges.

While I did not state that as one of my reasons for opposing appointment by the Judicial Conference, it is something that I would adopt as an additional reason.

I think the people who have knowledge and potential input with respect to the questions of sentencing come from many disciplines and occupations other than judging. I think you are going to want to see on this commission—I would want to see on it—lawyers, people with experience in parole, people with experience in the various helping-human professions, whether it is psychology, psychiatry, sociology, or others. There are people who have experience with the prisons, and others who have relevant kinds of knowledge and information.

It should not be exclusively judges by any means.

Senator HATCH. Judge, you suggest the members of the sentencing commission would best be appointed by the President.

Judge FRANKEL. Yes.

Senator HATCH. Do you feel that would be a better approach than the selection method presently contained in the bill?

In your prepared statement, you note some disappointment with the caliber of the persons which in the past have been appointed to the parole commission.

Does not that same danger exist if the members of the sentencing commission are Presidential appointments?

Judge FRANKEL. I would certainly hope not.

I might say, quite apart from the fact that a couple of my friends from the parole commission are here, that I think the unhappy condition of personnel in parole agencies has, in recent years, been improving. I have already expressed this publicly.

But let me get to your question.

I think what has happened in the field of corrections and sentencing is a basis for hope that you would get better people. This has become a matter of the most intense public concern. People are writing books about it at a great rate. You are getting statements by the Attorney General of great earnestness and deep concern.

To put it in one word, there is a very bright light of public attention on this subject. My sense of it, from reading books and observing what goes on in the world over the years, has been that, when you have the spotlight on an agency or a subject and a system of Presidential appointments, you have a good promise—no guarantee—that you are going to get good people.

The appointing process itself goes on with intense public scrutiny. In addition, you have the basis for attracting people who are interested in rising to a challenge and taking on an important public responsibility.

I do not think there is any guarantee in this life of getting supremely gifted people in any job through any appointing process. But I do think, for this commission in our time, Presidential appointment holds higher promise than any other kind of selection.

Senator HATCH. Judge, do you think it might be better to have a combination—some appointed by the Judicial Conference and some appointed by the President? Would that be satisfactory?

Judge FRANKEL. I would find that an acceptable close second, Senator.

Senator HATCH. I worry about the Commission being politicized. I do not think that it would be politicized if it were in the hands of the Judical Conference, as presently provided in the bill.

I worry about it being politicized if it is in the hands of the Executive, regardless of who the Executive is.

Judge FRANKEL. It is a problem.

I also mention in my statement—and I think I mentioned in the oral version of it—that one possibility would be tripartite appointment. Again, that would raise your problem of politics in two of the branches at least. But, at the same time, it would give a certain credit and representativeness to this commission, which, after all, relates to and has impact on each of the three branches.

I do not feel passionately about the choices between that and Presidential appointment; whereas, I would somewhat more strongly oppose appointment exclusively by the Judicial Conference.

Senator HATCH. Some of the questions I have been asking have been requested by Senator Kennedy. Here is another one that he wants asked.

Will not the unlimited right of appeal flood the courts of appeals and raise a serious problem of court congestion?

Judge FRANKEL. Well, I cannot give a flat "no" answer, Senator; but I can say "probably not."

The answers to that fear, which, frankly, I think is a hobgoblin, are outlined, again, in this book I mention.

First, that argument has been raised over and over again in the States, which, over recent years, have been adopting appellate review of sentences. I note that in actual experience the argument has

proved to be unfounded. The State appellate courts have not been flooded. They have not been overwhelmed.

I think that appellate review is important. But, at the same time, realistically, I do not think the problem of reviewing sentences is an onerous one. I do not think, very candidly, that most sentences will be modified or reversed. That is not the important reason for having appellate review. The important reason, if you put it in two words, is, one, so that we who sentence people have a sense that we are subject to scrutiny; and, two, so that you get some rationality and consistency finally into this process.

I do not think you are going to have a lot of them reversed.

I have one other point. That is that the sentence a person gets for a crime, a period of time locked up by his society, is a terribly important problem. With all deference to them, I would say that there is a good deal of business that the courts of appeals now do that is much less important. I do not think that we ought to say that we cannot add sentencing to your responsibilities because that will flood the appeallate courts, leaving them flooded, as they now are, with review of auto accident cases, copyright infringement, breach of contract, and other things that, very frankly, are not earth shattering in their significance.

Senator HATCH. Judge, there may be other members of this subcommittee or of the full committee who would want to submit written questions to you; so we will leave the record open. Hopefully, you will answer such questions.

Judge FRANKEL. I am at your service, sir.

Senator HATCH. Your statement will be placed in the record.

[Material follows:]

PREPARED STATEMENT OF MARVIN E. FRANKEL, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF NEW YORK

The sentencing provisions of S. 1437 mark long strides in the right direction. I take the privilege of this appearance mainly to support two key improvements offered by this measure: (1) the creation of a Sentencing Commission to pursue the tasks of study, policy formulation, and ongoing revision that are necessary in this troubled and complex sector of the criminal justice system, and (2) the provision for appellate review of sentences. At the same time, I have some criticisms of these aspects of the bill; I plan to state these and suggest a few changes.

I

My credentials for offering opinions about sentencing legislation can be stated fairly briefly. Now in my twelfth year as a district judge, I have sentenced more people than I find it comfortable to count. I am certain, but certainly not happy, that some of the sentences were too harsh. Some, no doubt, were excessively lenient, and I regret those too, but frankly not as much. Always there has been a disquieting awareness of having too much power, too little knowledge, and next to nothing in the way of guidance from the Congress, from higher courts, or from any other quarter. I have known vividly that I am responsible, with all of my colleagues, for creating the crazy-quilt of sentencing disparities that is probably the most awful aspect of this subject.

Brooding on these problems, I wrote a small book in 1972 called *Criminal Sentences*. I joined there with the American Bar Association and many others in urging appellate review of sentences. I "tendered as the most important single suggestion in this book" (p. 119) the idea of a Commission on Sentencing to study the problems, make rules to guide the discretion of sentencers, and assist Congress with further legislation. The proposal was meant then, as in my testimony today, to suggest the best means I could think of to begin improving the lawlessness of our sentencing practices.

II

Adhering to my earlier sense of the priorities, let me speak first, and very favorably, about the provisions in S. 1437 that would add a new Chapter 58 to Title 28, creating a United States Sentencing Commission. The fundamental virtues of this idea, as I see it, lie in (a) the recognition that we are not equipped now to solve the problems of sentencing once and for all, and (b) the creation of a mechanism with which to begin and continue working steadily at the job. What we have realized in the last decade or so is that the field of sentencing is a vast wasteland of ignorance, curbstone hunches, mythology, and general guesswork. We need information, guidelines to confine and assist the exercise of sentencing discretion, research and study to improve our understanding, and the steady development of better, more civilized policies. All these things the Commission could supply.

The idea of guidelines for categories of offenses and offenders offers a good compromise between the unacceptable regime of unfettered judicial discretion, which we have now, and the opposite extreme of rigid, mandatory sentences, which many have been driven to propose. The bill, in what would become 28 U.S.C. §994(a)-(d), is a splendid groundwork in this respect. It directs the Commission to create guideline ranges, weighing an array of factors about the crime and the criminal, and thus to supply rational and consistent boundaries for the fixing of individual sentences. The prospect is presented of substituting some decent measure of restriction on the power of the individual judge—who today, for example, is authorized to give a bank robber a sentence from probation to 25 years, or anything in between, with no stated criteria or controls to govern the particular decision. Under the guidelines the judge will still have, as he or she should, leeway to distinguish among the varieties of separate human beings who rob banks, but a leeway that is sensibly narrowed and canalized by standards of general application.

It is intolerable to permit judges, however good they are, to choose within a range from zero to 25 years, so that the actual sentences of similar defendants will vary wildly depending, not upon the offense or the defendant, but upon the varying beliefs and idiosyncracies of the sentencers. It is not more tolerable to legislate that every bank robber should be sentenced to X years regardless of age, prior record, the seriousness of the particular robbery, the defendant's potential for lawful functioning, etc. A middle course of ordered discretion, under general and steadily improved guidelines, is the clearly preferable scheme of S. 1437.

Another significant benefit in the Commission proposal is the mandate for research and development in §995. We are, as I have said, enormously ignorant on all the questions of human behavior, ethical choice, and policy that are implicated in the business of sentencing. Neither Congress nor the courts nor any executive agency has thus far found it feasible to give these problems the full time thought, on a substantial scale, that they so clearly require. The Commission would be expected to do that—both through its own staff and in its role "as a clearinghouse and information center * * *." §995(a)(10)(A). That function, along with the allied task of collecting and systematically organizing the sentencing data, id., subsecs. (11)-(14)—now largely unknown and unknowable to those who make the laws and to those who sentence people—would help us to begin to act upon knowledge rather than speculation and surmise. The bill expressly contemplates, id., subsec. (17), that the Commission would act upon its learning and organized data in recommending legislative improvements to the Congress. The courts as well would unquestionably be guided toward sounder decision-making by this growing storehouse of intelligence. The prospect is one of light, at long last, in a sea of darkness.

Also salutary are the provisions—in §§3831, 3834, 3535, and 3836—that would require the Parole Commission to function under "guidelines and * * * policy statements * * * issued by the Sentencing Commission * * *." The fragmentation of responsibility for the actual length of sentences between the judges and the parole authorities has been a major flaw in a thoroughly flawed system. Many observers, including me, have thought the parole release function (as distinguished from parole supervision) works abominably; the theory that the parole board would watch the prisoner's progress and release him when he was "ready" has never worked acceptably in practice. Parole board (or commission) members, at least until lately, have been perceived as unqualified and arbitrary. There has been growing sentiment for the abolition of parole as it has functioned until now.

While I have tended to share that abolitionist view, I think the proposals in S. 1437 are better. The Sentencing Commission, committed to the acquisition of facts and wisdom, can develop an overview not heretofore possessed by any agency. If parole finds a new life and new purpose under the Commission's guidelines and policies, this may be preferable to simple repeal of the function. If abolition is finally seen to be best, the position will rest upon a footing of knowledge more solid than what we have now.

Passing other details, I submit respectfully that the provision for a Sentencing Commission is a solid item of creative legislation. I would suggest, however, that it is less perfect than it might be in the provisions for selection and status of Commission members. The Commission is to be located 'in the judicial branch," and its nine members are to be "designated by the Judicial Conference of the United States." § 991(a). But the Commission's work is meant to guide and support functions of all three branches—the sentencing work of judges, parole and other executive responsibilities and, surly not least of all, further legislation as needs and ideas for improvement come to be discerned. It would be desirable to have the selection process reflect these assignments. Not, one would hope, in the interest of narrow parochialisms. Rather, the process of choosing Commission members should exemplify that its mandates are broader and more ambitious than the concerns of judges alone. One way to accomplish this would be by tripartite appointments. Another way—preferable, I think, for a combination of reasons—would be to have the President appoint the members and designate the Chairman.

It is familiar, of course, to have the President name officials whose positions are judicial, or even legislative in character, as well as those strictly "executive." Presidential appointment implies qualities of prestige and consequence not achieved by the provision for Judicial Conference appointments. This Commission ought to be, or we should make vivid the hope that it will become, an illustrious agency, charged with large responsibilities for improvement and innovation. The prospects for success will hinge upon the possibility of attracting as Commissioners people of rich qualifications and high repute. Presidential selection will enhance that possibility.

In the same vein, I question the provision for paying members not otherwise in Federal employment at the rate of a grade 18 civil servant. § 992(c). This is a crass subject, to be sure. And having been for long and rewarding years a civil servant in substantially lower grades, I have only respect for the many distinguished public people who hold super grades at or below 18. Nevertheless, to repeat the point applicable again, the problem is one of symbolism as much as anything else. The pay, I suggest, should be stated at the rate for judges on the Courts of Appeals and members of Congress. The amount at stake is trivial. The symbolic value, whether or not it is quite momentous, surely warrants the added costs.

III

The provision for appellate review of sentences is long overdue. The Federal Government has in this respect lagged behind just about every civilized country in the world. The history and the anomaly are amply portrayed by the American Bar Association's Project on Minimum Standards in its Standards Relating to Appellate Review of Sentences (Approved Draft, 1968).

I strongly favor the basic idea of §3725 insofar as it at least provides some review of sentences. I would submit, however, that the narrow limits the bill places upon reviewability are for the most part undesirable. It seems acceptable to say, as the bill does in effect, that sentences resulting from plea bargains—or, more accurately, from sentence bargains—should be unappealable. But I question seriously the allowance of appeals only for sentences outside the Sentencing Commission's guidelines and the denial of any appeal when "the sentence is consistent with policy statements issued by the Sentencing Commission * * *." §3725 (a)(1) and (b)(1). It should be clear from what I have said that I support heartily the planned work of the Sentencing Commission, including its promulgation of policy statements. Nevertheless, it seems excessive to confer this much final authority and to exclude in so extreme a measure the authority and potential contributions of the appellate courts. The actual task of sentencing will remain, after all, for the judges. The policies of the Commission will affect that task, will merit substantial deference, and will, it is hoped, supply substantial assistance. But they should not be immunized against reconsideration and possible modification by our higher courts, including, of course, the Supreme Court of the United States.

On a relatively low, technical level, the questioned subsections in their present form would invite a large, and largely trivial, jurisprudence as to when sentences were or were not "consistent with policy statements" of the Commission. That is, however, a lesser complaint. The strong objection is the fundamental matter of principle already stated.

More broadly, let me urge that we not be astute to find ways of excluding sentences from appellate review. As things stand today, a litigant can go to the Court of Appeals, unfettered by rules of limitation, in a case involving a fender bent by a Post Office truck, a breach of a contract to paint a pleasure boat, or an alleged infringement on a design for chewing gum wrappers. The amount of time someone will stay locked up is not a lesser concern than those. Our approach should be to offer at least an equally unfettered scrutiny by the appellate tribunal.

There is, as you know, much more to the sentencing aspects of S. 1437 than I have covered in these observations. Knowing that you will hear from others views I might have offered, I spare you any repetition. On the whole, I think sentencing provisions are good. I might have hoped to see a general lowering of the penalty ranges. Some other matters of relative detail have given me brief pause. I am prepared to mention some of these things and to answer the Committee's questions to the extent that I can. On the whole, ending this statement as it began, I think the bill would effect valuable improvements. I would hope that, perhaps with some perfecting amendments, the sentencing changes will be enacted.

Judge FRANKEL. Thank you, Mr. Chairman.

Senator HATCH. We appreciate your coming today and we appreciate your astute testimony.

At this time we are going to recess for about 10 minutes.

[Recess taken.]

Senator HATCH. The meeting will be in order.

Our next witness is Mr. Norman A. Carlson, Director of the Bureau of Prisons.

STATEMENT OF NORMAN A. CARLSON, DIRECTOR, BUREAU OF PRISONS

Mr. CARLSON. Thank you, Mr. Chairman.

It is a privilege to be here again today.

I had an opportunity yesterday to attend most of the session. Therefore, to avoid misunderstanding, I would like to summarize my statement.

Senator HATCH [acting chairman]. We would appreciate that.

Mr. CARLSON. First, let me state that I strongly support the proposal to revise the Federal criminal code. Without question, the present code creates many disparities and inequities in the criminal justice system. It is confusing and frustrating, to both criminal offenders in custody and the public.

Also, it causes unrest and uneasiness on the part of the offenders who have been convicted of violating the Federal law.

I want to compliment the committee and your staff in coming up with what I consider to be an innovative proposal and one that I believe in the long run will make a significant and positive contribution to the Federal criminal justice system.

I have been involved in the field of corrections for 22 years. During that period, I have become increasingly aware of the tremendous importance that sentencing has on the entire process. There have been two recent books that have had a great impact on me. Judge Frankel mentioned these worked in his testimony earlier today.

I think the book which Prof. Norval Morris, now Dean of the University of Chicago Law School, has written entitled "The Future of Imprisonment" as well as the book which is just being published, "Toward a Just and Effective Sentencing System," both outline clearly some of the needed changes that should take place to make our criminal justice system more effective and responsible.

To me, the most significant innovation that has been suggested in the proposed bill is the establishment of a Sentencing Commission. The Commission will establish sentencing guidelines for Federal district courts. Federal judges will be required to spell out the reasons and rationale for all sentences. The bill also provides for appellate review of sentences imposed which are outside of the guidelines.

In my opinion, Mr. Chairman, the Sentencing Commission should significantly reduce two basic problems that we have in the system today. One concerns disparity of sentences. The second is uncertainty on the part of the offenders as to what the sentence actually means in terms of years of confinement.

The proposal establishes a system which I believe is based on the principles of fairness and equity. I think it will replace the present concept which, frankly, frustrates the system.

I am pleased to note that the sentencing guidelines approach considers two factors: The offense and the offender. I think this will create a system which provides both individualized judgments and a degree of uniform determinacy in the overall system of sentencing.

I am also pleased to note, Mr. Chairman, that the proposed legislation eliminates the Youth Corrections Act as well as title II of the Narcotic Addict Rehabilitation Act. Both of these acts were appropriate when passed by Congress. However, I think experience over the years and research findings raise questions as to whether or not the acts should be continued.

Nearly everyone who is involved in the administration of criminal justice today is willing to abandon the "medical model" or the use of rehabilitation as a reason for imprisonment.

This does not mean that I suggest pulling back in terms of the programs we provide for offenders.

We recognize today that change cannot be coerced. When offenders change, they change because they want to. All those of us who work in the field of corrections can do is facilitate change. We cannot legislate or require change by the sentencing process.

I would like also to comment briefly on the parole component of the proposed legislation.

My statement was based on the draft legislation, which I have reviewed with my staff. The discussion yesterday brought in a new element; the suggestion that parole be eliminated.

As you know, the U.S. Parole Commission has developed a set of sentencing guidelines. It has been done carefully, after a great deal of research and evaluative effort. This, I believe, was the first sentencing body in the entire country—or world—that began to systematically develop a framework for sentencing guidelines.

I think what the Parole Commission has done is being transposed by the draft bill into an earlier stage in the criminal justice process. In other words, the Sentencing Commission is using the guideline

approach to establish a range of sentences for specific criminal violations.

I note that the draft bill also eliminates the concept of good time. I support the elimination of good-time credits if parole is retained. However, should the committee consider in its wisdom, the abolition of parole, there certainly should be some provision provided—a light at the end of the tunnel—for offenders in the system. I think there must be some inducement for inmates serving long sentences to conform to institutional regulations.

Again, I would favor the elimination of good-time credits if parole is retained. However, should parole be abolished by the Congress, I think the legislation should include at least a limited good-time provision.

If that is the case, I would suggest that a proposal in the book by Pierce O'Donnell which I cited earlier be considered. This proposal provides for a one-tenth reduction of all sentences imposed as a modified good-time provision. There would be the clear presumption that inmates will receive the good time automatically unless they are involved in a serious infraction of institutional regulations.

Mr. Chairman, should parole be eliminated, I believe there should be a careful review of the possible length of sentences imposed. Today nearly 50 percent of all inmates in Federal custody are released under parole supervision. In other words, they are released earlier than the maximum sentence imposed by the court.

At the present time, we are facing a serious problem of prison overcrowding in the Federal system as well as in virtually every State in the country. The Federal population is at an alltime high of over 29,000 offenders. There are limited resources available. The committee should carefully consider the question of good time and parole as they relate to the issue of prison capacity.

If I may, I would like to comment on several other aspects of the bill. We plan to submit a memorandum to the committee staff which comments on some technical points. These are minor and by no means detract from our overall endorsement and support of the bill.

[Memorandum referred to, p. 8890.]

I would like, however, Mr. Chairman, to comment on minimum mandatory sentences. As you recall, the bill contains minimum mandatory sentences for two offenses: trafficking in an opiate and using a weapon in the commission of a crime. These are certainly serious crimes which I think should generally result in lengthy periods of incarceration.

I do, however, have a basic objection to the concept of minimum mandatory sentences. The concern I have is that they eliminate all flexibility on the part of both the Sentencing Commission and the sentencing court. Even though the bill attempts to spell out some mitigating circumstances, I think it is impossible to fully anticipate all the possible considerations that influence the imposition of a sentence.

As you may recall, in 1970 the Congress had to address a similar problem when it eliminated the minimum mandatory sentences that were contained in the Harrison Narcotics Act. Congress had to repeal that act because there were many inequities which came to

light as a result of inmates who were sentenced to long terms where compelling extenuating circumstances were present.

I would also like to comment on an area Judge Frankel alluded to concerning the four criteria which the draft bill proposes should be considered before the imposition of a sentence.

The first three criteria I fully support. The concepts of deterrence, protection of the public, and just punishment are totally understandable.

The fourth concept, however, does present some problems so far as I am concerned.

Basically, the fourth criterion says that the sentencing judge should consider providing the defendant with needed educational and vocational training, medical care, and other correctional treatment.

I personally do not think—as Judge Frankel has already alluded to—that people should be sent to a prison with the thought that they are being sent for treatment. Perhaps if that criterion were limited to probation, I could agree. But I believe it should be eliminated as a consideration on the part of a sentencing court with respect to incarceration.

Senator HATCH. Well, that is if it is the only criterion applied. But what if it is one of four that are applied?

Mr. CARLSON. Mr. Chairman, I am reluctant to see anyone committed to an institution with the idea that one of the considerations on the part of the sentencing court was to provide rehabilitation. I think those programs must be provided.

By no means am I suggesting that we should not provide opportunities for inmates to change. But I do not think that people should be committed to an institution with rehabilitation as one of the criteria that was used by the sentencing judge.

Senator HATCH. Still, my point is, what if it is just one, and maybe a minor one? But nevertheless in every case there is a hope that there will be some rehabilitation of the person committed.

Mr. CARLSON. I think, as Norval Morris has clarly articulated, rehabilitation should be a hoped-for consequence of incarceration.

I certainly support that notion.

But I do question using rehabilitation as a reason for imposition of a prison sentence.

Senator HATCH. Is it your opinion that it is very unlikely for anybody to be rehabilitated in the prison system?

Mr. CARLSON. Not at all, Mr. Chairman. I think that many inmates do change. I think they change because they want to change; not because the court intended that as a reason for their incarceration.

My concern, Mr. Chairman, is that it might be used by some courts as a reason to impose a prison sentence. I have reservations about that as being a realistic consideration.

Senator HATCH. I think a lot of people would agree with you if that is the sole reason. But if it is just one of four and combines with the other three, I would hope that every prison would have some aspect of rehabilitation for inmates.

Mr. CARLSON. With that I certainly agree. Perhaps the legislative history could reflect that it is only a minor consideration and

certainly should not replace the other three which I think are the most basic and important.

Senator HATCH. I think that is probably why it is there. Nobody wants to fail to consider the fact that there may be rehabilitative aspects of incarceration in Federal prison.

Many people would feel this bill remiss if it did not make rehabilitation one of the aspects and emphasize this. But, you know, a lot of people feel that if that is the only reason then we ought to have better ways in our society to solve these problems.

Mr. CARLSON. That is the basic point, and I agree with your observations, Mr. Chairman.

I have several other minor points.

Section 2302, paragraph C, provides that the Director of the Bureau of Prisons can move a court to reduce a sentence in extraordinary circumstances.

My point is that the legislative history should clarify the fact that this would be done in most cases only for circumstances that were unforeseen at the time of imposition of sentence. I do not think that procedure should be used to usurp the appellate process, which is also contained in the bill.

I think there is a need, however, to provide relief for cases when consideration such as medical problems come to light after a sentence has been imposed and the person is in confinement.

I have two other points. The section on juvenile offender is something that I understand. I support the intent of what the bill is attempting to accomplish.

I want to point out a problem, however. That concerns the older juvenile offender who is convicted prior to the age of 18 but still remains in custody when he is 18, 19, and up to 21 years of age. We have problems trying to place those offenders in a situation where they are in no way commingled with adult offenders.

I have no solution to suggest for the problem, Mr. Chairman. I merely want to point out that by tightening up on the commingling aspects, the bill creates a significant operational problem for us. We find that most State institutions, and even including private facilities and programs—simply are unwilling to accept these offenders because they have no facilities and programs to meet the needs of the aggressive, assaultive 18, 19, or 20 year old who has been committed under the juvenile act.

In conclusion, I would like to comment on what I consider to be another important aspect of the bill. This concerns the provisions for offenders who have a significant mental disorder or disease.

The bill makes some much-needed improvements, particularly relating to persons who have been acquitted by reason of insanity. As you recall, section 3613 corrects a serious gap which now exists. At present, many individuals who are acquitted by reason of insanity remain a serious threat to society.

There is at present no provision to retain such individuals in any type of mental health facility or under custodial supervision.

I would, however, like to point out a possible major problem with the draft bill. If the bill presumes that all mentally ill defendants are to be placed in a State or private hospital, we would have problems in trying to arrange such placements.

We find from experience that most State and private hospitals are reluctant—frequently unwilling—to accept anyone who has a criminal charge pending or presents a serious threat to society.

Also, many of the State mental hospitals today, for good reason, provide no security. They are open-type hospital settings. For the serious, aggressive, assaultive person who has been found incompetent to stand trial or has been acquitted by reason of insanity, there are great problems in terms of trying to place those people in a secure facility.

This is a difficult area. I have no solution, but want to alert the committee to a possible problem in terms of implementation of the proposed legislation.

Mr. Chairman, that concludes my summary. Again, I want to point out that I fully support the bill. The minor modifications and changes in no way should detract from what I consider to be a carefully drafted piece of legislation.

Senator HATCH. We appreciate your consideration and the testimony you have given.

Without objection, your prepared statement will be inserted in the record.

[Material follows:]

STATEMENT OF NORMAN A. CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS

Mr. Chairman and members of the subcommittee, I welcome the opportunity to appear before you today to present the views of the Federal Bureau of Prisons on S. 1437, the Criminal Code Reform Act of 1977. Let me state at the outset that I fully support these efforts at major revision of the Federal Criminal Code. The patchwork approach of the present Criminal Code has created sentencing disparities which confuse and frustrate Federal offenders, making the task of correctional administration much more difficult. I am aware of the fact that the Committee has worked long and diligently in their efforts to improve the Federal Criminal Code and I want to offer my congratulations for the excellent Bill you have drafted. Most of the provisions of this legislation, particularly in the area of sentencing, will have a significant and positive impact on the Federal correctional system.

During my career in the field of correctional administration, I have become increasingly aware of the tremendous impact of sentencing procedures on the correctional process. During the past several years, I have closely followed the debate in legal and academic circles regarding sentencing and the purposes of imprisonment. Two studies which have had great impact, at least on my personal thinking, are *The Future of Imprisonment*, by Dean Norval Morris, and *Toward a Just and Effective Sentencing System*, by O'Donnell, Churgin and Curtis.

I share the collective opinion of these and others that there is an urgent need to reform the present Federal sentencing structure. In my opinion, S. 1437 emobides the needed reform: its passage will significantly reduce the irrationality of the present system, and will enable the Federal sentencing system to function swiftly, and with more certainty.

In my opinion, the most significant innovation contained in this legislation is the establishment of a Sentencing Commission which will promulgate sentencing guidelines for Federal district court judges. Under this guideline system, judges must give written reasons for the sentence imposed, and provision is made for appellate review of sentencing. Since the sentencing guidelines will, in large measure, determine the size and nature of our future institutional population, it is crucial that there be a close working relationship between the Sentencing Commission and the Federal Bureau of Prisons. By working together, we can ensure that sufficient and appropriate correctional resources are available to achieve and carry out the purposes of sentencing.

The legislation also eliminates the Federal Youth Corrections Act (18 U.S.C. 5005 *et. seq.*) and Title II of the Narcotics Addict Rehabilitation Act (18

U.S.C. 4251 *et. seq.*). While both of the Acts were needed and appropriate at the time of their passage, subsequent experience operating under their provisions has raised significant questions as to whether they should be continued. Specifically, most individuals involved in the administration of Criminal Justice, including judges, prosecutors, attorneys and correctional administrators, have abandoned the so-called "medical model," based upon research and experience which clearly indicate that change in a criminal offender cannot be coerced. This does not mean, however, that offenders should not be provided the maximum opportunity to change their pattern of behavior through the provision of educational, vocational and other kinds of correctional programs. I will address this issue later in my testimony in connection with a comment I have on one of the sentencing criteria provided in the bill.

Another significant change in this legislation is the elimination of good time credits which operate under present law to reduce the time an offender must serve if he is not previously released on parole. Provision is made for parole release, but the elimination of good time will mean that if an offender fails to gain parole release, he will serve the entire sentence imposed, not just two-thirds of it as is often the case today. We support the elimination of good time but we also recognize the importance of giving offenders serving long terms some "light" at the end of the tunnel. In S. 1437 that "light" will be provided by the parole provisions of Subchapter D of Chapter 38. If the possibility of parole were to be eliminated, however, we suggest that the Committee consider a scaling down of the maximum penalties and the retention of some form of good time, at least for long term offenders. In particular, I suggest that the Committee consider the "early release" proposal discussed in *Toward a Just and Effective Sentencing System* which would enable an offender to reduce by one-tenth his term of imprisonment. Among the many good time and early release proposals which I have reviewed, I believe this proposal is the most logical, administratively practical, and best thought out.

Finally, since under present law good time operates n a significant percentage of cases to reduce the actual time served by offenders, it is critical that the new Sentencing Commission takes its elimination into account in promulgating sentencing guidelines. Like all resources, the amount of space available in prisons and jails is finite. We are presently experiencing severe overcrowding which is expected to continue for the foreseeable future. The population of the Bureau of Prisons now stands at an all time record high of 29,606, an increase of 6,203 over the last 2 years.

The combination of the greatly needed innovations and changes in S. 1437 will in my opinion, provide a significant and critically needed infusion of rationality into the present sentencing structure. For both offenders and the public alike, it will make the appearance and reality of sentencing fairer and more straight forward. More importantly, it will provide a greater degree of certainty of punishment for criminal behavior. In my opinion, offenders all too frequently view the criminal justice system in terms of "gambling odds," with a conviction being perceived as simply a turn of "bad luck." By increasing the certainty of punishment rather than its length or severity, I believe we can be more effective in deterring crime.

In view of my background and present position, I will confine my specific comments to the provisions of the legislation which deal directly with, or significantly impact on, the Federal Prison System. I again want to point out, however, that these minor suggestions in no way detract from my strong overall endorsement of this much needed legislation.

Mandatory minimum sentences

Section 1811, Trafficking in an Opiate, and Section 1823, Using a Weapon in the Course of a Crime, both provide for mandatory minimum imprisonment penalties (accompanied by a similar term of parole ineligiblity) which the court will impose upon conviction. We are generally opposed to the use of mandatory minimum sentences for any specific criminal offense. Although the statutes exempt application of the mandatory penalty for certain specific mitigating circumstances such as youth (under 18) or mental impairment, mandatory minimums unnecessarily restrict the flexibility, in terms of sentencing options, which a judge needs. This flexibility, in our opinion, is inherent in the sentencing guidelines process which applies to sentences imposed under every other criminal offense in the Code. The need for deterrence and incapacitation can clearly be met by stiff sentencing guidelines which provide

high maximum terms and impose similarly severe terms of parole ineligibility, as I am sure will be the case for such crimes as murder, kidnapping and arson, for which no mandatory minimum penalties have been provided. Finally, the Committee may recall that Congressional action was recently required to relieve inequities caused by minimum mandatory penalty provisions in the Harrison Narcotics Act.

Penalties for rioting

Unlike present law, S. 1437 includes a uniform set of offenses for rioting, with increased penalties for riots in the prison setting. With the pension inherent in the prison environment, rioting is extremely serious behavior. The allocation of an entire subchapter of the Code to this type of criminal behavior, and the special penalty provisions for prison rioting, are clearly appropriate. We believe there is a problem, however, with the disparity in penalties provided for an offense under Section 1831, Leading a Riot, and Section 1833, Engaging in a Riot. The former provides for a class D felony penalty for a person who during a riot in a facility used for official detention "urges participation in, leads, or gives commands, instructions, or directions in furtherance of, the riot." The other section provides for only a class A misdemeanor for persons convicted of engaging in a riot in a facility used for official detention. The disparity in penalties (6 years in terms of the maximum term authorized) seems unwarranted, and we would suggest the Committee consider raising the penalty in Section 1833 for engaging in a prison riot to a Class E felony.

Sentencing criteria

Among the criteria which the proposed Code requires the sentencing judge to consider in imposing a sentence is "the need for the sentence imposed to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." Section 2003(a)(2)(D). In view of the state of the art of corrections and recent research concerning rehabilitation, we frankly question using this criterion as a basis for imposing a sentence of imprisonment. We can see, however, that it would be an appropriate cirterion for the judge to consider in imposing a sentence of probation. It is difficult to imagine a situation where a defendant's educational, vocational or medical needs could be better provided in a prison setting than in the community. And even if, for example, the medical services in the prison were superior to those available to an indigent defendant in the community, the other negative aspects and ramifications of incarceration far outweight any such advantage.

As I mentioned in the beginning of my testimony, another problem we have with this kind of sentencing criteria is that, at least with respect to vocational, educational and other correctional programming, it is premised on the old "rehabilitative" model. Clearly, the Bureau of Prisons should be statutorily required to provide offenders with medical care, and to make educational, vocational and other correctional programs and services. However, unless the offender's participation is voluntary, the impact of these programs and services, in terms of changing offender behavior patterns for the better, will be minimal. I suggest that the Bill be clarified to indicate that this criterion would be primarily used in connection with imposing a sentence of probation, and that it should not be used as a basis for imposing a term of incarceration. In addition, the Conforming Amendments should include a section indicating that one of the Bureau of Prisons' responsibilities and duties is the provision of educational, vocational, medical and other correctional programs and services to offenders.

Modification of the term of imprisonment or parole ineligibility

Under Section 2302(c), upon motion of the Director of the Bureau of Prisons "for extraordinary and compelling reasons," the court "may reduce an imposed term of imprisonment or term of parole ineligibility to the time that the defendant has served in imprisonment." This provision expands present law, 18 U.S.C. 4205(g), which permits the court, upon motion of the Bureau of Prisons, to make an offender immediately eligible for parole by reducing any minimum term to the time the defendant has served. Based on our experience with requests for motions under 18 U.S.C. 4205(g), we urge the Committee to make it clear in the legislative history that "extraordinary and compelling" criteria refer, in virtually all cases, to circumstances or events which could

not have been reasonably foreseen by the court at the time of sentencing. Without such a limitation, these criteria could be construed to include consideration of the appropriateness of the sentence imposed, which would unnecessarily and inappropriately overlap with the appellate review provisions of Chapter 37.

Multiple sentences of imprisonment

Section 2304, Multiple Sentences of Imprisonment, provides that multiple terms of imprisonment run concurrently unless the court orders that the terms are to run consecutively. This codifies the presumption of current sentencing law where a subsequent federal sentence is imposed on an offender presently serving a prior federal sentence. However, the presumption is presently just the reverse when a federal sentence is imposed upon an offender presently serving a state sentence. In this case, if the federal judge remains silent, case law and the application of 18 U.S.C. 3568 dictate that the federal sentence will be computed to run consecutively. We assume that Section 2305(a) continues present law, providing for commencement of a federal sentence in this instance when the defendant is released from state custody and comes into federal custody to serve.

Section 2304(c) provides that the aggregate of consecutive terms of imprisonment to which a defendant may be sentenced may not exceed such term as is authorized by Section 2301 for an offense one grade higher than the most serious offense for which he was found guilty. It is not clear, however, whether this limitation applies only to sentences imposed at the same time, or for any subsequent sentencing situation. Clearly, only the more narrow construction is appropriate. If the limitation is applied to any subsequent sentencing situation offenders who commit a series of crimes for which the maximum penalty is no greater than that for which they are presently incarcerated would achieve a certain degree of unwarranted immunization from possible criminal sanctions. The most they could get in terms of a new prison term is the difference between their present sentence and the maximum penalty for the next grade higher. If the limitation is only intended to apply to sentences imposed at the same time, we are not opposed to this provision, but suggest, for purposes of clarity, that the phrase "at the same time" used on lines 25 and 26 on page 178 in Section 2304(a) be inserted between the words "sentenced" and "may" on line 11 of page 179.

Finally, since the Bureau of Prisons is responsible for the computation of prison terms for federal offenders, we suggest that some minor revision may be needed to clarify the relationhip between Section 2304 and the parole eligibility provisions in Section 3831. Our concerns in this area, due to the nature and complexity of sentence computation, could best be resolved through discussions between Bureau of Prisons legal and records management personnel and the Committee staff.

Juveniles

Under S. 1437, the provisions for placing committed juveniles are much more restrictive than present law. Under 18 U.S.C. 5039, "(n)o juvenile committed to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges." Under Section 3603(h), however, a juvenile cannot be held "in an official detention facility in which an adult convicted of an offense or awaiting trial on a charge of an offense is held in official detention." At present, we are encountering many difficulties in trying to make state placements for some of the more criminally sophisticated juveniles, particularly those in the 18–21 year old range. Many states simply do not have, or refuse to make available, juvenile facilities for these individuals. If these juveniles cannot be placed in a state facility, and Section 3603(h) will significantly reduce the number of state facilities available, we may be forced to establish one or two Federal juvenile facilities, which means that most of the offenders placed there will be thousands of miles away from their families.

While we offer no specific solutions, we want to take this opportunity to call the Committee's attention to the difficulties we are presently encountering trying to carry out the juvenile commitment provisions of present law which are less restrictive than the provisions in this Bill.

Offenders with mental disease or defect

Chapter 36, Subchapter B replaces current Chapter 313 of Title 18. The new provisions are well drafted, and make several long-needed changes to the present federal competency laws. Most notable is Section 3613, which corrects a serious gap in federal law, providing commitment procedures for those who are acquitted by reason of insanity.

Commitments of the mentally ill under the sections of the Subchapter are to the custody of the Attorney General. The Attorney General is authorized to place the person in a suitable mental hospital for treatment. There is, however, no definition of "a suitable mental hospital."

We would point out that, if there is a presumption that all of these individuals are to be placed in state or private hospitals, this in fact may be extremely difficult. Experience indicates that most state and private hospitals will not accept persons who have criminal charges outstanding. It is true that, on the other hand, placement of these mentally ill persons in Bureau of Prisons facilities raises the constitutional issue of commingling the unconvicted with the convicted.

We believe that those who are convicted, under Sections 3614 and 3615, should be confined in appropriate Bureau of Prisons facilities. Those who are unconvicted, however, should be placed in non-prison hospitals or other suitable facilities, if at all possible.

Included in Section 3611 of the draft legislation is the provision for competency determinations and commitments. Here, the presumption should be that the initial competency determination, for those awaiting trial, should be done using local hospitals and mental health resources if at all possible. We assume that the dropping of the separate commitment provisions, currently in 18 U.S.C. 4244, dictates a local psychiatric examination, which we believe is highly desirable. The psychiatric examination may be conducted by clinical psychologists, as well as certified psychiatrists. We favor this addition of psychologists, with the expertise which has developed in the field of forensic psychology, and with the availability of psychologists in some situations where psychiatrists are hard to find. We do note, however, that Rule 12.2 of the Federal Rules of Criminal Procedure, upon which Section 3612 is based, will have to be amended to allow psychological as well as psychiatric testimony.

Section 3611(d) codifies time limitations for incompetency-to-stand-trial commitments. In practice, a 6-month limit has been placed on competency commitments at our Medical Center, before the defendant must be referred back to the committing court to ascertain the possibility of proceeding to trial, or dropping charges and obtaining a civil commitment. We find the 12-month ceiling—no more than 6 months to determine whether the defendant is likely to be restored to competency so that he can be tried, plus 6 months to achieve the restoration to competency or a dismissal of charges—is a reasonable and workable statutory direction. Section 3616 is available for the continued commitment of those few who cannot be restored to competency or civilly committed in their home states, and who pose a continuing and substantial danger to others.

Sections 3614 and 3615 provide hospitalization commitments for offenders, in lieu of any other sentence if raised immediately after conviction (Section 3614), or as a substitute commitment for those already serving a term of imprisonment (Section 3615). The rationale for the alternative commitment of Section 3614 is appealing. Psychiatric difficulties are of course present in the history of many offenders, so some grounds for raising the motion may be present in a majority of cases. This may result in a high volume of defense motions under the section. If this in fact happens, psychiatric examinations, hearings, and commitments will place a new burden on court and mental commitment facilities.

Section 3615 also imposes a new hearing and commitment procedure on the courts and on the Department of Justice. While the rationale is again understandable, the burden it will place on the courts and other systems must be considered. Since we now administratively transfer all sentenced persons who are in need of specialized psychiatric care to appropriate facilities, I question the need for the separate judicial commitment procedures of Section 3615.

Section 3616 sets up a necessary procedure for the continued commitment of those who are due to be released by operation of other statutory provisions, but who should be hospitalized for the protection of the public. As with persons who are acquitted because of insanity, the preferred course is clearly commit-

ment to a mental hospital in the state of residence. If that cannot be arranged, a federal commitment of those who are truly dangerous is established.

I would note that the provisions for periodic reporting to the committing court, in Section 3617(e), are highly desirable, to avoid the prolonged commitment of a forgotten person, which has happened in some systems of mental health commitments. This periodic reporting should ensure ongoing judicial review of the basis for the commitment, and prevent the "forgotten" person.

This concludes my formal statement, Mr. Chairman. I want to emphasize again, however, that I fully endorse this much needed legislative reform. In addition to these comments, we have several other minor suggestions of a technical nature which we will submit to the Committee in the form of a memorandum. I would be pleased to answer any questions you or your colleagues may have.

JUNE 14, 1977.

Memorandum to: Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs.

From: Norman A. Carlson, Director, Bureau of Prisons.

Subject: Suggested technical amendments to S. 1437, the Criminal Code Reform Act of 1977.

This memorandum identifies several minor problems in S. 1437 from the standpoint of correctional administration. During my June 8, 1977 testimony on S. 1437, I told the Committee that I would forward my comments on specific provisions in a separate memorandum. If your staff or the Committee have any questions on these comments, or any other correctionally related provisions in the legislation, please feel free to contact us.

The need to define "employee of the Bureau of Prisons"

We would suggest the Committee include in the Code a definition of the phrase "employee of the Bureau of Prisons," which would specify that employees of Federal Prison Industries and the National Institute of Corrections, as well as U.S. Public Health Service personnel detailed to the Bureau of Prisons, are covered by this term. This definition would be helpful in defining the scope of Section 3017, which authorizes Bureau of Prisons employees to carry firearms and make arrests. We believe this definition should be used in lieu of, or in addition to, the phrase "an employee of an official detention facility" which is used as a jurisdictional base in several of the offense provisions in the Code, e.g. §§ 1601(e)(2)(B) and 1611(c)(2)(B). By substituting or including this definition in these jurisdictional provisions, jurisdictional coverage will be extended to our Central and regional offices, similar to the coverage provided for law enforcement officers.

Contraband

The bill should include specific authority for prison officials to seize and forfeit contraband described in section 1314. Recently, the Eighth Circuit Court of Appeals in *Sell* v. *Parratt* (No. 76–1307) invalidated a Nebraska Department of Corrections regulation which provided for the forfeiture of money found in the possession of an inmate. The court held "that an administrative agency has no right without underlying statutory authority to prescribe and enforce forfeitures of property as punitive measures for violations of administrative rules and regulations, and that when an agency does so, it violates the due process clause of the fourteenth amendment."

To prevent, or at least reduce, the flow of contraband in institutions, the Bureau of Prisons needs to be able to seize and forfeit contraband found in Federal prisons. Without statutory forfeiture authority, for example, the Bureau of Prisons may be forced to return confiscated weapons to offenders at the time of their release.

There are civil forfeiture provisions in Subchapter A of Chapter 40 which permit the Attorney General to bring *in rem* civil proceedings in district courts for the seizure and forfeiture of property used in certain offenses, such as Bribery and Smuggling. Contraband in prison, however, is a pervasive problem, not only the obviously dangerous article such as weapons and drugs, but also contraband which has to be removed, almost daily, from inmate living areas for health and safety reasons. To require civil judicial proceedings such as those set out in Chapter 40 for the forfeiture of prison contraband would be impractical, and would, in effect, prevent enforcement of the contraband stat-

ute. We urge the Committee to place the forfeiture authority provision in Subchapter C of Chapter 38, and, if possible, to eliminate, or at least reduce to the bare minimum, any procedural requirements for forfeiture.

Interception of oral or written communications

Section 1521, Eavesdropping, and Section 1524, Intercepting Correspondence, make it a crime to intercept private oral or written communications, without the consent of at least one party to the communication. Consent as defined on page 16 includes "willing assent" but specifically excludes both the consent of individuals unable, by age, mental disease or defect, etc., to make a reasonable judgment as to the nature or harmfulness of the conduct assented to, or consent given under certain circumstances, such as force or threat. Under present law, the consent of at least one party is needed to intercept external phone conversations without a court order. At many correctional facilities, we have the capacity to monitor internal and external inmate telephone calls. Inmates receive notice of the monitoring practices through published regulations which are placed in law libraries and through institutional regulations which are given to them. Since they are on notice and continue to use the phones, the authority to monitor is based on the inmates' implied consent.

With respect to inmate correspondence, the Supreme Court has recognized the right of correctional officials to read certain kinds of incoming and outgoing inmate mail. *Procunier* v. *Martinez*, 416 U.S. 396 (1974). Under our inmate correspondence regulations, inmates sign a statement indicating that they understand that staff may open and read general correspondence, and that special correspondence (attorney mail, etc.) may be opened only in their presence in order to check for contraband.

While the phone and mail monitoring capabilities are not regularly used, I believe we need to retain the ability to do both, in order to maintain security. If either Section 1521 or Section 1524, on its own, or in conjunction with the definition of "consent," eliminates the authority to monitor, we urge the Committee to consider amending the legislation to preserve present authority.

Under present correspondence regulations, all incoming mail is checked for contraband, a procedure which on occasion has detected weapons and drugs. If we were required to seek a court order each time we needed to inspect mail and packages, our ability to prevent the introduction of contraband would be severely restricted. The knowledge that incoming material may be inspected deters individuals from mailing contraband articles. Elimination of the search mechanism would undoubtedly lead to the introduction of additional dangerous items into the institutions.

Probation

Section 2103(11) continues the split-sentencing authority of present law (18 U.S.C. 3651), but Section 2101(a)(3) cuts back on present judicial sentencing options because it prohibits a court from imposing a sentence of probation for conviction of one count of a multi-count conviction, if imprisonment is imposed on another count. It should be noted that the present split-sentencing statute was passed to give courts the same sentencing flexibility for a single count conviction which they enjoyed for multi-count convictions.

Section 2103(b)(12) which provides that the defendant may be required to "reside at, or participate in the program of, a community treatment facility for all or part of the term of probation" also continues present law but omits the present requirement that the Attorney General first certify that such facilities are available. This certification authority, although probably more appropriately placed with the Director of the Bureau of Prisons, should be continued to insure that adequate and appropriate facilities are available to carry out the sentencing intent provided in this section.

Interstate agreement on detainers

Section 3201(a) is new and provides that when the Federal Government is the requesting party, the production of an offender can only be by writ, and not pursuant to the Agreement. This is no change in practice, as the U.S. Attorneys Office almost invariably uses the writ and not the Agreement to produce a state offender. The purpose of the change in the law is to avoid certain restrictions in the Agreement which some court decisions have grafted on productions by writ: e.g., under the Agreement the state can say "no" to the production, if the offender objects; the offender can't be returned to the original place of confinement until the prosecution is fully completed, under all stages.

While we have some hesitation about adopting only part of a uniform agreement, we think it is probably appropriate, for two reasons: first, the Federal Government is not just another party to the agreement. Under the Supremacy clause, the Federal Government can compel production pursuant to the writ. Second, it was not the intent of Congress in originally adopting the Agreement to limit the Government's right to compel production. The Agreement was adopted not because the Federal Government needed it, but to assist states in facilitating production of offenders for prosecution purposes.

Transportation of certain unsentenced prisoners or witnesses

Section 3512, Discharge of an Arrested but Unconvicted Person, provides that the Director of the Bureau of Prisons will promulgate regulations concerning the transportation by the U.S. Marshals of certain unsentenced prisoners or witnesses who have been released from official detention. Since this function can be performed by several different divisions of the Department, the responsibility for promulgating these regulations should be vested in the Attorney General.

Gratuities for released prisoners

S. 1437 deletes the Attorney General's authority under present law (18 U.S.C. 4284) to provide loans of up to $150 to offenders at the time of their release. On the other hand, Section 3824(d)(2) increases the amount which an offender can be given as a gratuity at the time of his release from $100 (18 U.S.C. 4281) to $500. We support these changes. Experience has shown that lending offenders money at the time of their release often has negative side effects for both the offender and the U.S. Probation Officer who is responsible for monitoring the offender's repayment of the loan. Offenders are already facing many uncertainties and difficulties in trying to cope with the problem of community reintegration, and they do not need the added burden of a monetary debt to the Federal government. Probation Officers, on the other hand, are forced to play the role of debt collector, and understandably feel that it interferes with their efforts to aid the offender in his community reintegration. Our experience with collection of loan payments was very unfavorable.

The statute also imposes a $200 floor on offender gratuities, "unless the Director determines that the financial position of the offender is such that no sum should be furnished." Requiring a $200 minimum gratuity may unnecessarily restrict our flexibility in providing funds to offenders in need of financial assistance at the time of their release. For example, it would prevent us from providing financial assistance in certain borderline cases where an offender needs some money but not $200. This minimum requirement could also create problems when we encounter year-end financial shortages and we want to give every needy offender some financial aid at the time of his release, but we don't have sufficient funds to give each $200. I would recommend elimination of the $200 floor.

Application of the Administrative Procedure Act

Section 3825, Inapplicability of the Administrative Procedure Act, exempts "any determination, decision, or order" made under Subchapter C (Imprisonment) of Chapter 38 from the provisions of the Administrative Procedure Act. This exemption is both appropriate and essential to the operations of the Bureau of Prisons, and reflects the present caselaw, *Clardy* v. *Levi*, 545 F. 2d 1241 (1976). We are concerned, however, that by limiting the exemption to determinations, decisions, or orders made under Subchapter C of Chapter 38, inmate disciplinary proceedings, as well as certain other correctional procedures and proceedings which are currently exempt, are not covered. Clearly inmate disciplinary proceedings, which were the subject of the Ninth Circuit's opinion in *Clardy*, should not be covered by the Administrative Procedure Act. If an express exemption were not provided for inmate disciplinary proceedings, the Code could be construed as overruling *Clardy*, thereby imposing legislatively what the Supreme Court recently recognized as hazardous in the prison disciplinary setting, attorney representation and cross-examination and confrontation of adverse witnesses. *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) and *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

We assume that the authority of the Bureau of Prisons relating to inmate discipline will be covered in Title 28 in the Conforming Amendments, and we urge the Committee to include similar exemptions to at least continue the holding in *Clardy*.

Study reports prepared by the Bureau of Prisons for the courts and the Parole Commission

Section 2002(b) and Section 3832, respectively, require the Bureau of Prisons to prepare studies on offenders for the sentencing court and the Parole Commission. The information to be covered by the reports is identical in both statutes, and, we believe, unnecessarily specific. For example, at least one of the criteria listed in Section 3832(a), the availability of rehabilitative resources or programs, is not a significant factor under the present guidelines of the U.S. Parole Commission. A more flexible, and certainly more responsive, approach would be to delete any reference to specific kinds of information and require instead that the Director of the Bureau of Prisons issue guidelines, after consulting with the U.S. Sentencing Commission, for preparation of such studies. This consultation requirement will ensure that the Bureau of Prisons will always be providing the information needed by the Parole Commission and the Sentencing Commission which issues the controlling guidelines for both sentencing and parole.

JUNE 24, 1977.

HON. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR MCCLELLAN: After testifying on June 8, 1977 in support of S. 1437, the Criminal Code Revision bill, I have carefully followed the subsequent testimony on this legislation, particularly as it relates to correctional issues. One concern of several witnesses has been the application of the Administrative Procedure Act, the Freedom of Information Act and the Privacy Act to the Bureau of Prisons. Witnesses representing the National Prison Project and the National Moratorium on Prison Construction, for example, expressed concern that S. 1437 exempts the Bureau of Prisons from all three of these Acts. Section 3825 provides that "the provisions of 5 U.S.C. 551 through 559, and 701 through 706, do not apply to the making of any determination, decision, or order under" subchapter C of Chapter 38. The provisions of Chapter 38 Subchapter C, however, have nothing to do with the Bureau of Prisons rulemaking and record keeping authority and responsibility. The provisions relating to those areas would appear in Title 28 of the United States Code, as part of the Conforming Amendments to S. 1437 which have not yet been published. It is our understanding that the Conforming Amendments will continue present law: the Bureau of Prisons will not only promulgate its rules in accordance with section 553 of the Administrative Procedure Act, but also will comply with the provisions of the Freedom of Information Act and the Privacy Act. We fully support that approach and expect to continue to carry out our responsibilities under these Acts.

I am concerned, however, about the allegations of several witnesses that present law requires the Bureau of Prisons to comply with all the provisions of the Administrative Procedure Act. As mentioned above, the rulemaking requirements of section 553 of Title 5 do apply, but current caselaw clearly exempts the Bureau of Prisons from the adjudicatory provisions of the Administrative Procedure Act. *Clardy* v. *Levi*, 545 F. 2d 1241 (1976). As the Ninth Circuit observed in *Clardy*, "(t)he plain and simple fact is that the APA was not written with the problems of prison discipline in mind. The safeguards erected therein when applied comprehensively will unduly inhibit prison management." As noted in the memorandum which I submitted to the Subcommittee to supplement my testimony, if an express exemption from the APA were not provided for inmate disciplinary proceedings, the Code could be construed as overruling *Clardy*, thereby imposing legislatively what the Supreme Court recently recognized as hazardous in the prison disciplinary setting, attorney representation and cross-examination and confrontation of adverse witnesses. *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) and *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

Sincerely,

NORMAN A. CARLSON,
Director.

Senator HATCH. I do have a couple of questions.

You touched on this subject, but I would like to ask you this directly.

If sentencing using the judicial guidelines approach as provided in S. 1437 is adopted, do you think it is necessary or desirable to continue the availability of early release on parole?

Mr. CARLSON. Mr. Chairman, I think there is a need for a guideline system somewhere in the process, be it at the parole stage or, as the bill proposes, at the sentencing stage.

I do not, however, think there is need for guidelines to be used twice in the system. In other words, I think if you shift the guideline approach from the parole stage to the sentencing stage you probably could eliminate the concept of parole as we know it.

Senator HATCH. If the early release function of the Parole Commission were abolished, do you feel, as the Director of the Bureau of Prisons, that the provision now in the bill for a possible release during at least the last one-tenth of a prisoner's sentence is sufficient motivation for institutional discipline?

Mr. CARLSON. Yes, I do, Mr. Chairman.

There are a number of other inducements that we have available as a result of the statutory provisions of this bill. I think the one-tenth provision is adequate to provide the flexibility needed to maintain control and supervision in prison institutions.

Senator HATCH. We appreciate your testimony. Thank you for coming.

Mr. CARLSON. Thank you, Mr. Chairman.

Senator HATCH. Our next witness will be Mr. Pierce O'Donnell, attorney at law, Washington, D.C.

Mr. O'Donnell, we are happy to welcome you here today.

STATEMENT OF PIERCE O'DONNELL, ATTORNEY AT LAW, WASHINGTON, D.C., ACCOMPANIED BY MICHAEL J. CHURGIN AND DENNIS E. CURTIS

Mr. O'DONNELL. Thank you, Mr. Chairman.

I am an attorney here in Washington, D.C. My immediate background is service as a law clerk for Supreme Court Justice Byron White and a teaching fellow at the Yale Law School, where I met the two gentlemen on either side of me.

On my right is Mr. Michael Churgin, who is a professor of law at the University of Texas at Austin. On my left is Mr. Dennis Curtis, who serves as the director of clinical studies on the faculty of the Yale Law School. We met in New Haven in 1974 and embarked on this joint venture we will talk about today.

Senator HATCH [acting chairman]. As I understand it, you gentlemen are the authors of this book "Toward A Just and Effective Sentencing System." I understand the book is being released today.

Mr. O'DONNELL. Yes, sir.

Senator HATCH. I want to congratulate you for the efforts that you have put forth in trying to assist in this very serious and very important area of criminal justice.

Mr. O'DONNELL. Thank you, Mr. Chairman.

I will summarize our prepared statement this morning.

You are indeed involved in a historic undertaking. This subcommittee has before it the rich fruits of more than a decade's effort to revamp the Federal criminal code.

The Federal criminal laws today are, regretfully, a hodgepodge of statutes and procedures. They are a chaotic patchwork of penalties authorized by individual congressional enactments passed at different times with no apparent relationship to one another and establishing a bizarre range of penalties for an enormous variety of criminal offenses.

The subcommittee has the benefit of the combined product of the recommendations of the Brown Commission and the draft of S. 1 introduced by Chairman McClellan, Senator Hruska, and others in the 94th Congress.

Professors Churgin, Curtis, and I are pleased to place before the subcommittee today the results of a 3-year study of the entire Federal criminal sentencing, probation, parole, and correctional systems.

As you indicated, Mr. Chairman, this book is entitled "Toward A Just and Effective Sentencing System: Agenda for Legislative Reform," and is being released today by Praeger Publishers.

In 1974, the Yale Law School sponsored this undertaking, and the Daniel and Florence Guggenheim Foundation graciously funded it. It was a clinical workshop to investigate comprehensive reform of the Federal sentencing and parole processes. We had representatives from a broad spectrum of disciplines, including two Federal judges, probation officers, the Chairman of the United States Parole Commission, correctional officials, a representative from the United States Department of Justice, Federal inmates, the Bureau of Prisons, and Yale faculty and students.

Out of these deliberations came the recommendations set forth in our book and the proposed Federal sentencing statute.

I would like to summarize our recommendations. First of all, we recommend the outright abolition of parole.

Second, we recommend a determinate or flat sentencing system.

We recommend the establishment of a Federal sentencing commission to prescribe sentencing guidelines to insure that like offenders are treated similarly.

We recommend a requirement that Federal judges give reasons for sentences.

We recommend appellate scrutiny of sentences.

We recommend a 50-percent reduction in maximum prison sentences for all but the most serious offenses.

We recommend the elimination of mandatory minimum sentences.

We recommend a statutory presumption against imprisonment and the greater use of probation and fines.

We urge a severe limitation on the use of rehabilitation as a basis for punishment.

The earlier working draft of our study in 1975 had an influence on Senator Kennedy and others in the drafting of the sentencing guidelines bill introduced as S. 2699. We are also gratified to see that a number of our recommendations for substantial modifications of S. 1 have already been incorporated in S. 1437.

In the time allotted, we will highlight for the subcommittee the major findings of our study and our conclusions about the indispensable features for any rational, just, and effective sentencing system and the extent to which your proposed legislation, S. 1437, in our view, measures up to these standards.

Mr. Chairman, for too long now, legislators, judges, and practitioners have ignored the postconviction justice process. The convicted defendant is too often warehoused with little ceremony and usually even less thought in jails and prisons in the farflung corners of this country.

Our prisons and jails are overcrowded.

The long-neglected Federal and State sentencing systems are a national disgrace.

Discretion—unexposed, unbridled, and unreviewable discretion—has long been the hallmark of sentencing and parole decisionmaking. With very few exceptions, judges and parole authorities can be confident that no other body will review their decisions, much less know how their determinations were made. This has truly been a "lawless" system. As Judge Frankel lamented in his pioneering book:

All of the valuable research in the sentencing field, as well as our study group's own independent investigation, leads inexorably to two major conclusions about our correctional and sentencing process: The system does not work, and it is grossly unfair.

It does not work in the sense that it does not succeed in either reducing crime or in changing the proclivities of those who engage in criminal activity.

It is unfair because it lacks standards to prevent, or at least to minimize, arbitrary treatment at the hands of judges, corrections officials, and parole and probation authorities.

In the Federal system, and in virtually every State and the District of Columbia, judges who sentence criminal offenders do so virtually without any legal guidance or control. One judge can determine conclusively, decisively, and finally the period of time a citizen can be imprisoned without being subject to any review. This exercise of power goes unchecked despite the fact that a citizen may be sentenced to imprisonment for 10, 20, or 30 years.

Mr. Chairman, the fault lies not wholly with the judiciary. Some of the responsibility rests with Congress. The national legislature has abdicated its responsibility to delineate the goals of our sentencing system. Likewise, no meaningful standards have been prescribed.

With no congressional direction, judges have been left to themselves to develop sentencing philosophies. Sadly enough, too many of our judges have no sentencing goals in mind when they pass judgment on the convicted. Still others, Mr. Chairman, sentence on the basis of fears and prejudice, which we trust everyone here today would consider wrong and impermissible.

There are still other critical shortcomings.

Unless the judge advertises his errors, biases, and prejudices, no one will ever know. Not even the most fundamental requirements of due process of law apply at sentencing. A defendant who otherwise would be entitled to a statement of reasons from a government agency terminating welfare benefits, or evicting him from a public housing project, or suspending his driver's license is not entitled to know why he received a particular sentence—even when that sentence may restrict one-half or more or his remaining life.

Nor is there any appeal from this exercise of raw discretion. A convicted defendant cannot appeal his sentence on the very straightforward ground that it is too severe, so long as the sentence lies within

the usually wide range of penalties authorized by the criminal code. Nor can the U.S. attorney appeal what he believes to be an imprudently lenient sentence.

In the parole system, we have the same replication of no legislative guidance. Indeed, this situation may be even more intolerable. The U.S. Parole Commission annually engages in more sentencing than all Federal judges combined. Last year alone, the Federal parole system made approximately 25,000 parole decisions.

Under existing Federal law, the true sentencer is the Parole Commission. It is the commission that invariably sets the amount of time a person will serve behind bars.

Mr. Chariman, decades upon decades of legislative indifference, judicial neglect, and administrative uncertantiy have taken their toll. We must report to you that our study at the Yale Law School has concluded that the present state of affairs in sentencing is a national scandal.

No aspect of criminal law reform is more deserving of this subcommittee's attention. Nor does any other area hold out the promise of as rich a return on the investment of time and energy. We have reached a point where more of the resources of the criminal justice system must be devoted to the process by which we punish those who violate our laws. Indeed, in the entire United States today, there are well over a quarter of a million men, women, and youth in prisons and jails. In the Federal system alone, I believe we are approaching 29,000.

The long-festering problems of our sentencing system, we believe, are best dramatized by the shocking statistics concerning sentencing disparity, which are set forth in our book.

A natural—indeed, an inevitable—byproduct of this "nonsystem" of sentencing is that similar offenders in the United States guilty of similar crimes commonly receive grossly disparate sentence. To a large extent, sentencing in the Federal system is a judicial lottery, a game of Russian roulette. In perhaps no other corner of the criminal justice map is it truer that the quality of justice is a function of the luck of the draw.

The most conspicuous and disconcerting disparity, Mr. Chairman, ocurs when one person receives a prison sentence and another person committing the same crime and similar in virtually all respects is placed on probation.

Substantial disparities in sentencing are the inevitable result of judicial discretion exercised by almost 400 Federal district judges, district judges who are unfettered by legislatively established criteria and not subject to the uniform requirements of procedural regularity and prescribed criteria which appellate review lends to almost every other area of our Federal law.

Nor must we overlook the perception of prison inmates, whom we can consider the "consumers" of our system. Prisoners believe—and our research substantiates—that their sentences are often imposed in a random and unjust way under a tyrannical system sanctioned by law.

As Norman Carlson's prepared statement indicates, this well-founded attitude undermines effective corrections administration.

As we point out in our statement, Mr. Chairman, there are many

other harmful, and at times corrupting, consequences from our present sentencing system.

We can witness "judge-shopping," lawyers scrambling from one courtroom to the next to get the most lenient judge.

There can also be a lack of candor on the part of sentencing judges for fear that they might be reversed.

We have Federal judges and then the Parole Commission which acts upon those sentences, neither having any guidance, neither often knowing what the other did, working at cross purposes in a vast sea of ignorance.

This has caused mounting public dissatisfaction with the American sentencing system despite the fact that sentences imposed in this country, as well as the actual terms served, are far longer than those in other Western countries.

Our study concludes that, in devising a rational sentencing reform strategy, the subcommittee should be guided by the tandem objectives of fairness and effectiveness. Sentencing legislation should provide a procedural framework that will encourage a just and effective sentencing system. In a broad sense, this can be done by requiring judges to explain and justify the sentence, by supplanting the parole system with a determinant sentencing system, by establishing a Federal sentencing commission which promulgates guidelines, and by providing for appellate review of sentences.

We urge you to scrap the present sentencing system and to begin anew.

You are to be congratulated on the bill before you. S. 1437 shows that you have made an impressive start in the right direction.

We would make these recommendations briefly.

Congress must clearly delineate the goals and purposes of the sentencing system.

You asked earlier, Mr. Chairman, about rehabilitation. I think we should make known our views on that.

We have strong reservations about the medical model, about coercive behavioral change and incarceration for rehabilitative purposes. The Yale study concludes, however, that we should not abandon all inprison rehabilitation programs.

Some programs of limited scope and with adequate funding might have some measurable effect upon recidivism. We recommend, however, that no one should be sentenced to prison for the purpose of rehabilitation unless there have been several findings made, including one that there can be no hope of achieving the same rehabilitative results through a sentence not involving imprisonment.

If the court concludes that imprisonment must be imposed, no one should be sentenced to a prison for any period of time longer than 24 months for the purpose of rehabilitation.

Congress must also allocate responsibilities for the various sentencing goals and functions. The present statute continues much of the overlapping jurisdiction. This, however, would be solved in a major way if parole were abolished—a matter which I will address in a moment.

S. 1437 is landmark legislation because it insists on many procedural guarantees of fairness, access to sentencing information, a

statement of reasons for sentence, and appellate review—not to mention guidelines.

We urge passage of these provisions.

In our prepared statement, we have noted for the subcommittee a number of changes that we would like to see in S. 1437. In private discussions with the staff we have also suggested changes of a technical nature.

I would, however, like to urge one thing in the public testimony.

For too many judges today, imprisonment of an offender has become a habit. We suggest that a sentence of imprisonment should be a sentence of last resort. We suggest that you incorporate an explicit presumption against incarceration or, at the very least, a presumption in favor of the least drastic sanctions.

Your probation provisions are excellent. However, we oppose the exclusion of class A felons and certain drug and weapons offenders because our study concluded that mandatory minimum sentence offend basic principles of a just and effective sentencing system.

Parole should be abolished. This is our most urgent and important recommendation.

The best research indicates that parole has failed. The best empirical studies show that there is a greater deterrent effect from certainty and not the severity of punishment. Inmates in prison today enter in an agonizing holding pattern, waiting for faraway parole commissioners or hearing examiners that visit them in prison to determine that magic moment when, for whatever reason, they are to be released from prison.

Parole should be replaced by a determinate sentencing system. The sentencing court, at the time of sentencing, should set the amount of time to be served. At that point, the defendant would know how much time he would be in prison. Maine, Illinois, and California have adopted this type of legislation.

Finally, we urge substantial reduction of prison terms because, with the abolition of parole, there would not be that one-half leveling effect in the amount of time served now afforded by parole.

Mr. Chairman, the sentencing provisions of S. 1437 represent a dramatic improvement over existing law. S. 1437 reflects your faith that a just sentencing system can be effective in promting respect for law, deterring crime, rehabilitating some types of offenders, and incapacitating serious offenders.

The prospect of this far-reaching legislation being enacted in this Congress is, to those of us who have pressed such reforms, a very heartening prospect.

Thank you, Mr. Chairman.

Senator HATCH. We appreciate the testimony that you have given here today. Your statement will be placed in the record, without objection.

[Material follows:]

STATEMENT OF PIERCE O'DONNELL, MICHAEL J. CHURGIN, DENNIS E. CURTIS

Mr. Chairman and members of the subcommittee, I am Pierce O'Donnell, an attorney practicing law here in the District of Columbia. With me today are Michael Churgin, who is assistant professor of law at the University of Texas at Austin, and Dennis Curtis, who serves as Director of Clinical Studies on the faculty of the Yale Law School. We are delighted to appear before this

distinguished Subcommittee to testify about the sentencing provisions of S. 1437—the Criminal Code Reform Act of 1977.

You are engaged in a great—indeed, an historic—undertaking. This Subcommittee has before it the rich fruits of more than a decade's effort to revamp the federal criminal code. The federal criminal laws are a hodgepodge of statutes and procedures. They are a chaotic patchwork of penalties authorized by individual congressional enactments, passed at different times with no apparent relationship to one another and establishing a bizarre range of penalties for an enormous variety of criminal offenses.

The subcommittee has the benefit of the combined product of the recommendations of the National Commission on Reform of the Federal Criminal Laws—the Brown Commission—and the draft of S. 1 introduced by the Chairman, Senator Hruska, and others in the 94th Congress. The bill now under consideration, S. 1437, also reflects what Senator Kennedy has called "a quiet but constructive debate . . . over the issue of comprehensive criminal sentencing reform [among] judges, lawyers, corrections officials, law enforcement officers, members of the academic community and others."

THE YALE LAW SCHOOL SENTENCING AND PAROLE STUDY

Professors Churgin and Curtis and I are pleased to place before the Subcommittee the results of a three-year study of the entire federal criminal sentencing, probation, parole and correctional systems. This book, entitled "Toward A Just and Effective Sentencing System: Agenda for Legislative Reform," is being released today by Praeger Publishers in New York and London.

In 1974 the Yale Law School sponsored, and the Daniel and Florence Guggenheim Foundation financed, a clinical workshop to investigate comprehensive reform of the federal sentencing and parole processes. The study group was designed to enable scholars and students to meet with experienced professionals in the field of sentencing, probation, parole and corrections. Together we explored the long-neglected problems in these areas.

Participants in the monthly meetings of the workshop included two federal judges, probation officers, the Chairman of the United States Parole Commission, correctional officials, a representative from the United States Department of Justice, federal inmates, prison legal services attorneys and Yale Law School faculty and students.

The roster of panel members reads like a "Who's Who in American Corrections." It includes Judge Marvin E. Frankel of the United States District Court for the Southern District of New York, who is one of our most distinguished federal jurists and a pioneer in sentencing reform; Judge Jon O. Newman of the United States District Court for Connecticut, who has written numerous groundbreaking opinions on sentencing and parole; Maurice H. Sigler, who is the recently retired Chairman of the U.S. Parole Commission; and Ron Gainor, who is the former Chief of the Legislative Section and now serves as Deputy Assistant Attorney General, Office for Improvements in the Administration of Justice in the Department of Justice.

Out of these deliberations of the Workshop on Parole and Sentencing came the findings and recommendations set forth in our book. The most significant result of the study group's intensive efforts is the proposed federal sentencing statute contained in Appendix A of "Toward A Just and Effective Sentencing System." This legislation, which was originally drafted in the form of amendments to the sentencing provisions of S. 1, lays down a detailed blueprint for the wholesale reform of the present antiquated system by which we punish criminal offenders.

On the basis of an early working draft of our study, Senators Kennedy and McClellan introduced in November 1975, S. 2699, entitled "The Sentencing Guidelines Bill". Similar legislation (S. 181) has been reintroduced in this Congress.

We are gratified to see that a number of our recommendations for substantial modifications of S. 1 have already been incorporated in S. 1437. These include a statement of reasons for the sentence imposed, sentencing guidelines, a federal sentencing commission, and appellate review of sentences. We know that the Subcommittee has toiled long and hard in the sentencing vineyard. We particularly acknowledge the outstanding leadership efforts of the Chairman and Senator Kennedy to devise a rational sentencing system.

In the time allotted, we will highlight for the Subcommittee the major findings in our study. We will also outline our conclusions about the indispensable features for any rational, just and effective sentencing system and the extent to which S. 1437 measures up to these standards. In discussions with the Subcommittee staff, we have recommended additional changes in S. 1437 that are of a more technical nature.

A SYSTEM IN DISGRACE

For too long now legislators, judges, and practitioners have ignored the postconviction justice process. The convicted defendant is too often warehoused with little ceremony and usually even less thought in jails and prisons in the far-flung corners of this country.

To the legislator, sentencing has historically been viewed as a judicial responsibility.

To the judge, sentencing is reputed to be the most difficult and agonizing part of his job. It is too often a chore to be passed along to the parole board and correctional administrators, since they purportedly possess the experience and expertise to determine that "magic moment" when an offender has been rehabilitated and is ready for release into the community.

And to the lawyer, too often the overloaded or indifferent court-appointed advocate, sentencing is a part of the process to be tolerated—a perfunctory proceeding alien to the customary practice of the courtroom lawyer's craft.

The long-neglected federal and state sentencing systems are a disgrace.

A LAWLESS SYSTEM

Discretion—unexposed, unbridled and unreviewable discretion—has long been the hallmark of sentencing and parole decisionmaking. With very few exceptions, judges and paroling authorities can be confident that no other body will review their decisions, much less know how their determinations were made. This truly has been a "lawless" system. As Judge Frankel has lamented: "[t]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."

All of the valuable research in the field, as well as our study group's independent investigation, leads inexorably to two major conclusions about our postconviction "correctional" process: the system does not work and it is grossly unfair.

It does not work in the sense that it does not succeed in either reducing crime or in changing the proclivities of those who engage in criminal activity.

It is unfair because it lacks standards to prevent, or at least to minimize, arbitrary treatment at the hands of judges, corrections officials and parole and probation authorities.

In the federal system and in virtually every state and the District of Columbia, judges who sentence criminal offenders do so virtually without legal guidance or control. One judge can determine conclusively, decisively and finally the period of time a citizen could be imprisoned without being subject to any review. This exercise of power goes unchecked despite the fact that a citizen may be sentenced to imprisonment for 10, 20, or 30 years.

The fault lies not with the judiciary but with Congress. The national legislature has abdicated its responsibility to delineate the goals of our sentencing system. Likewise, meaningful legislative standards for trial judges exercising initial sentencing discretion are non-existent. The only legislative guidance as to whether an offender receives probation or is imprisoned is whether "the ends of justice and the best interests of the public as well as the defendant will be served thereby." (18 U.S.C. § 3651).

With no congressional direction, judges have been left to themselves to develop sentencing philosophies. Sadly enough, too many of our judges have no sentencing goals in mind when they pass judgment on the convicted. Still others sentence on the basis of fears and prejudices which we trust everyone here today would agree are wrong and impermissible.

NO REASONS, REVIEW OR RATIONALITY

This brings us to another critical shortcoming in our sentencing system. Unless the judge advertises his errors, biases, and prejudices, no one will ever

know. Under current practices, the public, the defendant, and the government have no way of discovering the basis for a sentence.

Not even the most fundamental requirements of due process of law apply at sentencing. A defendant who would be entitled to a statement of reasons from a government agency terminating his welfare benefits, or evicting him from public housing, or suspending his driver's license is not entitled to know why he received a particular sentence—even when that sentence may restrict one-half or more of his remaining life.

Nor is there any appeal from the discretion of the sentencing judge or any procedure to correct sentencing abuses. In its affirmance of the death penalty in the *Rosenberg* espionage case over a quarter century ago, the United States Court of Appeals for the Second Circuit summed up the state of the law:

"If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." Only a few years ago, the Supreme Court echoed this maxim.

Consequently, a convicted defendant cannot appeal his sentence on the straightforward ground that it is too severe, so long as the sentence is within the usually wide range of penalties authorized by the federal criminal code. Nor can the government appeal what it believes to be an imprudently lenient sentence.

THE FAILURE OF THE PAROLE SYSTEM

The lack of legislative guidance for sentencing judges is replicated in the parole system. Indeed, this situation may be even more intolerable: the U.S. Parole Commission annually engages in more sentencing than all federal judges combined. Last year alone, the federal parole system made over 25,000 parole release decisions. Under existing federal law, it invariably becomes the Parole Commission's responsibility to determine how much of an inmate's sentence will be served behind bars.

Unfortunately, the Parole Commission performs its sentencing task with as meager direction from Congress as judges. Under 18 U.S.C. § 4206(a), an inmate may be paroled if his "release would not depreciate the seriousness of his offense or promote disrespect for law" and his "release would not jeopardize the public welfare." Without any meaningful standards to guide its exercise of broad discretion and without a statement of reasons from the sentencing judge to shed light on what the court expected to accomplish, the Parole Commission is given an impossible task to decide in a vacuum: how much of the sentence imposed (often zero to 5 or 10 years) should actually be served.

Working in close cooperation with the Congress, the Parole Commission sought to remedy this situation by imposing upon itself a system of guidelines for decisionmaking. Using a table based on nine characteristics of the offender and a classification of the severity of the offense, the Commission devised a set of guidelines for the time to be served before release. The Parole Commission's guidelines—and the Parole Commission and Reorganization Act of 1976 which codified these administrative reforms—had two laudable objectives: (1) to treat like offenders who committed similar crimes as equally as possible; and (2) to moderate at least to some extent the sentencing disparities resulting from a lack of a national sentencing policy.

By all objective standards, however, these reforms in the federal parole system must be judged a failure. In fact, they were doomed from the outset. The Parole Commission's attempts at sentencing reform have three serious inherent limitations.

First, the Parole Commission lacks control over the most important sentencing decision of all—whether or not to incarcerate.

Second, the Parole Commission must operate within the framework of the judge's original sentencing decision.

Third, the parole release guidelines neither articulate a comprehensive sentencing policy nor give the inmate comprehensible reasons for denial of parole. Therefore, the fundamental weaknesses in the overall sentencing system persist.

A NATIONAL SCANDAL

Decades upon decades of legislative indifference, judicial neglect and administrative uncertainty have taken their toll.

The present state of affiars in sentencing is a national scandal.

No aspect of criminal law reform is more deserving of this Subcommittee's attention. Nor does any other area hold out the promise of as rich a return on the investment of time and energy. We have reached a point where more of the resources of the criminal justice system must be devoted to the process by which we punish those who violate our laws.

SENTENCING DISPARITY

The long-festering problems of our sentencing system are perhaps best dramatized by the shocking statistics concerning sentencing disparity that we have discovered.

A natural—indeed, an inevitable—byproduct of this "nonsystem" is that similar offenders in the United States guilty of similar crimes commonly receive grossly disparate sentences. To a large extent, sentencing in the federal system is a judicial lottery, a game of Russian roulette. In perhaps no other corner of the criminal justice map is it truer that the quality of justice is a function of the luck of the draw.

Almost 40 years ago United States Attorney General and later Supreme Court Justice Robert H. Jackson issued an indictment of the sentencing process that still rings true today.

"It is obviously repugnant to one's sense of justice that the judgment meted out to an offender should be dependent in large part on a purely fortuitous circumstance; namely the personality of the particular judge before whom the case happens to come for disposition."

As part of our study, we evaluated the latest available sentencing statistics compiled by the Administrative Office of the United States Courts. For fiscal year 1972, we found widespread sentencing disparity. Table I from our book depicts the average length of sentence imposed for six offenses: homicide and assault, robbery, burglary, larceny, auto theft, and forgery and counterfeiting. In each of the 11 federal judicial circuits, we selected the two districts that sentenced the greatest number of offenders for the selected offenses.

TABLE 1.—AVERAGE SENTENCE LENGTH FOR SELECTED OFFENSES, IN 1972

[In months]

	Homicide and assault	Robbery	Burglary	Larceny	Auto theft	Forgery and counterfeiting
National average	102	120	63	40	38	42
Maine				144 (+104)	21 (−17)	24 (−18
Massachusetts	48 (−54)	115 (−5)	40 (−23)	36 (−4)	20 (−18)	32 (−10)
New York (northern)		39 (−81)		11 (−29)	9 (−29)	12 (−30)
New York (eastern)	18 (−84)	130 (+10)	2 (−61)	48 (+8)	12 (−26)	49 (+7)
New Jersey	11 (−91)	103 (−17)	27 (−36)	50 (+10)	32 (−6)	29 (−13)
Pennsylvania (eastern)	102 (0)	88 (−32)		25 +15)	49 (+11)	30 (−12)
Maryland	6 (−96)	146 (+26)	61 (−2)	45 (+5)	49(+11)	40 (−2)
Virginia (eastern)	66 (−36)	135 (+15)	81 (+81)	50 (+10)	41 (+3)	39 (−3)
Florida (middle)		126 (+6)	34 (−29)	37 (−3)	32 (−6)	41 (−1)
Texas (northern)	62 (−40)	224 (+104)	46 (−17)	42 (+2)	39 (+1)	66 (+24)
Kentucky (eastern)	24 (−78)	124 (+4)	167 (+104)	25 (−15)	32 (−6)	20 (−22)
Ohio (northern)	28 (−74)	119 (−1)	36 (−27)	29 (−11)	31 (−7)	35 (−7)
Illinois (northern)	20 (−82)	81 (−39)	30 (−33)	40 (0)	45 (+7)	38 (−4)
Indiana (southern)	40 (−62)	101 (−19)	24 (−39)	35 (−5)	29 (−9)	34 (−8)
Missouri (eastern)	27 (−75)	180 (+60)	60 (−3)	54 (+14)	46 (+8)	46 (+4)
Missouri (western)	36 (−66)	120 (0)		57 (+17)	36 (−2)	33 (−9)
California (northern)	79 (−23)	115 (−5)	120 (+57)	32 (−8)	42 (+4)	37 (−5)
California (central)	190 (+88)	96 (+24)	24 (−39)	40 (0)	41 (+3)	43 (+1)
Kansas	74 (−28)	115 (−5)		46 (+6)	47 (+9)	63 (+21)
Oklahoma (western)	29 (−73)	85 (−35)	48 (−15)	31 (−9)	36 (−2)	41 (−1)
District of Columbia	161 (+59)	103 (−17)	84 (+21)	42 (+2)	40 (+2)	67 (+25)

Note.—The federal district courts for each of the 11 circuits were chosen on the basis of the 2 districts in each circuit that sentenced the greatest number of offenders for the selected offenses.

Source: Administrative Office of the United States Courts, "Federal Offenders in United States District Courts," 1972, app. table X-4.

A few representative examples dramatize the disparity.

Offenders found guilty of robbery received an average sentence of 39 months in the Northern District of New York. The average in the nearby Eastern District of New York, however, was 130 months.

Elsewhere the average sentence for robbery ranged from 60 months in Montana to 240 months in the Northern District of West Virginia.

Violation of federal forgery and counterfeiting laws drew an average sentence of 12 months in the Northern District of New York. This compares with 49 months in the Eastern District of New York and 67 months in the District of Columbia.

The most conspicuous and disconcerting disparity occurs when one person receives a prison sentence and another person—who commits the same crime and is similar in virtually all respects—receives probation. Table 2 from our book illustrates the substantial variation among federal district courts as to the percentage of offenders convicted of the same offense receiving probation in fiscal year 1972.

TABLE 2.—PERCENTAGE OF CONVICTED OFFENDERS PLACED ON PROBATION, 1972

	Homicide and assault	Robbery	Burglary	Larceny	Auto theft	Forgery and counterfeiting
National average	36	13	43	60	36	58
Maine				50 (−10)	0 (−36)	20 (−38)
Massachusetts	14 (−22)	17 (+4)	0 (−43)	77 (+17)	50 (+14)	53 (−5)
New York (northern)	100 (+64)	50 (+37)		54 (−6)	83 (+47)	62 (+4)
New York (eastern)	60 (+24)	16 (+3)	50 (+7)	52 (−8)	89 (+53)	62 (+4)
New Jersey	80 (+44)	6 (−7)	20 (−23)	64 (+4)	60 (+24)	66 (+8)
Pennsylvania (eastern)	50 (+14)	18 (+5)		79 (+19)	80 (+44)	74 (+16)
Maryland	33 (−3)	7 (−6)	0 (−43)	79 (+19)	57 (+21)	67 (+9)
Virginia (eastern)	8 (−28)	6 (−7)	50 (+17)	53 (−7)	33 (−3)	52 (−6)
Florida (middle)	50 (+14)	0 (−13)	40 (−3)	47 (−13)	28 (−8)	45 (−13)
Texas (northern)	0 (−36)	4 (−9)	25 (−18)	51 (−9)	24 (−12)	41 (−17)
Kentucky (eastern)	50 (+14)	0 (−13)	0 (−43)	11 (−49)	8 (−28)	17 (−41)
Ohio (northern)	43 (+7)	10 (−3)	50 (+7)	67 (+7)	45 (+9)	68 (+10)
Illinois (northern)	43 (+7)	16 (+3)	0 (−43)	64 (+4)	50 (+14)	62 (+4)
Indiana (southern) [1]						
Missouri (eastern)	60 (+24)	7 (−6)	0 (−43)	51 (−9)	14 (−22)	58 (0)
Missouri (western)	0 (−36)	6 (−7)	100 (+57)	78 (+18)	47 (+11)	74 (+16)
California (northern)	29 (−7)	12 (−1)	50 (+7)	65 (+5)	25 (−9)	62 (+4)
California (central)	53 (+17)	21 (+8)	50 (+7)	75 (+15)	64 (+28)	79 (+21)
Kansas	10 (−26)	19 (+6)	100 (+57)	61 (+1)	35 (−1)	64 (+6)
Oklahoma (western)	13 (−18)	25 (+12)	0 (−43)	49 (−11)	21 (−15)	42 (−16)
District of Columbia	37 (+1)	16 (+3)	35 (−8)	49 (−11)	48 (+12)	54 (−4)

[1] No information was available for the Southern District of Indiana.

Source: Administrative Office of the United States Courts, "Federal Offenders in United States District Courts," 1972, app. table X-4.

© O'Donnell, Churgin and Curtis, "Toward a Just and Effective Sentencing System: Agenda for Legislative Reform" (Praeger, 1977).

Again, a few example point up the magnitude of the problem.

While 100 percent of offenders convicted of homicide and assault in the Northern District of New York received probation, none of their counterparts in Western District of Missouri, were put on probation.

Probation was the preferred sentence for only 17 percent of the convicted forgers and counterfeiters in the Eastern District of Kentucky, while it was used in 79 percent of the cases involving the same offenses in the Central District of California.

JUDICIAL INCONSISTENCY

The possibility that such extremes can be attributed to an acute individualization of justice in sentencing—and not to the standardless exercise of discretion or judicial inconsistency—is largely disproved by self-studies conducted by the judges in several federal judicial circuits.

At one midwestern sentencing workshop, federal judges were given identical pre-sentence reports of five defendants and asked to pronounce sentence. The results are enlightening. One convict, who was an income tax evader, was fined by three of the judges, released on probation by 23 judges and imprisoned by 23 others for times spanning one to five years.

A car thief was released on probation by 43 judges. Six of their colleagues, however, decided to commit the same defendant under the Youth Corrections Act.

The most pronounced disparity was visited on a bank robber. Twenty-eight judges recommended diagnostic treatment, 14 judges imposed straight sentences ranging up to 20 years, six recommended indeterminate sentences for maximum periods ranging from 5 to 20 years, and three recommended probation with psychiatric care.

A more recent experimental study of sentencing disparity by 50 federal judges in the Second Circuit (New York, Connecticut, and Vermont) dramatically confirms the existence of substantial differences in sentencing treatment of the *same defendants* by different judges. As Table 3 from our book shows, the study required that all 50 judges impose sentence on 20 different defendants charged with different federal offenses selected to represent the sentencing business of the circuit. Each judge was furnished with the same representative pre-sentence report prepared for each hypothetical offender.

TABLE 3.—2D CIRCUIT SENTENCING STUDY (20 CASES)

	Most severe sentence	6th most severe sentence	12th most severe sentence	Median sentence	12th least severe sentence	6th least severe sentence	Least severe sentence	Number of sentences ranked
Case 1—extortionate credit transactions; income tax violations.	20 yr prison, $65,000.	15 yr prison, $50,000.	15 yr prison	10 yr prison, $50,000.	8 yr prison, $20,000.	5 yr prison; 3 yr probation; $10,000.	3 yr prison	45
Case 2—bank robbery	18 yr prison, $5,000	15 yr prison	15 yr prison [(a)(2)].	10 yr prison	7.5 yr prison [(a)(2)]	5 yr prison	5 yr prison	48
Case 3—sale of heroin	10 yr prison; 5 yr probation.	6 yr prison; 5 yr probation.	5 yr prison; 5 yr probation. [(a)(2).	5 yr prison; 3 yr probation.	3 yr prison; 3 yr probation.	3 yr prison; 3 yr probation.	1 yr prison; 5 yr probation.	46
Case 4—theft and possession of stolen goods.	7.5 yr prison	5 yr prison	4 yr prison	3 yr prison	3 yr prison	2 yr prison	4 yr probation	45
Case 5—possession of barbiturates with intent to sell	5 yr prison; 3 yr probation.	3 yr prison; 3 yr probation.	3 yr prison; 3 yr probation.	2 yr prison; 3 yr probation.	1.5 yr prison; 3 yr probation.	5 yr probation; $500	2 yr probation	42
Case 6—filing false income tax returns.	3 yr prison; $5,000	3 yr prison; $5,000	2 yr prison; $5,000	1 yr prison; $5,000	6 mo prison; 2.5 yr probation; $3,000.	6 mo prison; $5,000	3 mo prison; $5,000	48
Case 7—possession of heroin	2 yr prison	2 yr prison	1.5 yr prison	1 yr prison	6 mo prison; 18 mo probation.	3 mo prison	1 yr probation	39
Case 8—mail fraud	YCA indet	YCA indet	6 mo prison; 5 yr probation [§4209].	5 mo prison; 5 yr probation [§4209].	2 mo prison; 2 yr Probation [§4209].	3 yr probation	do	41
Case 9—eluding examination and inspection by immigration officers; illegal entry after deportation.	3 yr prison	6 mo prison; 2 yr unsupervised probation.	6 mo prison	3 mo prison; 21 mo unsupervised probation.	1 mo prison; 2 yr unsupervised probation.	2 yr unsupervised probation.	Suspended if leave United States.	49
Case 10—postal embezzlement	1 yr prison	6 mo prison; 1 yr probation.	3 mo prison; 27 mo probation.	2 mo prison; 1 yr probation.	3 yr probation	2 yr probation	1 yr probation	48
Case 11—bribery	6 mo prison; 6 mo probation; $5,000.	6 mo prison; $2,500	2 mo prison; 22 mo probation; $5,000.	1 mo prison; 11 mo probation; $5,000.	2 yr probation; $7,500.	$7,500; 2 yr unsupervised probation.	$2,500	43

Case 12—Possession of unregistered firearm.	1 yr prison	6 mo prison; 3 yr probation.	3 mo pris.; 21 mo. prob.	1 mo prison; 11 mo probation.	2 yr probation	1 yr probation	6 mo probation	44
Case 13—Possession of counterfeit currency.	1.5 yr prison	6 mo prison; 2 yr probation.	6 mo pris.; 18 mo. prob.	5 yr probation	do	2 yr probation	2 yr probation	48
Case 14—Altering a forged U.S. Treasury check.	YCA indet	YCA indet	1 yr pris.	4 yr probation	do	do	1 yr probation	39
Case 15—Operating an illegal gambling business.	1 yr prison; $3,000	6 mo prison; 3 yr probation $10,000.	3 mo prison; 2 yr probation $5,000.	3 yr probation; $10,000.	2 yr probation; $5,000	2 yr probation; $1,000.	1 yr probation; $1,000.	45
Case 16—Bank embezzlement	YCA indet	5 yr probation	3 yr prob.	3 yr probation	2 yr probation	2 yr probation	2 yr unsupervised probation.	42
Case 17—Interstate transportation of stolen securities.	3 yr prison	6 mo prison, 4.5 yr probation.	6 mo. pris.	do	3 yr probation	do	1 yr probation	46
Case 18—Mail theft	6 mo prison; 18 mo probation.	5 yr probation	3 yr prob.; $100	do	2 yr probation	do	do	48
Case 19—Conspiracy to commit securities fraud.	2 yr prison; $2,500	6 mo prison; 2 yr probation.	3 mo. pris.; 33 mo. prob.; $7,500	2 yr probation; $15,00.	2 yr probation; $400	1 yr probation; $7,500.	$2, 500	47
Case 20—Perjury	1 yr prison; $1,000	3 mo prison; $1,000	3 yr prob.; $1,500	2 yr probation;	1 yr probation; $1,500	1 yr probation $500	$1, 000	48

Note.—References to "(a)(2)" signify a sentence pursuant to former 18 U.S.C. 4208 (a)(2), under which the defendant is given an indeterminate sentence and is eligible for parole at any time determined by the Board of Parole.

References to "4209" signify a sentence pursuant to former 18 U.S.C. §4209, under which young adult offenders (under age 26) are given specialized treatment.

References to "YCA indet." signify an indeterminate sentence for young offenders under age 22 pursuant to 18 U.S.C. §5010.

The results of this study put to rest any notion that sentencing disparity is a minor problem or a small price to pay for our commitment to individualized treatment of offenders.

A wide range of disagreement existed among the 50 judges about the appropriate sentences. The study concludes that "the pattern displayed is not one of substantial consensus with a few sentences falling outside the area of agreement. Rather, . . . absence of consensus is the norm."

Despite the impact of parole in decreasing time served on a sentence, the substantial disparity of sentences imposed shown in Table 3 would carry over to disparity in time actually served.

As to the critical threshold decision whether to place a defendant on probation or to imprison, the judges disagreed in a staggering 16 out of 20 cases.

Considerable disparity also existed in the lengths of probation terms and amounts of fines.

The distribution of the sentences bore no relationship to the length of a judge's service. No evidence was found that experience on the federal bench tends to bring judges closer together in their sentences.

Substantial disparity exists within districts—for example, among judges sitting in Brooklyn—as well as among all judges in the Second Circuit.

Substantial disparities are the inevitable result of judicial discretion exercised by almost 400 federal district judges, unfettered by legislatively established criteria and not subject to the uniform requirements of procedural regularity and prescribed substantive criteria which appellate review lends to almost every other area of the law.

ADVERSE IMPACT ON CORRECTIONS

We must not overlook the perception of inmates—"consumers" of the system. Prisoners believe—and our research substantiates—that their sentences have been imposed in a random and unjust way, under a tyrannical system sanctioned by law. As Norman Carlson testified earlier today, this well-founded attitude undermines effective corrections administration. James V. Bennett, another progressive, reform-minded Director of the United States Bureau of Prisons, stated over a decade ago:

"The prisoner who must serve his excessively long sentence with other prisoners who receive relatively mild sentences under the same circumstances cannot be expected to accept his situation with equanimity. And the more fortunate prisoners do not attribute their luck to a sense of fairness and justice on the part of the law but to its whimsies. The existence of such disparities is among the major causes of prison riots, and it is one of the reasons why prison so often fails to bring about an improvement in the social attitudes of its charges."

ADDITIONAL ADVERSE EFFECTS

The present sentencing system produces many other harmful, and at times corrupting, consequences.

At the trial level, it contributes to "judge-shopping", as defense counsel scramble to arrange appearances before judges renowned for their "lenieney" and to flee the courtroom of the most notorious "hanging judges".

Trial judges are encouraged not to be candid in stating reasons for sentences. If the judge discloses the basis for his sentencing decision, he may be reversed, while his silent counterpart does not similarly risk reproach and reversal.

At the postconviction level, the Parole Commission performs its weighty task with as little direction from Congress as the judges receive. Federal judges and Parole Commission members work at cross purposes in a vast sea of ignorance.

The confusion of roles between these two institutions—neither of which seems to contribute to the rehabilitation of inmates—has eroded public confidence in our correctional system. This mounting public dissatisfaction persists even though American sentences imposed, as well as the actual terms served before parole or mandatory release, are far longer than those in other Western countries.

TOWARD JUSTICE AND EFFECTIVENESS

On the basis of these findings, the Yale study concluded that there are three major flaws in the federal sentencing process: (1) a lack of legislatively prescribed sentencing purposes and criteria for accomplishing those purposes;

(2) inadequate trial and appellate procedures to ensure rationality and fairness, to reduce uncertainty, to minimize disparities; and (3) a dearth of empirical information about almost all aspects of the sentencing, parole and corrections systems.

In devising a rational sentencing reform strategy, the Subcommittee should be guided by the tandem objectives of fairness and effectiveness. Sentencing legislation should provide a procedural framework that will encourage a just and effective sentencing system. In a broad sense, this can be done—

By requiring judges to explain and justify each sentence;

By supplanting the parole system with a determinate sentencing scheme;

By establishing a federal sentencing commission, which through research and experience will devise guidelines for federal sentencing policy; and

By providing for appellate review of sentences.

As lawyers and law teachers—but more importantly as citizens who believe that our sentencing and corrections processes need not be unjust, discriminatory and ineffective—we urge you to reject mere cosmetic changes and to resist the pressures of those defending the *status quo*.

Instead, we urge you to scrap the present system and begin anew. S. 1437 shows that you have made an impressive start in the right direction.

We have learned from our three-year study of sentencing that there are no instant solutions. Certainly, structuring judicial discretion and reducing unfairness will not make the system wholly effective. We are hopeful, however, that this unprecedented effort will be worthwhile. By specifying the goals we expect the system to achieve and by establishing substantive standards and decisionmaking procedures by which to attain these goals, the system's effectiveness should be vastly improved.

Regardless of the ultimate shape of a sentencing system, the Yale study found that a number of reforms are absolutely essential in maximizing the likelihood that the process will be just and effective. Of course, there are variations on these themes. In the few minutes remaining, we will briefly outline some of these and comment how S. 1437 measures up to these standards.

PURPOSES OF PUNISHMENT

Congress must clearly delineate the goals or purposes of the sentencing system. This is peculiarly a legislative function. The Yale sentencing statute identifies six goals similar to the four purposes set forth in § 101(b) and § 2003(a)(2) of S. 1437: to afford deterrence to criminal conduct, to protect the public, to provide for rehabilitation, to promote respect for law by means of denunciation, to provide just punishment for the offense and to reflect the relative gravity of the offense.

This list is by no means exhaustive. The relative merits of these sentencing goals are the current subject of scholarly debate. To be sure these arguments will persist. The Yale study concluded that, on the basis of the present paltry state of knowledge, none of these goals can be categorically rejected.

While we have strong reservations about the "medical model", coercive behavioral change, and incarceration for rehabilitative purposes (which are discussed later), we have not abandoned all hope that certain in-prison rehabilitative programs—of limited scope and with adequate funding—might have some measurable effect upon recidivism. We nevertheless remain uncertain as to what does and does not work, what is right and what is wrong, and what is necessary and what is unnecessary.

One noteworthy omission from S. 1437 is any definition of such critical terms as "adequate deterrence" and "just punishment". It is crucial that all sentencing judges, as well as the federal sentencing commission, rely upon the same meaning for these fundamental principles.

SENTENCING PRIORITIES

Congress must assign priorities to the specific, declared goals of the sentencing process. Again, this weighing of goals is uniquely a legislative responsibility. As Chief Judge David L. Brazelon of the United States Court of Appeals for the District of Columbia Circuit has observed:

"This confusion of purposes needs to be unraveled and the precise social justification for a particular confinement should be forthrightly recognized. It is only in this manner that we can think clearly about the conditions and extent of confinement, and rationally evaluate our response to disturbing

behavior that warrants societal intervention. Of course, more than one purpose may be served by a particular confinement. But we should be clear as to which purpose justifies which punitive or rehabilitative action."

S. 1437 is deficient in this regard. The statement of sentencing purposes in § 2003(a) does not indicate any priority. This issue should not be delegated to sentencing judges or the sentencing commission.

In § 2302(d) of the proposed Yale statute, we have suggested that deterrence and protection of the public (incapacitation) should be the dominant objectives of the federal sentencing process. While this ranking suits our study group's preferences, it of course need not be the one adopted by Congress. The important point is that Congress should clearly spell out its priorities.

INSTITUTIONAL RESPONSIBILITIES

Congress must allocate responsibilities for the various sentencing goals and functions. The current confusion about the respective roles of courts, corrections authorities and parole boards has led to duplicative and contradictory decisionmaking. It has also engendered needless and counterproductive uncertainty among decisionmakers and those subject to their decisions.

S. 1437 assigns tasks to the sentencing court, the Court of Appeals, the Parole Commission, the Bureau of Prisons, and the United States Sentencing Commission. Nevertheless, the statute essentially recodifies the present overlapping jurisdictions. Part of this problem would be remedied by the total abolition of parole, a recommendation that we will discuss in a moment.

PROCEDURAL SAFEGUARDS

The federal sentencing system must contain detailed trial and appellate court procedures to assure rationality and fairness and to minimize sentencing disparities. Differences in treatment should rest only upon an objective, factual basis relevant to a legitimate, articulated governmental interest in sentencing persons convicted of crime. S. 1437 is landmark legislation in view of its insistence on procedural guarantees of fairness in terms of access to sentencing information, a statement of reasons for a sentence, appellate review of sentences, and presumptive sentencing guidelines for all types of sentences.

We would suggest, however, that S. 1437 is flawed in several respects.

(a) The sentencing procedure does not require the judge to consider separately each of the goals of sentencing. In this area, procedure has a great deal to do with substance. One method might be the "lockstep progression" outlined in § 2302(d) of the proposed Yale statute. Under this system, the judge must first consider the amount of prison time for deterrence purposes, then for incapacitation, next for rehabilitation, and so forth. In addition, the judge is furnished with specific criteria to consider in evaluating each sentencing goal. This type of procedure is essential in assuring that the judge independently and faithfully considers each sentencing purpose.

To ensure compliance for any sentence imposed—whether probation, fine, imprisonment or a combination of these—the judge must place on the record the reasons for the sentence imposed. Otherwise, effective sentence review is impossible.

We applaud section 2003(b) of S. 1437. This provision requires a statement of "general reasons for . . . imposition of the particular sentence" and the reason for the imposition of a sentence outside the guideline sentencing range of the Sentencing Commission. Section 2302(d)(6) of the proposed Yale statute has a similar provision.

(b) To date rehabilitation efforts have not proven effective for the majority of offenders. This controversial topic is discussed in Chapters 3, 6 and 9 of our book. Any sentence for rehabilitative purposes should have an absolute ceiling. The Yale study recommends two years as a maximum. In Section 2302(d)(3), we also impose stringent criteria for sentencing an offender to prison for purposes of rehabilitation and treatment.

S. 1437 places no restrictions on the use of imprisonment as a rehabilitative tool. We urge the Subcommittee to recognize the mounting evidence of a lack of a direct correlation between length of incarceration and rate of recidivism. Substantial questions of civil liberties are raised by imprisoning someone when there is no realistic prospect that any significant benefit will result from this confinement.

(c) Appellate review of sentences is a vital element of any meaningful sentencing reform measure. Some institutional check on excessive and overly lenient sentences is a touchstone of procedural regularity and fairness. Appellate review also facilitates the development of a case law of sentencing and serves as a mechanism to upgrade the rationale and rationality of sentencing. Furthermore, appellate review should result in fewer appeals on the pretext of trial error when the true reason for the appeal is the severity of the sentence. Finally, the appeals of sentence would greatly enhance both the defendant's and the public's respect for the judicial system.

Section 3725 of S. 1437 provides for appellate review of sentences. This provision, however, is too restrictive. Under this section, appeals may be taken only from sentences outside the guidelines—the most egregious sanctions. This restriction, while largely based on an understandable desire not to overcrowd appellate dockets, is unfortunate. A broad right of appeal is necessary to minimize disparity since even sentences within the guidelines can be improper. A defendant should also have the right to test on appeal the accuracy of the judge's application of the guidelines in his case. Any abuses of this remedy can be handled by the appellate courts under traditional appellate review doctrines.

Moreover, the concern for flooding the appellate courts with sentence appeals is unfounded. Under § 3725(c) of the Yale statute, two standards for appellate review are established. A more stringent standard for setting aside a sentence within the guidelines—"clearly unreasonable" as opposed to only "unreasonable" for sentences outside the guidelines—places a considerable obstacle in the way of unmeritorious sentence appeals.

THE SENTENCE OF LAST RESORT

For too many judges today, imprisonment of an offender has become a habit. Under the federal sentencing system, imprisonment should always be the sentence of last resort. Federal sentencing legislation should incorporate an explicit presumption against incarceration—or at the very least a presumption in favor of the least drastic sanction(s) to accomplish the congressionally-established sentencing goals. Before a court considers a prison term of any length, it should first determine whether the sentencing goals in a particular case can be accomplished through the use of probation, special probationary conditions, and/or a fine.

The probation provisions of S. 1437 are excellent and provide a variety of imaginative alternatives to incarceration. We would recommend, however, that the absolute exclusion of Class A felons and certain drug and weapons offenders from eligibility for probation in §§ 2101(a), 1811(b) and 1823(b) be eliminated. We are opposed to any form of mandatory minimum sentences. They rob the sentencing system of flexibility and promote disparity.

We endorse the concept of swift and certain punishment and uniform sentencing practices. The Yale study and proposed statute are based on these principles. The price of mandatory minimum sentences, however, is too high for the speculative benefits from such inflexible laws. Indeed, the latest study of New York's bitter experience with severe mandatory penalties for narcotics offenses concluded that they did not prove a deterrent. We should never adopt a sentencing statute that squeezes all discretion out of the system. There will always be a need for judgment exercised by humane, sensitive and intelligent men and women.

ABOLISH PAROLE

Parole should be abolished.

The best available research on deterrence shows that the most important deterrent effect arises from the certainty and not the severity of punishment. Under present parole laws, an inmate enters prison in an agonizing holding pattern—waiting for that "magic moment" when the parole examiners decide he or she is ready to be restored to the community. But most of the available evidence—discussed in Chapters 3, 6 and 9 of our book—conclusively demonstrates that parole boards do not enjoy unique expertise in rehabilitation. Indeed, the U.S. Parole Commission has abandoned institutional performance or "rehabilitative progress" as parole release considerations.

At this point, the question naturally arises: "Is there any reason to perpetuate the parole system?"

The answer, we respectfully submit, is "No".

As we have already indicated, the Parole Commission largely duplicates the initial sentencing function performed by the trial judge. With the elimination of rehabilitation as a parole release factor, the Parole Commission relies upon the same information (usually in the form of a presentence investigation report) on which the judge based the sentence.

Parole injects a paralyzing uncertainty into the original sentencing decision. In addition to detracting from the judge's ability to control the type and length of sentence, this uncertainty deprives an inmate of the incentive to prepare seriously for release and fosters self-defeating despair.

Recent social science studies, including a pioneering empirical study of federal parole practices in the *Yale Law Journal* by William Genego, Peter Goldberger and Vicki Jackson, document the fallacy of the rehabilitative ("medical model") myth. At least with present research tools, rehabilitation—defined in the terms of increasing likelihood of successful adjustment upon release—cannot be observed, detected, or measured.

Parole should be replaced by a determinate sentencing system. The sentencing court should set the amount of time to be served. A defendant sentenced to prison would know then and there the period of incarceration. The proposed Yale statute is built on the foundation of a determinate (or flat or fixed) sentencing scheme. Three states—Maine, Illinois and California—have adopted this type of legislation.

S. 1437 does not explicitly abolish parole. Under § 2301(c), the trial court could effectively eliminate parole for an offender and set a fixed sentence by imposing the maximum authorized term of parole ineligibility of nine-tenths of the sentence imposed. Under proposed § 994(a)(1) of Title 28, the Sentencing Commission could administratively abolish parole through mandatory guidelines. These measures are a decided improvement over existing law.

These provisions, however, are a back door approach to eliminating parole and could cause more harm than good. The present problem of widespread disparity could be exacerbated by a situation in which some inmates would be eligible for parole while their similarly situated cellmates would have to serve their entire sentence. Furthermore, the parole process is a creature of the Congress. If it is to be abolished, it should be done by politically accountable leaders.

We urge the Subcommittee to make the abolition of parole and the creation of a determinate sentencing system the cornerstones of the Criminal Code Reform Act of 1977. The excellent legislative work of this Subcommittee would be immeasurably enhanced by the addition of this urgent sentencing reform to the impressive list already contained in S. 1437.

SUBSTANTIAL REDUCTION OF PRISON TERMS

Authorized prison terms in this country are far too long.

Presently, parole and "good time" credits have the combined effect in most cases of reducing an inmate's sentence by one-half to two-thirds. With the abolition of both of these substantial sentence-reducing devices, maximum authorized sentences—except for the most serious Class A felonies carrying a maximum of life imprisonment—should be reduced by one-half.

Even without the abolition of parole, maximum sentences should be reduced. Almost a decade ago, the American Bar Association, after a comprehensive study of sentencing in this country, concluded:

"It should be recognized that in many instances in this country the prison sentences which are now authorized, and sometimes required, are significantly higher than are needed in the vast majority of cases in order adequately to protect the interests of the public."

The Subcommittee is to be commended for its reduction of the maximum prison terms for Class B, C, and D felonies. We suggest, however, that these modest reductions are inadequate. The task of setting ceilings on prison terms for offenses should not be left to administrative agencies such as the Parole Commission or Sentencing Commission.

EARLY RELEASE PLAN

With the elimination of good time (and hopefully, parole), an inmate, as Norman Carlson indicated earlier today, will have no "'light' at the end of the tunnel." The Yale study concluded that some time-reduction provision should be retained as an incentive to assure good behavior and discipline.

In Chapter 9 of our book, we recommend an "early release" plan. This program, which has been endorsed by the Director of the Bureau of Prisons, would be limited to the last one-tenth of the sentence. This is a substantially smaller percentage of the original sentence authorized by the present "good time" laws. Early release decisions would be made by the Bureau of Prisons solely on the basis of institutional conduct and performance. Release would occur at nine-tenths of the sentence.

SENTENCING COMMISSION

To give meaning and effect to the legislatively-prescribed sentencing goals, criteria and procedures, a United States Sentencing Commission should be established. One of the most indictable aspects of the present system is the dearth of information about virtually all phases of the sentencing, parole, and corrections processes. The Commission would undertake ongoing research to evaluate different sentencing goals and to determine the best way to implement each objective. In addition, the Commission would promulgate guidelines for recommended normal ("benchmark" or "presumptive") sentence ranges to structure the sentencing judge's decisions.

As Judge Frankel, the first proponent of such a Commission, has observed:

"As is true in other domains, the notion of research and development [in the field of sentencing] must embrace more than the generation of scholarly studies, though such studies are surely wanted. There must be a commitment to change, to application of the learning as it is acquired. There must be a recognition that the subject will never be definitively 'closed', that the process is a continuous cycle of exploration and experimental change."

The proposed United States Sentencing Commission is the centerpiece of impressive sentencing reforms of S. 1437. With its ambitious charter, the Sentencing Commission has been given broad powers to instigate unprecedented changes in the federal sentencing system. We urge the passage of this provision.

We would suggest a few matters for your consideration.

Under § 994(a), you may want to require that the Judicial Conference's appointees to the Sentencing Commission come from a cross-section of the public and private sector. It would be a serious mistake if all the commissioners were either federal judges or private attorneys.

Under § 994(d), the Sentencing Commission is required to consider certain factors in classifying categories of offenders for purposes of its sentencing guidelines. Some of these factors include the offender's education, family and community ties, vocational skills and previous employment records. The Subcommittee, we are sure, is aware of the care which must be used in employing such considerations. Not only are there serious doubts about the utility of some of these factors in making assessments of risk of recidivism. There is also the potential for inadvertent discrimination on the basis of race and income. We would recommend that the Subcommittee highlight these concerns in its report so that the Sentencing Commission will be fully aware of congressional sensitivity to these issues and that after studying these factors, the Sentencing Commission need not utilize them if it finds them inappropriate.

Under § 994(g), the guidelines of the Sentencing Commission may be disapproved by only one House of Congress. Such one-House veto provisions are of arguable constitutionality and are under attack in the courts. We do not favor a congressional role in the process of implementing sentencing guidelines. If there is to be legislative involvement, however, we would recommend a procedure similar to 18 U.S.C. § 3771 now used in connection with the promulgation of the Federal Rules of Criminal Procedure by the Supreme Court.

Finally, we recommend that S. 1437 be amended to add a requirement that the Sentencing Commission follow the public notice and comment provisions of the Administrative Procedure Act in promulgating sentencing guidelines and general policy statements. We commend to the Subcommittee's attention § 5(b) of S. 204, the Federal Sentencing Standards Act of 1977, introduced by Senators Hart and Javits.

The sentencing provisions of S. 1437 represent a dramatic improvement over existing law. S. 1437 reflects Congress' faith that a just sentencing system can be effective in promoting respect for law, deterring crime, rehabilitating some

types of offenders, and incapacitating serious offenders. The prospect of this far reaching legislation being enacted in this Congress—to those of us who have pressed for these reforms—is heartening.

We would be pleased to answer any questions.

Senator HATCH. I think your prepared statement has covered the subject very comprehensively.

You commented on the failure of Congress to establish sentencing guidelines.

What role do you envision for Congress with respect to promulgation of guidelines or even supervision of guidelines once they are promulgated?

Mr. O'DONNELL. Section 994 of the present bill, sir, provides for a one-house veto provision after a laying on the table of, I believe, 180 days.

As we point out in our statement, this is of arguable constitutionality and the issue is being litigated. In our book, we favor no congressional role because we think we have to give this commission stature and prestige. The legislative responsibility is to establish what the purposes of sentencing should be and what the criteria are for reaching those purposes.

If, however, there is to be a legislative role in scrutinizing the guidelines, it should be similar to what we do with the present Federal criminal rules of procedure in which both Houses of Congress have to act to set them aside, so to speak.

We do not recommend that Congress get in the business of saying that this type of crime with this type of offender should result in imprisonment for 12 to 16 months. We think this is a task for your sentencing commission through the research functions which we envision and which this bill—which gives it a very ambitious charter—also envisions.

Senator HATCH. Would the Congress have any oversight over the Commission in any guidelines that it might publish?

Mr. O'DONNELL. Certainly. If Congress were dissatisfied with the guidelines, it could always enact legislation repealing them.

Senator HATCH. To the extent of its oversight authority?

Mr. O'DONNELL. Yes. That would be the traditional oversight function of the Congress which we would encourage because we do not think it has always been exercised in the past.

These hearings and this legislation are glowing testimony to the fact that Congress now sees it has a vital role to play in the area of corrections.

Senator HATCH. I go along with you. I think in the case of a lot of legislation which causes serious problems in implementation is put on the books by Congress, turned over to the bureaucracy, without any further thought by Congress, and the bureaucracy pretty well does whatever it wants with the legislation.

Mr. O'DONNELL. Only when we have a crisis, for example the Attica situation in New York, then people start getting concerned about it. I think what you are doing here may obviate those types of problems in the Federal system down the road if you pass this type of legislation.

Senator HATCH. In suggesting that parole be abolished, are you advocating that there should be no postrelease supervision?

Mr. O'DONNELL. As they say, you have gone to the jugular, Mr. Chairman.

At the Yale workshop over 3 years, this was one of the most hotly debated topics. We conclude in the book that there should not be traditional parole release supervision. However, with what we call a split sentence—so much time in prison, then probation—there would be a supervisory period. We do favor the probation-type of supervision.

Also, as Mr. Curtis points out, there are halfway houses and other types of phased release into the community.

Senator HATCH. Would those options still be available?

Mr. O'DONNELL. Certainly. In fact, this bill endorses and certainly gives the Director of the Bureau of Prisons every amount of authority he needs in that respect.

Senator HATCH. We appreciate your testimony today and we wish all three of you luck on your book.

Mr. O'DONNELL. Thank you.

Senator HATCH. Our next witness is Professor Ernest van den Haag.

Professor, I apologize that we are pressed for time.

Welcome to our committee.

STATEMENT OF ERNEST VAN DEN HAAG, NEW YORK, N.Y.

Mr. VAN DEN HAAG. Thank you, Mr. Chairman.

I am Ernest van den Haag. I am a lecturer in psychology and sociology at the New School for Social Research in New York. I have been a professor at a variety of universities and am now adjunct professor of law, New York Law School.

I have written a number of books, the latest of which is called "Punishing Criminals: Concerning a Very Old and Painful Question." Because the subject of that book interests me, I am here once more. I appreciate the opportunity to testify.

Let me very briefly summarize my prepared statement.

I think the bill before you is very great progress over what we had before. But I would like it to go further.

I think that the purpose of nonmandatory, nonflat sentencing and the purpose of parole basically is to permit judges—and, later on, parole boards—to determine whether a particular offender is more likely to be rehabilitated and, accordingly, to either tailor the sentence to his personality or tailor the length of confinement later on to his progress in rehabilitation.

I do not think this can work. I do not think a judge can determine what kind of personality the offender before him has. As a result, the discretion by judges tends to be tailored to the judge's personality rather than to the defendant's. This is not particularly desirable.

I also feel that no one has ever been able to show that behavior within prison enables parole boards to infer anything about behavior after release. Yet, this prediction is the only argument in favor of the existence of parole boards. Anything other than behavior within prison, the sentencing judge can be made fully aware of. Hence, he can consider all other factors in deciding on his sentence.

The only predictive elements that I would seriously consider are the previous offenses of the defendant. Of these, the sentencing judge

can be made aware. Hence, I do not see any good reason for the existence of parole or of parole boards.

I do see some reason for giving prisoners time off for good behavior—about 10 percent of their sentence and no more. Else the warden would have excessive power. Of course, this time off for good behavior can be abused. Nonetheless, it is an important disciplinary means in the hands of the warden. I would retain it.

Somewhere between a quarter and a half of all of our prisoners are recidivists. The data on this matter are very uncertain. Anyway, the rest—about 50 percent—are not. There is no evidence in the record—and I am quite familiar with the whole literature—to indicate that any rehabilitation program has ever made a difference here or abroad. I have in mind such countries as Sweden, Denmark, and Holland, which are famous for their prison reforms. There is no evidence that any rehabilitation program has made any difference whatsoever in the behavior of the convict upon release.

Some are recidivists; some are not. Prison may have an influence, but no study I know of has ever shown that any particular rehabilitation program has ever made a difference in the proportion of released offenders who become recidivists. This is provided, of course, that the comparisons are proper, that one compares a group of convicts who have been subjected to rehabilitation programs with a group of others who have committed the same offense, come from the same socioeconomic background, are of the same age, et cetera and have not been subjected to the program.

Lest I be misunderstood, I want to make it clear that I do not necessarily advocate lengthier confinement for all offenders. I do advocate less arbitrarily determined confinement and effectively more equal and certain sentences determined by law and by the courts, without any parole provisions whatsoever.

A frequent misunderstanding, which I heard repeated here by some of the previous witnesses before you, is that our prisons would become overcrowded if parole boards did not release people.

It is obvious, however, that shorter effective sentences, if they are desired, can achieve the same effect as parole does now.

More important, more severe effective sentences, if they do reduce the crime rate by reducing the numbers of crimes committed by those actually incapacitated, would still cost less than release would cost if it leads to more crime.

Thus, if the prison population were to increase, investment in more prisons might be entirely worthwhile.

But still more important is this. If the punishment of offenders does deter others—and in my book, "Punishing Criminals," I have presented very considerable evidence that it does—then the result of more severe and certain punishment would be to keep a greater proportion of offenders behind bars; but also to reduce the total number of offenders. Thus, ultimately, the proportion of offenders behind bars would increase; the number may decrease as the number of offenses decreases. Hence, there would be ultimately no overcrowding of prisons.

Whether the absence of parole will increase the severity of sentences will depend on legislation and on the sentencing guidelines that you have mentioned.

As has been mentioned before—and I wish to agree—confinement should be only a last resort. However, I think every second offender for violent crimes certainly should be confined.

The alternative to confinement, very often, is fines. The trouble with fines is that most offenders are not capable of paying a fine.

But I do wish to make it clear that, if we do consider fines, I would suggest these be stated not in sums of money but in income days. That is, the sentencing judge would sentence the defendant to 10 days' income or 50 days' income. There are obvious reasons, in terms of equity and fairness, for prefering this. A fine of say $500 would obviously be too heavy a burden for some and a tripling one for others. A fine of 10 income days would more nearly equalize the burden.

But I am afraid that fines as an alternative to imprisonment are in many cases not practical.

There is one other point I wish to make about parole and rehabilitation.

We do sentence people to punishment, not because of the future expected behavior—criminal or otherwise—but because of their past behavior. If that were not so, the work of our courts in ascertaining guilt would be wholly in vain. We could leave it to psychologists, if they are capable of that, to tell us who will commit a crime or who will not.

We do not do that. Our system is called a system of criminal justice. Justice means that people are punished only if they have committed a crime and only in proportion to the seriousness of that crime.

Hence, it seems to me that, on principle and by logic, the future behavior of offenders should not be a sentencing consideration. Their past behavior should determine the sentence.

Their past behavior, on the other hand—let me add—is also what is most predictive about their future behavior. I should say that a man who has committed two crimes is far more likely to commit crimes in the future than a man who has committed only one crime. Hence, it seems to me that whatever consideration you want to give to future behavior can easily be fitted with the proper consideration of past behavior.

We usually believe, based, perhaps, on our belief in rehabilitation, that young people should be treated most leniently and older people should be held more responsible for their wrongdoing. Hence, the young tend to get more lenient treatment.

I think that is exactly the reverse of what we should do.

Practically all violent crimes are committed by people between the ages of 14 and 30 to 35. Hardly anyone commits a crime requiring physical exertion after the age of 40.

It seems to me, therefore, that we can afford, so to speak, to be relative lenient with older criminals and we cannot afford to be lenient with younger criminals.

I certainly do not wish to condemn a person to prison for a long term simply because he is young. But younger criminals who give signs of becoming career criminals, by committing more than one crime—having, say, two previous convictions—I should think, in your sentencing provisions, you should deal with as career criminals. Chances of changes in his commitment to crime are extremely small. Early release simply means that the offender will continue his criminal career as usual to the age of 35 or 40.

Hence, contrary to the present practice in a number of States—which is to give practical immunity to people under 16, whatever crimes they commit and to treat quite leniently young people—I would advocate that the emphasis be reversed.

I think that the abolition of parole and the appropriate mandatory flat sentencing of career criminals alone are likely—quite apart from the deterrent effects—to reduce the crime rate by half, since at the present time, more than 50 percent of all violent crimes are committed by people out on parole or probation.

The abolition of parole for all offenders and the mandatory sentencing urged would by incapacitation and by deterrence decrease the crime rate much further. Thus, our Government could fulfill the promise of the Declaration of Independence to secure the life, the liberties, and the pursuit of happiness of our citizens.

It is to "secure these rights" that "governments are instituted among men" according to our Declaration of Independence.

If one looks at the present practices of the criminal justice system, including the correctional establishment, one may think that it was to secure the happiness of lawbreakers that our Government was instituted. Yet, as Lincoln warned, our citizens "become tired and disgusted with a government which offers them no protection."

I think we have reached this point.

I congratulate you for considering a bill which promises to change that.

Senator HATCH. Thank you.

We are grateful that you took time to be with us today and give us your insights.

Your statement will be made a part of the record. I am sure it will be interesting to all who read it.

[Material follows:]

My name is Ernest van den Haag. I am lecturer in psychology and sociology at The New School for Social Research, and an Adjunct Professor of Law, New York Law School, as well as a psychoanalyst in private practice. I studied here and abroad and received a Ph.D. in 1952 from New York University. Since then I have been a Guggenheim Fellow and a Senior Fellow of the National Endowment for the Humanities. I have published about 200 articles and seven books, the most recent of which is Punishing Criminals: Concerning a Very Old and Painful Question (New York: Basic Books, 1975). My present address is 118 West 79th Street, New York, N.Y. 10024. As the title of my latest book indicates, I have a considerable interest in the way we are dealing with criminals, and I am grateful for the opportunity to discuss the topic with you. I shall confine myself to the sentencing provisions of S. 1437.

S. 1437 limits the discretion of judges and enables them to limit the discretion of parole boards. This is progress, but in my opinion, it would be better to limit the discretion of judges much further and to eliminate parole and parole boards altogether.

I.

In 1952, Mr. Justice Black wrote: "Retribution is no longer the dominant objective of criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[1]

His description of the trend was correct; but Justice Black's acceptance of it I deem to be a mistake. Apart from incapacitation, the purpose of punishment must be to do justice: To punish those who by violating the criminal law deserved and have invited the punishment threatened by it. This is the threat or the promise of the law. As is any promise, that threat is a moral

[1] Dissenting in *Carlson* v. *Landon*, 342 U.S. 254, 549.

obligation that must be carried out regardless of usefulness. (There is a common misunderstanding here: It is believed that the obligation is to the criminal. It is not. It is to those who, perhaps because of the threat, did not commit crimes.) Further, if the threat is not carried out when the law is broken, it becomes incredible and, therefore, ineffective in restraining future lawbreakers. This would defeat the second purpose of the legal threat: To restrain prospective future lawbreakers from breaking the law.

Promises should be kept; threats should not be made unless one proposes to carry them out. Else they will be regarded as bluffs. If they are, threats cannot restrain or deter prospective law violators. Deterrence requires that the threats of the law be carried out by inflicting punishment—not rehabilitation—on those who volunteer to risk it, by breaking the law. Crime is deterred by the threat of punishment only as long as it remains credible. Thus, unlike Mr. Justice Black, I believe that the "dominant objective of criminal law" must be to do justice by punishing as threatened and thereby also to deter others. Rehabilitation, however desirable, cannot take the place of justice and deterrence. Moreover, attempts to achieve it lead to gross injustice and necessarily must fail, as indeed they have. Let us consider the distortions of justice that have occurred to accomodate these attempts.

II.

At the present time, considerable sentencing discretion is given to courts. After they have exercised it, parole boards determine what part of that sentence pssed by the court is actually served. I oppose the discretion given judges and favor narrowing it to near zero. The law should mandate the sentence for each crime.[2] I propose further that parole and parole boards be abolished altogether.

Essentially sentencing discretion is left to courts because (a) the circumstances of each crime differ, and it is felt that the judge, familiar with the case, is the best person to adapt the sentence to those circumstances; (b) the personality of each criminal is different, and again it is felt that the judge is more able than the legislator to adapt the punishment to the individual personality of the offender, to his degree of guilt, and to his chances for rehabilitation.

Certainly each crime is committed in different circumstances of an aggravating or extenuating nature, which legitimately ought to influence the sentence imposed by the court. However, these circumstances can be classified and listed in the law to a very large extent. Judges can be legally instructed to increase or decrease sentences accordingly. Thus, judicial discretion can be severely limited while aggravating or extenuating circumstances still can properly influence sentences. This limitation of judicial discretion is desirable, for without it elements of judgment (negatively expressed, of capriciousness) necessarily prevail. They give the appearance of injustice, at least of inequality, and sometimes the substance as well. Moreover, uncertainty about the sentence to be expected reduces the deterrent effect of punishment—crime becomes more of a gamble than it need be. Thus, I would make all sentences mandatory, allowing judges to increase or decrease the mandated sentence by no more than 10 percent for reasons (to be stated in passing sentence) beyond those specified in the law.[3]

Defendants differ, and this, too, is alleged to necessitate judicial discretion. Some, it is argued, have personalities more and others less susceptible to rehabilitation. This may be so. But, as has been noted, the purpose of a sentence is to punish those guilty of crime—rehabilitation is incidental to such punishment. Else, defendants not in need of rehabilitation could be released, guilty or not, and unrehabilitated offenders would have to be kept indefinitely. This would be unjust. Nor would it serve deterrence—it would indeed grant everybody immunity for at least one crime, provided he is found unlikely to commit other crimes.

---

[2] The only penalty that I believe should not be mandatory is the death penalty. Courts should be able to chose between it and life imprisonment for the reasons that the Supreme Court has specified in recent decisions.

[3] S. 1437, a hill now before Congress, proposes a sentencing commission that would elaborate guidelines. This, if properly done, would have nearly the same effect as making sentences mandatory.

At any rate, there is no evidence whatsoever that judges, even when aided by probation reports, or by psychologists, are able to gage personality differences and to adapt sentences to them. Sentences are much more likely to be adapted to the personality of the judge than to that of the defendant. Of this there is empirical proof in the literature, which suggests that some judges are considerably more lenient (or severe) than others, who may be presumed to sentence a similar assortment of personalities and offenses. Additional evidence indicates that some judges habitually deal with some types of offenses severely, while other judges deal leniently with that same type of offense. That much about judicial discretion. I suggest that it be so restricted that offenders having committed the same crime, as legally defined, can expect the same mandatory sentence.

III.

The major purpose of parole has been to release from prison offenders who, in the opinion of the parole board, are rehabilitated. Since the parole board thus determines within a minimum and maximum fixed by the court the actual length of any sentence, it necessarily makes all sentences indeterminate. This practice is unjust; it leads to wholly capricious punishment; and, finally, it does not and cannot achieve its purpose of releasing the rehabilitated and keeping those who are not—regardless of whether that purpose itself is justifiable.

No one has ever shown that behavior within prison enables parole boards to infer anything about behavior upon release. Experience indicates that it does not. And why, indeed, should behavior in the very special conditions of prison tell us much about behavior outside? Yet all elements, other than behavior within prison, are already available at sentencing time and do not require a parole board to second-guess the sentencing judge. Still, the idea that a parole board can estimate progress in rehabilitation by considering behavior in the prison setting persists. (So do parole boards.) Let me add that the idea implied by Mr. Justice Black, and accepted by influential writers, that rehabilitative treatments can replace punishment, is theoretically absurd. Rehabilitation could succeed only when preceded by by punishment: Punishment, if sufficient, may show the offender that crime is self defeating and might motivate him to avoid it in the future. Possibly, rehabilitation programs may subsequently help him to do so, but unless the program follows punishment, the offender has no motive for actually wishing to be rehabilitated. His crime has paid. Therefore, he cannot be rehabilitated. In practical terms, no program has yet been discovered to effectively help rehabilitation.[4] Perhaps rehabilitative programs to help noncareer criminals will be discovered and validated in the future. Although they may be added to it, they can never take the place of punishment as long as it is to be just and deterrent. At present, rehabilitative programs simply foster, abet and reward whatever histrionic and manipulative abilities prisoners possess. For, what is actually evaluated by parole boards is how well the prisoner get along with prison authorities and their notions of of appropriate prison behavior,[5] or of behavior indicating rehabilitation.

Somewhere between a quarter and a half of our prisoners are recidivists. (The data do not permit greater specification.) The rest are not. There is no evidence that any rehabilitation program here or abroad has ever made a difference in these proportions, in producing a change, in leading more people to be lawabiding upon release. It is quite possible that imprisonment itself does have effects, at least on the nonprofessional offenders, or that there are spontaneous changes. But there is no evidence either for (unintentional) criminalizing or for (intended) rehabilitative effects, i.e., no evidence that released offenders upon release commit either fewer or more crimes than they would have committed had they never been imprisoned. (Possibly the rehabilitative and criminalizing effects of imprisonment statistically offset each other.) Above all, there is no evidence that any specific treatment during confinement—any rehabilitation program—makes a difference.

---

[4] One must be careful to distinguish (1) rehabilitation brought about by the influence of extraordinary personalities—which, by definition, cannot be institutionalized; (2) rehabilitation by age, punishment, or other factors; (3) rehabilitation by a specific nonpunitive program. It is the latter that nowhere has succeeded when institutionalized.

[5] Elaborate pseudo-scientific tests do not change that situation.

The methods now used by parole boards do not ascertain the likely future behavior of a prisoner. Hence, there is no reason why the sentencing should not be left to the law and the judge. The parole board should be altogether abolished. Evidence abounds indicating that a disproportionate number of crimes are committed by previously incarcerated offenders, many released on parole. Among them are many career criminals whom parole boards believed rehabilitated.

Lest I be misunderstood, I do not necessarily advocate lengthier confinement for all offenders. I do advocate less arbitrary decisions on confinement and more equal sentences determined by law and by the courts, without any parole provisions whatever. I do not wish to eliminate "time off for good behavior" either. As long as it is a privilege and not a right, and left entirely to the prison administration to grant or withhold, "time off for good behavior" is a valuable tool of prison discipline. However, the maximum "time off" should never exceed 10 percent of the sentence being served. Else prison wardens gain excessive arbitrary power and sentences would no longer be determined by the law and by the courts. On the other hand, 10 percent of the sentence is enough incentive for proper conduct for any convict at all responsive to positive incentives.

IV.

It is frequently thought that our prisons would become over-crowded if parole boards did not release people. But if shorter effective sentences are desired, this can be accomplished by reducing penalties judicially or legislatively. Parole boards are not needed to shorten time served.

However, if severe effective sentences do reduce the crime rate by reducing the number of crimes committed by those incapacitated—and that is likely, since many crimes are committed by a small number of "career criminals"—lengthy confinement would still cost less than release would. The additional crimes committed by the released convicts cost more to victims and to the criminal justice system than confinement does. Thus, if the prison population were to increase, investment in more prisons might be entirely worthwhile.

But such an increase of the prison population, though likely in the short run, is unlikely in the long run. If the punishment of offenders does deter others,[6] more severe and certain punishment would keep a greater proportion of offenders behind bars, but it also would reduce the total number of offenses by deterring prospective offenders. Although the proportion of offenders behind bars would increase, their total number would decrease as the number of offenses decreases.

Whether or not the absence of parole actually increases the severity of punishment depends on the legislature and on the courts, which can increase or decrease the length of sentences. And that is where the decision belongs. Parole boards have no special competence which legislatures or courts lack, to, in effect, determine sentences, nor can they learn any relevant facts not available to the sentencing courts.

V.

Legislators and judges and, not least, parole boards often appear to believe that offenders are to be confined not for the crimes they committed, but for the crimes they may or may not commit. Thus, they should be confined or released not on the basis of past behavior, including crime, but on the basis of predicted future behavior. The actual length of the sentence served is made to depend on whether criminal or lawabiding behavior is predicted.

As indicated, there is no basis for making such prediction other than the kind of lawabiding or lawbreaking behavior of which courts are made aware. Hence, there is no reason for post-sentence modification or determination of length of time to be served in prison by parole boards. But the idea of determining sentences on the basis of future behavior is anyway contrary to our principles of justice, and to our principles of social defense.

Clearly, if we are interested in future rather than past behavior, our elaborate process of determining guilt—which is always and only incurred by past behavior—would be unnecessary. (Unless guilt itself predicts future

[6] There is ample evidence, experimental and statistical, for this effect. Some of it is presented in my Punishing Criminals: Concerning a Very Old and Painful Question (New York: Basic Books, 1975).

behavior. In which case, parole boards once more would be superfluous, since the courts would be able to predict future behavior.) If, however, past guilt is thought necessary and sufficient to determine sentences regardless of future behavior, then subsequent determination, or change, of the time to be served is unnecessary. And surely guilt, past behavior, should be decisive. Criminal statutes threaten with punishment those who violate them. They do not threaten punishment to those who are believed likely to break the law in the future. However, unless carried out against the guilty, the threats of the law become incredible and ineffective. And the performance of anti-social acts is encouraged as the threat that was to deter them loses its credibility.

Justice consists in meting out the punishments threatened by law and deserved by guilt to those—and only to those—who voluntarily have run the risk of suffering them, regardless of predictions, or guesses, about their future behavior. By doing justice we also hope to deter others from offenses, as they see that offenders suffer the punishments threatened. Not all will be deterred, but it seems obvious that the deterrent effectiveness of punishment depends on the certainty and severity of punishment that can be expected by lawbreakers—on the expected cost of lawbreaking compared to the benefits expected by the lawbreaker.[7]

Before turning to the effectiveness of punishment, let me illustrate briefly why guilt, and guilt alone, must determine the actual sentence served. Suppose a man kills his wife. Quite often such a man need not be incapacitated—he is unlikely to kill anyone else. Further, the crime itself may have fully rehabilitated him: He wanted to kill this particular woman, his wife, and having done so he may be a good citizen in the future, he may never remarry, and if he does, live ever after happily with his new wife.

We punish such a person for the sake of justice—to carry out the threat of the law, to inflict the punishment deserved—and of deterrence. We feel, in Tolstoy's words, that the seeds of every crime are in everyone of us. Hence, other husbands need to be restrained from doing what may tempt them by seeing what happens to one who has done it. This way we keep most wives surviving. Or, for that matter, most husbands. Obviously, neither rehabilitation nor incapacitation is needed or relevant—anymore than they were needed for the "Watergate" criminals, for most while collar criminals or for most "crimes of passion." But justice and deterrence are indispensable.

The threat of punishment obviously has not deterred those who are guilty of crimes. Some, to be sure, are altogether undeterrable. Others are so committed to a criminal career that they are quite unlikely to be deterred or to be rehabilitated by any reasonable punishment. (This is often the case for minor professional criminals, e.g., pickpockets.) But the threat continues to deter most of us. Those who cannot be deterred, if guilty of crimes, must be incapacitated at least temporarily, to prevent them from committing the additional crimes they would commit if free and to deter others from entering a criminal career.

I do not advocate punishment of offenders for what they have yet to do. They can only be punished for their past crimes. I do suggest, however, that the law mandate courts to impose a much more severe sentence on second offenders than on first offenders who commit serious crimes. Anyone who has not learned from his first conviction and punishment is well on his way to a criminal career; whatever mitigates a first offense does not mitigate the second. Anyone who commits a third offense must be considered a career criminal. He should, if convicted, be incapacitated for a lengthy period if his crime was violent, or if, like burglary, it involves physical exertion. He should not be released before he reaches the age of 40. At that age resumption of his criminal career is unlikely. Few people commit violent crimes after 35. Age rehabilitates. Thus, contrary to present practice, youthfulness generally requires longer, while age permits shorter confinement: The young career criminals are most likely to commit additional crimes, and least likely to be rehabilitated. Leniency toward young career criminals is based on the sentimental but demonstrably wrong premise that they are more likely to reform than older ones. The sentiment is generous but unrealistic. And the result is not generous as far as the victims of crime are concerned. While mandatory sentences should be determined by the gravity of the crime as defined by the law and by the

[7] The idea that certainty alone matters, or matters more than severity, is true under some conditions (including mostly the present ones) and not others. E.g., certainty of mild punishments invites crime. There is an optimum combination of certainty and severity, and neither variable is in principle more important than the other, since deterrence is the product of these joint causes.

courts, upon a third conviction the offender, particularly the assaultive offender, should not be released before reaching the age of 40. The law should take the habitual aspect of the criminal career into consideration.[8]

It is well known that career criminals commit a disproportionate number of all crimes. Nearly 50 percent of all violent crimes are committed by career criminals, many released on parole. The abolition of parole and the appropriate mandatory flat sentencing of career criminals alone are likely to reduce the crime rate by half, merely by incapacitation, quite apart from deterrent effects. Mandatory sentencing and the abolition of parole for all offenders, by incapacitation and by deterrence, would decrease the crime rate much further. Thus, our government could fulfill the promise of the Declaration of Independence: to secure the life, the liberties and the pursuit of happiness of our citizens. It is "to secure these rights" that "governments are instituted among men," according to the framers. If one looks at the present practices of the criminal justice system, including the correctional establishment, one may think that it was to secure the happiness of lawbreakers that our government was instituted. Yet, as Lincoln warned, our citizens "become tired and disgusted with a government which offers them no protection." I think we have reached that point.

[Excerpts from "Punishing Criminals: Concerning a Very Old and Painful Question," Ernest Van den Haag, New York: Basic Books, 1975.]

A MEANS TO REHABILITATE?

Since offenders voluntarily take the risk of punishment, and since punishment may include treatment thought suitable for correction, the Kantian injunction not to use anyone just as a means, even for his own benefit, need not prohibit the rehabilitative treatment of offenders as long as it remains incidental to but does not replace retributive justice. Yet attempts to rehabilitate often do, and even were meant to, replace retribution.[1] In the nature of the matter, "correction" requires individualized, i.e., different, treatment for each criminal, treatment linked to him rather than to his crime, whereas retribution and deterrence are linked to the act not the actor, and unlike rehabilitation require the same punishment for the same offense. Thus, rehabilitative treatment unless incidental to retribution—unless it neither decreases nor increases the punishment imposed for the offense—tends to be inconsistent with justice, whereas deterrence is not.

The utilitarian theories, which stress the correction of offenders, have found wide acceptance in modern times. Thus, the late Mr. Justice Black wrote: "Retribution is no longer the dominant objective of criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." [2] The idea that "punishment" is primarily for rehabilitation is:

. . . subscribed to by many if not most psychiatrists, by most practioners of the behavioral sciences who think about problems of the criminal law, by the overwhelming majority of "professionalized" workers in the correctional field—probation officers, case workers, and the like—and by an increasing number of those popular writers who perform the extremely important function of translating the ideas of the intellectually advanced into current popular terms. Its catchwords—"treat the criminal, not the crime," "punishment is obsolete," "criminals are sick," and the like—are standard fare in large circulation magazines, and show that the popular culture has absorbed, even if it has not yielded to, the behavioral approach to crime.

Concerned with the future personality and conduct of the offender, the "behavioral approach" replaces the justice model of punishment with a therapeutic one. Hence Barbara Wootton urges that "the formal distinction between prison and hospital [be] . . . eventually obliterated altogether." [3] A similar view is expressed in a letter to the *New York Times* (Dec. 27, 1973): "We on the left should be careful not to violate the principles we preach, among

---

[8] Society obviously needs less protection from one who is at the end of his criminal career. Therefore, we can do with fewer years of incapacitation. Moreover, it is likely that a year in prison at 40 is subjectively a greater loss than a year in prison at 20.

[1] The only criminal code that acknowledges rehabilitation of the offender—individualized treatment—substantially unaffected by the gravity of the crime as its major goal is that of Greenland. However, Greenland is an exception also owing to historical traditions and the nature of its society.

[2] Dissenting in *Carlson* v. *Landon*, 342 U.S. 254, 547 (1952).

[3] Samuel Butler (in *Erewhon*) anticipated (or produced) Lady Wootton by suggesting that criminals be hospitalized. However, his hospitals prescribed flogging.

which are the following: Acting in revenge is wrong . . . prisons, if they do not reform, should be closed." The writer rejects punishment (which he confuses with revenge) and believes that if society cannot rehabilitate convicts, it must release them. He does not believe incapacitation or deterrence useful. He is joined by renowned philosophers such as Richard H. Brandt, who proposes:

". . . if an accused were adjudged guilty, decisions about his treatment would then be in the hands of the experts, who would determine what treatment was called for and when the individual was ready for return to normal social living . . . it would be criminal-centered treatment, not crime-centered treatment. [For] it is doubtful whether threats of punishment have as much deterrent value as is often supposed."

Because they intend to meet the individual's needs, and concentrate on helping rather than punishing him, the future-oriented treatment theories often are regarded as more rational, charitable, and humanitarian than retributive theories, which punish past acts according to legal definitions and prescriptions and ignore individual rehabilitative "needs." What could be more humane than to deal with everyone according to his individual "needs"? To forget about guilt and the past, and to try to cure or correct for a better future? To help the criminal rather than to punish the crime? What could be more rational?[4]

One can argue that the justice model is more just than the therapeutic model, but the argument may amount to a disguised definition. It is more interesting to ask which model is ultimately more helpful to the offender and to society. With regard to the offender, the charity of the therapeutic model is suspect because it is compulsory. Convicts do not volunteer to be corrected. Most do not feel sick at all and do not want to be cured. They are held in a correctional institution to be treated against their will.

In the justice model the convict, punished according to desert, leaves when he has served his time, as legally prescribed for the crime for which he was convicted. He does not depend on the approval or disapproval of his jailers. The correctional or therapeutic model implies that he will leave when his needs have been met. The needs, however, are not those he feels but those he is felt to have. Experts and prison authorities decide on them, and on the length of his stay. The "needs" they attribute to the convict derive from their own notions about proper behavior and lifestyle. At best, experts define the convict's needs according to their reading of the significance of his prison behavior (or, sometimes, of his way of life) in predicting his conduct when released. If he is held because bad behavior is predicted, he is, as it were, made to suffer in advance for his expected future acts. Perhaps these social precautions can be justified as such, but not as punishment nor as a treatment. For treatment in the medical sense surely is in the convict patient's interest as he defines it, and punishment refers to past offenses only.

Justice, at any rate, becomes irrelevant. There can be no "just correction," no "just therapy." Correction or treatment can be effective or ineffective, needed or not, but neither can be just or unjust any more than an appendectomy can be, or Vitamin C. The link between guilt and the punishment deserved by it—justice—is severed and replaced by a link between therapy and expected future conduct. Dr. Karl Menninger acknowledges the therapeutic view when he writes: "The very word 'justice' irritates scientists."[5]

To be an involuntary patient and to depend on the uncertain judgment even of competent and well-intentioned authorities is also demeaning. The correctional model might well mean that offenders are released when they are sufficiently submissive—when they get along with prison authorities, including psychiatrists

---

[4] Strictly speaking, the humanitarian motive must be distinguished from the corrective-therapeutic one. The latter is instrumental and in principle could lead to painful or cruel, as well as humane, measures, depending on what is effective, whereas humane treatment is a moral precept, justified not by effects but by its intrinsic moral rightness. In practice, however, "humane" treatment is usually justified by the expected therapeutic effects.

[5] Those who originally sponsored rehabilitation as the main goal of legal sanctions against law violators are beginning to recoil having seen the consequences. Thus, *Struggle for Justice, A Report Prepared for the American Friend's Service Committee* (Hill and Wang, 1971), although still encumbered with many cliches, suggests that at least some among the Quakers to whom we owe the rehabilitative emphasis have seen the light. *Partial Justice* (Alfred A. Knopf, 1974) by Willard Gaylin, a psychoanalyst, reports on interviews with some forty federal judges which led Gaylin to conclude that sentencing becomes capricious when discretionary, more influenced by the divergent life experience of

(Continued)

and social workers. David Greenberg's "The desire to help when coupled with a desire to control is totalitarian," exaggerates only a little. Furthermore, psychiatry is not an exact science. Hence, capricious detention for involuntary treatment is hard to distinguish from detention based on a *bona fide* diagnosis. Once the therapeutic model replaces a definite punishment with indefinite, involuntary "correction," it may turn out to be less humane, as well as less just than the retributive model.

Is It Effective?

Rehabilitative treatment has not been shown to be effective in reducing recidivism: the recidivism rates of those treated in different programs by different methods do not differ from the rates of those not treated at all, whether in the U.S. or elsewhere. Attempts to rehabilitate need not be given up, although the result so far is discouraging. A way may yet be found. And even if it does not portend rehabilitation, humane treatment is always justified for its own sake, as is justice. However, given the evidence we now have we should no longer regard rehabilitation as a maor purpose to which punishment is suited. Retribution, deterrence, and incapacitation should have priority. Let me quote from an extensive report to substantiate the above.

With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.

The survey was limited to the rehabilitation methods generally in use during the period from 1945 through 1967, including small caseloads on probation or parole, intensive supervision in specialized caseloads, early releases from confinement, variation in sentence length and degree of custody, casework and individual counseling, psychotherapy, group therapies of various kinds, so-called "milieu therapy," halfway houses, pre-release guidance centers, tranquilizing drugs, plastic surgery, and other factors. Methods not evaluated included work release, methadone maintenance, recent forms of so-called "behavior modification," and what have come to be called diversion methods.

The weight of the evidence is that the addition of treatment elements ("programs" of the kind evaluated) to the system has no appreciable effect in changing offenders into non-offenders.

Those placed on probation do no worse than those imprisoned and may do slightly better. Small caseloads on probation do no better than standard caseloads. Probation supervision (as currently practiced) is not an effective "treatment," i.e., does not substantially improve the behavior of those supervised over what would be expected. A large number of treatment programs took place outside prison. The burden of evidence is not encouraging.

Prof. Ulla Bondeson found in Sweden "that different methods of confinement do not create any different effects." Bondeson "compared four different types of correctional institutions; Christiansen, Moe & Sehnholt (1972) compared two different types of imprisonment; and Uusitalo (1972) compared open labor camps with closed prisons. The effects did not differ." Bondeson concludes: "Despite shorter terms of confinement, more open institutions, and more treatment resources given both during and after institutionalization, the Swedish correctional institution seems to produce recidivism rates as high as the American. . . ." (If drunken driving is excluded, the recidivism rates still remain as high as in the U.S.)

These results are not unknown, but unceasing efforts are being made to ignore or deny them. Thus, Dr. Seymour L. Halleck still insists that "rehabilitation is a more important goal than punishment." And the following revealing note appeared in *New York* magazine:

Theoretically, "work release" contributes to the rehabilitation of prison inmates by freeing them for outside jobs under certain conditions. The *New York*

(Continued)

each judge than by the crime or the criminal. Gaylin might have spared himself the interviews by looking at any of the classical texts on criminal law. One reason Bentham advocated uniform sentencing standards determined by the crime and independent of the individual criminal was that sentences tailored to the criminal would necessarily be unequal and never above the suspicions of bias. Furthermore, he knew that the sentence would depend not on the criminal but on the judge who evaluates him. It would be unavoidably capricious. Yet physicians, psychiatrists, and psychoanalysts have long advocated discretionary procedures for the sake of rehabilitation. It is good that some of them finally have come to regret their advocacy. Gaylin concluded: "We must mechanize justice because we are not yet up to the love and understanding that is essential if discreation is to serve justice." "Not yet"– There is no reason to believe that we will ever be.

Post, for example . . . editorializes that "the repeater rate has been significantly cut; therefore so has crime." Nothing about the program could be further from the truth.

. . . More than one out of four in the program escape, a substantial number cause so much trouble that they're returned to prison; the recidivism rate for the program's "graduates" is so high that when it is combined with the other statistics, the probability is that "work release" participants are more likely to commit future crimes than the average prisoner released directly to the streets.

A large bureaucracy of professionals and quasi-professionals has gained a vested interest in "rehabilitative" activities on which its power, prestige, and income depend. Hence, the pressures for ever more "rehabilitation."

WHY REHABILITATION DOES NOT WORK

There are three major reasons for the failure of rehabilitation, even under favorable circumstances. In unfavorable circumstances prison may lead to criminalization more readily than to rehabilitation.

1. Only diseases can be cured by treatment. Few offenders are sick. There is no convincing independent evidence that convicts are more sick than non-convicts.[6] Those who feel that all offenders suffer from some disorder to be corrected by treatment confuse their moral disapproval with a clinical diagnosis. Theoretically, it seems likely that many offenses are rational acts on the part of the offender; to minimize offenses one must change not the offender but the cost-benefit ratios that cause offenses to be rational.

2. Even the offenders who are clinically sick—some certainly are—are not likely to be rehabilitated coercively. As Norval Morris puts it, "facilitated change" must replace "coerced cure"—i.e., the comforts of the prisoner and the duration of his incarceration must be entirely independent of his acceptance of a treatment program, which should be addressed only to those who want it. However, Prof. Morris has given no evidence of an available program that, if uncoerced, would be successful. It is one thing to point out that coerced rehabilitation does not work; it is quite another to show that if uncoerced it does work.

3. Rehabilitative treatment is necessarily ineffective, unless it follows or is part of independent retributive punishment for another reason as well. When a person decides *sua sponte* to undergo psychotherapy (or for that matter medical treatment), he does so because he is dissatisfied either with his state of mind—e.g., he may suffer from anxiety—or because he is dissatisfied with his own behavior. However dimly, he realizes that he does not achieve what he intends to or succeed in the relationships or careers he wants because he defeats himself, perhaps because of an unconscious conflict. He seeks treatment to help him decide what he wants and to help him achieve it.

In contrast, the offender's intention is defeated by his own behavior only inasmuch as it is punished. Otherwise he need have no reason for dissatisfaction. It is the punishment that makes his behavior unrewarding and thus, perhaps, causes him to wish to change it. Unless his offense is punished, his behavior need not be self-defeating or irrational; therefore he has no reason to desire the change that the psychiatrist might have helped him make had he desired it. To be a successful thief may be immoral, but it is not self-defeating or irrational. To be an unsuccessful one may be. A criminal becomes unsuccessful inasmuch as he is punished. Rehabilitative efforts make sense only if offenses are made unrewarding, selfdefeating, irrational, and ultimately painful. Only punishment can achieve this.[7] Hence rehabilitation can follow, but it cannot take the place of punishment.

Senator HATCH. Thank you for being with us.

Mr. VAN DEN HAAG. Thank you, Mr. Chairman.

Senator HATCH. Our last witness this morning will be Dean Don M. Gottfredson of the School of Criminal Justice, Rutgers University at Newark, N.J.

Welcome to our committee.

---

[6] See Chapter XI.

[7] To be sure, there are offenders who offend because they unconsciously seek punishment. There is evidence for the existence of such offenders, but none to indicate that their number is significant or that the unconscious need for punishment is decisive in producing their offenses.

STATEMENT OF DON M. GOTTFREDSON, DEAN, SCHOOL OF CRIMINAL JUSTICE, RUTGERS UNIVERSITY, NEWARK, N.Y.

Mr. GOTTFREDSON. Thank you, Mr. Chairman.

I am very pleased to be here. I will summarize my prepared statement.

I have indicated in my prepared statement some of my credentials. The principle one, I think, that brings me here is some involvement with others in research on the topic of guidelines for paroling decisions and sentencing decisions.

Certainly I do appreciate the opportunity to testify about those parts of the bill that concern sentencing. I mainly wish to support the concept of the sentencing commission and adoption of a sentencing guideline system.

I would also like to offer some suggestions that I hope you will consider toward a more complete implementation of this concept.

The concept of sentencing guidelines as incorporated in this bill is derived from developments in the U.S. Parole Commission. About seven years ago, there was considerable criticism of that Commission, then the U.S. Parole Board, including arguments, as usual, that its decision-making practices were arbitrary, capricious, and disparate.

At about that time, a study began in close collaboration with the members of the U.S. Parole Board that developed as part of that research the concept of guidelines as now used throughout the U.S. Parole Board system.

I have summarized the nature of those guidelines in the written statement; but I will skip over that in the interest of time. I would like to urge the committee and committee staff to look closely at that experience in the U.S. Parole Board. I do think it provides a very useful model, all of the elements of which are not immediately apparent without a fairly thoughtful look at that experience.

A major advantage of this system is that its development requires the explicit description of paroling policy. Hence, it is open, public, and available for public review and criticism.

Indeed, a central feature of this system is its provision for repeated review and criticism. This allows for—and indeed invites—subjecting parole decision-making criteria now in use to rigorous scrutiny with respect to both the moral and effectiveness issues raised. The moral issues then may be debated more readily; the effectiveness issues may be tested.

I should have mentioned that these studies of parole and sentencing were done with assistance from the Law Enforcement Assistance Administration.

A similar program is underway with a number of State paroling authorities and is nearly completed. Seven state parole boards have been involved in that. I could mention quickly that, in four of those, giudelines are now being implemented. Those are the states of North Carolina, Missouri, Louisiana, and Virginia. Also, the paroling authority in Minnesota has adopted and is using a very similar guidelines model.

The concept that a paroling authority or a judiciary may develop guidelines for use in their decision-making is in conflict with the be-

lief that these decision makers require only the individual wisdom of the board member or judge whose determination should be in no way restricted.

That is, it is inconsistent with the idea of complete, unbridled discretion for each board member or judge. Similarly, the concept of guidelines conflicts with the belief that paroling authorities or judges should exercise no discretion in determining the timing or mode or release from prison, the length of stay in confinement, or the choice of alternative sentences.

Thus, two quite different viewpoints are simultaneously rejected as a beginning point for the guidelines concept incorporated in the parole guidelines and in the Criminal Code Reform Act of 1977.

These are the belief, on the one hand, that sentences should be entirely fixed by statute, leaving no room to maneuver on the part of the judge or paroling authority; and, on the other hand, the belief that the sentence should be wholly indeterminate, leaving it to expert authority.

The former viewpoint generally would be associated with those who argue for mandatory sentencing, with sentences fixed by the Congress or legislatures; while the latter view would be the extreme limit of a treatment philosophy undergirding the concept of indeterminate sentencing.

If discretion in sentencing is not to be wholly eliminated, then some mechanism for its structure and control and for explicit statement of sentencing policy is needed.

Such a system has been demonstrated to be feasible, not only in the case of parole decisions, but in sentencing as well. Similar guidelines now have been developed and found to be feasible in a study completed in collaboration with several state courts. A guidelines model is briefly described in my statement; it is in use in the courts of Denver, Colorado.

On the basis of this experience, I believe the establishment of a sentencing commission and the development of guidelines as proposed in the bill to be feasible and to offer the potential for markedly increased equity in sentencing. I would like to suggest, however, some specific changes in the bill.

In paragraph 2301, concerning the sentence of imprisonment, in subparagraph C, about authorized terms of parole ineligibility, the imprisonment that may be required to be served before eligibility for parole is any term found appropriate by the court in the light of the provisions of the offense class categorization, although no term of parole ineligibility may extend into the last one-tenth of the sentence imposed.

This has a potential for markedly increasing time to be served in confinement, exacerbating problems of prison overcrowding by increasing sanctions in ways not apparently intended by the authors of the bill. This provision could very radically reduce the range of discretion of the Parole Commission, virtually abolishing parole.

There is, of course, as we have seen yesterday and today, a continuing national debate on this topic. Parole boards continued to be criticized on one of three grounds: either on procedural grounds, on the uncertainty issue, or on effectiveness issues.

I would like to point out that the guidelines model at least partially addresses the first two of the principal concerns.

The general issue of parole abolishment is one that should be addressed and resolved by the Congress after full study of the potential consequences. It should not be resolved by a sentencing commission such as proposed. That is, the question of parole retention or abolishment is a critical structural issue that will affect the entire criminal justice system, not just sentencing.

Parole decisions occupy a keystone position in the process. Changes in the structure may be expected to affect prosecution decisions, including plea bargaining, and prisons in very significant ways.

There are several points in the bill—and I have mentioned these in a little bit more detail in the written statement—that seem to me inconsistent in the sense that they do not reflect a full implementation of the guidelines model proposed as a kind of centerpiece in this bill.

I have reference, for example, to the section that discusses pre-trial release. The general decision problem is the same in that circumstance as in sentencing. There seems to be no reason that guidelines for pre-trial release cannot be developed providing a specific policy for use in determining a release before trial.

Similarly, in the section discussing juvenile delinquency, some general parameters to the initial decision as to detention of juveniles are listed. Again, it would seem desirable to, by some means, develop guidelines to structure and control this important decision.

Similarly, at the point in which the youth has been adjudicated to be delinquent, alternative dispositions are noted; but it is not specified that guidelines for this decision shall be developed and promulgated.

If increased equity in sentencing of adults is desired, surely we wish the same for children. These would be a question about the appropriate body to develop and promulgate these guidelines. I do not have a recommendation about that.

When the consideration of a prisoner for release on parole is considered, it seems to me that the relation between the present parole commission and the sentencing commission is rather unclear.

Surely, as we have seen, there will be those who will argue that, with a development and implementation of the sentencing commission and guidelines model, the parole commission and the parole function can be eliminated. I believe that this would be unwise and that the present parole commission structure should be retained.

The sentencing guidelines can reduce unwarranted disparity, but they cannot ensure its elimination. With nearly 400 judges interpreting the use of the guidelines developed, considerable room for such disparity remains. Envisioned as a two-step process with both the judiciary and the paroling authority operating under explicit policy, a coordinated increase in sentencing equity can be foreseen.

The broad limits can be set by the Congress. The sentencing guidelines can somewhat limit and better control the exercise of discretion by the judges. A smaller body operating also under explicit statements of policy provided by the guidelines can, in the end, best determine the actual time to be served in prison.

I briefly discuss in the prepared statement the composition of the committee. My comments are very similar to those of Judge Frankel in

terms of the general issue that sentencing concerns the whole criminal justice system. I propose, also, the presidential appointment process.

In summary, I went to say mainly that it is a feasible concept. It is demonstrably feasible by the experience in the United States Parole Board, other parole boards in the United States, and in the one sentencing study that I mentioned.

I would like to congratulate Senators McClellan and Kennedy for inclusion of that concept in the bill and to congratulate the committee for its attention to these important issues.

I thank you again for the chance to be with you, sir.

Senator HATCH. Thank you.

Your prepared statement will be made a part of the record.

[Material follows:]

TESTIMONY OF DON M. GOTTFREDSON, BEFORE THE COMMITTEE ON THE JUDICIARY, JUNE 8, 1977

Mr. Chairman and members of the committee, my name is Don M. Gottfredson. I am the Dean of the School of Criminal Justice at Rutgers University in Newark, New Jersey. Previously, I was Director of the Research Center of the National Council on Crime and Delinquency at Davis, California. I have been a consultant, advisor, or member of various national and state commissions or task forces on delinquency, crime and criminal justice, am Chairman of the New Jersey Correctional Master Plan Policy Council and a Fellow of the National Center for Juvenile Justice of the National Council of Juvenile Court Judges. With others I have done research on the topic of guidelines for parole and sentencing decisions. In this testimony, I speak only for myself.

The opportunity of testifying about the aspects of S.1437 that concern sentencing is appreciated. I mainly wish to support the concept of the sentencing commission and the adoption of a sentencing guideline system. I would like also to offer some suggestions that I hope you will consider toward a more complete implementation of this concept.

The concept of sentencing guidelines as incorporated in this bill is derived from developments in the United States Parole Commission. About seven years ago there was considerable criticism of that Commission (then the United States Board of Parole) including arguments that its decision-making practices were arbitrary, capricious and disparate. The Board began a pilot project in 1972 that included hearings by panels of hearing examiners, the providing of written reasons in cases of parole denial, an administrative review process, and the use of guidelines for decision-making. Previously, the Board had no written general policy providing a frame-work within which its individual case decisions were made. The decision-making procedures developed were expanded in October, 1974 to all federal parole decisions.

The guidelines developed by study of the decisions of the Board in the prior year, were designed to structure and control the Board's discretion. They were developed in close collaboration with the Board in a study of parole decision-making (funded by the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration) for which I was responsible together with Professor Leslie T. Wilkins of the School of Criminal Justice at the State University of New York in Albany.[1] These guidelines were based on the research finding that the main considerations of the Board were for the seriousness of the offense, the risk of recidivism, if paroled, and the inmates institutional behavior.

The guidelines now used by the Parole Commission are in the form of a two dimensional chart. On one dimension, the seriousness of the offender's commitment offense is considered. Six categories of offense seriousness are designated, and for each the Commission has listed examples of common offense behaviors for that category, arrived at by consensus judgments of the Commission

[1] Gottfredson, Don M., Wilkins, Leslie T., Hoffman, Peter B., and Singer, Susan M., *The Utilization of Experience in Parole Decision-Making: Summary Report*, Washington, D.C.: U.S. Government Printing Office, November, 1974.

Members. On the other dimension, four categories of parole prognosis or "risk" (of parole violation) are defined. These classifications of offenders were established by an empirically developed parole prediction device, called a "salient factor score," used as an aid in making prognosis assessments. For each combination of offense seriousness category and offender (salient factor score) class, a decision range is provided. This decision range specifies the customary paroling policy in terms of the number of months to be served before release (subject to the limitations of the judicially imposed sentence) assuming that the prisoner has demonstrated good institutional behavior. After the offender is classified according to both offense seriousness and risk of parole violation if released, the parole board member or hearing examiner checks the table to determine the expected decision. The guidelines define the usual policy. A range of months is used in order to allow for some variation within broad seriousness and risk categories. Should the decision-maker wish to make the decision outside the expected range, then he or she is required to specify the factors that made that particular case unusual (such as particular aggravating or mitigating circumstances, unusually good or poor institutional adjustment, or credit for time spent in a sentence of another jurisdiction). Decisions outside the specified guideline ranges are not only permitted but expected; and they are taken in about twenty percent of the cases, with specific reasons given.

Since it was thought that use of the guidelines could induce rigidity, just as the absence of guidelines could produce disparity, the Commission adopted two basic procedures for examining, modifying and updating them. First, the Commission may modify any guideline category at any time. Second, at six month intervals the Board is given feedback from the decision-making of the previous six months and examines each category to see whether the median time served has changed significantly. At these policy meetings, feedback is provided the Board concerning the percentage of decisions falling outside each guideline category and the reasons given for these decisions. This serves two purposes: the reasons for the deviations from the guidelines may be examined to consider their appropriateness, and the percentages of decisions within and outside the guidelines for each category can be evaluated to determine whether the discretion range for the category is appropriate. That is, too high a percentage of decisions outside the guideline range without adequate explanation may indicate either that a wider range is thought necessary or that the hearing panels are inappropriately exceeding their discretionary limits. On the other hand, a very high percentage of decisions within the guidelines may indicate a mechanical application with excessive rigidity. The guidelines themselves cannot provide answers to these questions of policy. But by articulating the weights given to the major criteria considered, explicit decision guidelines permit assessment of the rationality and appropriateness of parole board policy. In individual cases they structure and control discretion, thus strengthening equity, without eliminating that degree of discretion thought necessary.

A major advantage of this system is that its development requires the explicit description of paroling policy. Hence, it is open, public, and available for public review and criticism. Indeed, a central feature of the system is its provision for repeated review and revision. This allows for, and indeed invites, subjecting parole decision-making criteria now in use to rigorous scrutiny with respect to both the moral and effectiveness issues raised. The moral issues may be debated more readily; the effectiveness issues can be tested. Recent legislation (Public Law 94–233) has codified this administratively developed system (effective May 14, 1976).

Similar work also with Law Enforcement Assistance Administration support has been undertaken recently in a number of state paroling authorities; these are the parole boards in Washington State, The California Youth Authority, New Jersey, Virginia, North Carolina, Missouri and Louisiana. In the latter four state parole boards guidelines now are being implemented. Also, the paroling authority in Minnesota has developed and is using similar guidelines.

The concept that a paroling authority or the judiciary may develop guidelines for use in their decision-making processes is in conflict with the belief that these decision-makers require only the individual wisdom of the board member or judge whose determination should be in no way restricted. That is, it is inconsistent with the idea of complete unbridled discretion for each board member or judge in determination of the decision outcome. Similarly, the

concept of guidelines conflicts with the belief that paroling authorities or judges should exercise *no* discretion in determining the timing of or mode of release from prison, the length of stay in confinement, or the choice of alternative sentences. Thus, two quite different viewpoints are simultaneously rejected as a beginning point for the guidelines concept incorporated in the parole guidelines and in the Criminal Code Reform Act of 1977. These are the belief on one hand that sentences should be entirely fixed by statute, leaving no room to maneuver on the part of the judge or the paroling authority, and on the other hand, the belief that the sentence should be wholly indeterminate, leaving it to expert authority. The former viewpoint generally would be associated with those who argue for mandatory sentencing with sentences fixed by the Congress or legislatures, while the latter view would be the extreme limit of a treatment philosophy undergirding the concept of indeterminate sentencing. If discretion in sentencing is not to be wholly eliminated, then some mechanism for its structure and control and for explicit statement of sentencing policy is desirable.

Such a system has been demonstrated to be feasible not only in the case of parole decisions, but in sentencing as well. Similar guidelines now have been developed and found to be feasible in a study completed in collaboration with several state courts.[3] Following similar procedures and working in collaboration with representatives of the Denver, Colorado Court, the Vermont State Courts, the Polk County Court, and the Essex County, Newark, New Jersey Court, analogous guidelines were developed and are now being implemented in the Denver Court. These guideline models include, for each class of offense, classifications of seriousness (on the one hand) and of the offender (with respect to prior convictions, legal status, and other items) on the other. A report of this study includes more detail about the development and use of these guidelines.

On the basis of this experience, I believe the establishment of a sentencing commission and the development of guidelines as proposed in S.1437 to be feasible and to offer the potential for markedly increased equity in sentencing. I would like to suggest, however, some specific changes in the bill.

In paragraph 2006, concerning orders of restitution, it would be preferable that line 11 read "in addition to *or instead of*" the sentence that is imposed. This change (i.e., adding "instead of") would encourage judges to use restitution in appropriate instances as an alternative to confinement rather than always as an addition to other sentences imposed (as now implied).

In paragraph 2301, concerning the sentence of imprisonment, in sub-paragraph (C) concerning authorized terms of parole ineligibility, the imprisonment that may be required to be served before eligibility for parole is any term found appropriate by the court in the light of the provisions of the offense class categorization, although no term of parole ineligibility may extend into the last one-tenth of the sentence imposed. This has a potential for markedly increasing time to be served in confinement, exacerbating problems of prison over-crowding by increasing sanctions in ways not apparently intended by the authors of the bill. This provision could very radically reduce the range of discretion of the Parole Commission, virtually abolishing parole. There is, of course, a continuing national debate on this topic. Parole boards continue to be criticized on three general grounds. These have to do with *procedures* (including issues of fairness, equity and due process concerns), with adverse effects of *uncertainty*, and with the issue of *effectiveness* in regard to criminal justice goals. The first two issues are at least partially addressed by paroling guidelines. The general issue of parole abolishment is one that should be addressed and resolved by the Congress after full study of the potential consequences. It should not be resolved by a sentencing commission such as proposed. That is, the question of parole retention or abolishment is a critical structural issue that will affect the entire criminal justice system—not just sentencing. Parole decisions occupy a keystone position in the process; and changes in the structure may be expected to affect prosecution decisions (including plea bargaining) and prisons in very significant ways.

---

[3] Wilkins, Leslie T., Kress, Jack M., Gottfredson, Don M., Calpin, Joseph C., and Gelman, Arthur M., *Sentencing Guidelines: Structuring Judicial Discretion*. Albany, New York: Criminal Justice Research Center, October, 1976. See also, Kress, Jack M., Wilkins, Leslie T., and Gottfredson, Don M., "Is the End of Judicial Sentencing in Sight?" *Judicature*, 60, 5, December, 1976, 216–222.

In paragraph 2302, concerning imposition of a sentence of imprisonment, and sub-paragraph (C) it is indicated that the court "for extraordinary and compelling reasons" may reduce imprisonment to the time that the defendent has served; it would seem preferable that this read "the court, for *stated* extraordinary and compelling reasons . . ."

In Chapter 35, concerning release and confinement pending judicial proceedings, release pending trial in a non-capital case is discussed in paragraph 3502. Although release conditions are described and factors to be taken account in determining release are presented generally, it is not indicated that guidelines for these release decisions are to be developed by the sentencing commission. The general decision problem is the same as in sentencing; and there seems to be no reason that guidelines for pre-trial release cannot be developed, providing a specific policy for use in determining release before trial. For example, guidelines structured according to the seriousness of the alleged offense and the liklihood of the defendant's appearance for trial could be developed and used to increase equity in these decisions as well. Whether or not such guidelines should be developed by the sentencing commission or by another body is an issue that should be explored.

Similarly, in paragraph 3603, juvenile delinquency proceedings are discussed. In determining whether allegedly delinquent youth taken into custody shall be detained or released, general criteria are listed. Again, it would seem desirable to develop guidelines to structure and control this important decision. In sub-paragraph (E), concerning the disposition when the court finds a youth to be a juvenile delinquent, alternative dispositions are noted; but it is not specified that guidelines for this decision shall be developed and promulgated by the sentencing commission. If increased equity in sentencing of adults is desired, surely we wish the same for children. The appropriate body for determining such guidelines is again an important question.

In paragraph 3831, the consideration of a prisoner for release on parole is considered. Although the Parole Commission and its recent reforms in parole decision-making would be retained, the relation of that body to the sentencing commission seems unclear. Surely there will be those who argue that with the Criminal Code Reform Act of 1977 and creation of a sentencing commission, the parole function may be eliminated. I believe that this would be unwise and that the present Parole Commission structure should be retained. The sentencing guidelines can reduce unwarranted disparity, but they cannot ensure its elimination. With nearly 400 federal judges interpreting the use of the guidelines developed and promulgated by the sentencing commission, considerable room for such disparity remains. Envisioned as a two-step process, with both the judiciary and the paroling authority operating under explicit policies, a coordinated increase in sentencing equity can be foreseen. The broad limits can be set by the Congress, the sentencing guidelines can somewhat limit and better control the exercise of discretion by the judges, and a smaller body, operating also under explicit statements of policy provided by the guidelines, can in the end best determine the actual time to be served in prison. If the Parole Commission were to be eliminated, it probably would be found necessary to invent something like it within the Bureau of Prisons, for example, to determine such releases as provided for in paragraph 3822, concerning the temporary release of the prisoner for short terms or for participation in training or educational programs in a community or for work.

In paragraph 991, the United States Sentencing Commission is established. The bill is silent on the qualifications of the nine members to be designated by the Judicial Conference of the United States to serve on the sentencing commission. It seems highly desirable that a number of these persons should be those who generally are involved in day-to-day sentencing or paroling decisions. But sentencing is not a matter of concern to judges alone. It may be wise that the commission be broadened by requiring the appointment of a small number of additional members representing other aspects of the criminal justice system, including the areas of prosecution and corrections. Such appointments could be made by the President of the United States, with the advice and consent of the Senate.

In sub-paragraph (F) of paragraph 994 concerning the duties of the commission, it is indicated that the sentencing commission "shall promulgate and distribute to the United States Parole Commission" guidelines . . . for

use . . . in determining whether to parole a prisoner and in determining the length of the term and conditions of parole. If this section stands, it would seem desirable to have one or more members of the parole commission on the sentencing commission. It may be preferable to simply leave the present parole commission structure intact.

Two aspects of the powers of the commission, spelled out in paragraph 995, deserve rather to be listed as duties of that commission in paragraph 994. Particularly, it should be the duty of the commission to monitor the use of guidelines, including the giving of reasons outside the ranges specified, and the conducting of regular reviews, in order to modify the policy statements as needed. No matter how excellent the guidelines initially developed may be, as changes occur in the environment in which they are imbedded, they will become out of date. The guidelines structure probably should not be considered if it does not have built into it a system for the guidelines modification. Thus, it is necessary that the sentencing commission be admonished to invent the guidelines system as an evolutionary process. To be most useful, the guidelines procedures themselves ought to be continuously under review and the results of such review must determine modifications in the original design of the guidelines system. The guidelines system may be designed, but there must also be designed a system to continuously redesign the design. Similarly, the commission is empowered, in paragraph 995, to establish a research and development program and to conduct training and short term instruction for judicial and probation personnel and others. These functions too should be listed as duties.

In summary, the concept of decision guidelines has been demonstrated to be feasible in the area of parole and in at least one state court. Such guidelines have considerable potential for formulation of a consistent general sentencing policy. By articulating the weights given to the main criteria considered, it can allow interested publics to assess the rationality and appropriateness of the policy set out by the judiciary and paroling authorities. In individual case decision-making, the method provides for structuring and controlling discretion without eliminating it and thereby holds considerable promise for sentencing improvement particularly with respect to issues of fairness or equity.

I would like to congratulate Senators McClellan and Kennedy for inclusion of this concept in S.1437 and congratulate the committee for its attention to the bill as a whole including this needed and promising sentencing reform. I urge you to include the sentencing commission and guidelines concept in the final version, with the modifications suggested. I very much appreciated the opportunity to testify. Thank you.

Senator HATCH. You, of course, have extensive experience in the practical difficulties of formulating and implementing guidelines. I think you have described the proven feasibility of sentencing guidelines in other jurisdictions.

Do you think the guidelines contemplated by this bill can, in fact, be promulgated and used by the Federal courts?

Mr. GOTTFREDSON. I do believe it is a feasible thing. I believe it is a complex, difficult task.

I note with some trepidation the 24 months at the end of the bill when this would take effect.

I believe that could be realistic. I think you would have to insure adequate funding for that exercise. I believe that the best development of those guidelines, no matter what the composition of the sentencing commission, will necessarily involve active collaboration by judges in that activity. It will involve a good bit of educational work and training about the concept with judges. It will require quite a lot of data collection and analysis.

I think it is conceivable that good progress can be made during that 2-year period. It is at least conceptually possible that that could be sufficient time.

If the committee and the Congress were to take me quite seriously in the other recommendations about other parts of the criminal justice system and the juvenile justice system, I think that becomes considerably complex. I think that probably it would be necessary to embark upon separate studies in each of those areas to determine how those guidelines ought to be developed and used.

Senator HATCH. Thank you again. We appreciate your appearance and your testimony here today.

We will recess these hearings until 10 a.m. tomorrow.

[Whereupon, at 11:55 a.m., the meeting was recessed.]

HEARING ON REFORM OF THE FEDERAL CRIMINAL LAWS

THURSDAY, JUNE 9, 1977

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m. in room 2228, Dirksen Senate Office Building, Hon. Orrin Hatch (acting chairman of the subcommittee) presiding.

Present: Senator Thurmond.

Staff present: Paul C. Summitt, chief counsel; D. Eric Hultman, minority counsel; Paul H. Robinson, counsel; Michael M. Hunter, legislative counsel to Senator Hatch; and Mabel A. Downey, chief clerk.

Senator HATCH [acting chairman]. The subcommittee hearing will come to order.

We have had exceptional witnesses this week in what we consider to be extremely urgent and important changes in the criminal laws of the United States of America, in particular S. 1437 and other proposed legislation we are considering at this time.

We are particularly honored to have another distinguished group of witnesses this morning to testify before the subcommittee.

We will begin this morning with Mr. Harold D. Koffsky, a consultant to the Committee on the Administration of the Criminal Law, who will introduce Judge Zirpoli's statement.

We will then hear from Judge Gerald B. Tjoflat, chairman of the Committee on the Administration of the Probation System, U.S. Court of Appeals for the Fifth Circuit.

Following him, we will call on Judge William H. Webster, of the Advisory Committee on Criminal Rules of the U.S. Court of Appeals for the Eighth Circuit.

We are very honored to have these men with us this morning, representing the Judicial Conference of the United States.

Mr. Koffsky?

STATEMENT OF HON. ALFONSO J. ZIRPOLI, CHAIRMAN, COMMITTEE ON THE ADMINISTRATION OF THE CRIMINAL LAW, JUDICIAL CONFERENCE OF THE UNITED STATES AND JUDGE, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, REPRESENTED BY HAROLD D. KOFFSKY, CONSULTANT TO THE COMMITTEE ON THE ADMINISTRATION OF THE CRIMINAL LAW, JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. KOFFSKY. Thank you, Senator.

Judge Zirpoli has asked me to come up here and present his statement for the record.

Senator HATCH. Without objection, it will be entered into the record at the conclusion of your testimony.

Mr. KOFFSKY. Judge Zirpoli wrote the chairman of the subcommittee expressing his extreme regrets at not being able to be here but explained that his judicial commitments prevented him from doing so and, also, that anything he might say would reiterate the statements of Judge Tjoflat and Judge Webster.

He endorses everything they are going to say. Up until now, he has been the spokesman for the Judicial Conference on S. 1437 and of predecessors. But these other committees have particular expertness in the field, and he felt that it would save the time of this committee, if he deferred to their statements.

Senator HATCH. Thank you, Mr. Koffsky.

[Material follows:]

STATEMENT OF ALFONSO J. ZIRPOLI, SENIOR UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF CALIFORNIA

Mr. Chairman, I am Senior United States District Judge Alfonso J. Zirpoli, Chairman of the Committee on the Administration of the Criminal Law of the Judicial Conference of the United States. As such representative of the Judicial Conference, I wish to thank the Chairman for the privilege accorded the judiciary to express its views on Senate bill 1437.

Since January of 1971, at the direction of the Judicial Conference, our Committee has been engaged in a continuous study of the Brown Commission Report, Senate bill 1, and the many House versions thereof, and we are presently engaged in a similar study of Senate bill 1437, which should be completed by late July of this year for submission to the Judicial Conference at its September meeting. Hence, in commenting on the bill before you my colleagues and I must for the most part utilize past positions of the Conference.

Commencing in April, 1973, we have made five reports to the Senate Judiciary Committee and in March of this year we submitted a report to the House Judiciary Committee. In those reports the Committee on the Administration of the Criminal Law focused its primary attention on the provisions of Senate 1, now incorporated in Senate 1437, covering "General Provisions and Principles" found in Part I and "Offenses of General Application" found in Chapter 10 of Part II. On the provisions of the bill relating to sentencing, the Federal Rules of Criminal Procedure and utilization of magistrates we have bowed to the superior expertise of the Conference committees having primary responsibility in these respective areas. Hence, the position of the judiciary on sentencing and appellate review of sentences will be presented at this meeting by Judge Gerald B. Tjoflat, a member of the Conference Committee on the Administration of the Probation System, and Judge William B. Webster, a member of the Conference Advisory Committee on the Criminal Rules.

While our Committee has yet to complete its study of Senate 1437 and submit its recommendations to the Conference, I feel reasonably certain that our

recommendations will conform to those to be made by my colleagues, Judges Tjoflat and Webster.

With your kind indulgence, I should like to make one further observation. Because the primary concern of our Committee centers on Part I and Chapter 10 of Part II of the bill and the impact that the interpretation and execution of such provisions on the day-to-day operations of the courts and the fairness of their procedures, we trust and respectfully pray that before this committee gives its final approval to Senate bill 1437, it will give further consideration to the views and recommendations made by the Conference in its last report relating to:

1. General Principles of Construction, § 112;
2. Culpable States of Mind, § 302;
3. Bars to Prosecution, § 511(e);
4. Criminal Conspiracy, § 1002;
5. Criminal Solicitation, § 1003;
6. The Federal Civil Commitment of Offenders with Mental Disease or Defect, §§ 3611–3617;
7. The need for amendments to the Bail Reform Act of 1966, § 3502;
8. The need to amend the Speedy Trial Act of 1974 to make the exclusions of section 3161(h) applicable to the interim time limits of section 3164;
9. The failure of Senate 1437 to include the provisions of the Youth Corrections Act which would give the courts discretionary authority to set aside convictions under appropriate circumstances; and
10. The effective date of the proposed Act.

Mr. Harold D. Koffsky, consultant to our Committee who submits this statement in my behalf, is prepared to offer any assistance you or the members of your staff may require of him and I shall, of course, be happy to comply with any request you may make of me.

Respectfully submitted.

STATEMENT OF HON. GERALD B. TJOFLAT, MEMBER, COMMITTEE ON THE ADMINISTRATION OF THE PROBATION SYSTEM OF THE JUDICIAL CONFERENCE OF THE UNITED STATES AND JUDGE, U.S. COURT OF APPEALS, FIFTH CIRCUIT

Judge TJOFLAT. Thank you, Mr. Chairman.

I am Gerald B. Tjoflat, and I have been a U.S. Circuit Judge for the Fifth Circuit since December 1975. I served as United States District Judge for the Middle District of Florida from October 1970 until my appointment to the appellate bench. From June 1968 until October 1970, I was a judge of the Circuit Court, Fourth Judicial Circuit of Florida.

Since January of this year, I have been a member of the Advisory Corrections Council authorized by 18 U.S.C. 5002. Since January 1973, I have been a member of the Judicial Conference Committee on the Administration of the Probation System.

The Probation Committee was established as a standing committee of the Conference in 1963. It has oversight responsibility for the organization and work of the federal probation system and the formulation and conduct of sentencing institutes for judges and others, as authorized by 28 U.S.C. 334.

As a member of that committee and at the request of its chairman, I appear before you today to address S. 1437, a bill to codify, revise, and reform the federal criminal code.

I have reviewed those portions of S. 1437 that have reference to the concerns of the Probation Committee; namely, the sentencing provisions and the provisions relating to the agencies that carry out the

sentences—the Federal Probation System, the Bureau of Prisons, and the U.S. Parole Commission.

At your request, I shall limit my testimony to sections appearing at pages 167 to 179, 256 to 274, and 301 to 307 of the bill. I shall comment on those sections in the order in which they appear.

As you know, neither the Judicial Conference nor the Committee on the Administration of the Probation System has had the opportunity to consider or render an expression of views on this legislative proposal. However, the committee has considered previous versions of this legislative proposal and made certain recommendations.

Throughout my testimony, I shall identify those statements that are based on previous recommendations by the committee or the conference.

I have reviewed all of part III, pages 167 to 179, and shall restrict my comments to those sections where I recommend change.

Section 2001, authorized sentences, subsection (b) authorizes sentences for an individual of probation, fine, or imprisonment. Since its review of the report of the Brown Commission and the subsequent legislative proposals, the Probation Committee has consistently recommended that there be provision for a sentence of unconditional discharge without imprisonment, fine, or probation.

The courts presently have the power to effect such a sentence by imposing imprisonment for a period of less than 1 full day, ordering probation for 1 day, or imposing a nominal fine. A sentence of unconditional discharge would take public notice of and authorize this informal practice.

Senator HATCH. I think that is a very good point. I am sure the committee will be cognizant of your suggestions in that regard.

Judge TJOFLAT. We don't think it would disturb the spirit of the bill at all.

Senator HATCH. And it certainly allows the judge some leeway in a situation which merits that type of treatment.

I commend you for bringing that to the attention of the committee.

Judge TJOFLAT. Thank you.

Subsection (a) of section 2002, presentence reports, indicates that a probation officer shall make a presentence investigation of a defendant "found guilty of an offense."

I recommend striking the language "found guilty of an offense," thereby removing the limitation that a presentence investigation can be conducted only on a convicted person.

Rule 32 of the Federal Rules of Criminal Procedure authorizes the conduct of a presentence investigation prior to conviction. The only restriction has been that the report's contents could not be disclosed to anyone, including the court, before conviction.

Recent amendments to rule 32 and rule 11 provide for the investigation to be conducted and the report to be considered in connection with a plea agreement. In actual practice, approximately one-third of all presentence investigations are conducted prior to conviction.

Subsection (c) provides that as part of the presentence examination process, the court may order a psychiatric examination by "two or more examiners."

I recommend that provision be changed to "examination by one or more examiners where they is no issue of mental disease or defect but the court simply wants psychiatric guidance in shaping the sentence."

Speaking from my experience as a district court judge, one psychiatric report should be sufficient in a case—except the most unusual—that reaches the sentencing stage. Issues of mental disease or defect have generally been resolved before conviction.

Senator HATCH. I think that is another excellent point, and I hope that the staff will look at that.

We should be able to have preguilty plea reports or presentence reports as needed by the courts.

Judge TJOFLAT. Subsection (a)(3) of section 2003, imposition of a sentence, requires that the court consider the sentencing range established by the sentencing commission in effect "on the date the defendant committed the offense."

It would seem more practical for the court to consider guidelines that were in effect at the time of sentencing.

Determining what guidelines were in effect at the time of the offense could prove difficult if there had been a significant delay in prosecution and conviction. Using the incorrect guidelines could result in appeal.

Finally, it seems that the whole justification for guidelines is based on their currency. Guidelines are supposed to reflect the best information available at that time about the effectiveness of sentencing. It would seem to me that using old guidelines in current sentencing could increase rather than decrease disparity.

Subsection (b) requires the court to state general reasons for imposition of a particular sentence and, if the sentence is outside the range of the guidelines issued by the sentencing commission, the reason for imposition of a sentence outside the range.

The Probation Committee has consistently opposed the requirement for statements of reason for particular sentences as provided by the previous versions of this legislative proposal.

I note that the language of subsection (b) calls for "general reasons" as opposed to the very detailed and specific reasons that have been required in the previous versions and would have, without question, been an open invitation to wholesale appeal.

Unfortunately, the committee as a whole has not had an opportunity to review this particular section. I recognize that it is a vital element, and I am certain they would find it more acceptable than the previous proposal.

Section 2006, order of restitution, provides that in addition to any other sentence that is imposed, the court can order that the defendant "make direct restitution to a victim" in an amount and manner set by the court.

I recommend that the word "direct" be striken, thereby allowing the court to order collection and disbursement by the clerk of the court. This will provide for the monitoring process necessary for notification of the Attorney General in the event the defendant fails to pay the restitution.

Subsection (a) of section 2101, sentence of probation, establishes restrictions on the court's ability to sentence a defendant to a term of probation. The Probation Committee has consistently recommended that no offender should be excluded from consideration for probation. Therefore, I recommend striking the three general restrictions.

Subsection (b)(1) establishes a minimum term of 1-year probation for a felony. Here, again, the committee feels that the sentencing

judge should have the latitude to set any term of probation within a maximum period authorized by law. Therefore, I recommend eliminating the 1-year minimum term.

Subsection (a) of Section 2103, Conditions of Probation, provides one mandatory condition of probation: that the defendant not commit another crime during the term of probation.

I recommend the inclusion of the following conditions as mandatory conditions: Report to a probation officer at reasonable times as directed by the court or the probation officer; Permit the probation officer to visit at reasonable times and hours at the place of residence or elsewhere; Answer truthfully all reasonable inquiries by the probation officer; Notify the probation officer promptly of any change in situation, residence, or employment; Obtain permission of probation officer to leave the judicial district; Follow the probation officer's instructions; and Inform the probation officer immediately if arrested or questioned by a law enforcement officer.

These are the conditions of probation that the committee has recommended that the district courts adopt as general conditions of probation. If these conditions are adopted as mandatory conditions, you should delete numbers 15 through 18 of the discretionary conditions listed at subsection (b) of this section.

With further regard to the discretionary conditions at subsection (b), I recommend the inclusion of one that would provide for participation in an alcohol or drug treatment program as a condition of probation in an appropriate case.

Subsection (b) of section 2104, running of a term of probation, indicates that the term of probation shall "not run during any period in which the defendant is imprisoned in connection with a conviction of a Federal, State, or local crime."

This section should be modified to make it clear that this does not include a period of imprisonment imposed as a condition of probation under section 2103 (b)(11). There should be some guidance as to what constitutes imprisonment.

Is it the intent of Congress that probation should be tolled during short-term sentences for minor offenses? Computing the term of a probationer confined for short terms for traffic or similar petty offenses could present an administrative problem. It could create honest uncertainty in everyone's mind whether the offender was still on probation and could become a crucial issue in determining jurisdiction at the time of a subsequent violation. I recommend the court retain authority to toll the term of probation.

Subsection (c) prohibits the court's terminating probation in a felony case until after one year. The Probation Committee has recommended that the one-year limitation be stricken and that the court have the latitude to terminate probation at any time in any case.

Section 2302, imposition of a sentence of imprisonment, subsection (c) gives the court authority to reduce the imposed term of imprisonment or term of parole ineligibility to time served upon motion of the Director of the Bureau of Prisons and for "extraordinary and compelling reasons."

I recommend that the words "extraordinary and compelling reasons" be stricken. This will leave the court with the authority it now has under the recently enacted Parole Commission and Reorganization Act, 18 U.S.C. 4205.

I have reviewed all of chapter 38, pages 258 to 274, and, again, shall comment on only those sections where I recommend change.

Section 3801, supervision of probation: I suggest you amend this section to provide for supervision of a juvenile who has been placed on probation under chapter 36.

Section 3802, subsection (a), appointment of probation officers, provides that a court may, in its discretion, remove a probation officer previously appointed. The Probation Committee has previously recommended that this provision be amended by striikng "in its discretion" and substituting "for cause."

Subsection (c) provides that if a court appoints more than one probation officer, one may be designated by the court as chief probation officer and shall direct the work of all probation officers serving in the court.

The Probation Committee recommends that you strike the phrase "in the court" at the end of that sentence and substitute "in the judicial district." This will make clear that there will be only one chief probation officer in a judicial district.

Finally, I would ask that you add to that section the authority for the appointment of volunteer probation officers now found in 18 U.S.C. 3654.

The Federal Probation System has a long history of significant contributions by volunteers, including persons serving in that capacity while under internship programs for advanced degrees in the social sciences. As you know, there is a prohibition against accepting volunteer services without statutory authority. The Probation Committee does not want to lose that authority.

Subsection (g) of section 3803, duties of probation officers, requires a probation officer to "perform any duty with respect to a person on parole that the Parole Commission may designate."

The committee has recommended that this subsection be amended to further provide that a probation officer "perform preparole investigations and any duty with respect to a person on parole, and so forth."

Section 3832(b) provides that a probation officer shall prepare a preparole report on request of the Parole Commission. I feel, however, that this responsibility should be stated specifically within this list of duties of probation officers.

I recommend another subsection requiring that a probation officer "shall, upon request of the Attorney General or his designee, furnish information about, and supervision of, persons within the custody of the Attorney General while on work release, furlough, or other authorized release from their regular place of confinement."

This additional duty was considered in the form of a legislative proposal drafted by the Department of Justice and approved by the Judicial Conference at its April 1972 meeting. Incorporation of this duty in the statute would give authority to actual practice. Probation officers for some time have performed this duty.

Section 3805, transfer of jurisdiction over a probationer, provides a procedure for the transfer of jurisdiction of a probationer from one district to any other district to which he "is required to proceed as a condition of his probation."

This language is restrictive and does not cover the majority of instances where a transfer from one district to another is not effected

as a condition of probation. I recommend that you substitute the word "goes" for "is required to proceed as a condition of his probation."

Section 3806, arrest and return of a probationer, provides for the arrest of a probationer and his immediate return before the court having jurisdiction. I find no provision for the issuance of a summons or warrant for probation violation.

Therefore, I recommend the following language which is a modification of that now found in 18 U.S.C. 3653:

> At any time within the probation period, the court having jurisdiction over the probationer may issue a summons or a warrant for his arrest for violation of probation occurring during the probation period. A probationer, when arrested for violation of probation, shall be taken without unnecessary delay before the court having jurisdiction over him.

I recommend the addition of two sections to this subchapter. The first relates to what I assume was an omission in the drafting of the proposal—the duties of the Director of the Administrative Office of the United States courts with relationship to the Federal probation system as found now at 18 U.S.C. 3656. This appeared in previous versions of this proposal.

I recommend that the entire section 18 U.S.C. 3656 be included at this point.

The committee has recommended one additional duty; that is, that the director be required to:

> Collect, publish, and disseminate to the U.S. Sentencing Commission—to each judge and probation officer—statistical and other information concerning Federal sentencing practices, including, to the extent possible, information setting out by category the sentencing practices in each district, in each circuit, and in the nation with regard to persons with similar offenses under similar aggravating or mitigating circumstances.

I recommend an additional subsection under the duties of the Director of the Administrative Office; that is, that he—

> May operate or contract for the operation of appropriate facilities and services for the care of probationers or parolees, including, but not limited to, residential halfway houses, addict and alcoholic treatment centers, counseling services, employment training, and placement; may arrange and pay for emergency aid and shelter; and may purchase the implements of employment.

The Judicial Conference at its September 1975 meeting was informed that the Probation Committee had endorsed in principle the concept of providing supportive services to persons on probation or parole through contract arrangements. The Congress has expressed policy in this area through title II of the Speedy Trial Act extending limited contract authority to the probation system for persons on pretrial release.

The committee has had the continuing concern that a person participating in a program of rehabilitation under a contract arrangement, while in pretrial release, could not continue the treatment program when placed on probation.

A specific example is the need for contract authority in drug treatment programs. These programs for persons on probation or parole are now provided by the Bureau of Prisons under authority contained in the Probation Act, 18 U.S.C. 3651, the parole laws, 18 U.S.C. 4209, or the criminal provisions of the Narcotic Addict Rehabilitation Act, 18 U.S.C. 4255. I cannot find that any of these provisions are carried forward.

There should be specific provision for these services somewhere in this legislative proposal.

The committee has informed the Judicial Conference at its April 1976 meeting of its view that the provision of drug treatment services seems to be a function more appropriate to the executive branch than the judicial branch.

We recognize, however, that the responsibility for persons under probation and parole rests with the federal probation system and that drug treatment services are necessary for the proper operation of the probation system. Aside from the issue of who provides them, the services must be available.

Finally, I recommend that you make provision for setting aside the convictions of probationers who are successful on probation.

I have noted that this legislative proposal does not carry forward the Youth Corrections Act. One vital element of that act should be carried forward, and that is the ability to set aside a conviction in an appropriate case.

The committee has recommended, and the Judicial Conference has approved, a draft legislative proposal that was introduced but not acted on in the past session of Congress. I would recommend that this additional section provide that:

Upon the unconditional discharge of an offender sentenced to probation, the court may thereafter in its discretion set aside the conviction and issue to the offender a certificate to that effect.

In the case of an offender on whom no sentence of imprisonment or probation is imposed, the court after the expiration of two years from the date of conviction, in its discretion may set aside the conviction and issue to the offender a certificate to that effect.

A conviction so set aside by this section shall not constitute a conviction within the meaning of any law or regulation of the United States.

This additional section would allow for the setting aside of convictions for probationers, regardless of age. It would provide an incentive to offenders to succeed on probation and would partially alleviate the restrictions which are imposed on individuals previously convicted of a felony.

Under the present system, life-long disabilities are indiscriminately applied as bars to employment, banking, credit, and licensing. Thus, an ex-offender often finds it impossible to compete for employment or in business, even though no prison term was imposed.

As a practical matter, pardons are unavailable to many individuals eligible for such relief. This additional section would be a modest step to provide some relief.

The relief is discretionary on the part of the court. The recommended provision would apply to certain special classes of offenders: those who successfully complete a period of probation and those who the court decided did not require a period of supervision. The latter group would be eligible only after a period of time.

The proposal also defines, in part, the effect which will be given to a certificate. Full definition is left to judicial development.

There is nothing in the proposal that requires the expunction or sealing of records, nor does it constitute a "license to lie."

Likewise, we do not contemplate that this change would in any way create a "perennial first offender."

Subsection (b) of section 3831, consideration of a prisoner for release on parole, establishes the time schedule for a prisoner to receive his first consideration for parole. The mechanics for determining the time for the first parole hearing seem to be unnecessarily complicated.

Was your intent to establish a system whereby a prisoner did not receive his first parole hearing until his date of parole eligibility had passed?

As I understand the procedure, a prisoner who had received a 3-year sentence without a term of parole ineligibility would be eligible for release on parole after 6 months. However, by application of subsection (b)(1), he would not receive parole consideration until after 7 months.

I suggest that you change this section to provide that a prisoner shall receive first parole consideration at least 60 days prior to this parole eligibility date.

Subsection (c) of section 3834, term and conditions of parole, establishes one mandatory condition of parole that the parolee not commit another crime during the term of parole. My comments made previously regarding the conditions of probation at section 2103(a) and (b) also apply here.

I recommend adopting the same 7 additional mandatory conditions and deleting discretionary conditions, numbers 15 through 18, in addition to number 11 which you have already deleted. I feel these are appropriate and reasonable conditions which should apply in all parole cases.

Finally, I ask that you include as a discretionary condition of parole the addition I suggested earlier with regard to probation requiring a parolee to participate in an alcoholic or drug treatment program during the term of parole as now provided by 18 U.S.C. 4209.

Subsection (e) deals with the effective period of a parole term. My comments here are similar to those made in section 2104(b). There should be some statement as to what constitutes imprisonment and the effectof short jail sentences for minor offenses in the computation of the term of parole.

Subsection (b) of section 3835, revocation of parole, establishes the requirement for a preliminary hearing whenever a parolee is taken into custody for violation of a condition of parole. The purpose of this hearing is to determine if there is probable cause to believe that he has violated a condition of his parole.

I recommend that this subsection be amended to conform with present law by providing that conviction for a federal, state, or local crime committed subsequent to release on parole shall constitute probably cause—18 U.S.C. 4214(b)(1).

Finally, I find no provisions for continuing the U.S. Parole Commission as you have provided for the Bureau of Prisons and the Federal Prison Industries in title III at page 308.

With regard to the U.S. Sentencing Commission, in your invitation for testimony, you indicated your awareness that the Judicial Con-

ference has not yet established a formal position on this legislative proposal. I am certain you are also aware that the Judicial Conference at its April 1976 meeting disapproved a bill that would have established a U.S. Sentencing Commission.

In the context of the conference's previous action, I shall comment on what I would like to see if the Congress should establish a U.S. Sentencing Commission.

The lack of sound knowledge to provide the base for sentencing has been a matter of concern for years. No one is more aware than the judge on the bench of the lack of a sound body of knowledge to assist him in discharging his sentencing responsibilities.

Usually he has no guidelines, except his own experience to tell him how sentences have worked out in the past. There are no valid actuarial or prediction tables to indicate what the outcome of a particular case will be. He does not know what other judges in other courts have done with respect to similarly situated defendants.

When imposing a sentence, he has in mind one or more of the objectives you propose at section 101—deterrence, protection of society, just punishment, and rehabilitation of the offender.

However, he has no assurance that a given sentence will achieve these objectives. Nor does he know the actual effectiveness of the various correctional agencies that will carry out the sentence.

It was these very concerns that prompted the Congress to establish the Advisory Corrections Council, of which I am a member, 18 U.S.C. 5002.

The council met regularly until 1959 when it disbanded after the chairman resigned and the Attorney General did not appoint a successor.

The council was responsible, in part, for two pieces of legislation: One authorizing institutes and joint councils on sentencing, 28 U.S.C. 334, with a primary objective of reducing disparity of sentencing, and the other to provide greater flexibility in sentencing alternatives and parole procedures—formerly 18 U.S.C. 4208 and 4209 and now 18 U.S.C. 4205 and 4216.

The Advisory Corrections Council was reinstituted in December of 1976 with the designation of former Deputy Attorney General Harold Tyler as chairman by the then Attorney General Levi. I was designated by the Chief Justice to fill one of the three judicial positions on the council.

The council has met twice this year, and the focus of our attention has been on the need for a comprehensive statistical system in the criminal justice field and the need for a more effective and rational system of sentencing.

Notwithstanding the efforts that have been made to learn more about the effectiveness of sentencing—the work of the Advisory Corrections Council, the institutes and joint councils on sentencing, and the work of the Administrative Office of the U.S. Courts and the Federal Judicial Center—the fact remains that we are not much further along in understanding the whole process than we were years ago. I do not say this in any sense of criticism of the efforts that have been made in the past, but in recognition that much needs to be done.

The goals of the U.S. Sentencing Commission, as proposed, would be of immense assistance to the entire system of criminal justice if

achieved. Whether or not achievement of these goals is dependent on establishment of a new commission is a matter for Congress to decide.

Any organization charged with the stated goals of the commission should be a central body with authority to draw information from, and effect change of, the various parts of the system. Your legislative proposal would establish that capability.

Section 991, U.S. Sentencing Commission—establishment and purpose, would establish the commission in the Judicial Branch and provide for the appointment of the members by the Judicial Conference, subject to removal by the Conference for cause.

This form of organization should provide the necessary independence from pressures that might be brought to bear on the Commission if it were outside the judicial branch.

Establishment within the judicial branch might also enhance the Commission's acceptance.

Since this legislation calls for judges to relinquish some of their independence in sentencing, it is probably well it be to another body established within the judiciary.

While the proposal does not eliminate judicial discretion in sentencing, it does establish guidelines for the exercise of that discretion and provides a benchmark for appellate review of a sentence.

Section 994, subsection (a), duties of Commission, provides that the Commission shall promulgate and distribute to all courts of the United States and to the U.S. Probation System its guidelines for sentencing. I believe you should make it clear that such guidelines are to be publicly distributed for the benefit of the bar and the general public. You may wish to consider requiring general publication for comment before adoption.

Subsection (e) requires the Commission to establish a "substantial sentence of imprisonment" in its guidelines for certain types of offenders.

In my opinion, the Commission should have the latitude to establish guidelines within the maximum penalties that Congress has established by statute. Guidelines should be based on the best and most current information available and not mandated by a statutory provision.

This particular requirement runs contrary to the purpose of the Commission and impinges on its independence.

I have a similar comment regarding subsection (g) of Section 994 which gives the Congress authority to approve or disapprove guidelines promulgated by the Commission.

The Commission should have the latitude, as an independent commission in the Judicial Branch, to establish guidelines based on the results of its studies.

Subsection (b) of section 996, director and staff, requires the staff director to appoint the Commission's employees under the competitive civil service laws.

I feel that the Commission should have the latitude to appoint its employees without regard to the competitive civil service laws and regulations as is the general appointment procedure within the judicial branch.

This concludes my remarks concerning the sections of S. 1437 listed in your request for testimony. There are, however, several sections at

other points in the bill which embody provisions that have been the subject of the Probation Committee's concern. I have prepared comments on these sections as an appendix to this testimony and ask that they be included for the record.

I appreciate your courtesy, Mr. Chairman, and I shall be pleased to answer any questions you may have.

Senator HATCH. Without objection, they shall be included in the record.

[Material follows:]

APPENDIX

STATEMENT OF JUDGE GERALD B. TJOFLAT, JUNE 9, 1977, BEFORE THE SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

The following listed sections of S-1437 have been the subject of concern of the Judicial Conference Committee on the Administration of the Probation System.

I shall first address two types of offenses: bail jumping as it relates to the sentenced offender who has been ordered to surrender for service of sentence and crimes against the person as they relate to employees of the U. S. probation system. Both of these areas have been the subject of consideration and recommendation by the Judicial Conference.

SECTION 1312—BAIL JUMPING

Section 1312 establishes as an offense the failure to surrender for service of sentence pursuant to a court order. In connection with a penalty for the offense I recommend the subsection (c) (1) (B) be amended to include the language "or pending surrender for service of sentence." I find no specific provision for this type of release in chapters 35 or 36 of the bill and recommend provision for authority to release for the purpose of voluntary surrender for service of sentence.

In 1974 the Probation Committee endorsed procedures drawn by the Bureau of Prisons, the Probation System, and the Marshals Service that provided for the voluntary surrender of selected offenders. The Bureau of Prisons reports great success with this program and the savings to the Government are obvious.

Specific authority in the statute will encourage sentencing judges to make greater use of this procedure. Some judges have expressed reluctance to release for this purpose since criminal contempt appeared the only sanction available where an offender failed to surrender. At the request of the Probation Committee the Judicial Conference at its September 1974 meeting approved a legislative proposal that would establish failure to surrender as an offense. Adoption of section 1312 would fill this need.

SECTION 1601, ET SEQ.—HOMICIDE, ASSAULT, KIDNAPPING, AND RELATED OFFENSES

Certain sections of chapter 16 establish Federal jurisdiction where offenses are committed against an "employee of the U. S. probation service." These provisions are consistent with numerous recommendations of the Judicial Conference that probation officers be included in the protection statute (18 USC 1114).

I recommend that this language be amended to provide Federal jurisdiction where these offenses are committed against an employee of a pretrial services agency. Title II of the Speedy Trial Act required the Administrative Office to establish 10 pretrial services agencies. Five of these agencies are administered by the Probation Division of the Administrative Office of the United States Courts and five are administered by local Boards of Trustees. The employees of these agencies investigate, supervise, and work in the same circumstances of hazard as probation officers. They should enjoy the same protection. I am not certain that they would be covered under the current proposed language of these sections. Finally, I suggest that you change the title "U. S. Probation Service" to "U. S. Probation System," wherever it appears. The original act of Congress was an act to establish a probation system in the United States district courts. Subsequent amendments have referred to it as a system and I believe the word "system" is more descriptive of the organization than the word "service."

SECTION 3016—U.S. PROBATION SERVICE

Subsection (a) of section 3016 provides that a U. S. probation officer may carry a firearm pursuant to regulations issued by the Judicial Conference of the United States. The Judicial Conference considered an identical legislative proposal on recommendation of the Probation Committee at its March 1974 meeting. Although the Conference did not approve the legislative proposal it did subsequently approve guidelines which established as policy that probation officers should not carry firearms, however, the guidelines do provide for exceptions to that general policy. As I look at subsection (a), the Conference could continue to carry out its intent that carrying of firearms by probation officers should be the exception rather than the rule.

Subsections (b) and (c) give a probation officer authority to arrest a probationer or a parolee with a warrant or without a warrant if the officer has "reasonable grounds" to believe that the probationer or parolee has violated a condition of release. The Probation Committee in considering similar proposals in the past has consistently recommended that a probation officer's authority to arrest be limited to the arrest of probationers and that "reasonable grounds" be changed to "cause." Probation officers have always had the statutory authority to arrest probationers and the extent to which they exercise this authority is defined by court policy. In the unusual circumstances where a probation officer does arrest a probationer without the court having issued a warrant such a probationer is brought immediately before the court.

Under current practices parolees are arrested generally by the U. S. marshal after the U. S. Parole Commission has issued a warrant. Although probation officers have authority to arrest a parolee under the Youth Corrections Act this authority is not exercised. As a matter of fact it is the policy of the U. S. Parole Commission that probation officers shall not arrest parolees even with a warrant. I grant that in a limited number of circumstances probation officers find themselves hampered in the performance of their duties by not being able to arrest a parolee on the spot of an observed violation. However, weighing this against the due process problems if probation officers were to routinely arrest parolees, I am lead to believe we can do without this authority.

SECTION 3602—ARREST AND DETENTION OF A JUVENILE DELINQUENT

Subsection (c) of section 3602 places a 60-day limitation on the detention of a juvenile pending trial. I recommend that you retain the 30-day limitation now established by 18 USC 5036. Thirty days seems long enough to hold a juvenile pending trial unless there is some particular showing of need for additional delay.

SECTION 3603—JUVENILE DELINQUENCY PROCEEDINGS

Subsection (e) of section 3603 provides that after a hearing the "court may suspend the finding of juvenile delinquency, place him on probation, or commit him to official detention." If it is your intent that suspension of the finding of juvenile delinquency is a disposition unto itself I suggest you add the language "on such conditions as it deems proper" now found at 18 USC 5037(b). This allows the court to suspend the find of delinquency, permit the juvenile to participate in an informal program of supervision, then dismiss the entire proceedings. The current juvenile delinquency act at 18 USC 5032 prohibits changing from one type of proceeding to another once proceedings have reached a certain stage. You may wish to consider its inclusion as I find no similar provisions in this proposal.

Subsection (f) (1) of section 3603 provides that a juvenile may be placed on probation for a term not to exceed the period of minority. I recommend that you incorporate language from the current juvenile delinquency act which further restricts the authorized probation term to the maximum term that could have been imposed on an adult convicted of the same offense (18 USC 5037(b)).

SECTION 3605—USE OF JUVENILE DELINQUENCY RECORDS

Subsection (a) of section 3605 cites six limited circumstances under which a court may release information from the record of a juvenile. I would recommend that you include one additional circumstance under which information may be released by authorizing a court to release such information it deems essential to a program of education, employment, training, or rehabilitation in which the juvenile is participating while under supervision.

Senator HATCH. We appreciate your testimony, Judge.

I think you have pointed out a number of very interesting changes that we should consider in the committee. A number of the areas you covered have been hotly debated, as you know. I think you have brought some very meritorious, substantive changes to us today.

Some witnesses before this subcommittee have suggested that the members of the Sentencing Commission be appointed by the President.

What would be the view of the Judicial Conference to this particular proposal?

Judge TJOFLAT. I think that since we are treading in new territory for the first time, that we don't have much history to go by. That is essentially a congressional decision.

If the Commission is to be within the judicial branch, you have a separation of powers problem. The President, of course, appoints article III judges and other members of the judiciary. I really can't tell you what the Judicial Conference attitude would be.

The Probation Committee is going to meet next month, as other committees are, and the Conference will be meeting, either at the end of August or early in September. I am sure that if the bill is still in the hearing stages, or in the consideration stage, that statement can be augmented by the views of the Conference.

Senator HATCH. Thank you, Judge. We appreciate that.

With regard to the marijuana sections, this decriminalizes the mere possession of less than 10 grams. How do you feel about that?

Ten grams would be a little more than one-third of an ounce.

Judge TJOFLAT. These are my personal views, but I think that——

Senator HATCH. We are interested in that. You have had extensive experience as a Federal district and circuit courts.

Judge TJOFLAT. My personal views depend on whether or not you are going to decriminalize trafficking in the drug.

Senator HATCH. No.

Judge TJOFLAT. As long as you're not decriminalizing the trafficking in the drug and you are restricting it narrowly to use privately, I don't think—no; I don't disagree with that.

Senator HATCH. What I am asking is whether you disagree with having a criminal penalty for possession of more than 10 grams.

Judge TJOFLAT. No.

Senator HATCH. Even though it penalizes possession without requiring the trafficking element.

Judge TJOFLAT. That's right.

The more that you possess, the greater the inference is that it's involved in some kind of a trafficking operation.

Senator HATCH. I see.

Nor do you disagree with the decriminalization with regard to less than 10 grams.

Judge TJOFLAT. That's right.

Senator HATCH. There have been a lot of people in our society, including Mr. Bourne who suggested that it should be decriminalized as to less than one ounce—I personally agree with this particular section as being a more in-depth approach to a very serious problem in our society.

I justed wanted to have your viewpoint since you have so much experience on the bench.

Judge TJOFLAT. I am drawing on all my experience on that.

Senator HATCH. We appreciate your being here this morning, and the excellent testimony that you have given.

I have been chairing these committee sessions at the specific request of Senator McClellan and Senator Thurmond. I have appreciated the testimony we have heard so far. I think it's been very enlightening.

Judge Webster, we are looking forward to hearing what you have to say.

STATEMENT OF HON. WILLIAM H. WEBSTER, ADVISORY COMMITTEE ON CRIMINAL RULES, JUDICIAL CONFERENCE OF THE UNITED STATES, AND JUDGE, UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Judge WEBSTER. I would like to ask that my complete statement be made a part of the record.

Senator HATCH. Without objection, it is so ordered and will be entered at the end of your oral testimony.

Judge WEBSTER. I will attempt to highlight the main points which might be of inteerst to the chairman and to the members of the committee.

I shall direct my comments primarily to section 3725 dealing with sentence review.

The views of the Judicial Conference of the United States find expression in a proposed Federal rule, rule 35.1, which is incorporated in H.R. 7245, which was introduced on May 17, 1977, by Congressman Rodino.

Perhaps the most useful thing I could do this morning is to suggest some of the differences and some of the thinking that went into that rule as it may possibly apply to the final workout of section 3725 in this bill.

The particular emphasis that I hope will attract your attention is the proper role of discretion—both at the district court level and in the appellate courts—on the subject of sentence review and the use and application of the guidelines and the policy statements which this bill provides for.

I would like to refer to the evolution of the thinking of the advisory committee on the whole subject of sentence review over the past 6 years.

We have been studying this rather intensely over this period of time, and our thinking has gone through quite a change.

In the early 1970's, sentence review as a matter of right was viewed with considerable hostility from within the Federal judiciary, even though the United States is said to be the only Nation in the free world that does not have some form of sentence review.

For a number of years it was an open secret that appellate courts were finding ways to reverse cases on the basis of trial error because of excessive sentences. We were getting a lot of bad precedent as a result. Errors that normally would be called harmless were found to be prejudicial. So we began to look into this.

I will skip over the thought processes of the committee considering sentencing councils.

We went, as perhaps you know, to a panel review by district judges, which we finally abandoned when we concluded that the district judges were simply overwhelmed with present responsibilities and either unwilling or unable to take on the business of panel review of sentences. We addressed ourselves again to appellate review of sentencing.

That is all set out in my statement. In view of the time constraints, I would like to go to some of the differences between rule 35.1 and 3725.

Under 3725, a defendant would have no right to appeal for review of a sentence unless it exceeded the maximum punishment established by the proposed Sentencing Commission in guidelines to be promulgated under proposed 28 U.S.C. 994.

Proposed rule 35.1, on the other hand, would apply a screening approach in all cases, other than those involving a sentence of death which is not governed by the rule.

Review is not limited to a sentence in excess of a certain maximum, as in section 3725, but as a threshold requirement, the sentence must be one of imprisonment—execution of which is not suspended. And that is a slight difference.

The sentence must not have been entered pursuant to a plea bargain adopted by the court.

While section 3725 excludes plea bargained sentences from the right of review, it does not appear to distinguish between executed and suspended sentences.

The need for review of a suspended sentence prior to revocation of probation is not clear.

Under rule 35.1, the right to review of a sentence would be subject to a prior determination by the court of appeals through a screening-process method that "a showing has been made of a substantial basis for determining that the sentence is clearly unreasonable."

We are accustomed to using the screening process for weeding out frivolous claims. I think that this method of approach, within the court of appeals, has a great deal to commend it, even though guidelines along the road may point out definite areas which should be respected in the screening process.

I seriously urge the committee to consider leaving room for the application of a screening process which is not entirely controlled by the guideline method. I'm not sure whether a sentencing guideline will invariably keep out, from review, the sentences which perhaps ought to be reviewed because of individualized circumstances that are aggravating or mitigating.

Both your approach and the Judicial Conference's approach are designed to achieve the same protection for the defendant, with rule 35.1 perhaps offering a less-confining entry to review.

Much is going to depend on the range of punishment guidelines established by the Sentencing Commission under section 924. We don't know how wide those ranges are going to be, so we don't know how much discretion is going to be left to the court of appeals.

I might also mention that we excluded fines from the process of sentence review. We thought that the impact on the individual would not be the same as in the case of imprisonment, and we wonder

whether appellate review of fines is warranted. We ask that the committee would consider this question.

The Government gets to appeal under the proposed bill that we are considering this morning, section 3725, whenever the sentence is less than the minimum recommended in the Sentencing Commission.

Rule 35.1 would give a right of appeal if it was less than one-third of the maximum permissible. I think that's a policy question, and I simply call it to your attention.

Senator HATCH. Do you anticipate any difficulties with double jeopardy problems concerning government appeal of sentences?

Judge WEBSTER. In terms of H.R. 7245, we were sufficiently concerned about our ability to handle that by the rulemaking process, but we asked that the Congress consider dealing with it.

As far as double jeopardy is concerned, I do not think that is a problem. There is ample case authority for enhancement of sentences.

Senator HATCH. Do you both agree on that?

Judge TJOFLAT. Yes.

Judge WEBSTER. I would like to talk about the policy statements.

This provision concerns me quite a bit. Section 3725 excludes from sentence review, either by the defendant or the Government, sentences which are "consistent with policy statements issued by the Sentencing Commission pursuant to section 28, U.S.C. 994(a) (2)."

These, of course, are merely general policy statements that are intended to further the legitimate objectives of sentencing sanctions which are also defined: deterrence, protection of the public, just punishment, and rehabilitation.

But it is not at all clear when, or by whom, that determination is made.

The use of the policy statement here appears to override the maximum-minimum guidelines test.

We would ask: Would a policy statement, for example, that all defendants convicted of crimes committed with weapons should receive the maximum term permitted by law preclude all sentence review?

I would submit that this language may very well be a catch 22, which should be very carefully analyzed before you accept it as an exception to the right of sentence review.

If you will recall, it says that there will be no sentence review if there is a policy statement that is consistent with the sentence. Someone is going to have to decide that at some stage before we know whether there is a right of sentence review.

Here, again, the use of the screening process by the appellate courts with an area of interim discretion would have some utility.

I have a great deal of doubt about the use of the policy statement, particularly since we don't know quite what it might be.

It may very well be that such a policy would exclude sentence review, when it really should be granted by the appellate court. It makes it a condition of eligibility. I think this is cause for considerable concern.

Both your bill and H.R. 7245 use the clearly unreasonable standard of review; that is, that the sentence is clearly unreasonable. Although rule 35.1 couples the finding with clearly unreasonable and excessive or clearly unreasonable and insufficient.

We have since heard from a number of judges who are worried about that. They understand the term "abuse of discretion." They are not sure what "clearly unreasonable" is.

Senator HATCH. Excuse me, Judge. There is a vote on the floor with regard to the clean air bill.

The subcommittee will stand in recess for just a few minutes.

[Recess taken.]

Senator HATCH. The Subcommittee on Criminal Laws and Procedure will come to order.

I apologize for the length of time which it took, but we had three votes in a row.

I apologize especially to you, Judge, for interrupting your excellent statement right before you were almost through.

But these things do occur, and I think you understand them.

Judge WEBSTER. I do want to stress one or two things that appear in the statement that I think need further consideration by the committee.

I was attempting to make the point that the use of policy statements, as a method of eligibility for sentence appeal, had a catch 22 provision in them. I won't repeat myself there.

I have mentioned that the clearly unreasonable test had generated some questions among judges, but since it appears also in H.R. 7245 which is the proposed rule 35.1, I wouldn't pursue that.

I do want to come down hard on the question of discretion.

It may be said by some that sentence review is the result of the failure of the judges to meet their sentencing responsibilities with consistent fairness. I think this is much too broad an indictment.

Most judges perform their sentencing duties conscientiously and with great care.

I submit that the aberrational sentence should be the main target of sentence review.

We are going to have some degree of disparity by the nature of the fact that individuals are different, but what we are trying to reach is the aberrational sentence.

To the extent that discretion is taken from the judges, it must necessarily be placed elsewhere. If the guidelines are too tight and the sentence range is too narrow, then discretion is passed from the judge to the prosecutor, who can more fully control the sentence by selecting the nature of the charge and the number of counts.

I think it will be useful to utilize a Sentencing Commission to promote a greater degree of uniformity in sentencing philosophy.

It seems to me that article III judges should not be totally hamstrung by guidelines promulgated by the Sentencing Commission.

The process of evolving suitable guidelines promises to be a lengthy one, and certainly one guided by ongoing experience.

Your committee may wish to consider utilizing the screening process which I discussed before the recess and which is contained in proposed rule 35.1, at least in those areas in which the guidelines do not yet point the way.

It is entirely possible that appellate courts, in their analysis of sentences on review, may be able to contribute a useful body of law from which guidelines may be drawn by the Commission. In order for this

to be possible, the appellate courts may need a greater area of discretion in accepting or rejecting demands for review of sentences.

This concludes my statement. I would be glad to answer any questions.

[Material follows:]

STATEMENT OF WILLIAM H. WEBSTER, UNITED STATES CIRCUIT JUDGE AND MEMBER ADVISORY COMMITTEE ON CRIMINAL RULES

Mr. Chairman and members of the committee, I am William H. Webster, Judge of the United States Court of Appeals for the Eighth Circuit. I appear as a member of the Judicial Conference Advisory Committee on Criminal Rules. On behalf of our Chairman, Judge J. Edward Lumbard, and the other members of the Committee, I thank you for this opportunity to present our views on Senate Bill 1437. I shall direct my comments primarily to §3725 dealing with sentence review.

The Judicial Conference of the United States has endorsed a slightly different approach to sentence review and has forwarded its recommendation to the Vice President and the Speaker of the House. I am informed that a bill embodying this concept has been introduced by Congressman Rodino as H.R. 7245.

I think I can make best use of my time this morning if I share with the members of the Committee some of the evolution in the thinking of the Advisory Committee on this important subject.

For over six years, sentence review has been the object of an on-going study by the Advisory Committee, and the Federal Judiciary has been widely exposed to the issue through Workshops, Joint Sentencing Institutes and the writings of legal scholars.

The pendency of earlier bills in the Congress calling for various forms of sentence review has given substantial impetus to our work, since many of us felt some form of sentence review was inevitable and that the Judiciary should make its contribution in the selection of the most appropriate procedure.

I must say in candor that in the early 1970's sentence review as a matter of right was viewed with considerable hostility from within the Federal Judiciary, even though the United States is said to be the only nation in the free world without some form of sentence review. That feeling, while still intact in some quarters, has largely been ameliorated.

For a number of years, it was an "open secret" that a conviction was occasionally reversed upon appeal because appellate judges deemed the sentence to be excessive. In order to do this, it was necessary to find reversible trial error. There were substantial indications that this practice was producing bad legal precedent on trial error issues that would have been deemed harmless but for the sentence that the defendant received.

In the middle 1970's, a number of circuit courts began to cut around the edges of the traditional barrier to sentence review by finding authority to review a sentence where the trial judge had failed to exercise his discretion and instead applied an inflexible mechanical policy, such as giving maximum sentences to all draft evaders. Other appellate courts began to assert their authority to reverse based on a finding of gross abuse of discretion sufficient to shock the conscience of the court. The absence of uniformity within the circuits and the inability to adjust, other than to vacate, a sentence made review under inherent powers an unsatisfactory method of dealing with the problem.

The Advisory Committee considered three different alternatives within the rule-making powers of the courts:

(1) *Sentencing councils.*—The use of the other judges within the district to collaborate on sentences has been tried in a number of districts and is probably most effectively utilized in the Southern District of Michigan, which includes Detroit. While not technically sentence review, it meant that more than one judge contributed to the sentence determination and presumably reduced the amount of disparity within the district. The Advisory Committee recognized the advantages that this method might have in an urban district, but concluded it would be less useful in a nonurban district with judges spaced apart. Moreover, members of the Committee representing the defense bar expressed the concern felt by defendants who were in effect sentenced by judges before whom they did not appear.

(2) *Appellate review.*—The Advisory Committee was initially of the view that too few (then 34 out of 90) appellate judges had had sentencing experience and that review of this function should be retained at the district court level. Moreover, the Committee in the main was doubtful that a substantive law of sentencing, desirable as it might sound, could be successfully developed through the appellate process. Accordingly, the Committee opted for a system of panel review by district judges.

(3) *Panel review.*—In 1975, after considerable exposure, the Advisory Committee and the Standing Committee recommended a system of review by a panel of three district judges, similar to the state systems in effect in Massachusetts and Maryland. The standard of review was to be "excessiveness." The right of review was limited to a defendant who received a sentence that might result in imprisonment for two years or more. Review was to be conducted on the basis of the papers on file, including the presentence report. The Judicial Conference of the United States did not act upon proposed Rule 35(c), but instead referred the matter back to the Advisory Committee for further exposure and study. The results of such study, coupled with the responses from district judges following recirculation of proposed Rule 35(c), convinced the Committee that district judges were generally overwhelmed with existing responsibilities and were either unwilling or unable to assume responsibility for panel review. We therefore redirected our attention to appellate review.

At the same time, we concluded that a strong case had been made for giving the government the right to seek review of a sentence alleged to be insufficient. Because increasing a sentence has substantive implications, it was concluded that any rule incorporating sentence enhancement should be enacted by the Congress in the first instance rather than by means of the Rules Enabling Acts. H.R. 7245 incorporates the proposed Rule 35.1 endorsed by the Judicial Conference.

Perhaps the best way to point up our specific thinking is to discuss the main points of difference between proposed Rule 35.1 and §3725 of S. 1437.

APPEAL BY A DEFENDANT

Under §3725, a defendant would have no right to appeal for review of a sentence unless it exceeded the maximum punishment established by the proposed Sentencing Commission in guidelines to be promulgated under proposed 28 U.S.C. §994. Proposed Rule 35.1, on the other hand, would apply a screening approach in all cases other than those involving a sentence of death, which is not governed by the Rule. Review is not limited to a sentence in excess of a certain maximum, as in §3725, but as a threshold requirement the sentence must be one of imprisonment, execution of which is not suspended, and the sentence must not have been entered pursuant to a plea bargain adopted by the court. While §3725 excludes plea bargained sentences from the right of review, it does not appear to distinguish between executed and suspended sentences. The need for review of a suspended sentence prior to revocation of probation is not clear.

Under Rule 35.1, the right to review of a sentence would be subject to a prior determination by the court of appeals that "a showing has been made of a substantial basis for determining that the sentence is clearly unreasonable." Courts of appeal are experienced in preliminary screening and clearly frivolous claims can be swiftly weeded out in this manner.

It seems to me that your Committee must decide whether sentencing guidelines will invariably exclude the clearly unreasonable sentence when individualized to take into account aggravating and mitigating circumstances. Both approaches are designed to achieve the same protection for the defendant, with Rule 35.1 perhaps offering a less confining entry to review. Much will depend upon the range of punishment guidelines established by the Sentencing Commission under §924.

Your Committee may also wish to consider carefully whether guidelines for fines can be drawn with sufficient general application to provide a triggering mechanism for appellate review. After much consideration, the Advisory Committee concluded that fines do not have the same impact upon the individual as does imprisonment and the economic circumstances of defendants are so varied that it is impossible to set either a dollar limit or fraction-of-maximum-permissible-fine limit which is applicable to all cases. Appellate review of fines alone may prove to be unwarranted.

APPEAL BY THE GOVERNMENT

Both Rule 35.1 and §3725 permit appeals by the government. Rule 35.1 adopts as its test whether the sentence is less than one-third of the maximum permissible term of imprisonment. Section 3725 on the other hand permits appeal if the sentence includes a fine or imprisonment or a term of parole ineligibility less than the minimum recommended in the Sentencing Commission guidelines. Both approaches exclude plea bargained sentences. Rule 35.1 would not permit a government appeal based on the failure of the district court to impose consecutive rather than concurrent sentences.

POLICY STATEMENTS

Section 3725 excludes from sentence review, either by the defendant or the government, sentences which are "consistent with policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. §994(a)(2)." These are merely general policy statements that are intended to further the legitimate objectives of sentencing sanctions: deterrence, protection of the public, just punishment and rehabilitation. It is not at all clear when or by whom that determination is made. The policy statement appears to override the maximum-minimum guidelines test. Would a policy statement, for example, that all defendants convicted of crimes committed with weapons should receive the maximum term permitted by law preclude all sentence review? It is submitted that this may be a Catch-22 which should be carefully analyzed before accepting it as an exception to the right of sentence review.

The policy statement exception presents one further difficulty. It appears to be a condition of eligibility for review.

Who makes the determination in the first instance when the defendant seeks to file his notice? It appears that the appellate court will have to deal with §3725(a)(1), most likely as a preliminary administrative determination. This suggests that the screening process proposed by Rule 35.1 may have considerable merit and should be more flexible and more broadly applied than the present bill permits.

"CLEARLY UNREASONABLE"

Both Rule 35.1 and §3725 use the "clearly unreasonable" standard of review. This seems to be a new term of art. Many judges have expressed the view that the "abuse of discretion" standard of review is more of a known quantity. Under Rule 35.1 the court of appeals is required to find, as a condition of upsetting the sentence, that it is either unreasonable *and* excessive or that it is unreasonable *and* insufficient. Under §3725 the court of appeals must expand upon its determination by stating "specific reasons for its conclusion." A finding of "insufficiency" or "excessiveness" would not appear to satisfy this requirement. The extent of the explanation required is apparently left to future explication by the Supreme Court.

DISCRETION

It may be said by some that sentence review is the result of the failure of the judges to meet their sentencing responsibilities with consistent fairness. This is much too broad an indictment. Most judges perform their sentencing duties conscientiously and with great care. The aberrational sentence should be the main target of sentence review.

To the extent that discretion is taken from the judges, it must necessarily be placed elsewhere. If the guidelines are too tight and sentence ranges too narrow, then discretion is passed from the judge to the prosecutor, who can more fully control the sentence by selecting the nature of the charge and the number of counts.

It may be useful to utilize a Sentencing Commission to promote a greater degree of uniformity in sentencing philosophy, but it is submitted that Article III judges should not be hamstrung by guidelines promulgated by the Sentencing Commission.

The process of evolving suitable guidelines promises to be a lengthy one, certainly one guided by on-going experience. Your Committee may wish to consider utilizing the screening process contained in proposed Rule 35.1, at least in those areas in which guidelines do not yet point the way. It is entirely possible that appellate courts, in their analysis of sentences on review,

may be able to contribute a useful body of law from which guidelines may be drawn by the Commission. In order for this to be possible, the appellate courts may need a greater area of discretion in accepting or rejecting demands for review of sentences.

Senator HATCH. Judge, I appreciate your statement and the excellent suggestions both of you have made. We will certainly give every consideration to them before reporting this bill.

Thank you for coming today. We appreciate having you with us.

Our next witness is Hon. Harold R. Tyler, chairman of the Advisory Corrections Council.

We welcome you, Judge Tyler.

With your service and experience on the bench and as a former Deputy Attorney General, I am sure you will be helpful to the Committee. We are very pleased to have you with us today, and we are looking forward to hearing what you have to say about this and the enlightenment you can provide with regard to this particular piece of legislation and the amendments thereto.

STATEMENT OF HON. HAROLD R. TYLER, CHAIRMAN, ADVISORY CORRECTIONS COUNCIL

Mr. TYLER. Thank you, Mr. Chairman.

I would ask that my written statement be made a part of the record, and I will summarize some of the main points very briefly.

Senator HATCH. We appreciate that. We will incorporate your statement in the record, without objection, at the completion of your oral remarks.

Mr. TYLER. Very broadly, Mr. Chairman, I am here this morning to submit my views in support of the thrust of the sentencing provisions which appear in part III of S. 1437 and also in that appendix to the draft bill, known as part E, which would add a new chapter to title 28 of the judicial code and provide for a U.S. Sentencing Commission.

Essentially, as I see it, what this committee is considering is the legislative establishment of the outer limits of punishment in the Federal courts; and, second, the creation by Congress of an administrative body to be known as the Commission on Sentencing which will provide guidelines to typical sentences for categories of offenses and offenders; and, third, the authorization of the trial judges to impose specific or fixed term sentences, presumptively within the Commission-established guidelines but with necessary flexibility to go outside those guidelines in appropriate cases.

Then, of course, in the latter event, the thrust of the new proposals would be to allow sentence appeals to the duly constituted courts of appeal where the trial judge decided, for reasons stated in particularity on the record, to go outside of the administrative proposed guidelines.

It seems to me that this will be an imaginative and novel approach in our history and one which will permit us to build up a body of case law, a body of knowledge and learning on an empirical basis.

As you know, Mr. Chairman, one of the important parts of the Sentencing Commission mandate would be to accumulate information, statistical and otherwise, which we are sadly lacking and have been sadly lacking in the Federal system, particularly in the punishment arena, for all of our history.

I think some of us overlook this feature of the present proposal. I am happy to say that the draftsmen have not. The emphasis is very clear, and I think all to the good.

As other witnesses have testified, Mr. Chairman, the hope is—and I think it's a reasonable hope—that the scheme here will go a long way toward eradicating what I will call irrational disparity.

Surely, I think, there must be common agreement that there is no sentencing scheme in any country, let alone ours, where one has or one could expect to have total similarity in sentencing under various penal sections.

I don't think we want that, and I don't think it would be possible to achieve, even if we wanted it.

What this new proposal does, however, is to allow us for the first time to be in a position to eradicate unreasonable disparity which has no basis on the record. Such disparity does not comport with our notions of fairness and due process of law, and it does not serve the public image of justice for sentencing.

Finally, Mr. Chairman, to put it very bluntly, I would say this new scheme would allow us to have some simple candor and honesty in our sentencing arrangements.

You know, and I know, as lawyers, that for years we have read in the papers that an offender, John Doe, has been sentenced to 15 years but we know he is not going to serve 15 years. He is going to serve perhaps 5 years.

The public doesn't understand this. We lawyers perhaps do, but I'm not even sure we do all the time.

I believe that this new system will allow fixed-term sentences, hopefully for modest terms and not unduly harsh and repressive terms, and that everybody will know where they stand the day the sentence is imposed.

That, of course, includes most particularly the offender himself. If he knows that he is going to get a minimum of 4 years and a maximum of 6, that is better for him and it's better for us who have to be also considered, because punishment can only be sensible and only be politically acceptable if it's clear and honest to everybody in the general public, as well as thosee of us who labor in the system.

Earlier this morning, I heard some colloquy between you and Judge Tjoflat, I think, on the provisions in subparagraph (a) of section 991 of new chapter 58, providing for the designation of nine members of the Sentencing Commission by the Judicial Conference.

I would argue that the present draft is a little unclear because it doesn't really make it apparent what skills and what talents and what disciplines are to be possessed by members of this commission.

I think the present draft could be read to permit, if not encourage, the appointment of nine judges.

As an ex-Federal judge, Mr. Chairman, I am comfortable with the notion, from a parochial viewpoint, of having judges on the Commission; but I'm not so sure when I try not to be parochial that that would be a good idea entirely. Therefore, I would earnestly suggest, as others have, that there be reconsideration of this paragraph, particularly along the lines of maybe getting some other appointing authorities, in addition to the Judicial Conference, even though this Commission will be part of the judicial branch of government.

As I see it, there is nothing illegal about having the President, or perhaps one or more houses of the Congress, to make the appointments.

After all, the Congress and the President are in on the appointment of Federal judges. There seems to me to be no good reason why they couldn't be in on the appointment of these Commission members.

More than that, I would also advocate that we try to get different disciplines.

Judges aren't the only people concerned with sentences in the United States. Sentences are too important, also, to be left to the judges alone.

I think most judges in the federal system recognize this.

I would advocate that a number of disciplines be reflected among the members of this Commission. I would say, for example, prosecutors, parole officials, and perhaps even lay persons, and other professionals—from the medical profession, perhaps. In short, I think this is an important feature which deserves further consideration which I know the subcommittee will give to the matter.

I am also bold enough, Mr. Chairman, to point out that the present draft of chapter 58 is a little sketchy about the nature, pay, skills, and experience of the staff director and staff employees.

If this Commission is as important as I think we all agree it's going to have to be, I think the Congress might want to make it clear what key staffers are going to be paid and the kind of people that should be encouraged to be staff members of this Commission.

It is not going to be easy to write guidelines. We know that. We need the best brains and the best people we can get to assist in that, and anything that the Congress can do to make that clear in the staff provisions I think might be very helpful to the success of this scheme later on.

I would like to say, Mr. Chairman, with the utmost bluntness and candor, that I am one of those who thinks that the day of the parole boards and the parole commissions is coming to an end.

However, I would like to add, as I think other witnesses have said, that one of the features of the present draft that I think is quite practical and sensible is that though this proposal doesn't quite get rid of the parole commission, it does leave open to it certain duties which are fairly important—perhaps the most important of which is to make sure that there isn't an injustice perpetrated unwittingly by a sentence that turns out not to fit the offender, even where the judge has considered everything as best he can and has acted within the guidelines.

There may be another reason that is not spelled out, and it shouldn't have to be. But it may be in the minds of the Congress and, if so, I would think wisely so.

It is probably a good idea to think of keeping the Parole Commission in place for awhile longer, just to see how the Sentencing Commission scheme functions.

Although I am one who would concede, Mr. Chairman, that if the Commission works well there would then be no need of parole commissions as we now know them; but it may be the better part of wisdom and practicality to go slow, as the present draft does, in order to see how the Commission works.

Finally, I would note a concern which I'm sure will be echoed by others. It probably shows up in the present draft best in subparagraph (e) of section 994 where an attempt is made, as I read it, to have the Congress tell the Sentencing Commisison that there should be a presumption in favor of imprisonment for certain categories of offenses and offenders.

As best I can tell, this goes back to the old organized crime legislation, where the big manager of a narcotics scheme was singled out, you will remember, for special sentence treatment, and so on.

That is all understandable. I just would like to make two points, however.

The present draft, to me, seems to be unnecessarily ambiguous. The language used in the first sentence, for example, to the effect that a substantial sentence of imprisonment shall be provided "for most cases."

That phrase "for most cases" seems to me susceptible of difficulty of interpretation in the future. I really believe what is intended is to say there should be a presumption in favor of incarceration.

If that is it, I think it might be better said that way.

I would like to make this broader point. I continue to think that the legislature—in our instance, the Congress—must be involved where punishment is being provided in terms of rules or guidelines. Therefore, I think the legislature is entitled to put on the outer limits, as this proposal does, and also maybe to suggest priorities for consideration. But I think it has to be drafted in such a way so as not to fetter unduly the discretion and wisdom of the Sentencing Commission itself.

My own view is that the draftsmen here in this committee are already sensitive to the need of balancing those two polar limits, but I wanted to make the point since I am somewhat troubled by the present language as I read it in section 994.

Finally, Mr. Chairman, I would like to make one observation:

Earlier this spring, Dean Morris of the University of Chicago and other witnesses in a symposium run by the Library of Congress, which is now reflected in a report of the House Judiciary Committee, pointed out that in our system surely, if not in other systems, when a society lays down rules for punishment, they really are laying down something far more important. Sentencing provisions more than any other portions of a penal code stake out what a society means to be its criteria of justice.

If that is so, and I believe it is so most fervently, then the particular genius of the present proposal is that it allows the legislature to have its say, as it should, on what are America's criteria of justice.

It allows, also, a chance to get away from the hobgoblins of the legislative action which have always been with us; that is, the Congress, for example, is so terribly overburdened it can't catch up and have an annual review of penal code provisions, including sentence provision.

Here we have a chance for the legislature to stay in the fray, as it should, to allow somebody who is constantly in the business to review the matter on a regular basis and, finally, in the third part, to allow the sentencing judge who has to deal with the offender before him to

have sufficient discretion to tailor the punishment to fit that particular individual.

That seems to me to be a very promising tripartite approach to sentencing.

I think that we would be remiss if we didn't push forward and see how this goes. I suspect that it would be peculiarly American in the best sense if we could pull it off.

Thank you very much, Mr. Chairman.

Senator HATCH. Thank you, judge, for your comments.

Do you envision Congress playing any role in the sentencing guidelines?

Mr. TYLER. As I read the present draft, Mr. Chairman, the Congress will have a chance to review, because the Sentencing Commission will have to furnish its guidelines in a report to the Congress and then the Congress will have the right to approve or disapprove. Although I know some are opposed to this because they think it will cut into the discretion and independence of the Commission, for my part I think that's a good idea.

If you take our system of government, I really think the Congress can't get out of this entirely. As I read the draft, Congress doesn't propose to get out of it entirely, and I think it is balanced pretty well. I think it's worth a try just along these lines.

Senator HATCH. With experience on the bench and at the Department of Justice, do you envision any problems with appellate review of sentencing? If so, what problems?

Mr. TYLER. I have to confess, Mr. Chairman, that I am somewhat less than objective here because I was one of the co-schemers last year in the Department that worked on aspects of this draft which still incorporates many features, including this one on appellate review.

I was hopeful, quite frankly, that this scheme of appellate review would satisfy everybody. Very simply, what I mean by that is this: I happen to believe that we should have appellate review and that that review should be done by the duly constituted courts of appeal and not by panels of district judges, such as the Judicial Conference of the United States has recommended rather consistently.

On the other hand, I sympathize with those—including many of my friends on the courts of appeal in this country—who feel that they would be inundated by sentencing appeals if they were allowed generally.

The peculiar attraction of this proposal in this legislation is that it should tend to limit the appeals to serious appeals, but in a way that is totally visible to outsiders.

One of the reasons that I do not quite accept the views of my good friend, Judge Webster, that this can be done by an individual court of appeal screening process is that the courts differ in their procedures. And the public can't know and understand individually, internal court procedures.

Also, I'm not entirely sure that we should solely rest upon rules of screening designed to expedite the internal workings of a court, particularly when we are dealing with important subjects like punishment.

Therefore, my hope is that this particular scheme will insure that only serious sentence issues get up to the courts of appeal.

I also think, however, that it is important that the serious issues go up to the courts of appeal, because I think they're the best institution to build the case law of sentencing which our system so badly needs.

Senator HATCH. Do you favor the complete abolishment of the parole release function?

Mr. TYLER. Yes, Mr. Chairman. In theory, I do. Simply because what I look to this proposal to provide us with a scheme of fixed sentences and thus get away from the old indeterminate sentence.

Hopefully, the fixed sentences will not be unduly harsh or long; that they will be fixed even in terms of providing, after a period of incarceration, a short period of release on the streets, which we now call parole. But the judge can do that.

Very simply, it seems to me, in theory at least, we can look to the day when there will be no need for a separate superstructure known as the Parole Commission.

As I said earlier, I sympathize and join in with those who would say: A note of caution; let's not rush to abolish the U. S. Parole Commission which is the only parole commission I know of which in the last few years at least regularized their procedures. They deserve a lot of credit for that. Until we're sure how the new scheme works, maybe it's well, as this proposal says, to keep them in place a while longer.

Senator HATCH. A number of witnesses have suggested that the legislature should in this bill prevent the Sentencing Commission from promulgating guidelines which would impose a sentence of imprisonment solely for the purpose of rehabilitation.

Do you agree or disagree with that? Some say the issue of rehabilitation shouldn't even be mentioned in the bill.

Mr. TYLER. No; I understand that, and I know a good many very respectable people in the academic world who say that. But, frankly, I am not prepared, Mr. Chairman, to give up on the notion of rehabilitation entirely.

Senator HATCH. Neither am I.

Mr. TYLER. I agree that we aren't very good at rehabilitating so far as we know, just by putting man in prison, even though I happen to think some of our prisons are first-rate, contrary to what a lot of people think.

But even in those first-rate institutions, I don't think we know how to rehabilitate. But I still don't think the Congress or the courts can totally abdicate and say they don't believe in rehabilitation any more.

Senator HATCH. I have been asking this question to a few witnesses on the subject of marihuana and its decriminalization below 10 grams: What would be your viewpoint on that?

Mr. TYLER. In other words, make the 10 gram limit the cutoff point?

Senator HATCH. Right. Possession of anything below that would be decriminalized; anything above that would be subject to the effect of this act.

Mr. TYLER. I don't have much trouble with that. It would certainly be an improvement over what we're doing now.

I heard when you put this question to Judge Tjoflat. I think I would agree with him on that, basically.

Senator HATCH. But you still believe that we should have penalties for possession of amounts over a certain gram-size, but there should not be a record for some kid who has been indiscriminate.

Mr. TYLER. What bothers me, and I assume bothers people like Judge Tjoflat too, is this.

Our experience seems to indicate that if a person has more than a quantity that seems reasonable for his own use, the chances are he is probably dealing.

I am reluctant to see us decriminalizing dealing for profit, because that has its obvious consequences.

I am not sure I am sophisticated enough in my knowledge to know whether it should be precisely at 10 grams, but that seems to me more sensible than——

Senator HATCH. Than 1 ounce which might make 50 to 75 cigarettes?

Mr. TYLER. Yes.

Senator HATCH. Mr. Bourne testified before one of our subcommittees that one ounce would make something like 75 marihuana cigarettes. That is quite a few.

Mr. TYLER. Yes.

Senator HATCH. So this seems to be at least a reasonable approach in your eyes.

Mr. TYLER. Yes.

Senator HATCH. Thank you. We appreciate your testimony here today and the time you have taken to come here.

[Material follows:]

STATEMENT OF HAROLD R. TYLER, JR.

At the kind invitation of this subcommittee, I appear today to speak to S. 1437, The Criminal Code Reform Act of 1977. More particularly, it is my understanding that the subcommittee would like me to address myself to the sentencing provisions of this bill. Hence, I wish my remarks to be understood as focusing upon Part III of S. 1437 (Sections 2001 et seq.) and that appendix of the draft bill known as Part E, which purports to add a new chapter No. 58 to Title 28 of the United States Code, providing for a United States Sentencing Commission to be part of the Judicial Branch of Government.[1]

My testimony is frankly supportive of the thrust of these provisions in S. 1437. As I read the proposals, the Senate is considering therein at least the following significant items: (1) Legislative establishment of the outer limits of punishment; (2) the creation by Congress of an administrative board to be known as the commission on Sentencing which will provide guidelines to typical sentences for categories of offenses and offenders; and (3) authorization of the trial judges to impose specific or "fixed term" sentences, presumptively within the Commission-established guidelines, but with flexibility to go outside the guidelines, which latter event would subject the particular sentence to appellate review in duly constituted courts of appeal in the federal system. Accepting the major features of the proposal to be substantially these, I am of the opinion that the new sentencing sections will be more imaginative than those to which we have been accustomed and, more important, will permit an orderly development of legal sentencing—i.e., the creation of a "common law" of sentencing in the federal courts which will serve as a model for all segments of the criminal justice systems in the United States.

It should be conceded, however, that even if and when the new proposals become law, it will take a number of years before a significant edifice of case law on punishment can be erected in the federal system. Also, it is probable that the new proposals will not by themselves reduce instances of crime very much, if at all. Yet, with these caveats, I nonetheless submit that the proposals now under consideration before this subcommittee will allow us to deal more justly and sensibly with the criminal process on the federal level than heretofore—and this in keeping with our best notions of fairness and due process of law.

[1] See also S. 181, Jan. 11, 1977.

Turning to more specific potential advantages of these proposals, they will allow flexible responses to the problems of irrational disparities of sentencing within the federal system. Although I recognize that some argue to the contrary, every study on the subject indicates beyond serious doubt that there are unjust disparities, some within the same courts. Surely, one cannot contemplate any system whereby complete uniformity of sentences could or should be achieved. What attracts me to the present proposals is that they will go a long way toward eradicating unreasonable disparities. In addition, the guideline methodology will permit avoidance of the serious rigidities of mandatory minimum sentences. As this subcommittee knows, we have experimented with mandatory minima in the federal system before, most importantly and obviously in the narcotics offenses field, with conspicuous lack of success from most viewpoints. Moreover, mandatory minima at best only serve to shift discretion from the courts, which have to consider each individual case, to the legislature, which does not and cannot do so.

In addition, it is important to note the sensible resolution of the much-debated issue of sentence appeals in the federal system. The current proposals would provide for such appeals only in those instances where the sentencing judge chooses to go outside the guidelines proposed by the sentencing commission. In my judgment, this mechanism would serve to confine the appeals to serious issues and to assure that the courts of appeal are not unduly burdened by sentencing appeals on their dockets.

As has already been publicly noted,[2] Part III of S. 1437 and proposed new Chapter 58 of Title 28, United States Code, would largely eliminate the federal parole system as we know it and provide fixed sentences—either fixed terms of incarceration without parole or terms of incarceration followed by specific periods of parole. There is much to be said in favor of this approach, if only because offenders would know in advance exactly what to expect and so too would the interested public. In short, there would be precision and candor in our sentencing procedures—qualities sadly lacking now and within recent memory. Further, this approach may, with luck, lead us away from unnecessarily lengthy terms of incarceration.

As stated at the outset, the current proposals permit legislative guidance without the rigidities and time-lags which have heretofore been the hallmarks of legislative action in the field of punishment during virtually our entire history as a nation. This is important if one believes, as I do, that punishment questions, more than any other parts of a criminal code, involve the "fairly complex problem of definition of the criteria of justice."[3] The Congress, thus, must have an important role in determining criteria of justice. The pertinent promise of Part III is that its provisions enable Congress to fix the punishment maxima in the first instance and thereafter to exercise veto power, if it chooses, over specific guidelines within the maxima laid down by the administrative commission. But, at the same time, the commission and the judges in individual cases still will have the necessary flexibility and discretion to deal not only with individual cases but to take into account accretions of statistics and knowledge that hopefully will be forthcoming in the years ahead.

This last point leads to another intriguing and important potential of the existing proposals. Here I am talking about the mandate which Congress proposes to place upon the Commission to gather statistics and other relevant information on a regular and current basis in the field of punishment. In my opinion, the lack of any such capacity in the present federal system is one of our most critical weaknesses. Hence, for this reason alone, I respectfully submit that the new Commission, once it is properly staffed and in being, may turn out to offer as its most valuable contribution the collection of information and knowledge in this most important and difficult field.

Before conclusion, I respectfully call to the attention of the subcommittee one or two matters which may not be particularly clear in the present draft of the sentencing provisions. For example, turning to the proposed new Chapter 58 establishing the Sentencing Commission, I note the following:

1. In Section 991, subparagraph (a), it is provided that the nine members of the Committee are to be designated by the Judicial Conference of the United States. The disciplines or skills of the persons to be selected by the Judicial

---

[2] Tom Wicker, "Sentences to Fit the Crime," New York Times, June 7, 1977.

[3] Dean Norval Morris, University of Chicago Law School, Testimony, House Judiciary Committee, Subcommittee on Crime, April, Committee Print No. 2, April, 1977.

Conference, however, are not stated. Thus, for example, the present draft could be read to permit or require the Conference to select nine judges to be members of the Commission. Yet I am not convinced that this is clearly the intention of the draftsmen. In short, I suggest that the subcommittee might wish to consider this point and decide if it wishes to propose types or disciplines of persons to be designated by the Judicial Conference, either alone or in concert with other appointing officials or bodies.

2. The present draft of Chapter 58 fails to spell out potentially important details about the staff director and employees of the staff. To illustrate, I note that nothing is said as to the qualifications and pay scale of the staff director; similarly, the draft is silent as to the nature, qualifications and responsibilities of key subordinates of the director. If the Commission is to be as important as obviously intended, I would suggest that some thought might be given to some specific additional language bearing on these matters. In particular, because of the provisions of Section 995 dealing with the powers and obligations of the Commission, the research and development program alone will require people of considerable education and experience. Hence, it may be important to the Congress to make clear initially that there are appropriate positions with necessary pay scales in order to attract persons of reputation and capacity to these positions.

3. Subparagraph (e) of Section 994 now provides that, "a substantial sentence of imprisonment shall be provided in the guidelines *for most cases* in which . . ." (emphasis added). Although the Congress may wish to indicate to the commission certain priorities, including priorities in terms of gradations of punishment, I would suggest that the language here in subparagraph (e) may be ambiguous. Thus, the phrase "for most cases" is susceptible of several meanings which may provide trouble later on in the implementation of the policy judgment clearly intended in this subparagraph—i.e., that there should be a presumption in favor of incarceration for the categories of offenders here described.

4. Although this point may be implicit in the proposed draft of Chapter 58, I note that there are no express provisions for full public reporting of the guidelines promulgated pursuant to paragraph 994(a). In other words, though the present draft requires reporting to the Congress, it goes into no specifics as to how the commission shall report to the public, and indeed to the courts and the bar. Because of the significance of the guidelines and the desirability of their wide dissemination to not only courts and lawyers but also the public, the Congress may wish to give attention to specific requirements upon the commission for dissemination of guidelines and other information on a regular basis.

Once again, I thank the subcommittee for the invitation to appear here this morning. The importance of these sentencing proposals is considerable; thus, along with many others, I look forward to the progress of this important legislation in the weeks ahead.

Senator HATCH. Our next witness is Hon. Morris E. Lasker, Judge of the U.S. District Court for the Southern District of New York.

Judge Lasker, we are pleased that you would take the time to come here and express your viewpoints concerning this important piece of legislation.

Your reputation, as with the others, has preceded you. We appreciate your being here.

STATEMENT OF HON. MORRIS E. LASKER, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF NEW YORK

Judge LASKER. Thank you, Mr. Chairman.

I am glad to have the opportunity to join the other judges who have testified here today, particularly my friend, Harold Tyler, who was a member of our court and whom we miss very much.

Judge Tyler was the chairman of the Second Circuit Sentencing Committee. I am delighted that, since his return to New York, Chief

Judge Kaufman of our circuit has been wise enough to reappoint Judge Tyler to that job. I mention that because he and I have worked together in this process. I think a lot of our views are the same.

I still would like to give you my own thoughts about S. 1437. I am limiting what I have to say to the subjects of sentencing and parole, appeal of sentences, and the creation of the commission.

My suggestions as to sentencing and parole are, on the whole, technical but no less important, I hope, for that reason.

What I have to say as to the appeal of sentences and the creation of the commission expresses a philosophy.

As to sentences, it seems to me very important to bear in mind that the major decision to be made in imposing a sentence is whether or not the defendant should go to prison.

S. 1437 specifies no congressional view as to that matter. It seems to me that American experience with incarceration has not been encouraging. While there are many sound reasons for imposing a term of imprisonment, recognition of its destructive effects requires that, before sentencing a man or woman to prison, judges should consider whether a less drastic alternative will not do the job.

I, therefore, recommend that S. 1437 be amended to provide a presumption against incarceration, or the inclusion in section 2003(a) of a requirement that a Judge consider "whether other less restrictive sanctions have been applied to the defendant frequently or recently." That is language contained in S. 181 introduced by Senator Kennedy on behalf of himself, Senator McClellan and 10 other Senators.

Section 2104(d) of S. 1437 authorizes the sentencing court to extend the term of probation at any time prior to the expiration of the term if the original term was less than the authorized term. This provision seems to me unnecessary for the protection of the public and introduces into the probation process for the first time the destructive element of uncertainty so widely believed to have a pernicious effect on prisoner morale.

As probation now stands, a fixed term of probation is established by a judge; and it is not extended unless there is a violation of probation during the period of probation.

That, of course, is a feature which I think is salutary and which I think should be continued.

Moreover, as indicated in my prepared statement, I believe that section 2104(d) as now drafted raises questions of constitutionality which I will discuss later.

As to fines, I want to say that the new level of fines which may be imposed on individuals and corporations and the provision authorizing a court to require a defendant to pay a fine up to twice the gross gain derived or gross loss caused, which ever is greater, provide important new tools for the judiciary which should have a salutary effect even if a term of imprisonment is not imposed.

As to imprisonment and parole, an intelligent review of S. 1437's provisions on that subject must be unitary, not only because the subjects are functionally integrated in general, but because the provisions of S. 1437 themselves tie them together so closely.

I am concerned that, to the extent that 1437 reduces the Parole Commission's activities to merely ministerial duties, at the same time

authorizing the sentencing commission to prescribe periods of parole ineligibility up to nine-tenths of the sentence, without significantly diminishing the length of sentences presently authorized, the result will be to lengthen substantially the average period of imprisonment actually served.

I do not think that that is what S. 1437's drafters want to accomplish.

Many judges, I have to say, Mr. Chairman, habitually impose long or fairly long sentences in the expectation that a grant of parole will result in the actual time served being much less than that originally imposed.

There are two ways to eliminate the possibility that long sentences will still be imposed without the possibility of meaningful parole reduction. One is to reduce the scale of allowable sentences as proposed by the Hart-Javits bill, S. 204. The other is to limit the sentencing commission's powers, as specified in Senator Kennedy's bill, S. 181, to setting standards for judicial sentences but not parole decisions.

My preference is for the latter mainly because I think it is more politically feasible at the moment. Otherwise, I would favor reduction of sentences as provided in the Hart-Javits bill. That is, I favor that the radical amendment of the powers of the Parole Commission which 1437 contemplates be deferred for separate comprehensive treatment of the subject of parole, including its possible abolition.

In the meantime, however, S. 1437 and 18 U.S.C. section 4201—which is the Parole Commission Act—should be amended to require that the sentencing and parole commissions coordinate their activities for the purpose of establishing a rational and integrated sentencing parole process.

If, however, the present structure of S. 1437 is to be adopted, I make the following suggestions.

First, while I realize that the provisions of section 2302(a), which authorize the sentencing court to specify a portion of the term of imprisonment as a term of parole ineligibility, is the functional equivalent of a judicially imposed minimum, a feature common to many systems, I oppose its introduction, particularly in its present form in which, for example, nine-tenths of a 25-year term may be specified as a period of parole ineligibility.

Minimum terms write in stone an awesome proposition—that of incarceration—which ought not to be put beyond the power of the community itself to modify or alter. However substantial may be the knowledge available to him at the time of sentencing, no judge can pretend to the omniscience necessary to be sure that his sentence, even guided by the standards of the Commission, may not be mistaken or unjust, or that a change of circumstances may not require its alteration. That, of course, applies particularly to long sentences.

While I oppose minimum sentences, I recognize that there is an impressive body of support for their imposition in appropriate circumstances. Nevertheless, even a system of minimum sentences must maintain a mechanism for relief in exceptional and appropriate cases—at least during the period of experimentation which S. 1437 will inaugurate.

Second, section 3834(d) authorizes the Parole Commission to set the term of parole at the time of the release determination. This pro-

vision, it seems to me, aggravates the factor of uncertainty by postponing the decision of parole term length unduly. Parole, though not imprisonment, constitutes a sanction, the terms of which should be set at the earliest possible time in the corrections continuum.

Third, the provisions of section 3834(g) authorizing the Parole Commission to extend the period of parole supervision at any time prior to its expiration, if less than the maximum authorized term was originally imposed, are troublesome. It is certainly clear that authorizing judicial increase of a term of imprisonment up to the statutory authorized maximum at any time prior to the expiration of the original sentence of imprisonment would raise a very serious constitutional question.

The provisions which allow the Parole Commission to extend the term of parole supervision or a judge to extend the term of probation, may be subject to the same infirmity and, in any event, add uncertainty to uncertainty in the life of the prisoner.

A preferable scheme, it seems to me, would be the establishment of an integrated guideline's sentence to include a prison term and a parole term, subject to review by the Parole Commission, so long as it continues to exist, for possible reduction in exceptional and appropriate cases during the experimental period to come.

Finally, the provisions of section 3835(i), which permits the Parole Commission on a second or later revocation of parole to imprison a defendant for the term of the original sentence less only the portion of that sentence served in confinement prior to the last parole, but without giving him credit for the period of time served on the last revocation, if I have read it correctly, seems to raise questions of double jeopardy by twice punishing a defendant for the same underlying offense.

I come now, Mr. Chairman, to the question of appeal of sentences. I am pleased that S. 1437 contains provision for appeal of sentences as did its predecessor, S. 1. It is unsatisfactory, however, that the bill limits the right of appeal of a defendant to the instance of a sentence falling outside the guidelines.

While it is to be expected that if the guidelines ultimately developed are sound and are intelligently applied by the sentencing judge, the result should be reasonable and fair, I nevertheless believe that all sentences should be appealable be a defendant.

Even where guidelines are followed, we cannot be sure that the guidelines—an entirely new venture in criminal justice—will be so obviously just as to preclude the need for modification in individual cases. Nor can we be certain that judges may not mechanically apply the standards themselves with results which may be unjust at least on occasion. We have learned that the act of sentencing is too awesome to be entrusted to one man alone.

There may come a time—and I certainly hope there will—when the body of material developed by the Commission is so foolproof, or nearly foolproof, that a single judge's sentence within the guidelines can be trusted as sound. That time has not yet arrived.

At least until it does, the defendant should have the right to appeal any sentence; but no appeal should be favorably granted unless the court of appeals finds that a sentence outside the guidelines is unreasonable or, within the guidelines, is clearly unreasonable.

It may be argued that granting defendants a right of appeal in all cases will impose an unworkable burden on the courts of appeals. I do not believe this will be so, although it may be easy for a district judge to say that.

First, it is unlikely that sentences within the guidelines will often be appealed. If they are, the appellate courts should be able to decide them summarily in many, if not most, instances.

Second, where the conviction itself is appealed, a determination as to the propriety of the sentence will add only marginally to the burden on the court. Experience in States which permit appellate review of all sentences, suggests that the burden is not heavy.

Senator HATCH. Judge, excuse me.

This is Senator Thurmond, who is going to relieve me at this point. He is our ranking minority member in this subcommittee and in the full committee. He is a man for whom I have a great deal of respect.

I apologize that I have to leave, but I do need to be over on the floor.

Judge LASKER. Senator Hatch, I am grateful that you were here.

Senator HATCH. I am grateful that Senator Thurmond is able to be here.

Senator THURMOND [acting chairman]. We have such a good man here, I hate to replace him.

You may proceed.

Judge LASKER. Senator, I am coming now to the question of the Commission membership.

It seems to me that the major questions relating to the membership of the Commission are whether the membership should be restricted to judges and who should appoint the members.

In my view, the membership of the Commission should not be limited to judges.

The process of sentencing represents the exercise of the community's collective sanction upon destructive behavior. Wide as the experience of judges may be, it cannot encompass the views of the community as a whole. Moreover, the membership of nonjudges on the Commission would give perspective to the judicial approach and enrich the thinking which would otherwise emanate from this specialized group.

Furthermore, the sentencing process inevitably draws not only on the intelligence and experience of judges but on the professional training and expertise of those in the probation and parole service, for example. The value of their contribution is embodied in presentence reports furnished to judges.

An experienced probation officer who has recommended sentences over a period of years and supervised junior officers in the preparation of such reports could be a valuable commission member.

I, therefore, favor the terms of Senator Kennedy's bill, which provides that the Commission membership shall include practicing attorneys, criminologists, prison, and parole authorities. I would add to this list, although I deem the list inclusive only, a specification that the Commission should include a person experienced in probation administration.

Now, who should appoint the members?

S. 1437 provides that members of the commission shall be appointed by the Judicial Conference. With all respect to my honored colleagues who are or may be members of that important body, I question the wisdom or efficacy of the bill in this regard.

I favor the provisions of the Hart-Javits bill, which provide for appointment of the commission members by the President with the advice and consent of the Senate. Presidential appointment, it seems to me, has very important advantages.

First, in the light of our historic experience, appointments by the President with the advice and consent of the Senate are regarded as positions of distinction. Thus, a Presidential appointment will confer the maximum possible dignity upon the office of member of the commission.

Second, Presidential appointment will confer, as it should, an equality of position between judicial and nonjudicial members of the commission. If the commission is to be made up both of judges and nonjudges, as I believe it should, then appointments should be made by a nonjudicial authority.

Third, whether or not the membership of the commission is restricted to judges, lodging authority for appointment of its members in the Judicial Conference may throw an apple of discord among the members of the judiciary. One cannot say whether membership on the commission will now or in the future be regarded as a form of patronage, whether in terms of psychic or financial income. However, since that possibility exists, the judiciary should not be involved in the process.

The final objection to authorizing the Judicial Conference to appoint the members of the commission is that such a process would be inefficient. The conference, as you know, presently consists of approximately 25 judges chaired by the Chief Justice. Such a large body is particularly unsuited to exercise an appointive power which for good reasons is normally lodged within the authority of an individual, not a large group.

I have earlier recommended that until the phasing out of parole as an institution can be separately and comprehensively studied, or until the scale of sentences set by S. 1437 is substantially lowered, the commission should not be authorized to establish parole ineligibility or release guidelines. I reiterate the point here because such a proposed power is an important feature of S. 1437.

My final point has to do with when the guidelines should become effective.

Section 994(g) provides that the guidelines shall take effect 180 days after they are reported to Congress subject to veto by either house of Congress. I favor this provision over those of the Hart-Javits bill, which requires a two-house veto to disapprove proposed guidelines, or the Kennedy bill which permits the guidelines to take effect within 180 days unless Congress acts as a whole.

Indeed, a good argument may be made that the guidelines should not become effective without affirmative approval by both houses. Such a provision would eliminate any lingering question as to the constitutionality of a one-house veto—a subject recently passed upon by the Court of Claims in a suit brought by the judges against the United States.

A sounder reason, however, for requiring two-house approval of the guidelines is that no subject is more important in the process of government or to the welfare of the people than the fixing of criminal sanctions.

I end my remarks by complimenting the drafters of S. 1437 for authorizing the Commission, in subdivision (a) (13) of section 995 of chapter 58, to collect and disseminate information concerning sentences actually imposed and the relationship of those sentences to the purposes of sentencing set forth in the statute.

Such a program should include research to follow up the behavior of Federal convicts both on probation and at the end of prison terms. Its results should furnish information which would enable the Commission and judges to evaluate their sentencing practices and the Bureau of Prisons to test the validity of its programs. Under present circumstances, no one knows the effect of sentences imposed. The program which the statute authorizes would help us emerge from this wilderness of ignorance.

Mr. Chairman, it is gratifying for me to have the opportunity to give you my views.

If you have any questions to put to me, I would be glad to answer them.

Senator THURMOND. Judge, S. 1437 provides that the Congress have veto power over sentencing guidelines set by the new sentencing commission.

Does this procedure seem reasonable in terms of allowing Congress to set minimum levels of punishment for crimes?

Judge LASKER. I think, Senator, as I have just indicated, that it is a sound provision. I do think that it probably is adequate.

The provision, as I understand it, follows the procedure which is allowed with regard to the Federal rules of criminal procedure and civil procedure and so on. As you know, Congress has found that to be fully effective to enable it to influence the content of those rules, and I assume it will be fully effective to enable Congress to affect the substance of the guidelines when they are finally created.

So, I think the answer to your question is yes.

Senator THURMOND. A number of witnesses have advocated the abolishment of the U.S. Parole Commission. Do you think it should be abolished?

Judge LASKER. I do believe that history is showing that parole as an institution is an idea whose time may be past.

But, as I expressed in my earlier remarks before you arrived, Mr. Chairman, I am concerned about bringing about such a radical change without considering the effect which it ought to have on the sentencing structure. As I explained when Senator Hatch was in the chair, I believe that many judges impose sentences much longer than they would if there were no parole mechanism available.

Therefore, I believe the matter has got to be studied much more carefully before the commission or the institution is abolished.

Senator THURMOND. I want to take this opportunity to express our appreciation to you for your appearance here. I am sure that your testimony will constitute very helpful recommendations to this committee.

Judge LASKER. I will be happy if that is the case.

Senator THURMOND. Thank you very much. I believe I neglected to state that your entire statement will be placed in the record.

Judge LASKER. Thank you, Mr. Chairman.

STATEMENT OF MORRIS E. LASKER, U.S. DISTRICT JUDGE OF THE SOUTHERN DISTRICT OF NEW YORK

S 1437 constitutes an impressive accomplishment: a substantial recodification and revision of Title 18 of the United States Code and the creation of a new imaginative and business-like sentencing structure. The recodification, which eliminates or reconciles previously disparate provisions and which rationalizes the Code as a whole will furnish a more efficient, workable and fairer vehicle for the administration of justice. The new sentencing structure may eliminate and should minimize, insofar as human efforts can, the injustices which have flowed from the rudderless existing system. In doing so, the application of the new procedures should restore the confidence of those who are convicted of crime, as well as the public, that administration of justice in the federal courts and correctional system is fair.

My remarks are limited to the subjects of sentencing and parole, appeal of sentences and the creation of a proposed United States Sentencing Commission. My suggestions as to sentencing and parole are on the whole technical, but not less important for that reason. What I have to say as to appeal of sentences and the creation of the Commission expresses a philosophy.

AS TO SENTENCES

The major decision to be made in imposing a sentence is whether or not the defendant should be sent to prison. S 1437 specifies no Congressional view as to the matter. American experience with incarceration has not been encouraging. While there are many sound reasons for imposing a term of imprisonment, recognition of its destructive effects requires that before sentencing a man or woman to prison Judges should consider whether a less drastic alternative will not do the job. I therefore recommend that S 1437 be amended to provide a presumption against incarceration, or the inclusion in §2003(a) of a requirement that a Judge consider "whether other less restrictive sanctions have been applied to the defendant frequently or recently," language contained in S 181 introduced by Senator Kennedy on behalf of himself, Senator McClellan and ten other Senators.

Section 2104(d) of S 1437 authorizes the sentencing court to extend the term of probation at any time prior to the expiration of the term if the original term was less than the authorized term. This provision seems to me unnecessary for the protection of the public and introduces into the probation process for the first time the destructive element of uncertainty so widely believed to have a pernicious effect on prisoner morale. Moreover, as indicated below, I believe the provision raises questions of constitutionality.

FINES

The new levels of fines which may be imposed on individuals and corporations and the provision authorizing a court to require a defendant to pay a fine up to twice the gross gain derived or gross loss caused, whichever is greater, provide important new tools for the judiciary which should have a salutary effect even if a term of imprisonment is not imposed.

IMPRISONMENT AND PAROLE

An intelligent review of S 1437's provisions as to imprisonment and parole must be unitary, not only because the subjects are functionally integrated in general, but because the provisions of S 1437 itself ties them together so closely. I am concerned that to the extent that S 1437 reduces the Parole Commission's activities to merely ministerial duties, at the same time authorizing the Sentencing Commission to prescribe periods of parole ineligibility up to 9/10 of the sentence, without significantly diminishing the length of sentences presently authorized, the result will be to lengthen substantially the average period of imprisonment actually served. Many Judges habitually impose long or fairly long sentences in the expectation that a grant

of parole will result in the actual time served being much less than the sentence originally imposed.

There are two ways to eliminate the possibility that long sentences will still be imposed without the possibility of meaningful parole reduction. One is to reduce the scale of allowable sentences as proposed by the Hart-Javits Bill S 204; the other is to limit the Sentencing Commission's powers as specified in Senator Kennedy's Bill S 181 to setting standards for judicial sentences but not parole decisions. My preference is for the latter: that is, that the radical amendment of the powers of the Parole Commission which S 1437 contemplates be deferred for separate comprehensive treatment of the subject of parole, including its possible abolition. In the meantime, however, S 1437 and 18 U.S.C. §4201 *et seq.* (Parole Commission Act of 1976) should be amended to require that the Sentencing and Parole Commissions coordinate their activities for the purpose of establishing a rational and integrated sentencing-parole process.

If, however, the present structure of S 1437 is to be adopted, I make the following suggestions.

1. While I realize that the provisions of §2302(a), authorizing the court to specify a portion of the term of imprisonment as a term of parole ineligibility, is the functional equivalent of a judicially imposed minimum term of imprisonment, a feature common to many systems, I oppose its introduction particularly in its present form, in which, for example, 9/10 of a twenty-five year term may be specified as a period of parole ineligibility. Minimum terms write in stone an awesome proposition—that of incarceration—which ought not be put beyond the power of the community to modify or alter. However substantial may be the knowledge available to him at the time of sentencing, no Judge can pretend to the omniscience necessary to be sure that his sentence, even guided by the standards of the Commission, may not be mistaken or unjust, or that a change of circumstances may not require its alteration.

While I oppose mandatory minimum sentences, I recognize that there is an impressive body of support for their imposition in appropriate circumstances. Nevertheless, even a system of minimum sentences must maintain a mechanism for relief in exceptional and appropriate cases—at least during the period of experimentation which S. 1437 will inaugurate.

2. Section 3834(b) authorizes the Parole Commission to set the term of parole at the time of the release determination. This provision aggravates the factor of uncertainty by postponing the decision of parole term length unduly. Parole, though not imprisonment, constitutes a sanction, the terms of which should be set at the earliest possible time in the corrections continuum.

3. The provisions of §3834(g) authorizing the Parole Commission to extend the period of parole supervision at any time prior to its expiration, if less than the maximum authorized term was originally imposed, are troublesome. It is certainly clear that authorizing judicial increase of a term of *imprisonment* up to the statutory authorized maximum at any time prior to the expiration of the original sentence date would raise a serious constitutional question. The provisions which allow the Parole Commission to extend the term of parole supervision or a Judge to extend the term of probation may be subject to the same infirmity and, in any event, add uncertainty to uncertainty in the life of the prisoner. A preferable scheme would be the establishment of an integrated guideline sentence to include a prison term and a parole term, subject to review by the Parole Commission for possible reduction in exceptional and appropriate cases during the experimental period to come.

4. The provisions of §3835(i) which permit the Parole Commission on a second or later revocation of parole to imprison a defendant for the term of the original sentence less only the portion of the original sentence served in confinement prior to the last parole, but without giving him credit for the period of time served on the last *revocation*, if I have read it correctly, seems to raise questions of double jeopardy by twice punishing a defendant for the same underlying offense.

APPEAL OF SENTENCES

I am pleased that S. 1437 contains provision for appeal of sentences as did its predecessor S. 1. It is unsatisfactory, however, that the bill limits the right of appeal of a defendant to the instance of a sentence falling outside the guidelines. While it is to be expected that if the guidelines ultimately developed

are sound and are intelligently applied by the sentencing Judge, the result should be reasonable and fair. I nevertheless believe that all sentences should be appealable by a defendant. Even where guidelines are followed we cannot be sure that the guidelines—an entirely new venture in criminal justice—will be so obviously just as to preclude the need for modification in individual cases. Nor can we be certain that Judges may not mechanically apply the standards themselves with results which may be unjust at least on occasion. We have learned that the act of sentencing is too awesome to be entrusted to one man alone. There may come a time when the body of material developed by the Commission is so foolproof or nearly foolproof that a single Judge's sentence within the guidelines can be trusted as sound. That time has not yet arrived. At least until it does the defendant should have the right to appeal any sentence but no appeal should be favorably granted unless the Court of Appeals finds that a sentence outside the guidelines is "unreasonable" or within the guidelines, is "clearly unreasonable."

It may be argued that granting defendants a right of appeal in all cases will impose an unworkable burden on the Courts of Appeal. I do not believe this will be so. First, it is unlikely that sentences within the guidelines will often be appealed, and if they are the Appellate Courts should be able to decide them summarily in many instances. Second, where the conviction itself is appealed, a determination as to the propriety of the sentence will add only marginally to the burden of the Court. Experience in states which permit appellate review of all sentences, suggests that the burden is not heavy.

One further small but significant consideration as to appeals of sentences: S. 1 provided that in acting on an appeal the Appellate Court should take into consideration "the opportunity of the district court to observe the defendant." The provision has been eliminated from S. 1437. I believe it should be restored.

COMMISSION MEMBERSHIP

The major questions relating to the membership of the Commission are whether the membership should be restricted to Judges, and who should appoint the members.

In my view, the membership of the Commission should not be limited to Judges. The process of sentencing represents the exercise of the community's collective sanction upon destructive behavior. Wide as the experience of Judges may be it cannot encompass the views of the community as a whole. Moreover, the membership of non-Judges on the Commission would give perspective to the judicial approach and enrich the thinking which would otherwise emanate from this specialized group. Furthermore, the sentencing process inevitably draws not only on the intelligence and experience of Judges but on the professional training and expertise of those in the probation and parole service. The value of their contribution is embodied, for example, in the pre-sentence reports furnished to Judges. An experienced probation officer who has recommended sentences over a period of years and supervised junior officers in the preparation of such reports, could be a valuable Commission member. I, therefore, favor the terms of Senator Kennedy's Bill, S. 181, which provides that the Commission membership shall include practicing attorneys, criminologists, prison and parole authorities. I would add to this list, although I deem the list inclusive only, a specification that the Commission should include a person experienced in probation administration.

WHO SHOULD APPOINT THE MEMBERS

S. 1437 provides that members of the Commission shall be appointed by the Judicial Conference. With all respect to my honored colleagues who are or may be a member of that important body, I question the wisdom or efficacy of the Bill in this regard. I favor the provisions of the Hart-Javits Bill, S. 204, which provides for appointment of Commission members by the President with the advice and consent of the Senate. Presidential appointment has important advantages.

First, in the light of our historic experience, appointments by the President with the advice and consent of the Senate are regarded as positions of distinction. Thus a Presidential appointment will confer the maximum possible dignity upon the office of member of the Commission.

Second, Presidential appointment will confer, as it should, an equality of position between judicial and non-judicial members of the Commission. If the

Commission is to be made up both of Judges and non-Judges, as I believe it should, then appointments should be made by a non-judicial authority.

Third, whether or not the membership of the Commission is restricted to Judges, lodging authority for appointment of its members in the Judicial Conference may throw an apple of discord among the members of the Judiciary. One cannot say whether membership on the Commission will now or in the future be regarded as a form of patronage, whether in terms of psychic or financial income. However, since that possibility exists, the Judiciary should not be involved in the process.

The final objection to authorizing the Judicial Conference to appoint the members of the Commission is that such a process would be inefficient. The Conference, as you know, presently consists of approximately twenty-five Judges chaired by the Chief Justice. Such a large body is particularly unsuited to exercise an appointive power which for good reasons is normally lodged within the authority of an individual, not a large group.

THE POWERS OF THE COMMISSION

I have earlier recommended that until the phasing out of parole as an institution can be separately and comprehensively studied, or until the scale of sentences set by S. 1437 is substantially lowered, the Commission should not be authorized to establish parole ineligibility or release guidelines. I reiterate the point here because such a proposed power is an important feature of S. 1437.

WHEN SHOULD THE GUIDELINES BECOME EFFECTIVE

Section 994(g) provides that the guidelines shall take effect 180 days after they are reported to Congress subject to veto by either House of Congress. I favor this provision over those of the Hart-Javits Bill (S. 204) which requires a two House veto to disapprove proposed guidelines, or the Kennedy Bill (S. 181) which permits the guidelines to take effect within 180 days unless Congress as a whole acts. Indeed, a good argument may be made that the guidelines should not become effective without affirmative approval by both Houses. Such a provision would eliminate any lingering question as to the constitutionality of a one House veto (a subject recently passed upon by the Court of Claims in *Atkins, et al. v. United States*, (41–76 May 18, 1977)). A sounder reason, however, for requiring two House approval of the guidelines is that no subject is more important in the process of government or to the welfare of the people than the fixing of criminal sanctions.

I end my remarks by complimenting the drafter of S. 1437 for authorizing the Commission, in sub-division (a)(13) of §995 of Chapter 58, to collect and disseminate information concerning sentences actually imposed and the relationship of those sentences to the purposes of sentencing set forth in the statute. Such a program should include research to follow-up the behavior of federal convicts both on probation and at the end of prison terms. Its results should furnish information which would enable the Commission and Judges to evaluate their sentencing practices and the Bureau of Prisons to test the validity of its programs. Under present circumstances, no one knows the effect of sentences imposed. The program which the statute authorizes would help us emerge from this wilderness of ignorance.

Senator THURMOND. Our next witness is Andrew von Hirsch of the Center for Policy Research, New York, N.Y.

STATEMENT OF ANDREW VON HIRSCH, SCHOOL OF CRIMINAL JUSTICE, RUTGERS UNIVERSITY

Mr. VON HIRSCH. Mr. Chairman, it is a pleasure to be here to have the opportunity to testify.

In the interest of time, I will try to summarize some of the main points of my prepared testimony as quickly as I can.

My own involvement in this area comes from a number of projects that I have been working on. I was the principal author of a book entitled "Doing Justice: The Choice of Punishments," which advo-

cated a "just-deserts" rationale for sentencing. It contended that sentences should be primarily based on the seriousness of the offense; and that, in the interests of fairness, rehabilitative and predictive considerations should not be taken into account in setting the severity of punishment. The Hart-Javits bill, S. 204, which I helped draft, reflects this rationale.

I am now engaged in an LEAA-funded study on one of the issues which we have been talking about here: the alternative to parole. It deals with the question: if you get away from a rehabilitative model, what should happen to parole?

Let me say, first, that I think that this legislation, S. 1437, marks a great stride towards a sensible sentencing system. The existing situation, where judges have virtually almost unstructured discretion to decide the duration of confinement and whether to confine has never made any sense. As we begin to move away from the idea of rehabilitation as a justification for confinement, and as we move toward the idea that sentencing decisions should be based (at least in important part) on what somebody *did*—on the seriousness of his crime—it becomes absolutely essential to have standards.

I think that the technique which that the bills uses, which is to create a sentencing commission to set the standards, is the most sensible alternative.

California has tried to set sentencing standards by legislation. The experience in California suggests it is not a good idea. There are two kinds of problems. There is the political problems that arise from the fact that it is always tempting for a legislature advocate long minimum sentences, even when there is doubt that they actually can be imposed. But, beyond the political problem is simply the question of time. This body is engaged in a great deal of very important decision-making. Sentencing standards are very complicated. They have to be constantly revised. I do not think that a legislative body with this much on its agenda as the Congress has the time left over from more important functions to tinker with sentencing standards over time.

So, I do think that the basic thrust of the legislation is very salutary.

Let me, though, raise what I see to be problems in the bill. They revolve mainly around one issue. It is the issue of what should happen with parole.

The legislation, S. 1437, at the present time, leaves the commission to decide the details of the standards—which I think is sensible. It also leaves the commission to decide what the purposes of the standards should be—which is an arguable point. I prefer the approach of the Hart-Javits bill, S. 204, which specifies in some detail what purposes the sentencing commission should follow.

But S. 1437 goes further. Namely, it leaves the commission to decide the basic structural issue of whether parole should exist or not. It does this by providing that the commission may prescribe periods of parole ineligibility of up to nine-tenths of the sentence. If you impose across the board nine-tenths parole ineligibility, the effect is, of course, that parole, for all practical purposes, disappears.

Now, I think that that issue, of what should happen to parole, is a structurally important enough question that it should not be simply

passed on to the sentencing commission. It should, I think, be addressed in the legislation. That is the fundamental problem I have.

Let me mention some specific problems—some of them were touched on by Judge Lasker—in the manner in which the bill authorizes the effective elimination of parole.

My own theory of punishment would be a theory which would not leave much room for——

Senator THURMOND. Excuse me. I notice that there is another vote on the floor.

Can you finish in 3 or 4 minutes? Otherwise, I am afraid that we will have to come back another day.

Mr. VON HIRSCH. I could try to finish in 5 minutes.

Senator THURMOND. We are going to insert your full statement into the record. Are you saying things that are not in your statement?

Please take just 3 or 4 minutes to wind up, because I will have to leave.

Mr. VON HIRSCH. To put it very succinctly, Mr. Chairman, I think it is very dangerous to try to abolish parole if you do the two things that the bill now does: namely, preserve the very long authorized sentences of confinement, and—and I think this is the most serious problem—continue to have the judiciary appoint the members of the commission.

Judges are now used to prescribing long purported sentences of confinement. They are not used to the functions a parole board now has of, namely, imposing *actual* durations of confinement—which have to be shorter.

If you authorize the abolition of parole, continue the long maxima, and have a judge-dominated commission continue to prescribe the terms, I think you could have an enormous jump in the duration of confinement.

I, therefore, suggest the following.

First of all, I agree with Judge Lasker that the ideal solution would be that we defer any major change in the status of parole until we take a look at how well the sentencing commission has been handling its initial job of structuring judges' sentencing standards.

I think if you do that, then I think it would make sense in the interim to change the factors described in section 3831 (c) of the bill, that the parole board is supposed to consider in its parole decisions so that they read similarly to the factors which the bill requires the sentencing commission to consider.

If you do not do this, if you want to act now, then it seems to me that if you give the sentencing commission discretion on the question of parole abolition, that a few things have to be changed.

First, I think you have to change the appointing authority. You have to move toward a presidential appointment or some other method to insure that this is not totally a judge-dominated commission.

I think, also, that you should not allow——

Senator THURMOND [acting chairman]. Have you said this in your statement?

Mr. VON HIRSCH. No; Senator, I have not.

Senator THURMOND. Go ahead.

Mr. VON HIRSCH. If you authorize periods of parole ineligibility in excess of one-third, you should do so only to the extent prescribed by the Commission. At the present time, the way the bill works is that the Commission's guidelines are only guidelines which judges are asked to consider.

Finally, it seems to me that the commission should then be required to hold separate hearings on the question of the proposed phaseout or elimination of parole. I think there should be language expressly inserted in the bill which provides that if there is any phaseout of parole, the commission be required to adjust durations of confinement in such a way as to reflect the fact that parole is now no longer available to reduce times of actual imprisonment.

I take it, because of the absence of time, if that is all right, Senator, I can try to submit a separate letter in which I submit some of these details to the staff.

Senator THURMOND. Without objection, your statement will be inserted in the record. If you wish to make any addendum to your statement for the record, feel free to do that.

Mr. VON HIRSCH. Thank you.

Senator THURMOND. We will keep the record open for that.

Thank you very much for appearing here. We appreciate your presence. I am sure your testimony will be very helpful.

STATEMENT OF ANDREW VON HIRSCH, GRADUATE SCHOOL OF CRIMINAL JUSTICE, RUTGERS UNIVERSITY

The sentencing provisions of S.1437 contain an innovation which I strongly support—the creation of a sentencing commission to formulate standards for criminal sentences. At the same time, I have some concerns about some of the specifics of the legislation, which I shall explain.

My credentials for offering these opinions can briefly be stated. I was principal author of *Doing Justice: The Choice of Punishments*[1], which was the report on the aims of criminal sentencing of the Committee for the Study of Incarceration, an interdisciplinary study group of scholars funded by the Field Foundation and New World Foundation. The report recommended a "just deserts" rationale, and the creation of sentencing standards in the form of presumptive sentences. The substance of the report's recommendations are embodied in the Hart-Javits bill (S.204), now before this Subcommittee, and I assisted in the drafting of that bill.

I was also a member of the Twentieth Century Fund's Task Force on Criminal Sentencing, whose report, *Fair and Certain Punishment*,[2] likewise recommends the adoption of presumptive sentences.

Recently, I have been conducting a study on alternatives to parole, funded by the Law Enforcement Assistance Administration.

The Need for Sentencing Standards.—I shall not dwell long on the urgent need for standards in sentencing. Numerous studies and reports have documented that need, as a means for structuring discretion and reducing disparity.[3] My own book, *Doing Justice* strongly recommends the establishment of such standards.

Those of us who advocate sentencing standards do not claim, I should note, that disparity can be corrected *solely* by establishing norms for judges' formal sentencing decisions. Equal justice in sentencing will be elusive as long as prosecutors continue to have unlimited and unstructured powers to decide what crime to charge and what guilty plea to accept. We claim merely that sentencing

[1] Andrew von Hirsch, *Doing Justice: The Choice of Punishments*, (New York: Hill and Wang, 1976).

[2] Twentieth Century Fund, Task Force on Criminal Sentencing, *Fair and Certain Punishment* (New York: McGraw-Hill, 1976).

[3] See, e.g., Marvin E. Frankel, *Criminal Sentences* (New York: Hill and Wang, 1976): *Fair and Certain Punishment*, op. cit.

standards are a useful first step: that once some semblance of coherence is given the formal sentencing decision, one can then address the politically and substantively harder question of regulating prosecutorial discretion.[4]

The Advantages of a Sentencing Commission.—Sometimes, it is supposed that the only alternative to wide sentencing discretion is to have the legislature set the sentencing standards. Suggestions to limit judges' discretion evoke arguments about the ills of legislative sentencing—for instance, the tendency of some legislatures to adopt harsh penalties to show "toughness on crime" to the electorate.[5]

I do not believe that the legislature is well suited to write the sentencing standards. Aside from the dangers of escalating the penalties for political reasons, legislatures simply do not have the necessary time. Adequate standards are complicated—and will require experimentation and revision over time. The standard-setting agency should be capable of reviewing and adusting the standards continually, in the light of accumulating judicial experience with the use of such norms. A Congress that must each year decide a huge national budget and develop major programs in the fields of energy, environment, job-creation and a host of other areas simply does not have time and resources for the task of reviewing and fine-tuning sentencing standards adopted in a previous session.

It is much preferable, I think, to create a special rule-making agency—namely, a sentencing commission—to set the standards, as this Subcommittee's bill (S. 1437) as well as the Kennedy bill (S.181) and the Hart-Javits bill (S.204) propose. A specialized rule-making agency, having the setting of sentencing standards as its primary function, could develop expertise in this task. It could collect empirical data for use in formulating its standards. It could regularly modify and revise its norms on the basis of experience. And as a body that is comparatively insulated from political stresses, it will be under less pressure to adopt harsh symbolic penalties that, in a system having limited resources, cannot feasibly be applied in normal cases.

Who Should Appoint the Commission?—The Subcommittee bill (S.1437) provides that the Commission is to be located in the judicial branch, and that its members are to be appointed by the Judicial Conference.

I do not share the view that sentencing standards are a matter of concern to judges alone. Then sentencing norms adopted by the Commission will have an enormous impact on the decisions of prosecutors and parole officials—who are not members of the judicial branch, but who nevertheless substantially influence what happens to the convicted offender.

Consider the prosecutor. Even in the Federal system, pleas of guilty are not uncommon; and the prosecutor's decision on what plea to accept and what sentence to recommend may largely determine the disposition. Whether the standards succeed or fail may depend on the Commission's ability to anticipate how these norms will affect such prosecutorial decisions. With careful attention given this subject, the standards might help alleviate some present abuses of prosecutorial discretion—by making the penalty that would follow from a given charge more predictable, and by limiting the power to threaten disproportionate punishments against those who insist on their right of trial. But if the impact of the standards on prosecutorial decisions is overlooked, the standards may—as Professor Alschuler has warned in a thoughtful recent paper[6]—accomplish little more than to shift the locus of discretion from judges to plea bargainers. The large impact which the sentencing standards may have on parole decisions is still more obvious.

This suggests that the Commission, although affecting judges most directly, is not a parochial concern of the judicial branch alone. The appointing authority should be one whose interests are broad enough to take into account how the standards would affect and be affected by prosecutorial, parole and correctional decisions—and to appoint individuals to the Commission who can give guidance on these difficult interaction effects.

To my mind, the official best suited to make appintments that thus involve the activities of several branches of government is the President. As Judge Marvin Frankel has aptly noted in his testimony yesterday,

---

[4] Compare *Doing Justice*, op. cit., p. 104–106 with Zimring, "Making The Punishment Fit the Crime," *Hastings Center Report*, December 1976.

[5] Zimring, op. cit.

[6] Albert Alschuler, "Impact of Determinate Sentencing Upon Judges, Defense Attorneys and Prosecutors," paper presented before the Special Conference on Determinate Sentencing, Earl Warren Legal Institute, University of California, Berkeley, June 3, 1977.

"It is familiar, of course, to have the President name officials whose positions are judicial, or even legislative in character, as well as those strictly 'executive.' Presidential appointment implies qualities of prestige and consequence not achieved by the provision for Judicial Conference appointments. This Commission ought to be, or we should make vivid the hope that it will become, an illustrious agency, charged with large responsibilities for improvement and innovation. The prospects for success will hinge upon the possibility of attracting as Commissioners people of rich qualifications and high repute. Presidential selection will enhance that possibility."

I would thus have the members of the Commission appointed by the President with the advice and consent of the Senate, as the Hart-Javits bill (S.204) provides.

What Rationale Should the Commission Use?—Sentencing has been plagued with the problem of competing aims. The criminal sanction is said to serve at least four purposes: rehabilitation, incapacitation, deterrence and desert. Yet these can conflict: the best treatment may be a poor deterrent, and the best deterrent may be undeservedly severe.

The Commission's success will depend largely on establishing a consistent rationale for its decisions. If there are to be multiple aims in sentencing, priorities among those aims will have to be set. Otherwise it will be difficult to resist the temptation of leaving, as the Model Penal Code did, the reconciliation of competing purposes to the discretion of the judge in the individual case.[7]

Which body, then, should decide what the rationale for the standards should be?

My preference would be to follow the approach of the Hart-Javits bill (S.204): embody a clear statement of purposes in the legislation. The Hart-Javits bill gives priority to the requirements of desert—the Commission is required, in prescribing presumptive sentences, to ensure that "the severty of each presumptive sentence shall be commensurate with the gravity of the criminal offense to which [it] is assigned." A similar approach will soon be adopted in Oregon.[8] According to legislation passed in the state House of Representatives and likely to pass in the Senate, a Commission on Prison terms is required to recommend, and the parole board to adopt, standards for duration of confinement. The legislation requires that those standards give priority to desert, and consider other aims only if they do not result in disproportionate severity or leniency.

If the legislature cannot agree on a clear statement of purposes, then that should be the responsibility of the Commission. The Commission should explicitly state the rationale for its standards, and then decide the specifics on the basis of that rationale. This approach gives the Commission wider power, but at least assures that the content of the standards will be decided in a principled fashion.

This brings me to a feature that I find troublesome in the Subcommittee's bill (S.1437). The "purposes" section of the bill does not set forth a coherent rationale—but merely lists the four competing aims of rehabilitation, incapacitation, deterrence and desert. Then, the bill lists a miscellany of factors about the offender and offense which the Commission is supposed to consider.

---

[7] *Doing Justice*, op. cit., ch. 4.

[8] Oregon Legislative Assembly, 1977 Regular Session, A-Engrossed House Bill 2013, as amended by the House of Representatives, May 16, 1977. The bill creates an Advisory Commission on Prison Terms, consisting of the five members of the parole board and five circuit judges. The Commission is required to recommend, and the parole board to adopt standards for duration of confinement. Prisoners must be notified within six months of entering prison of their expected release date. The critical section of the bill, which requires the Commission and the board to rely primarily on "just deserts" in setting duration of confinement, reads as follows:

Section 2 (1) The commission shall propose to the board and the board shall adopt rules establishing ranges of duration of imprisonment to be served for felony offenses prior to release on parole. The range for any offense shall be within the maximum sentence provided for that offense.

(2) The ranges shall be designed to achieve the following objectives:

(a) Punishment which is commensurate with the seriousness of the prisoner's criminal conduct; and

(b) To the extent not inconsistent with paragraph (a) of this subsection:

(A) The deterrence of criminal conduct; and

(B) The protection of the public from further crimes by the defendant.

(3) The ranges, in achieving the purposes set forth in subsection (2) of this section, shall give primary weight to the seriousness of the prisoner's present offense and his criminal history."

Some of these are relevant to the offender's degree of blameworthiness (e.g., the "nature and degree of harm caused by the offense," and "the [defendant's] role in the offense"). Others seem germane only to his supposed future dangerousness or need for treatment (e.g., "previous employment record", "community ties" and "vocational skills"). Yet no one is called upon to address the issues of principle involved in including the latter factors: whether and to what extent a just sentencing system should allow someone to be punished more severely for what he is expected to do in future.[9]*

If Congress does not wish to furnish the Commission with a rationale, then it should be up to the Commission to decide what it should be. In that event, the Commission should decide, on the basis of its assumed aims, what particular factors should be included in the standards. The language of the bill should therefore make it clear it should be within the *Commission's* discretion to determine whether any particular factors are to be part of the standards. The bill ought not, as it now seems to, require the Commission's standards to include all the listed factors.

What Happens to Parole? The Subcommittee's bill goes far toward relegating the Parole Commission to merely ministerial duties. Standards relating to parole release are to be prescribed by the Sentencing Commission, rather than the parole board. And the bill authorizes the Sentencing Commission to prescribe periods of parole ineligibility of up to nine-tenths of the sentence.

Parole is now coming under attack from many quarters,[10] the most notable being the Attorney General's recent call for its abolition. Much of the current criticism of parole is, in my view, justified. I have no sympathy with parole boards' traditional practice of making standardless decisions about when an inmate was "ready" for release. There must be standards governing the duration of confinement. And on the "just deserts" view I espouse in *Doing Justice*, there would be no reason to delay notifying the prisoner of when he may be expected to be released. The duration of confinement should depend on the seriousness of the crime; and the latter is as well ascertainable at the moment of sentence as at any later date.

Yet I have been spending the last eighteen months on the LEAA-funded study I mentioned earlier, dealing with the subject of parole abolition and its possible consequences. The one thing that study has convinced me is that we should approach this subject with caution. Parole is now so integral to the whole sentencing system, that its elimination or downgrading could have all kinds of repercussions: unless care is taken, the unintended effects could largely vitiate the usefulness of that reform. Thus:

1. Whatever its other defects, parole does perform one vital function: it reduces the time of confinement to manageable levels. Judges are accustomed to imposing long purported sentences of confinement which (whatever their possible symbolic usefulness may be) could not be carried out given the limitation of prison resources; and which would be disproportionately severe were they carried out. The parole board reduces these purported terms by somewhere between one- and two-thirds—thus producing less harsh penalties, consistent also with the limitation of resources.

If one wishes to phase out parole, therefore, one must create some alternative mechanism to keep durations of confinement within reasonable bounds. The Hart-Javits bill (S.204) does so by setting stringent limits on durations of confinement. Parole is abolished, and judges decide the actual duration of confinement pursuant to rules of the Sentencing Commission. But the legislation expressly requires that the Commission's standards make sparing use of terms in excess of five years of actual confinement.

What troubles me about the Subcommittee's bill is that it authorizes the near-eclipse of the parole board without reducing the permitted duration of

---

[9] For citation in footnote: Andrew von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," 21 *Buffalo L. Rev.* 717 (1972); Norval Morris, *The Future of Imprisonment*, (Chicago: University of Chicago Press, 1974), ch. 3.

* Norval Morris and I have argued that it is unjust to rely on predictions of criminal conduct in deciding the severity of punishment—because of the inherent tendency of such forecasts to overpredict, and because an offender does not deserve additional punishment because of what he is merely expected to do in future.

[10] See, e.g., Citizens' Inquiry on Parole and Criminal Justice, *Prison Without Walls: Report on New York Parole*, (New York: Praeger Publishers, 1975); David T. Stanley, *Prisoners Among Us: The Problem of Parole* (Washington, D.C.: The Brookings Institution, 1976); M. Kay Harris, "Disquisition on the Need for a New Model for Criminal Sentencing Systems," 77 *West Virginia L. Rev.* 263 (1975).

confinement. The Sentencing Commission may set rules that make the offender virtually ineligible for parole, and yet the bill's statutory limits on imprisonment continue to be nearly as high as before. Instead of the modest durational limits called for by the Hart-Javits bill, the Subcommittee bill prescribes such large limits as 25 years, 12 years and 6 years.

This problem is compounded by the bill's choice of appointing authority, of which I spoke earlier. Parole boards, whatever their other defects, are used to thinking in terms of *actual* durations of confinement. Judges are used to thinking in terms of long symbolic durations which parole boards later shorten. Yet the bill, by having the Judicial Conference choose the Commission, may result in a rule-making body dominated by judges.

2. The U.S. Parole Commission has been the first sentencing or correctional agency in the nation to adopt explicit standards governing its release decisions. Only last year, Congress adopted legislation formalizing its standard-setting powers. I do not completely agree with the Parole Commission's standards, as they depend in part on predictive factors whereas I prefer to rely wholly on the gravity of the offender's criminal conduct. And others have pointed out technical defects in the standards.[11] But the Commission has striven hard to structure its discretion and has continually revised its standards in the light of criticism and new information.*

The Sentencing Commission is a new agency, which is given the novel and difficult mission of establishing standards for judges' sentencing decisions. We all hope that it will succeed in that task—and if experience bears out this hope, Congress can then phase out parole and have the Commission assume the parole board's present rule-making functions governing release from prison. But, we should realistically realize that our hopes could be disappointed. Perhaps, the Sentencing Commission will prescribe "standards" that are too imprecise to give much guidance to sentencing decisions. (This has just happened in California, where the new sentencing legislation—besides prescribing a detailed tariff of prison terms for those sent to prison—requires the state's Judicial Council to set standards governing the judges' decision to grant or deny probation.[12] The Council's recently published standards, many observers feel, are too vague to give much useful guidance to judges.[13] Were that to happen, we could be *worse* off were the Subcommittee bill's approach taken. Not only will we have failed to structure judges' sentencing discretion; but the new Commission might prove less effective in developing parole release standards, than the Federal Parole Commission is today.

My suggested solution is that, for the moment, we take the approach of the Kennedy bill—simply authorize the Sentencing Commission to prescribe standards governing judicial sentences. Before changing the status of parole and the standard-setting authority of the parole board, full hearings should be held on the specific subject of parole abolition. Those hearings should not only consider the proposals on periods of parole ineligibility contained in the Subcommittee bill, but also more ambitious proposals for complete abolition of parole.[14]**

Mandatory Minima.—I notice that the Subcommittee bill contains two provisions for mandatory minimum sentences. I do not think they are desirable—for my earlier-stated reason that the Commission is preferable to the legislature as the body that decides durations of confinement.

---

[11] See, e.g., Project, "Parole Release Decisionmaking and the Sentencing Process," 81 *Yale L.J.* 810 (1973).

* I am pleased to note that, for example, the Board is now considering a change of policy that would require offenders to be notified early of their expected date of release.

[12] California Penal Code, §1170.3

[13] See, e.g., Phllip E. Johnson and Sheldon L. Messinger, "California Determinate Sentencing Statute: History and Issues," Paper presented before the Special Conference on Determinate Sentencing, Early Warren Legal Institute, University of California, Berkeley, June 2, 1977.

[14] Caleb Foote, "The Unanticipated Consequences of Reform," Paper presented before the Special Conference on Determinate Sentencing, Earl Warren Legal Institute, University of California, Berkeley, June 3, 1977.

** My own study on the question of parole abolition will be completed shortly, and other scholars are also looking at the subject. At a recent LEAA-sponsored conference on determinate sentencing, Professor Caleb Foote of the University of California Law School at Berkeley read an excellent paper on the possible collateral consequences of parole abolition.

BIOGRAPHICAL STATEMENT

Andrew von Hirsch is associate professor at the Graduate School of Criminal Justice, Rutgers University, in Newark, New Jersey. He is also Senior Research Associate at the Center for Policy Research in New York City.

He was principal author of *Doing Justice: The Choice of Punishments*, the report on the aims of criminal sentencing of the Committee for the Study of Incarcertaion, and interdisciplinary study group funded by the Field Foundation and New World Foundation. The report was published by Hill and Wang, New York, New York in 1976.

He is now heading a study on alternatives to parole, funded by the Law Enforcement Assistance Asministration, Washington, D.C. The report is expected to be completed in the fall of 1977.

Mr. von Hirsch was also a member of the Twentieth Century Fund's Task Force on Criminal Sentencing, whose report, *Fair and Certain Punishment*, was published recently.

He is a graduate of Harvard College and Harvard Law School. He is a member of the New York Bar.

Our last witness is Mr. John Shattuck, who is with Mr. Aryeh Neier.

Mr. Shattuck, we can give you from now until the 5-minute bell rings.

Your statement will be inserted in the record later. If it is not complete and you would like to file any other paper, we will allow you to do that. [See p. 9058.]

You might touch on anything that is not in your statement so we get the benefit of that.

Welcome to the committee.

STATEMENT OF ARYEH NEIER, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION, AND JOHN H. F. SHATTUCK, WASHINGTON OFFICE DIRECTOR, ACLU

Mr. SHATTUCK. Thank you, Mr. Chairman.

I think the most effective way in which we can utilize the short time available is for Mr. Aryeh Neier, who is the executive director of the American Civil Liberties Union and who appears with me today, is to present a general introductory view that we set forth in the beginning of our prepared statement. He will summarize it for you. The details of our testimony on the entire bill are available in the remainder of our prepared statement. We may supplement them at some future time.

Senator THURMOND [acting chairman]. Go right ahead.

Mr. NEIER. Thank you very much, Senator.

The testimony that we have presented contains a large number of detailed criticism of S. 1437. We make these criticisms of the bill because we approach the entire process of criminal code revision as a once-in-a-lifetime opportunity to obtain Federal legislation that adopts a coherent approach to the problem of crime and punishment.

We recognize that this process has been underway for a great many years. A great many compromises have been made. This bill is a vast improvement over its predecessor, S. 1; but we still find a large number of deficiencies in this legislation. We feel obligated to seek the best possible legislation——

Senator THURMOND. You have outlined those in your statement?

Mr. Neier. There are three basic principles which we address in the various detailed criticisms. I just want to take a few moments to describe those basic principles.

One of the basic principles is that the criminal code should be focused on those crimes which injure other persons.

We say this because the Federal Criminal Code is important in and of itself but also because the Federal Criminal Code is a model for the States. The State criminal laws seriously affect——

Senator Thurmond. Excuse me. We will have to close the hearing.

Mr. Neier. Let me suggest something else, Senator. That is the possibility that we come back on some other occasion and present fuller testimony. I think we would like the opportunity to do that.

Senator Thurmond. That would be all right.

We will hold your statement until your later appearance. If you want to submit any supplementary statement, feel free to do that.

Mr. Neier. Very good.

Senator Thurmond. We will now recess, subject to the call of the chair.

[Whereupon, at 12:30 p.m., the meeting was recessed.]

CRIMINAL CODE REFORM ACT OF 1977

MONDAY, JUNE 20, 1977

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:50 a.m., in room 2228, Dirksen Senate Office Building, Senator Edward M. Kennedy (acting chairman of the subcommittee) presiding.

Staff present: Paul C. Summitt, D. Eric Hultman, Paul H. Robinson, Kenneth Feinberg, and Mabel A. Downey of the committee staff.

Senator KENNEDY. The subcommittee will come to order.

We will continue our hearings on S. 1437, legislation introduced by Senator McClellan and myself to recodify the entire Federal criminal code. This has been an ongoing effort for the last 11 years, beginning with the Brown Commission. We have had a concentrated series of hearings in the last 2 weeks in an effort to move this legislation along, recognizing its timeliness.

We will be focusing primarily on the issues of sentencing here today. We will continue tomorrow, and hopefully, that will conclude the hearings on this extremely important effort to recodify the criminal code.

We want to welcome this morning the former ranking minority member of the committee and also an extremely active member of the Brown Commission, Senator Hruska. He has given a great deal of time and effort to this whole area of recodification. This was one of his very important interests.

Beyond all of that, he has been a good friend as well. We have not always looked at matters in the same light, but we have enjoyed our exchanges. The committee was stronger for his service to it as was the Senate.

We are delighted to have Senator Hruska here to testify.

OPENING STATEMENT OF ROMAN L. HRUSKA

Mr. HRUSKA. I thank you for your welcome. It is a pleasure to return to these familiar surroundings, the scene of many parliamentary forays in many fields of endeavor. I recall them with a great deal of pleasure and a little bit of homesickness.

Mr. Chairman, I have a prepared statement here which I would like to have incorporated in the record at the conclusion of my remarks.

My support for the creation and enactment of a criminal code is a matter of record. About 10 years has been devoted to the creation of such a code. My prepared statement refers to the various steps in the development of the measure now before us.

I read with a great deal of interest the statement of former Governor "Pat" Brown before this committee. My association with him on the Commission on Reform of the Federal Criminal Laws, which he chaired, was the first time I had the opportunity to work with him. I have formed a very high respect and admiration for his qualities of leadership and his capabiltiies as an administrator.

We were lucky and fortunate to have had former Justice Tom Clark as chairman of the Advisory Committee. The Members of the Senate on that Commission, as you will recall, were Senator McClellan, Senator Ervin, and myself.

I must say, Mr. Chairman, that over the last 10 years the code has retained its essential integrity. A code is not only, as I understand it and as we have frequently been reminded by authorities, a rational, comprehensive and logical arrangement of rules and principles on a given subject. It is an arrangement which comes about at the hands of a competent authority, which in this case would be the Congress and the President, and also—and this is important—it must be achieved and made effective within a relatively brief frame of time. Without that, it partakes of the nature of being a piecemeal effort.

Ten years is not an unduly long time frame. Certainly one criminal code for a Republic which just recently celebrated its 200th year of independence is not an oversurplus of criminal codes. We have had none. This, if it is adopted, will be the first.

Throughout the process, all the way from the final report of the Brown Commission to the several bills which have been introduced in the Congress, there has been a retention of the essential quality and integrity of a code.

Given the broad level of support for the bill in its present form, we do hope for its enactment. However, there are still some potential obstacles. The subject of criminal law and codification always raises sensational issues. You have political winds which change. Coalitions are formed and they diffuse. Time is of the essence. It is hoped—and I certainly support that hope and express it as fervently as I can—that whatever issues that might arise will not suffocate the code.

I believe there is reason to believe that the volumes of hearings and reports and the years of debate and analysis provides an unusually sound basis on which to make a decision as to the merits of each of these issues.

Obviously some of these issues will be the subject of sharp debate on the floor of the Senate, and later in the other body. This is as it should be. After all, that is the essence of the legislative process.

There comes a time, however, when a vote will be taken and at least temporarily the results of that vote will abide and we will go on to the next item.

There may be a temptation, Mr. Chairman, in the months ahead to split up the code into more readily consummable parts. It would be a tragic mistake if that temptation was yielded to.

A code is an integral thing, as I have already pointed out. Its integrated nature provides its greatest advantage. Our laws cannot suffer additional patching up. I will not go into the details of the reasons why it is necessary that this be done—the inconsistencies and the obsolescence and the duplication—that has been well documented.

Senator KENNEDY. I think that is important, however, Senator. I think that will be the attempt that will be made by those, for whatever reasons, who are not sympathetic to the general approach that is being taken in this legislation.

I think you understand the interrelationship between these various provisions and the description of culpability, for example, and the proliferation of different terms that are used in different sections of the code and the interrelationship of these different provisions, both directly in terms of the different definitions of theft and armed robbery, let alone how that relates to the whole common approach with regard to the sentencing provisions.

I think we cannot stress enough the importance of the interrelationships of the various provisions, the definitions, the terms, and the extremely important sentencing provisions in terms of a composite package.

I am wondering whether we could not underline this a bit from your own experience as a member of the Brown Commission. You have seen this interrelationship. I think this will be one of the key points that will be attempted by those who want to frustrate it.

I would appreciate your underlining your own views on that.

Mr. HRUSKA. I quote Sir Francis Bacon in my statement. It was just as true in his time as it is now. "The laws of most kingdoms and states have been like buildings of many pieces, patched up from time to time according to occasions, without frame or model."

Unless it is considered as a unit, the code simply would not be a success. Even the finding of the law is difficult under the present situation because of its being scattered through numerous titles. The bill, as it now exists, makes the law simple and knowable.

Mr. Chairman, if we are going to consider various segments at different times without the necessity of the interrelationship to which you have referred in your comment, we will have failed. So, I do believe that, notwithstanding the fact that there are parts of it that anyone of us might severely criticize, it is incumbent upon us, however close or however removed we are from the creation of this legislation in its present form, to set aside points of individual preference, so that the effort to produce a code can succeed. Then, with the reservations that have been made on various specific points, there can be considered these other propositions at a later time.

The new sentencing provisions, Mr. Chairman, as they are before us in this bill, give me no pause in stating that the bill continues to have my full support.

I have some reservations about it. I shall mention one in particular a little bit later. However, if a person is convicted of an offense under the code, he will be sentenced under a system that provides some hope of fair and uniform punishment. Under our present system we do not have uniform punishment for the same types of offense committed by persons of the same status or history. That is too well known to require further documentation now.

The creation of a sentencing commission and the elimination of the indeterminate sentence in favor of more uniform sentences within the bounds set by the Commission will be a great improvement. It is not perfect. It will still remain for a fair trial of that method before we can make a final judgment. But I believe I am safe in saying, Mr. Chairman, that it holds bright promise to be a great improvement over what we have.

Within the bounds of the Commission's guidelines, sentence may be imposed by the sentencing court. If it is within those guidelines, then appeal will not lie. If there is a departure from the bounds of those guidelines, then two things will happen. First of all, the judge will be called upon to give his reasons why he chose to go beyond the guidelines. Second, the convicted person or the one who is sentenced will have an opportunity to appeal.

On the subject of appellate review, my views are well known. For about 10 or 12 years every Congress was favored or disfavored with the presence of a bill proposed by this one-time Senator on the subject of appellate review. I took a little different view of appellate review in those bills than is reflected in this present bill.

Notwithstanding that the method that was proposed in those bills in earlier times was not adopted and no action was taken on them, nevertheless, the literature that was created as a result of the hearings served a purpose. The rejection of those bills served a purpose because it showed us certain ways in which the problem could not be done. That reminds me of the story of Edison when he was told, after making six or seven attempts in laboratory experiments to achieve a given result he was asked if that was not a waste of time. He said, "No, it is not a waste of time. It shows six or seven ways in which that objective may not be reached. That narrows the field."

It was my thought in the bills that I had introduced that there should be appellate review with proper procedural requirements available to anyone who is convicted of a crime. The basis of that—and it is perhaps the most persuasive argument in favor of it—is that America is the only civilized country that I am aware of that does not have some form of appeal of sentence. We are the only country, Mr. Chairman, in which the word of one man is not supervised, is not reviewed, and is totally uncontrollable as it now stands, barring only those wide ranges in which the sentence may be imposed.

Senator KENNEDY. You would favor more general appellate review?

Mr. HRUSKA. Yes.

Senator KENNEDY. I mean, other than in the bill itself. If sentenced within the various guidelines, there would not be any appellate review. But sentences below the guidelines would be appealed by the Government, or above could be appealed by the defendant.

But your position generally would be to permit appeal of sentences under any circumstances. Is that correct?

Mr. HRUSKA. Mr. Chairman, I express support of the bill in its present form.

Senator KENNEDY. Yes.

Mr. HRUSKA. Judge Frankel favored the bill also. He said, "If I had my way, I would make more numerous the occasions upon which appeal may be taken from sentence."

I would be a little bit hypocritical if I urged that we not depart too much from this bill with the exception of something in which I have a pet interest.

Senator KENNEDY. That is right.

Mr. HRUSKA. My mentioning that point is not for the purpose of urging upon the committee or upon the Congress that they should not let this bill pass unless it had my pet concern taken care of. That is not my point.

My point it, however, that here are guidelines set by the sentencing commission. If the judge, in sentencing, stays within those guidelines, then there is no opportunity to appeal.

Consider this type of situation. In our country we used to have wheat acreage allotments with guidelines that fill books inches high. And yet, when a decision was made that the acreage allotment would be 212 acres, rather than 300 acres, an appeal would lie. The same thing is true in an Internal Revenue case.

In every other situation that we know of, there lies an appeal except where a man's liberty is taken from him by a judge whose action is not appealable as long as he stays within those guidelines.

Having said that, again let me repeat. The point is not to derogate one whit from my support of the bill as it is. In due time I do believe the concept of appellate review embodied in this bill will be expanded.

Senator KENNEDY. My inclination would be exactly the same as yours. How do you react to Chief Justice Burger's observations about the flooding of appellate courts, and Attorney General Bell's concurrence in that view? I am talking about all cases. That has been their position. They have written about it. The Chief Justice has spoken about it. He has communicated his views to us, on occasion.

I am wondering, as someone who is obviously concerned with the functioning of the courts, whether you think that would be a real problem?

Mr. HRUSKA. There are three observations I would like to make on that. That type of objection was made when we were considering the criminal justice bill some 25 years ago. I was here when that happened, as well as Senator Keating of New York—who was one of the sponsors of the early bills when he was a Member of the other body.

It was said that we could not do that. It would cost too much money and it would cost too much judge power and prosecutor's power and defender's power. Yet, it was a requirement of the Sixth Amendment as construed by the Supreme Court.

Then came the second step. The second step was this: Not only would that be a requirement in the Federal court system, but also in the State courts, even with respect to misdemeanors and juvenile cases. The same cry was raised then. However, the system is working.

The other point is this: Mr. Chairman, since when are we going to say, "Obviously, there is injustice here but we cannot afford to correct that injustice because of the tax on manpower or dollars."

Since when has that been a criterion? It cannot be a criterion because if it were, we would have to yield many of the prerogatives and many of the fundamental rights furnished by the Constitution out of deference to budgetary considerations.

Last, I would note that if we authorize pleas to sentence and deny review in such cases, virtually all of the manpower problems disappear.

I might say that I read with interest the statements of Judge Frankel and Attorney General Bell. My memory goes back to a year or so ago when Judge Tyler, then Deputy Attorney General, came to my home city of Omaha to be a speaker at the "Law Day" ceremonies at Creighton, my alma mater. He chose for a subject the idea of flat-time sentencing as opposed to indeterminate sentencing.

At a later time I inserted the text of his remarks into the Congressional Record to get the idea a little more currency and a little wider dissemination. I believe the approval of people like Judge Bell, Judge Frankel and Judge Tyler should be most helpful.

I am pleased with the bill, Mr. Chairman. I might say in summary that there are provisions with which I would not agree. Yet the democratic process has worked. I find so much that is good in it and so much that is along the right and proper road that I strongly approve of the bill and hope it will pass.

I do believe that the two predecessors of President Carter spoke in favor of a criminal code and the adoption thereof. I do not know whether President Carter has already spoken. But within the bounds of propriety—and we know that the administration does approve of it as Judge Bell indicated—it might be helpful if the President would personally speak on this subject and hopefully in a favorable way.

Senator KENNEDY. Without objection your written statement will be inserted in the record at this point.

[The material follows:]

PREPARED STATEMENT OF ROMAN L. HRUSKA

Thank you, Mr. Chairman, for the kind invitation to appear before the Subcommittee and to express my views on S. 1437.

As you know, I have attempted to be of some assistance in the federal codification effort over the years. I served as a member of the Brown Commission from 1966 through 1971. I was privileged to be a member of this Subcommittee during my service in the Senate and participated in the lengthy and thorough hearings that the Subcommittee held on the various codification proposals. I participated actively in the efforts during the last Congress to achieve a consensus on a codification bill. In short, the codification effort has been a key interest of mine for more than a decade.

S. 1437 is the sixth attempt at a bill that would receive the necessary Congressional support. The first effort was the final report of the Brown Commission issued in 1971 as a working basis for further legislative efforts.

In early 1973 there came the original S. 1, a bill drafted by this Subcommittee. That proposal was followed shortly by S. 1400, a bill drafted by a team of career attorneys in the Department of Justice. Hearings were held on these proposals and strenuous efforts were made to draft a single bill. Early in the 94th Congress that bill was introduced, again carrying the number S. 1.

That proposal, as you know, engendered heated debate. Each provision in it was gone over with a fine tooth comb. In the House a so-called "liberal" alternative, H.R. 12504 was introduced but no hearings were held on its provisions and no action was taken on it in the House.

In the meantime efforts instigated by the Senate leadership to form a compromise proposal were bearing fruit. Representatives of this Subcommittee and representatives of the Department of Justice as well as various interest groups met regularly to develop a position that was acceptable to all. Those efforts continued and the product of these efforts—S. 1437—is before the Subcommittee today.

While earlier efforts at codification were met with extremely hostile reactions, this new effort has received almost uniform praise.

The *Washington Post* has referred to the bill editorially as ". . . one that deserves to be passed and will be worth all the years of work that went into it."

The *New York Times* described it as the ". . . product of masterly legislative compromise . . . . (I)t merits enactment." Former Governor Brown, the chairman of the Brown Commission, testified here earlier this month that the bill was "eminently sensible and pragmatic" and represented "a delicate balance between the separate viewpoints of conservatives and liberals." Attorney General Bell provided his approval by stating that S. 1437 "is as fair and workable a code as has yet been devised" and pledged Administration support before this Subcommittee.

I should note that throughout this process of compromise, the code has retained its essential integrity. The bill before us today has been modified to reflect certain differing views. However, it has not been turned into a hodge podge of internal inconsistencies and conflicts. It is a uniform body of law—a code.

Given the broad level of support that has come forth for the bill it may seem that passage is assured. Yet we know that obstacles to enactment still exist. The subject of criminal law codification always raises sensational issues. Political winds change. Coalitions diffuse. Thus, time is of the essence. You must move promptly on the measure.

I hope that difficult issues will not suffocate the code. I believe that there is no reason why they should. The years of debate and analysis, the volumes of hearings and reports, provide an unusually sound basis on which to make a decision as to the merits of each of these issues. Obviously some of these issues will be the subject of sharp debate on the floor of the Senate. This is as it should be. That this will consume some valuable time is also apparent but S. 1437 is major legislation and the time spent on its passage will be time well spent. The Senate justifiably prides itself on its strength as a deliberative body. Surely it can deliberate the issues involved in a criminal code as well as it can those involved in a tax code or energy legislation.

There may be a temptation in the months ahead to split up the code into more readily consumable parts. I fear that would be a tragic mistake. A code is an integral thing. It is its integrated nature that provides its greatest advantages. Sir Francis Bacon, the Lord Chancellor of England, once proposed to the King that the laws of England be codified. He pointed out what has become so obviously true to those of us who have worked on codification: "The laws of most kingdoms and states have been like buildings of many pieces, and patched up from time to time according to occasions, without frame or model."

Our laws do not need, nor can they suffer, further patching up. They need a frame or model, a structure that holds the whole of the law together and makes the individual parts more comprehensible. Already significant parts of the code have been set aside for later action. The defenses have been left for the moment to continued judicial construction. The national security offenses, although outmoded in great parts, have been retained word for word from current law. Difficult issues such as the death penalty and gun control have been removed from consideration.

I recognize the necessity of these deferrals but I believe that further deferrals will only weaken the structure of the code until codification itself becomes a patchwork process. The years of thought and effort that have gone into codification would be wasted if such a thing were to come to be. I trust that the Senate and the House will see the necessity of treating the code as one unified item, not a series of separable parts.

Turning from the question of ways of dealing with a code, let me point out to the Subcommitee why I feel a new code is needed and why I believe that this bill is the answer to that need.

It is generally agreed by those familiar with the federal criminal laws that they are seriously in need of revision. Certainly today the nation does not have a federal criminal code in the true sense of the term, but has instead a jumble of piecemeal legislative efforts that have been enacted sporadically over the last two hundred years. While many of the current statutes are very useful, altogether too many are outmoded. Still others are unenforceable, either because of inadequate drafting in the first instance, or court interpretations construing provisions in an unintended fashion. Even those statutes that have utility are, in many respects, overlapping and inconsistent. Moreover, there are serious gaps in the coverage of the federal criminal laws.

Even finding the law is at times a problem. Some areas of law where there appear to be gaps, such as aircraft hijacking and espionage involving atomic weapons, actually are covered in obscure parts of the regulatory provisions of

the United States Code. Other provisions are hard to find simply because they do not exist in statutory form; several areas of the law, such as the principle governing the criminal liability of corporations, have been left entirely to development by judges in the course of writing judicial decisions on a case-by-case basis—a process that has made standardization and stabilization almost impossible.

In instances where the penal law does appear in statutory form, widely differing terms are often used to describe a defendant's intent or other state of mind that must be found to coexist with his criminal action.

Finally, the periods of imprisonment and fine levels carried by current offenses seem to bear little relationship to each other and a questionable connection with what would appear to be a fair penalty under all the circumstances; in fact, the whole sentencing process, which today may result in widely disparate sentences for essentially similar conduct, is sadly in need of reform.

S. 1437 makes the law simple and knowable. It takes the volumes of judge-made law and incorporates them into the related sections of the criminal code. The statute itself will be the basic source of law not the dozens, sometimes thousands of interpretive case.

I recall an incident a few years ago where a reporter for a major network who happened to be an attorney solemnly read the section of existing law dealing with misprison of a felony to the television audience. He concluded that, from the face of the statute, it was clear that a public figure had violated the law through inaction. Yet the annotations, if they had been read, made it clear that the courts required some positive action not mere inaction and so his statement was incorrect. I am not faulting the gentleman involved. His error simply points out the problems involved with current law.

S. 1437 introduces literally hundreds of reforms to the specific criminal provisions of federal law. Hundreds of sections are consolidated into a few. Outmoded laws such as those covering offenses against civil rights and sex offenses are revised and modernized. Recent innovations in crime such as pyramid sales schemes are treated in a forthright fashion.

Uniform definitions and common terms are introduced. Sentences are graded according to seriousness of offense rather than the fashion or whim of the enacting Congress. These innovations will save our courts and attorneys countless hours by settling the side issues and letting them concentrate their efforts on the search for truth.

The new sentencing provisions in the code before us give me no pause in stating that the bill continues to have my full support. If a person is convicted of an offense under the code he will be sentenced under a system that provides some hope of fair and uniform punishment. The sentence will be determined according to applicable standards. Persons committing similar offenses and sharing similar basic characteristics will receive similar sentences. If the defendant or the government believes that the sentence ignored this desired uniformity, appellate review of the sentence would be available.

This is the only civilized nation that I am aware of that does not provide for appellate review of the sentence imposed. That step has been a long time in coming but S. 1437 provides an opportunity to achieve it. While my own views on appellate review may be a bit more bullish than those of the members of this Subcommittee, I believe the approach taken in this area represents a worthwhile advancement.

I am pleased with this bill. There are provisions I would disagree with. Yet the democratic process has worked its will on the legislation and I find so much that I strongly approve of that my disagreements are substantially outweighed.

It is now time to move on to the business of enacting S. 1437. While the Administration is on record in support of the measure, I urge the leadership of this Subcommittee to call upon President Carter to lend his personal support and efforts to the early adoption of the measure. Fainthearted attempts will not suffice. We need a code and we need it now. Bold action is in order.

Senator KENNEDY. Your expression about some reservations with the legislation is echoed, I expect, by just about every member of this committee. I suppose if any of us were completely satisfied with it, we would find members who were completely dissatisfied with it.

I want to thank you very much. I think your support for this approach will be very helpful. I think it will be helpful to members of this committee because they know how much time and effort you have spent in this area of public policy. Having your support for this approach will, I think, be extremely important to the members of both this committee and the Senate.

Mr. Hruska. Thank you so much, Mr. Chairman. I hope that progress will be made. Time is of the essence. Times change and views change and personalities change. The time is ripe for action. I do hope within a short period of time the full committee can act and get the bill on the floor where consideration will be given at an early date.

Senator Kennedy. Thank you very much.

Our next witness is Ronald Gainer, who is the Acting Assistant Attorney General for Improvement in Criminal Justice, in the Department of Justice.

He has worked closely with this committee and with me on a number of different issues.

We are delighted to have you with us here this morning. We look forward to your testimony.

STATEMENT OF RONALD L. GAINER, ACTING DEPUTY ASSISTANT ATTORNEY GENERAL FOR IMPROVEMENTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE, DEPARTMENT OF JUSTICE; ACCOMPANIED BY KAREN SKRIVSETH, DEPARTMENT OF JUSTICE

Mr. Gainer. Mr. Chairman, as you know, the Attorney General has spoken on behalf of the Department as to the need for a new Federal criminal code generally. I have been asked to address some remarks this morning to the sentencing provisions, in particular, in current law and in the proposed new code.

I have a prepared statement on the subject. It is close to 50 pages in length, and in the interest of time and in the interest of our common sanity, I would like simply to paraphrase some of the thoughts that are contained therein.

Senator Kennedy. We will include it in its entirety as if read.

[The material follows:]

Prepared Statement of Ronald L. Gainer, Acting Deputy Assistant Attorney General, Office for Improvements in the Administration of Justice

Mr. Chairman: The suprising thing about the current federal system of sentencing criminal offenders is that it often wends its way to generally satisfactory results in individual cases. As a system, though, it is an anachronism. Its successes represent sporadic triumphs over legislative neglect.

I. The current law in general

The sentencing process lies at the chronological culmination of an elaborately structured series of processes designed to assure a scrupulously fair determination of a defendant's guilt or innocence. It should represent the apex of rationality and fairness—fairness to the defendant and to the public alike. It does not.

The sentencing of criminal offenders is left to the discretion of federal judges—persons who are well trained in the nuances of arcane torts and the rule against perpetuities but who have no more formal training than the rest of us in divining societal values and in understanding the various grounds for

the occurrence and persistence of criminal conduct. Some judges feel comfortable in the assigned role. Others find the lack of legislative guidance to be frustrating; as Judge Learned Hand once noted "Here I am an old man in a long nightgown making mulled noises at people who may be no worse than I am," thereby sealing their fate for years to come. The judges are free to follow any philosophical rationale they find appropriate in imposing a sentence, and are not required to divulge to anyone the reasons that prompted the selection of a particular sentence in an individual case.

The only real legislative guidance as to an appropriate penalty is provided by the maximum sentence specified for the particular offense involved, but under current federal law similar offenses may carry widely differing maximum penalties, less serious offenses may carry penalties which are longer than those of more serious offenses, and one federal offense of relatively moderate seriousness carries no upper limit at all on the penalty that may be assessed. Other than the stated maximum penalties, about the only congressional guidance afforded sentencing judges are the helpful admonitions at the beginning of Chapter 227 that a judge should not impose a sentence that would "work corruption of blood" or a sentence that would require the defendant to stand in the local pillory.

The current statutes do, however, recognize the sentencing alternatives of probation, fines, and imprisonment. Yet, although probation is permitted, it is considered a suspension of the imposition or execution of a sentence rather than a sentence itself, and partly for that reason has not been commonly employed on a conditional basis to induce a defendant to engage in such remedial measures as paying reparation to his victims or working in community service. The prescribed fine levels are abysmally low, often frustrating federal judges seeking an effective sanction against white collar offenders; the limited fine levels that may be assessed against a defendant corporation are so low as frequently to constitute little more than the entity's annual expenditure for paper clips. Even when fines are imposed, the existing law provides no effective means of insuring that they can be collected. The imprisonment provisions reflect the philosophy of past decades that criminality is a disease that can be cured through incarceration and that once an offender has been found by parole authorities to be cured he should immediately be released notwithstanding the fact that there may be considerable time remaining on the sentence imposed by the judge and notwithstanding the fact that the judge may actually have had in mind a quite different purpose for the sentence. Within the last few years, however, it has been generally concluded that we do not know how to induce rehabilitation or to recognize it when it occurs. Consequently, the federal Parole Commission now, rather than looking for signs of rehabilitation, releases an offender on the basis of mechanically-applied criteria developed from the same factors that were available to the judge at the time he decided to incarcerate the offender—the whole reason for a variable or indeterminate sentence has virtually disappeared.

As might be assumed, sentences imposed under such conditions vary considerably, with offenders in similar circumstances receiving inexplicably disparate sentences. Such sentences would seem to be prime candidates for review by appellate courts, but no appeal is permitted. While the most tenuous suggestion of technical irregularity in pretrial or trial procedure may be brought by counsel to the attention of an appellate court, the most climatic event in the whole criminal justice process—the sentence—may not be. Even if review were permitted in the current system, it probably would be of dubious value since it is difficult to make an intelligent and useful assessment of the propriety of a lawful exercise of unfettered discretion.

Finally, the sentencing provisions of current law take no cognizance of the need for reparation to the victim. The existing federal criminal title, for example, provides no means of compensating a person who may have been maimed for life by a federal criminal offense; anomalously, however, it does provide redress in one instance—any fine imposed for the offense of seducing a female steamship passenger is directed by 18 U.S.C. 3614 to "be paid for the use of the female seduced."

Such a recitation reads like an outline for a Gilbert and Sullivan production. But it plays like a tragedy. The situation leaves victims frustrated, leaves convicted offenders preoccupied with what they perceive to be gross unfairness, and leaves the public jaded about the efficacy of the whole criminal justice process. It thereby bears a principal responsibility for the stifling of whatever potential deterrence the system might otherwise be capable of producing.

II. The unwarranted disparities in sentencing under current law

The lack of logic in the current federal sentencing system could largely be forgiven if, by happenstance or by extraordinarily careful adminstrative guidance, it produced results perceived as generally equitable. It fails, however, to achieve such results. Although the average sentences of incarcerated offenders, at least when the calculations reflect the time actually served, may appear to strike a generally reasonable balance, it is apparent that many of the extreme differences between sentences cannot fairly be justified on the basis of differences between offenses or offenders. A balance obtained by the averaging of extremes is no real balance at all.

The legal invitations to disparity under the existing system have already been suggested. Chief among the problems are the following. First, because the federal criminal laws have been enacted on a piecemeal basis rather than as a comprehensive criminal code, persons who commit substantially similar offenses today may be subject to substantially different penalties depending upon the particular statutes under which they are prosecuted. Second, even when defendants are convicted under the same statute, they may be subject to sentences under differing and overlapping sentencing statutes. Third, the current statutes contain no clearly articulated sentencing philosophy to guide sentencing judges in the choice among the sentences that may be available. Fourth, even when a sentence of imprisonment is imposed, the existing statutes have mandated a substantial amount of uncertainty as to the actual length of the imposed sentences. The interrelationship of the above factors has caused considerable confusion and disparity. Although the federal Parole Commission has stepped into the void and has attempted to reduce the extremes of disparity, its efforts cannot help substantially with the problem—nor can the collective efforts that have been made in the past by the federal judges.

A. THE PENALTY LEVELS IN THE PENAL OFFENSES

Current law contains numerous examples of inconsistent grading of criminal offenses. In many such instances, there are material variations in the maximum penalties applicable under different statutes to essentially similar criminal conduct; in other instances, there are little or no variations in the maximum penalties applicable to offenses that may be similar in kind but materially different in gravity. Frequently, the punishment prescribed by a penal statute appears to depend more upon the nature of the federal jurisdictional interest involved than upon the nature of the underlying criminal conduct.

A few examples will suffice. The penalty for embezzlement of more than $100 may vary from a maximum of 2 years' imprisonment to a maximum of 10 years' imprisonment even if the only difference between the offenses is the identity of the entity from which the money is embezzled. See 18 U.S.C. 641, 656, and 665(a). The penalty for lying to the Department of Housing and Urban Development for the purpose of obtaining a mortgage loan is 3 years' imprisonment if the prosecution is brought under one statute and 5 years' imprisonment if the prosecution is brought under another. See 18 U.S.C. 1001 and 1010. The penalty for robbery of a bank is 20 years, for robbery on a federal enclave is 15 years, and for robbery of government property is either 15 or 10 years years depending upon the statute under which the charge is brought. See 18 U.S.C. 2111 through 2114. The penalty for an attempt to commit murder on federal land is 20 years under one statute and 3 years under another. See 18 U.S.C. 113 and 1113.

The maximum fine levels carried by the penal offenses vary as greatly and as inexplicably as the maximum terms of imprisonment. The principal difference is that almost all the maximum fine levels are much too low to be considered a realistic monetary approximation of the gravity of the offense.

B. THE VARYING SENTENCING STATUTES

Once a defendant has been convicted of an offense under federal law, the sentencing judge is faced with a variety of statutory options. Under current federal law, even in the most simple criminal case the sentencing judge is presented with at least five alternative kinds of sentences, with no statutory guidance as to the manner in which an appropriate selection should be made among them. An ordinary adult offender may be sentenced to a term of probation, to pay a fine, to a term of imprisonment with immediate eligibility for parole, to a

term of imprisonment with eligibility for parole after serving such period of time as is specified by the sentencing judge within the first one-third of the term of imprisonment, or to a term of imprisonment with eligibility for parole by operation of law after serving one-third of the term imposed. 18 U.S.C. 4205(a), (b)(1), and (b)(2).

If a convicted defendant is a drug addict or is under 26 years of age, the sentencing options become even more complex. If the judge reaches the conclusion that the defendant is an addict and is "likely to be rehabilitated through treatment," the defendant may be committed for an indeterminate period of time of up to 10 years' duration, as long as the sentence imposed does not exceed the maximum that otherwise would be permitted for the offense. On the other hand, if the judge believes that the defendant is a drug user but not an addict, or is an addict who is not likely to be rehabilitated through treatment, another statute must be used in imposing sentence. Any person who is sentenced under these statutes automatically becomes eligible for parole after the first 6 months of his incarceration. 18 U.S.C. 4253 and 4254.

If a convicted defendant is under 26 years of age at the time of his conviction, the Federal Youth Corrections Act provides still additional sentencing options. If the defendant is under 22 years of age at the time of his conviction, the sentencing judge is required to consider sentencing him under the Youth Corrections Act, but may still sentence him as an adult if he believes "that the youth offender will not derive benefit from treatment" under the Youth Corrections Act. 18 U.S.C. 5010(d); see *Dorszynski* v. *United States*, 418 U.S. 437 at 441 (1974). If the defendant, at the time of his conviction, is between the ages of 22 and 26, he may be considered a "young adult offender." As to such an offender, the sentencing judge need not consider imposing sentence under the Youth Corrections Act, although he may do so if he "finds that there are reasonable grounds to believe that the defendant will benefit from the treatment provided under the Federal Youth Corrections Act." 18 U.S.C. 4216.

If the sentencing judge in his discretion decides to sentence a young defendant—either one under 22 years of age or one between the ages of 22 and 26—pursuant to the provisions of the Youth Corrections Act, he still has three sentencing options under that Act. He may sentence the defendant to probation; he may sentence him to an indeterminate sentence of 6 years' duration, with immediate eligibility for parole and with no more than 4 of the 6 years to be spent in prison; or, if the judge finds that the defendant "may not be able to derive maximum benefit from treatment by the (Parole) Commission prior to the expiration of 6 years," he may sentence him to any period of incarceration as long as it does not exceed the maximum otherwise authorized for the offense. 18 U.S.C. 5010 and 5017.

C. THE LACK OF STATUTORY GUIDANCE TO SENTENCING JUDGES

The current federal statutes provide no specific guidance to sentencing judges as to the purposes sought to be achieved by the sentencing process. For the most part, no sentencing philosophy is outlined, and no direction is afforded as to the factors pertaining to the offense and the offender that warrant consideration in the imposition of an appropriate penalty. No instruction is set forth to govern the selection of the type of penalty to be imposed or of the severity of the penalty selected.

Because there exist no legislative standards—or, for that matter, judicial standards—governing the proper imposition of sentences in particular kinds of cases, judicially imposed sentences vary considerably.

Sentences vary according to the sentencing statute employed by the judge, despite similarities in the characteristics of the offense and of the offender. For example, the sentences imposed on male bank robbers who were discharged from the Bureau of Prisons in 1974 and 1975 ranged from 72 months under the indeterminate sentencing provision of the Youth Corrections Act in 18 U.S.C. 5010(b)—the maximum sentence available under that statute—to 141 months under the ordinary sentencing statutes when the judge specified a maximum sentence but did not specify a date of parole eligibility. Offenders who were sentenced under the Youth Corrections Act to a specified term under the provisions of 18 U.S.C. 5010(c) were also sentenced to an average of 141 months. In between those terms were the indeterminate sentences imposed under the Narcotic Addict Rehabilitation Act (105 months), the sentences imposed on

ordinary offenders under 18 U.S.C. 4208(a)(1) with early parole eligibility specified by the judge (119 months), and the sentences imposed on ordinary offenders with immediate eligibility for parole specified by the judge under 18 U.S.C. 4208(a)(2) (139 months).

Sentences imposed upon defendants who are similarly situated also appear to vary substantially from case to case and from district to district. For example, Bureau of Prisons reports for 1974 and 1975 show that approximately two-thirds of a group of 17 male bank robbers with similar backgrounds in terms of age, education, marital status, employment record, and criminal history, were sentenced to prison for terms varying from 75 to 195 months. The remainder of these offenders received sentences either above or below this range. Nationally, the average sentence imposed for bank robbery was 130, but in nine judicial districts the average sentence was less than 85 months, and in eight judicial districts the average was over 200 months.

Some recent studies have suggested that sentencing philosophy varies from one federal court to another, although this is a difficult matter to ascertain with any certainty since there exists no requirement that judges specify reasons for their sentences and judges in fact rarely do so. While federal sentences usually exhibit a direct correlation between the type and length of a sentence on the one hand and the offense and criminal history of the offender on the other hand, a number of other factors may be construed as playing a role in determining the sentence imposed even though those factors may not appear pertinent in many cases. Among the factors that seem to be related to sentence length for particular offenses in particular districts are the age, sex, and race of the defendant; whether the defendant had pleaded guilty or had proceeded to trial, and whether the defendant was tried before a jury or before a judge sitting without a jury. Although there may be valid reasons for such relationships under certain circumstances, and although the samples may suggest more differences than actually exist, the lack of sentencing standards makes any perceived unfairness harder to dismiss.

In addition to sentences for similar offenders varying without clear reason, sentences for dissimilar offenders appear to vary less than logic would suggest. One anomaly under current law is that, contrary to what one would expect, there is not always a high correlation between the sentence imposed for a particular offense and the incarceration history of the defendant. For example, Bureau of Prisons statistics indicate that among the prisoners confined in federal institutions in 1975 on assault convictions, those with three or more prior commitments to prison were serving an average sentence of 97.7 months while those with only two prior commitments were serving an average sentence of 103.4 months. Similarly, for the offense of fraud, defendants sentenced to prison for the first time actually received longer terms of confinement than did defendants who had previously been committed; in 1975, of federal prisoners serving sentences to imprisonment for fraud, those who had not previously been committed to prison were serving average terms of 52.8 months, while those with one, two, or even three or more prior commitments were all serving average terms of at least 4 months less than offenders who were committed for the first time.

D. THE UNCERTAINTY REMAINING IN IMPOSED SENTENCES TO IMPRISONMENT

Disparity does not end, of course, with the imposition of sentences. Defendants sentenced to identical terms of imprisonment may find themselves released from confinement after serving differing proportions of their imposed terms. As to each prisoner sentenced to a term of imprisonment in excess of 1 year, two methods are employed simultaneously to determine his potential release date even though only one of the two methods will actually determine his time of release. The Bureau of Prisons determines the potential release date according to the term of imprisonment imposed by the judge less any accumulated "good time" afforded for complying with prison rules, for participation in industrial programs, or for exceptional institutional service. 18 U.S.C. 4161 through 4163. At the same time, the Parole Commission must determine whether a prisoner who is eligible for parole should be released on parole and, if so, the date upon which his parole should begin. 18 U.S.C. 4206. The availability of "work-release" programs, which free a prisoner from confinement without affecting his formal release date, complicates the matter still further. 18 U.S.C. 4082(c).

Although the original purpose of the indeterminate sentence subject to review by parole authorities was to provide for a prisoner's release when it was found through review of his prison conduct that he had become rehabilitated, the Parole Commission today does not predicate its release determination upon a prisoner's institutional conduct but rather has adopted a mechanistic approach to release determinations based upon offender and offense characteristics known at the time of sentencing. The Parole Commission's self-developed guidelines for prisoner release are followed in approximately 85 percent of parole determinations, thereby introducing more certainty into the computation of an eligible prisoner's expected release date than previously had existed.

E. THE INTERRELATIONSHIP OF THE ABOVE FACTORS

The interrelationship between the operation of the maximum penalty provisions of the penal statutes, the sentencing statutes, the statutory provisions concerning parole eligibility and "good time," and the parole guidelines, compounds the uncertainties in the existing law. This may be illustrated by the example of three 23-year-old defendants with identical backgrounds who are convicted of armed bank robbery in which a weapon is not fired and no one is injured. To begin with, each defendant faces a statutory maximum sentence of 20 years in prison, a $5,000 fine, or both imprisonment and a fine. However, if the first defendant is sentenced under the ordinary sentencing statutes to 15 years in prison with no specification by the judge as to early parole eligibility, the second is sentenced under the indeterminate sentencing provisions of the Youth Corrections Act (which permit incarceration for no more than 4 years), and the third is sentenced under the Youth Corrections Act to 15 years in prison, they will serve different lengths of time in confinement even though there is no difference in their cases other than the statute under which they are sentenced. The defendant sentenced under the ordinary sentencing provisions would be released on parole at the time of his statutory eligibility for parole—after serving 5 years in prison (if he had been eligible for parole at an earlier time he might be released under the current parole guidelines in 36 to 48 months). Under the parole guidelines for persons sentenced under the Youth Corrections Act, both defendants sentenced under that Act will be paroled after serving between 27 and 34 months in prison. Thus, the defendant sentenced under the more common sentencing provisions will serve between 26 and 33 months more time in prison because the length of the sentence imposed precluded his eligibility for parole at the time recommeded in the current guidelines. Even if the judge in his case had imposed a lower sentence or had specified an earlier parole eligibility, the defendant sentenced under the usual provisions would still have to spend 10 to 15 months longer in prison than his contemporaries sentenced under the Youth Corrections Act.

F. THE ATTEMPT TO REDUCE DISPARITY THROUGH THE PAROLE COMMISSION GUIDELINES

The Parole Commission, in a role somewhat altered from the original design, has over the past few years undertaken to moderate the effects of disparate sentences to the extent that it has the power to do so. It has succeeded, through its guidelines, in bringing a measure of uniformity and predictability to the final part of the penal and correctional process. But while the Commission's guidelines represent a remedial attempt to bring about equal treatment for prisoners who are similarly situated, it is apparent that this is an inadequate mechanism for eliminating all unwarranted disparities. First, the Commission obviously can do nothing about the inadequacy of a judicially imposed sentence to probation when a sentence to a term of imprisonment might be more appropriate under all the circumstances. Second, the Commission cannot correct the inconsistencies in judges' selections among alternative sentencing statutes. Third, the Commission can do nothing about a sentence that is so long that a prisoner is not eligible for parole at the time recommended in the guidelines. Fourth, the Commission cannot extend a prison sentence that is shorter than the period that would be appropriate for the prisoner under the Commission's guidelines. Thus, all that the Parole Commission can do to alleviate sentencing disparity is to apply its guidelines to the approximately 50 percent of the defendants sentenced to imprisonment who are eligible for parole at the time recommended in the guidelines; it cannot affect the sentences of the other 50 percent of the defendants sentenced to incarceration, and cannot, of course, reach those defendants whose sentences do not include a prison term.

The Parole Commission has undertaken a progressive and unique step to meet some of the existing sentencing problems. It deserves credit for its effort, but its impact is limited.

6. THE ATTEMPT TO REDUCE DISPARITY THROUGH JUDICIAL INITIATIVES

The judicial branch of the federal government has undertaken a number of efforts designed to alleviate sentencing disparity.

The circuit courts have undertaken, pursuant to 28 U.S.C. 344, to hold sentencing institutes for the purpose of bringing together judges, prosecutors, and penal and correctional specialists for discussions of sentencing problems and training on sentencing issues. Although the sentencing institutes have served a useful educational purpose, they cannot be said to have achieved much more than an enhanced awareness of available sentencing options and of some of the problems in current sentencing law.

Some district courts have experimented with three-judge sentencing councils, consisting of the sentencing judge in a particular case and two colleagues. Each of the judges receives a copy of the presentence report in the case, and the judges then meet to exchange recommendations concerning an appropriate sentence. Such councils may be helpful to the sentencing judge, but they cannot achieve the goal of eliminating unwarranted sentencing disparity for a number of reasons. First, the panels are merely advisory, and the sentencing judge may impose a sentence quite different from the sentence recommended by his colleagues without stating his reasons for doing so. Second, the panels operate on a case-by-case basis within a single district, and do not have the benefit of detailed judicial points of view reflecting nation-wide or even circuit-wide practices. Third, the panels necessarily operate within the existing statutory law, which itself fosthers a great deal of the current disparity. An additional problem with the use of such councils, not related to the problem of disparity, is that they require the time of three judge to make a single sentencing decision.

In sum, the efforts of the judiciary, too, have proved largely unavailing because of the nature and magnitude of the underlying problems.

III. The sentencing reform proposal in S. 1437

It is clear that a major reform of federal sentencing law is required.

A dramatic proposal for reform of the entire sentencing process is now pending before this Subcommittee in S. 1437, the bill to revise the entire Federal Criminal Code. While the Subcommittee has under consideration a number of other bills that would restructure the sentencing process, only the one appearing in S. 1437 is sufficiently comprehensive to permit the degree of sentencing reform that is needed. Since the disparity in the existing system arises from a variety of causes, only a proposal that undertakes to deal with all of those causes holds real promise. Sentencing proposals addressing only the problem caused by unstructured judicial discretion cannot effectively reach the disparity arising from the inconsistent grading of offenses, the failure of the statutes to define the purposes of sentencing, and the welter of sentencing and prison release provisions.

The Administration strongly supports S. 1437's sweeping reforms of current sentencing law in the context of the revision of the Federal Criminal Code. By addressing all aspects of the law affecting criminal sentences, S. 1437 will introduce a rationality and fairness that has not previously appeared in the federal system. It is, moreover, highly practical in its approach.

A. THE GRADING OF OFFENSES

The new Code contained in S. 1437 completely restructures and rewrites the current federal penal laws to make them more understandable, to clarify their interrelationships, and to grade them consistently with their relative seriousness. It draws logical penalty distinctions where none have existed before and introduces lesser-included offenses where felonies have previously stood alone. For example, the penalty for the offense of theft is made to vary with the kind and value of the property stolen; large-scale thefts and frauds carry penalties significantly higher than those in current law, theft of items of little value are reduced to a misdemeanor level, and a youth's temporarily taking a motor vehicle without authority and then abandoning it is reduced from the current five-year penalty to a maximum of six months' confinement. The Code also introduces uniform culpability standards, thereby permitting the grading of

offenses, when appropriate, according to the state of mind with which the defendant committed the offense. Moreover, the Code also introduces uniform culpability standards, thereby permitting the grading of offenses, when appropriate, according to the state of mind with which the defendant committed the offense. Moreover, the Code provides a convenient, shorthand method of referring to the penalties and other sentencing considerations that are pertinent to the offense by using common grading categories—five grades of felonies, three grades of misdemeanors, and one grade of infraction. In a separate subsection of each offense the appropriate grade for the offense is set forth. In doing so, care is taken to grade the offense according to the underlying criminal misconduct rather than the federal jurisdictional interest involved. Moreover, if the seriousness of the offense varies according to specific circumstances, the grading subsection specifies the circumstances in which a different grade applies to the offense. This approach facilitates the establishment of a penalty structure assuring consistent penalties for conduct of a similar nature or similar degree of seriousness.

B. THE PURPOSES OF SENTENCING

The new Code sets forth for the first time the four generally recognized purposes of sentencing—deterrence, protection of the public, assurance of just punishment, and rehabilitation. They appear at the beginning of the Code in Section 101, and are set forth again at the beginning of the sentencing provisions in Section 2001. The Code does not direct the setting of priorities among those purposes, recognizing that for a particular offense committed by a particular offender, one of the purposes or a combination of purposes may be of overriding importance. The Code recognizes in the provisions governing the imposition of sentences to probation, fines, and imprisonment that not all the specified purposes would be appropriate or even relevant in individual cases. For example, a young first offender who commits a nonviolent offense might appropriately be sentenced to probation primarily or solely for rehabilitative purposes; a repeat violent offender might be sentenced to imprisonment primarily for incapacitative purposes; and a perpetrator of a large-scale fraud might be sentenced to imprisonment primarily for deterrent purposes. Other purposes suggesting other penalties either may be inapposite in such cases, or may be of such reduced importance as to be dismissed in the course of seeking to achieve the principal goal.

C. THE PROBATION PROVISIONS

The new Code makes a number of useful changes in the probation laws.

First, a sentence to probation is specified as a sentence in itself, and not simply the suspension of the imposition or execution of a sentence to imprisonment. In combination with other provisions, this should help to encourage the use of more innovative requirements that a defendant should be expected to fulfill as a condition of his probation.

Second, the Code sets forth an extensive list of possible conditions of probation that might be appropriate in particular cases. Under Section 2103(a), it is a mandatory condition of probation that the defendant not commit another crime during the term of his probation. This is the only mandatory condition. Section 2103(b) permits the sentencing judge to exercise his discretion whether to impose one or more of the 18 suggested conditions that might be suitable in particular situations, or whether to impose other conditions that he might wish to tailor to the offender or the offense. The simple listing of such provisions on the face of the statute should help assure that courts will give more cognizance to the possibility of predicating release upon compliance with conditions appropriate to the case. In addition to such discretionary conditions as the payment of a fine imposed as a part of the sentence and the making of direct restitution to a victim of the offense, the section includes a condition that the defendant engage in some form of community service—a condition that might more effectively serve the underlying purposes of a sentencing in particular cases than the more traditional criminal sentences.

Third, Section 2101 specifies different maximum terms of probation for different offense severity levels. Under current law the maximum term of probation is any period up to five years, without regard to the seriousness of the offense. Under the Code, the maximum probation terms would be five years for a felony, two years for a misdemeanor, and one year for an infraction.

D. THE FINE PROVISIONS

Chapter 22 of the Code sets forth the maximum fines applicable to each grade of offense. The specified fine levels are substantially higher than those appearing in current law which, for most offenses, are now so low as to be meaningless, particularly as they apply to corporate violators. For too long fines have been at such low levels that they tend to be considered by white collar offenders simply as minor, potential costs of doing business.

Under Section 2201(b) of the Code, an individual defendant is, for a felony, subject to a maximum fine of up to $100,000; for a misdemeanor, a maximum fine of up to $10,000; and for an infraction, a maximum fine of up to $1,000. The fines for organizations are even higher: for a felony, up to $500,000; for a misdemeanor, up to $100,000; and for an infraction, up to $10,000. In addition, the Code permits an alternative fine of double the pecuniary gain which accrued to the defendant or double the loss caused to the victim, whatever is greater—a provision that could be a particularly useful sanction against white collar offenders who conduct fraudulent businesses. It should be noted that as to all the fine levels under the Code, however, the imposition of a fine is specifically conditioned upon a defendant's ability to pay, thereby assuring that an individual or an organization with a few assets will not be fined an absurdly high amount.

Subchapter B of Chapter 38 of the Code, relating to the implementation of the fine provisions, introduces a change in the law of similar importance. It incorporates a series of provisions permitting resource to the Internal Revenue Service statutes so as to allow the levying of a lien upon a defendant's property if he has attempted to circumvent a court's order to pay a fine as directed. Under current law, criminal fines are collected from contumacious defendants primarily by executing judgment against real or personal property, or by the often cumbersome method of garnisheeing wages. The effectiveness of a garnishment varies from state to state since state law controls the manner in which the procedure operates in the federal district involved. The Code's introduction of a procedure akin to a tax lien should substantially improve the ability of the government to collect unpaid criminal fines, and, by providing a uniform set of procedures, should simplify the collection process. The result should be a more effective penalty and a substantial increase in revenues.

E. THE IMPRISONMENT PROVISIONS

The terms of imprisonment permitted by the Code are generally somewhat reduced from those in current law, with the major changes applying to the Code's counterparts to those existing statutes that carry penalties substantially higher or substantially lower than most similar offenses. The sentencing judge, however, is enabled for the first time to specify in appropriate cases that the sentence imposed shall not be subject to parole except for a stated period at the end of the imposed term—as short a period as the last ten percent of the term. This provision is included in recognition of the fact that sentences for punitive or deterrent purposes afford no basis at all for an indeterminate sentence, and that there is no legitimate reason for continuing the existing requirement that, if a judge wishes to assure, for example, that a white collar defendant will spend one year in prison for purposes of deterrence, he must go through the disingenuous process of imposing an illusory three-year term with parole after service of the first one-third. This change alone will help to make the sentencing system more forthright.

The complicated, special sentencing provisions of current law that are designed for particularly dangerous offenders, youth offenders, and narcotics offenders, are eliminated as unnecessary. Mandatory sentences to imprisonment are permitted for only two offenses—trafficking in heroin and using a weapon in the course of a federal crime; in those instances, the mandatory penalty is a moderate two-year term, and a judge is not required to impose the mandatory penalty if the defendant was less than eighteen, was of impaired mental capacity, was under unusual and substantial duress, or was only a minor accomplice in an offense committed primarily by another person. Finally, provisions are added to the law to make it clear that penalties for individual offenses cannot be strung together so as to create a total sentence that is unreasonably long; the maximum limit is roughly double the penalty for the most serious offense committed.

F. THE COLLATERAL PENALTY PROVISIONS

A variety of specific changes are introduced by the Code to augment the penalties traditionally applicable.

Under Section 2005 of the Code, a court is empowered, in addition to imposing any other sentence, to require that an individual defendant who has been found guilty of an offense involving fraud or other deceptive practice, or an organization that has been found guilty of any offense, provide notice and an explanation of the conviction to the class of persons or the sector of the public affected by the conviction or financially interested in the subject matter of the offense. The provision is designed to inform the public of "white collar" offenses that may affect their financial interests, in order to facilitate civil actions for recoveries of losses.

In Section 2006 of the Code the court is empowered to impose, in addition to any other sentence, a requirement that a defendant found guilty of an offense causing bodily injury, property damage, or other loss, make direct restitution to the victim of the offense. Today restitution is an under-utilized remedy. Although it may be required as a condition of probation, there is no statutory encouragement to its use and, in any event, if imprisonment is otherwise appropriate for the defendant there is no means by which an additional requirement of restitution may effectively be enforced. This provision of the Code should prove to be of particular utility in cases where a defendant can well afford to pay, immediately or in installments, for the damage he has inflicted.

The Code also contains two new provisions which, although not sentencing provisions, bear mention in a discussion of the Code's sentencing consequences.

First, Subchapter A of Chapter 41, in addition to carrying forward the provisions of current law permitting an individual in a civil action to obtain redress from a racketeering offender or an eavesdropping offender, includes a provision that will permit a civil action against an offender who has been convicted of a crime invoking fraud. A person who has been financially injured as a result of the fraud is permitted to bring a civil action in a federal court to recover three times the damages sustained plus a reasonable attorney's fee and other litigation costs.

Second, Subchapter B of Chapter 41 creates a victim compensation system to provide recompense for personal injury or death to victims or their survivors, of violent federal crimes. This provision demonstrates the recognition that the criminal justice system for too long has concentrated solely on the investigation and prosecution of criminal offenses, paying little attention to the plight of the individual victims of those offenses. In effect, the system has tended to consider crimes as affronts to society as a whole and has left the individual victims to bear by themselves the real costs of those affronts. The new subchapter will not only relieve the hardship of the victims; it will provide a means of ensuring that, to the extent practicable, the criminal offenders ultimately will be liable for costs incurred by the compensation program.

G. THE GUIDELINE SENTENCING SYSTEM

Although the new provisions noted above are important, they are overshadowed by the structural and procedural changes in the sentencing process. Those changes are designed to achieve a rationality, uniformity, and fairness that simply has not existed before.

The Code creates a Sentencing Commission within the judicial branch of the federal government for the purpose of establishing sentencing guidelines to govern the imposition of sentences for all federal offenses. In drafting the guidelines, the Commission is directed to take into consideration factors relating to the purposes of sentencing, the characteristics of offenders, and the aggravating and mitigating circumstances under which specific offenses may be committed. For each federal offense, the guidelines will be expected to specify a variety of appropriate sentencing ranges, depending upon the particular history and characteristics of the defendant in the case and the particular circumstances under which the offense is committed. The judge will be expected to sentence a defendant within the range specified in the guideline covering the specific situation in the case before him, although, if he considers the guideline range inappropriate because of factors not adequately taken into consideration by the Sentencing Commission, he is free to sentence the defendant above of below the guideline range as long as

he explains his reasons for doing so. If an offender is sentenced above the range specified in the guidelines he may obtain a review of his sentence by the federal court of appeals for the circuit; if he is sentenced below the range specified in the guidelines the government, with the Attorney General's concurrence, may obtain a review of the sentence.

The guideline sentencing system is designed to promote general uniformity and fairness while retaining necessary flexibility. It is as dramatic and innovative a series of provisions as appear anywhere in the new Code.

1. The sentencing commission

The Code will establish in the judicial branch of the federal government an independent United States Sentencing Commission with responsibility for developing and issuing guidance to federal judges with regard to appropriate sentences for convicted defendants. The Commission members will be designated by the Judicial Conference of the United States for six-year terms. The Code is silent as to the makeup of the Commission's membership, leaving its composition to the Judicial Conference. It is expected that, as is the case with the advisory committees on federal rules that have been appointed by the Judicial Conference, it probably will be found appropriate to include members who are not judges. In any event, under the Code the Commission will be accorded a staff composed of experts in various fields relating to sentencing, probation, penal, and correctional matters, and the Commission will be able also to draw upon the knowledge and experience of persons outside the Commission.

It seems appropriate, since the sentencing function that the Commission will be guiding is historically a judicial function, to repose ultimate responsibility for the guidelines in the judicial branch. If guidelines were to be promulgated by an agency outside the judicial branch, it might be viewed as an encroachment on a judicial function and engender a circumspection on the part of sentencing judges that could impede the effective operation of the guidelines.

The Commission will be a permanent agency, reflecting recognition that the guidance it develops and publishes is guidance based upon an expanding area of knowledge, and that to presume that the Commission's initial efforts could not be improved upon would be an unfortunate impediment to the goal of producing a Federal Criminal Code that can readily adapt to future advances in knowledge. Permanence will enable the Sentencing Commission to conduct a continuing review of the operation of the sentencing guidelines, permitting necessary refinements as more is learned about the effectiveness of different sentencing practices and as case law is developed regarding the operation of the guidelines.

2. The sentencing guidelines

The principal function of the Sentencing Commission is to promulgate guidelines and policy statements for use by federal judges in imposing sentences in individual cases. The guidelines will span a sufficiently broad reach of offender and offense characteristics that they will obviate the existing variety of narrow statutes designed to take into account particular factors, such as age or drug addiction, that might be relevant to determining an appropriate sentence in a particular case. The policy statements, as noted by the Code, will provide direction concerning the proper application of the guidelines and provide standard policies on sentencing issues not covered by the guidelines. The policy statements might be used, for example, to list aggravating and mitigating factors that might not occur sufficiently frequently to warrant incorporation in the sentencing guidelines but that might appropriately affect the type and quality of particular sentences; they might indicate offense or offender characteristics that should not affect the sentence; they might afford guidance as to the use of the authorized orders of notice to victims or of restitution under Sections 2005 and 2006; and they might suggest standards for the imposition of consecutive rather than concurrent sentences to incarceration. In addition, the Code specifically provides that the policy statements of the Commission are to guide the Bureau of Prisons in determining an appropriate prison facility for an offender and in determining the appropriateness of work release programs in individual cases.

In promulgating the guidelines, the Sentencing Commission is required to take into account the stated purposes of sentencing and the grades of individual offenses. In establishing sentencing categories for offenders and offenses for purposes of guideline application, the Commission will be expected to consider such offender and offense characteristics as are suggested by the Congress in the

proposed 28 U.S.C. 994. It should be noted that the Commission may, in addition, consider any unlisted factors that it determines to be pertinent, and that the Commission may well conclude that certain listed factors may be inappropriate or irrelevant in establishing guideline categories for certain sentencing purposes.

It may be expected that the initial sentencing guidelines will bear some similarities to the existing parole guidelines, but that the considerations on which they are based will differ appreciably from the considerations underlying the latter guidelines. For one thing, the current parole guidelines are designed in large measure to perpetuate its past policy decisions without the occurrence of disparity. The Sentencing Commission, however, is faced with a much broader task—de novo consideration of appropriate sentences for particular purposes—a task that has never previously been undertaken. Moreover, the parole guidelines are formulated on the basis of empirical data concerning the relationship between factors pertaining to the defendant and his offense and factors pertaining to the probability that a person with those characteristics will violate parole within a two-year period after release. The sentencing guidelines, on the other hand, will not be predicated primarily upon considerations relating to the possible future criminality of the defendant. Rather, they will be based on considerations relating to the four purposes of sentencing cited in Section 101 of the Code, and on identifiable offense and offender characteristics determined to be pertinent to those purposes.

In one area, the bill will provide legislative guidance as to the type and length of sentence that would be appropriate under the guidelines. Proposed 28 U.S.C. 994(c) would require that the sentencing guidelines provide "a substantial sentence of imprisonment" for a defendant with a history of several convictions, a defendant whose criminal activity was part of a pattern of criminal conduct from which he derived a substantial portion of his income, and a defendant whose offense was committed in furtherance of a pattern of activity by a group of persons engaged in racketeering. This provision is, of course, an abbreviated reflection of the considerations underlying the special dangerous offender provisions of current law. The Department of Justice concurs in this approach; rather than employing special sentencing provisions in Part III of the Code, it is reasonable to provide a means of ensuring that these considerations will be incorporated instead in the general guidelines developed by the Sentencing Commission. This is exactly the sort of special consideration that can be assured through the guidelines process, without requiring complex statutory coverage.

In light of the Code's treatment of the special offender sentencing provisions of current law, the Subcommittee might wish to consider whether the Sentencing Commission should be given similar legislative guidance with respect to the promulgation of guidelines for other types of offenders or offenses. For examples, the Subcommittee might wish to give consideration to providing, in the bill itself or in the legislative history, an example of the kinds of situations that ordinarily would be considered to justify probation rather than imprisonment. The Subcommittee might also wish to consider whether it should suggest the appropriateness of an incremental penalty for each offense when a defendant is convicted at one time for several offenses committed at different times. In addition, the Subcommittee might wish to consider whether the two mandatory penalties now set forth in Sections 1811 and 1823 of the new Code might be superseded by a legislative direction that the Sentencing Commission guidelines assure the imposition of an appropriate sentence to imprisonment under the instances covered by these sections. Since the whole purpose of sentencing guidelines is to achieve consistency in sentencing by taking into account the particular aggravating or mitigating circumstances found to warrant special treatment, well drafted guidelines should be able to accommodate the views of both those who have called for a presumption of probation in certain instances, and those who have called for a presumption of incarceration in other situations. It appears to be preferable to permit the Sentencing Commission to establish through the guidelines themselves, on the basis of aggravating and mitigating factors, the kinds of cases warranting a particular type and severity of sentence.

3. The imposition of sentence under the guidelines

Under Section 2001 of the Code, an individual found guilty of a federal offense may be sentenced to a term of probation, a fine, or a term of imprisonment. The sentence to pay a fine may be imposed in combination with either a term of probation or a term of imprisonment. An organization may be sentenced to a term of probation, a fine, or both.

In determining the type and severity of sentence to be imposed, the sentencing judge will be required to consider the nature and circumstances of the offense, the history and characteristics of the defendant, the four purposes for which sentence may be imposed, the sentencing range recommended in the guidelines promulgated by the Sentencing Commission for the applicable category of offense and applicable category of defendant, and any pertinent policy statements issued by the Sentencing Commission. The guidelines will recommend an appropriate sentence for a person of the defendant's background and characteristics who has committed the specified offense under the particular aggravating and mitigating circumstances found to exist. The judge ordinarily will be expected to sentence within the range recommended by the guidelines; although it would be impossible for the guidelines to account for every conceivable combination of circumstances, it seems unlikely that departures from the guidelines will be more common than the departures from the present parole guidelines which occur in no more than 10 to 15 percent of the cases to which the guidelines are applied. If, however, the judge finds that there are particularly aggravating or mitigating circumstances of a nature not adequately reflected in the Sentencing Commission guidelines, he will be free to impose a sentence outside the guideline range. In doing so, however, he will be required to state specific reasons for the sentence imposed, and the sentence will be subject to appellate review.

The sentencing guideline approach should help considerably in maintaining consistent adherence to a standard sentencing philosophy and in structuring the exercise of judicial discretion to the degree that sentences do not carry irrationally between similarly situated defendants. At the same time, it will preserve flexibility for use when it is most needed.

4. The sentence appeal provisions.

Section 3725 of the Code permits for the first time an appeal from sentences imposed by federal judges. By incorporating the appeal procedures into the general structure of a guideline sentencing system, the Code assures that the extremes of sentencing that most deserve review may be called to the attention of an appellate court, without overburdening the court wtih a flood of challenges to sentences well within the bounds of what would generally be considered reasonable under all the circumstances. A defendant will be free to appeal a fine, a term of imprisonment, or a term of parole ineligibility falling above the range specified in the guidelines. The government will be able to appeal a sentence falling below the recommended range of the guidelines, if in such a case the Attorney General approves the filing of an appeal. If, in light of all the factors to be considered in imposing a sentence and in light of the sentence rationale expressed by the district court judge, the court of appeals finds the sentence to be clearly unreasonable, it may remand the case for imposition of a new sentence or for further sentencing proceedings, or it may revise the sentence itself. Appellate review under this proposal should result in the development of a body of case law concerning the circumstances under which a sentence outside the guideline range is appropriate, and should encourage continuing refinement of the guidelines by the Sentencing Commission.

It should be noted that under Rule 35 of the Federal Rules of Criminal Procedure a mechanism exists for correction of a sentence in a case in which the guidelines have been incorrectly applied.

5. The determination of imprisonment release dates

Under the Code, the "good time" provisions of current law are abolished and the parole system is retained as the sole mechanism for determining the release date of an incarcerated prisoner. Under Section 2302(c), at the time the judge imposes a sentence to a term of imprisonment he will also designate the portion of the sentence, if any, during which the prisoner will be ineligible for release on parole. The decision whether to impose such a term of parole ineligibility, and, if it is to be imposed, the decision as to its length, is governed by the sentencing guidelines and by other factors the judge is required to consider in imposing sentence. If, under the Sentencing Commission guidelines, a judge determines that a particular category of white collar offender should spend some time in prison for purposes of deterrence and just punishment, he might conclude that, because such purposes would not support an indeterminate sentence, the maximum term of parole ineligibility—90 percent—should be imposed. On the other hand, if the judge determines under Sentencing Commission guidelines that a particular offender warrants incarceration solely for purposes of incapacitation,

he might conclude that, assuming the offense is one for which correlating factors for recidivism have then been developed, he may wish to employ a more substantial variable in the prison term. In any event, a prisoner's release date will be set according to parole guidelines developed by the Sentencing Commission to dovetail with the sentencing guidelines applicable in each particular case.

In combination, these factors will substantially increase the certainty of the effect of a particular sentence on a particular defendant. Such certainty should help enhance the credibility of the criminal justice system, permitting both the defendant and the general public to know the true import of a particular sentence. Moreover, it should benefit the defendant by permitting him to know in advance the actual length of his sentence, and may help concentrate his attention on planning more effectively for his future after release.

IV. Consideration of the need for retaining indeterminate sentences subject to parole in the context of a guideline sentencing system

As the Attorney General previously has suggested to this Subcommittee, it is appropriate that the Congress give consideration to abolishing the existing parole system in the context of the guideline sentencing system provided in the new Code. It is an action that would follow logically from the creation of a guideline sentencing system and that could result in additional benefits to the federal criminal justice system.

The existing federal sentencing system as it pertains to sentences to imprisonment is, of course, essentially a two-step process, with the judge imposing a sentence somewhere within the maximum range specified by Congress for the offense and the Parole Commission determining what portion of the original sentence should be the actual amount of time to be served by the offender. The new Code contained in S. 1437—except for permitting the sentencing judge to impose a substantial period of parole ineligibility, and except for assigning the drafting of parole release guidelines to the Sentencing Commission to assure that they dovetail with the sentencing guidelines in every case—continues this aspect of current law.

In the last several years, a growing number of persons of all political views have called for reform of sentencing and parole practices, partly because of recognition that the present system produces unwarranted disparities in sentencing, and partly because of a belated recognition that the theory of rehabilitation, which is the primary basis for indeterminate sentencing, has proven unsatisfactory in practice. The first problem, that of unwarranted disparity in sentencing, of course is addressed in the provisions of S. 1437 that clearly define the appropriate purposes of sentencing, establish a guideline sentencing system, and provide for appellate review of sentences falling outside the guidelines. The second problem is not addressed directly by the bill.

The parole system is made necessary by the indeterminate sentence approach under which a judge imposes only the maximum period of imprisonment that the defendant should be expected to serve. The theory underlying the indeterminate sentence is predicated on the rehabilitative ideal. It focuses on sentencing for rehabilitation, not sentencing for punishment, deterrence, or incapacitation. Simply stated, the theory assumes that by definition an offender is socially "ill," that he should be confined to prison for purposes of "treatment," and that he should be released just as soon as it is determined by parole authorities that he is "cured." The difficulty with the rehabilitative ideal, which has permeated our sentencing legislation for decades, is that it is unrealistic. Recent studies by Dr. Martinson and others have demonstrated that our behavioral scientists do not yet know of any reliable means of inducing rehabilitation of prisoners, nor can they provide a means of identifying an individual who has become rehabilitated. If there is no accurate way to determine when a person has become rehabilitated, there is no reason in the first instance for sentencing him to an indefinite term of imprisonment which is to be terminated only upon such a determination, as opposed to a definite term. Consequently, a rational sentencing system seemingly should provide that the sentence announced by the judge, pursuant to sentencing guidelines, should be the sentence actually to be served. Under such a system, the maximum penalties of the new Code could be further reduced, and the Sentencing Commission could be required to take into account the fact that the sentence imposed would be the sentence actually served, and, consequently, would be expected to recommend shorter sentences than those imposed

today. In those rare cases where extraordinary circumstances such as terminal illness or drastic changes in family circumstances would justify early release, the authority provided by the new Code's Section 2302(c)(1) for the Bureau of Prisons to ask the court to reduce the sentence would provide an appropriate means of altering the release date.

The benefits currently provided by the parole system would be lost under such a structure. Today the federal parole system is thought to serve four basic purposes. First, it attempts to mitigate unfair disparity by releasing similar offenders after similar periods of time regardless of the sentence imposed by the court. Second, it seeks to monitor a prisoner's progress toward rehabilitation so that he may be released when he is ready to return to society. Third, it offers a hope of early release that serves as an incentive to good behavior in prison. Finally, it creates a post-release period during which the Probation Service can provide asssitance to former prisoners and supervise their behavior to ensure against recidivism.

The first purpose—helping to eliminate unfairness—will be much better served by the sentencing guidelines system. The second purpose—monitoring rehabilitative progress—has fallen into such general disrepute that today the Parole Commission generally bases its release determination, as noted previously, only upon factors known at the time of sentencing rather than upon a prisoner's behavior while confined. The third purpose—encouraging good behavior—is felt to be unnecessary by the Bureau of Prisons; the granting or withholding of various privileges has been found to be a more effective means of encouraging compliance with prison regulations, and, in any event, the substitution of a modest "good time" proposal (perhaps ten percent of the prison term) for the Code's parole variable could provide any additional incentive that might be needed. The final purpose—prevention of recidivism—is now attempted through post-release assistance and supervision. That aspect of the parole system designed to assist prisoners in making the transition back to society could be replaced by requiring prisoners to spend a short period of time in a halfway house or other similar facility and by giving them post-release access to the assistance of the Probation Service. The supervisory role of the parole system would be eliminated, since it has not been found effective in preventing recidivism and since it would be fairer to use the criminal trial process to deal with the more serious misconduct of recently released prisoners as is done in the case of other members of society.

It appears, therefore, that the purposes of the parole system wuld be served at least as well by such a modification of the Code's guideline sentencing system. In addition, determinate sentences resulting from the abolition of parole would offer two clear advantages over indeterminate sentences.

One advantage is that, by eliminating all remaining uncertainty concerning a prisoner's release date, a major cause of prisoner complaints would be removed. The increased fairness, and the increased appearance of fairness, could help further to reduce a major reason for prisoner bitterness—a bitterness that hampers preparation for reentry into society since real or imagined injustices focus a prisoner's attention upon relitigating the propriety of his incarceration rather than upon his future after release. Participation in educational and training programs would no longer be designed simply to try to secure more favorable treatment from parole authorities; participation would become truly voluntary, and hence potentially more effective.

Another advantage is that a determinate sentencing system would enhance the credibility of sentences handed down by courts. Most persons recognize that even the small percentage of criminals who reach the end of the criminal justice process today will not be required to serve anything close to the periods prescribed in the sentences imposed upon them. This lack of credibility in sentencing makes a measurable contribution to the current disrespect for the criminal justice system and decreases any deterrent impact the system may be capable of. While there is substantial potential for increased credibility in the current version of the Code contained in S. 1437, the elimination of the remaining opportunity for indeterminate sentences could have a much greater impact.

V. Conclusion

The deficiencies of the existing sentencing laws will be dramatically rectified by the adoption of the proposed new Federal Criminal Code contained in S. 1437. The Department of Justice urges its prompt passage. Whether or not the Con-

gress determines to make any further changes to eliminate the vestiges of indeterminate sentencing still contained in the new Code, the Code's sentencing provisions will contribute significantly to the realization of a rational and fair criminal justice system.

Mr. GAINER. I would like also to be permitted to introduce for the subcommittee's consideration a paper prepared by Miss Skrivseth on what would happen if the sole vestiges of indeterminancy were eliminated from the code. It is a lengthy paper, and the typing should be completed in another day or two.

Senator KENNEDY. We will look forward to that.

[Material appears on pp. 9200–9228.]

Mr. GAINER. The current Federal sentencing statutes, Mr. Chairman, are not particularly helpful. The first section that appears in the current sentencing chapter informs Federal judges that they should not impose a sentence that would "work corruption of the blood." The second section that appears in the sentencing chapter informs Federal judges that they should not impose a sentence that would require a defendant to stand in the local pillory. This is not an auspicious introduction to the Federal criminal sentencing statutes, and in fact, in many respects they go downhill from that point.

The statutes provide very little guidance to sentencing judges. As a matter of fact, they leave the sentence to be imposed in a particular case—to the unfettered discretion of the judge. Federal judges, for the most part, are highly competent individuals, but they have no more formal training than the rest of us in penology, criminology, psychology, and defining the societal values that should affect the sentencing process. This does not bother some judges. Some judges feel that in sentencing they are at the apex of their proper judicial authority and that they are as well prepared as anyone in society to exercise that authority. It does bother other judges. Judge Frankel has quoted Judge Learned Hand as saying, in essence, that he often felt like an old man in a black nightgown muttering under his breath and thereby sealing the doom of some poor individual who might be no worse than he is.

There is little in the way of stated purposes of sentencing in the existing statutes. There is no legislative guidance whether sentences should appropriately be imposed for deterrent purposes or incapacitation purposes or purposes of just punishment. The only directions that appear are in a couple of peripheral statutes dealing with the purpose of rehabilitation.

The penalty limits supplied by existing criminal offenses vary irrationally. The maximum terms of imprisonment that may be imposed are the only guidance in the existing law, really, that govern the imposition of terms by Federal judges.

Yet, there are considerable differences in the available sentences for like offenses. Robbery, for example, under one Federal statute, carries 10 years' imprisonment; under another Federal statute, it carries 20 years'. Embezzlement under one Federal statute carries 10 years' imprisonment; under another Federal statute, embezzlement of the same amount of money carries 5 years' imprisonment; and under another Federal statute, embezzlement of the same amount of money carries 2 years' imprisonment. The fine available for the 5-year offense in-

cidentally, is $5,000, while the fine available for the 2-year offense is $10,000.

The penalty for perjury, intentional lying in an official proceeding after being sworn to tell the truth—carries 5 years and $5,000, but the penalty for false statements—intentionally lying to any Federal employee, not in an official proceeding, and not after having sworn to tell the truth—carries a like penalty of 5 years, but a greater fine of $10,000.

The dangerous special offender provisions of current law permit a penalty of up to 25 years for any offense—regardless of the offense penalty otherwise applicable—for certain kinds of offenders.

The penalty limits on contempt are nonexistent. A judge, in theory, can impose any penalty he wishes for contempt, two or three lifetimes or two or three fortunes.

Probation is not considered a sentence under current law. It is considered a suspension of the imposition or execution of the sentence. That is one of the reasons why it has not been used particularly innovatively.

The maximum fines under current law are abysmally low. They amount, usually, to no more than a potential slap on the wrist. They certainly have not been keeping pace with inflation. They are not, by any stretch of the imagination, serious alternatives to incarceration. Even when fines are imposed, there is no statutory means provided to assure that they can be collected.

Imprisonment maxima, under current law, are relatively lengthy, and the imprisonment is indeterminate in nature. Generally, it is a two-step process under current law. The judge imposes the maximum penalty that he believes the individual should serve and then the Parole Commission comes along and imposes the release date within that maximum penalty. The theoretical underpinning for this indetermine sentencing approach is, of course, the rehabilitative ideal. This has been an ideal that has permeated our sentencing philosophy, and certainly our legislative philosophy, for some decades. It is based upon the assumption that crime is a social disease—the persons who commit crimes are, by definition, socially ill, and therefore we will place them in penitentiaries where they may become "penitent," reflect upon their wrongdoings, engage in rehabilitative programs, and, at some juncture, reach a point where they are rehabilitated.

At this magical moment, the parole authorities are to recognize that a prisoner is rehabilitated and release him, no matter what the sentence imposed by the judge. They are to release him regardless of the fact that the sentence imposed by the judge may have been imposed for purposes entirely different from the purpose of rehabilitation. It may have been imposed for just punishment. It may have been imposed for deterrence. Nevertheless, under the current sentencing philosophy, predicated upon the rehabilitative ideal, the individual is to be released as soon as rehabilitated.

In the last few years the whole underpinning of the rehabilitative ideal has been somewhat shattered by the findings of Dr. Martinson and others when they conducted reviews of all rehabilitative efforts that had been tried over a 22-year period and found that nothing works. Nothing at all works. It does not matter what was tried to induce rehabilitation—work release programs, conjugal visits,

group therapy, and what not—the recidivism rate of the test group was invariably approximately that of the control group. The only thing Dr. Martinson found that worked was castration, something tried by Denmark in regard to sex offenders, and even then the rate was reduced from about 30 percent to 3 percent and not to zero.

With the recognition that we do not know how to induce rehabilitation and with the increasingly broad recognition that we cannot identify rehabilitation when it actually takes place, if it takes place, there is no real reason to have the parole authorities second-guessing the judge as to the time an individual should spend in prison. They are no longer looking to those factors pertaining to the individual's rehabilitative progress in the institutional setting.

The Federal Parole Commission, with admirable candor, has given up trying to base its release determination upon the individual's institutional behavior. The Commissioners have developed, to their credit, a set of guidelines, to be somewhat mechanistically applied, which indicate when an individual probably should be released regardless of the maximum sentence imposed upon him. The factors that underlie the guidelines are not factors pertaining to the individual's development while in the institutional setting, but instead are factors that were known to the judge at the time of sentencing.

If those factors are known to the judge at the time of sentencing, why cannot the judge himself say: "This is the term the individual should actually serve," instead of imposing a greater term and leaving it to the Parole Commission to look at the same factors and say: "This is the limit of the term the individual should actually serve." The Parole Commission is not looking at new information.

The result of the interrelationship of these peculiar features of our current laws is a great deal of unwarranted disparity in sentences imposed. We used to feel that our Federal system was somewhat sacrosanct and that while disparity occurred, of course, in the State systems, it did not occur in the Federal system. Well, it does.

We have had the benefit in the last several years of the second circuit sentencing study, among others, wherein hypothetical situations listing all sorts of factors concerning a particular offender, and the manner in which he committed the offense, were passed out to 40-some judges in the second circuit who were asked: "What do you think an appropriate sentence would be in this particular case? What sentence would you impose?" The judges, as an example, in the hypothetical situation involving a loan-sharking offender, ranged from 3 years' imprisonment to 20 years' imprisonment. These are judges within one limited part of the country. More significantly, the judges varied considerably on the issue whether any imprisonment was appropriate in over three-fourths of the hypothetical situations submitted to them.

Such disparities do not exist solely in theory. They exist in practice. The Bureau of Prisons has recently undertaken some studies of individuals incarcerated in 1974 and 1975. The researchers were looking for individuals similarly situated with similar backgrounds who committed similar offenses, and looking at the sentences actually imposed in those cases. They found, for example, that with regard to bank robbers of similar backgrounds, the average sentences varied considerably. At one extreme the average sentence in nine judicial districts

was 85 months. At the other extreme the average sentence in eight judicial districts was over 200 months.

The balance achieved by the averaging of extremes is no real balance at all. That is all we have today. In many instances we may as well be using what was given me some time ago as a suggested "judge's sentencing selector"—given to me by an individual who purported to have received it from a sentencing judge. It is one page of directions in the form of a dart board. All it requires in addition to the page is a dart. It lists "2 to 10 years," "3 to 5 years," "the first two digits of your street address minus the last two digits of your phone number," and so forth. The sad thing is that this attempt at caustic humor by the author is very close to what might be achieved through the system we have today.

The attempts to rectify the current situation that have been undertaken by the Judicial Conference, and undertaken by the Parole Commission, have been largely ineffective because the heart of the problem is the legislation that exists today in the sentencing area. They cannot reach that through sentencing councils, through sentencing practice institutes, or through Parole Commission guidelines that let out an individual at a set time, no matter what the maximum sentence that the judge imposed. Beyond that, the Parole Commission, of course, even in trying to eliminate disparity in sentences that are imposed today, can reach only the 50 percent of sentenced offenders in prison who come within their jurisdiction as a result of the periods of parole eligibility and the operation of the "good time" provisions. Of course, they can do nothing about the other 50 percent of those in prison. Of course, they can do nothing about the other 60 percent or so of offenders who are not sentenced to imprisonment at all. And, of course, they can do nothing about raising a sentence that is inadequate.

The entire Federal sentencing structure is drastically in need of a major overhaul.

The bill before this committee, S. 1437, contains, in the context of providing a major reform of all the Federal criminal laws, a dramatic and innovative proposal in the sentencing area.

Under the proposed new code, there would be rational grading for the first time, with offenses of similar severity carrying similar penalties and offenses of dissimilar severity carrying appropriately dissimilar penalties.

Purposes of sentencing would be recognized for the first time by the legislature. The judicially recognized purposes of deterrence, and incapacitation, and just punishment, and rehabilitation are set forth specifically in the first section of the entire code, and are set forth again in the first section of the sentencing provisions. They are not all applicable, of course in all instances. They are not all applicable to all forms of sentencing that might be imposed. Accordingly, this bill, at the beginning of the chapter on imprisonment, at the beginning of the chapter on fines, and at the beginning of the chapter on probation, provides that the judge, in assessing a sentence, shall consider, among other things, the purposes of sentencing set forth in the code "to the extent that they are applicable" to that kind of sentence. The assumption is, of course, that if the purpose required in a particular case is incapacitation, probation probably could not be supported by that

purpose. The assumption is also that, under our current state of knowledge, if the purpose of sentencing is rehabilitation, incarceration probably, in most instances, would not be an appropriate means of executing that particular sentencing philosophy.

The special, collateral penalties and provisions included in the code provide some innovate options that simply have not existed prior to this time. The judge is permitted, in any case, to impose, in addition to whatever sentence he comes up with, an order that a fraudulent offender or a corporate offender notify the victims of the offense in order to facilitate civil actions for damages. Indeed, the code contains a civil action for damages that may be brought in a Federal district court.

There is another special provision that provides for the first time in Federal law that a judge may direct, in addition to any other sentence, that the individual provide reparation to the victim of his offense.

There is also contained in the code an important provision that would provide compensation, through the Federal Government, to victims of all violent Federal offenses. Today, there are no provisions in current Federal title 18 that provide compensation for victims of offense, save one. The one instance where victim compensation is provided is not for murder, not for maiming, but for the offense of seduction of a female steamship passenger. In that instance, the fine is to be paid "for the use of the female seduced."

For too long in our society we have considered, or tended to consider, crimes to be affronts to society itself. We talk in terms of individuals paying their debt to society. It is the victims of those offenses who are the ones who really end up paying those debts, as the current law is constituted. For the first time, in this code, there would be an effective program of compensating the victims of those violent offenses.

Probation is set forth in the new code, not as a suspension of imposition of sentence or a suspension of execution of sentence, but as a sentence itself. A series of conditions are suggested that might be appropriate in particular instances, such as a sentence to probation on condition that the individual perform community service. Many of these conditions have not been specified before.

The maximum fines are greatly higher than those in current law. The fine for an individual committing any felony is $100,000. The fine for an organization committing any felony which today is often no more than the entity's annual cost of paper clips, is raised to half a million dollars. There is an alternative fine provision that provides a fine in appropriate cases, of double the loss occasioned to the victim of the offense, or double the gain accrued by the defendant in committing the offense. Importantly, the fines are made more collectable, too, in a separate subchapter. The code permits the utilization of the Internal Revenue Service lien procedures, so that when fines are imposed there is some real hope that they can be collected. In order to prevent an enormous fine from being imposed upon a person who has no means of paying it, however, all fines under the code are conditioned upon the individual's or the organization's ability to pay.

Imprisonment terms are generally somewhat lower than current law, and lesser included offenses appear where none have appeared

previously. For instance, while thefts today generally carry about 5 years, under the new code serious thefts would carry more, average thefts would carry about that time, and minor thefts would carry less. The petty offense of "joy riding," which today is treated like any other theft as a 5-year offense, is dropped to a maximum penalty of 6 months.

The sentences to imprisonment, in addition, may be imposed without eligibility or parole, eliminating in large measure, in appropriate cases, the indeterminate aspects of sentencing under existing law. A period of parole ineligibility may be imposed for close to the maximum term of imprisonment, or it may not be imposed at all, depending upon what appears appropriate in an individual case.

All of these specific provisions pale, however, in light of the general structure used to guide the judges in the imposition of sentences. The bill creates a guidelines sentencing system under which a Sentencing Commission is established in the judicial branch of the Federal Government. That Commission is directed to issue specific guidelines as to appropriate sentences for particular offenses committed by particular offenders under particular aggravating and mitigating circumstances. The guidelines might take the form of a grid system. When a judge had before him a particular offender he could look to see the offender characteristics involved, the aggravating circumstances involved in the offense, the mitigating circumstances of the offense, and determine what the Commission recommended in such a situation—probation on certain conditions, a fine of a certain amount, or imprisonment in a certain amount, whatever was the recommendation in that particular area. The sentencing range would be narrow—in imprisonment, for example, maybe a year and a half to a year and three-quarters; 5 years to 5½ years. It would be a fairly tight range.

The judge would be expected ordinarily to sentence within that range, but he would be free, if he came across particular circumstances in the case that led him to conclude that important factors were not adequately considered by the Sentencing Commission, to impose a sentence above the guidelines or below the guidelines. If he did sentence outside the guideline range, he would have to state his reasons for the sentence—no reasons are required today—and that sentence would be subject, as Senator Hruska has noted, to appellate review where there is no appellate review today.

Senator KENNEDY. He would like to give it to everyone.

Mr. GAINER. He would. The original proposal that Senator Hruska was working on, of course, was a proposal that would look to appellate review in the context of the current system where the disparities are rampant. Under the sentencing system that is designed in the code, there should be a tremendous amount of uniformity in Federal sentencing where it simply has not existed before.

Senator KENNEDY. We hope that is the case, but what about his point? We are moving ahead with over 100 new judges. Should we not consider the opportunity for appellate review for all sentences?

Mr. GAINER. The way to meet a problem is to meet it head on and not to try to graft on some remedial measure to correct a bad situation that exists at the beginning of the process. That is what this bill does. It corrects a bad situation that today exists at the beginning of the sentencing process. It introduces rationality and uniformity at the

first stage. It should provide a means so that disparity will occur relatively rarely, and, when extremes do occur, those instances will be subject to appellate review.

In the instances found by the sentencing judge to be appropriately within the Commission's guidelines, where the Commission had found its guidelines to be appropriate, and where this Congress in review of those guidelines had found the range to be appropriate, there would be no general need, as exists today, for appellate review of those sentences.

This is a major step forward to reach the extremes of sentencing. It should be adequate for those purposes. If it is not, after several years of experience, it can be looked at again. It would seem that by meeting the problem head on, at the beginning of the process, it is a far more rational way to approach the difficulty than attempting the use of remedial device, or relying in large measure on such a remedial device.

The proposals of the code, in combination, would provide a dramatic change in the Federal law concerning sentencing. They provide a change that is very badly needed. They are probably, in combination, the most innovate set of proposals in the proposed new code.

These proposals have the strong support of the Department of Justice and they have the strong support of this administration. We urge early passage of the bill containing them.

Senator KENNEDY. Let me touch upon two areas with you. One is the need for the continuation of parole release for prisoners who are already in prison, that is, prior to the enactment of the sentencing procedures included in this legislation. What are we going to do in the transitional period?

Mr. GAINER. Of course, as the bill now stands, it would continue the Parole Commission. The Commission in appropriate cases would have a function similar to that which it had when originally designed, and would be imposing release dates based upon guidelines developed by the Sentencing Commission in order to dovetail with the Sentencing Commission's original purposes in its sentencing guidelines.

Since the Parole Commission would continue under the present draft, it is only if this committee decides that it might abolish the remaining vestages of indeterminate sentences, and, accordlingly, the parole authority as it now exists, that consideration would have to be given to this factor. If the committee should choose to do that, there would still be a delay of 3½ years, assuming 1½ years before enactment and 2 years before the effective date, during which the Parole Commission would have to remain in existence. Even then, probably the Parole Commission would have to remain in existence for a further period in order to handle the offenders who had been sentenced under the previous laws.

Senator KENNEDY. How long?

Mr. GAINER. Well, it might range between 5 and 10 years. The number of cases coming before the Commission would decrease over time, of course.

The committee might wish to consider another alternative which would be to abolish the Commission—if this is the tack it chooses to take—at the time of enactment. It could give all the persons in prison at the time that this code comes into existence the benefit of the doubt,

releasing them automatically at the release date that would have been afforded under the current Parole Commission guidelines, or giving them the maximum sentence that would be impossible under the new code's guidelines, whichever is less.

Senator KENNEDY. Maybe we could take a look at that proposal.

Mr. GAINER. Again, that would come into play only if this committee wanted to eliminate early release on parole.

Senator KENNEDY. That ought to be before the committee.

Let me hear your views about rehabilitation. You have made reference in your statement about the importance of sentencing for purposes of deterrence and just punishment.

What is your view of rehabilitation, just generally, and what should we be thinking about in that area?

Mr. GAINER. Senator, rehabilitation is really the primary purpose for most sentences to probation. Therefore, it has to be a purpose of sentencing in the code.

The question usually arises as whether or not rehabilitation continues to be a valid purpose for incarceration. When Martinson completed his study, he seemed somewhat edgy about the public reception of his results. He was afraid they would be interpreted to mean that we should not even try rehabilitation anymore. Of course, we should try for two reasons. The first is simply a humanitarian reason; that is, persons who are in prison should be given the benefit of whatever rehabilitation programs we can design. Second, who knows but that we might find something that works.

A couple of weeks ago, there was a report that some researchers had found that criminality in particular individuals could be reduced by feeding them chocolate. I am not sure that we will come to such a neat solution in many cases, but whatever remedial attempts we can take certainly should be left open for experimentation.

But beyond that, it would clearly be a shame to cut off the possibility of any sentence in the future for rehabilitative purposes. Even today, there may be some sorts of situations in which incarceration may appropriately be imposed for limited times for essentially rehabilitative purposes, such, as perhaps, a defendant requiring a withdrawal period during drug addiction treatment. The issue probably could be handled adequately in the legislative history of the bill, indicating that, under the current state of knowledge, it would generally seem inappropriate to use rehabilitation as the sole purpose—not as a collateral purpose but as the sole purpose—for incarceration. Under the bill's approach, the propriety of the purpose would be left to the Sentencing Commission, based upon the information coming to it in the course of its keeping current with penological and certain sociological thinking as to what would be appropriate under all the circumstances.

I think it would be a mistake to delete rehabilitation as a purpose of sentencing simply on the basis of the most recent findings and the current conventional wisdom.

Senator KENNEDY. I think that we have to try to find ways of expanding rehabilitative programs. I agree with everything you said in terms of confused attitudes and the injustices which have resulted from the failure to understand the distinction between incarceration and rehabilitation.

But it seems to me that the only way that these sentencing provisions are going to make sense over a long period of time is with a strong emphasis on rehabilitation. That, I think, has to be recognized and has to be advanced.

Mr. GAINER. I think, Senator, the bill that you and others have produced does take cognizance of that need, particularly in the training area by providing the opportunity for engaging in industries in which prison personnel may sell in the competitive market. This will provide training in job skills where there is a market for job skills, and training that may eventually help in rehabilitation under the broad understanding of the term.

Senator KENNEDY. I want to thank you very much and we want to thank Karen Skrivseth. She has been very helpful to the Committee. We look forward to working with you. Thank you very much.

Our next witness is Curtis Crawford, Acting Chairman of the U.S. Parole Commission, accompanied by Commissioner Dorothy Parker, Dorothy Parker is a former employee of the committee.

Ms. PARKER. Senator, it might be better if I did not join the Chairman. I do not agree with the philosophy of the majority of the Commission in the handling of this. The Chairman will state the opinion of the majority.

Senator KENNEDY. Fine.

You have views and if you would like to submit them, we would welcome them as well.

Ms. PARKER. I would be glad to.

Senator KENNEDY. We will hear from the Chairman, but if you have other views and would like to submit them, we would include them in the record.

[Material appears on page 9028.]

STATEMENT OF CURTIS C. CRAWFORD, ACTING CHAIRMAN, U.S. PAROLE COMMISSION; ACCOMPANIED BY PETER HOFFMAN, DIRECTOR OF RESEARCH, U.S. PAROLE COMMISSION

Mr. CRAWFORD. Thank you, Mr. Chairman.

I would like to say that I have with me this morning Dr. Peter Hoffman, who directs the research for the U.S. Parole Commission.

I have a brief statement that I would like to read into this record and also I would like to state that my comments here this morning—I am not speaking for either the Department of Justice or the administration.

Senator KENNEDY. What does that mean?

Mr. CRAWFORD. Briefly, what I am saying is that the Department under Attorney General Bell has taken a position. I do not want anybody to misconstrue my thoughts here and perhaps adopt these thoughts as being the thoughts of the Department of Justice or the administration. I want it clear in this record that these are the comments of a majority of the members of the Parole Commission.

On behalf of the U.S. Parole Commission, I welcome this opportunity to appear here today to present for your consideration the

views of the majority of the members of the Parole Commission on certain provisions of S. 1437 relating to parole and sentencing.

As I indicated, I am not speaking for either the Department of Justice or the administration.

The foundation of modern parole is founding in the progression from strict imprisonment to gradual freedom within limited areas, to liberation with conditions of parole and supervision in the community.

Parole in America has played a continuing, vital, and distinguished role over the past 100 years in the administration of criminal justice:

Two national attorney general's conferences on parole have been called by the Attorney General and President to evaluate the progress of the parole system in America. The first national conference was in April 1939 by Attorney General Frank Murphy with the very active participation of President Franklin D. Roosevelt.

The conference was attended by nearly 800 delegates representing 46 States of the Union. Objectives of the conference as stated by General Murphy was to: (1) Present the facts about parole to the American people; (2) to reach agreement as to desirable standards in administration; and (3) to point the way to closer cooperation between the Federal Government and that of the several State paroling authorities.

In opening this historical National Parole Conference, President Roosevelt stated that he "considered parole the most enlightened and promising method of terminating a prison sentence."

President Roosevelt, in the keynote address, pointed out that public criticism has been based upon inadequate information, particularly about the ratio of parole success. The President continued:

> It is especially important that people should not be deceived by violent attacks on properly run parole administrations if one parolee goes wrong and commits another crime. The fact clearly show that while a properly run parole system gives no guarantee of perfection, the percentages of parolees who go straight for the rest of their lives are infinitely higher than where there is no parole system at all. Well administered parole is an instrument of tested values in the control of crime. Its proper use in all jurisdictions will promote our national security.

The second National Conference on Parole was called by U.S. Attorney General Herbert Brownell, Jr., in April 1956 in the Nation's Capital.

Chief Justice Earl Warren, in his keynote address, stated:

> It has been my opportunity in life to see parole from different vantage points. First, of course, as a citizen; second, as a prosecutor; third, as a legal adviser of a parole system; fourth, as Governor of my State charged with the administration of a parole system; and recently from the bench. I say to you frankly that it presents a different picture from each of these vantage points because each of these experiences has strengthened my belief in the parole system and my expectation for its accelerated progress in the future.

Now, let me say that the members of the Parole Commission support the general thrust of this bill to reform the Federal criminal laws and particularly the efforts to set forth a system to reduce judicial sentencing disparity. Problems of excessive and unwarranted variations in criminal justice sentences are all too readily apparent in the way the system presently operates.

It is believed that a guideline system promulgated by a sentencing commisison can provide a significant step in regard to improving judicial sentencing. We do, however, have certain suggestions to offer concerning the role of a parole authority and its relation to the sentencing commission, which we think will prove this measure.

As you may know from the previous testimony of Bureau of Prisons Director Norman Carlson, Dean Don M. Gottfredson, and former Deputy Attorney General Harold Tyler, the U.S. Parole Board—now the Parole Commission—was the first operating criminal justice agency to implement a guideline model for the determination of time to be served in prison before release—within the limits set by statute and sentencing judge.

Decisions outside the guidelines are permitted, but only for good cause and upon the provision of specific written reasons. Based upon the work of a team of distinguished researchers, including Dean Gottfredson, who has testified before this committee in relation to his work with guidelines for sentencing, guidelines for parole release decisions first went into effect in October 1972, nearly 5 years ago.

Expanded to all Federal parole release decisions by October 1974, this guideline model was incorporated into statute in the Parole Commission Reorganization Act of 1976, a major reform of the Federal parole practices resulting from over 3 years of study.

In content and application, this guideline model is quite similar to what S. 1437 appears to contemplate would be promulgated by the Sentencing Commission. For example, one might compare the criteria of proposed 1437 with the present 18 U.S.C. 4206 and the detailed text of the accompanying conference report.

Since the first pilot project nearly 5 years ago, parole release guidelines have been applied to nearly 40,000 sentenced Federal prisoners. Thus, the Parole Commission feels that it has considerable experience with the guideline concept in practice and can attest to both its strength and its limitations.

That brings me to consideration of the role of the Parole Commission under proposed S. 1437. Given the concept of Federal judges imposing sentences under a guideline framework, the question has been raised as to what, if any, function would be served by a parole authority.

In fact, several witnesses testifying before this committee have concluded that under this act the Parole Commission would merely be duplicative and should be eliminated. We feel that such conclusions are based upon certain erroneous assumptions and that there is a clear and viable role for a parole authority working in conjunction with the Sentencing Commission and judiciary in determining fair and consistent prison terms.

It is our reasoned belief that while implementation of a Sentencing Commission is likely to enhance equity in certain areas, such as the primary decision as to who is committed to prison and who is placed on probation.

Without the retention of the Parole Commission, equity in other areas, specifically in the determination of the actual length of prison terms, is likely to be reduced.

Even Mr. O'Donnell, who argued before this committee that parole should be abolished, points out in his text, "Towards a Just and Effective Sentencing System," the fact that a strong limitation of the Parole Commission's present use of guidelines is that the Parole Board does not have adequate control over sentencing practices to sufficiently reduce judicial sentencing disparity.

Thus, it might appear that a liability under the present system is not too much authority for the Parole Commission, but rather too little.

Simply stated, it is our belief from considerable experience within a guideline system, that sentencing guidelines alone, applied by 398 or more, as I have heard, Federal judges, sitting individually will, even with appellate review, not produce the fairness and equity in the setting of actual time to be spent in prison that is the underlying intent of this legislation.

Senator KENNEDY. Let me ask you this. That is the whole point that we are attempting to reach; that is, that the prisoner will know at the time by his initial sentence exactly how much time he is going to spend.

Why shouldn't he know at the outset that he is going to spend *x* number of years in prison, subject to good behavior? If he does not misbehave, on *x* date he will be released. Not only will he know, but society will know as well.

It seems to me that those are the two elements that we are trying to achieve. Why is not that your concern about the disparity between different judges and all the other factors? Why is not that the best way to deal with it?

Mr. CRAWFORD. I could say at this particular time, Senator, that the Commission has only recently done this. It is currently running in the Federal Register. The fact that we are seeking to give prisoners within 120 days, or within 4 months of their incarceration the specifics as to how long they will be there.

Senator KENNEDY. Why not have that done in the courtroom? Why not have the judge do that? Why should you do that?

Mr. HOFFMAN. Mr. Chairman, I think that has to do solely with the number of individuals involved. I think from our experience, using a very similar guideline concept, that we have learned that while the guidelines are very, very valuable, that they will not alone be sufficient to serve their intended tasks; that is, while guidelines can reduce disparity, it is doubtful that the guidelines alone, applied by 400 to 500 separate individuals, can substantially reduce that to accomplish the aims at fair and consistent present terms.

Senator KENNEDY. We have heard the proposals. Senator Hart has said that rather than have a 1- or 2-year flexibility period he would provide the exact number of years.

Mr. HOFFMAN. Yes.

Senator KENNEDY. Would you favor that?

Mr. HOFFMAN. No. I think the liability with that approach is the liability of the mandatory sentence provision. It is simply that it is extremely difficult, if not impossible, for anybody to, in advance, articulate all of the possible permutations and combinations of circumstances that may arise. That is why flat sentencing, or mandatory

sentencing, has run into the situation where a law will pass and a proposal will come that sale of drugs to juveniles will receive a very stiff penalty. Then it turns out, for example, in the State system, that the age of criminal responsibility is 16, and the age of majority is 18. So, distribution by a 16-year-old to a 17-year-old friend, comes under the heading of sale of marihuana to a minor which was obviously not the intent.

It is simply a matter that while guidelines can substantially structure the discretion, it is doubtful, at least in our view, that they can be written comprehensively enough so that they can be applied by 500 separate individuals and achieve the consistency you desire without making them too rigid. This is why it is suggested that there should be a two-stage process. There would be the initial determination using guidelines and that would be made by the Federal judge.

But for the much more limited number of individuals who receive Federal prison terms, there would be a collegial body which would be a smaller number of individuals and they would sentence full time. They would use guidelines dovetailed into the Sentencing Commission guidelines, and they would apply the actual determination as to the length of time served.

It is argued that the advantage and the production of equity by having a full-time group, which specializes in this task, to do it. We do not care what they are called, but they will be a group which could produce a result which will much more than make up for the alleged duplicativeness of this system.

While the average Federal judge, with 400 Federal judges now, and you run approximately 12,000 prison terms, which is approximately 30 prison terms per year per judge, then sentencing is a part-time function.

If it is true that the guidelines themselves cannot be written that specifically, then it is argued that you are better off with a small full-time body implementing the actual prison term.

Senator KENNEDY. I have not heard among those who have testified that they feel that they could not address those variables.

Mr. HOFFMAN. Dean Gottfredson and Andrew von Hirsch did address that subject. I believe that even Judge Tyler recommended that the Parole Commission be kept in place for a while specifically for a similar purpose.

We simply do not know whether guidelines can be written that tightly. There is the experience with 4 years and 40,000 cases with the Parole Commission, and that seems to indicate, to me at least, that both a small number of full-time decisionmakers and guidelines are required rather than one or the other.

I believe this is the position of Dean Gottfredson who, as you know, worked for the Parole Commission, but who more recently has been working with the sentencing guidelines, in a feasibility of State courts fields.

Senator KENNEDY. But I do not know what information you are going to have 2 or 3 or 4 months hence after sentencing.

Mr. HOFFMAN. No, sir, it is not a question of having additional information. It is simply a question of this. If it is true that the guidelines can articulate the underlying principles and can articulate cer-

tain fact situations, but if it is true that it is supplied by 500 individuals, and if it is true that they sit separately and individually, then you will not achieve the consistency that you desire. Then the function of the Parole Commission or whatever agency you would want to call it, would be that they would not have additional information within 4 months. It would be that with the limited task of setting a prison term you would have a small full-time body who communicates with each other and works in panels rather than individuals.

So, you have the concept of guidelines going for you. In addition, you have the concept of a small body who are working full time. They would have sentencing panels which have been advocated in the Federal system for so long, but rarely tried. All of these work together to reduce the disparity rather than only using it one way.

Senator KENNEDY. Under your proposal, then, they would have the authority to reduce the sentence imposed by a judge; is that correct?

Mr. HOFFMAN. Under this type of proposal, which has been recently passed by both houses of the Oregon legislation, you would have a judge who would fix a maximum term. In Oregon, a judge may fix a maximum up to one-half of the maximum. Then, within 6 months in Oregon, although administratively the parole board in Oregon does it within 90 days, the parole board would affix the actual release date. As a matter of fact, the Oregon proposal has this. The parole board has an override so that if four of the five members concur, they may fix a release date notwithstanding the minimum sentence.

What you have is this. You have the original decision as to who to incarcerate, which is a broad decision that would be made in this system under the guidelines by the Federal judge, and then very, very quickly you would have a smaller body fix the actual time to be served.

The advantage is simply the smaller full-time body. There is no new information necessarily.

If the guidelines could be written so specifically and if they could take into account all the permutations and accommodations which would be required, then this would be duplicative.

But the liability of mandatory sentences, which we have had in the past, and which have not worked very effectively, have been that they have tried to take into account all of the combination and permutations. They have not been successful.

Our experience with the parole guidelines, in applying them and implementing them, is simply that they can be a variable tool. They can be a dramatic tool, but in themselves, there is simply the question as to whether they are the end-all and whether they can be totally sufficient in themselves.

Senator KENNEDY. We will get a chance to look at the Oregon legislation. It seems to me it is an improvement over the present system, but I think you still face indecisiveness from the point of view of the prisoner him or herself, as well as society.

Mr. HOFFMAN. Sir, I agree. The question is simply this. Would you trade several months of indecisiveness, or of not knowing, for the increased equity which this system can provide? I agree with you completely that you have to have one or the other.

If the underlying intent is to produce fair and consistent prison terms, then it is simply recommended that this may do the job better.

Senator KENNEDY. That assumes it will be fair and more equitable.

Mr. HOFFMAN. Yes.

Senator KENNEDY. That case still has to be made, does it not?

Mr. HOFFMAN. Yes, sir. That certainly is true. But it is simply the question. I think the witnesses who have testified previously might be asked specifically on the point as to whether a very, very large number of decisionmakers, that is, whether the interpretation of these guidelines will be sufficiently consistent so that this will be unnecessary.

Mr. CRAWFORD. Senator, also in conjunction with the question, it seems to me that I should say this. We know these facts. We do know that many sentences are controlled by community pressure. We know that a judge sitting there is responding many times in his sentence to the pressures of a given community.

So, even though facts that are similar are used by the Parole Board in making its determination after he has been incarcerated, it is made under circumstances that are far different and far more calm than it would be normally at the time of the sentence made by the sentencing judge.

That was just one other factor relating to the question as to whether or not the judge could perform that same function that the Parole Commission could perform 4 or 5 months after the incarceration.

I wish to be clear that this is not meant as a reflection on the ability of the Federal judiciary, but, rather, as I shall discuss shortly, simply a limitation imposed by the very large number of individuals involved.

Nevertheless, it is our belief that working together, the Sentencing Commission, judiciary, and Parole Commission can enhance equity and fairness, particularly in the time actually to be served by similarly situated offenders. That is, we will attempt to show that a Sentencing Commission model and a Parole Authority are complementary, rather than competitive concepts, and that the increased consistency, effectiveness and checks and balances of this complementary model far outweighs any claims of duplicativeness.

To discuss these issues, I must first highlight the functions that the Parole Commission actually serves and those that it does not serve.

A primary function of the Parole Commission under present statutes is to set fair and equitable prison terms within the limits set by the sentencing judge. Thus, at present the Parole Commission is the only body that has any responsibility at the Federal level for reducing disparity in sentences.

This has repeatedly been recognized by Congress specifically in the legislative history of 18 U.S.C. 4208 in 1958, and again in the Parole Commission and Reorganization Act of 1976 which states:

> In the first instance, parole has the practical effect of balancing differences in sentencing policies and practices between judges and courts in a system that is as wide and diverse as the Federal criminal justice system.

Nevertheless, this is certainly not a widely known role. It is a role explicitly stated by only a few other parole systems—for example, Minnesota and Oregon; and it is most emphatically not the image of the Parole Commission that is generally created and reported by the mass media.

You have heard, in previous testimony, an argument that coercive rehabilitation programs are not effective, and that consequently the

Parole Commission should be abolished. As applied to present Federal parole practice, this criticism is simply inaccurate.

As noted above, the primary purpose of the Parole Commission is the provision of fair and consistent prison terms, not coerced rehabilitation. Rehabilitation—rather than being a function of the parole board—lies primarily within the province of the Bureau of Prisons.

Another criticism has been related to indeterminacy and to the uncertainty under which prisoners are kept regarding their release date. Although this has been the traditional practice of paroling agencies, since the development of the guideline model in 1972, the U.S. Parole Commission has been moving in the direction of increased certainty in the determination of parole release dates.

Not only do the guidelines provide an estimate for prisoners as to the time they will actually serve, but the Parole Commission has actively been experimenting with a procedure for reducing unnecessary uncertainty.

In May of last year, an experimental project was begun in the western region of the country by the Parole Commission which involved informing a prisoner early in his term of a prospective parole date—contingent upon good conduct. A similar joint effort with the Bureau of Prisons was also begun last year at the Butner facility in North Carolina.

The tentative feedback obtained to date, although based upon an extremely limited sample, is very encouraging. Partially as a result of this experiment, the Parole Commission has recently set forth proposed regulations under which most prisoners would be informed of a presumptive release date, contingent upon good behavior, within 4 months of their arrival at the Federal prison.

While this method may still technically be classified as an indeterminate sentence, it certainly does not contain the uncertainty or coercive rehabilitation pressure that certain critics decry. Upon receipt and consideration of public comment as provided by the Administrative Procedure Act, it is the Commission's intention to move forward promptly in this area.

Another criticism that you have heard in testimony is that the Parole Commission does not operate under clearly drawn legislative standards. I submit that this is incorrect. It is our belief that the standards drawn by the Parole Commission Act of 1976 in 18 U.S.C. 4206 are extremely clear, particularly when read in light of the conference committee report. It is noted that these standards are quite similar to those enunciated in S. 1437, except that rehabilitation is not mentioned in the Parole Commission Reorganization Act.

Let me turn to the guidelines themselves. From experience with our system, we know that the guidelines are a valuable tool; we also know that even with a small staff of 36 hearing examiners supervised by five regional commissioners and a three-member National Appeals Board, there can be considerable differences in guideline interpretations; and if training and review is not constant and ongoing, considerable disparity even with guidelines can occur.

Morevover, Parole Commission staff devotes full-time effort to the setting of prison terms, and decisionmaking is by two-member panel. Sentencing, and particularly the imposition of prison terms, is but a

minute portion of the Federal judge's role. Last year, there were roughly 12,000 prison terms imposed by 398 judges, an average of 30 per judge in the entire year.

It is our belief that even with the most sophisticated guidelines, there remains considerable potential for disparity in relation to actual prison terms in their application by 400 Federal judges—and I am told that an increase to over 500 judges with the new legislation may be forthcoming.

Moreover, we do not believe that appellate review by 11 circuit courts, divided into numerous panels and already overworked, would be the best vehicle for insuring the consistency required. That is why even with valuable sentencing guidelines, it is our view, the role of a smaller full-time body—whose primary duty is to fix prison terms—needs to be maintained.

I believe this was explicitedly stated by Dean Gottfredson and Professor von Hirsch in their testimony before this committee and alluded to by other committee witnesses who have testified that abolition of the Parole Commission at this stage would not be wise.

This role has also been recognized in recent legislation passed in Oregon, which creates a Joint Parole—Sentencing Commission on Prison Terms. Under this Oregon legislation, judges and parole board members will combine to provide guidelines for prison terms.

The judiciary will decide whether or not to impose a prison sentence and if so, its maximum length. The parole board, a small full-time body, which like the Federal Parole Commission, is already using guidelines, will set the actual prison term.

Moreover, to provide determinancy and reduce uncertainty, the Oregon Parole Board will be required by law—as it already does by administrative rule—to tell the prisoner within 6 months of commitment of his presumptive release date—contingent upon good conduct.

The second primary function of the Parole Commission under present statutes relates to the sanctioning of institutional disciplinary infractions and thus, to the maintenance of institutional order.

In 1976 the Congress stated:

> It is the intent of the Conferees that the Parole Commission reach a judgment on the institutional behavior of each prospective parolee. It is the view of the Conferees that understanding by the prisoner of the importance of his institutional behavior is crucial to the maintenance of safe and orderly prisons.

It would appear that this function would become even more critical with the proposed elimination of good time in S. 1437. Although it has been suggested by Mr. Carlson that restriction of internal privileges, combined with good time loss of 10 percent of the total sentence would be insufficient to maintain institutional order, this has not been empirically tested.

Moreover, it must be recognized that elimination of the Parole Commission from this task would simply transfer the power from a limited number of specialized decisionmakers to numerous disciplinary committees in 38 Federal institutions, plus numerous additional community treatment centers and State contract facilities.

The U.S. Parole Commission's experience in observing Bureau of Prison disciplinary actions and good time allocation in the course of parole hearings, unfortunately, has pointed up considerable disparities

from institution to institution. The type of institution and philosophy of the warden heading it seems to be a significant factor in determining whether a certain action is disciplined or good time lost.

Even if all prisoners within an institution are treated similarly, the difference between institutions is too great to permit a return to the pre-Parole Board days when the Bureau and its wardens totally determined who was paroled and when. It is to be remembered that disparity is not related solely to the matter of sentence length, but if left unchecked can affect any criminal justice decision.

Moreover, it might be recalled that in 1930, all parole decisionmaking, which had previously been under institutional control, was removed to a small full-time decisionmaking body, such as the Parole Board, partially to correct such problems and to reduce the possibility that prior release, by whatever method it is called, parole or good time, would be tied too closely to institutional considerations or institutional needs.

Under any system, from time to time, powers which may be placed under the general heading of clemency need to be exercised. For example, serious medical problems such as terminal cancer or heart disease; exceptional meritorious acts within the institution; or even changes of public perception of offenses may require such action—reduced perception of the seriousness of marihuana offenses.

Again, the Parole Commission provides an efficient vehicle for the required exercise of this discretion. For example, when the Congress repealed the mandatory sentencing provisions of the Harrison Narcotics Act, the approximately 600 cases were efficiently processed. Cost of transportation alone for resentencing would have been extremely high, not to mention judicial time involved.

In the other situations mentioned, the remedy of pardon as a practical matter would often be overly cumbersome or time consuming.

As with disciplinary infractions, merely turning the function over to individual institutional officials would not likely result in uniform and consistent policy as provided by a more specialized body.

S. 1437 provides in the proposed 18 U.S.C. 2303 that a sentence of a term of imprisonment, in the case of a felony or a class A misdemeanor carrys an automatic post-sentence parole term. These terms of post-sentence parole are fixed under the proposed 18 U.S.C. 3834(b) and I assume are to follow the expiration of the service of the regular sentence imposed.

Obviously, somebody must undertake this function. If the Parole Board was abolished and the court fixed the post-parole term, who would supervise the parolee? Who is to make the determination if a condition of parole is violated? Who is to make the decision of what to do with the parolee if it is found that the parole has been violated?

The U.S. Parole Commission, in the period from October 1975 to September 1976, conducted 1,560 institutional parole revocation hearings and 256 local revocation hearings, as well as made equal numbers of decisions relating to warrant issuance and findings of probable cause.

Absent a parole commission, this would simply be much more work for overburdened district courts and courts of appeal judges.

In summary, we believe that retention of the parole board—a small collegial body of decisionmakers which votes in panels—such as the

sentencing panels which have for so long been advocated but rarely implemented, and devotes full time to these specialized tasks is essential to accomplish the primary aim of this legislative reform: That of providing equitable and just prison terms.

Specifically, we believe that:

1. The Parole Commission should be specifically authorized by statute to tell the prisoner early in his term of a presumptive release date, contingent upon good conduct;

2. That the period of permissible parole ineligibility—of up to 90 percent—specified in S. 1437 should be substantially reduced. Judge Lasker in his testimony has suggested retaining the present 33.3 percent—one-third;

3. That until substantial experience with the Sentencing Commission is developed, the Parole Commission should retain the power to establish its own regulations and guidelines, but as Judge Lasker suggested, the legislation should specify that the Parole and Sentencing Commissions should coordinate their activities; and

4. Now is the appropriate time for the President, Attorney General, and the Congress to call for a Third National Conference on Parole.

I might add that we have a number of additional suggestions of a more technical nature and I would ask that we be granted permission to submit them separately subsequent to this meeting.

Senator KENNEDY. Without objection, that will be inserted in the record.

Mr. CRAWFORD. This concludes my formal statement. On behalf of the Commissioners on the U.S. Parole Commission, I wish to thank you for this opportunity to appear before the subcommittee and present the Commission's views.

I should be happy to answer any questions you might have.

Senator KENNEDY. I think that has been helpful. We will get a chance to examine your statement in detail. I think you have made interesting points here which we will have to examine and review. We will hear other comments but it is useful and helpful testimony. We are very grateful.

We thank you very much.

[The following letter from Commissioner Dorothy Parker was subsequently received:]

U.S. DEPARTMENT OF JUSTICE,
U.S. PAROLE COMMISSION,
Washington, D.C., June 20, 1977.

HON. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C., June 20 1977.

DEAR SENATOR KENNEDY: As suggested by you at today's hearings on the sentencing provisions of S. 1437, before the Subcommittee on Criminal Laws and Procedures, which you chaired, I am submitting my personal views on the subject. These are solely my views and are not to be deemed those of my fellow-Commissioners on the U.S. Parole Commission nor of anyone else.

Nonetheless, based on my over 25 years of experience in the private practice of the law plus my five years with the Office of Legal Counsel, Department of Health, Education, and Welfare; my six and one-half years of work on the Hill with the Senate Judiciary Committee and my eight months of experience serving as the only member of the U.S. Parole Commission confirmed under the Parole Commission and Reorganization Act (P.L. 94–233), I appreciate this opportunity to voice certain suggestions for consideration by this Subcommittee in connection with one of the most important, if not the most important, aspect of the

criminal justice process—the imposition of sentence and the method of selection of the type of sentence to be imposed, by whom and upon what conditions and based on what considerations.

The basic philosophical different I voiced today which made it impossible for me to support the views of the majority of the Commissioners on the U.S. Parole Commission is based on the difference in concept of the basis for determining incarcerated time to be served—i.e.: is it a judicial or executive function which the U.S. Parole Commission performs? My colleagues contend the function is executive in nature; I contend it is judicial.

Based upon the historical concept of parole, my colleagues, George Reed and William Amos[1] in an article in Federal Probation, 1972, pp. 16–18 entitled: "Improved Parole Decision-Making" supported the interpretation that "parole is a matter of 'grace' and not of 'right'" and that parole decision-making is "to the end that (a) the (Parole) Board will release from prison inmates who have arrived at the psychologically right period of maturation to be able to make a satisfactory community adjustment under parole supervision and that (b) the Board will better protect society by continuing to provide institutionalized treatment for the inmate who is not yet ready even under supervision to provide self-direction in an open society." (at p. 17).

The presentation for this Subcommittee argues the "history" of parole and that the U.S. Parole Commission's function under the Parole Commission and Reorganization Act is executive in nature. That conclusion is only possible if the time of incarceration is determined upon the basis of the executive-sovereign's determination that the person involved is "rehabilitated" and therefore that as a matter of the sovereign's "grace" he should be released.

It is my contention that in fact under the Parole Commission and Reorganization Act which became effective May 14, 1976, the Congress converted the U.S. Parole Commission into an agency mandated to fix the time of incarceration to be served by federal prisoners based upon the "nature and circumstances of the offense and the history and characteristics of the prisoner" (as enunciated in 18 U.S.C. 4206(a)). This, I suggest, is part of the judicial sentence fixing function and rightly is a judicial function. Hence, the U.S. Parole Commission belongs in the Judicial branch of the government, not the Executive.

In my opinion, neither I nor anyone under the present state of the art has the prescience to determine when a prisoner is "rehabilitated" so as to be released to the community. In recognition of this fact, nowhere in the Parole Commission and Reorganization Act is there mention of this concept of rehabilitation as a basis for prisoner release. To introduce the concept, I contend, flies in the face of the Congressional mandate expressed in the Parole Commission and Reorganization Act, P.L. 94–233, and the Congressional intention expressed in the Act and throughout its legislative history. See Conference Report, S. Report No. 94–648, wherein it is stated, at p. 26: "The parole-decision makers must weigh the concepts of general and special deterrence, retribution and punishment"—They talk of "fairness" and "just punishment," not of rehabilitation of the offender.

Eligibility for "parole" under the Parole Commission and Reorganization Act is based on "the nature and circumstances of the offense and the history and characteristics of the prisoner" and is granted solely when "release would not depreciate the seriousness of the offense or promote disrespect for law"; and when "release would not jeopardize the public welfare"; (18 U.S.C. 4206(a) (1) and (2)—and, nowhere is there mention of when the prisoner is "rehabilitated." As pointed out in 84 Yale Law Journal, 810, 814: "Although parole release decisions have been regarded as virtually autonomous from sentencing per se, parole is an integral part of the sentencing and correctional process." (Footnote omitted).

Accordingly, I suggest that the U.S. Parole Commission, as a sentencing body, should be renamed, taken out of the Department of Justice, and made a part of the Judicial Branch of the United States Government in recognition of the fact that it no longer performs an executive or at best quasi-judicial functions, but is and should be an integral part of the judicial sentencing process.

[1] Mr. Reed is nearing his 20th year as a member of the Parole Board and as a Commissioner on the U.S. Parole Commission. Dr. Amos is serving his second term as a member of the Parole Board and as a Commissioner on the U.S. Parole Commission.

A. SUGGESTED GUIDELINE SYSTEM FOR S. 1437

For reasons which will be presently shown, the United States Sentencing Commission to be set up under Sec. 241 of S. 1437 to add Chapter 58, 28 U.S.C. 991, et seq., should, with the assistance of expert staff and consultants who have varied disciplines, develop guidelines for U.S. District Court Judges to apply in determining what penalty shall follow conviction of a federal offense.

Broadly viewed guidelines for use by Federal Judges should be developed by the Sentencing Commission. These guidelines should set forth according to specific standards whether in a particular type of case and for a particular kind of offender the punishment most likely to be effective is to be a fine and, if so, how much; a term of probation and, if so, for how long and subject to what conditions; an order of restitution and, if so, on what notice, in what amount and to whom payable; imprisonment and, if so, the reasons therefor and if the Judge so desires the suggested time he deems appropriate for the defendant to serve in incarceration; or any combination thereof.

It cannot be denied that one thing that is radically wrong with the present sentence fixing adjustments by the U.S. Parole Commission is that there is not adequate control over the sentencing process *before* it reaches the Commission.

As Mr. Pierce O'Donnell pointed out in his testimony before this Subcommittee on June 8, 1977:

"The most conspicuous and disconcerting disparity, Mr. Chairman, occurs when one person receives a prison sentence and another person committing the same crime and who we would consider to be similar in virtually all respects is placed on probation." (Testimony Transcript, June 8, 1977, at p. 44).

The guideline system envisioned for determination of the type of sentence to be imposed would radically reduce if not eliminate this type of dissimilarity in sentence. Then, if such broadly viewed guidelines outlined above when applied by the U.S. District Court Judges result in a judgment that imprisonment would be the fairest punishment, the Judge would fix the statutory sentence. Thereafter, the U.S. Parole Commission, under whatever name it is to be given, could apply its even-handedness predicated upon the expertise developed over the past five years by applying its different, supplemental and specific guidelines to determine, within the first 120 days or preferably within 60–90 days after incarceration, the presumptive term that would have to be served in a particular case and the reasons therefor, whether within the guidelines or above or below the guidelines. Of course, the rights of appeal now available under the Parole Commission regulations to the Regional Commissioner for reconsideration and to the National Appeals Board would and should remain available under such system.

Obviously, both the Judicial Sentencing Commission and the Parole Sentence-Fixing Commission or Commission on Federal Incarceration, as I prefer to call it, should work very closely in coordinating guidelines. Both guidelines, I am earnestly convinced, should be subject to the Administrative Procedures Act in their promulgation and further subject to the Congressional review contemplated under the proposed Sec. 994 (g) amendment to Chapter 58, Title 28, U.S. Code.

B. ADVANTAGES OF USE OF SMALL COLLEGIAL BODY VERSUS U.S. DISTRICT COURT JUDGES IN FIXING TIME OF INCARCERATION

The U.S. Parole Commission, as you are well aware, was the first agency to implement a guideline system for the determination of the range of time to be served for a particular offense behavior based on the characteristics of the offender. Deviations from the guidelines both above and below the range, of course, occur for good cause, with written reasons given in general terms for decisions within the guidelines and should be given with specificity if the decision is to go over or below the guideline range.

The guidelines were developed by a team of researchers in the field of criminology and related areas and were first tried on an experimental basis in 1972. The concept of a guideline model as thus developed was incorporated into P.L. 94-233 in 18 U.S.C. 4203(a)(1) wherein the Commission was expressly authorized to "promulgate rules and regulations establishing guidelines for the powers enumerated . . . and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter. . . ." And, the enumerated powers of the Commission include the power to—

"(1) grant or deny an application or recommendation to parole any eligible prisoner;

"(2) impose reasonable conditions on an order granting parole;

"(3) modify or revoke an order paroling any eligible prisoner; and

"(4) request probation officers and other individuals, organizations, and public or private agencies to perform such duties with respect to any parolee as the Commission deems necessary for maintaining proper supervision of and assistance to such parolees;" * * * (18 U.S.C. 4203(b)).

Since the first pilot project nearly five years ago, parole release guidelines have been applied to nearly 40,000 Federal prisoners by the Commission's 36 Hearing Examiners and Commissioners, as well as previous Parole Board Members. Rehearings are mandated after 18 months and 24 months under the Parole Commission and Reorganization Act depending on whether the sentence is less than or more than 7 years and also rehearings occur more frequently if release is likely in the interim.

1. Criteria for guidelines

The guideline considerations used by the Parole Commission and its precursor, the Parole Board, are quite similar to those set forth in Section 241 of S. 1437 as an amendment to 28 U.S. Code, Chapter 58, Sec. 994. Similar guideline considerations would be the basis upon which the proposed Sentencing Commission would formulate guidelines for probation, fine, imprisonment and parole ineligibility and for general policy statements regarding application of the guidelines or any other aspect of sentencing that would further the purposes set forth in 18 U.S.C. 101(b). These purposes as set forth in S. 1437 are:

"(b) Prescribing appropriate sanctions for engaging in such conduct that will:

"(1) Deter such conduct;

"(2) Protect the public from persons who engage in such conduct;

"(3) Assure just punishment for such conduct;

"(4) Promote the correction and rehabilitation of persons who engage in such conduct, * * *"

The U.S. Parole Commission based on its considerable practical experience with such guideline concept can attest to both its strengths and limitations. Sec. 994 (c) and (d) considerations should be the basis for determination of time to be served. More generalized guidelines should determine imposition of a prison term. The implementation as well as the formulations of the guidelines requires constant oversight in order to make the guidelines function properly and achieves the ends for which they were designed.

For example: (1) S. 1437 and the U.S. Parole Commission guidelines agree that "family ties and responsibilities" have great predictive value as a factor in predicting success on release. However, the Commissioners working with the guidelines soon discovered that meretricious relationships were springing up in almost every case. Family ties were predictive, but too subject to manipulation to be reliable, so this factor was eliminated from the salient factor score of the guidelines.

(2) S. 1437 and the U.S. Parole Commission guidelines agree that the defendant's "education" is a valid predictive factor in successful releases. Numerous complaints came from low income minority prisoners that it was discriminatory to deny them a point on their salient factor score because they had had to go to work at an early age and had no high school or college education. This appearance of unfairness was deemed by the Commissioners to be detrimental and this item was deleted, although it was a valid predictive factor for success on parole.

The statute should not freeze in items for inclusion in guidelines—and even more importantly, only a closely knit body such as the Commissioners on the Incarceration Commission could become aware of needed changes in guidelines, regardless of the predictive value of a particular item on the guideline's statutory laundry list.

Almost 400 U.S. District Court Judges working with guidelines when they try a criminal case and imposing an average of 30 prison terms a year will not be in a position to catch these "flaws" in the guidelines, let alone call them to the attention of a Sentencing Commission rapidly enough to make timely changes, which then have to be dispersed to all 398 or more U.S. District Court Judges and the new guidelines then uniformly implemented by this large body of U.S. District Court Judges.

2. Application of guidelines and discrepancy in punishment

The U.S. Parole Commission experience in having 36 Hearing Examiners and 8 Commissioners (there has never been a full complement of Commissioners) applying the guidelines has clearly shown that, in order to get uniformity in application, constant training and retraining and consistent supervision are absolutely indispensible.

It must be obvious that unless the Sentencing Commission in discharging its obligations under S. 1437 goes to a determinate sentence for each degree of each criminal offense, with specific add-ons for specific multiple offenses an impossible criminal offense, with specific add-ons for specific multiple offenses—an impossible combination and permutation—much must be left to the discretion of the person applying the guidelines.

Judges' time and training are too valuable to be diverted to any mechanical computation of guidelines to fix specific individual sentences. Absent such specificity in guidelines, 398 U.S. District Court Judges cannot be so trained and supervised as can less than 40 Hearing Examiners, whose recommendations are subject to review by the Regional Administrative Hearing Examiner and the Regional Commissioner and further subject to reconsideration by the Regional Commissioner and to review on appeal by the prisoner by the Commissioners constituting the three-member National Appeals Boards. It is only such closely knit, constantly supervised and consistently applied guidelines by the newly named Commission on Federal Incarcerations which will result in greater uniformity in decisions.

Discrepancy in sentence and fairness in sentencing will not and cannot, in my opinion, be solved by realistic guidelines applied by approximately 400 independent U.S. District Court Judges, each appointed for life, even with a statement of the reasons for the sentence and with an Appellate Court review under the proposed amendment of S. 1437 to 18 U.S.C. 3725 or the proposed amendment to Rule 35A of the Rules of Criminal Procedure.

Of course, the price of proper application of the guidelines by a small body, which I call the Commission on Federal Incarceration rather than the Parole Commission, to be sure of compliance with Congressional intent is constant and close oversight of such Commission. With such oversight it would be possible not only to assure the proper implementation of the statute but since the appointment of Commissioners is subject to Senate advice and consent, and they are limited by statute to a maximum of two six-year terms, it would be possible for the Senate to assure itself that each Commissioner is carrying out his function fully and in accordance with the statutory intent. Such control over judges appointed for life is not possible and might be, in my opinion, unwarranted in the exercise of their other judicial functions.

3. Recognized need for fixing of prison terms by small body on full-time basis

Judge Tyler, Judge Webster, Judge Lasker, Judge Frankel, Dean Gottfredson, Professor Schwartz and Professor Von Hirsh all have testified that abolition of the Parole Commission at this time would not be wise.

Recent Oregon legislation, following the model set by the U.S. Parole Commission, specifically provides for the setting of parole guidelines by a Council on Prison Terms consisting of 5 members of the Parole Board, 5 Circuit Court Judges and Legal Counsel to the Governor. Within six months of incarceration, the State Board of Parole is to set the date for release on parole, based on the guidelines and considering aggravating and mitigating circumstances and other factors. This date can be within or without the guidelines for good cause provided the reasons therefor are stated in writing. A final interview is had prior to release to review the release plan, the psychiatric report, if any, and the record during confinement, with a 3 month postponement if the parole plan is not adequate.

So, despite the present trend to downgrade or eliminate rehabilitation as a goal of imprisonment, many states, many criminal justice experts, including some who heretofore urged abolition of the Parole Commission, now recognize the need for sentence-term fixing by a small, collegial body, based on guidelines—the prototype of which is and has always been the U.S. Parole Commission.

4. Commission as buffer providing justice and flexibility

Public opinion, most legislatures and many criminologists call for long statutory terms of imprisonment for purposes of punishment and deterrence as well

as a means of satisfying the community need for a "get-tough" policy on criminals. Yet, almost all, if not all, experts feel that certainty of punishment rather than length of period of incarceration would serve as a better deterrent to crime and thus afford greater protection to the public. Furthermore, it is frequently argued that rehabilitation of the criminal might better be achieved outside the prison system. Thus, justice can best be achieved by long statutory prison terms being set, long maximum terms being set by a judge when his guidelines call for incarceration *and* the Commission on Federal Incarceration (now the U.S. Parole Commission), based on guidelines and taking into consideration the offender and his background, the offense behavior and aggravating or mitigating circumstances, determining the time to be served which is fair under all the circumstances, with the type of uniformity in time to be served achievable only by a small body of full-time "experts" in sentencing.

Furthermore, present law recognizes that sentences imposed by a judge, who lives in the community, immediately after the heat of a trial are not necessarily the optimum sentences, affected as they are by community and emotional pressures. 18 U.S.C. 4205(b)(2) sentences now permit a judge to impose a long sentence—for public mollification—with the U.S. Parole Commission, away from the glare of the press and the emotions of the community being empowered to more even-handedly assess the offender, his offense behavior and the circumstances and, applying the sentencing guidelines now set forth in 28 C.F.R. 2.20, to fix the time to be served. As this could be done within the first 60–90 days of incarceration, certainty in sentence and greater fairness to all parties could be achieved.

S. 1437 has no provision for any such "cooling off" period. Immediately after trial, sentence would follow, according to guidelines, with a parole ineligibility of up to 90% a possibility. Emotion rather than reason could well be the basis of sentence, with fairness to the defendant and the calmer and better judgment of the community after a cooling-off period being ignored.

All too frequently, after a trial for a crime such as bank fraud, the community clamors for long term imprisonment of "the culprit." Within a few months and usually by the time the prisoner is scheduled for his initial (b)(2) parole hearing, the community has reverted to its old-time appraisal of the individual, who up until the time of the crime had been a pillar of society and the church but who yielded to certain pressures, and the Parole Commission files I have noted are filled with letters and petitions urging his early, if not immediate, release as by then the community has cooled down and, realizing he is never going to commit another offense, ceases to call for its pound of flesh.

Under the dictates of S. 1437 nothing could be done to effectuate the new community sense of justice. The Commission on Federal Incarceration on the other hand, as does the U.S. Parole Commission, could fix the prison term based on its guidelines, absent emotion.

Another situation arises when an offense behavior is no longer considered by the community to be as severe as it was at the time of sentencing. For example, when Congress repealed the mandatory sentencing provisions of the Harrison Narcotic Act, the 600 or so persons serving such mandatory terms were given hearings and efficiently processed by the U.S. Parole Commission.

Similarly, under the S. 1437 proposal to decriminalize for Federal purposes the possession of under 10 grams of marihuana, an offender serving a long term for such offense could have his sentence reduced at his next parole hearing, under new guidelines. However, even if Section 1813(a) of S. 1437 were to be enacted, no such flexibility would exist absent a Commission on Federal Incarceration.

While Section 2302(c)(1) does provide for court modification of a term of imprisonment upon motion of the Director of the Bureau of Prisons for "extraordinary and compelling reasons," that is not an-as-easily available remedy and at best would further burden over-burdened courts with more cases.

Nor is a pardon the answer to either changes in law or in circumstances. This remedy is too long drawn out. The average case takes well over a year for consideration by the Pardon Attorney and requires Presidential action—a much too cumbersome procedure to remedy emergency situations or where the concept of the severity of a crime has changed.

Neither alternate remedy to Commission action is a better answer to the need for flexibility in sentence should an emergency situation, such as the prisoner's health warranting release, etc., require humanitarian action.

Only a Commission on Federal Incarceration in its application of its frequently reviewed, reconsidered and revised guidelines could meet these needs for fairness and justice in time served by an individual.

5. Commission on Federal incarceration vs. Bureau of Prisons good time

S. 1437 rightly does not provide for good time. The U.S. Parole Commission's experience in reviewing Bureau of Prison disciplinary actions and good time allocation in the course of parole hearings, unfortunately, has pointed up wide discrepancies in the Bureau's revocation of good time and in disciplinary proceedings available in each institution. The type of institution and philosophy of the warden heading each institution seem to be the governing factors in determining whether a certain action is disciplined and good time lost or even if extra good time is awarded. Even if all prisoners within an institution are treated similarly, the difference between institutions is too great to permit a return to the pre-Parole Board days when the Bureau of Prisons and its wardens determined who was released on parole and when.

Giving the Bureau of Prisons indirect control of release time by re-introducing good time, above and beyond the 90% parole ineligibility term, would be a giant step backwards—and might even be a great temptation to unwarranted, early release of prisoners by the Bureau so as to make "beds" available especially in view of the overcrowded conditions in Federal prisons. It would be a horrible situation if such improper early release were to result from the need for facilities—a consideration which does not enter into parole consideration and could not enter into a Commission on Federal Incarceration consideration of whether or not a prisoner should be released.

Director Carlson of the Bureau of Prisons in his testimony before this Subcommittee supported the elimination of good time, but only if the parole provisions of Subchapter D of Chapter 38 of S. 1437 were retained. If not, he advocated the scaling down of the maximum penalties and the retention of good time, at least for long term offenders, since offenders must have "some 'light' at the end of the tunnel." If such "light" is necessary, its control should not be transferred from the U.S. Parole Commission successor agency, the Commission on Federal Incarceration, back to the Bureau of Prisons where it reposed prior to the 1930's when a Parole Board was set up to get away from Bureau of Prison's control of such "light."

6. Plea-bargained cases

There is one more area in which I should like to suggest to this Subcommittee that there is an absolute need for Parole Commission or Commission on Federal Incarceration action. In cases in which there is plea-bargaining and a sentence is agreed to or not objected to by the attorney for the Government, 18 U.S.C. 3725(a)(2) and (3) of S. 1437 deny the right of appeal to either the defendant or the Government. Similarly, Rule 11(e)(3) of the Rules of Criminal Procedure provides for the embodiment in the judgment and sentence of the disposition provided for in the plea agreement.

Concededly, the U.S. Attorney must have the right to determine for what crime he will seek an indictment and for what crime he will accept a plea and agree to fix a sentence. However, experience shows that in some areas and with some U.S. District Court Judges and some U.S. Attorneys, sentences are inordinately long or too short for the actual total offense behavior and offender. While the U.S. Parole Commission can do nothing with a sentence below its guidelines even when in the Commission's judgment there are no reasons for going below the guidelines, the Commission can and does, independently, determine how much of a "too long" sentence is actually to be served, all or only a part thereof depending on the circumstances and guidelines. This procedure, while imperfect because of too many, too short plea-bargained sentences, does bring some uniformity and some fairness into an otherwise impossible to oversee plea-bargained situation. And, with all due respect to the ability of the legal profession, all too frequently lawyers appointed by the Court pursuant to the provisions of the Sixth Amendment, often inexperienced in criminal procedures, tend, even in their plea-bargaining, not to be able to achieve for their client all than an experienced criminal lawyer can negotiate in the way of a sentence. The U.S. Parole Commission is a great leveler in this respect as would be its successor, the Commission on Federal Incarcerations, by whatever name it is called.

7. *Post sentence parole and parole revocation proceedings*

S. 1437 provides in the proposed 18 U.S.C. 2303 that a sentence of a term of imprisonment in the case of a felony or a Class A misdemeanor carries an automatic post-sentence parole term. These terms of post-sentence parole are fixed under the proposed 18 U.S.C. 3834(b) and I assume are to follow the expiration of the service of the regular sentence imposed pursuant to Sec. 2301(b) and the parole ineligibility period of Sec. 2301(c). Obviously, the U.S. Parole Commission or an agency taking over its functions is needed and must be in existence to parole an inmate under Sec. 3834(a) and to impose a parole term.

But more importantly, even if the Court in the initial sentence fixed the post-parole term, who would supervise the parolee? Who is to make the determination if a condition of parole has been violated? Who is to make the decision of what to do with the parolee if it is found that parole has been violated?

The U.S. Parole Commission in the period from October, 1975 to September, 1976 conducted 1560 institutional parole revocation hearings and 256 local revocation hearings, all held after an interview and determination that probable cause existed to hold a parolee for the parole revocation hearing. It was then determined by the Commission whether to revoke parole or not; if it was revoked, whether or not to allow street time and whether to reparole or incarcerate the individual. If the decision was to incarcerate, the time to be served had to be computed according to the U.S. Parole Commission guidelines. All action, of course, is subject to the review procedure of the Commission.

Absent a U.S. Parole Commission or its successor, this would be that much more work for overburdened U.S. District Court and U.S. Courts of Appeals Judges.

8. *Operation of U.S. Parole Commission, misconceptions and suggested changes in modus operandi*

The U.S. Parole Commission performs its sentence-fixing function through five regional offices, each headed by a Regional Commissioner, with Central Office support. Hearing Examiners, in pairs, many of whom have a Master's Degree in Criminology or the Social Sciences, go into Federal and State prisons and conduct parole hearings of Federal prisoners incarcerated therein. The Hearing Summary and Recommendations are then reviewed by the Regional Administrative Hearing Officer and the Regional Commissioner. If the inmate is dissatisfied with the decision, he has a right to appeal to the Regional Commissioner for reconsideration and then, he has a further right of appeal to the three-member National Appeals Board in Washington. All parole proceedings are conducted in accordance with the regulations and guidelines promulgated by the U.S. Parole Commission and published in the Federal Register pursuant to the Administrative Procedure Act.

The Parole Commission has been experimenting for the past year with two projects wherein release dates were fixed early in the sentence. One project was in the Western Region and one in the Federal institution at Butner, North Carolina. It was determined by the Commissioners that the detriment, if any, to the prison system discipline resulting from the early fixing of the release dates was so small that it was far outweighed by the benefits to prisoners obtained from their knowledge with certainty as to what is their release date early into their terms of incarceration (subject to change only if institutional behavior or other unusual circumstances so warranted). Hence, at the last Commission meeting in May, 1977, it was determined, subject to public comment, to initiate a system of fixing presumptive parole dates of inmates at the initial hearing, within 120 days of reception of the inmate at a Federal institution. This proposed procedural change was published as a Proposed Rule in 42 Federal Register, No. 112, at page 29934, on June 10, 1977, as required by the Administrative Procedure Act.

Were a Commission on Federal Incarceration to take over the sentence-fixing and revocation functions of the U.S. Parole Commission, I would suggest the elimination of all regional offices. It is my opinion that Commissioners based in Washington, able to constantly communicate with each other, would be better able to formulate policy than is presently the case with a Commission whose Commissioners are scattered throughout the country. One Commissioner is located in Atlanta, another in Philadelphia, another in Dallas, another in Kansas City

and a fifth in Burlingame, California respectively, and 3 Commissioners and the Chairman are in Washington, D.C.

A pool of 36 Hearing Examiners and supporting pre- and post-release analysts all located in Washington, D.C. would be much more effective in making decisions in constantly changing panels of two examiners than 6, 7 or 8 hearing examiners located in 5 regions. Combinations of these examiners should be shuffled and reshuffled to assure independent decision-making and to prevent building up of any buddy system within the examiner corps or with institutions.

I strongly urge that the Commission on Federal Incarceration hearings, in the interest of fairness and openness, should be open to the public and exempt from the Privacy Act, except for the limitations imposed under Rule 32(c)(3) of the Rules of Criminal Procedure. Most serious consideration should be given to having the attorney who represented the defendant at trial also appear for the inmate at the Commission hearings, especially the initial hearing at which the time to be served is to be fixed. And, in going to such type of hearing, consideration should be given to the use of Administrative Law Judges to conduct institutional hearings, with the decisions as to time to be served made by the present Hearing Examiners, Regional Commissioners and with a National Appeals Board review.

In passing, it should be noted that throughout these hearings, I have heard much which may indicate a failure, deliberately or unwittingly, to understand the effect of S. 1437 on sentencing and parole generally.

For example: The Manson case was mentioned; a case in which imposition of a 1433-year sentence by a Texas jury was mentioned as means of getting a prisoner to serve a longer sentence. Both are State cases and would obviously be unaffected by any change in Federal sentencing-parole procedures.

While the Federal system has and will continue to influence, and hopefully, lead the States in better implementation of the criminal justice system, Federal law is no sinecure for the states' actions. Each state will have to evolve its own method of sentence imposition and determination of time of actual incarceration—and, if any should turn out to be an improvement over the Federal method, hopefully, that would be adopted by the Commission on Federal Incarceration or whatever the successor to the U.S. Parole Commission is called.

C. RECOMMENDATIONS

With this background and based upon the considerations outlined above, to wit: the attainment of greater uniformity throughout the United States in sentences served by Federal offenders taking into account the particular offender and the offense behavior; the need for close and constant watch over the guideline use-development so as readily to make necessary revisions therein; the need for even-handed, dispassionate sentencing and flexibility in adjusting sentence tim to reflect individual changes in circumstances (including hopefully, the "rehabilitated offender") and in law; the need for keeping human hope alive in the breast of the human being incarcerated in Federal prisons; the need for evening-out of plea-bargained sentences and post-sentence parole fixing and parole revocation and based on the experience obtained from implementation of sentence-fixing guidelines, I urge the Subcommittee consider:

1. The setting up of a Sentencing Commission by the Judicial Conference which, with the assistance of any and all expert staff and consultants, will develop guidelines for Federal Judges for use in determining whether to impose a sanction after conviction of a particular crime and under what circumstances and whether the sanction be (1) fine and if so, how much; (2) probation and if so, for how long and under what conditions; (3) imprisonment and if so, the reasons therefor; (4) restitution and if so, how much and to whom; or (5) any combination thereof.

2. The renaming of the present U.S. Parole Commission to reflect its sentence-fixing function and its transfer to the Judicial Branch of the Government so as to make its location within the Government structure coincide with its actual functions. For example; I have used the nomenclature: Commission on Federal Incarceration.

3. The guidelines and regulations promulgated by both Commissions should be coordinated with each other, promulgated under the Administrative Procedures Act and subject to being reported to the Congress. They should become effective 180 days after each Commission reports them, unless within that time one House of Congress votes to disapprove them.

4. The location of the Commission on Federal Incarceration, or whatever the successor to the U.S. Parole Commission is called, should be a Washington-based operation, with all hearings open to the public and exempted from the Privacy Act, except for the limitations imposed under Rule 32(c)(3) of the Rules of Criminal Procedure. A prisoner should be represented by his trial attorney at the initial hearing, and thereafter if he so desires but in that case at the expense of the prisoner, unless the Commission determines that in the interest of justice such representation is required. Hearings should be conducted by Administrative Law Judges, though not necessarily subject to the Administrative Procedure Act practice, with the determination of time to be served or whether or not a prisoner is to be reincarcerated for a violation of parole and if so for how long being made by Commission Hearing Examiners who have training and a developed expertise in making such determinations, subject to the review by a Regional Commissioner and also subject to appeal by the prisoner to the National Appeals Board, whose decision is final.

I appreciate your affording me this opportunity to again work with and submit my views to a Senate Judiciary Subcommittee.

Respectfully yours,

DOROTHY PARKER,
Commissioner.

U.S. DEPARTMENT OF JUSTICE,
U.S. PAROLE COMMISSION,
Washington, D.C., June 21, 1977.

HON. EDWARD M. KENNEDY,
U.S. Senate, Washington, D.C.

DEAR SENATOR KENNEDY: Pursuant to your invitation yesterday to Curtis Crawford, Acting Chairman of the United States Parole Commission, when you granted his request to have further documents presented for the record, I am forwarding you and the other members of the subcommittee, now conducting hearings on Criminal Code Reform Act of 1977, Senate Bill 1437, a copy of a speech titled "Probation and Parole Better Protect Society" which I gave at the Houghton College's Community Forum on Prison Reform on March 16, 1977.

I was appointed by President Dwight David Eisenhower in 1953 and have had the honor of serving as Chairman or Vice Chairman of the United States Parole Commission (formerly United States Board of Parole) for 16 of the past 24 years. I have served under both the Republican and Democratic Party administrations including the honor of serving under your brother, the late Robert F. Kennedy when he was Attorney General of the United States.

I believe that the enclosed speech should be made a part of the record of your subcommittee and carefully read to understand the tremendous contribution which some three years of research and operating under the new guidelines for nearly four years has been made by the United States Parole Commission in improving the administration of criminal justice at the federal level.

I have read and have carefully studied Senate Bill 1437 which you and Senator McClellan introduced into the United States Senate, May 2, 1977, before the First Session of the 95th Congress, under Title I, Codification, Revision and Reform of Title 18 U.S. Penal Code. During the past twenty-five years no one has decried the disparity in sentencing as practiced by the federal courts of this Nation more than I. I applaud the efforts of Senator McClellan and you in attempting to reduce disparity in sentencing through Senate Bill 1437. However, I must admit in all candor that I believe in our efforts to reduce disparity in sentencing under the proposed act we may be diminishing other areas of the Federal Criminal Justice System which could result in the setting back the criminal justice system unless some modifications are made in the Bill as it is constituted. I fully support the concept of a sentencing commission using the enormous experience which the United States Parole Commission has had in developing highly predictive salient factor scores as well as guidelines in sentencing. However, unless the United States Parole Commission is permitted to continue its seven years of research and programing under this program, great harm can be done to convicted felons under the federal system in determining what shall happen to the inmate once he is convicted by the sentencing court. Thus, it is an imperative that the United States Parole Commission exercise its highly predictive salient factor scores and guidelines and be carefully attuned to the sentencing guidelines as the Parole

Commission continues to administer the sentence including providing a certainty of fairness and equity to the inmate.

The sentencing judge and the proposed sentencing commission would have information only at the time of sentencing and, in view of the fact that 85 percent of all federal offenders are convicted on a plea of guilty and only 15 percent appear before the sentencing judge during trial, the court or the sentencing commission would have very little information upon which to make a proper decision, while the United States Parole Commission has greater after-the-fact knowledge as we apply the highly predictive salient factor scores and the guidelines to those offenders who are responsive to the treatment program within the institution and, despite some academia testimony to the contrary, there are still inmates in federal institutions who are being rehabiiltated in 1977.

The harsh determinate sentences equally punish the situational offender, youth offender, and the immature offender who emotionally matures during his incarceration with the "hard-nosed, aggressive and dangerous offender." The latter will continue to be a threat to society for a long period of time and for the best protection of the public should be incarcerated for a vastly longer period of time than the situational, youth or immature offender who could safely be released at a relatively earlier period after diagnosis and treatment within the institutional setting and will benefit by a period of parole supervision in the community.

As the conclusion of my speech indicates empirical research shows that studies completed by the United States Parole Commission possesses the assistance of an implicit policy that has been made explicit through an analysis of individual case decisions. Judgments on offense severity, parole risks, predictive power of the salient factor scores, and individual performance were found to account for most of the variants in parole decisions (Peter Hoffman—1972). Accordingly, "guidelines" were developed to combine the dimensions as a statement of operational policy.

The United States Parole Commission's statistical research highlights covering October 1974–September 1976, a statistical review of how the Commission is functioning after three years of research and now four years operating under the guidelines and highly predictive salient factor scores are most encouraging in improved parole decision-making of the United States Parole Commission. The study includes as follows:

"(A) Total numbers of parole or re-parole grants (all sentence types) show that the Federal Parole Commission granted 57.1 percent of all inmates eligible for parole during this time frame.

"(B) Recidivism—(1) Adult Offenders under supervision at beginning of time frame, violation warrants with a two year follow-up of paroles granted in 1970 show that 79.9 percent succeeded. Paroles granted in 1972 with two year follow-up showed a success rate of 86.1 percent. (2) Youth offenders released in 1970 show a success rate of 65.1 percent while youths released with two-year follow-up show a 70.1 percent success. (3) Mandatory Releases—(not granted parole) after a two year follow-up show a success rate of only 68.8 percent for those released in 1970.

"CONCLUSION

"I. Parole as administered by the United States Parole Commission better protects society by releasing more inmates from prison, 57.1 percent, while because of empirical research which has been operational for the three past years, it shows that in 1972, 86.1 percent of all adult prisoners granted parole succeeded under adequate parole supervision in the community, while prisoners released without parole in 1970 only 68.8 percent succeeded over the two year follow-up period. Thus, prisoners granted parole in 1972 had a 20 percent better success rate than prisoners released in 1970 under mandatory release.

"II. With crime in increasing at a frightening rate of 15 percent last year and threatening the safety and security of every American citizen, including the private enterprise system and an orderly society, it is imperative that we improve our criminal justice system. While we build more and more prisons to house the dangerous offenders, an improved parole system better protects the community, the tax dollar, the citizen, and our beloved America."

I believe that our three years of empirical research under the auspices of the best researchers in this Nation resulted in the Congress only last year passing Public Law 94–223, Parole Commission and Reorganization Act, establishing vastly improved procedures for implementing the improved parole decision-making process.

The United States Parole Commission is continuing a re-evaluation of the Commission's empirical research which developed the salient factor scores and guidelines and a "blue ribbon" panel composed of the following will supervise the re-evaluation study. Distinguished members of this panel are: Hon. A. Leon Higginbotham, District Court Judge in Philadelphia; Judge Cornelia Kennedy, Northern District of Illinois; and, representing the academic community, Dr. Herbert Solomon, Director of Industrial Research, Stanford University, and Dr. Marvin E. Wolfgang, Director of Criminology, University of Pennsylvania, and Dr. Charles Wellford of the Attorney General's research and development staff, Department of Justice, as well as Parole Commissioner Joseph A. Nardoza and myself.

If I can be of any further assistance to you, your subcommittee, or your staff in coordinating the above listed suggestions, please be assured of my willingness to do so.

Very sincerely yours,

GEORGE J. REED,
Chairman, National Appeals Board.

Enclosure.

PROBATION AND PAROLE BETTER PROTECT SOCIETY

By George J. Reed, Vice Chairman, United States Parole Commission, presented at Houghton College's Community Forum on Prison Reform, Houghton, N.Y., March 16, 1977

Thank you, Mr. Chairman, it is indeed a real personal privilege to be back on a college campus that is not only quiet, but which has thoughtful students, sincerely and scholarly preparing themselves to make a contribution to our homes, communities and our beloved America.

It is most appropriate that Houghton College, located so near to the Attica State Prison where the tragedy of "The Attica Uprising" occurred a few years ago, should be promoting a "Community Forum on Prison Reform." I am honored to share this program with the Warden of the Attica State Prison and appreciate his earlier remarks on "Prison as an Alternative."

Before discussing "Alternatives to Prison" I feel compelled to take a brief look at some of the causative Factors that are contributing to the "lawless society" in which we live in America today. Last week, the Nation's Capital was almost paralyzed when some four dozen Hanafi Muslim black gunmen took 125 citizens hostage in three downtown locations, representing what was called by the News media a "Holy War", between warring factions of Black Muslim militant groups and other religious and cultural groups. One man was killed, a City Councilman shot and seriously injured and reportedly some two dozen innocent unsuspecting citizens were beaten and mistreated for some 39 hours by their captors. Taking hostages by disturbed individuals and revolutionary groups appears to be rapidly increasing in this country and around the world.

When some of our national leaders, including "Watergate" defendants, State Governors, States Attorney's Generals, Mayors, Judges, and Members of Congress are being sent to prison for violating the laws of the land, it is little wonder that concerned citizens are beginning to ask "Why?" When Daniel Elsberg becomes a national hero for turning over "classified material" to the news media to print and distribute for not only United States citizens to read, but made available to our potential enemies, we have somehow confused the right of the individual to know as against the Nation's ability to operate a viable intelligence system to protect this Nation's security.

The foundations of our society, culture and national greatness has, during the history of this Nation, relied upon the integrity of the American monogomistic home. Today 50% of all marriages end in divorce. It's the chic and the growing popular practice for couples to live together, produce children and split when things become difficult or the responsibility of feeding, providing a home and love for the children become too much of a drag. Thus, we are today producing unloved, undisciplined, emotionally rejected children, who cry out for someone to care enough to provide physical and emotional security during infancy, pre-adolescent and adolescent years. When their basic emotional needs are denied them at all socioeconomical levels of society, we produce emotionally blunted children and youth who are turning at an ever increasing rate to alcoholics, drug users and pushers and from there into a life of crime and violence.

The frightening rise of an ever more powerful organized crime, casts a shadow over our land. They buy, pressure or "wipe out" all opposition as the web of their influence weakens our political, business and labor leaders until the fabric of our entire society stands in danger. In some of our large cities you cannot buy, sell or get a job without a payoff to organized crime.

Turning now to the debate over "Prison Reform" in America, it goes without saying that, while prison reform is necessary, a reformed society is a greater need. No sooner had the debate over rehabilitation surfaced and become center stage, than prison populations began to grow and grow and grow. The overcrowding of all our correctional institutions is the one problem that is bearing down hardest on penal administrators at this moment. The Federal prison system and every State system, with the exception of California, experienced a sharp rise in prison populations during 1976. The overall total of inmates in our Nation's penal institutions rose from 249,500 to 255,800 or 11 percent increase during the course of 1975 and continued to rise at a higher rate during 1976. Serious crime increased 17 percent during 1974, another 10 percent during 1975 and continues to grow in 1976 and 1977.

Factors overlooked in predicting prison populations included the failure to note that the peak of the World War II babies would enter the 20–30 age bracket during the 1970's. As you know, this is the age group that accounts for most of the Nation's adult crime.

All community based programs were thought to greatly influence prison populations, but the use of community based programs has its strengths as well as its weaknesses. Such programs as deferred prosecution as used by the federal courts on a very select group of first time offenders has been relatively successful. Well trained and adequately staffed probation departments capable of making full use of community resources have a very good track record. I question seriously whether the public will stand for any expansion at this time. The Federal and State community treatment centers have provided an excellent program for offenders who have been granted a parole but providing for a 6 months period to depressure his prison experience gradually get reacquainted with his family, community, and secure a job compatible with his vocation training in the institution. The drug treatment community centers, including regular urinalysis tests and counseling, have scored well in aiding the drug user to kick the habit.

Federal parole statutes, as interpreted by the federal courts over a period of many years, made it plain that parole was a matter of "grace" and "not of right." Thus, the courts at that time indicated that "Parole is left to the informed discretion of the Parole Board". It soon became apparent that Parole Board decisions, operating under such a broad discretion, became more of a "gut reaction" than an "informed discretion."[1] In 1969 the Federal Courts began looking over the shoulders of prisons, parole and probation administrators, to insure that decision makers in the criminal justice system developed a more scientific procedure to (a) Improved Parole Decision Making (b) Provide for better structured equity, and (c) Improved Prediction Devices, and (d) Appeal Procedures.

THE PROJECT

In 1969 as Chairman of the United States Board of Parole I presented to Attorney General John Mitchell a very comprehensive and costly research design titled "Improved Parole Decision Making." The project and $500,000 were approved for a three-year research project. The project was directed by two of the most distinguished scholars in the field of research in the criminal justice field, Dr. Donald M. Gottfredson, Dean of the School of Criminal Justice, Rutgers University, and learned British scholar, Professor Leslie Wilkins of the University of New York, and an outstanding research staff.

GOALS

Goals included: (1) the definition of paroling decisions, objectives, alternatives, and information needs; (2) the measurement of relationships between offender information and parole objectives; (3) the development and testing of "expe-

[1] *Huser* v. *Reed*, 218 F. 2d, 2.25 (C.A.A.C.); Certiorari denied sub. nom. *Thompson* v. *United States*, No. 29416, (C.A. 5), decided 6/15/70; *United States* v. *Fredrick*, 405 F. 2d, 1.29 (C.A. 3, 1968); *Brest* v. *Cicrone*, 371 F. 2d, 9.81 (C.A. 8, 1967); *Walker* v. *Taylor*, 338 F. 2d 9.45 (C.A. 10, 1964).

rience tables"; (4) the development and demonstration of procedures for rapid retrieval of relevant objective information; and (5) the assessment of the utility of the procedures developed.

UNIQUE RESEARCH PROJECT

This project was unique because it provided for the first time the ability through the miracle of modern computers to update the old parole predictions tables data to current sociological factors (salient factors) that are truly predictive of potential success or failure of a federal prisoner, should the United States Parole Commission (formerly United States Board of Parole) grant or deny parole. Another first in this project that no other research program had ever been able to achieve is individual case follow-up over a period of five years after release on parole or mandatory release. No other research project had ever been able to follow up on the individual case because they got lost. The Federal Bureau of Investigation, with the approval of the late F.B.I. Director J. Edgar Hoover, agreed to furnish the United States Parole Commission and the research project a "rap sheet" that has allowed the project and this Commission to know exactly what happens to every parolee or mandatory releasee released from a federal prison for a period of five years after release. Critics of parole have for years been throwing around wild statistics on the success or failure of the parole system with no real research or facts to back up their criticism. This no longer can be tolerated by the United States Parole Commission.

Controversy has recently surfaced over the structure and effectiveness of parole. The suggestion of abolishing parole is complex, and debate on its relative merits has often been devoid of empirical research data pertinent to the uninformed and unrealistic deductions drawn.

The first criticism focuses primarily on concern for Equity. It includes arguments that paroling decisions are arbitrary or capricious, or reflects the exercise of unfettered discretion without established boundaries.[2]

A second popular theme involves the effectiveness of treatment. There appears to be a growing disenchantment with the concept of rehabilitation, a cry for abolishment of the "treatment medical model myth" and a return to a punishment philosophy—renamed as "just desserts". David Fogel of the Illinois Law Enforcement Commission loudly preaches and supports an act to provide determinate sentencing with additional penalties for repeat offenders.[3] Dr. Fogel's "Justice Model for Corrections" would reverse the hands of justice by more than 100 years and would, under the determinate sentence, equally punish the situational offender and the immature offender who emotionally matures during his incarceration with the hard nosed, dangerous offender who is a real threat to society and should be incarcerated for a much longer period of time than the situational or immature offender who could safely be released at a relatively early date.

Research studies completed by the United States Parole Commission show the existence of an implicit policy that could be made explicit through an analysis of individual case decisions. Judgments on offense severity, parole risk, predictive power of the salient factor scores, and individual performance were found to account for most of the variance in paroling decisions (Hoffman, 1972). Accordingly, "Guidelines" were developed to combine the dimensions as a statement of operational policy. The Commission has been operational under the guidelines for some three years and each report vindicates the predictive power of the Federal Parole Commission's guidelines.[4]

Since 1965 Uniform Parole Reports have been collecting data on parolees released in the United States. The project currently has parole performance information on approximately 250,000 males and females with one, two and three year follow-up. The Uniform Parole reports on a national basis and shows that cohorts released each year from 1968 through 1974 with one year follow-up or until parole supervision was terminated. Of the 1974 cohorts 82 percent con-

---

[2] Harris, M. Kay, "Disquisition on the need for a new model for Criminal Sanctions systems," 77 West Virginia Law Review, P. 296 (1974–75).

[3] See American Friends Service Committee, Struggle for Justice, New York: Hill and Wang, 1971, Chs. 6 and 8; Fogel, David—"We are living proof"—The Justice Model for Corrections.

[4] Parole: How It is Working, unpublished report by Dr. William H. Moseley, Associate Director, Uniform Parole Reports, National Council on Crime and Delinquency Research Center, Davis, California.

tinued on parole. They had a return to prison rate of 14 percent; technical violations accounted for 9 percent, and new major convictions were 5 percent.

In the United States Parole Commission's Statistical Highlights covering October 1974-September 1976, a statistical review of how the Commission is functioning after three years of research and now three years operating under the Guidelines and salient factor predictive devices in the administration of the federal parole system.

(A) Total numbers of parole or re-parole grants (all sentence types) show that the Federal Parole Commission granted parole to 57.1 percent of all inmates eligible for parole during this time frame.

(B) Recidivism—Adult offenders under supervision at beginning of time frame, violation warrants with a two year follow-up of paroles granted in 1970 show that 79.9 percent succeeded. Paroled granted in 1972 with two year follow-up showed a success rate of 86.1 percent. (2) Youth offenders released in 1970 show a success rate of 65.1 percent while youths released with two year follow-up show a 70.1 percent success. (3) Mandatory releases—(Not granted parole) after a two year follow-up show a success rate of only 68.8 percent for those released in 1970.

Conclusion:

I. Parole as administered by the United States Parole Commission better protects society by releasing more inmates from prison, 57.1 percent, while because of imperical research which has been operational for the three past years, it shows that in 1972—86.1 percent of all adult prisoners granted parole succeeded under adequate parole supervision in the community, while prisoners released without parole in 1970 only 68.8 percent succeeded over the two year follow-up period. Thus, prisoners granted parole in 1972 had a 20 percent better success rate than prisoners released in 1970 under mandatory release.

II. With crime increasing at a frightening rate of 15 percent last year and threatening the safety and security of every American citizen, including the private enterprise system and an orderly society, it is imperative that we improve our criminal justice system. While we build more and more prisons to house the dangerous offenders, an improved parole system better protects the community, the tax dollar, the citizen and our beloved America.

Senator KENNEDY. I will ask Professor Dershowitz if he would be good enough to come next. We will ask Mr. Shattuck of the ACLU to follow Mr. Dershowitz, who has to catch a plane and return to Cambridge.

I want to welcome Professor Dershowitz. He has been extremely helpful to this committee over the years, and particularly over the last year, in helping us to deal with an extremely complex, difficult assignment—the recodification of the criminal code. His suggestions have been of enormous value to us. His guidance in these areas is highly regarded by myself and other members of this committee. We look forward to his testimony on this legislation.

I will ask him after his testimony, or even during the testimony, if he has some reaction to the last proposal about how we might deal with sentencing.

But we welcome you here.

Please proceed.

STATEMENT OF ALAN DERSHOWITZ, HARVARD LAW SCHOOL

Mr. DERSHOWITZ. Thank you very much, Mr. Chairman.

When S. 1 was originally launched, I was strongly opposed to its enactment, as were many of my colleagues. It was in tone, in spirit, and in substance simply too prosecutorial in its orientation. At a time of contracting constitutional safeguards by the courts, many of us felt that enactment of this kind of legislation by Congress would not

achieve an appropriate balance between the legitimate needs of law enforcement and the equally legitimate needs of our society to treat those accused of crime with justice and compassion.

Over the past months, however, as you have indicated, I have had the privilege of working with this committee and suggesting certain changes and responding to the suggested changes of others. I think the process has been an extremely useful and valuable one. We have seen input from a great many sources in an attempt to depoliticize the process and to achieve a code which has both scholarly acceptability and acceptability to the wide spectrum of political views and law-enforcement views and needs reflected in this country. The process is still an ongoing one as evidenced by these hearings and as evidenced by the fact that so many different and interesting views have been brought to the attention of this committee.

At this point, I would now, on balance favor the enactment of the criminal code reform, especially if certain additional changes, each of which I think is entirely reasonable, and none of which I think is earth shaking or tremendously controversial, could be considered and possibly added.

I will speak to some of these possible changes at the end of my testimony, but I did want to devote the substance of my remarks to the sentencing provisions which have been under discussion today.

I have a prepared statement which I would like to have incorporated in the record. I will only briefly summarize the views on sentencing that are reflected therein, and also add to my views in response to some of the statements previously made, particularly relating to the possible abolition of the Parole Commission.

Senator KENNEDY. Without objection, your statement will be inserted in the record at this point.

[The material follows:]

PREPARED STATEMENT OF PROFESSOR ALAN DERSHOWITZ

The sentencing provisions of the proposed Federal Criminal Code are, in my view, the most significant aspect of this important bill. Indeed, they may well constitute the most enduring and far reaching criminal law reform of this century.

Judge Marvin E. Frankel, a leading judicial authority on sentencing, has recently observed that "the imposition of sentence is probably the most critical point in our system of administering criminal justice." I need not belabor the obvious significance of the sentencing function: the criminal defendant may at that point be poised between life and death, freedom or confinement, short or long imprisonment. Moreover, sentencing may be the sole instance of judicial decisionmaking in the criminal justice process for many criminal defendants, since the vast majority of criminal cases are disposed of without a trial.

Despite these high stakes, sentencing is in most jurisdictions essentially lawless: judges are furnished few guidelines and are accountable in most circumstances to no higher authority. Defendants charged with identical crimes in virtually identical circumstances may receive stunningly disparate sentences. In one recent study, fifty federal trial judges were given twenty identical files, drawn from actual cases, and asked to indicate the sentence they would impose on each defendant. In a case of possession of barbiturates with intent to distribute, one judge gave the defendant five years in prison, while another put him on probation. A middle-aged union official convicted on several counts of extortionate credit transactions was sentenced by one judge to 20 years in prison and a $65,000 fine, and by another judge to 3 years imprisonment with no fine. Factors such as race, personal appearance, and dress have repeatedly been shown to significantly influence the sentencing process, usually to the detriment of minorities and the poor.

These disparities cannot be explained by reference to relevant differences among criminals. They are—to quote Judge Frankel once again—more often a function "of the wide spectrums of character, bias, neurosis and daily vagary encountered among occupants of the trial bench." Release decisions made by parole boards also reflect the personal inclinations of the boards' members.

It is not surprising, then, that recent years have seen a gathering wave of criticism from all sides of the political spectrum against sentencing systems which rely heavily on the idiosyncracies of individual judges or parole officials. The proposed sentencing provisions reflect these criticisms and the virtually unanimous view that the time has come to establish a new and significantly more just sentencing structure. The creation of a system of rational, consistent, and comparable punishments for comparable criminal activities is mandated by our commitment to equal justice, by the necessity or maintaining public respect for the law's impartiality, and by the hope that increased certainly in punishment will enhance the deterrent impact of the criminal sanction.

A number of proposals for supplanting the present system of wide judicial and parole board discretion with legislatively fixed sentences have gained recent attention. Two of the most prominent of these are the concepts of "flat-time sentencing" and "mandatory minimum sentencing."

Flat-time sentencing has several variations. In its most extreme form it means that the legislature defines one single sentence for each crime or degree of crime; that term is imposed by the judge in every case and is served in full, with the only possible reduction being for "good time" or by executing commutation in an extraordinary case. Former President Ford added his voice to those supporting this system in his 1975 message to Congress on crime, in which he stated that "it may be time to give serious study to the concept of so-called flat-time sentencing in the Federal law," as a means for eliminating "wide disparities in sentencing for essentially equivalent offenses." As an alternative to indeterminate sentencing, this proposal has gathered wide-ranging support. Jessica Mitford, whose book *Kind and Unusual Punishment* declares that prisons are intrinsically evil and ought eventually to be abolished, prefers flat-time to indeterminate sentencing. Likewise, The Prisoners' Union, a national organization controlled and staffed by ex-convicts, has made "the abolishment of the indeterminate sentence and all its ramifications" its primary object. The Union is supported in this drive by Evelle Younger, California's attorney general, and by many other law-enforcement officials dissatisfied with the operation of indeterminate sentencing.

However, it is my view and the view of many others that this kind of flat-time sentencing is simply too extreme a remedy; by eliminating all flexibility and requiring judges to impose the identical sentence on every single defendant convicted under the same statute, flat-time sentencing threatens to create a system so automatic that it will produce major injustices of its own. It is simply impossible to devise a single just sentence for all armed robbers, burglars, or first-degree murderers. Some degree of flexibility, both at the sentencing and parole stage, must remain in order for the system to maintain credibility.

Under another variation of flat-time sentencing, the sentencing judge would retain his discretion to impose any sentence within the legislatively prescribed range, but whatever sentence he selects would be imposed as "flat-time". This variation eliminates the discretion of the parole board, but retains the discretion of the sentencing judge.

Mandatory minimum sentencing, the half-brother of flat-time sentencing, simply eliminates all discretion to go below a certain sentence which must be served for a given crime, regardless of the circumstances. Massachusetts, for example, has a mandatory one-year sentence for unlicensed possession of a gun; New York has one for certain drug crimes. But there are a number of problems with this approach as well. First of all, it deals with only discretion at the minimum end of the statutory spectrum, and not with discretion at the maximum end. It addresses only the floor—not the house itself, or the ceiling. Further, there is mounting evidence that rigidly fixed sentences do not work: ways are found to circumvent them by prosecutors, judges, and juries. In Massachusetts, for example, judges have contrived reasons for freeing otherwise "law-abiding" citizens who have run afoul of the strict gun-control law. In states with a mandatory death penalty for murder, prosecutors are reducing charges and juries are returning 'manslaughter' verdicts in cases where the death penalty is deemed inappropriate. Thus it is clear that discretion finds its way into the law's operation, whether exercised by prosecutor, judge, or jury.

My personal preference is for a system which I call "presumptive sentencing", a system which was proposed by the Task Force on Criminal Sentencing of the 20th Century Fund for which I was the reporter. To a greater extent than either flat-time or mandatory minimum sentencing, presumptive sentencing seeks to steer a delicate course between the Scylla of glaring disparity and the Charybdis of inflexible equality in sentencing.

Presumptive sentencing entails the specification by the legislature of not only the minimum and maximum sentence for a given crime, but of what the fairly typical first offender convicted under the statute should receive. For example, most armed robberies are committed by unmarried males in their early 20's who never finished high school and have been unemployed for more than a year. The robbery typically consists of an entry into a local store late at night with a loaded pistol. The store clerk and a few customers are frightened but not otherwise injured, and the robber takes several hundred dollars. Taking these factors into consideration, the presumptive sentence for a first offender might be set at, say, two years. The presence of legislatively specified mitigating or aggravating circumstances could be used by the trial judge to raise or lower the presumptive sentence: to raise it, for example, in the case of the robber who terrorizes his elderly victims by cocking a pistol held at their heads; to lower it in the case of the robber who nervously uses a toy gun in a desperate attempt to rob enough money to pay for his child's operation. So, too, prior convictions would increase the presumptive sentence by a specified percentage, perhaps 25%. On appeal, there would be a presumption against any departure from the range of presumptive sentences, which would at once pressure sentencing judges to remain within the presumptive range and yet leave them some needed flexibility to go outside it in truly extraordinary cases.

As may be clear to you by now, my position is basically in accord with that set forth in the sentencing provisions of S. 1437, with some reservations. The system of presumptive sentencing which I sketched earlier is a schematic one, and I would like to note some of the instances in which I believe this bill departs from that model.

First of all, I applaud the innovative step taken by the creation of a Sentencing Commission to develop Guidelines for the use of judges and the Parole Commission. As noted previously, the absence of meaningful guidelines has contributed to the glaring disparity in sentences meted out by different judges for comparable crimes. I welcome this development, however, with serious concern for the composition of the Commission, which is to be appointed by the Judicial Conference of the United States. I would hope and expect that the nine members of this Commission would be suitably familiar with the problems involved in sentencing, and that such expertise will be the sole basis for appointment.

The promulgation of Guidelines leads me to hope that the Commission will not set the range of presumptive sentences higher than is necessary. That is a danger which lurks in systems that focus on the atypical offender—the particularly heinous criminal—and one which I hope may be avoided.

The American Civil Liberties Union has critized the maximum authorized terms set forth in this bill as being far too high; I would join in that criticism, especially if those maximums came to play a substantial part in establishing the range of presumptive sentences. If indeed the maximum is designated as the extreme to which a judge may go in the extraordinary case, my concerns would be reduced. But I would certainly object to a presumptive sentencing range which approached the maximums provided for, or indeed, one which was set even at the mid-point between the minima and the maxima established by the provisions of the Proposed Code. In short, it is important that these maxima not serve as the basis or even as a guideline for the presumptive sentence range. The value of the presumptive sentencing procedure lies in its ability both to provide certainty and fairness by placing the vast majority of similar crimes within a narrow range of sentences, and to provide the flexibility necessary to deal with extraordinarily different crimes of the same genre by reaching either above or below this range. Consequently it is not necessary, and would be a mistake, to set the range too high; if aggrevating cirmumstances are present the trial judge may deal with the sentence accordingly. But once having established a range, the tendency of judges—and properly so—will be to place nearly all defendants convicted of that particular crime within that range. Thus it is imperative that the fear of "letting him off easy" not be allowed to drive up the range to unnecessary heights, thereby inordinately penalizing the average defendant. There-

fore, the range must be kept narrow and low, and reliance placed on judicial discretion to go beyond it when circumstances so dictate. Moreover, I must emphasize that if the range is set too high, it simply will not work. History has taught us that we pay for every increase in *severity* by a decrease in *certainty*, and that certainty is far more impotrant than severity in reducing crime.

It would be a sure sign of failure of the proposed sentencing system if it resulted in more total person-days of imprisonment; its goal is to improve the justice and effectiveness of sentencing without creating more imprisonment—without requiring additional prisons. This admirable goal is achievable *only* if we have the courage to keep presumptive sentences at a reasonable level of severity, while increasing the certainty that the vast majority of convicted serious criminals will receive some serious punishment.

I also favor the provision in this proposed code [§ 2003(b)] compelling the court to state, at the time of sentencing and in open court, the general reasons for its imposition of the particular sentence, and particularly of the obligation to set forth the reasons for any sentence outside the presumptive range. However, I would prefer that there be a presumption in favor of a sentence within the applicable range, an element which is not explicitly provided for at present. Also in the realm of sentencing review, I am troubled by the provision [§ 3725 (a)(1)] denying a felony defendant review of a sentence higher than the maximum established in the Guidelines if "the sentence is consistent with policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2)." I believe that *any* sentence outside the presumptive range should be appealable of right; to allow a policy statement of the Commission to provide a justification for denying review threatens to undermine the impact of the presumptive range. The central function of the Commission is to create such ranges in order to infuse a greater degree of certainty into sentencing, and subsequent policy statements susceptible of varying interpretations should not be warrant for overriding this purpose without review.

I should note, also, my objections to this bill's mandatory sentencing provisions, particularly as to trafficking in an opiate [§ 1811], and, to a lesser degree, to the use of weapons in the commission of a crime [§ 1823]. Again, mandatory sentences address the problem of discretion only at the minimum end of the spectrum: the floor and not the entire house, and are in any case incapable of truly impartial enforcement.

In sum, I would stress again my belief that the time has now come for greater certainty and uniformity in sentencing, a principle which I believe may be furthered by the proper employment of a system of presumptive sentencing such as this bill contemplates. I think the creation of a Sentencing Commission is an important step in the necessary move to rein in the untrammeled discretion of judges and parole boards. But I caution that the Commission must remain aloof from pressures which would disserve these goals; its function is to narrow the permissible range of sentence in all but the extraordinary cases. If it chooses to set the range high in response to external pressures, it will have frittered away an unusual opportunity for truly significant reform of our criminal justice system.

Mr. Dershowitz. In my view, and one of the reasons I now favor the enactment of this bill, is that the sentencing provisions of the proposed criminal code are, I think, the most significant aspect of this important codification.

Indeed, I would go so far as to say that these sentencing provisions may very well constitute the most enduring and far-reaching criminal law reform of this century. That may sound grandiose, but I think in light of the important role that sentencing plays in the criminal justice system of this country, and in light of the fact that so little attention has been paid to it in the past, a systematic new approach to sentencing, which incorporates considerations of fairness and equity, as well as efficiency, can make the major difference in our approach to crime.

As I point out in my prepared statement, the imposition of sentence, not only is the most important aspect of the criminal justice

system, but for a great many defendants, it may indeed be the only judicial aspect of our criminal justice system, since the vast majority of criminal defendants do not have an actual trial. Their "trial" is the sentencing proceeding itself. Although in recent years there has been a great deal more attention devoted to this process of sentencing, it is one which has been considerably neglected by legislatures throughout the country, and also by scholars. I think we academics have to take responsibility as well. It should be no surprise that the lack of guidelines and the lack of law on the issue of sentencing, has enured primarily to the disadvantage of the poor, the disadvantaged of other minorities who suffer grievously from the lack of equity.

The statistics are appalling. I need not quote them here. They have been quoted repeatedly, indicating that both in Federal and State courts, when both the crime and the previous history of the offender are held equal, black and minority offenders fare considerably worse in discretionary sentencing by judges than I think they would under the proposals that are being considered today.

As Judge Frankel, who has testified here, indicates: These disparities simply cannot be explained by reference to differences; that is, relative differences among the criminals charged and convicted. They are primarily a function of the different views felt and expressed by different judges.

As indicated in the prior testimony, perhaps there will be 500 judges and when one considers the number of State judges who impose sentences today, the amount of disparity is simply staggering.

I will not go into the studies that have been made. They have been alluded to by previous witnesses.

I think this committee can take as a given—I do not think there is any dispute about that—that sentencing disparity in this country is rampant and that virtually everybody, regardless of their view on criminal justice, wants to see change in the system reduction of disparity.

The only remaining dispute really is how much we narrow the existing disparity. Should we opt for fairly radical provisions such as flat time sentencing provisions which require the judge to impose a single sentence and require the defendant to serve it? Should we opt for the kind of flat time sentencing provisions which enable the judge to select from a wide range of legislatively prescribed sentences, but whatever sentence he picks is a flat time sentence; that is, must be served in full?

That kind of flat time sentencing is simply an abolition of parole. It does not address the problem of disparity at the judicial level; indeed, the disparity would probably be fare worse because I think the prior witness is correct when he points out that the Parole Board does serve, in its own way, the function of reducing disparity.

Indeed, one of the original functions of parole, when enacted in this country, was to reduce the disparity of sentencing. Historically, parole comes just at about the time when legislatively fixed sentences are on the way out.

One centralized parole agency, whether in the Federal Government or in the State, simply by the very nature of the fact that it is a small cohesive group, will have less disparity than several hundred judges operating around the country.

Perhaps at this point it would be appropriate to address myself to the remarks made by the previous witnesses because I think they make a telling argument, but one which ultimately I think misses the point of the appropriate function of parole in our society.

The argument is simply this. It is a tautology: The more you centralize sentencing, the less the disparity will be. If you have 10 people deciding on sentencing, there will be less disparity than if you have 500 people. It does not matter whether the 10 people are judges or parole officials. If you had a system whereby 10 judges in the United States were to determine, one a full-time basis, all of the sentences for the Federal defendants, then there would be considerably less disparity. There would be 10 points of view. They would be acting collectively and, therefore, even the 10 points of view would tend to be compressed into perhaps only one or two or three points of view.

So, I think there is some truth, necessarily, to the fact that the more you centralize sentencing, the more equality there will be and also perhaps the more rigidity there will be. There is always that trade-off.

As I think the last witness was candid to acknowledge that it has nothing really to do with the passage of time, whether it be the four weeks or the years that may come between the judicial imposition of sentencing and the parole amelioration of that sentencing. The time is not the factor, and the personnel is not the factor. It does not matter whether they are judges or parole officials.

It is just that the fewer there are, the more centralization and the less disparity there will be.

That is not, however, an argument for the retention of parole. It is perhaps an argument for some kind of centralization of sentencing. It may very well be that since we have an existing parole board, and since in the area of criminal law reform, one does not like to move in great leaps—one likes to move incrementally—that there might be an argument for retaining this function for a limited period of time as a kind of phasing out process.

I, myself, favor the retention of some kind of parole authority precisely for the kinds of cases that the last witness alluded to at the end of his testimony. There are going to be special circumstances that arise during the course of the prisoner serving his sentence. Whether they be considerations of illness, or whether they be considerations of safety, or whether they be unique educational opportunities, or whether, despite Martinson's studies, there is the rare defendant who truly is rehabilitated, then there are going to be certain factors which come into operation during the course of the prison sentence.

For that reason, I personally would like to see more authority retained for a small amount of discretion to be handled in individualized cases, but not a discretion to determine the actual sentence.

For example, it seems to me a person who is sentenced to serve two years, and that two-year sentence expires in November, and he has a rare educational opportunity that begins in September, and that educational opportunity was not known or could not have been known to the sentencing judge, or a rare work opportunity, then it seems to me there is every reason for allowing the group of experts—not to make policy or broad determinations as to what this person deserves—but to make technical expert decisions involving the need to fit the precise and tailored punishment to this person's individual needs.

That, I think, does not conflict with the basic thrust underlying the sentencing proposal suggested here. It seems to me that it fits exactly into the spirit of what this committee, I think, is doing, which is, that it is not seeking to adopt an academic model. It is seeking to adopt a practical compromise which steers the delicate course between the Scylla and Charybdis of much too inflexible flat-time sentencing and much too discretionary indeterminate sentencing.

Every good piece of legislation in that respect involves compromises. The job of the academic is to create models, not to suggest compromises. I, for one, would not want this committee to adopt the kinds of models that I personally have suggested in the academic literature. I do not have the background and the knowledge to know how that is going to operate in the real world of politics. That is the job of the committee. That is the job of the Congress.

For that reason I strongly favor the modification that has been made by this committee of the presumptive sentencing suggestions I have made in an academic setting.

Let me speak to those briefly for one moment.

Before I do that, let me return to one point on parole before I forget it.

I think it is extremely important the decision whether to abolish the Parole Board be made in absolutely practical terms with a cautious eye toward seeing what its real impact will be on the duration of sentences.

If the abolition of the Parole Board results in people serving far more time than they currently serve, then that would be a failure. If the Parole Board is going to be abolished, or phased out, or changed in its function, or converted from a major policy making organization to an expert technical organization, then the presumptive sentences, or the guideline sentences, have to be reduced accordingly to reflect the fact that under existing approaches, a sentence of five years is seen by everybody in the process as really a sentence of two years.

What we cannot tolerate is the situation where sentencing remains the same and where the parole reduction is eliminated, and the net result is to build far more prisons than are needed and to keep far more people in jail for longer periods of time.

Now let me turn briefly to presumptive sentencing and how I think it is very well incorporated into this bill. The idea of presumptive sentencing is that instead of legislators only deciding what the worse criminal would get, that is, the maximum, and what the best criminal gets, that is, the minimum, the legislature, or somebody delegated by the legislature, has the responsibility to determine what the typical average offender will get.

I know we do not like to hear words like "typical average offenders". It is kind of demeaning. It is insulting. Everybody is different. There is no typical average offender, just as there is no typical average law student or applicant for admission.

But really there are. When one looks at the data, one finds that the average armed robbery, for example, is committed by somebody who fits into relatively narrow circumstances.

I will not go into the circumstances here. They are outlined in my prepared testimony. But many armed robbers are amazingly similar.

Even if they are really different and even if their souls and hearts are different, these are not the considerations that judges take into account in sentencing.

Judges, in fact, take into account only a small number of factors which this committee is fully capable of articulating and fully capable of assigning weight to, or at least articulating and having a commission assign weight to.

So the idea of presumptive sentencing is to shift back to the legislature the responsibility for determining what typical offenders should get for typical first offenses.

At the same time, presumptive sentencing does not surrender to the temptation of having one sentence for every crime. We simply do not have the human capability of knowing in advance every factor that will operate in a given crime on a given defendant.

The vast majority of criminals, who are fairly typical by definition, should receive a fairly typical sentence, articulated in advance by some group, whether it be a committee or commission, but some group designated by Congress.

But there is flexibility for any judge to use the judicial ability for which he has been selected to that important position on the bench. There is the factor of discretion in unusual situations. In presumptive sentencing you build that in by calling the sentence "presumptive", that is, we are to presume that the sentence will fall into a narrow range, but if the judge has good reasons which he can articulate for taking the sentence outside of that range, then he is encouraged to write those reasons out and to impose any sentence which Congress has specified within minimum-maximum range.

The proposal suggested in this bill is somewhat different in detail, but in purpose and effect, they are very similar. What it basically does is it says there should be a commission, "hopefully of experts", as part of the judicial system of this country so as to avoid problems of separation of powers and to give the judiciary what the judiciary essentially is entitled to do under the Constitution, which is to fit the punishment to the particular crime.

So there will be a judicial body. That body will set out presumptive ranges. They are not called presumptive, but in effect——

Senator KENNEDY. What about the makeup of that panel? There have been those that have suggested that it be more representative and not just judicial. What about that?

Mr. DERSHOWITZ. I am concerned that the body not be a political body in the sense of not being a body that is immediately responsive to some of the baser instincts that people in this country temporarily feel when there is a crimewave or when there is concern about increasing crime. I think it would be independent and insulated, but nonetheless ultimately responsible.

If we could know in advance what kinds of people would serve on the Commission, I think we would have a better opportunity to know whether a judicial appointed Commission would be better than, let us say, a mixed Commission.

I am satisfied, personally, with the judicially selected Commission, so long as the message is clear to the judicial conference that what is sought is expertise and what is sought is a wide range of views and

what is sought is insulation from the immediate pressures. One, of course, has to have some degree of hope and faith that the commission will be appointed in that spirit.

There is no guarantee. I think the American Civil Liberties Union has a point when it says that we have to hold back ultimate decisions about whether or not this is going to work until we see what kinds of people are appointed to the Commission and what kinds of guidelines they actually set out.

I, for one, think the judicial conference probably is as good an appointing body as one can come up with.

Senator KENNEDY. Should it be just judges?

Mr. DERSHOWITZ. Oh, no. I would not think the people appointed to the Commission should be just judges. I would hope there would be some judges and that there would be some experts. I would hope that they would reflect the wide and rich diversity ethnically and in terms of gender and race that we have in this country. I would think it should reflect a wide spectrum of views. I think it should, with all due respect, include some academics and experts, either in staff capacities or in Commission capacities.

But it should not consist—and I do not think the bill indicates—that it should consist entirely of judges. I think that would be a mistake. I think the problem would be that judges might turn out to be somewhat too protective of the judicial prerogative and somewhat too anxious, conscientiously or unconscientiously, to preserve an existing status quo and not to act in areas which might be seen as criticism of their colleagues and brothers on the bench.

I think it is tremendously important that this body, however it is constituted, understand that it would be absolutely gutting the purposes of this legislation were it to set the presumptive sentences very high and were it to take a one-sided prosecutorial point of view, on the appropriate range of sentencing. I am not arguing that point as a civil liberatarian, which I am. I am not arguing that point in terms of sentimentality for criminal defendants. I want to make this point as, I think, somewhat as an expert in this field.

History has taught us that we pay for every increase in severity by a decrease in certainty. Moreover, certainty is far more important than severity in reducing crime. It is not just a matter of muscle flexing. If you set presumptive sentencing high, judges and proescutors and defense attorneys and the system will find ways around that kind of presumptive high sentencing.

Evidence comes from our own State, Senator, where there was a 1-year mandatory minimum imposed for gun possession. Without taking into account the diversity of factors under which a person might find himself possessing a gun, consider the extreme case of somebody from New Hampshire legally having a gun, and chasing the kidnapper of his son across State lines, and being found in Massachusetts carrying that gun which he legally had in New Hampshire, no judge or prosecutor would tolerate sentencing that law-abiding person to a year in prison. That case actually occurred several months ago.

Ways are found around high sentences, whether they be called "mandatory" or "presumptive". The system simply will not work unless we are willing to make a sacrifice of reducing what are some-

what higher sentences in the interest of buying greater certainty and the hope thereby of increasing both the fairness and efficiency of the system.

It would be a sure sign of failure of the proposed sentencing system if it resulted in more total person days of imprisonment than the current system. Its goal, one would hope, is to improve the justice and effectiveness of sentencing without creating many more imprisonment than currently exists and without requiring the building of any additional penitentiaries.

I think this admirable goal is achievable only if we have the courage of keeping presumptive sentences at a reasonable level of severity, while increasing the certainty that the vast majority of convicted criminals will receive some substantial punishment.

There is one detail of the sentencing bill that I did want to briefly address myself to, because I do disagree with it.

That is section 3725(a)(1). Maybe I misunderstand it, or maybe there is a policy decision there. It provides that there should be automatic review of sentencing anytime a sentence goes beyond the presumptive range.

But then it states one important exception that there would not be an appeal of sentencing, even if it went beyond the range, if it was, and I paraphrase, consistent with the policy guidelines of the Commission.

It seems to me that is simply too general. It simply gives the judge the power unequivocably and unilaterally to deny appellate review. All the judge has to do is impose a sentence outside the range and state that is consistent with the policy guidelines of the Commission. It does not even require him to explain the reason why he would do it or to justify it in any way.

Obviously, as a practical lawyer, it cannot work. If the judge states it is consistent with the policy guidelines, then the defense attorney certainly has the right to say that it is not consistent. Then you have an appeal as to whether there is a right to an appeal. That simply proliferates the problem.

Senator KENNEDY. We will change that.

Mr. DERSHOWITZ. Good. I am sorry to have taken the committee's time on that.

[Laughter.]

Mr. DERSHOWITZ. That is probably just a technical change.

I have really finished my remarks, I think, on the sentencing provisions which again, let me applaud you for and indicate how important I think they are. I do have certain other observations about changes I think would be warranted in the code if you want me to address myself briefly to that.

Senator KENNEDY. Go right ahead.

Mr. DERSHOWITZ. In the area of victimless crime, my own views, and the views of the ACLU are well known. I will not try to persuade this committee to adopt those views. The views are generally that victimless crimes should not be legislated, but again I will not speak to that.

What I will speak to is the very serious problem of federalism that I think exists in the current code as to two major provisions but, has been eliminated interestingly enough as to a third major provision. The problem is simply stated as follows.

The Federal Government may have very different views than certain States may have on the use of marihuana or the availability of sexually explicit material.

Certain areas of Michigan, for example, are experimenting, within the tradition of Brandeis' great laboratory concept with the decriminalization of marihuana. Iowa experimented and may still be doing it with the decriminalization of certain sexual explicit material not available to minors and not thrust on unconsenting adults.

For purposes of this testimony I do not think it is important for any of us to decide who is right and who is wrong or whether Michigan is more correct than its neighboring State, or whether Iowa is more correct than its neighboring State.

I think the important thing is that States should be entitled to experiment.

This bill does not enable States to experiment in a realistic way. What it says basically is that even though it is not illegal for somebody to possess a certain amount of marihuana in Michigan as a matter of State law, he still cannot possess it because it is illegal as a matter of Federal law.

Even though the citizens of Iowa are entitled to read certain magazines under State law, they may not be entitled to get those magazines under Federal law.

It seems to me that the provision of the code as it relates to prostitution in 1843(c), adopts a model which I think is appropriately a balance between the interests of States and the Federal Government.

It says there that if the matter is legal within the State, then it is a defense to a charge of Federal crime. I strongly urge that similar defenses be written in to all victimless crime provisions, particularly the sexually explicit material provision and the drug, particularly marihuana, and perhaps other "soft drug" provisions as well.

I think it gives the Federal Government what it is entitled to and it gives the State what they are entitled to, and most importantly, it gives the citizens of a particular State what they are entitled to. It is in keeping with the spirit of experimentation. It is in keeping with the appropriate Federal role which in this area, after all, is as an aid to State enforcement.

If you look at the legislative history behind these provisions, they are definitely designed as an aid to State enforcement. The Federal Government comes in and prosecutes those people who are involved in national distribution where the State may have a problem of prosecuting.

But it turns the problem on its head to say that the Federal Government may prosecute where the State does not want to prosecute.

Lest anybody feels this is hypothetical, let me alert you to a Supreme Court decision rendered, I think 2 weeks ago today, involving the State of Iowa where, in fact, somebody was prosecuted for Federal mail violations for sending allegedly obscene material within the State of Iowa. It did not even go out of the State of Iowa. The package was sent from somebody who sent it legally under State law to somebody who received it legally, and nonetheless the Federal Government came in and prosecuted. The Supreme Court, in a split decision, upheld, that provision.

But there is no obligation on Congress to enact a law permitting that kind of prosecution. The Supreme Court did not say that those kinds of statutes are mandatory or even desirable. All they said is that they are not so inconsistent with the constitution as to warrant invocation of the extraordinary remedy of declaring it unconstitutional.

Senator KENNEDY. I suppose the Federal Government ought to be using its resources in other areas anyway, shouldn't it?

Mr. DERSHOWITZ. Yes; that is the more general argument, but certainly at least this potentially dangerous situation warrants a change.

Another change which I had hoped to see achieved and it had been under discussion, but I notice it has not been incorporated in the legislation, is the venue provisions of section 3311.

Under existing Federal law, anybody can be prosecuted for a Federal crime in the district where any minor aspect of the crime occured, like even a letter sent through the mail.

The civil law, I think, has achieved a far more appropriate balance. It requires that in order for a case to be brought in the district, it is essential that that district has to have significant contracts and significant ties. It is discretionary. It gives a judge great power to determine where the case should be brought, but under existing Federal law, there is no power in the judge at all. The power lies exclusively in the prosecutor. It is not fair. It permits the prosecutor to take somebody from his home town and put him on trial in a district where he has never been in his life and where no part of the crime really took place, but where, as a result of the fortuities of mail, or the fortuities of the messenger service, venue happened to be found under these varied laws.

I would recommend a change in that area.

Senator KENNEDY. Yes. We are attempting to make some important adjustments on that. That is a good suggestion.

Mr. DERSHOWITZ. One other area that I would again bring to your attention is this. I know it is controversial. It deals with oral false statements.

The existing law is no better than the proposed law because the existing law as well, is a shambles in this area.

As indicated previously, it is worse because it carries harsher penalties for making a statement not under oath under certain circumstances, than if the statement were made under oath.

There is certainly a legitimate interest in making certain oral statements criminal. An obvious example is any kind of a false alarm or any kind of a statement made to law enforcement officials which makes them divert their efforts from one direction to a false lead. Crying fire in a theater is appropriately criminal. There is a way of drafting the statute to legislate that without any ambiguity. What I am concerned about is the following situation.

A Federal agent walks over to a potential criminal defendant on the street and says, "Hey, I would like to talk with you about certain charges that have been leveled against you."

He says, "I am innocent. I did not do it."

By the terms of this statute, that very proclamation of innocence, which anybody, you would think under our American system, has the

right to claim, could constitute a criminal act. After all, it is a false statement if, in fact, he is guilty. It is made to a law enforcement official. Even though he has not been warned about it, but he has volunteered that, and the voluntary aspect of it is very troublesome.

I can understand how the committee and the draftsmen made the mistake it did. They tried to use the concept of the *Miranda* warning. The *Miranda* warning does have an exception for voluntariness, but that is very different. He is not being charged with a crime for making that statement. The statement is true, and presumably because it was spontaneously uttered, and the needs that people feel about warnings do not exist in that situation. I would not argue with that, but the compelling need to warn somebody that what he is going to say in conversation may be result in his being sentenced to a substantial amount of time, is so foreign to the typical American experience, that I think it requires more careful legislation than that contained in the proposed bill.

I think that most Americans understand that when you file a written statement, then you must tell the truth. I am not suggesting that we are dishonest. I am not suggesting that the lessons of Watergate tell us anything about the general morality of individuals.

But I think it is fair to say that Americans today do not think it is a crime to say something that turns out not to be true to somebody even if he is a law enforcement official.

When Congress seeks to move into an area which flies in the face of what I think are fairly deeply rooted common expectations, then they have to do it with extraordinary care. I think this statute does not reflect the kind of care that is required in this area.

There are other provisions with which I disagree. Hopefully, I will continue to be in touch with the committee, and I will provide continued suggestions, particularly as to certain technical changes that I think can be made.

I only want to highlight one more general area: The area of mental illness commitment. I think there have been some major improvements in existing law in the area. I think there is one suggestion that I would like to propose, which I think can also add a dimension of safety and security. Today if a person is found not guilty by reason of insanity, he can be sentenced indeterminately. Under the provisions of this bill, he can still be sentenced for an indeterminate period of time. I do not think that is consistent with the spirit of the sentencing provisions in the remainder of the code.

I think that one should think carefully about how to reconcile mental illness confinement wtih the presumptive sentence provision of the code. I think, in general, the absolute maximum that a person should be able to be held if he is found innocent of a crime on insanity grounds is the maximum he would have been held for if he were found guilty of that crime.

If he continues to be dangerous, of course, he can be civily committed, whether by State or Federal authorities. But the fact of conviction of a crime, coupled with mental illness, should not be able to result in confinement for more than the maximum time. Indeed, it might be my suggestion that the committee ought to at least think

about whether he should be able to be held for a time more than the presumptive range, before a new civil commitment proceeding could be instituted. There is literally no danger here. If we have one of the rare cases where a person continues to be dangerous, there are adequate civil commitment provisions.

But the remainder of that part of the code is a substantial improvement. As you know, the change from preponderence of the evidence, the civil standard, to clear and convincing evidence, I think, adequately reflects the difference between our society's feelings toward money, under which the civil standard of preponderance generally operates and feelings of liberty under which a higher standard, such as clear and convincing should operate.

So, I think that is an area where, although there are some changes that are needed, there is a general and considerable improvement.

I have one final summary statement.

I think the bill as a whole is a substantial improvement over existing law, in several respects: Codification in and of itself is a substantial improvement. I think also several important existing problems in the prior law have been changed.

Let me mention just one and make an argument that might not be apparent to this committee.

I have recently had extensive dealings with the Soviet Union on the issue of human rights. I participated recently in an international debate on human rights. I can tell you that in my discussions with the Soviet Union, they constantly focused on the Smith Act, saying, "Look, how can your President be so concerned with human rights in other parts of the world when you have a statute on your books under which you can go around prosecuting Communists for membership in the party?"

I was pleased to be able to say to them, "That is going to be changed." That, I think, is an important message sent out to the world community. I think several of the other changes that have been made are consistent, not only with the domestic concerns of this country, but with the new and important foreign policy initiative undertaken by President Carter in trying to bring a semblance of human rights to other countries in the world today.

We simply have to begin at home. I think this bill provides an important beginning, though by no means an ending point. I, for one, would continue my efforts, and I know colleagues will continue our efforts to see major improvements in the criminal code.

But this bill, I think, should be passed.

Senator KENNEDY. Let me just ask you how you reached the conclusion that this bill is a net gain in the area of the civil liberties of the American people.

Mr. DERSHOWITZ. It is a complicated process to decide that a bill, as long and as complex as this, achieves a net gain. I tried to use several criteria in my own mind. Is not codification an important net gain for civil liberties? I think the answers to that is clearly yes. It permits the citizenry to look to one place and find what its government is saying to them about crime. It provides much more adequate fair warning. It reduces discretion by prosecutors to charge under one provision rather

than another for identical conduct. And it provides coherence. As Justice Black once said many years ago, "Tyrants in the old days used to write their criminal laws in print so fine or languages so strange that citizens could not read it."

Our existing criminal code was not quite written in that kind of obscurity, but in practice it provides almost as great an obstacle as a foreign tongue.

So, I think codification in and of itself has to be weighed heavily.

Second, I asked myself a question. Are there any civil liberties "horrors" in the bill? Are there any provisions which are so intolerable to the mind of a civil libertarian that the entire bill would not be worth the effort of enactment?

Although I can say I think there were some provisions in the old bill which could be reasonably categorized as fitting that definition, there are none in the existing bill. There are problems in the existing bill. There are areas where, if I had the last word, I would change them. They are provisions dealing with wiretaps and immunity and provisions where I think the balance has been struck somewhat to the disadvantage of those accused of crime.

But those are all within reasonable ranges of disagreement.

Moreover, in every such case, we see nothing worse than in existing law. When one combines major advantages in the area of sentencing and major advantages in the area of civil commitment and major advantages in the area of codification, and several other major advantages—for example, the decriminalization of small amounts of marihuana which will hopefully be followed over the years with increasing decriminalization—then that is a beginning and an important improvement. There are some important changes in the crimes of advocacy.

For example, eliminating the crimes of attempt of conspiracy and solicitation as they relate to certain forms of CORE political advocacy.

When one adds into the balance what one, I guess, could call perhaps a dozen major substantive civil libertarian changes, and one finds there are really no changes in the opposite direction, then the only criticism one can really make of the code—and it is an important criticism and one which I do not think should be downplayed—is the criticism of the ACLU that this committee did not seize the opportunity to make enough changes; that the committee did not seize the opportunity to structure a criminal code in a way so as to really achieve a model of balance.

One can join those criticisms and one can hope that eventually those kinds of changes will be seen. But at the same time one can support the bill which has moved us considerably along the lines of protection of civil liberties which has made other major changes and which has done so without the sacrifice of, I think, any major interests of the civil liberties community in relation to existing law.

Senator KENNEDY. I would say that in the areas you have identified, which are troublesome, we have a responsibility to attempt to make important changes.

The fact of the matter is that the issue of recodification has been before the committee for about 10 years. I think we are either going to try to make progress in a meaningful way along the lines you have outlined, or we will have nothing to show for it.

We thank you very much.

We will now hear from Mr. John Shattuck and Nancy Crisman of the American Civil Liberties Union.

We welcome you back.

STATEMENT OF JOHN SHATTUCK AND NANCY CRISMAN, AMERICAN CIVIL LIBERTIES UNION

Mr. SHATTUCK. It seems to me I have been here for 4 days now.

Mr. Chairman, as you know, the issue before this subcommittee has long been of great interest and concern to the American Civil Liberties Union.

I have submitted a lengthy statement for the record which covers a lot of territory. I will attempt to summarize the principal points in it.

Senator KENNEDY. Without objection, your statement will appear in the record at this point.

[The material follows:]

PREPARED STATEMENT OF ARYEH NEIER, EXECUTIVE DIRECTOR AND JOHN H. F. SHATTUCK, WASHINGTON OFFICE DIRECTOR, AMERICA CIVIL LIBERTIES UNION

Mr. Chairman. We are pleased to be invited to appear before this Subcommittee on an issue of vital concern to the American Civil Liberties Union. The ACLU is a nationwide, nonpartisan organization of 275,000 members dedicated to protecting individual rights and liberties guaranteed by the Constitution of the United States. One of the ACLU's primary missions is to encourage legislative advancement of civil liberties and to oppose legislative encroachment of them.

I. INTRODUCTION

An opportunity for comprehensive revision of the federal criminal code comes but once in a great many years. It is a moment to seize to put into practice a coherent approach to crime and punishment that concentrates law enforcement energies on the crimes against persons and property that plague Americans and that respects the limits on government power that are mandated by the United States Constitution.

The federal criminal law is significant both in its own right and in its potential to serve as a model for the criminal laws of the states. The American Civil Liberties Union approach to the process of criminal code revision is to attempt to insure that this vital legislation is not merely an improvement on what has gone before. If that is all that emerges from the deliberations of the Congress, we will count it as a setback for civil liberties because we know only too well that we are unlikely to have another opportunity for significant revision in the foreseeable future. Our approach is to seek the best criminal code that can be conceivably obtained. We are very well aware that the process of criminal code revision has already been underway for a decade and understand the impatience of those who seek to complete the process. We know that many compromises have taken place to arrive at the proposal that is now before you in S. 1437. We believe it is incumbent on us and on this Committee to look afresh at each provision of the law, regardless of the compromises that have been reached by its sponsors, in pursuit of a law that will serve us well for many years to come.

Before setting forth our views on particular provisions of the proposed legislation, we state some principles which should guide the Congress in its enactment of a new criminal code:

A. Criminal sanctions should be applied only to conduct that causes harm to others. The proscription of sin, or of consensual behavior in which no other person is victimized, is not a proper concern of the criminal law

Almost half of the approximately nine million arrests nationwide each year are for crimes that do not harm others: public drunkenness, possession of drugs for one's own use, consensual sex acts, vagrancy, loitering, obscenity, gambling and the status offenses committed by the young—running away, truancy, disobedience to parents, curfew violations and "incorrigibility." The damage done by

these arrests is incalculable. They criminalize millions of people. They punish people though no legitimate purpose is served by punishment. They consume a very large part of the time of our police, prosecutors, judges and defense attorneys. They jam the judicial process, and their presence in it is a major factor in making it necessary for matters that are the proper concern of the criminal courts to be disposed of through plea-bargaining. They account for about 60 percent of the population of our juvenile institutions, at a moment when there is a great outcry about violent crime by juveniles and not enough space to confine those convicted of such crimes; they account for about 40 percent of the population of local jails nationwide; and for about 10 percent of the population of our prisons. They stigmatize with arrest records many millions of persons who, thereby, find difficulty in finding employment and in integrating themselves into the mainstream of society. And they breed an intense disrespect for the criminal laws that is inimical to the very idea of a law abiding society.

In seeking to punish such conduct, the law does much more to create crime than to control it. At the same time, all parts of the machinery of law are so preoccupied with the crime thus created that they can deal effectively with little else.

As just one example of the misplaced emphasis of law enforcement energies, in the last few years there have been about the same number of arrests nationwide for all the major crimes of violence or threatened violence combined—murder, manslaughter, rape, robbery and aggravated assault—as for offenses involving marijuana. Americans are outraged by the shoddy way our police, prosecutors and courts deal with crimes of violence. The police are slow to respond to calls. No one has any time to inform witnesses of court adjournments. Violent criminals are allowed to plead to minor offenses. Would any of us care to face the victims of a violent crime and admit that these things came about because law enforcement officials were preoccupied with arresting, booking, jailing, prosecuting and judging a youngster charged with possession of marijuana? But admit it or not, that is one of the practical consequences of the criminalization of this drug. Then consider that marijuana counts for only 10 percent of the arrests for behavior that does not harm others. There are almost ten times as many arrests for victimless behavior as for crimes of violence or threatened violence.

B. The criminal laws must respect constitutional provisions, such as the guarantee of freedom of expression in the First Amendment, the guarantee of privacy in the Fourth Amendment and the guarantee of due process of law in the Fifth Amendment

It should be elementary, of course, that no law may be passed by Congress that that violates the provisions of the United States Constitution. There is no room here for compromises.

Many of the provisions of the present criminal law and the proposed criminal law attempt to place forms of speech outside the pale of constitutional protection. These include provisions dealing with conspiracy, solicitation, incitement, impairing, espionage, demonstrating and obscenity. In each instance, the ACLU has examined the provision to see whether it is speech itself that is punished—which is impermissible—or whether it is some form of conduct that may be legitimately prohibited by the government. In connection with some crimes—such as espionage—certain speech may be so closely brigaged with conduct that no separation can be made and a constitutional statute may prohibit it. In other instances, as in the case of obscenity, it is only a perjorative label that has been attached to speech. No conduct other than speech is involved and there should be no criminal sanction.

We approach in the same spirit provisions of the law which intrude on privacy, such as those maintaining authority for wiretapping or providing for the use in evidence of the products of illegal searches, and provisions of the law violating due process, such as those dealing with contempt and the compulsion of testimony. Again, there can be no compromise with constitutional standards. Nor do we think that the law enacted by Congress should go to the very brink of what the United States Supreme Court will tolerate before it declares a law unconstitutional. Where constitutional rights are at stake, it is unbecoming for the Congress of the United States to adopt a law with provisions drafted in the spirit of "How much can we get away with?"

Respect for constitutional provisions in the criminal law also requires machinery for enforcement of those provisions. This means punishment of those who

would deprive others of rights directly guaranteed by the Constitution and rights guaranteed in implementing legislation. Government officials must recognize that they face punishment for violating individual rights.

C. A sentencing system must be devised that is fair and no more harsh than is absolutely necessary.

The present system of sentencing persons convicted of crimes is patently unfair. Much of it is a legacy of the belief that people should be punished for their own good so that they could be rehabilitated through isolation from society. It is a theory that has long since fallen into disrepute.

One of the consequences of the belief that people would be made better by punishment is that the authority to determine the length of punishment was shifted from judges to parole boards. Judges would only set the outer limits, while parole boards, which could evaluate a prisoner's rehabilitation, determined the actual length of sentences. The system has been a complete failure. Parole boards have shown no ability to determine rehabilitation. It is also grossly unfair. It makes the length of a sentence depend on behavior in prison, on reports on that behavior by guards, and on the prisoner's performance at a parole board hearing. The sentence for a crime, we believe, should be proportional to the crime committed. This means it should be fixed by a judge at trial who knows what crime has been committed and the aggravating circumstances or mitigating circumstances of the crime.

As study after study has shown, there are wide disparities in the sentences meted out by judges. This, too, is unfair. A sentence should not be dependent on the character traits, moods and whims of judges. Discretion in sentencing must be maintained because the nature and circumstances of each crime differ. It should be recognized that there is no such thing as a mandatory sentence. What is labelled mandatory sentencing merely shifts discretion out of the hands of judges into the hands of prosecutors who determine the charges to be brought. But, while judicial discretion is essential, it should be guided by the legislature. Aggravating and mitigating circumstances should be spelled out in law. This would reduce disparities in sentencing. Requiring judges to explain their sentencing on the record and to state which aggravating or mitigating circumstances influenced their sentences would further reduce disparities. It would also allow for appellate review of sentences. In the interests of fairness, such appeals should be a right of any defendant facing incarceration.

Sentencing reform also requires the elimination of unnecessary harshness. The death penalty is outright barbarous and should be abolished. Despite loud assertions to the contrary, and despite the public opinion polls showing support for the death penalty, this is something Americans have long recognized in practice. Only one American criminal—Gary Gilmore—has been legally executed in the last decade. Before that, executions were very few and far between. Even if capital punishment is resumed full force, no one expects more than 100 or 200 executions each year. That many legal executions would be a blood bath. And yet, it would still mean that only ½ of 1 percent of the 20,000 murderers each year would be executed. The death penalty would remain the freak'sh thing it has been and must be in a society which has recognized in practice, if not yet in word, that it is too cruel and barbarous to be used systematically.

Except as punishment for repeated crimes of violence, long prison sentences are also unnecessarily harsh. Prison itself should be used sparingly and only as punishment for serious crime. For the most part, prison does the opposite of what the advocates of rehabilitation had hoped: it makes people worse. When serious crimes have been committed, there may be no alternative. Prison may be the best way to punish such criminals—for the good of the rest of us, not for the good of the prisoner. But recognizing that prison is likely to make people worse—and more likely than ever to commit crimes after they get out—should make us, in prudence, resort to prison as a punishment only when we are persuaded that no lesser punishment will suffice. Long sentences, such as three years in prison or five years in prison, make people worse than three month sentences. Again, prudence dictates the very sparing use of long sentences. For repeated crimes of violence, long sentences may be the only alternative, but they are an inappropriate response to lesser crimes.

Based on these principles, we recognize that S.1437 represents an improvement over S.1 and other earlier efforts to codify the federal criminal laws. We are pleased that several of the most objectionable features of these earlier bills—

such as the "official secrets" sections and the Nuremburg defense for government officials—have been dropped. We also note favorably that S.1437 contains several important reforms which would either tighten existing law from a civil liberties standpoint or eliminate repressive sections of S.1 These include:

Repeal of the Smith Act (§ 1103) which penalizes advocacy of overthrowing the government. While this statute has been greatly weakened by Supreme Court decisions it still has provided the alleged legal basis since 1940 for FBI actions against political groups.

Repeal of the Logan Act which prohibits private communications to a foreign government. It was this law passed in 1799 which the government attempted to use against those U.S. citizens who contacted and visited North Vietnam during the war, in their attempt to achieve peace.

Expansion of the Civil Rights Act of 1968 to make it a criminal offense to discriminate on the basis of sex as well as race, color, religious or national origin.

Strengthening the law to permit prosecution of any person who deprives another by intimidation of his/her federally protected civil rights (§ 1502) because specific intent need not be shown. Current law deals only with a conspiracy to violate civil rights whereas under S.1437 the casts of an individual may also be prosecuted.

Return of the constitutional requirements for proof of treason (§ 1101(b)).

Improvement of the definition of rape by making it sex neutral, clarifying the type of force required and eliminating the necessity for corroborating of the victim's testimony (§§ 1641, 1646).

Elimination of the crime of disorderly conduct, proposed for the first time in S.1.

Repeal of the speech-related crime of impairing military effectiveness by false statement.

We turn now to a closer look at other provisions of S.1437 which, although in a few cases are an improvement over S. 1, continue to threaten civil liberties and cause us to continue to oppose the bill. We urge Congress to make the amendments we suggest in our testimony before taking any further action to codify the criminal law.

II. CHAPTER 4—COMPLICITY

The dangers in the complicity provisions of Chapter 4 §§ 501–504 were described by this Subcommittee when it accurately stated in its report on S. 1, "complicity concepts . . . mark the outermost limits of the criminal law for, in some instances, they operate to hold liable persons who took no part in the conduct and who had no agreement with the actor. . . . There is an inherent risk of overreaching and constant danger of understating" (Report No. 94-00, p. 63). The pitfalls of overreaching and understating are to be found in S. 1437.

A. Accomplice liability

Section 401(a)(1) provides in general that one who "knowingly aids or abets" the commission of an offense by a principal actor is criminally liable for that offense. Although the National Commission on Reform of Federal Criminal Laws (hereinafter the Brown Commission) limited its definition of "abets" to commands, induces [and] procures," the definition of "abet" in § 111 of S. 1437 includes "*counsel*, induce, procure and command." We submit that the term "counsel" is overreaching and should be deleted from the definition of "abet" in § 111. Retaining the term "counsel" leaves open the possibility of punishing a person engaged in speech activities (e.g., draft counselling) as principals. But under the Supreme Court definition of "aiding and abetting" they are not associated with the venture, have not participated in it wishing to bring it about, nor sought by counselling to make it succeed. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949).

B. Conspirator liability

Contrary to the recommendations of the Brown Commission, Section 401(b) retains the *Pinkerton rule*, setting a different standard for conspirator liability than for accomplice liability in general. In *Pinkerton* v. *United States*, 328 U.S. 640 (1946) the test established for conspirator liability was whether it is "reasonably foreseeable that the conduct would be performed in furtherance of the conspiracy." On that basis the Court sustained a conviction of a substantive crime where there was no proof of participation or knowledge of the crime.

The Brown Commission rejected the doctrine of *Pinkerton* that mere membership in a conspiracy creates criminal liability for all specific offenses committed in furtherance of the conspiracy. Comment. to § 401. Since an application of the *Pinkerton* test could often reach conduct too attenuated from the conspiratorial goal fairly to hold all parties liable, § 401 (b)(3) should be deleted as overreaching. Instead, we recommend that the standard for holding conspirator parties liable should be the same standard as § 401(a) for general accomplice liability, that is, whether the parties knowingly aided or abetted the commission of the offense. To find criminal liability where persons would not be guilty of aiding and abetting is to "incriminate persons on the fringe of offending." *Krulewitch* v. *United States*, 336 U.S. 440 (1949) (Jackson, J., concurring).

C. Defenses precluded

Section 404 (b)(2) provides that an accomplice can be held liable for the conduct of the principal actor even if the principal has been acquitted, has not been prosecuted, has been convicted of another offense or is otherwise immune from prosecution. This is an exception to the general rule that a secondary actor cannot be convicted where the principal actor has committed no crime for which he or she may be convicted. "There is no question but that there must be a guilty principal before there can be an aider and abettor." *United States* v. *Jones*, 425 F.2d 1048, 1056 (9th Cir. 1970); *Edwards* v. *United States*, 286 F.2d 681 (5th Cir. 1960).

Furthermore, while a principal may be able to exclude crucial evidence on the grounds that it was illegally seized, an accomplice might not have standing to raise this objection.

In order to insure fourth amendment freedom from illegal search and seizure, and reduce the danger of police misconduct in obtaining evidence, we recommend that where the principal is acquitted based on illegally obtained evidence, the accomplice, as well, should be able to raise this defense. In addition, it is patently unfair for a secondary actor to be prosecuted when the principal actor has been acquitted. This same argument applies to § 1002(c), the identical provision concerning defenses precluded for conspirators. No person should be convicted of conspiracy if all other alleged conspirators have been acquitted. Thus, the same deletion is recommended in § 1002(c) in order to restore the defenses precluded for both complicity and conspiracy charges.

III. CHAPTER 10—INCHOATE OFFENSES

The criminal law has wrestled long and hard with the problem of when the law may intervene to prevent criminal conduct by imposing sanctions against activities which lead up to the actual criminal event. The ACLU acknowledges the importance of crime prevention and the logic of punishment which protects the innocent public before rather than after completion of the criminal act. At the same time, we believe that the so-called inchoate offenses—solicitation, attempt, and conspiracy—offer unparalleled opportunities for over-zealous law enforcement which invades constitutional guarantees of freedom of the press, free speech, free association with others, and due process of law.

The combination of inchoate with substantive offenses can lead to such absurdities as the prosecution of outspoken public critics of the government for conspiracy to incite draft resistance. See *United States* v. *Spock*, 416 F. 2d 165 (1st Cir. 1969). In such cases the conduct alleged to constitute a criminal offense is doubly removed from any act in itself criminal; the links connecting them may consist entirely of constitutionally protected speech and association, and there is seldom any possible proof that another's act originated in the speech or assembly prosecuted rather than springing from individual choice. Such prosecutions, with their unmistakable overtones of political repression and enforced unanimity of public opinion, move far away from the general purposes of the criminal law and the theories under which inchoate offenses have been held punishable. See *Grunewald* v. *United States*, 353 U.S. 391, 402 (1957): "For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world."

Society unquestionably has a stake in punishing or deterring those who seek to undermine it by criminal activity. But it has at least as great a stake in clearly marking the limits of the criminal sanction. Laws which make political dissent evidence of criminality have no place in our system of constitutional

self-government. The government which extends criminal punishment to responsible opposition attacks its own foundations. The government which sweeps within the label of criminality those who only may perhaps belong there, who may have lacked firm purpose, or drifted temporarily close the margin of legality, makes more outlaws than it needs. See *Working Papers of the National Commission on Reform of Federal Criminal Laws*, Vol. I, at 362–363 (1970) (hereinafter *Working Papers*). Indeed, it may even induce criminal behavior. Cf. Wootton, *Crime and the Criminal Law* 14 (1963): "one conviction, and still more one period of imprisonment, is a great impediment to a subsequent honest and respectable living; and . . . the experience of conviction, and still more of imprisonment, is itself only too likely to be criminogenic." Until we learn far more than we now know about deterrence of crime and rehabilitation of offenders, we have an obligation to society, as well as to the prospective victims and defendants, not to make too many criminals.

A. Criminal attempt

Section 1001 would give the federal government, for the first time, an across-the-board attempt statute applicable to all other offenses. Such a statute may have the virtue of uniformity, but it directs Congressional attention away from the salutary effort to determine, in respect to particular crimes, whether an attempt statute is wise or necessary. Do we really want to punish unsuccessful attempts to engage in disorderly conduct, disseminate obscene books, or disclose classified information? Are such prosecutions an intelligent use of limited resources for combatting serious crime? Moreover, the ACLU believes that punishing attempts to incite unlawful conduct seriously increases the danger of government prosecution for advocacy plainly protected by the First Amendment.

Section 1001(a) of S. 1437—like S. 1, but contrary to the Brown Commission recommendation—defines the conduct sufficient to constitute an attempt as "more than mere preparation for and that indicates his intent to complete the commission of the crime." Such a standard could affect many First Amendment activities from their very beginning. For example, making arrangements for a public assembly at which inflammatory statements were to be made would arguably be enough to constitute an attempted incitement to riot. News reporters gathering information for reports on issues of vital public interest might be subject to prosecution for attempts to obtain classified information if their research annoyed someone in authority.

These examples are not farfetched. Courts have not found it easy to define the meaning of "attempt" in the criminal law. Even Justice Holmes, as Chief Justice of the Supreme Judicial Court of Massachusetts, had his difficulties. See *Commonwealth* v. *Peaslee*, 177 Mass. 267, 272, 59 N.E. 55, 56 (1901): ". . . preparation is not an attempt. But some preparations may amount to an attempt . It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still . . . need of a further exertion of the will to complete the crime."

To eliminate this dangerous ambiguity, we recommend that conduct sufficient to constitute an attempt should, at the least, be defined as a "substantial step toward commission of the offense" in line with both the current practice of federal courts and the Brown Commission recommendation in § 1001(a). Further, a substantial step should be defined as any conduct "corroboration of the firmness of the actor's intent to complete the commission of the offense." Brown Commission, § 1001(a).

Section 1002(b) permits defense of "voluntary and complete renunciation" of criminal conduct. The defendant must abandon his criminal effort and, if this does not prevent the crime in itself, take affirmative steps which do prevent it.

However, such a high standard for renunciation is defined in § 1004(a) that the affirmative defense of § 1002(b) is severly weakened. A renunciation does not meet the "voluntary and complete" standard if motivated even in part by belief that "a circumstance exists that increases the probability of detection or apprehension . . ." or by a decision to postpone the criminal activity. Remembering that the offense involved is merely an attempt, such a high standard for renunciation may be a trap for the belatedly innocent who go along so long as crimnial purposes are hazy but draw back when faced with the actual necessity for criminal behavior if their end is to be accomplished. One purpose of criminal sanctions is to deter people from making the ultimate decision to violate the law. If the sanctions work, the case for punishment is at best tenuous.

B. Conspiracy

In defining criminal conspiracy, Section 1002 does nothing to limit the "elastic, sprawling and pervasive" nature of the offense. *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring). As long ago as 1925, the federal judiciary expressed serious concern that conspiracy prosecutions were ranging far beyond the legitimate purposes of conspiracy law—to prevent the establishment of continuing group schemes for cooperative lawbreaking—and being used "arbitrarily and harshly." Annual Report of the Attorney General for 1925 at 5–6. Some twenty-five years later Justice Jackson again warned that "loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." *Krulewitch*, supra, 336 U.S. at 446 (concurring opinion). Twenty-five more years have passed, with conspiracy prosecutions for political dissent and mere advocacy drawing yet more criticism. Yet S. 1437 would leave conspiracy law in much the same state of confusion and overbreadth, subject to the same flagrant abuse, as it is now.

"The modern crime of conspiracy is so vague that it almost defies definition." *Krulewitch*, supra, 336 U.S. at 446 (concurring opinion). According to section 1002, conspiracy occurs when someone "agrees with one or more persons to engage in conduct, the performance of which would constitute a crime or crimes, and he or one of such persons in fact engages in any conduct with intent to effect any objective of the agreement."

By using the overbroad terminology, "any conduct" and "any objective", the conspirator need not know that the conduct he or she agrees to engage in or cause is actually a crime. He or she can therefore be punished merely for an agreement, evidenced only be speech ordinarily protected by the First Amendment, to engage in other speech ordinarily protected by the First Amendment. The only consummation required is some act to effect an objective of the agreement or relationship. "Any act or omission, however otherwise innocent, other than those acts surrounding the hatching of the plot itself, performed by any member of the conspiracy, while the conspiracy remains yet afoot, fulfills the requirement." Working Papers, vol. I at 393 and cases there cited. Attendance at a meeting may be sufficient. See *Yates* v. *United States*, 354 U.S. 298, 333–334 (1957). The objective effected need not itself be criminal under the terms of S. 1002(a). In short, one may be convicted of conspiracy on almost no proof at all of serious criminal intent or behavior seriously tending to accomplish a crime. The divorce between criminal act and criminal intent is virtually complete. See *United States* v. *Spock*, 416 R. 2d 165 (1st Cir. 1969).

At a minimum, reform of § 1002(a) should delete "any conduct with intent" and substitute a "substantial step" standard so that only a substantial step towards the completion of the conspiratorial goal would constitute sufficient conduct for commission of the offense.

The substantive law of conspiracy is made even more dangerous by the procedural anomalies that have grown up around it. Since the parties to a conspiracy need not be aware of the participation of others or know each other's identity, *Blumenthal* v. *United States*, 332 U.S. 539, 557–58 (1947), and since one co-conspirator may be convicted on the hearsay evidence of another, *Krulewitch* v. *United States*, 336 U.S. 440 (1949), a defendant may be convicted of conspiracy on the basis of collateral agreements or acts he knew nothing about, engaged in by persons he had never heard of.

Moreover, although the Sixth Amendment grants the rights to trial in the district where the crime was committed, a conspiracy prosecution may be brought anywhere any conspirator did any act to effect an objective of the conspiracy. Thus in the *Spock* case, supra, the government chose to try the case in Boston although several of the acts charged in the indictment took place in New York and Washington, D.C. The procedural law of conspiracy permits the government to engage in forum-shopping for the place where a conviction is thought most likely to be obtained.

The political misuses of conspiracy law have been amply demonstrated in the last few years. The more ordinary abuses, against less publicized defendants, were well-known as much as fifty years ago. One test of any revision or reform of the Federal Criminal Code is its willingness to grapple with and end the abuses of this prosecutorial tool. S. 1437 totally abdicates Congressional responsibility in this critical area of the law.

C. Criminal solicitation

Section 1003(a) makes it a crime to endeavor to persuade another to do something which constitutes a criminal offense under "circumstances strongly corroborative of that intent." The solicitor need not know that the conduct he endeavors to persuade another to undertake is criminal. He need only intend that the conduct occur. Thus under S. 1437 he could be convicted for encouraging someone else to engage in what he thinks is constitutionally protected protest activity, and still be convicted for soliciting disorderly conduct.

In proposing a solicitation statute, the Brown Commission intended to provide punishment for those who instigate offenses and thereby are truly culpable. Working Papers, Vol. I at 368. But terms like "endeavor to persuade" cast a much wider net. On their face they ensnare the speaker for nothing more than speech, when no other criminal act has occurred. By deleting the Brown Commission's requirement of an overt act in response to the solicitation, see Final Report § 1003, S. 1437 could be used to punish advocacy without the slightest possibility of producing lawless action. But the First Amendment plainly forbids this consequence. E.g., *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

Although Section 1004(b)(2) of the proposed bill renders the offenses in Chapter 10 inapplicable to certain advocacy crimes (such as obstructing military recruitment, inviting mutiny, or leading a riot), this is not sufficient to safeguard against overreaching. Even with these exclusions, we question whether solicitation should be applicable as a general provision; the entire bill should be examined to determine whether solicitation should be proscribed in particular instances rather than by general provision. In accord with the Brown Commission recommendation to limit solicitation to the instigation of "a particular crime which is, in fact, a felony," solicitation of crimes which are not felonies should not be an offense.

IV. CHAPTER 11—OFFENSES INVOLVING NATIONAL DEFENSE

A. Sabotage

Sections 1111 and 1112 prohibit impairing military effectiveness by damaging, tampering with, or contaminating any property particularly suited for use in the national defense. The required intent is "to impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or to engage in war or defense activities."

Under the vague terms of § 1111, anti-Vietnam war demonstrators who "interfered with" public transportation by their very numbers could have been prosecuted for sabotage, a major felony. Nothing in the statute's language prohibits a jury from deducing "intent . . . to obstruct the ability of the United States . . . to . . . engage in war or defense activities" from such circumstances. Nothing would prevent prosecution under the general criminal attempt, conspiracy, and solicitation sections of S. 1437, see sections 1001–03, for speech encouraging such a demonstration. The section could be used to chill the rights of association and assembly guaranteed by the First Amendment. It would make every public demonstration, no matter how peaceful and orderly, subject to criminal sanctions at the whim of official power. See *Cox* v. *Louisiana*, 379 U.S. 536, 557–58 (1965), where the Supreme Court, in striking down a similarly vague and overboard statute, observed:

"It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute."

Since intent to impair military effectiveness could be read to include any opposition to development of weapons, no matter how costly or obsolete, editorials against the ABM, news stories exposing enormous cost over-runs and mechanical failure, or simply a citizen's public or private remarks against the situating of nuclear stockpiles in his hometown, could be prosecuted on the theory that they "damage" the objects of their disapproval.

This section should therefore be narrowed to apply only to substantial physical damage.

Moreover, § 1111 applies to a limitless array of property. "Any property", § 1111 (a) (1) (A), or "any public facility." § 1111 (a) (1) (C), can qualify simply be being "particularly suited for use in the national defense." At the very least, therefore, this section should be amended to require designation of such property or facility (for example specific military hardware), or should raise the culpability level to "knowing."

Section 1112 essentially repeats the offense outlined in § 1111, but lowers the level of required intent to "reckless disregard." It thus extends still further the opportunities for official suppression of that vigorous and effective dissent on which democracy relies.

If there should be any impairment of military effectiveness offense at all, it should be limited to periods of declared war, and only to a narrowly defined category of major weapons systems. This is a critical amendment to § 1112, and as presently drafted, a major defect of S. 1437.

B. Espionage—Subchapter C

Through cross-referencing, the proposed bill would retain the language of existing espionage statutes, thereby losing a significant opportunity to reform the archaic and ambigious provisions of existing law.

If Congress is to codify the general espionage laws, it should at least make clear in the legislative history that proof of specific intent to injure the national defense is an essential element of the offense. The Ellsberg indictment in 1973 demonstrates the vagueness, overbreadth, and adverse impact on the First Amendment of 18 U.S.C. § 793. Prior to the Ellsberg indictment for disclosing the Pentagon Papers, the general espionage laws had been interpreted to require proof of an intent to injure the national defense.

The Ellsberg indictment was constitutionally deficient in that it failed to reflect this element. This deficiency should be cured in codifying existing law.

If the Committee determines merely to re-enact existing espionage laws, every effort must be made to ensure that re-enactment does not carry with it any change in meaning. We note with approval that the provisions of Chapter 3 are expressly made inapplicable to the espionage provisions in order to avoid any change in the statement of mind necessary for conviction. However, the term "communicate" is defined in § 111 (General Definitions) to include publication by a newspaper. The use of the word "communicate" in the existing espionage laws has been the source of continuing controversy. See *New York Times Co. v. United States*, 403 U.S. 713 (1971) (compare the concurring opinions of Justices White, Douglas and Black); see also for an exhaustive review of the legislative history accompanying original enactment of the espionage laws concluding that the laws did not pertain to publication by a newspaper except with regard to a narrow category of cryptographic information, H. Edgar and B. Schmidt, Jr., "The Espionage Statutes and Publication of Defense Information," 73 Col. L. Rev. 929 (1973) (reprinted in Hearings, p. 7141).

C. Obstructing a Government function by fraud

According to § 1301, a person commits a felony if he or she "intentionally obstructs or impairs a government function by defrauding the government in any manner."

To avoid the possibility that defrauding the government might be read to include publishing a government document which does not fall under the Freedom of Information Act, the ACLU believes that either the statutory language or the legislative history should make clear that this section cannot be used to prosecute legitimate journalistic activities. For this reason, the statute should be narrowed in three ways:

To provide an affirmative defense where the primary purpose of a defendant's conduct was the dissemination of information to the public;

To prosecute only "material" obstructions of government functions, and

To provide a defense where the government function obstructed was itself unlawful.

D. Hindering law enforcement

§ 1311 of the bill is aimed at deterring and punishing persons who destroy evidence or conceal a suspect in a criminal case. Although these purposes are clearly legitimate, the statutory language also reaches persons who conceal merely the identity of a suspect language which could be interpreted to include news reporters protecting their sources.

Another section of the bill, § 1333, which penalizes refusing to testify or produce information when ordered to do so by Congress or a federal court, contains an affirmative defense in cases where a defendant is legally privileged to withhold information. An earlier version of § 1311 made it clear that a similar defense applied to this section so as to protect a reporter who asserts constitutional or statutory privilege not to reveal the identity or confidential communications of a secret news source. See Senate Judiciary Committee Report on the Criminal Reform Act of 1974, Vol. II, pp. 317–319.

The ACLU believe that § 1311 should include a similar limitation, a result which requires the elimination or modification of § 1311(C), which precludes such a defense as currently written.

E. Tampering with a Government record

§ 1344 penalizes a person who "alters, destroys, mutilates, conceals, removes, or otherwise impairs the integrity of a government record." The ACLU is concerned about the scope of the terms, "otherwise impairing the integrity of" a government record. The term is inherently vague, raising constitutional problems of notice and due process. In addition, it is possible to interpert the section to criminalize unauthorized photocopying or mere disclosure of the contents of a government document, despite the fact that the document itself was neither removed from government premises nor altered in any way.

Since other provisions of the proposed code deal with the unauthorized disclosure of information in government documents (see, e.g. § 1525—Revealing Private Information Submitted for a Government purpose), we submit that First Amendment interests must be protected by either a clarifying amendment to this section or a statement in the Committee Report that the section is not to be construed to extend to unauthorized photocopying or disclosure of the content of government documents without more.

F. Retaliating against a public servant

§ 1358 prohibits any conduct subjecting "another person" to bodily injury, property damage, or improper economic business, or professional loss because of the official action or status of a public servant.

This section is overbroad in its potentially chilling effect on freedom of the press. Because the bill's definition of a public servant—which includes any government employee, consultant, or juror—is broader than the concept of a "public figure" under *New York Times* v. *Sullivan*, this section may criminalize the publication of a financially damaging news report which has been found libelous (i.e. "improper") by state law under a mere negligence standard. Just because criticism of certain public servants is not protected by the First Amendment for purposes of civil liability does not mean that such criticism should be turned into a federal criminal offense.

While we recognize that the statute is not intended to reach robust editorial criticism of former or present public servants, this is clearly a section requiring the inclusion of an editorial writer/news reporter's defense.

V. CHAPTER 13—OFFENSES INVOLVING GOVERNMENT PROCESSES (SPEECH RELATED OFFENSES)

Under the guise of protecting the integrity and neutrality of government operations. Chapter 13 would permit governmental interference with First, Fifth, and Sixth Amendment rights. There is a genuine need to protect judicial and administrative proceedings from corruption and intimidation. But this need must not be used to invade constitutional rights where the behavior curbed has, at most, slight chance of deleterious effect. Public demonstrations directed primarily at public opinion must not be suppressed on the theory that they interfere with the sanctity of the judicial process. Vigorous advocacy must not be stifled under the label of criminal contempt.

A. Obstructing a Government function by physical interference

Section 1302 makes physical interference with federal government functions a felony. The proposed bill in subsection (a)(2) through (a)(4) specifically defines the conduct to be covered in acceptable language. However, subsections (a)(1) serves as a residual clause covering obstruction or impairing "the performance by a federal public servant of an official duty." This broad language could be misused against lawful and peaceful demonstrations. Virtually every

mass demonstration would, at one moment or another, fall within its prohibition. Yet such demonstrations can be an important contribution to the public debate on a wide variety of topics.

Under the unfettered terms of subsection (a)(1), it would be up to the prosecutor to determine whether a large demonstration on federal grounds or near federal buildings was or was not "physically interfering" with the performance by a federal public servant of an official duty. Even an influx of cars carrying demonstrators to the chosen site might constitute the proscribed felony. Since mass arrests on the basis of group behavior are constitutionally forbidden by the particularly requirements of the Fourth Amendment, this provision would invite selective abuse by law enforcement officials who object to life-styles different from their own. See e.g., *Coates* v. *City of Cincinnati*, 402 U.S. 611, 616 (1971). Subsection (a)(1) should therefore, be amended to specify the particular kinds of public servants and duties that are covered. This could be accomplished by returning to existing law contained in 18 U.S.C. § 1114.

B. Demonstrating to influence a judicial proceeding

Section 1328 prohibits pickets, parades, display of signs or other demonstrations on the grounds or within 200 feet of a courthouse. Although the ACLU generally endorses such statutes as necessary to protect due process rights, we believe the statute should be written so as not to apply to demonstrators who have no possibility of influencing or intimidating the courts, and whose primary intent is to express opinions of the judicial process which are protected by the First Amendment.

The courthouse should not be treated differently from other public buildings generally open to the public. A demonstration should not be prohibited unless it disrupts proceedings being conducted within the courthouse by unreasonable noise, obstruction of an entry, or the threat of force or property injury. For example, the grounds of the Supreme Court should be open to demonstrators wishing to protest the abortion decisions even while the Court is in session unless the demonstrators knowingly disrupt the Court's business.

C. Criminal contempt

Section 1331 makes it a crime to "misbehave in the presence of a court or so near to it as to obstruct the administration of justice." But the provision offers no further guide to judicial discretion. The Supreme Court has cautioned that before the "drastic procedures of the summary contempt power may be invoked," it must be clearly shown that the Court has actually been obstructed in "the performance of a judicial duty." *In re McConnell*, 370 U.S. 230, 234 (1962).

Under § 1331, there is a significant danger that vigorous representation or self-representation may be held subject to summary punishment, thereby chilling the Sixth Amendment right to effective assistance of counsel. See *Powell* v. *Alabama*, 287 U.S. 45 (1932); *McConnell*, supra. The vagueness of the term, "misbehaves," could violate due process rights by leaving the trier of fact "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsylvania*, 382, U.S. 399, 402-03 (1966). See *Smith* v. *Goguen*, 415 U.S. 556 (1974). The potential overbreadth of the term may invade First Amendment rights to present relevant public issues for discussion or decision, no matter how distasteful to the individual judge. Cf. *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967).

Section 1331(b) adds an affirmative defense to the proposed bill if the court order disobeyed was "clearly invalid" *and* if there was no reasonable opportunity to obtain judicial review of the order prior to the disobedience charged. However, by stating the elements of the defense conjunctively rather than in the alternative, this defense has been unnecessarily limited. There is no reason why a person who can show that a court order was, in fact, invalid (regardless of whether the invalidity was "clear") should be guilty of contempt *if* he or she had no prior opportunity to obtain timely judicial review.[1]

Section 1331(d) further specifies that a criminal contempt proceeding does not bar subsequent prosecution for another federal offense based on the same conduct.

---

[1] Thus, we would suggest that the affirmative defense to contempt should read as follows: "It is an affirmative defense to a prosecution under subsection (a)(2) that the writ, process, order, rule, decree, or command was: (1) clearly invalid; or (2) invalid and that the defendant did not have judicial review or a stay thereof prior to the disobedience or resistance charged."

The ACLU believes that there is a serious question whether the double jeopardy clause of the Fifth Amendment permits more than one prosecution based on the same conduct. Such a bifurcation invites prosecutorial harassment. See Comment in the Brown Commission Working Papers, Vol. I at 602.

Because the criminal contempt power is often subject to judicial abuse and has been too often invoked against politically controversial defendants and their counsel, we endorse the recommendation in the original Brown Commission study draft that penalties be sharply curtailed to no more than five days imprisonment and a $500 fine. We also believe that a criminal contempt trial must be held before a neutral judge—not the one in whose court the alleged contempt occurred. See Working Papers, Vol. I at 603. If longer penalties are to be imposed, there can be no substitute for the intervention of a jury between the court and the accused. Indeed, Supreme Court decisions require a jury trial in criminal contempt cases where a sentence longer than six months is imposed. *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966); *Bloom* v. *Illinois*, 391 U.S. 194, 208 (1968) (Jury trial must be granted in contempt cases where "serious punishment . . . is contemplated").

D. Making a false statement to a law enforcement official

While judicial authority is split over whether 18 U.S.C. § 1001 covers false statements made to law enforcement authorities, compare *United States* v. *Adler*, 380 F. 2d 917 (2nd Cir 1967), cert. denied, 389 U.S. 1006 (1967) with *Friedman* v. *United States*, 374 F. 2d 363 (8th Cir. 1967), Section 1343 resolves this conflict in favor of covering such statements. Even with the limitation that the defendant must have known he was speaking to a law enforcement agent (unless he volunteered the statement or was advised that the making of such a statement was an offense), this Section invites abuse by law enforcement officials. The possibility of abuse is particulary great with regard to allegedly false oral statements. Prosecution for perjury requires close examination of the actual words used by the defendant. Since this offense sets up a "my word against yours" situation when the defendant and the police officer are the only two witnesses, the unfair advantage of the officer's presumed credibility in the eyes of the jury makes the fabrication of charges a potential danger. False statements to a law enforcement officer, whether oral or written, or sworn or unsworn, should not be an offense except in the case of false alarms or a person's intentional false imlication of another person in the commission of a crime. See Final Reports § 1354.

V. CHAPTER 18—OFFENSES INVOLVING PUBLIC ORDER, SAFETY, HEALTH, AND WELFARE

A. Drug offenses

Chapter 18, subchapter B, eliminates as a federal offense possession for personal use of 10 grams or less of marijuana. The ACLU endorses the decriminalization of marijuana possession and uses, but recommends in addition, that gratuitous transfer of marijuana also be decriminalized. Further, no federal penalty should be provided in excess of any state law that decriminalizes possession of marijuana.

Beyond marijuana, the ACLU believes that criminal punishment of drug addicts, whose use and possession of the drugs is fundamentally a result of illness rather than criminal intent, is a violation of the Constitution. See *Robinson* v. *California*, 370 U.S. 660 (1962), holding it unconstitutional to make addiction per se a crime; *Powell* v. *Texas*, 392 U.S. 514 (1968) (dissenting opinion). If the Eighth Amendment ban on cruel and unusual punishment forbids punishment for "an irresistible compulsion," according to Justice White, concurring in *Powell*, supra, 392 U.S. at 348, "I do not see how it can constitutionally be a crime to yield to such a compulsion." We agree.

B. Riot offenses

Like many of the offenses against national security, the anti-riot laws are broad and vague, sweeping within their terms conduct clearly protected by the First Amendment, failing to notify the law-abiding of what conduct is properly forbidden, and providing a convenient tool for discriminatory prosecution and governmental oppression of political adversaries.

Although the term, "incitement," in § 1831(a)(1) has now been defined in section 111 in general accord with the formulation in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), one further change is necessary. The proposed bill defines "incites"

as "urging other persons to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct." [2]

Under this definition, the defendant need only be reckless with regard to the fact that circumstances exist which render his otherwise lawful advocacy likely to result in a riot. The definition of incites in § 111, therefore, should be changed to require knowledge of the requisite existing circumstances.

Section 1831(a)(2) punishes the leading or giving of "commands, instructions, or directions in furtherance of" a riot. This is vague and overbroad. *Hess* v. *Indiana*, 94 S.Ct. 326 (1973), amply demonstrates the difficulties encountered in determining who is trying to further a riot and who is trying to limit it. Such speech is protected not only by the First Amendment, but also by the Fifth Amendment guarantee of due process of law. The standards for punishment are so vague as to require potential violators, law enforcement personnel, and judge or jury to guess at their meaning. See *Lanzetta* v. *New Jersey*, 306 U.S. 4551 (1938).

Section 1833, which prohibits "engaging in a riot," also suffers from vagueness. The problem created by such vagueness is the discretion left to law enforcement officials to determine what conduct is criminal.

Such broad provisions can only encourage dragnet arrests, where police make the arbitrary determination that everyone within sight or reach is "engaging in" the disturbance, even though many of them may be persons who have committed no culpable act whatsoever or innocent bystanders caught up in unexpected circumstances. It invites arrest on the basis of such irrelevant factors as race, age, and manner of dress. The later invalidation of such arrests or the dismissal of charges cannot compensate the victims for restraint, incarceration, or such collateral consequences of arrest as, under current law, the inclusion of their fingerprints in crime control databanks and the refusal by public or private employers to hire them on the basis of their brush with the law. See *Sullivan* v. *Murphy*, 478 F.2d 938 (D.C. Cir. 1973).

C. Obscenity

Section 1842 makes it a federal felony to disseminate obscene material, thereby punishing the freedom of speech and press guaranteed by the First Amendment.

The ACLU opposes any restriction on expression on the grounds that it is somehow obscene, immoral, shameful, or distasteful. The Constitution requires that such judgments be left to the individual rather than to the government. Justice Douglas, dissenting from the Supreme Court majority in *Miller* v. *California*, 93 S.Ct. 2607 (1973), outlined the dangers of determining that some forms of expression are beyond the protection of the Constitution.

"The idea that the First Amendment permits government to ban publications that are 'offensive' to some people puts an ominous gloss on freedom of the press. That test would make it possible to ban any paper or any journal or magazine in some benighted place * * * To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society * * * The materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV or over the radio. By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be 'offensive' to some." Id. at 2626.

A definition of obscenity that would both give fair warning of what is prohibited and limit itself to the truly pornographic has defied the best legal minds of the century. In *Miller*, *supra*, the Court majority confidently predicted that its newest test would single out protected "commerce in ideas" from punishable "commercial exploitation of obscene material." Id. at 2621. The Georgia Supreme Court responded two weeks later by holding that the widely acclaimed movie "Carnal Knowledge" was obscene, the Supreme Court of the United States failed to relieve itself of "the awesome task of making case by case at once the criminal and the constitutional law." Id. at 5058 (Brennan, J. dissenting). The constitutional definition of obscenity remains uncertain.

Unfortunately, the proposed bill codifies the standards laid down in *Miller*, thus cementing the "community standards" test into the federal criminal laws.

---

[2] We assume that there is either a typographical or drafting error in § 1831. Subsection (a) prohibits "inciting" participation in a riot during a riot. Subsection (b) however prohibits "urging" participation in a riot during a riot. If "urging" is meant to denote a lesser quantum of conduct than "inciting," then defining inciting in accord with *Brandenburg* becomes an illusory change. We assume the sponsors of this bill intended no such result, and will readily agree to delete the relevant language from subsection (b).

Under Section 1842(b)(4)(B)(i) and the venue provisions of Section 3311, the contemporary community standards to be applied are those generally accepted in the judicial district where the offense occurred. Section 1842 thus invites a local jury in any district through which or into which the material has passed by mails or commerce to dictate the standards for the rest of the community. The ACLU strongly opposes any federal obscenity statute, but at the very least, the venue provisions must be modified to reduce the liability of defendants to prosecution in every district of the country.

D. Failing to obey a public safety order

Under Section 1861, it is an offense to disobey a lawful order of any public servant "issued in response to a fire, flood, riot or other connection that creates a risk of serious injury to a person or serious damage to property." No comparable offense exists under current federal law. The residual clauses, "other condition that creates a risk. . . ," is vague and should be deleted. Furthermore, authority to issue such orders should be narrowed since the definition of public servant in Section 111 included any "officer, employee, advisor, consultant, juror, or other person authorized to act for or on behalf" of the government. Nothing in Section 1861 requires the public servant whose orders it is an infraction to disobey to be a public safety officer or to have any specific authority related to the specific circumstances. In addition, like other infractions, the offense should carry no prison term, but be punishable solely as a civil violation subjecting the offender to minimal fines.

Under § 1861, members of the press and public could be ordered to "move, disperse, or refrain from specified activity"—such as taking photographs—by any government official who objected to their presence or activity in an area where a riot was "impending" if the order were "reasonably designed" to prevent injury to persons or property. Such vague provisions give government officials broad powers to interfere with free speech and press and to control what the public learns about government response to protest demonstrations as well as to riots, or potential riots. But these are matters of which the public should be thoroughly and accurately informed.

VII. PART III—SENTENCES

In addition to the general comments on sentencing which are set forth at the beginning of our statement, we refer the Subcommittee to the testimony of the ACLU National Prison Project which addresses in detail the proposals in S. 1437.

VIII. CHAPTER 31—ANCILLARY INVESTIGATIVE AUTHORITY

A. Wiretapping—subchapter A

The ACLU has long opposed wiretapping and electronic surveillance by anyone—including the government—for any reason. The use of electronic devices to invade the privacy of conversation in homes and offices, in telephone booths, and nearly anywhere else is a flagrant violation of the Fourth Amendment ban on dragnet searches and seizures, the Fifth Amendment privilege against self-incrimination, and the constitutional right of privacy. The electronic ear does not discriminate between conversations about criminal activity and conversations entirely within the protection of the First Amendment. It does not separate the intimate discussions of friends from the clandestine plotting of criminals. It sweeps up everything in its way. As Justice Brandeis observed in *Olmstead* v. *United States*, 277 U.S. 438, 475–76, 478 (1928) (dissenting opinion):

"The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping. . . .

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. * * * They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

The threat to privacy from electronic surveillance was so great, so pervasive, and so alien to the spirit of the Constitution, Brandeis wrote, that even intrusions

in the name of law enforcement must be banned. "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. * * * The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding." Id. at 479.

Despite studies indicating that, from the government's point of view, the costs of electronic surveillance far outweigh its purported benefits, Schwartz, Report on Costs and Benefits of Electronic Surveillance (ACLU 1973), S. 1437 essentially re-enacts the electronic surveillance provisions of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510–20.

The ACLU vigorously opposed Title III at the time it was under consideration by Congress. We oppose its re-enactment now. Despite its requirement that a neutral magistrate issue a warrant based on "probable cause" and on the failure of ordinary investigative techniques, Title III has greatly expanded the use of electronic surveillance. In the overwhelming majority of cases, the neutral magistrate has accepted the government's word that such surveillance was necessary and would be carefully limited within statutory guidelines.

The number of "intercept applications" authorized has risen from 174 in 1968 to 686 in 1976; in the latter year only two applications were denied. Of the 686 applications granted in 1976, only 20% were granted by federal rather than state judges. In 1976, the average number of persons whose conversations were overheard was 54 per wiretape; and the average number of conversations overheard was 662 per order. The average wiretape was in actual operation for almost 19 days. Administrative Office of the United States Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications (1976).

Yet there have been extraordinary abuses—abuses involving wholesale deception of the courts by the Administration. Despite the requirement that only the Attorney General or an Assistant Attorney General specially designated by him could authorize federal applications for intercept orders, 18 U.S.C. § 2516, a requirement designed by Congress to insure that only a "publicly responsible official" would set law enforcement policy in this sensitive area, S. Rep. No. 1067, 90th Cong., 2d Sess., 96–97 (1968), a large number of such orders were routinely approved by an executive assistant to the Attorney General and submitted to the courts in the anem of an Assistant Attorney General who had, in fact, nothing to do with their authorization. As a result, the Supreme Court has held that evidence gathered under those orders cannot be admitted in court. See generally, *United States* v. *Giordano*, 416 U.S. 505 (974).

While Section 3104 limits the types of crimes for which an emergency warrantless wiretap is obtainable, and removes the reservation of an inherent presidential power to conduct wiretaps without warrants, it still permits broad wiretapping. An important opportunity is thus lost to examine closely the record of nine years under Title III to determine whether the minimal gains for law enforcement are, as we submit, far outweighed by the loss of privacy which has been suffered.

B. Compulsion of testimony

Subchapter 31 (b) restates existing law, compelling a person's testimony even though his or her refusal is based on the privileges against self-incrimination. Section 311(b) thus continues the practice adopted in 1970 in the Organized Crime Control Act, which cut to the heart of the Fifth Amendment privilege by providing that a witness claiming the privilege could nevertheless be compelled to testify by being granted limited, "use" immunity. Use immunity means that testimony or evidence derived from such testimony cannot be used against the witness, but the witness can still be prosecuted for any crimes admitted in the testimony, so long as the prosecution is based on independent evidence.

Substituting use immunity for the broader, historically approved "transactional" immunity from prosecution severely weakens Fifth Amendment rights. The ACLU opposes use immunity on the ground that the Fifth Amendment guarantees a person's right to remain silent and to be free from compulsory self-incrimination. The requirement of full transactional immunity is the minimum constitutional compromise which could justify displacing that right of silence.

The rationale for this position is explained in Justice Douglas' dissenting opinion in *Kastigar* v. *United States*, 406 U.S. 411, 467 (1972):

"The Self-Incrimination Clause says: 'No person . . . shall be compelled in any criminal case to be a witness against himself.' I see no answer to the proposition that he is such a witness when only "use" immunity is granted." *Kastigar*

v. *United States*, 406 U.S. at 462. Emphasizing the broad reach of the Fifth Amendment, Justice Douglas noted that "the framers put it beyond the power of Congress to compel anyone to confess his crimes. The Self-Incrimination clause creates, as I have said before, 'the federally protected right of silence,' making it unconstitutional to use a law 'to pry open one's lips and make him a witness against himself.'" *Id.*, at 467. We agree. The compulsion of involuntary self-incriminating testimony through use immunity should be abolished.

IX. CHAPTER 36—DISPOSITION OF INCOMPETENT OFFENDERS

Chapter 36(b) deals with determination of competency to stand trial and treatment of offenders who are suffering from mental disease or defect. It also provides for the disposition of persons found not guilty of any federal offense by reason of insanity. Most of these sections either entirely rewrite existing law or codify current practice that is not dealt with at present by statute. The subject is not without difficulty and a complete discussion would substantially lengthen this already lengthy testimony. Therefore, we merely set forth below some general comments in this subchapter as a starting point for the Committee:[3]

A. S. 1347 makes an important change in S. 3611. A person held to determince competency to stand trial may not be held for more than a year. Current law specifies only a reasonable time or until it is clear that there is no substantial likelihood that the defendant will regain competency. Legislative definition of time limit is useful and a year would appear to be appropriate for felony cases. For a misdemeanor, the time period should be considerably shorter.

The major defect in this section is that it fails to deal with dismissal of charges of one found to be incompetent to stand trial.

As the statute of limitations is tolled when the prosecution is commenced, an incompetent defendant can remain subject to further prosecution for an indefinite time. This is a fundamentally unfair burden to impose on one who, through no fault of the accused, cannot be brought to trial.

B. Chapter 36(b) also asserts federal authority to commit a person who has been found not guilty (by reason of insanity) of any federal offense or whose term of imprisonment about to expire. Such authority does not exist under current federal law, nor should it. Once a person has been found not guilty—for any reason—or served the prison sentence imposed, the federal interest expires.

If there is reason to believe that such a person must be involuntarily confined, the proper course is to refer such person to state authorities for possible commitment under state civil commitment law. By this method, commitment will only be obtained when both authorities, state and federal, agree that the defendant must be deprived of his or her freedom. This renders less likely the possibility that commitment will be obtained out of retribution, either by the federal prosecutory who has been "defeated" by a plea of insanity, or by prison authorities who seek additional punishment for an unruly inmate whose term is about to expire. The checks and balances built into the present system should be preserved.

The S. 1347 bill changes the commitment standard from preponderance of the evidence to "clear and convincing"—a significant and welcome change but one which in no way mitigates the overreaching of federal authority. Other procedural changes are necessary if these sections are to be retained against our recommendations. This chapter should be compared in its entirety with H.R. 12504 which in numerous ways better protects the defendant's right to a fair hearing before the loss of his liberty, e.g., composition of the examining panel of psychiatrists, video-taping of evaluative staff conferences, and frequency of reports from the hospital staff of the committing authority.

X. CHAPTER 37—SUBCHAPTER B—EVIDENCE

A. Admissibility of confessions

Section 3713 is an attempt, derived from existing law enacted as part of the 1968 omnibus anti-crime bill, to undercut the *Miranda* decision providing suspects certain rights when subjected to custodial interrogations by law enforce-

---

[3] We understand that Professor Heathcote Wales of Georgetown University Law Center will be invited to testify on Chapter 36(b). Professor Wales has served as an advisor to the ACLU on this subject and played a key role in drafting Chapter 36(b) of H.R. 12504 "the 94th Congress (now H.R. 2311) which we commend to this Committee for comparison.

ment officials. Section 3713(C), provides that the presence of absence of any of the factors enumerated is not conclusive as to voluntariness of the confession. Among the factors, which are not to be conclusive, is "whether the person was advised or knew that he was not required to make a statement and that the statement could be used against him." Allowing judges and juries to find a confession admissible even if this requirement has not been met is inconsistent with a defendant's right to be so advised in custodial interrogations and the ACLU opposes it.

B. Admissibility of evidence in sentencing proceedings

The ACLU opposes Section 3714, which would allow illegally obtained confessions and fruits of illegal searches to be considered in sentencng. The section provides that "any relevant information concerning the history, characteristics and conduct of a person * * * regardless of the admissibility of the information under the Federal Rules of Evidence" would be permitted.

XI. MISCELLANEOUS PROVISIONS

A. Revealing private information submitted for a Government purpose

§ 1525 prohibits a present or former public servant from disclosing information submitted to the government by a private citizen in connection with an application for a license or benefit or to comply with a legal duty, where such disclosure would violate a specific duty imposed on the official by statute, regulation, rule or order.

This section is properly aimed at assuming the reliability of private information submitted to regulatory and other government agencies by assuring that the confidentiality of such records will be maintained.

We submit however, that this section as drafted could be used to insulate documentary evidence of official corruption or other wrongdoing from scrutiny and airing by Congress, the press, and the general public. To obviate this danger, we suggest that the Committee Report make it clear that the section does not cover internally generated government documents or documents obtainable under the Freedom of Information Act or discoverable under the Federal Rules of Civil Procedure.

In addition, the legislative history should reflect the fact that Congress intends this section neither to restrict its own access to information nor to dilute the obligation of public servants to come forward with evidence of wrongdoing (codified in § 1311 or elsewhere).

B. News reporters' defense to theft offenses

§ 1733(b) creates a defense for receiving stolen property where the property was received with intent to report the matter to a law enforcement officer or the owner of the property. § 1739(C) bars prosecution for theft of intangible government property where the defendant obtained the property by non-criminal means and used it solely for disseminating it to the public without deriving anything of value therefrom.

The ACLU strongly endorses the policies expressed in the affirmative defense of § 1733(b) and the bar to prosecution of § 1739(C). We are concerned, however, that § 1739(C) as currently written will not protect a news reporter who uses intangible government property as the basis for an investigative report for which he is paid his usual salary. It is not in the public interest for investigative reporters to be cut off from their usual sources of income while pursuing their profession; and we assume that such was not the intent of the bill's drafters.

We suggest therefore, that § 1739(C)(2) be amended to read: "* * * the defendant obtained or used the property for the purpose of disseminating it to the public, and not for the primary purpose of deriving anything of value. * * *"

Thank you for the opportunity of appearing before the Subcommittee.

Mr. SHATTUCK. There are two parts to our testimony. First I would like to present an overview of the bill, S. 1437, and point out some ways in which it is an improvement over prior bills and other ways in which we continue to see problems in it.

Then Ms. Crisman of the ACLU national prison project will focus on the issues which many of the other witnesses this morning, and in

previous hearings, have focused on, which is the sentencing structure of S. 1437.

We all know that the opportunity to codify the criminal laws is a rare opportunity indeed. I suppose that most people would agree that it is also a rare opportunity to improve those laws.

That is the spirit in which we at the ACLU have reviewed S. 1437.

We recognize that the bill is an improvement over S. 1 and earlier bills which we strongly opposed and felt should not be enacted under any circumstances. But we also recognize that S. 1437 poses dangers to civil liberties, some of which are not found in existing law at all.

Before I review the details of the bill, let me summarize the principles that we have tried to follow in reaching our conclusions.

The first principle is the one that Professor Dershowitz alluded to, and that is that where there is no victim, there should be no crime. I think there are at least two very compelling social reasons for this.

First, the society should not be in the business of telling people what is harmful to them. It should not be in the business of legislating morality in the criminal law. That is certainly true when it comes to locking people up or otherwise penalizing them under the criminal code, even if certain warnings to people can be given that things may be harmful to them.

The second reason is that it is an incredible waste of judicial and law enforcement resources to focus on victimless crimes when there are so many crimes with victims that go unpunished. One very dramatic example of this is the fact that in the last few years there have been the same number of arrests nationwide for marihuana offenses as for all other major crimes of violence combined.

In fact, speaking to this question of wasted resources, there is every reason to believe that we actually create crime by stigmatizing people with criminal records so that they cannot get employment and they become social and economic outcasts and in some instances will then have to turn to crime. This is a result of criminal laws which penalize those who are engaged in what we broadly categorize as victimless crimes.

This point has been made again and again in the Presidential Crime Commission reports. I will not dwell on it here.

So, we believe that an enlightened criminal code should eliminate victimless crimes and focus on while-collar crimes and crimes of violence.

Our second principle is that the criminal law should not undermine crucial constitutional rights, such as free speech, due process of law, the right of privacy, the fourth amendment, and the whole range of protections in the Bill of Rights.

From our point of view, as I am sure you are aware, Mr. Chairman, there is no room for compromise on the question of undermining constitutional rights in the enactment of a criminal code.

In the first amendment area, for example, it is essential that the criminal law stay clear of speech and thought and association and focus on conduct and not on behavior that is protected, even if that behavior is controversial or might possibly be leading toward crime.

There is a whole range of offenses which must be carefully drafted in this area. These are the so-called inchoate offenses, such as con-

spiracy and solicitation, which is a new offense in S. 1437, as well as obscenity in the area that Professor Dershowitz was touching on, and the laws regulating demonstrations and assembly.

There are many provisions in S. 1437 which come very close to protected speech, and we have set forth in the prepared statement ways in which those provisions must be amended in order to avoid trampling on that speech.

There are other areas. There are the areas affecting the press, for example, which I will get into in a moment, and laws intended to protect the national security, or national defense.

These all come very close to protected speech, and unless extremely, carefully drafted—we would submit, more carefully than is presently the case in S. 1437—will have a serious impact on first amendment rights.

The same thing, of course, is true of investigative authority which intrudes on privacy, or can intrude on privacy, such as wiretapping, search procedures, and the administration of the criminal justice system and the evidentiary rules which can also touch very closely on constitutional rights, and must be very carefully drafted.

In sum, I would say in no area should we sacrifice constitutional rights to criminal law, which is not to say that laws cannot be narrowly drafted, that is, with care and attention. We think the task can be accomplished.

Our third principle involves the fairness of the sentencing system. In this area, my colleague, Ms. Crisman, will present to you our testimony and our view of the sentencing structure of S. 1437, after I have concluded with an overview of the bill.

We have examined the bill under these general principles. As you might suspect, we have been rigorous in our review and have not hesitated to identify problems. We have already identified many of these problems to your staff in the drafting stages of the bill. We will set them in the record in the prepared testimony which I have submitted.

Based upon our review, our general conclusion is that S. 1437 does indeed represent an improvement over S. 1, but in key respects as now drafted, it fails to seize the opportunity for significant reform of the criminal law, and it contains a substantial number of provisions which threaten constitutional rights.

Before I summarize these sections, let me review quickly the bill's major civil liberties improvements over S. 1.

First, and now importantly to us is the elimination of the official secrets section and the Nuremburg defense for Government officials. The repeal of the Smith Act is also important. This penalizes advocacy of the overthrow of the Government and, of course, is right in the middle of this area of criminal law intruding upon constitutional rights. The repeal of the Logan Act which prohibits private communication to a foreign government is, of course, important. It was this law, passed way back in 1799, which the Government attempted to use against U.S. citizens who contacted and visited North Vietnam during the war there in an attempt to achieve peace.

The expansion of the Civil Rights Act of 1968 to make it a criminal offense to discriminate on the basis of sex and strengthen the law to permit prosecution of any person who deprives another by intimidation of federally protected civil rights is also important.

There is also the return to the constitutional requirements of proof of treason and the improvement of the definition of rape by making it sex neutral and clarifying the type of force required and eliminating the necessity for corroborating the victim's testimony and elimination of the crime of disorderly conduct, proposed for the first time in S. 1, and finally, the repeal of the speech related crime of impairing military effectiveness by false statement.

These are improvements over S. 1. We recognize them as such. But these improvements are balanced and in many respects over-shadowed by a large number of sections in the bill which would have a negative impact on civil liberties. In my prepared statement I have analyzed these sections in detail. Let me summarize the areas in which they occur and brief them for you here.

First, there are the so-called inchoate offenses, contempt conspiracy, complicity, and the new crime of solicitation, all of which, as drafted, reach beyond specific criminal conduct. As drafted, they reflect many of the constitutional difficulties of inchoate offenses.

Because the focus of these offenses is on precriminal associations and relationships, on thinking and on speech, they are dangerously vague and overbroad. There are ways in which this bill can be improved to eliminate the overreaching of these inchoate offenses. We would commend to you, Mr. Chairman, the suggestions that we have made in our prepared statement.

The second area involves the national defense. Here the bill contains a number of offenses which cut severely into political activity and the right of assembly.

For example, the impairment of military effectiveness section, as drafted, would probably have permitted the arrest and prosecution of antiwar demonstrators in many situations during the great national controversy over the Vietnam war. We know that is not the intent of the section, and we trust that is not the way it would be used. But an over-zealous prosecutor could certainly read the impairment of military effectiveness section in that manner. We have again suggested ways in which that could be improved.

A third and related area is the series of sections involving interference with government processes. Here again, the right of political assembly and speech is restricted by, for example, broadly defining the crime of obstructuring a Government official in the performance of his duty. Or, the attempt to influence a judicial proceeding, which has been improved over S. 1, but requires further amendment so that it does not impinge on First Amendment rights, and the new crime of failing to obey a public safety order, which again, is a crime we do not find in existing law.

In another area we are concerned that S. 1437 will perpetuate some of the dangers of political surveillance and political investigations by, for example, reenacting the use immunity standard of the grand jury investigations. The grand jury was one of the principal elements in the abuse of the Justice Department under Attorney General Mitchell when the grand jury was used to round up and question large numbers of people who were forced, under a use immunity standard, to give their testimony.

The bill also creates a new crime of making a false oral statement to any law enforcement official, and I think for the same reasons that

Professor Dershowitz has identified, we have serious problems with that. As he said, it is not generally the perception of American people that oral statements will get them involved in criminal violations. Beyond that we think this section would invite a swearing contest between the police and dissenters or others in contact with the police over whether or not some statement was, in fact, made by the person charged.

A fifth area in which the bill threatens civil liberties involves constitutional safeguards in the administration of criminal justice. In several respects, these are undermined by S. 1437. For example, there is the provision permitting a court to find that a confession was voluntary even if the defendant did not receive *Miranda* warnings before making a confession. Another provision permits the use of illegally obtained evidence in sentencing proceedings.

In the area of obscenity regulation, we are disappointed that S. 1437 follows the trend of the Burger court towards removing Federal protections of constitutional rights by mandating community rather than national standards in defining obscenity and by codifying the Supreme Court decision in *Miller* v. *United States*.

This means that a defendant charged with disseminating obscene materials under Federal law could be prosecuted in any district in the country where those materials are found under the venue provisions of this bill, and the standard to be applied against him would be the local one, even if he had never set foot in that district. As Professor Dershowitz pointed out, this could result from the mere fortuities of the mail system.

Another area in which we are concerned about the reach of S. 1437 involves offenses which cut into freedom of the press. Again, we trust that this is not the intent of the bill, but as drafted, there are several dangers. For example, there is nothing to indicate that the crime of obstructing a Government function by fraud, which is found in the bill, would not be applied against a person who publishes a Government document obtained outside the Freedom of Information Act.

There is no reason for us to believe that this is the intent of that section. But there is, by the same token, no evidence or no indication that there is a defense for a journalist who publishes a Government document obtained without resorting to the Freedom of Information Act.

We have a similar question about the offense of tampering with the Government record. Publishing a record should not be construed as tampering, but again it might be under this section where there are no affirmative journalist offenses inserted. We understand the committee is considering this problem and hopefully there will be improvements here.

Finally, in the extremely difficult area of the disposition of incompetent offenders, we have proposed several amendments. We recognize that the subject is complicated. We urge the committee to turn to the large number of experts in this field, particularly Professor Heathcote Wales of Georgetown University, who has been very helpful to us in formulating our position, and whom, we understand, will be appearing before the committee.

Although the chapter on the disposition of incompetent offenders is an improvement over existing law in some respects, we feel that in another respect, it improperly expands Federal authority to commit a person who is found not guilty by reason of insanity.

To avoid the prejudice of having the same authority commit a person who has been found not guilty for any reason, the commitment proceedings, we believe, should take place in State rather than in Federal court.

Obviously, there is a great deal more in my statement than I covered in this summary of its highlights. I would hope, Mr. Chairman, that the specific proposals we have made, which I will not go through here, will be seriously considered by the committee so that the bill can become a gain rather than a loss for civil liberties.

I would like to turn to Ms. Crisman now who will focus for you our thoughts on the sentencing structure. Before she testifies, let me point out that the ACLU national prison project has had a great deal of experience in the area of sentencing and incarceration and parole. Her testimony will reflect this experience.

Senator KENNEDY. Ms. Crisman, we are glad to have you here. You will have to excuse me for a moment. I do not want to be a name dropper, but I have a meeting with the President at 12:45 on airline deregulation.

So, we will take that testimony and come back at 2:15 and hear our final witness, Benjamin Ward. I have gone over your testimony. You are very close to the approach we are taking.

At that time we will have about 40 minutes. So, would you like to proceed, or you can come back at that time.

Ms. CRISMAN. I can proceed. I can highlight my testimony. Also, if there are questions, I will be happy to take them.

Senator KENNEDY. I must leave.

Please proceed.

Ms. CRISMAN. My name is Nancy Crisman and I am a staff attorney with the national prison project of the American Civil Liberties Union Foundation in Washington, D.C. I would like to thank the subcommittee for inviting me to testify. Through litigation and public education, the national prison project seeks to protect and strengthen prisoners' rights, to improve conditions in the Nation's prisons and to develop rational, less costly, more humane and more effective alternatives to incarceration. We are primarily a litigation project and it is from the lessons we have learned in that arena that I speak today.

Any analysis of the sentencing proposals now pending before this subcommittee must begin with an examination of the problems caused by the existing statutory framework. At present, offenders are sentenced to prison for an indeterminate length of time; neither the offender, nor the court, nor the public has any idea or any control over how long the offender will actually stay in prison. Individual judges exercise wide, virtually unfettered discretion in determining who should go to prison and how long a sentence should be. Offenders are not accorded even the most rudimentary due process when they are sentenced. The U.S. Parole Commission decides when a prisoner is ready to be released, a decision which most experts agree cannot be and has not been made in any statistically fair way.

The results of this system have been disastrous. Incarceration has been overused as a primary sanction and virtually all of our prisons are overcrowded. There is a vast disparity in sentences in violation of all notions of justice and fundamental fairness and which breeds hostility, distrust and disrespect for the entire criminal justice system.[1]

We commend the drafters of S. 1437 for taking the initial steps to remedy the problems of the present sentencing structure. We are particularly pleased that you have included a Federal Sentencing Commission, sentencing guidelines, reasons for sentences, and appellate review of sentences in the bill. However, the bill falls far short of solving the critical problems of sentencing reform and the present halfhearted attempt at reform may create as many problems as it solves. Our concerns are as follows:

ALTERNATIVES

Any attempt at sentencing reform must emphasize the use of alternatives to incarceration; S. 1437 does not. We overuse incarceration as a sanction in this country. We send a greater percentage of the men and women convicted of crimes to prison than any nation in Western Europe.[2] There is now wide agreement among experts that over 50 percent of the people presently incarcerated could be released to the community without increasing the chances that they would recidivate and without endangering the community.[3] In one of our recent cases, *Pugh* v. *Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), the Honorable Frank M. Johnson, Jr., Chief Judge of the U.S. District Court for the Middle District of Alabama, declared the entire Alabama prison system unconstitutional. As part of the court's order, and to remedy the unconstitutionality, a team of experts reevaluated every prisoner in the Alabama prison system and concluded that approximately 40 percent of those incarcerated could immediately or shortly be placed in the community.

In addition, the destructive and dehumanizing effect of overcrowded institutions on the people incarcerated in them is becoming more widely recognized.[4] Prisoners are forced to spend almost all of their

---

[1] Since the committee has already heard from some of the most outstanding experts in this field, I will not reiterate the documentation for these problems but refer the committee to the following: Fogel, "* * * We Are Living Proof * * *": A Justice Model for Corrections, Cincinnati: W. H. Anderson Co.: 1975; Frankel, "Criminal Sentences: Law Without Order," Hill and Wang, 1973; von Hirsch, "Doing Justice: The Choice of Punishments," (New York: Hill and Wang, 1976); Morris, "The Future of Imprisonment" (University of Chicago, 1974); O'Donnell, Churgin, Curtis, "Toward a Just and Effective Sentencing System," Praeger, 1977; Dershowitz, "Let the Punishment Fit the Crime" N.Y. Times Magazine (1975); Dershowitz, A. R. "Indeterminate Sentencing" University of Pennsylvania Law Review 23 (February 1974): 297–339; Frankel, "The Sentencing Morass and a Suggestion for Reform," Criminal Law Bulletin 3 (July–August 1967): 365–383; Harris, "Disquisition on the Need for a New Model for Criminal Sentencing Systems," 77 West Virginia L. Rev. 263 (1975); Illinois Law Enforcement Commission, Illinois Justice Model, Chicago, 1975; Twentieth Century Fund, Task Force on Criminal Sentencing, Fair and Certain Punishment (New York: McGraw-Hill, 1976).

[2] L.E.A.A., "Sourcebook of Criminal Justice Statistics," (1975).

[3] Goldfarb, After Conviction, New York: Simons and Schuster (1973); Mitford, Kind and Usual Punishment, New York: Alfred A. Knopf (1973); Morris, *supra;* National Council on Crime and Delinquency, "Policy Statement: The Non-Dangerous Offender Should Not Be Imprisoned," 19 Crime and Delinquency 449, 450 (1973); Struggle for Justice; A Report on Crime and Delinquency in America, Morganroth, Chairman, New York: Hill and Want (1971).

[4] Fogel, *supra;* Goffman, Asylums, Doubleday (1961); Morris, *supra;* Wilkins, Evaluation of Penal Resources, Random House (1969); Coleman, "Psychiatry in Prisons: Treatment or Punishment," 11 Psychiatric Opinion, June 1974; Berecochea, "The Cause, Cure, and Control of Crime, a Critique of the Indeterminate Sentence and Prison/Parole Systems," August 1972; Cummings and Monahan, "Social Policy Implications of the Inability to Predict Violence," 31 Journal of Social Issues, 153 (Nov. 2, 1975); Report of the Committee for the Study of Incarceration, Doing Justice, Chairman Charles Goodell (1976).

time idle, with litle or no privacy, subject to unbearable noise, in an atmosphere of hostility and in constant fear of assault. Institutional emphasis on impersonal regimentation and control is increased. Tension and violence skyrocket. In the short run, wide scale violence or rioting is inevitable. Over the longer team, prisoners are physically and psychologically debilitated, their progress toward rehabilitation destroyed and their chance of reentering society successfully is reduced.

In the same Alabama case mentioned above, after hearing evidence on almost every aspect of the entire State prison system, as well as extensive expert testimony, Judge Johnson found as a matter of fact that Alabama's prisons necessarily and inevitably made people worse. It is no wonder that national statistics reflect that a large percentage of those in prison will commit a new crime upon release and that most correctional experts now acknowledge that we do not know how to rehabilitate.[1]

The excessive use of incarceration in closed institutions in light of this data, is antithetical to the interests of society as a whole. It not only fails to protect society from crime and brutalizes all who are subjected to these conditions, but it actually increases the likelihood that those who enter the criminal justice system for the first time will return time and time again.

To alleviate this problem a sentencing statute must contain a presumption in favor of the use of alternatives to incarceration for all offenders except where surveillance in the community has already failed or where the offender's recorded criminal behavior clearly demonstrates that protection of society cannot be afforded in any other way.

Senate bill 1437 would permit sentencing alternatives to be used, but does not require them or even encourage them (§§ 2101, 2102, 2202). The bill should provide for a range of alternatives, such as fines, restitution, forfeiture, intermittent incarceration, community supervision and community service, and require the sentencing authority to consider each of these alternatives before imposing a sentence of imprisonment. Senate bill 1437 provides, as alternatives to imprisonment, only fines and probation (§§ 2101, 2202). It allows forfeiture notice to victims and restitution to be used only "in addition to" rather than in place of fines, probation or prison (§§ 2004, 2005, 2006).

We would urge this subcommittee to adopt the provisions of Senate bill 204 on this issue. Senate bill 204 creates a presumption in favor of the use of alternatives to incarceration except in certain specified instances (§§ 8, 9). It provides for a range of alternatives which can be imposed instead of incarceration.

SENTENCING RATIONALE

Any sentencing reform must set forth a coherent rationale for sentencing. It should eliminate standards which have been proven ineffective and allow only criteria related to the seriousness of the offense to be used when setting sentences.

---

[1] Goffman, *supra*; Kaufman, Prisons: The Judges Dilemma (1973); Morris, *supra*; Rothman, "Behavior Modification in Total Institutions," 5 Hastings Center Report 17 (February 1975); Rothman, "Decarcerating Prisoners and Patients," The Civil Liberties Review (Fall 1973). Washington Post, Interview with Norman Carlson, Director, Federal Bureau of Prisons, Washington Post, Apr. 13, 1975; see note 2, *supra*.

Several sections of S. 1437 permit sentences to be imposed for the purpose of providing the offender with "needed educational or vocational training, medical care or other correctional treatment" (§§ 101, 2003, 2102, 2202, 2302). The same criteria may be used to enhance the length of incarceration (§ 2302). Other sections allow the Sentencing Commission and Parole Commission to consider a defendant's education, vocational skills, mental, emotional and physical condition, employment record and family ties, when determining sentencing ranges and the date of release from prison (§§ 994, 3822, 3831). Another provision would make release from prison contingent on a finding that there is "no undue risk" that the offender will commit another crime or fail to conform to certain conditions of parole (§ 3831).

These criteria are totally unacceptable from both a correctional and a civil libertarian point of view. Current criminal justice data indicates that we do not know how to rehabilitate, or how to determine when a person has been rehabilitated. Almost every expert, including the Director of the Bureau of Prisons, agrees.[1]

The facts show that first, there is no proven correlation between participation in any prison program and lower recidivism rates.[2] Second, authorities agree that therapy or programs which are forced on an individual by the threat of the indeterminate sentence cannot be successful.[3] Third, parole boards and other professionals making determinations as to when people can be released from institutions cannot predict with any accuracy who will or will not commit another crime and that decisions based upon these predictions are wrong so frequently as to be considered completely arbitrary.[4]

Obviously, it is illogical and unjust to put someone in prison to do something to them that we do not know how to do—rehabilitate. Equally, it is illogical and unjust to make determinations as to how long a person must remain inside a prison based upon a determination of rehabilitation when we do not know how to make that decision in

---

[1] See note 5, *supra*.

[2] Glaser, "The Effectiveness of a Prison and Parole System" (1964); Moris, supra; Wilkins, supra; Robinson and Smith, "The Effectiveness of Correctional Programs," 17 "Crime and Delinquency" 67 (1971); Steele, A Model for the Imprisonment of Repetitively Violent Criminals," Center for "Studies in Criminal Justice," University of Chicago Law School (1974); Lipton, Martinson, Wilks, "The Effectiveness of Correctional Treatment" (1975); Martinson, "What Works" 35 Pub. Int. (1974).

[3] Bandura, "The Ethics and Social Purposes of Behavior Modification" (1974); Mattick, "Criminal, Justice and Society," Short (ed.) (1976); Morris, supra; Ayllon, 17 "Arizona Law Review" 12 (1975); Bazelon, (Chief Judge, U.S. Ct. of Appeals, for the District of Columbia), "Institutionalization, Deinstitutionalization and the Adversary Process," 75 "Columbia Law Review" 897 (June 1975); Meister, "A Visit to Patuxent, 'Participation is Voluntary . . .'" 5 "Hastings Center Report" 37 (February 1975); Opton, Jr., "Psychiatric Violence Against Prisoners: When Therapy Is Punishment," 45 Miss. L.J. 605 (1974); Wilkins, "Putting Treatment on Trial," 5 "Hastings Center Report" 35 (February 1975).

[4] Morris, *supra*; von Hirsch, *supra*; Cummings and Monahan, *supra*; Dershowitz, "The Psychiatrist's Power in Civil Commitment," "Psychology Today," February 1969; Diamond, "Psychiatric Prediction of Dangerousness," 123 University of Pennsylvania L.R. 439; Ennis and Litwak, "Psychiatry and the Presumption of Expertise," 62 Cal. Law Review 693 (May 1974); Hunt and Wiley, "Operation Baxtrom After One Year," 124 "American Journal of Psychiatry" 974 (1968); Kozol, Boucher and Garofalo, "The Diagnosis and Treatment of Dangerousness," 18 Crime and Delinquency 371 (1972); McGarry, "Massachusetts' Operation Baxtrom," Massachusetts Journal of Mental Health, spring 1974; Rubin, "Prediction of Dangerousness in Mentally Ill Criminals," 27 Arch General Psychiatry 397 (1972); Steadman, "Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry," Journal of Psychiatry and the Law, p. 409, Winter 1973; von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," 21 Buffalo L. Rev. 717 (1972); Wenk and Robinson, "Can Violence Be Predicted," 18 Crime and Delinquency 393 (1972); Project, "Parole Release Decisionmaking and the Sentencing Process," 81 Yale L.J. 810 (1973); Report of the American Psychiatric Association Task Force on Clinical Aspects of Violent Individuals (1974).

any objective way. The result of using these criteria can only create greater disparity and unfairness than already exist under the current system.

The "rehabilitation" criteria also present a serious threat to civil liberties. Obviously, the use of criteria which are inherently arbitrary and capricious to determine whether a person should go to prison or how long that person should stay in prison, raises serious due process problems. Moreover, using criteria like education, vocational skills, employment records, family and community ties to determine the freedom of offenders, a large percentage of whom are poor, undereducated and minorities, is grossly discriminatory and a violation of the 1st, 5th, 9th, and 14th amendments to the U.S. Constitution. Finally, permitting "prior criminal activity not resulting in convictions" to be used as a basis for sentencing decisions totally undermines the notion of a presumption of innocence which is fundamental to our criminal justice system and protected by the 5th and 11th amendments to the Constitution.

This is not to say that we must abandon rehabilitation efforts in prisons, only that the state of the art is such that no one can justly be sent to prison or kept in prison for the purpose of rehabilitation. Programs in prisons should be encouraged. In order to be successful, participation in the programs should be voluntary and not tied to release.

It is our firm belief that the only fair rationale for sentencing is what has been termed "just deserts." [1] The criteria for sentencing should be based on the seriousness of the individual's offense rather than on his or her need for rehabilitation or on the likelihood of recidivism.

Some of the criteria in the bill clearly do relate to the seriousness of the offense and can be measured with some degree of objectivity.[2] For example, "the nature and degree of harm caused by the offense," the offender's "role in the offense," "prior convictions" and "prior sentences" (§ 994). Senate bill 204 is limited to only "just deserts" criteria. We urge the subcommittee to similarly limit S. 1437.

FIXED SENTENCES

In order to limit judicial discretion and eliminate disparity in sentences, reform of our sentencing structure ought to establish a scheme for fixed or determinate sentences which grant the sentencing judge carefully defined power to modify a standard sentence only in cases involving certain specified aggravating or mitigating circumstances.

Senate bill 1437 will not accomplish these goals for two reasons: First, S. 1437 calls for the Sentencing Commission to establish a sentencing range for each category of defendant and each category of crime (§§ 994, 2301(b)). Depending on what that range is, this proposal could result in a wide variance in sentences. Moreover, S.

---

[1] Von Hirsch, *supra*.

[2] Some of the other criteria in S. 1437 for determining sentences bear no relation whatsoever to any legitimate interest of the criminal justice system. For example: (1) the community view of the gravity of the offense; (2) the public concern generated by the offense; (3) the current incidence of the offense in the community; (4) the degree of dependence upon criminal activity for a livelihood (§ 994). Each of these criteria is totally irrelevant to any objective determination of just punishment, is highly prejudicial to defendants, and in all likelihood will increase disparity in sentences.

1437 allows the judge to sentence outside the guidelines (§ 3836). Although such a sentence is appealable, it will still allow for a significant amount of disparity.

Several experts who have studied these problems recommend a system of presumptive sentences.[1] Under that system, for each gradation of seriousness of criminal behavior, a definite penalty— the "presumptive sentence"—would be set. Individuals convicted of crimes of that degree of seriousness would receive the presumptive sentence, unless there were special, carefully defined circumstances of aggravation or mitigation. For example, a second serious offense would be considered an aggravating circumstance, requiring a more severe sentence than the presumptive sentence. Senate bill 204 sets out a presumptive sentencing proposal and I urge that this provision of S. 204 be adopted.

The second reason S. 1437 will not eliminate sentence disparities is that it does not eliminate the parole process. While the guidelines and criteria established by the bill and the Commission may narrow a judge's sentenceng discretion, the amount of time a person will actually serve will continue to be determined by a separate entity—the Parole Commission.

We join with the Attorney General, the Director of the Bureau of Prisons, and many other experts who recommend that parole be abolished. However, we caution that if parole is abolished, any sentences established pursuant to a new sentencing bill must be short! Under our present system, a person is incarcerated for only a fraction of his or her maximum sentence. Under the Parole Reorganization Act even prisoners with life sentences are eligible for parole after no more than 10 years (18 U.S.C. 4205). In light of the debilitative effects of prisons, sentences under the new definite sentencing scheme should be no longer and proferably should be shorter than the time which is actually served under our present system. Again, only S. 204 seems to have been drafted with full awareness of these factors. It provides for a presumptive sentencing scheme and short sentences and we recommend that the subcommittee adopt its provisions.

If parole is maintained or phased out of existence instead of abolished, there is one provision of S. 1437 which must be eliminated. Section 2301 (c) allows a judge to make a prisoner parole ineligible for up to nine-tenths of his or her sentence. In our opinion, this is one of the most egregious provisions in the entire bill. If enacted, this provision could result in shockingly harsh sentences, on a scale far worse than anything we know today under our present system. Moreover, this draconian provision is contrary to all current correctional thought which, I indicated earlier, favors short sentences.

SENTENCE REDUCTIONS

If some sort of definite sentencing scheme is adopted, and if parole is eliminated, two types of correctional programs assume increased importance and should be supported in the bill—(1) a program providing prisoners with good time credits for discipline free behavior and (2) a program which permits the prisoner greater access to the community. We agree with the Director of the Bureau of Prisons that

[1] Frankel, *supra*; Morris, *supra*; von Hirsch, *supra*.

offenders, particularly prisoners serving long sentences, must be given some "light at the end of the tunnel." [1] Under our present system, good time credits normally reduce a prisoner's sentence by one-third. In addition, prison administrators find good time a useful tool for encouraging good behavior. The problem with the system as it now exists is that the granting and denying of good time is, to a large extent, discretionary and is often abused.

We suggest the bill be amended to include a system whereby a prisoner can earn a specified amount of good time for every day of good behavior. The good time should be vested and not subject to removal. A prisoner may be subject to losing prospective good time for a disciplinary infraction but no more than 15 days. Any serious intraprison infraction should be handled by a court of law, not by taking good time as a sanction.[2]

Senate bill 1437 also allows release from prison for a number of reasons, including establishing family ties, participation in training and educational programs and work, § 3822. A number of studies have shown that furlough programs can be highly effective as a correctional tool as well as safe for the community.[3] They help prisoners maintain important community ties, give them an opportunity to participate in educational and vocational programs which are not available inside prisons and provide prisoners with an opportunity to work, learn skills, and earn money. Furlough programs have been particularly useful for helping offenders going through the difficult transition period from prison to the community.

One concern of the people who oppose abolishing parole is that there will be no after care for offenders leaving prison. Obviously, many of these same services can be provided to prisoners through the furlough system. We therefore urge the subcommittee to make the furlough program as effective as possible. Specifically, we suggest that § 3822(a) should be amended to allow the 30-day furlough to be extended. Often the prisoner who is nearing release would like to participate in a job training program or educational opportunity which will take longer than 30 days. We also believe that § 3822(c)(2) must be eliminated. This section provides that a prisoner can be furloughed to a job only in trades in which there is not a surplus of available labor in the community. With our current level of unemployment, this provision would virtually preclude prisoners from obtaining jobs. The ability of an offender to find employment upon his or her release has been shown to be directly related to his or her ability to lead a crime-free life. Therefore, unnecessary barriers to the employment of offenders should be removed.

---

[1] Statement of Norman Carlson, Director, Federal Bureau of Prisons before the Senate Judiciary Committee on Criminal Laws and Procedures, June 8, 1977.

[2] The bill also provides mechanisms for early termination of probation, parole, and prison on the recommendation of the controlling authority of §§ 2104(c), 3834(f), 2302(c)). We have no objections to these provisions. However, we recommend that some sort of mechanism be added so that the probationer, parolee, or prisoner can initiate a request for reduction.

[3] Markley, "Furlough Programs and Conjugal Visiting in Adult Correctional Institutions" Federal probation March, 1973; Serrill, "Prison Furloughs in America" Corrections Magazine Vol. 1, No. 6, August 1975; Leclair,An analysis of recidivism rates among residents released from Massachusetts Correctional Institutions, Massachusetts Department of Correction, October, 1976; Rudolf and Esselstyn, "Evaluating Work Furlough", Federal probation June, 1973; "A Review of D.C. Department of Corrections Furlough Program, History and Performance", review, Dec. 31, 1974.

APPEALS

The provision of S. 1437 which permits the appeal of sentences is a significant step in eliminating the disparities and inequities which are now the bane of our sentencing system (§ 3725). However, under this section appeals may be taken only from sentences which are outside the guidelines. Any attempt to minimize disparity in sentences must permit appeals from all sentences. Sentences within the guidelines could also be too severe or too lenient. Any defendant should have the opportunity to challenge the application of the sentencing standards to his or her particular case as well as the validity of the sentencing standards themselves.

Limits on the appellate procedure were apparently drafted in order to prevent the courts from being flooded with appeals. However, this is a highly unlikely result. Any nonmeritorious appeals can be handled summarily by the traditional appellate court doctrines. Senate bill 204 permits appeals from all sentences and we believe its provisions should be adopted (§ 13).

We also believe that the section of S. 1437 which permits the Government to appeal sentences which are too lenient is highly questionable from both correctional and constitutional standpoints. As I indicated above, most criminologists agree that we overincarcerate. In our law and order society there is a tendency to give long sentences regardless of the fact that such sentences are probably not necessary to protect society and regardless of the fact that such sentences may actually debilitate the prisoner. From a correctional standpoint it is not a good idea to give the Government an additional mechanism to enhance sentences.

More importantly, we feel that this provision, which allows the Government a second chance at giving a defendant a more severe or longer sentence violates the spirit of the double jeopardy clause and raises serious questions of its constitutionality.

SENTENCING COMMISSION

There are several problems with the structure of the new Commission which we urge the subcommittee to change. Senate bill 1437 and S. 181 provide that the Judicial Conference of the United States should select Commission members and that the Commission itself should be part of the judicial branch (§ 991). It is our position that sentencing is not the concern of judges alone. Sentencing is an integral part of the entire criminal justice system. The appointing authority for the Commission should be one whose interest is broad enough to take all of the variables into account. We join with several others from whom you have already heard to suggest that the President, with the advice and consent of the Senate, should appoint the Commission. Senate bill 204 already provides for this type of appointment (§ 4).

Considering the breadth and difficulty of the task the Commission must accomplish, we also think the membership of the Commission should be as varied and accomplished as possible. Neither S. 1437 nor S. 204 address this problem. However, S. 181 provides that membership of the Commission should not be limited to judges but should

include practicing attorneys, criminologists, prison and parole authorities (§ 3802). This provision should be adopted. The Commission should also include exoffenders and prisoners in its membership.

Finally, we believe that the bill contains adequate review of Commission decisions. Congress has traditionally set Federal sentences. Although we believe that the complexity and scope of the presently proposed sentencing revision is much too complex and time consuming to be performed on the floor of Congress, we believe it is important that Congress maintain the ultimate veto power over the results of the Commission's work. Section 994(g) makes the sentencing standards promulgated by the Commission subject to congressional disapproval. This seems to be a satisfactory balance of interests.

ADMINISTRATIVE PROCEDURE ACT AND ACCESS TO INFORMATION

The ACLU is particularly disturbed that S. 1437 would exempt the Bureau of Prisons and the Parole Commission from the Administrative Procedure Act and its subchapters, the Freedom of Information Act and the Privacy Act (§§ 3825, 3837 respectively). Under current law, both agencies are subject to all three acts except the Parole Board is exempted from the adjudication sections of the APA (18 U.S.C. § 4218).

The Administrative Procedure Act is intended to insure fairness and consideration of important administrative determinations, to make public information about Government decisions available and to prevent unwarranted invasions of personal privacy. It is even more important that these protections be afforded to prisoners because the agencies, to which they are subject, control every aspect of their daily lives, as well as their ultimate freedom.

Previously, the Bureau of Prisons and the Parole Commission attempted to avoid their responsibilities under these acts by claiming that they were not agencies. After protracted litigation, several courts have held that the two organizations are subject to the acts.[1] The courts found that the rules and practices of these two agencies have such a staggering impact on the life of a prisoner and his or her family that they are entitled to the protections afforded by these acts. The courts also found that the general public as well has an interest in the administration of these agencies and that the statutes should be followed. These hard fought battles should not be reversed by this legislation.

Questions about the availability of information are raised by several other sections of the bill as well. Sections 2002 (b) and (c), 3725(c), 3832(a), and 3833(c) concern presentence, preparole, and other sentencing materials. These sections provide for the gathering and use of these materials at every level of decisionmaking. They require that the materials be made available to the Government, the courts, and to prison, probation, and parole authorities. However, they do not provide that the materials should be made available to the individual. Each of these sections should be amended to require that all

[1] *Ramer* v. *Saxbe*, 552 F. 2d 695 (D.C. Cir. 1975) ; *Pickus* v. *U.S. Board of Parole*, 507 F. 2d 1107 (D.C. Cir. 1974) ; *Hrynko* v. *Crawford*, 402 F. Supp. 1083 (E.D. Pa. 1975) ; *Philadelphia Newspapers, Inc.* v. *U.S. Department of Justice*, 405 F. Supp. 789 (E.D. Pa. 1975) ; *National Prison Project* v. *Sigler*, 390 F. Supp. 789 (D.D.C. 1975).

of these materials should be made available to the defendant and to his or her counsel subject to any previously existing statutory restrictions.

PROCEDURAL FAIRNESS

Several sections of the bill fail to meet minimum requirements of procedural due process and should be amended. First, the bill permits the conditions and length of an offender's probation or parole (if it continues to exist) to be modified, but it provides no procedures for a prisoner to participate in or state his or her reasons for objecting to the decision. Fundamental fairness requires that an offender should, at a minimum, have the opportunity to have a hearing, present evidence, and be represented by counsel before such a decision can be made—sections 2103(c), 2104(d), 3834(g).

Second, the bill is vague as to what due process procedures are to be accorded to a probationer whose probation is being revoked—section 2105. When he or she is taken into custody, section 3806, a bail hearing should be provided. When he or she is subject to revocation, the offender should be entitled to a hearing, the opportunity to present evidence, and to be represented by counsel.

The procedures for revocation of parole are equally lacking in due process, section 3835. Where a person's freedom is concerned full due process should be accorded. The bill should be amended as follows: (1) An offender taken into custody should be given an opportunity for a bail hearing since he or she can be held in custody well over 60 days before the decision on revocation is made, section 3835(c); (2) The parolee should be provided with warnings and counsel at the preliminary hearing stage, section 3835(b): (3) Hearsay testimony should not be permitted, section 3835(d). For similar reasons we object to section 2803 which provides for a contingent parole term and allows a person to be sent to jail for up to 90 days without having committed a crime and without due process.

CONDITIONS OF PROBATION AND PAROLE

Several of the conditions to which the bill permits a probationer or parolee to be subjected are violative of the Constitution and should be eliminated. Specifically, sections 2103(b)(7) and 3834(c) provide that a parolee may be ordered to "refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons." This provision infringes upon the basic constitutional right to freedom of association. Section 2103(b)(3) as it is referred to in section 3834 allows a probationer or parolee to be ordered "to refrain from posessing a firearm, destructive device, or other dangerous weapon." It is our opinion that "destructive device" is unnecessarily vague, subject to abuse and therefore a violation of the Constitution.

CONCLUSION

In conclusion, I commend the subcommittee for taking the important initial steps toward sentencing reform. However, the bill as it is presently drafted fails to solve many of the most fundamental prob-

lems which have motivated the call for reform. I urge this subcommittee to make the necessary amendments, or in the alternative, to adopt S. 204.

Mr. FEINBERG. Senator Kennedy did want two or three questions asked. I would like to ask them of you and your response will be part of the record.

The first is this. There is the recommendation that there be presumption in favor of probation. How do you justify that in light of an approach taken in S. 1437 that there should be no presumption either way and that the Sentencing Commission, in promulgating its guidelines, shall decide appropriate sentences in appropriate cases without regard to any presumption either in favor of probation or in favor of imprisonment?

Ms. CRISMAN. In fact, the Commission, when setting its guidelines, is going to come up with a set of criteria under which we can assess the seriousness of crimes. I assume that applying those criteria, is, in fact, going to establish presumptions.

In other words, there are clearly some crimes that are less heinous than others.

Mr. FEINBERG. Should not the Commission do that?

Ms. CRISMAN. Yes, but we are simply suggesting that the bill itself ought to give some guidance to the Commission based on what we currently know about prisons and prisoners.

Current studies of sentencing schemes, as they are applied throughout this country, show us that we are grossly over-incarcerating. Virtually 99 percent of our prisons are overcrowded, Federal prisons, as well as almost every State prison system. There are experts who have analyzed those populations and determined that almost 50 percent of those populations can be reduced and eliminated and can be put out in the community safely. We are paying huge amounts of money to incarcerate those people. We are incarcerating them in prisons which are, in fact, debilitating them, as Judge Johnson found in *Pugh* v. *Locke*.

Interestingly enough, part of his order in that case was to send in experts to analyze the population. They determined that 40 percent of the prisoners could be, safely put out on the streets. They are in the process of doing that now. That is the only way that the Alabama prison system is going to continue.

You are hearing people like the Parole Commissioner tell you that one of the functions of the current parole board is to take people out of prisons, that is, to operate at the other end of the system and reduce disparity by reducing overcrowding in our systems.

We are suggesting to you that if the Commission is abolished, you will have to have a presumption right in that bill that is going to do something about the overcrowded status of our prisons, that is a presumption in favor of alternatives.

Mr. FEINBERG. Let me ask you one other question which has been on Senator Kennedy's mind, and a lot of other people's minds as well.

What about the argument that has been made in recent weeks that perhaps this bill and the statement of the ACLU goes too much the other way in the sentencing area.

The American Civil Liberties Union, by coming out for the abolition of the Parole Board, and by stating very clearly that rehabilitation should not be a function of imprisonment, or the purpose of imprisonment, then what about the argument that some people are making?

I am talking about Professor Vorenberg at the Harvard Law School, for example. The argument is that we are all too quick to push this new approach and that perhaps rehabilitation should be kept in the bill the way it is in the bill, that is, to the extent that the Commission finds rehabilitation applicable in the next few years and that there is a concern that we may be over-reacting the other way to what all would agree would be unacceptable situations today.

You are not the first witness who has said this, but I think what runs through the concerns of people like Professor Vorenberg, is the fear that we do not know enough about all of this. The ACLU, or anybody else, does not really know enough about this. It could be a fad. We are throwing out the parole boards and rehabilitation is out. It is strange that everyone is saying that.

How do you react to a statement like that? He is saying:

> Hey, wait a minute. Let us leave rehabilitation in to the extent that it might be found to be applicable. Let us gradually phase out the Parole Board, but let us not willy-nilly abolish parole, because in another 3 years or 4 years or 5 years there may be another approach to sentencing that we have not even begun to deal with here today.

How do you react to that?

Ms. CRISMAN. First, any law you draft can subsequently be amended. I think that you are well aware that the proposed bills call for the setting up of a commission which is going to be packed full of experts who are going to continue to analyze the data as it comes in.

I assume that as science develops and as our research develops, and as we find out what works and does not work, we will modify our legislation.

Our major point is this. There is every indication right now that rehabilitation does not work. It is an incredible abuse of discretion to pretend to send someone to prison to do something that we do not know how to do.

Mr. FEINBERG. I agree.

Ms. CRISMAN. It is equally abusive to use this term "rehabilitation" to determine the length of time a person would spend in prison. There are innumerable studies which I have cited in my written testimony which indicate that any kind of decisionmaking board, when they look at any institutionalized population and say, "This guy is cured and this guy is not cured and we are going to let him out and not let the other one out," is simply guessing. They have no idea of what they are doing and their judgments have been proven inaccurate up to 75 percent. It is simply not a decision that we know how to make and should not be included in a sentencing guideline.

We are not saying that we should lock criminals away in warehouses forever. There have got to be programs inside prisons. Prison programs could be a lot better than they are today. If we reduced the population inside prisons we would have more resources to spend on that population. Then we might accomplish more.

Mr. FEINBERG. A technical question: Would you be satisfied with carrying forward current law concerning application of the Adminis-

trative Procedures Act to the Bureau of Prisons and the Parole Commission?

Ms. CRISMAN. Yes, we would. We have litigated several cases on that. That is the reason we have taken this position. We do not want our cases reversed by legislation.

Mr. FEINBERG. As Senator Kennedy stated, we will pick up with our last witness at 2:15.

The committee will stand in recess until that time.

AFTERNOON SESSION

Senator KENNEDY. The subcommittee will come to order.

We want to welcome Benjamin Ward, who is the commissioner of the Department of Correctional Services in the State of New York. Probably no State has more difficulty or complex problems than the State of New York in dealing with the whole system of criminal justice.

We know that Benjamin Ward made a very special effort to be with us. He came overnight from Florida to join us. It has been a long night and day for him. I apologize to him for the delay, but look forward to your testimony.

STATEMENT OF BENJAMIN WARD, COMMISSIONER, DEPARTMENT OF CORRECTIONAL SERVICES, STATE OF NEW YORK

Mr. WARD. Thank you very much, Mr. Chairman. I thank you for the opportunity to testify on S. 1437.

Just by way of background, since I am a State correctional commissioner, I thought I might talk a moment about New York State.

We are probably the third largest correctional system in the State systems. We have some 18,300 prisoners and over 16,000 parolees and over 11,000 employees in the correctional system, 6,000 of whom are correctional officers.

Field parole services are under my jurisdiction and until the last few years the parole board as well was under the direction of the commissioner of corrections and now it is split out as a separate entity.

While I have been involved in criminal justice for more than 30 years, I currently am involved in one aspect of criminal justice—corrections. My concern today is the sentencing portion and the parole portion of the bill S. 1437.

I am particularly pleased to be here today because I am a black State commissioner of corrections, and to my knowledge I am the only black State commissioner of corrections in this country at this time, although your State [Massachusetts] at one time did have a black commissioner. That ought not to be important, but in this country, unfortunately, it is important.

I know how difficult it is for you as well as State legislators to deal with the problems of rising crime without appearing to do things that have racial overtones, particularly where so many of the Nation's prison inmates are black, brown, or red. I know it is difficult to advocate change, particularly when that change admits failure of a long-cherished scheme of sentencing and correctional theory that well-intentioned men designed to help the offender without undue harassment and punishment.

If my voice and some notoriety can make your task easier, then I am happy to be with you today.

Increasingly, the fundamental precepts of corrections are being subjected to intense scrutiny.

By the way, I would like to ask that my full statement be included in the record.

Senator KENNEDY. It will be included as if read.

[The material follows:]

THE INDETERMINATE SENTENCE: A COMMENTARY

(By Commissioner Benjamin Ward. New York State Department of Correctional Services)

Increasingly the fundamental precepts of corrections are being subjected to intense scrutiny.

Since corrections is a part of the criminal justice system, should it not operate under the basic principles of justice?

Is it sufficient to state that since corrections is in the business of rehabilitation, the question of a justice base has no proper meaning in the discipline of corrections?

Many factors have led to the reexamination of the basic precepts of corrections: the civil rights movement of the 1960's; the Viet Nam War: the erosion of the judicial "hands-off" policy toward corrections: the advent of Watergate: and, most importantly, the decades of the failure of corrections to achieve the rehabilitation of offenders.

The rehabilitation of offenders as a proper goal of corrections was not open to question for almost a hundred years following the Declaration of Principles of the National Prison Congress of October 1879 at Cincinnati, Ohio.[1]

The indeterminate sentence was the vehicle through which the new penology would be implanted.[2]

In the decade of the the seventies, the indeterminate sentence has come under especially severe attack.

In the Nineteenth Century, Americans, armed with a new conscience, with the humanitarian and rational ideals of the Enlightenment, and with the "can-do" spirit of a young nation, faced the problem of what to do with its deviant members, the criminals and the mentally ill. They responded by constructing asylums and prisons. Mental hospitals and prisons were developed at approximately the same time in America and their purposes, construction, organization, and methods significantly influenced each other.[3]

Although it was never fully practiced, corrections borrowed from the medical model.[4] Reception, classification, rehabilitation, and parole were the analogues of admission, diagnosis, treatment, and discharge to out-patient status.

Despite the absence of objective physiological conditions, "criminality" was inferred from criminal acts, and the offender was seen as the victim of a treatable malady.[5] Treatment, commonly called rehabilitation, required the development of an individualized treatment plan. Corrections became offender-oriented and punishment would henceforth fit the criminal rather than the crime.

---

[1] David Fogel. ". . . *We Are the Living Proof . . .*": *The Justice Model for Corrections* (Cincinnati: The W. H. Anderson Company, 1975, p. 32.

[2] *Ibid.*, p. 32.

[3] See David J. Rothman, *The Discovery of the Asylum': Social Order in the New Republic* (Boston: Little, Brown and Company), 1971. Also see Harry E. Allen and Clifford E. Simonsen, *Corrections in America: An Introduction* (Beverly Hills: Glenco Press, 1975) p. 344.

[4] "The Indeterminate sentence has always been justified by analogy to other forms of Indeterminate confinement, such as commitment of the mentally ill. Cesare Lombroso directly analogized Indeterminate imprisonment of the 'born criminal' to confinement of the insane." Alan M. Dershowitz, "Background Paper," *Fair and Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing* (New York: McGraw-Hill, 1976), p. 98.

[5] Cf. Robert W. Balch, "The Medical Model of Delinquency: Theoretical, Practical, and Ethical Implications," *Crime and Delinquency* (Vol. 21, No. 2, April 1975), p. 117.

With regard to the lack of physical manifestations of criminality, it will be recalled that the 19th Century penologist Cesare Lombroso attempted to establish the existence of objective physiological conditions or stigmata of criminality.

The prison sentence, now seen as a temporal framework within which to work a cure, acquired some of the flexibility of medicine where confinement to a hospital for an arbitrary "flat-time" was clearly absurd.[6] The power to set the prison term was transferred from the legislative and judicial to the correctional administrators of the executive branch.

In 1847, S. J. May, a leading prison reformer, stated the argument as follows: "You ask me for how long a time he should be sentenced to such confinement? Obviously, it seems to me, until the evil disposition is removed from his heart; until his disqualification to go at large no longer exists; that is, until he is a reformed man. How long this may be, no human sagacity certainly may predetermine. I have therefore for many years been of the opinion that no discretion should be conferred on our judges in regard to the length of a convict's confinement; that no term of the time should be affixed to any sentence of the court. The offender should be adjudged to undergo the duress and discipline of the prison-house, not for weeks, months, or years, but until that end for which alone he should be put there is accomplished; that is, until reformation has evidently been affected." [7]

A resolution to replace "peremptory" sentences, "measured by mere lapse of time," with "those of indeterminate duration. . .limited only by satisfactory proof of reformation" was unanimously adopted at the 1870 National Prison Congress.[8] The resolution stated that "with men of ability and experience at the head of our penal establishments, holding their offices during good behavior, we believe that it will be little, if at all, more difficult to judge correctly as to the moral cure of a criminal, than it is of the mental cure of a lunatic." [9]

As an enlightened means to secure public protection both through the reformation of the offender and his incapacitation for so long as he was considered dangerous, the principle of the indeterminate sentence was widely adopted. Although the "pure," totally open-ended indeterminate sentence of one day to life was rarely authorized in law and more rarely imposed ,every state of the union had some measure of indeterminacy by the 1970's.[10] Suddenly, we are witnessing the beginning of a retreat.

The indeterminate sentence can be described as a noble experiment that has failed. After decades of experience, there is still no evidence in support of the hypothesis that criminals are sick, that we can treat them, or that we can determine the moment of cure.[11] Stripped of its theoretical basis, the indeterminate sentence serves only to increase the length and disparity of sentences, and is a cause of frustration for inmates and administrators. It undermines the ends of criminal justice by obscuring the nexus or link between crime and punishment and by enabling unjust discretionary treatment of offenders.

The indeterminate sentence often amounts to indefinite preventive detention.[12] In most jurisdictions, "the principal consideration in the decision to grant or deny parole is the probability that the inmate will violate the criminal law if he is released." [13] Aside from the ethical question of whether punishment to prevent uncommitted crimes is a right of the State, predictive techniques are not sufficiently advanced to allow the releasing authority to make this decision with acceptable accuracy. Research indicates that in order to detain the truly dangerous, a great many non-dangerous persons must also be detained.[14]

---

[6] *Ibid.*, p. 128.

[7] Dershowitz, *op. cit.* (note 4), pp. 90–91.

[8] From the *Congress of Corrections Proceedings*, quoted in Jessica Mitford, *Kind and Usual Punishment* (New York: Alfred A. Knopf, 1973), p. 80.

[9] Mitford, *ibid.*, pp. 80–81.

[10] J. Foster, M. Kannensohn, J. White, T. Henderson, S. Werner, J. Weber, and W. Howard, *Definite Sentencing: An Examination of Proposals in Four States* (Lexington, Kentucky: The Council of *State Governments*, 1976), p. 5.

[11] Cf. Marvin E. Frankel, *Criminal Sentences: Law Without Order* (New York: Hill and Wang, 1972), pp. 89–91.

[12] ". . . the concept of preventive detention has for a century been the raison d'etre for a system of indeterminate sentencing. Any prisoner denied leniency by a judge or parole board is likely to be imprisoned under a policy of preventive detention . . . for what is probably the majority, confinement is the result of a decision that the prisoner is not yet safe enough to release." American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America* (New York: Hill and Wang, 1971), p. 76.

[13] Robert O. Dawson, *Sentencing: The Decision as to Type, Length, and Conditions of Sentenced: The Report of the American Bar Foundation's Survey of the Administration of Criminal Justice in the United States* (Boston: Little, Brown and Company, 1969), p. 263.

[14] See Chapter 3, "*Predictive Restraint*," *Andrew von Hirsch, Doing Justice: The Choice of Punishments, Report of the Committee for the Study of Incarceration* (New York: Hill and Wang, 1976), and Norval Morris, *The Future of Imprisonment* (Chicago: The University of Chicago Press, 1974), p. 34 and pp. 66–73.

Professor Hans Toch presents the argument succinctly: "Followup studies of parolees across the country tell us . . . that one percent of parolees formerly imprisoned for homicide commit a new murder, and one percent of paroled rapists rape again . . . it is true that one could prevent *some* murders and rapes by refusing to parole all men convicted of such offenses. But as a consequence of this strategy, 99 persons would have been erroneously detained . . . to neutralize one individual who would repeat his offense." [15]

Any offender-oriented sentencing system requires that a great deal of discretion be allocated to the sentencing authorities. While I feel that a system with no room for discretion would be appropriate only in a world peopled by robots, we must recognize that unbridled discretion is certain to result in sentencing disparity and other abuses.

Discretion is supposed to make allowances for differences in attitudes, circumstances, and potential of offenders; in practice, however, it may reflect the attitudes, circumstancse, and prejudices of criminal justice practitioners, be they policemen, judges, wardens, case-workers, or parole commissioners. In an experiment conducted at the University of California at Los Angeles, a sample of students with clean driving records placed Black Panther bumper stickers on their automobiles. "The experiment had to be terminated after several weeks because the $1,000 fund that had been set aside to pay fines had been exhausted by the immediate rash of tickets received by the students." [16]

Judge Marvin E. Frankel has said that sentences are "not so much in terms of defendants, but mainly in terms of the wide spectrums of character, bias, neurosis, and daily vagary encountered among occupants of the trial bench." [17]

The discretion of parole boards are in a sense lawless because most are not regulated by specific rules, criteria or guidelines. Decisions are generally not appealable, and even if they were, appeal of a decision based on broad criteria of none at all is meaningless.

The danger of abuse increases when discretion, in the name of individualized treatment, is conferred on bureaucratic agencies. As Caleb Foote noted in his study of parole in California, there is a tendency to compromise among a variety of conflicting interests including, in addition to the needs of the offender, "political pressure . . . cooperation with law enforcement and prosecution . . . the management interests of correctional bureaucracy . . . the pulse of seething unrest in inmate populations . . . widely divergent views (of colleagues) . . . budget priorities (and) administrative polices. . . ." [18]

Even where discretion is not abused, it will be perceived as arbitrary and discriminatory, with equally troublesome consequences for correction officials.

Although the indeterminate sentence was intended to promote the rehabilitative ideal,, a number of observers feel that, because it is perceived as unfair in its implementation, it mitigates against the achievement of respect for the law,[19] and because release is in theory based on rehabilitation, it encourages insincere program participation, thereby diluting the quality and effectiveness of the programs. Prisons become theaters, inmates are the actors and parole boards, the critics.[20]

While rehabilitation, the cornerstone of the indeterminate sentence, has not generally been achieved, there has been an increase in the length of the sentences. Although existing evidence is inconclusive, it is probable that the indeterminate sentence has produced an increase in the average time actually served,[21] and many offenders serve more time (though some serve less) than they would have under a definite sentence structure. Of greater concern should be the fact that the additional time served is often for reasons unrelated to the offense for which the inmate was incarcerated (e.g., predicted dangerousness, failure to participate in institutional programs, or political pressures on the releasing authority).

---

[15] Hans Toch, *Police, Prisons, and the Problem of Violence* (Washington, U.S. Government Printing Office, 1977), p. 92.
[16] American Friends Service Committee, *op. cit.* (note 12), p. 130.
[17] Frankel, *op. cit.* (note 11), p. 21.
[18] Cited in von Hirsch, *op. cit.* (note 14), p. 30.
[19] Cf. Morris: ". . . there is at present such a pervading sense within prison of the injustice of sentencing that any rehabilitative efforts behind the walls are seriously inhibited", (*op. cit.*, note 14, p. 50).
[20] Fogel, *op. cit.*, (note 1), p. 201.
[21] See Fogel, *op. cit.* (note 1), pp. 194–195; Dershowitz, *op. cit.* (note 4), pp. 122–123; American Friends Service Committee, *op. cit.*, (note 12), p. 85; and Morris, *op. cit.* (note 14), p. 48.

The indeterminate sentence tends to sever the link of nexus between crime and punishment, and in so doing undermines the entire justice system. By diffusing responsibility for sentence length, reference by any of the participants (offender, victim, law-enforcement, judiciary, paroling authority) or the public to the reasons for punishment is difficult. Indeed, the differing perspectives of the judge (retrospective) and the parole board (prospective) dictate that there be more than one reason, with the perception that there is no reason. Tailoring of the punishment to the offender rather than the offense breaks the link. Any deterrent effect, special or general, of the sentence is weakened as punishment is terminated or continued for what the offender is rather than for what he has done.[22] Even the retributive effect is dissipated. These unfortunate effects are magnified as the decision concerning the length of the sentence is further removed in time from the commission of the offense.

In addition to the theoretical difficulties of the indeterminate sentence, it creates practical management problems. Administrators, as well as inmates, are aggrieved by the uncertainty of the time to be served. When the correctional agency can only guess at the inmate's release date, the development of a realistic program plan is difficult. There is no point in enrolling an inmate in a treatment program if, after completion, the effect will wear off with years of continued imprisonment. Alternately, it is a waste of resources to enroll an inmate in a program if he will be released prior to completion.

But the chief management problem is that the indeterminate sentence is a source of inmate discontent. The uncertainty of the release date may be a punishment in itself.[23]

Interestingly, Zebulon R. Brockway, one of the pioneer advocates of the indeterminate sentence, recognized this but felt that it was beneficial. "The indeterminateness of the sentence," he said, "breeds discontent, breeds purposefulness, and prompts to a new exertion. Captivity, always irksome, is now increasingly so, because of the duty and responsibility of shortening it and of modifying any undesirable present condition of it devolves upon the prisoner himself, and again, by the active exactions of the standards and criterion to which he must attain." [24]

Modern observers agree that uncertainty renders captivity more irksome, but do not agree that this is desirable. Whatever contribution the torture of suspense may make to prison discipline, it is more than offset by its creation of inmate frustration and aggression.[25] After the 1971 riot at Attica, where 43 men died in the retaking of the prison, the McKay Commission reported that "the operation of the parole system was a primary source of tension and bitterness within the walls." [26] My experience in speaking with prisoners at Attica and other New York State correctional facilities indicates that this is still true.

As a result of perceived inequities in the nation's sentencing policies, recent years have witnessed an emerging call for a narrowing of discretion and disparity. In 1962, the American Law Institute developed a Model Penal Code. The Code's most significant achievement for corrections was the development of statutory criteria for sentencing decisions.[27]

---

[22] Federal Judge Constance Baker Motley observes that "punishment is an effective device for altering conduct only if it is applied fairly and as a direct sanction against the conduct which is sought to be punished . . . By punishing the defendant for what he is rather than what he has done, some sentences loosen what may already be a fragile tie between the defendant and society." Constance Baker Motley, "Criminal Law: 'Law and Order' and the Criminal Justice System," in Telford Taylor, Constance Baker Motely, and James K. Feibleman, *Perspectives on Justice* (Evanston: Northwestern University Press, 1975), pp. 69–70.

[23] "The growing evidence of prisoner sentiment . . . indicate that the inmate experiences as cruel and degrading the command that he remain in custody for some uncertain period, while his keepers study him, grade him in secret, and decide if and when he may be let go . . . The uncertainly of the indeterminate sentence is experienced as a steadily galling affliction." Frankel, *op. cit.* (note 11), pp. 96–97.

[24] Cited in Mitford, *op. cit.* (note 8), pp. 81–82.

[25] Cf. Foster, *et al:* "Bitterness over unequal sentence lengths as well as tensions and frustrations arising from the uncertainties and irrationalities of the parole process are cited by correctional administrators, as well as prisoners, as a major contributor to violence within correctional institutions. Overcrowding, lack of adequate medical services, or poor food are secondary sources of prisoner grievances compared to the resentment engendered by the indefinite sentence. The cited violence was not limited to organized or spontaneous prison riots against correctional authorities; individual, random acts of violence against prison guards and other prisoners have been the more prevalent expression of frustration and outrage." Foster *et al*, *op. cit.* (note 10), p. 10.

[26] *Attica: The Official Report of the New York State Special Commission on Attica* (New York: Bantam Books, 1972), p. 93. The report also concluded that "the existing procedure merely confirms to inmates . . . that the system is indeed capricious and demeaning" (p. 98).

[27] National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (Washington: United States Government Printing Office, 1973), p. 549.

In 1969, the American Bar Association expanded on the Model Penal Code along traditional indeterminate lines. While proposing generally low maximum sentences and limiting judicial discretion (with a provision for appellate review of sentences), the principle of indeterminacy was expressly preserved.[28]

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals issued its report on corrections. Again, judicial discretion was limited by relatively low maximums and strict guidelines for deviating from sentencing norms. Strict definitions, for example, of persistent felony offenders, professional criminals, and dangerous offenders were developed.[29]

All three models substantially circumscribe the discretion of judges and parole boards. However, inasmuch as indeterminacy is retained, each model continues uncertainty and diminishes the essential crime-punishment link.

In the past few years, a variety of proposals for the elimination or reduction of indeterminacy have been published. They go by a variety of names—the Justice Model, the Just Deserts Model, Presumptive Sentencing—but they are substantially consistent in their aims and strategies.

The Quakers, more than anyone else, were responsible for the development of the American correctional system. It would be ironic—were it not that the Quakers have never forsaken their interest in offenders—that the American Friends Service Committee attacked the prison system in an influential monograph entitled *Struggle for Justice* (1971). The monograph focused on the inappropriate application of a medical model, the dangers of unfettered discretion, and recommended the abolition of the indeterminate sentence. Punishment should "fit the crime" and should be the least restrictive of alternatives. Rehabilitative services were to be made available on a truly voluntary basic since participation is no longer to be a consideration in the determination to release.[30]

In 1972, Federal Judge Marvin E. Frankel published *Criminal Sentences: Law Without Order*. Judge Frankel's central theme is that the sentencing and release functions, exercised in an atmosphere of invisibility and unchecked by rule, are intolerably disparate. Judge Frankel calls for subjecting the discretion of judges and parole boards to clear checks. While the indeterminate sentence may in some cases be proper, it "has produced more cruelty and injustice than the benefits its supporters envisage," [31] and is "usually evil and unwarranted." [32] The "presumption ought always to be in favor of a definite sentence, known and justified on the day of sentencing (and probably much shorter than our sentences tend to run). There should be a burden of justifying an indeterminate sentence in any particular case—a burden to be satisfied only by concrete reasons and a concrete program for the defendant in that case." [33]

In 1973, in a lecture at the Northwestern University School of Law, another Federal Judge, the Hon. Constance Baker Motley, reiterated that the practice of sentencing and release decisions are without law and order. She proposes fixed sentences for purposes of punishment and deterrence without reference to rehabilitation.[34]

In 1974, Norval Morris in *The Future of Imprisonment* recommended that punishment be based on "desert," a concept similar to but not synonymous with retribution, which links crime and punishment and limits the allocation and severity of punishment.[35] While rehabilitation is not a purpose of the prison sanction, services should be offered; the emphasis is changed from "coerced cure" to "facilitated change." [36] While "predicted dangerousness" is not to be considered in the decision to imprison (or in the decision to release), "graduated testing of increased increments of freedom must be substituted for parole predictions of suitbility for release." [37]

---

[28] *Comparative Analysis of the Standards and Goals of the National Advisory Commission on Criminal Justice Standards and Goals with Standards for Criminal Justice of the American Bar Association* (Second Printing, June 1974), pp. 386–470.

[29] National Advisory Commission, *op. cit.*, (note 27), Chapter 5, "Sentencing," pp. 111–196.

[30] American Friends Service Committee, *op. cit.* (note 12).

[31] Frankel, *op. cit.* (note 11), p .88.

[32] *Ibid*., p. 99.

[33] *Ibid.*, p. 98.

[34] Motley, *op. cit.* (note 22), pp. 66–67.

[35] Morris, *op. cit.* (note 14), pp. 73–76.

[36] *Ibid.*, pp. 13–20.

[37] *Ibid.*, pp. 41–43. Milton Rector, according to David Fogel, suggests a similar technique: "the periodic mandatory release of prisoners with assessments of how the prisoner fares on those furloughs as determination of readiness-for-release decisions." Fogel, *op. cit.* (note 1), note on p. 241.

David Fogel's well-known proposal that corrections be based on a due process or "justice" model was published in 1975. In the pursuit of justice, Fogel advocates a return to totally "flat time" sentences for different classes of felonies. Sentence may be reduced through good time, earned at the rate of a day-for-a-day and vested. Parole boards would be abolished. Legislatively fixed sentences for each offense category would be reduced or increased by the court, within predetermined limits and under specified circumstances indicating aggravation or mitigation.[38]

Two committee reports came out in 1976. Although the Report of the Committee for the Study of Incarceration, written by Andrew von Hirsch, is popularly called the "Commensurate Deserts" model, and the Twentieth Century Fund Task Force on Criminal Sentencing calls its proposal "Presumptive Sentencing," they are very similar in aim and substance. Imposition of the criminal is justified, and limited, on the grounds that the specific criminal act, coupled with the interests of the public at large, merits punishment. Desert is posited as a requirement of justice.

Each model recommends that conviction for a particular crime "presumes" a given sentence. Variation from the presumptive, legislatively fixed sentence, may be made on the basis of prior convictions and specified aggravating or mitigating standards.[39]

Just deserts, the justice model, and presumptive sentencing severely curtail judicial and administrative discretion, make the punishment fit the crime, and generally admit good time in the interests of prison discipline.

Maine adopted definite sentencing effective March 1, 1976. Indiana has legislatively passed and California has enacted determinate sentencing. Bills are pending in Alaska, Colorado, Connecticut, Illinois, Ohio and Washington. In Florida, South Dakota, and Virginia, legislative commissions are studying fixed prison terms.[40]. United States Senators Hart and Javits recently proposed (United States Senate Bill S. 204) that the Federal criminal justice system adopt a presumptive sentencing model. Senator Edward Kennedy and Senator John L. McClellan have a similar bill (United States Senate Bill 1437).

While it is difficult to summarize, the new models generally establish crime categories to each of which a scale of terms is attached. Most of the models assume a fixed sentence at a particular point on the scale, and specify the circumstances (such as prior convictions or use of a weapon) under which the sentence may be set at a higher or lower point within the range. In each model, sentences are subject to reduction through the application of good time credits.

According to David Fogel, "an important chorus . . . is developing, seeking a sensible sentencing scheme." [41] The American Law Institute's *Model Penal Code;* the National Council on Crime and Delinquency's *Model Sentencing Act;* the American Bar Association's *Standards Relating to Sentencing Alternatives and Procedures;* the National Advisory Commission on Criminal Justice Standards and Goals' *Report on Corrections;* the President's Commission on Law Enforcement and Administration of Justice; the New York State Citizens' Inquiry on Parole and Criminal Justice; the Committee for the Study of Incarceration; and the Group for the Advancement of Corrections represent an emergent consensus that sentencing criteria should be statutorily required; that sentences should be based upon classification of offenders into risk categories; that sentences should be more definite; that they should be reviewable; that they should be shorter; and that they should be imposed only when a satisfactory community-based alternative is not practicable.[42]

With respect to sentencing policy, correction is coming into full circle.

Correctional administrators tend to look warily at flat time sentencing proposals. They fear that sentences will be unnecessarily severe; that prison populations,

---

[38] Fogel, *op. cit.* (note 1), pp. 245–260.

[39] von Hirsch, *op. cit.* (note 14); Twentieth Century Fund, *Fair and Certain Punishment: Report of the Twentieth Century Fund Task Force on Criminal Sentencing* (New York: McGraw-Hill, 1976). Whereas the other "flat time" proposals discussed eliminate the paroling authority, the Twentieth Century Fund grants it a limited power to reduce a sentence "within a previously fixed range and on the basis of relevant information . . . that was not available to the sentencing judge . . . to facilitate the prisoner's transition to the outside community or because of compelling medical needs" (p. 22).

[40] Michael S. Serrill, "California Turns to Fixed Sentences," *Corrections Magazine* (Vol. II, No. 6, Dec. 1976), p. 56.

[41] Fogel, *op. cit.* (note 1), p. 241.

[42] *Ibid.*, pp. 241–244.

already at the breaking point, will increase; and that, because the indeterminate sentence is based on the rehabilitative ideal, the death of the one will mean the death of the other.

Determinate certainly need not mean longer. Comparative lengths will depend on the existing practices and models adopted by individual jurisdictions. California's flat sentences will be base on the average time served over the last six years.[43]

A recent LEAA funded study concluded that, excluding enhanced terms, "the lengths of sentences . . . contrary to the popular presumption, are on the whole either shorter or similar to the average time served under the indefinite sentence in California, Illinois, and Minnesota . . .".[44]

Whether prison populations will increase is also a matter for speculation; average time served is only one of many factors affecting the prison census.

It is understandable that correctional administrators fear that the abandonment of the concept of indeterminancy threatens programs. Indeed before supporting the bill, the California Department of Corrections sought and received assurances that there would be no cut-backs in funds for programs which will be voluntary.[45]

While rehabilitation is necessary to the indeterminate sentence, the indeterminate sentence is certainly not necessary to the pursuit of rehabilitation.[46]

Offenders must be given the opportunity to acquire some of the skills for successful living in a technological society.

The indeterminate sentence should be abolished because it is an unjust basis for sentencing; and because, being perceived as unjust and discriminatory, it mitigates against rehabilitation. The indeterminate sentence should be abolished because it breeds unnecessary frustration in the prison setting. Finally, the indeterminate sentence should be abolished because it undermines justice by breaking the link between crime and punishment.

In its place, I suggest the presumptive sentencing model. Presumptive sentencing eliminates uncertainty and reduces discretionary disparity while avoiding the danger of inflexible rigidity. The punishment is commensurate with and clearly a consequence of the criminal act. A primary source of bitterness, frustration, anxiety, and cynicism is removed. Criminal justice, operating in a visible theater, becomes known and knowable in advance.

Mr. WARD. Many factors have led to the reexamination of the basic precepts of corrections: The civil rights movement of the 1960's; the Vietnam war; the erosion of the judicial hands-off policy toward corrections; the advent of Watergate; and, most importantly, the decades of the failure of corrections to achieve the rehabilitation of offenders.

The rehabilitation of offenders as a proper goal of corrections was not open to question for almost 100 years following the declaration of principles of the National Prison Congress of October 1870 at Cincinnati, Ohio.

The indeterminate sentence was the vehicle through which the new penology would be implemented.

In the decade of the seventies, the indeterminate sentence has come under especially severe attack.

In the nineteenth century, Americans, armed with a new conscience, with the humanitarian and rational ideals of the enlightenment, and with the can-do spirit of a young Nation, faced the problem of what to do with its deviant members, the criminals and the mentally ill.

---

[43] Serrill, *op. cit.* (note 40), p. 55.
[44] Foster *et al.*, *op. cit.* (note 10), p. 21.
[45] Serrill, *op. cit.* (note 40), p. 56.
[46] It is suggested above that relating release to progress in rehabilitative programs may dilute the quality of participation in programs. Professor Toch suggests that definite sentences may in fact be a spur to rehabilitation: "But a short sentence is a challenge for treaters to do the best they can in the time they have. It may even enhance their work. Freud recommends fixing terminal dates for complacent patients, and he notes that this often inspires serious efforts to change." Toch, *op. cit.* (note 15), p. 119.

They responded by constructing asylums and prisons. Mental hospitals and prisons were developed at approximately the same time in America and their purposes, construction, organization, and methods significantly influenced each other.

Although it was never fully practiced, corrections borrowed from the medical model. Reception, classification, rehabilitation, and parole were the analogs of admission, diagnosis, treatment, and discharge to out-patient status.

Despite the absence of objective physiological conditions, criminality was inferred from criminal acts, and the offender was seen as the victim of a treatable malady. Treatment, commonly called rehabilitation, required the development of an individualized treatment plan. Corrections became offender-oriented and punishment would henceforth fit the criminal rather than the crime.

The prison sentence, now seen as a temporal framework within which to work a cure, acquired some of the flexibility of medicine where confinement to a hospital for an arbitrary flat time was clearly absurd. The power to set the prison term was transferred from the legislative and judicial to the correctional administrators of the executive branch.

A resolution to replace peremptory sentences, measured by mere lapse of time, with those of indeterminate duration, limited only by satisfactory proof of reformation, was unanimously adopted at the 1870 National Prison Congress. The resolution stated that

> With men of ability and experience at the head of our penal establishments, holding their officers during good behavior, we believe that it will be little, if at all, more difficult to judge correctly as to the moral cure of a criminal, than it is of the mental cure of a lunatic.

As an enlightened means to secure public protection both through the reformation of the offender and his incapacitation for so long as he was considered dangerous, the principle of the indeterminate sentence was widely adopted. Although the pure, totally open-ended indetermine sentence of 1 day to life was rarely authorized in law and more rarely imposed, every State of the Union had some measure of indeterminacy by the 1970s. Suddenly, we are witnessing the beginning of a retreat.

The indeterminate sentence can be described as a noble experiment that has failed. After decades of experience, there is still no evidence in support of the hypothesis that criminals are sick, that we can treat them, or that we can determine the moment of cure. Stripped of its theoretical basis, the indeterminate sentence serves only to increase the length and disparity of sentences, and is a cause of frustration for inmates and administrators. It undermines the ends of criminal justice by obscuring the nexus or link between crime and punishment and by enabling unjust discretionary treatment of offenders.

The indeterminate sentence often amounts to indefinite preventive detention. In most jurisdictions, the principal consideration in the decision to grant or deny parole is the probability that the inmate will violate the criminal law if he is released. Aside from the ethical question of whether punishment to prevent uncommitted crimes is a right of the State, predictive techniques are not sufficiently advanced to allow the releasing authority to make this decision with acceptable accuracy.

Any offender-oriented sentencing system requires that a great deal of discretion be allocated to the sentencing authorities. While I feel that a system with no room for discretion would be appropriate only in world peopled by robots, we must recognize that unbridled discretion is certain to result in sentencing disparity and other abuses.

Discretion is supposed to make allowances for differences in attitudes, circumstances, and potential of offenders; in practice, however, it may reflect the attitudes, circumstances, and prejudices of criminal justice practitioners, be they policemen, judges, wardens, caseworkers, or parole commissioners.

Judge Marvin E. Frankel has said that sentences are "not so much in terms of defendants, but mainly in terms of the wide spectrum of character, bias, neurosis, and daily vagary encountered among occupants of the trial bench."

The discretion of parole boards is in a sense lawless because most are not regulated by specific rules, criterias, or guidelines. Decisions are generally not appealable, and, even if they were, appeal of a decision based on broad criteria or none at all is meaningless.

The danger of abuse increases when discretion, in the name of individualized treatment, is conferred on bureaucratic agencies.

There is a tendency to compromise among a variety of conflicting interests including, in addition to the needs of the offender, political pressure, cooperation with law enforcement and prosecution, the management interests of correctional bureaucracy, the pulse of seething unrest in inmate populations, widely divergent views of colleagues, budget priorities, and administrative policies.

Even where discretion is not abused, it will be perceived as arbitrary and discriminatory with equally troublesome consequences for corrections officials.

Although the indeterminate sentence was intended to promote the rehabilitative ideal, a number of observers feel that, because it is perceived as unfair in its implementation, it mitigates against the achievement of respect for the law, and, because release is in theory based on rehabilitation, it encourages insincere program participation, thereby diluting the quality and effectiveness of the programs. Prisons become theaters, inmates are the actors, and parole boards are the critics.

While rehabilitation, the cornerstone of the indetermine sentence has not generally been achieved, there has been an increase in the average time actually served, and many offenders serve more than—though some serve less—than they would have under a definite sentence structure. Of greater concern should be the fact that the additional time served is often for reasons unrelated to the offense for which the inmate was incarcerated—for example, predicted danggrousness, failure to participate in institutional programs, or political pressures on the releasing authority.

The indeterminate sentence tends to sever the link or nexus between crime and punishment, and in so doing undermines the entire criminal justice system. By diffusing responsibility for sentence length, reference by any of the participants—offender, victim, law-enforcement, judiciary, paroling authority—or the public to the reasons for punishment is difficult. Indeed, the differing perspectiveness of the judge—retrospective—and the parole board—prospective—dictate

that there be more than one reason, with the perception that there is no reason.

Tailoring of the punishment to the offender rather than the offense breaks the link. Any deterrent effect, special or general, of the sentence is weakened as punishment is terminated or continued for what the offender is rather than for what he has done. Even the retributive effect is dissipated.

These unfortunate effects are magnified as the decision concerning the length of the sentence is further removed in time from the commission of the offense.

In addition to the theoretical difficulties of the indeterminate sentence, it creates practical management problems. Administrators as well as inmates are aggrieved by the uncertainty of the time to be served. When the correctional agency can only guess at the inmate's release date, the development of a realistic program plan is difficult. There is no point in enrolling an inmate in a treatment program if, after completion, the effect will wear off with years of continued imprisonment. Alternately, it is a waste of resources to enroll an inmate in a program if he will be released prior to completion.

But the chief management problem is that the indeterminate sentence is a source of inmate discontent. The uncertainty of the release date may be a punishment in itself.

Whatever contribution the torture of suspense may take to prison discipline, it is more than offset by its creation of inmate frustration and aggression. After the 1971 riot at Attica, where 43 man died in the retaking of the prison, the McKay Commission reported that "the operation of the parole system was a primary source of tension and bitterness within the walls." My experience in speaking with prisoners at Attica and other New York State correctional facilities indicates that this is still true.

As a result of perceived inequities in the Nation's sentencing policies, several new models have been proposed in recent years. Most of the new models recommend that conviction for a particular crime "presumes" a given sentence. Variation from the presumptive, legislatively fixed sentence, may be made on the basis of prior convictions and specified aggravating or mitigating standards.

Just deserts, the justice model, and presumptive sentencing severely curtail judicial and administrative discretion, make the punishment fit the crime, and generally admit good time in the interests of prison discipline.

Maine adopted definite sentencing effective March 1976. Indiana has legislatively passed and California has enacted determinate sentencing. Billls are pending in Alaska, Colorado, Connecticut, Illinois, Ohio, and Washington. In Florida, South Dakota, and Virginia, legislative commissions are studying fixed prison terms.

While it is difficult to summarize, the new models generally establish crime categories to each of which a scale of terms is attached. Most of the models assume a fixed sentence at a particular point on the scale, and specify the circumstances—such as prior convictions or use of a weapon—under which the sentence may be set at a higher or lower point within the range. In each model, sentences are subject to reduction through the application of good time credits.

An important chorus is developing, seeking a sensible sentencing scheme. The American Law Institute's Model Penal Code; the National Council on Crime and Delinquency's Model Sentencing Act; the American Bar Association's Standards Relating to Sentencing Alternatives and Procedures; the National Advisory Commission on Criminal Justice Standards and Goals' Report on Corrections; the President's Commission on Law Enforcement and Administration of Justices; the New York State Citizens' Inquiry on Parole and Criminal Justice; the Committee for the Study of Incarceration; and the Group for the Advancement of Corrections represent an emergent consensus that sentencing criteria should be statutorily required; that sentences should be based upon classification of offenders into risk categories; that sentences should be more definite; that they should be reviewable; that they should be shorter; and that they should be imposed only when a satisfactory community-based alternative is not practicable.

With respect to sentencing policy, corrections is coming full circle.

Correctional administrators tend to look warily at flat time sentencing proposals. They fear that sentences will be unnecessarily severe; that prison populations, already at the breaking point, will increase; and that, because the indeterminate sentence is based on the rehabilitative ideal, the death of the one will mean the death of the other.

"Determinate" certainly need not mean longer. Comparative lengths will depend on the existing practices and models adopted by individual jurisdictions. California's flat sentence will be based on the average time served over the last 6 years.

A recent LEAA funded study concluded that, excluding enhanced terms, "the lengths of sentences * * * contrary to the popular presumption, are on the whole either shorter or similar to the average time served under the indefinite sentence in California, Illinois, and Minnesota."

Whether prison populations will increase is also a matter for speculation. Average time served is only one of many factors affecting the prison census.

It is understandable that correctional administrators fear that the abandonment of the concept of indeterminacy threatens programs. Indeed, before supporting the bill, the California Department of Correction sought and received assurances that there would be not cutbacks in funds for programs which will be voluntary.

While rehabilitation is necessary to the indeterminate sentence, the indeterminate sentence is certainly not necessary to the pursuit of rehabilitation. Offenders must be given the opportunity to acquire some of the skills for successful living in a technological society.

The indeterminate sentence should be abolished because it is an unjust basis for sentencing; and because, being perceived as unjust and discriminatory, it mitigates against rehabilitation. The indeterminate sentence should be abolished because it breeds unnecessary frustration in the prison setting. Finally, the indeterminate sentence should be abolished because it undermines justice by breaking the link between crime and punishment.

In its place, I suggest a more determinate sentencing model. Determinate sentencing eliminates uncertainty and reduces discretionary

disparity while avoiding the danger of inflexible rigidity. The punishment is commensurate with and clearly a consequence of the criminal act. A primary source of bitterness, frustration, anxiety, and cynicism is removed. Criminal justice, operating in a visible theater, becomes known and knowable in advance.

The McClellan-Kennedy bill, S. 1437, recognizes that rehabilitation is only one of several purposes for which a penal sentence is imposed by a court of law. S. 1437 would require the sentencing judge to state in writing whether he is imposing the sentence for deterrence, incapacitation for protection of the public, retribution as an insurance of just punishment, or rehabilitation.

The present sentencing practices in this country leave the participating members of the criminal justice system in a state of confusion.

Judges frequently sentence for the purpose of retribution and this is often interpreted by correctional administrators as a sentence for incapacitation. Parole boards generally ignore both of these purposes for sentencing and operate on the theory that the purpose of all sentencing is for rehabilitation.

The McClellan-Kennedy bill will go a long way toward setting a standard which will eliminate this confusion at the State level as well as the Federal level.

Parole was created on the twin theories that prisons could rehabilitate prisoners and that penal authorities could predict human behavior. Experience has demonstrated the fallibility of both theories.

The idea of abolishing parole in the Nation's next criminal code may sound startling, but the concept is in fact eminently sensible. The combination of disparate sentences doled out for similar offenses and the quixotic and often arbitrary character of parole dicisions has undermined the rationality of the criminal justice system and contributed greatly to prison tensions. One provision of the McClellan-Kennedy bill would sharply narrow the discretion of judges in sentencing. If accompanied by the elimination of parole, an inmate would serve his full sentence, less time earned for good behavior.

The result will be equal time for equal crimes. The criminal justice system gains by removing a cause of bitterness and tension in our volatile prisons, and by taking a giant stride toward fundamental fairness.

Just in case I was not going to get any questions, I thought that I would answer one that you asked of an earlier witness this morning. I think your question was this: Why shouldn't the defendant know before what his sentence will be and whether he will be released if he behaves himself in the correctional setting?

I do not know why he should not know that. I am hard pressed to understand how anyone can defend a system that says burglar A goes to prison and in my State he will not see a parole board for 10 months. At the end of that 10 months he will sit down with three parole board members who will then determine what his sentence will be. Burglar B, from another part of the State will come in with the same kind of crime and a similar type of background and see a different set of parole commissioners and receive an entirely different sentence.

Senator KENNEDY. Let me ask you: As I understand the argument, they say that you need parole to be sure of eliminating disparity. They say that a small group of people, the parole board, could assure a

greater degree of certainty, and therefore justice, as it applies to the individual. They feel it is valuable and worthwhile.

How do you answer that?

Mr. WARD. I disagree with that on several grounds. To begin with, I think the sentencing judge has more information available to him at the time of sentencing than a parole board has, even in a State like mine where they see them 10 months later.

If you look at the folders or the records of any of the inmates who are coming before that parole board then you will see the presentence report in which most of the information is contained. If you are in a system that is heavily programmed, as my State is and many other States are, the man quickly learns that the way to please the parole board is to become involved in programs. Therefore, he quickly becomes involved in programing to favorably impress the parole board.

Therefore, what good, really, is that 10 months in a controlled environment in which he has already begun to play the game so that he can favorably impress that small board?

If you want to argue that 500 judges will have more disparity than 12 parole commissioners, then certainly we cannot argue with that. However, I think that one of the most important decisions, one of the most important roles, that judges have in this country—particularly in large metropolitan districts like mine, where plea bargaining is the name for more than 9 out of 10 defendants—is sentencing. To take that judicial responsibility and legislative responsibility and shift it to the parole board, I think is a mistake.

Senator KENNEDY. How do you deal with plea bargaining? Should we be speaking of guidelines as well in that area? Does plea bargaining have a legitimate place? If it does have a legitimate place in society, how do you try and deal with it in a way that is going to eliminate disparity?

Mr. WARD. Well, I think plea bargaining is greatly misunderstood by the public. If for no other reason, the public ought to be informed as to what is involved in it. I cannot find a sensible argument for administrative plea bargaining. That is the kind of plea bargaining that serves only the purpose of clearing the calendar. The people have a case that should be ready to go to trial and the only thing that is stopping them from going to trial is a crowded calendar, so you administratively plea bargain and get rid of the case.

There really is no excuse for that, as I think Senator Hruska stated. That ought not to be a reason for not giving a man his day in court.

I think there were other cases in which plea bargaining may be appropriate—particularly in those jurisdictions where police officials set the crime. They charge the robbery when prosecutors would admit that this is grand larceny. In those jurisdictions where prosecutors overindict and indict for grand larceny when they clearly know that this really would fall within the petty larceny area, then you have those cases.

In those cases there is room for plea bargaining because clearly there is just no point in going forward with it. In your State, the man who goes over the line maybe unknowing with a gun in his possession and may unknowingly find himself facing a year. That ought to be plea bargained out.

Senator KENNEDY. Do you think many of the abuses of plea bargaining could be remedied by having it done in an open forum or an open session with everything on the record?

Mr. WARD. I really think so. I don't know of anyone supporting plea bargaining as it goes on in so many of our jurisdictions. It just happens. I don't know of anybody defending that system that makes believe that a judge is not a party to it.

Senator KENNEDY. Would that move us a long way down the road, do you think, in terms of a more fair and equitable——

Mr. WARD. I think it would put more equity into the plea bargaining and get rid of some of the disparity that goes on in the plea bargaining area. My lawyer, if I could afford the right one, would be able to get a better deal for me than the person who is a street mugger or the common house burglar who is trying to support a drug habit. He's got legal aid, and he gets in with a fellow who has got 50 or 60 cases, and his plea bargaining is not going very far.

Senator KENNEDY. There are those who say that we should not really get involved in terms of recodification until we deal with the social causes of crime. What is your reaction to that?

Mr. WARD. I disagree strongly. That seems to me to be the old excuse for doing nothing because we can't do everything. Surely we ought to be dealing with the root cause of the crime. Certainly there are high unemployment rates and many social factors that perhaps people could argue lead to crime. However, there is a great injustice going on within the criminal justice system.

Surely, within the criminal justice system there ought to—it ought to be the place where justice ought to prevail. Poor people, black people in particular, and minorities in general in this country, since they tend to be the poor, become the victims of this system that tends to be based upon rehabilitation.

With our great concern for these people, we put them in prison for their own good under this system. We put them in there because they need rehabilitation. We let some people whose fathers and mothers have millions of dollars go off on 5 or 6 years of probation because obviously they do not need rehabilitation.

The system operates against the poor. It operates against the minorities. The fact that we cannot straighten out our system in this country to provide employment for everyone and equal opportunity for everyone ought not to be tolerated as an excuse to do nothing about an area where we can do something.

Senator KENNEDY. I think you have answered the second point that I was going to bring up, and that is that, as Professor Dershowitz indicated, under the present system we do discriminate against the black and the poor and the other minorities.

Mr. WARD. Absolutely, Senator. You would only have to look at any State in this country to get rid of the myth that minorities, and blacks in particular, are not involved in criminal justice. They are greatly involved. They just happen to be on the other side of those bars and on the inside of those walls. That is where they are involved. It is the majority population that is putting them in there. In the name of rehabilitation we are imprisoning minorities for their own good so that we can help them.

I think that what we are doing—if you take a look at any one of our prison systems you would be hard pressed to come to the conclusion that prisons help anyone except you and me and my mother and my sister. They feel better when that rapist and that burglar and that robber get punished. That is what they think should happen to him.

Somehow or other we have gotten mixed up in this society and come to the conclusion that it is wrong to say "punish the person who breaks the law or violates our codes." It is not wrong to do that. There is an expectation that that will happen. Don't put him on the stocks and whip him or put him in a chair and shoot electricity through him or some of these kind of Draconian solutions. However, there is absolutely nothing wrong with separating him from society for reasonably short periods of time under relatively humane conditions of confinement. It is about time we got back to taking a good, firm look at that and admit that all criminals are not sick. Even those that are sick we do not have a cure for. We really do not know when the cure has taken place.

What we do know is that perhaps there is some deterrent effect to prisons. Certainly there is some incapacitation effect to it.

Senator KENNEDY. What can we do to help New York and the other State jurisdictions? I don't know whether there are any others like New York, but what can we do?

Mr. WARD. Well, I started to say "send money." However, aside from that, I think that the reason I am here and the reason I expressed the willingness to be here is that I think there is so much confusion in New York, as well as around this country, on this whole issue of indeterminacy and the whole question of rehabilitation. We need some guidance from the Federal level in the direction that corrections ought to go—maybe not for the next 100 years, but certainly after 100 years of a model that has not worked, and which no one is defending today.

I think that this bill goes a long way toward giving that direction.

Senator KENNEDY. I would just like to hammer home one final point. This is repeating a previous question, but I think it is important. The question is: If you have the minimums and maximums within a guideline, there have been those who say we ought to have it very narrow for every crime. For every crime we ought to have just one flat time. We have tried to have a very narrow range of flexibility. It might be 6 to 8 years—but we have to try and define it.

Do you think that that kind of protection which we have included in the sentencing provisions is sufficient to meet the kind of extenuating circumstances which may arise?

Mr. WARD. Yes, Senator. I can't stress it too strongly. I think Professor Dershowitz was absolutely correct. There are no typical offenders, but when you look at a large aggregate of offenders there does seem to be a kind of typical offender. It is no one person, but one that you can put together.

Certainly, you can design a range of sentences that take into consideration the extenuating circumstances. The person who should get less and the person who should get more could be included in that range. If that is not sufficient, this bill gives enough. What this bill does is to allow increases in sentences or decreases in sentences to be written on the record with reasons given for why it is done. I think that gives enough flexibility to the statute to encompass these unusual cases without going into a straight indeterminate sentence.

Senator KENNEDY. Just briefly, and finally, do you think this bill is anti-civil-libertarian, in terms of trying to address this particular issue in the way that we have approached it?

Mr. WARD. Not at all. That is one of the main reasons that I am here. It is not at all anti-civil-libertarian in my regard. I would suggest that if there were some way that you could get into a prison and speak to the prisoners you would find that they would agree with what I say.

The most discouraging thing and the most uncivil thing is to not know when you are going to get out of prison. Prisoners are ready to accept some measure of deprivation of liberty for what they have done. However, they are not willing to accept open-ended punishment. There should be an end to the concept of "treatment until cured." We do not know when the cure takes place.

Senator KENNEDY. That was excellent testimony.

Mr. WARD. Thank you.

Senator KENNEDY. It was very, very helpful. We are going to be working with you.

The subcommittee stands in recess.

[Whereupon, at 3:10 p.m., the subcommittee stood in recess.]

CRIMINAL CODE REFORM ACT OF 1977

TUESDAY, JUNE 21, 1977

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS
AND PROCEDURES OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:33 a.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (acting chairman of the subcommittee) presiding.

Present: Senators Kennedy and Thurmond.

Staff present: Paul C. Summitt, chief counsel; D. Eric Hultman, minority counsel; Paul H. Robinson, counsel; Kenneth Feinberg, counsel to Senator Kennedy; and Mabel A. Downey, chief clerk.

Senator THURMOND. The subcommittee will come to order.

Our first witness this morning is Prof. Thomas I. Emerson, Yale School of Law, on behalf of the National Committee Against Repressive Legislation.

Mr. Emerson, since we have a lot of witnesses today, I would suggest that your entire prepared statement be included in the record, and then you may summarize if you are agreeable to that.

STATEMENT OF PROF. THOMAS I. EMERSON, YALE SCHOOL OF LAW, ON BEHALF OF THE NATIONAL COMMITTEE AGAINST REPRESSIVE LEGISLATION

Mr. EMERSON. Yes; that is agreeable.

I should say that the statement has the approval not only of myself, but of Prof. Vern Countryman of the Harvard Law School as well as Prof. Carole Goldberg of the law school at the University of California at Los Angeles.

[The material follows:]

PREPARED STATEMENT OF THOMAS I. EMERSON, LINES PROFESSOR OF LAW, EMERITUS

S. 1437, introduced in the Senate jointly by Senator McClellan and Senator Kennedy, represents the latest proposal for codification and revision of the Federal criminal laws. The bill is the result of a compromise, reached after long negotiations, between Senator McClellan and Senator Kennedy. It is a revision of S. 1, the notorious bill that was smothered in the Senate in 1976 as a result of widespread popular opposition.

S. 1437 is a substantial improvement over S. 1, as will be noted below. Nevertheless, S. 1437 retains a large number of provisions which, individually and in totality, are gravely detrimental to the American system of individual rights.

We must therefore oppose it. We continue to support revision and codification of the Federal Criminal Code. But we do not believe that such reform should be achieved at the price of sacrificing our civil liberties.

The many features of S. 1437 which are repressive on their face or in potential application can be grouped under the following categories:

(1) The inchoate offenses—attempt, conspiracy, and the new crime of solicitation—are dangerously vague and overbroad, and have enormous possibilities for oppressive use.

(2) While dropping the original provisions of S. 1 dealing with the publication of national defense and classified information, S. 1437 does not eliminate the dangers of establishing an official secrets act as part of our law, thereby imposing unprecedented restrictions upon freedom of speech and of the press.

(3) A series of provisions attempting to protect the executive branch of government from the impact of political opposition—including the new crimes of obstructing government functions by fraud and by physical interference—would seriously hamper many forms of political expression.

(4) The sections attempting to protect the judicial process—including provisions against "improperly" impairing the administration of justice and "resisting" a court order—could be used to limit drastically legitimate activities directed against judicial proceedings deemed to be unfair or oppressive.

(5) The attempt to shield military and defense operations from political opposition—including the offenses of impairing military effectiveness and of obstructing military recruitment—go substantially beyond what is necessary or proper in a democratic society which treasures the principle of civilian control over the military.

(6) Provisions affecting the right of assembly and demonstration—particularly the new crime of failing to obey a public safety order—could be used to curtail seriously the most effective form of political expression available to those without access to the mass media.

(7) The dangers inherent in political investigations and political surveillance are enlarged by several provisions, particularly the reenactment of use immunity, available in grand jury proceedings, and the creation of the crime of making a false statement to any enforcement official.

(8) Safeguards in the administration of criminal justice are reduced by several provisions, including one which would undermine the requirement of Miranda warnings in police interrogation, and one sanctioning the use of illegally obtained evidence in sentencing proceedings.

(9) The extortion and blackmail sections, as well as other provisions, bring a wide range of legitimate labor union activities under Federal control.

(10) The trend of the Burger Court toward removing Federal protections against infringement of individual rights is encouraged and accentuated by expressly mandating the use of community, rather than national, standards in obscenity cases.

(11) Reform of the penalty and sentencing procedures is undercut by providing mandatory sentences for some offenses and by delegating the task of achieving uniformity in sentencing to a Sentencing Commission to be appointed at a later date.

(12) Probation and parole reforms do not conform to the progressive proposals made by the Brown Commission.

There are improvements in S. 1437 as compared with S. 1. S. 1437 omits the sections which would have created an official secrets act and allowed government officials the Nuremberg defense; it deletes the provision nullifying the insanity defense; it removes the definition which would have authorized the police to engage in virtually unrestricted entrapment; and it contains a hundred or more similar omissions and modifications of some of the reactionary provisions of S. 1. The new bill also contains some important gains over existing law, including the repeal of the Smith Act; a more effective version of the laws prohibiting interference with political and civil rights; a more sensitive rape statute; some improvement in the wiretap law; and decriminalization of the possession of small amounts of marijuana. As a systematic codification of the existing jumbled statutes S. 1437 has some deficiencies, but it does make significant progress in removing inconsistencies, ambiguities and obsolescences from our Federal Criminal Code.

These advantages over S. 1, however, cannot be grounds for supporting S. 1437 so long as so many objectionable provisions remain. It is unlikely that the bill can be successfully amended. Omnibus legislation of this nature is subject to very limited change in the course of the legislative process. The difficulties of securing amendments are accentuated in this case because Senator Kennedy, the chief liberal sponsor of the bill, is committed to support the whole bill and is not in a position to advocate or acquiese in large-scale amendments. Hence the only satisfactory procedure is to start the legislative process with an acceptable bill. We believe the Kastenmeier bill, introduced in the House last year as H.R. 12504, and in the present session by Representative Cohen as H.R. 2311, can serve this function. We therefore urge that H.R. 2311, rather than S. 1437, be used as the instrument for considering Federal Criminal Code reform.

A more detailed analysis of the principal provisions of S. 1437 that conflict with our system of individual rights is set forth below. Before proceeding to that analysis, however, one general point should be emphasized. Virtually all criminal offenses require that an intent to commit the crime be shown, and in some instances, a particular kind of intent must be demonstrated. Moreover, the drafters of a provision may be concentrating on a specific form of conduct and may not mean to cover other forms of activity within their prohibition. The actual impact of a proposed provision, however, cannot be judged on the assumption that prosecutors or juries will make refined distinctions about the mental state of the accused, especially an unpopular accused, or that courts will limit the scope of a provision to the primary focus of the original authors. Nor is it safe to pass laws on the theory that only wise and benevolent government officials will be the ones to enforce them. If we are to preserve our system of individual rights a far more demanding standard must be applied.

1. INCHOATE CRIMES

Attempt, conspiracy, complicity and solicitation are all inchoate crimes. They punish, by criminal penalty, not the actual conduct which constitutes the social evil but conduct prior to the occurrence of the evil or conduct by persons on the periphery who did not themselves actually participate in the crime. Traditionally inchoate crimes have been used as dragnet devices to permit the government to extend the scope of its control over wrongful activity. Moreover, the procedures for proof and trial of these offenses are likely to be inherently unfair. Not only are the rules of evidence relaxed, in order to allow easier proof of states of mind, but the linking of those at the center of the offense with those on the boundaries inevitably creates a built-in prejudice against the latter.

Inchoate crimes may have some justification in dealing with organized crime, drug offenses, or the anti-trust laws. But they pose serious dangers for offenses occurring in the course of political opposition to the government. They can be used to prosecute or harass many individuals who participate in group political activity by making everyone associated with the group liable for the offenses of a few militant members, or for the conduct of an agent provocateur. They have, in short, an extreme chilling effect upon legitimate political expression.

The inchoate crimes incorporated in S. 1437 are sweeping in their impact. Section 1001 (Criminal Attempt) provides that a person is guilty of an offense if "he intentionally engages in conduct that, in fact, amounts to more than mere preparation for the commission of the crime, and that indicates his intent that the crime be completed." This would mean that a person who planned with others to picket a courthouse (a Federal crime under Section 1328) and then walked in the direction of the courthouse would be guilty of an offense even though he or she never reached the courthouse or picketed there. There is no reason for the government to have the power to make such conduct criminal so far in advance of the event.

Section 1002 (Criminal Conspiracy) makes it an offense if an individual "agrees with one or more persons to engage in conduct, the performance of which would constitute a crime or crimes, and he or one of such persons in fact engages in any conduct with intent to effect any objective of the agreement." Like the traditional conspiracy statute, all that is really required to constitute the crime is *an expression of agreement* to commit the offense; after that *any* conduct by *any* party to the agreement which the jury finds was intended to effectuate *any* objective of the agreement completes the proof necessary. Under this provision any person present at a meeting where it was agreed to block construction of an inter-

state highway through a part (a Federal crime under Section 1302) would be guilty of criminal conspiracy even though he or she never participated in the demonstration.

Section 401 (Liability of an Accomplice) establishes a general offense of complicity. This makes a person "criminally liable for an offense based upon the conduct of another person 'if' he knowingly aids or abets the commission of the offense by the other person." The term "abet" is defined in Section 111 to include, not only "procure" or "command", but "counsel" or "induce." Thus a person who advises another person not to tell the whole truth when an FBI agent calls at the door (a Federal crime under Section 1343) would be guilty of a crime. So would a person who advised a young man to avoid the draft by emigrating to Canada (a Federal crime under Section 1114).

Most dangerous of all is Section 1003 (Criminal Solicitation). This section creates a new Federal crime, the crime of "criminal solicitation": "A person is guilty of an offense if, with intent that another person engage in conduct constituting a crime, and, in fact, under circumstances strongly corroborative of that intent, he commands, entreats, induces, or otherwise endeavors to persuade such other person to engage in such conduct." By the terms of this all-embracing provision any discussion of political tactics which might involve commission of a Federal offense, such as "obstructing a government function by fraud" (Sec. 1301), could be the basis of a criminal prosecution.

It is true that S. 1437, recognizing the danger of these catch-all crimes, exempts from their coverage an attempt, conspiracy or solicitation to commit the crimes of obstructing military recruitment, inciting or aiding mutiny or insubordination in the armed forces, and leading a riot (Sec. 1004(b)). (It also exempts anti-trust violations). But this palliative has little meaning. The crime of complicity is not included. And many other criminal offenses which may be involved when political activity takes place, such as those mentioned above, are not exempted.

The fact is that, in attempting to codify and thereby generalize the inchoate offenses, S. 1437 has gone far beyond what is necessary to maintain the integrity of the democratic process against illegal conduct and has cut deeply into fundamental political rights. The inchoate crimes in Federal law should be limited to a few specified offenses.

2. OFFICIAL SECRETS

S. 1437 has dropped the provision of S. 1 which would have established an official secrets act, that is, would have made the publication or dissemination of classified or national defense information by anyone at any time a criminal offense. Instead S. 1437 reenacts Sections 793, 794 (a), (b) and (c), and 798 of Title 18 of the present Code, and Sections 4(b) and 4(c) of the Subversive Activities Control Act of 1950. This modification of S. 1 leaves existing law in effect. But it does not eliminate serious dangers to freedom of speech and the press that exist in the present state of the law. On the contrary it accentuates those dangers. The threat to freedom of expression is evident from the following facts:

(1) Much of the legislation left in effect goes far beyond the needs of a proper espionage law. It is in fact the product of the hysteria and repression of the McCarthy period. This is true of Section 4(b) and 4(c) of the Subversive Activities Control Act of 1950 (originally the Mundt-Nixon bill), and Section 798, which was Section 18 of the same legislation. Most of the Subversive Activities Control Act has been declared unconstitutional by the Supreme Court, and the Subversive Activities Control Board is now defunct. The remaining provisions of that infamous law ought not to remain on the books in any reform of the Criminal Code.

(2) The government has consistently claimed, in the Ellsberg case and elsewhere, that the present statutes should be interpreted as imposing an official secrets act. In fact the Department of Justice took the position that the provisions included in S. 1 did not change the existing law. Under these circumstances it would be a disaster not to repudiate the government's interpretation of the provisions left in operation by S. 1437.

(3) The impact of an official secrets act could be obtained under S. 1437, apart from the espionage provisions, as a result of Section 1301 (Obstructing a Government Function by Fraud). It could easily be asserted, under this section, that obtaining or publishing classified, defense, or other information without

the government's consent impairs a government function through fraud. That this danger is real is evidenced by the fact that in the Ellsberg prosecution one of the charges brought by the government was that Ellsberg and Russo had violated 18 U.S.C. § 371 by conspiracy "to defraud the government." The presence of Section 1301 in S. 1437 is virtually equivalent to retaining the original official secrets provision of S. 1.

(4) Other provisions of S. 1437 might also be construed to restrict the publication or dissemination of material the government wishes to keep secret. These include Sections 1731 (Theft), 1732 (Trafficking in Stolen Property), and 1733 (Receiving Stolen Property); Section 1525 (Revealing Private Information Submitted for a Government Purpose); and Section 1524 (Intercepting Correspondence).

The only way to avoid the likelihood of serious repression is to limit criminal prosecution for the dissemination of government secrets to a simple and straightforward espionage provision, such as that proposed in the Kastenmeier bill (Sec. 1121 and 1122 of H.R. 2311).

3. POLITICAL OPPOSITION THAT INTERFERES WITH GOVERNMENT OPERATIONS

One of the principal objectives of the original S.1 was to enact legislation which would, in numerous ways, shield government functions and government operations from the impact of political opposition such as that expressed in the civil rights movement and the peace movement of the 1960's and early 1970's. A substantial residue of these provisions remain in S. 1437.

Section 1111 (Sabotage) makes it a crime to damage, tamper with, contaminate, or defectively make or repair "any property used in, or particularly suited for use in, the national defense" that is owned by or being produced for the United States; "any facility that is engaged in whole or in part" for the United States in "furnishing defense materials or services" or "producing raw materials necessary to the support of a national defense production or mobilization program"; and "any public facility," defined as "a facility designed for use, or used, as a means of national defense" or "a facility of a police, fire, or public health agency" (Sec. 111). The offense must be committed "with intent to impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or engage in war or defense activities"; but this is hardly a limitation, as such an intent could be found by a prosecutor or jury in almost any case of damage to government or defense property that was not accidental. Moreover, Section 1112, discussed below, eliminates even this requirement of intent.

A statute directed against sabotage is necessary. But Section 1111 goes much too far. It would apply to damage to most government property, all police and fire facilities, and an enormous sector of American industry. It would be applicable to any political assembly or demonstration where incidental damage to property or obstruction of a facility resulted. It would also be applicable to many labor disputes, where damage to property is not unusual, and perhaps to other labor activities such as boycotts. There is no reason why traditional State and local laws against destruction of property are not adequate to deal with most of the problem. Federal laws against sabotage should be confined to military property or services.

Section 1301 (Obstructing a Government Function by Fraud) introduces a new crime. A person is guilty of this offense if he "intentionally obstructs or impairs a governmental function by defrauding the government in any manner." There seems to be no logic or limit to the scope of this crime. A person could commit it by giving a postman the wrong directions to a house. A businessman would be guilty if he engaged in some deception in fulfilling a government contract. Or a political activist might be in violation if he used a trick to avoid surveillance by an FBI agent. On a more sinister level Section 1301, as noted above, could perform the function of an official secrets act. There is no justification for any such amorphous crime.

Section 1302 (Obstructing a Government Function by Physical Interference) also proposes a new crime. This offense is committed by a person if, "by means of physical interference or obstacle, he intentionally obstructs or impairs a government function" involving "the performance by a federal public servant of an official duty," or "the exercise of a right, or the performance of a duty" by any one under a court order or judgment. The only defense is if the government function was "unlawful" *and* "conducted by a public servant who was not

acting in good faith." There are no other limitations. *Any* physical interference or obstacle, impairing *any* government function, under *any* circumstances, is the basis for up to a year in prison. A demonstration that partially blocks a post office, a refusal to open the door to a marshal serving a subpoena, continuation of picketing after a patently invalid injunction issued by a judge "acting in good labor union activities. A provision of this sort should be strictly limited to specific faith," all would be subject to criminal prosecution. So might numerous forms of areas, such as interference with the mails or with government inspection.

Two other provisions give over-protection to government operations and under-protection to political dissent. Section 1334 (Obstructing a Proceeding by Disorderly Conduct) makes it an offense if a person obstructs or impairs an official proceeding "by means of unreasonable noise," by means of violent or tumultous behavior or disturbance, or "by similar means." Section 1358 (Retaliating Against a Public Servant) punishes a person who "improperly subjects another person to economic loss or injury to his business or profession . . . because of an official action taken . . . or because of the status of a person as a public servant." Both of these provisions are excessively vague and overbroad and Section 1354 imposes absurdly high penalties for the nature of the offense. Moreover, like the other provisions discussed above, they would only be applied on a highly selective basis, against unpopular or minority groups.

4. POLITICAL OPPOSITION TO JUDICIAL PROCEEDINGS

S. 1437 also inherits a group of provisions from the original S. 1 that attempted to curtail political opposition directed against actions of the judiciary. Section 1323 (Tampering with a Witness or an Informant), after including the usual provisions against using force, threat, intimidation or deception to influence a judicial or other official proceeding, goes on to make it also an offense to do "any other act with intent to influence improperly, or obstruct or impair," the administration of any law or the exercise of a legislative power of inquiry. This provision could readily be used to suppress or inhibit many forms of legitimate opposition to judicial, administrative or legislative proceedings. The word "improperly" has no clear meaning, but obviously includes more than illegal conduct: the word "impair," which is not even qualified by the term "improperly," could include any kind of effective objection to an official proceeding. Thus organizing a demonstration to protest the conduct of a political case, or to oppose a legislative committee like the House Un-American Activities Committee, would fall within the ban of the statute.

Section 1328 (Demonstrating to Influence a Judicial Proceeding) prohibits picketing, parading, displaying a sign, using a sound amplifying device, or otherwise demonstrating within 200 feet of a Federal courthouse, while *any* judicial proceeding is in progress, or at any time within 200 feet of a building occupied by a judicial official. The section is entirely too broad; the judiciary does not need, and should not have, that kind of isolation from public opinion. Judicial proceedings, like all government activity, ought not to be immune from public criticism or influence. At most, a judicial proceeding needs protection only from violence or physical intimidation. The provision should be so limited.

Section 1331 (Criminal Contempt) makes it an offense not only to disobey but to "resist" a court order. Moreover, the fact that the court order is "clearly invalid" is no defense for refusal to obey so long as there has been a reasonable opportunity to obtain court review or a stay of the order, even though such appeal did not result in relief. The same language is repeated in Section 1335 (Disobeying a Judicial Order), where a higher penalty is applicable. The term "resist" could include any form of opposition to a court order and is subject to serious abuse. The refusal to allow a defense that the court order is "clearly invalid" puts every person at the mercy of every judge. If, for example, a judge issued a gag order against a newspaper, enjoining publication of information about a pending trial, even though the order was "clearly invalid," the newspaper could not publish the material but would have to await the outcome of a long appellate process. By the time the right to be free from censorship had been established, the material would long since have lost its value as news.

Judicial proceedings deserve their share of protection. But the provisions of S. 1437 go far beyond the necessary limits and impair important rights of free expression.

5. OPPOSITION TO WAR OR DEFENSE

The crucial test of a system of freedom of expression is whether it can operate effectively under the pressures of war or defense preparations. We have seen in the Viet Nam War how important it is that the channels of political discourse be kept open during a period of hostilities. The provisions of S. 1437 dealing with this problem unfortunately do not afford the protections to political opposition that we have learned by past experience are essential in a democratic society.

Section 1115 (Obstructing Military Recruitment or Induction) makes it an offense if a person, in time of war and with intent to interfere, "creates a physical interference or obstacle to the recruitment, conscription, or induction" of persons into the armed forces, or "incites others" to evade military service. The term "war" includes not only a declared war but a situation in which the armed forces are engaged in hostilities (Sec. 111). The term "incites" means "to urge other persons to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct." (Sec. 111). Picketing in front of an induction center could be held illegal under this section. Likewise conduct such as signing the "Call to Resist Illegitimate Authority" (to which over 300 prominent people attached their names during the Viet Nam War), the urging of young men to turn in or burn their draft cards, and counseling a conscientious objector not to register for the draft, would all fall within the prohibition. Effective expression of opposition to a war deemed unjust could thus be suppressed.

Section 1116 (Inciting or Aiding Mutiny, Insubordination, or Desertion) makes it an offense if a person "incites" members of the armed force to engage in mutiny, insubordination, refusal of duty or desertion or "aids or abets" the commission of mutiny or desertion. "Incites" is defined as above, and "abets" includes "counsels" (Sec. 111). Here again the criminal net is spread too indiscriminately. The provision would extend to a forcefully written article or pamphlet opposing the war or objecting to conditions in a military installation, so long as such material might reach the hands of members of the armed forces. In short, the provision would tend to isolate military operations from civilian criticism.

Finally, Section 1112 (Impairing Military Effectiveness) makes it an offense for any person to engage in sabotage (as set forth in Section 1111, noted above), whether or not such person has the intent to interfere with the ability of the United States to prepare for or engage in war or defense activities, but merely if the person acted "in reckless disregard of the risk" that his conduct would do so. Thus the section makes it a Federal offense to engage in virtually any conduct that damages facilities connected in any way with defense, including police, fire and health agencies, without regard to the purpose which motivated the conduct.

6. ASSEMBLIES AND DEMONSTRATIONS

Assemblies, demonstrations, picketing, leafleting, and canvassing constitute the "poor person's media," a way for those who do not have access to the mass media to reach their fellow citizens. We have seen in the civil rights movement, the peace movement, the women's liberation movement, and in other areas what a vital role these activties can play in a changing society. Poltical expression of this sort is frequently unsettling and sometimes, through the actions of extremists, agents provocateur, or otherwise ends up in turbulence or violence. A healthy society must find a way to protect itself against violence or intimidation, without throttling legitimate political expression. In general, State and local laws of long standing are entirely capable of doing this. Federal intervention is normally superfluous, tends to be discriminatory in application, and much too far.

It has already been noted that the provisions of S. 1437 which attempt to protect Federal government operations against interference from political opposition seriously curtail the right of citizens to assemble and demonstrate. In addition, S. 1437 in Section 1861 (Failing to Obey a Public Safety Order) creates a wholly new Federal offense. This section makes it unlawful if any person "disobeys an order of a public servant to move, disperse, or refrain from specified activity in a particular place", where the order is issued in response to a fire, flood, riot, "or other condition that creates a risk of serious injury to a person or serious damage to property" and is, in fact, "lawful and reason-

ably designed" to accomplish the end. This provision put in the hand of *any Federal employee* the authority to disperse a gathering, to forbid picketing or parading, to require citizens to refrain from leafleting or canvassing, whenever in his judgment there is a risk of injury to person or property. The impact of granting such autocratic power to petty government officials does not need to be elaborated. Moreover, the authority is conferred not only with respect to specific Federal areas, such as a Federal building, but anywhere in the United States. There is no possible justification for such an extension of Federal authority.

The Federal Riot Act provisions of S. 1437 contain the same defects. They impinge too far on legitimate political expression, including labor activity, and they needlessly extend Federal power into local affairs. Section 1831 (Leading a Riot) states that a person is guilty of an offense not only if he causes a riot, or leads, give commands or directions in furtherance of a riot, but also if he "incites participation" in a riot taking place or during a riot he "urges participation" in the riot. As noted above, the term "incite" includes urging a person to engage imminently in conduct, which brings the application of the government prohibition at a stage when only expression is involved. Use of the term "urges" carries government controls even further back into the speech process. The result is that expression is punished even though there is no immediate danger that it will have any effect upon the riot. The area of government power is thus expanded far beyond the core toward the periphery of the problem, with an obvious impact upon freedom of expression.

Section 1831 Federal jurisdiction over riots to any situation involving the movement of a person across State lines, and Section 1833 (Engaging in a Riot), which punishes persons who actually participate in a riot, extends to any riot which "obstructs a federal government function". A "riot" is a public disturbance that involves ten or more persons. Thus the vast weight of the Federal criminal law can be brought to every nook and cranny in the land, regardless of the magnitude of the event.

7. POLITICAL INVESTIGATIONS AND SURVEILLANCE

Recent disclosure of abuses by the intelligence community has alerted us to the dangers emanating from law enforcement agencies and officials who have not kept within strict bounds. S. 1437 does little or nothing to maintain those boundaries. On the contrary, some provisions greatly expand the powers of enforcement agencies to interfere with legitimate political activties.

The most glaring instance of this is Section 1343 (Making a False Statement). This section provides that a person is guilty of an offense if, "in a government matter" he makes "a material oral statement that is false" to a person he knows is "a law enforcement officer" or "a person assigned investigative responsibility" by a statute or regulation, or by the head of a government agency. Although there is some authority to the contrary, it has been assumed that under present law a person was guilty of a criminal offense for making a false oral statement only if the statement was made under oath before a government official authorized to administer oaths, in a context of the safeguards available in a judicial or quasi-judicial proceeding. This new provision would give enormous power to FBI agents, Internal Revenue investigators, custom officials, and every other Federal employee engaged in law enforcement. Any statement made to such a government agent, deemed by him to be false or later found to be false, would subject the citizen to the risk of Federal prosecution. In that prosecution the outcome would depend upon the citizen's word against the official's word. No prior warning, no presence of counsel, no other safeguard would be afforded. It is unthinkable that police officials should wield such power in a democratic state.

Much concern has been expressed recently over the use of the grand jury, not to protect the citizen from unwarranted prosecution, but to give prosecuting attorneys what is in effect subpoena power for criminal investigative purposes. This development has been facilitated by the authority to grant a witness before a grand jury "use immunity". That is, the witness must forego his right under the Fifth Amendment to invoke the privilege against self-incrimination, and in return is promised that the evidence he gives may not be used against him. But the witness may still be prosecuted for an offense about which he testifies, if other evidence is available. Section 3111 (Compulsion of Testimony Generally)

reaffirms this procedure. "Use immunity" not only deprives a citizen of an express constitutional safeguard—the right to remain silent—but places him in grave risk of being prosecuted for an offense he has been forced by the government to divulge. Section 3111 is a serious encroachment upon a fundamental right.

The wiretap and bugging provisions of S. 1437 (Secs. 3101–3108) make some improvements in the present law as set forth in the Omnibus Crime Control and Safe Streets Act of 1968. They reduce the number of crimes in the investigation of which electronic surveillance may be employed, and remove the provision disclaiming intention to interfere with any "inherent" power the President may have to use electronic surveillance without regard to constitutional or statutory limitations. But S. 1437 otherwise leaves the authority to wiretap and bug intact. Experience since 1968 has shown that these powers are of little use in law enforcement and, since they infringe so patently upon the right of privacy, they should be abandoned altogether.

Section 1521 (Eavesdropping), prohibiting interception of a "private oral communication by means of an eavesdropping device", does not apply where one party consents. The consent of *all* parties should be required.

It also should be noted that several other provisions of S. 1437, mentioned above, particularly Section 1301 (Obstructing a Government Function by Fraud), add greatly to the investigating powers of government officials and seriously threaten individual rights.

8. ADMINISTRATION OF CRIMINAL JUSTICE

Some provisions of S. 1437 which adversely affect the fairness of criminal law administration, including use immunity, wiretapping, and bugging, have already been mentioned. Another unwarranted abridgement of the rights of an accused is found in Section 3713 (Admissibility of Confessions) which provides that the test of whether a confession is admissible in evidence at a trial is, not whether Miranda warnings have been given, but simply whether it "is made voluntarily". Section 3714 (Admissibility of Evidence in Sentencing Procedures) allows the use of any "relevant information" in sentencing proceedings even though it was obtained illegally, thereby encouraging police practices which violate constitutional and other legal rights. Section 3725 (Review of a Sentence) allows the government to appeal the length of a sentence under certain circumstances, a right which may jeopardize the defendant's freedom to appeal his or her conviction.

None of these provisions seem compelled by the need of effective law enforcement.

9. LABOR ACTIVITIES

A number of sections of S. 1437 which could seriously hamper legitimate labor activities have already been mentioned. The overbroad provisions of the sabotage law (Sec. 1111), the new crime of obstructing a government function by physical interference (Sec. 1302), and the proscription against "resisting" a court injunction (Sec. 1331), all pose great danger for labor unions. Two other provisions are of paramount concern to labor. There are Section 1722 (Extortion) and Section 1723 (Blackmail).

Section 1722 provides that a person is guilty of an offense "if he obtains property of another . . . by threatening or placing another person in fear that any person will be subjected to bodily injury or kidnapping or that any property will be damaged." Section 1723 defines blackmail as including, among other things, obtaining the property of another "by threatening or placing another person in fear that any person will . . . improperly subject any person to economic loss or injury to his business or profession." Obviously these provisions on their face can be applied to a broad range of labor union activities. Any strike involving violence would clearly violate both sections. Moreover, quite apart from violence, labor unions seeking higher wages and more favorable working conditions frequently "threaten" an employer or "place him in fear" that his "property will be damaged" by a strike. In fact these are the very purposes of a strike. Similarly labor unions attempt to obtain property from an employer, in the form of higher wages, by threatening him with "economic loss or injury" unless he consents to a new contract; whether the conduct is "improper" or not may depend on the court's attitude. Hence labor unions are placed in a very vulnerable

position by S. 1437, far worse than at the present time when activity occurring in the course of a legitimate labor dispute has been held not to be covered by the analogous provisions of the Hobbs Act.

Section 1722 does recognize the threat to labor union activities inherent in that provision. It provides that it is an affirmative defense, to be proved by the defendant, that "the threatened or feared injury or damage was minor and was incidental to peaceful picketing or other concerted activity in the course of a bona fide labor dispute." This affords totally inadequate protection. Violence in labor disputes, whether instigated by union members or provoked by the employer, is frequently not "minor" or "incidental" to "concerted activity." Moreover, the provision puts the government in the position of determining whether a labor dispute is "bona fide" or not, a dangerous power. Furthermore, no exception for labor union activity is contained in Section 1723.

The fact is that Sections 1722 and 1723 would put the Federal government in the business of intervening in the conduct of labor disputes on a massive scale. No such Federal intrusion union activities is necessary or justified.

10. WITHDRAWAL OF FEDERAL PROTECTION TO INDIVIDUAL RIGHTS

One of the major concerns in the area of civil liberties today is the tendency of the Supreme Court to withdraw Federal protection, both procedural and substantive, against State and local infringements upon individuals rights. S. 1437 does nothing to halt this development. And in at least one important respect it encourages and promotes it.

Section 1842 (Disseminating Obscene Material) prohibits the commercial dissemination of "obscene material", which is defined in part as material that "appeals predominantly to prurient interest of * * * the average person, applying contemporary community standards". The result of substituting local standards for national standards in obscenity cases is that every publisher and distributer is liable to criminal prosecution in every city and town which wishes to impose more strict standards than prevail nationally. A number of such prosecutions have already taken place. In the end the kind of material that the vast majority of people in the United States are allowed to read, or see in films, is determined by the strictest view of what "appeals to the prurient interest."

It is true that the Supreme Court, by divided vote, has accepted the "community standards" test, at least for the time being. But it is clear from pending cases that the Supreme Court has not yet fully resolved the issue, and the present majority may back away in whole or in part. At any rate, it is most unfortunate at this stage in the controversy to have Federal legislation which enacts into permanent law this highly restrictive doctrine of "community standards."

11. PENALTIES AND SENTENCING

The penalty and sentencing provisions of S. 1437 (Part III), while an improvement over S. 1, fall considerably short of the recommendations made by the Brown Commission:

(1) The penalties imposed, although not as draconian as those incorporated in S. 1, nevertheless remain much too high, substantially more severe than the Brown Commission proposals. Moreover, mandatory sentences are required in two areas,—trafficking in an opiate (Sec. 1811), and using a weapon in the course of a crime (Sec. 1823).

(2) S. 1437, unlike the report of the Brown Commission, does not seriously approach the problem of reconsidering the goals of our criminal justice system, or reforming the sentencing structure. On the contrary it delegates the whole matter to a United States Sentencing Commission, to be appointed by the Judicial Conference of the United States. It is the Commission, not our representatives in Congress, which is to establish the guidelines for sentencing. These guidelines are to be reported to Congress, but they become effective unless both Houses of Congress decide otherwise within 180 days. There is no way of knowing what the proposed Commission would do or what the nature of its guidelines would be.

(3) The Brown Commission proposed a method of appellate review of sentences in order to achieve uniformity, rationality and fairness. S. 1437 largely abandons these proposals. It allows appellate review only in felony cases and only if the sentence is more severe than the Sentencing Commission's guidelines. Where

the guidelines allow the maximum sentence, which are the more significant cases, there is in effect no review. Moreover, as noted above, the government is empowered to appeal felony sentences that are lower than the guidelines suggest.

One of the major purposes of the effort to codify the Federal criminal law has always been to modernize and reform the penalty and sentencing structure. S. 1437 fails to accomplish this.

12. PROBATION AND PAROLE

S. 1437 also fails to measure up to the recommendations of the Brown Commission in its provisions dealing with probation and parole. For example, under the Brown Commission proposals a judge could require that a sentence be served up to one third of the time before the person sentenced was eligible for parole; under S. 1437 the judge may bar parole up to nine-tenths of the sentence (Sec. 2301). The difference is that, if the sentence is 30 years, a defendant would be eligible for parole in 10 years under the Brown Commission recommendation; under S. 1437 he would not be eligible for 27 years.

CONCLUSION

Reform of the Federal Criminal Code is a worthwhile project. That reform is not, however, inconsistent with maintaining our system of individual rights. On the contrary one cannot be done successfully without the other. S. 1 was designed to impose a Watergate-type straitjacket upon the people of this country. S. 1437 retains too many of those provisions to be acceptable. They are still framed with an eye toward affording the government apparatus meticulous protection against every possible form of inconvenience, while forgetting the needs of a healthy and dynamic citizenry. There is no reason why codification of the Federal criminal law cannot be accomplished in a manner that strengthens, rather than undermines, democratic institutions in America.

Mr. EMERSON. My testimony is concerned with the impact of the proposed Federal Criminal Code on the system of individual rights in the United States. I am particularly concerned with the results it has with respect to the power of the ordinary citizen to oppose the policies of the government that is in power.

I think that S. 1437 is a substantial improvement over S. 1, but I still believe that it retains a large number of provisions which individually and in totality are greatly detrimental to the American system of individual rights.

The National Committee Against Repressive Legislation therefore opposes the bill. We continue to support revision and codification of the Federal Criminal Code. We do not believe that such reform should be achieved at the price of sacrificing civil liberties.

Let me address myself to some of the provisions as examples of the problems which I have in mind.

First of all, let me address myself to the inchoate crimes—attempt, conspiracy, solicitation, and I would add to that the crime of complicity. The purpose of these criminal offenses, of course, is to allow the Government to punish conduct that goes beyond the actual physical conduct of committing the crime. It allows the Government to punish activities of persons who are associated in some way or on the periphery of what happens.

These offenses are useful for law enforcement purposes with respect to some aspects of crime—for instance, organized crime and probably the antitrust laws. When you apply these general inchoate offenses in the field of political expression, however, it is likely to have a very dampening effect on freedom of expression.

First of all, the inchoate crimes necessarily deal with conduct before the crime is committed and therefore in the speech area. They, therefore, have a direct impact on speech.

They also deal with the right of association, which is a basic right in terms of political opposition, because they bring within the scope of the Criminal Code many people who are on the edges. Therefore, they have a very hampering effect on persons who want to associate with other persons but feel they may be liable for the actions of extremists in their group.

Third, inchoate crimes by their very nature, since they apply so much across-the-board, are administered on a selective basis. Therefore, they are directed against unpopular causes.

If one looks at these crimes as applied in the civil liberties field, one can see the potential impact. The crime of conspiracy, for instance, would mean that anyone who joined an association that considered plans, say, to lie down in front of bulldozers that were about to put an interstate highway through a park, even though the person took no part in the action, would be guilty of a Federal criminal offense.

Consider the crime of solicitation, which is a totally new crime in the books as far as the Federal Code is concerned. Under that provision anyone who talked with another person about civil disobedience and urged a person to live up to his principles and engage in civil disobedience would be guilty of a Federal offense.

Stated as they are in such broad language, these offenses are a very grave threat to civil liberties. They should be confined to very specific areas, not generalized across the whole field. In my view the crime of solicitation should be eliminated entirely.

A second area with which I am particularly concerned is the area of official secrets. The original provisions of S. 1 were, of course, eliminated, leaving in effect the present provisions of the espionage laws.

The fact is that the Department of Justice has consistently said that the existing espionage laws do impose what amounts to an official secrets act. In the *Ellsberg* case the prosecution was based on that assumption, although the issue never came to a decision. Assistant Attorney General Thornberg consistently repeated that the provisions of S. 1 did not change existing law. So we have here a situation where the Government is claiming that existing law does constitute an official secrets act which would impose criminal penalties on dissemination of any information that the Government wanted to keep secret. Therefore, to leave the law in that situation is almost as bad as the original provisions of S. 1 which were taken out.

In addition to that, section 1301 of S. 1437, obstructing a government function by fraud, might be utilized as an official secrets act. The fact is that in the *Ellsberg* case one of the charges of the indictment, in addition to those under the espionage laws, was a violation of section 371 of the Criminal Code for conspiracy on the part of Ellsberg and Russo to defraud the Government. If the Government had succeeded in that charge, it would have established that obtaining information the Government wants to keep secret is defrauding the Government. Of course, a newspaper reporter who collaborated or obtained that information could be charged with conspiracy or with obstructuring a government function by fraud.

Section 1310 thus seems to me to bring back into S. 1437 the worst provisions of S. 1 with respect to classified and national defense information.

Similarly, the theft and revealing information provisions could be interpreted with the same results. It seems to me that the only solution to this is to take the provisions in the Kastenmeier bill with respect to espionage and make them the sole provisions that apply to the disclosure of government information.

Third, I wish to call the subcommittee's attention to the provisions that deal with political opposition that interferes with government operations. The problem here is that a great deal of political expression is not carried on in an abstract, essentially polite sort of way.

If one were to look at the social movements that have marked the progress of our nation over the years, one would see that there is a certain amount of turbulence, disturbance, interference with government activities, and so forth. That is true of the labor movement. That is true of the women's suffrage movement. It is true of the civil rights movement, the peace movement, and the women's liberation movement. All of those social movements involved activities that interfered with the Government.

What this bill does is attempt to eliminate all inconveniences and annoyances, in effect, that the Government might face from that sort of political opposition.

The provisions of section 1111, the sabatoge provisions, apply most across-the-board to almost all activity of American industry and make it a Federal crime to interfere. Of course, you have to have intent to interfere with a government function, but that is very easy for a prosecutor or a jury to find.

Most important of all, section 1301, which I just mentioned, obstructing a government function by fraud, opens up the possibility of making it a Federal criminal offense to engage in many kinds of activities that are the inevitable outcome of political opposition.

Even worse, section 1302, obstructing a government function by physical interference, is a totally new provision. It would mean that anything that in some physical way interfered with a Federal Government function could be a Federal criminal offense. Thus a demonstration in which a lot of people gathered together outside a post office would interfere with access to the post office or would interfere with traffic in front of the post office. It would be a physical interference with a Federal function.

There is almost no end to what could be involved there. Moreover, that proivsion could be used, of course, in a highly selective way to prosecute certain people the Government found objectionable.

Senator THURMOND. Mr. Emerson, we have a long list of witnesses here so we are going to have to confine each witness, in addition to putting his statement in the record, to not over 15 minutes. I thought I should mention that since your time will soon be over. In the event you have something special you want to bring up before your time is up, I hope you will bring it to the subcommittee's attention.

Mr. EMERSON. I will hasten along, Senator.

Another series of provisions I want to mention deal with assemblies and demonstrations, which is related to what I just said. This may

be the only method of political expression that is available to persons who do not have access to the mass media.

Section 1861, failing to obey a public safety order, and section 1831, leading a riot, both could be used to seriously hamper the right of demonstration, which, as we have seen, in the civil rights movement and peace movement has been a matter of extreme importance.

Similarly, I would call the subcommittee's attention to political investigations. I would particularly call the attention of the subcommittee to section 1343, making a false statement, which is essentially a new criminal offense. This provision gives any law enforcement officer or any police officer an extraordinary power over the investigation of anything in which a person might be involved.

Similarly, many provisions affect labor adversely.

In conclusion, let me say that the difficulties I find are partly due to the fact that the draftsmen have attempted to generalize or write general crimes of conspiracy, solicitation, obstruction of Government by fraud, and so forth. They have simply cut across the board in a very inhibitory way.

Second, they have, as I said, attempted to protect Government operations against every possible source of inconvenience and to, in effect, isolate the Government from the people that the Government is supposed to serve. The provisions seem to be written by persons who went into a back room and tried to think up every possible kind of interference or annoyance or opposition that might arise and then put some provision in the bill to make that a Federal criminal offense.

It seems to me that it is about time that someone wrote a code from the point of view of the people who are on the receiving end, not from the point of view of the people who are in the Government who have plenty of power to handle their affairs as it is. The citizens who are trying to have an impact on Government are the ones that ought to be considered in this code, not the Government officials.

While a Federal Criminal Code is certainly a worthwhile project, that reform is not inconsistent with maintaining our system of individual rights. On the contrary, one cannot be done successfully without the other.

S. 1 was designed to impose a Watergate-type straitjacket on the people of this country. S. 1437 retains too many of those provisions to be acceptable.

There is no reason why codification of the Federal criminal law cannot be accomplished in a manner that strengthens, rather than undermines, democratic institutions, in America.

Thank you.

Senator THURMOND. We are glad to have you with us, Professor Emerson. We thank you for your presence and the contribution you made to this hearing.

Our next witness is Ms. Marilyn Kay Harris, coordinator on behalf of National Moratorium on Prison Construction, Washington, D.C.

Ms. Harris, would you like to have your entire statement placed in the record?

Ms. HARRIS. Yes; I would.

Senator THURMOND. Without objection, that will be done. You will have not to exceed 15 minutes to say anything in addition to that statement which you may wish to say.

STATEMENT OF MARILYN KAY HARRIS, COORDINATOR ON BEHALF OF NATIONAL MORATORIUM ON PRISON CONSTRUCTION, WASHINGTON, D.C.

Ms. HARRIS. Thank you very much.

I would also like to ask permission to extend my remarks concerning some specific revisions of the bill. We would like to provide this in addition to what I will say orally today.

Senator THURMOND. Without objection, that will be done. You may submit it to us.

Ms. HARRIS. Thank you.

[The material follows:]

PREPARED STATEMENT—NATIONAL MORATORIUM ON PRISON CONSTRUCTION

The National Moratorium on Prison Construction is pleased to submit this written statement for the record to further elaborate on points raised in our oral testimony and to direct attention to specific sections of the bill with which we are concerned. As stated in our testimony, the National Moratorium on Prison Construction (NMPC) has scrutinized S. 1437 in terms of its potential impact on the nature and extent of incarceration of federal offenders and found the bill seriously deficient. In undertaking comprehensive sentencing reform, the Congress should authorize and encourage a wide range of sanctions. More imagination and effort should be devoted to developing a hierarchy of sanctions ranging from less severe to more severe. The criminal code should expressly favor sanctions of lesser severity and explicitly disfavor incarceration.

Society has an interest in minimizing incarceration because it is drastic, costly, and productive of alienation, and because there are alternative means for promoting and protecting societal values. Any criminal sanction involves various degrees of impairment of an offender's freedom. Residence restrictions, curfews, supervision, community service, even money damages, diminish personal liberty and involve elements of control and manipulation. The point is that the criminal code should try to minimize these elements both for the offender's sake and for the sake of the larger society. The code should prefer those measures which are most consistent with and conducive to, individual freedom and dignity.

It is vital that the Congress recognize that imprisonment as we know it is cruel, and although all too usual, does not comport with evolving standards of decency. Prisons as we know them are antithetical to dignity and humanity. They destroy the human spirit, brutalize, and negatively socialize.

It is difficult to understand how the typical prison or jail thrives in modern America. American penal facilities seem clearly anachronistic—clearly out of some earlier, less civilized, less enlightened, less humane time. As Dr. Karl Menninger has recorded his impression of prisons, "An atmosphere of monotony, futility, hate, loneliness, and sexual frustration pervades the dark dungeons and cold hangers like a miasma, while time grinds out weary months and years."

A recent book based on a long-term research study in an Ohio Training school for boys documents in a painfully clear fashion how such an institution socializes young people to values exactly counter to those we would wish. The institution described and all to many of our other institutions holding juveniles and adults are institutions of terror, violence, and victimization. Individuals sent there by society must choose whether to victimize others or be victimized or suffer some of both. Such institutions breed violence and disrespect for human life. They subvert rather than serve societal interests. (See Juvenile Victimization: The Institutional Paradox, by Bartollas, Miller, and Dinitz)

Construction of newer, more modern prisons, but prisons based on the same bankrupt concepts as the old, is not an answer to our prison problems. Witness the federal prison system which is spending the taxpayers' money for new prisons for youthful offenders in locations like Lake Placid, New York; Bastrop, Texas; and Talladega, Alabama. These new prisons will open with a guarantee that meaningful contact with family and friends will not be possible for the prisoners. Designed to hold 500 persons for "economies of scale", the new prisons will share the many defects inherent to such a scale, no matter how well they are managed.

The very concept of caging large numbers of persons in penal institutions must give way to better means of responding to criminal acts.

Federal Judge James Doyle has been much quoted in saying, "I am convinced that the institution of prison probably must end. In many respects it is as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational." (*Morales* v. *Schmidt*, 340 F. Supp. 544, 548–9 (W.D. Wis. 1972), rev'd 494 F. 2d (7th Cir. 1974).)

The conclusions reached by Judge Doyle and the facts that underlie them are by no means secret. It has recently been out of favor to discuss humanity, decency, and acceptability of criminal sanctions. The cry has been for getting "criminals off the streets" and keeping them locked up longer. However, recent polls show fear of crime no longer increasing. The pendulum of public opinion seems to be coming back toward a more reasonable, moderate position and as unemployment declines, crime and fear should decrease even more. (Both crime and prison admissions are highly correlated with unemployment rates.) Now is the time for Congress to lead the country in an unprecedented move away from conventional confinement.

As important steps in establishing new directions, a number of fundamental changes in S. 1437 are required. Perhaps most fundamentally, the bill fails to declare a coherent philosophy to guide development of sentencing policy.

NEED FOR CLEAR STATEMENT OF PURPOSE

There are deep and continuing conflicts about the proper philosophy upon which sentencing and dispositional decisions should rest. In the past, legislators have tended to leave the important issue of what philosophical base should be used for sentencing decisions to the discretion of criminal justice personnel. Recodification of the federal criminal code provides an opportunity to establish and declare national public policy and purpose in regard to criminal sanctions. This opportunity is about to be missed.

S. 1437 evidences a belief that the criminal code can be all things to all persons or reflects that no one has been able to decide or agree on what purpose is to predominate in criminal sentencing or which purpose is to govern on a specific occasion. The statement of sentencing purpose lists all of the commonly proposed purposes—deterrence, protection of the public, punishment, and correction or rehabilitation. Retention of such a blanket statement of allowable purposes in effect means that the legislature has refused to decide what should be accomplished. How is an individual judge, or the proposed sentencing commission, to balance these complex and perhaps conflicting purposes in making individual dispositions or establishing sentencing ranges? How do the various sentencing alternatives, sentence lengths, sentencing factors, or offender categories relate to these purposes?

In considering an appropriate sanction for a given crime, how is the decision to be made among the sentencing options? If incarceration is chosen, how long should the term be? If a fine is selected as the appropriate sanction, how much should it be? Clearly, the answer to these and many other questions will vary depending on whether the goal is to make an example of this offender as a deterrent to others, to protect the public from this offender, to promote this offender's rehabilitation, to "make the victim whole" by ordering restitution, or to serve some other purpose.

S. 1437 provides virtually no guidance on how a choice should be made among all of the allowable purposes. It specifies that the sanction, and perhaps the purpose, may vary depending on the absence or existence of a number of subsidiary factors related to the offender and the offense, but it does not specify in what direction. There is no indication of an order of importance among the factors to be considered nor any indication of how they should be weighted against one another. Does the bill intend that "physical condition, including drug dependence", would result in a harsher sentence or a more lenient one? Does it envision prior unemployment as grounds for confinements as evidence of risk of future criminality or grounds for imposing probation with assistance in finding employment?

Since the bill would codify virtually all popular purposes of sentencing as allowable, it is not clear that the Commission would have the authority to dis-

allow any of them. The Congress should either address these vital issues directly or delegate them completely. It would be better to say nothing at all as to purpose or characteristics of the offense or the offender and simply delegate the entire job to the Commission than to provide a laundry list of vague and questionable factors that must be considered. Defendants should not be penalized in sentence severity or length based on such factors as education, vocational skills, previous employment, community ties, already punished criminal activity or alleged criminal activity. Many of the other factors, such as community attitudes, current incidence of the offense, likely effect on commission of the offense by others are also inapproriate matters for the Commission or a judge to consider. The inclusion of such factors in such numbers is simply reflective of the failure of the bill to come to terms with what it is designed to accomplish.

The legislative branch bears the responsibility for developing a coherent public policy to govern the criminal sanctioning process. This is a difficult and controversial process, but far from an impossible one. Some existing alternative bills, such as S. 204, the Hart-Javits Bill, go a lot farther toward fulfilling this important legislative role than S. 1437. There are a few specific concerns which the National Moratorium on Prison Construction wishes to address.

AUTHORIZED SENTENCES

As indicated above, NMPC regards Section 2001, concerning Authorized Sentences, to be too narrow. The only sentences authorized are probation, fines, and imprisonment. Other sanctions, such as day fines, community service orders, curfews, restitution orders, and other penalties should be authorized as sentences. Some of these punishments are included in the bill as possible conditions of probation or as additions to other sentences. They should be sentencing options in themselves.

Also as indicated above, the sentencing options delineated should reflect an order of preference for their use, from least drastic to most drastic. For example, Section 3502 which concerns release pending trial, specifies that a person charged with an offense shall be released pending judicial proceedings unless a specific finding is made. The section further specifies that if an individual is not released on his or her own recognizance, the first of a list of factors, which is ranked from less to more severe, that will assure the appearance of the person for trial is to be imposed. A similar approach should be taken in regard to imposing sentence following conviction. In addition and as stated above, a sentence to incarceration should be explicitly disfavored generally. Incarceration should be prohibited for most offenses—certainly for misdemeanors and infractions. Conversely, probation should not be prohibited for any offense as Section 2101 would do. In the December 1976 issue of *Judicature*, Senator Kennedy states in an article that he "suspects" that sentences of imprisonment would be reserved for the more serious crimes. The matter of offenses for which an offender may suffer deprivation of liberty should not be a matter of speculation. NMPC joins the other witnesses, including Judge Lasker, Mr. von Hirsch, and the National Prison Project, who recommended that a presumption against incarceration be written into the bill.

PROBATION

As stated above, and consistent with revising the bill to disfavor use of incarceration, probation should not be precluded as a sentence for any offense or offense class. Thus section 2101 should be revised to read that any persons found guilty of an offense may be sentenced to a term of probation.

As regards allowable conditions of probation, NMPC believes revision of the list of conditions allowed should be done in connection with refinement of the purposes to be served in sentencing. For example, some of the conditions might make sense for rehabilitative purposes, but not for purposes of deterrence or punishment. If rehabilitation were rejected as an allowable basis for sentence selection, such conditions should be deleted.

NMPC endorses inclusion in the bill of punishments heretofore used rarely including restitution payments, residence at a community facility, and work in community service, but would favor making these punishments discrete sentences which need not be tied to probation.

Just as no offenses should preclude probation, there should be no minimum probation terms set by law nor any durational restrictions on early termination of probation. If as NMPC and others have urged, the sentencing provisions of the

criminal code were based on a preference for use of the least drastic suitable alternative, no restrictions on the implementation of this principle should be allowed in the law.

The notion that a term of probation may be extended at any time prior to expiration if less than the authorized term was originally imposed is contrary to the need to make criminal penalties definite, an espoused objective of sentencing reform. Reductions of term or early termination are a form of mercy or forgiveness or of responding to new information and are desirable in that they reduce the exercise of state power over individuals. Provisions allowing extension of a sentence once set remove the individual's assurance that the punishment will be over when promised. As in Mr. Lowenstein's analysis of June 27, 1977, regarding appeal of a sentence by the government, possible extension of a sentence late in a term constitutes double jeopardy and cruel policy. All such provisions which allow enhancing a sentence in length or severity once imposed should be deleted.

IMPRISONMENT

As previously stressed, S. 1437 now authorizes excessively long periods of confinement for excessively broad categories of offenders. By eliminating good time, adding contingent parole terms, and allowing terms of parole ineligibility, yet authorizing long periods of incarceration, the bill would help inflate the already excessively large federal prison population. Such an impact would be highly undesirable economically and socially. The authorized terms of imprisonment should be substantially lower and the set of offenses for which incarceration is allowable should be limited. Furthermore, the bill should specifically prohibit extra-added, but illegal, punishments common to the typical prison.

Mr. O'Donnell urged a fifty percent reduction in maximum sentence lengths. Judge Frankel endorsed a general lowering of sentences as did the National Prison Project and Mr. von Hirsch. The Director of the Bureau of Prisons, Mr. Carlson stated that, "By increasing the certainty of the punishment rather than its length or severity, I believe we can be more effective in deterring crime." Mr. Dershowitz postulated that for every increase in severity of sentence there is a corresponding decrease in certainty.

The National Advisory Commission on Criminal Justice Standards and Goals and S. 204, the Hart-Javits bill, both call for an authorized maximum sentence of five years for most offenders, but even that is too long although clearly preferable to the terms in the existing bill. The statute should incorporate a presumption against incarceration and limit use to a very small number of serious offenses. Consistent with the philosophy of utilizing the least drastic suitable alternative, incarceration for a minimum term should not be required by law. Similarly, if parole is to be retained, periods of parole ineligibility should not be allowed. Furthermore, if parole is retained, the total length and severity of punishment should not be increased by contingent terms of imprisonment.

NMPC endorses three separate recommendations made by Judge Tjoflat. The first recommendation would preserve the court's option to prescribe a sentence of unconditional discharge. The second recommendation would give the court authority to set aside convictions of successful probationers upon their termination (as is presently provided for by the Youth Corrections Act) and also the convictions of offenders not originally sentenced to either imprisonment or probation two years from the date of conviction. The third recommendation would delete the phrase "for extraordinary and compelling reasons" from Section 2302(c), which gives authority to the court to reduce the original term of imprisonment or parole ineligibility to time already served on the motion of the Director of the Bureau of Prisons.

As regards the type of prison facility or the place of imprisonment, the bill should be modified to allow and encourage execution of the deprivation of liberty in facilities other than conventional prisons and jails. The provisions of S. 1437 that address juveniles authhorize the Bureau of Prisons to designate as the place of official detention a suitable public or private agency or foster home (Section 3603). The bill also authorizes the Director of the Bureau of Prisons to contract with a public or private agency or foster home for the custody, care, subsistence, education, and training of juveniles. The Bureau of Prisons should be similarly authorized and encouraged to enter into a wide variety of arrangements, including contracting with private and public agencies and individuals,

for the housing, care, custody, and supervision of adult offenders. At present, when the Bureau of Prisons experiences temporary population increases, institutional overcrowding tends to result. The bill should make clear that most offenders in the federal system do not require confinement in an institution with a high level of security and that development of alternative arrangements is preferable to overcrowding in federal facilities or continued use of inhumane facilities. The requirement in the bill that the Bureau of Prisons shall commit a juvenile to a home or agency near his home community if possible should also be applied to adult offenders.

Sections of the bill that address juveniles also specify that a juvenile who has been committed shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care, including any necessary psychiatric, psychological, or other care or treatment (Sections 3602 and 3603). Similar specifications of requirements and minimum standards should be incorporated in the bill to apply to adults.

EXCLUSION OF AGENCIES FROM APA AND FOIA

Sections 3825 and 3837 would exempt the Bureau of Prisons and the Parole Commission from the Administrative Procedures Act, the Freedom of Information Act, and the Privacy Act. NMPC finds that there is no justification for such exclusions other than historical tendencies to keep the affairs of these agencies out of the sunlight of public scrutiny and input. The profound effects that these two agencies have on the lives of prisoners warrant access of prisoners to the information and processes that these laws concern. The decision made by the Bureau of Prisons and the Parole Commission are also a major concern of organizations like the National Moratorium on Prison Construction and the National Prison Project and such organizations should not be cut off from the processes by which they are made nor be unable to learn what the decisions are.

PAROLE

NMPC favors in principle the abolition of parole, but believes that parole abolition should not be attempted in isolation from other major criminal justice system changes. In the context of the bill as it now stands, elimination of parole would simply serve to further increase terms of incarceration and insure that disparities would not be corrected. However, we believe that the parole system is fatally flawed conceptually, based as it is on prediction of future individual conduct. Parole has often served to increase, rather than decrease, arbitrary and inequitable treatment of prisoners. Thus, a few recommendations regarding parole are offered here assuming that parole will not be immediately abolished, although such patching will not overcome some of the major flaws of the parole system.

Under present law, one of the primary methods of insuring against unreasonably harsh sentences is by the limitation in Title 18 Section 4202(b), which prohibits a judge from imposing a minimum sentence establishing parole eligibility at greater than one-third of the statutory maximum. The proposed bill would virtually eliminate this prohibition by allowing a judge to impose parole ineligibility for up to nine-tenths of the statutory maximum, subject only to the as yet non-existent guidelines of the proposed sentencing commission. Given the excessively long prison terms authorized in the bill, such terms of parole ineligibility should not be allowed. Certainly such terms should not exceed the current one-third limitation unless sentence lengths are drastically reduced.

As regards the criteria for release on parole, some modifications are in order. Sections 3831(c) (2) and (3), should be eliminated. Subsection (c)(2), "there is no undue risk that he will fail to conform to such conditions of parole as would be warranted under the circumstances," requires prediction of individual conduct and is therefore unreliable and unfair. Subsection (c)(3), "his release at that time, in light of his conduct at the institution, would not have a substantially adverse effect on institutional discipline," would punish an individual for the presumed effects such punishment would have on other persons and is hence unfair even if it could be accurately assessed. Criteria for release on parole should be designed to serve the objectives of reducing disparity, reducing undue harshness or deprivation, and promoting equity, consistent with the objectives of the sentence imposed. Section 3831 should be revised in this light.

The authorized parole terms offer the potential for undue extension of state control over individuals lives. Under sections 2303 and 3834, a prisoner could be subject to a period of up to five years on parole, regardless of the fact that she or he had already served a complete term in prison. Terms in excess of three years would serve little purpose and would be unnecessarily restrictive. In line with the general orientation of NMPCs recommendations, even shorter terms of parole should be preferred.

APPELLATE REVIEW OF SENTENCES

NMPC applauds S. 1437's inclusion of appellate review of sentences falling outside the guidelines provided by the sentencing commission. However, we consider it essential to the ends of justice to provide for appellate review of sentences within the guidelines, and also for affording review of challenges made as to the validity of the sentencing guidelines. NMPC concurs with Judge Lasker that the as yet non-existent guidelines will not be so perfect as to eliminate any need for appellate review. Judge Frankel, Mr. O'Donnell, and the National Prison Project all urged availability of appellate review within the guidelines and NMPC concurs.

As stated above, NMPC is opposed to the provision allowing the government to appeal for the purpose of urging more severe sentences due to the chilling effect on prisoner appeals and the constitutional prohibition of double jeopardy.

SENTENCING COMMISSION

NMPC supports the establishment of a sentencing commission and concurs with those witnesses, including Senators Hart and Javits, Judge Lasker, Dean Gottfredson, Mr. von Hirsch, Mr. Dershowitz, and the National Prison Project, who have supported Presidential appointment of the members, with the advice and consent of the Senate. The members of the commission should include persons from inside and outside of the criminal justice system including ex-offenders. Representation from diverse ethnic backgrounds and from both sexes should be required. The concerns with which the commission will be dealing are relevant to, and their implementation will effect, all sectors of the public and the criminal justice system, making a broad range of backgrounds and perspectives desirable on the commission.

A sentencing commission offers a means to refine, implement, monitor, and evaluate legislatively created sentencing criteria. Given legislative failure to develop clear statements of sentencing purpose and means of accomplishment, a sentencing commission offer an alternative means of carrying out these functions if not excessively constrained by law. As stated above, NMPC finds many of the "factors" listed as allowable for inclusion in the commission's development of categories of offenses or offenders to be vague or undesirable and recommends their deletion.

Finally, NMPC finds the importance and consequences of the guidelines to be supplied by the sentencing commission of such magnitude that we recommend that both houses of Congress be required to approve them before they are put into use.

Ms. HARRIS. My name is Kay Harris. I am very pleased to appear here today on behalf of the National Moratorium on Prison Construction, which is a project of the Unitarian Universalist Service Committee and the National Council on Crime and Delinquency.

The National Moratorium on Prison Construction was established in February of 1975 to work toward achievement of a halt to construction of new penal facilities and jails in this country. Such a moratorium on prison and jail construction would allow time and a technique for forcing an unprecedented analysis and critique of our entire criminal justice process as well as time to develop and implement a variety of alternative programs, procedures, policies, and philosophies.

The national moratorium office cooperates with individuals and groups throughout the country who are interested in stopping the proliferation of prisons.

There is one major concern that I would like to address before this subcommittee today. It is a concern that has been raised repeatedly before the subcommittee, but it is of such fundamental importance that we believe that we must add our voices to the chorus.

The National Moratorium on Prison Construction urges that S. 1437 be revised to drastically limit the use of incarceration as a criminal sanction.

Professor Dershowitz testified yesterday to the effect that if Criminal Code reform resulted in construction of more prisons, it would be a failure. The National Moratorium on Prison Construction would assert that unless comprehensive Criminal Code reform significantly reduces use of conventional imprisonment in this country, it will be a failure.

Senator THURMOND. May I interrupt you for a minute?

We have just put your statement in the record. I thought you might want to emphasize certain points or bring out something that is not in your statement. Otherwise there is a duplication in the record.

Ms. HARRIS. OK.

I would like to emphasize one point. We feel very strongly that this country needs to move away from its practice now of caging many thousands of people in massive congregate institutions where those people are deprived of a number of rights in addition to the deprivation of liberty. They are put in fear of their lives. They live in constant fear for their personal safety. They are deprived of the opportunity to associate meaningfully with friends and relatives. They are deprived of many opportunities to read or to engage in activities that they choose to engage in.

We believe this country must stop the practice of not only depriving people of liberty, but also adding many other punishments to the deprivation of liberty as a sanction.

Senator THURMOND. May I ask you a question here?

Ms. HARRIS. Certainly.

Senator THURMOND. As I understand your testimony, you are opposed to sending people to prison; is that correct? What do you have in mind?

Ms. HARRIS. What we are opposing is the confinement of people in the modern American prison as we know it today.

Senator THURMOND. What do you suggest as an alternative to sending people to prison?

Ms. HARRIS. We suggest as a major first step we should turn away from use of confinement by using a broad range of alternatives involving such things as fines, curfews, restrictions, community service orders, restitution, and a whole range of penalties that are punitive but not so drastic as the deprivation of liberty in a massive institution with hundreds of other people far from family and friends.

We think that the idea that incarceration protects the public is, in fact, a myth. There are no good reasons to continue to incarcerate people in the manner that we do. We do it because we are so accustomed to doing it. We believe as Americans we have the spirit and opportunity to develop more humane, more sensible kinds of alternatives.

When I say that it is a myth that incarceration protects the public, if you look at common estimates of what happens to 100 major crimes—felonies—you will see that of 100 major crimes that are committed only 50 are reported to the police. For the 50 crimes reported to the police, approximately 12 people are arrested. Of those 12 people, 6 are convicted; out of those 6, about 1¼ go to prison.

In fact, LEAA's victimization surveys indicate that an even smaller percentage of crimes are reported to the police, so probably the percentage of crimes that end in imprisonment is even lower than 1.5 percent. Yet at the same time we have in our midst at any given time a number of people who will someday commit a violent act. In any practical sense these people are undetectable. Also, in a constitutional sense they are undetectable or unpredictable. Our inability to predict human behavior, especially something such as a violent act, has been well documented by a number of authorities, some of whom have testified before this subcommittee.

For example, there was a recent study done in Columbus, Ohio, by the Academy for Contemporary Problems. The study was designed to look at the idea that incapacitation in penal institutions protects society.

They were interested in the serious crimes of homicide, rape, robbery, and aggravated assault. They were interested in how many of those crimes could be prevented by a policy that would involve incarcerating everybody convicted of the felony for a flat term of 5 years. Using statistical means, which has some definite limitations, they found that out of all those violent crimes that I listed which were committed in 1 year in that given county, only about 4 percent of those could have been prevented if all felons who had been convicted of felonies in the previous 5 years had been incarcerated for a flat term of 5 years. They concluded from the study that more cells for more criminal will not reduce crimes enough for the community to notice a change.

In fact, another author, Gilbert Canter, whom I would like to quote has said:

> If our entire criminal justice apparatus were simply closed down, there would be no increase and there would probably be a decrease in the amount of behavior that is now labeled criminal.

We are indeed saying that incarceration as we know it is not necessary. In fact, there is quite a bit of evidence that incarceration breeds violence in our society. When you consider the cost of incarceration today, that is another factor.

The Congressional Budget Office has recently reported that the cost of maintaining a Federal prisoner for 1 year in one of our new Federal institutions is over $17,000. This is on top of the cost of constructing one prison bed, which is now about $43,000, in the Federal system.

If this Criminal Code reform does not do something to move away from use of incarceration, if it does not specify a preference against incarceration—a very strong preference—if it does not decry and speak out against the unauthorized, unjustifiable and brutal accouterments of incarceration in this country today, it will have a negative impact.

There is one other particular point I want to make. One of the primary activities of the National Moratorium on Prison Construction

has been working to stop the proliferation of the Federal prison system. Every year since at least 1969 the Federal Bureau of Prisons has come to the Congress and asked for more Federal funds for construction of new prisons and jails.

Every year the National Moratorium on Prison Construction joins other witnesses before the Appropriations Committees opposing this expansion of the Federal prison system and opposing the addition of more and more Federal prison beds. Each year the Appropriations Committees tell us that we really are before the wrong committees. They tell us we need to be addressing the committees which establish the criminal laws and develop the criminal sanctions in this country.

Despite such reluctance to interfere with the jurisdiction of other committees, the Appropriations Committees on both sides of the Congress have expressed strong dissatisfaction with the continued demand for more Federal prison beds. Last year the Senate Appropriations Committee stated that the current range of alternatives to incarceration is clearly unsatisfactory. They directed the Justice Department in the strongest possible terms to pursue development of additional alternative sanctions.

This year the House Appropriations Committee, has disapproved funds requested by the Bureau of Prisons for planning and site acquisition of two new Federal prisons on the grounds that the facilities have not been well justified and on the grounds that the prison officials should be pursuing more fully alternative means of housing offenders.

We feel very strongly that this subcommittee needs to reassess the impact that this bill might have on prison populations. Incarceration should be reserved for the most serious of offenses, as it is the most serious sanction we have other than execution. Where we do resort to deprivation of liberty as a sanction, it should not be carried out in what we have come to know as the typical modern American prison.

With the recent emphasis by President Carter on human rights, the spotlight of the world will surely fall on America's prisons and jails. Given the fact that we have the highest incarceration rate in the industrialized nations—in fact, among reporting nations that we know of—and given the fact that there is such a disproportionate share of racial minorities behind our bars, there is much that we should not want to come into world view. We would not stand up very well.

Let us acknowledge the inhumanities that exist in our present system and move affirmatively toward their prompt elimination.

Thank you.

Senator THURMOND. We are pleased to have you here. Thank you for your thoughts.

Our next witness is Mr. John Cleary. I believe he has Mr. Roger Lowenstein with him. They are here on behalf of the National Legal Aid & Defenders Association.

If it is agreeable, Mr. Cleary, we will put your entire statement in the record. Then we will give you 15 minutes to say anything in addition to that. During the 15 minutes you may explain anything about your statement or bring up new points not already in your prepared statement.

[The material follows:]

PREPARED STATEMENT OF JOHN J. CLEARY, EXECUTIVE DIRECTOR, FEDERAL DEFENDERS OF SAN DIEGO, INC., THE FEDERAL COMMUNITY DEFENDER ORGANIZATION FOR THE SOUTHERN DISTRICT OF CALIFORNIA ON BEHALF OF THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION

I. INTRODUCTION

A compromise has been made to remove some defects of S. 1 (94th Cong. 1st Sess.) which has not only reduced the size of the proposed revision of the Federal Criminal Code (title 18) but has also allayed public criticism. This reduced version still needs further study and review so as to provide a better integration and comparison with existing Federal practice. Although as a Federal defender I find many aspects of S. 1437 repugnant to the concept of limited federal police jurisdiction (i.e. the expansion of Federal jurisdiction, the creation of new offenses (solicitation etc.), and the redefinition of offenses to broaden the scope of criminal statutes), the most dangerous provisions deal with Federal sentencing.

Existing Federal laws on sentencing need substantial revision and reform to eliminate arbitrary action and unduly long-term confinement, but the sentencing provisions of S. 1437 are wore than existing law. S. 1437, in the guise of reform, exercises present protection for the convicted defendant.

S. 1 and S. 1437 have been drafted with a clearly prosecutorial slant, and it is obvious that the judiciary has but little involvement in the drafting of such legislation. Chief Justice Burger has very validly criticized the action of Congress in adopting legislation without considering its "impact" on the judiciary. This wholesale revision and expansion of Federal criminal law will deluge the Federal courts with new criminal cases and increased litigation, and yet there has been little and late response in Congress to the needs of the judiciary for more judges. It is anomalistic that in our Federal criminal justice system we will spend $2 billion for the Federal investigative and enforcement agencies to prosecute criminal laws in the Federal courts, but provide less than $400 million (one-fifth) for the total operation of the Federal judiciary that must consider civil as well as criminal litigation.

Criminal litigation is tolerably processed with the aid of such dubious features as "plea bargaining," and the use of Draconian penalties, presumptive mandatory minimum sentences, and high possibility of parole ineligibility, coupled with limited flexibility of the district judge at sentencing creates an awesome response. The observer has the feeling that the new increased penalty provisions were designed to use long-term confinement as a threat to avoid the possibility of litigation, so that the average American faced with a Federal accusation would sacrifice his fundamental right of his "day in court" to avoid threatened long-term confinement. Ironically, the "upping" and crystallizing of the penalties may not induce guilty pleas but increase trials. The person faced with a relatively certain penalty will have nothing to lose by presenting the case to a jury. Litigation will proliferate under this system, and yet the prosecutor still maintains the ability to manipulate this system by the nature of charge that he files so as to have absolutely unfettered discretion at sentencing. Again, the irony of the system is to restrict the discretion of the judge but to provide the potential for serious abuse on the part of the prosecutor. It is self-evident that those practicing on the behalf of persons charged with crime have had little input, and although a few may be given a limited opportunity at this late date in these hearings, the very drafting should have included the input of the defense bar.

Federal courts have resorted to the principle of lenity favoring the imposition of a lesser penalty in construing penal statutes. To the contrary S. 1437 is confinement oriented. Arbitrary abuses in the imposition of penal servitude should be removed but not in a manner that would preclude the trial judge from individualizing the sentence to fit the offense and the offender.

In an effort to save this legislation a rather novel and apparently reform concept of a Sentencing Commission (P 28 U.S.C. 991 [1]) is added. This Sentencing Commission without any specific standards is to establish guidelines for sentencing to imprisonment, ineligibility for parole, and other dispositions of offenders. The concept had the support of those seeking to reduce the harshness

[1] "P" placed in front of a U.S.C. citation refers to a proposal in S. 1437. Otherwise, such references are to existing Federal law.

to an alternate concept espousing the other extreme. The provisions of S. 1437 do not abolish the Parole Commission, which uses a set of similar guidelines pursuant to Congressional authority, but creates a competing agency without insuring that a new one would have any better chance of success than the Parole Commission. The creation of the new agency (Sentencing Commission) in addition to the old agency (Parole Commission) both without specific congressional guidelines almost predicts failure.

Congress has made revisions in recent years of various parts of the Federal criminal code, but S. 1437 has the effect of obviating this recent congressional action. Much of it is in the form of a "word massage" by the artistic hand of those interested in increasing the opportunities for prosecution or in achieving greater opportunities for confinement. Last year the Parole Commission and Reorganization Act of 1976 was enacted, but now a new concept is introduced without a fair evaluation of legislation only one year old. In 1974 there was a revision of the Federal Juvenile Delinquency Act, and instead of S. 1437 adopting the law less than 3 years old, there is again a clear effort to dilute and eliminate many of the ameliorative and reform provisions contained in that legislation. Our only expungement law for first offenders (21 U.S.C. 844) has also been modified with slight word changes so as to denigrate the rights of the individual. The work of the Congress in recent years should not be so easily discounted.

S. 1437 is too much too soon. Although the effort to reduce its bulk has been achieved, the magnitude of this proposed legislation staggers understanding and comprehension which is necessary to provide adequate feedback on these revolutionary legislative proposals. It is strongly urged that legislation be redrafted to focus on some particular aspect of the Federal criminal justice system (i.e. sentencing, jurisdiction), and after careful study and evaluation from those practicing regularly in the field, that legislation be considered by this Congress.

II. GENERAL PURPOSE (P 18 U.S.C. 101)

S. 1437 provides in section 101(b) general standards for prescribing sanctions, but neither in this section nor in the later sections dealing with sentencing is there any orientation concerning the predisposition toward the use of confinement. It is urged that section 101 be amended to include the following principles:

1. The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant.[2]

2. A sentence not involving confinement is to be preferred to a sentence involving partial or total confinement in the absence of affirmative reasons to the contrary.[3]

III. IMPRISONMENT

Our prisons are often placed where a life of crime is encouraged rather than deterred. The prison should be the last resort. Although it may be necessary for those who cannot otherwise be restrained, the use should be limited rather than expanded. Efforts at prison reform and the opportunities for rehabilitation and vocational training should be increased, but today there is an attitude common among prison authorities, including the Bureau of Prisons, that they are little more than warehouses. Ultimately, the people serving in those institutions return to our community and are often embittered by the experience. The needs of society would be best served by a general orientation in any federal criminal code to avoid confinement unless necessary.

Existing laws provide statutory maximums that are ameliorated by the actual sentences imposed by judges in the reasonable exercise of their discretion. Sometimes that discretion is abused. Long-term confinement (more than 3 years) is reserved for the minority of serious offenders, and it must be remembered that in the Federal criminal justice system we are faced with the Federal criminal defendant who is only rarely charged with those common law offenses that give rise to more serious offenses prosecuted within State court (i.e. murder, robbery, burglary). Even then the sentences meted out by American courts have been known to be excessive. Prof. Daniel J. Meador, now Special Assistant Attorney General, prepared a report in 1965 entitled "The Review of Criminal Sentences in England." In that report he offers this commentary on American sentencing practices:

---

[2] ABA standards relating to sentencing alternatives and procedures, standard 2.2.
[3] Ibid, standard 2.3(c).

"Another point to be noted is that criminal sanctions are imposed less heavy-handedly in England than in the United States. Observation suggests that English judges give probation or a fine in cases where imprisonment would be imposed in America. English prison sentences are shorter. A 3-year term is considered substantial, and 7 or 8 years a very long term. The 30 year sentences given in the train robbery case are almost unheard of." "ABA Standards Relating to Appellate Review of Sentences," appendix C 97–98 (approved draft 1968).

This disproportionate affinity for long-term confinement should be abated. The "ABA Standards Relating to Sentencing Alternatives and Procedures," standard 2.1(d) provides: "For most offenses, on the other hand, the maximum authorized prison term ought not to exceed 10 years except in unusual cases and normally should not exceed 5 years."

Since the Federal jurisdiction is a limited one, it might gain guidance from the largest state in formulating new statutes for sentencing. Effective July 1, 1977, California has completely revised its sentencing scheme. Except in capital cases, the maximum range of a sentence is 5, 6 or 7 years with the possibility of enhancements up to 3 years and the possibility of consecutive sentences.[4] The California Judicial Council on May 13, 1977 promulgated sentencing rules to implement this new Uniform Determinate Sentencing Act of 1976. Cal. Stats. 1976. CH 1139. This system too has a tack-on parole provision of not more than three years. The length of confinement is substantially less for a jurisdiction that has to deal with the common occurring criminal offenses which would more often involve violence or other danger to society than the type of offenses that are ordinarily the fare of federal courts. A range of sentences under California law that will take effect within a month are far less than the zones outlined in S. 1437.

Under existing law the judge at sentencing can grant probation or impose a sentence of confinement which is tailored to the circumstances of the offense giving credit to the extenuation or mitigation presented by the defendant. The abuses from the system come from the imposition of disproportionate or long-term confinement not justified by the circumstances surrounding the offense or the background of the individual. The existing ameliorative procedure for this is our Parole Commission, even though it does have a history of malfunctioning. The defendant facing a criminal charge must be advised of the maximum penalty. That is a question asked of the defendant at the time the plea of guilty is taken (rule 11, Federal rules of criminal procedure). When a lawyer advises a client, he would be remiss in his professional responsibilities if he did not state the maximum, and although counsel may miscalculate in his professional estimate the actual sentence imposed by the judge, his responsibility is to make clear that which is the outside limit for confinement. The maximum penalty, therefore, can provide some reasonable degree of certainty. Hopefully, it is not used in most instances. Under existing law, defense counsel states the statutory maximum, but into it he must also consider two essential factors: reduction for good time credit, as well as parole eligibility. The first is a "top"; the second is a minimum. On a 20-year sentence, a prisoner would only have to serve 13 years, 1 month, and there is a possibility that the prisoner could acquire "earned good time" which would make the sentence served approximately 11 years or less. A 20-year sentence under existing law might result in service of less time than on a 12-year sentence (class C felony) under S. 1437.

Bail-jumping might serve to point out the disparity. If a person is charged with bail-jumping on a class A–D felony, he is subject to 6-years confinement. (P 18 U.S.C. 2301(b)(4)). He has an add-on parole term of one to 2 years (P 18 U.S.C. 3834(b)(3)) and a contingent term of confinement of 90 days (P 18 U.S.C. 2303(b)(1)). Under a bail-jump offense under S. 1437, the defendant has the maximum term of confinement of 6 years 90 days plus a total exposure to confinement and parole to a maximum of eight years 90 days. Under existing law, the 5-year offense for bail-jumping (18 U.S.C. 3150), with good time deduction, has a mandatory release (18 U.S.C. 4163, 4164) after 3 years 8 months service of his sentence with a maximum parole period at that release of 10 months. Under existing law, the total exposure to confinement is 3 years 8 months with an overall exposure to confinement and parole of 4½ years. The difference between existing law and the proposed law is startling.

---

[4] Unlike S. 1437, California preserved good time reductions with these reduced terms of confinement.

IV. PAROLE INELIGIBILITY

Under existing law, the trial judge may designate a period of up to one-third of the total sentence as a period of parole ineligibility. 18 U.S.C. 4205(b)(1). On a sentence of 6 months to 1 year, the judge may designate one-third of the sentence as time for release on parole but need not do so. 18 U.S.C. 4205(f). A person serving a sentence of 1 year and 1 day is eligible for release on parole after serving 4 months (18 U.S.C. 4205(a)), and if the judge imposes sentence under 18 U.S.C. 4205(b)(2) the person is eligible for parole at any time. S. 1437 inordinately favors a concept of parole ineligibility. The Parole Commission has not been abolished, but now the trial judge has the discretion to discount their potential undue generosity in releasing a meritorious prisoner by determining at sentencing that such future conduct will not in any way accelerate release from confinement. Under S. 1437 the prisoner must first serve 6 months before he is eligible for parole (P 18 U.S.C. 3831(a)), and the district court may impose the term of parole ineligibility up to 90 percent of the total term of confinement (P 18 U.S.C. 2301(c)). After the 120-day period has expired for a motion to reduce (rule 35, Federal rules of criminal procedure), only the Bureau of Prisons may suggest the removal of a term of parole ineligibility. (P 18 U.S.C. 2302(c)(1)).

V. PAROLE

Existing federal law provides for parole as an integral part of the overall sentence. If a prisoner is sentenced to 10 years confinement and released after 4 years, he has a 6-year parole period. The recent revisions of our parole system permit early termination at any time, a file review by the Parole Commission after 2 years, and a presumptive termination of parole after 5 years which, unless terminated must give the parolee an adversary hearing with counsel to determine the reasons for extension of parole. (18 U.S.C. 4211). Under S. 1437 parole is an add-on feature to the term of confinement, which extends out the overall period of federal control and supervision. Even though the prisoner may have served his sentence, during the period of parole there is a provision for contingent confinement up to 90 days which will serve as a punitive sanction in the event of some misstep on parole even though the total term of confinement has been served. If the individual has been required to serve every day of his sentence to confinement, then the sentence should be terminated. This type of parole after complete service of confinement is not a legitimate governmental control, and this type of parole provision only further strengthens the consideration that service of every day of confinement will literally be possible under S. 1437.

VI. SENTENCING COMMISSION

The duties of the Sentencing Commission include the formulation of guidelines for sentencing and parole (P 28 U.S.C. 994), but only the most general guidelines are used to suggest what standards should be achieved. The Parole Commission and Reorganization Act of 1976 provide authority to promulgate rules and guidelines for parole (18 U.S.C. 4203(a)(1)), but the use of the Salient Factor Score and the guidelines on sentencing ranges leave much to be desired. The fact that the person might have used an automobile in his offense (i.e. in bribery) would reduce his Salient Factor Score, and the arbitrariness of the sentencing ranges has also generated much criticism. Although it has been suggested that the Sentencing Commission will devise specific sentencing ranges, there is nothing in the proposed legislation for the duties of the Sentencing Commission that would preclude them from coming up with the very same standards now used by the Parole Commission. If the Parole Commission was functioning properly, the Sentencing Commission would not be necessary. S. 1437 does not even have the governmental efficiency/integrity to establish one or other as the agency, and it is somewhat inefficient and impractical to expect a separate federal agency to follow guidelines promulgated by another in its daily work, especially where those guidelines might have conflicted with prior practices of that agency. The principles sought in the reform of sentencing could now be achieved by an enlightened and renovated Parole Commission.

Congress should establish sentence ranges if they are to be used. California has set the example of one procedure, but it would be doubtful that the California legislature could be induced to transfer their responsibility of setting

some sentencing guidelines by leaving the specific range of sentences up to the Sentencing Commission (i.e. Judicial Council of California to promulgate rules which only general maximum ranges). Whether or not such delegation of legislative powers is constitutional, it is improper without some specific standards to avoid the situation that has developed with the Parole Commission.

One of the examples Senator Kennedy has suggested that might be used by the Sentencing Commission dealt with the offense of bribery. A government officer holding the position of high public trust who solicits and/or receives something of value knowing its illegal purpose but enters into no specific agreement with the briber about how the payment will be earned is to receive 2 to 3 years, but if he had a particular agreed upon action as part of the bribe then the sentence would be 3 to 4 years. Who determines the actual basis for the sentencing range—the jury or the judge? As a defense lawyer, I feel that the precedent is such that it would require the jury, the trier of fact, to determine the specific allegations that might be considered at sentencing. Instead of the general issue of guilt, the jury will now have to find the specific degree of involvement. If the jury did not consider that factual controversy, then the present sentencing scheme would have to be substantially expanded to include due process guarantee so that the actual determination may be made openly and fairly.

The Sentencing Commission would undermine judicial integrity and responsibility. Sensitive to the import of his decision, the judge must tailor the sentence to fit the offender and the offense. Although the guidelines will permit deviation, deviations could be appealed. The judge recognizing promulgation of guidelines from upon high would take the easy course by merely accepting a range provided by the guidelines. Now the judge must accept responsibility for the sentence, but the use of guidelines would permit "the passing of the buck." Those judges who might be the "offenders" would still be able to "end-run" the guidelines, and even with appellate review it will be difficult to reverse their determination based upon a face-to-face confrontation with the defendant.

The Sentencing Commission and S. 1437 do not eliminate Rule 35, Federal Rules of Criminal Procedure, which provides for a motion to reduce sentence 120 days after the original sentence is imposed with the period tolled during an appeal. Especially where there is an appeal and the defendant confined, the district court often gains an advantage from an institution report on the progress of the defendant in prison. The judge has the second meaningful chance to evaluate his sentence. The potential of Rule 35 should be expanded to provide later reevaluation in light of actual performance, but the Sentencing Commission with its "freeze-dried" sentencing guidelines effective at the time of sentencing are the product of pure prognostication giving little advantage to hindsight review.

The Sentencing Commission not only duplicates the work of the Parole Commission but does inefficiently that which could be more readily handled by the Court of Appeals. A defendant may now appeal his conviction, and if he files a motion to reduce, he may appeal the denial of the motion to reduce for sentence. Although the appellate review of a motion to reduce sentence is extremely limited, the vehicle is there. If a conviction were reviewed, it would add little to include the sentence imposed by the judge. If the sentence were reviewed, the circuit would have insight into the range of sentences and the performance of the district judges, and the circuits would be better able to ameliorate arbitrariness in sentencing in those rare cases. Further, the arbitrariness occurs in the excessive cases, not in the case where the defendant receives a light sentence.

The Sentencing Commission in formulating its guidelines will consider the background of the defendant (P 28 U.S.C. 995(b)) which would include the defendant's criminal history. The offense should be the key in imposing punishment (confinement), and the background on the individual should only be used to alleviate, not aggravate the sentence. The background of the individual is important in determining the grant of probation as an alternative to confinement (confinement), and the background on the individual should only be used tence of confinement. In achieving some uniformity in sentences, the offense should be the "polar star" for the duration of confinement. However, the proposed legislation (S. 1437) is extremely ambiguous and permits new standards ranging from those now used by the Parole Commission to those suggested by the LEAA Denver Project which allowed some type of cross-reference or point

system to allow mechanical computation of the actual sentence. Even the guidelines permit variation, and that is only due recognition to the inherent discretion a judge must have. If discretion is allowed, what objective factors or criteria are to be used by the sentencing judge? If the LEAA Denver Project is to be used, then it should be spelled out in the statute. If the Parole Commission guidelines are proper, then the statute should so state.

For the Sentencing Commission guidelines to have any effect, the judge will have to state more than his reasons at the time of sentencing (P 18 U.S.C. 2003(b)). He will have to state the factual considerations placing the defendant in a particular category. There is no provision for a statement of these requisite factual findings, and they are highly important in light of the fact that any type of evidence may be considered at sentencing (Federal Rules of Evidence 1101(d); P 18 U.S.C. 3714)).

The guidelines proposed by the Sentencing Commission would be national guidelines, but such guidelines discount regional and other variances. The federal jurisdiction is a limited one, and it does not have the day-to-day criminal justice experience of a state. Although I am not suggesting "local community standards," I think that sentencing patterns geared to a region such as the size of a Circuit would be more appropriate. The type of federal offenses might vary with the region, and guidelines might be more accurate along those lines.

The purpose of the Sentencing Commission is to limit the broad discretion of the trial judge, but what limitations are placed upon the unbridled discretion of the prosecutor? May a prosecutor, by his form of charging or factual allegations, limit the range of sentencing by the district judge? The district judge now may consider any evidence at sentencing, and will the district judge be able to go beyond the actual charge and characterize the offense so as to fit within the guidelines? For example, the offense originally charged was a 4–6 year offense under the guidelines, but the offense to which the plea of guilty is under permits probation or a sentence of up to 2 years. Would the trial judge still be able to impose the 4–6 year sentence even though there has been no formal finding of that degree of criminal liability. It would be suspected that if the prosecution and defense counsel agreed either upon a particular characterization, the trial judge would most likely acquiesce. If so, the whole working of the Sentencing Commission could be avoided. This would give the prosecutor a powerful tool to induce guilty pleas to offenses of lessor liabilities to avoid the more serious liabilities set forth in a sentencing schedule. If district judges did not permit this type of device, the only alternative would be increased jury trials on the issue of criminal liability to avoid the foregoing sentence predicted by the guidelines of the Sentencing Commission.

The Sentencing Commission will have a difficult time taking into consideration different districts charging practices. In one district a charge of possession of 20 kilos of marijuana may rate a misdemeanor with reasonable expectation of probation, but in another district would be treated as a felony, (21 U.S.C. 841(a)(1)) with reasonable expectation of a penitentiary sentence. The Sentencing Commission will have a difficult time comparing these two because of the disposition—one a misdemeanor, and the other a felony. The resolution of this by guidelines would seem to be impossible.

VII. SENTENCING OF PROBATION

Under existing law, probation is an alternative to a sentence of confinement, but under S. 1437 it is referred to as a form of sentence. Under existing law, if the defendant is sentenced to a sentence of more than 6 months, the court may require that the defendant spend up to 6 months in a jail-type institution and suspend the execution of the remainder of confinement and place the defendant on probation. This provision would require characterization of the offense at the time of sentencing so that the defendant would be aware of the maximum he was facing if there was a later violation of probation. Under S. 1437 the 6 month condition of confinement is available for a sentence of probation, but the defendant would not become aware of the maximum until the time of final sentencing after a possible revocation of probation. The danger with this procedure is that the misconduct giving rise to the probation revocation might influence the court in determining the nature of the sentence of confinement for the original charge. Mandatory supervision and probation should not be re-

quired (P 18 U.S.C. 3801). The qualification for a probation officer should include at least a college degree in a social science (P 18 U.S.C. 3802), and it does not seem appropriate that federal statute should authorize a probation officer to carry a firearm (P 18 U.S.C. 3016). One of the most serious deficiencies of S. 1437 is its failure to give some preferred status to probation as an alternative to confinement.

VIII. FEDERAL YOUTH CORRECTION ACT

In 1950, Congress initiated an experiment for youthful offenders which focused on "treatment and supervision" rather than imprisonment. (18 U.S.C. 5026). See also *Dorszynski* v. *United States*, 418 U.S. 424 (1974)). This sentencing alternative is available for youthful offenders up to 26 years of age. (18 U.S.C. 5006(e), 4216). Although the Bureau of Prisons has not responded well to the treatment for youthful offenders (they have been placed in penitentiaries and treated as regular adult prisoners), the purpose of the legislation should be continued and not abandoned. The principal asset of this legislation is a provision for a certificate to set aside conviction upon completion of the expiration of the sentence or completion of probation. (18 U.S.C. 5021). Although the ramifications of the certificate have not been legally clarified, its beneficial effect has been compared to being better than a pardon. (*Tatum* v. *United States*, 310 F. 2 854 (D.C. Cir. 1962)). No equivalent remedy is found in S. 1437. The failure to make any distinction from those under the age of 18 up to age 26 for a felony offense, which exists only as an option, is a serious deficiency.

IX. FEDERAL JUVENILE DELINQUENCY ACT

In September 1974 Congress passed a comprehensive revision of the federal criminal law relating to juveniles, persons under the age of 18 years at the time of the offense. Federal jurisdiction was ordinarily evoked only if the state could not assume jurisdiction, and this new law emphasized lack of restraint prior to adjudication and treatment if the juvenile was adjudicated delinquent.

A line by line comparison of S. 1437 against existing law will point out the efforts to modify the recently enacted legislation for juveniles. For example, jurisdiction will be assumed over juveniles for Class A, B, and C felonies but now only occurs only after a hearing (P 18 U.S.C. 3601; 18 U.S.C. 5032). An existing mandatory duty is to notify juvenile's parent, guardian, or custodian if he is taken into custody is now modified that the government shall "make reasonable efforts" to notify such persons. (P 18 U.S.C. 3602(a)). If the juvenile wishes to be treated as an adult which is his existing right, he may be treated as an adult under S. 1437 only if he waives the defense of immaturity. If the juvenile was too young to be criminally responsible, he should not be forced to be treated as juvenile and denied the possible right to trial by jury. Under existing law, the detained juvenile cannot be confined in an institution where he has regular contact with adult prisoners (18 U.S.C. 5035), but this is reduced to an "insofar as possible" condition under S. 1437 (P 18 U.S.C. 3602(b)). A careful word-by-word review of the Proposed Federal Juvenile Delinquency Act will reveal many variations from the recently promulgated law that inured to the advantage and convenience of the Attorney General. If Congress has spoken so recently on the issue of juvenile delinquency and S. 1437 is a neutral compilation of the law, these changes should be carefully scrutinized and weighed. They are not restricted to the laws relating to juveniles but permeate the entire proposed federal criminal code. These slight word modifications that exist throughout the entire legislation are grounds enough that the matter should be put over for several years to provide adequate review of the impact of existing legislation and the needs or reasons for these changes. The careful reading of the entire S. 1437 will clearly demonstrate a prosecutorial bias that should not be tolerated under the guise of some type of "neutral" codification.

X. PRESUMPTIVE MINIMUM MANDATORY SENTENCING

After a long and tortuous history, Congress finally abandoned the minimum mandatory sentencing that grew up under our old narcotics laws with the adoption of the Comprehensive Drug Abuse Control Act of 1970. Prior to 1 May 1971, if a person possessed a drug (i.e. heroin, cocaine, marijuana) they could be charged

either with an unlawful importation count (21 U.S.C. 174 or 21 U.S.C. 176(a)) or with a tax count (21 U.S.C. 4705(a) or 4744(a)). With the provisions of old 26 U.S.C. 7237(d) a person convicted under 21 U.S.C. 174 or 176(a) would be ineligible for probation and parole. The alternative charging counts available to the prosecutor permitted gross discrimination, for if the defendant did not accept the "deal" of the prosecutor to a "soft count," he would be prosecuted with the "hard count" with the minimum mandatory of 5 years imprisonment. The plea to the "soft (tax) count" had no minimum mandatory sentence, and the defendant was eligible for probation. The defendant would surrender his day in court to litigate criminal liability, because if there was a chance that he lost, the penalty was too great. Under existing laws, the maximum penalties available are severe. Federal judges are strict and stern in punishing serious drug offenders, but for the weak addict involved in a criminal case, an adjustment is possible.

S. 1437 in response to the opposition of many including the American Bar Association[5] changes a manadtory minimum for trafficking in an opiate (P 18 U.S.C. 1811) and use of a weapon in a crime (P 18 U.S.C. 1823) to a presumptive minimum mandatory of a term of two years and a parole eligibility of not less than two years with such sentence to run consecutive. However, S. 1437 grants an exception to the imposition of the mandatory minimum sentence if the court expressly finds at the time of the offense that the defendant was less than 18 years old: the defendant's mental capacity was significantly impaired, although the impairment was not sufficient to constitute a defense of the prosecution; the defendant was under unusual and substantial duress although not such duress that would constitute the defense of prosecution; or the defendant was an accomplice and the conduct constituting the offense was principally the conduct of another person and the defendant's participation was relatively minor. This exceptional language is not unique for it tracks the very language used to permit a jury to avoid the imposition of the death penalty for aircraft piracy. 49 U.S.C. 1473(6). In a sense, the comparison of a death penalty with the minimum mandatory is appropriate, for both should not be part of any reasonable sentencing scheme. Trial judges do adhere to the law, and it is possible in meritworthy cases (i.e. a 20-year-old first offender) the judge would be forced by virtue of the statutory guidance to impose a two-year minimum mandatory and two-year parole ineligibiilty which would insure confinement for a period of two years. A minimum mandatory should be avoided both directly (S. 1) and indirectly (S. 1437).

XI. EXPUNGEMENT

The only federal statute that recognizes and authorizes deferred sentencing and expungement of criminal records is 21 U.S.C. 844, adopted in 1970, which is part of the federal provisions prohibiting possession of a controlled substance. No other federal law permits expungement. Under 21 U.S.C. 844(b)(1) after a guilty plea or a trial, the court may defer further proceedings without entering a judgment of guilty. If the person obtains a dismissal and was "not over 21 years of age at the time of the offense," the record may be formally expunged. (21 U.S.C. 844(b)(2)).

The corresponding provision in S. 1437 (P 18 U.S.C. 3807) does not use the language of deferring proceedings but refers to the withholding of the entry of the judgment of conviction. Implicit is a finding of guilty which is not the intent of 21 U.S.C. 844(b)(1). The expungement provisions are restricted to persons who are "less than 21 years of age at the time of the offense." The advantages of deferred sentencing and expungement are unfortunately limited under present law to drug offenses, and any meritworthy revision would consider the expansion of this to other misdemeanor offenses especially those involving youthful offenders. S. 1437, in its traditional nature, with a prosecutorial gloss, defines and restricts the language of recently adopted legislation by Congress so as to restrict its import. This action is symptomatic of the total revision which should cast in doubt those sectons that cannot be so carefully scruinized against existing law.

---

[5] ABA standards relating to sentencing alternatives and procedures, standard 3.2(a) which states: "Because there are so many factors in an individual case which cannot be predicted in advance, it is unsound for the legislature to require that the court impose a minimum period of imprisonment which must be served before an offender becomes eligible for parole or for the legislature to prescribe such a minimum term itself. It is likewise unsound for the legislature to condition parole eligibility upon service of a specified portion of the maximum term."

XII. THE APPELLATE REVIEW OF SENTENCES

Under existing law, there is no practical federal review of a sentence. "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." *Gurera* v. *United States*, 40 F.2d 338, 340 (8th Cir. 1930). Cited with approval in *Dorszynski* v. *United States*, 418 U.S. 424, 440 (1974). In some rare cases, the federal reviewing courts have granted some partial relief in extreme cases. However, the exceptions prove the general rule that there is no practical review of a federal sentence.

Appellate review of a sentence is available under S. 1437 (P 18 U.S.C. 3725), and this concept of appellate review of sentences is integrated with the guidelines established by the Sentencing Commission. Now there would be three reviewing authorities of a sentence: the Parole Commission, the Sentencing Commission, and now the Court of Appeals. Appeals are allowed only if the sentence would be outside of the guidelines and was "clearly unreasonable." The test should be "reasonableness" if one is seeking to establish a form of justice, for with such a high standard as "clearly unreasonable" it would be difficult for any court as a matter of *law* to overide the factual considerations that would be primarily within the evaluation of the district court. Also, the fact that the sentence of confinement, and even a short sentence that might not fall outside of the guidelines where clearly probation was expected, should be reviewable. An important discrepancy and inconsistency is the fact that under Section 3725 a defendant who receives a six month sentence of imprisonment for a felony might have appellate review, but a defendant who receives a year confinement before the Magistrate on a misdemeanor would have no appellate review. The existence of an appeal by the government for a sentence is totally inconsistent with the spirit of the principles underlining the Former Jeopardy Clause of the Fifth Amendment and the professional responsibility of the prosecutor to defer to the court at the time of sentencing rather than being an advocate for "stiff sentences."[6] It is a radical departure to expand the power of the government to appeal to include the self-initiating right to appeal the sentence if it is lower than the Sentencing Commission guidelines.

Appellate review of federal sentences is necessary. The judges resist it, and the prosecutors claim that if it exists they wish to have a similar opportunity. It is interesting to note that the experience in England dating to 1906 did permit the defendant an appeal of sentence, and when the defendant did so the appellate court had the right to increase the sentence on appeal. Obviously, this is much less than the situation that the government has the right of appealling lenient sentences. The 60-year experience in England resulted in the statutory modification to deny to the reviewing court that considered the sentence of the defendant, the power to increase the sentence. This experience should serve as a valuable lesson for us. See Report of then-Professor Daniel J. Meador, ABA Standards Relating to Appellate Review of Sentence, Appendix C (Approved Draft 1968). The right of appeal to the defendant would obviate the claim of the existing disparity in sentences. As mentioned above, it would be best handled by the Court of Appeal which already has existing apparatus to handle it. The right of appeal should extend to any term of confinement, whether imposed by the district court or the Magistrate, but the appeal from the Magistrate could be fashioned to the district court.

The Judicial Conference of the United States, through its appropriate committee, is now considering a proposed Rule 35.1, Federal Rules of Criminal Procedure. The judges do not seek appellate review of sentencing, but they recognize the neccessity of it and ultimately the fact that the merit of such review will ultimately be a fact. Since the judiciary, albeit reluctantly, is involved in such a proposal, it would be advisable to await the outcome of that judicial action, if it is not unreasonably delayed, prior to formulating guidelines for appellate review of federal criminal sentences.

XIII. MISCELLANEOUS PROVISIONS

S. 1437 provides for substantially increased fines, expanded forfeiture proceedings, and new techniques such as notice to the victim. Some of these pro-

[6] ABA standards relating to the Prosecution Function, standard 6.1(b) states: "Where sentence is fixed by the judge without jury participation, the prosecutor ordinarily should not make any specific recommendation as to the appropriate sentence, unless his recommendation is requested by the court or he has agreed to make a recommendation as a result of plea discussions."

visions are overly broad and need to be limited. Some are designed for meritworthy purposes, but they might be subject to serious abuse unless legislative amendments are made. All of these provisions, as well as many other provisions of S. 1437 need additional review and study, and let us hope that sufficient time will be allowed to permit a careful review of all the sentencing provisions of S. 1437 which could have a decided impact on federal criminal practice.

XIV. CONCLUSION

In 1971 the National Commission on Reform of Federal Criminal Laws (Brown Commission) filed its final report. Although that proposed revision introduced innovative concepts, to a substantial degree it tracked the existing federal criminal practice at the same serving as a comprehensive codification.

S. 1 (1975) was a substantial reconstruction of that first attempt, but it offered so much that its size and bulk defied analyses by even those regularly practicing in the field. S. 1437, the "son of S. 1," has removed those provisions which were subject to the greatest public notoriety. Those provisions, although deserving of careful review, overshadowed the serious neglect on other important passages of this legislation. One of the most important aspects of the legislation was the provision that would radicalize existing sentencing practices. S. 1437 offered modifications to the original sentencing proposals of S. 1, but when S. 1437 is compared to existing law, clearly existing law is to be preferred. To choose the continuation of existing federal sentencing practices, which defects have been publicized, should seriously indicate the inherent weaknesses in S. 1437. There is a superficial appeal to a concept of liberal reform to provide some aura of "certainty" at sentencing, but in the process discretion of the impartial judge, which in a few cases has been abused but in more cases has offset the abuses of unbridled prosecutorial discretion, has now been limited and handicapped. No comparable provision is offered for control of prosecutorial abuse in the charging process. Relief from long-term and protracted incarceration, one of the most serious aspects of American criminal penology, is not addressed. The opportunity to evaluate a substantial experiment in sentencing in California is discounted in a mad rush to pass S. 1437 during this Congress. Although Congress must give reasonable attention to those that must enforce the federal law, defense should be provided an opportunity, more than a *pro forma* appearance in a hearing on a bill that might be already "cast in concrete," to participate in the formulation of such a comprehensive overhaul of the federal criminal laws. Failure to do so will only wreak havoc, for a bad law generates needless litigation and will produce mountainous remedial legislation occupying the time of one already over-taxed Congress. In Ranger School, I learned the principle of the Five "P's" (Prior Planning (or preparation) Prevents Poor Performance). S. 1437 is a clear violation of that fundamental principle, and it should be sent back to the drawingboards.

STATEMENT OF JOHN J. CLEARY, EXECUTIVE DIRECTOR, FEDERAL DEFENDERS OF SAN DIEGO, INC., ON BEHALF OF THE NATIONAL LEGAL AID & DEFENDER ASSOCIATION

Mr. CLEARY. Thank you very much, Senator.

I am John Cleary, on behalf of the National Legal Aid & Defender Association.

I would point out also that the California Attorneys for Criminal Justice have endorsed the position we have taken pertaining to S. 1437. Further, they would like the right to submit a supplemental statement.

Since in the short time I have had to prepare this statement I have focused on sentencing, I would also reserve the right on behalf of the National Legal Aid & Defender Association to file a supplemental statement, if that is permissible.

Senator THURMOND. Without objection, that will be received.

Mr. CLEARY. At this time I would just like to discuss one of my major concerns. It is that S. 1437, the son of S. 1, has not really ever considered in the formulation and drafting the role of the defense

attorney. This is not to show some type of undue consideration for a defense lawyer, but those persons who may come through the judicial system should have a voice.

The role that we have as Federal defenders—and Mr. Roger Lowenstein, the Federal public defender from New Jersey, and myself, the Federal defender from San Diego—is to offer some substantial experience in dealing with the criminal justice machinery.

Unfortunately, S. 1437, designed to achieve what I would call relative certainty, has caused serious deficiencies. Compared against existing Federal criminal law, S. 1437 is worse.

The problem has been that the drafting of this legislation from its onset has been the work of the prosecutors—for the prosecutors, by the prosecutors, and of the prosecutors.

A recent example is section 3835(b). Under existing law, section 4214 of title 18, you are entitled to counsel at a preliminary hearing on revocation of parole. That has been eliminated.

If you look at the Juvenile Delinquency Act established by this Congress in 1974, less than 3 years later substantial reservation and dilution exists. The wasting away of the rights of the juvenile is present in this substitute form.

We have also, for example, in the only Federal expungement statute a further erosion of the rights of the individual.

Confinement is the order of the day. S. 1437 oozes confinement. Its whole attitude is to put people in jail.

We like to think that the ABA articulates a simple premise of penology: that is, the least confinement necessary should be the orientation. The avoidance of confinement might not be appropriate in every case, but it should be the general orientation. The ABA standards on sentencing, 2.2 and 2.3, articulate these points. Is that anywhere stated in section 101 or the sentencing provision of S. 1437? Certainly not.

Imprisonment in S. 1437 is for ever and ever. We have the ABA standard which talks about 10 years in abnormal cases being the top and 5 in the ordinary case. This starts off with class A, life imprisonment; class B, 25 years; and then it goes down to 12, 6, and 3.

It is hard to bring home the difference in existing law, but I would like to use as an example bailjumping—18 U.S.C. 3150 is the present bailjumping statute.

Under S. 1437, bailjumping has for a class A through D felony a 6-year confinement provision. Add to that the tack-on parole of 1 to 2 years, and that would give you 8 years with the tack-on contingent period of incarceration of 90 days. That is 8 years and 90 days of exposure to confinement and Federal parole. That is 6 years and 90 days of confinement.

Under existing law, the maximum for bailjumping is 5 years. Given a person's mandatory release date, which is 3 years and 8 months, the maximum period of incarceration would be 3 years and 8 months followed by a 10-month parole. You have to compare 3 years and 8 months confinement against 6 years and 90 days in this new reform that "lessens."

Class D offenses are the substitute for existing 5-year offenses, a common penalty, but this code has an overwhelming tendency to

double confinement over existing law. The trend of socking it to people permeates this piece of legislation.

Parole ineligibility, by which the sentencing judge now can only give up to one-third under 4205(b)(1), under this parole ineligibility up to 90 percent of the sentence. Instead of thinking in terms of being eligible for parole—existing law—the converse is true.

Under existing law, if you get a year and a day sentence, you are eligible for release at any time, even though many of us know that to be illusory. You might get out in 4 or 5 months and you will certainly get out by 9 months. Under this, you cannot get out, once you go in, for a period of 6 months.

The Sentencing Commission is a nice exercise, I think, in futility. If you can consider what the Parole Commission has accomplished, you might find much criticism. However, I think what you have to compare is what the Parole Commission has been authorized by this Congress to do.

Under 4203(a)(1) they can set up guidelines for prison sentences. That same general authority is given to the Sentencing Commission but there are no further guidelines.

I think a very easy and warranted charge is that this delegation to a sentencing commission would be unconstitutional. The theory is that by giving this authority to the Sentencing Commission they will come up with reasonable zones. With that concept there is the portent for fantastic litigation.

Once guidelines are established, the Sentencing Commission will create a de facto form of minimum mandatory sentences. It will allow what I think is the one thing that is not addressed adequately in this bill. The bill attempts to impede and restrict judicial discretion. What about the prosecutorial discretion?

We now have a new code that adds on literally hundreds of charges not otherwise existing.

Before this, a bank robber could only face one charge, 18 U.S.C. 2113 (a) and (d). Now he could face criminal entry, use of a gun, and robbery—three counts. Of course, the provision is that you cannot go more than double the sentence, more than 24 years straight time, under S. 1437.

This is a mockery. This has no regulation of the prosecution. Of course, given the tone of its drafters, I doubt that it would have such limitations.

The problem is what is the effect of this type of certainty in sentencing. Chief Justice Burger asks us to consider the impact of legislation upon the courts. The impact would be, given a certain sentence, the prosecutors may think that you would deal out to a lesser sentence, which is common every day, although you will avoid your day in court, and sacrifice your opportunity to have your innocence established or the guilt not proven to avoid penalty that will be controlled by the prosecutor. That is coercive plea bargaining.

How do you control this variation in the prosecution? In one district, 20 kilos of marihuana might be a misdemeanor with probation while in another district it might be a felony with a jail term. How do you regulate that?

The presumptive minimum mandatory sentences are absolutely terrible. I think the example there is that the only exceptions—and it is

ironic—are the same exceptions as to the death penalty. Death penalties and minimum mandatory sentences should be treated in the same fashion.

I would have liked to have said a little bit about appellate review of sentences. This is a mockery for it provides prosecutorial review.

With the remaining time, I would like to have Mr. Roger Lowenstein speak to sentencing and any other portions of the bill on which he cares to comment.

STATEMENT OF ROGER LOWENSTEIN, ON BEHALF OF NATIONAL LEGAL AID & DEFENDER ASSOCIATION

Mr. LOWENSTEIN. I am the Federal public defender in New Jersey. Our office represents people in Federal court who are charged with Federal crimes and who are too poor to afford an attorney. It is a very tough job. It is probably as difficult as being in Congress. It is very hard.

One of the hard things, I imagine, about being an elected official is that crime as a problem in our society gets put at the doorstep of our elected leaders. What do we do about crime? What do we do about people who cannot leave their homes because they are afraid and are worried about being attacked?

The problem with S. 1437 and with Federal approaches is that we are a very limited jurisdiction. The Federal system does not begin to incorporate all the crime and all the criminal offenses. In fact, more than 90 percent of crimes are handled in State courts, as they should be.

The crime that scares us, the stranger-to-stranger violence, that is mostly State crime.

What do you do when constituents write you hundreds and hundreds of letters saying, "What are you doing about crime?" In fact, all that Congress can do is really approach crime in the Federal system, which is a very small percentage of all crime.

The general reaction has been, unfortunately, to take that small area of Federal law which is largely nonviolent and to overcriminalize that. I guess this was partly a reaction to the depression era and the worry about spreading interstate crime.

We have now on the books a tremendous disparity of Federal offenses, most of which are overly punished and, therefore, greatly in need of some codification.

Codification is a good idea. It is something that has never been done in a good way. So the general effort is to be applauded.

However, if the codification results in continuing the overcriminalized, heavy sentences for crimes which do not really deserve that kind of heavy attention, then the codification effort will not be successful.

When Chief Justice Burger talks about sentencing disparities, I think he means not only disparities from one Federal judge to another Federal judge, but I think he also worries about disparities between State courts and Federal courts.

The very same kind of offense, an armed robbery, if it is in a bank, might very well result in a 20- to 25-year sentence in Federal court and 8 to 10 in a State court. These are disparities which have to be resolved.

One of the real good provisions in S. 1437 is section 205 which suggests that in concurrent jurisdiction where a crime could be handled either in State court or in Federal court, it might very well be the best idea to prefer State prosecution in all but certain particular Federal kinds of crimes.

Federal courts have limited jurisdiction. I think that it would be worthwhile to analyze where Federal prosecutors' priorities are and carve out those particular kinds of special Federal cases, focus on those, and really let the States handle the bulk of the criminal prosecutions and spend a lot of time getting more money to State prosecutors so that they can do the job.

The problem I have with the sentencing part of the legislation is this. I am absolutely in favor of appellate review of sentence. We have it in New Jersey.

In the State courts, which are far more crowded than the Federal courts, every sentence, if the defendant wishes, may be appealed. The appellate judges have handled it expeditiously. It has been no burden. I think in the Federal system it would work extremely well.

Instead of appellate review of sentencing, in S. 1437 we have a Commission, which worries me greatly. I worry that the Commission is going to set guidelines which will result in extremely harsh penalties. Once again, I feel that the penalties are far too harsh at the moment.

I would like to suggest that there is one real problem with the appeals by the Government of the sentence. I am submitting a legal memorandum on that issue to the committee and I ask that it be incorporated in the record. I will not go into it.

When the Government is allowed to appeal a sentence, what occurs to me is that at the point where plea bargains, if any, are discussed, that is one more hammer used by the Government to obtain a favorable plea from the defendant.

For instance, they might say, "You plead guilty here or else we are going to appeal your sentence if it is too lenient; if you plead guilty, we promise we will not appeal."

It is a kind of tool that may be abused in the prosecutorial process. I worry about that.

I further worry in the presentence investigations, which are now opened up in S. 1437 to all evidence regardless how lawfully obtained, people are going to be subjected to harsh sentences not for the crime they committed, but for rumors and allegations of other crimes which have no real business being in a presentence report.

I appreciate the opportunity of being here and representing the National Legal Aid & Defender Association.

Senator THURMOND. Thank you very much. We thank you for your appearance here and your contribution to this hearing. Your statement will be printed in the record.

[The statement follows:]

PREPARED STATEMENT OF ROGER A. LOWENSTEIN, FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF NEW JERSEY ON BEHALF OF NATIONAL LEGAL AID & DEFENDER ASSOCIATION

I thank this Subcommittee for the opportunity to share my views on some aspects of S. 1437, representing the National Legal Aid and Defender Associa-

tion. Ours is the only national organization of public defenders, and among our membership are hundreds of defense attorneys who practice regularly in the federal courts. S. 1437, if enacted into law, will become the major working document for those attorneys who practice regularly in the federal courts.

It is our position generally that federal criminal statutes are overcriminalized. Sentences are far too long, giving rise to widespread sentencing disparities. There are far too few misdemeanors which would allow lesser offenders to have their cases disposed of in magistrate's courts. Too many unsubstantial prosecutions are disposed of by means of a felony prosecution in district court. S. 1437 does not go nearly far enough in reducing maximum penalties and providing for lesser-included offenses which may be disposed of in magistrate's courts.

Little mention has been made of § 205 of the bill. That section would permit federal prosecutors to refer the bulk of routine cases to state courts, where there is concurrent jurisdiction. This would be a commendable technique for reducing the disparities in sentencing between state and federal offenses, as well as removing the routine case from federal court dockets. Federal courts are specialty courts by virtue of our Constitution. The bulk of crime and therefore the bulk of law enforcement is on the State level. Unfortunately, the public outrage on the crime problem demands action from our federal legislature. The wisest response to the public outcry would be to provide more adequate funds for state law enforcement efforts. An unwise response would be to continue the overcriminalization of federal offenses.

With regard to sentencing, we recommend specific statutory provision for appellate review of sentencing in all cases, but limited to the ability of the Court of Appeals to reduce a sentence upon appeal by the defendant. In the State Court system in New Jersey, the judge's discretion in imposing sentencing is merely one more issue to by determined by the appellate court. For quite a number of years the state appellate courts carefully developed a "common law" of sentencing and have succeeded in eliminating gross disparities statewide.

A similar system would work well in the federal system, if each circuit would gradually develop its own careful standards in reviewing district court sentencing determinations. The proposed Sentencing Commission in S. 1437 does not provide an adequate appeal, and there are strong indications that defendants would suffer from even longer sentences under the new system. The Parole Commission has been severely criticized for keeping extreme numbers of nonviolent defendants in prison long after the Bureau of Prisons and the sentencing judges indicate the incarceration should be terminated. The Parole Commission justifies its decisions upon "guidelines" which would be identical to the proposed Sentencing Commission's guidelines. An overly cautious judge might defer automatically to harsh guidelines rather than mitigate the sentence and risk reversal on appeal.

At a minimum, if there are to be sentencing guidelines, they should completely replace the parole system which should be eliminated. Any move in the direction of increased certainty would be appreciated by our clients who are too often confused and disappointed by the current system.

With regard to the government's right of appeal in proposed § 3725 of the bill, I attach a memorandum of law which raises grave constitutional questions concerning that "right." The government should not be permitted to have one additional weapon in coercing guilty pleas from defendants who may have defenses to the crime charged. A criminal trial is not an even contest. Introducing the notion of symmetry into the criminal justice process is misleading and unfair. The defendant should be able to challenge the abuse of discretion by a judge. Notions of double jeopardy prevent the government from having an equal right to re-litigate a case against a particular defendant.

We appreciate the opportunity to provide this information to the Subcommittee and to participate in this important work.

MEMORANDUM OF LAW CONCERNING SECTION 3725 OF S. 1437

Section 3725 of proposed bill S. 1437 presents grave questions of constitutional considerations and public policy. Specifically, § 3725 (b), (c), and (e) provide for review in the court of appeals of a final sentence imposed for a felony if the sentence includes a fine or a term of imprisonment lower than the minimum established in guidelines issued by the Sentencing Commission. If the court of appeals determines that the sentence is "clearly unreasonable" and

too low, it may remand the case for imposition of a greater sentence or for further sentencing procedures, or impose a greater sentence.

The most serious defect in this provision is that the defendant whose case is appealed by the government is exposed to double jeopardy in violation of rights guaranteed by the Fifth Amendment of the Constitution of the United States. That guarantee protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishment for the same offense. *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1968). The right of the government to seek an enlarged sentence on its own appeal has never been litigated. However, the Supreme Court has held that a second punishment proposed on the same facts for the same statutory offense violates the prohibition against double jeopardy. *Ex parte Lange*, 18 Wall. 163 (1873). Also, in *United States* v. *Benz*, 282 U.S. 304 (1931), the Court noted that a court action to increase the punishment of one serving a criminal sentence is illegal. Although under the appeal provisions of S. 1437 a defendant could receive an increased sentence before actually beginning to serve the one imposed, the same prohibitions against double jeopardy apply. "The prohibition is not against being twice punished, but against being twice put in jeopardy." *United States* v. *Bell*, 163 U.S. 622, 669 (1896).

Once a specific sentence has been imposed upon a defendant, he has been in jeopardy as to the possible greater sentence. He risks the maximum permissible punishment when first tried. That risk having been faced once need not be faced again. *North Carolina* v. *Pearce*, *supra* at 746, Douglas concurring. In *Green* v. *United States*, 355 U.S. 184 (1954), the Court held that a defendant who had appealed a conviction of second-degree murder could not be convicted upon appeal and retrial for first-degree murder because of double jeopardy. The Court found an "implicit acquital" of the higher charge. Justice Harlan, in his opinion, in *North Carolina* v. *Pearce*, *supra* at 746, states that this concept applies equally to the imposition of a greater sentence. Since the defendant's offense had been found to be of a certain limited degree of "badness" or gravity only, only a certain limited punishment was merited. Imposition of a greater sentence would thus be constitutionally prohibited.

The specific holding of *Pearce* is not to the contrary. The Court held that an increased sentence could be imposed at retrial after an appeal by the defendant when based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. This narrow scope for the permissible imposition of a greater sentence does not apply to the provisions of S. 1437. First, the government's appeal under § 3725(b) would presumably be based not on the defendant's conduct occurring after the original sentencing, but on an opinion that the sentence below the suggested guidelines was too low. Second, the majority in *Pearce* based its holding on the rationale that where a first conviction has been successfully set aside at a defendant's behest, the conviction has been wholly nullified and the "slate wiped clean." *Supra* at 721. This clearly does not apply to a government appeal of a sentence under § 3725. In this instance, the first conviction still stands, so the defendant is exposed to double jeopardy. Further, the appeal is not at a defendant's behest, but at the government's.

Some cases have advanced the theory that a defendant taking an appeal waives his constitutional protection against double jeopardy. Waiver represents some form of knowing and intelligent relinquishment of a right. This waiver concept cannot apply to a defendant who helplessly stands by while the government appeals his sentence. Such a defendant has patently not "assumed the risk" of an appeal.

That the Double Jeopardy Clause proscribes the imposition of a harsher sentence upon resentencing where there has been either a new trial nor a conviction was affirmed in *United States* v. *Durbin*, 542 F. 2d 486 (8th Cir. 1976). In that case the defendant sought to vacate a sentence on the ground that a subsequently reversed conviction for an unrelated offense had been taken into account in its imposition. He received a greater sentence upon resentencing. The Court found that since Durbin had neither sought nor acquired a nullification of his conviction, the ban against double jeopardy prohibited imposition of an increased sentence. *Pearce* was specifically distinguished in that "the guarantee against double jeopardy does not restrict the length of the sentence upon *reconviction*." *United States* v. *Durbin*, *supra at* 488 (emphasis added). A defendant therefore may not receive an enlarged sentence based on the original conviction as would be the case with government appeals of sentencing under § 3725.

In addition to constitutional problems with § 3725, several questions of public policy must be carefully examined as well. First, defendants may be forced to engage in plea bargaining with prosecutors who promise not to take an appeal as one of the bases of the bargain. It is true that there is a societal interest in efficient criminal administration in having guilty defendant plead guilty, thus avoiding unnecessary trials. However, it is detrimental to society to have innocent defendants plead guilty because they fear the government will appeal their sentences if they refuse to engage in plea bargaining. A conviction founded on an involuntary guilty plea is constitutionally void, and coercion, whether physical or mental, vitiates voluntariness. *Machibroda* v. *United States*, 368 U.S. 487 (1962).

The Supreme Court in *Pearce* clearly stated that due process requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. (at 725). Accordingly, vindictiveness must play no part in the government's appealing a defendant's sentence because the defendant had declined to cooperate in plea bargaining.

Similarly, the danger exists that the defendant who has the right under § 3725(a) to appeal a sentence which is above the suggested guidelines will be the victim of a retaliatory appeal by the government (in the event of imposition of a sentence which is lower than the guidelines), unless he previously has promised not to appeal. The defendant would thus be denied a free and independent assessment of the choice of whether to appeal or not.

Finally, proponents of the government's right to appeal may argue that society's interest in avoiding too lenient sentences and great disparities in sentencing justifies the provision. As to the first, the societal interest must yield, as compelled by the Double Jeopardy Clause. *North Carolina* v. *Pearce*, *supra* at 750, Justice Harlan's opinion. As to the second, uniformity of sentencing is not necessarily a desirable goal in all cases. The prevalent modern philosophy of penology is that the punishment should fit the offender and not merely the crime. *Williams* v. *New York*, 337 U.S. 241 (1949). A judge may well determine that the circumstances of a particular offense and an individual offender warrant a sentence below that of the guidelines. The Supreme Court in *Dorszuski* v. *United States*, 418 U.S. 424 (1974), noted the traditional powers and unfettered sentencing discretion of a federal district judge.

In conclusion, considerations of both a constitutional and public policy nature require that the government not be permitted to appeal sentences which are below the suggested guidelines. Defendants must not be coerced, even subtly, into plea bargaining or giving up their rights to appeal. Further, having once faced the jeopardy of a higher sentence, the Double Jeopardy Clause protects them from being exposed again to the risk of a harsher sentence. "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict?" *Ex parte Lange*, *supra* at 173.

Senator THURMOND. Our next witness is Mr. Jack Landau, on behalf of the Reporters Committee on Freedom of the Press, Washington, D.C.

Mr. Landau, we will put your entire statement in the record, if that is agreeable. Then we will give you up to 15 minutes, if you want that much time, to comment on the statement or make any additional points you care to make.

[The material follows:]

PREPARED STATEMENT OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Mr. Chairman and members of the subcommittee, on behalf of the Reporters Committee, we should like to thank you for this opportunity to express our views on the new S-1.

As you may remember, The Reporters Committee testified before this Subcommittee in 1973 on the 1973 versions of S-1 and S-1400, and in 1975 on the 1975 version of S-1.

In our previous appearances, we strongly disapproved of a number of provisions which we thought would have undermined the First Amendment rights of the press to report and the public to receive information about the government.

Subsequent to that testimony, Senators McClellan and Kennedy and their staffs reworked the bill. The result is that a few of our suggestions—and the suggestions of other press groups—have been heeded, mainly with the elimination of the espionage sections. We, of course, appreciate that effort.

But unfortunately, the bill today remains what it was in 1973. The New S–1 is an Official Secrets Act which would give the government wide-ranging new criminal powers to severely restrict First Amendment rights of the press to report—and the public to receive—the news.

Here we are, five years after Watergate and the Pentagon Papers, with a bill making a frontal assault on the First Amendment by giving the Justice Department and the courts new or expanded criminal authority to jail news reporters and news organization executives—

(1) For "improperly" criticizing government officials.

(2) For publishing news in violation of illegally issued "gag orders."

(3) For protecting confidential news sources in violation of illegally issued disclosure orders.

(4) For publishing "stolen" government reports without government permission, regardless of content;

(5) For possession of original government memos without permission, regardless of content.

The bill also makes it a crime for government employees to leak to the press any "private" information which the government has from oil, auto, drug and defense contracting firms and other nongovernment organizations.

We would have hoped that Congress would have proposed a bill which maintains the status-quo or would offer more protection for press coverage of governmental affairs. But the New S–1 tightens the legal noose around the flow of government news to the public by authorizing jail sentences and fines for collecting and publishing information about the government.

It retains the same basic philosophy and most of the same provisions of 1973 and 1975 versions of S–1 (and S–1400), except for the espionage act provisions.

This Official Secrets Act philosophy—conceived mainly by the Nixon Administration—was and is that government should have the power to protect itself from public criticism and embarrassment by having criminal conviction powers to intimidate and harass the press into silence; and, if the press refuses to be intimidated, then to send reporters and editors to jail.

The liberal and conservative supporters of this bill argue that the Justice Department will never use the provisions of this bill against the press.

We are, they say, in a "new era"—"an era of good feelings." Therefore, despite the plain language of the bill—authorizing criminal prosecution and jail against the press for reporting news to the public—we are asked to believe that the recent unpleasantnesses between press and the government will never happen again.

We, most respectfully, dissent for five reasons:

First: We were told when we first appeared here in 1974 to oppose S–1 and S–1400 that we were being too protective of the First Amendment when we classified this bill as an "Official Secrets Act."

We were told, in 1976, again that we were wrong. We think time and events justified our past criticism and will justify this criticism.

Second: We are in an era of good feelings between the press and the government at the national level—at least much better than it was.

But the moods of politicians change quickly and dramatically. We are trying to assure that the public will be protected in its rights to know the news, regardless of whether the administration is friendly or hostile.

Suppose the situation changes and prosecutions do ensue? What are we to tell the public "Yes . . . we knew this could happen. Yes, we saw the danger. We're sorry. We closed our eyes to the First Amendment?"

Third: This is supposed to be reform of the criminal law to and I quote . . . "take recognition of the problems that have arisen" recently.

There are new provisions for the protection of convicted criminals, for example, in the sentencing area.

But what about the free flow of news to the public? We find no new protections there. What we find is a net of new laws and of changes in old laws tightening the legal noose around the press.

Fourth: This will be a model for the states and will encourage similar official secrets acts to be passed by state legislatures.

Fifth: Certainly, when the major news organizations are faced with these provisions—if they are—they will spend thousands of dollars (millions if they have to) to keep their reporters and editors out of jail.

But the small weekly or daily, the independent radio station, the aggressive individual reporter and freelance writer do not have the resources to hire legal help, especially when you remember it may cost as much as $35,000 to fight a subpoena.

This bill gives a federal prosecutor the clear power to threaten these reporters with jail—and if they read the law, they might well conclude that they have no defenses available. They may stop publishing or they may give the government back the report without publishing it or they may disclose their news sources.

The First Amendment and the federal law is not only for the rich and influential who can defend themselves, if need be. It is also to protect the small news organization and individual reporter and editor who can't defend himself very well. Given the already unlimited legal and law enforcement resources of the federal government, this bill would now add the additional powers to harass and intimidate the news organization and news persons of modest financial resources with the threat of bankruptcy if they attempt to fight back.

For all these reasons, as more fully explained in the following section-by-section analysis,* we urge this Subcommittee to decline to approve the Official Secrets Act

I. CRIMINAL SEDITION

Criticizing a public servant (section 1358).

It would be a crime for a news organization or news reporter to publish a news report or editorial which "improperly attacks" a government employee, causing him any financial damage, such as suspension, reassignment or job termination. Maximum penalty: One year in jail and/or $100,000 fine.

1. This provision is entirely new to the federal criminal code. It is a criminal libel and sedition law and was specifically designed to protect government officials from "improper" criticism even for "illegal" acts.

The bill achieves this result by making it a crime for any "person"—including a news reporter or news organization—to take any action which "improperly subjects" any government employee or private citizen "to economic loss or injury to his business or his profession . . . because of an official action performed by a public servant or because of the status of a person as a public servant."

This means that a newspaper or new organization which "improperly" criticizes government officials can be prosecuted on a showing that the person criticized was damaged in his "business or profession."

The language of this bill is similar to the Alien and Sedition Act of 1798, which said it shall be a crime:

"[I]f any person shall . . . publish . . . any false, scandalous and malicious writings against the government of the United States . . . with intent to defame . . . the government . . . or to bring them . . . into contempt or disrepute."

In fact, in the Alien and Sedition Act, the government, in order to jail one of its critics, had to prove that the publication was "false, scandalous and malicious." In the New S. 1 version, all the government need prove is that the criticism was made "improperly."

The Congress, it appears, is not alone in wanting to resurrect criminal sedition. The Supreme Court of Virginia has just upheld the constitutionality of a law used to convict the Norfolk Virginian-Pilot for reporting that a local judge was under investigation for allegedly improper behavior.[1]

Thus, this new S. 1 provision gives the federal government the authority for the grossest type of censorship aimed at the press.

2. Congressional supporters of this legislation argue that this provision was intended to protect government employees from retaliatory actions by business firms and others critical of the government employee's conduct.

We answer that the bill already has a provision punishing a person who "uses

---

*The Reporters Committee wishes to thank Charles Sennet, of George Washington University Law Center, for his help in analyzing this bill and preparing the written testimony. The Committee would also like to thank Allan Adler, of George Washington University Law Center, and Kevin Allen, of the University of California at Los Angeles Law School, for their invaluable help in the production of this testimony.

provisions which still infect this bill.

[1] *Landmark Communications v. Commonwealth of Virginia*, Record No. 760596 (Va. Sup. Ct., decided March 4, 1977).

force, threat, intimidation, or deception with intent to influence a public servant." [2]

3. To understand the scope of this provision against the press one need only refer to the legislation history which states, that the action in "retaliation is unjustified against a public servant, irrespective of the legality of the public servant's acts." [3]

That is to say, a publisher who "improperly" decided to engage in "retaliation" editorially against a government official for his *illegal acts* could be convicted and jailed for one year if he succeeds in getting the public official fired.

Under *New York Times Co.* v. *Sullivan* [4] and *Gertz* v. *Robert Welch, Inc.*,[5] the government official can sue for libel if he can prove that the statements were false and reckless.

This bill would send an editorial writer or publisher to jail even if the statement is truthful.

The example given in the legislative history speaks for itself. This criminal provision "would reach, for example, the case of an employee of the Civil Rights Division of the Department of Justice who is attacked ('by non-physical acts') because of his employment in such agency."

"This is intended to reach non-physical acts such as effecting the discharge or transfer of a person from his employment".[6]

4. It is the position of our Committee that the First Amendment guarantees to the public and the press the right to criticize government officials as often and as abrasively as they wish, calling for dismissal or resignation or whatever other action the citizen thinks is warranted. That is the essence of a free society. "Retaliation" by words against government officials is every citizen's right. Who is to decide whether the criticism is "improper"—a jury? The government official? The Congress? We urge this Subcommittee to eliminate this criminal sedition provision designed to protect the government from being "improperly" criticized.

II. PRIOR RESTRAINTS ON PUBLICATION OF NEWS

Violations of illegal gag orders (sections 1331 and 1335).

This bill would make it a crime for a news person or news organization to publish a news article or editorial in violation of a court order later declared void. Maximum penalty: For a news person, six months in jail and $100,000 fine (more at the judge's discretion for ignoring this illegal order) and for a news organization, a $500,000 fine (more at the judge's discretion). This would be a new law.

1. This bill permits the fining and imprisonment of news persons or new organizations who violate prior restraint orders illegally issued by judges. Two separate criminal contempt sections can be used.

The bill achieves this result by making it a crime for any "person"—including a news person or news organization—to "disobey(s) . . . a(n) . . . order . . . or command of a court," even if that order is subsequently declared void (Section 1331); and makes it an additional crime for any "person" to disobey(s) a temporary—or final order" of a court, even if the order is subsequently declared void (Section 1335).

The bill offers a purported defense to the press: the news organization or news person must be able to obtain a decision that the order is not only *void*, but is also "clearly invalid"; and that the news organization or news person must show there was no "reasonable opportunity" to appeal.

There is no question that the contempt provision is aimed at the press. As Senator Kennedy said when he joined Senator McClellan in introducing this bill, "New defenses are added to protect the press from 'gag orders' ".[7]

2. It is our position that this provision, if passed, will violate the First Amendment, offer less protection than current law, and will encourage federal judges all over the country to issue gag orders and therefore to decide what the public will read.

We are facing a plague of gag orders issued by both federal and state judges barring the press from publishing court news—either by ordering the press not

---

[2] *See* S. 1437, 95th Cong., 1st Sess. § 1357, May 2, 1977.

[3] Criminal Justice Reform Act of 1975, S. Rep. No. 94-00, 94th Cong., 1st Sess. (1975), p. 447.

[4] *New York Times Co.* v. *Sullivan*, 376, U.S. 254 (1964).

[5] *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

[6] *Supra*, note 3, p. 447.

[7] 123 Cong. Rec. S. 6840 (daily ed. May 2, 1977) (remarks of Sen. Kennedy).

to publish or by censoring public proceedings, public records and public figures involved in civil and criminal cases.

Here are some of the gag order cases pending in state or federal courts in the last six months:

Massachusetts: Judge stops *Cape Cod Times* from reporting about a case filed by a bank against the State Banking Commission by sealing the complaint and all other papers, including docket entries of the case.[8]

New York: Judge orders *New York Times* not to publish prior criminal history of a defendant.[9]

New Jersey: Judge orders *New Brunswick Home News* and *Trenton Times* not to publish report of open court proceedings.[10]

Pennsylvania: Judge stops *Philadelphia Inquirer* from attending pretrial proceedings in criminal trial of Tony Boyle.[11]

Maryland: Judge stops *Washington Post* from reporting on Mandel trial by sealing all papers filed in the case.[12]

Virginia: Judge stops *Richmond News Leader* from reporting on Kepone chemical contamination case by sealing all papers filed in the case.[13]

North Carolina: Judge stops *Raleigh News and Observer* from reporting on the killing of fugitive by sealing coroner's autopsy report.[14]

South Carolina: Judge stops South Carolina media from reporting on public corruption case by prohibiting all persons in the trial from "mingling with or being in the proximity of" reporters in the courthouse.[15]

Florida: Judge issues order to show cause why *New York Times*, its editor, A. M. Rosenthal, and reporter Seymour Hersh should not be held in contempt for publishing a grand jury report about the Internal Revenue Service.[16]

Florida: Judge stops *Jacksonville Times* from reporting about illegal drug case by holding secret proceedings.[17]

Ohio: Judge orders *Dayton Journal* not to publish report of open court proceedings in murder case.[18]

Ohio: Judge stops *Akron Beacon Journal* from reporting on murder case by sealing all pretrial proceedings.[19]

Illinois: Judge orders *Rockford Gazette* not to publish editorials critical of local court system.[20]

District of Columbia: Judge stops Washington news media from reporting on baby selling case by sealing formal criminal complaint.[21]

Kentucky: Judge stops *Louisville Courier-Journal* from reporting on criminal sewage contamination case by sealing formal criminal complaint.[22]

Oklahoma: Judge orders *Daily Oklahoman* and other Oklahoma City news media not to publish report about open court proceedings involving a juvenile.[23]

Washington: Judge stops news media from reporting on murder case by ordering the defendant not to talk to the press.[24]

---

[8] *Cape Cod Times* v. *Appeals Court, et al.*, No. 715 (Supreme Judicial Court of Massachusetts, filed May 11, 1977).

[9] New York Times, January 20, 1977, p. A–1.

[10] *State of New Jersey* v. *Allen, et al.*, No. A–59/60 (N.J. Supreme Court, filed April 22, 1977).

[11] Philadelphia Inquirer, May 8, 1977, p. 8–G.

[12] In re Washington Post Co., Nos. 76–1695, 76–1698, 76–1699, 76–1711 (4th Cir. 1976).

[13] Richmond Times Dispatch, August 3, 1976, p. 1.

[14] *News and Observer Publishing Co.* v. *Smith*, No. 76SC474PM–P–M–M–M (North Carolina Court of Appeals, dismissed as moot, January 4, 1977, after the gag order was vacated in *State* v. *Conley*, No. 76 CRS61666, Superior Court, Ninth Judicial District, December 21, 1976).

[15] *Society of Professional Journalists* v. *Martin*, No. 77–1636 (4th Cir. May 17, 1977), *stay denied*, — U.S. —, (order of May 22, 1977, Brennan and Marshall, JJ., dissenting).

[16] In re Disclosure of Grand Jury Report, No. 75–A (Mia) (U.S.D.C., S.D. Fla., Orders of December 8, 1976 and January 10, 1977).

[17] *United States* v. *Smith, et al.*, No. 77–14–Cr–J–T (U.S.D.C., M.D. Fla., Orders of January 28, 1977 and February 9, 1977). See also, Florida Times-Union, January 25, 1977, p. B–6.

[18] State ex rel. *Dayton Newspapers* v. *Phillips*, 46 Ohio St. 2d 457, 351 N.E. 2d 129 (Ohio 1976).

[19] State ex rel. *Beacon Journal* v. *Kainrad*, 46 Ohio St. 2d 349, 348 N.E. 2d 695 (Ohio 1976).

[20] *Cooper* v. *Rockford Newspapers, Inc.*, et al., No. 76–204 (App. Ct. of Illinois, 2d Judicial District, appeal docketed March 4, 1976).

[21] *Doe* v. *Risher*, Civ. No. 10997–76 (D.C. Sup. Ct. decided November 30, 1976).

[22] *United States* v. *Distler*, No. 77–0658M–01–L (U.S.D.C. W.D. Kentucky, filed June 1, 1977). *See also*, Louisville Courier-Journal, June 8, 1977.

[23] *Oklahoma Publishing Co.* v. *District Court*, No. 50052 (Oklahoma Sup. Ct., decided October 19, 1976), *rev'd*, — U.S. —, 45 U.S.L.W., 3599 (U.S. March 7, 1977).

[24] *State of Washington* v. *Wanrow*, No. 20876 (Spokane County Superior Court, Order of May 13, 1977).

3. We believe, in general, that the principles of the First Amendment never authorize any agency of the federal or state governments to issue a prior restraint on the publication of news unless—as the *New York Times* and *Washington Post* argued in the Pentagon Papers case [25] the government can prove "clear and present danger to the national security of the United States."

Following this principle, it is our position with reference to this bill, that it can never be a federal crime for a news person, or news organization, acting in good faith under the First Amendment, to publish news in violation of a court order—except for the "clear and present danger" situation.

At an absolute minimum, it can be no federal crime to publish in violation of an illegal gag order.

Therefore, we oppose these new criminal contempt provisions because they do authorize the jailing or fining of news reporters and news organizations who ignore an illegal "gag order" and publish.

4. Congressional supporters of this legislation argue that current law now permits the criminal conviction of a news organization for violating a prior restraint order subsequently declared void. We disagree.

While it is conceivable that this might be the law at some future time—especially if this bill is passed—no news organization or news reporter we know of has ever been held in criminal or civil contempt on appeal for violating a prior restraint order, except for one case in the Fifth Circuit.

That case was *United States* v. *Dickinson*,[26] in which two news reporters from The Baton Rouge *Morning Advocate* and *States Times*, who were sitting in court, were ordered not to publish information elicited during the open court proceeding. The reporters ignored the order, published their articles, were convicted of criminal contempt and fined.

The United States Court of Appeals ruled the order was invalid. But relying on the doctrine of *Walker* v. *Birmingham*,[27] the Court of Appeals also ruled that the news reporters should have obeyed the order, suppressed the new article, and appealed—for however long that migth have taken.

The Supreme Court declined to review the *Dickinson* case, an action which indicates neither approval nor disapproval of the Fifth Circuit decision.

No other Court of Appeals so far has followed *Dickinson*. Two State Supreme Courts—the Supreme Court of Washington [28] and the Supreme Court of Arkansas [29]—have ruled the other way and have voided criminal contempts against news reporters who violated illegally issued prior restraint orders.

The Nebraska Supreme Court in *Nebraska Press Association* v. *Stuart* [30] indicated that it did not believe that the press was required to pay any attention to an illegal prior restraint order, even when, as in *Dickinson*, reporters were present in the courtroom when the order was issued. The United States Supreme Court took note of the problem, but did not offer any guidance.[31]

The only other case we know about involves the *Rockford*, Illinois, *Gazette*, which was ordered not to publish any editorials criticizing the local court system. The newspaper ignored the order and was held in criminal contempt. The order was subsequently declared invalid. The criminal contempt conviction is now pending before the Illinois Court of Appeals.[32]

Therefore, we believe that this provision, authorizing criminal contempt for violation of an invalid gag order, is clearly not the law today, with only one conviction in 47 years from one Court of Appeals, and with two recent state supreme court decisions in opposition.

5. Congressional supporters also argue that this bill offers "new defenses" against gag orders because the news reporter or news organization can escape jail by obtaining a ruling that the illegal order was also "clearly invalid", *and* that there was not a "reasonable opportunity" to appeal.

We disagree. A criminal law, the Supreme Court has said, must be specific enough so that a person subject to its jurisdiction has a reasonable opportunity

---

[25] Brief for petitioner, *New York Times* v. *United States*, 403 U.S. 713 (1971).
[26] *United States* v. *Dickinson*, 465 F. 2d 496 (5th Cir. 1972), aff'd en banc 476 F. 2d 373, cert. denied 414 U.S. 979 (1973).
[27] *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967).
[28] State ex rel *Superior Court* v. *Sperry*, 79 Wash. 2d 69, 483 P. 2d 608, *cert. denied* 404 U.S. 939 (1971).
[29] *Wood* v. *Goodson*, 253 Ark, 196, 485 S.W. 2d 213 (1972).
[30] *Nebraska Press Association* v. *Stuart*, 194 Neb. 783, 795; 236 N.W. 2d 794, 802 (1975).
[31] *Nebraska Press Association* v. *Stuart*, 96 S. Ct. 2791, 2806, n. 9 (1976).
[32] *Supra*, note 20.

to evaluate whether he will be convicted; or as this bill itself states, he must be given adequate "notice of conduct" which will send him to jail [33]

For a wire service, on deadline every minute all over the world, or for a radio or television station, one minute may be "reasonable" from a reporter's or editor's point of view, but a judge may disagree. For a newspaper with a daily press run, it might be decided that 20 hours is reasonable. And for a monthly magazine, it might be a month.[34]

The injunction against the *New York Times* in the Pentagon Papers case lasted 18 days. The injunction against the Nebraska press in *Nebraska Press Association* v. *Stuart* lasted 3½ months, while Justice Blackmun indicated that 30 days might be acceptable. The injunction against the Oklahoma City media in *Oklahoma Publishing Co* v. *District Court* lasted five months before the Supreme Court reversed it. And last week, the Supreme Court said that prior restraint orders must be given an "immediate" appeal, citing Justice Blackmun.

We think it is intolerable that a news person and news organization, in order to exercise constitutional right to publish in violation of an illegal order, are to be subjected to the discretionary decision of some judge or some jury as to whether there was "reasonable" time to appeal.

The second requirement, which the news organization must show, is equally unconscionable. A newspaper cannot require an appeals court to rule that an order is "clearly invalid". This means that the newspaper is at the mercy of an appeals court in deciphering whether a ruling of invalidity is also "clearly invalid."

6. The Supreme Court said in *Nebraska Press Association*—an opinion without dissent—that there is a "presumption against prior restraint" [35] on the publication of news. There is no substance to a constitutional presumption when a reporter may be jailed for violating a court order which is not only presumptively invalid, but also is declared to be *totally invalid*. But that is the result this provision authorizes.

The bill imposes a chilling effect on the free exercise of the First Amendment rights by the requirement that every publisher and reporter must take a calculated risk of imprisonment by gambling on whether an *illegal* prior restraint order is also "clearly invalid" and whether he also has a "reasonable time" to appeal or seek a stay before going to press.

When the order is issued, the press has two choices. It can obey the order and appeal, or it can ignore the order and publish. If it publishes, and the order is declared void, no punishment can attach. But this bill would have two pernicious results: first, it would force a newspaper to appeal an illegal order and submit itself to the jurisdiction of the courts if there was "reasonable" time. Second, by giving the federal courts a new prior restraint weapon against the press, it would encourage federal judges to issue these orders. Certainly, by expanding the existing power to issue gag orders, Congress would appear to be both approving of these gag orders and suggesting that the gag order power be exercised.

III. DISCLOSURE OF CONFIDENTIAL NEWS SOURCES

Contempt (section 1331).

The bill would make it a crime for a news reporter to refuse to obey an illegal court order requiring the disclosure of confidential news sources by testimony or by revealing notes and out-takes. Maximum penalty: 6 months in jail and/or unlimited fine.

1. The bill's criminal contempt section authorizes fines and imprisonment for violating an *illegal* court order calling for the production of confidential news sources, because it would be a crime to "disoby(s) . . . a(n) . . . order . . . or command of a court," even if the order is declared void.

The contempt section has the same almost useless defense for the press as the prior restraint-contempt section. In order to escape jail for disobeying the

---

[33] *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). See also S. 1437 provisions, supra note 2, § 101(a).

[34] In the field of libel law, the Suprem Court has indicated that First Amendment Standards may vary, based on the degree of news organization's need to disseminate the news rapidly. See *Associated Press* v. *Walker* and *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 157–9 (1967).

[35] *Supra*, note 31, p. 2802.

illegal order to disclose confidential sources, the reporter must convince a court that the order was not only void, but was also "clearly invalid," and that there was not a "reasonable" time to appeal.

This means that if reporters who broke stories such as Watergate, the Huston Plan, the Korean gifts scandal, the CIA mail openings, etc., were ordered to disclose their confidential news sources and their notes, and then refused, and the order was subsequently declared *illegal*, they would still go to jail unless they could also convince a court that the illegal order was "clearly invalid," and there was time to appeal.

2. We are at something of a loss to suggest a situation where a reporter held in contempt would have a reasonable time to appeal, because the refusal to testify is always contemporaneous with the contempt order.

Perhaps what is meant by this section is that the reporter is required to litigate the subpoena *before* he is asked any questions, or that he is required to make a motion for a stay of the illegal order *prior* to being held in contempt. This would create an absurd requirement—that a person must arrange for an appeal of an order before there is an order.

We have discussed earlier the problems associated with obtaining a ruling that an illegal order is also clearly invalid.

3. The contempt section is equally applicable to a court order to turn over notes obtained in interviews with confidential sources, or "out-takes" of news film which would lead to identification of such confidential sources. Orders for the production of newsgathering materials, as well as for the compulsion of testimony can also be punished under Section 1333, Refusing to Testify or to Produce Information, which will be discussed below.

4. The section raises an even more fundamental question. News reporters and news organizations are not agents of the government. They obtain information for dissemination to the public.

Unlike other persons who raise privileges—such as attorneys—the reporter generally has no direct interest in the news source. He does not get paid to protect the legal or financial interests of a client. He gives the assertion of confidentiality in order to bring news to the public about government crime or other matters of public interest.

Without the promise, the public would be severely damaged because it would be deprived of the information. What Congress would, in effect, be doing by retaining criminal contempt for a good-faith refusal to produce information is to punish the public for reading the news as much as punishing the reporter for collecting it. Confidential sources, fearing discharge or prosecution, would not inform the public about crime. Reporters, fearing jail, would not give the promise and most likely would not obtain the story.

5. In *Imbler* v. *Pachtman*[36] and *Zweibon*[37] v. *Mitchell* respectively, the Supreme Court and the U.S. Court of Appeals both said that there can be no federal liability for government officials who violate the laws and the Constitution of the United States if their illegal behavior was a *good faith* assertion of what they thought were their rights, as law enforcement officers, to protect the public welfare.

We suggest giving the same protection to the public's right to know the news. Why should two reporters in Baton Rouge be convicted for properly informing the public about current news if federal and state officials are immune when in good faith they violated the law?

6. Supporters of this legislation argue that current law in the federal courts provides that mere silence under a good-faith constitutional claim of privilege justifies a criminal conviction.

We can find but one case in the federal courts where a news reporter was held in criminal contempt for a good-faith assertion of a First Amendment privilege, and in that case, at least, the order was upheld.[38] We can find no case in the federal courts where a news reporter was held in criminal contempt for violating an illegal disclosure order. In fact, we know of only one Supreme Court decision where any citizen was held in criminal contempt for a good-faith assertion of a constitutional privilege.[39]

---

[36] *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976).
[37] *Zweibon* v. *Mitchell*, 516 F. 2d 594 (D.C. Cir. 1975).
[38] *Garland* v. *Torre*, 259 F. 2d 545 (2d Cir. 1958), cert. denied — U.S. —, 79 S. Ct. 237 (1958). *See also* Application of Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1965).
[39] *Shillitani* v. *United States*, 384 U.S. 364 (1966).

7. Despite the complete lack of authority for this new S–1 approach, there is one institution which believes that reporters should be held in criminal contempt and jailed for refusing to disclose confidential news sources. It is the Department of Justice.

The Justice Department is currently attempting to jail for six months on criminal contempt charges two reporters from the Charleston, West Virginia *Gazette*, who have refused to disclose news sources pursuant to an order of the U.S. District Court in a case involving a dispute between coal operators and the United Mine Workers.[40]

The coal dispute has long since been resolved. Even if the reporters were to testify now, there are no proceedings in which their testimony could be used. But the Justice Department, relying on the *Shillitani* case, wishes to send these reporters to jail for six months to punish them for the exercise of their First Amendment privilege not to disclose the information.

8. This bill would condone such efforts by the Justice Department to criminally punish news reporters for their silence—completely misconceiving the difference between criminal and civil contempt.

Criminal contempt, going all the way back to the *Gompers* case,[41] is a penalty for disrupting judicial proceedings or for intentionally affronting the dignity of a court. It is meant as a *punishment*.

Civil contempt is an effort by the court to obtain compliance with its orders. It seeks a remedy—such as the disclosure of information.

9. We believe that a news reporter has an absolute right under the Constitution to refuse in good faith to disclose confidential and other unpublished information obtained during the course of newsgathering, except, perhaps, if the government can show that the refusal would result in a "clear and present danger" to the national security of the United States, and was intended to harm the United States or to help a foreign power.

Much as we oppose it, *Caldwell* does give the courts some powers to hold a news reporter in civil contempt for refusing to obey a valid disclosure order.[42]

If courts are interested in *obtaining* the information—rather than interested in *punishing* the reporter—we find it an unconscionable assault on First Amendment values to jail a reporter for up to six months because he asserted his good-faith privilege and lost.

Refusing to testify or produce information (section 1333).

The bill would make it a crime for a news reporter or news organization to unsuccessfully challenge an order issued by a court, a legislative proceeding or an agency, seeking testimony or unpublished notes or film identifying confidential news sources. Maximum penalty: 3 years and/or $500,000 fine.

1. The bill makes it a crime for a reporter to "refuse(s) to answer a question" or to "produce a record" about confidential news sources when asked to do so by the "presiding officer" of a congressional proceeding, a federal judge, or an executive branch "hearing examiner, administrative law judge, . . . notary," or any other officer conducting an official proceeding before a "government branch or agency."

Here, again, we have a provision which subjects a news person to imprisonment for the unsuccessful good-faith assertion of a First Amendment privilege to protect confidential news sources.

2. Unlike the criminal contempt provision, the reporter does not go to jail under Section 1333 if the disclosure order is illegal, since this section states that a reporter may plead that he should be "legally privileged" to maintain his silence under the First Amendment.

Yet, if the reporter asserts his First Amendment privilege, he may be indicted, tried and convicted for refusing to testify or produce information. If an appeals court then ruled that his claim of privilege could not prevail, the reporter could volunteer to provide the information that had been sought.

But the reporter's decision to test his claim of privilege in the courts, and wait until the issue is resolved by the courts of appeal, would do nothing to mitigate his jail term. Under this section, if the reporter decides to testify on the day after an appeals court finds his claim of "legal privilege" invalid, he could provide the information and still serve a three-year sentence, based on his conviction for his earlier refusal to testify.

---

[40] *See United States* v. *Steelhammer*, 539 F. 2d 373 (4th Cir. 1976).
[41] *Gompers* v. *Buck's Stove and Range Co.*, 221 U.S. 418 (1911).
[42] *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

3. We suggest that the civil contempt power described in *Caldwell*—allowing the courts to imprison the reporter until they obtain the information they seek—is more than sufficient as a means of obtaining this confidential information from news persons. A criminal statute is unnecessary.

Hindering law enforcement (section 1331).

This bill would make it a crime for a news reporter or news organization to refuse to give information, notes or news film out-takes to law enforcement officials, grand juries or courts, if the information involved confidential sources who were known to have committed a crime or to be criminal suspects. The bill specifically prohibits the news reporter or organization from raising any first amendment privilege. Maximum penalty: 6 years and/or $500,000 fine.

1. The bill achieves this result by making it a crime if a news reporter or news organization "delays, or prevents, the discovery, apprehension, prosecution, conviction, or punishment of" a confidential or named news source, if the reporter or news organization knows that the news source "has committed a crime, or is charged with or being sought for a crime."

Among the acts which the bill specifies is "concealing . . . a record" of the interview which would help "the discovery . . . (or) prosecution" of the news source.

The bill further provides that "it is not a defense to a prosecution under this section that the "record" of the interview "would have been legally privileged" under the First Amendment.

This means that a reporter or news organization executive will go to jail if he "conceals" a reporter's notebook or news film involving a confidential source who has admitted a crime or a named news source wanted or being tried for a crime.

This provision would also apply to television "out-takes" or other news film of violent political demonstrations, for example, if law enforcement authorities thought they could apprehend the persons by identifying them through the film.

2. This section authorizes almost unlimited "fishing expeditions" by law enforcement officers and courts into the files of news reporters and broadcast and print news organizations. There is virtually no major crime which occurs any place in the nation which is not intensively covered by local press organizations. Frequently it will be the press, through confidential news sources, who uncover the stories.

To give you some recent examples:

The Providence newspapers, based on confidential news sources, reported that city officials were tampering with odometers on city vehicles in order to defraud the city in relation to auto mileage repayments.

A Washington television station recently reported that illegal drugs were being sold in the District Building.

CBS Reports recently disclosed after an extensive investigation that anti-Castro Cubans from Florida were planting bombs both here and abroad.

A newspaper in North Carolina reported that police were receiving illegal kickbacks from towing operators.

Reports of these crimes—most notably white-collar crime and official corruption—generally come from confidential news sources who admit to the crimes or who know others who commit crimes. The bill would give government authorities carte blanche to raid the files of the news media, shortcut their own investigative efforts, and annex news persons as government investigators.

3. To compound this unrestricted search and seizure power against news organization files, notes and film, the news organization is helpless to protest because Congress has told the federal courts to ignore a First Amendment claim that the information is "legally privileged," and the reporter or news editor can be sent to jail.

4. Furthermore, the bill prohibits the act of "concealing . . . (the) identity" of a person who is known to have committed a crime or to be under suspicion. This section could be used against the news person who declines to tell an F.B.I. agent the name of a suspect whom the reporter had interviewed. Again, the First Amendment privilege is specifically rejected by this section.

Supporters of the legislation say that the 1975 committee report makes clear that this provision does not apply to news reporters who, in the course of their work, interview persons on a confidential basis. They say that the committee report limits the offense to "affirmative acts" of the defendant, and that a reporter who answers the government agent's questions with silence cannot be prosecuted.

Our reading of the act is somewhat different. Confidential news sources who disclose their own crimes or the crimes of others ask for confidentiality precisely because they fear "apprehension, prosecution, conviction or punishment."

The news reporter generally *agrees* to keep th news source's identity a secret as the price the public must pay in order to be informed of crimes. It does not tak any stretch of the imagination to assume that a prosecutor would say that the news reporter and the source entered into a conspiracy to conceal the source's identity in order to "delay(s) or prevent(s) the discovery, apprehension, prosecution, conviction or punishment" of the news source.

As we have said, it is our position that a news organization or news reporter can never be convicted of a crime for refusing, under a good-faith assertion of the First Amendment, to provide the government with the identity of confidential news sources or other unpublished information.

5. While the other efforts in this bill to obtain confidential information from news persons (i.e., contempt, and refusing to testify or produce information) at least require an appearance before a court, this provision imposes an affirmative duty on the press to cooperate with law enforcement officials.

It is our belief that news organizations and news reporters collect news to disseminate it to the public. They do not act as agents for the courts, for the police, for the defendant, or for prosecutors and plaintiffs.

These sections, authorizing criminal penalties for good-faith attempts to protect confidential news sources will, we think, encourage judges to issue even more subpoenas to the press.

The situation here is as threatening as with gag orders. Subpoenas, which were once limited to disputes between the Justice Department and the news media, are being obtained by state prosecutors and even civil litigants all over the country.

We know of a total of about 400 subpoenas to news reporters and news organizations for confidential and other unpublished information between 1970 and 1977. Of these, about 300 came from the Justice Department, and about 100 from the states.

We know of 21 reporters who have been held in contempt of court, and 14 of these reporters were jailed. We don't know how many reporters disclosed information rather than become entangled in long and expensive litigation.[43]

The New S. 1, by giving the government some new powers and expanding some old powers, can only serve to encourage more federal and state judges to seek to force reporters to disclose their sources.

IV. GOVERNMENT OFFICIAL SECRETS ACT CRIMES AGAINST THE PRESS FOR RECEIVING OR PUBLISHING GOVERNMENT INFORMATION

Publishing "Stolen" Government reports (section 1733).

The bill would make it a crime for a news reporter or news organization to publish a "Stolen" Government report if the reporter or news organization derived any profit from the publication of the report. Maximum penalty: 3 years in jail and/or $500,000 fine.

1. This new provision is the classic Official Secrets Act. The bill achieves this result by making it a crime for any person, including a news organization or news reporter, to "receive" or "possess" any "stolen" government "property" if the news reporter or organization dissemintates it to the public for profit.

2. Supporters of the bill maintain that, cognizant of the press' problems with this section in the 1973 and 1975 versions of S. 1, the drafters purport to protect the press in the new S. 1 by stating that intangible property owned by the Government is not covered.

We find it hard to believe that 42 volumes of the Pentagon Papers were "intangible," and we would remind the Subcommittee that the Justice Department argued privately that it was possible to prosecute *The New York Times* and its reporter Neil Sheehan for having possessed the Pentagon Papers; and that, in fact, Dr. Ellsberg was prosecuted for, among other things, criminal conversion of government property under the current law.

Leslie Whitten, an associate of Jack Anderson, was arrested for possessing stolen government property—reports and memos taken from the Bureau of Indian Affairs. Arthur Burns, chairman of the Federal Reserve Board, claimed that

---

[43] *See* Press Censorship Newsletter, Compiled and distributed by the Reporters Committee for Freedom of the Press, Nos. 1–10.

an employee of the Federal Reserve had illegally given to *Consumer Reports* a Federal Reserve report on consumer interest rates at various banks.

Was the Huston Plan "intangible"? Was the White House Enemies List "intangible"? Was the CIA report obtained by Mr. Schorr "intangible"? We saw Mr. Schorr standing on television, holding something in his hand, and it was not intangible.

3. Next, the congressional supporters of the bill suggest that the press is exempted because it would be a defense that the reporter "obtained or used the property solely for the purpose of disseminating it to the public, and did not derive anything of value from obtaining, using or disseminating it."

Clearly, this bill authorizes prosecution against the free-lance reporter, writer or author who publishes an article based on a stolen government report in a magazine and receives in return "anything of value," such as money; or, publishes the report in a book and receives royalties.

In addition, regularly employed news reporters are paid salaries and, despite their modesty, we consider them "something of value," given in return for such journalistic enterprise as obtaining reports which the government does not want published.

News organizations, which publish these reports, obtain money for their newspapers, magazines and air time. If the report is on an extremely important topic, they may put it on their syndicates for regular subscribers, who give something "of value," or they may syndicate it specially.

In short, one would have to search far and wide to find a situation where a news reporter, news organization or free-lance writer disseminated a government report to the public free of charge.

Therefore, this defense is quite useless.

4. Furthermore, by specifically singling out the press as one of the institutions to be covered by this new provision, Congress, by implication, is authorizing its use against the press.

5. It is our belief that government information belongs to the people. If the Congress wishes to be true to the whole concept of the First Amendment—that the people have a right to know what their government is doing—then it can *never* be a crime in a free society for a news persons or news organization to possess and publish a government report without the permission of the government, unless the government can show that the information contained in the report is a "clear and present danger" to the national security of the United States, and was obtained or published with intent to harm the United States or to aid a foreign power.

If the document is an original, the government should make a demand for its return, and the news organization should be given a reasonable period of time to copy it and return it.

If the document is a copy—which is also considered to be "property" of the government—one supposes that the government could make a claim for the value of the photocopy paper.

In short, this provision, allegedly showing such solicitude for the press, is almost as bad as its predecessor in S. 1. It is an Official Secrets Act because it punishes the possession of government information regardless of content.

Illegal possession of any original Government memorandum (section 1344).

This bill would make it a crime for a news reporter or news organization to possess any original Government memorandum or document. Maximum penalty: 3 years in prison and/or $500,000 fine.

1. This is an Official Secrets Act provision because it penalizes the possession of government reports, regardless of content.

The bill achieves this result by making it a crime if anyone, including a news reporter or news organization, "impairs the . . . availability of a government record . . . document, or other object . . . kept by a government for information or record purposes . . ."

This means, quite clearly, that reporters could be convicted if their mere possession of a government record—as it must—"impairs the . . . availability" of the government report to the government.

2. Once again, our position is that it can never be a crime for a news organization or a news person to receive or possess government information with the intention of disseminating it to the public, except for national security reasons mentioned above.

3. Supporters of the bill appear to concede that this criminal provision covers the possession of an original memorandum or report, even if the government has copies of it.

The supporters argue that its application to the press, in this day of the Xerox machine, is merely hypothetical because copies of original documents are not covered.

We would suggest, at least, that the plain wording of the statute does cover photocopies of original documents possessed by the press. The bill defines a government "record" as being "a record, document, or other object . . . kept by a government for information or record purposes . . . or required to be kept pursuant to a statute, or a regulation, rule, or order . . ."

It would not be unreasonable to assume that a prosecutor could claim that a photocopy of an original was being "kept . . . for information or record purposes" and that its mere possession by the press impaired its "availability" to government.

If, in fact, the Congress does not intend this section to cover either originals or copies of government records obtained by the press with the intention of disseminating them to the public, it might be helpful to simply say so.

Obstructing the Government's purported information control function (section 1301).

The bill would make it a crime for a news reporter or news organization to publish any Government information without permission. Maximum penalty: 6 years in jail and/or $500,000 fine.

1. To explain the application of this Official Secrets Act provision against the press, it is necessary to go back to the Department of Justice's prosecution of Dr. Ellsberg. Dr. Ellsberg was indicted on a charge that he did "defraud the United States . . . by . . . obstructing (the) lawful government function of controlling the dissemination of . . . government . . . reports." [4]

This was a new and novel use of the fraud section to punish a citizen for the dissemination, without permission, of government information, regardless of its content.

The new bill perpetuates this new "information crime" theory of the Ellsberg prosecution.

This means that, under the theory of the Ellsberg indictment, as interpreted by the Justice Department, a newspaper or news organization which published any government information without permission—from the Enemies List to a confidential H.E.W. or H.U.D. report—could be prosecuted for defrauding the government of its "lawful government function of controlling the dissemination of government reports."

2. There is no specific reference to the Ellsberg prosecution problem in the legislative history—despite the fact that our committee has brought it to the attention of this Subcommittee twice before. But congressional supporters of this bill argue privately that everyone realizes that the Justice Department was wrong when it indicted Dr. Ellsberg.

They say to us "Don't worry, it won't happen again," and we say to you—we agree; let's make sure it doesn't happen again and make it an absolute defense that this provision shall not apply to news persons or news organizations who obtain government reports without permission with the intention of disseminating them to the public.

That is what the First Amendment requires.

V. OTHER GOVERNMENT CENSORSHIP PROVISIONS

Government employees cannot leak "Private" information to the press (section 1525).

It would be a crime for a past or present Government employee to tell the press about Government or non-Government crime or other news based on "Private" information submitted to the Government in confidence. Maximum penalty: One year in jail and/or $100,000 fine.

1. The bill achieves this result by making it a crime for a "present . . . or former public servant" to "disclose(s) information . . . to which . . . he has or had access . . . in his capacity as a public servant" if the information is not supposed to be released under any "statute . . . regulation, rule, or order . . ."

---

[4] *United States* v. *Ellsberg*, Grand Jury Indictment No. — CD (U.S.D.C., C.D. Ca. March 1971), p. 1.

As you know, every agency in the government has a network of regulations, rules and orders requiring its information to be kept confidential—from the much-abused classification systems in the Departments of Defense and State to the hundreds of regulations covering domestic agencies, such as the Departments of Health, Education and Welfare, the Equal Employment Opportunity Commission, the Federal Trade Commission and the Department of Labor.

Under this bill, any time a government employee leaks to the press any information "provided to the government by" car makers, drug companies, housing contractors, defense contractors, hospitals, etc., in confidence, he can be criminally prosecuted and jailed for one year.

2. Supporters of the legislation argue that much of the information covered in this new provision is already covered under current law. We would agree that current law, in an effort to protect trade secrets, patents and competitive financial information, does impose a crazy patchwork of criminally enforceable silence on government employees.

In view of Watergate, the C.I.A. and F.B.I. scandals, the disclosures about the Immigration and Naturalization Service, payoffs to foreign and domestic officials by contractors, the Medicaid scandals and the welfare scandals, etc., the Congress ought to encourage federal employees to step forward with information indicating crime, mismanagement, and deception in the operation of government.

3. It has been suggested that a government employee cannot be convicted under this section if the information he releases to the press could be released under the Freedom of Information Act. But the Freedom of Information Act—and the interpretations of its exemptions—are confusing at best.

Furthermore, much of the information involved in recent investigative reporting efforts—such as the C.I.A. mail openings, the F.B.I. break-ins, the poor ratings of some major banks, etc.—would clearly have been kept secret under the Freedom of Information Act and punished under this section.

4. It is our position that, except for some narrow categories of information such as trade secrets, patents and atomic energy information, a government employee, as a *citizen*, should be free to give to the press government information even if it is in violation of departmental regulations.

The government has been very successful in keeping secret 99 percent of the information it wants to keep secret. It has at its disposal the ability to fire or re-assign employees who break its regulations, as witnessed by the case of the Defense Department employee who informed the press about cost overruns and found himself virtually jobless.

Government employees have reputations to protect and mortagages to pay and we think firing remains an effective gag. Except for information which is a "clear and present danger to the national security", we think that any government employee who, as a good citizen, wishes to disclose government crime and mismanagement, should not be sent to jail for his efforts.

5. It would be our position that, at a minimum, a government employee prosecuted under this act could not be convicted if the government information he disclosed raised a reasonable presumption that there was a violation of the Constitution, laws, regulations, or stated public policy of the government and if the information was disclosed in order to be disseminated to the public.

The only exception should be for information which is a clear and present danger to the national security of the United States, and was released with the intent to help a foreign power or harm the United States.

We oppose making it a crime to release the official secrets which any government agency says it ought to have by its own self-serving rules and regulations.

Sealing conviction records (section 3807)

The Federal courts are authorized to permanently seal public arrest, indictment records of first-offenders under 21 years of age convicted of possessing heroin and other drugs, if they are placed on probation.

This section of the bill is part of the overall reform for probation involving drug offenders. It already exists in current federal law. We oppose this section because we believe that the criminal justice system must remain open and publicly accountable.

The only way for it to remain publicly accountable is for its key documents—arrest, indictment and conviction records—to be permanently available for any member of the public or the press to inspect.

We recognize that frequently innocent persons find their reputations damaged because they are improperly arrested, indicted and tried, and are then acquitted. Occasionally, innocent persons are convicted. Frequently, innocent third-party witnesses suffer embarrassment and humiliation as the result of being involved in criminal proceedings.

Unfortunate as this may be in individual cases, this is the price we must pay under our criminal justice system. But this provision does not attempt to protect the innocent. It seals the records of a person "found guilty" of drug possession.

We see this provision as a dangerous first step to sealing information about the courts and the administration of justice, and we oppose it.

STATEMENT OF JACK C. LANDAU, ON BEHALF OF REPORTERS COMMITTEE ON FREEDOM OF THE PRESS, ACCOMPANIED BY CHARLES SENNET, GEORGE WASHINGTON UNIVERSITY LAW CENTER

Mr. LANDAU. Senator. I would like permission for Mr. Charles Sennet, from George Washington University Law Center, who helped us with this testimony, to sit at the witness table with me, please.

Senator THURMOND. That will be fine. We are glad to have you with us, Mr. Sennet.

Mr. LANDAU. My name is Jack C. Landau. I am a director of the Reporters Committee and a reporter for the Newhouse papers and an attorney.

As I said previously, this is Mr. Sennet, who is a law student who works with us.

On behalf of the Reporters Committee, we would like to thank you for this opportunity to testify, Senator.

As you may remember, the Reporters Committee testified in 1973 on the 1973 version of S. 1 and S. 1400 and again we testified in 1975 on the 1975 version of S. 1.

In our previous appearances here before this subcommittee, we strongly disapproved of a number of provisions which we thought, if passed, would have undermined the first amendment rights of the press to report and the public to receive news about the Government.

Subsequent to that testimony in 1975, Senators McClellan and Kennedy and their staffs worked very hard on the bill. The result is that a few of our suggestions—and the suggestions of other press groups—have been heeded, mainly with the elimination of the espionage sections. We, of course, very much appreciate that effort.

But, unfortunately, from our point of view, the bill today remains basically what it was in 1973. The new S. 1 is an official secrets act which would give the Government wide-ranging new criminal powers to severly restrict first amendment rights of the press and the public.

Here we are 5 years after Watergate and 6 years after the Pentagon papers with a bill making a frontal assault on the first amendment by giving the Justice Department and the courts the authority to jail news reporters and news organization executives for improperly criticizing Government officials; for publishing news in violation of illegally issued gag orders; for protecting confidential news sources in violation of illegally issued disclosure orders; for publishing stolen

Government reports without Government permission, regardless of content; and for possession of original Government memos without permission, regardless of content.

The bill also makes it a crime for Government employees to leak to the press any "private" information which the Government has from oil, auto, drug, and defense cointracting firms and other nongovernmental organizations.

We would have hoped that, especially in view of the controversy in the previous bill, the Congress would have proposed a bill which at least maintains the status quo or would have offered more protection for press coverage of governmental affairs. But the new S. 1 tightens the legal noose around the flow of Government news to the public by authorizing jail sentences and fines for collecting and publishing information about the Government.

It retains the same basic philosophy and most of the same provisions of 1973 and 1975 versions except for the espionage classification violations.

This official secrets act philosophy—conceived mainly by the Nixon administration—was then and, unfortunately, still is in this bill that Government should have the power to protect itself from public criticism and embarrassment by having criminal conviction powers to intimidate and harass the press into silence; and, if the press refuses to be intimidated, then to send reports and editors to jail.

The liberal and conservative supporters of this bill argue that the Justice Department will never use the provisions of this bill against the press.

We are, they say, in a "new era"—"an era of good feelings." Therefore, despite the plain language of the bill—authorizing criminal prosecution and jail against the press for reporting news to the public—we are asked to believe that the recent unpleasantnesses between press and the Government will never happen again.

We most respectfully dissent for a number of reasons, and I will just touch on a few, Senator Thurmond.

First we were told we were wrong in 1973. We were told we were being too protective of the first amendment. Again, in 1975 we were told we were wrong and being too protective. I think time and circumstance justify the testimony in 1973 and the testimony in 1975. I would hope that time eventually, perhaps with more study by the subcommittee, might justify the criticisms we make today.

Second, while it is true that we are in a better atmosphere today than we were 3 years ago, we have to remember that the moods of politicians change quickly and dramatically.

I think that our job in terms of analyzing the reasonable use of this bill should the circumstances change again is to insure that the public will be protected under its right to know the news, regardless of whether the administration is friendly or hostile.

Third, and I think this would be most important for the subcommittee, this is a model law. It is going to be a model to the States. It is the first major reorganization in 170 years. The States are going to look at the provisions in this bill, especially the provisions which are designed at least to be used against the press because of the legislative

history or which can clearly be used against the press. I fear we will face many State official secrets acts, relying on the wisdom of Congress in having passed this bill.

Last, for the major news organizations, when faced with some of the threats that this bill authorizes, I think if history is any guide they have the adequate legal resources to fight these types of criminal prosecutions. However, I do not think we should design a law which perhaps is going to eventually result in an acquittal only because a news organization has thousands or millions of dollars to spend on legal defense. I think we should have a law that is clear enough and in areas of doubt errs on the side of the first amendment rather than erring against it.

We have done an analysis of about 10 sections of this bill, which I will skip over very briefly. Because of the time limitation, I will not have much time to go into any analysis.

I would be happy to answer any questions in the middle of this if you would like to stop me.

We do have some footnotes in the back for you.

One provision which I think warrants an enormous amount of worry is section 1358 which says that it shall be a crime to improperly take any action which results in professional or financial damage to a Government employee or official as the result of his status or action.

This is a new provision. It is a criminal sedition law. It penalizes criminally "improper" criticism which results in damage or "improper retaliation," as it is worded in the heading of the bill.

I think that it is very clear that a newspaper and news organization which some jury thinks "improperly" took an action with damage to Government employees professionally could be prosecuted under this bill.

For your study we quoted the provision of the Alien and Sedition Act of 1798, which made it a crime to publish any false, scandalous, and malicious writings against the Government. At least they had to prove it was false, scandalous, and malicious. Here they only have to prove it is improper.

We would oppose the section. I think the legislative history gives a marvelous example. The example they use is this provision would reach, for example, the case of an employee of the Civil Rights Division of the Department of Justice who is attacked by nonphysical acts because of his employment in such agency.

This provision is intended to reach nonphysical acts. This provision is intended to reach words. It is intended to send people to jail for criticizing the Government. It is a sedition provision.

Senator THURMOND. Would you enumerate the provisions in the bill which you feel affect freedom of the press which impose more onerous burdens than now exist under current law?

Mr. LANDAU. This does not exist in current law.

Senator THURMOND. I thought you might point them out without elaborating.

Mr. LANDAU. This does not exist in current law. There is a provision in current law which was designed to protect Government employees from physical intimidation and that type of thing—obstructing them from performing their Government services. There is nothing that I know of in current law which extends it.

I believe the committee report says that this is an expansion of it.

As I understand it, this was designed to protect Government officials from lobbyists, say, circulating petitions against them and trying to get them fired.

I think it would be our position that anybody, including the lobbyist, has the right to stand on a street corner and scream his head off about anything a Government officer does. That is the essence of a free society—letting him talk.

Senator THURMOND. Where is the section that prevents that?

Mr. LANDAU. Which section prevents that?

Senator THURMOND. Which section in the bill would prevent a lobbyist from doing that?

Mr. LANDAU. I believe that this section was intended to stop an act or make illegal an act damaging a Government official in his employment. If you intend to get him fired or intend to cause him damage, it would seem to me that that would be perfectly proper.

Senator THURMOND. On page 81 of the bill——

Mr. LANDAU. Yes; 80 and 81.

Senator THURMOND [continuing]. It says, "Improper subjection of other persons to economic loss or injury to his business or profession." Is that the section to which you refer?

Mr. LANDAU. That is right. Yes.

Senator THURMOND. What do you suggest we change—"improper" to "willfully"?

Mr. LANDAU. I think it can be willful, Senator. I think a newspaper or a private business organization can stand out on the street corner and say, "We want John Jones fired because he banned our product. We want him out of Government." I think that you have the right to willfully criticize a Government official for his acts. That is the price you pay.

There is one other thing that is rather curious in the committee report. It says it also applies to improper criticism of an illegal act by a Government official. It says it does not make any difference whether the act is legal or illegal.

Senator THURMOND. What page is that on?

Mr. LANDAU. That is page 448 of the 1975 committee print report.

Senator THURMOND. What page of the bill is that?

Mr. LANDAU. It is an interpretation of the bill in the 1975 committee report, it says:

> The committee considers that retaliation is unjustified against a public servant irrespective of the legality of the public servant's acts that may have prompted the retaliation.

Senator THURMOND. On that point would you draw a line between violent and nonviolent acts?

Mr. LANDAU. Yes, sir. In the committee report it says it extends to nonphysical acts. That is precisely what it says. I do not know any nonphysical act except talking or publishing.

Mr. SUMMITT. I just wanted you to distinguish between subparagraphs (a) (1) and (2).

Mr. LANDAU. Subparagraph (a)(1) is the recodification of the existing statute, which basically was passed in the 1930's to protect the revenue officers.

Senator THURMOND. There would be no objection to (a) (1), would there?

Mr. LANDAU. No, sir.

Senator THURMOND. What you object to, as I understand it, is (a) (2); is that correct?

Mr. LANDAU. Yes, sir.

Senator THURMOND. "Improperly subjects another person to economic loss or injury to his business or profession because of an official action taken or a legal duty performed by a public servant because of his status as a public servant."

Do you suggest rewriting that or just to eliminate it entirely?

Mr. LANDAU. I certainly think if the committee has some particular type of behavior in mind that it wants to try to protect against that will not restrict the free dissemination of ideas by people who want to criticize the Government, perhaps the staff could work something like that out.

I understand what the intent is. It is just like so many other provisions of this bill. What they have done is thrown out the baby with the bath water.

Senator THURMOND. Do you have any suggestions for rewriting?

Mr. LANDAU. We might be happy to submit something to you after the hearing.

Senator THURMOND. All right. You may proceed.

Mr. LANDAU. The second section that we feel rather strongly about is both sections 1331 and 1335, which basically would subject a news organization to a criminal conviction for violating a prior restraint order that was void.

What has been done in this provision, as your staff knows, is to enshrine the *Dickinson* case into Federal law. We feel very strongly that we have two State supreme courts which say that if a news organization violates an illegal order that no penalty can attach. We have no Supreme Court decision saying that in the area of just pure speech. We have one fifth circuit decision which says that and it was cert. denied. You can read that, I suppose, one way or the other.

Certainly there is nothing in current law that we can see that clearly authorizes the criminal conviction of a news person or a news organization for violating an illegal prior restraining order. That is precisely what this would do. It was intended to do that.

There was a statement in the most recent legislative history that this was designed as a new protection for the press. Since I think that the law at this point is either against this point of view completely or certainly not clear, what the bill does is in effect have Congress telling the Federal court, one, issue gag orders and, two, throw them in jail even if the gag orders are illegal.

Mr. SUMMITT. Isn't this a codification of a U.S. Supreme Court decision?

Mr. LANDAU. There are some who think that *Hague* v. *the CIO* and *Walker* v. *Birmingham* have applied this doctrine or have extended this doctrine out to the area of prior restraint of pure speech.

In the *Walker* case, as you know, what the State was seeking to enjoin was not Rev. Martin Luther King and Shuttleworth talking about civil rights, but they were seeking to enjoin their parade. They

were seeking to enjoin physical acts. They were not seeking to enjoin words.

I think we have a very strong constitutional presumption against prior restraints to begin with. The *New York Times* and *Washington Post*, I think joined by almost everyone else in the press, have argued that you cannot issue a prior restraint in any area unless there is a showing that it is a clear and present danger to the national security of the United States.

This bill is considerably worse. This bill would authorize prior restraints in any area and jail even if you are right.

Mr. SUMMITT. Would you be satisfied if we took it out?

Mr. LANDAU. Yes; if you mean the entire contempt section, as it applies to publication, I think we would be.

The next section poses a double problem.

Senator THURMOND. Does your statement contain all that you are talking about now or is what you are saying in addition to what is contained in your statement?

Mr. LANDAU. What we tried to do, Senator, was to take up in the statement the explanations that were given by the staff members so that we could give people reading the statement the answer.

Senator THURMOND. Does the statement raise all of the points you have raised here?

Mr. LANDAU. In that section, yes, sir.

Senator THURMOND. There is no use in duplicating what is already in your statement. Your statement is going to be studied very carefully. If you have any additional points, we want to hear those.

Mr. LANDAU. The one suggestion that was made at a meeting attended by some of the staff members which was more or less convened on an ad hoc basis by some members of the press was this. Perhaps rather than rewrite it, rather than rewriting these sections section-by-section, it might be possible to simply draft some type of general defense for the dissemination of news and ideas. I do not know if that is possible. It was the suggestion that many people at the meeting thought might solve the problem of having to go through every section and say, "Well, let's take this word out and remove that word. Let's put this defense in."

I do not know if it is possible, but if somebody could come up with a formula that would protect both the collection of news and the publication of news as the first amendment intended it, I think it might be an easier drafting job than opposing it on a section-by-section basis.

In addition to the criminal sedition problems, this thing basically falls down into three categories. One involves prior restraint. Two involves what we think is new authority to throw reporters in jail for refusing to expose confidential sources even if the order itself was illegal. The third involves the flow of information from the government.

Senator THURMOND. I believe your time is about up. Do you think you have covered everything that you had in mind?

Mr. LANDAU. I think we have in the statement, sir. Thank you.

Senator THURMOND. Thank you very much. We appreciate your presence. Thank you for the contribution you made to this hearing.

We will stand in recess until 11:30 a.m.

[A letter from Arthur B. Hanson follows:]

LAW OFFICES OF HANSON, O'BRIEN, BIRNEY AND BUTLER,
Washington, D.C., June 21, 1977.

Hon. JOHN L. MCCLELLAN,
U.S. Senate, Committee on the Judiciary,
Washington, D.C.

DEAR SENATOR: I was unable to attend the hearings on S. 1437 when Jack Landau, appearing for the Reporters Committee, delivered what to me was an intemperate, unjustified attack on the pending legislation.

I want you to know that this attack is in no way supported by the American Newspaper Publishers Association nor by me as its General Counsel. It is my belief, from a professional point of view, that the efforts made by you, Senator Kennedy and your staffs and the staff of the Justice Department to clarify and remove legitimate press objections to the proposed revisions of the Federal Criminal Code has been a good faith, outstanding effort.

We all know the difficulties faced in this matter. It is the American Newspaper Publishers Association's continuing intention, subject to yours and Senator Kennedy's desires, to continue to try to bring light to bear on matters of legitimate concern affecting the press.

There is no way that we can prevent things such as today's happening. It is our view, however, that reasoning people will be led to further support your's and Senator Kennedy's efforts rather than be driven away by this move which is little short of incredulous.

With my sincere best wishes.

Faithfully yours,

ARTHUR B. HANSON,
General Counsel, American Newspaper Publishers Association.

[Recess taken.]

Senator KENNEDY [acting chairman]. The subcommittee will come to order.

Our next witness is Rev. Virginia Mackey, chairperson, National Interreligious Task Force on Criminal Justice.

STATEMENT OF REV. VIRGINIA MACKEY, CHAIRPERSON, NATIONAL INTERRELIGIOUS TASK FORCE ON CRIMINAL JUSTICE, JSAC AND NATIONAL COUNCIL OF CHURCHES

Reverend MACKEY. Senator and members of the staff. I am happy to be here to testify on this legislation.

Hopefully, in this Congress consensus will be achieved on a fair and comprehensive Criminal Code revision. Members of Congress wisely heeded public opposition to S. 1 and have drafted a vastly improved bill. But preliminary review of S. 1437 and the testimony already offered to this committee indicates that the present draft is not yet viable.

The task of this committee—indeed, of all of us—is of overwhelming magnitude. We commend this committee for holding open hearings. We commend you, Senator Kennedy, for encouraging dialog leading to continued improvement in light of critical questions such as those you outlined in remarks at the opening of the hearings on June 7.

Senator Kennedy, you asked if S. 1437 should be tightened in the area of the first amendment so that sections 1831 dealing with riot; 1302, obstructing a Government function; and 1328, demonstrating to influence a judicial proceeding, do not inhibit free speech and assembly. Our answer is a resounding yes, it must be tightened.

Sections 3101–3108 on wiretapping, 1843 on obscenity, 3111–3115 on immunity, 3614 and 3713 on evidence and confessions, 1331 on con-

tempt are some of the additional sections which are unnecessarily repressive and undermine constitutional guarantees to rights of assembly, due process, press, privacy, and speech.

Senator KENNEDY. You do not question that the troublesome issues included in this legislation are current law, and that other sections are an improvement of current law; is that correct?

Reverend MACKEY. The questions we raise are in regard to specific language in those sections.

Senator KENNEDY. But you do not question that what we have in these areas in either recodification of current law or an improvement of current law, is that correct?

Reverend MACKEY. I would have to pass on that. I would have to discuss each specific section in order to answer that question. We are still very much concerned about some of the sections of this bill.

Senator KENNEDY. I am, too. But we are talking about what can be done in these areas. In the areas that you have mentioned here, there has been some improvement in most of them. Obviously balances must be struck. They do not always represent what I personally would like to see, but I think it is a question of what you are going to achieve.

Reverend MACKEY. That is true.

Senator KENNEDY. The Warren court made a decision on use immunity. What reasonable position can you expect from the Judiciary Committee in that area with the national representation we face here? Do you really expect to get something that might be what you want or what I might want? We are dealing with the reality of the situation here.

Reverend MACKEY. I think there are constitutional scholars who still believe that the language as it is now drafted violates constitutional standards and so there is still debate. We would like to see this committee structure it as tightly as possible within constitutional guidelines.

The Interreligious Task Force joins with those who have analyzed those sections and find them completely unacceptable in their present form. We also reiterate the contention that there is no reason why codification of the Federal criminal law cannot be accomplished in a manner that strengthens, rather than undermines, democratic institutions in America.

Senator Kennedy, you have asked whether comprehensive reform is feasible. Our answer is that it is both necessary and feasible. We vigorously disagree with former Governor Edmund Brown who calls for the passage of the bill in its present form as the only possible consensus which can be achieved and who calls for initiation of the amendment process in separate bills "addressing themselves to narrow, specific controversial problems." We believe that such an approach would perpetuate the very hodgepodge which the present legislation is designed to charge.

The section on sentencing is one of the most critical and one of the most promising of the present revision. It does not resolve the current widespread debate about the purpose and mode of sanctions, but develops an interim strategy in order to offer, according to Judge Marvin Frankel in his testimony of June 8, a compromise between

"the unacceptable regime of unfettered judicial discretion which we have now, and the opposite extreme of rigid, mandatory sentences, which many have been driven to propose."

Unfettered discretion and rigid mandatory sentences are the antipodes of the debate but there are emerging areas of agreement which should inform the sentencing provisions of S. 1437.

First, the discretionary powers of judges should be maintained but limited as a means of controlling disparity. S. 1437 takes this course—in the interim by narrowing somewhat the range and scaling down slightly the maximum terms of most categories of offenses; and in the long range, by establishing a Sentencing Commission which will establish guidelines for determinate sentencing.

We recommend two changes. First, we recommend that maximum sentences be scaled down drastically. The criminal justice system, as the agent of intervention, should intervene in the life of an individual only for socially useful purposes and for very short periods of time.

The 1973 "Report of the National Advisory Commission on Standards and Goals," page 145, Corrections Volume, concludes that:

> Long periods of isolation from society as an answer to increased crime may be self-defeating * * *. The fact remains that if society had to bear the burden of showing that increased restrictions on liberty deter crime, it would undoubtedly fail. In a free society, long prison sentences cannot be justified on the basis of speculation concerning deterrence, particularly where the detrimental effects of imprisonment for the individual offender are known and demonstrable.

The second change we would recommend is that the mandatory imprisonment provisions for class A felonies, trafficking in an opiate and for use of a weapon in the course of a crime, be eliminated. We oppose all forms of mandatory sentences as unworkable and insist that discretion belongs properly with the judiciary.

When you try to impose mandatory sentences, what happens is that, rather than discretion being lodged with the judiciary, it is used by the prosecutor or by the law enforcement personnel.

Our experience in New York State with mandatory drug laws would bear that out.

Senator KENNEDY. We are talking about a 2-year minimum, not a 10-year minimum as you have in New York, or even life imprisonment in New York. We are talking about a 2-year minimum for trafficking in heavy drugs and use of a weapon in a crime, with exceptions written in. We have a list of exceptions, such as age, duress—all kinds of exceptions. And there is only a 2-year minimum.

Reverend MACKEY. We believe that the judiciary should have discretion not to use imprisonment in every instance of imposing a sentence.

Senator KENNEDY. Are you familiar with the fact that the Second Circuit in a hypothetical case involving the same fact situation, gave from 3 years to 20 years?

Reverend MACKEY. Yes; I am aware of the problem of disparity.

Senator KENNEDY. That was in one circuit with the exact same fact situation.

What we are talking about here is trafficking in narcotics with the possibility of mitigating circumstances.

Reverend MACKEY. We are unalterably opposed to mandatory sentences.

Senator KENNEDY. You may continue.

Reverend MACKEY. We oppose the death penalty on principle and could not support a bill which contained it.

A second general area of agreement is that judicial sentences should be subject to review. S. 1437 provides for appellate review if a sentence exceeds the minimum or maximum guidelines. We recommend that the right of review for the defendant not be limited. We believe a sentence could be improper even though it was within the guidelines. We urge this committee to further question the advisability of prosecutorial review because it would seem to place the defendant in double jeopardy.

A third general area of agreement is that guidlines should require a judge to sentence on the basis of the least drastic alternative. S. 1437 enumerates several sentencing options but it has no explicit presumption against imprisonment.

Section 2003(b), which requires a statement of reasons for imposing a sentence, should be revised to include the procedure a judge must follow in determining the least drastic alternative.

Again, we refer you to Standard 5.2 of the Corrections Volume, "National Advisory Commission on Criminal Justice Standards and Goals;" to the proposed rule of the Second Circuit Court of Appeals, Committee on Sentencing Procedures, II, Dannaz, 1976; and to the Yale Study, "Toward a Just and Effective Sentencing System: Agenda for Legislative Reform," June 1977.

S. 1437 takes cognizance of another area of agreement that, if incarceration is ordered, length of sentence should be determined by the judiciary rather than the Parole Commission. We recommend that abolition of parole be made more explicit on the basis of our concurrence with Professor O'Connell's contention in his testimony of June 8, 1977, that the parole process should not be administratively abolished by the Sentencing Commission. It is Congress that should set the lead time at which the Parole Commission would be phased out as the Sentencing Commission's provisions for determinate sentences are adopted.

If parole determinants are abolished and early release set at nine-tenths of sentence, it is all the more imperative that maximum terms be drastically reduced.

S. 1437 should be structured to avoid the pitfall of longer average times served associated with the determinate sentence schedules proposed or adopted to date. Also, if parole is abolished, the post release services now provided should be available to releasees without coercive supervision.

Finally, in regard to the proposed Federal Sentencing Commission, our preference for the composition would combine the best features of S. 1437 and S. 204, Senators Hart and Javits. The appointments should not be made from the Judicial Conference exclusively. We recommend that the appointments be made on a tripartite basis and that there be nine members, at least one of whom is a former prisoner.

In addition to the perspectives of the Judiciary and the Parole Commission, it is important to have those of the private sector and of affected persons.

Too many of our criminal justice standards and goals are developed in isolation from the testimony of those most affected. Too many of our standards and goals are based on misconceptions about the nature of crime.

We commend S. 1437 for reducing at the Federal level some of the disparity of treatment between so-called white collar crime and that of street crime. But the fact remains that poor and minority persons are most often victimized as well as being those most often sentenced to prison.

David L. Bazelon, chief judge of the U.S. Court of Appeals, District of Columbia Circuit, cautions us against simplistic solutions to that type of crime, New York Times, February 15, 1977.

He reminds us that we convict and demand "tougher sentences" for the street offender, yet:

> Street crime has no nostrums apart from profound social reforms, which are generally expensive, inefficient, and unpopular . . . It is always easy to concede the inevitability of social injustice and find the serenity to accept it. The far harder task is to feel its intolerability and seek the strength to change it.

America needs to search for new paradigms for conflict prevention, intervention, and resolution. Fortunately, the religious community is beginning to respond to Roscoe Pound's challenge—lecture at Harvard Law School, 1925—to "give serious attention and show the way to more coherent and ethical ways of dealing with crime."

L. Harold DeWolf, retired dean of Wesley Seminary and a member of our Interreligious Task Force, is one who is building bridges between Judeo-Christian ethics and criminal law. It is his premise that:

> Criminal justice, properly understood, is the defense of a community in which people are able to pursue their various legitimate interests. When the existing community is disrupted by crime, it is the task of criminal justice to restore its unity in such a way as to strengthen it against further disruption. Cumberland Law Review, volume 7:393, 1977.

In that definition, justice is not repressive but is the standard by which wholeness is attained and maintained in communities. We wish to continue exploration by the public and private sectors of our Nation into the concepts of social defense and restoration as the bases upon which to build future criminal codes.

In the meantime, we pledge our efforts to the members of this committee so long as you are committed to developing an eminently fair and constitutional code.

Thank you.

Senator KENNEDY. I want to thank you very much. I think it is marvelous that the Interreligious Task Force is working in this area. It is very, very helpful to us. I think there are very profound moral implications as well as legal implications regarding this legislation. I welcome the attention and the interest which you have made here. I want to thank you very much. We hope you will keep in touch with us and give us your views as the legislative process moves ahead. We are very grateful to you.

Our next witness is Ms. Susan Kokinda of the U.S. Labor Party.

STATEMENT OF SUSAN KOKINDA, U.S. LABOR PARTY

Ms. KOKINDA. Thank you, Mr. Chairman.

I have a prepared statement which I would like to have submitted for the record. I would like to elaborate on what I feel are the critical points.

Senator KENNEDY. We will have it included in the record in its entirety.

Ms. KOKINDA. Thank you.

[The material follows:]

TESTIMONY OF THE U.S. LABOR PARTY REPRESENTATIVE

Mr. Chairman and members of the Senate Judiciary Committee; the U.S. Labor Party views S.B. 1437, the proposed revision of the federal criminal code as incompetent, dangerous and subversive to the Republican principles of law elaborated at the founding of this nation. As a result of a total mislocation of the problem of crime and the proper function of law in society, the American people have been presented in the past two years with a Hobbesian choice as the legislative outcome of the eleven-year project to overhaul the nation's criminal code: a direct police-state by 1978 (the old S-1) or Kennedy's new version, which will bring the U.S. to the same end, but narcoticized (quite literally) by Orwellian provisions for so-called equality and individual liberty.

MISLOCATION OF THE PROBLEM

Laws exist to inform the willful impulses of a society and its individual members to absorb the outlooks and methods, and to take the actions which correspond to the society's general interest. There is no way to reform the federal criminal code without applying a definition, at least implicitly, of the society's general will and interest, coincident with defining penalties for crimes against that national interest. As we demonstrateed for you in the Law Enforcement Reform Act of 1976, it is precisely the lack of a compelling definition of the national interest and the political failure to win the population to such a definition which is the chief cause for epidemics of crime such as the one this nation is experiencing.

Deterrance, with "equality" of treatment—the motivating point for this bill's mandatory sentencing provisions and the recent resurrection of capital punishment—is a mockery of law well demonstrated in the Gary Gilmore case where the criminal, a confessed murderer, was eagerly accepted as an anti-hero by a degraded U.S. population.

In fighting the war against Britain and in winning the population of the colonies to the Constitution, the Federalists faced similar outbreaks of crime and heteronomy fed by the Tories' ideology of direct democracy and populism, and ideology embraced by the Carter Administration today. They did not turn, as the conservatives on this committee have, to a hoard of law professors, miseducated social scientists, and criminologists who ply their trade on the "insolubility of the crime problem." They did not turn to the ignorant legal codifiers who spin laws on top of each other into infinity with no relationship to the problems they are addressing. Nor did they rush away from defining policies and programs which would properly subsume the problem of crime as this committee has done with eleven years of misinformed debate in which the public good was defined, crime by crime, by the number of years of punishment attached to each.

Instead, the Founding Fathers developed a rigorous definition of the national interest: industrial growth and development, scientific progress under a Republican and federal system. They launched a massive political organizing campaign aimed at raising the general intellectual level of the population to allow for assimilation of the advanced conceptions on which that definition of the national interest was based. Such a program would allow for the proper situation and definition of a criminal justice system, through the individual's compelling moral experience of his freedom, his capacity to create new lawful orders within the necessities posed by society, to mediate the progress of society, and his related capacity to distinguish between good and evil.

IMMEDIATE POLICY IMPLICATIONS OF THE KENNEDY PROPOSAL

Our detailed analysis of this bill is being submitted for the record. Here, we want to touch briefly on Chapters 13 and 14 and on the organized crime section to demonstrate the bill's incorporation of the methods of the Institute for Policy Studies and Ralph Nader into national law. These provisions codify legal procedures which will institute a permanent Watergate against any and all political opposition to the Carter Administration's programs. Since the function of the

original Watergate operation conducted by New York banking interests was the destruction of the population's belief in its national institutions, these chapters militate against the government's ability to appropriately define the national interest. They therefore insure continued government by the Rockefeller financial interests.

Since Watergate, radical chic lawmakers have proved their worthiness to lower Manhattan by demonstrating how the invention of new crimes, reform and regulation of the lives of public officials, trial by the press—all sanctimoniously undertaken on behalf of the American little man against complexity and bigness—can effectively destroy political opposition without resort to more tedious methods.

The drive against organized crime was and is the primary vehicle for destroying this nation's trade unions, particularly the Teamsters. The official corruption sections now incorporated into law produced the lawless Federal Election Commission and a cowering Congress eager to separate itself from such "special interest groups" as its own constituencies. The Offenses Involving Government Processes Section with its perjury and false swearing provisions replicates the legal system which emerged in post-1933 Nazi Germany. This Nazi legal system emphasized crimes of ommission to regulate both the population and industry. Finally, the corporate accountability and white collar crime provisions echo the Rockefeller-sponsored Naderite drive to strangle American industry.

If the Congress buys the Carter energy and economic programs rather than insisting that the United States join the rest of the world in founding a new world economic order, these sections of the Kennedy Bill will be utilized ruthlessly by the Justice Department in operations to soften the U.S. population for austerity. However, the severe economic looting policies dictated by the drive to pay the New York banking debt will quickly require a shift into the direct police-state methods, of the type set forth in the original S–1.

THE KENNEDY BILL DEFINES A SOCIAL-CONTACT CONTRARY TO REPUBLIC LEGAL PRINCIPLES

The amoral theorists who have devoted themselves to the Kennedy proposal—precisely because the bill is being discussed apolitically and without regard to a coherent definition of the national interest—have developed an Animal Farm model of the criminal justice system where the sovereign powers and laws of this nation are degraded to the functions of low-grade management experts.

This nation has enacted and upheld laws against drug use—including marijuana—and other "victimless" crimes precisely because it depends on the creative labor power of its population for its continued existence. To the legal management expert, prosecution costs too much and is not efficient—besides the prerogative of an individual to destroy his or her mind is a private interest and not one which should concern the state. The state is simply the collection point for all these private individuals and contracts its services to them. It is only a short step from this notion of law to the point where the state will itself provide the wares for its citizen drug users in order to turn a better and quicker profit. In fact, this has been proposed by Dr. Peter Bourne's endorsement of heroin and cocaine legalization.

Similarly there is a whole new class of citizens to be managed by the federal legal system, the so-called victims of crime. Since there is no real approach to ridding the nation of crime we can assume their numbers will double and triple and all of them must be compensated for this policy failure.

Finally, the legal managers have had to develop efficient and "equal" means for dealing with its regular customers. Now they grade crimes according to their assumed social value and mete out penalties without the need for human intervention. The U.S. Labor Party takes note of the efficiency of the method but asks what reason have you given your properly processed and punished felon for going through the arduous educational process of actually becoming a human being, of defining himself as a member of society?

The problem with all social contracts as our Founding Fathers noted in rejecting such a scheme for the U.S. Constitution is that they postulate a continuous war between the interests of the individual and his society, the antithesis of Republican national policies. If the Congress does not take cognizance of the federalist approach to situating the criminal justice system, if it continues on its present social contract course at the whims of the New York Banks, the associated social and moral breakdown will quickly overcharge Mr. Kennedy's system of efficient management—leading directly to a U.S. police state.

Ms. KOKINDA. The discussion which has taken place so far on the question of Criminal Code reform severely mislocates the real question of crime facing this country. Instead what has taken place is the classic left-right tug of war around two sides of the same coin essentially.

On the left side one has those who favor more rehabilitation and less punishment. On the right side one has those who favor more punishment, perhaps, and less rehabilitation.

Both are missing the critical issue, which is the outbreak of crime and heteronomy in a society whose clearly defined national goals and national interests are now lacking. That is the critical question of an outbreak of crime and heteronomy in society.

What has to be grappled with is that there are essentially two approaches to the question of crime and the relationship of the individual to society.

The first approach, the approach embodied in the founding of this country and in the notion of a republic, is that of the ability of a nation to define its national interests and to define what is a crime against the national interest and the individuals engaged in propagating that national interest.

Our country was founded on a very clear perception of national interest—that of industrial, technological, and scientific progress in opposition to those British financier forces who were attempting to keep this country in a state of enforced backwardness, an agricultural backwater open for British looting.

It is with that kind of definition of national interest that one can then locate the definition of a crime against society.

Take the example of decriminalization of marihuana and other drugs. The use of marihuana and other drugs absolutely must be considered a crime against society. What is the most important precious resource of a society? The ability of the human mind to make creative contributions to the further advancement of the technological and industrial progress of that——

Senator KENNEDY. You are against decriminalization, is that correct?

Ms. KOKINDA. Absolutely.

Senator KENNEDY. Do you think we ought to do the same thing for liquor?

Ms. KOKINDA. No; because the medical evidence for liquor is not the same as the medical evidence for marihuana.

Senator KENNEDY. Please submit that.

Ms. KOKINDA. We certainly will.

Senator KENNEDY. We have evidence quite to the contrary.

Ms. KOKINDA. That is true. I am quite aware of some of that evidence, but I think it is scientifically incompetent, unfortunately.

I will refer as our evidence our testimony on the nomination of Dr. Peter Bourne around the question of decriminalization of marihuana.

Senator KENNEDY. I am familiar with that.

Ms. KOKINDA. In the body of that testimony we discussed the scientific evidence, much of which has been downplayed or underplayed in the press. That scientific evidence is actually quite profound.

I will be more than happy to submit that.

The specific question with regard to marihuana is this. The scientific evidence indicates—evidence which is not very well known but is extremely competent, and actually well known in international circles——

Senator KENNEDY. I have more than just a passing interest because I am also chairman of the Health Committee. We have spent a great deal of time in all of these areas trying to review the health implications of these issues. That is why I am interested in terms of your testimony that you do not think that the continuing use of alcohol has as serious health implications as marihuana has.

Ms. KOKINDA. Indeed, I would not want to say that it has no serious health implications. However, the impact of marihuana on the creative capability of the mind——

Senator KENNEDY. Do you think we ought to stiffen the penalties for it?

Ms. KOKINDA. I would not want to specifically make a suggestion one way or the other on that, but it definitely should not be decriminalized.

The individual in society must not be given license to destroy his own mind. That is the basic resource of our country.

Senator KENNEDY. Do you think we ought to leave that up to the Federal Government?

Ms. KOKINDA. Absolutely.

Senator KENNEDY. We should not leave that up to the States or——

Ms. KOKINDA. We do have a Federal system, the States have a role.

Senator KENNEDY. We also have a State system.

Ms. KOKINDA. It is necessary for the States to play their proper role in that question.

Senator KENNEDY. You do not think they ought to be able to make a decision on that; is that correct?

Ms. KOKINDA. The States absolutely should make some decisions. The States, in fact, in the past 6 months have taken, we feel, very important steps toward defeating decriminalization in a number of places where we have played a critical role in bringing forward the medical evidence which in general has not been brought forward.

It is not simply a question of some individual's right one way or the other. It is a question of what is the basic resources of a human society. It is that creative potential of the mind. The medical evidence is incontrovertible that extended use of marihuana destroys precisely those——

Senator KENNEDY. Do you think there are more people hooked on alcohol or marihuana in this society.

Ms. KOKINDA. Pardon?

Senator KENNEDY. Are there more people hooked on alcohol or marihuana?

Ms. KOKINDA. I would imagine there are probably more people hooked on alcohol. The question is which is more destructive to the human mind.

Senator KENNEDY. What is the third biggest killer and the most costly disease today in terms of our society?

Ms. KOKINDA. I don't know.

Senator KENNEDY. It is alcoholism.

Ms. KOKINDA. The question again is the question of the most critical resource. That is the question of the human mind.

Senator KENNEDY. Alcoholism—what does that do to the human mind?

Ms. KOKINDA. It does not have the effect on the higher order functions of the mind which marihuana does. That is some of the medical evidence which we and others have brought forward in recent hearings.

I think it is perhaps necessary to move on from this point since this should not be a debate around marihuana.

Senator KENNEDY. Fine.

Ms. KOKINDA. The point I am trying to make here is the question about national interest and how one defines national interest and the activities of the individual in that context. That is the approach we feel is embodied in the Constitution and form of republican government which this country has.

There is a second notion. This is a notion which I think this legislation, unfortunately, embodies. That is the notion in which the individual stands in conflict with his society. It is a social contract notion, an Animal Farm notion. It is a notion in which one keeps the individual in check by a certain amount of punishment—pain and pleasure, if you will. It keeps him in check through the codification of a series of punishments which suppress these anarchic or heteronomic motions.

The question with this social contract notion and what is embodied in this is that it completely ignores the notion of national interest, and mobilizing a population around a clearly defined national interest.

Let me compare the way this legislation goes at the question of an outbreak of heteronomy with the way our Founding Fathers dealt with precisely the same question.

The ability to mobilize the American population, faced with a similar crisis, say, in the 1780's or the 1790's——

Senator KENNEDY. Will you define heteronomy as you are using it, please?

Ms. KOKINDA. It is a more precise form of the word "anarchy" essentially. It is the individual acting without any notion of a larger interest or a larger whole. I guess antomism would be a corollary or anarchy, but heteronomy is a more philosophical use of the term, I think.

What occurred in the 1780's and 1790's in this country on a number of occasions was an outbreak of heteronomy—anarchy in a number of places. Take, for example, the Shays Rebellion in New England. Essentially there were outbreaks of looting and outbreaks of lawlessness——

Senator KENNEDY. You do not think there was justification for the Shays Rebellion? You do not think there was some merit to that?

Ms. KOKINDA. That is precisely the point. How do you deal with the Shays Rebellion? Do you round up the entire population of New England and put it either through rehabilitation or punishment or do you go to the root cause of that in terms of the economic basis?

Precisely what the Founding Fathers did was carry out a political education or a political organizing drive around what the solution to the Shays Rebellion was, which was the establishment of the Constitu-

tion, a Federal system, the enhancement of the notion of republic with this very clear notion of what the economic interests of the country were in terms of advancing economic development.

That is the critical question we are facing. We are facing exactly the same question now. We are seeing increasing outbreaks of criminal activity on the part of the American population. The question is why. This country has been in a state of economic decay starting basically from 1958 with the recession but most clearly within the past 5 or 6 years.

That economic decay is most eminent on an international scale right now. Senator Javits last week warned of a full scale outbreak of international depression based on the collapse of the international monetary system.

The question is does one simply try to check the outbreak of criminal activity on the part of a population or does one go to the root cause of what the problem is. That is precisely the question which has to be grappled with by Congress. Anything else is rearranging the deck chairs on the *Titanic*. In fact, it is much worse. It is punching big holes in the hull of the *Titanic*.

Senator KENNEDY. How do you explain the reduction in unemployment and the general stability of the economy in the 1960's and yet the growth of crime?

Ms. KOKINDA. Although there was a certain nominal reduction in unemployment, if you actually look at the composition of the work force, you will find a very real reduction in skilled and semiskilled labor in this country and an increasing influx into paper-pushing or labor-intensive kinds of jobs. This correlated with the decrease in the actual capital base of this country starting with the 1958 depression.

The critical question facing, say, youth in the early 1960's or a member of the black population is did he see an expanding work force where he could enter the ranks of the skilled and semiskilled. He did not. He saw perhaps paper-pushing jobs or unproductive labor-intensive jobs. That is the root cause of the outbreak of disaffection, both in the black population and in the youth population in this country.

What this country needs at this moment is a fundamental return to what was called "the American system" in the 1820's, and earlier actually. That would include the principles of Alexander Hamilton, Washington, and most emphatically Franklin and carried forward by such individuals as Henry Clay.

It is a very simple notion—the establishment of a national bank which allows for the social surplus of the Nation to be constantly directed into those areas which would yield the greatest scientific and industrial development and insuring that the industrial interests of the Nation are constantly the interests which are in the forefront. Unless we insure that, we have the situation we face today (and faced in the 1830's) where financier and monetarist interests, who will make profit on a piece of paper at the expense of industrial growth if necessary, will dominate our national economy.

That is the first question that has to be dealt with. How are we going to reestablish the American system of industrial growth in this country in opposition to what President Carter is representing, in

opposition to what the financial forces such as the trilateral commission behind him represent?

Unless we do that, we are going to see increasing outbreaks of heteronomy, of criminal activity, and of anarchy. The only way to cope with it is going to be increasing the hue and cry in the population for more punitive punishment or an increasing prison system, in very simple terms.

That is the dilemma facing this Congress. The legislation currently before this subcommittee and the Congress in no way grapples with that question. In fact, in a number of detailed sections of my printed testimony it makes the situation substantially worse.

Senator KENNEDY. Why shouldn't you try to do both?

Ms. KOKINDA. One can only be seen as a subset of the other. We are not doing the first. How can we deal with the criminal question if we are not dealing with the basic economic problems facing the country? You cannot. Indeed, Carter's energy program makes our economic problems worse. Again, you are rearranging the deck chairs on the *Titanic*.

Senator KENNEDY. Thank you very much.

Ms. KOKINDA. Thank you.

Senator KENNEDY. Our final witness is Ms. Marian Agnew.

STATEMENT OF MARIAN AGNEW, ACCOMPANIED BY JULIAN C. HOLMES

Ms. AGNEW. Mr. Chairman, I have with me my colleague, Mr. Julian Holmes.

We have submitted a statement for the record. I would ask that sections of both House and Senate Labor Committee reports cited at the end of our statement be included in the record as well—those sections which refer to grand juries.

Senator KENNEDY. Your prepared statement will be included in the record in its entirety.

[The material follows:]

PREPARED STATEMENT OF MARIAN K. AGNEW, JULIAN C. HOLMES, AND ARLYN E. UNZICKER

This testimony was prepared following several years of effort to bring certain violations of local and Federal laws committed by local and Federal officials to the attention of appropriate authorities.[1]

We learned an important lesson from this experience: That Federal prosecutors do not hesitate to intimidate and threaten persons who attempt to provide information on white collar crime to grand juries in the Washington metropolitan area.

Section 1326 of S. 1437 deals with the subject of improper approaches to juries. Section 1326 will replace Section 1504 of Title 18 which today specifically permits persons to seek hearings before grand juries. The right to request an audience before a grand jury is not guaranteed or even suggested by the language of Section 1326: "A person is guilty of an offense if he communicates in any way with a juror . . . with intent to influence improperly the official action of the juror."

[1] (a) Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 93d Congress, 2d Session, on a Review of the Occupational Safety and Health Act of 1970, July 22, 30 and 31, August 13 and 14, 1974.

(b) Hearings before the Select Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 93d Congress, 2d Session, on An Act to Assure Safe and Healthful Working Conditions for Working Men and Women . . . September 17, 1974.

It is argued that the word "improperly" somehow establishes the propriety of a "proper" approach to a grand jury. But unless the right to request an audience is guaranteed, such a request can be considered a criminal offense by prosecutors who over the years have assumed responsibility for directing, controlling, and restricting the daily business of grand juries. When white collar crime is at issue, one best remember that prosecutors sometime serve at the pleasure of the corruptors.

Our experience with prosecutors around Washington suggests that a rewriting of Title 18 Section 1504 should:

1. Reiterate the traditional right of citizens to bring knowledge of wrongdoing to a grand jury.

2. Provide criminal penalties for anyone who interferes with persons who, at the request of a grand jury, are assisting that jury.

The present law provides only one of these vital protections. Section 1326 of S. 1437 provides neither.

It is our belief that persons concerned about wrongdoing in government have little or no hope for relief unless a grand jury of peers can be apprised of such wrongdoing. It is our experience that prosecutors often protect themselves and their political colleagues from investigation, by preventing grand juries from receiving information about high level crime. Under S. 1437, this oppressive practice would be encouraged by weakening the current law.

Thus we believe S. 1437 must be strengthened by including the provisions noted above.

Ms. AGNEW. We would like to thank you for the opportunity to appear today.

This testimony was prepared following several years of our efforts to bring certain violations of local and Federal laws committed by local and Federal officials to the attention of appropriate authorities.

Mr. Holmes, Mr. Unzicker and I took to grand juries facts which we felt should be of major concern to the Justice Department and U.S. attorneys. We learned a very important lesson from this experience. Federal prosecutors will not hesitate to intimidate and threaten persons who attempt to provide information on white collar crime to grand juries in the Washington area.

I have been threatened by a U.S. attorney for bringing to the grand jury information requested by that grand jury.

This testimony addresses a problem of which you have seen primarily the other side—the abuse of prosecutorial power.

We not only experienced that but an even greater problem: acts of omission on the part of the prosecutors when we brought substantive issues which we felt should be discussed before the grand jury to them.

Section 1326 of S. 1437 is a recodification of section 1504 of 18 U.S.C. Section 1504 of title 18 specifies that "Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury." This particular section is supported by *United States* v. *Smyth*, 104 F. Supp. 283 (N.D. Cal. S.D. 1952), which has been followed consistently in the courts and is cited in the U.S. Code Annotated in conjunction with section 1504.

Compare this wording to that in section 1326 of the new S. 1 which uses the word "improperly" to describe the notion that the prosecutor will have to evaluate whether issues and facts communicated to the grand jury will be legal. There are several places in S. 1437 where this word "improper" is used. It allows the prosecutor a vague standard to accept or reject information. Our position is that a vague standard cannot be used to make the decision as to the legality or illegality of a communication. We feel that this word "improper" is not specific enough.

The Senate Committee Report (1976) also says on page 363 that in addition to requests to grand juries for appearances "only such other 'clearly proper' communications as those involving the court, attorneys and others who counsel jurors as to their functions and duties" would not violate section 1326. Therefore the vague word "improper" has been further diffused into a "not clearly proper" standard. We are most uncertain as to the intent of the authors of this ambiguous language. It is likely that our communication with the Federal grand jury would have violated this standard if the prosecutor had chosen to interpret it according to the text of the committee report.

As no culpability is set forth in this section, the applicable culpability level for "improper" conduct is "knowing," an awareness that the offender was communicating. Furthermore, even though the purpose of the communication contains the element of intent, that "particular motive or reason behind the defendant's intent to influence improperly need not be shown." Senate Committee Report, at 363 (1976). Here the word "improper" circumvents logical reasoning to provide no requirement for a reasonable evaluation as to whether the information communicated was given in the time-honored grand jury tradition of public remedy or was, in fact, a clearly defined illegal act. The distinction is obvious. Therefore, the prosecutor is not required to consider whether the communication is a good faith effort by citizens to give helpful information or an attempt to wrongfully influence. Communication, per se, without the sanction of the prosecutor or court in all cases will violate section 1326 of the new S. 1—a Class A misdemeanor which could sentence a law-abiding citizen to up to 1 year in prison.

We must also object strenuously to the exclusion of the precedent set by *United States* v. *Smyth*, *Id.* from the Senate committee report. Cited in the U.S.C.A. § 1504, in pertinent part the Court held that:

> The purpose of 18 U.S.C.A. § 1504 was to prevent anyone from attempting to bring pressure upon or intimidate a grand juror by a written communication with that intent. But that section does not prohibit a grand juror from receiving a communication, written or oral. The grand jury could indict anyone for a violation of that section if the requisite elements were present. But not if they solicited a communication or indicated a willingness to receive one; then *the requisite intent would not be present* and there would be no crime. *Id.* at 209 [emphasis added].

This omission is a clear indication that the committee wanted to eliminate the standard of intent and to reverse a sound public policy which has served the public well. Evidently the committee chose to substitute for that policy a vague and ambiguous standard which could be interpreted to thwart the efforts of well-intentioned citizens to bring matters involving white-collar crime to the attention of the juries and to have them prosecuted and imprisoned for trying to do so. We claim that this section of § 1326 must be changed and the applicable sections of § 1504 including the pertinent annotations relating to *Smyth* must be retained in the U.S. Code.

Senator KENNEDY. Under what now exists there is the language "nothing in this section shall be construed to prohibit * * *"

Ms. AGNEW. That is correct.

Senator KENNEDY. If we put that in, in terms of the bill, are you satisfied with that?

Ms. AGNEW. Sir, that handles one of the problems that must be addressed.

Senator KENNEDY. I will make every effort to put that in. I think it should be.

Ms. AGNEW. Thank you, Senator. That is excellent.

Our other request is to provide criminal penalties for anyone who interferes with persons who at the request of a grand jury are assisting that grand jury.

These two provisions will substantially strengthen section 1326 which as now written would effectively prohibit private citizens from bringing to the grand jury the kinds of issues which have traditionally been the purview of the citizen's jury.

Senator KENNEDY. I agree with what your thrust is, but the other side of the argument is the improper influencing of grand juries. That is the balance.

There are people, particularly in the area of organized crime, who will contact all of the members of the grand jury in order to influence them adversely.

These are the balances obviously. We are trying to deal with it.

I would be interested in how you would provide protection against that kind of thing.

Ms. AGNEW. I think you have to deal with that on the grounds of intent, particularly with people who have been targeted by grand juries. However, people have that right to be heard.

I think that you can very easily lean too far on one side. Threats by prosecutors have been made to both Mr. Holmes and to myself. We are not speaking of something in the abstract; this was personal.

There is another provision of the new S. 1 which must be revised. This is section 1358 which again uses the word "improper."

Page 447 of the committee report interprets this particular section by defining "improper" criticism of an illegal act by a Government official as a Federal crime if it does the official some economic harm.

One of the things that we did was request the resignation of certain Labor Department officials as a result of not investigating a very serious crime. We could have been indicted under section 1358 at that time had S. 1437 been law in its present state. If harm had consisted of economic loss or injury to an official, the offense would have been graded as a class A misdemeanor—up to 1 year in prison—committee report, p. 448.

Senator KENNEDY. Why do you think so?

Ms. AGNEW. Because we came before the grand jury. We requested the resignation of a Labor Department official. We would have caused him economic loss and injury by depriving him of his job. We criticized him.

Whether that criticism was "improper" would have been the prosecutor's own determination.

Senator KENNEDY. I do not see how that would have been considered improper. That is going to be a factual question to be decided, is it not?

Ms. AGNEW. Senator, the current prevailing political atmosphere in this country is for reform of our Federal statutes. We hope never again to have the corrupt and regressive situation that we have had under the past administration. However, unless the institutions of our

Federal justice system are reformed so that it will be impossible for that kind of regressive situation to occur, I fear that it is possible. It may not be probable but it is possible.

I would hope that any recodification of the United States Code would preclude to the ultimate extent any recurrence of those kinds of events. We do not want a United States Code that is worse than that which got us into the problems that we have had heretofore. We have got to have a U.S. Criminal Code that is far more protective of the right of private citizens to go before grand juries—that traditional right which dates back to the origins of our criminal justice system—to enable citizens to have some effective remedy for injury from white collar crime. That is due process.

We want a Justice Department that functions in the interest of justice, not injustice.

I would like to give the rest of my time to Mr. Holmes.

STATEMENT OF JULIAN C. HOLMES

Mr. Holmes. I think Ms. Agnew has presented our position. I would however, like to comment, Senator Kennedy, on the question of balance.

Senator Kennedy. You see, the language in the statute says a person is guilty of an offense if he communicates in a way with a juror or a member of the juror's immediate family with the intent to influence "improperly" the official action of the juror.

It is incredible to me, although you might find a U.S. attorney who would say that just bringing information to a grand juror's attention falls within that particular definition. You may find a U.S. attorney who interprets it that way. They can interpret any provision illegally, I suppose.

I agree with your point and I think it is well taken. I will be glad to have our people draft language regarding how you can deal with that, but we will not be able to deal with a situation where a U.S. attorney runs amuck. I think your point is well taken and legitimate.

Mr. Holmes. Yes, Senator, we think what you have suggested would be a perfectly suitable way to work out a big part of this problem.

In answer to your particular question about balance, our answer is yes, we were threatened with criminal prosecution by a U.S. attorney who interpreted the law exactly this way which you have found to be surprising. This is what prompted us to think about this matter further.

Perhaps our situation has been unique in that citizens are not appearing before grand juries bringing information about wrongdoing in government everywhere. However, both in the local communities here in Washington and on Federal issues I have had considerable experience with grand juries because I have found that grand juries seem to be at times the only way that a person has any possibility of an action against a corrupt act of a governing official. If he does not bring it before a jury of peers, he may not succeed in finding an ear to listen to the problem.

It has been my personal experience—and I think it has been Ms. Agnew's experience—that prosecutors are very likely—more likely than not—to interpret as "improper" such an approach as we have made to grand juries.

I have written evidence to submit. I will briefly describe one incident which is not atypical.

Senator KENNEDY. Just give it briefly. We would be glad to have it for the record.

Mr. HOLMES. In the summer of 1973 we submitted some information to a grand jury, which jury invited us to testify before it. That jury asked us to bring more detailed information on the crimes which we said we suspected existed, which information we immediately prepared and tried to submit to that jury.

To make a long story short, we were personally threatened with a possible violation of title 18, section 1504 by the prosecutor over here in Alexandria, in the Eastern District of Virginia.

We have a letter among other exhibits in this file, from Senior Judge Walter Hoffmann suggesting that there could be a problem with our submission of evidence even with the protection which is written into the present law.

Our evidence, though, was apparently interesting enough and substantial enough that the judge requested that the prosecutor schedule us to appear again before that grand jury. That is what it took. It took a threat to me. It took a threat to my colleague, Arlyn Unzicker. It took a threat to Ms. Agnew, but we persisted. We ignored those threats.

These threats are sometimes more the rule than the exception. Our experience is that there does need to be a balance, but there also needs to be a balance to protect the public from prosecutors who exercise oppressive power right now under the present law, which is, I think, a little better than the new version of S. 1. That balance is certainly needed.

Senator KENNEDY. We will make sure that these other provisions are considered.

The committee itself is considering grand jury reform. There may be some opportunity in that legislative undertaking to carry this to a conclusion.

Would you submit that and we will make the relevant parts of it part of the record. We will include the entire story as part of the files of the subcommittee.

Mr. HOLMES. Would you like me to note what the documents are?

Senator KENNEDY. Sure.

Mr. HOLMES. One is a letter of July 29, 1973, to the foreman of the U.S. Federal grand jury from the three of us. The second is a letter from——

Senator KENNEDY. Are they all identified or will you identify them and we will make them a part of our complete file.

When you submit them, just give us an explanation and then we will make them a part of the file.

Mr. HOLMES. Yes, I will.

Senator KENNEDY. OK. Fine.

Thank you very much.

The record will be open until July 15.

The subcommittee stands in adjournment.

[Whereupon, at 12:15 p.m., the subcommittee adjourned.]

[Material supplied by last witness follows:]

LETTER OF TRANSMITTAL

The set of documents which follows is submitted by Marian K. Agnew, Arlyn E. Unzicker, and Julian C. Holmes to illustrate a coverup by Federal prosecutors and the U.S. Department of Justice of violations of law by the U.S. Department of Labor and other Federal and state officials. These exhibits outline the course of our efforts to secure grand jury action on these matters.

Between July of 1973 and June of 1975, we presented indictable evidence to local and Federal grand juries. For having done so, each of us was threatened by Federal prosecutors with criminal prosecution.

Although a Federal grand jury in Alexandria, Va., asked U.S. Attorney General Edward Levi for a special prosecutor to investigate "possible coverup by local and Federal officials", Dr. Levi never granted the request. Thus, the efforts of the Justice Department and its prosecutors to quash any meaningful inquiry—were ultimately successful.

MARIAN K. AGNEW,
JULIAN C. HOLMES,
ARLYN E. UNZICKER.

Enclosures.

INDEX OF DOCUMENTS

1. Hearings on OSHA Act of 1970 Before the Select Committee on Labor of the House Committee on Education and Labor, 93d Cong., 2d Sess. 515–516 (1974) (Testimony of Arlyn E. Unzicker). (Discussion or problem with prosecutors and grand jury procedures.)
2. Id. at 687–690 (Testimony of Julian C. Holmes).
3. Unzicker et al., letter to Foreman, U.S. Federal Grand Jury, Norfolk, Virginia, November 11, 1973. (This letter details problems with the U.S. Attorneys in the Eastern District of Virginia and his obstruction of justice with regard to grand jury business.)
4. Agnew et al., letter to Hon. Sam Ervin, November 11, 1973. (Names parties benefitting from obstruction of justice by the U.S. Attorney in the Eastern District of Virginia.)
5. Hon. Walter E. Hoffman, letter to Marian K. Agnew, November 20, 1973. (Letter notes that attempt to provide information to grand jury about obstruction of justice by the U.S. Attorney could be a crime.)
6. Jim Walls, Skyline—Jury Renews Inquiry, The Globe, June 6, 1974. (Article reports that Federal Grand Jury in Norfolk asks for investigation by reluctant prosecutor.)
7. Ben A. Franklin, $50,000 Awarded in Building Collapse, The New York Times, January 14, 1975.
8. Marie C. Caber, letter to Hon. Edward Levi, May 7, 1975. (This was a request by the Acting Foreman of the Alexandria, Virginia Federal grand jury for the Attorney General of the United States to provide a special prosecutor to investigate charges of violations of Federal laws by local and Federal officials. This letter was prepared following testimony before the jury on May 7, 1975 by Julian C. Holmes.)
9. Steve Bates, Justice Tells Juries No Probe Needed, The Globe, October 9, 1975. (Details Justice Department actions to head off grand jury probe with a special prosecutor.)

STATEMENT OF ARLYN E. UNZICKER, ANNANDALE, VA., AND JULIAN C. HOLMES, FRIENDLY, MD., ACCOMPANIED BY DAVID A. SUTHERLAND, ESQ., ALEXANDRIA, VA.[1]

Mr. UNZICKER. We have presented this to a U.S. grand jury, and presented it to the Justice Department. Mr. Chairman, in your opening remarks, we can give you a historic perspective and documentation of the run-around we have had with the Justice Department, with the Watergate Prosecutor, with the FBI and with the U.S. attorney in Virginia.

Mr. GAYDOS. Well, what was the responsibility of the grand jury? Was that a county grand jury?

[1] Excerpts from hearing on Occupational Safety Hazards Act of 1970 before the Select Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 83d Congress, 2d Sess., 1974.

Mr. UNZICKER. That was a U.S. grand jury.

Mr. GAYDOS. United States.

Mr. UNZICKER. We understand from the U.S. attorney, David Hopkins, acting U.S. attorney, now, that the grand jury decided not to return a bill of indictment on the criminal charges that we brought, which are contained in our report called The Bailey's Crossroads Cover-Up and the Law, which I want to make part of the record.

It is my presentation prepared for the Federal grand jury and the Office of the Special Watergate Prosecutor.

Mr. GAYDOS. You state that you personally testified?

Mr. UNZICKER. Yes, sir. We have testified. We have in September of 1973, in December of 1973, and on June 5, 1974.

Mr. GAYDOS. Let me ask you. I know you comprehend and understand that a grand jury is composed of citizens like you and I.

Mr. UNZICKER. Yes, sir.

Mr. GAYDOS. And is that grand jury still sitting, do you know?

Mr. UNZICKER. That grand jury is not sitting.

Mr. GAYDOS. Have you made any attempt to contact any of the members of that grand jury at all to find out what went on?

Mr. UNZICKER. Mr. Chairman, when we indicated to the U.S. attorney, Brian P. Gettings, earlier that we charged him in a conference that he wasn't doing anything and that we planned to go to that grand jury and asked for the members, he said, "Mr. Unzicker and Mr. Holmes, I don't like to do this, but I want to caution you that under title 18 you are not permitted to communicate with a grand jury."

Mr. GAYDOS. After it finished sitting?

Mr. UNZICKER. Yes, sir.

Mrs. AGNEW. No, no: this was while it was sitting, after he testified.

Mr. UNZICKER. After September 1973, after we testified.

Mr. GAYDOS. I am talking about after the grand jury made its decisions. I am asking you, have you contacted the grand jury as to why when you made your presentation they saw fit not to recommend to the U.S. attorney to prosecute? That is the only question.

Mr. UNZICKER. All right, that is the question.

Mr. GAYDOS. I am not asking you for a specific response if you haven't done it.

Mr. UNZICKER. No: we haven't done it.

Mr. GAYDOS. Proceed. I didn't want to interrupt you because I will sidetrack you. Excuse me. You may proceed.

Mr. UNZICKER. All right. I am just going to say that we have received, well, the runaround from the U.S. attorney's office in this matter. Mrs. Agnew will testify that when she got—tried to get the list of the grand jurors, the U.S. attorney down in Norfolk was cooperative and was willing to give this list and then later on he called back and said, "I cannot permit you to have that list."

So getting the names of the grand jurors is a problem, isn't it, Mr. Chairman?

Mr. GAYDOS. Well, I wasn't there. I wouldn't know; but if you are posing the question generally and if I may respond on behalf of that nebulous person you are talking to, I might agree with you and say "yes," but I don't know.

It is public; I am advised by counsel it is public and can be available, and if you have time you stop in and see us after you testify and we will show you how to get the names.

Mr. UNZICNER. Well, we will proceed in that direction. We have had a number of things. We have had this Richmond appeal as to trying to pin the responsibility on who is responsible for the construction work, for one, for construction work, and so forth.

Now, in our prepared statement we would like to say that our story is about one of the worst construction disasters in the United States. It is the story of how governmental venality has deprived the public of the protection of our Nation's safety laws and how public officials cover up for influential developers who break them.

Mr. HOLMES. Mr. Chairman, the statement which is sort of a summary of what we found out that OSHA has done in the past is the prepared statement which we submitted to the committee, and we can complete reading that statement, at your pleasure, or we could summarize what is in that statement with a quick summary of what OSHA is not doing today.

Mr. GAYDOS. I would appreciate it if you would summarize it because I am more impressed with summaries. I think a man is more persuasive in summarizing rather than reading a statement. I would appreciate your proceeding in that way, if you don't mind.

Mr. HOLMES. All right. Some of the facts I think are in order about how bad the coverup was. The average strength of the vertical columns in the lower six floors of building A–4 were below specification. Both construction cranes were erected improperly. Mazes of cracks radiate through the floors around most columns on all 24 floors.

The collapse has been blamed on workman error, that a workman on the day of the collapse pulled supports from under freshly poured concrete on the top floor. Both the Labor Department report and the county's report ignore the fact that the building is rotten from top to bottom, riddled with bad concrete and bad steel work and missing steel work. This is the high-rise building.

The Labor Department found in its report no bad steel work, no missing steel, no bad cracks, and no concrete that could be the cause of the collapses. The Labor Department issued no citations to the builder. It failed to cite the construction subcontractor for the crane violations, the lateral-bracing violations and the out-of-plumb shoring violations.

The outrages of outrages, though, is what is going on now. On May 9 of this year the Smith Co., working in close cooperation with the county officials, announced a plan to patch up the remaining standing portion of A–4 with a system of steel splints and subfloor I-beams. Expansion bolts were to be used to attach the splints to the weak concrete columns.

What is going to happen? The county says it has issued a building permit to rebuild the building and the garage.

What is being done by the Labor Department today? It is continuing to violate at Bailey's Crossroads the most fundamental provisions of the 1970 OSHA Act. It has failed to halt construction activities until the workers are provided with a safe place to work.

It was the intent of this Congress in passing the act to assure safe and healthful working conditions for working men and women. In stark contrast to this worthy purpose, the Labor Department has frustrated the right of citizens to equal protection under the law, has endangered the life and health of workers on tomorrow's jobs by failing to enforce safety regulations today, and has in fact discouraged OSHA Act compliance by employers who trust that the Labor Department will not enforce the law.

The ultimate insult is that the Labor Department has even failed to implement the procedures spelled out in its own compliance manual.

You asked us questions which relate to the motivations of officials, perhaps as to why these things happen, and we feel that it is unfortunate for the taxpayer that there does not seem to be an effective prohibition against making financial campaign contributions to persons who do business with the U.S. Government.

The authors, us, do not understand why the U.S. law, title 18,611 of the United States Code, prohibiting political contributions by Government contractors, should not have applied to the Smith partnerships.

Their Presidential campaign contributions were made while the Department was leasing to the Government buildings such as executive offices of the President.

The fact that the law has not been applied in this case, in Bailey's Crossroads, or in the case of these contributions, excuse me, places the Labor Department in the very uncomfortable position of having to decide how to be fair to a loyal supporter or contributor, and who at the same time is a prominent Government landlord.

We don't know whether the contributions were a factor considered by public officials who engineered the Bailey's Crossroads coverup. The important fact is that by their actions local government and Labor Department officials did cooperate to protect the general class of builders, developers, building inspectors, and construction companies which stand to benefit from less than vigorous enforcement of worker safety laws.

If the reason this was done is not determined, it will happen again and again, just as it has in the past. More people will be maimed and killed, and Government officials will continue to ignore the law with impunity.

We feel there is a difference between the Labor Department coverup at Bailey's Crossroads and the administration coverup of the ITT-Hartford incident, the IRS coverup of President Nixon's tax returns, the coverup of the Watergate burglary, the coverup of the CREEP campaign contributions, the wheat deal, the milk deal, the Justice Department foot-dragging in the Fitzgerald affair, and the commission and coverup of the burglary of Dr. Fielding's office.

There is a difference: At Bailey's Crossroads, 14 men were killed; 46 were injured, some for life.

Concerning the general subject which I will try to clear up in a couple of sentences of our work with the grand jury in Norfolk on the Bailey's Crossroads collapse, it is our feeling, and all three of us have testified before that grand jury and tried to work closely with the Federal prosecutor, that the Federal prosecutor did not want anything to do with any indictments arising out of the Bailey's Crossroads controversy.

We found the grand jury to be what I considered a fair cross-section of the public that I have known in my lifetime; they were most interested in the subject matter, and indicated to us, in our many hours before them, that they thought something should be done. The prosecutor indicated just the opposite at almost every step of the way. And now the grand jury has been sent home and we are in limbo concerning what to do.

It has been dropped, in spite of the fact that we have been given indications that we would be brought back to testify, if we wished, next montth.

To summarize the problems at Bailey's Crossroads and OSHA's participation, the photographs which we will present, that I took myself, I think show, I think they document, three simple problems.

The photographs of the high-rise building show how part of the high-rise structure was brought down on top of a rubble pile in which men still lay buried.

The photographs of the garage, which are most of the photographs which I have, show very clearly the inadequate design of this garage to protect workers from being killed—which they were. It shows how a total floor slid down over the columns that were supposed to support it. It shows the lack of bonding between concrete and what few reenforcing bars were there.

Many photographs show very clearly the reenforcing bars sticking out, completely stripped, hardly any little bits of concrete sticking to them.

And the other photographs which I have, two or three, show the nature of the bowstring construction in the garage. It shows the ends of the cable sticking out of their tubes that are tightened up to put compression sidewise on the floors.

And I think these photographs will give the committee a good handle on the physical problem that was there, both in design and with the construction practices used at Bailey's Crossroads. The photographs simply show that there wasn't enough support around in that structure to prevent a tragedy, and I think the photographs will help this committee to come to a conclusion that the sole cause of this collapse, which as given by OSHA and the county officials involved was workmen error, is not a proper conclusion; that the cause of the collapse was a building riddled with problems, and which still is riddled with problems, as the report we have submitted by Law Engineering Testing Co. shows.

OSHA deliberately ignored a major part of the disaster, the garage. OSHA failed to cite the builder for anything. OSHA failed to cite violations in the building that their own technical report on Building A–4 documented.

All kinds of things which could have very well caused or contributed to the building collapse. OSHA did not study the structure of the building. It did not find the bad concrete, the bad steel work, the missing steel, the cracks in the floor.

Today, OSHA is still failing in its duty. Work is going on over on building A–4, a building riddled with all these problems; the building is being rebuilt, and OSHA did not even exercise its opportunity to appear before the county when the county held a meeting, a public meeting on the rebuilding of this building, to send a representative, and OSHA knew about it. And that is part of our file, the notice given to OSHA of that meeting and the response OSHA gave to us.

And OSHA has not done anything to stop the work on the garage to rebuild it, which the county says they have issued a permit for.

Thank you.

Mr. GAYDOS. I wish to thank you for some very impressive and courageous testimony.

MacLean, Va., *November 11, 1973.*

Foreman, *U.S. Federal Grand Jury,*
U.S. District Court,
Norfolk, Va.

Dear Sir: On September 12 we appeared before the Norfolk Grand Jury and delivered over 3 hours of testimony on matters pertaining to the collapse of two buildings at Bailey's Crossroads in Fairfax County, Va.

During our testimony, U.S. Attorney Brian P. Gettings announced that the decision had been made to proceed with an inquiry into the matter, and it was agreed that we would provide to the Jury our personal files of documentation and any other material that would aid in establishing violations, or probable cause for violations of Federal statutes.

Six days later we had prepared chronological files of documentation. We had developed a witness list with subject matter that we felt should be discussed with witnesses under oath. We reiterated a number of possible crimes that the Jury might pursue, and we provided a list of new citations that updated to September 18 our formal Report to the Grand Jury of July 25, 1973.

On September 18, we hand delivered this material to U.S. Attorney Brian B. Gettings and Assistant U.S. Attorney David H. Hopkins. A letter summarizing the material was addressed to the Grand Jury, and we asked that it be delivered.

On October 23, two of us (Unzicker and Holmes) met again (at our request) with Mr. Gettings and Mr. Hopkins. We have found to our dismay that:

(1) No documents had been acquired from the U.S. Department of Labor file as Mr. Gettings had assured us would be done promptly.

(2) No meaningful inquiries had been made.

(3) Our letter of September 17 addressed to the Grand Jury had not been delivered.

(4) Since September 12, no jury had been called into session in the Bailey's Crossroads matter.

(5) December would be the first occasion on which Mr. Gettings would bring the Bailey's Crossroads matter before the Jury.

In addition we informed Mr. Gettings that:

(6) Important evidence that we had twice urged him to acquire was being destroyed and, his delay was seriously compromising the Grand Jury's case.

(7) We would mail immediately our letter of September 17 to the Grand Jury in Norfolk if Mr. Gettings would provide the addresses of the Jurors.

Mr. Gettings informed us that it would be a Federal Crime (Title 18 USC Sec 1504) to mail the information requested by the Jury to the Jury. Our request for the mailing addresses for the Jurors has brought a threat from Mr. Gettings' office to bring criminal charges against us.

The Annotated United States Code makes it quite clear that our requests are legitimate, and that furthermore it is unlawful to obstruct the flow of information requested of us by the Jury. (Title 18 USC Sec 1503, 1504; U.S. v. Smythe, D.C. Cal 1952, 104 F Supp 283)

We attach hereto our letter to the Jury dated September 17, and we request to appear under oath before the Grand Jury to inform the Jury of:

(9) Recent actions and inactions by the office of the U.S. Attorney that prejudice the Grand Jury investigation of Bailey's Crossroads.

(10) Recently discovered actions of the U.S. Department of Labor to cover up culpability at Bailey's Crossroads.

(11) Evidence being destroyed because of inaction by the U.S. Attorney.

(12) The need for a prompt request from the Grand Jury to the U.S. Attorney General to assign a special prosecutor to the case for the purpose of:

(a) Implementing the investigation started by the Grand Jury on September 12.

(b) Bringing a halt to the destruction of evidence.

(c) Determining whether the conduct of the U.S. Attorney in the Bailey's Crossroads case constitutes an obstruction of justice under Title 18 USC Secs. 1503 and 1505.

We trust that this information is useful, and we wish to cooperate in any way possible to expedite the investigation of the Bailey's Crossroads disaster.

Very truly yours,

Arlyn E. Unzicker.
Marian K. Agnew.
Julian C. Holmes.

MACLEAN, VA., *November 11, 1973.*

Hon. SAM ERVIN,
Chairman, Select Committee on Presidential Campaign Activities, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR ERVIN: On March 2, 1973 at the Skyline Towers construction site at Bailey's Crossroads in Fairfax County, Va., a 24-story vertical section of a high-rise condominium apartment building collapsed. Simultaneously, a separate 2.3 acre, two-story concrete parking garage disintegrated. Over a period of 2 weeks, 14 bodies of construction workers were found in the rubble.

Public officials have produced no meaningful explanation for the separate collapse of the parking garage where flexible steel cables replaced the more familiar self-reinforcing steel rods and where faulty concrete was used. Many men who died were found in the garage.

Our report on the disaster (attached) documents a coverup by local and Federal public servants of gross negligence that caused the collapse of the two separate buildings. We summarize in this letter recent participation in the Bailey's Crossroads coverup by both the U.S. Department of Labor and the Department of Justice.

Among those to benefit from the coverup are the concrete construction industry; a $35,000 contributor to the Committee to Reelect the President; and a now prominent subsidiary of IT&T, the Hartford Accident and Indemnity Company which insured both the negligent local officials and the concrete contractor.

It has now become clear that the Department of Labor "investigation" into the double disaster was directed at only one of the two buildings that collapsed. The reports on tests of the post-collapse concrete are being withheld from the public by the Department of Labor, so that there is no way to ascertain why one investigation was called off. We do know that the uninvestigated garage building used bad concrete and was constructed with insufficient reinforcing steel to provide worker safety. To have investigated and reported on this collapse would have resulted in the condemnation of an unsafe construction practice.

On September 12, we presented over 3 hours of testimony on Bailey's Crossroads to the Federal Grand Jury in Norfolk, Va. The Jury indicated a strong desire to pursue the matter of the coverup by Federal officials and asked us to provide the Jury with documetation and other material that would aid in establishing violations of Federal statutes. We promptly provided this information, but U.S. Attorney Brian P. Gettings has failed to deliver our mail to the Jury, stating that it would be a violation of the law to do so.

Mr. Gettings response to our offer to mail the information ourselves to each Grand Jurors was that such an action would constitute a Federal Crime under Title 18 USC Sec. 1504. The annotated Code cites specifically a Federal Court decision that flatly contradicts Mr. Gettings interpretation of the Code. (U.S. v. Smythe, D.C. Cal. 1952, 104 F Supp 283)

Our request for the mailing addresses of the Grand Jurors has been answered by the office of the U.S. Attorney with a threat of criminal court action against us if we persist in our efforts to mail to the Grand Jury the information it requested. In our opinion, Title 18 USC Secs. 1503 and 1505 bear strongly on this obstruction of justice by the office of the U.S. Attorney.

The building industry is a heavy contributor to political campaigns, and it is very important to this special interest group that the U.S. Government not reveal the truth about construction practices at Bailey's Crossroads. The Committee may wish to inquire whether the IT&T—Hartford intrigues and the $35,000 campaign contribution from the Bailey's Crossroads builders to the CRP provided an incentive for U.S. Attorney Gettings' stalling of the inquiry requested on September 12 by the Federal Grand Jury and calling off the investigation promised on March 3 by Secretary Peter Brennan after consultation with President Nixon.

The Committee may well ask whether the relationship of Secretary Brennan to the Bailey's Crossroads coverup is similar to that of of John Mitchell to high level influence peddling. We hope the Committee will find the enclosed material useful in clearing the way for a full investigation of this scandal in which the lives of 14 men were lost and in which much Federal tax money has been spent to protect the guilty and in which the U.S. Justice Department has aided materially the coverup of facts in this record disaster.

Sincerely,

MARIAN K. AGNEW.
ARLYN E. UNZICKER.
JULIAN C. HOLMES.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF VIRGINIA,
Norfolk, Va., November 20, 1973.

MS. MARIAN K. AGNEW,
MacLean, Va.

DEAR MS. AGNEW: Your certified letter, return receipt requested, addressed to "Foreman, U.S. Federal Grand Jury, United States District Court, U.S. Post Office Building, Norfolk, Va.," was received by the Clerk of this Court and, pursuant to my instructions, he delivered the letter to me as I assumed (and he assumed) that it was a communication from some member of the family of the former Vice President of the United States. As you may know, I presided over the trial of Spiro T. Agnew which was concluded on October 10, 1973.

I opened the letter in question and have noted its contents. It appears clear that the signers of the letter do have a right to appear before the grand jury and I am instructing the U.S. Attorney, Mr. Gettings, to whom a copy of this letter is being sent, to arrange for your appearance at the grand jury session to be held in Norfolk beginning December 10, 1973. However, unless the U.S. Attorney believes that your presence is necessary for the purpose of testifying in conjunction with a case which he has authorized continued prosecution, the signers of the letter will have to pay their own expenses in coming to Norfolk and returning to their residences.

Except for the fact that your request to appear before the grand jury is proper, I have concluded not to deliver your letter to the foreman of the grand jury as it may well be a violation of 18 U.S.C. § 1504, in which event I would be a party to such a violation. If, however, you and your co-signers are desirous of expressly violating the law, the U.S. Attorney may wish to present your letter to the foreman of the grand jury at the appropriate time.

Any request for the appointment of a special prosecutor should be directed to the Attorney General of the United States.

I note that you also sent a copy of your letter to Senator Ervin. I do not know what status he has in the matter and, for that reason, am not sending him a copy of this letter. You are, of course, at liberty to forward a copy of my letter to Senator Ervin.

However, I suggest that you refrain from attempting to write to any member of the grand jury.

Very truly yours,

WALTER E. HOFFMAN, *U.S. District Judge.*

P.S.—I do not have the addresses of the other signers of the letter. Extra copies are enclosed for distribution to them.

[From the Arlington Globe, June 6, 1974]

SKYLINE—JURY RENEWS INQUIRY

(By Jim Walls)

A U.S. grand jury in Norfolk has ordered a 90-day investigation into allegations surrounding the collapse of two buildings last year at Bailey's Crossroads, according to a citizen group which appeared before the grand jury Wednesday. "U.S. Attorney David Hopkins has informed us that we presented a clear cut case of a violation of federal criminal law, and that he is initiating an FBI inquiry into the question of whether a District of Columbia or Virginia grand jury should have geographical jurisdiction," said a statement released Wednesday afternoon by the citizen group, which includes Marian K. Agnew, David Sutherland and Arlyn Unzicker of Fairfax County and Julian Holmes of Prince Georges' County, Md.

The citizens would not indicate the nature of the alleged violation. Hopkins would neither confirm nor deny the statement attributed to him.

The citizen group last week released a portion of their prepared testimony, which alleges that federal and local investigations covered up important information regarding the disaster.

The atmosphere of the press conference, held Friday in Washington, was in marked contrast to a similar meeting last July 30. Reporters asked few questions and chatted with the activists afterward. Last year, when the group first officially made their coverup charge, much of the questioning was openly hostile.

The group has been interviewing workmen and public officials and analyzing documents pertaining to the Skyline Center collapse since March 2 of last year, when an 80-foot portion of a 24-story apartment building collapsed during construction. A 2.5-acre parking garage adjacent to the high-rise collapsed simultaneously. The disaster killed 14 construction workers and injured 46 others.

"By their actions, local government and Labor Department officials did cooperate to protect the general class of builders, developers, building inspectors and construction companies which stands to benefit from less than vigorous enforcement of worker safety laws," the prepared statement said. "If the reason this was done is not determined, then it will happen again and again and again."

The group charged that Fairfax County, through its paid consultant Ingvar Schousboe, and the federal Occupational Safety and Health Administration—OSHA—limited their investigations to the collapse of the high-rise, and ignored the parking garage.

Schousboe has maintained that the garage collapsed under the impact of debris falling from the high-rise next to it. Schousboe said in a sworn deposition that he limited his investigation to the high-rise, according to the citizen group.

OSHA has had no official comment on the collapse of the garage. The report of the National Bureau of Standards, which performed technical work for OSHA said that "consideration of (the garage's) failure was beyond the scope of this report."

The citizens maintain that the garage, built with post-tensioned concrete, might not have collapsed completely if it had been built with conventional reinforced concrete. Four workers died in the garage area.

The group noted that the OSHA investigation uncovered seven violations of federal safety standards at the Skyline site. However, only three citations were filed by OSHA, and only against the concrete subcontractors, Miller and Long of Virginia Inc. OSHA's failure to issue all the citations, and failure to charge the project's owner-builder, the Charles E. Smith Building Corp., is a violation of the 1970 act creating OSHA, according to the group.

The group also charged that OSHA "covered up and kept from the public the knowledge of the characteristic dangers from easily triggered, total collapse of post-tensioned concrete construction." The group asked the grand jury to determine if that is an indictable offense.

The Fairfax County investigation, the activists alleged, "concentrated on the premature removal of shoring to the exclusion of other possible causes of collapse." They also charged that Schousboe's report "goes beyond the point of simple coverup of material fact." Citing Schousboe's statement that concrete compression tests during construction showed no sub-standard concrete in the area of the collapse, the group said that "over half of the concrete samples tested on the second level of the garage failed to attain minimum strength," according to the same concrete tests.

The activists also noted that officials of the Smith Corp. contributed "substantial" amounts to the Committee to Re-Elect the President in 1972. Information obtained by Common Cause from the Committee to Re-Elect showed that Charles and Robert Smith contributed some $35,000 in the final days before mandatory disclosure came into effect.

However, Presidential secretary Rosemary Woods has disclosed a "secret donors list" which reveals that Smith Corp. officials contributed $55,500 to the re-election effort. The disclosure came in March in the trial of former Cabinet members John Mitchell and Maurice Stans.

The group noted that Smith partnerships collect about $12-million annually in rental income for offices leased to the federal government. The federal grand jury was asked to determine if the contributions are in violation of a campaign statute prohibiting political contributions from anyone "entering into any contract with the United States . . . for the rendition of personal services or furnishing any material, supplies or equipment to the United States."

In a related development, the Fairfax County Board of Supervisors rejected a motion to ask the state licensing board to review the license of the Smith Corp. The motion was made by Annandale Supervisor Audrey Moore whose only support for the action came from Centreville Supervisor Martha Pennino.

Opponents of the measure said that the county should wait until it has received a comprehensive report on a Smith proposal to rebuild the collapsed structures.

Smith's license in the District of Columbia was revoked last Sept. 10, for "having failed and-or refused to file annual reports and pay all fees due" in 1972 and 1973.

[From the New York Times, Tuesday, Jauary 14, 1975]

$500,000 Awarded in Building Collapse

(By Ben A. Franklin, Special to the New York Times)

Alexandria, Va., Jan. 12—A Federal jury here has awarded a $500,000 judgment to a worker who was disabled in a 1973 apartment building collapse in which 14 workers were killed and 34 were injured.

The negligence judgment was returned in United States District Court on Thursday against the architects and consulting structural engineers on the Skyline Plaza project in nearby Bailey's Crossroads.

The judgment went to Joseph Bergen, a 30-year-old former elevator installer. It opened the way for scores of similar suits, asking million of dollars more in worker damage claims not covered by workmen's compensation.

At least 26 more plaintiffs involved in the 1973 construction disaster were described by a lawyer in the case as "getting their papers ready" to sue.

The defendants ordered to pay the $500,000 are the architectural firm of Weihe, Black & Jeffries and the consulting engineers, Heinzman, Clifton & Kendro, both of Washington, D.C.

A "frightening" decision

A spokesman for the American Institute of Architects described the judgment as "frightening" and said it raised "large, new questions about the professional liability" of architects.

Experts in the field said that if the award is upheld on appeal it could encourage reform of state workmen's compensation laws. Such laws, which vary widely from state to state, generally limit benefits to the dead and injured in on-the-job accidents to low weekly or monthly payments, while shielding employers from any further liability to damage suits.

Mr. Bergen suffered arm fractures, a skull fracture and lung injuries at the bottom of an unfinished elevator shaft when the central third of the building, one of four at the Skyline Plaza project, crashed down on March 2, 1973, as the concrete forms were being removed on the top floors.

He had been receiving Virginia's maximum workmen's compensation benefit for a 100 per cent disabiilty, $160 a week. The payments were suspended last month, according to Lawrence J. Pascal, Mr. Bergen's lawyer, pending a medical reassessment of Mr. Bergen's asserted inability to work since his injury.

The judgment served to revive a citizens' investigation aimed at fixing responsibility for the collapse and for an alleged "cover-up" of culpability.

Problems with inquiry

Half a dozen private citizens in Fairfax County, Va., who have failed so far to enlist much official interest in their 18-month effort—said that they were more determined than ever to force government authorities to fix the ultimate blame for the collapse.

Arlyn E. Unzicker, a civilian physicist with the Navy who has been the group's chief spokesman, said that despite nearly two years of investigatory efforts he and other critics of what he has called "the Bailey's Crossroads cover-up" have failed to obtain indictments or "meaningful action" from two Federal grand juries, the Federal Bureau of Investigation, the United States Labor Department, a Congressional committee, or from state or county prosecutors.

"We think we may get somewhere now," Mr. Unzicker said in an interview after the judgment was returned. "This decision holds, as we have held all along, that it was the faulty design and supervision of the Skyline Plaza building by the engineers and architects that brought on the collapse. An awful lot of other, corner-cutting building has been going on around the country that should be looked at too."

The suit was the second filed by Mr. Bergen in the case. His original suit was against an array of the project's architects, engineers and contractors, as well as the owners, the Charles E. Smith Company of Washington.

Judge Albert V. Bryan, in whose court Thursday's judgment was made, dismissed the original suit a year ago. He acted then under a standard provision of workmen's compensation laws that forecloses damage suits by injured workers

against companies that have made payroll contributions to state workmen's compensation funds.

The theory of these laws is that such employers are covered by compensation benefits, in place of the right to sue for damages.

Judge Bryan ruled, however—and he was subsequently upheld on appeal—that the Skyline Plaza architects and engineers could not automatically escape vulnerability to Mr. Bergen's suit and could be held liable for proved negligence in the design and engineering supervision of the building.

In the four-day trial that ended on Thursday, the judge instructed the jury to decide whether the architects and engineers had been negligent. The jury held that they were. Lawyers for the two firms said that they would appeal.

U.S. DISTRICT COURT,
EASTERN DISTRICT OF VIRGINIA,
Alexandria, May 7, 1975.

Hon. EDWARD H. LEVI,
U.S. Attorney General, Department of Justice,
Washington, D.C.

SIR: The Federal Grand Jury appearing before this Court requests that a Special Prosecutor be appointed based on testimony heard on May 7, 1975.

The purpose of this appointment is to investigate alleged illegal activities involving possible cover-ups by local and Federal officials centered around the collapse of the Skyline Towers Buildings at Baileys Crossroads, Virginia.

Yours very truly,

MARIE C. CABER, *Acting Foreman.*

[From the Northern Virginia Globe, October 9, 1975]

JUSTICE TELLS JURIES NO SKYLINE PROBER NEEDED

(By Steve Bates)

Two Alexandria-based federal grand juries have been told by at least one U.S. Justice Department attorney that a special Skyline prosecutor should not be appointed because the special Watergate grand jury is the appropriate body to probe allegations surrounding the 1973 high-rise collapse.

But according to court documents and correspondence, the Watergate grand jury went out of existence a month before one of the two Alexandria juries was briefed by Justice, the Watergate jury did not have time to adequately consider citizen allegations about Skyline, and that jury was empowered to deal only with the political contributions aspects of two local citizens' charges.

Citizen activists Aryln Unzicker of Annandale and Julian Holmes of Friendly, Md. have asked a number of federal and state grand juries to probe the reasons for the 1973 Baileys Crossroads high-rise collapse that killed over a dozen men.

They have also presented allegations of a local and federal cover-up of the reason for the collapse, illegal political campaign contributions made by the three principle officers of the Skyline construction firms, and federal cover-up of the contributions violations.

In response to Holmes' testimony on these matters on May 7, 1975, the regular grand jury sitting in the Alexandria federal courthouse formally asked U.S. Attorney General Edward H. Levi to appoint a special prosecutor in the case.

The jury wrote Levi on May 7, "The purpose of this appointment (a special prosecutor) is to investigate alleged illegal activities involving possible cover-ups by local and federal officials centered around the collapse of the Skyline Towers Buildings at Baileys Crossroads, Virginia."

Two weeks ago Justice released a copy of the grand jury's letter to The Globe, which had filed a Freedom of Information Act request and successfully appealed a preliminary refusal of that request.

According to Justice press spokesman John Russell, the department had responded verbally to the jury's letter by sending "someone to testify to the first (Alexandria) grand jury."

Russell said he understands that grand jury was "satisfied" by the testimony, and that when a subsequent regular Alexandria grand jury expressed an interest in the case, Justice told the new jury of the previous jurys apparent reaction.

Russell declined to elaborate further on Justice testimony at the grand jury.

In response to Holmes' offer to testify before the current Alexandria grand jury, that jury's foreman wrote Holmes on Sept. 5 that an unnamed Justice attorney advised the jury that "the Attorney General has submitted the transcript of your prior testimony before the previous (Alexandria) grand jury to the special Watergate grand jury."

"As far as the current grand jury is concerned," the Alexandria foreman continued, "the matter is in the proper hands, and we do not think it proper or necessary for you to appear before us."

The Watergate grand jury went out of existence on July 3 and was empowered only to pursue specific allegations of criminal conduct in the Watergate affair and related political contributions.

Outgoing Watergate Special Prosecutor Henry Ruth acknowledged in an Aug. 29 letter to Rep. Marjorie S. Holt of Maryland, Holmes' representative in Congress, that the Watergate grand jury heard testimony from Holmes and Unzicker on political gifts by Skyline officers Charles E. Smith, Robert Smith and Robert Kogod.

Ruth wrote Holt in response to inquires from Holmes, "The grand jury fully considered this matter and . . . did not return any indictments."

But according to a May 9 letter from the foreman of the Watergate grand jury to Holmes, in which he and Unzicker were invited to testify on the contributions, the allegations raised "are very serious and may require many months of investigations before a decision concerning 'probable cause' could be made."

"Therefore," the Watergate foreman concluded, "we are uncertain whether we can reach a conclusion during the remainder of our term."

The jury did not meet many times between Holmes' and Unzickers' June 12 testimony to them and their July 3 expiration. During that time its main order of business was Watergate-related allegations, requiring two jury members to travel to the west coast to take testimony from former President Richard Nixon.

Holmes said he has written the current Alexandria grand jury that it was "apparently" given false information about the duration and scope of Watergate grand jury's probe of Skyline. He said he is asking the new Alexandria jury to take sworn testimony from him and certain "self-serving Justice Department personnel" regarding discrepancies in the case.

Alexandria U.S. Attorney William Cummings, court administration personnel and clerks office personnel have not returned a reporter's calls on Skyline matters.

Legal observers say the current Alexandria grand jury or a federal judge can appoint a special prosecutor for Skyline, although funding and logistical problems would have to be overcome.

Says Holmes, if the current Alexandria grand jury again declines to pursue the matter, he will "go elsewhere with the information if necessary."

APPENDIX

U.S. Department of Justice Memorandum

To: Ronald L. Gainer Office for Improvements in the Administration of Justice.
From: John M. Beal, Office for Improvements in the Administration of Justice.
Subject: The Impact on the Federal Courts of Enactment of the Proposed Criminal Code.

February 10, 1977.

This memorandum examines the impact that enactment of the proposed recodification of the federal criminal law may be expected to have on the courts and the judiciary. Section A discusses the potential problems that could result from enactment of the Code. Section B examines the experiences of the courts in several states where codification of the criminal law has recently taken place.

A. IMPACT OF THE CODE ON THE FEDERAL JUDICIARY

(1) Will the proposed Code increase the federal district courts caseload?

The proposed Code should not increase the number of criminal cases in the federal district courts. The number of cases filed is a function of the investigative and prosecutorial decisions made by federal investigators and Department of Justice attorneys. Whether the present law or the proposed code is in effect

should not affect the number of cases brought. Likewise, the number of appeals filed is not likely to be markedly affected by the enactment of the recodification. A defendant who wishes to appeal a finding of guilty following a trial can almost invariably locate issues to raise. This would not change under the new code. Nor is there a sound basis for expecting the number of appeals following pleas of guilty to increase consequent to recodification. These suppositions are supported by the experience of states that have codified their criminal law, as described in Section B, below.

(2) Will the proposed Code increase the federal court workload?

(i) Long Term Effect. In the long term the proposed Code will lessen the work per criminal case of the federal courts. This will be the result of simplification of the law and elimination of some present procedures.

There is simplification of both general terminology and definitions of offenses. For example, the present federal criminal law contains some 79 culpability terms that are undefined. In each case the burden is placed upon the courts to define these terms and their meanings within each statute. Under the new code there would be only four carefully defined terms.

With respect to definitions of offenses, federal law contains some 70 theft offenses; 80 forgery, counterfeiting, and related offenses; 50 sections covering perjury or false statements; and approximately 70 arson and property destruction offenses. In the proposed code all 270 of these offenses would be covered in fourteen sections.

In addition to simplification, consistency of terminology is maintained throughout the proposed revision. The result of this increased simplicity, clarity, and consistency will be that both trial and appellate courts will have less work in interpreting the law than at the present time. This will apply to such matters as selection of jury instructions, determination of the statute most applicable to particular conduct, and determination of whether particular conduct is encompassed by a given statute.

Other aspects of the proposed Code will eliminate several types of cases and procedures. Particularly, the decriminalization of the possession of small amounts of marijuana will eliminate one category of cases, the obviation of the need to prove jurisdiction to the jury will save trial time in litigated criminal cases, and the provision for limited appellate review of sentences is expected to reduce the number of post trial, appellate, and collateral attacks on convictions which are, in fact, usually indirect efforts to obtain sentence review.

(ii) Short Term Effect. It is recognized that the adoption of the proposed Code would result, after the effective date, in the necessity for the courts to provide interpretations of terminology used and offenses created. However, many aspects of the Code and its supporting material will minimize the extent of such interpretive work. Moreover, the savings in time that the Code will otherwise bring, even immediately upon its enactment, will substantially offset any interpretive burden. Specifically, there is, first of all, great consistency and repetition of terminology throughout the proposed Code. Consequently, relatively few terms will require interpretation, and the initial interpretation of a term in one context will facilitate, or even eliminate the need for subsequent interpretation elsewhere in the Code.

Secondly, much of the language of the Code is copied directly from current law. It has, therefore, already been interpreted. For example, the substance of the drug offense provisions of the proposed Code are taken directly and exactly from existing law, except that possession of small amounts of marijuana is decriminalized federally, and distribution of controlled substances is subsumed in the possession sections, thereby eliminating the need to prove intent to distribute or sell. Thus, existing interpretations of controlled substances law would apply to the proposed Code, some cases would be eliminated, and a difficult issue presented in many current cases would cease to arise. The significance of the continuity in this area is evident from the fact that in fiscal 1975, of 4,187 criminal cases filed in the U.S. Court of Appeals, 1,322 were for narcotics offenses.

Third, the Congress has been preparing a extraordinarily careful and extensive legislative history for the proposed Code, drafted in large part by experienced appellate attorneys. Congressional intent is set forth explicitly and in great detail, even to the extent of citing particular cases which the Congress intends should continue to be controlling.

Finally, with the expected two year delay between enactment and effectuation, there will be ample time for preparation to minimize the burden of the Code on the Courts. This will provide full opportunity for the drafting and approval of standard jury instructions; for familiarization and training of judges, prosecutors, and defense attorneys; and for preparation by the Department of Justice before the effective date of full briefs on all the major points of law in the Code that differ from current law. This last activity has already begun.

In short, the proposed Code will bring great long term benefits and, with proper preparation, will impose minimal short term burdens on the courts. These expectations are supported by an examination of the experience of several states that have recently codified their criminal law.

B. STATE EXPERIENCE

An examination of the experiences of several states that recently codified their criminal law indicates that the courts of those states had little increase in workload because of the codification. Of course, almost all trial and appellate courts have been experiencing increasing caseloads during the past decade. But it appears that codification has not been a contributing factor to the generally constant increases.

(1) *New York.*—Codification of the criminal law was effective in New York in September, 1967. Volume 300 of the New York Supplement contains reports of 212 criminal cases in trial and first level appellate courts reported during 1969, almost all of which came under the new code. Only 13 of the 212 cases involved interpretations of the new code. Excluding one case with an eleven page opinion and another which ran eight pages, the cases involving code interpretations averaged less than two pages. The other appeals, involving issues such as search and seizure, confessions, and sufficiency of the evidence, were resolved under the new code just as they would have been under the old law. The new code thus does not appear to have significantly increased the workload of New York state judges.

The foregoing conclusion was supported by Judge Richard Bartlett, Chief Administrative Judge of the New York Trial Courts, and Judge Harold Stevens, Chief Judge of the First Department of the Appellate Division of the New York Supreme Court. Judge Bartlett said that while some construction of new language was necessary, the volume of cases did not increase and the code had a minimal overall impact on the workload of the courts. He said he was confident that this is the opinion of New York judges generally. Judge Stevens echoed this opinion, stating that in his opinion the effectuation of the code did not measurably affect the workload of the courts.

Another perspective on the effect of the code has been provided by the district attorney for Schnectedy County, who, in a law review article, evaluated the effect of codification after two years of experience. He concluded that the codification led to more efficient administration of justice and improved enforcement of the law. He attributed these improvements to a simplification of the law and a great increase in its internal coherence and consistency. This made it easier for police officers, prosecutors, judges, and jurors to understand the law, and, thereby, to more effectively and efficiently fulfill their respective responsibilities. (H. Levine, "The New York Penal Law: A Prosecutor's Evaluation," 18 Buffalo L. Rev. 269, 1969).

In sum, the evidence of the New York experience with codification indicates that it did not noticeably add to the burden of the courts.

(2) *Georgia.*—Codification in Georgia was effective July 1, 1969. An inquiry into the effect of codification on the workload of the courts reveals that there has been no appreciable impact. The number of criminal cases filed with the Georgia Court of Appeals during the codification period is presented in Table 1.

TABLE 1.—GEORGIA COURT OF APPEALS FILINGS

Year	1968	1969	1970	1971	1972	1973	1974	1975
All cases	842	826	877	951	931	1,137	1,152	1,547
Criminal cases	130	143	142	208	248	346	348	520

From Table 1 it can be seen that the number of criminal cases filed with the Court of Appeals has been increasing rapidly but relatively constantly since 1970. This suggests that the codification did not result in a sharp, temporary increase in work as a consequence of questions of interpretation created by the new code.

This conclusion is buttressed by an examination of all the criminal cases reported in Volume 124 of the Georgia Appellate Reporter, which covers approximately half of the cases decided by the Georgia Court of Appeals in 1971. There were 76 criminal cases. Of those only 14 involved questions of interpretation of the new code, although almost all of the 76 cases involved incidents that took place after the effective date of the new code. Nor do the cases presenting questions of interpretation appear to present more involved problems. Excluding one unusual case with a 23 page opinion, the 13 cases presenting new code questions had opinions averaging 2.6 pages, while all 75 cases averaged 2.3 pages.

The Chief Judge of the Courts of Appeals, John Sammons Bell, who has occupied that position since prior to the effectuation of the code, was asked in a telephone conversation about the impact of the codification on the courts. He said that he believes that the codification actually made the resolution of legal matters easier. He said that there were some interpretive questions presented concerning the codified law, but no more than had regularly been the case under the prior law.

Thus, from case reports and judicial opinion, it appears that in Georgia the 1969 codification did not place a significant burden upon the courts.

(3) *Ohio.*—The Ohio codification was effective January 1, 1974. The impact of the codification on the workload of the Ohio courts does not appear to have been substantial.

The criminal caseload of the Ohio felony trial courts and the Ohio Supreme Court appear to have been affected very little by the effectuation of the new Code. Table 2 shows the post indictment felony terminations in the criminal trial courts in Ohio and the criminal filings in the Ohio Supreme Court (excluding a small number of original actions).

TABLE 2.—OHIO CRIMINAL CASES

	1973	1974	1975	1976
Common Pleas Court post indictment felony terminations	25,833	28,220	31,230	(1)
Ohio Supreme Court motions for leave to appeal in criminal cases:				
Filed	330	306	378	465
Granted	19	22	15	20

[1] Unavailable.

The figures in Table 2 suggest that the Ohio Supreme Court filings reflect the constant increase in felony cases in the trial courts. The relatively constant number of motions for leave to appeal granted by the Supreme Court after codification indicates that there was not a great upsurge in unresolved issues created by the new Code.

An examination of the criminal cases reported in volumes 45 of the Ohio State Reports (2d) and 45 of the Ohio Appellate Reports (2d) reveals that the new code had a very limited impact on the workload of the courts. The Ohio State Reports volume, containing the decisions announced by the Ohio Supreme Court in January through March 1976, contains eight criminal cases. Only three of the eight involve interpretations of the new code, with one of the three being a speedy trial question. The three cases involving the new code averaged eight pages apiece, while all eight cases averaged 6.5 pages.

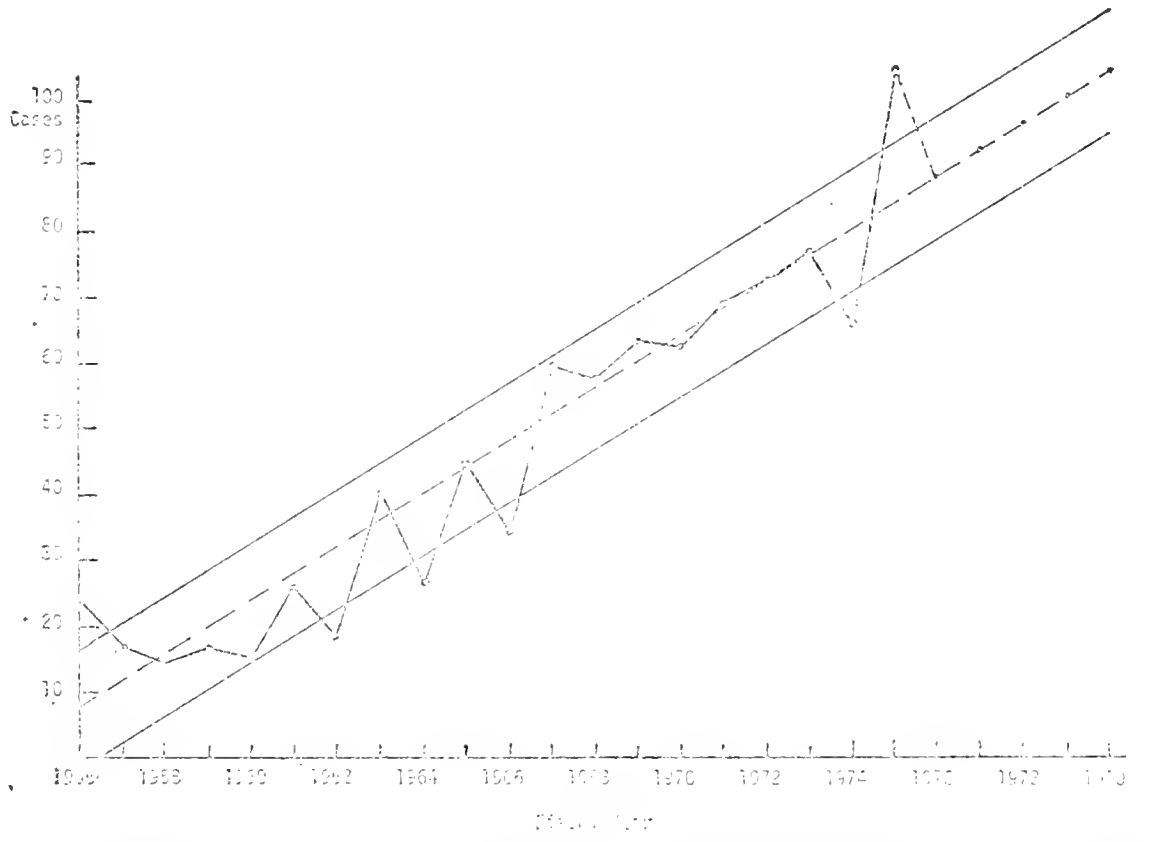
The Ohio Appellate Reports volume contains all the reported decisions of the Ohio Courts of Appeals from January through June, 1976. There are 25 criminal cases, with seven involving the new code and two of the seven presenting only speedy trial questions. The cases involving the new code average 6.1 pages, while all 25 criminal cases average 5.1 pages. These figures are particularly significant because in Ohio, appellate cases are generally reported only when new or important questions of law are decided. Thus, during the period covered by volume 45 of the Appellate Reports many additional appellate court cases were decided but did not involve interpretative or other significant issues and were not reported.

It appears from the filings and reported cases that in Ohio codification did not significantly increase the workload of the courts.

(4) *Other States.*—Less extensive information has been obtained from four other states which recently codified their criminal law.

(i) *Kansas.*—Codification was effective in 1970. The number of criminal filings in the state Supreme Court each year continued to increase at the same rate after codification as it had before, as Figure 1 shows. The Supreme Court is the only appellate court in Kansas, there being no intermediate appellate tribunal.

FIGURE 1.—Criminal cases filed annually in the Kansas Supreme Court.



(ii) *Hawaii.*—Codification was effective in 1973. As table 3 shows, the rate of criminal filings has grown at a steady rate since before codification. As in Kansas, there is no intermediate appellate court in Hawaii.

TABLE 4.—HAWAII SUPREME COURT CRIMINAL CASE FILINGS

Year	1972	1973	1974	1975	1976
Number of cases	28	41	69	78	9

(iii) *Illinois.*—Codification was effected between 1961 and 1963. The consequence of codification was discussed with retired Illinois Supreme Court Justice Walter Schaefer and sitting Justice Robert Underwood, both on the Court at the time of codification. They both said that while questions of interpretation did arise, neither those questions nor any other aspects of the codification had a significant impact on the appellate workload. Justice Schaefer added that the Illinois Supreme Court promulgated certain rules of criminal and appellate procedure to ease the transition to the new code.

C. CONCLUSION

The fundamental purpose of the proposed recodification of the federal criminal law is to significantly enhance the quality of federal criminal justice. As with any major development in the law, a degree of adjustment must be made at the time of transition. With the recodification, however, the available evidence indicates that the burden of adjustment on the federal courts will be minimal.

The Code has been carefully drafted to avoid litigation on questions of interpretation, there will be ample time for full preparation for the transition, and the experience of the States with criminal law codification is that the burdens placed upon the courts by codification are not substantial.

The permanent benefits that will be brought by the new Code, both to the public and all segments of the criminal justice system, including the courts, are undeniably great. The possible short term burdens are thus not such as to warrant delay in the enactment of this important reform.

Sentencing Reform: The Probable Effects on the Federal Criminal Justice System of Abolishing Indeterminate Sentences and Parole in the Context of a Sentencing Guidelines System

(By Karen Skrivseth, Office for Improvements in the Administration of Justice, United States Department of Justice)

I. INTRODUCTION

There are under consideration in the Congress and in the Department of Justice a number of proposals to reform sentencing practices in the federal criminal justice system.[1] A common feature of the pending proposals is that each would replace the existing discretionary and indeterminate[2] sentencing scheme with a guidelines sentencing system. While these proposals differ in detail, they all reflect a growing concern that the rehabilitation model—the theoretical basis for indeterminate sentencing—is unsatisfactory from a sociological point of view, that it produces unwarranted disparities in sentencing, and that, in fact, it is no longer used as the sole or even primary basis for determining the appropriate type and length of sentences.

In broad terms, the current sentencing system operates at two stages. First, the judge determines whether a convicted defendant should be sentenced to a term of imprisonment, and, if so, imposes the maximum term to be served; later, the Parole Commission fixes the actual amount of time to be served. Briefly stated, the rationale for this approach is that it permits and encourages rehabilitation of an offender by tailoring the length of his sentence to his individual needs and progress while institutionalized. In recent years, however, a growing number of studies have undermined the rationale for individualized, indeterminate sentencing by demonstrating that it is impossible to determine when or whether rehabilitation has occurred, if indeed it can be induced at all.[3] For this reason, and because indeterminate sentencing is seen as resulting in unwarranted disparity in sentences, it has been proposed that fixed or determinate terms be set by the judge at the time of sentencing pursuant to guidelines that reflect the characteristics of the offense and of the offender. Although the guidelines sentencing proposals now being considered would not explicity alter the existing parole release system, they obviously raise the question whether that system is the best means of setting a release date.[4]

This paper reviews the existing indeterminate sentencing system, discusses the major proposals for a guidelines sentencing system and examines the probable effects of abolishing the parole system in the context of a guidelines system.

---

[1] See, e.g., the sentencing provisions contained in the proposed Federal Criminal Code, S. 1437, introduced in the Senate by Senators McClellan and Kennedy on May 2, 1977, and H.R. 6869, introduced in the House of Representatives by Congressman Rodino on May 3, 1977. See also note 42 *infra*.

[2] As used in this paper, an "indeterminate" sentence means a sentence to imprisonment which sets the upper limit of the term the sentenced defendant may have to serve, with the sentenced defendant's actual release date to be controlled by factors taking place after the sentence is imposed. A "determinate" sentence, by contrast, means a sentence to imprisonment which sets the exact term the sentenced defendant actually will have to serve.

[3] See Platner, *The Rehabilitation of Punishment*, 44 The Public Interest 104 (1976); Morris, *The Future of Imprisonment*, pp. 15–18 (1974); Wilson, *Thinking About Crime*, pp. 170–172 (1975); Frankel, *Criminal Sentences: Law Without Order*, pp. 86–102 (1973); von Hirsch, *The Aims of Imprisonment*, 71 Current History 1 (July/August 1976).

[4] A number of recent publications suggest that parole in its present form be abolished in the context of a determinate sentencing system. See, e.g., O'Donnell, Churgin, and Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform*, pp. 68–71 (1977); Joint Committee on the Legal Status of Prisoners, American Bar Association, *The Legal Status of Prisoners*, § 9.1, 14 Am. Crim. L. Rev. 589 (1977); von Hirsch, *Doing Justice: The Choice of Punishments*, p. 18 (1976); Neier, *Crime and Punishment: A Radical Solution*, pp. 197–98 (1976).

It concludes that all of the necessary functions now performed by the parole system could adequately be replaced under a guidelines sentencing system and that additional advantages to the criminal justice system would result if the parole system were abolished.

II. THE EXISTING FEDERAL SENTENCING SYSTEM

A. *Generally.*—The sentencing provisions in current federal law were originally enacted on the basis of the theory that a convicted person could be "rehabilitated" if he were "treated" for the conditions that led him to engage in criminal activity, and that his sentence should be indeterminate in length in order that the prison system could provide a corrections program tailored to his individual needs.[5] As a result, the ultimate disposition of a convicted offender is determined by two factors, the sentence initially imposed by the judge and the subsequent working of the parole system.

It is up to the sentencing judge to decide whether the defendant should be placed on probation or given a term of imprisonment. If imprisonment seems warranted, it is also the prerogative of the sentencing judge to set the maximum amount of time to be served before the prisoner my be released, and, if the judge wishes, he may further specify a part of the term of imprisonment as the minimum amount of time to be served before the prisoner becomes eligible for parole. The amount of time actually served by the prisoner, however, is determined by the Parole Commission. Theoretically, this determination should be made on the basis of his progress toward "rehabilitation," but in practice it is made today almost exclusively for the purpose of mitigating unwarranted disparities in sentences actually served.

B. *Unwarranted Disparities in Sentencing—The Role of the Parole Commission.*—Unwarranted disparities in sentencing occur when different sentences are imposed on defendants who are similarly situated and who committed the same offenses under like conditions. Such disparities occur chiefly because of the complexity of the sentencing provisions in current law and because of the absence of guidance to sentencing judges. Under current law, the sentencing judge determines whether or not to impose a term of imprisonment solely on the basis of his own, usually unarticulated, theory of sentencing.[6] He might decide, for example, that a person convicted of a major business fraud would not benefit from incarceration and sentence him to probation instead, while concluding that a relatively uneducated defendant convicted of a minor theft should be imprisoned so that he could be "rehabilitated" through job training and educational programs. Moreover, even when a term of imprisonment seems warranted, the statutes generally specify only a maximum term of imprisonment, giving the judge no guidance as to the sentence that should actually be set in a particular case. As a result, disparities occur not only between sentences imposed by judges of the same court,[7] but also between sentences imposed in different district courts.[8]

The fact that judicial discretion in sentencing is limited by statutes prescribing maximum penalties does little to reduce sentencing disparities since there are often a number of different penal statutes under which a defendant may be prosecuted for a particular criminal act, and there are in any criminal case a number of different sentencing statutes that the judge might use in imposing sentence, each of which may have a different impact on the length of time a defendant will actually spend in prison. To begin with, current federal criminal law contains numerous examples of inconsistent maximum sentences applicable to sub-

---

[5] See von Hirsch, *Doing Justice: The choice of Punishments*, pp. 9–10 (1976).

[6] See Frankel, *Criminal Sentences: Law Without Order*, p. 21 (1973).

[7] Partridge and Eldridge, *The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit*, Federal Judicial Center, August 1974. Other studies showing significant discrepancies in sentences imposed by judges in the same geographic area include: Engle, *Criminal Justice in the City*, Temple University, 1971 (unpublished Ph. D. dissertation); Hogarth, *Sentencing as a Human Process* (1971); and Chiricos and Waldo, "Socio-economic Status and Criminal Sentencing: An Empirical Assessment of a Conflict Proposition," 40 Am. Sociological Rev. 6 (1975).

[8] Bureau of Prisons discharge files for fiscal years 1974 and 1975 show, for example, that the average term of imprisonment imposed in 35 cases of bank robbery in the Southern District of New York was 78.7 months, while for 10 cases in the Western District of Missouri the average term imposed was 181.2 months. See Attachment B. See also notes 64 and 65, *infra*, and accompanying text. Studies that indicate disparities in sentencing between different jurisdictions include: Nagel, *The Legal Process from a Behavioral Perspective: Homewood, Illinois* (1969); Chiricos and Waldo, *supra*, note 7; Sutton, "Geographical Variations in Federal Sentencing Patterns," U.S. Department of Justice, Law Enforcement Assistance Administration (1977) (unpublished monograph).

stantially similar offenses. For example, there are more than seventy theft offenses under current law, with maximum sentences ranging from one to ten years.[9] In addition, a defendant who receives a regular adult sentence, where the judge sets only a maximum term of imprisonment and makes no statement as to parole eligibility, will be eligible for parole after service of one-third of his term of imprisonment.[10] The judge can, however, specify under different provisions of law that the defendant will be immediately eligible for parole;[11] or that he will be eligible for parole at a specified time up to one-third the term of imprisonment;[12] or, if the defendant is under 26 years of age at the time of sentencing,[13] sentence him under the terms of the Youth Corrections Act,[14] as a result of which he will be immediately eligible for parole by operation of law.[15] In addition, if a convicted defendant is found to be an addict, he may be sentenced for treatment under title II of the Narcotic Addict Rehabilitation Act of 1966,[16] with the result that he may serve a shorter period of imprisonment than he would have had he not been addicted. Despite all the possible types of sentences available in current law, however, there is no statutory guidance concerning when a particular type or length of sentence would be appropriate, and the judge is not required to, and rarely does, set forth his reasons for imposing a particular type or length of sentence.

To bring some order out of this chaotic situation, the United States Parole Commission[17] began in 1972 to experiment with the use of guidelines to reduce unwarranted disparity in the terms of imprisonment imposed by judges in substantially similar cases.[18] Guidelines have been in use for all federal prisoners eligible for parole since 1973.[19]

The latest version of the guidelines,[20] promulgated after enactment of the Parole Commission and Reorganization Act in 1976,[21] appears in two tables, one that applies to regular adult offenders and one that applies to convicted defendants sentenced pursuant to the Youth Corrections Act[22] or the Narcotic Addict Rehabilitation Act.[23] Each table[24] consists of a grid that grades offenses according to seriousness in six groups from "low" to "greatest" seriousness from the top to the bottom of the table, and ranks the offender according to his "parole prognosis," (i.e., the probability of his success on parole) from "very good" to "poor" across the top of the table.[25] A defendant's "parole prognosis" is determined by giving him a score on each of seven "salient factors" relating to prior criminal record, drug dependence, and employment record.[26]

---

[9] See, e.g., 18 U.S.C. 288, relating to false claims against the Postal Service, and 18 U.S.C. 641, relating to embezzlement.

[10] 18 U.S.C. 4205(a). If the sentence to a term of imprisonment is a sentence to life imprisonment or a sentence to a term of imprisonment of over thirty years, the defendant would be eligible for parole in ten years if the judge specified only the maximum term. Citations to provisions of the parole laws are to sections of title 18 of the United States Code enacted in Public Law 94–233 unless otherwise indicated.

[11] 18 U.S.C. 4205(b)(2).

[12] 18 U.S.C. 4205(b)(1).

[13] 18 U.S.C. 4216.

[14] 18 U.S.C. 5005 et seq.

[15] 18 U.S.C. 5017(a).

[16] 18 U.S.C. 4251 et. seq. This is one of the few sentencing statutes that specifically states a purpose of sentencing. It requires a specific finding by the court that the convicted defendant "is an addict and is likely to be rehabilitated through treatment . . .". 18 U.S.C. 4253(a).

[17] The United States Parole Commission was called the United States Board of Parole until Public Law 94–233 became effective. For convenience the designation "United States Parole Commission" or "Parole Commission" is used throughout this paper.

[18] Hoffman and Gottfredson, *Paroling Policy Guidelines: A Matter of Equity*, June 1973 (NCCD Parole Decision-Making Project Supp. Rep. No. 9).

[19] The original parole guidelines appear at 38 F.R. 31942 (1973).

[20] 41 F.R. 37316 (September 3, 1976).

[21] Public Law 94–233, 18 U.S.C. 4201 et seq.

[22] 18 U.S.C. 5005 et seq.

[23] 18 U.S.C. 4251 et seq.

[24] The parole guidelines appear as Attachment A–1 to this paper, and amended salient factor score appears as Attachment A–2.

[25] 28 C.F.R. § 2.20(c), 41 F.R. 37202 (September 3, 1976).

[26] The list of "salient factors" was revised effective April 1, 1977, 42 F.R. 12045 (Mar. 2, 1977). The "salient factors" were selected after extensive empirical research concerning the history and characteristics of defendants released from prison and the relationship of those characteristics to their relative ability to remain free on parole without violation of parole conditions. For discussions of the development and revalidation of the salient factor score, see Hoffman and Beck, *Parole Decision-Making: A Salient Factor Score*, United States Board of Parole Research Unit: Report Two (April 1974); and Hoffman and Beck, *Research Note: Salient Factor Score Validation—A 1972 Release Cohort*, United States Board of Parole Research Unit: Report Eight (July 1975).

For each possible combination of offense characteristics and salient factor scores, the grid specifies a narrow range of imprisonment in terms of months. In determining whether to release a prisoner on parole, the Parole Commission is required to take into consideration the term of imprisonment recommended in the guidelines for a person who has been convicted of an offense of the severity of that committed by the prisoner and who has the salient factor score applicable to the prisoner. The terms set forth in the guidelines are not mandatory, however. According to Parole Commission regulations, "These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics[27]. . . . [E]specially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed [in the parole guidelines.]"[28] Currently, 84.4 percent of the persons released on parole are released after being incarcerated for the period of time recommended in the guidelines. The remaining 15.6 percent of persons who are released on parole serve terms of imprisonment longer or shorter than those recommended in the guidelines because the Parole Commission determines that particular aggravating or mitigating circumstances justify a period of incarceration different from that recommended in the guidelines.[29]

While the parole guidelines have substantially reduced unwarranted disparity in the lengths of terms of imprisonment, it is impossible for the Parole Commission alone to eliminate all unwarranted disparity in sentences. For example, it can do nothing about disparity in the decisions of sentencing judges as to whether or not to incarcerate persons convicted of particular offenses, even though this may be the area of greatest disparity.[30] All it can do for the person who should never have been sentenced to prison at all is release him on his date of parole eligibility; of course, it cannot cause the imprisonment of a convicted person who should have been sentenced to a term of imprisonment but was not.[31] Furthermore, the Parole Commission has no authority to lengthen the sentence of a person sentenced to prison for too short a period or to shorten the term of imprisonment of a person ineligible for parole until after serving an unreasonably long term of imprisonment.

As noted above, under the "rehabilitation" theory of sentencing, the Parole Commission's task should be to determine when a prisoner has been rehabilitated and can safely be released. To make this determination, it should concentrate on the prisoner's reaction to treatment for the conditions that led to his offense. As a practical matter, however, Parole Commission determinations are seldom influenced by a prisoner's progress toward rehabilitation. Although the Commission's regulations provide that "the guidelines are established specifically for cases with good institutional adjustment and program progress,"[32] the parole guidelines themselves do not require the Commission to consider any information that was unknown at the time of sentencing in evaluating a prisoner for purposes of parole.[33] Of course, if the prisoner's institutional behavior has been so poor that his forfeited statutory good time has not been restored, he is automatically ineligible for parole.[34] Only if he has performed exceptionally well

---

[27] 28 C.F.R. § 2.20(b), 41 F.R. 37322 (September 3, 1976).

[28] C.F.R. § 2.20(d), 41 F.R. 37322 (September 3, 1976).

[29] Meierhoefer, *The First Full Year of Regionalization: A Statistical Summary*, U.S. Board of Parole Research Unit, p. 6 (January 1976).

[30] A recently completed study of the feasibility of sentencing guidelines notes that what the authors call the "in-out" decision is a frequently overlooked aspect of sentencing variation, and that sentencing should be viewed as a decision involving two steps—first, the decision whether to incarcerate, and, second, the decision as to the length of the sentence. Wilkins *et al.*, *Sentencing Guidelines: Structuring Judicial Discretion, Final Report on the Feasibility Study*, October 1976, pp. 2–3.

[31] Of the persons convicted of federal offenses in fiscal year 1976, 46.1 percent were sentenced to terms of imprisonment. *1976 Annual Report of the Director, Administrative Office of the United States Courts*, Table D–7. Even among similar offenses there is substantial disparity as to incarceration. For example, in fiscal year 1976, 38.6 percent of the persons convicted of "larceny" or "theft" were sentenced to terms of imprisonment, while only 17.5 percent of those convicted of "embezzlement" were sent to prison. *Id.*, Table D–5.

[32] 28 C.F.R. § 2.20(b), 41 F.R. 37322 (September 3, 1976).

[33] Effective April 1, 1977, the salient factor score contained no item of information not known at the time of sentencing. 42 F.R. 12045 (March 2, 1977). Before that date, the salient factor score had included one possible point for a prisoner whose parole release plan was to live with his spouse or children or both. 41 F.R. 37324 (September 3, 1976).

[34] 28 C.F.R. § 2.6, 41 F.R. 37320 (September 3, 1976). This is a fairly unusual occurrence. Of the prisoners for whom the Parole Commission held special review hearings in a one-year period, 11 percent were denied parole on the basis of institutional discipline problems, but not necessarily problems that led to forfeiture of good time.

during confinement will his term of imprisonment be reduced to a period shorter than that provided by the guidelines.[35]

The Parole Commission's preoccupation with ameliorating unwarranted sentencing disparities to the virtual exclusion of considerations of rehabilitation is not surprising since it has become increasingly apparent that the state of knowledge of human behavior is such that it is not possible to determine whether or when a prisoner has been rehabilitated.[36] Moreover, prison authorities themselves increasingly view indeterminate sentences as counterproductive in terms of efforts at rehabilitation because they lower prisoner morale and hamper the ability of prisoners to plan their futures.[37]

III. DETERMINATE SENTENCING PROPOSALS

A. *Background.*—In the last few years, increased attention has been paid to the problem of unwarranted sentencing disparity. As previously noted, in addition to the growing body of literature concerning problems with existing sentencing law,[38] the United States Parole Commission has issued parole guidelines to reduce unwarranted disparity in the lengths of prison terms.[39] The efforts to structure discretion in the parole decision and the efforts toward legislative revision of substantive federal criminal laws[40] led the Yale Law School to organize a Workshop on Parole and Sentencing to address the problems of sentencing reform. The early drafts of the Workshop's study[41] led to a number of legislative proposals for the creation of a Sentencing Commission within the judicial branch to promulgate guidelines for use by sentencing judges.[42] Under these proposals, guidelines would be applied at the outset of the sentencing process to reduce unwarranted disparity in sentencing, rather than leaving the problem to the Parole Commission which, as stated above, is limited in its ability to mitigate all of the disparities created initially.

B. *The Major Proposal.*—The major sentencing reform proposal under consideration by the Congress is contained in the proposed Criminal Code Reform Act of 1977 as introduced in the Senate by Senators McClellan and Kennedy (S. 1437) and in the House of Representatives by Congressman Rodino (H.R. 6869). That proposal provides for the creation within the judicial branch of a United States Sentencing Commission, the members of which would be designated by the Judicial Conference of the United States.[43] The Commission would promulgate guidelines recommending narrow ranges of sentences for defendants with a particular history and characteristics who were convicted of particular offenses under specified circumstances.[44] The Commission would also issue policy

---

[35] This occurred in 17 out of 1,080 cases in which prisoners were paroled in the northeast region of the Parole Commission in the period from October 1973 through March 1974. Hoffman and DeGostin, *Parole Decision-Making: Structuring Discretion*, U.S. Board of Parole Research Unit, Report 5 (June 1974).

[36] See note 3, *supra*, and accompanying text.

[37] Carlson, "Corrections in the United States Today: A Balance Has Been Struck," 13 Amer. Crim. L. R. 627–35 (1976).

[38] See *supra* note 3; von Hirsch, *supra* note 4.

[39] See Part B of chapter II at pp. 2–12, *supra*.

[40] S. 1 and H.R. 3907 in the 94th Congress.

[41] O'Donnell, Churgin, and Curtis, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform* (1977).

[42] In addition to the Sentencing Commission provisions in the compromise version of the proposd federal criminal code in the 95th Congress, introduced by Senators McClellan and Kennedy (S. 1437) and Congressman Rodino (H.R. 6869), the following bills introduced in the 95th Congress would create a sentencing guidelines system: S. 181 (Senators Kennedy, McClellan, Abourezk, Bayh, Haskell, Mathias, Stevenson, Humphrey, and Matsunaga); S. 204 (Senators Gary Hart and Javits); H.R. 470 (Lehman); H.R. 1182 (Rodino); H.R. 2312 (Cohen); and H.R. 5314 (McClory, Butler, and Railsback).

The following bills introduced in the 94th Congress provided for the creation of a sentencing guidelines system: S. 2699 (Senators Kennedy, Abourezk, Bayh, Fong, Philip A. Hart, Hruska, McClellan, Tunney); H.R. 11655 (Congressman Rodino); H.R. 13492 (Congressmen Tsongas and Dodd); H.R. 13716 (Congressmen Tsongas, Dodd, Mazzoli, Pattison, and Russo); H.R. 13754 (Congressmen Tsongas, Dodd, Cohen, Mazzoli, Pattison, and Russo); H.R. 14014 (Congressmen Tsongas, Dodd, Barnes, Bedell, Biaggi, Carney, Cohen, Cotter, Downey, Edgar, Florio, Grassley, Hughes, Keys, Koch, Lehman, Lloyd (Calif.), McCollister, Maguire, Mazzoli, Moakley, Mollohan, Moorhead (Pa.), Nedzi and Nowak); H.R. 14015 (Congressmen Tsongas, Dodd, Ottinger, Patterson, Pattison, Russo, Spellman, and Thornton); and H.R. 14896 (Congressmen Tsongas, Burke (Calif.), Cleveland, Hall (Ill.), Heckler (Mass.), and Matsunaga).

[43] Proposed 28 U.S.C. 991(a).

[44] Proposed 28 U.S.C. 994(a)(1).

statements on other sentencing issues that were not the subject of guidelines.[45]

The proposed legislation specifies for the first time the factors that a judge should take into consideration in imposing sentence on a convicted defendant.[46] In addition to considering the nature and circumstances of the offense and the history and characteristics of the offender, the sentencing judge would be required to consider the four general purposes of sentencing: the need for the sentence to deter criminal conduct, to protect the public from further crimes of the defendant, to provide just punishment for the offense, and to provide needed correctional treatment for the defendant in the most effective manner.[47] In imposing the sentence, the judge would also be required to consider the policy statements promulgated by the Sentencing Commission. The judge would be required to state general reasons for the sentence imposed, and, if the sentence was outside the range suggested in the guidelines, the reason for imposing a sentence outside the guidelines.[48]

Appellate review would be available for sentences outside the guidelines range; the defendant could appeal a sentence above that recommended in the guidelines,[49] while the government could appeal a sentence below the guidelines range if the Attorney General or his designee approved the appeal.[50] If the court of appeals found that the sentence was clearly unreasonable, it would be required to state specific reasons for its findings and either remand the case for imposition of an appropriate sentence or further sentencing proceedings, or resentence the defendant itself.[51]

The sentencing reform proposal set forth in the proposed federal criminal code would retain the United States Parole Commission, but would permit the sentencing judge, after considering the sentencing guidelines, to impose a term of parole ineligibility for a defendant sentenced to a term of imprisonment. Such a term could not extend in any case into the last one-tenth of the term of imprisonment imposed.[52] If the term of parole ineligibility was inconsistent with the sentencing guidelines, the defendant and the government would have the same appeal rights as they would have with respect to a term of imprisonment that was inconsistent with the guidelines.[53]

The sentencing provisions of S. 1437 and H.R. 6869 do not represent abandonment of efforts at rehabilitation. Rather, they constitute a recognition of the fact that rehabilitation should no longer be regarded as the principal reason for giving a particular defendant a particular type or length of sentence. Rather than concentrating exclusively or primarily on rehabilitation, S. 1437 and H.R. 6869 would give equal recognition to the four commonly cited purposes of sentencing: just punishment; deterrence of criminal conduct by others; incapacitation of the criminal for protection of the public; and rehabilitation of the offender.[54] The Sentencing Commission would be directed to consider these purposes in formulating sentencing guidelines for federal offenses, and in formulating policy statements on sentencing in general.[55] The proposed legislation does not attempt to give greater weight to one purpose than to another nor to define the extent to which the purposes may overlap. It leaves to the Sentencing Commission the evaluation of the extent to which each sentencing purpose should and would be served by setting a particular type and length of sen-

---

[45] Proposed 28 U.S.C. 994(a)(2).
[46] Proposed 18 U.S.C. 2003(a).
[47] Proposed 18 U.S.C. 2003(a)(2).
[48] Proposed 18 U.S.C. 2003(b). The purposes of stating a reason for a sentence within the guidelines are: to make clear to the defendant and to the public the purpose to be served by a sentence, to provide guidance to the Bureau of Prisons in determining the appropriate type of prison and program for the defendant; and to take into account that the guidelines might specify a different sentence for persons sentenced for the same offense for different purposes, such as probation for rehabilitation for a first offense and incapacitation or deterrence for a second offense. The Bureau of Prisons has expressed concern that the statement of reasons for a sentence within the guidelines might be used as the basis of an appeal where, for example, one reason that the sentence was imposed was rehabilitation and the defendant alleges that he is not being rehabilitated and thus should not be incarcerated.
[49] Proposed 18 U.S.C. 3725(a).
[50] Proposed 18 U.S.C. 3725(b).
[51] Proposed 18 U.S.C. 3725(e).
[52] Proposed 18 U.S.C. 2301(c).
[53] Proposed 18 U.S.C. 3725 (a) and (b).
[54] Proposed 18 U.S.C. 101(b). See Packer, *The Limits of the Criminal Sanction*, pp. 35–61; *Working Papers of the National Commission on Reform of Federal Criminal Laws*, Vol. I, pp. 3–4.
[55] Proposed 28 U.S.C. 991(b).

tence for a particular offense.[56] For example, the Sentencing Commission might conclude that for many white collar offenses deterrence and punishment should be emphasized rather than rehabilitation or incapacitation. Conversely, in the cases of repeat violent offenders, emphasis might be placed on incapacitation.

These proposals leave unanswered one important question regarding the operation of the new sentencing system: the role of the parole system. The parole system was created to determine when to release prisoners who had been sentenced to indeterminate prison terms for rehabilitation purposes. Since recognition of rehabilitation is no longer regarded as an appropriate determinant of a prisoner's release date, the authority of the Parole Commission is now used primarily as a means of attempting to ameliorate unwarranted disparities in sentencing, and of shortening the average term of imprisonment served from the average terms imposed by sentencing judges. Under the proposed sentencing guidelines system, the problem of sentencing disparity would be addressed at the time of sentencing and there would be no need for subsequent review by the Parole Commission. However, there would still be a need for a mechanism for determining prisoners' release dates. In addition, means would have to be provided for maintaining institutional discipline, encouraging participation in rehabilitation programs, preventng further criminal activity by persons recently released from prison, and providing services to prisoners about to be released or recently released from prison to assist in their transition to the community.

These are functions that are now performed in large part by the parole system. Under S. 1437 and H.R. 6869, they would continue to be so performed, even though the primary justification for the parole system would no longer exist. The question arises, therefore, whether these functions could be performed by other means, with the result that the parole system could be abolished entirely. It would appear that this is a realistic possibility. Determinate sentences could be imposed, with the release date modified from the form of imprisonment only by vested credit toward early release that would be earned if the prisoner complied with institutional rules.[57] The objective of encouraging participation in rehabilitation programs might, as Bureau of Prisons experiments already indicate, be attained by making participation in such programs voluntary. The use of post-release supervision in the community as a means of preventing future criminal behavior by persons recently released from prison needs to be reexamined. If such supervision is believed desirable, it could be provided by the Probation System even if the Parole Commission were abolished. The objective of providing services to prisoners in need of assistance in making the transition back to the community could be met by requiring that the final portion of a term of imprisonment be spent in a minimum security facility. During this period, and for a limited time thereafter, facilities of the Probation System could be made available to assist such prisoners in obtaining employment or medical services and otherwise to facilitate their transition from prison into society.

C. *Treatment of Functions of Parole System; Effect of Abolition.*

1. *Sentencing Disparity.*—There has been a growing concern over the fact that many defendants convicted of violent offenses never serve time in prison.[58] In response to this concern, a number of legislative proposals have been put forth that would require the imposition of mandatory minimum terms of imprisonment to be served without parole for a number of serious offenses.[59]

---

[56] One exception appears in proposed 28 U.S.C. 994(e) as set forth in S. 1437 and H.R. 6869. That provision in effect emphasizes incapacitation and just punishment for certain persons with extensive criminal records or who are involved in criminal activity as a means of livelihood or as part of a major conspiracy by requiring that the sentencing guidelines provide that most persons in those categories receive a "substantial sentence of imprisonment."

[57] Compare 18 U.S.C. 4161 et. seq.

[58] In fiscal year 1976, only 54.4 percent of the persons convicted in the federal courts of burglary, 64.3 percent of the persons convicted of rape (including convictions under 18 U.S.C. 2032) and 46.1 percent of the persons convicted of assault were sentenced to terms of imprisonment. *1976 Annual Report of the Director, Administrative Office of the United States Courts*, Table D-5.

[59] Under a Ford Administration proposed amendment to S. 1, 94th Congress (121 Cong. Rec. S 13827 (daily ed. July 26, 1975)), a person convicted of heroin or morphine trafficking, kidnapping, aircraft hijacking, or committing a federal offense with a firearm, would be subject to a mandatory term of imprisonment. S. 3411 and H.R. 13577, 94th Congress, that Administration's heroin trafficking proposal, also would have provided mandatory minimum sentences for heroin and morphine trafficking, while S. 2186 and H.R. 9022, 94th Congress, that Administration's gun control proposal would have provided a mandatory minimum sentence for a first offense of committing a federal felony with a firearm.

While these proposals would eliminate disparity from decisions as to whether or not to incarcerate certain violent offenders and would provide minimum terms of imprisonment, they would not eliminate all unwarranted sentencing disparity any more than does the existing parole system.[60] In addition, the mandatory minimum sentence proposals do not recommend an appropriate length of a term of imprisonment, but serve only to specify the minimum term of imprisonment.

The proposed sentencing guidelines system, on the other hand, seeks to eliminate unwarranted sentencing disparity in all federal criminal cases.[61] The guidelines would provide a suggested sentencing range for a particular offense committed by a defendant with a particular history and characteristics.[62] Only if the judge believed that there was a significant aggravating or mitigating factor in a case should he impose a sentence outside the guidelines range, and such a sentence would be subject to appellate review. Perhaps the most important aspect of the guidelines would be that they would recommend whether a person convicted of a particular offense and who had a certain history and characteristics should be sentenced to imprisonment or to probation, thus eliminating a major source of sentencing disparity under current law.

The guidelines would also eliminate disparity between sentencing practices of different districts. Recent statistics of the Administrative Office of the United States Courts show that, while 45.8 percent of the offenders convicted in the federal courts are sentenced to a term of imprisonment, the percentage of convicted defendants who are sentenced to terms of imprisonment in different districts varies from a low of less than 10 percent to a high of over 75 percent.[63] Even if allowances are made for variations in the types of cases brought in different districts, the degree of variation in whether prison terms are imposed remains substantial. A comparison of districts with criminal caseloads of similar size[64] shows that: in one district with fewer than 500 criminal convictions per year over 75 percent of the convicted defendants received prison sentences while in another, similar district only 13.6 percent received prison sentences; in medium sized districts (those having 500–1,000 convictions per year), the rate of imprisonment ranged from 9.6 percent to 70 percent; and among larger districts (those with more than 1,000 convictions per year), the rate varied between 8.3 percent and 67.0 percent.[65]

The major sentencing reform proposals would also eliminate the disparity caused by the differences in the sentencing statutes applicable to regular adult offenders, youthful offenders, and drug addicts. In place of the numerous sentencing statutes now available there would be a single sentencing system applicable to all persons convicted of federal offenses but flexible enough to take into account the age or addiction or other characteristics of a particular offender as appropriate.

---

[60] See part B of chapter II, *supra*.

[61] The United States Parole Commission points out that the parole guidelines are both promulgated and implemented by the Parole Commission, while the Sentencing Commission guidelines would be implemented by over 450 federal district court judges, with appellate review by the United States courts of appeals. The Acting Chairman has questioned whether this will lead to the desired consistency in decisions since the Sentencing Commission would not play a direct role in supervision and monitoring of the cases. Memorandum from Curtis C. Crawford, Acting Chairman, United States Parole Commission, to Harry A. Scarr, Assistant Director, Office of Policy and Planning, October 7, 1976. However, the Sentencing Commission would be constantly reviewing sentencing decisions to evaluate the effectiveness of the guidelines in eliminating unwarranted disparity and would have the power to revise the guidelines if they were not initially successful in preventing unwarranted disparity.

[62] Attachment D shows the wide variations in time served in prison by male bank robbers who have similar characteristics, backgrounds in terms of age, marital status, education, and prior criminal record.

[63] *1976 Annual Report of the Director, Administrative Office of the United States Courts*, Table D 7.

[64] It would seem that districts with criminal caseloads of similar size would tend to have similar types of crimes to deal with and similar problems in administering their criminal justice systems. For example, large urban districts have more similar criminal problems than do large and small districts. Therefore, a comparison of statistics for comparable districts is more meaningful than a comparison of statistics for dissimilar districts.

[65] *Supra*, note 63. These differences result from many factors. Some of the disparity can be attributed to differences in the types of cases prosecuted, since this is the major determinant of the types of cases in which sentences are imposed by the courts. For example, the 8.3 percent figure is down from the Southern District of Georgia which handles a large number of traffic cases.

2. *Actual Time Spent in Prison.* As a consequence of the existing parole system, there is a substantial difference between the average term of imprisonment imposed for federal offenses and the time actually spent in prison. For example, the average term of imprisonment that had been imposed on the 886 adult male offenders released from prison during fiscal years 1974 and 1975 after serving sentences for bank robbery was 129.56 months, while the average time actually spent in prison by those prisoners was 45.46 months, or about 35 percent of the sentence imposed.[66] For 9 federal felonies, including bank robbery, during the same period the time actually served ranged from 35 to 53 percent of the terms of imprisonment imposed by the sentencing judges.[67] The result of the differences between the terms of imprisonment imposed and the actual time served is substantial uncertainty on the part of defendants and of the public as to the effect of a criminal sentence.[68]

If the system of indeterminate systems is replaced by a system of determinate sentences, it is essential in order to prevent further overcrowding of the prisons that a significant increase in the average time actually spent in prison by persons convicted of federal crimes be avoided. This should not be a problem under the sentencing system proposed for two reasons. First, under the proposed revision of the federal criminal laws contained in S. 1437 and H.R. 6869, the maximum terms of imprisonment for federal crimes would be lower than those set forth in current law and in earlier versions of the proposed revision of the federal criminal code.[69] Second, because the Sentencing Commission would be aware of the capacity of the federal prison system and because it would be developing its guidelines in part on the basis of current sentencing practices, it can be expected to develop guidelines that result in an average term of imprisonment for all federal convictions generally similar to the average term that now results from operation of the parole guidelines. Furthermore, the proposed sentencing revisions make clear that the guidelines should be structured so that the longest prison terms for particular offenses would be imposed on serious repeat offenders, persons deriving a substantial part of their livelihood from criminal activity, and leaders of racketeering syndicates. On the other hand, the guidelines would be structured so that a first offender would probably receive no imprisonment or only a short term of imprisonment unless the offense were serious or committed under aggravating circumstances.

3. *Determination of Release Date.* Under current law, there are two separate, parallel determinations made concerning the release date for each prisoner. These determinations are made under the provisions for good time allowances[70] and for release on parole.[71] While a potential release date is calculated for each prisoner under each of these provisions, the prisoner's release date is in fact generally affected by only one of the two determinations, although there is uncertainty in many cases as to which of the two calculations will ultimately control a particular prisoner's release date.

a. *Good Time Allowances.* Under the good time statute, each prisoner is given a deduction from his sentence of several days each month, according to the length of his sentence, if his "record of conduct shows that he has faithfully observed all the rules [of the institution] and has not been subjected to punishment."[72] If the prisoner commits an offense or violates a rule of the institution, all or part of this statutory good time deduction he has earned up to the

---

[66] Under the parole guidelines, 41 F.R. 37322 (September 3, 1976), a person convicted of robbery with a weapon or a threat would serve from 26 to 72 months in prison, depending upon his parole prognosis, while a person otherwise convicted of bank robbery would serve from 16 to 44 months, depending on parole prognosis.

[67] See Attachment C, Statistics from the Office of Program Planning, United States Bureau of Prisons.

[68] In many cases, the public views the parole system as the mechanism that permits even the worst criminals to be released from prison substantially before the ends of their terms of imprisonment. See, *e.g.*, "Puzzling Parole Arithmetic," *The Washington Star*, September 3, 1976, p. A–2.

[69] If the parole system is no longer used as the means for determining release dates, the maximum terms of imprisonment might be lessened even further in order to help assure that the actual time served by the average prisoner would remain fairly close to the time now served.

[70] 18 U.S.C. 4161 *et seq.*

[71] 18 U.S.C. 4201 *et seq.*

[72] 18 U.S.C. 4161. In addition to the deduction for "good conduct" ("statutory good time"), a prisoner may earn "industrial good time" by employment in a prison industry or camp or by exceptional performance in connection with institutional operations. 18 U.S.C. 4162.

time of the offense may be forfeited.[73] Forfeited or withheld good time may be restored in whole or in part by the Attorney General "as he deems proper upon recommendation of the Director of the Bureau of Prisons." [74]

The Institution Discipline Committee for each Bureau of Prisons institution has the responsibility for determining whether and when good time should be withheld or forfeited and whether and when withheld or forfeited good time should be restored. While Bureau of Prisons policy requires that withheld good time must be considered for restoration within six months of the conduct that was the basis for withholding and that forfeited good time must be considered for restoration within one year of the conduct that was the basis of the forfeiture, the standards for restoration vary from institution to institution because of differences in the nature of inmates and violations.[75] The decisions of the Institutional Discipline Committee are subject to review and modification or reversal on appeal to the warden, the appropriate regional director, and the Office of General Counsel of the Bureau of Prisons.[76]

Federal prisons officials consider the good time provisions to be so cumbersome that they avoid using forfeiture or withholding of good time for rules violations if other means of dealing with violations are available.[77] This fact, together with the fact that good time remains constantly subject to forfeiture under current law, creates substantial uncertainty as to the potential effect of the withholding, forfeiture, or restoration of good time on a prisoner's release date.

b. *Parole.* At the same time as the Bureau of Prisons is calculating the potential release dates of prisoners on the basis of good time, the United States Parole Commission is considering whether prisoners whose sentences exceed one year[78] and who are presently eligible or will become eligible for parole within 30 days[79] should be released on parole.

The date of eligibility for parole varies according to the statute under which the judge imposes sentence. If the judge specifies no specific time for parole ineligibility, a regular adult offender is eligible for parole after serving one-third of his term of imprisonment (or ten years of a sentence of over thirty years or of life imprisonment).[80] If the sentence exceeds one year, the judge may either specify a minimum term of up to one-third of the sentence at the expiration of which the prisoner will be eligible for parole,[81] or may specify that the defendant may be released on parole at any time the Parole Commission "may determine." [82] A prisoner who is serving a sentence of five years or longer must be released on parole after serving two-thirds of that sentence (or 30 years of a sentence of 45 years or longer or of life imprisonment) unless the Commission "determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime." [83]

These general parole eligibility provisions do not apply to two classes of prisoners, those subject to title II of the Narcotic Addict Rehabilitation Act (NARA) [84] and those sentenced pursuant to the Federal Youth Corrections Act.[85] Under title II of NARA, an addict convicted of a non-violent first or second offense that is not a drug trafficking offense (unless it was committed for the "primary purpose" of supporting his drug habit) [86] is "committed" for an indeterminate sentence not to exceed ten years.[87] A person committed under title II of NARA may be released on parole any time after six months of commitment for treatment.[88] A person sentenced under the Youth Corrections Act is sentenced to an indeterminate sentence that may not exceed four years of im-

---

[73] 18 U.S.C. 4165. But see notes 114 through 117 *infra*, and accompanying text.
[74] 18 U.S.C. 4166.
[75] Federal Prison System Policy Statement on Inmate Discipline, No. 7400.5D, July 7, 1975, p. 13.
[76] *Ibid.*, at p. 15.
[77] Interviews by staff of Office of Policy and Planning.
[78] 18 U.S.C. 4205(a).
[79] 18 U.S.C. 4208(a).
[80] 18 U.S.C. 4205(a).
[81] 18 U.S.C. 4205(b)(1).
[82] 18 U.S.C. 4205(b)(2).
[83] 18 U.S.C. 4206(d).
[84] 18 U.S.C. 4251 *et seq.*
[85] 18 U.S.C. 5005 *et seq.*
[86] 18 U.S.C. 4251(f).
[87] 18 U.S.C. 4253(a).
[88] 18 U.S.C. 4254.

prisonment,[89] but is immediately eligible for parole.[90] If the court finds that the defendant "may not be able to derive maximum benefit from treatment" within that time, it may sentence under the Youth Corrections Act for any additional period authorized for the offense,[91] but the defendant will be immediately eligible for parole.[92]

When feasible, the initial parole determination proceeding for a prisoner must be held thirty days before the prisoner's parole eligibility date or, if the prisoner is eligible for parole immediately upon the commencement of the service of his sentence, within 120 days following his imprisonment.[93] No hearing is required if the Parole Commission decides to grant parole on the record.[94] If parole is denied, there must be another parole determination proceeding within 18 months for a person with a sentence of more than one but less than seven years, and within 24 months for a person with a sentence of seven years or longer.[95]

The Parole Commission is required to grant parole pursuant to the parole guidelines to any prisoner if three criteria are met, unless it determines that there is good cause for setting a release date that would result in a different length of time in prison than is recommended in the guidelines. The prisoner must have substantially complied with the rules of the institution. In addition, the Commission must determine, upon consideration of the nature and circumstances of the offense and the history and characteristics of the offender, that his release "would not depreciate the seriousness of his offense or promote disrespect for the law; and (2) that release would not jeopardize the public welfare. . . ."[96]

As discussed earlier,[97] there are two sets of parole guidelines. One applies to adult offenders, while the other applies to prisoners sentenced under the Federal Youth Corrections Act or the Narcotic Addict Rehabilitation Act.[98] The two sets of guidelines recommend that the same length of time be spent in prison by most persons to whom either set of guidelines apply if the offense is of "low" or "low moderate" seriousness. However, for more serious offenses, the parole guidelines applicable to adult offenders recommend imprisonment for periods of 2 to 23 months longer, depending on the seriousness of the offense, than those recommended under NARA or the Youth Corrections Act.

c. *Application of Release Date Calculations to Individual Prisoners.* Even though the Bureau of Prisons and the Parole Commission are simultaneously concerned with the release date of each prisoner whose term of imprisonment exceeds one year, only one of these agencies will actually determine the release date of the prisoner, since the release date is either the date on which the prisoner's sentence expires, minus good time, or the date set for release by the Parole Commission, whichever is earlier.

Approximately 56 percent of all prisoners released, according to a recent study, are released at he expiration of their sentences less good time.[99] Such prisoners fall into three groups. The first group consists of prisoners who were not within the jurisdiction of the Parole Commission because their terms of imprisonment are one year or shorter;[100] they are released upon expiration of their sentences less good time. The second group contains those whose terms of imprisonment are so short that the date of expiration of sentence less good time occurs before the prisoner has spent as much time in prison as is recommended in the parole guidelines. These prisoners are usually released upon the expiration of sentence less good time rather than on parole, although there may be a few instances where—because of unusual mitigating circumstances—they are released on parole on a date that occurs before they have been in prison for the time rec-

---

[89] 18 U.S.C. 5017(c).
[90] 18 U.S.C. 5017(a).
[91] 18 U.S.C. 5010(c).
[92] 18 U.S.C. 5010(a).
[93] 18 U.S.C. 4208(a).
[94] *Ibid.*
[95] 18 U.S.C. 4208(h).
[96] 18 U.S.C. 4206(a).
[97] See notes 20–23, *supra* and accompanying text.
[98] 28 C.F.R. § 2.20, 41 F.R. 37322 (September 3, 1976).
[99] Federal Bureau of Prisons Statistical Report, Fiscal Year 1975 (U.S. Department of Justice, Washington, 1974), p. 19.
[100] Prior to the adoption of 18 U.S.C. 4205(a), the Parole Commission had jurisdiction over all prisoners whose terms exceeded six months. Under S. 1437 and H.R. 6869, the Parole Commission's jurisdiction would be the same as it was before the adoption of 18 U.S.C. 4205(a).

ommended in the guidelines. Finally, Parole Commission regulations deem a prisoner who has forfeited good time that has not been restored to have "violated the rules of the institution to a serious degree," [101] and, threfore to be unparoleable. If the prisoner is eligible for parole but has any unrestored forfeited good time, he will be released at the expiration of his sentence less any good time that he may have accumulated.[102]

In the period between October 1, 1975 and September 30, 1976, 43.3 percent of all regular adult prisoners with prison sentences exceeding six months were released on parole.[103] Of these, 81.8 percent were released at times within the applicable parole guidelines. Of the remaining prisoners placed on parole, 11.3 percent were paroled after serving a longer time in prison than recommended in the guidelines, and 6.8 percent were paroled earlier than the time recommended in the guidelines.[104]

Most prisoners who are paroled rather than released at the expiration of sentence less good time are those upon whom relatively long sentences have been imposed. Of prisoners released in fiscal year 1975, the average time served by persons released on parole was 27.8 months (or 37.8 percent of their average sentence), while the prisoners released at the expiration of sentence less good time served an average of 12.6 months (or 67.8 percent of their average sentence).[105]

d. *Determination of Release Date Under Proposals.* Whether or not S. 1437 and H.R. 6869 are amended to abolish parole, the proposed revision of the federal criminal code would result in a substantial reduction in the uncertainty regarding release dates now present under the current system of indeterminate sentences and would eliminate the current duplication of mechanisms for setting release dates. The goal would be achieved by different mechanisms, and possibly with differing degrees of success if the proposed code were amended to abolish parole.

S. 1437 and H. R. 6869 would retain the Parole Commission to determine the actual release date, but would eliminate all good time allowances, including those for good institutional behavior and those for industrial good time. Even though the proposed criminal code would alter the way in which the Parole Commission would make the release date determination, it would not necessarily result in removing all vestiges of indeterminate sentences. The Sentencing Commission would issue both the sentencing and parole guidelines.[106] Presumably, the sentencing guidelines would be based on those factors known at the time of sentencing that the Commission believed should have an impact on sentences, while the parole guidelines would address the question of the effect that subsequent occurrences should have on a prisoner's release date. While the proposed code provides that the term of parole ineligibility could be as high as 90 percent of the term of imprisonment,[107] and permits the Sentencing Commission to recommend a term of parole ineligibility for each set of offense and offender characteristics,[108] there is no requirement that the length of the recommended term or parole ineligibility correspond to the length of the recommended term of imprisonment. In addition, while the sentencing judge would be required in imposing a prison sentence to state whether the term includes a term of parole ineligibility and how long that term will be,[109] he may decide that the term of parole ineligibility recommended in a particular case is inappropriate. Therefore, to the extent that the guidelines did not specify that a particular category of offense committed by a particular category of offender should result in a specified term of imprisonment with the defendant's being ineligible for parole for a

---

[101] 28 C.F.R. § 2.6(a), 41 F.R. 37320 (September 3, 1976).

[102] Eleven percent of the prisoners who were scheduled by the Parole Commission for review hearings held in the first half of 1975 were denied parole because of "disciplinary infractions." Hoffman, *Federal Parole Guidelines: Three Years of Experience*, United States Board of Parole Research Unit, November 1975, p. J–6. Some of these infractions had resulted in forfeited good time. No information is available as to how many of these prisoners were ultimately released on parole and how many served their full sentence less good time.

[103] Meierhoefer, *Workload and Decision Trends: Statistical Highlights 10/74–9/76*, United States Parole Commission Research Unit, Report Thirteen, Table II, p. 8 (February 1977).

[104] *Ibid.*, Table III, p. 11.

[105] *Statistical Report, Fiscal Year 1975*, U.S. Department of Justice, Federal Prison System, p. 22. See also, Meierhoefer, *supra*, note 103, Table II, note 1, p. 10.

[106] Proposed 28 U.S.C. 994 (a) and (f).

[107] Proposed 18 U.S.C. 2301(c).

[108] Proposed 28 U.S.C. 994(a).

[109] Proposed 18 U.S.C. 2301(c).

high percentage of the term of imprisonment, or to the extent that a sentencing judge chose to set a low, or no, term of parole ineligibility, a substantial portion of the term of imprisonment would remain in which the Parole Commission could set a release date. While the potential for disparity created by this situation could be alleviated somewhat by parole guidelines, the result would still be to retain at least some of the uncertainties of current sentencing practices.

If parole were abolished, it would be necessary to substitute another mechanism for determining the release date of a prisoner. One possible method would be to provide that the term of imprisonment imposed by a judge would represent the actual time to be served in prison, except that a prisoner could earn a small percentage of that time, perhaps ten percent, as credit toward early release if he complied with the rules of the institution. This approach would eliminate from the criminal law the remaining vestiges of indeterminate sentencing. The prisoner would be certain of his release date from the outset of his sentence and could easily determine the effect of earning credit toward early release on the time he would actually have to spend in prison.[110]

4. *Institutional Behavior.*—Both the good time allowance and parole provisions in current law are designed to induce institutional discipline by holding out the potential for early release. However, because of the uncertainties in the release date caused by the complexity of each system and the interrelationship between them, it is doubtful that institutional behavior is actually improved by use of these mechanisms. In fact, many corrections officials believe that the uncertainty of prison release dates is detrimental to prison behavior it makes it difficult for prisoners to plan for their futures.[111]

The administration of existing laws regarding forfeiture of good time for committing an offense or violating the rules of an institution[112] is extremely complex, with practices relating to the restoration of good time varying from institution to institution.[113] Moreover, it is doubtful whether the good time allowances help to control the institutional behavior of prisoners other than those whose sentences are so short that they are directly affected by the provisions and who will probably be released at the expiration of sentence less good time rather than being released on parole.

While the good time provisions may affect somewhat the behavior of prisoners who wish to remain eligible for parole, prison officials indicate that current laws on good time allowances probably have little impact on the behavior of prisoners who anticipate that they will be released on parole. In the first place, the system for administering the good time statutes is so cumbersome that withholding or forfeiture of good time is used only for the most serious disciplinary problems. Prison officials believe that the other means of dealing with normal disciplinary problems,[114] such as withholding of privileges, are effective to maintain discipline.[115] Moreover, under present law, any amount of good time that has been accumulated before an offense may be forfeited[116] since there is no vesting of earned good time. Prison officials indicate that prisoners give little weight to the risk of forfeiting good time since they assume that it will be reinstated when the Institution Discipline Committee considers its restoration.[117]

---

[110] But see note 139 *infra*.

[111] The official report on the Attica riots indicates that the uncertainty of release dates was a major cause of the riots. New York Special Commission on Attica, *Attica* (1972), cited in von Hirsch, *Doing Justice: The Choice of Punishments*, at p. 31, n. 11. Interviews by the Office of Policy and Planning with prison officials indicated that prison officials and prisoners commonly favored determinate sentences with as little discretion in sentencing as possible.

[112] 18 U.S.C. 4165.

[113] Under Order No. 7400.5D of the Federal Prison System, *supra* note 75, at 13: "All or part of an inmate's accumulated good time may be forfeited. Authority to restore all types of forfeited and withheld good time is delegated to the Institution Discipline Committee of each institution. Forfeited good time must be considered for restoration on or about one (1) year from the date of the offense which formed the basis of the forfeiture. Forfeited good time may be considered for restoration earlier than the one (1) year date if circumstances warrant."

No further guidance is given to the institutions on when and whether to restore good time.

[114] Disciplinary measures now used by the Bureau of Prisons include changing a prisoner's housing assignment or job, placing him in administrative detention or segregation, or, in extreme cases, assigning a prisoner to a more secure facility or criminally prosecuting him for the offense.

[115] Office of Policy and Planning staff interview with Roy Gerard, Assistant Director of the Federal Bureau of Prisons.

[116] Federal Prison System Order No. 7400.5D, *supra* note 75 at 13.

[117] See note 75, *supra*, and accompanying text.

The proposed federal criminal code would drop the good time provisions in current law as unnecessary and administratively burdensome, leaving the Parole Commission to evaluate prison behavior.[118] As discussed earlier,[119] an alternative to this approach would be to amend the proposed criminal code to abolish the Parole Commission and establish a simplified version of the current good time allowance as a mechanism for effecting institutional discipline. Under this alternative, if a prisoner complied with the rules of the institution for a specified period of time, he would receive a certain number of days' credit toward early release.[120] That credit could not be taken away from him at a later date nor could he earn back credit toward early release that had been denied. The prisoner would know at the time of sentencing the maximum period he would have to serve and would would know that compliance with prison rules would earn credit of a small percentage of this period toward early release. Thus, this alternative would provide a direct connection between good behavior in prison and the length of time the defendant had to serve in prison in any case in which the sentence was six months or longer.

While the effects of this approach on prison behavior cannot be predicted with certainty, prison officials believe that it would not add to disciplinary problems in prison and that it might even reduce them. With the elimination of parole, good time would become more important since it would be the only mechanism by which most prisoners could reduce their time in prison. Allowing periodic vesting of credit toward early release, rather than permitting any amount of good time earned up to the time of a rules violation to be forfeited and permitting later restoration of forfeited good time, would create a continuing incentive for the prisoner to earn credit toward early release through compliance with institutional rules.[122] The system of periodic vesting of credit toward early release would also be less cumbersome to administer than the current system and could probably be handled in most cases as a routine bookkeeping matter in the absence of serious infractions.

5. *Participation in Rehabilitation Programs.* Many prisoners participate in vocational training and rehabilitation programs in the belief that they will receive favorable consideration from the Parole Commission when such participation is called to its attention.[122] As a result, many corrections officials view such participation as involuntary, a fact that they regard as possibly detrimental to rehabilitation.[123] Because of this growing concern, the Federal Bureau of Prisons is placing increased emphasis on making all such programs voluntary [124] in the belief that a prisoner will benefit more from a program in which he participates

---

[118] The National Commission on Reform of Federal Criminal Laws, in its draft revision of the federal criminal code, viewed provisions on "good time" as "an unecessary inducement in view of the parole possibilities." *Working Papers*, p. 1299.

[119] See note 57 *supra* and accompanying text.

[120] It has been suggested in the course of the Department's review that a prisoner sentenced to a term of imprisonment of six months or more receive credit toward early release of one day at the end of each ten days of imprisonment beginning after the first six months and before the end of the first three years of his term, and one and one-half days for each ten days beginning after the first three years of his term if the Bureau of Prisons determined that the prisoner had satisfactorily complied with institutional rules approved by the Attorney General and given to the prisoner. If his behavior was less than satisfactory, he would be given no credit toward early release or such lesser amount of credit than he would receive for satisfactory behavior as the Bureau determined to be appropriate.

[121] The Bureau of Prisons has adopted a change in its regulations, effective November 1, 1976, that provides for vesting of industrial good-time (18 U.S.C. 4162), but not of "statutory" good time (18 U.S.C. 4161).

[122] According to Genego, Goldberger, and Jackson, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 at pp. 829–30 (1975), this impression in enhanced by the emphasis in the parole hearings on discussion with prisoners of rehabilitation-oriented matters rather than of the facts necessary to determine the appropriate guidelines to be applied to the prisoner. A Bureau of Prisons survey of the heads of federal institutions indicated that 45 percent of the prison officials who responded to the survey believe that inmates feel the Parole Commission gives some consideration to participation in programs, while 41 percent believe that inmates think the Parole Commission does not consider participation in programs. Memo of Roy E. Gerard, Assistant Director, Correctional Programs Division to Executive Staff of Bureau of Prisons, March 7, 1977. In fact, it is fairly unusual for a prisoner to be released early because of an unusual level of rehabilitation. For example, in the period from October 1973 through March 1974, the Parole Commission made in one region 45 decisions below the guidelines, of which 17 were for "outstanding institutional progress" and 3 were for the reason that "clinical judgment indicates better risk than indicated by salient factor score." Hoffman and De Gostin, *Parole Decision-Making: Structuring Discretion*, U.S. Board of Parole Research Unit, p. 11 (1974).

[123] Carlson, "Corrections in the United States Today: A Balance Has Been Struck," 13 Amer. Crim. L.R. 627–35 (1976).

[124] *Ibid.*

voluntarily than from participation for purposes of impressing parole officials.[125] While some corrections professionals believe that prisoners might benefit from programs in which they would not participate unless required to do so,[126] recent experience of the Bureau of Prisons indicates that substituting voluntary programs for involuntary ones "is not detrimental to prison rehabilitation in any way."[127] The growing belief among corrections officials and researchers is that if a prisoner knows what his release date is, he will be more motivated than he is now to plan ahead and to participate in programs that will enable him to find employment when he leaves prison.[128]

6. *Community Supervision.* Under current law, persons released on parole receive community supervision by probation officers until the expiration of their sentence or until they have been released from parole supervision.[129] In addition, persons released after serving the term of imprisonment imposed by the judge less good-time deductions are subject to supervision for the remainder of their maximum terms of imprisonment less 180 days.[130] This supervision is intended to serve two arguably conflicting[131] purposes, protection of the community from additional crimes by the parolee and facilitation of the parolee's return to the community by assisting him in obtaining such things as employment and medical services.

Whether parole supervision achieves the goal of protecting the community is doubtful. The average federal probation officer supervises 10 parolees and 30 probationers.[132] As a result of this caseload, each probation officer can spend only a limited amount of time supervising each probationer and parolee.[133] In any event, studies on the value of supervision indicate that the degree of supervision has little or no impact on the recidivism of parolees.[134]

"Any combination of visits and reports keeps pressure on the parolee to be law abiding and to stay in touch with the parole office. It is very hard to say whether such supervision really prevents relapses into crime. A parolee determined to make it does not need surveillance; a parolee determined to con his parole officer, evade him, or engage in illicit activities can find ways to do so. [Footnote

---

[125] Carlson, Speech before the 47th Annual Criminal Justice Institute of the Florida Council on Crime and Delinquency, South Orlando, Florida, July 7, 1976. Mr. Gerard indicated in his memorandum of March 7, 1977, that one-third of the prison officials who responded to the Bureau of Prisons survey commented that "the voluntary, non-coercive approach to programming was a more realistic and philosophically sound position for the Bureau to adopt."

[126] Interview by staff of Office of Policy and Planning with federal prison officials, June 1976.

[127] Letter from Norman A. Carlson, Director, Federal Bureau of Prisons, to Harry A. Scarr, Assistant Director, Office of Policy and Planning, U.S. Department of Justice, October 5, 1976.

In a memorandum outlining the results of a survey of officials, *supra* note 125, Roy Gerard, Assistant Director of the Correctional Programs Division of the Bureau of Prisons indicated that 62 percent of the Bureau of Prisons officials who responded to the questionnaire found that making rehabilitation programs in their institution voluntary had not significantly changed inmate participation, 24 percent found that making the programs voluntary had increased enrollment, and 10 percent found that it had decreased enrollment.

[128] See Sentencing, Parole and Good Time, a position statement of the National Prison Project of the American Civil Liberities Union. This position was also taken by Lawrence Bennet, Director of Research, Department of Corrections in California, and Owen Kennedy, Gerard M. Farkas, and James D. Henderson, regional directors of the Federal Bureau of Prisons, in telephone interviews.

[129] 18 U.S.C. 4210 and 4211.

[130] 18 U.S.C. 4164.

[131] "A compulsory relationship is strained enough, but the tension is worse if one party is policing the other. The strain becomes even more complex and unreasonable if the supervisory party is required to be the other's primary source of advice and help." See Stanley, *Prisoners Among Us: The Problem of Parole*, p. 102 (1976).

[132] United States Probation Service, Administrative Office of the United States Courts, November 1975 time study.

[133] According to the time study, cited in note 132 above, a probation officer spends an average of 30 minutes per month, or 6 hours per year, in face-to-face contact with each probationer or parolee he supervises. Additional time may be spent in telephone contacts with the person under supervision and on such matters as assistance to the probationer or parolee in seeking employment. See also Stanley, *supra* note 131, at 125-26.

[134] Stanley, *id.*, at 128-29, citing Neithercutt and Gottfredson, "Case Load Size Variation and Difference in Probation/Parole Performance" (Administrative Office of the United States Courts, Probation Division, 1973); and Carter, Glaser, and Nelson, "Probation and Parole Supervision: The Dilemma of Caseload Size" (Administrative Office of the United States Courts, Probation Division, February 1973). See also von Hirsch, *Doing Justice: The Choice of Punishment*, Report of the Committee on the Study of Incarceration, p. 14, citing Greenberg, "Much ado About Little: The Correctional Effects of Corrections," Department of Sociology, New York University, June 1974 (unpublished); Lipton, Martinson, and Wilks, *The Effectiveness of Correctional Treatment Evaluation Studies*, p. 119 (1975).

omitted.] A parolee who is not committed either way may be induced to accept guidance and help." [135]

If parole supervision were abolished, it would be desirable to provide an alternative means of facilitating prisoners' return to society. This could be accomplished by establishing a transition period at the end of the term of imprisonment. The transition period could consist of the last thirty days of any term of imprisonment, which could be spent in an environment—perhaps a halfway house or other minimum security facility—that would give the prisoner an opportunity to prepare for his return to the community.[136] During this period, the Bureau of Prisons, in cooperation with the United States Probation System, could provide the prisoner with assistance in locating a place to live and in obtaining employment. This period could be followed by a period of 90 days during which the services of the Probation System would be available if the former prisoner wanted such services. Thus, for example, if the former prisoner believed that the Probation System could help him find a job or obtain necessary medical services, such as a drug treatment program in the community, and requested its help, it could assist him. This approach would permit probation officers to assist persons released from prison without supervising their conduct and would free their time for work with probationers and those recently released prisoners who actually want assistance from the Probation System.

There remains the question of the manner in which criminal conduct by released prisoners should be dealt with if there is to be no parole supervision. Under the existing parole system, parole revocation is sometimes used as a substitute for prosecution of new offenses [137] or to cause incarceration of a person convicted of an offense while on parole but not sentenced to another term of imprisonment. If parole supervision were abolished, an offense committed by a person recently released from prison would be handled in the same manner as an offense committed by anyone else. If the person were prosecuted and convicted, the fact that he had recently been released from prison would be taken into account under the sentencing guidelines applicable to his case. However, there would be no sanction for acts by a released prisoner that now constitute technical violations of parole but that are not criminal. To meet this problem, the Parole Commission has suggested that, rather than abolishing post-release supervision, it would be desirable to provide a fixed period of supervision following every term of imprisonment.[138] If this suggestion were adopted, careful consideration would have to be given to the problem of appropriate sanctions for non-criminal violations. Existing law, which permits reincarceration for a technical violation of parole, is subject to the criticism of unfairness since it permits the incarceration of certain persons for committing acts that do not result in incarceration if committed by anyone else.

D. *Impact on the Federal Criminal Justice System.* Reform of the federal law on sentencing, whether or not the parole system is abolished, will obviously have a substantial effect on several components of the federal criminal justice system, as well as on the system as a whole. The following is a discussion of the probable effects on the federal criminal justice system of the sentencing reform proposals

---

[135] Stanley, *supra* note 131, at 101. One study shows that, while parole supervision continues, it may have an effect on the behavior of a parolee. Lipton, Martinson, and Wilks, *The Effectiveness of Correctional Treatment Evaluation Studies*, p. 119 (1975). However, after supervision is discontinued, there is apparently no significant difference in the recidivism rates of persons who had been subject to parole supervision and those who had not. *Ibid.* at 150.

[136] The Bureau of Prisons has suggested that, if parole is abolished, it should be permitted to determine whether a transition period is necessary in a particular case, in order to avoid putting an undue burden on community treatment facilities. A possible alternative would be to require that there be a transitional period for all prisoners incarcerated longer than a set period of time, perhaps two or three years, and permit the Bureau of Prisons to decide whether the transitional period is needed for individual persons serving shorter terms of imprisonment. The Bureau of Prisons also suggests that exceptions be made in the transition period requirements in certain situations, such as when there is a detainer outstanding against a prisoner or when it is necessary to send a prisoner back to prison from a halfway house for serious violation of rules.

[137] See Stanley, *supra* note 133 at 107. According to Parole Commission records, of the 187 parole revocations in October and November 1974, 116 or 62 percent followed new convictions, 27 or 4.4 percent followed a new arrest without conviction, and 6 or 3.2 percent involved parolees involved in criminal behavior for which there was no arrest or conviction. The remainder of the revocations were for technical violations. From May 16, 1976 (the effective date of the revocation guidelines, 28 C.F.R. § 2.21), through February 28, 1977, 992, or 64.5 percent, of the 1538 parole revocations were in cases in which there was a new conviction or the Commission found that there had been criminal conduct, and the remainder were for technical violations.

[138] Memorandum from Curtis A. Crawford, *supra* note 61.

contained in S. 1437 and H.R. 6869, and of abolishing the parole system in the context of those proposals.

1. *United States Parole Commission.* If the sentencing provisions of S. 1437 and H.R. 6869 are adopted, the cost of operating the United States Parole Commission will probably not be altered substantially. The provisions will, however have a substantial impact on the way in which the Parole Commission operates. While the Parole Commission would continue to have jurisdiction to set release dates for persons sentenced to terms of imprisonment, both the parole guidelines and the law concerning parole eligibility would be altered.

The manner of promulgating parole guidelines, as well as the content of the guidelines themselves, would be affected. The parole guidelines would be promulgated by the Sentencing Commission in order to assure that they would be compatible with the sentencing guidelines. As noted earlier, the parole guidelines now in use take into account only factors known at the time of sentencing. Under the proposals, sentencing guidelines would be based on all factors known at the time of sentencing that the Sentencing Commission believed to be relevant to the sentencing judge for the imposition of sentence. This would leave to the parole guidelines the question of how factors unknown at the time of sentencing, such as prison behavior, should affect a prisoner's release date.[139]

The changes in promulgation and form of the parole guidelines would undoubtedly have a substantial impact on the operations of the Parole Commission. While the Commission would no longer promulgate parole guidelines, it should participate in the process of making recommendations concerning them. The changes may also affect the research undertaken by the Parole Commission. The Commission now does a substantial amount of research during the process of developing and revalidating parole guidelines to evaluate their effectiveness in predicting behavior of parolees. Under the revised code, the Sentencing Commission will be authorized to conduct its own research on the effectiveness of different sentencing practices and related issues. It seems likely that, since the Parole Commission will be more concerned with post-conviction events than with matters known at the time of sentencing, the focus of any continued research it might undertake would shift to evaluation of the correlation between prison behavior and post-release behavior.

Making the parole laws inapplicable to persons who committed offenses after the effective date of the code would result in the gradual phasing out of the Parole Commission, which had a budget in fiscal year 1976 of $3.4 million, with 138 positions, including nine Presidential appointees. The Parole Commission probably would not go out of existence immediately, however; it would still be needed to deal with persons convicted of offenses committed before that date.[140] Since 27 percent of the prisoners discharged from federal prisons in fiscal year 1976 had served more than five years in prison and 10 percent spent more than 10 years in prison,[141] it would take 5 to 10 years to phase out the parole system. Since the average prisoner who was released on parole in a recent year served 27.8 months in prison,[142] it also appears that the Parole Commission would need to retain its full complement of employees for at least the first two years after the effective date of a sentencing guidelines system abolishing parole. While normal attrition at the Parole Commission may somewhat reduce the number of employees, the Parole Commission has a relatively low attrition rate. Most

---

[139] The Parole Commission has published for comment the outline of a proposal that would change its hearing practices. The proposal would require that a "presumptive" release date for every prisoner be set early in his term of imprisonment, based on the factors known at the time of sentencing. As the parole release date approached, the prisoner's institutional behavior would be reviewed to determine whether it met the statutory requirement of substantial compliance with institutional rules. If it did not, the parole release date would be rescinded. 42 F.R. 29934, June 10, 1977.

[140] A possible alternative to phasing out the Parole Commission gradually would be abolishing the Commission on the effective date of the code, requiring that a designated authority determine each prisoner's probable release date under the latest parole guidelines and determine what the sentence of the prisoner would have been if he was sentenced pursuant to the new sentencing guidelines, and releasing the prisoner on the earlier of the two dates. When the State of California enacted its recent statute for determinate sentences, it required that the Community Release Board determine what each prisoner's sentence would have been if he had been sentenced under the new provisions, except that if that sentence would have been shorter than the time that the prisoner would have served under the indeterminate sentencing law, the parole date could be set at a later date if specified aggravating circumstances were present. Section 1170.2 of the California Penal Code.

[141] Data from Inmate information discharge files; calculations in September 1976 by Federal Bureau of Prisons for Congressional Budget Office study.

[142] *Statistical Report, Fiscal Year 1975*, U.S. Department of Justice, Federal Prison System, p. 22.

parole specialists would have little difficulty finding other employment with the federal or state corrections systems, with state parole boards, or in other criminal justice related fields. In fact, some of the employees would have knowledge and experience needed by the Sentencing Commission in developing its guidelines and policy statements.

It should be noted that the United States Parole Commission is an extremely costly and complex mechanism for setting release dates for federal prisoners.[143] This is especially true since many of the hearings and review proceedings held by the Parole Commission concerning parole release dates are probably unnecessary. Some hearings are held when there is no realistic prospect that they will result in the setting of a release date;[144] in other cases, release dates could be set on the basis of the records and the guidelines without holding hearings.[145]

If a sentencing guidelines system is established, whether or not parole is abolished, the sentencing guidelines will recommend an appropriate term of imprisonment for persons sentenced to prison, just as the parole guidelines do now. However, if parole is abolished it is necessary to insure that the new system adequately provide for those persons who are now released before or after the periods recommended in the parole guidelines. Release on parole earlier or later than the time recommended in the parole guidelines now occurs in three special cases. First, many cases involve factors that were known at the time of sentencing but were not taken into account to the extent appropriate by the judge in imposing sentence. Second, some cases involve factors that would not be permitted to be considered in setting the release date if the criminal code were adopted. Neither of these first two groups of cases would be affected if parole were abolished. The third group of cases involves factors that would have to be taken into account by other elements of the criminal justice system if parole were abolished.

The Parole Commission undertook to monitor the operation of parole guidelines in one region for a six-month period. The resulting report provides detailed information on the number of parole decisions outside the range recommended in parole guideilnes and the reasons for such decisions.[146] Of the 1,080 parole decisions in the period of October 1973 through March 1974 in the northeast region of the Parole Commission, 98 decisions, or 9.1 percent, fell outside the guidelines for the reasons shown in the following table:[147]

Above guidelines (N=53):	
Poor institutional conduct	17
To complete specific program	19
Aggravating offense factors	8
Clinical judgment indicates poorer risk than indicated by salient factor score	6
Other	3
Below guidelines (N=45):	
Outstanding institutional progress	1
Credit for additional time served in state custody or to be served (commitment detainer)	14
Health or emotional problems	7
Clinical judgment indicates better risk than indicated by salient factor score	3
Parole to deportation only	3
Mitigating offense factors	1

[143] According to the Parole Commission, it spent $2,391,000 in fiscal year 1976 to produce 27,471 parole decisions of all types at a cost of approximately $123.44 per decision. Memo of September 17, 1975, from Jim Fife, Executive Assistant to the Chairman of the Parole Commission to Stephen Finan, Office of Policy and Planning.

[144] But see note 139 *supra*.

[145] Of the parole decisions in the period of October 1, 1975 through September 30, 1976, no more than 18.1 percent fell outside the guidelines. Meierhoefer, *supra* note 103, Table III. The Parole Commission includes as decisions within the guidelines those decisions that actually fall outside the guidelines in two circumstances. First, the Parole Commission considers a release date to be within the guidelines if the prisoner is released at the expiration of sentence before serving the time in prison recommended in the guidelines. Second, if the release date is above the guidelines recommendation only because the prisoner is ineligible for parole on the date recommended in the guidelines, the release date is considered to be within the guidelines.

[146] Hoffman and De Gostin, *Parole Decision-Making: Structuring Discretion*, United States Board of Parole Research Unit, Report 5 (June 1974).

[147] Hoffman and De Gostin, *supra* note 146, Table II at p. 11.

Of these factors that result in setting release dates outside the recommended range in the parole guidelines, several would be known at the time of sentencing and could be taken into account by the sentencing judge. These include aggravating or mitigating offense factors, credit for past or future service in state custody, clinical judgments indicating a poorer or better risk of repeated criminal behavior than suggested by the factors taken into consideration in the guidelines,[148] and health or emotional problems that justify a lighter sentence than might ordinarily be given. In addition, the sentencing judge should be able at the sentencing hearing to direct the Bureau of Prisons to turn a prisoner over to the immigration officials for deportation at the end of a specified term of imprisonment.

As discussed above, some decisions outside the guidelines would not occur under the proposed determinate sentencing provisions. First, sentences above the guidelines for purposes of permitting a prisoner to complete a specific program should not occur with determinate sentences. If the term of imprisonment is known from the beginning, the prisoner's participation in institutional programs can be planned to utilize the time available to the prisoner's best advantage. Conversely, cases are rare in which a sentence below the guidelines is warranted because of outstanding institutional progress. Moreover, if the stated purpose of a sentence is just punishment or deterrence, rather than rehabilitation, outstanding institutional progress should not affect the appropriate length of sentence.

If the parole system is retained, it can deal with the rare cases where a term of imprisonment should be shortened because of outstanding institutional progress or because the prisoner becomes seriously ill. If the parole system were abolished, such cases could be handled by having the Bureau of Prisons transfer the prisoner to an appropriate medical facility or make application to the sentencing court for a reduction of sentence.

If the parole system is retained, as provided in the proposed criminal code, the present duplication of judicial and Parole Commission hearings on the appropriate length of sentence will continue.[149] If parole were abolished, the second hearing on the appropriate term of imprisonment would, of course, be eliminated altogether.

The abolition of parole would obviously obviate the need for the existing complex review procedure for parole decisions, a procedure that, in fact, has little impact on release dates of prisoners. Under current law, the first stage of review of the parole examiners' decisions is conducted by the regional commissioner. There were 3,425 appeals to the regional commissioner between October 1, 1974, and September 30, 1975, and the decision of the hearing examiner panel was affirmed in 86.7 percent of the cases.[150] The regional appellate hearing involves only a single regional commissioner; other regional commissioners become involved in reviewing the record only if the regional commissioner wishes to reverse the decision of the hearing examiners or alter the release date by more than 180 days.[151] There is a final appeal to the National Appeals Board of any denial of an appeal to the regional commissioner. This Board costs $159,000 per year[152] and confirms the decisions at the regional level 94.5 percent of the time.[153] Thus, the total appellate process results in a change in the release date of only 531 of the 3,425 prisoners who appeal release decisions per year.[154]

2. *Bureau of Prisons.* It seems unlikely that the determinate sentencing proposals will have any appreciable effect on the size of the federal prison population and, therefore, on the budget of the Bureau of Prisons. In establishing sentencing guidelines, the Sentencing Commission will be making judgments as to the appropriateness of incarceration for certain types of offenses and offenders. The process of determining which categories of offenders need to be incarcerated

---

[148] Many of these cases are based on a rehabilitation theory of sentencing that probably would not be used as the basis of determining the length of sentence under the determinate sentencing proposals.

[149] As noted above, however, Parole Commission hearings would no longer consider factors known at the time of sentencing; those factors would be considered only at the sentencing hearing.

[150] Meierhoefer, *supra* note 29, at 13.

[151] 28 C.F.R. § 2.25 (b) and (c).

[152] *Supra* note 143. This figure does not include support cost other than rent and communications that are shared with the regional and central office.

[153] Meierhoefer, *supra* note 29, at 15.

[154] The same case may appear in these statistics twice because of the possibility that a particular release date has been modified at both the regional and national levels.

and which do not will result in a setting of priorities in the use of prison facilities. While these priorities may result in some changes in the makeup of the prison population, such as more repeat offenders in prison and fewer first offense car thieves, the Sentencing Commission can be expected to take into account the capacity of the federal prison system so as not to create guidelines that would substantially alter the average term of imprisonment or the size of the prison population.[155] However, it is possible that sentencing guidelines will alter the nature of prison facilities somewhat if, for example, the guidelines lead to the incarceration of greater numbers of violent offenders who require particularly secure facilities; and, if fewer non-violent first offenders convicted of minor offenses were sentenced to terms of imprisonment, there would be less need for minimum security facilities.

If parole supervision were abolished, it is possible that there would be an increased burden on community treatment centers because of the need for a prisoner about to be released to serve the last part of his sentence in an environment that will aid his transition back into the community. This burden on the community treatment centers would be lessened if other minimum security facilities were used for some prisoners about to be released and further reduced if the requirement for spending a transition period in a minimum security facility were applied to a narrower class of prisoners or at the discretion of the Bureau of Prisons, as suggested by the Director of the Bureau of Prisons.[156]

The simplified procedure that would result from using credit toward early release rather than the parole system to determine release dates should not be as costly for the Bureau of Prisons to administer as the existing good-time allowance provisions.[157] Under a system of periodic vesting of credit toward early release for good behavior and denial of credit for bad behavior during the same short period of time, it would be less time consuming to keep records than it is under the more complex forfeiture provisions in current law which permit the forfeiture of any amount of good time accumulated up to the time of the violation.[158] In addition, since the simplified procedure would not permit the restoration of credit toward early release that had been withheld because a prisoner had not complied with institution regulations for a ten-day period, the cost of periodic review of the question whether to restore withheld or forfeited good time would be avoided. Further, the provisions for credit toward early release would affect the term of imprisonment of all prisoners to whom they apply, rather than only those prisoners who are released at the expiration of sentence less good time or who are ineligible for parole at the time recommended in the parole guidelines because they have forfeited good time that has not been restored—fewer than half the prisoners in the federal prisons.[159]

It should be noted, however, that credit toward early release could be withheld only after compliance with due process procedures similar to those now required to be followed for the withholding of good times.[160] While the simpler provisions may affect these procedures somewhat, it is not expected that there would be a significant cost saving.

3. United States Probation System. S. 1437 and H.R. 6869 would have very little overall impact on the United States Probation System. Its existing functions would be expanded only by a requirement that the pre-sentence reports it prepares include a statement of the guidelines categories of offense and offender applicable to the defendant and of any factors that the probation officer believes might warrant a sentence outside the guidelines.[161] It is unlikely that this requirement will have an appreciable effect on the workload of the Probation System.

---

[155] Senator Edward M. Kennedy, in discussing his sentencing guidelines bill, S. 2699, 94th Congress, said:

"It is likely that the guidelines would mandate sentences substantially less than the maximums now authorized by law. But in terms of actual time served I do not see a radical change. Nor do I perceive the possibility of the guidelines approach increasing prison populations. I suspect that sentences of imprisonment would be reserved for the more serious crimes, with petty offenders—too often the cause of overcrowded prisons—avoiding lengthy prison terms." Kennedy, "Criminal Sentencing: A Game of Chance," 60 Judicature 208 (December 1976).

[156] See note 136, *supra* and accompanying text.

[157] Chapter 309 of title 18, United States Code.

[158] 18 U.S.C. 4165.

[159] See note 103, *supra* and accompanying text.

[160] See *Wolff* v. *McDonnell*, 418 U.S. 528 (1974).

[161] Proposed amendment to Rule 11(c)(2) of the Federal Rules of Criminal Procedure.

The abolition of parole supervision would have a greater impact on the Probation System, although it would probably not result in a cost saving or reduction in the personnel level of the System.[162] While there would be no parole supervision, the Probation System would still need to provide assistance to prisoners who request it during the transition to the community. In addition, the Probation System might be required to provide assistance requested by a prisoner during a period—perhaps ninety days—immediately following his release. In providing these services, the Probation System would work closely with the halfway houses and other community-based treatment centers.[163] The cost of this program would obviously depend on the ability of the Probation System to develop programs that were viewed by the prisoners as helpful. It seems probable that many prisoners would seek the services, particularly assistance in obtaining employment, while they were still in custody, in preparation for their release. Once they had been released, however, there might be less incentive to request services from the Probation System because the programs would be entirely voluntary and the prisoner would no longer be under any form of supervision.

Even if the abolition of parole caused a reduction in supervisory responsibilities of the Probation System[164] the overall demands on the Probation System would probably not be reduced, for two reasons. First, if the Probation System did not have to supervise parolees, it would probably, and appropriately, spend more time supervising probationers. Second, there is a growing use in the Federal criminal justice system of pretrial diversion, which involves supervision by probation officers. This supervision is used for an estimated 4 or 5 percent[165] of the matters now referred to the United States Attorney's office in 32 federal districts.[166] The program will probably be used by over half the federal districts within the next year or so.

4. *Federal Court System.* The creation of the United States Sentencing Commission is the only aspect of the determinate sentencing proposal that will have a measurable impact on the resource needs of the federal courts. However, a number of other aspects of the sentencing proposals will affect the nature of sentencing proceedings and of issues before the appellate courts.

The major cost of the proposals to the Federal court system would probably be the cost of the United States Sentencing Commission itself. The proposals provide for a nine-member Commission. Those members who were not already employed by the federal government would receive compensation at the equivalent of the GS–18 daily rate, and all members would receive transportation and per diem travel expenses. The Commission would have a full time staff of experts in fields related to corrections, with a GS–16 staff director. The Commission would also have power, in connection with its duty to promulgate sentencing guidelines and policy statements, to conduct a research and development program.

It seems unlikely that the sentencing process in an individual case will have an appreciably different cost to the federal court system under the proposals than the sentencing process under current law. Rule 32(a)(1) of the Federal Rules of Criminal Procedure now requires that the defendant be permitted to make a statement in his own behalf and that defense counsel and the attorney for the government also be permitted to speak to the court. Under the proposals the

---

[162] The United States Probation System in fiscal year 1975 had a budget of $10.5 million and had 595 workyears allocated to parole matters.

[163] Under current law, a parolee or mandatory releasee may be required as a condition of release to reside in or participate in a program of a residential community treatment center. 18 U.S.C. 4209(c)(1). Thus, the Probation System already works with the Bureau of Prisons in the community treatment centers as part of its responsibility to supervise these releasees. 18 U.S.C. 3655.

[164] A probation officer now spends 8.5 percent of his time supervising parolees. (Stanley, *Prisoners Among Us: The Problem of Parole*, p. 125 (1976), citing Federal Judicial Center, Probation Time Study (February 26, 1973)) Parolees constitute approximately 20 percent of the persons supervised by a probation officer. *1976 Annual Report of the Director, Administrative Office of United States Courts*, Table 10, p. 17.

[165] Testimony of Doris Meissner Office of Policy and Planning, U.S. Department of Justice, on Pretrial Diversion before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary, September 19, 1975. Studies are in process on the effectiveness of pretrial diversion in the federal system

[166] In fiscal year 1975, pretrial diversion was used in 6 demonstration districts and 26 non-demonstration districts, resulting in pretrial diversion of 786 persons. Letter from Doris M. Meissner, Chairperson, Task Force on Pretrial Diversion, U.S. Department of Justice, to Eileen Bergsmann, Division of Probation, Administrative Office of the United States Courts, July 30, 1976.

only change that would be made in the sentencing hearing would be a requirement that the judge announce how the guidelines apply to the convicted defendant and permit the defense and prosecution to comment on the classification. Rather than requiring more time for the hearing, this change should result in focussing the hearing on the characteristics of the offense and the offender, the matters most important to the determination of an appropriate sentence.

The proposals will undoubtedly affect the decisions of defendants as to whether to plead guilty. If, for example, a defendant were charged under current law with an offense carrying a potential maximum term of imprisonment of ten years, he might be reluctant to plead guilty to the charge even if he knew (which he probably would not) that the average time served in prison by persons convicted of the same offense was substantially shorter than ten years. If a sentencing guidelines system were in use, however, he would know the recommended sentence for a person with his history and characteristics who was convicted of the same offense under similar circumstances. If he knew that the evidence against him was strong and believed that the recommended sentence was reasonable, he might be more inclined to plead guilty than under current law. On the other hand, if the defendant believed the evidence was not strong, or if he thought the sentence recommended in the guidelines was too high, he might be more inclined to go to trial.[167]

With respect to appellate review of sentences, the proposals would permit a defendant to appeal a sentence—other than a sentence consistent with a plea agreement or sentence recommendation made pursuant to Rule 11(e) of the Federal Rules of Criminal Procedure—if it exceeded the maximum applicable to the defendant under the guidelines. Appeal by the government would be permitted, with the Attorney General's approval, if the sentence were lower than that recommended in the guidelines.[168] It is difficult to estimate the cost of permitting such appellate review of sentences. It can be assumed that approximately 10 to 15 percent of the sentences will be outside the guidelines,[169] as is now the case with the parole guidelines, but for a number of reasons it seems unlikely that all of these will result in petitions for appellate review. First, the requirement of Attorney General approval should minimize the number of appeals of sentences below the guidelines. It can be expected that such appeals will be limited by Department of Justice policy to those cases where the sentence is clearly in error or where the reason for setting a sentence below the recommended guidelines range would set an undesirable precedent. Second, the sentence may not vary sufficiently from the guidelines to warrant an appeal, particularly if the sentencing judge has articulated justifiable reasons for going

---

[167] In order for the sentencing guidelines system to achieve its goal of eliminating or reducing unwarranted disparity in sentencing, it will be necessary to assure that exercises of prosecutorial discretion during the charging and plea bargaining stages of prosecution do not undermine that goal. In commenting on an earlier draft of this paper, the Bureau of Prisons, the United States Parole Commission, and the Director of Research of the Federal Judicial Center all stressed the importance of guidelines for prosecutorial discretion in the context of this proposal.

In January 1977, the Department of Justice distributed, to the United States Attorneys and their assistants, draft instructional materials relating to exercise of prosecutorial discretion in plea negotiations. Those materials emphasized the importance of accepting a plea only where the charge or charges to which the defendant pleads bear a reasonable relationship to the nature of the defendant's criminal conduct, where there is a factual basis for the charge or charges, and where the plea will allow the imposition of a sentence that is appropriate under all of the circumstances of the case. It is expected that a revised version of those materials will be promulgated well before the effective date of the new code.

[168] On March 29, 1977, the Director of the Administrative Office of United States Courts submitted to the Congress proposed legislation approved by the Judicial Conference of the United States to amend Rule 35 of the Federal Rules of Criminal Procedure to provide for appellate review of sentencing at the instigation of either the defendant or the government.

[169] A recent study on the feasibility of sentencing guidelines developed guidelines that were based on empirical research into past sentencing practices. The researchers found that knowledge of six to twelve items of information could be used to predict the sentence a judge would give in 85 percent of the criminal cases in the jurisdictions being studied. The researchers also concluded that additional items would not increase the accuracy of their predictions by a sufficiently great percentage to justify the expenditure of time and money involved in using the information in a guidelines system. Furthermore, they concluded that some departure from guidelines is inevitable:

"Since sentencing deals with an infinite variety of human behavior, it is impossible to plan in advance all possible circumstances which might arise which would justify going outside the guidelines. (If one *could* identify and include all those factors in the guidelines, the result would be a system which would be more cumbersome than that which exists today!)" Wilkins *et al.*, *Sentencing Guidelines: Structuring Judicial Discretion, Final Report of the Feasibility Study* October 1976, p. 84 (emphasis in original).

outside the guidelines. While the initial level of appeals may be fairly high, it will probably diminish substantially as a body of case law is developed concerning the appropriateness of particular reasons for sentences outside the guidelines.[170] Under a proposed amendment to Rule 35 of the Federal Rules of Criminal Procedure, there may also be claims that inaccurate categorization of the offense or offender resulted in an inappropriate sentence, although the number of such claims will probably not be great and any review of a district court determination would be discretionary.

IV. CONCLUSIONS

Enactment of the sentencing provisions of S. 1437 and H.R. 6869 would enhance the fairness and effectiveness of the federal sentencing process in several respects. First, it would shift the focus of sentencing away from the single, outmoded theory of rehabilitation and permit a more balanced approach to the end product of the criminal justice system. Second, it would provide guidance to judges in carrying out their sentencing responsibilities in a fair manner, thereby serving to eliminate unwarranted disparity at the time of sentencing. Third, it would introduce a logical division of related functions, giving sentencing judges the responsibility for evaluating the effect on a prisoner's release date that should result from factors concerning the offense and offender that are known at the time of sentencing, leaving to the Parole Commission the determination of the effect that subsequent events should have on the release date. Fourth, it would permit continued refinements in federal sentencing policy and practices through provisions for evaluating the effectiveness of the sentencing guidelines and through appellate opinions with regard to sentences outside the guidelines.

If parole were abolished in connection with these proposals, the last vestiges of indeterminate sentencing would be eliminated. The prisoner and the public would know that an announced sentence to a term of imprisonment would actually represent the length of time that a prisoner would spend in prison (except for a small period that might be subtracted for good behavior). The abolition of parole would also eliminate the current, costly duplication of effort involved in having both the sentencing judge and the Parole Commission evaluate information known at the time of sentencing, with possibly inconsistent results. The Parole Commission has been attempting to reduce unwarranted disparity in sentencing for a number of years. The use of sentencing guidelines to address this problem at the beginning of the sentencing process will make it possible to avoid unwarranted disparity in decisions whether or not to incarcerate a convicted defendant and in decisions as to release dates of prisoners who are similarly situated.

The abolition of parole would not have a deleterious effect on prison discipline or participation in institutional educational and vocational programs; in fact, it would have a favorable effect because of the certainty of the release date and the provision of an incentive to plan for the future. Finally, the elimination of parole supervision would have little, if any, effect on recidivism rates of released prisoners, but would permit probation officers to provide assistance to releasees in a context more conducive to success than now exist by virtue of the coercive nature of the parolee probation officer relationship.

---

[170] It has even been suggested that the availability of appellate review of sentences might actually reduce the burden on the courts of appeals. Some commentators believe that many groundless appeals and petitions for habeas corpus brought today probably would not be brought if the convicted defendant had a mechanism for challenging his sentence. See, e.g., Frankel, *Criminal Sentences: Law Without Order*, pp. 81–82.

ATTACHMENT A-1 PAROLE GUIDELINES*

ADULT

[Guidelines for decisionmaking, customary total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Marihuana or soft drugs, simple possession (small quantity, for own use). Minor theft (includes larceny and simple possession of stolen property less than $1,000). Walkaway	6 to 10 mo.	8 to 12 mo.	10 to 14 mo.	12 to 18 mo.
LOW MODERATE				
Alcohol law violations Counterfeit currency (passing/possession less than $1,000) Forgery/fraud (less than $1,000) Immigration law violations Income tax evasion (less than $10,000) Selective Service Act violations Theft from mail (less than $1,000)	8 to 12 mo.	12 to 16 mo.	16 to 20 mo.	20 to 28 mo.
MODERATE				
Bribery of public officials Counterfeit currency (passing/possession $1,000 to $19,999). Drugs: Marihuana, possession with intent to distribute/sale (less than $5,000). "Soft drugs possession with intent to distribute/sale" (less than $500). Embezzlement (less than $20,000) Firearms Act, possession/purchase/sale (single weapon—not sawed-off shotgun or machinegun). Income tax evasion ($10,000 to $50,000) Interstate transportation of stolen/forged securities (less than $20,000). Mailing threatening communications Misprision of felony Receiving stolen property with intent to resell (less than $20,000). Smuggling/transportation of aliens Theft/forgery/fraud ($1,000 to $19,999) Theft of motor vehicle (not multiple theft or for resale)	12 to 16 mo.	16 to 20 mo.	20 to 24 mo.	24 to 32 mo.
HIGH				
Burglary or larceny (other than embezzlement) from bank or post office. Counterfeit currency (passing/possession $20,000 to $100,000). Counterfeiting (manufacturing) Drugs: Marihuana, possession with intent to distribute/sale ($5,000 or more). "Soft drugs possession with intent to distribute/sale" ($500 to $5,000). Embezzlement ($20,000 to $100,000) Explosives, possession/transportation Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machinegun(s), or multiple weapons). Interstate transportation of stolen/forged securities ($20,000 to $100,000). Mann Act (no force—commercial purposes) Organized vehicle theft Receiving stolen property ($20,000 to $100,000) Theft/forgery/fraud ($20,000 to $100,000)	16 to 20 mo.	20 to 26 mo.	26 to 34 mo.	24 to 44 mo.
VERY HIGH				
Robbery (weapon or threat) Drugs: "Hard drugs" possession with intent to distribute/sale (no prior conviction for sale of "hard drugs)." "Soft drugs" possession with intent to distribute/sale (over $5,000). Extortion Mann Act (force) Sexual act (force)	26 to 36 mo.	36 to 48 mo.	48 to 60 mo.	60 to 72 mo.

See footnotes at end of table.

ATTACHMENT A-1 PAROLE GUIDELINES*—Continued

ADULT

[Guidelines for decisionmaking, customary total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
GREATEST				
Aggravated felony (e.g. robbery, sexual act, aggravated assault)—weapon fired or personal injury. Aircraft hijacking Drugs: "Hard drugs" possession with intent to distribute/sale for profit (prior conviction(s) for sale of "hard drugs)." Espionage Explosives (detonation) Kidnaping Willful homicide	(Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)			

NOTES

1. These guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 30 d (1 mo) for release program provision.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes. "Soft drugs" include, but are not limited to, barbiturates, amphetamines, LSD, and hashish.

* 28 C.F.R. §2.20, 41 F.R.37322 (September 3, 1976).

YOUTH AND NARA

[Guidelines for decisionmaking, customary total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Marihuana or soft drugs, simple possession (small quantity, for own use). Minor theft (includes larceny and simple possession of stolen property less than $1,000). Walkaway	6 to 10 mo.	8 to 12 mo.	10 to 14 mo.	12 to 18 mo.
LOW MODERATE				
Alcohol law violations Counterfeit currency (passing/possession less than $1,000). Forgery/fraud (less than $1,000) Immigration law violations Income tax evasion (less than $10,000) Selective Service Act violations Theft from mail (less than $1,000)	8 to 12 mo.	12 to 16 mo.	16 to 20 mo.	20 to 26 mo.
MODERATE				
Bribery of public officials Counterfeit currency (passing/possession $1,000 to $19,999). Drugs: Marihuana, possession with intent to distribute/sale (less than $5,000). "Soft drugs," possession with intent to distribute/sale (less than $500). Embezzlement (less than $20,000) Firearms Act, possession purchase sale (single weapon—not sawed-off shotgun or machinegun). Income tax evasion ($10,000 to $50,000) Interstate transportation of stolen/forged securities (less than $20,000). Mailing threatening communications Misprision of felony Receiving stolen property with intent to resell (less than $20,000). Smuggling/transporting of aliens Theft/forgery/fraud ($1,000 to $19,999) Theft of motor vehicle (not multiple theft or for resale)	9 to 13 mo.	13 to 17 mo.	17 to 21 mo.	21 to 28 mo.

See footnotes at end of table.

YOUTH AND NARA—Continued

[Guidelines for decisionmaking, customary total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
HIGH				
Burglary or larceny (other than embezzlement) from bank or post office. Counterfeit currency (passing possession $20,000 to $100,000). Counterfeiting (manufacturing). Drugs: Marihuana, possession with intent to distribute/sale ($5,000 or more). "Soft drugs," possession with intent to distribute/sale ($500 to $5,000). Embezzlement ($20,000 to $100,000). Explosives, possession/transportation. Firearms Act, possession purchase sale (sawed-off shotgun(s), machinegun(s), or multiple weapons). Interstate transportation of stolen/forged securities ($20,000 to $100,000). Mann Act (no force—commercial purposes). Organized vehicle theft. Receiving stolen property ($20,000 to $100,000). Theft/forgery/fraud ($20,000 to $100,000).	12 to 16 mo.	16 to 20 mo.	20 to 26 mo.	26 to 32 mo.
VERY HIGH				
Robbery (weapon or threat). Drugs: Hard drugs possession with intent to distribute/sale (no prior conviction for sale of hard drugs). Soft drugs possession with intent to distribute/sale (over $5,000). Extortion. Mann Act (force). Sexual act (force).	20 to 27 mo.	27 to 34 mo.	34 to 41 mo.	41 to 48 mo.
GREATEST				
Aggravated felony (e.g. robbery, sexual act, aggravated assault)—weapon fired or personal injury. Aircraft hijacking. Drugs: "Hard drugs" possession with intent to distribute/sale for profit (prior conviction(s) for sale of hard drugs). Espionage. Explosives (detonation). Kidnaping. Willful homicide.	(Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)			

NOTES

1. These guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 30 d (1 mo) for release program provision.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes. "Soft drugs" include, but are not limited to, barbiturates, anphetamines, LSD, and hashish.

ATTACHMENT A–2

SALIENT FACTOR SCORE*

Item A---------- ☐
Total score---------- ☐
(No prior convictions adult or juvenile)=3
One prior conviction=2
Two or three prior convictions=1
Four or more prior convictions=0

Item B---------- ☐
No prior incarcerations (adult or juvenile)=2
One or two prior incarcerations=1
Three or more prior incarcerations=0

Item C---------- ☐
Age at first commitment (adult or juvenile)
(26 or older)=2
(18 to 25)=1
(17 or younger)=0

Item D---------- ☐
Commitment offense did not involve auto theft or check(s)=1
Otherwise=0

Item E---------- ☐
Never had parole revoked or been committed for a new offense while on parole, and not a probation violator this time=1
Otherwise=0

Item F---------- ☐
No history of heroin or opiate dependence=1
Otherwise=0

Item G---------- ☐
Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community=1
Otherwise=0

Total score---------- ☐

*28 C.F.R. § 2.20, 42 F.R. 12045 (March 2, 1977).

ATTACHMENT B

AVERAGE SENTENCES IMPOSED AND SERVED FOR FEDERAL OFFENSES COMMITTED IN RANDOMLY SELECTED DISTRICTS

District [1] (number of judges)	Bank robbery			Securities		
	Number of cases	Average sentence served (imposed [2]) (months)	68 percent [1] sentence range (months)	Number of cases	Average sentence served (imposed [2]) (months)	68 percent sentence range (months)
Alabama, Southern (2)	5	47.8 (176.4)	38.0–57.6 (98.3–254.5)	1	33.0 (72.0)	
Oklahoma, Eastern (3)	1	32.0 (120.0)	NA	0		
Pennsylvania, Eastern (19)	50	38.4 (92.0)	22.4–54.4 (54.0–130.0)	4	12.3 (39.0)	5.0–19.6 (1.0–86.4)
Texas, Southern (8)	10	41.0 (104.4)	21.7–60.3 (61.8–147.0)	5	18.8 (44.4)	8.7–28.9 (23.1–65.7)
Virginia, Eastern (6)	25	35.6 (139.2)	17.5–53.7 (92.1–186.3)	10	17.2 (62.4)	14.8–21.6 (64.6–90.2)
Illinois, Northern (12)	21	45.3 (94.7)	19.2–64.4 (38.9–150.5)	14	24.7 (46.1)	11.5–37.9 (14.3–77.9)
New York, Southern (27)	9	13.2 (30.7)	5.2–21.2 (8.9–52.5)	19	12.2 (23.2)	3.9–20.5 (1.0–47.3)
California, Middle (16)	25	17.7 (31.1)	6.9–28.5 (10.4–51.8)	6	29.2 (50.0)	10.9–47.5 (23.0–77.0)
Georgia, Northern (6)	36	20.0 (41.4)	8.0–32.0 (19.6–63.2)	8	13.0 (33.5)	6.6–19.4 (14.5–52.5)
Missouri, Western (5)	16	15.8 (31.0)	6.7–24.9 (9.3–51.7)	6	21.7 (25.0)	3.8–39.6 (1.1–49.9)
Florida, Northern (2)	18	23.4 (48.7)	7.1–39.7 (23.6–73.8)	0		
Kansas (4)	32	27.8 (56.0)	18.5–37.1 (35.5–74.5)	10	28.3 (58.8)	11.2–45.4 (26.8–98.8)

[1] The range is derived from the standard deviation (not shown). 68 percent of all sentences given for each group of offenders are within this range.

[2] If a youth offender is sentenced under 18 U.S.C. 5010(b), the Bureau of Prisons records the sentence imposed as 6 years. If a youth offender is sentenced under 18 U.S.C. 5010(c), the record shows the actual sentence imposed.

Source: Bureau of Prisons Statistics on releasees in fiscal years 1974 and 1975.

ATTACHMENT C

MALE OFFENDERS DISCHARGED FROM PRISON DURING FISCAL YEARS 1974 AND 1975 (FEDERAL OFFENSES)

Crime	Average sentences imposed (months)	Average sentence served (months)	Percentage of imposed sentence actually served	Number of offenders
Bank robbery	129.56	45.46	35	886
Marihuana [1]	38.84	14.89	38	1,001
Auto theft	42.90	22.00	51	839
Narcotics	56.49	23.50	42	1,396
Controlled substance [1]	32.47	14.40	44	406
Securities	46.30	20.81	45	251
Embezzlement	25.82	11.80	46	156
Fraud	30.28	12.86	42	340
Forgery	37.58	19.86	53	409

[1] The parole guidelines issued Sept. 3, 1976 (41 CFR 37316) changed the rating of the offenses of possession of a small quantity of marihuana or "soft drugs" for personal use from "low moderate" to "low," thus changing previous range of sentences within the guidelines of 8 to 25 months to a new range of 6 to 18 months, depending upon the alient factor score of the particular prisoner.

Source: Office of Program Planning, U.S. Bureau of Prisons.

ATTACHMENT D

SENTENCES SERVED BY MALE BANK ROBBERS ACCORDING TO OFFENDER CHARACTERISTICS

Age	Offender characteristics [1]			Average sentence served for 1st offense (months)	Number of first offenses	Range which includes 68 percent of cases [2] (months)	Average sentence served for 2d offense [3]	Number of second offences	Average sentence served for more than 2 offenses [3]	Number of third or subsequent offenses
	Employment (months)	Marital status	Education (years)							
−26	+6	M	+12	30.1	7	20.8–39.4			42.7	3
−26	+6	M	−12	29.1	10	15.3–42.9			44.2	6
−26	+6	S	+12	26.6	5	18.7–34.5				
−26	+6	S	−12	25.7	3	15.2–35.9	42	1	36.0	1
−26	−6	M	+12	40.7	3	26.8–54.6			29.0	3
−26	−6	M	−12	30.1	7	18.3–41.9	51	1	36.9	7
−26	−6	S	+12	25.0	3	12.8–37.2			41.0	1
−26	−6	S	−12	28.7	6	19.0–37.4			40.5	2
+26	−6	M	+12	32.6	5	16.1–49.1			54.8	5
+26	−6	M	−12	31.3	3	24.4–38.2	38	1	60.8	14
+26	−6	S	+12	39.6	8	19.4–59.8			42.1	13
+26	−6	S	−12	32.0	5	22.6–41.4			50.6	16
+26	+6	M	+12	41.9	17	27.8–56.0			42.9	16
+26	+6	M	−12	33.3	12	15.6–51.0	41	1	54.4	34
+26	+6	S	+12	35.0	41	18.5–51.5			51.4	29
+26	+6	S	−12	38.9	34	15.3–62.5			51.6	77

Source: Bureau of Prisons discharge file, fiscal years 1974 and 1975.

[1] Explanations of symbols:
Age—(−26) 26 yr old or younger. (+26) over 26 yr old.
Employment—(−6) employed for 6 mo or less on last job in the 2 yr prior to commitment. (+6) employed for more than 6 mo on last job in the 2 yr prior to commitment.
Marital status—(M) married at time of commitment. (S) single, separated, divorced, or widowed at time of commitment.
Education—(−12) less than a high school degree. (+12) high school degree or more.

[2] The range was determined by use of the standard deviation (not shown). 68 percent of all sentences given for each group of offenders are within this range.

[3] The most recent conviction was for bank robbery; previous convictions considered in this chart were for felonies.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES,
Washington, D.C., June 23, 1977.

Hon. GRIFFIN B. BELL,
Attorney General of the United States,
Department of Justice, Washington, D.C.

DEAR GENERAL BELL: Enclosed is a copy of the statement of the American Civil Liberties Union and The Reporters' Committee for Freedom of the Press submitted in hearings before the Subcommittee on Criminal Laws and Procedures on S. 1437, the "Criminal Code Reform Act of 1977".

It would be most helpful to the Committee to have for the record your comments with respect to the issues raised in these statements. Since the record will be closed July 15, 1977, I would appreciate your observations before that date.

With kindest regards, I am

Sincerely yours,

JOHN L. MCCLELLAN.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to your request, there are enclosed two series of Departmental comments concerning suggestions for the modification of S. 1437 that have been made in statements filed with your Subcommittee by the American Civil Liberties Union and by the Legal Defense and Research Fund of the Reporters Committee for Freedom of the Press.

The suggestions made by the ACLU and the Reporter's Committee are directed largely to obtaining change in particular provisions of the new Code that would carry forward the existing state of the federal criminal law. The fact that certain Code provisions are derived from existing law, of course does not necessarily mean that they reflect the best possible approach to the issues involved. It may mean, for example, that difficulty may have been anticipated in securing congressional agreement as to the need for change in the law, and, if need were established, agreement as to the direction which any change should take. As you know, that difficulty did arise with respect to many of the particular issues that have been raised in the statements. The Code provisions in those areas adopted the existing law approach because it was a reasonable and acceptable middleground.

What is really needed at this time is an integrated, workable basic structure for the federal criminal code, together with such substantive changes from current law as can generally be agreed upon. Other specific changes may then be made, within that structure, in the future.

Both series of comments follow the order of the subjects as they appear in the statements. We appreciate the additional time that has been afforded for the review of the statements, and hope that the comments will prove helpful to the Judiciary Committee in the course of its work.[1]

We look forward to early Senate passage of S. 1437.

Sincerely,

GRIFFIN B. BELL, *Attorney General.*

Enclosures.

---

[1] The comments by the Attorney General were not provided until after the Subcommittee reported the bill to the Committee on the Judiciary on August 5, 1977, and include observations on the bill as reported.

COMMENTS ON ACLU SUGGESTIONS CONCERNING S. 1437

1. *ACLU recommendation.*—The ACLU suggests that section 401(a) relating to accomplice liability, should be narrowed by eliminating the term "counsel" from the definition of "abet".

Comment.—The word "counsel", which appears in the existing statute pertaining to accomplice liability (18 U.S.C. 2), was carried forward in the bill in order to parallel the current scope of the law. In the August 4 Committee Print of S. 1437, however, the term has been deleted from the definition of "abet" for the reason that "counseling" is included in the concept of "aids", also proscribed in section 401. Counseling will still be covered by the Code, but the new version clarifies the fact that it is covered only to the extent that it constitutes aiding, as proposed by the Brown Commission.

2. *ACLU recommendation.*—The ACLU suggests that section 401(b), which carries forward the "*Pinkerton*" doctrine under which conspirators may be held liable for the "reasonably foreseeable" substantive crimes committed by their fellow conspirators, should be eliminated.

Comment.—The rule announced by Justice Douglas in the case of *Pinkerton* v. *United States*, 328 U.S. 640, is predicated on the hypothesis that a person who sets in motion a chain of criminal events by agreeing with others to perform one or more illegal acts should be liable for other crimes that foreseeably are committed by the members of the conspiracy (e.g., stealing a car for use as the escape vehicle in connection with an agreed-upon bank robbery). It is a reasonable principle of criminal liability, and has proved useful in a variety of situations where most observers would agree that criminal responsibility should be recognized. S. 1437 narrows the theoretical reach of the *Pinkerton* doctrine somewhat by adopting the dictum in the case and making it clear that the crime not only must be reasonably foreseeable but must be committed "in furtherance of the conspiracy".

3. *ACLU recommendation.*—The ACLU suggests that section 404(b), which provides that it is not a defense to a charge of accomplice liability that the accomplice's principal has been acquitted, should be deleted (and suggests that the same deletion should be made in section 1002(c) which precludes a similar defense in the conspiracy context).

Comment.—This aspect of S. 1437 is consistent with existing case law. See *United States* v. *Bryan*, 483 F. 2d 88, 93–94 (3d) Cir. 1973). Such a provision was recommended by the Brown Commission and has been included in several recent state codes.

A contrary rule, automatically extinguishing criminal liability for an accomplice if the principal is acquitted, would appear to be proper if the acquittal was on the ground of lack of proof of the principal's guilt of an offense beyond a reasonable doubt, but would not appear to be proper if the basis for the principal's acquittal was, for example, a defense of insanity. Protection today to a defendant in the former situation is provided by the doctrine of collateral estoppel, a doctrine that would still be available under the Code.

Nor would a required acquittal of an accomplice appear proper if the principal's acquittal is predicated on the inadmissability of certain evidence as to which only the principal had standing to object (e.g. incriminating evidence obtained during an overly-broad search of the principal's house). In such a situation the principal's acquittal would have nothing to do with his guilt or innocence. Avoiding a mandatory acquittal in such a situation does not undermine the exclusionary rule, which today is conditioned on standing so that only a person whose privacy rights were infringed by an illegal search may invoke the deterrent consequence of precluding jury consideration of the resulting evidence. Thus, if an accomplice and his principal, or two coconspirators, are jointly tried, only the party aggrieved is entitled to have illegally obtained evidence suppressed (e.g., *Alderman* v. *United States*, 394 U.S. 165), and there is no reason to alter the rule if they are tried separately. S. 1437 is consistent with this rule.

It should be noted that no objection is made to the doctrine in current law (carried forward in section 401(b)) that it is no defense for an accomplice that the principal was immune from prosecution (e.g., because of incompetence, diplomatic immunity, etc.). Similarly, it should not be a defense that the principal was acquitted, if the reason for the acquittal was unrelated to a determination of innocence on the merits.

4. *ACLU recommendation.*—The ACLU suggests that section 1001 should be modified to make the test for an attempt whether the conduct constituted a "substantial step towards completion of the crime. It also suggests that the renunciation defense (which appears in the conspiracy section as well) is too narrow to be of value.

Comment.—The formulation of attempt in S. 1437—i.e. intentional conduct that "amounts to more than mere preparation for the commission of the crime, and that indicates [the defendant's] intent that the crime be completed"—differs substantively very little from the "substantial step" test. Of the two approaches, the Code formulation appears to be the more accurate synthesis of present federal case law.

The renunciation defense excuses conduct, otherwise criminal, in a case where a defendant voluntarily has averted the actual commission of the offense he originally planned. It provides an incentive for persons to stop criminal conduct. It is new to the law, and appears to be of reasonable and useful scope.

5. *ACLU recommendation.*—While implicitly recognizing that the Code carries forward the present formulation of the conspiracy offense (18 U.S.C. 371)—i.e. an agreement to commit a crime plus an overt act intended to effect an object of that agreement—the ACLU suggests that the Code should undertake to discourage abusive conspiracy prosecutions by narrowing the offense to require one of the conspirators to have taken a "substantial step" toward completion of the conspiratorial goal.

Comments.—The present formulation of the conspiracy offense is a reasonable one, and is no more subject to potential abuse than a variety of other accepted statutes. The Supreme Court has repeatedly expressed its view that the offense serves significant interests in protecting society. E.g., *United States* v. *Feola*, 420 U.S. 671. Moreover, it should be noted that S. 1437 somewhat narrows current federal law by making applicable to all conspiracy offenses the section 1002 requirement of proof of an overt act. Present federal law contains a number of conspiracy statutes apart from 18 U.S.C. 371—for example the ones applicable to narcotic offenses, 21 U.S.C. 846 and 963—that require proof merely of an unlawful agreement without the need to show any overt act in furtherance of the conspiracy.

6. *ACLU recommendation.*—The ACLU opposes the solicitation offenses in section 1003 on grounds of First Amendment considerations and overbreadth.

Comment.—Solicitation of a crime is no more pure, protected speech than is perjury or offering a bribe. As Professor Thomas Emerson has noted:

Most crimes * * * involve the use of speech or other communication. Where the communication is an integral part of a course of criminal action, it is treated as action and receives no protection under the First Amendment. * * * [T]he applicable legal doctrine [in solicitation] undertakes to draw the line between 'expression' and 'action.' The fact that issues of this nature rarely arise indicates that establishing the division between free expreession and solicitation to crime has not created a serious problem.

No examples of overbreadth are provided except for a general assertion that soliciting a misdemeanor should not be an offense. The basis for such a distinction is not apparent. Certainly the solicitation of a violation of many regulatory misdemeanors in such areas as environmental quality or food and drug purity would be a serious matter.

7. *ACLU recommendation.*—The ACLU raises a general objection to section 1111, dealing with sabotage, on First Amendment grounds. It states that the section should be amended to require that the property covered—i.e., property used in or "particularly suited for use in the national defense"—also be required to be "designated" for such use, or alternatively that the suitability of the property be made subject to a "knowing" rather than a "reckless" standard of culpability. The ACLU also proposes the limitation of section 1112, dealing with impairing military effectiveness, to time of war.

Comment.—The First Amendment assertions do not take into account the requirement of the section that the conduct be accompanied by a specific "intent to impair, interfere with, or obstruct" war or defense activities. Accordingly, the example of an anti-war demonstration which coincidentally obstructs traffic certainly would not be covered by the section.

The requirement that the property be "designated," as well as "particularly suited" for the national defense has already been incorporated in the section's provision relating to public facilities. In the provision relating to government property, such a requirement would inappropriately narrow current law (18

U.S.C. 2151–2156), since the property's federal ownership and defense utility should be sufficient to place persons on notice that it is an appropriate subject for statutory protection. The formulation of property "particularly suited" for use in the national defense is a fair synthesis of the terms used to describe categories of property employed in the present statutes.

The suggestion that the culpability concerning the property's status be elevated to "knowing" does not appear to be warranted. A person who, as section 111 requires, "with intent to impair, interfere with, or obstruct the ability of the United States * * * to prepare for or to engage in defense activities, damages, tampers with, contaminates, defectively makes, or defectively repairs" property should not also have to be shown specifically to know that the property is particularly suited for use in the national defense in order to be guilty of sabotage. It should be enough that he is "reckless" as to the nature of that property—recklessness being defined in S. 1437 to require proof that the defendant was aware of but disregarded, a risk that the property is of the type covered, under circumstances demonstrating that such disregard constituted a gross deviation from the standard of care that a reasonable person would utilize.

Finally, to limit the application of 1112 to wartime would constitute a major contraction of present law, which applies not only in wartime but in time of declared national emergency (18 U.S.C. 2153, 2154) and in time of peace (18 U.S.C. 2155). See *United States* v. *Bishop*, 555 F. 2d 77 (10th Cir. 1977). In view of the importance of the nation's being able to deter hostilities as well as to defend against them, there is clear reason to retain the present coverage.

8. *ACLU recommendation.*—The ACLU, with regard to the Code's carrying forward of present statutes relating to espionage, suggests making clear in the legislative history that proof of intent to injure the national defense is an essential element of espionage. It also suggests that the word "communicate" is defined too broadly in section 111 to reflect the proper scope of the term as used in the espionage statutes.

Comment.—The current espionage statutes use the language "with intent *or reason to believe*" that the information disclosed is to be used to the injury of the United States. 18 U.S.C. 793, 794. The proposed addition to the "legislative history" would therefore be at odds with the clear coverage of the existing statutes. It would also be at odds with the bill's design of carrying forward the exact state of the current law in this area, a device that was found necessary to avoid potential conflicts concerning the manner in which the coverage of existing law should be changed.

With regard to the section 111 definition of "communicate", the definitions of that section do not apply to offenses retained outside the new Title 18.

9. *ACLU recommendation.*—To make it clear that section 1301 of the Code cannot be "used to prosecute legitimate journalistic activities," the ACLU suggests that the section be limited to "material" obstructions of government functions through fraudulent means and that defenses be added excluding liability for such obstructions where the "primary purpose" is the dissemination of information to the public.

Comment.—Addition of the word "material" would tend to confuse the application of the statute, which continues current law (18 U.S.C. 371). For example, the prompt delivery of five dollars worth of food stamps might be material to a person in need, while a few days delay in the delivery of a multimillion dollar bomber might not result in any real inconvenience. If a person specifically intends to obstruct a government function through fraudulent means, it seems clear that he, at least, regards the function as material. Proof of this element beyond a reasonable doubt should suffice to limit the application of the statute to appropriate bounds.

Excluding liability for obstructing "lawful" government functions by fraudulent means would encourage out-of-court testing of the legitimacy of private, subjective interpretations of law. If a government function is thought to be unlawful, the civil law provides the forum for testing the legality of the function. There appears to be no reason to provide an incentive to fraud as a device for testing the validity of a government act.

It is unclear why it is thought that there should be a defense for situations where the primary purpose of a fraud is news dissemination. The section requires a specific intent to obstruct a government function by fraud and that intent would have to be proven beyond a reasonable doubt. It is difficult to envision a situation in which a defendant's specific intent is to obstruct a government function by fraud but his primary purpose is to disseminate information to the public.

10. *ACLU recommendation.*—The ACLU proposes that the preclusion of a defense in section 1311(e) be removed out of concern that the section's coverage of "concealing [a fugitive] or his identity" might otherwise be construed to reach a journalist who refuses to divulge the identity of a news source who is a fugitive.

Comment.—The section does not reach anyone who merely refuses to identify a fugitive. As the draft Senate report on the bill makes clear, only affirmative acts of concealment are covered, as is the case under current law.

11. *ACLU recommendation.*—In section 1344 (Tampering with a Government Record), the ACLU suggests that the phrase "otherwise impairs the integrity of a government record" could be interpreted to criminalize unauthorized photocopying of a record even if the document was not removed from government premises or altered in any way. It proposes a clarifying amendment or legislative history disavowing such an interpretation.

Comment.—The draft Senate report on the bill expressly disavows such an interpretation, as have the courts with regard to the current statute. See *United States* v. *Rosner*, 325 F. Supp. 515 (S.D.N.Y., 1972), aff'd and remanded for resentencing, 485 F. 2d 1213 (2d Cir. 1973).

12. *ACLU recommendation.*—The ACLU proposes a journalist's privilege to the offense of retaliating against a public servant where the offense is committed through economic injury rather than physical injury.

Comment.—The suggestion has been mooted by the deletion, in the August 4 Committee Print of S. 1437, of this aspect of the offense.

13. *ACLU recommendation.*—The ACLU proposes deleting paragraph (1) of section 1302(a), punishing the intentional obstruction or impairment, by means of physical interference or obstacle, of the performance by a federal public servant of an official duty. The ACLU suggests that there be substituted a provision comparable to 18 U.S.C. 1114, which lists various classes of public servants who are covered by the proscriptions of 18 U.S.C. 111 against physical interference with official duties.

Comment.—Current federal law contains many statutes besides 18 U.S.C. 111 and 1114 that punish intentional interference with the performance of official duties by particular classes of federal servants. The purpose of section 1302 is to combine these provisions and to fill unwarranted gaps in coverage. The section is designed, therefore, to expand current law, which is erratic and inconsistent in its scope. The Brown Commission's Final Report and the Model Penal Code contained a similar coverage. The provision seems reasonable, and its specific intent requirement limits its application to appropriate bounds.

14. *ACLU recommendation.*—Section 1328 deals with demonstrations intended to influence judicial proceedings. The ACLU suggests that it be limited to cover such demonstrations only while court is in session, and even then only if the demonstration actually disrupts the session by unreasonable noise, obstruction of access, or threat of force.

Comment.—The bill provides a defense if court was not in session (including a half hour before and after a session) and if the conduct did not involve the specific kinds of conduct the ACLU would prohibit. It does, however, cover demonstrations while the court is in session, whether or not an actual disruption is apparent. The purpose is to avoid improper pressures designed to influence judges and juries in carrying out their often-difficult responsibilities. Criminal and civil cases must be decided on the basis of facts established under the rules of evidence in the courtroom—not on the basis of pressures by demonstrators, no matter how worthy their motivation. As long as the described conduct takes place in the specific intent of influencing the judicial proceeding, this offense appropriately should continue to be recognized by the criminal code.

15. *ACLU recommendation.*—Section 1331 of S. 1437 as introduced created an affirmative defense to contempt of a court order if the order was "clearly invalid" and if the defendant "did not have a reasonable opportunity to obtain a judicial review or a stay thereof prior to the disobedience or resistance charged." The ACLU suggests the substitution of "or" for "and" in this defense so that, *inter alia*, disobedience of a "clearly invalid" order would not be an offense. The ACLU also expresses concern that the provision permitting a separate prosecution for a substantive offense involved in the contempt, e.g., assault on a juror, may raise double jeopardy problems.

Comment.—It is settled law that the invalidity of a court's order is no defense to a charge of contempt for disobedience of the order. The rationale is that recourse to the courts through the appellate process is the only legally tolerable

means of challenging a judicial order. It is debatable whether federal law now even recognizes an exception for "transparently" unlawful orders as the ACLU assumes. The affirmative defense created in the August 4 Committee Print of S. 1437, which is somewhat modified from that in the bill as introduced, is in any event carefully framed to accommodate the competing interests at stake. By allowing a defense only when the order is clearly invalid *and* recourse to the appellate process has proven ineffective, the provision does not encourage resort to self-help while it does permit a defendant to rid himself of criminal liability for disobedience of a plainly invalid order when such obedience is the only effective means of vindicating the right at issue. By contrast, the ACLU's proposal would encourage some defendants to risk a violation of a court's order based on an assessment of its "clear" invalidity, irrespective of the opportunity to appeal, and would, on the other hand, denigrate the authority and respect due judicial orders that are not "clearly invalid" by allowing a defense merely because no appeal is immediately available.

The suggestion that double jeopardy problems arise from allowing prosecution for a specific offense as well as the contempt has not been supported by the courts. See, e.g., *Yancey* v. *McCracken*, 294 U.S. 125 (1935); *United States* v. *Rollerson*, 449 F. 2d 1069 (D.C. Cir. 1971). In any event, credit is given in the section for time served on the underlying offensive.

16. *ACLU recommendation.*—The ACLU suggests the amendment of section 1343, insofar as it covers oral false statements to law enforcement officers, by limiting the offense to instances involving "false alarms or a person's intentional false implication of another person in the commission of a crime."

Comment.—The ACLU correctly points out that a conflict in case law exists whether the principal, present federal false statement statute reaches oral false statements to law enforcement agents. The great weight of such case authority, however, is in favor of such coverage. *United States* v. *Adler*, 380 F. 2d 917 (2d Cir.); *United States* v. *Lambert*, 501 F. 2d 943 (5th Cir.) (en banc); *United States* v. *Goldfine*, 538 F. 2d 815 (9th Cir.); *contra*, *Friedman* v. *United States*, 374 F. 2d 363 (8th Cir.). See generally *United States* v. *Chevoor*, 526 F. 2d 178, 182–183 (1st Cir.). The position taken in section 1343 of S. 1437 substantially restricts such current law application by conditioning coverage of oral false statements on proof (1) that the defendant knew the person to whom the falsehood is told is a law enforcement agent, and (2) that the statement is volunteered or is made after the defendant has been advised that making such a false statement is an offense. These limitations seem to represent more appropriate boundaries for the offense than the narower ones suggested by the ACLU. Persons should not be able to lie with impunity to an individual known to be a law enforcement agent, since such a lie, whether or not it consists of implicating another person in an offense, may cause the agent, or the agency for which he works, to commence an investigation and thereby waste or divert valuable resources and needlessly embarrass other persons. The limitations in the Code also guard against the situation of a law enforcement officer seeking to trap an unwary target into a falsehood; the requirement of knowledge of the status of the person as an officer, and the requirement that the statement be volunteered or made after a warning, protect against official overreaching.

17. *ACLU recommendations.*—The ACLU suggests that gratuitous transfers of small amounts of marihuana should be decriminalized along with simple possession. It further suggests that criminal punishment of drug addicts is unconstitutional.

Comment.—Sections 1812 and 1813 of S. 1437 decriminalize federally both the simple possession and gratuitous transfer of ten grams or less of marihuana, thus according in part with the ACLU recommendation. Possession or gratuitous transfer of more than ten grams is punishable by up to thirty days in prison and a $500 fine, a material reduction from the current penalty of one year's imprisonment and a $5,000 fine.

The suggestion that drug addicts may not constitutionally be held liable for drug offenses has not been supported by the federal courts. See *Powell* v. *Texas*, 392 U.S. 514 (1968); *United States* v. *Moore*, 486 F.2d 1139 (D.C. Cir), cert. denied, 414 U.S. 980 (1973).

18. *ACLU recommendation.*—S. 1437, in section 111, defines "incite" as "to urge other persons to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct." The ACLU, in connection with the offense of inciting a riot under section 1831, suggests amending the definition to insert a requirement that the actor know,

rather than be reckless as to the fact, that the circumstances are such that there is a substantial likelihood of his imminently causing a riot. It also suggests that the offenses of leading a riot (section 1831) and engaging in a riot (section 1833) are too vague.

Comment.—The bill's definition is taken from the Supreme Court's decision in *Brandenburg* v. *Ohio*, 395 U.S. 444. It appropriately uses a reckless rather than a knowing culpability standard as to the nature of the surrounding circumstances in which the actor's conduct occurs. A "knowing" standard would seem to be too high, in view of the definition of "riot" as a public disturbance that involves violent and tumultuous conduct, that involves ten or more participants, and that causes, or creates a grave danger of imminently causing, injury to persons or damage to property (section 1834). It appears proper to render liable for inciting a riot a person who knows that he is urging an imminent public disturbance that involves violent and tumultuous conduct and who disregards a known risk that the number of participants in the group being incited is ten or more and that the danger of injury to persons or property being imminently created is "grave".

As to the vagueness allegations raised with regard to sections 1831 and 1833, the sections seem to be adequately clear. "Riot" is carefully defined in section 1834, and "leads," "gives commands, instructions, or directions in furtherance of", and "engages in" are words of common understanding. The draft Senate report on the bill makes it evident that merely being swept up in a riot is insufficient to constitute an offense under section 1833.

19. *ACLU recommendation.*—The ACLU urges that the obscenity offense (section 1842) be deleted. It then states that at least the venue provisions should be modified to reduce the liability of defendants to prosecution in any one of several districts that may have a connection with the offense.

Comments.—The retention of some form of federal obscenity offense may be necessary to assure a reasonable supplement to state proscriptions in this area. It is worthy of note that the provision in S. 1437 considerably narrows the reach of present federal law by punishing only commercial dissemination of obscene matter, or its distribution to minors, or its display in such a manner as not to permit persons to avoid exposure to it. Mere possession of, or profitless transactions in, obscene material among consenting adults—penalized under current law—are eliminated from the purview of the Code.

S. 1437's venue provisions applicable to this section (3311) carry forward present 18 U.S.C. 3237(a), which provides that any "offense involving the use of the mails, or transportation in interstate or foreign commerce . . . may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves." To be sure, just as is the case with mail fraud and other crimes, this often permits the commencement of a prosecution in any of several districts with which the offense is connected. To avoid too tenuous an interconnection, however, the August 4 Committee Print restricts the districts in which a prosecution may be initiated for a conspiracy to violate the obscenity section (section 3311(b)).

20. *ACLU recommendation.*—The ACLU objects to various aspects of the infraction offense in the Code concerning failure to obey a public safety order. The ACLU asserts that the phrase "or other condition that creates a risk of serious injury," which appears after the words "fire, flood, riot," is too vague and should be deleted; that authority to issue public safety orders should be more confined; and that the offense should carry no criminal penalty but instead should be a civil violation subjecting the offender to a "minimal" fine.

Comment.—The offense provides that a person is guilty of an offense if he disobeys an order of a public servant to move, disperse, or refrain from specified activity in a particular place, and the order: "(1) is issued in response to a fire, flood, riot, or other condition that creates a risk of serious injury to a person or serious damage to property; and (2) is, in fact, lawful and reasonably designed to prevent serious bodily injury to a person or serious damage to property." The offense carries a maximum penalty of five days in prison and a fine of $1,000.

The "or other condition" clause is not vague in its context, and plainly is needed to cover a variety of miscellaneous situations, such as law enforcement efforts to apprehend a sniper, where public safety is jeopardized.

The concern that personnel without authority to act might be granted broad powers by the section is not supported by the section's language. The section's requirement that the order in fact be lawful precludes its application to a situation in which an order is issued by a person without authority to do so. That

provision, in combination with the requirement that the order be "reasonably designed" to safeguard the interests at stake, constitute ample protections against overreaching by officials who are not authorized to exercise authority in the circumstances or who are abusing authority that has been conferred.

The suggestion that the offense should be a "civil violation" does not adequately recognize the exigencies of such situations. The situations in which such orders may need to be issued are, by definition, of a kind in which compliance with the order is essential if serious personal injury or property damage is to be avoided. Thus, providing that a refusal to obey a lawful public safety order is a criminal offense—even though a minor one—is needed to insure that, when necessary, an arrest can take place to remove a recalcitrant individual from a location where he is interfering with the difficult work of public safety officers such as firefighters, civil defense personnel, bomb squad experts, or law enforcement agents.

21. *ACLU recommendation.*—The ACLU questions whether it is appropriate for Congress to delegate to a commission the function of developing sentencing guidelines. It also suggests that the Code should not be enacted until the sentencing commission has made its report to Congress and Congress has had an opportunity to review the commission's proposals. It further suggests that the commission be required to submit its guidelines within a set period of time.

Comment.—The Code's proposal for a sentencing guidelines commission (which is established as an agency in the Judicial Branch) contemplates an active congressional review of the guidelines. Under 28 U.S.C. 994(k), as it would be added by the August 4 Committee Print of S. 1437, the Congress would have 180 days to review, revise, and vote on the guidelines after they had been submitted by the sentencing commission. This system is similar to that in effect with respect to the promulgation by the judiciary of Rules of Criminal Procedure, and would seem to afford Congress an adequate opportunity for review so as to meet any claims of improper delegation.

There is no reason to delay passage of the Code until the sentecing guidelines have been promulgated. The Code carries a two-year delayed effective date. That period should be sufficient to permit the sentencing commission to complete its development of sentencing guidelines and to permit their consideration by the Congress. If two years proves to be insufficient, the Congress may decide at a later time whether to extend the Code's effective date, or to permit it to take effect with the sentencing decisions continuing to be made, as they are now, by judges without the benefit of the guidelines until such time as the guidelines are established. There is, in any event, no reason to delay enactment of the Code.

The bill probably should, as the ACLU suggests, provide a fixed time within which the commission is to submit its proposed guidelines. A one-year period, however, is probably too short.

22. *ACLU recommendations.*—The ACLU suggests that an opportunity has been lost in the Code to reexamine the wiretap authorization statutes (18 U.S.C. 2510–2520).

Comment.—As the ACLU recognizes, S. 1437 essentially recodifies current law in this area. This is partly the result of a decision, first made by the Brown Commission, to avoid any attempt at this time to undertake major procedural reform as opposed to substantive reform. It is also partly the result of a decision to resolve controversial areas by adopting current law. In light of the strong and divergent views in this area concerning matters of fact (e.g., court-authorized wiretapping being "remarkably unsuccessful" as an investigative tool) and matters of policy, it seems appropriate, as in the national security area, to retain current law.

23. *ACLU recommendations.*—The ACLU notes in passing that the Code restates the existing statutes on compulsion of witnesses' testimony (18 U.S.C. 6001–6005), which the ACLU opposes.

Comments.—The present statutes, which provide for the conferring of "use immunity", date from 1970 when the Congress enacted this Brown Commission proposal to replace a number of laws that conferred "transactional" immunity. The Supreme Court has sustained the constitutionality of these provisions, and experience has demonstrated their superiority over the previous system. See also *Lefkowitz* v. *Cunningham*, — U.S. — (decided June 13, 1977). Irrespective of the merits, moreover, this is another procedural area in which it is understood that no change from the present laws could be agreed upon at this time.

24. *ACLU recommendations.*—The ACLU suggests that the basic six-month period of custody that S. 1437 (section 3611) provides for a determination

of competence to stand trial, while reasonable for persons charged with a felony, is too long a period as applied to accused misdemeanants.

Comment.—Just as the Code makes no distinction between the time needed to determine mental competency depending upon the grade of felony charged (i.e., Class E to Class A carrying a range of maximum incarceration from three years to life) so it makes no distinction between accused misdemeanants and felons in this respect. Rather the time period selected, while necessarily arbitrary to a certain extent, is based upon an assessment of what length of observation may be needed to determine "whether there is a substantial probability that in the foreseeable future [the defendant] will attain the capacity to permit the trial to proceed." The six-month interval adopted by the Code is not unreasonable in this context.

25. *ACLU recommendation.*—The ACLU suggests that the Code should not permit any Federal retention of custody over an individual who has been found not guilty by reason of insanity.

Comment.—S. 1437 does permit civil custody and hospitalization—contrary to current federal law except in the District of Columbia—but only after there has been a judicial determination at a hearing, based upon "clear and convincing evidence," that the person "is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another", and only if the person's state of domicile will not assume responsibility for his custody, care, and treatment (section 3613). The detention may continue only until the person has recovered to the extent that he no longer poses such a danger or until he can be turned over to state authorities. The Code takes the position, in short, that in these circumstances it is preferable to continue federal custody over a dangerously disturbed individual than to release him on the streets. The lack in present federal law of any such residual commitment authority is an unwarranted gap that poses a serious, albeit only occasional, threat to the public safety. Such a proposal was suggested by the Brown Commission staff and was also suggested by the Judicial Conference.

26. *ACLU recommendation.*—The ACLU objects to the fact that the S. 1437 carries forward, in sections 3713 and 3714, procedural provisions of current law (18 U.S.C. 3501, 3577) relating to the admissibility of confessions and of evidence in sentencing proceedings.

Comment.—The ACLU asserts that section 3713 "is an attempt . . . to undercut the *Miranda* decision." *Miranda*, however, is predicated on constitutional grounds, and any legislative attempt to override that decision would be fruitless. Moreover, section 3713, like the present statute, contains several useful provisions that plainly do not pertain to *Miranda* situations. In any event, the Code adds a new clause at the outset of the statute ("Unless otherwise required by the Constitution") to insure that it is not construed as an effort to overrule *Miranda*.

Section 3714 continues the existing law that "no limitation shall be placed on the information . . . which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence" (18 U.S.C. 3577). Although the Federal Rules of Evidence contain a provision for their own inapplicability to sentencing proceedings (Rule 1101(d)(3)), there is no statute apart from this that indicates the principle of evidence that does apply. The broad principle carried forward by this section is a reasonable means of assuring as informed a sentencing decision as is possible, and the importance of such informed decisions appears to outweigh any reasons for extending the technical rules of evidence to control defense and prosecution information pertinent to punishment. See, e.g., *United States* v. *Lee*, 540 F. 2d 1205, 1212 (4th Cir.).

27. *ACLU recommendation.*—The ACLU suggests that the legislative history of section 1525 (revealing information submitted for a government purpose) express the intent of precluding offenses based on release of internally generated documents or of documents available under the Freedom of Information Act or under the Federal Rules of Civil Procedure.

Comment.—Documents which must be produced under the Freedom of Information Act or the civil rules are clearly not documents released in violation of a specific duty, as the offense requires, and thus do not come within the statutory proscription. The draft Senate Report makes this clear. It also makes clear that most forms of internally generated documents are not covered. However, some internal documents would appropriately be covered, such as taxpayer data that is put on another form, or computerized and printed out. It is the information

given in confidence which needs protection, not the particular sheet of paper on which it arrives.

28. *ACLU recommendations.*—The ACLU suggests amending the bar to prosecution in section 1739 to make clear that a reporter's normal salary is not meant to be included in the "anything of value" exclusion from the defense.

Comment.—The requirement that a person, in order to avail himself of the bar to prosecution for theft or receiving stolen property, did not derive "anything of value" from obtaining, using, or disseminating the information to the public, has been deleted in the August 4 Committee Print of S. 1437. The bar to prosecution in section 1739 now requires, in this respect, only that the defendant obtained or used the property primarily for the purpose of disseminating it to the public.

COMMENTS ON REPORTERS COMMITTEE SUGGESTIONS CONCERNING S. 1437

1. *Reporters committee recommendations.*—Section 1358 seeks to protect public servants from retaliatory acts taken against them or others because of their official actions or status as public servants. In S. 1437, as introduced, the acts can be physical or economic. The Reports Committee objects to the provision concerning economic retaliation, since it construes the provision to reach press criticisms which may be found to lead to economic loss.

Comment.—The protection from economic retaliation appeared in S. 1437 as a result of a gap in existing coverage demonstrated by an incident in which an attempt was purportedly made to fire a federal employee because he had testified forthrightly before a congressional committee investigating serious cost overruns in defense contracts. It is difficult to see how the provision could be applied as the Reporters Committee suggests. Nevertheless, the issue is now moot, since this provision has been eliminated from the August 4 Committee Print of S. 1437.

2. *Reporters committee recommendations.*—Sections 1331 and 1335 continue the present statutory coverage of acts in the nature of contempt of court, but provide an express exception to liability if the order disobeyed was clearly invalid and the defendant took reasonable and expeditious steps to obtain a review or stay of the order but was unsuccessful in doing so. The Reporters Committee states that orders restraining the press are always invalid unless the actions of the press would present a clear and present danger to the national security, and that as "an absolute minimum, it can be no federal crime to publish in violation of an illegal gag order." The Committee apparently opposes both the formulation of the contempt offenses and the defenses.

Comment.—The contempt offenses in S. 1437 do not change current law, and they certainly have no special application to news reporters. As under existing law, the First Amendment would continue, of course, to confine narrowly the circumstances under which an injunctive order can be issued against the press. Accordingly, it is unclear just what argument the Reporters' Committee is attempting to make in suggesting that the new Code would foster an unwelcome change.

If the Committee's objection is directed to the formulation of the new statutory defense, it apparently is of the view that an intended protection that does not go as far as the Committee believes warranted is worse than no protection. It would be surprising if this were so in this situation, but deference probably should be paid to those groups whose members conceivably would have a principal interest in the subject. Before acting with regard to this issue, however, the Congress should be careful to ascertain whether dropping the defense would in fact be favored by the news reporting community, and whether in any event it would be in the general interest to maintain the defense for the benefit of others.

3. *Reporters committee recommendations.*—The Reporters Committee asserts that section 1331 would improperly apply to a reporter who willfully disobeys a court order to reveal sources or disclose notes.

Comments.—Section 1331, the general contempt section, applies to any person just as does its current law counterpart (18 U.S.C. 401). Neither reporters nor other groups of individuals are singled out by the statute for special application. The Committee does not identify the manner in which it would seek to change the statute, unless it means to debate the new defense.

4. *Reporters committee recommendation.*—Section 1333 punished persons who refuse a court or congressional order to provide testimony or evidence without any legal privilege to do so. The Reporters Committee objects to the section, asserting that a civil contempt provision is all that is needed and that a criminal provision is unnecessary.

Comments.—A potential witness who refuses without privilege to answer proper questions may deprive the courts or the Congress of important information, perhaps resulting in the permanent failure of an investigation or trial. In addition to the civil contempt power designed to induce a witness to testify, employment of the criminal contempt provisions occasionally is warranted. There appears to be no reason to change the existing law in this regard.

5. *Reporters committee recommendation.*—Section 1311 covers any person who, among other things, conceals or destroys records, or conceals a person's identity, and thereby interferes with the apprehension, prosecution, conviction, or punishment of a person who he knows has committed or is being sought for a crime. It is no defense under the section that any concealed records eventually turn out to be inadmissible because of privilege or otherwise.

The Reporters Committee opposes the section on the grounds that it would cover the act of concealing a record even if harmless because the record was inadmissible, and that it would cover reporters who simply decline to reveal their sources.

Comment.—As to the first objection, an individual, reporter or otherwise, cannot be permitted to make an unreviewable determination of the law which may affect the outcome of another person's criminal trial. Destruction of a record is a final act. Concealment of a record may be equally serious, as the resulting delay in a criminal investigation can be irreparable. If a record is in fact legally privileged, the court can promptly determine that fact in the course of reviewing the propriety of a subpoena or warrant and the possessor of the document will adequately be protected thereby. But if the record is not privileged and is destroyed or hidden, the court and the public will be deprived of potentially important evidence and that deprivation may be irreversible. The provision is a reasonable one.

As to the second objection, the draft Senate report makes it clear that the section, like the misprision provision of current law (18 U.S.C. 4), requires active concealment, and that the refusal of any person to identify a fugitive could not constitute a violation of the section.

6. *Reporters committee recommendation.*—Sections 1731–1733 are the general theft and receipt of stolen property offenses. In section 1739 of the bill a bar to prosecution is provided where intangible property was obtained without a trespass solely for public dissemination and not as consideration for "anything of value." The Reporters Committee objects to this provision as being inadequate because a reporter's salary or a newspaper's profit might be construed to remove them from the protection of the bar.

Comment.—The August 4 Committee Print of the bill, at the suggestion of the American Newspaper Publishers Association, deletes the "anything of value" requirement and permits the bar to prosecution to be applied as long as the primary purpose of obtaining the information is to disseminate it to the public.

7. *Reporters committee recommendation.*—Section 1344 punishes, among other things, the removal of a government record, thereby impairing its availability. The Reporters Committee suggests that the language would cover photocopies of government records even if the original were not removed.

Comment.—Even though it is quite apparent that under normal circumstances removal of a photocopy could not impair the "availability" of a record, the August 4 Committee Print of S. 1437 specifies that the removal, to be covered by the section, must impair the record's "physical" availability.

8. *Reporters committee recommendation.*—Section 1301, which is derived from present law (18 U.S.C. 371), punishes those who intentionally obstruct or impair a government function by defrauding the government in any manner. The Reporters Committee opposes the section on the ground that a part of the Ellsberg indictment charged a conspiracy to defraud the government under 18 U.S.C. 371 by disseminating officially controlled documents.

Comment.—The provisions of 18 U.S.C. 371 cover both property-taking fraud and non property-taking fraud (such as misusing the CIA in the Watergate case). The essence of the former is theft, the essence of the latter is obstructing

a government function. S. 1437 divides the coverage, placing part in section 1731 (Theft) and part in section 1301 (Obstructing a Government Function). The taking of government records falls within the theft coverage of the new Code, provisions already subject to a bar to prosecution in the situation that concerns the Reporters Committee.

9. *Reporters committee recommendation.*—Section 1525 punishes government employees who disclose private information that members of the public are required to submit to the government and that is barred from release under a specific duty imposed by law. The Reporters Committee objects to the section on the ground that it would reduce the flow of information to the public.

Comment.—The section consolidates a number of existing offenses punishing the release of tax information, census data, trade secrets, and the like. Since it requires breach of a pre-existing duty before the section applies, its primary effect is in affording a single penal statute with a common penalty. Consequently, it is not likely to alter substantially the existing availability of data.

The Reporters Committee proposes that a defense be inserted which would exculpate a government employee who publically releases private information in government files. Such a defense would seriously compromise recent efforts to help ensure against unwarranted breaches of citizens' privacy.

10. *Reporters committee recommendation.*—Section 3807 carries forward 21 U.S.C. 844, which permits the sealing of arrest and disposition records of certain first-time drug possessors who were under the age of 21 at the time of the offense. The Reporters Committee criticizes it as a "dangerous first step" in cutting off access to information about the criminal justice system.

Comment.—This provision, which was designed as a device to promote the rehabilitation of youthful drug offenders, has been law for seven years. In that time, it does not appear to have blocked access to important information that warranted wider public dissemination. The competing interests in this area are clearly appropriate matters for congressional resolution.

DEPARTMENT OF JUSTICE,
Washington, D.C., February 19, 1976.

HON. JOHN C. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR: While, as you know, the Department of Justice considers that the S. 1 provisions dealing with public corruption offenses are generally very satisfactory and make notable improvements over current law in some areas, I am disturbed by the fact that S. 1 would not carry forward the "under color of official right" offense presently contained in the Hobbs Act, 18 U.S.C. 1951, and punishable by up to twenty years in prison.

The non-codification of this offense evidently represents a conscious decision by the draftsmen of the bill. In discussing the matter, the draft Senate Report takes the position that the conduct covered by the offense can almost always be proved either to constitute classic extortion, or bribery, both punishable under S. 1 at a Class C felony level (up to fifteen years in prison). As the Report puts it: "[A]s a practical matter, where a public official receives property to which neither he nor his office is entitled from persons who pay, e.g., because of an understanding or custom that every person doing business with the city has to pay, it can readily be shown—and normally is by the prosecution—that the payment was made unwillingly because of an implicit threat of force or fear [of a harmful economic consequence]". The report further asserts that, where no explicit or implicit threat of harm accompanying the payment can be shown, S. 1 will permit prosecution of the official for bribery.

The fact, is however, that S. 1 does not perpetuate the full scope of the "under color or official right" offense since a threat of reprisal if payment is not made is often very difficult to establish and since, even assuming that a bribery prosecution would always be a viable means of reaching the identical conduct proscribed, the jurisdictional provisions applicable to bribery in S. 1 do not include an "affecting commerce" base as does the Hobbs Act today, and thus would not permit successful federal prosecution of such cases as *United States* v. *Mazzei*, 521 F. 2d 639 (3d Cir. 1975) (en banc), involving a corrupt local official. Moreover, contrary to the assumption in the draft Report, the conduct reached by the "under color of official right" offense would not be preserved by the possibility of a prosecution for classic bribery. To establish bribery under section 1351 of S. 1 the prosecution must show that the defendant public servant ac-

cepted "anything of value in return for an agreement or understanding that the recipient's official action as a public servant will be influenced thereby, or that the recipient will violate a legal duty as a public servant." Proving the existence of such a *quid pro quo*, which is the essence of bribery, presents far more difficult problems of proof than to make out the "under color of official right" offense.

Because the "under color of official right" offense has received favorable treatment recently from the courts and promises to be a highly useful prosecutive tool against corrupt public officials, it would seem appropriate—and on behalf of the Department of Justice I strongly urge—that the offense be restored to S. 1.

Specifically, I suggest that the "under color of official right" offense be added to S. 1's extortion section (1722), which already contains an "affecting commerce" jurisdictional base. In recognition, however, of the fact that the conduct required to commit this offense most closely resembles that proscribed by S. 1's graft section, 1352 (a Class E felony) and that Class C felony treatment, equivalent to forcible extortion under section 1722, is not justified, I recommend grading the "under color of official right" offense as a Class E felony. The section, if amended as proposed, would then read, in pertinent part, as follows (new matter underlined):

"§ 1722. Extortion

"(a) OFFENSE.—A person is guilty of an offense if he obtains property of another:

"*(1)* by force or by threatening or placing another person in fear that any person will be subjected to bodily injury or kidnapping or that any property *will be damaged; or*

"*(2) under color of official right.*

"(b) GRADING.—An offense described in this section is:

"(1) a Class C felony *in the circumstances set forth in subsection (a)(1)*;

"*(2) a Class E felony in the circumstances set forth in subsection (a)(2).*

Of course, from our point of view the location of the offense in the Code is not of great significance and we would not object to its placement elsewhere. At the risk of undue reiteration, however, I do wish to emphasize the importance of the "under color of official right" offense to this Department's current efforts to root out corruption and I therefore hope that serious consideration will be given to an amendment to restore this offense to the criminal code.

Sincerely,

RICHARD L. THORNBURGH,
Assistant Attorney General, Criminal Division.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 21, 1976.

Hon. EDWARD M. KENNEDY,
U.S. SENATE,
Washington, D.C.

DEAR TED: We greatly appreciated the May 13 letter from your staff informing us of the status of negotiations on S. 1, and we apologize for the delay in commenting on the changes negotiated thus far.

As former members of the Brown Commission, and as House sponsors of criminal code reform legislation, we share your belief that reform of the federal criminal law is an important task facing the Congress. Efforts to make this legislation more widely acceptable, and thus more likely to achieve eventual passage, certainly must be encouraged. You and your colleagues are to be commended for the enormous headway you have already made in dealing with a number of the more controversial aspects of this legislation. As negotiations are continuing, we would like to indicate our support for your efforts.

There still are several aspects of S. 1 which cause us great concern and it seems most useful at this point to share those concerns with you. While the attached list of suggestions do not cover all of the items with which we have problems, these are the most important and may be helpful to you in your further pursuit of compromise legislation.

We should also note that we have spoken to the various members of the House who would be responsible for guiding the bill through hearing and markup, and it is their estimation that there is not sufficient time remaining in this session to complete House action on the bill. Nevertheless, your efforts

in the Senate to achieve needed amendments to the proposed code reform will place us much closer to the goal of eventual recodification. We would appreciate being kept informed of any further progress you might make on this issue.

Sincerely,

ROBERT W. KASTENMEIER.
DON EDWARDS.
ABNER J. MIKVA.

Sec. 511 (Statute of Limitations): A 5 year period of limitations for misdemeanor offenses is excessive. *Compare* section 701 of the Brown Commission Report (embodied in H.R. 333) (3 years); section 511 of H.R. 12504 (2 years).

Secs. 521–552 (Defenses): Although deletion of all the defenses removes an area of significant controversy, we note that such an approach misses the opportunity to achieve important reforms and bring greater clarity to this area of criminal law.

The recent case of *Hampton* v. *United States*, 44 U.S.L.W. 4542 (April 27, 1976), holding that a predisposed defendant cannot claim entrapment even when the government is *both* the supplier and purchaser of contraband, is but another illustration of the need for reform of this defense.

Sec. 1001 (Attempt): We prefer the "substantial step" formulation contained in both the Brown Commission Report (H.R. 333) and H.R. 12504 to that contained in S. 1. Of equal significance, the language of the Senate Draft Report (p. 172) derived from earlier versions of S. 1 and the Model Penal Code describing conduct deemed sufficient to constitute an attempt is strongly objectionable. Such matters are best left to continued case-by-case development in light of particular facts in individual instances.

Preclusion of the defenses of legal or factual impossibility will also lead to unwarranted results in certain circumstances. See *United States* v. *Hair*, 356 F. Supp. 339 (D.D.C. 1973).

Sec. 1002 (Conspiracy): Lou Schwartz, staff director of the Brown Commission, has been highly critical of the S. 1 formulation of the overt act requirement for conspiracy. *Compare* section 1002 of H.R. 12504 ("substantially tends to effect"). *See also* the suggested alternative comment in section 1004 of the Brown Commission Report ("substantial step").

We also support abolition of the *Pinkerton* rule of co-conspirator liability, a position endorsed by both the Brown Commission and the American Bar Association.

Secs. 1111–1112 (Sabotage Offenses): The agreement to eliminate references to "delays or obstructs" is an important and necessary amendment. However, we continue to question whether a "reckless sabotage" offense (section 1112) is necessary or desirable, notwithstanding the argument that this merely preserves existing law. Note that the "reason to believe" phrase of the existing statute is subject to the same conflicting interpretations as is the case with the similar phrase used in current espionage statutes. S. 1 resolves this ambiguity in favor of broader application.

Secs. 1116–1117 (Incitement Offenses): Like section 1831 (Riot), these offenses should be amended to incorporate the *Brandenburg* definition of incitement. The amendment should be clear in requiring knowledge of the existence of the requisite circumstances, not merely reckless disregard.

In addition, in the sensitive area of aiding mutiny, insubordination or desertion by members of the armed forces, the culpability level should be amended to require specific intent, rather than merely knowing aid.

Sec. 1302 (Obstructing a Government Function by Physical Interference): The problems with this section seem to be of draftsmanship as much as anything else. All agree that there is a legitimate need for an offense to protect government inspectors, federal marshals serving process, and so on from physical obstruction while performing their duties. However, in creating this generic offense, broad language has been used which at least arguably would make it applicable to a wide range of First Amendment related activities (absent a saving Court construction). Consideration should be given to enumerating in the statute the kinds of conduct intended to be covered, and making clear in the Report that which is excluded from this section.

Other Demonstration Offenses: Whether drafting an affirmative defense for peaceful, non-disruptive demonstrations on the grounds of a courthouse will be sufficient to remedy the difficulties with section 1328 (Demonstrating to In-

fluence a Judicial Proceeding) is difficult to evaluate without examining the text.

Limiting section 1863 (Failing to Obey a Public Safety Order) to riots and natural disasters is a desirable amendment, but it seems equally desirable to follow the Brown Commission recommendation that the authority to issue such legally binding orders be limited to supervisory personnel. See section 1804 of H.R. 333.

Section 1861, like all disorderly conduct statutes, presents great difficulty. In attempting to reach a wide variety of disruptive conduct not covered by more specific statutes, disorderly conduct offenses tend to reach the outer limits of constitutional boundaries, both in vagueness and in overinclusiveness.

Two of the remaining subsections of section 1861 continue to pose these problems: (A) "obstructs vehicular or pedestrian traffic, or the use of a public facility" and (a)(4) "engages for no legitimate purpose in any other conduct that creates a hazardous or physically offensive condition." As to the former, many demonstration activities will involve some measure of obstruction of traffic or of use of public facilities. These activities, however, should ordinarily be protected. Yet lying down in a line across a public street goes too far, and may legitimately be subject to criminal sanction. The present statute fails to find a balance. Much the same consideration may apply to (a)(4).

Disorderly conduct is an infraction. Both the Brown Commission Report and H.R. 12504 provide no authorized term of imprisonment for infractions; S. 1 authorizes 5 days. If this offense were reduced to a civil violation handled much the same as a traffic offense, then the threat that unjustified arrests could be used to break-up demonstration activities would be greatly reduced.

Chapter 13 (Perjury Offenses): It has been asserted that section 1343 merely preserves existing law by making false oral or unsworn statements to a law enforcement officer an offense. Yet the Senate Draft Report itself (pp. 397–398) citing *Friedman* v. *United States*, 374 F. 2d 363 (8th Cir. 1967), indicates a split of authority over whether present 18 U.S.C. section 1001 covers such statements. The Brown Commission Report (section 1354) sharply limited criminalization of false oral statements to "false alarms" and those where another person is intentionally falsely implicated in crime. The American Bar Association recommendation goes even further and supports deletion of the oral statement provision. H.R. 12504 contains no provision punishing false oral statements.

Both H.R. 333 and H.R. 12504 take a more limited approach to abrogating the two-witness rule in perjury prosecutions than does S.1. *See* section 1351(2) of H.R. 333 and section 1347(b) of H.R. 12504.

Both the Brown Commission Report and H.R. 12504 require for conviction of perjury that the defendant did not believe his statement to be true. S. 1 merely requires that the defendant be reckless (under an objective standard) with regard to the falsity of the statement.

Chapter 18 (Marijuana): In view of the agreement to reduce the penalties for possession of small amounts of marijuana (and to provide no federal penalty for possession of very small amounts), we question whether a 1 year penalty for gratuitous transfers of small amounts of marijuana and a 7 year penalty for sales of large amounts is justifiable. (Section 1812). Also, the jurisdiction provision should be amended to provide no federal penalty in those states that act to decriminalize marijuana entirely.

Sec. 1842 (Obscenity): We support your original proposal that there be no federal obscenity offense.

However, if this cannot be agreed to, at the very least the venue provisions (section 3311) should be amended so that publishers, filmmakers and others cannot be harassed by multiple prosecutions in every district through which the material has passed in the mails or otherwise. The Senate Draft Report (p. 863) endorses this undesirable practice.

Sentencing: We understand that six general principles for redrafting the entire federal sentencing system have been indicated.

Incorporating a sentencing guideline represents a fundamental shift in approach to the subject of sentencing. This attempt to reduce judicial discretion may be desirable, but it necessarily calls for a review of the entire process. For example, while the substance of the Parole Reform Act is to be included in S. 1, the desire to remove discretion from the system would require substantial change in the parole provisions as well. Indeed, the logical extension of the guideline approach calls for abolition of the parole system in its entirety.

We raise these points not to indicate our disapproval of the general approach you are following, but merely to note that such a substantial reform of the sentencing process will call for the most careful scrutiny, and until more of the details have been worked out, it is impossible for us to evaluate these proposals properly.

Secs. 3611–3617 (Civil Commitment): Objections have been raised to expanding federal authority in this area, and to the details of the proposals in S. 1. We commend to your attention several procedural changes contained in H.R. 12504, including composition of the examining panel of psychiatrists, videotaping of evaluative conferences, and frequency of reports from the hospital staff to the committing authority.

As to incompetency to stand trial, time limits for duration of commitment *and* dismissal of charges must be provided (though they need not necessarily be the same time limit.

Sec. 3715 (Admissibility of Evidence at Sentencing): The new Federal Rules of Evidence, in Rule 1101(d)(3), already provides that the Rules do not apply to sentencing proceedings. Thus, if this section is not intended to undermine the Fourth Amendment's exclusionary rule, it should be deleted as surplusage.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
SUPREME COURT BUILDING,
Washington, D.C., March 31, 1977.

Hon. JOHN L. MCCLELLAN,
U.S. Senate, Dirksen Senate Office Bldg., Washington, D.C.

Attention: Mr. Paul Summitt

Re Criminal Code Recodification Bill

DEAR SENATOR MCCLELLAN: In reference to a telephone conversation Mr. Judd Kutcher of my staff had with Mr. Paul Summitt of the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee concerning chapter 36, "Disposition of Juvenile or Incompetent Offenders," I would like to offer the following observations on that subject. One of the functions of this office is to provide legal advice to United States District Judges, United States Magistrates, and United States Probation Officers relative to the legal construction of federal statutes, including construction of the intended practical application of the Juvenile Delinquency Act of 1974. In performing that function, it appeared to me that several aspects of that Act required clarification. The present draft of §§ 3601–3606 addresses some of these subjects; however, it appears that further elucidation regarding some important items critical to the practical application of the Act would be helpful.

First, under F.R. Crim. P. 54(b)(5), the rules of criminal procedure only apply to juvenile delinquency proceedings so far as they are consistent with that chapter. It would be helpful if chapter 36 could affirmatively indicate any rule *not* intended to apply (for example, chapter 36 is silent as to the application of the rules relating to arrest warrant, initial appearance, preliminary hearing, etc.) or if the statement in Rule 54(b)(5) were reiterated in chapter 36.

Second, this office has taken the view that a fine may *not* be imposed as part of a juvenile's disposition or as a condition of probation since § 5037 of title 18 is silent on that subject and imposition of a fine would appear to constitute a combination of rehabilitation treatment and retributive punishment inconsistent with the purpose of the Juvenile Act. An express reference in § 3603(e) regarding this issue and the related issue of restitution could clarify this question, such as the addition of the following sentence:

"No fine, other than a restitution, may be imposed either as a juvenile's sentence, part of his sentence, or as a condition of his probation."

Third, it is the opinion of this office that a juvenile charged with an act of juvenile delinquency who is released on bail pending the disposition of that charge and jumps bail is not subject to prosecution under § 3150 of title 18, which by its terms only applies to persons released in connection with a charge of felony or misdemeanor. This problem could be remedied if proposed § 1312 included the phrase: "or if the person was released in connection with a charge of juvenile delinquency;"

Fourth, this office has been presented with numerous questions regarding the practical application of nondisclosure of juvenile records. In construing § 5038 of title 18, I have concluded that: (1) § 5038 is remedial and should be applied retroactively; (2) the exceptions to nondisclosure should apply to any release of juvenile information collected during the "safeguarding" stage of the juvenile proceeding as well as to sealed records; (3) the term "juvenile proceeding" encompasses the time from the juvenile's arrest until the completion of his final discharge or dismissal—thus all his records during that time are "safeguarded" until his dismissal or discharge, at which time the records are "sealed;" (4) § 5038 permits the disclosure of favorable information in a juvenile's records where a juvenile requests such release and expressly consents to the disclosure;[1] and (5) authorizes the *sentencing* court to order a juvenile's records sealed, and in conjunction with such an order, to instruct the clerk of the court to collect all court records, including records in the custody of employees of the Administrative Office of the United States Courts and the United States Probation Office, for the purpose of sealing the juvenile's records, and as to information and records relating to a juvenile proceeding prepared in the discharge of an official duty of an employee of *other* governmental agencies, instruct the clerk of the court to provide the appropriate agencies with a copy of the sentencing court's sealing order; and (6) a juvenile may *not* deny his juvenile arrest, information, or adjudication without being subject to possible prosecution for perjury or false statement.

As regards the first four juvenile record questions, a simple reference would suffice to clarify the intended application of § 3605. As to court procedure, the following statement, adapted from the recommendations of the Judicial Conference of the United States in reference to § 844(b) (1) of title 21, would be helpful:

"The sentencing court must ensure that all records and information pertaining to a juvenile proceeding, from the time of a juvenile's arrest until his dismissal or discharge, be safeguarded. Upon a dismissal or discharge, the sentencing court shall order all records and information pertaining to his juvenile proceeding be sealed, and instruct the clerk of the court to collect and seal all court records and provide other government agencies with a copy of the seal order so that they may seal all records or information in their custody pertaining to his juvenile proceeding."[2]

The above described procedure for accomplishing the sealing of a juvenile's records would seem imperative if such records are to be effectively removed from access to achieve the purpose of giving the juvenile a second chance free of the taint of the juvenile proceeding.

Finally, as regards whether a juvenile can legally give a negative response to a question concerning his juvenile proceeding, a negative response would comport with intent of § 5038 and the proposed § 3605, yet the present language used in those sections fails to explicitly provide this right, as Congress did, by contrast, in § 844(b) (2) of title 21. Accordingly, I would recommend that a statement similar to the provisions of § 844(b) (2) be added to § 3605:

"no person found to have committed an act of juvenile delinquency shall be found thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge his arrest, information, or adjudication in response to any injuiry made to him for such a purpose."

I very much appreciate the opportunity to express the views of my office on this important legislation and hope my comments prove helpful to you.

Sincerely,

CARL H. IMLAY,
General Counsel.

---

[1] A juvenile's request for such information would likely arise in the context of a probation officer's efforts to place him in a job. By virtue of his title, the probation officer would alert the potential employer that the juvenile was involved in some judicial proceedlng, yet by a strict application of § 5038, the probation officer would be precluded from responding in any way to the employer's inquiry into the nature of the juvenile's offense and behavior—an inquiry which must be expected in that situation. In such circumstances the juvenile, with counsel, should be able to waive the restrictions of § 5038 with respect to favorable information. Otherwise the practical application of § 5038 would ensure the failure to secure the juvenile a job, rather than achieving the section's intended purpose of helping him seeure a job.

[2] Adapted from a Judicial Conference standard order. See Proceedings of the Judicial Conference (1973), pp. 14–15.

JULY 13, 1977.

HON. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: As individuals interested in the sentencing and correctional process, we would like to take this opportunity to express our views on certain provisions of the proposed federal criminal law revision, S. 1437.

We strongly favor the main sentencing provisions of S. 1437. The creation of a commission to set guidelines for judicial sentencing decisions will do much to alleviate disparity, and bring order and rationality to the present chaos.

We have, however, certain reservations about the bill's provisions concerning parole, which we would like to bring to your attention. The bill goes far towards authorizing the near-eclipse of parole—by permitting the Sentencing Commission to prescribe periods of parole ineligibility of up to nine-tenths of the sentence. It also eliminates the Parole Commission's power to set release guidelines, transferring those to the new Sentencing Commission.

We share the skepticism that has been expressed in many quarters about the traditional rehabilitative rationale for parole. However, this is not the only function that can be served by a parole authority. Parole plays a critical role in the actual operation of the sentencing system. Judges are accustomed to imposing lengthy sentences which could not possibly be carried out given the limitations of prison space and which would be disproportionately severe were they carried out. It has been a practical function of the parole board to scale down the actual duration of confinement to more manageable levels. It may be desirable for the Parole Commission, a small, compact, and specialized body to continue its practical function of reducing undue disparity in the actual length of prison terms. Parole also performs a miscellany of other important functions, such as providing incentives for good behavior in prison. Unless care is taken, therefore, the precipitate abolition or downgrading of parole could have unintended effects that could seriously diminish the usefulness of the reform you are undertaking.

Even omitting any change in the status of parole, the Sentencing Commission will face formidable tasks. It must develop guidelines on the critical choice of whether to send the offender to prison or impose a lesser sentence such as probation. The latter is an exclusively judicial choice for which no standards whatever now exist. In developing its guidelines, the Commission must decide how broad or narrow the limits of judicial discretion should be. It must address the perplexing question of how its guidelines are likely to affect and be affected by prosecutorial decisions. It must develop methods of monitoring judges' decisions, to see whether the standards are being complied with. Given these tasks, we do not see how a Commission having human limits of energy and time can also, at the outset, regulate the standards for parole release and consider fundamental changes in the parole system.

For several years, the U.S. Parole Commission has been continually developing and revising guidelines governing its parole release decisions. While we might quarrel with some of the details of the guidelines, they *do* constitute a substantial step towards structuring the discretion to release prisoners. If the Parole Commission's standard-setting function is transferred immediately to the Sentencing Commission during the latter's difficult initial stages of organization, that function might be performed less well.

We therefore think it preferable at present to reduced the provision on parole ineligibility to a maximum of not more than one-third of the sentence imposed, and continue to have the Parole Commission set the parole release guidelines. This will allow the Sentencing Commission to get organized and issue its guidelines for sentencing judges; and it will allow Congress, scholars and the public to look at the Commission's handiwork. It will also allow more time and a more informed setting to debate the question of parole abolition and its collateral consequences. In the meantime, to ensure that the Parole Commission and Sentencing Commission adopt guidelines that are consistent, the statute should require the two bodies to consult with one another.

On a different issue, we also have equally serious reservations about S. 1437's proposed standards for appellate sentencing review. Restricting appeals to sentences outside the guidelines found by the sentencing judge to be applicable (§ 3725) may eliminate the opportunity to hear appeals based upon an incor-

rect judicial application of the guidelines. Further, conditioning appellate relief on a finding that a sentence outside the guidelines is 'clearly unreasonable' may make it so difficult to overturn a sentence as to substantially reduce the ability of the guidelines to structure discretion and promote equity.

Yours sincerely,

PETER B. HOFFMAN,
Director of Research, U.S. Parole Commission.

MORRIS E. LASKER,
Judge, U.S. District Court for the Southern District of New York.

LESLIE T. WILKINS,
Professor of Criminal Justice, School of Criminal Justice, State University of New York at Albany.

DONALD J. NEWMAN,
Acting Dean and Professor, School of Criminal Justice, State University of New York at Albany.

MICHAEL TONRY,
Assistant Professor, University of Maryland Law School.

ANDREW VON HIRSCH,
Associate Professor, Graduate School of Criminal Justice, Rutgers University.

FRANKLIN E. ZIMRING,
Professor of Law, University of Chicago Law School.

DON M. GOTTFREDSON,
Dean and Professor, Graduate School of Criminal Justice, Rutgers University.

STATEMENT OF PROF. HEATHCOTE W. WALES

Section 3616 and 3616 exacerbate the existing constitutional infirmities of 18 U.S.C. §§ 4246–48 by expanding federal power to preventively detain the mentally ill. The sections isolate three classes of persons for whom no further criminal proceedings or confinement are justifiable—persons acquitted by reason of insanity, persons deemed unlikely ever to be competent to stand trial,[1] and federal prisioners whose sentences have expired—and subject them to federal civil commitment proceedings if they are believed mentally ill and dangerous.[2] Commitment under these provisions if indefinite.

Federal power to civilly commit is expanded in three ways. First, § 3613 creates federal power over those acquitted by reason of insanity, a power previously thought not to exist.[3] Second, §§ 3613 and 3616 expand the concept of dangerousness to include danger to state as well as federal interests.[4] Third, both new sections would pre-empt state law by requiring federal civil commitment regardless of state willingness to accept jurisdiction over the person committed.[5]

---

[1] Sections 3611(d) and 3616(a) and the case upon which they are based, *Jackson* v. *Indiana*, 406 U.S. 715 (1972), fail to guide the courts and prosecutors as to when criminal charges should be dropped against a person deemed unlikely ever to be competent to stand trial. Thus, a portion of this class of commitable persons may technically still be within the criminal jurisdiction of the United States, although the clear spirit of §§ 3611(d) and 3616(a) is to apply only to those who will never be prosecuted.

The Supreme Court has clearly invited lower court and legislative guidance on the issue of when charges against such persons should be dropped. 406 U.S. at 740. One should hope Congress might address itself to this problem when it considers amendments to § 3611, insofar as it may be better situated than the courts to establish a coherent policy on the issue.

[2] A person is eligible for commitment if he is "presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another." §§ 3613, 3616. This paper will continue to use the shorthand phrase "mentally ill and dangerous" to refer to the above-quoted language.

[3] See note 19 *infra*.

[4] See note 21 *infra*.

[5] The extent to which the new law would pre-empt state civil commitment authority may be less under § 3616 than under § 3613. Under § 3616(a), the director of a facility in which the relevant classes of persons are confined is directed to ascertain the willingness of the state of domicile to hospitalize the person before triggering federal civil commitment. However, there is no mechanism in the statute to enforce this obligation; the court conducting the federal commitment hearing is not empowered to review the director's efforts to discharge this duty. § 3616(d(. See note 22 *infra*; notes 55–56 *infra* and accompanying text. See also note 45 *infra*.

At the outset, any effort to legislate federal civil commitment authority over the mentally ill is caught between two competing constitutional limitations of power. On the one hand, civil commitment authority in general is a power thought to be reserved to the states. Confinement and treatment of the mentally ill is a federal matter only insofar as it is necessary and proper to the exercise of some other federal power—here the power to legislate federal criminal law.[6] On the other hand, considerations of due process and the prohibition on cruel and unusual punishment require that civil commitment of the mentally ill be dissociated from governmental exercise of its criminal law powers.

Civil commitment, historically a coloidial mix of police and parens patriae powers, is designed to be non-punitive in nature. Although it seeks to achieve some of the goals of punishment, notably restraint and rehabilitation, civil commitment is not designed to achieve retribution or deterrence and does not constitute punishment for constitutional purposes[7] unless conducted without treatment.[8] Nor is civil commitment based on prior criminal conduct; rather it follows from a prediction of future behavior which may or may not be based on prior antisocial acts.[9]

The fact that a mentally ill person originally came to the attention of the authorities through the criminal justice system does not permit any different type of commitment than if there had been no criminal charge. Thus, in *Baxstrom* v. *Herold*,[10] the Supreme Court held that a state prisoner was denied equal protection when he was committed at the end of his prison term to a facility not used for civilly committed persons generally and when he was not afforded procedural rights accorded in ordinary civil commitments. The Court found the following principle controlling: "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a panel term from all other civil commitments." [11]

The *Baxstrom* principle was extended to commitment of persons acquitted by reason of insanity in *Bolton* v. *Harris*,[12] and to persons found unlikely ever to be competent to stand trial in *Jackson* v. *Indiana*.[13] In *Jackson*, the Court reasoned:

"If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice." [14]

In short, the only raison d'etre for the presence of provisions like §§ 3613 and 3616 in a federal criminal code is that the classes of persons affected come to the attention of federal authorities in the course of the administration of federal criminal laws. Yet the *Baxstrom* principle requires that such persons be treated equally under the law of civil commitment with those not charged with crime. In the federal context, the applicable law of civil commitment should be that of the state of the prisoner-patient's domicile. Section A of this paper argues that §§ 3613 and 3616 should be replaced with a simple provision allowing for transfer of the persons covered to their state of domicile.[15] Section B suggests how §§3613 and 3616 might be amended to render them more palatable, constitutionally and practically, should Congress reject the argument in Section A.

A. THE FEDERALISM OBJECTION TO §§ 3613 AND 3616

The courts and Congress have traditionally assumed that the care and treatment of the mentally ill was the province of the states, beyond the power of

---

[6] See notes 17–27 *infra* and accompanying text.

[7] See *Robinson* v. *California*, 370 U.S. 660 (1962).

[8] See authorities cited note 40 *infra*.

[9] Thus, for example, one who is charged with disrupting a judicial proceeding (§ 1334) could be committed on the basis of expert testimony that he is a compulsive thief and likely to commit theft offenses in the future.

[10] 383 U.S. 107 (1966).

[11] Id. at 111–12.

[12] 395 F. 2d 642 (D.C. Cir. 1968). Bolton is cited with approval in *Jackson* v. *Indiana*, 406 U.S. 715 (1972). Accord, *Reynolds* v. *Neill*, 381 F. Supp. 1374 (N.D. Tex. 1974), vacated sub nom. *Sheldon* v. *Reynolds*, 422 U.S. 1050 (1975); *State* v. *Clemons*, 110 Ariz. 79, 515 P. 2d 324 (1973); *Wilson* v. *State*, 256 Ind. 375, 287 N.E. 2d 875 (1972); *People* v. *McQuillen*, 392 Mich. 411, 211 N.W. 2d 569 (1974). But see *United States* v. *Ecker*, 543 F. 2d 178 (D.C. Cir. 1976).

[13] 406 U.S. 715 (1972). See also *Humphrey* v. *Cady*, 405 U.S. 504 (1972).

[14] 406 U.S. at 724.

[15] The provision would resemble § 3616(f) but would be broadened to cover the three classes of persons which §§ 3613 and 3616 make eligible for federal commitment. See note 26 *infra*.

Congress under Article I, section 8, clause 18. Legislative exceptions to this rule generally have been confined to the care and treatment of those currently within the criminal jurisdiction of the United States—those awaiting federal criminal trials and those serving federal criminal sentences.[16] Current developments in the treatment of the mentally ill and in the state law of civil commitment greatly strengthen the policy reasons for maintaining the traditional state-federal balance. The first alternative for Congress then should be simply to eliminate §§ 3613 and 3616 and replace them with a simple provision for transferring the persons covered to the relevant state authorities for civil commitment or release, in accordance with state law.

1. The constitutional issue

The traditional view of the state-federal division of power over civil commitment has been stated by the courts as follows:

"While the care of insane persons is essentially the function of the states in their sovereign capacity as parens patriae, and while the federal government has neither constitutional nor inherent power to enter the general field of lunacy, Congress has the power to make provision for the proper care and treatment of persons who become temporarily insane while in custody of the United States awaiting trial upon criminal charges, and to make provision for the care and treatment of federal prisoners who become mentally incompetent during their incarceration after conviction." [17]

Congress had a similarly restrained view of federal power when, in 1949, it enacted 18 U.S.C. §§ 4241–48, the statute which chapter 36, subchapter B, of S. 1437 would supercede. The report of the Committee of the Judicial Conference upon which the 1949 statute was based stated:

"If the accused's mental disability appears not to be a transitory condition, but in all likelihood he will, because of his insanity, never be brought to trial, it would seem that as a general rule the federal government should not assume responsibility for his hospitalization merely because he has been accused (but not convicted) of a federal crime. Normally such a person should be turned over to the state of his domicile to be confined in a state mental hospital if hospitalization is called for." [18]

To ensure the appropriate state-federal balance, Congress limited federal civil commitment power in several significant ways. First, the statute made no provision for those acquitted by reason of insanity, apparently because the federal government was thought to be without power once an individual was acquitted of federal charges.[19] Second, federal commitment was permitted only where the individual was found to be mentally ill and a danger to "the officers, the property, or other interests of the United States." [20] This clause has been interpreted to require a showing of danger to federally protected interests, as distinct from purely state criminal law concerns.[21] Third, federal authorities

---

[16] 18 U.S.C. §§ 4247–48 go beyond the general rule, permitting commitment of mentally ill and dangerous federal prisoners whose sentences have expired. This authority, however, has rarely if ever been used. See note 43 *infra*.

[17] *Wells, by Gillig* v. *Attorney General*, 201 F. 2d 556, 559 (10th Cir. 1953), quoted in *Higgins* v. *United States*, 205 F. 2d 650, 653 (9th Cir. 1953).

[18] Report of Committee to Study Treatment Accorded by Federal Courts to Insane Persons Charged With Crime, July 30, 1945, at 7, quoted in *Greenwood* v. *United States*, 350 U.S. 366, 373 (1956).

[19] See *Dixon* v. *Steele*, 104 F. Supp. 904, 912–13 (W.D. Mo. 1952). The legislative history of §§ 4241–48 is silent on this point. The practice has been to refer such individuals to state authorities for hospitalization if state law so required.

A subsequent effort to legislate federal civil commitment power over insanity acquittees—S. 3689, 89th Cong., 2d sess. (1966), introduced by the late Senator Kennedy of New York, 112 Cong. Rec. 18326 (Aug. 4, 1966)—failed to pass out of committee.

[20] 18 U.S.C. § 4247.

[21] See *Royal* v. *United States*, 274 F. 2d 846, 852–53 (10th Cir., 1960). The Royal distinction and the related language from 18 U.S.C. § 4247 is erased by §§ 3613 and 3616 of S. 1437.

A predecessor to § 3613, introduced by the late Senator Kennedy of New York in 1966, note 19 *supra*, cited the Royal distinction with approval, 112 Cong. Rec. 18325 (Aug. 4, 1966), and incorporated it into the statutory language. Under subsection (b) of that bill, only those insanity acquittees evidencing a danger to "the officers, property, or other interests of the United States" would be federally committed, the remainder to be released to their state of legal residence. Under subsection (c) persons federally committed who were still dangerous to themselves or others generally, but no longer dangerous to any identifiable federal interest, were to be released to their state of legal residence, if known, or, in the alternative, to the state in which they had originally been tried.

were to institute federal commitment proceedings only in cases where no state would assume jurisdiction over the individual.[22]

Admittedly, the 1949 statute was not free from federalism objections. Although federal power to hospitalize those serving federal prison sentences seemed clear, no court has ever ruled on the constitutionality of federal commitment of persons whose prison terms have expired under 18 U.S.C. §§ 4247–48.[23] Judicial attention has been limited to whether federal power could properly be extended to federal commitment of those incompetent to stand trial. Whereas the courts agreed that temporary federal commitment was permissible as necessary and proper to the exercise of federal criminal jurisdiction, several courts ruled that where incompetency was permanent with no hope of trial ever occurring, federal authorities were required to release the defendant even if no state would accept jurisdiction over him.[24] The issue reached the Supreme Court in *Greenwood* v. *United States*,[25] where the Court held that more than temporary commitment was constitutional under the necessary and proper clause of Article 1, section 8, clause 18, so long as federal authorities retained criminal jurisdiction over the defendant through a valid pending indictment.[26] The Court rejected the distinction made by lower courts between temporary and permanent incompetence because of "the uncertainty of diagnosis in this field and the tentativeness of professional judgment . . . Certainly, denial of constitutional power of commitment to Congress in dealing with a situation like this ought not to rest on dogmatic adherence to one view or another on controversial psychiatric issues." [27]

The Court's narrow holding in *Greenwood* avoided a series of other constitutional questions in the case. The due process, equal protection and speedy trial clauses of the Constitution all suggest limitations on the duration of the commitment upheld in *Greenwood* and on the duration of the indictment. In *Jackson* v. *Indiana*, the court gave preliminary answers to these questions, holding that the pendency of charges empowered the state to detain one deemed incompetent to stand trial for only "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." [28] If the defendant is unlikely to become competent within that period, he must be released unless subject to the same civil commitment provisions as other citizens not charged with crime. The fact that he has once been charged with crime is no longer a relevant factor in his status before the law. A similar analysis had previously been applied to prisoners whose sentences had expired [29] and persons acquitted by reason of insanity.[30]

---

[22] See Report, *supra* note 8, at 7–9, citing examples; 2 U.S. Code Cong. Serv., 81st Cong., 1st sess. (1949), at 1929.

Although the Eighth Circuit Court of Appeals in one case has read this provision to confer federal power to commit where a state amidst jurisdiction over an individual, but determines that he must be released under state law, *Greenwood* v. *United States*, 219 F. 2d 376 (8th Cir. 1955), aff'd. 350 U.S. 366 (1956), most courts seem to follow the practice that if the state of domicile admits jurisdiction, but declines to commit pursuant to state law, the individual must be released. See, e.g., *United States* v. *Walker*, 335 F. Supp. 705 (N.D. Cal. 1971); *Cook* v. *Ciccone*, 312 F. Supp. 822 (W.D. Mo. 1970); *United States* v. *Jackson*, 306 F. Supp. 4 (N.D. Cal. 1969). The Supreme Court, in affirming Greenwood, *supra*, did not reach this issue. See notes 25–27 *infra* and accompanying text. Sections 3613 and 3616 of S. 1437 would clearly require federal commitment for this situation. See Staff of Senate Committee on the Judiciary, 93d Cong., 2d sess., Report on Criminal Justice Codifications, Revision, and Reform Act of 1974, at 1010, 1017 (Comm. Print 1974) [hereinafter cited as Senate Comm. Print].

[23] At least since 1965, the Bureau of Prisons has not sought federal commitment of any prisoner whose prison term has expired. Any persons who might have been eligible for such commitment under 18 U.S.C. §§ 4247 and 4248 have been turned over to state authorities. See note 43 *infra*. The disuse of these provisions is particularly striking since they were originally included in the 1949 legislation at the behest of the Director of the Bureau of Prisons. See *Hearings on S. 850 Before a Subcommittee of the Senate Committee on the Judiciary*, 80th Cong., 2d sess., at 7 (1948).

[24] See, e.g., *Higgins* v. *United States*, 205 F. 2d 650 (9th Cir. 1953); *Wells, by Gillig* v. *Attorney General*, 201 F. 2d 556 (10th Cir. 1953); *Edwards* v. *Steele*, 112 F. Supp. 382 (W.D. Mo. 1952); *Dixon* v. *Steele*, 104 F. Supp. 904 (W.D. Mo. 1952).

[25] 305 U.S. 366 (1956).

[26] At a minimum, Greenwood seems to require constitutionally the approach taken by the draftsmen of S. 1437 in § 3616(f) (persons incompetent to stand trial whose federal charges are dismissed for reasons *unrelated* to mental condition must be released to their state of domicile). Nor does Greenwood suggest why persons incompetent to stand trial whose federal charges are dismissed for reasons *related* to their mental conditions (§§ 3611 (d) and 3616(a)) should be treated any differently.

[27] 350 U.S. at 375–76.

[28] 406 U.S. 715, 738 (1972).

[29] *Baxstrom* v. *Herold*, 383 U.S. 107 (1966).

[30] See cases cited at note 12 *supra*. See also notes 10–14 *supra* and accompanying text.

Reading the due process and equal protection limitations of *Jackson* together with the *Greenwood* reading of the scope of the necessary and proper clause suggests that when the United States loses criminal jurisdiction over an individual, it loses the auxiliary power to hospitalize him as well. Unless and until Congress determines in a manner consistent with Article I, section 8, that it has general parens patriae authority for the care and treatment of the mentally disabled, such persons should be left to the operation of state civil commitment laws and institutions.[31] This analysis includes all classes of persons covered under §§ 3613 and 3616 of S. 1437, except those incompetent to stand trial against whom federal charges are still pending.[32]

The policy issue

The expansion of federal civil commitment power proposed by §§ 3613 and 3616 comes at a time when Congress should be contracting federal authority over the care and treatment of the mentally disabled. Even the civil commitment authority claimed by the 1949 statute appears unwise in light of intervening developments in medicine and law concerning the mentally disabled.

In 1949, the principal "treatment" of the severely mentally disabled and dangerous was extended hospitalization. Isolation of the patient from the stresses of the community, shock treatments, and marginal efforts at psychotherapy were the therapeutic embellishments to what was essentially a warehousing program to protect the community.[33] State mental hospitals were far more overcrowded and understaffed than they are today. As a result, state mental health systems were especially reluctant to assume the burden of care for prisoners and persons incompetent to stand trial in the federal system.

The revolution in modern psychiatric treatment stems largely from discoveries of major psychotropic medications during the late 1940's and early 1950's. The new drugs enabled a dramatic reduction in the average period of hospitalization and a movement towards community mental health.[34] Spurred on by federal money from the Community Mental health Centers Act of 1963,[35] a vast expansion of outpatient services has occurred at the state and local level over the past twenty years.[36] At the same time research showed, contrary to earlier theories of mental health care, that separation of the patient from the family and community in which stresses had arisen and the effects of institutionalization caused patients to get sicker.[37] Indeed, post-hospital studies of patients hospitalized for varying periods of time have found that the patient's ability to function in the community is negatively correlated with length of stay in the hospital.[38]

Hence, to be effective, hospitalization must be brief and must be conducted in a setting where outpatient programs, the family, and community resources can be involved in the overall treatment program. Lengthy hospitalization in places remote from the patient's community may keep the mentally disabled off the streets, but is not conducive to amelioration of their ability to function normally in society.

What good medical policy dictates, the courts are beginning to require as a constitutional matter through the twin doctrines of right to treatment and least

---

[31] Put differently, enactment of §§ 3613 and 3616 would establish a significant Congressional precedent for the proposition that Congress does in fact possess such a generalized parens patriae authority pursuant to Art. I, § 8, cl. 18. The dangers to civil liberties and to principles of federalism which might ensue may seem speculative to some, but, to this writer at least, should be addressed by the Congress and thought through with utmost seriousness.

[32] See note 1 *supra*.

[33] See *Deutsch, The Mentally Ill in America* 446–57 (1949).

[34] "The drug revolution has probably had a more profound effect on the mental hospital as an institution and as part of a community care program than all other changes combined." *B. Passamanick, F. Scarpitti, & S. Dinitiz, Schizophrenics in the Community* 17 (1967). See also, Englehardt, Freedman, Glick, Hankoff, Mann & Margolis, *Prevention of Psychiatric Hospitalization With Use of Psychopharmacological Agents*, 173 J. A.M.A. 147 (1960) *M. Greenblatt, R. Moore, R. Albert & M. Solomon, The Prevention of Hospitalization: Treatment Without Admission for Psychiatric Patients* (1963).

[35] Pub. L. No. 88–164, tit. II, 77 Stat. 290, *as amended*, 42 U.S.C. §§ 2681–87 (1970).

[36] See C. Taube, Distribution of Patient Care Episodes in Mental Health Facilities, 1969, Statistical Note 58, Survey and Reports Section, National Institute of Mental Health (1972); C. Taube, Changes in the Distribution of Patient Care Episodes—1955–1968—By Type of Facility, Statistical Note 23, Survey and Reports Section, National Institute of Mental Health (1970).

[37] See, e.g., *E. Goffman, Asylums* (1961); Mendel, *On the Abolition of the Mental Hospital*, in *Comprehensive Mental Health: The Challenge of Evaluation* (L. Roberts, N. Greenfield & M. Miller ed. 1968).

[38] Mendel, *Brief Hospitalization Techniques*, 6 Current Psychiatric Therapies 310 (1966).

restrictive alternative. Although the Supreme Court has not yet ruled on whether a right to treatment exists for persons deemed mentally ill and dangerous,[39] several lower courts have found such a right to exist [40] to avoid the constitutionally repugnant prospect of detaining a person solely to prevent future criminality.[41] The least restrictive alternative doctrine goes toward balancing the patient's needs for particular treatment modalities against his due process right to liberty. Thus a patient is entitled to the minimum intrusion on his liberty consistent with medical needs in conducting treatment and controlling any danger the patient presents toward others.[42] These two emerging constitutional doctrines then, combined with modern practices and techniques of treatment of the mentally disabled, render untenable the indefinite total hospitalization of patients in federal facilities located far from the patients' communities and associated outpatient services.

Finally, the Attorney General, to whose custody §§ 3613 and 3616 would commit patients, currently has no medical facilities under his control in which to place the infinitesimal number of patients he is likely to receive under these provisions.[43] Although Veterans Administration hospitals may take some of these patients, their current practice is not to accept such patients unless charges have been dropped and the Attorney General has relinquished all authority over the individual. Medical facilities under the Bureau of Prisons could not be used for civilly committed patients without creating serious constitutional difficulties.[44] Contracting out such patients to state medical facilities pursuant to § 3617(h)(1) presents the most ludicrous alternative of all. The Attorney General would only be saddled with such patients in the event that the state of the patient's domicile refuses to take responsibility for the patient. But what state administrator would accept such responsibility if he knew the Attorney General's only other alternative was to pay the state to take the patient? [45]

---

[39] See generally *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975).

[40] See, e.g., *Wyatt* v. *Aderholt*, 503 F. 2d 1305 (5th Cir. 1974); *Rouse* v. *Cameron*, 373 F. 2d 451 (D.C. Cir. 1966); *Stachulak* v. *Coughlin*, 364 F. Supp. 686 (N.D. Ill. 1973); *Nason* v. *Bridgewater*, 353 Mass. 604, 233 N.E. 2d 908 (1968). See generally, Developments, Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1316–33 (1974).

[41] See *In Re Williams*, 157 F. Supp. 871 (D.D.C. 1958), aff'd 252 F. 2d 629 (D.C. Cir. 1958).

[42] See, e.g., *Covington* v. *Harris*, 419 F. 2d 617 (D.C. Cir. 1969); *Dixon* v. *Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971). For a comprehensive treatment of the doctrine as applied to the mentally disabled, see Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1107 (1972). See also Developments, *supra* note 40, at 1245–53.

[43] In the years 1965–74, a total of 176 persons have undergone the commitment procedures of 18 U.S.C. § 4248 (the current analogue to § 3616 of S. 1437), an average of 17.6 per year. The great majority of these have been referred to state hospitals for commitment pursuant to state laws. A few have gone to private hospitals and the remainder have been placed in Veterans Administration hospitals. All 176 were persons incompetent to stand trial. For at least the period 1965 to present, no prisoner whose sentence has expired has undergone § 4248 proceedings. Conversation with Dr. Colin Frank, Bureau of Prisons, July 9, 1975. These statistics dramatically undercut the conclusory statements based on anecdotal evidence in Tydings, *A Federal Verdict of Not Guilty by Reason of Insanity and a Subsequent Commitment Procedure*, 27 Md. L. Rev. 131, 133–34 (1968), cited in Senate Comm. Print at 1006, n. 33.

Although the numbers may increase slightly with the addition of those acquitted by reason of insanity (§ 3613), the increase should be insubstantial. Data collected in the District of Columbia under the operation of the *Durham* rule showed insanity acquittals occurring in 2 percent of all cases terminated. *United States* v. *Brawner*, 471 F. 2d 969, 989 (D.C. Cir. 1972).

[44] See, e.g., *People* v. *Feagley*, 14 Cal. 3d 338, 535 P. 2d 373, 121 Cal. Rptr. 509 (1975); *Kesselbrenner* v. *Anonymous*, 33 N.Y. 2d 161, 305 N.E. 2d 903, 350 N.Y.S. 2d 889 (1973); *In Re Maddox*, 351 Mich. 358, 88 N.W. 2d 470 (1958).

The fact that §§ 3613 and 3616 commit patients to the custody of the Attorney General, rather than to some department concerned with mental health care, may in itself raise constitutional doubts about these provisions. *Compare* the proposed legislation cited in note 19 *supra* (commitment of patients to Surgeon-General). Cf. *Child Labor Tax Case*, 259 U.S. 20, 37 (1922).

[45] Under this alternative, there is also the prospect that a patient will be treated with other state-committed patients who are hospitalized under narrower commitment standards than the federal patient. For example, many states do not permit indefinite commitments. Others require a higher standard of proof than §§ 3613 and 3616. Still others require more specific showings of dangerousness, some of which exclude danger to property as a criterion for commitment.

Furthermore, one may assume that different procedural schemes for committed patients may be linked to variations in the nature of the treatment provided. Thus federal patient A, contracted out to state facility X where procedural protections are high, may be receiving intensive treatment designed to ready him for release in a few months, whereas federal patient B, contracted out to state facility Y, may be receiving something not much better than custodial care.

B. CONSIDERATIONS FOR ALTERNATIVE AMENDMENTS TO §§ 3613 AND 3616

The discussion thus far is directed to the conclusion that §§ 3613 and 3616 constitute an impractical and unconstitutional arrogation of power that properly should be left to the states. Should Congress reject these contentions by attempting to preserve the thrust of these sections, it may wish to consider a series or perfecting amendments to deal with other more limited constitutional objections and practical difficulties summarized below.

Prisoners whose sentences have expired. Section 3616(a) directs that prisoners believed by the director of the facility in which they are confined to be mentally ill and dangerous may be detained after their sentences have run on the basis of a certificate filed by the director until a court hearing occurs under § 3616(c). No time limitation is set for this detention, no probable cause is required, nor is any mental examination required. Pure, unbridled discretion is left in the hands of the director. No reason is given why the examinations required by § 3616 (c) and (d) cannot occur before the sentence has run.

Psychiatric examinations—Place of confinement. Section 3617(b) gives the court discretion to designate the facility in which the examination is to occur. Experience shows that judges often have left persons awaiting examinations in jail. This section should specifically exclude jails and prisons from the clause "or another facility designated by the court as suitable" in the interests of humane treatment of the mentally disabled.[46] The same problem appears in §§ 3613(d) and 3616(d).

Psychiatric examinations of persons acquitted by reason of insanity. Section 3617(b) allows persons undergoing civil commitment because their prison sentences have expired or because they are unlikely to become competent to stand trial to have appointed a psychiatrist of their choice for the pre-hearing examination, while denying that right to persons acquitted by reason of insanity. Since all three classes of persons are being subjected to precisely the same loss of liberty on precisely the same basis—mental illness and dangerousness—the distinction seems to raise significant equal protection problems.

Furthermore, § 3617(b) permits a 60-day commitment of persons acquitted by reason of insanity for purposes of examination without any showing of probable cause to believe the person is presently mentally ill and dangerous.[47] Similarly, § 3613(a) states that "the court shall order a hearing" on indefinite commitment for such persons regardless of the absence of probable cause. The fact that a jury has entertained reasonable doubt that the person, because of mental illness at the time of the alleged offense, could be held culpable for the crime charged does not of itself provide probable cause to believe he is presently mentally ill and dangerous.[48] It should also be made clear in the legislative history of the bill that the fact that such 60-day commitments are discretionary means that one otherwise entitled to bail should be permitted an examination on an out-patient basis.[49]

Finally, the draftsmen have left to the court's discretion the issue of whether the examining psychiatrist under this provision may be the same person who examined the patient for his insanity defense.[50] Experience in the District of Columbia has revealed what Professor David Chambers has called a "conflict of interest" for psychiatrists conducting court-ordered examinations at St. Elizabeth's Hospital.[51] If the examination of the accused before the trial on the issues of insanity and incompetency is conducted by staff from the hospital where the accused will be hospitalized if found insane or incompetent, pre-trial psychiatric conclusions will be influenced by staff willingness to have the accused as a patient. Similarly, a psychiatric conclusion as to a patient's present mental illness and dangerousness may tend to be influenced by the desirability of receiving the patient should the court order commitment. The issue is not which psychiatrist should conduct the examination, but which facility should do it. The addi-

---

[46] A simple amendment here would be to add a word to the above-quoted language to make it read: "or another *treatment* facility designated by the court as suitable." For similar language, see the proposed bill cited at note 19 *supra*.

[47] See *In Re Barnard*, 455 F. 2d 1370 (D.C. Cir. 1971).

[48] Contra, *United States* v. *Ecker*, 543 F. 2d 178 (D.C. Cir. 1976).

[49] See *Marcey* v. *Harris*, 400 F. 2d 772 (D.C. Cir. 1968).

[50] Senate Comm. Print, at 1009.

[51] Brief of David L. Chambers as Amicus Curiae at 3, *United States* v. *Brawner*, 471 F. 2d 969 (D.C. Cir. 1972). See also Brawner 471 F. 2d at 1018, n. 21; Judicial Conf. of the District of Columbia Circuit, Report of the Comm. on Problems Connected With Mental Examinations of the Accused in Criminal Cases Before Trial 97 (1966).

tion of a simple sentence to the dispositional sections of the statute, §§ 3613(d) and 3616(d), would resolve the issue.

Time limits for reports and hearings. In its current version the bill sets no time limits for psychiatric reports in court-ordered mental examinations. Nor are there time limits set for the commencement of a hearing, once the reports have been filed. The experience of trial attorneys demonstrates that the mere recommendation that reports be filed and hearings held "promptly" or "within a reasonable time"[52] are inadequate in many cases, particularly when the patient is confined.

Access to psychiatric records. Section 3617(c) provides that attorneys for the government and for the patient be given copies of the psychiatric report filed with the court. Experience indicates that such reports tend to be boilerplate and relatively undetailed, particularly with regard to information of dissenting views of hospital staff who have seen the patient and information of behavior which conflicts with the ultimate conclusions of the examining psychiatrist. This section should be broadened to permit access not only to the conclusory final report,[53] but also to all records concerning the examination kept by the hospital staff.

Consideration should also be given to requiring a videotape of the staff conference upon which the psychiatric report is generally based. At issue is the patient's right of confrontation.[54] Although it might be impractical to require the presence of the patient's attorney, a videotape would not adversely affect the conduct of the staff conference while it would provide attorneys with fuller information of what goes into the final report.

Furthermore, § 3617(c) should be amended to reflect the fact that such reports are generally the product not only of the psychiatrist's findings, but also those of psychologists, neurologists, social workers, and other ward staff. The term "psychiatric report" should be replaced with the term currently used by mental health professionals, "mental status report," and it should be made clear that although the psychiatrists may be in charge of the examination, the report is to include the input of the entire ward staff.

The commitment hearing generally. Sections 3613(d) and 3616(d) suggest that the commitment hearing and determination should be held first, followed by efforts of the Attorney General to release the committed person to state authorities.[55] Current law, 18 U.S.C. 4248, states the procedure in reverse order. Since the majority of such persons are indeed released to state authorities for commitment under state law,[56] the existing procedure would seem more efficient than that proposed by S. 1437. Why proponents of S. 1437 wish to provide for a number of court hearings which will have no effect on the ultimate administrative disposition of most cases is puzzling.

The right to a jury. Many states provide the right to a jury trial in civil commitments.[57] The jury serves as the community's conscience on the issues of what degree of mental impairment and/or dangerousness is sufficient to deprive an individual of liberty.[58] Since neither medical experts nor legal and social philosophers have come to any clear conclusions on these issues, the jury's role is particurly important in commitment determination. Although jury trials are typically waived where the right is accorded,[59] the right should be established for those cases in which the patient wishes a jury.

The Role of Experts. In § 3617(c), Congress is challenged with a unique opportunity to attempt resolution of one of the great issues of the period in the inter-

---

[52] See Senate Comm. Print at 1009–10. See also §§ 3613(e) and 3616(e).

[53] Section 3617(c)(4) exacerbates the current practice of filing conclusory reports by requiring the report to include legal conclusions by non-legal experts. Compare *Washington* v. *United States*, 390 F. 2d 444 (D.C. Cir. 1967). Cf. *Hicks* v. *United States*, 511 F. 2d 407 (D.C. Cir. 1975) (hospital held negligent in wrongful death action for filing conclusory report inadequately informing court of patient's condition).

[54] See *Thornton* v. *Corcoran*, 407 F. 2d 695 (D.C. Cir. 1969).

[55] Section 3616(a) requires "the director of a facility" to investigate state commitment options before triggering a federal commitment proceeding. The extent and nature of that obligation are unclear, however. See note 5 *supra*. Nor is it clear that the director is the most appropriate person to make such inquiries. In any event, no such screening occurs for § 3613 commitments.

[56] See note 43 *supra*.

[57] See, e.g., *Quesnell* v. *State*, 83 Wash. 2d 224, 517 P. 2d 568 (1974); D.C. CODE ANN. § 21–544 (1973). See generally Developments, *supra* note 40, at 1291–95.

[58] See generally *Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972); notes 61–65 *infra* and accompanying text.

[59] See Developments, supra note 40, at 1293, n. 168; Pfrender, *Probate Court Attitudes Toward Involuntary Hospitalization: A Field Study*, 5 J. Fam. L. 139, 148 (1965).

face of law and psychiatry—that of the psychiatric expert witness.[60] Unfortunately, in § 3617(c)(4), the draftsmen break and run the other way. To avoid the prospect of wholesale legislative retreat on the issue, § 3617(c)(4)(A)–(D) should be deleted. To advance the state of the law on this question, those same subsections should be rewritten.

Of particular relevance to commitments under §§ 3613 and 3616 is § 3617(c)(4)(C),[61] which asks examining psychiatrists and psychologists to state their opinion in writing for the court as to whether the patient "is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another." [62] The language assumes that psychiatrists and psychologists are experts in assessing each element of the commitment standard when in fact they are not. To be sure, qualified examiners are expert in the diagnosis and treatment of mental disorders. They are not experts, however, on the definition of "mental disease or defect" for purposes of this section nor on the prediction of antisocial conduct.

A conclusion as to whether a patient is "mentally ill" is immaterial in ordinary private psychiatric practice. If the patient presents himself to the therapist complaining of unwanted thoughts or behaviors, it is the therapist's role to advise and assist the patient in ways to cope with or eradicate such thoughts and behaviors. It is only when some third party becomes involved in the therapist-patient relationship that the existence or nonexistence of mental illness as such becomes an issue.[63] Thus, for purposes of invoking insurance coverage for treatment, mental illness may be broadly defined. For purposes of deciding what criminal defendant should be held not culpable for their conduct, the definition of mental illness may be considerably more narrow. The point is that "mental illness" is not a purely medical concept, but a social one employed for a variety of social purposes.[64] To make the therapist the judge of what constitutes a sufficient mental disease or defect for purposes of §§ 3613 and 3616 is to abdicate the proper role of legislature and courts in formulating this essentially social judgment. Furthermore such abdication perpetuates the myth that certain social problems are in fact medical problems so that society suspends efforts to deal intelligently with the social aspects of those problems.

Legislating medical expertise over the prediction of antisocial behavior flies in the face of repeated disclaimers of such expertise by the country's foremost

---

[60] See *Washington* v. *United States*, 390 F. 2d 444 (D.C. Cir. 1967). See generally *United States* v. *Brawner*, 471 F. 2d 969 (D.C. Cir. 1972); R ARENS, THE INSANITY DEFENSE (1974); J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (1970); Bazelon, *The Perils of Wizardry*, 131 Am. J. Psychiat. 1317 (1974); Bazelon, *Psychiatrists and the Adversary Process*, 231 Sci. Am. 18 (June 1974); Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 Mich. L. Rev. 1335 (1965); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693 (1974).

[61] Although this paper confines itself to examination of subsection (C), relating to commitments under §§ 3613 and 3616, many of the comments made here are also relevant to subsections (A), (B), and (D).

[62] Although the statute does not compel the court to be bound by the expert's opinion on these matters or even to admit the expert's opinion into evidence, § 3617(c)(4) strongly suggests that such conclusions are admissible evidence (Contra, *Washington* v. *United States*, 390 F. 2d 444 (D.C. Cir. 1967)), and that they are to be accorded the weight ordinarily attributed to expert testimony.

[63] Even when mental disorder is attributed to organic causes, such as a tumor, there is no precise point at which the tumor becomes so intrusive upon the patient's functioning that experts would agree that the condition constitutes "mental disease or defect." The task becomes even more subjective when, as is usually the case in patients seen by forensic psychiatrists, no organic cause for the signs and symptoms displayed by the patient can be demonstrated.

[64] *See Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972).

For empirical support of this statement, *see, e.g.*, Pugh, *The Insanity Defense in Operation: A Praeticing Psychiatrist Views Durham and Brawner*, 1973 Wash. U.L.Q. 87, 95–96; Dix, *Acute Psychiatric Hospitalization of the Mentally Ill in Metropolis: An Empirical Study*, 1968 Wash. U.L.Q. 485.

Dr. Pugh has written of his experiences from 1968 to 1970 at the forensic unit at St. Elizabeths Hospital in Washington, D.C.

"Some doctors seemed to have the 'policy' that anyone who committed a sex crime was insane. Some doctors tended to find a defendant insane if they felt the hospital could 'help' him—or if they felt sorry for him. One psychologist had a racial quirk: though he might find black defendants either sane or insane, he invariably found any white defendant to be insane." 1973 Wash. U.L.Q. at 96.

One survey of residents of Manhattan concluded that only 18.5 percent of the population was "free of significant symptoms of mental pathology." L. SROLE, T. LANGER, S. MICHAEL, M. OPLER & T. RENNIE, MENTAL HEALTH IN THE METROPOLIS 135 (1962).

forensic psychiatrists and psychologists.[65] Nor do the judgments as to what constitutes "a substantial risk," "serious bodily injury," or "serious damage to property" lend themselves to psychiatric expertise. Such issues must be addressed by courts in hearings under §§ 3613 and 3616, and judgments must be rendered in each case, however crude the present ability of courts to make them. But the capabilities of courts to render such judgments intelligently and in a manner consistent with current social mores will not be advanced—indeed they will be retarded—so long as courts are encouraged or even required by statute to pretend that their function may be adequately discharged by merely asking a medical "expert" to make such judgments for them.

A properly redrafted § 3617(c)(4)(C) would attempt to pinpoint the kinds of information over which examiners possess expertise which can be most helpful to a court presented with the difficult task of applying the statute's necessarily vague standard for civil commitment. What this subsection should not do is to perpetuate demonstrably erroneous myths which serve to impede judicial development of our social and political values concerning the proper relation between the state and its potentially anti-social citizens.

Indefinite commitment. Sections 3613(d) and 3616(d) require the Attorney General to hospitalize indefinitely committed persons for whom no state will take responsibility. Although this section could be construed consistent with the least restrictive alternative doctrine,[66] additional statutory language would clarify the obligation of the committing court to seek out with the assistance of the Attorney General a disposition which would provide the minimal intrusion on the patient's liberty consistent with the needs of maintaining treatment and protecting the community.

The Congress should also consider placing absolute time limits on total hospitalization.[67] If such limitations are imposed, they should be drafted to accord with desirable medical practice, rather than being tied to the sentence the patient might have received had he been convicted of the offense charged as some states have done.[68] Limitation in terms of potential criminal sentence suggests a criminal rather than civil commitment and more nearly approximates constitutionally suspect preventive detention. Sentence-linked limitations would also be inconsistent with the commitment and release provisions of the statute which are drafted in terms of the patient's present mental condition and dangerousness.

One mechanism for limiting indefinite commitments is to require the admitting psychiatrist to draw up a treatment plan to be filed with the court as part of the commitment papers.[69] Such a plan should specify to the greatest degree possible the treatment modalities suitable for the particular patient and rough time schedule for carrying out the plan. The treatment plan also establishes a basis for reports back to the court which will be more frequent and more informative than the boilerplate reports called for in § 3617(e). Such a plan also facilitates judicial administration of the least restrictive alternative doctrine by requiring medical justification for the treatment modalities and degrees of confinement selected at each stage of the plan.

---

[65] A prominent forensic psychiatrist, upon reviewing the studies on psychiatric predictions of dangerousness, concluded:

"Neither psychiatrists nor other behavioral scientists are able to predict the occurrence of violent behavior with sufficient reliability to justify the restriction of freedom of persons on the basis of the label of potential dangerousness."

Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa. L. Rev. 439, 452 (1974). *See also*, American Psychiatric Association, Clinical Aspects of the Violent Individual (1974); A. Stone, Mental Health and Law: A System in Transition (1975). Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 Arch. Gen. Psychiat. 397 (1972); Developments, *supra* note 40, at 1240–45.

[66] *See* note 42 *supra* and accompanying text.

[67] *See, e.g.*, Cal. Welf. & Inst. Code §§ 5000 et seq. (Supp. 1972). *See also* notes 34–38 *supra* and accompanying text.

Subsection (e) of a 1966 bill for commitment of insanity acquittees, note 19 *supra*, would have provided for a new commitment hearing, with the burden of proof on the government, at least once every two years. Although two years may be to long a time period, the basic model of short-term commitments with the power to recommit allows for far greater court supervision over commitments than does the model of indefinite commitments with periodic reports set forth in ch. 36, subch B.

[68] *See, e.g.*, N.Y. Crim. Proc. Law § 730.50 (McKinney's Consol. Laws c. 11–A, 1971); Ill. Ann. Stat. c. 38, § 104–3(c) (Supp. 1969).

[69] *Cf. Ashe v. Robinson*, 450 F. 2d 681 (D.C. Cir. 1971). *See generally* Schwitzgebel, *The Right to Effective Mental Treatment*, 62 Cal. L. Rev. 936 (1974).

Discharge. Sections 3613 (d) and (e) and 3616 (d) and (e) suggest that a patient should be released when his mental condition has improved to the extent that he is no longer a danger. This conflicts with the commitment standard which requires showings of both mental illness and dangerousness. According to the release provisions as drafted, a committed person could recover from his mental illness, still be dangerous, and hence be ineligible for release. Such a case would amount to pure preventive detention. Discharge should occur either when the patient is no longer mentally ill or when he is no longer dangerous.[70]

More serious are the immense hurdles the committed patient must overcome to obtain release in § § 3613(e) and 3616(e). Having persuaded the hospital director of his eligibility for release, the patient must, if the court or Attorney General so choose, bear the burden of proving by a preponderance of the evidence that he is no longer dangerous.

From the theoretical standpoint, placing such a burden on the patient makes little sense. If clear and convincing evidence is required to force confinement and treatment upon him, why is not the absence of such evidence sufficient for release.[71] Whereas it is logical to place the burden of persuasion on the patient when he initiates release proceedings, as in habeas corpus, the contrary should be true when it is the government's own doctors who are seeking release.

From a practical standpoint, the provision makes even less sense. First, it requires the patient to prove a negative—that he is no longer dangerous—a feat made even more difficult if the patient has been confined in an artificial hospital setting since confinement. If his pre-confinement offense was a serious one, even the model patient will find proof of non-dangerousness impossible at least until he has "served" time roughly approximating a criminal sentence for his conduct.[72] Furthermore, such a system places considerable control in the hands of the Attorney General. Psychiatrists are notoriously (and understandably) reluctant to testify in an adversary setting, both because of the fear of embarrassement on the stand and because of the time court hearings and continuances take from their busy schedules. I have been told on more than one occassion by state directors of facilities for the "criminally insane" that, faced with certain opposition from the prosecutor in a release proceeding, they will forego their recommendation for release rather than "waste time."

Save Parole Supervision [1]

(By Robert Martinson and Judith Wilks)

The increasing attacks on the institution of parole in the U.S. today fail to distinguish between parole as a method for releasing offenders from (or returning offenders to) imprisonment and parole as a method for supervising offenders in the community. These two distinct functions need to be separately evaluated for an overall assessment of the usefulness of parole and its fairness in our system of criminal justice.

The parole release (and revocation) decision is inseparable from the indeterminate sentence. Decision-making is a quasi-judicial process carried on by small groups of appointed officials organized into Parole Boards. Parole supervision, on the other hand, is not dependent on the indeterminate sentence. It is a method for controlling, helping, or keeping track of offenders in the community. For hundreds of thousands of convicted offenders, it is a major institutional alternative to extended periods of imprisonment. The supervision functions of parole are carried on by an extended network of thousands of agents organized into parole district offices and divisions.

The essential criterion for parole as a quasi-judical process is simple fairness and equity. Such issues are especially critical when unreviewed discretion in-

---

[70] *Accord*, proposed bill cited *supra* note 19.

[71] This is the approach favored by the proposed bill cited *supra* note 19.

The habeas corpus provision, § 3617(g), may be in conflict here if it is interpreted to permit the patient to establish a right to release by demonstrating the absence of clear and convincing evidence of commitability.

[72] *See Covington* v. *Harris*, 419 F. 2d 617 (D.C. Cir. 1969).

[1] Article has been accepted for publication in the September 1977 issue of *Federal Probation*. Data for this article was derived from a project conducted for the National Institute of Law Enforcement and Criminal Justice under grant No. 76NI–99–0023. Points of view expressed are those of the authors and do not represent the official position of the the U.S. Department of Justice.

volves deprivation of liberty. Many critics have rightly argued that the parole decision-making process is lamentably brief for such an important decision, lacking in essential elements of due process, frequently arbitrary and subject to political interference, and based in part on a myth that Parole Boards have the ability to accurately predict when a particular offender is "ready" for parole.

The usual criterion for assesing parole supervision has been how *effective* it is in reducing the criminal behavior of those under supervision. Such effectiveness need not be gained at the price of unfairness. On the contrary, since the consequence of engaging in criminal behavior is to be reimprisoned, supervision which is effective directly contributes to fairness in the sense that fewer offenders are deprived of their liberty. By preventing or inhibiting criminal behavior, effective parole supervision insures that fewer offenders will be re-arrested, convicted and returned to prison.

Unfortunately, in their haste to restrict or eliminate the Parole Board decision-making function (and the indeterminate sentence on which it rests), some critics propose to throw the baby out with the bath water. Yet there is no reason why a mandatory and definite parole sentence could not be substituted for the present system of Parole Board discretion and conditional release under threat of revocation for rule-breaking.[2] And those who propose such radical surgery would do well not to speak in the name of the offender for there is grave danger that the overall consequence of abolishment of parole supervision would be to consign larger numbers of offenders to prison.

One critical empirical question that must be answered is: would the abolition of the present system of parole supervision increase or decrease the rates at which persons released from incarceration would be re-processed into the criminal justice system? Previous research has not addressed this question. Such research deals primarily with variants of parole supervision within the existing system.[3] Inferences from such research are speculative and do not permit a ". . . direct comparison of offenders under parole supervision with offenders set entirely free." [4]

Parole has never been a universal method for releasing offenders from incarceration, and therefore in most jurisdictions in the U.S. some persons are released on parole supervision while others are released at the expiration of their terms, i.e., "set entirely free." Clearly, the most obvious research method, available to researchers since parole was established in the U.S., would be controlled comparisons of persons released under parole supervision with comparable persons released directly from imprisonment without parole supervision. This is the method to be used in the present analysis.

THE SURVEY

The data presented in Table 1 is taken from a larger survey of criminal justice research. The survey was designed to provide a standard procedure for maximizing the accumulation of existing information so that substantive questions can be answered and decisions taken on matters of public policy. For a description of the search procedure, the classification of documents received, and the variables coded, it is necessary to read the preliminary report.[5] The present sub-study illustrates the utility of the procedure adopted.

Two key concepts were employed in collecting, coding and organizing the data taken from more than 600 recent documents: the "batch" and the "computable recidivism rate."

a. *Batch.* A "batch is any number of persons at some specificable location in the criminal justice system for whom a "proper" recidivism rate is computable. A proper recidivism rate must specify what *proportion* of a batch are recidivists. The term "parent batch" refers to a universal set which contains two or more batches. For example, a universal set of, say, 1000 male and female parolees may be broken into one batch of 800 *male* parolees and one batch of 200 *female* parolees. Each of these batches is coded as "exclusive" since together they ex-

---

[2] See, J. Wilks and R. Martinson, "Is the Treatment of Criminal Offenders Really Necessary?" *Federal Probation*, v. XXXX, n. 1 (March 1976), pp. 3–9.

[3] See, for example, D. Lipton, R. Martinson, and J. Wilks, *The Effectiveness of Correctional Treatment*, New York: Praeger Publishers, 1975, sections on Probation and Parole.

[4] D. T. Stanley, *Prisoners Among Us, The Problem of Parole*, The Brookings Institution, Washington, D.C., 1976, pp. 181–2.

[5] See, R. Martinson and J. Wilks, *Knowledge in Criminal Justice Planning, A Preliminary Report*, October 15, 1976, 58 pp. (processed).

haust the parent batch and have no members in common. All batches in Table 1 are exclusive batches with an N or 10 or more.

b. *Recidivism Rate.* The primary unit of analysis in the survey is the computable recidivism rate. Each such rate specifies what proportion of any batch shall be identified as "recidivists" according to whatever operational definition of recidivism is utilized by the researcher. Such an operational definition will normally specify the length of time which the batch was followed-up in addition to the criminal justice action (arrest, suspension, conviction, return to prison, and so forth) which led to the decision to classify a particular person as a "recidivist." All such definitions were coded into seven categories. Three of these categories—arrest, conviction, and return to prison with a new conviction—were judged to be appropriate for a comparison of parolees and persons released from incarceration with no supervision ("max out").[6]

The term "system re-processing rate" specifies precisely what is being measured in Table 1. An "arrest," for example, is an event that can occur to a person under the jurisdiction of criminal justice, and an arrest *rate* simply reports what proportion of any batch included in Table 1 were reported as being reprocessed in this way in the documents coded in the survey.

Each recidivism rate in the survey has been coded with additional items of information. The coding system developed was guided by the primary aim of the accumulation of knowledge based on the existing state of the art in criminal justice research. Codes were designed to maximize the information produced by the standard procedures now used in the body of documents encountered. Many of the items specify critical methodological features of the study such as whether the batch is a population or a sample, the type of research design utilized, months in follow-up, months in treatment, the type of population or sample (e.g., "termination" sample), and so forth. Since studies report information on the characteristics of batches in a bewildering variety of ways, a standard attribute code was developed so as to maximize the reporting of such information as educational attainment, current offense, race, class position, family status, and so forth.[7] In addition, it was possible to code a considerable number of batches (and therefore rates) with such information as mean age, months in incarceration, sex, wether the batch consisted primarily of narcotics cases or persons with alcohol problems, and so forth.

PROCEDURE

The procedure adopted was to exhaust the survey data base of all meaningful comparisons between adult offenders released from incarceration to parole supervision and comparable groups of adult offenders not released to parole supervision ("max out"). This was a simple sorting operation with an IBM counter-sorter. From a total pool of 5,804 recidivism rates for batches of adult persons in the U.S. and Canada released under parole supervision, those rates which fell in the category of "arrest" (N=235), "conviction" (N=135), and "return to prison with a new conviction" (N=738) were sorted out. A similar sort for adult max out rates resulted in 44 arrest rates, 26 conviction rates, and 73 return-to-prison-with-new-conviction rates. The total number of rates produced by these initial sorts are found at the bottom of Table 1.

The cards were then sorted on the variables which had been coded in the survey making no distinction between items which were primarily methological (e.g., time in follow-up) and those which were primarily descriptive of a batch (e.g., mean age, sex, percent property offenders). All code categories for which at least two rates were reported for both parole and max out were located. Mean rates for these code categories were computed, and are presented in Table 1.[8]

---

[6] The other four categories were: 100 percent minus "success" rate; short of arrest (i.e., AWOL, absconding, suspension, and similar); return to prison for technical violation; and return to prison for technical plus new conviction. Three of these categories were eliminated because they cannot happen to max out groups. The fourth—100 percent minus "success" rate—was eliminated because of possible problems in interpreting the meaning of the measure.

[7] The proportion in which an attribute was present in a batch was coded as follows: 1=0—24.9%; 2=25—48.9%; 3=50—74.9%; and 4=75—100%.

[8] Multiplying the total number of coding categories (97) by the three definitions gives a total of 291 possible comparisons if sufficient data has been present. Eliminating 39 cases where data was reported as "unknown," 38 cases in which there were less than two rates in a category of either parole or max out, and 134 cases in which no data was reported, leaves the 80 comparisons reported in Table 1.

DISCUSSION

Item 1 can be used to illustrate how the table should be read. For parole, there were 84 recidivism rates where "arrest" was the measurement of recidivism and for which the batch size fell between 100 and 499. The mean of these 84 rates was 26.9. For this same batch size (100–499), there was 12 max out rates, and the mean of these rates was 32.8. The difference between these two means is 5.9.

Reading across the table, for the "conviction" definition the mean rates for parole and max out were 20.5 and 25.9, respectively. For the "return to prison with new conviction" definition these means were 11.0 and 14.7. Turning to a different batch size of 50–99 (Item 24), one notes that comparisons could only be made for two of the three definitions. For some variables comparisons were possible for only one definition.

This table presents data in a manner which is similar to the procedure of simultaneously controlling for adulthood, definition of recidivism, place in the criminal justice system (i.e., parole vs. max out), and at least one additional variable. Given the number of rates available, it would have been possible to have controlled for one (or even more) variables in addition to the four specified above. For reasons of time, these additional controls were not attempted.

It is interesting to note that in *seventy-four of the eighty comparisons contained in Table 1, the mean of the recidivism rates for parole is lower than max out.* This is the case whether the final variable controlled is methodological or socio-demographic. For the arrest definition, the difference *in favor of* parole range from a low of 0.2 (Item 22) to a high of 43.6 (Item 24). For conviction, the differences in favor of parole range from 0.2 (Item 20) to 16.9 (Item 15). For new prison sentence, the differences in favor of parole range from 0.2 (Item 10) to 11.3 (Item 43).

In six of the eighty comparisons, the mean of the rates for max out is equal to or lower than the mean for parole. These six cases are unsystematically distributed throughout the table. In three instances the final control variable is methodological; in three it is socio-demographic. Two cases fall under the arrest definition; two under conviction; and two under return to prison. These six exceptions do not suggest to us any particular set of conditions which might be further explored to discover sub-groups of offenders, or contexts, for which max out would be a superior policy for criminal justice.

Data contained in our Preliminary Report provided a starting point for this analysis. This initial data (based on 3,005 rates coded at that time) indicated that the mean of the rates for parole (25.4) was somewhat lower than the mean of rates for max out (31.6). This six percentage point difference resulted from a comparison which did not further control for the definition of recidivism, for adults vs. juvenile, or for any of the other variables utilized in Table 1. Increasing the total number of rates, and simultaneously controlling for four additional variables has led to the discovery of larger mean differences between parole and max out.[9]

SUMMARY

Those who propose the abolition of parole supervision in this country often speak of "fairness to the offender." It is difficult to detect in Table 1 evidence of such fairness. On the contrary. The evidence seems to indicate that the abolition of parole supervision would result in substantial increases in arrest, conviction, and return to prison. Those who wish to eliminate the unfairness of Parole Board decision-making might well concentrate on finding a specific remedy for this problem, a remedy which would not increase the very "unfairness" they deplore.

At the very least, the data in Table 1 should give pause to those policy makers and legislators who have been operating on the unexamined assumption that parole supervision *makes no difference*. In face of the evidence in Table 1 such an assumption is unlikely.

---

[9] This method is an application of standard research procedures. See, for example, P. F. Lazersfeld, "Interpretation of Statistical Relations as a Research Operation," in *The Language of Social Research* (P. F. Lazersfeld and M. Rosenberg, eds.), Glencoe, Ill.: The Free Press, 1955.

TABLE 1.—MEAN RECIDIVISM RATES

Batch characteristic	Definition: Arrest					Conviction					New prison sentence				
	Parole		Max out			Parole		Max out			Parole		Max out		
	X	N[1]	X	N	D[2]	X	N	X	N	D	X	N	X	N	D
1. Batch N equals 100 to 499	26.9	84	32.8	12	5.9	20.5	68	25.9	22	5.4	11.0	227	14.7	44	3.7
2. Male	25.2	174	39.5	32	14.3	19.1	85	29.6	21	10.5	11.3	393	14.3	58	3.0
3. Percent white equals 1 to 24.9	20.8	38	31.0	17	10.2	12.8	18	22.8	6	10.0	13.3	24	22.8	6	9.5
4. Total population	20.8	62	37.7	22	16.9	13.9	31	28.1	25	14.2	9.7	593	14.5	67	4.8
5. Termination sets	24.4	206	42.1	25	17.7	21.3	79	35.7	17	15.4	10.9	603	14.9	71	4.0
6. After-only research design	25.2	96	42.3	27	17.1	21.8	60	28.9	25	7.1	10.9	581	14.8	73	3.9
7. Research done in 1970's	24.0	178	43.6	42	19.6	18.1	66	28.9	25	10.8	9.8	543	14.8	73	5.0
8. Standard treatment	27.4	129	43.0	39	15.6	19.3	96	29.9	26	10.6	10.3	584	14.9	72	4.6
9. 7 to 12 mo followup	24.6	85	43.7	12	19.1	15.6	66	22.8	6	7.2	8.7	250	5.2	15	−3.5
10. 19 to 24 mo followup	28.4	41	57.5	10	29.1	20.9	11	32.5	5	11.6	11.0	170	11.2	15	
11. 25 to 36 mo followup	28.9	25	49.5	4	20.6	17.8	15	27.5	10	9.7	15.5	79	18.9	16	3.2
12. Measured only after treatment	28.3	8	43.4	36	15.1	46.3	11	33.2	15	−13.1	14.9	48	13.9	62	−1.0
13. Percent property offenders, 50 to 74.9	16.6	39	34.5	6	17.9	13.0	70	22.8	6	9.8					
14. Percent 1st offenders, 1 to 24.9	29.5	32	37.5	10	8.0	13.8	14	22.8	6	9.0					
15. Not primarily narcotic users	32.5	5	32.5	5	0	5.9	7	22.8	6	16.9					
16. Not primarily alcohol problems	43.2	9	36.2	6	−7.2	13.7	12	22.8	6	9.1					
17. Percent white, 25 to 49.9	27.8	39	51.2	9	23.4	44.5	7	30.7	13	−13.8					
18. Mean age, 25 to 34.9	22.2	51	40.5	25	18.3	20.9	28	23.1	7	2.2					
19. Percent high school graduates, 1 to 24.9	25.5	67	41.2	9	15.7	19.8	17	22.8	6	3.0					
20. Measured over same time at risk	22.6	26	44.0	19	21.4	18.7	55	18.9	9	.2					
21. Months incarcerated equals 12 to 17	17.3	36	40.8	8	23.5	17.5	10	28.2	19	10.7					
22. Percent from broken families, 50 to 74.9	32.3	9	32.5	5	.2	19.3	23	22.8	6	2.5					
23. Comparison group	28.3	79	42.5	15	14.2						9.9	126	14.5	9	4.6
24. Batch N equals 50 to 99	20.9	53	64.5	4	43.6						12.6	62	15.5	10	2.9

See footnotes at end of table.

TABLE 1.—MEAN RECIDIVISM RATES—Continued

Batch characteristic	Definition Arrest					Conviction					New prison sentence				
	Parole		Max out			Parole		Max out			Parole		Max out		
	X	N[1]	X	N	D[2]	X	N	X	N	D	X	N	X	N	D
25. Sample	25.9	62	48.1	22	22.2						14.0	145	16.3	11	2.3
26. "E" group	23.7	84	42.5	5	18.8										
27. Percent property offenders, 25 to 49.9	21.1	29	48.5	10	27.4										
28. Batch N equals 10 to 49	22.8	72	44.1	28	21.3										
29. Primarily narcotics users	29.0	20	29.5	6	.5										
30. Mixed sex batch	28.6	39	51.7	9	23.1										
31. Percent from broken families, 1 to 24.9	29.3	31	51.2	3	21.9										
32. Percent high school graduates 25 to 49.9	33.5	10	37.0	4	3.5										
33. Lowest class	34.1	22	45.8	8	11.7										
34. Non-random-research design	24.4	93	43.9	17	19.5										
35. 1 to 6 mo followup	15.5	61	29.5	12	14.0										
36. 13 to 18 mo followup	30.1	16	32.5	5	2.4										
37. Months incarcerated equals 24 to 29	29.5	32	31.2	3	1.7										
38. Months incarcerated equals 30 to 36	36.2	6	59.5	6	23.3										
39. Percent property offenders, 1 to 24.9						20.5	15	30.5	10	10.0					
40. Highest class						20.8	19	22.8	6	2.0					
41. Batch N equals 500-plus											9.3	378	13.9	18	4.6
42. 37 to 60 mo followup											13.5	87	18.4	18	4.9
43. 60-plus mo followup											14.1	22	25.4	7	11.3
Total	24.5	235	42.9	44	18.4	19.7	135	29.9	26	10.2	10.5	738	14.8	73	4.3

[1] N equals number of rates.

[2] D equals max out mean minus parole mean.

ALBANY, N.Y.

Senator JOHN L. MCCLELLAN,
Senate Subcommittee on Criminal Law, U.S. Senate,
Washington, D.C.

DEAR SENATOR MCCLELLAN: I regret that I have not been able to study the above because of absence from the country. However, I am informed that it is proposed to abolish the United States Parole Commission.

I do not regard supervision or surveillance on parole to be of any value, but the decision-making function of the Commission through its Hearing Representatives is a piece of judicial machinery which, I think, should be retained.

I do not think that it could be replaced adequately by any other body charged with a wider range of determinations of disposition of offenders. Judges have considerable experience of *selecting between incarcerative and non-incarcerative penalties*, while Parole Boards have experience in *setting time* once a decision to incarcerate has been made.

It seems to me to be most advantageous to separate the selection of time to be served from the initial decision to incarcerate and to ensure that there is a feedback of information to the decision-making body. The "guideline" system in use by the United States Parole Commissioners is, in my view, most suited to this purpose.

I hope that the decision to abolish the *decision-making* function of the Parole Commissioners will be carefully re-considered.

Yours truly,

LESLIE T. WILKINS,
Professor of Criminal Justice, State University of New York, Albany.

WASHINGTON, D.C., *June 15, 1977.*

Hon. EDWARD M. KENNEDY,
U.S. Senator,
Washington, D.C.

DEAR SENATOR: I have enclosed for your consideration, and for inclusion in the record regarding your bill, S–1437, a copy of the comments of the Freedom of Information Clearinghouse on two provisions of that bill which we believe unnecessarily threaten to undermine the open government provisions of the Freedom of Information Act. In view of the exceptional work which you have done to reduce government secrecy, we hope that you will either eliminate the two provisions to which we refer or, at least, amend them to reduce their anti-openness effects.

We thank you for your consideration of these matters.

Respectfully yours,

LARRY P. ELLSWORTH

FREEDOM OF INFORMATION CLEARINGHOUSE,
Washington, D.C.

MEMORANUM REGARDING PROVISIONS OF S. 1437 WHICH ADVERSELY AFFECT THE OPEN GOVERNMENT PROVISIONS OF THE FREEDOM OF INFORMATION ACT

S. 1437 is intended to be a comprehensive recodification and reform of the criminal provisions of Title 18 of the United States Code. However, two of the intended reforms would, perhaps inadvertently, have severe adverse effects on the disclosure provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Section 1525 would subject former and present Government employees to criminal liability for disclosing, "in violation of a specific duty," virtually any information received from outside the Government. Section 3825 would exempt the Bureau of Prisons, when making certain imprisonment, transfer and release decisions, from the Administrative Procedure Act, including the FOIA and the Federal Privacy Act, 5 U.S.C. § 552a. This memorandum discusses the public access problems created by these provisons and suggests solution to these problems.

SECTION 1525

Section 1525 is apparently intended to replace 18 U.S.C. § 1905, the so-called Trade Secrets Act. This latter Act punishes any disclosure by Federal employees, which is "not authorized by law," of any information that "relates to trade

secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person . . . ."

Interestingly the broad prohibitory language of Section 1905 was itself created by a 1948 codification of three much narrower non-disclosure statutes, even though the legislative explanation denied any intent to expand the prohibitions of precodification law.[1] These pre-existing statutes punished only disclosures of certain income tax return, Tariff Commission and Commerce Department information.[2] The expanded 18 U.S.C. § 1905 has apparently never been used to prosecute anyone criminally, but in recent years it has been the subject of an ever-expanding amount of civil litigation. Typical cases include those where companies have attempted to use it to prevent civil rights groups from obtaining information concerning employment discrimination and to prevent state agencies from securing financial information needed for state law enforcemet efforts.[3] Courts have generally held that commercial and financial information is protected by section 1905 only if its disclosure would be likely to cause substantial competitive injury.[4] They have split widely on such questions as whether an agency may by regulation "authorize" disclosure where the public interest will thereby be advanced.[5]

Just as section 1905 expanded the criminal prohibitions contained in pre-1948 law, proposed section 1525 would expand upon the criminal prohibitions of section 1905. No longer will criminal sanctions be limited to disclosures of competitively sensitive commercial information. Instead, subject to the not altogether clear qualifying phrase—"in violation of a specific duty"—any disclosure of any information, whose submission is required by the Government or is necessary in order to receive a benefit, will subject Government employees to the threat of criminal prosecution. While disclosures required by the FOIA would apparently not violate this duty of secrecy, the threat of criminal sanctions for mistakes could have a significant chilling effect on the willingness of employees to disclose and also might significantly reduce the number of legitimate discretionary disclosures of technically exempt information which is necessary for informed public debate of political, health, or other important issues. Section 1525 thus threatens important First Amendment interests which the FIOA, and similar laws, were intended to foster.

The sweeping nature of section 1525, which subjects to possible criminal sanction disclosures of most information received from private parties, is overbroad. As the history of non-enforcement under 18 U.S.C. § 1905 reveals, overbroad criminal statutes are often unused statutes. Moreover, the criminal law cannot, and should not, be used in an attempt to cure all possible ills. Indeed, use of Civil Service sanctions or imposition of civil damages for injuries inflicted would probably be a far more effective deterrent to wrongful disclosures, if any additional deterrent is needed.

Assuming, however, that criminal penalties for disclosures of some types of private information will be maintained, the scope of this criminal statute should be narrowly confined to the most sensitive of information. Our society has historically chosen not to criminalize all disclosures that might harm Government functions, but instead only disclosures of a narrow class of very sensitive national security information where the intent of the disclosures was to aid a foreign power. Similarly, in dealing with private information in the hands of the Government, we should single out only the most sensitive information for the protections afforded by criminal sanctions. This does not mean that because there are no criminal penalties for disclosures of other types of information, it must or will generally be disclosed. Rather, this is merely a recognition that not all private information, and not all business or personal information, is of equal sensitivity. More flexibility than a criminal statute provides is needed to deal with less sensitive information. Indeed, experience teaches that claims that everything must be kept secret generally result in nothing being kept secret. The narrowing of Section 1525 to only the most sensitive of private information is therefore essential.

---

[1] *See* S. Rep. No. 1620, 80th Cong., 2d Sess. 1 (1948); H.R. Rep. No. 304, 80th Cong., 1st Sess. 8, A 127–28 (1947); 91 Cong. Rec. 8721 (1948) (Remarks of Senator Wiley).

[2] 18 U.S.C. § 216 (1940); 19 U.S.C. § 1335 (1940); 15 U.S.C. § 176b (1940).

[3] *See, e.g., Westinghouse Electric Corp. v. Schlesinger* 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3749 (May 16, 1977) (No. 76–1192) (civil rights); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935 (D.C. Cir. 1975) (law enforcement).

[4] *E.g., Westinghouse Electric Corp. v. Schlesinger, supra.*

[5] *Compare Westinghouse Electric Corp. v. Schlesinger, supra, with Westinghouse Electric Corp. v. Nuclear Ruglatory Comm'n.*, No. 76–1611 (3d Cir., March 22, 1977).

This objective can be accomplished by amending Section 1525 by adding the phrase "trade secrets or intimate personal" just before the words "information". Amended Section 1525 will then read in pertinent part that: "A person is guilty of an offence if . . . he discloses trade secrets or intimate personal information . . ."

Another aspect of Section 1525 which deserves attention is the "state of mind" that must be proved as an element of the crime. Since Section 1525 does not specify the required state of mind, one must look at Section 303(b), which provides the required state of mind in any instance where it is not otherwise specified. However, it is unclear whether the required state of mind under Section 1525 is "knowing" (§ 303(b)(1)) or "reckless" (§ 303(b)(3)). In neither case, however, are the protections against possibly unwarranted prosecutions sufficient. As presently written, disclosure of personal information may be punishable under Section 1525, even though it would not be an offense under the criminal provisions of the Federal Privacy Act, 5 U.S.C. § 552a(i)(1), which punishes only those disclosures that were both knowingly and willfully made. Moreover, the penalties under proposed Section 1525 are much greater: up to a year in prison and a ten thousand dollar fine as opposed to a fine of no more than five thousand dollars, and no prison term, under the Privacy Act. There is no reasonable justification for such unequal treatment, unless Section 1525 is going to punish only more significant offenses. Government employees should not be subjected to the threat of criminal sanctions for disclosures of information to the American people, unless the employee intended the disclosure to injure the source or subject of the information, or the employee intended to gain personal pecuniary advantage from the disclosure. Section 1525 should be amended accordingly.

Finally, the language of Section 1525 should be revised simply to make it clearer. The present single, run-on sentence should be divided into at least two separate sentences. With such a division, and the addition of the aforementioned amendments, Section 1525(a) will read as follows:

"(a) OFFENSE.—A person is guilty of an offense if, in violation of a specific duty imposed upon him as a public servant or former public servant by a statute, or regulation, rule, or order issued pursuant thereto, he discloses trade secrets or intimate personal information, to which he has or had access only in his capacity as a public servant, where the intent of the disclosure was to cause injury to the source or subject of the information or to benefit financially the person making such disclosure. This section applies only to information that had been provided to the government: (1) by a person, other than a public servant acting in his official capacity; and (2) solely in order to comply with:

"(A) a requirement of an application for a patent, copyright, license, employment, or benefit; or

"(B) a specific duty imposed by law upon such other person."

SECTION 3825

Subchapter C of Chapter 38 concerns post-sentencing imprisonment and release, excluding parole. For a convicted person, the decisions of the Bureau of Prisons under this Subchapter probably affect his or her life more than any others made during the period of incarceration. Certainly the public has a significant stake in assuring that such decisions are made on rational and nondiscriminatory grounds. In the past, there have been many instances, for example, of transfers from one prison facility to another less desirable facility in retaliation for the exercise of First Amendment rights.

In view of the overriding importance of sentencing decisions to an inmate and to society, the advisability of exempting these decisions from the procedural protections of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551–59, 701–06, as Section 3825 would do, is very doubtful. Be that as it may, the determination totally to exempt the Bureau of Prison's records of decisions from public scrutiny under the FOIA and the Privacy Act, 5 U.S.C. §§ 552 and 552a, is indefensible. Inmates who have access to records explaining the basis of transfers and other sentencing decisions are more apt to accept those decisions and are more apt to react favorably to rehabilitation programs. Just as important, citizens are more apt to put their trust in, and to give their support to, our correctional system if they have access to the documentation of its workings. Thus, even if the exemption in Section 3825 from the APA's procedural is retained, the exemption from our open Government laws should be stricken. This can easily be accomplished by amending Section 3825 to read as follows (additional matter is italic): "The provisions of 5 U.S.C. 551, 553 through 559, and 701 through 706,

do not apply to the making of any determination, decision, or order under this subchapter."

NEW YORK COUNTY LAWYERS' ASSOCIATION,
New York, N.Y., June 13, 1977.

KENNETH FEINBERG, Esq.,
Committee on the Judiciary,
Senate Office Building, Washington, D.C.

DEAR MR. FEINBERG: In response to your request for areas for possible further consideration with respect to the conforming amendments to titles other than Title 18 in connection with the new federal criminal code, I would like to mention the following questions (which have not been, however, the subject of any specific position by our Committee):

S. 1, 8/15/75 version, p. 435–36, sec. 9115: should there be an exception for: Communication of information to a member of Congress or a Congressional Committee? This might be important to protect someone who "blows the whistle" with regard to a matter of public concern and who might otherwise be threatened with the spectre of actual or possible prosecution.

Communications requested by a member of Congress or Congressional committee? This might be important to protect full congressional access to ideas and recommendations from those with the most information. Limiting access to ideas flowing through approved channels would prevent consideration of many alternatives other than a bureaucratically sanctioned "party line".

The section as drafted is obviously not intended to cover the kinds of situations mentioned, but its existence and possible misinterpretation might exert an *in terrorum* effect absent clarification by amendment or Committee Report language.

S. 1, 8/15/75 version, p. 512, sec. 386 covers the "Denture Crimes Act," making it a crime to transport in commerce or with the use of the mails any dentures made by one lacking a license to practice dentistry under the laws of the state into which the dentures are brought, where required by such state law. This is a mercantilist provision preventing even licensed personnel in State X from competing with those in State Y. The analogy would be a federal law penalizing legal advice by a California lawyer to a New York resident. Further, licensing is not always in the public interest, as frequently noted in recent days. The federal interest in a criminal provision of this type reinforcing state licensing laws is questionable at best.

S. 1, 8/15/75 version, p. 760–707, sec. 6008, 6009 continue criminal penalties for private carriage of mail. The need for a statutory monopoly in this field supported by criminal sanctions today may well be questioned. Further, many types of private delivery systems in fact compete with the Postal Service, making the theoretical prohibitions somewhat obsolete and perhaps making any prosecution today even unfair to one singled out. The federal interest in providing postal service does not necessarily extend to punishing citizens who, not satisfied with the service, might wish to "do it yourself" within limited areas. The argument to the contrary—that private delivery services would simply "skim the cream" and leave the unprofitable work to the Postal Service—is similar to the CAB controversy over limiting competition on prime runs as a way of subsidizing socially desirable unprofitable ones. It may be better to give subsidies to unprofitable but necessary postal or personal transportation directly rather than via Crown monopolies.

As noted, these are questions merely, in response to your request, and not Committee positions.

Respectfully,

RICHARD A. GIVENS,
Chairman, Committee on Federal Legislation.

GEORGIA DEPARTMENT OF LABOR,
EMPLOYMENT SECURITY AGENCY,
Atlanta, Ga., May 13, 1977

HON. EDWARD KENNEDY,
Member, U.S. Senate, Russell Senate Office Building,
Washington, D.C.

MY DEAR SENATOR KENNEDY: This letter is in regard to S. 1437 authored by you and Senator McClellan now pending in the Committee on the Judiciary pro-

viding for codification, revision and reform of the Federal Criminal Code. This Bill is immeasurably superior to previous versions. The staff work on it has been excellent.

There is one matter which I would like to present to you for your attention and for your consideration. That has to do with the language of Section 1516 on pages 92 and 93 of S. 1437.

My first comment on these sections right along in here is that we have done considerable research on existing laws relating to these same subject matters and find that the codification in S. 1437 clearly states what Congress from the beginning has intended these laws to be notwithstanding the sometimes vague language in the present laws, intermittent changes over the years and conflicting interpretations by various Federal Courts.

We agree with the proposed codification in S. 1437 and particularly with the language of the other sections in subchapter B on pages 90, 91, 92, 93 and 94.

While we understand what is meant by Section 1516, we think for the purposes of clarity, a new subparagraph (c) should be added on page 93 in lieu of the present subparagraph (c), the new paragraph to read as follows:

"(c) The provisions of this section shall not apply to officers, officials and employees of State governments or any of their political subdivisions or entities nor to buildings or facilities owned, rented, occupied or operated by them."

We suggested further that subparagraph (c) as it appears in S. 1437 be redesignated as subparagraph (d) and that it be added after the above paragraph to read as follows:

"(c) Grading—An offense described in this section is a Class A misdemeanor."

Please let me compliment you and Senator McClellan and others for the good work which you have done trying to bring some order out of a very chaotic condition as regards Federal Criminal Statutes. Under S. 1437 it will be possible for a person to read the same and know what is prohibited and what is not.

With the expression of my highest esteem for you and with warmest regards,

Always sincerely,

WALTER O. BROOKS,
Director.

UNIVERSITY OF CHICAGO LAW SCHOOL,
Chicago, Ill., June 20, 1977.

Hon. EDWARD M. KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: To my deep regret, earlier made and firm obligations preclude my accepting the invitation to appear before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary. I was advised, however, that a letter to you on certain aspects of the testimony I had planned to offer may be appropriate and of some use. I do hope so.

Let me open by expressing the satisfaction that all who care about the shape, content and operation of the federal criminal justice system must feel in your initiative and that of your colleagues in the Senate, expressed in S. 1437. It is surely time that order and principle are brought to the federal statute book of crime and punishment; S. 1437 is a secure foundation for such an effort.

In this letter I shall confine myself to a few comments on the sentencing provisions in the proposed Federal Criminal Code.

Responsible students of the federal criminal justice system have come to appreciate that present legislative provisions on criminal sentences are so scattered and uneven, and present judicial sentences are so characterized by arbitrary and unjust disparities that it is impossible to fashion a fair, just and community protective criminal justice system around them. Charge and plea bargaining, at one end of the process, and parole discretion at the other compound and vary the mixture. A responsible balance between legislative, judicial and administrative sentencing functions remains elusive. The sentencing provisions of the proposed Code provide a rational system of checks and balances which should in time lead the federal system to fair and just sentencing of criminal offenders.

Of course I have quibbles and disagreements. They merely slightly cloud my enthusiasm for the broad approach to sentencing in the proposed Code.

As a quibble, section 2003(a)(2)(d): Is it really appropriate in deciding on what sentence to impose to consider rehabilitative purposes? For example, fed-

eral prisons should provide more vocational and educational training than they now do, but it seems to me an abuse of power to send a convicted criminal to prison for such training who, lacking that need, would not have been imprisoned. On this point, I respectfully agree with the testimony already presented to your subcommittee by Norman Carlson, Director of the Bureau of Prisons. Some refashioning of the language of section 2003 and comparable sections on sentencing purposes could easily put rehabilitative processes into proper sentencing perspective.

As a disagreement: I doubt the wisdom of those mandatory minimum sentences and those provisions for parole ineligibility which are to be found in the Code. They tend to be largely nullified in practice: they shift discretion from judge to prosecutor, or from parole board to the judiciary, in an unsatisfactory and unprincipled way. They are politically attractive, it is true, but seems to me out of phase with the broad and balanced approach of the other sentencing provisions of the proposed Code.

Let me put aside quibbles and disagreements and come to areas of enthusiastic support. The U.S. Sentencing Commission, an idea first suggested, I believe, by Judge Marvin Frankel in his excellent *Criminal Sentences: Law Without Order*, will be a mechanism to bring justice to the present disparity of federal sentencing. The Commission can, over time, produce guidelines and policy statements, within, and sometimes overlapping, legislative categories of criminal sanctions, which will contribute to rational and fair sentencing based on our best present knowledge, on feedback from how sentences operate in practice, on the continuing controls of Congress and the decisions on sentencing from the newly-established judicial appellate procedures. A sound process may be fashioned by which a common law of sentencing may evolve. It is an enormously important development in the jurisprudence of punishment.

Buoyed by the hope of passage of this Federal Criminal Code, a group of scholars who have written on problems of sentencing are planning to start this summer drafting a series of "guidelines" and "policy statements" under the terms of the Code. We may thus be of some assistance to the Sentencing Commission when, as I hope, they take up this difficult task.

The Sentencing Commission is the linchpin of the punishment system of the proposed Code: For this reason, I wonder whether the provisions in Part E are the best that could be devised. Should membership of the United States Sentencing Commission be designated only by the Judicial Conference of the United States? May that appointment procedure not overload the Commission with judges? The Commission's role is to acquire knowledge of sentencing and its efficacy and to shape the evolution of fair sentencing principles. This complex task requires, I believe, also some of the knowledge of other actors in and students of the criminal justice system. The insight and experience of a member of a parole board may well be appropriate to membership of the Sentencing Commission: there may even be room for an academic or scholar in that the insights of research feedback on sentencing must be incorporated into the Commission's work: and there are several other appropriate professional paths, in my view, to membership on the Commission. Would it not be appropriate to reduce the appointive power of the Judicial Conference and give some of it, perhaps the bulk, to the Executive? It seems so to me, being likely to provide a more roundly informed Commission, better able to harmonize legislative, judicial and administrative sentencing discretions contemplated under the proposed Code.

May I comment on two more points of importance in the proposed Code: the question of parole and the Parole Board, and the question of appellate review?

I note that some witnesses have advocated the abolition of parole with the establishment of legislative sentencing criteria and the creation of the Sentencing Commission. Norman Carlson has gone further and advocated the abolition of "good time." Both recommendations are congenial to my view of what the sentencing of criminals will be like in the future, assuming the gradual perfectability of men and women and their institutions. But at this stage of our efforts to reshape our jurisprudence and practice of crime control it seems to me that there is a great deal to be said for the preservation of the parole discretion and of "good time" (provided it be applied with due process) to assist in the gradual evolution of principled sentencing. For the time being I think we need the safety valves they provide. And further, the proposed Code would bring pressure to bear on the Parole Board to pursue its present plans for earlier fixation of presumptive parole dates under firm and predictable criteria. The proposed Code makes the Parole Board subject to the guidelines of the Sentencing Commission;

indeed, it may go too far toward restricting parole release discretion; but certainly a wise use over time by the Sentencing Commission of its powers could lead to a better informed judgment than can now be made on the proper role of a parole board. The abolition of parole boards may prove desirable; the bill allows for movement in that direction and, if appropriate, for a gradual reduction of the Parole Board's discretion and a consequential expansion of that of the Sentencing Commission.

Appellate Review: The proposed Code does not, in my opinion, go far enough. Respectfully, I would concur with the testimony offered to the Subcommittee by Judge Frankel. Building on the Sentencing Commission's guidelines and policy statements, it should be possible under the Code to use appellate review as a means of further developing guidelines and policy statements and of fashioning a common law of sentencing. Principled sentencing is central to a fair criminal justice system. I appreciate the present pressure of business on the federal courts but a proposed Code should not let expediency preclude a design that can in time achieve a fair criminal justice system. Ample appellate review is essential to the interlocking sentencing relationships in the proposed Code between congressional control, the influence of the Sentencing Commission, and the work of trial judges.

Sincerely,

NORVAL MORRIS, *Dean.*

ARKANSAS WOMEN'S CLUB.
Eureka Springs, Ark., May 20, 1977.

GENERAL FEDERATION CLUBWOMEN NEWS,
Washigton, D.C.

DEAR EDITOR AND STAFF MEMBERS: We, the Womans Club of Eureka Springs, Arkansas, want to go on record as supporting the General Federation of Club Woman News in its "Justice for Citizens" campaign.

We share your views concerning the tendency of our courts to protect the rights of criminals rather than the rights of victims and we are hopeful that the combined efforts of our women throughout the nation may be a compelling factor which will bring about much needed change.

Below is our statement of commitment as you requested:

"Whereas, compassion for the criminal at the expense of the victim is at the root of our rising crime problem; and

"Whereas, too often court interpretations mock justice and affront the victim and release, suspend sentence, or parole offenders who return to the streets to commit more crimes; and

"Whereas, we need to approach the problem at the beginning point, in the sentencing, to insure that lawbreakers will be punished and will not be encouraged to contribute to the suffering and terror of the law-abiding; therefore

"Resolved, that the Womans Club of Eureka Springs, Arkansas go on record supporting General Federation CLUBWOMAN NEWS' JUSTICE FOR CITIZENS campaign which calls for a mandatory minimum sentence, without parole, suspension or probation, for violent crimes, in an effort to promote community welfare and the security and wellbeing of the general citizenry.

Sincerely,

MRS. C. J. TYSON,
Corresponding Secretary.

STATEMENT OF JAMES V. BENNETT, FORMER DIRECTOR OF U.S. BUREAU OF PRISONS

As the former Director of the U.S. Bureau of Prisons and a much chastened advocate of sentencing reform, I appear before you to suggest a word of caution about the pending proposals on sentencing lest the admirable efforts of a decade to revamp and modernize the criminal code are frustrated.

Praiseworthy as may be the goal to structure and guide judicial discretion in the imposition of sentences, its achievement along the lines suggested in the pending bill will require so much research, so much debate, and so much controversy that the impressive progress so far made by the Brown Commission, the Committees of the Congress, and a host of scholars may be stymied for years.

The proposal to delay the effective date of the Act for two years in order to give the suggested Sentencing Commission time to obtain funds, organize, select

its staff, prepare its guidelines and policies, and obtain the approval of the Congress of its findings is, I suggest, much too optimistic. It would be far better to split off Part E of the bill and go forward with immediate approval of the revision of Title 18 of the U.S. Code. Its sentencing proposal can be taken up later.

FORMULATION OF SENTENCING GUIDELINES MIND BOGGLING

The proposal to establish a nine-person Sentencing Commission of judges, lawyers, laymen, and perhaps ex-prisoners to draft really meaningful and definite guidelines to channel the concepts of upwards of 500 judges in their disposition of hundreds of different crimes is an overwhelming, not to say chimerical, task.

I have read much of the literature on sentencing, listened to much rhetoric about the lawlessness of our methods of imposing sentences—indeed contributed to some of it myself—but have yet to learn of any precise definition of the factors that a court should take into consideration in disposing of particular cases.

SELF-EVIDENT GUIDELINES

To be sure, a court can be urged to take into account the seriousness or gravity of the offense, the prior record of the defendant, his age, his emotional problems and handicaps, his work history, the extent of harm done to others or to society, public attitudes about the crime, deterrent values and so on and so on. But these are mostly admonitions which will be impossible to scale or quantify, even with the help of computer science. Inevitably, guidelines for sentencing many offenders will be articulated in such vague and ambiguous terms as to be of little help to the conscientious and experienced judge. Moreover, recent pre-sentence reports have become so lacking in depth and analysis that the court is severely handicapped in making judgments.

And if some genius could be found to verbalize a set of really definite and useful guidelines for robbery, or auto theft, or counterfeiting, how can he define the factors that must be taken into account in disposing of an anti-trust violation, an income tax case including many with implications of social significance, a charge of perjury, bank embezzlement, or any of the myriad types of drug-law violation? And, the Commission must spell out factors and guidelines that Congress must approve!

DIFFICULTIES OF LEGISLATIVELY MANDATED GUIDELINES

If, in all deference, we suggest Congress has great difficulty agreeing on the penalty for a marijuana smoker or the disposition of a military deserter, how can it possibly be expected to approve definitive guidelines for sentencing a Jimmy Hoffa, an Alger Hiss, a Patty Hearst, a John Dean, a John Mitchell, or a Dave Dellinger—the draft evader and militant leader of the war-protesters.

The American Bar Association spent much time, money, and effort to develop a set of standards for the administration of Criminal Justice. Among them was one volume dealing with sentencing. The entire thrust of the standards on sentencing was to minimize the role of the legislature in determining precise sentences. It urged legislatures not to specify mandatory sentences and that the court be provided with a wide range of alternative dispositions so that a sentence appropriate to each individual case, the times, the potentialities of the offender, the correctional facilities available, and the purposes of the criminal justice system.

In view of this standard, I should think the Bar Association could not accept a plan which required that a detailed formulation of sentencing criteria be subject to approval by Congress with its many faceted attitudes with respect to crime control.

BROAD SCOPE OF SENTENCING COMMISSION

The proposal (Sec. 994(a)2) that the Sentencing Commission may, from time to time, promulgate "general policy statements regarding application of the guidelines or *any other aspect of sentencing that in the view of the Commission would further the purposes set forth in Section 101b of Title 18*" seems bound to raise serious practical and constitutional problems since the general purpose of this section, among other things, is to "prescribe appropriate sanctions" for engaging in conduct that causes or threatens harm to those individual or public interests for which federal protection is appropriate.

I cite this chiefly to call further attention to the many aspects of the proposed sentencing procedure that are bound to be controversial. The ultimate abolition of the Parole Board without providing any alternative system of aftercare or supervision or any means to ameliorate a sentence other than by Presidential intervention is another. The virtual abandonment of the "good time" system without providing any other system of incentives for good conduct is, in my judgment, a fatal flaw that forebodes institutional violence.

PLEA BARGAINING THE CRUX OF THE DISPARITY PROBLEM

The crux of the disparity of the sentencing problem, however, is not alone to bring more even-handed justice to the fifteen percent of those who stand trial but to the 85 percent of the approximately 59,000 defendants whose sentence was set, to all practical intents and purposes, by the prosecutor in a plea negotiation. It is the 94 U.S. Attorneys and their hundreds of assistants who determine the charges, make recommendations as to sentences, and largely determine the disposition of the offenders who do not stand trial. Spelling out sentencing guidelines, incidentally, would give the prosecutor another bargaining chip and, in all likelihood, further exacerbate the sentencing dilemma. The speedy trial law, on the other hand, is an incentive for the prosecutor to accept a negotiated plea and sentence that may further contribute to disparity.

AN ALTERNATE PROPOSAL

The effort to bring about a more consistent, a more rational, a more effective system of sentencing surely should not be abandoned. A number of alternatives to the sentencing guideline plan have been proposed: (a) flat sentences; (b) presumptive sentences; (c) sentencing councils; (d) mandatory minimum sentencing; (e) review boards; (f) sentencing seminars; and (g) development of a system of judicially promulgated case law on sentencing stemming from appellate overview of the reasons stated by the district judge for the sentence.

It would seem the part of wisdom for the Federal Government with its heavy responsibility for law enforcement to delay venturing into so baffling a field until it had commissioned a group to draft specific sentencing guidelines and subjected them to study by knowledgeable groups. It might indeed be possible to find several courts that would voluntarily undertake to implement them. The results could be studied and improvements made, or the plan abandoned, and one of the other proposals tried.

Meanwhile, the substantive code with its enormous promise of important improvements in existing law can be enacted. To delay its enactment until a highly controversial sentencing scheme is developed and wins the approval of the Congress would be "throwing out the baby with the bath water."

WASHINGTON SUPREME COURT,
Olympia, Wash., July 8, 1977.

SENATE SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES,
New Senate Office Building,
Washington, D.C.
(Attention: Mr. Paul C. Summit.)

GENTLEMEN: I appreciate the opportunity to comment on the provisions of SB 1437. My first comment is a rather minor one and regards the definitions found at the end of a particular subchapter which apply only to that section. It might be more convenient to place these at the beginning of the section where they are not easily overlooked.

CHAPTER 3.—CULPABLE STATES MIND

Rather than commenting on the chapter specifically, my comments will be in subsequent chapters whose provisions require substantially less than the intentional or knowing state of mind normally presumed to exist where a particular state of mind is unspecified.

CHAPTER 4.—COMPLICITY

§ 401. Liability of an Accomplice. Section (a) (2) appears to be a method for making one liable as a principal for what is in fact the crime of "solicitation" (§ 1003) which ordinarily carries a penalty one grade lower than that of the

crime solicited. (§ 1003(d)). If this is in fact true, I question whether this is an appropriate degree of prosecutorial discretion, given the ability to charge two or more different crimes with the same elements but different penalties.

Section (b) Liability as Coconspirator. There appears to be an inconsistency with the general conspiracy statute, § 1002, which provides one is liable as a conspirator for the same grade of crime as the most serious crime which was an objective of the conspiracy (the agreement to engage in criminal conduct). Section 401(b) renders a coconspirator liable as a principal for any conduct of another party to the conspiracy which is not a part of the agreement or, arguably, the "objective" but is simply "reasonably foreseeable."

CHAPTER 10.—OFFENSES OF GENERAL APPLICABILITY

§ 1002. Criminal Conspiracy. Our recently drafted criminal code for Washington State, RCW 9A.28.040(1), sought a compromise between the "any objective" language used in § 1002 and the "unequivocal step" language employed in the Model Penal Code and original recommendations to our State legislature. Our statute adopted the "substantial step" requirement which seemed to me to be a more reasonable middle ground. I am also concerned about section (c) (Defense Precluded). Section 1002 would seem to allow conviction of one who agreed, but performed no act, even if the individual who conspired with him was agent or informer and therefore immune from prosecution and the latter individual was responsible for all significant overt acts in furtherance of the conspiracy.

§ 1003. Criminal Solicitation. This provision seems a bit overbroad to me. It could be argued every drug enforcement agent who assisted in arranging a sale would be guilty of this crime as the statute is presently worded. The statute also appears to require nothing more than speech as actus reus. In our recently revised criminal code, RCW 9A.28.030, criminal solicitation is defined as "(1) A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed."

CHAPTER 11.—OFFENSES INVOLVING NATIONAL DEFENSE

§ 1102. Armed Rebellion or Insurrection. It seems to me this statute needs more concise definition. The terms "armed rebellion" or "armed insurrection" appears to provide possible void for vagueness issues.

§ 1103. Engaging in Para-Military Activity. I have some problems with this provision which relates back to the chapter 3 definitions of culpable states of mind. The purpose of an organization training one in use of weapons would be "an existing circumstance." Guilt under this section would only require a showing that the defendant was aware of a "risk" that the purpose of the organization was the unauthorized assumption, by threat of force, of a government agency, rather than proof he knew that to be its purpose. Moreover, this provision does not require a showing that the training or caching of weapons was in furtherance of the unlawful purpose. For instance, the Black Panthers cache weapons in fear of assaults by a rightist para-military group. This would be enough, arguably, to establish guilt since the purpose to assume control of government activity by threat of force has at various times been an expressed purpose of that organization.

§ 1115. Obstructing Military Recruitment or Induction; and § 1116. Inciting or Aiding Mutiny, Insubordination, or Desertion. I agree with the legitimate aims of these sections, but I am concerned about overbreadth. I would hope these statutes could be altered so as to include more than speech as a sufficient actus reus and also be more specific as to the extent of the incitement or obstruction required in order to survive an overbreadth challenge. As presently constituted, they seem to have a potential chilling effect on peace and disarmament movements traditionally thought to be protected by the First Amendment.

CHAPTER 13.—OFFENSES INVOLVING GOVERNMENT PROCESSES

§ 1302. Obstructing a Government Function by Physical Interference. I am uncertain of the specific situations this subsection was meant to encompass. It does seem the possibility of a one-year jail sentence against one who staged a sitdown strike or sit-in at a federal office building may be a bit overbroad and

further grading as to various types of obstruction which might be committed would be appropriate.

CHAPTER 14.—OFFENSES INVOLVING TAXATION

§ 1411. Smuggling. The culpable state of mind as to section (a)(1)(B) ought to be "knowing" rather than the "reckless" standard which is applied in the absence of a specific section to the contrary. With the proliferation of regulations there could always be the risk that formal conditions had not been complied with and the severity of the potential sentence seems to make a "knowing" standard more appropriate.

§ 1412. Trafficking in Smuggled Property; and § 1413. Receiving Smuggled Property. I believe these sections have the same deficiencies as section 1411.

CHAPTER 15.—OFFENSES INVOLVING INDIVIDUAL RIGHTS

§§ 1501–06. It seems ironic that the grading of these offenses are listed as misdemeanors while nearly all the offenses against the government carry more severe sanctions. It seems that the danger to constitutional government is identical whether in an act of defiance against the government or an act violating the civil rights of its citizens. An example of this is the comparison of the "strikebreaking" provision in section 1506, which requires the use or threat of force, with section 1302 (obstructing government function), which requires only a physical interference.

§ 1511(a)(2). I am concerned about the phrase "something of value" applicable to this provision. Is it the same as "anything of value" (p. 14, line 32) which means "any direct or indirect gain or advantages, or anything that might reasonably be regarded by the beneficiary as a direct or indirect gain or advantage, including a direct or indirect gain or advantage to any other person." If this in fact is similar, it would seem to include any innocuous campaign promise and be overboard. If another definition is intended it should be spelled out in the definition section at the end of the chapter.

§ 1513(a)(3). This provision also seems overbroad and places a penalty on what could be simply an administrative oversight. If the present grading is to be maintained it should be tightened to punish only intentional misrepresentation by the responsible organization.

§ 1516. Soliciting a Political Contribution as a Federal Public Servant or in a Federal Building. With the exemption noted in section (b) (affirmative defense), would it not be better to control this through civil service sanctions and fines, rather than making this a criminal offense.

§ 1521. Eavesdropping. The defense for "quality control" checks should be limited to preclude it in instances where the information obtained is transferred to anyone not employed by the common carrier or used for a purpose other than quality control. The same would apply to section 1524 and the defense should protect only in innocent interception or one necessary to monitor service by the carrier. It should not protect subsequent disclosure for any other purpose.

CHAPTER 16.—OFFENSES INVOLVING THE PERSON

§ 1601. Murder. I am convinced by the "loss of self-control" defense, section (b). It appears to be a substitute for the traditional protection of the person rationale for self-defense and greatly reduces an individual's responsibility for control of emotions. I would urge a limitation of the felony-murder provision (section (3)) to instances in which the conduct during the course of the specified crime which in fact causes the death must itself demonstrate a reckless regard for human life. Such a provision would dispense with many of the problems inherent in felony murder statutes, particularly when coupled with a merger rule which the federal act has adopted. By limiting application of felony murder to instances in which death is caused by reckless conduct, focus is placed on the felon's willingness to employ dangerous means to perpetrate a felony. This is the only sort of conduct which a felony murder rule can logically be designed to deter.

§ 1621. Kidnapping. The grading of this crime seems to encourage the kidnapper to persevere. It is only a Grade A crime if the actor fails to voluntarily release the victim unharmed prior to trial. On the basis of this reasoning, one who succeeds in collecting ransom and then releases his victim is no more culpable than one who gives up sooner.

§ 1624. This affirmative defense should also extend to parents or guardians of adult incompetents.

§ 1641. Rape. This section takes needed steps toward reform but could go further. The definition of "spouse", section 1646(a)(3), could be limited additionally so as not to include persons living separate and apart even if there is no judicial decree of separation. This definition is related to the "not a spouse" exception contained in the definition of the substantive offense.

§ 1641(a)(2). I am concerned that the grading of a forcible rape may be too lenient. It is in harmony with the gradation of other violent crimes against a person, Maiming, § 1611 (class C); Aggravated Battery, § 1612 (class D), but no more severe than most of the crimes against property. It seems to me the violent crimes against persons should be more severe than the sanction for a simple burglary and that, for example, aggravated battery which is a class D felony, should be at least as severe as simple burglary, a class C felony and arguably more severe.

The rape statutes could be more clear on the nature of consent which is sufficient to exculpate. Our state statute, RCW 9.79.140(6) defines "consent" to mean that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse.

CHAPTER 18.—OFFENSES INVOLVING PUBLIC ORDER, SAFETY, HEALTH, AND WELFARE

§§ 1811–15. I have not been a trial court judge for seven years and do not have current experience with sentencing problems involving drug offenders. My general feeling at that time regarding dealers at all levels was one of outrage and the temptation was to impose punitive sentences. In retrospect I question the effectiveness of such a policy. While I can and do justify this attitude toward those involved in the narcotics trade at a commercial level, most of those arrested and brought before me were addicts themselves. Incarceration for some time for addicts may be justifiable, but the majority of those I observed did not have access to effective help for addiction while incarcerated. They also had better or equal access to drugs in prison compared to their availability on the street and on release were in no better position to remain away from drugs than they were before they were incarcerated. I am enclosing copies of two opinions I wrote in *Bresolin* v. *Morris* which set forth some of my concerns about handling of drug offenders in institutions. The only effective programs I have observed dealing with addicts are those for addicts who want help and are supervised by ex-addicts, where close supervision and positive peer pressure is combined with effective post-release job placement and close personal supervision is provided after release. My candid observation is that, while the public is very supportive of punitive sentences for anyone involved in drug offenses, with the exception of those possessing minor amounts of marijuana, the effectiveness of such programs, as evidenced by the recent New York legislation, has been minimal.

§ 1821. Explosives Offenses. In section 1821(a)(1) the second phrase in the provision seems a bit broad, and I would suggest it be amended to read "with knowledge it is intended to be used by its ultimate recipients to commit a felony."

§ 1823. Using a Weapon in the Course of a Crime. This provision is an excellent one, eliminating some of the problems of definition and enforcement we have encountered in our state.

§§ 1831–34. Riot Offenses. Although I appreciate these provisions have been changed since the original proposals in S. 1, I still believe the proposed provisions have problems. The most serious is the failure to grade the offense in a manner which distinguishes a barroom brawl or minor disturbance which can easily be controlled by local law enforcement efforts, from a civil insurrection. The provisions originally put forth by the Brown Commission Report at pp. 241–45 offer the flexibility needed.

SENTENCING

My comments on the new sentencing provisions of the Senate Bill would generally echo the testimony of Judge Marvin Frankel, who has already appeared before your committee. The presence of guidelines with a requirement for statement of reason for deviating from them is a positive step. My experience with sentencing and other judges, however, has been that the greatest damage to the public and unfairness to the offender comes from judges who have an unjustifiable bias in sentencing a particular offender. Many judges recognize what these biases are but are able to articulate reasons to justify them, sufficient to pass any appellate review of a sentence. I have been intrigued with the concept of a panel

of two or three judges who would initially impose a sentence. This would seem to me to largely eliminate the element of individual bias and force judges to articulate, at least to each other, the reason for their views in a given case at a time when they could be modified by a group discussion. The time demands on a judge to be involved in a small panel for sentencing would not greatly exceed those now required for individual sentencing. The added number of cases to be decided would be offset by sharing the time spent agonizing over the proper decision with someone else. Such a system would seem to me to greatly reduce the chances of the occasional unjustifiable grant of probation to those involved in organized crime or anti-trust violations, and on the other hand furnish an additional person to be a bulwark in cases where public passion is unreasonably strong.

I have grave concern about the workability of appellate review of sentences. Delay is a great curse in the appellate system and criminal justice process and is inherent in appellate review. What appellate review produces is a panel decision on sentencing by judges removed from the individual offender and the victim or victims. These persons are essential ingredients to reaching a proper sentence and their presence is often helpful. Additional factors considered by every judge in sentencing are the availability of alternative resources to incarceration and their effectiveness. I believe personal evaluation of these, whether job opportunities, half-way houses or work release programs, is essential. This is impractical at the appellate level.

§3611. Determination of Mental Competency to Stand Trial. The proposed statute limits the authority to raise this issue to the defendant or the state. Although the trial judge can be viewed as possessing inherent power to raise the issue, this power should be articulated in the statute. The burden to establish incompetency is by a preponderance of the evidence. Presumedly this burden falls upon the moving party, or if raised by the court, upon the government. The statute, however, does not specify who must carry it and it should.

§ 3613. Hospitalization of a Person Acquitted by Reason of Insanity. Section 3613(d) and (e) places an insurmountable barrier before a defendant who is committed following a verdict of not guilty by reason of insanity. The standard for initial commitment following such a verdict is "clear and convincing evidence that release would create a substantial risk of serious injury to another person or serious damage to the property of another." The release provisions, while somewhat ambiguous, appear to place the burden upon the defendant to establish that he no longer possesses a substantial danger by a preponderance of the evidence. The standards for release of one subjected to a criminal mental commitment should be the same as those released as civilly committed mental patients. Such identity in standards may be mandated by the equal protection clause. *Jackson* v. *Indiana*, 406 U.S. 715 (1972); *Baxstrom* v. *Herold*, 383 U.S. 107 (1966).

§ 3835. Revocation of Parole. Section (e) does not specify the burden of proof to establish a parole violation. The committee should consider the use of a clear and convincing standard. The current Washington statute requires proof of a parole violation by a preponderance of the evidence. *See* RCW 9.95.125.

I hope you find these comments helpful. If I can be of further assistance, please advise.

Very truly yours,

ROBERT F. UTTER.

Enclosure.

86 Wn.2d 241, 543 P.2d 325

[No. 43846. Department One. December 11, 1975.]

BRADLEY LAVE BRESOLIN, *Petitioner*, v. CHARLES MORRIS, *as Secretary of the Department of Social and Health Services, Respondent.*

[1] **Judgment — Vacation — Collateral Proceeding — Void Judgment.** A final judgment may be vacated during a collateral proceeding only by demonstrating that it is void, *i.e.*, entered without jurisdiction over the parties or the subject matter or without the inherent power to enter the decree involved.

[2] **Controlled Substances — Convicts — Isolated Facilities — Necessity.** Under the terms of RCW 69.32.090 the State is required to provide facilities within prisons wherein health authorities may treat convicts suffering from narcotics addiction. Such facilities must include isolation areas if they are deemed necessary to such treatment.

[3] **Contempt—Officers—Convicts—Condition of Imprisonment—Failure To Comply.** Failure of responsible officers to comply with an order concerning certain conditions of imprisonment of convicts may be treated as criminal or civil contempt by the courts or may result in the release or transfer of convicts whose conditions are the object of the order.

[4] **Constitutional Law—Statutes—Construction—Source of Relief.** When judicial relief is available within the terms of existing statutes, relief on constitutional grounds will not be afforded.

Application filed in the Supreme Court August 13, 1975, to compel admission of a convict to a drug treatment program. *Granted in part.*

Richard Emery, Steven G. Scott, John G. Ziegler, and *Allen Ressler*, for petitioner.

Slade Gorton, Attorney General, and *William C. Collins, Assistant*, for respondent.

UTTER, J.—Petitioner seeks a writ of mandamus ordering his transfer to the drug treatment program at Western State Hospital. Alternatively, if this motion is denied, he asks for an order adjudging respondent Charles Morris, as Secretary of the Department of Social and Health Services, in contempt of this court for failure to abide by our order entered December 2, 1974. That order directed respondent

to "make available to health authorities portions of correctional institutions under his jurisdiction for the isolation and treatment, at public expense, of petitioner" for narcotic addiction. The primary questions presented by this writ are the extent of petitioner's rights under the December 2, 1974 order and the nature of the proper remedy for this court to enter in enforcement of that order.

The proceedings leading to the entry of the order for isolation and treatment began with a petition filed by Bresolin on August 28, 1973, seeking his discharge from custody and alleging that he had been consistently and arbitrarily denied treatment for his narcotic addiction. Petitioner claimed this treatment was directed by RCW 69.32.090 and the eighth and fourteenth amendments to the United States Constitution. Hearings were held on the merits of the petition and this court referred to the Superior Court for Walla Walla County a series of questions upon which we desired to have evidence taken. Findings of fact were entered by the Superior Court on September 23, 1974. These findings indicated petitioner, who is now 31, is psychologically addicted to use of narcotic drugs and has been since he was 18, and that he was both physically and psychologically addicted at the times he committed the crimes for which he was imprisoned. His current incarceration resulted from the armed robbery of a narcotics dealer to obtain drugs. He is continuing to take drugs on a weekly to bi-weekly basis while at the penitentiary and these drugs include, occasionally, heroin. Although the diminished dosage he receives has cured his physical dependence, his psychological dependence on drugs remains. At the time the trial court heard testimony, there was no drug counseling available at the penitentiary, nor was there any form of therapy available at the institution to cure or rehabilitate narcotic addicts. The court found the State had the power and duty to provide petitioner treatment under RCW 69.32.090, which should be administered to him in light of his psychological addiction to drugs.

In response to the court's order, petitioner received a

letter on March 13, 1975, from respondent's legal counsel informing him that three alternatives were available: (1) transfer to the Washington State Reformatory to be screened for entry into the drug treatment program there which did not include an isolated treatment program; (2) remain at the Washington State Penitentiary and continue to participate in the social therapy program which was not a drug-oriented treatment program and did not include an isolated treatment program; or (3) wait for establishment of a drug treatment program at the Washington State Penitentiary which was then in the process of being funded for two counselors.

Petitioner, after receipt of this letter, moved to hold respondent in contempt or to have the court order him transferred to an existing drug treatment program at Western State Hospital. Petitioner's motion was withdrawn on May 29, 1975, as he believed he was then eligible for the program at Western State. Following respondent's refusal to transfer him there, petitioner again moved for a writ of mandamus ordering his transfer to the Western State Hospital program, or, if this was denied, an order finding respondent in contempt. It is this last motion that is before us at this time.

Respondent first contends that the court's order of December 2, 1974, focused too closely on certain language of RCW 69.32.090 and that when this statute is considered in the total context of RCW 69.32 and respondent's overall responsibility in administering this state's prisons, it does not require isolation for treatment. Respondent argues he has therefore adequately complied with the order of December 2, 1974, by making available the alternatives set forth in the March 13, 1975, letter.

The applicable statutes provide:

> 69.32.070 Suspected addicts — Treatment — Isolation. State, county and municipal health officers, or their authorized deputies, who are licensed physicians, within their respective jurisdictions are hereby directed and empowered, when in their judgment it is necessary to protect the public safety, health and morals, to make exami-

nations of persons reasonably suspected of being habitual users of any narcotic drug and to require persons whom they have reason to suspect to be habitual users of any narcotic drug to report for treatment to an approved physician, and continue treatment at his own expense until cured, or to submit to treatment, provided at public expense, until cured, and also to isolate or quarantine habitual users of such narcotic drugs or their derivatives. Such officer, deputy or physician shall make a written finding that such person is an habitual user of a narcotic drug, which finding shall be filed in his office: *Provided*, That such habitual users shall not be isolated or quarantined until the state board of health shall first, by general regulation, determine that the quarantine or isolation of all habitual users is necessary: *Provided, further*, That any persons suspected as herein set forth may have present at the time of his examination, a physician of his or her own choosing: *And provided further*, That the suspected person shall be informed by the health officer of his or her rights under this chapter.

69.32.090 Examination and treatment of convicted persons. Any person convicted under the provisions of RCW 69.32.080 or any person who shall be confined or imprisoned in any state, county, or city prison in the state and who may be reasonably suspected by the health officer of being a narcotic addict shall be examined for and if found to be an habitual user of said drugs, or any of them, shall be treated therefor at public expense by the health officers or their deputies who are licensed physicians. The prison authorities of any state, county, or city prison are directed to make available to the health authorities, such portion of any state, county, or city prison as may be necessary for a clinic or hospital wherein all persons who may be confined or imprisoned in any such prison, and who are habitual users of said drugs or their derivatives, may be isolated and treated at public expense until cured, or, in lieu of such isolation any such person may, in the discretion of the board of health, be required to report for treatment to a licensed physician, or submit to treatment provided at public expense, as provided in RCW 69.32.070. Nothing herein contained shall be construed to interfere with the service of any sentence imposed by a court as a punishment for the commission of crime: *Provided*, That licensed physicians treating any narcotic addict shall, upon beginning said

treatment, immediately report the same to the health officer in charge in that jurisdiction, such report to be on forms prescribed by the state board of health, and such report shall give the name of the person receiving such treatment and such other information as shall be deemed necessary by the state board of health.

[1] The order of December 2, 1974, was a final order entered in a different cause, Supreme Court No. 42966. Respondent may only attack that order in a collateral proceeding if it is absolutely void, not merely erroneous. *State ex rel. Ewing v. Morris*, 120 Wash. 146, 207 P. 18 (1922); *State v. Lew*, 25 Wn.2d 854, 172 P.2d 289 (1946); *State ex rel. Superior Court v. Sperry*, 79 Wn.2d 69, 483 P.2d 608 (1971). A judgment is void only where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved. *Dike v. Dike*, 75 Wn.2d 1, 448 P.2d 490 (1968); *see State v. Alter*, 67 Wn.2d 111, 406 P.2d 765 (1965); *cf. Bergren v. Adams County*, 8 Wn. App. 853, 509 P.2d 661 (1973); *Lange v. Johnson*, 295 Minn. 320, 204 N.W.2d 205 (1973). There is no such defect here and respondent's challenge to the order must fail for that reason.

The large number of persons affected by the issues raised here, however, makes it imperative for this court to dispose of this case on the merits of the arguments as well. Testimony of respondent's expert witness established that, in his opinion, 45 to 50 percent of the prison population at the Washington State Penitentiary were convicted of crimes where drugs were either a primary or secondary factor.

[2] At the outset we take particular note of the legislative command in RCW 72.08.101 that "[t]he director of institutions shall provide for the establishment of programs and procedures for convicted persons at the state penitentiary, which are designed to be corrective, rehabilitative and reformative of the undesirable behavior problems of such persons, as distinguished from programs and procedures essentially penal in nature." This directive reinforces the specific statutory provisions governing the treatment of addicted

inmates. RCW 69.32.090 does not require the isolation of all persons addicted to narcotic drugs. The health authorities are given responsibility under RCW 69.32.070 and .090 to require narcotic addicts to report for treatment at public expense, both within and without the prison system. Narcotic addicts not already incarcerated may not be isolated until the board of health, by general regulation, determines isolation of all habitual users is necessary. The vital distinction, however, is that for those addicts who are confined in prison, the board of health need not determine by general regulation that isolation of all narcotic users is necessary before isolating and treating confined addicts. Prison authorities must provide health authorities with facilities where imprisoned addicts may be isolated, if needed, and treated. While under RCW 69.32.090 health authorities may require treatment of imprisoned addicts in the same manner as those outside prison are treated, the option of isolation must be provided. The current prison programs do not comply with the plain language of the statute, its spirit or the order of the court.

Testimony at the fact-finding hearing provided some insight into the need for the two different modes of treatment set out in the statute. At that hearing, Lyle Quasim, mental health administrator for the Department of Social and Health Services, Office of Mental Health, in charge of drug abuse programs in adult corrections, testified as one of the witnesses. Quasim stressed the need for two types of treatment: first, isolated therapeutic communities both inside and outside the penitentiary serving 35 to 40 people who have an extensive drug history; second, some program that is applicable to the penitentiary population similarly afflicted with drug problems. When asked why such programs were not available, Quasim stated the only reason was that the money was not provided. He indicated, "[t]here were herculean efforts made to encumber money at the levels that I exist at. We put in a supplemental budget request. We dealt with federal funding sources . . . I was not successful in developing additional funding."

Quasim estimated the amount of funding needed to support the two-level program at the Washington State Penitentiary in 1974 was $195,000 a year; $125,000 for the isolated therapeutic community and $70,000 for the general program.

Both staff and residents of the Washington State Penitentiary expressed concern that if the programs instituted were superficial, people would be sent to the penitentiary and other institutions for programs that provided the illusion of help, but could not in fact help. Quasim saw the institutional programs as no panacea, but necessary to the care of addiction, in the same sense as kindergarten is a necessary first step for a college graduate. He stressed the need for continuing programs after release into the community.

Affidavits on file by the two counselors now employed in the Washington State Penitentiary drug program instituted since the 1974 hearing, indicate that although the program consists of educational, individual and group counseling and placement service for those on parole, it is not effective. The reason they gave for its ineffectiveness was that residents who participated in it had to return to the general prison population where the availability of drugs and the existence of a drug subculture nullify any gains. The residents of the penitentiary voted not to endorse the existing drug program because they would "rather have a real drug program than an educational program."

Petitioner is an adopted child who adjusted well to school and community and had no history of law enforcement contacts until after the death of his adoptive father in an industrial accident when Bresolin was 15. At age 16, he began drinking cough syrup containing codeine and later experimented with marijuana, heroin and amphetamines. He became addicted to drugs by age 18 and at 20 was convicted of burglary in the second degree in December 1963 after participation in the burglary of a drugstore to obtain narcotics. His presentence report at that time indicated a poor prognosis for future adjustment due to his

drug addiction. There were, however, no drug treatment programs available, either inside or outside the institution, and he was placed on probation. During this time he continued his involvement with use and sale of narcotics in both the Tacoma and Portland areas.

Bresolin was again convicted and sentenced in Portland in 1964 for attempting to obtain narcotics by forged prescription. By that time he was using heroin regularly and when it could not be obtained, he consumed as many as 20 bottles a day of cough medicine containing codeine. His deferred sentence on the Washington burglary conviction was revoked in 1965 and petitioner was initially sent to the Washington State Reformatory, but was transferred later to the Washington State Penitentiary because of his extensive drug involvement. There his counselor reported he was skeptical Bresolin would have the willpower to overcome his drug habit when released. Once again, however, there was no drug counseling or treatment program to help him overcome his addiction at any institution where petitioner had been confined.

He was released on June 15, 1971, and for a period of time was active on a methadone maintenance program. He was dropped in April 1972 for passing marijuana to another participant. He then became actively involved in the sale and use of heroin and shortly afterward was charged with grand larceny in King County and arrested on federal charges for sale of heroin as well as a state charge for robbery of a drug dealer. Bresolin was sentenced to the Washington State Penitentiary on the state drug charges and received a deferred federal sentence as well. On his return to the Washington State Penitentiary, his adjustment potential was evaluated. The penitentiary staff noted, "he has the potential to become a productive member of our society if and only when he can stay off drugs. It is evident that Bradley can't accomplish this alone."

The State of Washington, by its failure to fund and establish legislatively mandated drug treatment programs in the state's prisons, has constructed a maze for Bresolin

from which there is no escape. He is psychologically and has been physiologically addicted to drugs. All his crimes have been committed either to obtain drugs or money with which to purchase drugs. Due to lack of funding, no programs have been provided to help him cure this addiction, although the people of this state over 50 years ago, in Laws of 1923, ch. 47, § 7 (now RCW 69.32.090), expressed a mandate that such programs were necessary and must be provided. Use of drugs has resulted in confinement in institutions where his addiction is encouraged by the availability of narcotics. He is unable to escape either their physical presence or the prison drug subculture that encourages their use. On his release at the end of his term, nothing will have been accomplished by confinement except to confirm the physical and psychological needs which guarantee, once more, his involvement in criminal acts, followed by more confinement.

The Washington prison system has been the object of care and attention by successive Governors, legislatures, and the people of this state. Many innovative programs have been instituted to alleviate improper conditions in our prisons. And yet, even with our history of concern for prison conditions, there still exist in this state's prison system conditions which destroy the ability of drug-addicted inmates to prevent a repetition of the offenses which led to their incarceration. It may not be possible to effectuate rehabilitation for a particular inmate within a prison setting. The key to rehabilitation is as often found in the particular personality of the offender as it is in the availability of affirmative rehabilitative programs. On the other hand, there can be no justification for failure to follow the statutory mandate to provide the inmate the opportunity to participate in a rehabilitative program, focused on his drug addiction.

[3] The Secretary has failed to comply with his statutory duties as well as the order of this court. Petitioner asks that the Secretary be held in contempt for this failure. Many alternatives are available to enforce our order. If the

Secretary's failure is willful, he could be found guilty of criminal contempt with its attendant sanctions. RCW 9.23.010(4) and (5). He could be held guilty of civil contempt and a fine imposed for failure to comply, regardless of good faith. RCW 7.20.010(5), 7.20.020. *Landman v. Royster*, 354 F. Supp. 1292 (E.D. Va. 1973). Alternatively, we could release or transfer petitioner. In *Inmates of Suffolk County Jail v. Eisenstadt*, 494 F.2d 1196, 1198 (1st Cir. 1974), the court upheld a district court order requiring that the State Commissioner of Corrections transfer jail inmates from facilities which were deficient. The court noted that the commissioner, in resisting the transfer order, "underestimates his own statutory duties respecting the Jail and its inmates . . ." *See Commonwealth ex rel. Bryant v. Hendrick*, 444 Pa. 83, 280 A.2d 110 (1971); *Rhem v. Malcolm*, 507 F.2d 333, 340-42 (2d Cir. 1974). In *Hamilton v. Love*, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971), the court said "[i]f the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons."

[4] At this time we decline to order the transfer of petitioner to the drug treatment program at Western State Hospital. That program is designed only for persons who will be released into society within a short time after commencing treatment, and, as respondent notes, is not designed to treat an individual and then return him to an institution. Under the terms of petitioner's sentence, the length of his incarceration is subject to adjustment only by the Board of Prison Terms and Paroles. He likely will not be available for release within the short time contemplated by the Western State program. However, at the time when it appears to the administrative officials that petitioner satisfies all the criteria for admission into the Western State treatment program, he may be transferred there. We also do not rule on petitioner's constitutional claims inasmuch as the relief he seeks is available under existing statutes. *Kirkland v. Steen*, 68 Wn.2d 804, 416 P.2d 80 (1966).

Faced with similar problems of even greater magnitude than ours, the court in *Holt v. Sarver*, 309 F. Supp. 362, 383 E.D. Ark. 1970), noted "[i]t is obvious that money will be required to meet the . . . deficiencies of the institution, and there is no reason to believe that, subject to the overall financial needs and requirements of the State, the Legislature will be unwilling to appropriate necessary funds." We share this optimism despite earlier legislative refusals to fund these programs and believe respondent should use the expertise available to him to tell this court, and through it the people of this state, how he plans to remedy the existing failure to abide by legislative mandates. To comply with our order we assume additional funding will be required and that requests for such funds will be directed to the legislature. Reports shall be made to this court monthly following the issuance of this order/opinion, describing respondent's progress, his plans, his efforts to secure funding, and the implementation of his plans. Petitioner's request to hold respondent in contempt will be continued pending our examination of his efforts to comply with this order and the order of December 2, 1974.

STAFFORD, C.J., and FINLEY, BRACHTENBACH, and HOROWITZ, JJ., concur.

> construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Since the search and seizure were without valid warrant, and do not come within a recognized exception, the motion to suppress should have been granted. *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, 84 A.L.R.2d 933 (1961); *Weeks v. United States*, 232 U.S. 383, 58 L. Ed 652, 34 S. Ct. 341 (1914).

The judgment should be reversed and a new trial granted.

ROSELLINI and UTTER, JJ., concur with HOROWITZ, J.

[No. 43846. En Banc. January 7, 1977.]

BRADLEY LAVE BRESOLIN, *Petitioner*, v. CHARLES MORRIS, *as Secretary of the Department of Social and Health Services, Respondent.*

[1] Appeal and Error—Decisions Reviewable—Moot Questions—Issues of Public Concern. An otherwise moot case will be determined by the Supreme Court when the constitutional issues involved are of great public concern and will continue to recur in subsequent cases, and the issues and arguments have been adequately presented to the court.

[2] Prisons—Rehabilitation—Right of Prisoners. Rehabilitation of convicted persons is a legitimate governmental interest and institutional goal but it is not an enforceable right of institutionalized prisoners.

[3] Prisons—Medical Treatment—Duty To Provide—Burden of Proof. A prisoner seeking medical treatment or care in a penal

institution has the burden of showing that his condition is amenable to treatment and that the appropriate treatment is available to prison officials.

[4] **Prisons—Medical Treatment—Drug Rehabilitation.** In the absence of a showing that there exists and is available to prison officials an accepted method of treating drug addiction in a prison environment, there is no violation of prisoners' constitutional rights in the failure of the state penitentiary to provide more extended drug rehabilitation programs within the institution.

UTTER, HUNTER, and HOROWITZ, JJ., dissent by separate opinions.

Supreme Court: Original action to compel the Secretary of the Department of Social and Health Services to establish and maintain a drug rehabilitation program at the state penitentiary. Mandamus is *denied* on the basis that there is no enforceable right of a prisoner to be rehabilitated and that the present record shows no available method for medical treatment of drug addiction within a prison environment.

Allen Ressler and *John G. Ziegler*, for petitioner.

Slade Gorton, Attorney General, and *William C. Collins, Assistant*, for respondent.

ROSELLINI, J.—An inmate of the state's correctional institution at Walla Walla brought this action seeking mandamus to compel the Secretary of the Department of Social and Health Services to establish and maintain a drug rehabilitation program at the institution. In a previous hearing, we ordered the secretary to take steps to secure financing for isolated facilities for drug addicts, which were required under RCW 69.32.090, and to report to the court. *Bresolin v. Morris*, 86 Wn.2d 241, 543 P.2d 325 (1975).

After three reports had been rendered, the legislature enacted Laws of 1975, 2d Ex. Sess., ch. 103, which repealed RCW 69.32.090, and made the establishment of a drug treatment and rehabilitation program discretionary rather than mandatory.

[1] In the meantime, we are advised that the petitioner has, in spite of his ineligibility, been transferred to Western State Hospital where he is enrolled in that institution's drug offender program. Since this was one of the alternative forms of relief which he sought in the original action, the case would appear to be moot. However, we are asked to consider the constitutional questions which were passed in the original opinion. The question of the constitutional duty of prison officials with respect to drug rehabilitation, we are told, is one of great public concern which will continue to recur in similar suits until the court answers the contentions raised.

Being assured by the parties that this case is as well prepared and argued as any that is likely to come before the court in the near future, we will dispose of these questions.

The petitioner contends that a prisoner has a right to treatment of his psychological dependence on drugs, for rehabilitative purposes, and that the denial of this right constitutes cruel and unusual punishment (forbidden by the eighth amendment to the United States Constitution and article 1, section 14, of the Washington State Constitution) as well as a deprivation of his liberty without due process of law and a denial of equal protection of the law.

The authorities cited do not establish these contentions. None of them holds that a prisoner in a penal institution has a right to rehabilitation, and none holds that the failure to rehabilitate amounts to cruel and unusual punishment.

It is established that prisoners do not lose all of their constitutional rights and that the due process and equal protection clauses of the Fourteenth Amendment follow them into prison and protect them there. *Washington v. Lee,* 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd and approved,* 390 U.S. 333, 19 L. Ed. 2d 1212, 88 S. Ct. 994 (1968); *accord, Smith v. Schneckloth,* 414 F.2d 680 (9th Cir. 1969).

As the federal district court in the latter case said, however, it is also settled that correctional authorities have wide discretion in matters of internal administration and

that reasonable action within the scope of this discretion does not violate a prisoner's constitutional rights.

[2] The petitioner cites *Procunier v. Martinez*, 416 U.S. 396, 404–06, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974), for the proposition that rehabilitation is a basic penal goal, and reasons that because it is a goal, punishment is cruel and unusual if it fails to substantially further such rehabilitation. The United States Supreme Court in *Martinez* was concerned with the censorship of prisoners' mail in a state institution. Before deciding that such prisoners have a right of free speech and a right of access to the courts, both of which are subject to reasonable restrictions in furtherance of legitimate governmental interests, the court summarized the role of courts in solving prison administration problems. While the language was directed primarily to the question of the intervention of federal courts in state penal matters, its import is equally valid with respect to the role of state courts in such matters, if it is borne in mind that such courts have also the duty of protecting statutory rights of prisoners.[1]

The United States Supreme Court said:

> Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most

[1] *See Bresolin v. Morris*, 86 Wn.2d 241, 543 P.2d 325 (1975).

require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reason, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.

(Footnotes omitted.)

The court in *Martinez* recognized that rehabilitation is a *governmental interest. Procunier v. Martinez, supra* at 412. It did not characterize it as a prisoner's right. The legislature in this state has also adopted rehabilitation as a penal goal. RCW 72.08.101.[2] But to say that the government has an interest in rehabilitation and that this is a legitimate institutional goal is one thing. To say that a prisoner has an enforceable right to such rehabilitation is another. The United States Supreme Court has spoken to that subject in a case not cited by the parties to this action but which we find to be directly in point and controlling.

That court, in *Marshall v. United States*, 414 U.S. 417, 421, 38 L. Ed. 2d 618, 94 S. Ct. 700 (1974), affirmed a holding of the Court of Appeals (*Marshall v. Parker*, 470 F.2d 34 (9th Cir. 1972)) that "there is no 'fundamental right' to rehabilitation . . . at public expense after conviction of a crime". In that case, the petitioner claimed that the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. §§ 4251–

[2]"The director of institutions shall provide for the establishment of programs and procedures for convicted persons at the state penitentiary, which are designed to be corrective, rehabilitative and reformative of the undesirable behavior problems of such persons, as distinguished from programs and procedures essentially penal in nature." RCW 72.08.101.

4255, denied him due process and equal protection of the laws because it excluded persons in his situation from its benefits. Noting that no suspect classification was involved, the high court said that the correct standard to be applied was whether the statutory classification bore some relevance to the purpose for which the classification was made. The Congress, the court said, could reasonably find that some types of offenders were more likely to be susceptible and suitable to treatment than others, and could justifiably make classifications upon this basis.

There is no contention here that the drug treatment program at the state correctional institution discriminates among prisoners; rather, the factual allegation of the petitioner is that it is inadequate. Certainly, if a legislative body may enact a statute which discriminates among prisoners (upon a nonsuspect basis) in providing drug treatment, and may deny such treatment to some prisoners, it may constitutionally decide that no drug rehabilitation program shall be required at all.[3]

[3, 4] The petitioner relies upon federal cases which have held that a prisoner is entitled to essential or reasonable medical care. We have no quarrel with this concept; however, the cases generally recognize that the burden is on the complainant to show that his disease or condition is amenable to medical treatment. For example, in *Smith v. Schneckloth, supra,* it was held that under the federal Civil Rights Act, 42 U.S.C. 1983, a complaint can be maintained in federal court if it alleges that a state prisoner suffering an acute physical condition and having urgent need for medical care was refused such care and suffered tangible injury thereby. But as that court pointed out, implicit in the formulation is the requirement of proof that medical treatment in fact exists and is available to state officials,

[3]Our recent cases of *State v. Starrish,* 86 Wn.2d 200, 544 P.2d 1 (1975)(observing in a footnote that the problem of treatment of alcohol problems of offenders is one for legislative resolution), and *Robinson v. Peterson,* 87 Wn.2d 665, 555 P.2d 1348 (1976)(holding that jail officials do not have a constitutional duty to provide rehabilitation programs) are in accord.

before their refusal to provide it can be said to violate the Fourteenth Amendment.

It should be emphasized that the petitioner is not contending that the institution withholds needed medication and medical treatment.[4] He makes no showing that there is an accepted method of treating psychological addiction, either within the confines of prison or without. At the same time, the respondent's authorities and affidavits stress the uncertainties which exist with respect to the efficacy of attempts to rehabilitate drug addicts, and particularly within the prison setting. That the entire concept of rehabilitation as a practical goal of confinement is under question can be appreciated by examining the current literature upon this subject. *See, e.g.*, L. Pierce, *Rehabilitation in Corrections: A Reassessment*, 38 Fed. Prob. No. 2, p. 14 (1974); J. Wilks & R. Martinson, *Is the Treatment of Criminal Offenders Really Necessary?*, 40 Fed. Prob. No. 1, p. 3 (1976); N. Morris & G. Hawkins, *Rehabilitation Rhetoric and Reality*, 34 Fed. Prob. No. 4, p. 9 (1970).[5]

Thus, the petitioner has not shown that there exists and is available to prison officials an accepted method of treating drug addiction in the prison environment. The respondent, on the other hand, has demonstrated that the department is not indifferent to the problems of drug addiction. In addition to its other rehabilitative programs,

[4]A law review article relied upon by the petitioner, in support of his claim that drug rehabilitation programs should be judicially required, goes no further than to advocate protection of the right to receive methadone for withdrawal symptoms and treatment of physical dependence, while at the same time recognizing that even this treatment is controversial. Comment, *The Rights of Prisoners to Medical Care and the Implications For Drug-Dependent Prisoners and Pre-trial Detainees*, 42 U. Chi. L. Rev. 705 (1975).

[5]An article by P. Dwyer & M. Botein, *The Right to Rehabilitation for Prisoners—Judicial Reform of the Correctional Process*, 20 N.Y.L.F. 273 (1974), cited by the petitioner, takes the view that the courts should intervene in prison management and order the establishment of maintenance of rehabilitation programs. The authors assume, without citation of evidence, that rehabilitation is an achievable prison goal. They do not address the specific problem of rehabilitation of drug addicts.

the institution at Walla Walla (which is the institution here under attack) offers drug counseling to those who are willing to accept it. While this program may be termed minimal, the consensus of opinion appears to be that, as a practical matter, drug rehabilitative programs within the prison environment are nonproductive. Psychological assistance to motivated prisoners who are shortly to be released or paroled offers some hope of success, and to this end the program at Western State Hospital, to which the petitioner has been prematurely transferred, has been established.

In the meantime, the Secretary and those charged with the responsibility of administering the prison system are constantly reexamining their programs and policies and the available and evolving alternatives, with a view to fulfilling to the best of their capacity the statutory goal of rehabilitation. The petitioner makes no showing that these efforts are pursued with less than good faith or that any superior alternatives to the existing programs and methods presently exist and are available to the respondent. We need not decide whether, if such a showing were made, judicial intervention would be appropriate. As the record stands, there is nothing here to indicate that the low incidence of drug rehabilitation is occasioned by any breach of duty on the part of the respondent.

We find no constitutional violation in the failure to provide a more extended drug rehabilitation program within the institution.

The writ is denied.

STAFFORD, C.J., and HAMILTON, WRIGHT, BRACHTENBACH, and DOLLIVER, JJ., concur.

UTTER, J. (dissenting)—The majority contends this court is helpless to act in the face of the failure of the State to provide meaningful assistance to the petitioner, a narcotic addict who has demonstrated a willingness and desire to cure his addiction, when State action exacerbates his

addictive personality by placing him in a closed setting where the sale and use of drugs apparently cannot be effectively controlled.

This is not, should not, and cannot be the law. For this court to hold that it is assures the continued explosive degeneration of the addicts confined to our institutions and creates a great likelihood that such individuals will do further injury to society when they are eventually released. The United States Supreme Court in *Estelle v. Gamble*, ___ U.S. ___, ___, ___ L. Ed. 2d ___, 97 S. Ct. 285 (1976), has recognized as repugnant to the Eighth Amendment "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society'," and that infliction of unnecessary suffering is "inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that '[i]t is but just that the public be required to care for the prisoner, who cannot, by reason of the deprivation of his liberty, care for himself.'" (Footnote omitted.)

The relief here requested does not require, as the majority insists, the recognition by this court of a constitutionally based broad right of rehabilitation. In its present facutal framework this case presents a narrow, albeit important, issue concerning the constitutional rights of inmates confined to state institutions: Does a prisoner who is psychologically addicted to narcotics have the right to demand some protection from the demonstrable physical and mental harm which he suffers as a result of being confined to an institution in which he is unavoidably exposed to unlawful trade in and use of hard narcotics, which prison officials are unable to prevent? I conclude that the state is constitutionally compelled to provide protection from harm of this nature and therefore dissent.

The record establishes that, prior to his recent and more than coincidental transfer to Western State Hospital, the petitioner was incarcerated at Walla Walla State Penitentiary where there is extensive unlawful use of hard drugs, including heroin, amphetamines, and hallucinogens. This

drug culture allegedly involves not only prisoners, but staff and visitors as well. Prison personnel have, under existing conditions, been unable to do anything to significantly curtail this activity, nor have they provided a means by which prisoners who wish to do so, may seek sanctuary from its adverse effects. Such a situation not only results in the creation of an environment in which it is extremely difficult for most inmates who have the desire to rehabilitate themselves, but in the case of the petitioner and others like him, makes debilitation inevitable. As we stated in our prior opinion in this case, the petitioner

> is psychologically and has been physiologically addicted to drugs. All his crimes have been committed either to obtain drugs or money with which to purchase drugs. Due to lack of funding, no programs have been provided to help him cure this addiction . . . Use of drugs has resulted in confinement in institutions where his addiction is encouraged by the availability of narcotics. He is unable to escape either their physical presence or the prison drug subculture that encourages their use. On his release at the end of his term, nothing will have been accomplished by confinement except to confirm the physical and psychological needs which guarantee, once more, his involvement in criminal acts, followed by more confinement.

Bresolin v. Morris, 86 Wn.2d 241, 249, 543 P.2d 325 (1975).

Faced with this situation, the petitioner has made great efforts to secure placement in a drug treatment program. As the majority points out, the petitioner has recently been transferred to the drug treatment program at Western State Hospital. That placement is unusual, to say the least. In the long history of this case, the petitioner first sought treatment under RCW 69.32.090. This court then ordered, in the words of the statute, that respondent "make available to health authorities portions of correctional institutions under his jurisdiction for the isolation and treatment, at public expense, of petitioner." Respondent failed to do so and petitioner sought placement in the Western State

Hospital drug treatment program. Respondent resisted that placement, stating in the Brief of Respondent at pages 1–2:

> [I]t is used primarily as a stepping stone back to the streets and is not designed to treat an individual and then return him to an institution . . . The treatment program at the hospital is of limited duration (about 18 months) and the program is of limited size (30 people). Because of the physical layout of the hospital, it is not considered a "secure" facility. It has no walls, fences or guards, limiting the types of persons it can take and clearly indicating it was not established to provide immediate drug treatment for all prison inmates who might be found to be narcotics addicts.
>
> Petitioner has not been transferred to Western State Hospital because of his long sentence. He is presently serving the first of three five–year mandatory minimum terms based upon deadly weapon findings, *State v. Bresolin*, 13 Wn. App. 386 (1975), and in fact has no tentative release date yet established because of his consecutive sentence structure. He also has a federal detainer, based on a federal conviction, lodged against him which prevents his parole, except to federal custody, . . .

The court has been informed by counsel for the respondent, at the time of the most recent hearings in this case, that these underlying facts have not significantly changed. Respondent has not contended Bresolin now fits the established criteria for the Western State program.

It is difficult to view Bresolin's recent transfer to the Western State program, in view of respondent's past position, as little more than an effort by the respondent to render moot the important issues raised by this case. Bresolin's placement at Western State does not, however, moot these issues as to other inmate/addicts who, as the undisputed evidence indicates, desire and would benefit from placement in a drug treatment program. These inmates are still incarcerated in the state penitentiary under conditions and with resulting harm identical to that of the named petitioner here.

The legislature has expressly repealed RCW 69.32.090 (*see* Laws of 1975, 2d Ex. Sess., ch. 103), the statute which

we found controlling in our prior opinion in this case. While the present statutory scheme clearly allows the establishment of drug treatment programs, and I feel in a factual setting such as this requires them (RCW 72.08.101), the record is devoid of any indication that the respondent intends to implement an adequate program at the state penitentiary at any time in the near future.[6]

As the majority suggests, courts have shown reluctance to become involved in the inner workings of our penal institutions. The power of the courts to intervene to protect inmates from conditions which threaten their health or safety, or which are violative of a basic constitutional right is clearly established. *See, e.g., Estelle v. Gamble, supra; Procunier v. Martinez,* 416 U.S. 396, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974)(prison mail censorship regulations held violative of inmates' First and Fourteenth Amendment rights); *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1974)(confinement under conditions which threaten physical health and safety and deprive inmates of basic hygiene and medical treatment constitutes "cruel and unusual punishment"); *Riley v. Rhay,* 407 F.2d 496 (9th Cir. 1969)(claim by inmate of Washington State Penitentiary that failure to provide medical care violated his constitutional rights states cause of action under the Civil Rights Act, 42 U.S.C. §§ 1981, 1983, 1985); *Pugh v. Locke,* 406 F. Supp. 318 (M.D. Ala. 1976)(failure to protect inmates from the constant threat of physical harm constitutes cruel and unusual punishment).

Where deprivation of needed medical care is added to the imprisonment imposed as punishment for commission

---

[6]The trial court, in its hearing on this matter, expressly found that "[t]here is no form of therapy available to the Petitioner at the Penitentiary which has any probability of curing his condition." In an affidavit submitted in this case dated June 16, 1976, Harold Bradley, Director of Adult Corrections Division of the Department of Social and Health Services, stated the existing drug treatment program at Walla Walla would continue at "essentially the same level as it has been in the past . . ."

of a crime, the additional suffering imposed thereby constitutes cruel and unusual punishment and provides justification for our intervention to alleviate that additional suffering. *Estelle v. Gamble, supra; Ramsey v. Ciccone,* 310 F. Supp. 600 (W.D. Mo. 1970). Moreover, due process requires additional proceedings to justify failure of the state to protect an inmate from any harm greater than that contemplated by his incarceration. *New York Ass'n for Retarded Children, Inc. v. Rockefeller,* 357 F. Supp. 752 (E.D.N.Y. 1973); *Baxstrom v. Herold,* 383 U.S. 107, 15 L. Ed. 2d 620, 86 S. Ct. 760 (1966).

The trial court found, pursuant to our order of referral, that:

> The Petitioner is psychologically addicted to the use of narcotic drugs. Psychological addiction is the primary cause of drug usage. Drug treatment programs have as their primary focus the cure of psychological addiction. . . .
>
> . . .
>
> . . . [The petitioner's] psychological addiction leads him to obtain and use narcotic drugs when he is able to do so.
>
> . . .
>
> . . . There is no form of therapy available to the Petitioner at the Penitentiary which has any probability of curing his condition.

The evidence presented at this fact–finding hearing further establishes that the petitioner has actively sought aid in dealing with his drug problems while not in prison. No such programs are available to him, or other inmates, at the penitentiary. Yet, because of his confinement and the failure of prison officials to control illegal drug activity within the walls of the institution, it is impossible, at the present time, for an addicted inmate to avoid continued involvement with drugs, no matter how determined he might be to forsake them. This would not be the case but for the inability of the institution staff to adequately control the prison environment, coupled with the failure to provide addicts who *affirmatively seek help* an environment in

which to begin to rebuild their lives. Confinement under the present conditions only intensifies such an individual's psychological addiction, with the result that when he is thrust once again into society's mainstream, it will be even more difficult for him to avoid further involvement with drugs and additional confinement.

Contrary to the assertion of the majority, the uncontroverted testimony of expert witnesses in the superior court fact–finding hearing established that the petitioner and others like him are indeed treatable and that such treatment is a necessity.[7] While there is considerable conflict among experts as to which of a number of techniques would be most beneficial to addicts, most authorities seem now to assume that effective treatment can be provided. See S. Levine, *Narcotics and Drug Abuse* 311 (1973); R. Bonnie & M. Sonnenreich, *Legal Aspects of Drug Dependence* 171–80 (1975); *Drug Addiction and Treatment in the District of Columbia, Hearing Before the Subcomm. on Public Health, Education, Welfare, and Safety of the Comm. on the District of Columbia United States Senate,* 92nd Cong., 1st Sess. (1971); G. Swanson, *Law Enforcement and Drug Rehabilitation: Is a Bridge of Trust Possible?* 4 Contemporary Drug Problems 493 (1975).[8]

---

[7]Lyle Quasim, a qualified expert, testified as follows: "Q. [by Mr. Emery]: Can you treat the psychological addiction in prison? A. Yes, you can treat psychological addiction in prison. . . . I think that we can make some significant inroads into dealing with the psychological process in the penitentiary." Gene Chontos, another expert, testified as follows: "Q. [by Mr. Emery]: Do you conclude that drug treatment in prison is an absolute necessity as a grounding for successful treatment of an addict who is in prison and who will be released later on? A. I think, yes, it's necessary. It's definitely necessary just to build trust that you can transfer outside. . . . Q. [by the Court]: In other words, and assuming the law is that you can't interfere with his prison sentence while you are treating him, there are available to the State forms of medical or psychological therapy which could be administered to this petitioner at the penitentiary beneficially in the light of his present physical and mental condition? A. If the funds were free enough to do that. If there were money available, I would say yes." The record is replete with similar statements.

[8]Expert testimony at the fact–finding hearing was to the effect that the most effective drug treatment program would involve isolated therapeutic communities

The record in this case clearly establishes that the failure to make such treatment available to the inmate/addict who affirmatively seeks it does substantial harm to that individual, as well as society as a whole. *See Bresolin v. Morris, supra* at 247–49. Though it may be true that the Supreme Court has not recognized the existence of a "'fundamental right' to rehabilitation from narcotics addiction . . ." (*Marshall v. United States,* 414 U.S. 417, 421, 38 L. Ed. 2d 618, 94 S. Ct. 700 (1974)),[9] it is clear that a person may not be punished simply for being an addict, *Robinson v. California,* 370 U.S. 660, 8 L. Ed. 2d 758, 82 S. Ct. 1417 (1962), and has a constitutional right to protection from direct harm caused by the failure of prison officials to keep order. *Gates v. Collier, supra; Pugh v. Locke, supra.*

In a situation such as that before us, the right to be free of official indifference to the need for medical treatment and protection from harm, which is constitutionally required, forms the basis for petitioner's claim. An accepted part of medical treatment is often the healing of the mind. *See, e.g.,* Howard R. & Martha E. Lewis, *Psychosomatics* (1972); L. Keiser, *The Traumatic Neurosis* (1968). Such healing of the mind is necessary to treat psychological addiction for the purpose of providing the inmate with the defense mechanisms necessary to survive as a nonaddict in the drug culture existing inside the prison. The trial court

---

of approximately 35 to 40 members each. These groups would include those addicts who had affirmatively and sincerely sought help in curing their drug addiction. In addition, some apparently less intensive program was indicated to be desirable to serve the approximately 300 members of the prison population who are primarily or secondarily involved with the drug culture but do not seem to be prime candidates for successful isolated treatment.

[9]I disagree with the majority's conclusion that the Supreme Court's decision in *Marshall* controls our disposition of this case. The Supreme Court affirmed the determination of the Court of Appeals that the eligibility classifications contained in the federal statute there at issue, which rendered the particular addict there considered ineligible for discretionary rehabilitative commitment, did not violate the petitioner's right to equal protection. The court was not considering the right of an inmate to be protected from the specific harm caused him by the inability of the state to keep order within its institutions. It is that issue which is before us here.

found on the basis of expert testimony that the primary means of treating addiction is to combat the psychological roots of this "disease." *Robinson v. California, supra* at 667 n.8. It is entirely inappropriate to deny the addict protection from the harm which the prison environment causes him, simply because the appropriate means of implementing those constitutional rights requires treating his mind.

I therefore conclude the established right of the petitioner and others similarly situated to be free of cruel and and unusual punishment (U.S. Const. amend. 8; Const. art. 1, § 14) and the due process right to be free from direct harm not contemplated by the sentencing court, create in these circumstances a concomitant obligation on the part of the State to provide adequate treatment to ameliorate the harm caused those addicts who affirmatively seek help with their drug problems. Such a result is required because it is the failure of the State, (presumably due to inadequate facilities and staffing), to bring under control unlawful activity within the penitentiary which creates the particular harm suffered by this petitioner and others like him.

I would deny respondent's motion to dismiss and order the respondent to take appropriate action to provide meaningful drug treatment programs for individuals whose circumstances are similar to the petitioner's, and further order that the respondent report to this court on a monthly basis as to his progress in this endeavor.[10] We must assume that the respondent, like all citizens of this state, will obey the

---

[10]The power of the courts to enforce such obligations is well established. In recent years the courts of this nation have utilized various remedies in an effort to protect the constitutional rights of persons confined to prisons. Traditionally, the courts have allowed relief in the form of contempt citations, injunctive relief, or, particularly in section 1983 actions, damages. More recently, the courts have found it appropriate to utilize remedies which are quite broad in scope, including: enjoining institutions from accepting new prisoners until populations within the institutions are reduced; ordering specific institutional changes; and, appointing special masters or committees to enforce orders of the court requiring specific reforms. *See* Comment, *Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform*, 7 Cumberland L. Rev. 31 (1976), and cases cited therein.

commands of this court and therefore see no need at this time to consider what further remedies may prove appropriate or necessary.

HOROWITZ, J., concurs with UTTER, J.

HUNTER, J. (dissenting)—I concur with the dissent except for the mandate requiring the respondent to make monthly reports to this court regarding the success of the treatments, in which respect, I dissent to the dissent.

BOARD OF PAROLE,
Salem, Oreg., July 7, 1977.

Hon. EDWARD M. KENNEDY,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR KENNEDY: I am writing you regarding parole decision-making and the sentencing commission that you are advocating. You may recall that we have met on several occasions in Oregon regarding national health insurance and Senator Robert Kennedy's campaign for president. Currently I am the Chairman of the Board of Parole in Oregon.

Oregon has recently passed progressive legislation. HB 2013 is attached relating to the Board of Parole. I believe that you will find it of interest and may possibly find ideas and concepts relevant to your legislative undertaking. This bill will become law in the State of Oregon on October 4, 1977.

I have worked, along with my colleagues on the Board of Parole, on development and passage of this legislation for over two years. We have consulted with or utilized concepts developed by the United States Parole Commission (especially Peter Hoffman), Leslie Wilkins, Don Gottfredson, Norval Morris, and Andrew von Hirsch. Because of this experience, I presume to offer some comments.

I believe the guideline approach to parole board decision-making undertaken by the United States Parole Commission and the Oregon State Board of Parole is progressive and enhances the quality of justice. It has been argued by some that since the guidelines have been developed, it is no longer necessary to have a parole board or a commission. Since the guidelines have been developed, the argument runs, simply give the sentencing responsibility to the judiciary and adopt a presumptive sentencing approach. This approach is not as fair or equitable as a two-tiered approach to sentencing.

The vast number of judges cannot be expected to apply guidelines and standards with the precision that a smaller, collegial body such as the parole board or commission can.

Additionally judges are not dealing with real time in terms of incarceration. They have in the past dealt with symbolic sentences and mythological time. When it comes to imprisonment, we have tended to bark louder than we wanted to bite. The parole decision makers are more aware of the reality of prison time. For these reasons a two-step process is to be favored, I submit, over a one-stage determination of time to be spent behind bars.

In Oregon we will develop, as you will see from the enclosed legislation, a commission on prison terms. This commission will be composed of the five voting members of the board, five who are appointed by the Governor, and five circuit judges appointed by the Chief Justice of the Supreme Court. This body is charged with the responsibility to develop and recommend parole standards regarding length of incarceration, offense severity assessments, and aggravating and mitigating circumstances for typical offenses encountered by the parole board. Additionally some kind of scaling device (quantifiable measure) to determine criminal history/risk will be developed. This is in effect a sentencing commission at the state level.

Another criticism of parole that has been leveled is that the offender must serve time waiting, perhaps years, for the parole board to make a decision about his release. In point of fact, a parole system does not depend upon deferring a release decision. A parole board operating under a modified "just deserts" system can establish a parole release date early in the man's term. This is a suggestion that has been advanced by Norval Morris in his book *The Future of Imprisonment*. There is no reason why this cannot be done.

The United States Parole Commission is moving toward establishing parole hearing/release dates early in a man's term. It is current Oregon practice. In Oregon we meet with each offender within the first four months of his incarceration. We establish a parole hearing date at that time. Approximately 80% of those who come before the board on that parole hearing date are paroled. The only resets or parole deferrals are because of serious institutional misconduct or present severe emotional disorder. In addition, a prisoner's release may be deferred because of a poor parole plan. However, this deferral is limited to 90 days.

I believe that this system eliminates or meets the criticism that parole subjects prisoners to nerve-racking uncertainty about the time of their release. In a

few cases the parole board advances a release date (a shorter period of incarceration) because of an offender's altered circumstances, outstanding conduct, or because new information is presented to the board. Because release criteria are explicit, the decisions of the parole board can be subjected first to administrative review by the board itself and ultimately by the courts.

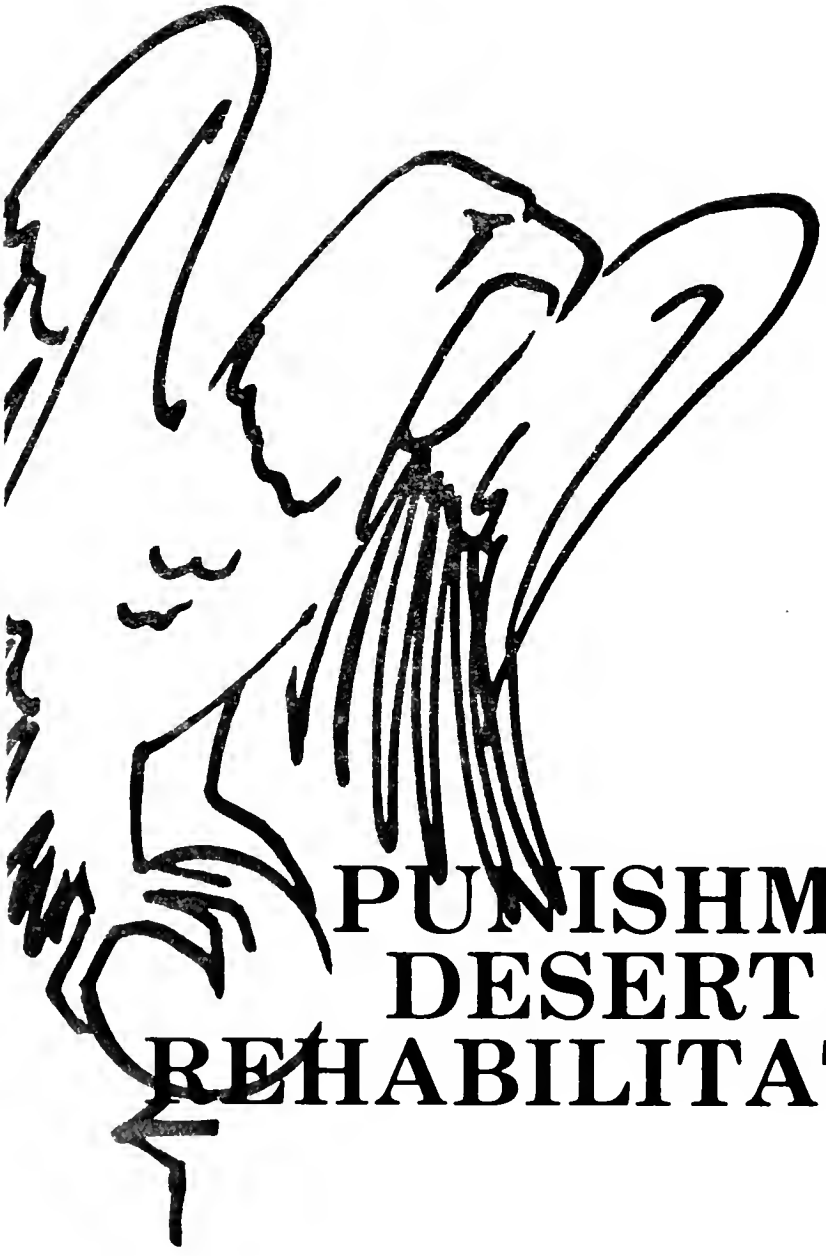
This procedure (a two-tiered decision-making system) offers a more efficient application by a collegial body of explicit release standards, enhances equity, can eliminate indeterminacy, and provides for more realistic review of parole decisions.

Finally, I read and enjoyed your recent article in *Judicature*; and I have had occasion to quote from it. I hope your legislative efforts regarding sentencing are successful. Perhaps our experience in Oregon will provide you with something useful. We have certainly benefited from our knowledge of the federal experience.

Sincerely,

IRA BLALOCK, *Chairman.*

EQUAL JUSTICE UNDER LAW
U.S. Department of Justice
Bicentennial Lecture Series
VOL. 7



PUNISHMENT, DESERT AND REHABILITATION

Norval Morris
Dean, University of Chicago Law School

THE BICENTENNIAL LECTURE SERIES
SPONSORED BY
THE UNITED STATES DEPARTMENT OF JUSTICE

"PUNISHMENT, DESERT AND REHABILITATION"

PRESENTED BY

NORVAL MORRIS

AT THE

UNIVERSITY OF DENVER COLLEGE OF LAW
DENVER, COLORADO

4:30 P.M.

FRIDAY, NOVEMBER 12, 1976

Let me open with a summation of my submissions to you this afternoon so that you may have a glimpse of the intellectual terrain I wish to cross and may, if you wish, by swift departure avoid what may well be a somewhat ghastly journey. I shall be making a case against equality, a case on its face less than congenial to the American ethic. I will argue that equality in punishment is not an absolute principle; that equality in punishment is a value to be weighed and considered among other values, no more; and that there can be just sentences in which like criminals are not treated alike, as to either who goes to prison or for how long. If I am right, conclusions follow of substantial importance to sentencing principles and practice, and to prison administration; if I am wrong, many of my colleagues will be pleased and little harm will have been done.

No apology is needed for seeking to attract your attention to problems of crime control in this series of Bicentennial lectures. Crime has long been a serious blight on the social stability of this country and a great impediment to the sense of security of generations of Americans. And the crime problem grows more intractable, matching in severity the persistence of poverty amongst plenty and of racial discrimination in a constitutional democracy dedicated to equality of opportunity. In particular, the past decade of claimed efforts at more effective crime prevention and control, with substantially increased resources allocated to those tasks, has proved deeply disappointing. Crime continues to influence where Americans live, how they live, where they work, their patterns of recreation and of social intercourse; crime touches all aspects of life. Nor will this lecture offer any cures for this scourge. And for that deficiency an apology may be thought to be appropriate.

With crime rates high and increasing, with the police, jails, and prisons overburdened, it seems almost perverse or picayune to devote a lecture to jurisprudential issues in sentencing and prison administration, when the pressing problems are so practical. Even in relation to sentencing the immediate needs are obvious enough: higher detection rates of serious crime, better control of plea bargaining, more adequate resources to prosecute and to defend those charged with serious crimes, and so on. Why then bother with questions that are so unlikely to have any imminent impact as whether like cases should be treated alike? But it has been my experience that it is often questions of pure theory that turn out to have the most lasting influence.

There is another reason that seems to me to justify my trying to turn your attention to jurisprudential issues in crime control. Current recognition of the gravity of the threat of crime to the quality of life in this country, particularly in our urban areas, and the threat of the further disruption of the patterns of our lives by crime and the fear of crime, is attracting recommendations for repressive measures, swift and draconic cures, which are not only illusory protections but, more importantly, are likely to erode values of freedom and justice which are of fundamental importance—values properly celebrated in this Bicentennial year.

The title of this lecture, however, does demand an apology. It is pretentious; it promises too much. It was settled months ago when ambition over-reached judgment, when the trivia of decanal duties seemed no impediment to scholarly productivity. What has emerged is much less than an analysis of "Punishment, Desert, and Rehabilitation"—very much less. What has emerged are notes towards a jurisprudence of imprisoning.

3

Oscar Wilde wrote of promising careers being ruined by the vice of attending to one's correspondence. It is an occupational vice of law school deans from which I hope to be cured before the capacity for any sustained thought is quite removed.

Sustained thought about the jurisprudence of imprisoning is, of course, complicated enormously by the extraordinary diversity of crime and criminals to which that jurisprudence must apply. Nevertheless, relatively few principles may suffice, with different mixes of those principles being capable of embracing the diversities of behavior and personality of crime and criminals respectively—that, certainly, is my belief. Acting on that belief, in a chapter of a book entitled, *The Future of Imprisonment*,[1] I tried to answer the question "Who should go to prison?". I now hope to carry that analysis a few steps further by considering the interrelationship between a few of the principles that seem to me to bear on that critical question and also on the proper role of prison programs in the jurisprudence of criminal sanctions.

Here are the three principles I wish to relate to the general presumption in favor of equality in punishment:

Parsimony: The least afflictive (punitive) sanction necessary to achieve defined social purposes should be imposed.[2]

Rehabilitation or Reform: Power over a criminal's life should not be taken in excess of that which would be taken were his reform *not* considered as one of our purposes. Rehabilitative programs in prison must not define either the duration or the conditions of incarceration; prison programs must be entirely facilitative, never coercive.[3]

Desert: No sanction should be imposed greater than that which is "deserved" by the last crime, or series of crimes, for which the offender is being sentenced. Nor should a sanction be imposed which is so lenient that it unduly depreciates the seriousness of the crime.[4]

These three principles are not, of course, sufficient in themselves to support a jurisprudence of imprisonment. There are other purposes and principles to be considered of greater or less validity and justice—deterrent purposes; incarceration while time passes and the fires of criminality abate; imprisoning because of repeated failure of other lesser sanctions; the community educative effect of condign punishments; the segregation of the dangerous; and so on. But in this lecture I wish to confine myself to the relationship between the above three principles—parsimony, reform, and desert—and to discuss ways in which they relate to another principle, the allegedly over-arching principle of equality, ingrained both in our Constitution and in our systems of justice and ethics.

The central question I address is this: In seeking to facilitate the prisoners' reform and in seeking to impose deserved punishment on the criminal, to what extent is it necessary that like cases should be treated alike? To what extent does the value of equality preclude differentiation between prisoners in facilitating their self-reform; must they all be given equal self-developmental opportunities? To what extent does the value of equality preclude differentiation between prisoners in imposing deserved punishments; must the equally undeserving be equally punished?

To offer answers to these questions, I need the following distinctions which I do not take from the literature but which I find helpful in my own thinking. I

wish to distinguish between three types of principles of justice: Those which are defining, those which are limiting, and those which are guiding.

If we knew enough, deterrent purposes could be *defining*. If we knew enough, it would be possible to graph the precisely appropriate deterrent punishment for a given crime committed by a given type of criminal. We would have to know a great deal more than we do now, but if we did the graph could be drawn and the hedonistic utilitarian precise punishment found. We would have to know for each community all about the relationships between certainty, celerity and severity of punishments and the incidence of the crime we are to punish. We would have to make value judgments relating the criminal's pain to the pain of future victims, say, fifteen hedonistic units to one. But if we knew all this, and more besides, the precise point on the graph of punishment could be determined where any additional punishment of the criminal was not worth the margin of increased crime prevention it would produce.

(I set aside possible questions of the disutility of increased sanctions achieving lesser enforceability. I assume, for this argument, that the co-relationship between increased punishment and reduced incidence of crime is linear.) Thus, given sufficient knowledge, on utilitarian grounds we could determine the precisely appropriate deterrent punishment. There may be other reasons why we would not wish to impose the punishment so defined, for example, it may exceed what we think is just, but nevertheless deterrent utilitarian values could precisely determine the punishment. Deterrence could be a defining principle of punishment, achieving fine tuning of punishment to its precise utilitarian purpose.

By a *limiting* principle of punishment I mean a principle that, though it would rarely tell us the exact

sanction to be imposed, as deterrence might, would nevertheless give us the outer limits of leniency and severity which should not be exceeded. Desert, I will submit, is such a limiting principle.

By a *guiding* principle, I mean only a general value which should be respected unless other values sufficiently strongly justify its rejection in any given case. Equality, I will submit, is such a guiding priniciple.

Equipped with these distinctions between defining, limiting and guiding principles, let us start by considering the relationship between rehabilitation and equality; later we shall consider the relationship between desert and equality.

Rehabilitation and Equality

The proper role of rehabilitation in sentencing and corrections is, I am glad to say, receiving increasing support both in the literature and the practice of punishment. In *U.S.* v. *Bergman*, Judge Marvin E. Frankel of the United States District Court for the Southern District of New York put the point with his usual grace and precision:

> The court agrees that this defendant should not be sent to prison for "rehabilitation." Apart from the patent inappositeness of the concept to this individual, this court shares the growing understanding that no one should ever be sent to prison *for rehabilitation.* That is to say, nobody who would not otherwise be locked up should suffer that fate on the incongruous premise that it will be good for him or her. Imprisonment is punishment. Facing that simple reality should help us to be civilized. It is less agreeable to confine someone when we deem it an affliction rather than a benefaction. If someone must be imprisoned—for other, valid reasons—we should

> seek to make rehabilitative resources available to him or her. But the goal of rehabilitation cannot fairly serve in itself as grounds for the sentence to confinement.[5]

This position does not, of course, argue for any reduction of treatment programs within prison, quite the contrary. But it does require that such programs should be voluntary and that success or failure in them by the prisoner should in no way determine either the duration or the conditions of his imprisonment.

Does the principle of equality require that all prisoners have equal access to such self-developmental rehabilitative programs—educational, vocational and psychological—as are available within the prison? The problem troubles me in relation to a new federal prison in which I have a close personal interest.

The new federal prison at Butner, North Carolina, is currently testing ideas on prison programs which I offered in *The Future of Imprisonment.* Butner is designed to hold 140 psychiatrically ill prisoners and 200 dangerous prisoners, that is to say, men aged 18 to 30 who have been convicted of at least two separate serious crimes during their last three years at large and who have between one to three years to serve before their parole release date. This is the deep end of the pool of prisoners, not the shallow end of criminality usually chosen by penal reformers; the dangerous, not the amenable. Butner is a "voluntary" prison in the sense that after the prisoner has been there a few weeks, long enough to understand something of the prison and its treatment program, he may return if he so wishes to the prison from whence he came or to any other federal prison to which he may properly be transferred. Soon after his arrival in Butner he will be told his release

date and that date will be adhered to subject only to his obedience to the disciplinary requirements of the prison; the date will be entirely independent of his involvement either at all or with success or failure in prison training programs. If he decides to leave Butner he can take his release date with him and suffer no adverse consequences thereby. There is much else that I would like to say about this prison, since I have a paternal affection for it, but for present purposes all I really need add is that it will, it is hoped, provide more educational, vocational training and self-developmental opportunities to prisoners than any other prison in this country. Selected for these opportunities is a group of repetitive criminals whose final selection is made by a computer, so that there will be available a perfectly matched control group of similar prisoners to facilitate measurement of the Butner experiment. The equality issue bursts out: Is it fair, is it just, to give these unusual opportunities to a few serious offenders when they are not available to the broad spectrum of federal prisoners, many of whom must be in more need of these excellent self-development opportunities and who have also inflicted much less harm on society than the Butner group?

Have the prisoners who are excluded from Butner a valid complaint? I think not. The argument will be more fully developed in relation to equality and desert; it will suffice here to note only the outline of my justification of that conclusion.

The shortage of treatment resources; the need for critical testing of what programs prove of assistance to which prisoners; the wisdom of allocating scarce resources where they are likely to be of more value

these and other properly discriminating values adequately justify the breach of any rigid application of a principle of equality to rehabilitative programs in prisons. Here, as in relation to sentencing, equality is only a guiding principle; it neither limits nor defines what may justly be done. Ideally, of course, in a Utopia in which there was no shortage of treatment resources, the case for inequality would rest only on the need for experimentation with a view to the acquisition of knowledge. In the interim, and it looks like a long interim, lacking both adequate resources and knowledge, there is clear propriety in our allocating those scarce treatment resources unevenly.

There is another aspect of equality that has borne heavily on prison conditions which cannot be so lightly brushed aside. May prison programs provide more and better self-developmental opportunities than are available to citizens who have not been convicted of crime? This is the question of "less eligibility" which is supposed to call forth the answer that prison conditions must always be less desirable than the conditions available to any (and therefore every) more worthy group in the community whose members have not been convicted of crime. This miserable principle of "less eligibility" has helped to impose idleness and brutality on our prisons; it has been used by the unthinking to justify overcrowded cages, fortress prisons of fear in which we are unable to protect the weak from the predatory strong, in which coerced homosexuality flourishes, in which drug habits are supported, institutions run by the prisoners rather than by representatives of the society who have imprisoned them.

Must racial discrimination be eliminated from society at large before we can provide a decent integration within

the walls? Must meaningless and insufficient make-work, idleness and inefficiency, characterize prison labor until full employment exists in society generally and poverty has been eliminated? Will there be a rush to the prisons, a diminution of the deterrent threat of imprisonment, if we give reasonable productive opportunities to prisoners and give them a chance to earn money to pay for their keep, to compensate their victims where that is appropriate, to support their families where that is within their competence, and possibly even to save something to tide them over the difficulties of re-integration into the economic life of the community? Protracted observation of the widest diversity of prisons in many parts of the world has convinced me that the last thing we need worry about is that prisoners will not dislike their cages. The pervading aim of prisoners in Butner, as well as every other prison I have visited in the world, is to get out of prison, and it is unlikely indeed that any variation of opportunities for self development within the walls will make any difference whatsoever to that overwhelming motivation.

No one of any sensitivity can visit any of our prisons without recognizing that they contain, as in all countries, populations which are disproportionately illiterate, unemployed, vocationally untrained, undereducated, psychologically disturbed and socially isolated. It is both in the prisoner's and the community's best interests to help them to remedy these deficiencies: We should not inhibit ourselves from doing so by any presumed principle of equality by which they must not have greater opportunities than those who have not been convicted of crime. To do so is self-defeating. Nor will denial of these opportunities to prisoners have the slightest effect upon the more important and larger efforts at social equality outside the walls.

It thus appears to me that the principle of equality, both as between one group of prisoners and another, and between prisoners and those who have not been convicted of crime, must not be allowed to inhibit such hesitant steps toward the minimization of brutality and cruelty within our overcrowded prisons as the federal and state governments are now taking. There is no categorical imperative to treat like prisoners alike nor to treat prisoners, other than by virtue of their imprisonment, worse than the next most eligible group in the community.

Desert and Equality

One defect frequently alleged to exist in sentencing practice is that of unjust disparities between sentences. By "unjust disparities" I mean that the chance of which judge hears a case, or which parole board member the prisoner comes before, or even the point in time at which the case is heard, will be powerfully and irrationally determinative both of the likelihood and of the duration of his imprisonment.

There is a mass of compelling data on this question, culminating in the recent important sentencing study in the Second Circuit,[6] and there is no need for me to belabor them here. I ask you to accept that the case is proved, that there are unjust and irrational sentences pervasively imposed in adult and juvenile courts, and by parole boards throughout this country. I ask you further to accept what is less generally recognized but is, I believe, also quite clear, that the inequitable disparities achieved by charge and plea bargaining processes are even greater than those that have been demonstrated in the literature of judicial sentencing.

Let me try to summarize briefly the paths of reform that are being advocated at present to bring order to this

32-466 O - 77 - 48

jungle of unjust, disparate sentences. Let me set aside charge and plea bargaining for the time being and concentrate on judicial sentences and the sentences shaped by parole boards. First, there is the attack on the indeterminate sentence and on parole. Elsewhere I have argued that the parole board is no more capable than the judge of predicting the later criminal conduct of the offender and that there is no principled case that can be made for the continuance of parole board sentencing.[7] Certainly, if parole boards are to continue to exist their roles will change as the federal parole board's role is currently changing. They will increasingly set the prisoner's release date, with more or less precision, quite early in his sentence. Base expectancy recidivism rate can be determined as well early in the prisoner's term as later. Present parole practice has, as Hans W. Mattick phrased it, turned our prisons into great schools of dramatic art; it is time we abandoned this hypocritical pretense. There will, in other words, be a gradual movement away from the false proposition that by observing the prisoner's behavior in prison it is possible to make predictions about his likely criminal behavior in the community. That is the cure suggested for the unprincipled randomness of parole board "sentencing."

Let us turn now to the cures for unjust sentencing disparities recommended at the legislative level. One group of reformers, of whom David Fogel is a principal spokesman, advocate fixed-term sentences, the legislature prescribing precisely what sentence the judge must impose for any given offense proved before him, allowing him only a relatively small margin for the variation of the sentence because of mitigating or aggravating circumstances of the offense or of the offender.[8] Somewhat similar recommendations are offered by Andrew von Hirsch in his book *Doing Justice*[9] and a more sophisticated plan is developed in the report of the Twentieth

Century Fund, "Fair and Certain Punishment," in which Professor Dershowitz has been influential.[10] Their recommendations have similar thrusts, seeking to control judicial discretion by precise legislative statements of the appropriate or "presumptive" sentence. I regard all these recommended reforms as steps in the right direction, but in my view they fail sufficiently to address the complexity of the subject. They are shortcuts to rational sentencing, having the defect of most shortcuts—they quickly get you into rough terrain best avoided. For my own part, I believe we should continue on the path set in the mid-1950's by the American Law Institute in its Model Penal Code. The legislature should bring some order to sentences provided in the criminal codes, federal and state, by reducing the categories of offenses in relation to their punishment and by defining the criteria that judges should take into account in imposing sentences. Then we must move steadily toward a common law of sentencing, in the same way that the common law has developed elsewhere. The judge must give reasons for the sentence he imposes and the sentence must be subject to appellate review, so that the usual pattern of the emergence of wisdom through precedent may apply here as it applies in many less important areas of juridical practice.

A recently announced plan,[11] currently under discussion in the Department of Justice, may prove a useful step in that direction. The proposal calls for the abolition of the Federal Parole Board and the creation of a Commission on Sentencing, composed of nine commissioners whose task it would be to promulgate guidelines to sentencing in the federal system. When any federal judge imposed a sentence outside the guidelines he would be required to set out his reasons for doing so. Such sentences outside the guidelines would be subject

to appellate review, at the motion of the defense if they exceeded the severity prescribed in the guidelines, at the instance of the prosecution if they were more lenient than the guidelines indicated. This plan is politically sophisticated and practical; its broad thrust, gradually bringing defined criteria and appellate review to sentencing, is to be welcomed.

One other reformist recommendation that has a current fashion can be cursorily dismissed. I refer to the advocacy of mandatory minimum sentences for given offenses. This is a wholly illusory path to rational sentencing. It is not even clear whether mandatory minimum sentences achieve the increased severity which their protagonists seek. In some cases, certainly, and probably in the case of the mandatory minimum sentences experimented with in New York for dealing in drugs, they have achieved leniency rather than severity. People who advocate mandatory minimum sentences seem to forget that discretion, rather like matter, cannot be destroyed; it can be shifted, it can be controlled and possibly modulated, but not destroyed. Mandatory minimum sentences tend merely to shift discretion from judges to prosecutors. Charge bargaining increases; plea bargaining and judicial sentencing decrease. There is little reason to believe that prosecutors and defense counsel, in their intricate negotiating gavottes, influenced by the widest range of pressures, proper and improper, not the least by the business of the jurisdiction in which they practice, can achieve more just sentencing than prosecutors, defense counsel and judges do at present. A shift of discretion from the judge to the prosecutor by no means guarantees a reduction of unjust sentencing disparities.

But there is an important element in the recommendations of von Hirsch, of Dershowitz and (to add another

commentator) of Ernest van den Haag in his book, *Punishing Criminals*,[12] which cannot be as cursorily dismissed as can the argument for mandatory minimum sentences. Their recommendations lead to an issue of principle central to the relationship between equality and desert. They all favor, as do I, a system of sentences which is primarily retributive, which does not pretend to a personal curative effect on the criminal, and in which the proper sentence to be imposed is strongly influenced by what the criminal has done. Thus, concepts of just desert are of overwhelming importance. Indeed, von Hirsch and the Committee for the Study of Incarceration, whose report his book encapsulates, build their entire sentencing system on a *defining* relationship between the deserved and the imposed punishment. Alan Dershowitz' presumptive sentencing recommendation somewhat weakens the link between the deserved and the appropriate sentence, but desert still remains a defining principle. My view is different: It is that desert is not a *defining* principle, but is rather a *limiting* principle; that the concept of a just desert properly limits the maximum and the minimum of the sentence that may be imposed, but does not give us any more fine tuning to the appropriate sentence than that.

Is this only a quibble, or does it push to issues of principle concerning just sentencing? I think the latter, of course, and hope to prove that conclusion to you today. Let me offer some examples where it seems to be accepted, and is in my view proper and just, not to treat like cases alike. The exemplary sentence is such a case. As Professor Nigel Walker put it, judges "will sometimes impose sentences which are markedly more severe than the norm for the express purpose of increasing their deterrent effect."[13] He gives as an example the im-

position of a sentence of four years imprisonment on each of nine young white men who were involved in attacks on blacks in the Nottinghill District of London in 1958. This sentence was at least double the sentence normally imposed for their offenses, and was stated by the sentencing judge to be in excess of his normal sentence for such offenses, but it was within the legislatively prescribed maximum for those offenses. It was imposed expressly as an exemplary punishment, to capture public attention and to deter such behavior by a dramatic punishment. It needs no refined analysis to demonstrate that these nine offenders were selected for *unequal* treatment before the law. Please do not misunderstand me, I am not opposing such sentences, quite the contrary. Rather, I am arguing that if the increased penalty is within the legislatively prescribed range then any supposed principle of equality does not prevent such a sentence from being in the appropriate case a just punishment. There are many such examples, they occur in all countries and are generally accepted. Let me give you just one more example. Annually, in Chicago, there is what is called a "crackdown on drunken driving." It occurs in the latter weeks of November and the early weeks of December. It is designed expressly to reduce the carnage from drunken driving in Chicago over the Christmas period. Often, those selected for punishment during this crackdown commit their offenses in the summer or autumnal months, when the thought of the allegedly jolly penury of Christmas is far from their minds; but such are the delays in the courts that an opportunity to serve their country as recipients of exemplary punishment is vouchsafed them—in this instance, a jail term for what would at other times be punished by lesser sanctions. My excellent colleague, Franklin Zimring has done a close study of this practice and has concluded, cautious fellow that he is, addicted

as he is to methodological niceties, that it is not disproved that the "crackdown" may have reduced the Yuletide devastation in Chicago from the combination of the ingestion of alcohol and the activation of the internal combustion engine.

Exemplary punishment is surely discordant to the principle that like cases should be treated alike, if that principle is regarded as either a limiting or defining principle of just punishment.

At the other end of the punishment process another example is to be found of general acceptance of not treating like criminal cases alike. The pardon and amnesty power is exercised in dramatically different ways in different jurisdictions, but it exists in all, at home and abroad. Pressures outside the prisoner and his crime, factors plainly extrinsic to the deserved punishment, the birth of a prince, the inauguration of a new government, the cessation of a foreign war, and political processes far removed from whatever makes criminal cases alike, except differences of date of the commission of the crime or imposition of the sentence, will lead to clemency to one prisoner which was denied to another. The pardon and amnesty power is difficult to reconcile with the equality principle if that principle is regarded as either defining or limiting just punishment.

Let us consider another hard case for that principle, this time a law teacher's hypothetical, which, however, I shall later argue is realistic, presenting some empirical data to that end.

Let us suppose what is, no doubt, wildly unlikely, that six medical practitioners in Denver are discovered to have a preference for patients who pay them in cash and who do not require receipts. Let us suppose that on full investigation we discover that all six doctors have

understated their income last year by, say, $20,000 each. For some time we have been doubtful of the precision of tax returns by medical practitioners in this city and, as advisers to the Internal Revenue Service, we discuss what should be done about the six doctors. Well, to start with, it is quite clear that all six must pay tax on the income they have failed to declare, interest at appropriately high rates on that tax, and substantial financial penalties for their criminality. All this can, of course, be arranged without the need for their prosecution before a federal district court. Most of the six and their tax advisers will be happy indeed to arrange such settlements with IRS agents or, if necessary in relation to disputed issues of fact, through the tax court. Do we need to prosecute all six in the federal district court and do we need to send all six to prison? I submit not. Our purposes are utilitarian, deterrent. We wish, as Voltaire said of the English practice of killing an occasional admiral to encourage the others to bravery, publicly to punish by sending to prison an occasional medical practitioner "to encourage the others" to integrity in their tax returns. We do not need to send all six to prison. The extra increment of deterrence would be bought at too high a cost. It would be wasteful of our own resources, wasteful of the court's time and, what is perhaps also in point, it would inflict unnecessary suffering on those doctors whose punishment did not substantially increase the deterrent impact we would gain by the imprisonment of, say, two of their number. The principle of parsimony overcomes the principle of equality.

How should we select those to be imprisoned? Perhaps we should struggle for some distinguishing characteristic of deserved severity or some opportunity of extra deterrent utility in the punishment of some amongst the

six; but what is important to recognize is that we are involved in a conscious breach of a principle that like cases should be equally punished. It may be that we would select those doctors whose lives had achieved the larger contribution to social welfare and who, as a consequence, were the better known of the six; their punishment would thus achieve the larger deterrent impact. *That* can hardly be a reason of equality for selecting them for the larger punishment.

This principle of parsimony in the imposition of punishment is, I think, of great importance, and is too often neglected. Let me offer some figures to demonstrate the frugality with which the Internal Revenue Service in practice applies its massive punitive powers. In 1975, throughout this vast country, only 1391 defendants were indicted for federal income tax violations, of whom 1158 were convicted and sentenced, and of whom only 367 were sent to prison or jail. In 1976, the number of indictments declined to 1331 and, of course, the number of convictions and prison sentences are not yet determined. This is an astonishingly selective and cautious use of the sanction of imprisonment for deterrent purposes. Is it unjust? It cannot be treating like cases alike if any reasonable concepts of the quality of guilt and deserved suffering are to be applied. In my view, on the data that have been published about the implication of the prison term in federal district courts, the system is both unequal and just, and it is precisely that apparent paradox I am seeking to defend.

When I put this type of case to many people, academic and civilian (if the distinction will be accepted), they tend to reply that this discriminatory selective invocation of the prison sentence by prosecutorial agencies, by administrators, is to be approved, provided it is

properly controlled by K. C. Davis-like criteria that can be announced and tested as to their validity; but that it would be grossly unjust for a judge to act in this fashion in exercising his sentencing discretion. This distinction puzzles me. You will note that it is not made about exemplary punishment, where there seems to be general acceptance of the judge as the selector of the individual for the exemplary punishment. Why should the judge not be equally capable of being the selector of the four of my six doctors not to receive the more severe punishment? It can hardly be that the sentence of two of the six to prison, if only two are taken by the prosecutor to trial and four are handled administratively, is a just sentence, but that it would not be a just sentence if the selection were made by a judge. Equality in that case would serve only to protect the judicial role, to protect the oracle, the black robe—although that too is an important value which cannot be dismissed out of hand.

As you will gather, I have difficulty with these problems and by no means pretend to their solution; but I do strenuously argue that I have demonstrated situations in which justice and the principle of equality are not coterminous.

Our entire present criminal justice system is infested with discretion in the exercise of the punishment power, and much of this discretion must continue to be exercised, guided but not determined by principles of equality in punishment. At present, the shortage of police, prosecutorial, defense, judicial and punishment resources compels the discretionary selection of cases to be prosecuted; but the constraint that the principle of parsimony in punishment properly imposes on the principle of equality in just punishment would remain were such resources unlimited. Equality would still remain only a guiding

principle; even with adequate resources in the criminal justice system, equality would neither define nor limit just punishment. By contrast, the principle of a deserved punishment is and should remain a limiting principle of just punishment. Let me try to unpack that blunt affirmation.

Let me propose that the death penalty be the mandatory sentence for anyone convicted of abortion. I am not talking only about an abortion in which the mother dies but the run-of-the-mill legally unjustified abortion in which the life of the well-grown, third-trimester foetus is terminated. Well, why do you not leap to accept such a proposition? Why does no one, so far as I know, advocate *that* punishment? Not even the most perfervid advocates of the right-to-life position seem to take themselves that seriously in relation to abortion being murder. On deterrent utilitarian grounds there would be a great deal to be said for such a penalty if you are a true believer in the right to life. It would certainly push the price of the backyard abortion up to a very high figure; it would greatly reduce the number of foetuses whose existence was terminated; it would greatly increase the number of tickets that were purchased on international airlines and I would, for my own part, immediately reinvest in TWA. Well, why not? The answer must surely be that no one would see such a punishment as an appropriately *deserved* punishment, even those who are both in favor of protecting the foetus and in favor of capital punishment for convicted murderers. The limiting principle is the principle of desert. As elsewhere, it is hard to quantify this principle, but it clearly operates in this case to hold that such a punishment would be undeserved.

Desert thus operates categorically to limit the maximum of punishment. Sometimes it operates to limit the minimum,

when it is argued that a too lenient punishment would unduly depreciate the seriousness of the offense that the accused has committed. An example of this was the sentencing of Spiro Agnew which, in my view, was entirely correct, for utilitarian and governmental practical reasons, but which certainly strained at the lower level of the deserved punishment.

By contrast, I am suggesting that the principle of equality, that like cases should be treated alike, is not a limiting principle at all, but is only a guiding principle which will enjoin equality of punishment unless there are other substantial utilitarian reasons to the contrary; such as those that favor exemplary punishment or the parsimonious punishment of some of my six doctors, or in situations where there are inadequate resources for or high costs attached to the application of equal punishments. The equality principle neither restricts nor limits; it merely guides. The principle of desert is not much of a guide, but it does restrict and limit.

When we say a punishment is deserved we rarely mean that it is precisely appropriate in the sense that a deterrent punishment could in principle be. Rather we mean it is not undeserved; that it is neither too lenient nor too severe; that it neither sentimentally understates the wickedness or harmfulness of the crime nor inflicts excessive pain or deprivation on the criminal in relation to the wickedness or harmfulness of his crime. It is not part of a utilitarian calculus, in the properly restricted Rawlsian sense of utilitarianism. The concept of desert defines relationships between crimes and punishments on a continuum between the unduly lenient and the excessively punitive within which the just sentence may on other grounds be determined.

It is not my concern today to try to explain how complexities of social relationships and the dialectic of

human thoughts and actions determine over time the values that set these minima and maxima of deserved punishments for diverse crimes. What is determinative is that these values exist and underlie concepts of "just desert" which set the limits of acceptable intervals on a spectrum of just punishment.

To summarize: Desert is not a defining principle; it is a limiting principle. The concept of "just desert" sets the maximum and minimum of the sentence that may be imposed for any offense and helps to define the punishment relationships between offenses; it does not give any more fine tuning to the appropriate sentence than that. The fine tuning is to be done on utilitarian principles.

Some immediate quibbles you may have concerning this analysis had better be brushed aside. What of the Talionic Law, you say? An eye for an eye, a tooth for a tooth, a life for a life? Well, that does not help much with our present punishment currency of fines, probation and prison where the desert exchange rates are harder to calculate. And even the most atavistic punisher does not advocate capital punishment for every criminal killer; he will favor the death penalty for only some murderers, indeed a few, which supports rather than conflicts with my argument. And, in any event, the Talionic Law properly understood means not a life for a life, an eye for an eye, but rather *no more than* a life for a life, not torture and then death, and a life *only* for a life, not a life for larceny or embezzlement. It, too, was and is a limiting not a defining principle.

No. The Mikado's aim of letting the punishment fit the crime belongs to Gilbert and Sullivan, not to the real world of criminal justice nor to a jurisprudence of imprisonment.

As you will have gathered, I come to these problems by worrying about practice and then I try to look at the philosophic authorities to see how they address them. This second step is always more burdensome, but we had better take it.

In the *Protagoras*, Plato suggests that "He who undertakes to punish with reason does not avenge himself for past offense, since he cannot make what was done as though it had not come to pass; he looks rather to the future, and aims at preventing that particular person and others who see him punished from doing wrong again . . . . He punishes to deter."[14] Seneca put it more curtly, "Nemo prudens punit quia peccatum est, sed ne peccetur" (No reasonable man punishes because there has been a wrongdoing, but in order that there should be no wrongdoing). That is the purely utilitarian statement, the extreme contrast to which is that of Kant: "The Law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it—in keeping with the Pharisaic motto: 'It is better that one man should die than that the whole people should perish'. If legal justice perishes, then it is no longer worthwhile for men to remain alive on this earth."[15]

Thus the issue has been drawn in philosophic discourse between relativist, utilitarian guides to punishment and categoric, non-utilitarian absolutist principles. The argument survives the centuries, but throughout these centuries of uncertainty there has been what H. L. A. Hart describes as the "somewhat hazy requirement"[16] of justice that like cases be treated alike. Professor Hart further suggests that "there is, for modern minds,

something obscure and difficult in the idea that we should think in choosing punishment of some intrinsic relationship which it must bear to the wickedness of the criminal's act, rather than the effect of the punishment on society and on him."[17]

Much of the literature of philosophy on this topic deals with what factors make like cases alike and once it is decided what factors bear upon desert and deterrence, it tends to be assumed that the equally guilty should be equally punished. As you see, it is a severance I am seeking to make and to suggest that these two principles operate quite differently.

How does all this square with the views of John Rawls? It is true, of course, that Rawls was writing in *A Theory of Justice*[18] of strict compliance theories of justice and not of the problems of punishment with which we are concerned, but it seems to me that his principles are applicable and in conformity with the argument that I am trying to offer. He writes that "all social values . . . are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage. Injustice, then, is simply inequalities that are not to the benefit of all."[19] It seems to me that the type of parsimony and inequality in the use of punishment which I suggest works to the benefit of all and does not offend sound principles of justice as Rawls defines them.

Let me put aside the philosophic implications of the argument and turn to some more lighthearted psychological reflections.

"It isn't fair," the prisoner tells me. "Here am I, serving two years for that bank robbery when others who have done just as bad, have ripped off even more, have not been caught or have not been convicted or are

serving lesser terms." My usual reply is to wish that they were in there with him, but to ask him if he thinks that for what he actually did, as distinct from that for which he was convicted, he deserved the punishment he has received. The general answer, I find, is an enthusiastic reassurance that he certainly has done enough to deserve this punishment and that his only complaint is that others haven't been treated likewise. Well, is it a good complaint? In terms of utilitarian analysis it may well be. We might well have a much safer society if we were capable of catching, convicting and rationally sentencing more of our predatory and violent criminals. But in terms of justice, I am not at all sure. I am prepared to allow that he has been treated unfairly, if fairness presupposes equality of punishment, but I always argue to prisoners, and usually without too great animosity on their part, that principles of justice do not require an equality of punishment. You would be surprised how much more sensible prisoners are about matters of punishment than are my colleagues at the University of Chicago Law School.

I used to hear the same argument interminably in my family. "Here you go," said my second son, "imposing these cruel deprivations on me. This brutal temporary denial of use of the car, whereas my elder brother, as usual, gets away with much worse without even detection, and that younger brother, who is discovered in his wickedness, is treated with maudlin, senile sentimentality, and not punished at all." I used to find these confrontations with my second son more difficult than those with the prisoners—I miss them now.

There is little doubt that principles of equality bulk large in psychological concepts of the fair punishment. The question is whether concepts of fairness and of

justice are identical. I think it not at all imprecise to argue that a punishment is both unfair and just. Principles of fairness, psychologically and in terms of the growth of the individual psyche, antedate the development of a sense of justice. The sense of justice is a social concept in which the necessities and practicabilities of social organization must in some cases take precedence to the pressures towards identity of treatment in relation to desert.[20]

Let me now, and I am sure you will be deeply grateful for the promised cessation of punishment, try to draw this lecture to a close by suggesting some of the implications of the argument I have offered concerning the relationship between equality and desert.

First, though my view of the equality principle is neutral in its relationship to the indeterminacy of sentencing and to the survival or the proper role of parole boards, it argues strongly against legislatively fixed, flat-time sentences. The legislature is in no possible position to handle the fine tuning of just sentencing required by the relationship I have suggested between the principles of desert and equality. Flat-time sentences, judicially fixed terms subject to time off for good behavior, are entirely acceptable; but not legislatively fixed sentencing, even if some discretion be given to the judge to vary sentences for statutorily defined aggravating and mitigating circumstances. Such are the diversities of human criminal behavior and such the complex relationships between justice and fairness, that the legislature should properly define only the maximum and minimum terms that the judge should impose. In other words, concepts of "just desert" should properly guide the legislature in fixing the range in which the judge should struggle for larger justice than can be achieved by the desert principle alone.

92-465 O - 77 - 49

Secondly, mandatory minimum sentences offend the principles of parsimony and of equality as here interrelated. Further, they are either ingenuous or unwise, being a shift of discretion from judge to prosecutor, which is unwise. They are political ploys, not principled sentencing reforms.

Thirdly, recommendations like those of the Committee for the Study of Incarceration and the Task Force on Criminal Sentencing of the Twentieth Century Fund, with their support of "presumptive sentences," do not lay out the path we should follow. If accepted, they would be clear advances on our present sentencing anarchy and inequity, but they are a less principled course for us to follow than the path laid out by the American Law Institute's Model Penal Code commissioners, which would better guide us to a Common Law of Sentencing. The several proposals for a federal criminal code, the American Bar Association's Committee on Sentencing in its Standards Project, and a number of recently proposed and legislatively accepted state criminal codes are building on the American Law Institute's initiative and can increasingly give a rational frame of reference to the judge in his difficult task of punishing the convicted criminal. They reduce the number of categories of felonies and misdemeanors in relation to the maxima and minima of punishment applicable to each and they guide the judge in the criteria that he is to apply in the exercise of his sentencing discretion to fix the proper term of imprisonment, if imprisonment is to be ordered, within the discretion statutorily given to him. To continue this evolution toward a Common Law of Sentencing it should increasingly be required that the judge should give reasons for his choice of sentence and that his sentences and thus his reasons should be subject, as in other countries, to appellate review. Princi-

pled sentencing lies at the heart of an effective criminal justice system; it is obvious that it deserves our best intelligence and that means reasons given, critical appellate review of those reasons, critical public consideration of those reasons, a system of precedent leading to principled justice under law.

It should be added that the proposals of the Department of Justice for the establishment of a Commission on Sentencing, promulgating guidelines to sentencing, requiring the statement of reasons for sentences outside those guidelines and subjecting such sentences to appellate review is a most encouraging step towards rational and just sentencing.

Finally, everything I have said and the work of others that I have tried to build upon, all presuppose that we take seriously the moral imperative critically to measure the consequences of our penal sanctions. So much that could be known about punishment is unknown and unstudied. Deterrent studies are in their infancy, studies of reformative efforts, in and out of institutions, are unsophisticated and largely unhelpful. It is a sin against the light to have to base such serious penal sanctions as imprisonment and now, God help us all, possibly the death penalty, on our present insecure, empirically unsophisticated guesses about the social consequences and effects of what we do. I hope my speculations have interested you; how much better if they could have been buttressed by more knowledge of the social consequences of imprisonment.

---

[1]University of Chicago Press, 1974.

[2]Id. pp. 60-62.

[3]*Studies in Criminal Law*, Norval Morris and Colin Howard, (Oxford: Clarendon Press, 1964), pp. 175-177; *The Future of Imprisonment*, Norval Morris, Chapter 2.

[4]*The Future of Imprisonment*, pp. 73-77.

[5]Sentencing Memorandum 75 Cr. 785, delivered in the United States District Court, Southern District of New York, June 17, 1976.

[6]"The Second Circuit Sentencing Study: A Report to the Judges of the Second Circuit," by Anthony Partridge and William B. Eldridge, Federal Judicial Center, August, 1974.

[7]*The Future of Imprisonment*, pp. 31-57.

[8]*We Are the Living Proof: The Justice Model of Corrections*, David Fogel (W. H. Anderson, 1975).

[9]*Doing Justice - The Choice of Punishments, Report of the Committee for the Study of Incarceration* (Hill & Wang, 1976).

[10]*Task Force on Criminal Sentencing, Fair and Certain Punishment - Report of the Twentieth Century Fund* (McGraw-Hill, 1976).

[11]"Sentencing Reform and Its Impact on Parole Practices," Karen Skrivseth and Harry A. Scarr, a paper presented before the American Society of Criminology on November 3, 1976. See too Senate Bill 2699 presented on January 20, 1976, in the first session of the 95th Congress by Senators Kennedy, Abourezk, Bayh and McClellan.

[12]Basic Books, 1975.

[13]*Sentencing in a Rational Society*, Nigel Walker (London: Penguin Press, 1969), p. 69.

[14]*Protagoras*, trans. W. R. M. Lamb (London: Heinemann, 1952), p. 139.

[15]*The Metaphysical Elements of Justice*. Part I of *The Metaphysics of Morals*, trans. John Ladd (Indianapolis, 1965), p. 100.

[16]*Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, 1968), p. 24.

[17]Id. at 163.

[18]*A Theory of Justice*, John Rawls (Harvard, 1971).

[19]Id. at 62.

[20]"On the Development of a Sense of Justice," Bernard Rubin, a paper presented at the Judges Seminar, Annual Judicial Conference, Chicago, Illinois, April 1, 1976.

UNITED STATES CATHOLIC CONFERENCE,
DEPARTMENT OF SOCIAL DEVELOPMENT AND WORLD PEACE,
Washington, D.C., July 13, 1977.

Hon. JOHN L. MCCLELLAN,
Subcommittee on Criminal Laws and Procedures, Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Department of Social Development and World Peace, the United States Catholic Conference, welcomes this opportunity to comment on S. 1437, the Criminal Code Act of 1977. We recognize that reform of the federal criminal code is both technically and politically a difficult task. Crime and punishment are, however, preeminently moral issues. As religious leaders, our primary concern is with the moral and human dimensions of criminal justice policy and reform rather than specific technical and administrative aspects of the criminal justice system. At this time, we wish to address only those provisions of S. 1437 which focus on corrections, sentencing, parole, handgun control, victim compensation and unlawful discrimination.

On several occasions the Catholic Bishops of the United States have formally addressed critical justice issues, including prison reform, capital punishment and handgun control. In 1973, the bishops issued the statement, *The Reform of Correctional Institutions in the 1970s*, which focused on the need for and problems of prison reform. They publicly stated their opposition to capital punishment in November 1974 and in 1976, the President of the United States Catholic Conference, Archbishop Joseph L. Bernardin, issued a statement opposing the reinstitution of the death penalty in this country. In 1975, the bishops' Committee on Social Development and World Peace issued a document supporting a federal ban on handguns. Copies of these statements are enclosed for your information.

These statements embody certain basic principles which we believe are relevant to federal criminal code reform. We will evaluate S. 1437 according to the following norms.

I. Punishment in order to fulfill its proper purpose must fit the nature of the crime; it must be considerate of the offender's human dignity; and it must be tempered by mercy and constantly aimed at reconciliation.

II. Dealing with all except the dangerous offenders outside of penal institutions is a challenging concept which society should allow to prove itself. Individual and community acceptance of ex-offenders with love and understanding is absolutely necessary for their complete integration into normal community living. Community correctional efforts, therefore, should be high on the list of priorities.

III. Society has a right to protect itself against lawbreakers and even to exact just and measured retribution, but the limits of what is reasonable and just are far exceeded in too many penal institutions. Abuses cannot be justified on the basis of their effectiveness as deterrents to crime. It is necessary to raise serious moral objection to tormenting one man unjustly in order to instruct or caution another. Correctional institutions should be institutions of rehabilitation. They should help men and women rebuild their lives in order that, with few exceptions, they can return to society as considerate, free and law-abiding citizens.

IV. A resident should be free to refuse treatments aimed at social rehabilitation, whose appropriateness can be called into question by reasonable persons in and outside the institution. No penalties of any kind should result from such refusal.

V. The work to which a resident is assigned should be—and appear to be—worthwhile and compatible with the dignity of a human being. National standards should be adopted and promulgated regarding compensation for work. Much greater emphasis is needed on practical job training and post-release employment opportunity.

VI. A resident should be informed of the date beyond which further detention demands another intervention of the court.

VII. Parole is a vital function both for the offender and for society. Consideration should be given to shifting the "burden of proof" by making a parole automatic after a definitely determined period of confinement unless there is sound reason against it.

VIII. No resident should be detained simply because employment is not available. If employment is a condition for release and no private employment is available, federal, state or local government should make every effort to assist the

resident. Career counseling, testing, guidance and bonding—where applicable—should be offered all who are preparing to be released.

IX. The United States Catholic Conference opposes the use of capital punishment.

X. Society must share at least some of the responsibility for compensating innocent victims of crime. When a way is found to pay offenders a fair rate for the work they do in confinement, provisions should be made for regular court-determined payments or at least a partial recompense to the victims, or the survivors of victims of their crimes.

XI. We believe that effective action must be taken to reverse the rising tide of violence. For this reason, we call for effective and courageous action to control handguns, leading to their eventual elimination from our society. Of course, reasonable exceptions ought to be made for the police, military, security guards, and pistol clubs where guns would be kept on the premises under secure conditions.

In light of these criteria, we have reservations about certain provisions of S. 1437. We recognize that some of these provisions are current law. As moral teachers, we believe that the primary basis for reform should be the development of a fair and equitable criminal justice system. The fact that a provision is current law does not mean that it is necessarily just, and therefore even current law should be carefully scrutinized in the context of criminal justice reform.

SENTENCING PART III, CHAPTER 20

We are concerned about the provisions on sentencing as they relate to imprisonment, the rehabilitation of the offender, the definiteness of the length of the sentence, and the quality of time served. Based on the principles articulated above, we agree that the primary basis for determining a sentence should be the nature of the crime. The characteristics of the offender, however, are factors relating to the quality of treatment needed rather than determinants for the length of sentence. Factors such as the educational, medical or correctional treatment of the offender should clearly be stated as the basis for the consideration of placement of the offender and not the length of sentence or even incarceration. An individual should not be imprisoned for an offense or receive a longer sentence because of educational needs. These services should be provided but not be the basis for the length of sentence.

Since the decision to incarcerate is the major sentencing decision, we believe that the legislation should include a statement on this matter. In light of the proven destructiveness of prisons, we would recommend that S. 1437 be amended to provide a presumption against incarceration or a requirement that a Judge consider "whether less restrictive sanctions have been applied to the defendant frequently or recently," as found in S. 181.

Adequate deterrence against crime is a legitimate concern of society, however, it should not be considered as a primary basis for the sentence imposed. Too often the concern for deterrence has led to abusive treatment in correctional facilities. We would, therefore, recommend a clearer statement of this provision, and a warning against abuse.

IMPRISONMENT AND PAROLE PART II, CHAPTER 23

In general, parole and imprisonment are related functions. This fact was recognized by the Catholic bishops in their 1973 statement on correctional reform. In S. 1437, these functions are particularly well-linked because of the interrelationship of the tasks of the Parole Commission and the proposed Sentencing Commission.

In their 1973 document, the Catholic Bishops criticized the practice of indeterminate sentencing and the frequent arbitrary decisions of overburdened parole boards by which an offender's confinement can be unjustly and inhumanly extended beyond any reasonable criterion of retribution for the defense. They then state that "consideration should be given to shifting the 'burden of proof' for parole by making parole automatic after a definitely determined period of confinement unless there is sound reason against it. We, therefore, support the efforts in S. 1437 to provide for a more automatic system of parole.

In the same statement, however, the bishops also state that correctional institutions are fundamentally places of custody and strongholds for the re-

moval of certain citizens where rehabilitation remains largely an abstract ideal rather than a concrete achievement. We are, therefore, concerned that the effects of Part 11, Chapter 23 of S. 1437 may result in increased sentences served by most offenders in facilities that are non-rehabilitative and often harmful. We would encourage the Subcommittee to review this section in order to ascertain the impact of these provsions.

Our difficulties with this section also relates to Title II, Part E of the bill, which describe the functions of the Sentencing Commission. This is discussed below.

With repect to parole services we believe that greater emphasis on practical job training and post-release employment opportunity is needed. If community-based alternatives become the primary recourse of the corrections system, then these concerns should be well-integrated with that approach. For those who are incarcerated, we believe that this function of the parole system is essential and should remain a clear and distinct function within the criminal justice system.

CAPITAL PUNISHMENT, PROPOSED CONFORMING AMENDMENTS

It is our understanding that the provision of current law authorizing capital punishment in cases of hijacking where a death occurs, will be incorporated into the new criminal code through the proposed conforming amendments to S. 1437. We recognize that this provision is current law. Recently, we opposed S. 1382, the bill which proposes to establish a rational criteria for the imposition of the death penalty under federal law. We do not believe that capital punshment should be used under any circumstances.

SENTENCING COMMISSION, TITLE II, PART E

The United States Catholic Conference does not have a position at this time as to whether or not sentences and sentencing guidelines should be determined by a sentencing commission or who should be represented on such a commission. In light of the influence that the proposed Commission will have over sentencing and our concern that the punishment of offenders fit the crime, be considerate of human dignity and be tempered by mercy and constantly aimed at reconcilitation we believe that a clear rationale to guide the Commission should be included in the text of the bill rather than the hodgepodge of competing factors articulated in the present bill.

As presently worded, there is no basis in S. 1437 from which one may determine the importance that the particular factors enumerated will have in the guidelines to be established since there is no overall statement of purpose of sentencing. We believe such a statement is essential to the development of a fair code.

VICTIM COMPENSATION, CHAPTER 41, SUBCHAPTER A

We were pleased to see that some recognition of the victims of crime has been incorporated into this bill. The inclusion of victims of federal crimes against person is a first step toward society's acceptance of its responsibility to provide for the victims of crime.

We wou'd also encourage efforts to involve the offender in providing restitution to the victim and not simply repayment to the victim's fund. Restitution should be made part of the rehabilitative process, as has been done successfully in a number of states .

HANDGUNS, TITLE II, PART A, SECTION 202

We recognize that handgun control is a controversial issue. In 1975 the Committee on Social Development and World Peace of the United States Catholic Conference issued a statement supporting strong handgun control legislation. As initial steps toward comprehensive control, they endorsed the following measures: a several day cooling off period, a ban on "Saturday Night Specials," registration of handguns, licensing of handgun owners, and more effective controls and better enforcement of existing laws regulating the manufacture, importation, and sale of handguns.

S. 1437 essentially transfers existing statutes to the new criminal code. We would support the inclusion of more stringent handgun control measures. At

minimum, we would recommend the amendment of section 922, of title 18, United States Code and referred to in Title II, Section 202 b(2) of the Criminal Code Reform Act of 1977 (50 U.S.C.) so as to ban the importation of any part intended to be used in the production of a firearm. This would thereby strengthen an obvious loophole in the Gun Control Act of 1968.

We are also concerned that this bill be consistent with previous civil rights legislation on the subject of discrimination.

UNLAWFUL DISCRIMINATION, SECTION 1504

This section makes it a crime for a person, by force or threat of force, to intentionally injure, intimidate, or interfere with another person's civil rights because of that person's race, color, sex, religion or national origin. It is essentially a recodification of 18 U.S.C. 245(b) (2), (4), and (5), and 42 U.S.C. 3631 with the addition of sex as a prohibited ground for discrimination.

The above-stated statutes were part of the Civil Rights Act of 1968. Apparently, at that time, religion was included with race, color and national origin as a prohibited ground for discrimination in certain parts of the Act. Although we have no record of any difficulty being experienced with those provisions and no evidence that they have been abused, since Congress is reviewing the law we believe it is the proper time to stress our opposition to the inclusion of religion in Section 1504 without some qualifying statement, specifically as it is contained in Section 1054 (H) and (I).

Although Section 1504 in many ways parallels the Civil Rights Acts of 1964 and 1968, making discrimination a crime where before it only subjected one to a civil penalty, the section does not have any of the exceptions or exclusions for religion that those laws have. For example, Title VI, Section 601 of the Civil Rights Act of 1964 states that: "No person in the United States shall on the ground of race, color or national origin be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Religion was not included as one of the prohibited grounds. By excluding religion Congress was recognizing the distinction between legitimate religious preference and individous discrimination based on inherent characteristics such as race, color or national origin.

Congress also granted an exemption to religion in Title VII of the Civil Rights Act of 1964 in Section 702, as amended:

"This title shall not apply to an employer with respect to . . . a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities." And Section 703 "it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of higher learning to hire and employ employees of a particular religion, if such school, college, university or other educational institution of higher learning is in whole or in substantial part owned, supported, controlled or managed by a particular religious corporation, association or society, or if the curriculum of such school, college, university or other educational institution or institution of higher learning is directed toward the propagation of a particular religion."

Section 1504(H) of S. 1437, however, makes it a crime to intentionally injury, intimidate or interfere by force or threat of force with another person on the ground of religion in applying for or enjoying employment by a private employer.

While religions and religious organizations are free from the requirements of Title VII for their legitimate operations, they are included in the jurisdiction of Section 1504. It is not unreasonable to imagine that the officials of religious institutions may be subject to criminal sanctions for activities which are exempted under other Civil Rights laws.

This is also true regarding Section 1504(I), which refers to the selling, purchasing, renting, financing or occupying a dwelling; contracting or negotiating for the sale, purchase, rental, financing or occupation of a dwelling; or applying for or participating in a service of renting dwellings. Section 807 of the Civil Rights Act of 1968, allowed an exemption for religious organizations, associations or societies of any nonprofit institution operated, supervised or controlled by or in conjunction with a religious organization, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other

than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin.

From the above it is clear that Section 1504 of S. 1437 will be inconsistent with these earlier Civil Rights laws. Although we do not foresee any instances of church officials using force or threats of force to intentionally injure or intimidate the civil rights of any person, we can foresee situations where unjust charges may be made. If they are upheld we wonder what effect this will have on the previous exemptions and exclusion in the Civil Rights laws.

We believe that this is an opportunity for Congress to eliminate this inconsistency in the law. This could be done either by removing the word religion from Section 1504 or by adding in Section 1504 a provision which would state that:

"Provided: that the above prohibitions are not to be interpreted as to modify or change in any way or manner the religious exemptions included in the Civil Rights Acts of 1964 and 1968 and that these exemptions remain in full force and effect."

The failure to provide this clarification may make it possible to charge persons with crimes for religious discrimination where they would not be subject to civil penalties. The inclusion of Section 1504 in S. 1437 without qualificaton may also create doubt in the minds of some courts whether these exemptions are meant to continue to exist since criminal penalties are more severe than civil ones. If criminal penalties are permitted, it may seem logical to some that civil penalties are also allowed.

In the Civil Rights Acts of 1964 and 1968, Congress recognized the differences between religion and inherent characteristics such as race, color and national origin. We believe that Congress shou'd strive to maintain this position by making Section 1504 of S. 1437 consistent with those laws. Failure to do so will only result in confusion. It is important that the language in this area of law be clear as to rights and responsibilities.

CONCLUSION

We wish to thank the Subcommittee for including these remarks in the hearing record on S. 1437. While acknowledging that much time and effort has already been devoted to this bill, we believe that the issues raised in this letter are critical to the development of a just and effective criminal code and criminal justice system. Your careful consideration of these concerns is appreciated.

Sincerely,

(Msgr.) FRANCIS J. LALLY,
Secretary, Department of Social Development and World Peace.

Mailgram

HACKENSACK, N.J.

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES,
SENATE JUDICIARY COMMITTEE,
U.S. Senate Office Building,
Washington, D.C.

Please record the National Council on Crime and Delinquency as opposed to the enactment of S. 1437.

A Federal criminal code is needed and should enunciate a major change in national criminal justice policy which could serve as a model for State criminal codes and justice systems. We recommend that the new Federal code: Reduce Federal jurisdiction for crimes which are State crimes; decriminalize victimless-type crimes; eliminate the use of imprisonment as punishment except for dangerous defenders; expand the range of non-imprisonment sentences: establish a policy of short sentences or consistent with those of other industrial nations; guarantee a helping service to persons discharged from prison; provide for serving of Federal prison sentence in State prisons near the residence of the prisoner.

A full statement in support of the above principles will be submitted at a later date.

MILTON G. RECTOR,
President, National Council on Crime and and Delinquency.

PREPARED STATEMENT OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.

The Association of American Publishers (AAP), whose more than 300 members include most of the leading book publishers in the United States, submits this statement to the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, to record its opposition to Section 1842—the proposed obscenity provisions—of S. 1437.

Section 1842 was among the "controversial" provisions of S. 1, but, unlike other sections of S. 1437 that appear to modify or eliminate many of the disputed provisions of the earlier bill, the current Section 1842 duplicates its predecessor provision, almost verbatim. It thus fails to resolve the troubling constitutional issues presented in S. 1.

As drafted, Section 1842 retains the worst features of current federal laws and introduces significant new provisions that will compound the vagueness and overbreadth of current federal law. Yet it will do nothing to eliminate or reduce the "chilling" effect on the exercise of constitutional freedoms that, unfortunately, has been a hallmark of obscenity law for the past one hundred years.

For these reasons and other stated below, this ill-conceived provision should be eliminated from S. 1437 or, at least, should be substantially revised.

Federal laws dealing with obscenity date back more than one hundred years to Anthony Comstock's crusades against sexual immorality, coarse language and corrupt opinion. But since the 1870's this country has experienced several revolutions in sexual, legal and constitutional values. And the American people have granted a progressively higher priority to First Amendment guarantees of freedom of speech and the press. Despite these fundamental changes, the Comstock laws have remained on the books virtually intact, their constitutionality sustained only by virtue of constant reinterpretation in the United States Supreme Court.

The obscenity issue has sharply divided the Supreme Court for the past two decades. During that time a substantial number of the Justices sitting on the Court have come to the conclusion that criminal obscenity laws—including the Comstock laws—are inherently at odds with constitutional protections. Even the bare majority of Justices who have voted to sustain criminal obscenity laws have expressed concern over the difficulty of fairly defining and even-handedly enforcing such laws.

In sum, while it is true that a bare majority of the present Supreme Court continues to affirm the power of the federal government to prohibit the commercial dissemination of "obscenity", within strict constitutional limits, it would be a serious error to interpret the Court's divided and troubled posture on obscenty as representing a judicial mandate for, or as affirming the wisdom of, federal criminal laws proscribing obscenity. In these circumstances, the Supreme Court's reluctant and constantly-shifting judicial *construction* of the constitutional limits of obscenity is neither an appropriate nor sufficiently stable basis for *legislative* action to reform or codify the federal law of obscenity. We believe that the recommendations of the 1970 Congressional Commission on Obscenity and Pornography do constitute the proper basis for establishing a sound legislative and constitutional policy. That Commission's basic recommendation was that no legislation should be adopted which operates to prevent the dissemination of sexually-related materials to adults who wish to read or view them.

If, however, the Subcommittee is committed to including in S. 1437 federal criminal legislation regulating such materials, we believe that the bill must be substantially revised in order to eliminate the many constitutional and technical defects that inhere in Section 1842 as drafted.

Without attempting to create an exhaustive catalogue, we list a number of possible amendments that would, in the AAP's view, help to improve Section 1842.

I. *Precedence for State Laws.* As new, free-standing federal law, potentially inconsistent with state or local standards of obscenity, Section 1842 could be used by federal prosecutors to invoke stricter standards than those which a state may have adopted. The section should therefore be amended to limit any federal offense to the dissemination of sexually-oriented materials in violation of the laws of the state in which they are disseminated.

II. *Attorney General's Prior Approval to Prosecute.* To reduce inconsistency and confusion in the application of a federal obscenity law, Section 1842 should provide for prior approval of any federal obscenity prosecution by the Attor-

ney General. Publishers and distributors would thus be assured of uniform application of federal law in different federal jurisdictions, and there would be less likelihood of the federal statute being used to circumvent application of more permissive state or local procedures.

III. *Enforceable Bars to "Venue-Shopping"*. Many recent federal prosecutions of allegedly obscene materials have been brought against nationally-distributed material, not in its place of origin or where it is predominantly sold, but in some community having no substantial connection to the act of publication or distribution. Section 1842 (or other pertinent provisions of S. 1437) should be amended to provide a strict and enforceable rule against such "venue-shopping". Prosecutions should be limited to the district in which the material was created or from which it was disseminated. Multiple prosecutions, which invite similar abuses, should also be outlawed—once specific materials have been acquitted in any proceeding, there should be no further federal prosecution.

IV. *A Single Statutory Framework*. It is essential that federal law relating to obscenity be limited to one statutory framework. Provisions contained in other titles—for example, the postal act provisions in Title 39—should conform to those enacted elsewhere in the statute. Similarly, to insure consistent enforcement, all federal proceedings against sexually-oriented materials, whether civil or criminal in nature, should be subject to approval by the Attorney General.

V. *Prior Civil Determination of Obscenity*. Because the definition of obscenity is inherently vague, and a publisher or distributor risks criminal prosecution if it is ultimately determined that materials he disseminates are obscene, a number of states have adopted procedural safeguards to assure greater clarity, uniformity and fairness in the application of their obscenity laws. To this end, the Congress should consider amending Section 1842 to provide for a *civil* proceeding to make initial determination of the obscenity or non-obscenity of sexually-oriented materials, prior to the commencement of any criminal action. Any such civil proceeding should provide for a speedy jury trial and expedited appeals, and should permit introduction of expert testimony and other evidence bearing upon the constitutional test of obscenity.

VI. *Clarified Provisions Concerning Minors and "Thrusting"*. There is logic in according separate statutory considerations, as Section 1842 does, to distribution of sexually-explicit materials to *willing* adults as distinct from their dissemination to minors or their exposure to *unwilling* adults ("thrusting"). Indeed, the AAP has not opposed appropriate state or local legislation dealing with either of the two latter activities. However, such legislation is new to federal law and, so far as we are aware, the proper role, if any, for federal legislation regarding minors has never been considered by the Congress. It is not surprising, therefore, that the two provisions of Section 1842 purporting to deal with these two aspects of the obscenity question present substantial questions of propriety and enforceability. Their lack of specificity stands in stark contrast to the detailed provisions of the many state and local laws in these areas. If Congress wishes to legislate on thrusting, Section 1842 must, at least, be amended to specify the kinds of public displays or premises to which it is applicable. If Congress wishes to legislate regarding dissemination to minors, Section 1842 should, at least, be amended to provide as an affirmative defense that the minor has parental permission, is emancipated or has provided convincing evidence that he or she is of age. Again, any enforcement of the minors and thrusting provisions should, we believe, commence with a prior civil determination of obscenity.

VII. *Sexual Abuse of Minors*. The shocking phenomenon of the sexual abuse of minors in creation of pornography is another issue which the AAP believes can be an appropriate subject of federal legislation, if properly defined. While we have some reservations concerning the constitutionality of bills dealing with the use of minors in pornography that are currently before the Congress, we believe consideration could be given to the probable relationship between such pending federal child abuse legislation and the proposed Section 1842, provided that any legislation is drafted with careful concern for the constitutionally-mandated protection of materials of potential scientific and educational value.

Finally, it should be made clear that our opposition to Section 1842 does not represent an attack on S. 1437 as a whole. On the contrary, we recognize and commend the seriousness of purpose and spirit of compromise that have gone into this revision of S. 1. Many groups, including ours, that vigorously opposed S. 1, now substantially support S. 1437 as a substantial improvement. However, as Senators Kennedy and McClellan have both recognized, the bill can be further improved. It is in this spirit that we urge this Subcommittee—and the Congress—to recognize that very serious defects are still present in Section 1842 and to delete or amend this provision accordingly.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA,
Washington, D.C., July 12, 1977.

HON. EDWARD M. KENNEDY,
U.S. Senate,
HON. JOHN L. MCCLELLAN,
U.S. SENATE,
Washington, D.C.

DEAR SENATORS KENNEDY AND MCCLELLAN: In reviewing the provisions of S. 1437, it occurs to me that a series of potential problems exist for which no clear resolution presents itself in the bill. As you know, in the District of Columbia there are two court systems which are intended to be independent, but which, in actuality, overlap in some certain areas. Most particularly, both the Superior Court of the District of Columbia and the United States Court for the District of Columbia have the responsibility for sentencing offenders convicted of offenses listed in the D.C. Code. Of concern in the present context is Section 11–502(3) of the D.C. Code which provides that the United States District Court has jurisdiction of the following: "Any offense under any law applicable exclusively to the District of Columbia which offense is joined in the same information or indictment with any Federal offense."

It is not uncommon for such a mixed indictment, containing Federal and D.C. Code offenses, to be resolved by a plea of guilty to a D.C. Code offense only, thereby putting the United States District Court in a position to sentence the offender under a criminal statute applicable exclusively in the District of Columbia. In other cases, the Federal Court may have to sentence for both a Federal and a D.C. Code violation.

Another difficulty is also present. I enclose herewith a copy of two related opinions which I wrote in the case of *United States* v. *Mary Williams*, Criminal No. 35771–73. My decision in this case was never appealed by any government party to the litigation. While this case deals with the issue of an unconstitutional discrimination against female felons convicted and sentenced to more than one year's confinement in the District of Columbia, the case also discloses the source of a potential problem lurking, but not addressed, in S. 1437.

Section 103(a) of S. 1437 exempts prosecutions under any Act of Congress applicable exclusively in the District of Columbia from the provisions of S. 1437. However, in light of certain unique aspects of sentencing, imprisonment and parole which apply in the District of Columbia, it seems to me that certain provisions of S. 1437 will apply to criminal cases under exclusively local criminal provisions of the D.C. Code which are applicable exclusively in the District of Columbia.

As the *Mary Williams* opinion points out, Sec. 24–425 of the D.C. Code provides that all persons convicted in the District of Columbia of a criminal offense, either under Federal law or provisions of the D.C. Code, shall be committed to the custody of the Attorney General of the United States. Thereafter, D.C. Code offenders may be incarcerated either in institutions maintained by the D.C. Department of Corrections or the Federal Bureau of Prisons. When such offenders are confined in Federal prisons they are then subject to parole consideration by the U.S. Board of Parole. In that circumstance it appears to me that Sections 3821 through 3837 of S. 1437 will indeed apply to offenders who have been convicted under an Act of Congress applicable exclusively in the District of Columbia, in contravention of what is apparently intended by Section 103(a).

Furthermore, in cases where the United States District Court for the District of Columbia, pursuant to the provisions of D.C. Code Sec. 11–502(3), is called upon to sentence an offender for a D.C. Code violation, it appears that the provisions of Chapter 20 of S. 1437 may come into play. And if they do not, then there will be the anomolous situation of a Federal District Court sentencing a criminal defendant under some system other than that made applicable to such Federal Courts by Chapter 20.

Also, there may well be created by the system here to be established a serious problem of a violation of the Constitutional right to equal protection of the law. My opinion in *Mary Williams* addressed that very problem in the context of the treatment of women only, but the vast disparity between the sentencing and parole treatment of convicted offenders which will arise if some District of Columbia offenders are treated under local sentence and parole systems while others are treated by the provisions of S. 1437, may well give rise to extensive litigation over that very constitutional issue. It seems to me that such matters should be considered and resolved in the drafting, amending and enacting stages of S. 1437 so as to forestall just such problems.

May I respectfully suggest two possible means of removing these potential problem areas. First, the District Court for the District of Columbia should have removed from its jurisdiction all purely local offenses in the District of Columbia. Indictments or informations filed in the Federal Court should only contain counts setting forth violations of Federal laws. This would require an amendment to D.C. Code Sec. 11–502(3). Second, although it is probably imperative for the Attorney General to have the authority to be able to transfer certain individuals to more secure Federal prisons, or to transfer them for their own or others' safety, I suggest that no matter where a D.C. Code violator who is sentenced in Superior Court of the District of Columbia is incarcerated, all such prisoners shall be considered by the D.C. Board of Parole. By removing all such D.C. prisons from the ambit of the U.S. Board of Parole, two incipient problems will be solved. One, all such prisoners will be afforded equal treatment, thereby curing the constitutional infirmities delineated in my *Mary Williams* opinion. Two, there will be no possibility that strictly D.C. Code offenders, who are sentenced by Superior Court, and not under the provisions of Chapter 20 of S. 1437, will thereafter have to be dealt with by the U.S. Parole Board under the provisions of Section 3821–3827 of S. 1437. Indeed, if those sections of S. 1437 had to apply, it is doubtful if they could be made to work in the case of a sentence imposed by a Superior Court judge under the applicable sentencing scheme now in use pursuant to the D.C. Code, rather than being imposed under Chapter 20 of S. 1437.

I would be happy to meet with either you or members of your staff to discuss further the matters discussed above, in the event you feel that I can be of any further help.

Very truly yours,

CHARLES W. HALLECK,
Judge.

Enclosure.

In the Superior Court of the District of Columbia

(Criminal No. 35771–73; Civil Action No. SP 792–76)

UNITED STATES

v.

MARY A. WILLIAMS

MARY A. WILLIAMS

v.

EDWARD LEVI, ATTORNEY GENERAL OF THE UNITED STATES; DISTRICT OF COLUMBIA BOARD OF PAROLE; AND DELBERT JACKSON, DIRECTOR, DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS

OPINION AND ORDER

Mary A. Williams is before the sentencing court seeking post-conviction relief from a denial of equal protection of the law arising solely from a classification by sex which resulted in a discrimination in her consideration for parole. This court hereby finds that Mary Williams, having come under the authority and power of the United States Board of Parole pursuant to D.C. Code Sec. 24–209 due solely to her designation and placement in a federal correctional facility, was a victim of a discriminatory application of different parole standards than would have been applicable to her if she had appeared before the District of Columbia Board of Parole. This court finds that she came under the authority of the U.S. Board of Parole solely as a result of classification by sex, and that the resulting different treatment is a violation of her rights to equal protection of the law guaranteed by the United States Constitution. The appropriate remedy, declaratory and injunctive relief, is granted herein.

I.

On May 8, 1974, the defendant Mary Williams pleaded guilty to a charge of assault with a dangerous weapon in violation of D.C. Code Sec. 22–502, which carries a maximum possible penalty of ten years imprisonment. On May 31, 1974,

this court sentenced her to ninety (90) days to three (3) years imprisonment. It was this court's intention and belief that she would receive some treatment for alcoholism, and that she would receive meaningful parole consideration ninety days after commencing her sentence and that the Parole Board would make an individualized determination of her progress toward rehabilitation.

Like all persons sentenced by the District of Columbia Superior Court, pursuant to D.C. Code Sec. 24–425, Mary Williams was committed to the custody of the Attorney General for imprisonment in such facility as he or his authorized representative would designate. The Federal Bureau of Prisons designated her to serve that sentence at the Federal Women's Reformatory at Alderson, West Virginia, and she was accordingly transferred there from the Women's Detention Center in Washington, D.C. Pursuant to D.C. Code Sec. 24–209, the United States Board of Parole had jurisdiction over the parole status of Mary Williams. That section provides:

"The Board of Parole created by section 723a of title 18, U.S. Code, shall have and exercise the same power and authority over prisoners convicted in the District of Columbia of crimes against the United States and now or hereafter confined in any United States penitentiary or prison (other than the penal institutions of the District of Columbia) as is vested in the Board of Indeterminate Sentence and Parole over prisoners confined in the penal institutions of the District of Columbia."

On November 6, 1974, Mary Williams was interviewed by a hearing examiner from the United States Board of Parole. On November 20, 1974, she was notified that she would be required to continue to serve *to expiration* the sentence imposed by this court. The November 20 notice introduced at the November 17, 1975, hearing as defendant's exhibit #2 gives the reasons for the continuance to expiration as follows:

"Your offense behavior has been rated as greatest severity. You have a salient factor score of 5. You have been in custody a total of 8 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of unlimited months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision outside the guidelines at this consideration does not appear warranted. You need additional institutional treatment, specifically, alcohol therapy to enhance your capacity to lead a law abiding life." [1]

The guidelines which dictate this result are applicable only to the United States Board of Parole and not to the District of Columbia Board of Parole.

Thereafter, Mary Williams, through court-appointed counsel, moved this court to vacate or modify her sentence pursuant to Superior Court Criminal Rule 35, D.C. Code Sec. 16–1901, *et. seq.*, or D.C. Code Sec. 23–110. On November 17, 1975, this court heard testimony from Mr. Peter Hoffman, Research Director of the United States Board of Parole, concerning that Board's adult guidelines for length of time to be served prior to parole as well as the procedures of that Board, and from Mr. Edward Keightley, Program Analyst of the District of Columbia Board of Parole concerning the procedures and standards of that Board. On February 9, 1976, Mr. Delbert Jackson, Director of the D.C. Department of Corrections, testified concerning the reasons for and methods of transferring sentenced women felons to federal institutions.

This court determined by order of May 3, 1976, for reasons set forth therein, that this court has jurisdiction to consider Mary Williams' motion under D.C. Superior Court Rule 35 to correct an illegal sentence, her motion under 23 D.C. Code Sec. 110 to vacate or correct the sentence as one subject to collateral attack, and her petition for habeas corpus under 16 D.C. Code Sec. 1901. Mindful that the mandate of 23 D.C. Code Sec. 110(e) that "[t]he court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner" was intended not only to prevent repetitious demands by the same prisoner for relief on the same grounds, but also to require the assertion in one motion of all the existing grounds which the prisoner has for questioning the validity of his or her sentence, *see Bistram v. United States*, 283 F.2d 1 (8th Cir. 1960), cert. denied, 366 U.S. 921 (1960), and especially mindful of the interests of judicial economy, efficiency, and convenience to the parties and witnesses, as well as the court, this court by order of May 3, 1976, consolidated the civil and

---

[1] There was no indication of what "treatment, specifically, alcohol therapy" had been afforded her, the degree of her progress, or more importantly, what kind of additional treatment other than incarceration was contemplated.

criminal motions above-mentioned into a single case for unitary disposition. That order is appended hereto. The question before the court, to be resolved upon careful consideration of the testimony taken at two hearings, as well as the numerous extensive written pleadings submitted by the parties and by a court-appointed amicus curiae, is as follows: Was Mary Williams discriminated against in her parole treatment solely on account of sex, and if so, does that discrimination constitute a violation of her right to equal protection of the laws? This court concludes as a matter of fact, and of law, that the answer to that question is yes.

II

Before examining the question of discrimination in parole treatment, the court must first consider why Mary Williams appeared before the United States Parole Board rather than the District of Columbia Board of Parole. On February 9, 1976, Mr. Delbert Jackson, the Director of the District of Columbia Department of Corrections testifield in this matter. He explained that at one time sentenced female felons were incarcerated in a facility operated by the D.C. Department of Corrections and located in Occoquan, Virginia, but that the facility was subsequently converted to what is now Youth Center Number Two for male youths. (Transcript, pp. 8–9). Mr. Jackson testified that despite the "dramatic" increase in female offenders in D.C. (Tr., p. 9), "there are no facilities for sentenced female felons in the District of Columbia at present." (Tr., p. 8, also p. 23). On cross-examination, he explained that there is no possibility of using the present Women's Detention Center, located in Washington, D.C., to house sentenced felons; it was designed simply as a holding facility and "most certainly is not" a reformatory. It was never designed to house convicted defendants (Tr., p. 15) and Mr. Jackson asserted, "It's not a facility that I personally recommend for the maintenance of human beings over a prolonged period of time." (Tr. p. 14).

Mr. Jackson testified that although bringing the sentenced women back from federal facilities is a high priority in his mind, it would require a minimum allocation of twenty million dollars ($20,000,000.00) (Tr., p. 38). The D.C. Department of Corrections' projected facility for women is part of a $55 million Lorton Improvement Plan, extant since 1972, and to date with no prospects of being funded.

However, the District of Columbia does provide extensive facilities to house male sentenced felons and youth offenders at its buildings in Lorton, Virginia.

As a consequence of this lack of facilities sentenced female felons from Superior Court must serve their sentences in federal correctional facilities.

D.C. Code Sec. 24–425 provides that all prisoners sentenced in the District of Columbia are committed to the custody of the Attorney General of the United States or his authorized representative, "who shall designate the places of confinement where the sentences of all such persons shall be served." Likewise persons convicted and sentenced in federal courts across the country are committed to the custody of the Attorney General. Persons convicted in federal courts, both for offense in violation of the U.S. Code and for lesser included D.C. Code offenses, are designated to serve their sentences in federal prisons. (Tr., p. 6). Theoretically, a reading of D.C. Code Sec. 24–425 would produce the impression that persons sentenced by the District of Columbia Superior Court would receive from the Federal Bureau of Prisons the same individualized designation treatment as do federal court prisoners; that is, an examination of available relevant information to determine whether maximum-, medium-, or minimum-security setting is appropriate, whether informants need to be separated from other persons, and similar factors.

However, this individualized evaluation and designation does not occur for D.C. Code offenders sentenced by D.C. Superior Court. Mr. Jackson testified about, and subsequently submitted to this Court, as part of the record of this case, an exchange of correspondence between then Chief Judge John Sirica of the United States District Court for the District of Columbia and then Attorney General Richard Kleindienst, dated in October, 1972, concerning designation of sentenced prisoners. Chief Judge Sirica, in his letter of October 13, 1972, to Attorney General Kleindienst, requested that because "the prison facilities of the District of Columbia Department of Corrections are overcrowded, * * * discipline is lax or non-existent", "prisoners entrusted to the care of the District of Columbia Department of Corrections are not protected from sexual assault and bodily harm at the hands of other prisoners and * * * there are frequent escapes and release from the Department's custody of prisoners deemed to be highly dangerous", and

because "the services, facilities, personnel and programs are totally inadequate" the Judges of the United States District Court after consideration at an Executive Session on October 12, 1972, urgently requested the Attorney General to "designate institutions other than the facilities under the supervision or control of the District of Columbia Department of Corrections for incarceration of all defendants" thereafter convicted in the United States District Court for the District of Columbia. By letter of October 16, 1972, Attorney General Kleindienst agreed to the request and informed Judge Sirica that the Director of the Federal Bureau of Prisons had been so instructed.

The trade-off for all prisoners from federal court being designated to federal facilities is that persons convicted in the District of Columbia court system are all automatically, pursuant to a categorical agreement, designated to serve their sentences in District of Columbia Department of Correction facilities. (Tr., p. 5) The exception, for persons sentenced by the D.C. Courts, are twofold. First are those "special cases" (Tr., p. 22) who for individual reasons of safety or security are in danger from other inmates in D.C. facilities; examples include persons who have informed police or assisted prosecutors such that their lives may be endangered. Each of these cases is handled on an individual basis and a decision is made on the facts of each case. The second exception is a class one rather than an individual one: women, solely on account of their sex, are routinely sent to federal institutions, as Mr. Jackson testified, "simply because at present, there are no facilities in the District of Columbia for sentenced incarcerated women." (Tr., p. 23).

Indeed, so routine is the designation of D.C. Superior Court sentenced males to D.C. Department of Corrections facilities that the Attorney General has delegated the designation of such persons to the Mayor of the District of Columbia, who in turn has further delegated that authority to the D.C. Department of Corrections.

At the hearing on February 9, 1976, Mr. Jackson was presented with the hypothetical question of a male, John Smith, who was found guilty of assault with a dangerous weapon and sentenced by a D.C. Superior Court judge to a sentence of three months to three years. The court inquired of Mr. Jackson how such a person would be designated:

THE COURT. Well, if I give this man, John Smith, for assault with a dangerous weapon felony, and if I give him a sentence of three months to three years. Then, the first thing that happens is that there has to be a designation by the Federal Bureau of Prisons?

THE WITNESS. No.

THE COURT. No?

THE WITNESS. No.

THE COURT. Does he go straight to Lorton?

THE WITNESS. Yes.

THE COURT. Who decides that?

THE WITNESS. I do.

The COURT. Now, would you send him to a Federal Institution?

THE WITNESS. No.

THE COURT. So, he would have to go to Lorton?

THE WITNESS. That's correct.

(Tr., pp. 10–11).

Then Mr. Jackson was asked the identical hypothetical for a female who committed the same offense and received the same sentence. She would be routinely sent to a federal institution, probably Alderson for an adult and Morgantown for a person with a youth sentence.

This explains why Mary Williams was sent to Alderson. The District of Columbia has facilities for female felons. Although theoretically the Attorney General designates the place of sentence of every person sentenced by D.C. Superior Court, he has en-masse designated the males to facilities run by the D.C. Department of Corrections and female go en-masse to federal institutions.[2] The designation is made by class on the basis of sex. The court must then evaluate the applicability of D.C. Code Sec. 24–209 in light of these facts found by the court.

---

[2] The court also notes that the "Plaintiffs' and Defendant U.S. Attorney General's Stipulation of Fact Concerning Designation and Return" in *Garnes v. Taylor*, Civil Action No. 159–72, now pending before Judge Bryant in U.S. District Court to litigate claims of sex discrimination against women prisoners, contains this stipulation: "#10. Since 1972, the Bureau of Prisons had designated a federal facility for service of sentence for D.C. female offenders with sentences greater than one year as a matter of course."

III

As set forth above, D.C. Code Sec. 24–209 provides that the Federal Board of Parole has the same power and authority over persons convicted of crimes in this court and confined in federal prisons as does the D.C. Board of Parole over persons in D.C. penal institutions.

The respondents here argue that Mary Williams' placement under the authority of the U.S. Board of Parole cannot be a discrimination because some males sentenced in D.C. Superior Court also are designated to federal prisons and they too are subject to the authority of the U.S. Parole Board. The crux of the matter is not that all D.C. sentenced prisoners designated to federal prisons equally appear before the U.S. Parole Board, but rather that it is discrimination in the designation process which results in the federal parole authority. Part II of this opinion, supra, contains findings of fact that a discrimination exists in the designation process.

The next question to consider is whether the standards and rules of the District of Columbia Board of Parole and the United States Board of Parole are different, so that a woman appearing before the federal board would be treated differently than if she appeared before the D.C. Board.

The United States Board of Parole uses "Guidelines for Decision Making", first published in the Federal Register in November, 1973,[3] which outline the length of time persons under the jurisdiction of that Board will be required to serve. The guidelines have been described in a number of court opinions on parole and in scholarly articles, and were also explained by Mr. Peter Hoffman, Research Director of the U.S. Board of Parole in his testimony in this matter on November 17, 1975.

"The Guideline Table consists of two basic indices on which inmates are scored: an 'Offense Severity' index and a risk prediction or 'Salient Faction' index. These two indices form the axes of a matrix: on the vertical axis inmates are placed into one of six severity groups according to the 'offense behavior,' while along the horizontal axis they are divided into four risk groups according to their Salient Factor Score. At the intersection of each severity and risk category, a range of months is listed. This range represents the amount of actual time to be served prior to the first release of an inmate with those offense and risk characteristics. By scoring and rating an inmate on the two indices, the hearing examiners determine the inmate's expected incarceration period. They will normally recommend a decision—parole, a continuance to a later hearing or report (a set-off), or imprisonment until the expiration of the sentence (continue to expiration, or CTE)—such that the total time actually served by the inmate at release will be within that expected range.

The Offense Severity Scale was derived by averaging the evaluations of Parole Board members and examiners of the seriousness, on a scale of one through six, of typical offense behaviors. The Offense Severity Rating reflects the Parole Board's independent, subjective evaluation of the gravity of the inmate's past criminal behavior. Classification on the severity scale is not based on the legal "offense of commitment" or on sentence length: rather, the Board makes its own determination of the inmate's offense behavior, which it then rates relative to 'offense behaviors . . . commonly seen by the parole board.'

The Salient Factor Score is designed to predict the likelihood that an inmate will succeed on parole. This score is measured by an 11-point Salient Factor Scale, which consists of nine weighted personal characteristics that were statistically determined to have high predictive power in discriminating between past groups of releases who 'succeeded' and 'failed' after their release. All but two of the nine items are part of the inmate's past criminal record and behavior: they are 'static' and generally known to the judge at the time of sentencing. The items scored cannot reflect rehabilitative progress, because they bear little or no relation to the commitment offense, the amount of time the inmate has served, or the programs in which he or she has participated at the institution." Parole Release Decisionmaking and the Sentencing Process, 84 *Yale L. J.* 810, 823–824.

Neither the Offense Severity nor the Salient Factor Score measures the person's institutional behavior or rehabilitative progress. The Board gives each person a rating along each axis of its chart, using a different chart for adult,

---

[3] Federal judges were first notified of these guidelines in August, 1974. *See* Parole Release Decisionmaking and the Sentencing Process, 84 *Yale L. J.* 810, 822, note 59. Judges of this court have never been directly notified of these guidelines.

youth, and narcotics addiction sentences, and then sees the "customary total time served before release."

In his testimony of November 17, 1975, in this case Mr. Peter Hoffman testified that "within the last six months approximately 84 percent of the initial decisions have been within the guidelines." (Tr. p. 23), or perhaps 82 percent (Tr. p. 46), with half of the remainder above and half below the guidelines figure. Mr. Hoffman testified that in May, 1975, the guidelines were applied 90 percent of the time at initial hearings in the Northeast region, with another 5 percent serving longer than the guidelines and 5 percent serving shorter times. (Tr., p. 44). He referred to a written report giving a figure of 91.7 percent adherence to the guidelines, (*id.*) [4] In the case of *Grasso* v. *Norton*, 376 F. Supp. 116, 119 (D.Conn. 1974), Mr. Hoffman testified that the Board follows its guidelines between 92 and 94 percent of the time. Mr. Hoffman explained that these figures derived from different time periods, that from October, 1973, to March, 1974, at initial parole board hearings the guidelines were applied in 91.7 percent of the cases. (Tr. p. 47), that since then the percentage of decisions within the guidelines has gone down somewhat so that the figure has "leveled off" at about 85% compliance with the guidelines, 7 and ½ percent above, and 7 and ½ percent below the guidelines (Tr. p. 48). This court finds as a fact the United States Board of Parole follows its "Guidelines for Decisionmaking" charts in making parole release decisions in the vast majority of cases, from 84 to 92 percent of the time.

Mary Williams' conviction for assault with a dangerous weapon was considered to be in the "greatest severity" category, along with such other crimes as aircraft hijacking, espionage, kidnapping, and willful homicide. Her salient factor score was calculated as 5, in the "fair" range. A person with a 5 salient factor score and the next lesser severity category (very high) would be required to serve 45 to 55 months, and a person with a 5 salient factor score in the greatest severity category is to serve a time "greater than above"; thus the U.S. Board of Parole told her that the time for her to serve was "a range of unlimited months to be served before release", (Deft. exhibit #2), and that a decision outside these guidelines was not warranted in her case. It is an inescapable fact that her parole decision, to continue her to the expiration of her sentence, was premised on these guideline charts.

The District of Columbia Board of Parole does not use this chart-based decision method of the federal board. The compilation of rules and regulations of the D.C. Board of Parole, tendered by Mr. Edward J. Keightley, Program Analyst of the D.C. Board of Parole at his November 17, 1975, testimony in this case, sets forth the factors to be considered in making a parole determination. Sec. 105 of the D.C. Rules and Regulations, Title 9, notes that the statutory criteria are "that there is a reasonable probability that a prisoner will live and remain at liberty without violating the law, that his release is not incompatible with the welfare of society, and that he has served the minimum sentence imposed or the prescribed portion of his sentence as the case may be." Sec. 105.1 sets forth the specific factors considered by the D.C. Board as follows:

"(a) The offense, noting the nature of the violation, mitigating or aggravating circumstances and the activities and adjustment of the offender following arrest if on bond or in the community under any pre-sentence type arrangement.

(b) Prior history of criminality noting the nature and pattern of any prior offense as they may relate to the current circumstances.

(c) Personal and social history of the offender, including such factors as his family situation, educational development, socialization, marital history, employment history, use of leisure time and prior military experience, if any.

---

[4] The Yale Law Journal study reported figures based on a written report by Mr. Hoffman, as follows:

"Between October 1973, and March 1974, 91.7 percent of all decisions at initial parole hearings were within the Guidelines, while 4.5 percent were decisions above the Guidelines and 3.8 percent were decisions below the Guidelines. P. Howman & L. DeGostin, Parole Decision-Making: Structuring Discretion, June 1974, at 10. (U.S. Bd. of Parole Res. Unit: Rep. 5) [hereinafter cited as Structuring Discretion]. There is some dispute as to the meaning of these figures. If all cases are excluded that involve either minimum sentences greater than the Guideline range or maximum sentences or mandatory release dates below the Guideline range (cf. note 80 infra), then the percentage of decisions at initial hearings within the Guidelines is 88.4 percent with 5.3 percent below and 6.3 percent above." Id.

Parole Release Decisionmaking and the Sentencing Process, *supra*, at 825, note 75.

(d) Physical and emotional health and/or problems which may have played a role in the individual's socialization process, and efforts made to overcome any such problems.

(e) Institutional experience, including information as to the offender's overall general adjustment, his ability to handle interpersonal relationships, his behavior responses, his planning for himself, setting meaningful goals in areas of academic schooling, vocational education or training, involvements in self-improvement activity and therapy and his utilization of available resources to overcome recognized problems. Achievements in accomplishing goals and efforts put forth in any involvements in established programs to overcome problems are carefully evaluated.

(f) Community resources available to assist the offender with regard to his needs and problems, which will supplement treatment and training programs begun in the institution, and be available to assist the offender to further serve in his efforts to reintegrate himself back into the community and within his family unit as a productive useful individual." D.C. Register, Special Edition, D.C. Rules and Regulations, Title 9, Board of Parole, July 24, 1972, at pp. 19–21.

See also testimony of Mr. Keightley, November 17, 1975, Tr., pp. 106–108.

The court takes note that institutional experience and behavior is a factor considered by the D.C. Board of Parole which is not considered by the U.S. Board of Parole.

Mr. Keightley testified at the November 17, 1975, hearing that the D.C. Board of Parole has no guidelines or mechanical computations for parole, the only applicable calculation being the minimum sentence imposed by the judge (Tr., p. 104), and that prisoners under their jurisdiction are generally given parole consideration on or shortly after the expiration of their minimum sentence (Tr., p. 105) or after one-third of their sentence (Tr., p. 112). He testified that the D.C. Board of Parole looks "at each individual as an individual and the length of his sentence, minimum sentence" and that "the maximum sentence doesn't come into play at all in making that determination as to whether they are going to . . . grant parole." (*Id.* also Tr., p. 15). Mr. Keightley explicitly stated on cross-examination that the D.C. Board does not use the federal guideline charts or any analogous schedules (Tr., pp. 109–110).

Mr. Keightley testified that the D.C. parole rate is about 69 percent; that between 57 to 59 percent of the persons under their jurisdiction are granted parole at their first eligibility date, and an additional 12 percent are granted at a rehearing. (Tr., pp. 105, 114). The *Washington Post* reported more recently, on March 14, 1976, that of 1,025 inmates considered for parole for the first time in 1975, 667 were paroled, or two-thirds at the initial hearing and that of the 1,330 persons heard altogether in 1975, 948 or 71.2 percent were granted parole. In 1974, the total percentage granted was 72.9 percent. D.C. Parole Rate of 66 percent Tops Area, *Washington Post*, Sunday, March 14, 1976, p. A1–A5. By contrast the *Post* reported that "according to statistics on file in the Senate Judiciary Committee, the federal board paroles about 35 percent of those considered for parole annually." *Id.*, at A5, col. 8.

Indeed, some judges of this court have criticized the D.C. Board of Parole for Parole for presuming that every prisoner who completes the minimum sentence is ready to be paroled, absent some deficiency in prison behavior, so that "the vast majority of prisoners make parole at the initial hearing." *See United States* v. *Michael Samuels*, Crim. No. 2331–73, Memorandum and Order dated January 14, 1975, at p. 4, and that the Board does not make an affirmative finding of rehabilitation but presumes such a state. (*Id.*) *See also Washington Post* article, *supra*.

This court finds as a fact that Mary Williams' consideration by the United States Board of Parole resulted in the application of different and harsher standards of parole than would have been applied by the District of Columbia Board of Parole had they had jurisdiction of her case. This does *not* constitute a finding of fact concerning whether or not she would have been *released*. This court's findings herein related only to the application of a different set of standards to Mary Williams simply by virtue of her status as a convicted, sentenced *female* felon from Superior Court of the District of Columbia.

IV

Having found the above facts, the court must now address the question of whether this application of different and harsher parole standards constituted

a denial of equal protection of the laws in violation of Mary Williams' right to due process under the Fifth Amendment.

The United States Supreme Court held in 1954 that equal protection of the law is one element of the due process guarantee which applies to the District of Columbia through the Fifth Amendment, and that an unjustifiable discrimination violates due process. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Procedures through which persons are granted or denied parole are subject to a standard of due process; the right to consideration for parole is an aspect of liberty to which the protection of the due process clause extends. *Childs* v. *United States Board of Parole*, 167 U.S. App. D.C. 268, 275 (1974); *United States ex rel. Johnson* v. *Chairman of New York State Board of Parole*, 500 F. 2d 825, 927 (2nd Cir.), vacated as moot, 95 S. Ct. 488 (1974); *Bradford* v. *Weinstein*, 519 F. 2d 728, 731 (4th Cir., 1974), certiorari granted, 95 S. Ct. 2394, dismissed as moot after prisoner released from supervision, 96 S. Ct. 347 (1975).

Absent an equal rights amendment, this court must turn to equal protection case law to determine the correct analytical framework.

Differences in treatment based solely on classification by sex violate equal protection of the laws, and therefore due process of law, when there is no "rational relationship" between the classification by sex and the governmental purpose sought to be achieved, or when the distinction between the sexes does not bear a "fair and substantial relation to the subject of the legislation", or when a distinction based on a suspect classification found to be inherently suspect is not justified by a compelling government interest, depending on the constitutional test applied.

In recent years there has been a great deal of litigation over the proper status of women in society, and despite a series of Supreme Court opinions on sex discrimination issues, the exact test to be applied is still not firmly resolved. In 1971, the Supreme Court was confronted with an Idaho statute which required that "males must be preferred to females" among persons otherwise equally entitled to administer the estate of a person who died intestate. The Court concluded that this "arbitrary perference . . . cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within is jurisdiction." *Reed* v. *Reed*, 404 U.S. 71, 74 (1971). The test enunciated by the Court was drawn from *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920):

"A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (404 U.S. at 76.)

This "fair and substantial relation" test is less stringent than the "strict scrutiny" which must be applied to classifications declared inherently suspect, but clearly stronger than the traditional "rational relationship" test.

Then in 1973 the Supreme Court in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), again considered the validity of a sex-based classification scheme. In *Frontiero* a servicewoman challenged statutes which allowed a serviceman to claim his wife as a "dependent" without regard to whether she was in fact dependent upon him for any part of her support, but required a servicewoman to prove that her husband was in fact dependent upon her for over one-half of his support in order to claim him as a dependent for medical and dental benefits and quarters allowances. The court struck down the statute as a violation of the Due Process Clause of the Fifth Amendment. The plurality opinion, containing the views of Justices Brennan, Douglas, White, and Marshall, found that "classifications based on sex, like classifications based on race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." 411 U.S. at 682. The court went on to note that "[t]his departure from 'traditional' rational-basis analysis with respect to sex-based classifications is clearly justified" because of the "unfortunate history of sex discrimination" in our nation. 411 U.S. at 684.

"And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." (411 U.S. at 686.)

There was no majority opinion in *Frontiero*. Justice Stewart concurred in the judgment of the plurality, on the ground that the statutory scheme worked "an invidious discrimination" and cited only *Reed* v. *Reed*. Justices Powell, Blackmun, and Chief Justice Burger concurred in the judgment but did not adopt sex as a suspect classification, because they felt it unnecessary to the decision and

because the equal rights amendment was then involved in the ratification process in state legislatures. Justice Rehnquist dissented.

In *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), the Court struck down rules in Cleveland, Ohio, and Chesterfield County, Virginia, which required public school teachers to take unpaid maternity leaves five and four months, respectively, prior to the expected childbirth, and which in Cleveland prohibited the female teacher from returning to work until her child was at least three months old. The Court's rationale there was based on due process rather than sex discrimination. The mandatory times fixed created irrebuttable presumptions of physical incompetence and the Court noted that "irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." 414 U.S. at 644.

The Court's next opinion in a sex discrimination case was *Kahn* v. *Shevin*, 416 U.S. 351 (1974). In upholding a tax exemption for widows but not for widowers, the Court applied the *Reed* test and found "some ground of difference having a fair and substantial relation to the object of the legislation." 416 U.S. at 355.

Geduldig v. *Aiello*, 417 U.S. 484 (1974) upheld the exclusion of certain pregnancy related disabilities from coverage by the California disability insurance system because the heavy expense of covering pregnancy would destroy the economic viability of the social welfare program. Indeed, the Court denied that the case presented a question of sex discrimination.

"[T]his case is . . . a far cry from cases like *Reed* v. *Reed*, and *Frontiero* v. *Richardson*, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, law-makers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." (417 U.S. at 496–97, note 20.)

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) extended to widowers with dependent children the social security benefits formerly available only to widows with dependent children. The Court found the gender-based distinction of the Social Security Act "indistinguishable" from that invalidated in *Frontiero* v. *Richardson*, 420 U.S. at 642–43. The Court did not articulate the precise test it was using because the discrimination could not be found constitutional under any test.

"Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of Sec. 402(g) is entirely irrational." (420 U.S. at 651.)

Most recently, the Court found that a difference in sex between children did not warrant a distinction in the Utah statute under which girls attained majority at age 18 but boys did not attain majority until age 21. The challenged statute allowed for support payments to cease when female children reached age 18 and male children reached 21. The Court left open the precise test to be used in sex discrimination cases.

"We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect.

* * * * *

"*Reed*, we feel, is controlling here.

* * * * *

"We therefore conclude that under any test—compelling state interest, or rational basis, or something in between—Sec. 15–2–1 in the context of child support, does not survive an equal protection attack. In that context, no valid distinction may be drawn." (*Stanton* v. *Stanton*, 95 S. Ct. 1373, 1377–1379 (1975).)

This court believes that the correct and appropriate test to be applied here is that of strict scrutiny for two reasons: First, sex is a suspect classification. *Frontiero* v. *Richardson*, *supra*, *United States ex. rel. Robinson* v. *York*, 281 F. Supp. 8, 16 (D.Conn 1968); *Sail'er Inn, Inc* v. *Kirby*, 5 Cal. 3d 1, 485 P.2d 529

(1971); second, the right to non-discriminatory parole consideration is a fundamental one.

There are few interests more substantial than freedom from imprisonment. Chief Justice Burger described the important function of parole in the criminal justice system as follows:

"During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo. L. J. 705 (1968). Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." (*Morrissey* v. *Brewer*, 408 U.S. 471, 477 (1972).)

Just as a parolee has an interest in his continued liberty, so a prisoner has a substantial interest in non-discriminatory consideration for parole and non-discrimination parole eligibility.

"The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions, in many cases, the parolee faces lengthy incarceration if his parole is revoked.

"We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with the problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." (*Morrissey* v. *Brewer*, *id.*, at 482.)

The federal respondents seem to believe that the correct test is that of a "fair and substantial relationship to the object of the legislation." *See* Return and Answer to the Order to Show Cause, p. 7.

However, the discrimination against Mary Williams cannot withstand an equal protection attack even if the test to be applied is merely that of a rational relationship between the classification based on sex and the difference in parole treatment. Parole is a fundamental public policy in the District of Columbia. *See* D.C. Code, Secs. 24-201, et. seq. Parole may mean an opportunity to start anew in society, and may be a determinative step in a person's rehabilitation and adjustment to a law-abiding life.

The Supreme Court of Pennsylvania struck down a statute regarding the imposition of minimum sentences for men but not for women, which resulted in different parole eligibility dates solely on the basis of sex. Their approach is worth noting:

"That one person (assuming equality of considerations as, for example, prior criminal record or rehabilitative progress) should be eligible for parole at a different time than another person solely because of his or her sex is discrimination of the most obvious sort. We perceive no basis, let alone a rational basis, for predicating eligibility for parole on a person's sex." (*Commonwealth* v. *Butler*, 328 A.2d 851, 856 (Pa., 1974).)

"In other contexts, much has been written about the equal protection clause (especially about its impact on sex discrimination) and many different views of its scope and role propounded. And although at times the equal protection clause can at best be seen through a glass darkly, one aspect is perceived clearly: if a legislative classification bears no reasonable relationship to the purposes of the legislation, the equal protection clause is offended. * * * [W]e

have concluded that there is no rational relationship between the sex of a convicted person and the Commonwealth's interest in parole eligibility." (*Id.* at 858.)

See also State v. *Chambers*, 63 N.J. 287, 307 A.2d 78 (1973).

This court, too, must conclude that there is no rational relationship between the sex of a convicted person and the District of Columbia's interest in parole eligibility or the application of different parole standards and criteria to male and female prisoners sentenced in District of Columbia Superior Court. No testimony has been introduced to even suggest any theory that men and women should have different parole criteria applied. Indeed, the respondents have only addressed themselves to whether the criteria are indeed different, a factual question.

The plurality in *Frontiero* v. *Richardson* wrote about sex discrimination in this country:

"There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of a 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage." (411 U.S. 677, 684.)

Mary Williams is here literally in a cage, a federal cage. She may not be entitled to release from her cage, but she is most certainly constitutionally entitled to the same consideration for possible parole as a male would have had before the District of Columbia Board of Parole.

Accordingly, this court finds that the United States Board of Parole having authority and jurisdiction over Mary Williams pursuant to D.C. Code Sec. 24–209 was a result of a discriminatory classification by sex, and the resulting different treatment is therefore a violation of her right to equal protection of the law and due process guaranteed to her by the Fifth Amendment to the Constitution.

The court must now address the question of an appropriate remedy.

There is some substantial question whether the rights of women such as Mary Williams are violated when they are not provided prison facilities by the District of Columbia while men prisoners similarly situated are so provided. The United States Supreme Court held in *Missouri ex. rel. Gaines* v. *Canada*, 305 U.S. 337 (1938) that if a state furnishes legal education to white students within its borders, it cannot deny that quality legal education to black students in the state; paying for the black students to go to out-of-state schools would not suffice. The fact that there may have been only a limited number of black students seeking such benefits, so that provision of a separate-but-equal school was burdensome, was not relevant. The Court found that the obligation of the State to give the protection of equal laws must be performed where its laws operate; that is within its own jurisdiction.

Similarly, at a time when Congressional intent regarding the education of deaf children in the District of Columbia was that such children should be separated by race, it was the practice that the D.C. Board of Education contracted with a private school within the District for the education of white deaf children, and the black deaf children were sent to a school in Maryland. The United States District Court held in *Miller* v. *Board of Education*, 106 F. Supp. 988 (D.C.D.C. 1952) that, although the separation by race was proper, the District may not provide facilities for one race in the District and send the other race outside the jurisdiction; it is the duty of the District to provide equal education facilities within the District for deaf children of both races, if it provides for any within the District.

Although all persons sentenced in District of Columbia Superior Court to terms of incarceration are committed to the custody of the Attorney General, the District of Columbia Government has elected to provide for the confinement of males in its own facilities while it sends the females to federal institutions far from their homes and families.[5]

However, Mary Williams has not here challenged her placement in a federal institution, only her resultant parole treatment. This court can afford her a full equitable remedy without ordering the provision of facilities by the D.C. Department of Corrections.

Mary Williams has sought declaratory and injunctive relief. Pursuant to its equitable powers, D.C. Code 11–946, *District of Columbia* v. *Walters*, 319 A. 2d 332 (D.C.C.A., 1974); *Spock* v. *District of Columbia*, 283 A. 2d 14 (D.C.C.A., 1971),

---

[5] The nearest federal prison for women is at Alderson, West Virginia, some 350 miles from Washington, D.C.

this court hereby renders a declaratory judgment that D.C. Code Sec. 24–209 is unconstitutional as applied to persons sentenced by the District of Columbia Superior Court who are designated to serve their sentences in federal institutions solely on the basis of sex; that is, females who receive regular sentences. Thus, this judgment will not apply to persons who are in federal institutions serving NARA sentences.

This court on May 14, 1976, ordered respondent District of Columbia Board of Parole to give a hearing to Mary Williams within twenty days. By order of May 14, 1976, this court granted a conditional writ of habeas corpus and ordered that the writ will issue discharging Mary Williams unless within twenty days the District of Columbia Board of Parole grants a hearing to consider whether or not Mary Williams should be paroled.

Dated: June 9, 1976.

Judge CHARLES W. HALLECK.

In the Superior Court of the District of Columbia, Criminal Division

UNITED STATES

v.

MARY A. WILLIAMS

(Criminal No. 3577I–73)

ORDER

Mary Williams is before the sentencing court seeking post-conviction remedies to correct what she alleges is a denial of equal protection based solely on classification by sex. Several motions are now pending. By this order, the court finds jurisdiction over this action under Superior Court Criminal Rule 35, under D.C. Code 23–110, and under D.C. Code 16–1901 and grants the Motion for Joinder of Parties to join Mr. Delbert Jackson in his capacity as Director of the District of Columbia Department of Corrections, Mr. Joseph Shore as a representative of the District of Columbia Board of Parole, and Attorney General Edward Levi in his capacity as ultimate custodian of Mary Williams. The joined parties will now have an opportunity to file any pleadings on the merits of the case, if they so desire, prior to any ruling on the equal protection issue and any appropriate remedy.

I

On May 8, 1974, the defendant, Mary Williams, pled guilty to a charge of assault with a dangerous weapon in violation of D.C. Code Sec. 22–502, which carries a maximum possible penalty of ten years imprisonment. On May 31, 1974, this court sentenced her to ninety (90) days to three (3) years imprisonment. She was designated by the Federal Bureau of Prisons to serve that sentence at the Federal Women's Reformatory at Alderson, West Virginia. Testimony introduced in a hearing in this matter was that women sentenced by D.C. Superior Court are routinely sent to federal prisons because of a lack of facilities for females in the D.C. Department of Corrections, whereas males similarly sentenced normally serve their sentences in facilities of the D.C. Department of Corrections.

Pursuant to D.C. Code 24–209, the United States Board of Parole had jurisdiction over the parole status of Mary Williams. On November 6, 1974, Mary Williams was interviewed by a hearing examiner from the United States Board of Parole. On November 20, 1974, she was notified that she would be required to continue to serve to expiration the sentence imposed by this court. The November 20 notice introduced at the November 17, 1975, hearing, as defendant's exhibit No. 2 gives the reasons for the continuance to expiration as follows:

"Your offense behavior has been rated as greatest severity. You have a salient factor score of 5. You have been in custody a total of 8 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of unlimited months to be served before release for cases with good institutional program performance and adjustment. After careful consideration of all relevant factors and information presented, it is found that a decision out-

side the guidelines at this consideration does not appear warranted. You need additional institutional treatment, specifically, alcohol therapy to enhance your capacity to lead a law abiding life." [1]

The guidelines which dictate this result are applicable only to the United States Board of Parole and not to the District of Columbia Board of Parole.

Thereafter, Mary Williams, through court-appointed counsel, moved this court to vacate or modify her sentence pursuant to Superior Court Criminal Rule 35, D.C. Code Sec. 16–1901, *et seq.*, or D.C. Code Sec. 23–110. This court has heard testimony from Mr. Peter Hoffman, Research Director of the United States Board of Parole, concerning that Board's adult guidelines for length of time to be served prior to parole and the procedures of that Board on November 17, 1975. Also, Mr. Edward Keightley, Program Analyst of the District of Columbia Board of Parole testified on November 17th concerning the procedures and standards of the Board.

Mary Williams remains incarcerated on this sentence [2] and seeks relief.

II

The relief requested by Mary Williams presently includes a motion to vacate or modify her sentence, filed May 21, 1975, and supplemented on November 7, 1975, by a request for equitable relief through habeas corpus contained in a supplemental memorandum filed December 11, 1975, a motion for declaratory and injunctive relief filed December 19, 1975, and a motion for declaratory and injunctive relief filed April 28, 1976.

She has requested to "be resentenced in such a manner as to be given credit for time served and released from custody" (Dec. 11, 1975, p. 4), "to order the D.C. Board of Parole to consider her for parole" (*Id.*, p. 5), for "an affirmative remedy which would place the petitioner in the same position as a similarly situated male" (*Id.*, p. 6), and for "a declaration that her continued incarceration without parole consideration by the respondents is unlawful and in violation of her right to due process of law under the Fifth Amendment." (Dec. 19, 1975, p. 1 and April 28, 1976, p. 1).

Before addressing these substantive issues of whether Mary Williams has been unconstitutionally denied equal protection of the laws and due process of law by reason of her consideration for parole by the personnel and procedures of the United States Board of Parole rather than by the personnel and procedures of the District of Columbia Board of Parole which she alleges would have been afforded to a similarly-situated male sentenced by this court, and whether her sentence should be vacated or modified by this court, it is first necessary to consider the pending Motions for Joinder of Parties and the preliminary jurisictional issues.

III

The jurisdictional issues have been well and thoroughly briefed by counsel for Mary Williams, counsel for the United States, and by the amicus curiae appointed by this court. Three theories of jurisdiction have been advanced and require evaluation.

First, defendant moved under Superior Court Criminal Rule 35 for correction of her sentence. This motion is required to be filed before the original sentencing judge. Rule 35(a), identical to Federal Rule of Criminal Procedure 35, provides:

"The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence."

The time provided where, as here, there was no appeal from the conviction, is 120 days. Defendant's Rule 35 motion was filed well after the 120 day limit had expired. The case law is uniform in federal court that Rule 35 motions required to be filed within that time limit cannot be considered after the 120 days. *See Kortness* v. *United States*, 514 F.2d 167, 168, note 1 (8th Cir., 1975). The counsel for the United States correctly points out that Superior Court Criminal

---

[1] There is, however, nothing to indicate that "alcohol therapy" is either available or afforded to prisoners at Alderson.

[2] Mary Williams was initially incarcerated in Alderson, West Virginia. During the course of this litigation she was brought to Washington, D.C. to be a witness in unrelated litigation in U.S. District Court, and has subsequently remained in Washington by May 30, 1975, order of this court. Her presence under that order, modified by consent of both the Assistant U.S. Attorney and defense counsel on February 13, 1976, is not the basis of any finding of jurisdiction herein.

Rule 45(b) explicitly disallows extensions of time for filing Rule 35 motions. Therefore this court cannot and will not now consider any allegations under a Rule 35 motion that the sentence was "imposed in an illegal manner". However, the court can and will consider the allegation made in this Rule 35 motion that the sentence itself is illegal, as that aspect of a Rule 35 motion may be made "at any time".

The appropriateness of entertaining a Rule 35 motion in a situation where the defendant was denied parole consideration due to the U.S. Board of Parole's guidelines is well illustrated in *United States* v. *Manderville*, 396 F. Supp. 1244 (D.Conn. 1975). In *Manderville*, Judge Blumenfeld held that while courts should not function as superparole boards, "they should not be reluctant to modify sentences when assumptions which they entertained at the time of sentencing with regard to parole possibilities have subsequently been invalidated." 396 F. Supp. at 1249. In *Manderville*, the trial judge had sentenced the defendant to two years imprisonment for possession of stolen bank funds with the expectation that the defendant would serve 12 to 16 months in prison and the remainder on parole, but the U.S. Board of Parole in applying its policy guideline table had determined that the defendant should serve the entire sentence less good time, a period of 19 months. The judge therefore on a Rule 35 motion reduced the sentence to 18 months imprisonment which would allow for release in 14 months.

In *United States* v. *Slutsky*, 514 F.2d 1222 (2nd Cir. 1975), the second circuit found that a Rule 35 motion is an appropriate method for reconsideration of a sentence where the trial court was unaware at the time of sentencing of new Board Parole guidelines which had the effect of causing the defendants to serve longer sentences. The appellate court held:

"We are convinced that the parole consideration afforded the Slutskys is likely to depart substantially from what we must assume were the reasonable expectations of the district judge. Accordingly, we think that a remand for resentencing is appropriate in order to allow the district judge an opportunity to reconsider the original sentence in light of these new circumstances." *United States* v. *Slutsky*, 514 F.2d 1222, at 1227.

Because new parties are about to be joined, *infra*, this court does not now rule on the substance of Mary Williams' Rule 35 motion but only decides here that this court does have jurisdiction over the unlimited time "illegal sentence" aspect and will not consider the time-expired "sentence imposed in an illegal manner" aspect of the Rule 35 motion.

The second basis of defendant's requests for relief is a motion under 23 D.C. Code Sec. 110 to vacate or correct the sentence. That section of the D.C. Code, almost identical to 28 U.S. Code Sec. 2255, provides in relevant part:

"Sec. 23–110. Remedies on motion attacking sentence

"(a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

"(b) A motion for such relief may be made at any time.

* * * * * * *

"(c) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

* * * * * * *

"(g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

This motion is timely made and is correctly before the judge who imposed the original sentence. That a motion under 28 U.S.C. Sec. 2255 is an appropriate method of challenging parole board implementation of a sentence is illustrated by *Kortness* v. *United States*, 514 F.2d 167 (8th Cir., 1975).

Robert Kortness was sentenced on November 19, 1973, to a three year prison term. On May 2, 1974, the sentencing court denied his Sec. 2255 petition on the grounds that the "court is without authority to direct the Parole Board in the discharge of its responsibility and is without authority to modify the sentence imposed". 514 F.2d at 168. He appealed and the Court of Appeals found that the sentencing court did have the authority to modify the sentence. Kortness had applied for parole, and like Mary Williams, was informed that he would receive no further consideration for parol during the remainder of his prison term. Like Mary Williams, the reason for this determination was that the Parole Board's set of tables, known as their parole policy guidelines, indicated a sentence to be served that equalled or exceeded the maximum sentence imposed. Kortness' sentence under 18 U.S.C. Sec. 4208(a) (2) allowed for immediate parole consideration, yet the board computation of an offense severity rating and salient factor score combined on a matrix to indicate a range of 26 to 32 months to be served in such cases. The Board determined that a decision outside the guidelines was not warranted and continued his case to the expiration of his sentence. The *Kortness* court noted that in *Grasso* v. *Norton*, 376 F. Supp. 116, 119 (D. Conn. 1974), the Director of Research for the Board of Parole testified that the Board follows its guidelines between 92 and 94 percent of the time. The same official of the U.S. Parole Board, Peter Hoffman, testified in this case on November 17, 1975, that from October, 1973, to March, 1974, at initial parole board hearings the guidelines were applied in 91.7% of the cases, and that from January to July of 1975 the Parole Board held 5,993 hearings and in 84% of the intial hearings the guidelines were applied. He also testified that where the Board goes outside the guidelines it must justify that decision with an explanation, whereas decisions within the guidelines required no explanation.

Kortness' sentence was imposed the same day as the initial publication of the guidelines. "Without access to these guidelines, the sentencing judge was entitled to assume that defendant Kortness would receive meaningful consideration for parole at an early date or at least upon completion of one-third of this sentence." 514 F.2d at 170.

When this court sentenced Mary Williams to a sentence of ninety days to three years, the court was unaware of the Parole Board guidelines and their applicability. The court intended that she should undertake alcohol rehabilitation and requested that she be designated to serve her sentnce in a federal facility so that she might receive such therapy. It was the court's intention and belief that she would receive meaningful parole consideration ninety days after commencing her sentence and that the Parole Board would determine her progress toward conquering her alcohol problems. The Government argues that defendant cannot claim relief only because the court had insufficient or erroneous information to enable an accurate *prediction* of future decisions by the Parole Board. But that argument misses the mark completely. The point is not that the sentencing judge should be able to *predict* whether or not a defendant will be *released* but rather that the judge *intends* that the defendant be given meaningful *consideration*. Here the sentence and parole treatment combine to effect a three year sentence with no possibility of parole.

The 8th Circuit found in *Kortness* that under these exact circumstances "a prisoner may utilize 28 U.S.C. Sec. 2255 to attack a sentence apparently legal on its face", that under the "otherwise subject to collateral attack" language of Sec. 225, "[a] critical error made by the sentencing court in fixing the sentence may be corrected through a Sec. 2255 proceeding." 514 F.2d at 170. This court has jurisdiction over Mary Williams' motion under 23 D.C. Code Sec. 110.

The third basis for Mary Williams' request for relief is an application for the Great Writ of Habeas Corpus under 16 D.C. Code Sec. 1901.

"Sec. 16–1901. Petition; issuance of writ.

"(a) A person committed, detained, confined, or restrained from his lawful liberty within the District, under any color or pretense whatever, or a person in his behalf, may apply by petition to the appropriate court, or a judge thereof, for a writ of habeas corpus, to the end that the cause of the commitment, detainer, confinement, or restraint may be inquired into. The court or the judge applied to, if the facts set forth in the petition make a prima facie case, shall forthwith grant the writ, directed to the officer or other person in whose custody or keeping the party so detained is returnable forthwith before the court or judge.

"(b) Petitions for writs directed to Federal offices and employees shall be filed in the United States District Court for the District of Columbia.

"(c) Petitions for writs directed to any other person shall be filed in the Superior Court of the District of Columbia."

Parole treatment is clearly an appropriate subject matter for habeas corpus treatment. *United States, ex. rel Marrero* v. *Warden, Lewisburg Penitentiary*, 483 F.2d 656, 659-60 (3rd Cir., 1973), rev'd on other grounds *Warden* v. *Marrero*, 417 U.S. 653 (1974), *Grasso* v. *Norton*, 520 F.2d 27 (2nd Cir. 1975), and indeed has been held to be the proper method of challenging denial of parole. *Lupo* v. *Norton*, 371 F. Supp. 156 (D.Conn. 1974). *See also Garafola* v. *Benson*, 505 F.2d 1212 (7th Cir., 1974).

Mary Williams is "a person committed, detained, confined or restrained from [her] lawful liberty within the District" and may therefore apply to the appropriate court for a writ of habeaes corpus.[3] This statute is even more liberal than the federal habeas corpus statute, 28 U.S.C. Sec. 2241, which requires that the prisoner be "in custody". So long as a person subject to the jurisdiction of this court is committed, detained, confined, *or* restrained from his or her liberty the habeas remedy applies and is to be liberally construed. *Jones* v. *Cunningham*, 371 U.S. 236 (1963). The use of the word "or" provides for habeas jurisdiction in any one of those four instances. Mary Williams was obviously "committed" "within the District" since she was sentenced by and committed by this judge of the District of Columbia Superior Court. This provision is doubtless a recognition of the duty of the District to adjudicate matters which initially stem from its own courts. *See McCall* v. *Swain*, 166 U.S. App. D.C. 214, 229–31 (1975).

Mary Williams, like all persons sentenced in D.C. Superior Court, was committed to the custody of the Attorney General of the United States pursuant to 24 D.C. Code Sec. 425. Throughout her sentence, the Attorney General has been her custodian. She is "restrained" within the District because that is the place of her custodian, regardless of whether she is physically present in the District. The Supreme Court, in *Jones* v. *Cunningham*, *supra*, found that the Virginia parole authorities were the correct parties for a habeas corpus petition of a parolee under their authority who was being permitted to live with relatives in Georgia.

The facts of Ms. Williams' physical location are that she served the early part of her sentence at Alderson, West Virginia, then was transferred to the Women's Detention Center in Washington, for the purpose of being a witness in another unrelated case, and then was ordered kept in Washington by this court. She is presently in a Half-way house in Washington. There has been some dispute among the parties as to whether her transfer and present location in Washington do or do not provide the basis for habeas jurisdiction. The dispute centers on whether, were she still located at Alderson, this court would have habeas jurisdiction under *I.B.* v. *District of Columbia*, 287 A.2d 827 (D.C.C.A., 1972), which found that D.C. Superior Court did not have jurisdiction over persons it committed to institutions located in Maryland, as that decision must now be viewed in light of the Supreme Court's ruling *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973). The Braden ruling held that the jurisdiction of a district court considering a habeas corpus petition requires only that the Court issuing the writ have jurisdiction over the custodian of the prisoner.

"So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction." *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 495 (1973).

The court noted that a number of developments had vitiated *Ahrens* v. *Clark*, 335 U.S. 188 (1945), including Congressional enactment of 28 U.S.C. Sec. 2255, requiring collateral attack on a sentence to be brought in the sentencing court and 28 U.S.C. Sec. 2241(d), permitting habeas in either the district of confinement or the district of the sentencing court. Indeed, Justice Rehnquist, dissenting for himself, the Chief Justice, and Justice Powell asserted that *Braden* overruled *Ahrens*, *see* 410 U.S. at 502, 509–511, and the U.S. Court of Appeals for the D.C. Circuit notes that "that accusation would appear to be well-taken". *McCall* v. Swain, 166 U.S.App.D.C. 214, 222, note 20 (1975).

The D.C. Court of Appeals has not addressed this jurisdiction question post-*Braden*, but the U.S. Court of Appeals for the D.C. Circuit has. *McCall* v. *Swain*,

---

[3] The exhaustion requirement of 23 D.C. Code 110(g) is addressed below.

166 U.S.App.D.C. 214 (1975), made an exhaustive and careful analysis of this very statute, 16 D.C. Code Sec. 1901, and its jurisdictional ramifications. A unanimous opinion held that the phrase "within the District"

"does not prohibit the court—whether the District Court or the Superior Court—located in the District from entertaining habeas corpus petitions from individuals confined within the District's correctional facilities located outside the District limits." 166 U.S.App.D.C. at 224.

This court is not bound by the opinions of the U.S. Court of Appeals but adopts that analysis of "within the District" contained in 16 D.C. Code Sec. 1901.

Having then found that the District Court and Superior Court may entertain habeas corpus petitions from persons in D.C. correctional facilities that are outside the District of Columbia boundaries, the *McCall* court went on to hold that the District of Columbia correctional officials at Lorton, to the extent they were holding a person sentenced by federal District Court, took on the cloak of federal officials and thus the petitioner could seek habeas corpus relief in the court that had sentenced him under Sec. 1901(b).

The jailer who has had, or presently has, custody of Mary Williams does so as an "official or employee" of the District of Columbia. This is so whether she is at Alderson or the Women's Detention Center or any other facility and the court need not now discuss any consequences of her moves for this action, as there are none.

Having found that a Sec. 16–1901 action does lie, the question of the appropriate forum arises under 1901 (b) and (c). The person to whom the writ should be directed is Mary Williams' custodian. Traditionally, habeas corpus actions have been brought in the jurisdiction in which the petitioner was confined. In such actions, petitioner's "immediate" custodian, (usually the warden of a prison), is named as the respondent. However, it is now well established that a habeas corpus action is proper in the jurisdiction of a petitioner's "ultimate" custodian, regardless of whether the petitioner is confined within that jurisdiction. *Braden* v. *30th Judicial Circuit Court of Kentucky, supra, see also Ex Parte Hays*, 414 U.S. 1327 (1973). In *Braden*, the petitioner, who was incarcerated in an Alabama prison, filed in the Western District of Kentucky for a writ of habeas corpus. The Supreme Court held that, notwithstanding the fact that the petitioner was not confined in the Western District of Kentucky, habeas corpus jurisdiction was still proper there since the petitioner's ultimate custodian was within the territorial jurisdiction of that court. In so doing, the Court substantially modified its opinion in *Ahrens* v. *Clark*, 335 U.S. 188 (1948), *see Braden, supra*, 410 U.S. at 501, an opinion which had previously led many courts to take a narrow and overly restrictive view of habeas corpus jurisdiction. *See, e.g., I.B.* v. *D.C. Department of Human Resources, supra.*

Fletcher v. *Levi*, — F. Supp. —, (Criminal Case No. 1421–71, civil action No. 75–2063, D.D.C. January 16, 1976), involved a person sentenced by U.S. District Court in the District of Columbia who challenged her parole treatment. She was then incarcerated in a federal prison in California. Judge June Green consolidated a Motion to Correct Sentence pursuant to 18 U.S.C. Sec. 2255 with a Petition for Habeas Corpus pursuant to 18 U.S.C. Sec. 2241. Judge Green denied the Sec. 2255 motion and granted the habeas corpus, finding both jurisdiction and venue:

"Petitioner was sentenced from this Court to the custody of the Attorney General. Moreover, this Court has jurisdiction over the respondent custodian of petitioner who can be reached by service of process within this Court and therefore, this Court can grant full and complete relief to the petitioner. Accordingly, this Court has jurisdiction over the Petition for Habeas Corpus. *Braden* v. *30th Judicial Circuit of Ky.*, 410 U.S. 484 (1973); *McCall* v. *Swain*, 166 U.S.App.D.C. 214, 510 F.2d 167 (1975); *Starnes* v. *McGuire*, 168 U.S.App.D.C. 4, 512 F.2d 918 (1974); *Pickus* v. *United States Board of Parole*, 165 U.S.App.D.C. 284, 507 F.2d 1107 (1974), and statutes and authorities cited therein." Slip opinion at p. 7. District of Columbia courts have repeatedly faced the situation of persons serving sentences in District facilities located in Virginia at the Lorton Complex and have asserted juridiction. *See, e.g., Fitzgerald* v. *Sigler*, 372 F. Supp. 889 (D.C.D.C., 1974). Habeas petitions routinely come to the Superior Court from the Lorton Complex. To deny jurisdiction over such petitions, especially in light of *Braden*, would be a totally inappropriate treatment of persons sentenced by this court. Certainly, to require Virginia courts to entertain all such petitions would be an incongruous result. Note that federal jurisdiction in *McCall* applied because McCall, incarcerated at Lorton had been convicted in federal district court.

As Judge Gesell asserted and the U.S. Court of Appeals confirmed in *McCall*, a court has an "inherent power" to act with respect to prisoners "committed under its aegis." 166 U.S. App. D.C. at 231.

The Attorney General, as custodian of Mary Williams is acting in his capacity as an officer and agent of the Superior Court, and therefore the habeas corpus petition is properly filed in this court. The habeas corpus statute under which this Petitioner is proceeding, 16 D.C. Section 1901, contains provisions for the petition to be filed in the United States District Court for the District of Columbia or the Superior Court for the District of Columbia. The determination as to which court the petition should be filed in depends upon the capacity of the respondent to whom the petition is directed. If the petition is directed to a Federal officer or employee it is to be filed in District Court. 16 D.C. Code. Sec. 1901(b). If it is directed to a person other than a Federal officer or employee, it is to be filed in Superior Court. 16 D.C. Code Sec. 1901(c). The proper respondent in this Petitioner's action is the Attorney General as she was committed in his custody by the Superior Court and therefore is her custodian. *See* 24 D.C. Code Sec. 425. Although the Attorney General is nominally a Federal officer, he is not acting in that capacity in his control and custody over this Petitioner. She is in his custody because she was committed there by the Superior Court of the District of Columbia. Consequently, as to this Petitioner, he is acting as an officer and arm of the Superior Court, as he is in the context of this case a person other than a Federal officer. 16 D.C. Code Sec. 1901(c).

The reasoning behind why he is acting as an officer of the Superior Court can be found in the U.S. Court of Appeals decision in *McCall* v. *Swain*, 166 U.S. App. D.C. 214, 224–232, 510 F.2d 167 (1975). In that case, a person was convicted of a local District of Columbia offense in Federal court and was thereafter incarcerated in the Lorton Reformatory, a District of Columbia institution. The *McCall* court considered whether the Superintendent and officers of that institution were District of Columbia officials or Federal officials. The same statute, and the same subsections that are at issue in the present case, Sec. 1901(b)(c), were those at issue in the *McCall* case. After extensively reviewing the case law, *McCall* v. *Swain*, *supra*, at 224–231, the court held that the Superintendent of Lorton was acting as a Federal officer and the petition was therefore properly filed in the District Court pursuant to Sec. 1901(b). The court so held notwithstanding the fact that the petitioner in that case was incarcerated for a local District of Columbia offense, was incarcerated in a District of Columbia institution, and the issue under consideration concerned the local prison's administrative decision. The court's holding in *McCall* was based on the fact that the petitioner was convicted and incarcerated by an order of the Federal court. "Appellant was tried, convicted, sentenced, and resentenced by the District Court. * * * [t]hat Federal court issued the order under which the Attorney General assumed custody of and responsibility for appellee, a responsibility which he subsequently delegated to appellants. In accepting custody of appellee, the Attorney General and appellants were acting as officers of the District Court * * * *McCall* v. *Swain*, *supra*, 166 U.S. App. D.C. at 231.

These same principles, as enunciated in *McCall* and in the cases on which the court there relied, require and demonstrate why the Petitioner's custodian in the present case, the Attorney General, is acting as an officer of the Superior Court. The Petitioner was tried, convicted and sentenced by the Superior Court, and the Superior Court issued the order under which the Attorney General assumed custody of and responsibility for the petitioner. He must therefore be seen as acting as an officer of the Superior Court. The U.S. Court of Appeals itself in *McCall* noted, * * * to the extent that he [the Attorney General] acts pursuant to an order of the Superior Court or another local court, *he would probably be characterized as 'other than a Federal officer' for purposes of jurisdiction under Section 1901.*" (emphasis added) *McCall* v. *Swain*, *supra*, 166 U.S. App. D.C. at 227, n. 34.

That the Attorney General is acting as an officer of the Superior Court and that the action must be filed in Superior Court is further supported by the obligation of the Superior Court to adjudicate matters which initially arise out of its own courts. *Id.* at 221. "It is simply anomalous to suggest that a court, whose duty it is to ensure that the full vitality of the Great Writ is preserved inviolate, could be precluded from exercising continuing oversight of the manner in which individuals it commits to custody are treated, particularly when those executing the court's commitment orders are considered officers of the court with respect to those prisoners. Judge Gesell's assertion is worth repeating: a court has an 'in-

herent power' to act with respect to prisoners 'committed under its aegis.' " *Id.* at 231 (footnote omitted).

The logic, and indeed the necessity of finding the Attorney General an officer of the Superior Court and the petition properly filed in Superior Court is persuasively demonstrated by considering the implications and results of a contrary holding. All persons convicted and sentenced in Superior Court are committed to the custody of the Attorney General, 24 D.C. Code Sec. 425. If he were to be held a federal official in that capacity, when acting directly pursuant to the orders of the Superior Court, it is difficult to see how habeas corpus would ever be proper in the Superior Court. In addition, such an interpretation would be contrary to the purposes and objectives of the Court Reform Act. *See Bland* v. *Rogers*, 332 F. Supp. 989, 991 (D.D.C. 1971); *See also McCall* v. *Swain, supra*, 166 U.S. App. D.C. at 232, n. 53, *citing* S. Rep. No. 405, 91st Cong., 1st Sess. 1 (1970).

IV

Mindful of the interests of judicial economy, efficiency, convenience to the parties and witnesses, and of the admonition that a habeas corpus proceeding "must not be permitted to flounder in a procedural morass", *Bland* v. *Rodgers*, 332 F. Supp. 989, 993 (D.C.D.C., 1971), this court hereby consolidates Mary Williams' various motions and actions into a single case covering three elements:

(1) Her Rule 35 motion to correct an illegal sentence;

(2) Her Motion under 23 D.C. Code Sec. 110 to vacate or correct the sentence as one subject to collateral attack; and

(3) Her petition for habeas corpus under 16 D.C. Code Sec. 1901.

Such a consolidation is not only prudent and conservative of the time and resources of all parties, including the court, but is also necessary.

Under 23 D.C. Code Sec. 110(g), an application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief under 23–110 shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant failed to make a motion for relief under 23–110, unless a 23–110 motion would be inadequate or ineffective to test the legality of detention.

It was therefore incumbent upon the defendant-petitioner to seek relief under Sec. 23–110 to see whether or not the court deems that an adequate remedy. In *Fletcher* v. *Levi*, — F. Supp. —, Criminal Case No. 1421–71, civil actions Nos. 75–2063, 75–2064, D.C.D.C., January 16, 1976) Judge June Green, in a similar situation consolidated a motion under 28 U.S.C. Sec. 2255, and a petition for habeas corpus, and found jurisdiction and venue proper as to both actions.

The court also finds that venue is proper here. Service of process is available here on all parties, the parties and witnesses are all present in this jurisdiction, the Rule 35 motion and 23–110 motion must be assigned to the sentencing judge, and this is the jurisdiction whose Code is in question. This is clearly the most appropriate and convenient forum. *See Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Starnes* v. *McGuire*, 168 U.S. App. D.C. 4 (1974).

The court hereby grants Mary Williams' Motions for joinder of those parties needed for a just and complete adjudication, namely Attorney General Edward Levi in his capacity as the ultimate custodian of Mary Williams, the District of Columbia Board of Parole through its representative Mr. Joseph Shore, and the District of Columbia Department of Corrections through its representative Mr. Delbert Jackson.

VI

Therefore it is this 3rd day of May, 1976,

Ordered That in light of the court's jurisdiction, as delineated above, the causes of action are consolidated, the motions for joinder are granted, and the three newly joined parties have five days in which to file any motions, if they so desire, and the respondents, on or before the fifth day after service of a copy of this order, shall make return to said petition and show cause, if any they have, why the Writ of Habeas Corpus should not issue, and why the Motion to Vacate or Correct the Sentence should not be granted.

It is further ORDERED that the respondents serve on counsel for Mary Williams a copy of any answer to this order that they may file with the court.

Counsel for Mary Williams having certified that he has served each of the respondents with the pleadings filed in this matter, the United States Marshal is directed to serve a copy of this order on each of the respondents forthwith.

JUDGE CHARLES W. HALLECK.

Statement of Daniel Crystal, East Orange, New Jersey

INTRODUCTION

I am an attorney at law and a member of the Bars of New Jersey, the Supreme Court of the United States, and the District of Columbia. I am deeply appreciative to the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee for this opportunity to include in the record my views as to S. 1437.

I have been deeply concerned about the predecessor bills, including S. 1 of the 94th Congress, and the earlier S. 1400 and S. 1. My concern has led me to write law review articles on various phases of this important proposed legislation, *e.g.*, Crystal, *The Proposed Federal Criminal Justice Reform Act of 1975: A Civil Liberties Critique*, 6 Seaton Hall Law Rev. 591 (Summer 1975); Crystal *The Proposed Federal Criminal Justice Act of 1975: Sentencing—Law and Order With a Vengeance*, 7 Seton Hall Law Rev. 33 (Fall 1975). In addition I drafted various analyses of S. 1 and H.R. 3907 of the 94th Congress which were inserted into the *Congressional Record* by Congresswoman Bella S. Abzug, *e.g.*, *Dangers of S. 1 and H.R. 3907, Proposed Revisions in the Federal Criminal Code, Cong. Rec.*, Nov. 4, 1975, Vol. 121, No 163, H10689; *The Booby Traps for Labor, Cong. Rec.*, May 20, 1976, H.R. 4769–4771; *S. 1 Compromise Is Unacceptable, Cong. Rec.* April 26, 1976, E2082–E2083. My concern in writing these articles and analyses has, at all times, been to foster the protection of the Bill of Rights. I have felt impelled to set forth the many areas in which I felt that the predecessor bills failed to measure up to the requirements of our great charter of liberty.

In my judgment, the redraft of S. 1, now known as S. 1437 in the Senate and H.R. 6869, constituting the proposed Criminal Code Reform Act of 1977, still fails in important respects to give adequate protection both to the Bill of Rights and to the due process rights of the accused and the convicted alike who become enmeshed in the federal penal and correctional system. I welcome the changes which have been made in S. 1. They have substantially lessened the civil liberties horrors of the original bill. However, in my view, those 35 or so changes have simply not yet gone far enough. My analysis in the present statement is limited to the sentencing provisions of S. 1437. Even with this limitation, I find that the new bill, instead of being purged of all the provisions violative of due process requirements, still contains provisions inimical to the Bill of Rights.

It remains true, in my judgment, that what Professors Vern Countryman of Harvard Law School and Thomas I. Emerson of Yale Law School wrote about S. 1 has continuing validity with respect to the sentencing provisions contained in the identical bills, S. 1437 and H.R. 6869:

"S. 1 was designed and drafted upon the basis of philosophical, ethical, and political goals that were repudiated by the American people in the Watergate scandals. The bill is the product of the Nixon Administration, prepared under the ageis of Attorneys General Mitchell and Kleindienst, and put into concrete form by a group of lawyers in Nixon's Department of Justice. The objective of the draftsmen was to incorporate into the criminal code every restriction upon individual liberties, every method and device that the Nixon Administration thought necessary or useful in pursuit of its fearful and corrupt policies. As such, the bill is permeated with assumptions, points of view, and objectives, finding expression in numerous overt or subtle provisions, that run counter to the open and free spirit upon which American liberties are based. This pervasive taint cannot be amended out."

For reasons set forth in detail below, I am impelled to conclude that this trenchant criticism of S. 1 applies with continuing relevance to the provisions of S. 1437 and H.R. 6869 dealing with sentencing, parole, probation, the proposed Sentencing Commission, and all too many other provisions of the bills applicable to penology and correction. The philosophy of the bill continues to be one which turns its back on the objectives and recommendations of experts in penology and criminal law in favor of a harsh approach toward the punishment of crime which can only guarantee recidivism and the use of prisons as cages and storehouses for embittered men and women.

Repeated assurances have been given that some 85 percent or more of S. 1 was non-controversial and that those provisions meriting criticism have been corrected by amendment so that the substitute for S. 1 is now a "clean bill." See, *e.g.*, "Retirement and You," by Theodore Voorhees in the October 1976 issue of the American Bar Association Journal, and the reply thereto by this writer in the January 1977 issue of the ABA Journal (pp. 8, 10). These assurances are

illusory. It is a legal myth to urge that 85 to 95 percent of the bill is non-controversial. The sentencing provisions of S. 1437 are highly controversial. Moreover, many of them have been repeatedly opposed by prestigious legal bodies, including the American Bar Association, the Association of the Bar of the City of New York, and a special committee on S. 1 of the California Bar Association. Many of the provisions carried over intact into S. 1437 and H.R. 6869 from S. 1 have been objected to by such leading authorities in penal reform as the National Council on Crime and Delinquency, the American Civil Liberties Union, and the Friends Committee on National Legislation. This memorandum will call attention to some of the testimony and statements, already in this subcommittee's past hearings, which have taken strong exception to provisions applicable to sentencing which are offered in S. 1437 and H.R. 6869 as ostensibly non-controversial.

If the proponents of this legislation have made a policy decision to ignore these objections from prestigious legal groups and other authorities on penology and criminal law, the country should be so advised and made aware. The country should be given an opportunity to make a knowing choice between the harsh retributive approach toward sentencing, probation, and parole exemplified by S. 1437 and H.R. 6869 in precisely the same way as it was exemplified by S. 1, and the enlightened, humane, hopeful view of sentencing exemplified, for example, by the program and reports of the National Council on Crime and Delinquency.

To have the hard-nosed view of "law-and-order" which still permeates all too much of S. 1437 and H.R. 6769 offered in a purported compromise bill makes it necessary to advise this subcommittee of what appears again and again in its past hearings as recommendations from knowledgeable witnesses. Those recommendations are squarely contrary to the proposals for sentencing contained in S. 1437 and H.R. 6869. The startling disparity between those recommendations and what the bill actually contains is all too reminiscent of what Professor Kenneth Clark is quoted in the famous Koerner Report dealing with the civil disorders of 1967. "The same moving picture shown over and over again, the same analysis, the same recommendations, and the same inaction."

The sentencing provisions of S. 1437 and H.R. 6869 will set the penology and correctional standards of these countries for generations to come. When they are analyzed objectively, as the instant memorandum seeks to do, it becomes clear that they constitute a rejection of modern views of penology. Incarceration rather than hope for rehabilitations is to be the national policy. That road will predictably lead to further Attica's and Rahway's. It will solve little except to create the simplistic impression that something meaningful is being done about street crime. The approach is illusory and retrogressive. In this writer's opinion, it will not work.

It may readily be conceded that there is a very real and, indeed, a shocking problem of steet crime. There is equally a growing problem of white collar crime—what Ralph Nader aptly described to this subcommittee as "suite crime." The difficulties of achieving meaningful improvements in penology should not lead to rejection of what experts have concluded is the viable method of eventually winning success. It is by now a cliche, but nevertheless remains true, that the baby should not be thrown out with the bathwater.

It should also be noted that the statistics which this subcommittee and proponents of both S. 1 and the present re-draft of S. 1 have apparently relied upon appear to be erroneous and obsolete. There is signficant applicability to this subcommittee's present hearings in a newstory appearing in *Lawscope*, in the *American Bar Association Journal*, April 1977, p. 481 (Vol. 63):

"*Corrections*

"*Recidivism not so bad after all, study finds*

"The national crime recidivism rate is much lower than has been believed and is steadily declining, according to a recent analysis. And the study shows, parolees are less likely to return to jail than nonparolees.

"The results could have an impact on the current hard line being taken by many on mandatory sentencing.

"The study, by Robert Martinson and Judith Wilkes of the Center for knowledge in Criminal Justice Planning, produced interim results showing:

"The recidivism rate is about 23 per cent, not the 50–70 per cent cited recently by textbooks, corrections authorities, and the courts.

"Parolees have a lower repeat offense rate than nonparolees—about 25 per cent compared with about 32 per cent.

"Convicts routed through halfway houses on their way out of prison have a lower repeat crime rate than those going to the houses before prison—22 per cent compared with 42 per cent.

"Special in-prison rehabilitative programs do not affect recidivism. About 22.5 per cent of prisoners become repeaters, whether they undergo 'rehabilitation' or not.

"Recidivism has declined from about 33 per cent in the 1960s to about 23 per cent thus far in the 1970s.

"The findings contradict not only current theory, but an earlier study by Martinson and Wilkes as well. Martinson explains that the first analysis was not as sophisticated."

There is accordingly the great probability that the policy judgments as to how to deal with crime and with sentencing incorporated into S. 1437 and H.R. 6869 are based upon incorrect, erroneous statistics, and reflect an equally erroneous view as to how a very real problem should properly be dealt with.

The issues have been, and should be, sharply defined. They are made unmistakably clear by Professor Louis B. Schwartz, formerly Director, National Commission on Reform of Federal Criminal Law (the Brown Commission). In an article by Professor Schwartz reprinted in this subcommittee record of Hearings on S. 1, Part XII, p. 384 (April 18, 1975), the contrast between the two opposing views of the direction to be taken in sentencing and correction is made in the sharpest possible terms:

"It can be said generally of the contrasts between S. 1 and the Brown Commission proposals that S. 1 expresses the view that the crime problem can and should be solved by extending government's power over individuals. This extension can take the form of wiretapping and other secret surveillance, of giving broad discretion to officials in decisions about punishment, of authorizing exceptionally severe sentences, or of restricting access to critical information about government operations. The other school of thought, represented by the Brown Commisssion, is skeptical about the gains in law enforcement that can be expected from such measures, and more concerned about impairing the quality of civic life by needful restraints on liberty."

This contrast in views is of paramount importance because in actuality much of the sentencing in the federal courts, as in all courts, is a reflection of disparity in economic opportunity and freedom or lack of freedom from racism. This subcommittee has been advised that "in the Federal District Court in Los Angeles, 75 percent of the defendants in criminal cases are indigent. Indigent defendants in the main commit crimes because of their poverty. Their poverty and the powerlessness that goes along with it, is a central fact in their lives." Statement of John Van De Kamp, Federal Public Defender, Los Angeles, Hearings on S. 1 and S. 1400, Part XI, p. 7805 (July 13, 1974). The proposed federal criminal code must contain safeguards against racism. Whether or not the proposed Sentencing Commission will do so adequately is open to question for reasons set forth below. What is abundantly clear in my view is that it is impossible to achieve a just criminal code unless there is a just economic society. There is no suggestion here to wait for the millenium. All that is being sought is that Bill of Rights protections be adequately included in any omnibus bill offered as a federal criminal code. In my judgment, S. 1437 and its companion bill, H.R. 6869 fail to meet this challenge adequately. On the other hand, H.R. 2311, introduced into the House by Congressman Cohen of Maine, and carrying on last session's Kastenmeier-Mikva-Edwards bill (H.R. 10850 of the 94th Congress), although containing some serious defects, does offer far more civil liberties protections in its sentencing provision than do S. 1437 and H.R. 6869.

The analysis which follows attempts to compare the two bills in important sections applicable to sentencing.

II. THE PRESUMPTION IN FAVOR OF INCARCERATION CONTAINED IN S 1437 AND H.R. 6869

Generally, the sentences proposed by S. 1437 evidence a preoccupation with punitive considerations at the expense of crime prevention and rehabilitation of offenders. This preoccupation is apparent in the length of the proposed authorized prision sentences (S. 2301), the insufficiency of restraints on consecutive sentencing (S. 2304), and particularly in certain proposed criteria required to be evaluated by the federal courts in determining terms of imprisonment, terms of probation, fines, and parole ineligibility. It is abundantly clear that those criteria in actuality establish a totally unacceptable presumption in favor of

incarceration, and are squarely opposed to modern views of penology and correction.

S. 1437's "law and order" thrust is plainly reflected in these criteria which the judge is to consider when imposing sentence. Apart from a rearrangement of the order in which these criteria appear, S. 1437 is identical in this respect with its predecessor bill, S. 1. Sec. 2302(a) would require that the court, in considering imposition of a sentence of imprisonment, consider the factors earlier set out in section 2003(a) "to the extent that they are applicable." Sec. 2003(a) in turn requires that the court consider the following:

"(1) The nature and circumstance of the offense and the history and characteristics of the defendant; and

"(2) The need for the sentence imposed:

"(A) To afford adequate deterrence to criminal conduct;

"(B) To protect the public from further crimes of the defendant;

"(C) to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense; and

"(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

"(3) The sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant committed the offense; and

"(4) Any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2)."

The provisions relating to the Sentencing Commission did not, of course, appear in S. 1. The approach of the section and the mandate that these criteria be applied remains a constant in both S. 1 and S. 1437.

As this writer noted in a law review article with respect to the comparable provision of S. 1 (Crystal, *The Proposed Federal Criminal Justice Act of 1975: Sentencing—Law and Order With A Vengenance*, 7 SETON HALL LAW REV. at 41, it is not enough that the sentence "protect the public from further crimes of the defendant" and "afford adequate deterrence to criminal conduct," the sentence must also:

"Reflect the seriousness of the offense,

"Promote respect for law, and

"Provide just punishment for the offense.

The criteria thus imposed would have a judge punish a defendant beyond what is required for his individual wrong, and even beyond that required for deterrence, apparently in a single-minded attempt to set an "example." The burden is put on the defendant to show why he should not be imprisoned; why he should not be denied probation; why he should be granted parole. Incarceration is to be the norm. As noted below, this is squarely at variance with the philosophy of the Brown Commission, of the ABA Standards and Goals, of the recommendations of prestigious legal bodies, including the American Bar Association, the Association of the Bar of the City of New York, and the Special Committee on S. 1 of the State Bar Association of California, of the National Council on Crime and Delinquency, and Program for Prison Reform in the United States, set forth in the Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy, June 9–June 10, 1972, sponsored by the Roscoe Pound-American Trial Lawyers Foundation, Cambridge, Mass.

The country is thus faced at the very outset of S. 1437 with a fundamental choice in sentencing policy. The approach chosen by the draftsmen of S. 1437 is demonstrably out of line with the recommendations of the leading legal and penological authorities of the country. The discrepancy is far too glaring to be papered over by the bland assurances that 85 percent to 95 percent of the bill is non-controversial.

The genesis of the "criteria" set forth in S. 1437, and derived from S. 1 which, in turn, derived it essentially from the Nixon-Mitchell Administration version, S. 1400 of the 93rd Congress, 1st Sess., is clear. It reflects the law and order approach toward crime voiced by former President Richard M. Nixon, who decried the "sense of permissiveness" that characterized America in the 1960's, and who concluded that "the only way to attack crime in America is the way crime attacks our people—without pity." (*Sixth in a Series of Presidential Messages to the Congress on the State of the Union*, reprinted in this Subcommittee's Hearings, 4819–20 (1973).

This subcommittee has been told repeatedly by the most prestigious legal bodies that the Nixon-Mitchell approach, including its emphasis upon incarceration, is unacceptable. Citation to the testimony and statements appearing in the committee's own hearings makes this abundantly clear.

A. *Position of the American Bar Association:* In its testimony, and statement, Hearings, Part XII, April 17, 1975, ABA submitted to the subcommittee the following as its position with respect to grant of probation in lieu of incarceration (p. 377):

"(26) *Recommendation as to presumption for probation.* ABA Standards for Probation, § 1.3 (a) provides: 'Probation should be the sentence unless the sentencing court finds that: (i) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed.' The Association supports § 3101 (a) of Brown Commission to this effect. Section 2102 of S. 1 does not have any such presumption in favor of probation, and is not supported."

B. *Position of the Association of the Bar of the City of New York:* This equally prestigious law association similarly vigorously opposed the provisions of S. 1 which are carried forward virtually intact (with the exception of reference to the Sentencing Commission) in S. 1437.

With respect to probation, the Association advised the subcommittee on June 13, 1974:

"2. We approved the [Brown] Commission's statement of preference for probation sentences, and therefore disapprove the failure of S. 1 to state a policy, and even more the presumption favoring imprisonment in S. 1400." *Hearings*, Part XI, at 7765.

With respect to the closely related problem of parole, the Association stated in the same report: (commenting on the Brown Commission bill, S. 1 of the 93rd Congress, and S. 1400 of the 93rd Congress:

"The difference in the parole provisions of the three bills is closely analogous to that in their probation provisions. The Commission bill mandates earlier release, and expressly favors parole over continued imprisonment. S. 1 takes a middle position on mandatory release, and is silent on priorities. S. 1400 mandates no early release and suggests a stricter parole standard, parallel to that in its probation provisions. (e.g., parole may be granted if the Board ('Commission') is of the opinion that the defendant's release 'would not fail' to afford adequate deterrence).

"We favor the Commission bill's provisions on early release and its expression of priority for parole over continued imprisonment."

C. *Position of Special Committee on S. 1 of the California State Bar Association:* A Special Committee of the State Bar Association of California prepared a report for submission to the 1976 Conference of State Bar Delegates, Sept. 1976, in Fresno, Calif. The Special Committee reviewed many provisions of S. 1. Its final conclusion was as follows (App. M–18):

"CONCLUSION

"S. 1 cannot be adequately amended to avoid creating serious voids and retrogressions in existing federal criminal practice, and the Committee recommends that the State Bar make every attempt to defeat this unwise proposed legislation."

After thorough review of both existing law and of the specific proposals of S. 1 as to sentencing, probation, parole, and the like (largely carried into S. 1437 unmodified from S. 1) the Special Committee concluded (App. M–7–App. M–8):

"D. Opinion and Recommendation:

"The American Bar Association Standards for Sentencing § 3.1(d) provides that 'for most offenses . . . the maximum authorized term ought not to exceed ten years except in unusual cases and normally should not exceed five years,' with sentences of 25 years or longer 'reserved for particularly serious offenses or for certain particular dangerous offenders.' The need for such long term sentences has been seriously questioned, and the sentencing structure proposed by S. 1 is clearly at odds with the sentencing structure proposed by the Brown Commission. The total sentencing scheme presumes potential misconduct, and the uncontrolled and the almost limitless possibility of parole fosters a serious danger for

the use of parole as an easier method by which to return a person to the penitentiary rather than by a trial in court for subsequent alleged criminal misconduct. Neither the existing prison system nor our parole system are even capable of adjusting to the new requirements that would be imposed by S. 1. The pattern and procedure of sentence to imprisonment clearly proclaims that confinement is the only effective answer and control of criminal misbehavior, but confinement if necessary to deter, isolate, and finally punish, should be used only as a last resort. Its present failure is obvious, and, unfortunately, our places of confinment are often the breeding places of tomorrow's violent offender. In S. 1—confinement appears to be the first and omnipresent control—a clear case of overkill. The Committee recommends against adoption of the provisions of S. 1."

D. *Position of the National Council on Crime and Delinquency:* The National Council on Crime and Delinquency, organized in 1907, has long had an interest in improving sentencing and the quality of our penal systems. Its surveys and consultation have been of immeasurable importance in achieving long overdue reform in penology. It has published a number of model legislative acts, those most relevant to the proposed federal criminal code, being the Model Sentencing Act, authored by the Council of Judges of the Council (NCCD) and the Standard Act for State Correctional Association published by NCCD.

On April 17, 1975, Mr. Justus Freimund, Director, Action Service Division, of the NCCD, testified before this subcommittee and presented a prepared statement on behalf of the National Council on Crime and Delinquency. With respect to the issue of the apparent presumption in favor of incarceration rather than release of the defendant to some rehabilitative program in the community, Mr. Freimund presented the following statement on behalf of NCCD:

"*Probation Sentence:* Section 2102. Another issue of major concern is the legal restraints on probation. We urge the Subcommittee not to support such a statute. It goes against the grain of progressive penology. Probation is recognized as the most effective form on sentence in a great many cases, and yet, Section 2101 requires a prison sentence unless the judge is of the opinion that probation 'will not fail to afford deterrence to criminal conduct and such disposition will not unduly depreciate the seriousness of the defendant's crime, undermine respect for the law, or fail to constitute just punishment for the offense committed.' Although the judge is required to consider the offender's individual circumstances, such provisions implicitly tell the judge that probation is not preferred, but a last resort, to be accorded only the criminal offender who is an extraordinarily good risk. They ignore the fact that prison sentences completely dislocate offenders from the community, cutting off the ties of family and job which alone may provide the incentive to obey the law. Yet since most offenders ultimately do return to the outside world, it in society's best interest—as well as their own—that these offenders have more to go back to than a life of crime." *Hearings*, Part XII, at 184.

E. *Position of American Civil Liberties Union*: The ACLU was equally sharp in its rejection of the sentencing scheme of S. 1 (which has been largely carried over intact into S. 1437 and H.R. 6869). Melvin I. Wulf, Legal Director, American Civil Liberties Union, advised this subcommittee in a statement on April 17, 1975:

"S. 1 sets harsh, retributive sentences for many crimes, and provides for the death penalty, which the ACLU has long opposed as cruel and hard punishment in violation of the Constitution. * * *

"The sentencing schemes of S. 1 are skewed in favor of long-term prison sentences, despite the overwhelming recommendation of penologists and lawyers who have studied the correctional system that sentences instead be sharply reduced. See, e.g., President's Commission on Law Enforcement and Administration of Justice. *The Challenge of Crime in a Free Society* 348–351 (Avon. Ed. 1967); Brown Commission *Working Papers*, vol. II at 1255–57, 1269; Schwartz, "The Proposed Federal Criminal Code," 13 Crim. L. Rep. 3265, 3266 (1973). Although such sentences may be aimed at the most egregious offenders, the Brown Commission reported:

"'They have a psychological tendency to drive sentences up in cases where such a tendency is unwarranted. Long, incapacitating terms can do great damage, if imposed in the wrong cases, both in terms of injustice to the individual and in terms of positive, harmful effects to the public upon release of the prisoner. Long sentences imposed on the wrong people can lead to more offenses

rather than less. *Working Papers*, vol. II at 2257." (*Hearings on S. 1*, Part XII, pp. 208–209).

* * * * * * *

"Despite the Brown Commission's finding that 'probation is likely to be the most effective form of sentence in a great many cases', *Working Papers*, vol. II at 1268, S. 1 creates substantial legal hurdles to the imposition of probation instead of a prison sentence.

"Section 2102 instructs a judge, in granting probation, to consider the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner. Such factors only reinforce the criminal justice system's discrimination against the poor, the sick, and the uneducated. The constitutional guarantees of due process and equal protection of the law requires courts to weigh evenly the claims of rich and poor, skilled and unskilled. Freedom from imprisonment and the chance to try again should not depend on an absence of past sufferings. 'Effective' provision of job training and medical care in most cases does not require isolation of the offender from the community in which he will ultimately have to learn to live. The Congress should legislate to provide these services outside of prison, instead of incarcerating people just to obtain them. S. 1 similarly stacks the decision-making process against the granting of parole and fails to provide for a preference to parole over continued imprisonment. Yet parole, like probation, can be crucial in encouraging offenders to establish law-abiding lives. See *Morrissey* v. *Brewer*, 409 U.S. 471, 484 (1972)." (Hearings on S. 1, Part XII, p. 210).

F. *Position of Friends Committee on National Legislation*: The approach toward sentencing set forth in S. 1 (much of which is retained in S. 1437 and H.R. 6869) was also opposed in a statement by Ralph Rudd on behalf of the Friends Committee on National Legislation. Mr. Rudd was there testifying with respect to S. 1 and S. 1400 of the 93rd Congress rather than the later composite S. 1 of the 94th Congress. His statement (Hearings, Part XII, pp. 176–181, April 17, 1975) has continuing validity to the present S. 1437. He there stated (Hearings, Part XII, at 177):

"The other main idea I want to express has to do with the iniquity of our prison system. It is widely said that it takes young delinquents and turns them into hardened criminals. The National Advisory Common on Criminal Justice Standards and Goals reported in its 1973 report, A National Strategy to Reduce Crime, page 173 and 183, two studies that seemed to show that recidivism increases with longer terms in prison. This seems attributable to the basic character of prison life, which, at best, reduces drastically the opportunities for practice of freedom and exercise of responsibility. At worst it reduces one from a person to a number, from a citizen to a subject, from self-reliance to dependency, from hope to frustration. It tends even to degrade the jailers. I have read of an experiment in which a sociology class voluntarily simulated a prison situation and the volunteer jailers, chosen by lot, found themselves becoming brutal and tyrannical. Imprisonment as presently practiced, and perhaps inevitably, is totally undemocratic and fundamentally debasing. It is a monument to the strength and resiliency of the human spirit that so many do come out of prison still able to make their way in normal society. It is small wonder that so many come out unable to do so.

"The gist of our message is that every effort should be made to minimize imprisonment, both the number of prison sentences, and the length of time served."

G. *Position of Federal Public Defender, Los Angeles, and National Legal Aid and Defenders' Association:* The approach still reflected in S. 1437 of so-called "criteria" intended to utilize sentencing so as to make "an example" of a convicted defendant has been vigorously opposed before this subcommittee by the National Legal Aid and Defenders' Association in testimony given and a statement submitted on June 17, 1974, with respect to the predecessor bills, S. 1 and S. 1400 of the 93rd Congress (*Hearings*, Part XI, pp. 7796–7862). It is urged that the subcommittee members and all members of the Senate Judiciary Committee reread this important testimony and authoritative statement. The views there set forth reflect the expertise of those who come daily into contact with defendants and have first-hand knowledge of how truly illusory are the approaches toward sentencing and dealing with crime that all too much of S. 1437 still reflects. In this writer's belief, this statement constitutes the most creative and significant approach toward a sentencing policy that combines meaningful dealing with the important problem of sentencing and penology consonant with pro-

tection of the Bill of Rights freedoms of the accused and the convicted which has been presented to this committee. Of the numerous contributions which this testimony and statement make, the following may be quoted as particularly relevant here.

John K. Van De Kamp, Federal Public Defender in Los Angeles, formerly the U.S. Attorney in Los Angeles, and also formerly the Director of the Executive Office for the U.S. Attorneys in Washington, D.C., from 1967 to 1969, advised this subcommittee (*Hearings*, Part XI, at 7809) :

"With respect to probation, I think it is important that the code treat probation as a sentence, not as an event, in lieu of sentencing. We support the concept that probation be considered as a proper disposition in each case, unless confinement is necessary to protect the public from further criminal activity by the offender, and/or the need for treatment and supervision relating to an offender's potential for further criminal conduct cannot be provided through available community resources.

"We take some issue with the criteria set up on S. 1, particularly the first standard which the court is to consider, that is, 'the need to maintain respect for law and to reinforce the credibility of the deterrent factors of the law.' [cf. Sec. 2003 (a) of S. 1437]. While warehousing a hardened criminal and potential recidivist may well be justified in a particular case, the fuzzy concept of public deterrence is one which has often been used by trial judges as a justification for a jail sentence, and yet we know that a sanction does not have preventive deterrent capability unless the public is not only aware of the potential sanctions that will be imposed, and knows when it will be imposed. And I can tell you, Senator, that press coverage and public awareness is absent in all but the most extreme, extraordinary or bizarre Federal cases in our district. For this reason I would suggest that the provision be eliminated since it tends to shift the focus of the judge away from the offender to a concept which is rarely applicable."

The statement submitted on behalf of the National Legal Aid and Defenders' Association urged this subcommittee to set forth in the code for the trial courts to consider in sentencing the presumption articulated by the National Commission on Reform of the Federal Criminal Law (Brown Commission) and which were incorporated in proposed legislation :

"The court shall not impose a sentence of imprisonment upon a person unless, having regard to the nature and character of the offender and the circumstances of the offense, the court is satisfied that (a) confinement is necessary to protect the public from further criminal activity by the offender; and/or (b) the offender is in need of treatment and supervision which can only be provided in a correctional institution." (*Hearings*, Part XI, at 7809).

The National Legal Aid and Defenders' Association further urged this subcommittee to set forth appropriate factors for sentencing, including these suggested by the Brown Commission in Sec. 3101 of its proposed Federal Criminal Code :

"(a) The defendant's criminal conduct neither caused nor threatened serious harm to another person or his property :

"(b) The defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property ;

"(c) The defendant acted under strong provocation ;

"(d) There was substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct.

"(e) The victim of the defendants' conduct induced or facilitated its commission ;

"(f) The defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained ;

"(g) The defendant has no history of prior delinquency or criminal activity, or had led a law-abiding life for a substantial period of time before the commission of the present offense ;

"(h) The defendant's conduct was the result of circumstances unlikely to recur ;

"(i) The character, history and attitudes of the defendant indicate that he is unlikely to commit another crime ;

"(j) The defendant is likely to respond affirmatively to supervision and/or treatment in the community ;

"(k) The imprisonment of the defendant would entail undue hardship to himself or his dependents."

It appears clear that these standards, criteria, and guidelines suggested by the Brown Commission in Sec. 3101 of its proposed Federal Criminal Code are

eminently more practical and consonant with fairness and a just criminal code than are the sweeping, law-and-order motivated criteria reflected, respectively, in Secs. 101 (a) and (b), 2003(a), 2102, 2302, and 3834 of S. 1437.

II. *Criteria Urged in Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy Proposing a Program for Prison Reform:* The approach toward sentencing reflected in S. 1437 is also dramatically out of line with the program for prison reform set out in the Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, held June 9–10, 1972, and sponsored by the Roscoe Pound-American Trial Lawyers Foundation, 20 Garden Street, Cambridge, Mass. 02138. The report sets out as its theme the following trenchant observation by Dostoevski:

"Humane treatment may raise up one in whom the divine image has long been obscured. It is with the unfortunate, above all, that humane conduct is necessary."

It is a lesson the drafters of S. 1437, in common with the drafters of the predecessor bills, S. 1 of the 94th Congress and S. 1 and S. 1400 of the 93rd Congress, appear to have paid all too little heed in their omnibus criteria motivated rather by unworkable and emotion-ridden law-and-order concepts reflecting largely the Nixon-Mitchell view of control of crime and imposition of sentencing.

In a clearly written, yet extremely sensitive, foreword, Jacob D. Fuchsberg, then President, The Roscoe Pound-American Trial Lawyers Foundation 1964–1972 (now Judge of the Second Circuit Court of Appeals) and Theodore I. Koskoff, Chairman of the Annual Chief Justice Earl Warren Conference, 1972, stated:

"America's penal system is a major national chronic blight. Citizen disinterest has too often swept it under the rug of public conscience. But periodic eruptions, of which perhaps the most dramatic in recent years was the violence at Attica State Prison in New York in September 1971, have turned current public attention to it. Further, this waking of concern has occurred during a period of our history when the larger problems of crime and justice are in the forefront of our national issues.

"There are those sensitive and knowledgeable lawyers, law professors, students, criminologists, wardens, law-enforcement officers, psychiatrists, judges, prosecutors, defenders, administrators of penal programs, journalists, ex-prisoners, and others who through periods of public interest and public indifference alike, have worked insistently for solutions in this field. It was such distinguished and experienced people, perhaps as a group the most outstanding ever assembled in our country to deal with such problems, who met to concentrate their combined thinking and ideas at the Law Research Center of the Roscoe Pound-American Trial Lawyers Foundation in Cambridge, Massachusetts, in June of this year [1972.]. There the Foundation's Annual Chief Justice Earl Warren Conference on Advocacy was given over to the subject of prison reform."

The recommendations of this distinguished body, constituting their Final Report, and their Program for Prison Reform, are markedly different from the approach taken in S. 1437. That difference should impel this subcommittee to reconsider, fundamentally and completely, its approach toward the admittedly difficult and complex problem of sentencing, probation, parole, and utilization of prisons in the federal correctional system.

It is urgently recommended that the statement of purposes, constituting a declaration of national policy, contained in Sec. 101, of S. 1437, be rewritten to incorporate the formulations proposed by the Chief Justice Earl Warren Conference on Advocacy in the United States, that the bill be completely and totally redrafted in the spirit there reflected, and that, accordingly, S. 1437 itself be tabled pending such complete redrafting in the spirit of the Conference's recommendations and the imperative mandates of the Bill of Rights.

This is particularly proper and urgently required because of the virtual unanimity that the Conference participants—of widely different views and approaches—reached that it is in these recommendations that the workable approach lies to achieve sentencing and prison reform. In this connection, this further extract from the Foreword to the Conference's Report is appropriate:

"The overriding fact that broad consensus was reached by a highly diverse group—representing such poles as prosecution and defense, prison administrators and ex-prisoners—illustrates that prison reform is not, and must not be a partisan or adversary issue. Everyone in our society—including the potential victims of crime—will benefit from a wise overhaul of our penal system.

"It is the hope of the Foundation that the Report will become a practical blueprint, a living letter helping to give a new sense of direction to penal practices at national, state, and local levels. To that end, many Conferees have volunteered to join in a task force available to legislators, courts and others with power to implement the Report's recommendations. In other words, they are ready to provide the activism that will guarantee that this Report is not 'filed away.'"

Such, however, will unquestionably be the fate of this seminal Report unless this Committee makes use of the opportunity presented by the Report and by the availability of the Conferees to make their expertise available to implement the Report's recommendations. It is accordingly urged that the present hearings on the sentencing provisions of S. 1437 be broadened and that the Conferees to this important Conference on Prison Reform be invited to set forth their views and recommendations at length as to the proper course which the sentencing and correctional philosophy of the federal government should take, and which should be reflected in any omnibus federal criminal code.

For the convenience of the Subcommittee, the Recommendations of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States sponsored by the Roscoe Pound-American Trial Lawyers Foundation (Library of Congress Catalog Card Number 73-75717) are here set forth:

"I

"Criminal sanctions can never be a cure for the ills of society. While at present they are considered necessary, and are regretfully imposed for lack of a constructive alternative, criminal sanctions are essentially negative responses to the failings of human beings, to the failure to correct basic malfunctions and inequalities in society, and to public demands for retribution.

"II

"Prisons must be judged by their actual functioning rather than by their stated objectives. Experience has shown that prisons do not rehabilitate offenders. For all practical purposes, prisons are wholly punitive. Given this reality, they accomplish only three limited functions: Protection of society from a relatively small number of dangerous convicted persons for a limited period of time; possibly some deterrence of a limited segment of society at large; retribution for blameworthy acts. Furthermore, recidivism rates indicate that prison 'caging' maladjusts prisoners, and thus actually exacerbates the crime problem.

"III

"These limitations must be candidly recognized and the employment of imprisonment and other criminal sanctions must accordingly be sharply curtailed. Indeed, the release of the majority of the prison population, coupled with the provision of community programs and services, would not increase the danger to the public, and ultimately would enhance public safety.

"IV

"Imprisonment should be a last resort. The presumption should be against its use. Before any offender is incarcerated, the prosecution should bear the burden of proving in an evidentiary hearing that no acceptable alternative exists. An equal burden should be required for the denial of revocation of 'good time', probation, and parole, which really are only other ways of imposing imprisonment.

"V

"Nearly half the present potential prison and jail population can and should be placed outside the criminal justice system by decriminalizing behavior which does not involve (a) the threat of use of force against another person or persons, (b) fraud, (c) wanton destruction of property, or (d) violent attacks against the government.

"VI

"Among the offenses which should be reviewed for immediate removal from the criminal law are alcoholism, drug addiction, adult-consenting sexual acts, such as homosexuality and prostitution, and gambling, all of which are usually 'complaint-less'. It should also be recognized that further social, psychiatric

and medical research may place certain forms of behavior now termed 'criminal' into discernable, and possibly treatable, disease entities.

"VII

"The de-criminalizing of offenses does not apply approval of such behavior or that society should ignore it. It recognizes that the criminal law and its agencies are inappropriate, often even exacerbating, to such behavior, and that what is required instead is a concurrent enlargement of available community resources in medicine, public health, vocational training, education, welfare and family counselling. It is important, however, that such 'therapeutic' programs not be employed either as a guise under which another form of incarceration is imposed, or as a condition for the avoidance of imprisonment, both of which are often now the case.

"VIII

"We should further reduce our extensive reliance on prisons by making extensive use of alternatives to imprisonment, such as fines, restitution, and other probationary methods, which could at least as effectively meet society's need for legal sanctions. However, such alternatives must be made available to all people who have committed similar offenses, so as not to become a means for the more affluent to buy their way out of prison. And, where some kind of confinement seems necessary, half-way houses, community centers, group homes, intermittent sentences, and other methods of keeping offenders within the community should be preferred to prison.

"IX

"Even where imprisonment is warranted, we should not normally resort to long sentences. Experience has proved that, beyond a certain length, they are self-defeating. Therefore, those present statutory maximum sentences which are grossly disproportionate to any legitimate social purpose should be drastically reduced. Correspondingly, the average length of actual time served, which now exceeds that of other western nations, should likewise be greatly shortened.

"X

"The indeterminate sentence has not had the salutary effects predicted. Instead it has resulted in the exercise of a wide discretion, without the guidance of standards, and in longer periods of time served in prison. Those who are least able to mobilize social, economic and legal resources into the sentencing processes thus become the victims of the harshest and most discriminatory sentences. On occasion, even the non-poor may be victimized by an idiosyncratic judge with tendentious prejudices about race or life style. There should, therefore, be strict limitations on the judicial and quasi-judicial exercise of discretion in the fixing of terms, of imprisonment, with firm guidelines based on reasonably definite factors such as past criminal record, maturity, and the mitigated or aggravated nature of the particular criminal act being weighed. By way of contrast, the definite sentence would automatically eliminate administrative parole board procedures which now consist largely of an untrammeled discretion which reduces prisoners to little more than supplicants. The ultimate goal should be no indeterminancy whatsoever in sentencing.

"XI

"The presumption of innocence should pervade our system of criminal justice at all pre-conviction stages. But our present bail and release-on-recognizance systems do violence to that principle and are discriminatory and arbitrary.

"Studies have demonstrate that most bail is unnecessary and merely an unjustifiable impairment of the right of an accused to be free pending bail. Yet under our present practices half or more of accused persons are detained in jail pending trial.

"Some members of the Conference recognized that short and specified pretrial custody may be required for society's protection in a few extreme cases, such as where a person is irrational and dangerous due to severe mental illness or when the state can establish the highly probable imminent occurrence of a specific dangerous crime of personal violence.

"But all agree that bail as a prevailing system should go. An end to it would, of course, also serve to further reduce prison and jail populations.

"XII

"The drastic reduction of our present population would enable us to employ better our resources in the penal institutions which would remain.

"Prison personnel must be adequately trained and compensated, and the racial and ethnic composition of the prison population should be taken into account in the formulation of staff recruitment policies.

"XIII

"We must take immediate steps to ensure respect for the rights which a democratic society must grant even to prisoners. Though he is suffering a punishment, a prisoner is still a citizen and a human being. Therefore, except to the extent absolutely necessary for custodial purposes, he should not be deprived of any of the individual rights recognized in a free society. These include, but are not limited to, such basic dignities as freedom from racial discrimination, freedom from physical and mental brutality, the right to adequate diet, clothing, and health care, the right to furlough or institutional accommodations to maintain social and familial ties, including being located as close to home as practicable, freedom from censorship of mail and other literature including law books, the right to participate in local and national elections, and the right to procedural and substantive due process to guarantee such rights. Judicial, administrative, and legislative action to promote and develop these rights is imperative. The presumption should always be strongly in favor of full enticement to such rights and not against them as is all too prevalent today.

"XIV

"As a further concomitant for the securing of such rights, prisoners should be permitted to organize, without fear of reprisal, for the purpose of effective expression and negotiation of grievances. Even in the absence of grievances, and as a method of avoiding abuses leading to grievances, there should be regular meetings between duly elected prisoners' representatives and prison authorities.

"XV

"Under current practices, the initial sentencing, as well as the later parole hearing that determines the ultimate sentence, is usually conducted absent the right of a prisoner to present open proof, to cross-examine witnesses and probation officers, and to exercise the other elements of due process. The right to full due process should accompany the sentencing procedure through all its stages, including the denial of probation, or to any other decisional stage that substantially affects the term of imprisonment. Until such time as the present parole system is eliminated by short definite prison terms, due process should apply to both the initial granting and revocation of parole or good conduct time. These events are now at least as critical in the sentencing process as is the original judicial decision.

"XVI

"Since most prisoners are without means to engage counsel for the protection of their rights, it is essential to the implementation of such rights that the availability of properly trained and experienced Public Defenders or private counsel, with adequate staff support, be assured to all. Such legal services should be available to challenge the conviction, to aid the prisoner with any civil problems, and to represent the prisoner in grievances against the institution.

"XVII

"Like most other public institutions, prisons must be open to public scrutiny and not be hidden away beyond easy observation. To assure such high visibility, the press and other media, upon request, should have ready access to our prisons, provided that each prisoner's right to refuse interviews or exposure shall be respected.

"XVIII

"The fact that rehabilitation is not a legitimate purpose of imprisonment does not imply that 'helping' programs should be removed from prisons. The state has a duty to provide economic, social, educational and medical services in

prisons, as well as in the communities, but since such services bear no relationship to the legitimate purposes of imprisonment, their acceptance by prisoners should be voluntary. Especially since there is no convincing evidence of the effectiveness of rehabilitative programs in prison, they should have no bearing whatsoever on the length of a prisoner's incarceration.

"XIX

"Upon completion of their sentences, prisoners should return to full, lawful membership in society. No discrimination should be permitted against former offenders regarding work, education, voting or other civil and human rights. Legislative reform in this regard should be undertaken, and existing agencies engaged in such functions as job placement and training should coordinate their efforts with those of the prison system. Changes should not have to await judicial intervention.

"XX

"To focus, as we have done in this Conference, on that portion of the criminal justice system which begins with judicial sentencing and terminates with restoration of civil and political rights is not to imply that other areas of our criminal justice system are not also in need of reform. Our entire criminal law should be reviewed periodically and systematically so as to keep it abreast of the contemporary needs of a free society."

This thoughtful Report merits the most detailed study by this Subcommittee. As the Foreword to the Report noted, is reading makes obvious that it is no halting, equivocating document. The Conferees clearly felt that the time for minor, piece-meal "reforms" is long past. Indeed, the Report cut both ways. As the Foreward noted (pp. 6–7):

"Rather the Report challenges the fundamental value of today's prison as an institution. In effect, as we read the findings and as we heard them formulated, their plain-spoken direction is toward the elimination of prisons, now too often just a way to cage society's cast-offs. A similar conclusion is reached on our bail system.

"The report also strips away the protective covering from many shibboleths to which now applies the lip-service label 'progressive.' For instance, the Report minces no words when it tells us that our 'modern' parole system and the indeterminate sentence which is its concomitant, do not in actual practice operate in response to rehabi'itative achievement, but instead most often are but a means of adding punishment. Indeed, the value of 'rehabilitation' procedures is almost entirely unproved. And the net effect of the use of these devices is to cause our sentencing structure to bear most heavily on the poor."

These are searching, insightful conclusions squarely applicable to the important issues with which this Subcommittee is now dealing. They provide the basis for a national policy toward sentencing, probation, parole, bail, early release programs, correction, and prisons which will be consonant with both criminal law realities and the Bill of Rights.

Yet it must be stated, regretfully but firmly, that in all too many aspects, S. 1437 takes precisely the opposite approach toward sentencing, correction, probation, and parole. It appears to be motivated by a harsh, even vindictive, approach toward the defendants in the criminal justice system. In all too many instances, it fails to provide even the due process protections set forth in H.R. 2311 now pending in the House, which traces back to the H.R. 10850 of the last Congress and which had much of its provisions drafted in close collaboration with the American Civil Liberties Union. See comparison of S. 1 and H.R. 10850 by Congressman Kastenmeier, *Cong. Rec.*, February 24, 1976, H. 1270–H. 1277.

What the foregoing analysis has clearly shown is that S. 1437, like its predecessor, S. 1, disregards many of the sound recommendations of legal, penological and correctional experts, including those embodied in the Report of the National Commission on Reform of the Federal Criminal Laws (Brown Commission) relating to the structure of criminal sentences.

III. THE CHOICE OF NATIONAL SENTENCING POLICY PRESENTED BY S. 1437

Before analysis is made of the specific provisions relating to sentencing contained in S. 1437, the national choices which this legislation presents to the country should be made crystal-clear. S. 1437, far from being noncontroversial as its proponents fallaciously assert, is in actuality retrogressive and has every

probability of proving to be harshly vindictive and punitive in its sentencing philosophy. The purported equalization and end to sentence disparity is the false equality (and will so prove, it may be predicted, in all too many instances) of the fabled Bed of Procrustes.

The fateful choice as to a sentencing policy in criminal law which this country is being asked to make was set forth in two diametrically opposed speeches given recently to the Convocation of the Center for the Study of Democratic Institutions, held in Chicago, Illinois, on April 2, 1977.

Senator Edward M. Kennedy (D. Mass.), one of the sponsors of S. 1437, stated in part:

"What lessons have we learned? Is there anything we can do now? How much progress can we make?

"The first step is to change the terms of the debate on crime. We must end the foolish argument over whether crime can be attacked more effectively by correcting social injustices or by locking up offenders and throwing away the key.

* * * * * * *

"But let us no longer confuse social progress with progress in the war against crime. We must eliminate ghetto slums, reduce teenage unemployment and improve health care, because such steps in and of themselves, are necessary and right. To the extent that steps like these have a beneficial impact on our soaring crime rate, that would be a welcome side effect.

"But to argue 'no crime reform until society is reformed' is to direct attention away from the significant steps government can take now to fight crime. The demand for causal solutions to the nation's crime problem is, whether intended or not, a way of deferring specific action.

* * * * * * *

"The chaos of the substantive offenses in the code is bad enough. But when we talk about how the current laws promote injustice how they mean different things to the rich and the poor, one flaw stands out above the rest. That is federal sentencing policy. Sentencing in America is a national scandal. Every day the system breeds massive injustice. There are no guidelines to aid judges in the exercise of their discretion. There is no appellate review of sentences. Judges are free to roam at will, dispensing ad hoc justice in ways that defy both reason and fairness. Different judges hand out widely differing sentences to similar offenders convicted of similar crimes. Some offenders, including many repeat offenders, escape jail althogether while others—convicted of the very same crime—go to jail for excessive periods.

"The impact of such sentencing disparity on our criminal justice system is devastating. Certainty of punishment is a joke. To all who come in contact with it, the system is seen for what it is—a game of chance in which offenders play the odds and gamble on avoiding punishment. Because one thief went to jail doesn't mean the next will go. Hire the well-connected lawyer; play assignment calendar roulette by adjourning your case again and again until you get a lenient judge; in every other way, learn the ropes and beat the rap.

"Sentencing disparity also tilts the process against the young and poor and nurtures a growing public cynicism about our institutions. The youth who goes for a joyride or commits petty larceny is sentenced to a year in jail. Too often, the evader, the price fixer, the polluter or the corrupt public official receive suspended sentences on the unthinking ground that the stigma of their convictions is punishment enough.

"The judges are not to blame. The problem cannot be traced to 'weak' judges who 'coddle' criminals. The great majority of our federal judges try to perform their sentencing duties in a responsible, diligent manner. But they must act without guidelines or review, because there are no standards or review procedures. The law invites injustice by conferring unlimited discretion to impose sentences within vast statutory limits. A convicted bank robber can be sentenced anywhere from a term of probation to twenty-five years in prison, a rapist anywhere from probation to life imprisonment. This discretion has been provided for in the name of benevolence, in the name of doing good. The original purpose of the law was to promote rehabilitation by tailoring the sentencing to fit the personal needs of the offender.

"But this purpose has too seldom been achieved. Our good intentions are not enough. The use of broad discretion has backfired; there has been notorious lack of rehabilitation and an equally notorious increase in arbitrariness and injustice."

There is truth in some of Senator Kennedy's comments, but equally, there are fallacies, half-truths, and a glossing over of a retreat toward a mechanical method of sentencing which will be brought about if the proposed Sentencing Commission establishes guidelines in the light of the criteria which, if S. 1437 becomes law, will be made mandatory by Sec. 101(a) (the General Purpose section), Sec. 2003(a) (dealing with factors to be considered in imposition of a sentence), Sec. 2102 (dealing with factors to be considered in imposition of a sentence of probation), Sec. 2201 (and Sec. 2202(a) (dealing with imposition of a sentence of fine), and Sec. 3831(c) (dealing with criteria for release of a prisoner on parole).

Issue is effectively and authoritatively joined with the views expressed by Senator Kennedy (which in large part are incorporated into S. 1437 just as are also those of the Nixon-Mitchell administration) in the remarks given at the same Conference on Crime and What We Can Do About It held in Chicago on April 22, 1977, and sponsored by the Center for the Study of Democratic Institutions, such rebuttal remarks being given by David L. Bazelon, Chief Judge, United States Court of Appeals for the District of Columbia Circuit. Judge Bazelon's remarks appear in the *Congressional Record*, May 2, 1977, E. 2674–E. 2676. In inserting Judge Bazelon's address into the *Congressional Record*, Congressman Don Edwards of California observed, "I was deeply moved by the insight and wisdom in the speech, and commend its study to my colleagues." (E. 2674).

In this important speech, Judge Bazelon cut through much of the self-serving rhetoric that has been offered in justification, respectively, for the hard-line view of sentencing that has apppeared, respectively and successively, in S. 1 and S. 1400 of the 93rd Congress, S. 1 of the 94th Congress, and now in S. 1437 of the 95th Congress, 1st Sess. Congressman Edwards was eminently correct in commending its study to the members of Congress.

Judge Bazelon there said in part (*Cong. Rec.* May 2, 1977, at E. 2675) :

"On the other end of the spectrum from the abolitionists [of prisons], there are growing numbers of criminologists and politicians who are promising society great victories in the war on crime by changing our sentencing policies. They speak of flat sentences, uniform sentences, mandatory sentences, presumptive sentences. Under one proposal, a new sentencing commission would set standards, and appellate courts would review sentencing decisions to insure that those standards are implemented.

"Some of these proposals come from those who have given up on rehabilitation, and indeterminate sentencing, which uses the unfixed release date to induce prisoners to reform themselves. Since prisons now seem to serve no purpose but punishment and isolation, they say, there is no reason that like crimes should not receive like sentences. These people rest their case for uniform sentences on fairness for prisoners themselves, who are too often kept ignorant of their release date or subjected to unequal treatment.

"Perhaps it is true that 'we have not achieved either the individual love and understanding or the social distribution of power and property that is essential if discretion is to serve justice.' Yet I still cling to the ideal of individualized justice. As others have recognized, 'In abandoning individuation here, we make it progressively easier to abandon it elsewhere. I fear that if we shift from concern for the individual to mechanical principles of fairness we may cease trying to learn as much as possible about the circumstances of life that may have brought the particular offender to the bar of justice.

"At present, sentencing discretion is shared by prosecutors, judges, parole boards, and others. Uniform and mandatory sentences would merely transfer most of this discretion to prosecutors, who would in effect set sentences by their decisions about whom to charge with what crime and whether to plea bargain. Since prosecutors need not reveal their reasons, their exercise of discretion is not reviewable.

"Of course, keeping discretion in judges' hands is preferable only if judges explain their decisions and make themselves accountable to the public. Sentencing discretion cannot appear fair or serve justice or teach anyone anything unless its exercise is fully explained. Unfortunately, most judges now give only boilerplate reasons for that sentencing, if that. I would guess that some judges—those who are moved by retribution and vengeance—would be ashamed to say no forthrightly. Others suppose there must be right and wrong sentences, so they are embarrassed to reveal their understandable dilemma in not knowing one from the other. And finally there are those who can't be troubled; if they bothered

to probe their own minds, who knows what useful insights or disturbing biases they would find?

"All the proposals for sentencing reform are worthless unless trial judges clearly and honestly reveal in writing the reasons for the sentences imposed. Without such reasons, no review—judicial or otherwise—would have any basis for determining whether the judge abused his sentencing discretion. And without reasons, we would be denied the experience which would be essential for fixing sentencing standards and guidelines by any court, commission, or legislature.

"I am also disturbed by the movement for mandatory and uniform sentencing because some people advertise it as a way of reducing crime. Led by Harvard's James Wilson and NYU's Ernest van den Haag, this group argues that increasing the certainty of a prison sentence will decrease the crime rate either by removing the more prolific criminals from the streets or by deterring others from yielding to temptation. Some politicians have told me that they are highly impressed with the theory, which they attribute to Wilson, that the current surge in crime is caused by the post-war baby boom. Apparently, the idea is that as this generation enters its crime-prone years, all that is required is essentially a holding action—put these people away until the population bulge passes, and eventually the problem of unacceptable crime statistics will largely solve itself.

"What can society really expect from these proposals? Of course, all these proposals are almost certain to increase the number of prisoners, even if sentences are shortened. Most state systems are already overcrowded; many are operating at 130% or more of capacity. In one state the Department of Corrections has stopped issuing a capacity figure 'because we keep passing it.' One survey puts our national prison population at 276,000. In the last year, this country experienced the largest one-year increase on record. Billions of dollars in new prison construction is scheduled for the next few years; yet at a cost of $35,000 to $50,000 per cell, we can safely assume that overcrowding will get worse before it gets better.

"Can society expect harsher sentences to deter crime? The white-collar offender may weigh the risks of punishment, but the street offender—the one who is the cause of our alarm—most probably does not. With no job, no opportunity, no close family ties, he may well believe he has more to gain than he has to lose. More than 3% of this nation's non-white male population between the ages of 18 and 34 was imprisoned in 1970. This is six times the percentage for whites. Can anyone doubt the connection between these out-of-proportion figures and the out-of-proportion unemployment rates and lack of opportunity facing this country's non-white slum dwellers?

"Also, even *if* it is true that we can reduce crime simply by locking up enough lawbreakers, we must ask—for how long and at what cost to them and ourselves? Is the plan to keep them behind bars for life? Even if it succeeds, will this approach make our society more just, or merely more repressive?

"Most disturbing, all these proposals fail to consider the social injustices that breed crime. Can it be true that this nation would rather build a new prison cell for every slum dweller who turns to crime than try to alleviate the causes of his lawlessness. I do not understand how academicians and politicians can have a clear conscience preaching repression as the solution to crime, unless of course they believe that despite the accident of birth everyone in this country is equally endowed, mentally and physically, and has the same opportunities they have had to get ahead.

"If the present debates in corrections are aimed at making prisons less brutal and sentencing more fair, then the effort is worthwhile. But if they are aimed at reducing crime, they are dangerously off-target. They are dangerous because they risk repression and greater suffering. They are off-target because they encourage society to expect magic cures rather than facing the real causes of crime."

And Judge Bazelon concluded his incisive criticism of the fallacious and probably self-defeating approach toward crime which is exemplified by S. 1437 with these wise words (*Cong. Rec.*, May 2, 1977, at E 2676):

"Prison reform and tougher sentencing seem like hollow promises when we realize that it is this kind of crime with these causes that we are really talking about. At worst, the present attacks on crime are repressive. At best, they are mere nibbling.

"Of the more humane reforms that I call 'nibbling', Norval Morris argues that 'it is a serious mistake to oppose any reform until all can be reformed.' Of course I agree. Making sentences more fair and relieving over-crowding in prisons need

not wait for the elimination of poverty in this country. Surely review of the sentencing judge's discretion—accompanied by a requirement that he give his reasons—could eliminate wide disparities in sentencing without ignoring differences in individual offenders that justify different treatment.

"But what I reject is the notion we should strive to achieve only those changes in the criminal justice system. Instead, we must try to hold in mind the full picture. We must not forget that the people I have been speaking about in the criminal justice system are merely the end-product of our failling social justice system.

"What ultimately is at issue in the debate over alternative responses to the crime problem is a question of the goal to be pursued: repressive order or moral order. To choose to eliminate social injustice is to choose a long, painful, and costly process. The only option I can imagine that is less appealing is not to choose. Creating order through repression will not be easy, and maintaining it, as the frustrations of the deprived grow, will be more and more difficult. As the poet Langston Hughes warned:

"What happens to a dream deferred?
Does it dry up
like a raisin in the sun
Or fester like a sore—
And then run?
Does it stink like rotten meat?
Or crust and sugar over—
Like a syrup sweet?
Maybe it just sags
Like it just sags
like a heavy load.
Or does it explode?

"Everything I've said this morning you've heard somewhere, sometime before. I've given you no new data or new theories. My purpose in coming here was to deliver a simple message: In the growing debate about corrections and the rising hysteria about crime, we have lost sight of old truths and old priorities. I believe there is a desperate need to inform the nation that there are no nostrums for street crime apart from social reform, and that to put social order ahead of social justice is repressive.

"The crux of the dilemma is this: It is easy to concede the inevitability of social injustice and find the serenity to accept it. The far harder task is to feel its intolerability and seek the strength to change it."

It is against this wise perspective by Judge David L. Bazelon that the analysis of the Sentencing Commission and the sentencing provisions to be established by S. 1437 if it becomes law, which follows, must be weighed. The bias of this writer is one in favor of the Bill of Rights and against the tough, law-and-order concepts which infest S. 1437, just as they infested S. 1437's predecessor bill, S. 1 of the 94th Congress. It was precisely those supposedly "tough" approaches that led inevitably to Attica and to a host of other incidents that tore the lid off the myth that we have true criminal justice in our sentencing and correctional system of law enforcement and crime prevention. Judge Bazelon's warnings take on even more urgency when it is seen, as the next section demonstrates, that the choice of a national policy is to be made in actuality not by Congress, but instead in secret by a non-legislative body, the Judicial Conference. The reality is that, in being asked to enact S. 1437 into law, Congress is being asked to addicate its constitutional obligation to make policy and legislate. The true national policy for sentencing, probation, parole, dangerous offenders, and other aspects of the correctional aspects of criminal law will not be made by Congress but instead by a self-perpetuating body of ranking jurists heavily influenced by the strict constructionist views of former President Richard M. Nixon's appointees to the United States Supreme Court. As noted in the next section of this analysis, this is both undemocratic and unwise.

IV. CONGRESS SHOULD NOT ENACT S. 1437 PRIOR TO HAVING BEFORE IT THE SENTENCING GUIDELINES PROPOSED TO BE ESTABLISHED BY THE SENTENCING COMMISSION

It is abundantly clear that the proponents of S. 1437 regard the proposed Sentencing Commission as the keystone of their arch for federal criminal law codification. Yet those guidelines to be established have every probability of being formu-

lated in a harsh, repressive manner that will inevitably have the effect of further crowding of already over-crowded prisons and in which unworkable "law-and-order" concepts will have priority over intelligent, expert use of probation, parole, halfway houses, release to the community, and other methods of correction offering hope of rehabilitation and reform for the person who has run afoul of the law, and will do so again unless recidivism is avoided by his own motivation to "go straight".

Viewed in this sense, Congress is clearly being invited to "buy a pig in a poke." Momentous issues of national policy should not, and must not, be delegated to a non-legislative body, as is the formulation adopted with respect to the proposed Sentencing Commission (Chapter 58 of Part E, pp. 301–307, Secs. 991–998).

In a Statement issued on April 4, 1977, the American Civil Liberties Union, appraising the Kennedy-McClellan Proposed Revision of S. 1, noted that the Kennedy guidelines proposal has been incorporated into the bill. Under this system, a nine-member commission is to be established, appointed by the Judicial Conference of the United States, to draft "guidelines" to direct the trial judge in making his sentencing decision. Failure to sentence within the guidelines creates a presumption of error when the sentence is reviewed by the appellate court.

On this important provision of S. 1437, ACLU recommended:

"*Recommendation:* The ACLU, of course, cannot properly evaluate this proposal without seeing the guidelines themselves. Furthermore, we question whether a non-legislative commission should be delegated the authority to make essentially legislative decisions, that is the severity of punishment to be accorded particular categories of crime and criminals.

"We propose that a sentencing guidelines commission should be given a fixed time, perhaps one year, to draft and submit to Congress its proposed sentencing guidelines system. Enactment of any criminal codification bill should be deferred until the sentencing commission has made its report and until Congress has had an opportunity to review the proposal."

Such recommendation by ACLU is both practical and cogent. It closely parallels criticism made by the National Council on Crime and Delinquency with respect to Senator Gary Hart's draft of the Federal Sentencing Standards Act of 1977 (S. 204). Included in the National Council's (hereinafter NCCD) comments on Senator Hart's draft were the following observations, *inter alia:*

"The operative sections of the draft bill (S. 204) are sections 6, 7, 8, 9, and 10. Section 6 calls for a new commission (1) to establish a number of categories of offenses, placing each criminal offense in a category; and (2) to assign a presumptive sentence for each category.

"With respect to the first task, the draft bill would set up a complex procedure *without establishing the classifications*, or placing the different crimes in the categories. It is hard to see that anything is gained by this procedure, and something is lost by it: the first hand legislative consideration of the vital ingredients of its bill. It should be a legislative task to determine what classification accords with its view of sentencing, and to set it forth. Pushing the problem aside does not promise anything superior.

"A sponsor of a bill of this kind has choices among the models. The choice involves such decisions as whether the classifications will be more punitive than the existing law, less punitive, or much the same. The suggestion that the commission may establish subclasses for any criminal offense is a seemingly neutral guideline, but the question is a vital policy matter that should be answered by the Congress."

As noted below, the proposed Sentencing Commission provided by S. 1437 would establish guidelines which would take into account a series of mitigating and aggravating circumstances. If anything, the provisions of S. 1437 in this regard are even more speculative and conjectural than the parallel provisions of Senator Hart's S. 204, the "Federal Sentencing Standards Act of 1977." We do not know, and cannot know, at this time what these guidelines will be. No one can evaluate either the effectiveness or the fairness of the guidelines to be eventually established by the Sentencing Commission to be set up pursuant to S. 1437 until they have actually been promulgated and the country finally will know what they provide.

Accordingly, it is strongly advocated that action on criminal code legislation be deferred and tabled for the present session of Congress at the very least. Legislation in this area should be confined to establishment of such a Sentencing Commission (the members to be appointed by the President rather than by the Judicial Conference). That Commission in turn would have the duty to formulate its proposed guidelines and make them public and available for analysis and public

debate, including the extent to which they deal fairly with the poor, the minorities, and other categories which thus far have never truly known either fairness and basic justice in sentencing, as groups, or that federal criminal law could seriously be termed a just criminal code. Only after Congress and the Executive Department are truly satisfied, following extensive hearings with full opportunity for all interested groups to make their views known on the fairness and justice of these guidelines, including the availability of probation, parole, Half-Way Houses, release to the community, work release, and other creative programs affording a real hope for rehabilitation and avoidance of recidivism, should Congress consider passage of the complex criminal code reform bill exemplified by S. 1437.

This recommendation is eminently reasonable in view of the great importance which the sponsors and proponents of S. 1437 place upon the Sentencing Commission and the sentencing guidelines it will be given the power to promulgate, if S. 1437 becomes law. This is made strikingly clear by the statements offered, respectively, by Senator John McClellan and Senator Edward M. Kennedy in introducing S. 1437 (*Cong. Rec*, May 2, 1977, S. 6833–S. 6841).

Senator Kennedy, for example, stated (*Id.*, at S. 6839):

"Mr. President, although these new [sentencing] features in the bill basically result from our effort to codify current law, the proposed bill goes well beyond mere codification. It is a reform effort as well.

"First and foremost, the new bill overhauls the entire Federal sentencing process by adopting many of the sentencing reforms I suggested in S. 181, 'the sentencing guidelines bill,' introduced with broad, bipartisan support, including the cosponsorship of Senator McClellan, on January 10, [1977]. *I view the sentencing provisions as the key reform of the entire bill.* The bill sets forth four generally recognized purposes of sentencing—deterrence, protection of the public, assurance of just punishment, and rehabilitation. A sentencing commission is created and directed to establish guidelines to govern the imposition of sentences for all Federal offenses, taking into consideration factors relating to the purposes of sentencing, the characteristics of the offender, and the aggravating and mitigating circumstances of the offense.

"In sentencing offenders, a judge will be expected to sentence within the range specified in the guidelines, although if he considers the guideline range inappropriate for a particular case he is free to sentence above or below the guideline range as long as he explains his reasons for doing so. If an offender is sentenced below the range specified in the guidelines, the Government may obtain appellate review of the sentence. If an offender is sentenced above the range specified in the guidelines, the offender may appeal. This system is designed to promote greater uniformity and fairness, while retaining necessary judicial flexibility. Under this new approach, the gross disparities in sentencing found in current law should be significantly reduced." (Emphasis supplied).

Similar stress upon the importance of the Sentencing Commission and the guidelines it is to formulate appears in the analysis of S. 1437 inserted into the *Congressional Record* on May 2, 1977, by Senator McClellan. *Cong., Rec.*, May 2, 1977, at S. 6838).

It is eminently fair accordingly that Congress defer enactment of this complex proposed legislation until means can be assured that it is Congress, not some self-perpetuating group of judges, appointed by the Judicial Conference, which will make national policy with respect to sentencing, probation, parole, fines, prisoner release, and all the other important social-policy issues involved here, and which S. 1437 proposes should be effectively delegated to a body not answerable to the people, but instead to the Judicial Conference, and which, as demonstrated in the next section of this analysis, has every probability of being undemocratic and unresponsive to progressive views of sentencing in determining these guidelines.

Just as it is eternally true that questions of war and peace are too important to be left to generals, it is equally true that questions of national policy as to sentencing are too important to be left to judges or other appointees of the Judicial Conference. Democratic controls over sentencing policy are absolute, indispensable requirements for a just criminal code. The input, expertise, and advice of judges are urgently needed, just as is the comparable authoritative input of others who deal with those who come into conflict with the law—attorneys, correctional officers, Public Defenders, social workers, psychiatrists, penologists. There is, however, an enormous distinction to be made between utilizing the expertise of the resources and personnel available to the Judicial Conference and having Congress abdicate its legislative responsibilities so as to delegate decision making as to sentencing to appointees of the Judicial Conference.

We are dealing here with issues where legislative decisions between choices must be made. Those legislative decisions should not be delegated to a commission. Congress will be flagrantly remiss in measuring up to its constitutional duties if it surrenders the power to make these decisions to a non-legislative body, the proposed Sentencing Commission.

V. APPOINTMENT OF THE MEMBERS OF THE SENTENCING COMMISSION BY THE JUDICIAL CONFERENCE IS BOTH UNDEMOCRATIC AND UNWISE

Both S. 1437 and its legislative sibling, S. 181 (a bill to establish certain guidelines for sentencing, introduced by Senator Kennedy) provide that there is established as an independent Commission in the judicial branch a United States Sentencing Commission which shall consist of nine members designated by the Judicial Conference of the United States. A member of the Commission may be removed by the Judicial Conference only for cause. (S. 1437, Ch. 58, Sect. 991, p. 301).

The Federal Sentencing Standards Act of 1977 (S. 204, introduced by Senator Gary Hart) takes the democratic approach with respect to the Federal Sentencing Commission which it would establish. Sec. 4 of S. 204 provides for the establishment of a commission to be known as the Federal Sentencing Commission. This commission is to be composed of five members appointed by the President of the United States, with the advice and consent of the Senate. This is entirely consonant with our democratc form of government. It permits full opportunity to have public participation in the choice of the membership of this body. It does not leave such choice to a group (the Judicial Conference) entirely separated from the democratic process and which is demonstrably part of a closed universe of judicial elitism largely dominated by the influence of Chief Justice Warren Burger.

Little has been publicly revealed about the activities and decisions of the Judicial Conference. Some of the secrecy in which this powerful, but little known, judicial agency operates has been stripped away by an article by John P. MacKenzie, former Supreme Court reporter, *Dark Doings Among the Judges*, appearing in *Saturday Review*, May 28, 1977 (pp. 18–19). A copy of this revealing article is annexed as an appendix to this statement.

Mr. MacKenzie's enlightening article makes clear that, far from delegating to designees of the Judicial Conference unprecedented power to determine the policy of the federal government over sentencing, fines, probation, parole, and the other broad powers which S. 1437 seeks to confer upon the Sentencing Commission, the time is overdue for Congress to investigate the powers the Judicial Conference already has, the secrecy in which it operates, and the extent to which it is an arm for lobbying and execution of the narrow, rigid views of the Bill of Rights and constitutional liberties typified by the Burger Court majority of the United States Supreme Court.

Mr. MacKenzie states initially in his article:

" 'Sunlight,' said Justice Louis D. Brandeis, 'is the best of all disinfectants.' Yet one enormously influential body of high-level jurists, the Judicial Conference of the United States, has been meeting in the dark for so many decades that by now one almost hesitates to throw its proceedings open to the cleansing sunlight and fresh air."

His article makes clear that the public interest is deeply involved in understanding the use of power in secret by this small body of leading federal judges. He states (p. 18):

"But why should the public care about this secret society of a few dozen eminent judges? Why not just let the judicial 'beetles' doze away on their perches, safe from the glare of publicity?

"The answer is that, whatever its original intended functions, this conference of respected jurists, chaired and guided by Chief Justice Warren Burger has slowly become a secret lobby, a powerful policy-shaping instrument that is in no way accountable for its often questionable actions.

"Not content with lobbying for higher salaries for judges (a perhaps understandable preoccupation), the group has lately gone on to influencing congressional deliberations on wiretap legislation and similar key policy matters. As things stand, the Judicial Conference is fast becoming a secret government force to be reckoned with."

The *Saturday Review* article emphasizes the way in which the Judicial Conference is dominated by its chairman, Chief Justice Warren Burger. Mr. MacKenzie explains (p. 18):

"Chief Justices have many collateral duties thrust upon them, but Burger, who has sought and gained more renown as a judicial administrator than as a jurist, has accepted the conference chairmanship with gusto and spends long

hours on its work. The members (11 chief judges of the regional U.S. courts of appeals, 11 federal district judges elected by their peers from those same regions, and representatives from claims and patents courts) often are no match for a well-prepared presiding officer, even if the judges were inclined to resist his leadership.

"What does the conference actually do? An attempt to help outsiders find out was quietly launched a few years ago—and just as quietly buried last year. James E. Doyle, a U.S. district judge in Madison, Wisconsin, advanced the modest proposal that the conference meetings be thrown open to the public. He told his colleagues that after attending a number of these meetings as a conference member, he couldn't think of any discussion he had heard that couldn't have been held in the open. His proposal was drowned in apathy and opposition led by Burger. The subject itself became classified. Burger refused to discuss the details. Terrified staff members, taking that cue, were struck dumb when questioned. Judge Doyle himself found the topic too hot to talk about. 'No comment,' he replied to inquiries. Was he the initiator of such a proposal? 'No comment on that either,' he answered."

Moreover, it has become clear that, under the domination of Chief Justice Burger, the Judicial Conference has been utilizing its prestige in favor of proposed legislation which is demonstrably violative of civil liberties and constitutional protections. That record of attempting to influence legislation in a manner supportive of the type of proposed legislation which public outrage forced deletion from S. 1 is highly disturbing. It poses sharply the questions whether the hardline, rigid views of the Nixon appointees on the Supreme Court are to be the ultimate guidelines promulgated by the Sentencing Commission so that what we are dealing with here is an indefensible species of legislative legerdemain in which Congress and the Carter Administration abdicate their mutual responsibilities to formulate national policy over sentencing in favor of delegating that choice of national policy to Chief Justice Warren Burger, dominant force, it is clear, in the Judicial Conference, a body of top jurists, responsible and answerable to no one, meeting in secret, and reflecting views of the Bill of Rights which are increasingly arousing alarm among those who regard the constitution and the Bill of Rights as a precious charter of freedom not to be eroded even by a temporary majority on the Supreme Court representing Justices carefully chosen by Richard M. Nixon to reflect his views of strict constructionism and a "tough" attitude toward lawbreakers and constitutional freedoms.

And Mr. MacKenzie concluded (p. 19):

"Whether or not the press can be likened to government, there's little doubt that the Judicial Conference performs important governmental tasks—judicial, legislative, and executive. It has come a long way since 1922, when Congress heeded [Chief Justice] Taft's call for a body to cope with case-load arrears and possibly to something about the disparity among courts in their sentencing of convicted criminals. Those two problems remain as baffling as ever, but the conference has branched out into other fields. One is lobbying, and not just for higher federal-court payrolls. One recalcitrant congressman predicted early that the conference would become 'a legally constituted and publicly financed propaganda organization on behalf of the fedral judiciary.' His predictions have been borne out several times.

"One notable instance occurred in 1967, when the conference, then led by the late Chief Justice Earl Warren, voted to volunteer its views to Congress on the wisdom of the pending wiretap bills. It was an odd stance, one that came to light only in the fine print of the conference's report and the satisfied reactions of wiretap advocates. The conference, with its roster of senior and prominent jurists, could be expected to properly comment on the practicality of specific provisions in a bill, but this body went beyond that: it chose a pro-tap bill in preference to a bill banning all wiretapping, and it favored a bill that was clearly unconstitutional under existing Supreme Court precedents. Activists and advocates of judicial restraint alike let the resolution pass, since there was no recorded dissent. Subsequent inquires by several members of the Judicial Conference as to what had happened yielded the inescapable conclusion that many of them had no idea of what they had done.

"Chief Justice Warren and Chief Justice Burger have inspired many studies in contrast, but they are alike in their passion for conference secrecy. Congress could cool that passion by bringing the conference under the lash of disclosure and public access now required of government advisory committees and agencies by the Freedom of Information Act. The judicial branch is not covered by the

information law—needed, the alarming fact is that these same secretive jurists are the ones with power to say what that law means—but there is little reason to exempt the conference, especially when it is not performing strictly judicial work.

"That was the view of former senator Sam J. Ervin, Jr. (D–N.C.). Like many other lawmakers, Ervin found other fields to conquer than the Judicial Conference. But he said this in 1970:

" 'They certainly do not act as judges when they vote to approve or disapprove of pending legislation, or adopt rules of financial disclosure for their colleagues. Why, then, should the conference meet in secret? I believe that when judges act as policy makers and lobbyists, it follows that their discussions should be public. If the conference supports or opposes a bill, the Congress and the public should have free access to the conference's debate on that proposal. The Congress should know how carefully the Judicial Conference researches its positions so that it can attach relative weights to them.' "

There can be no more important domestic issue for the citizenry of the country to confront than whether Congress is to abdicate its legislative responsibilities and surrender legislative decision making to an unresponsive body dominated by Chief Justice Warren Burger, so that the sentencing policy of this country is to be formulated, not by Congress responsive to the democratic wishes of the electorate, but instead by the judiciary, and particularly, by the narrow, retrogressive views of the Burger Court majority of the United States Supreme Court, and its titular head, the Chief Justice.

What that will mean for sentencing may be seen in a disturbing article, *Has the Supreme Court Abandoned the Constitution?* written by Laughlin McDonald, director of the southern regional office of the ACLU Foundation in Atlanta, Ga.

Mr. McDonald states initially (*Saturday Review*, May 28, 1977, at 10):

"The Supreme Court has lost its sense of direction. It seems almost to have forgotten what its job is—to interpret and defend the Constitution. Under Chief Justice Warren Burger it is systematically restricting is own jurisdiction, and that of the lower federal courts, to hear and decide cases involving the denial of constitutional rights. It is nailing up its doors. As a result, people with legitimate complaints are left without remedy or redress. But paradoxically, it is often better to be ignored by the Supreme Court these days, for with increasing frequency the Court turns the cases that it does hear into constitutional disasters."

And he concluded (*Saturday Review*, May 28, 1977, at p. 14):

"On the whole, the decisions of the Burger Court unmistakably suggest an underlying ideology similar to that of Richard Nixon, who placed Chief Justice Burger and Justices Powell, Rehnquist, and Blackmun on the Supreme Court. Nixon said he was a 'strict constructionist.' Later, Nixon proved he loathed the Constitution.* * *

* * * * * * *

"As things are now developing, Burger Court decisions will mean a reduction in constitutional protection, and in freedom, for all of us. There will be less protection from police abuse and less free speech, less protection from consumer fraud *and less fairness in the administration of the criminal laws.* There will be more repression in the administration of archaic sex laws, more invasion of privacy, *and more discrimination against* the poor and other minorities.

"All of our freedoms will be diminished, and as the Constitution begins to atrophy through lack of enforcement, increased constitutional violations will be encouraged and will occur. Our institutions of government will become more and more prone to abuse and less and less reliable. There will be an ever increasing, palpable deterioration in the quality of American democracy and in American life." (Emphasis supplied.)

Is then the ultimate victor in determining the country's national policy toward sentencing and correction to be Richard M. Nixon through the lasting influence of his handpicked Chief Justice Warren Burger, chosen to reflect the then President's law-and-order views of dealing with crime? Is a hardnosed approach toward crime, offering little or no hope of rehabilitation and providing merely storage, retribution, and claimed "deterrence" to mark this country's policy toward sentencing for generations to come, and thereby to reflect Nixon's ulti-

mate victory in this important area? Whether or not the proponents of S. 1437, and its Sentencing Commission recognize that this will be the outcome if S. 1437 becomes law in its present form, such will indeed be the predictable, and disturbing, effect of enactment of this provision.

To recapitulate, S. 1437 presents the country with the following little-realized phenomenon of national importance: (1) the bill is replete with hard-nosed guidelines for so-called "law-and-order" treatment of defendants (euphemistically called "certainty of punishment" even though realistically our already overcrowded courts and prisons will be flooded far beyond capacity if this increased imprisonment called for by S. 1437 and its proposed Sentencing Commission becomes law); (2) the national policy as to sentencing is to be made by a Sentencing Commission to be appointed by the Judicial Conference with the result that Congress is being required to abdicate its constitutional obligation to legislate national policy in this important area of the law in favor of a nonlegislative body (totally unresponsive to the will of the people) which has not yet even been appointed; (3) the Judicial Conference is responsible to no other group, represents only the elite hierarchy of the federal judiciary and meets and conducts its business completely in secret; and (4) the Judicial Conference is totally dominated by its chairman, Chief Justice Burger, who in turn speaks for the Burger Court majority of the Supreme Court which has issued opinion after opinion taking a narrow, retrogressive view of the Constitution and its Bill of Rights.

From this emerges the inescapable conclusion that S. 1437 leaves determination of the country's national policy about sentencing, parole, probation, early release of prisoners, and the like to a totally unresponsive group, dominated by Chief Justice Burger. Accordingly, what is in actuality involved in the provision that the Sentencing Commission is to be appointed by the Judicial Conference is that effective control of the country's policy about how to deal with crime and correction is being surrendered to Chief Justice Burger and the narrow, law-and-order view he typifies which has led those concerned about the Bill of Rights to conclude that its greatest danger is no longer some demagogue of the type of Senator Joseph McCarthy, but instead the present majority of the United States Supreme Court. The attempt to gloss over this important fact by claiming judicial impartiality or whatever other euphemistic defense is to be given to this demand for abdication by Congress of its legislative responsibilities cannot conceal the fact that, if S. 1437 becomes law, the country will have surrendered any effective control over sentencing; capitulated as to making work probation, parole, diversion of the offender to the community, and other creative and hope-inspiring correctional techniques; and delegated full control in this area of the criminal law to a secret body in the judiciary dominated by the retrogressive views of Chief Justice Burger and his colleagues who form the Burger Court majority.

There is no criticism here of the concept of a Sentencing Commission *per se*. The danger to constitutional freedoms and to a fair sentencing policy for the country arises in one important aspect from the indefensible provision that the members of the Sentencing Commission are to be appointed by the Judicial Council. That danger can readily be remedied—and must—by the simple process of amending the provision to replace it with the approach taken in S. 204, the Federal Sentencing Standards Act of 1977, introduced by Senator Gary Hart, provided, as previously noted, that the members of the Commission must be appointed by the President of the United States, with the advice and consent of the Senate.

This one change will by no means tame all the dangers which the Sentencing Commission, as formulated in S. 1437, presents to justice in America. It is, however, an indispensable initial requirement.

It is possible to legislate a Sentencing Commission which has some reasonable likelihood of evolving fair and just sentencing guidelines within the framework of a just criminal code. But S. 1437 is not a just criminal code, and the Sentencing Commission provisions of S. 1437 do not establish a commission which will bring into being just, equitable, and fair sentencing guidelines. Most certainly, it will not do so long as S. 1437 continues to set forth harsh, vindictive standards of its own which look toward punitive treatment of the offender, rather than rehabilitation and return to society with a motivation to abide by the law. Both the sentencing guidelines of S. 1437 itself, and the undemocratic and unresponsive nature of the proposed Sentencing Commission, will inevitably interlink to produce a tough, inflexible set of Sentencing Commission guidelines which will equally inevitably exacerbate, rather than alleviate, the existing

problem of dealing effectively with crime and those convicted of crime. It is to this area of the proposed Sentencing Commission that the instant analysis now turns.

VI. THE GUIDELINES SET FORTH IN S. 1437 AND TO BE REFLECTED IN THE SENTENCING COMMISSION GUIDELINES ARE UNACCEPTABLY HARSH AND PUNITIVE

This analysis has earlier noted (Point II) that there is a presumption in favor of incarceration contained in S. 1437 and its companion bill in the House, H.R. 6869. That point quoted the factors set forth in Section 2003(a) required to be considered by the trial court in sentencing the convicted defendant. In addition to the factors there quoted, the court is required to consider the sentencing range established for the applicable category of offense committed by the applicable category or defendant as set forth in the Sentencing Commission's guidelines and, further, any pertient policy statement issued by the Commission.

Section 2003(a) of S. 1437 (Ch. 20, p. 169) directs the federal district court to consider all these factors in determining sentences of probabation, fines, or imprisonment. There has been a modification from the old S. 1. That predecessor bill established different criteria to be considered by the court in sentencing a defendant to any of the listed sanctions.

However, S. 1437 does establish additional factors for the court to consider in levying a fine and for the parole commission in granting parole.

Section 2202 (Ch. 22, p. 175) of S. 1437 mandates that, in levying a fine, the court must consider the defendant's "income, earning capacity, and financial resources: the nature of the burden that payment of the fine will impose on the defendant or his dependents; and any requirement that the defendant make restitution to the victim of the offense."

The Parole Commission must be "of the opinion that: there is no undue risk that a prisoner will fail to conform to his conditions of parole * * * and his release at that time, in light of his conduct at the institution, would not have a substantially adverse effect on institutional discipline" in order to grant parole. (Sec. 3831, p. 266).

The purposes of S. 181, the bill to establish certain guidelines for sentencing introduced by Senator Kennedy, are understandably very similar to those in S. 1437.

In contrast, the purposes of S. 204, the "Federal Sentencing Standards Act of 1977," introduced by Senator Gary Hart, differ from those in S. 1437 and S. 181. The objective of S. 204 is stated to be the establishment of standards "that will help to deter crime and punish convicted criminal offenders fairly and equally." Senator Hart has declared that this bill is based on a "just deserts" rationale for sentencing. "The severity of a sentence must be commensurate with the seriousness of the offender's crime, rather than being based on his supposed need for treatment or his likelihood of recidivism. Accordingly, S. 204 is markedly different in important commendable respects from S. 1437. It is not based on the "need * * * to provide the defendant with needed educational or vocational training . . . or other correctional treatment," and thus recognizes that true treatment cannot be coercively imposed by the courts and the prison system. This requirement penalizes blacks, Hispanics, and members of other minority groups, as well as the poor, and adds to the results of discrimination previously suffered by them the opportunity to correction officers to keep them in prison on the claim that somehow this will provide them with "needed educational or vocational training"—training which is desirable, but which should be provided in the community instead of in prison, as part of the alternatives to sentencing which S. 1437 minimizes as correctional approaches to be taken by the sentencing judge.

S. 204 is further preferable because it does not (as S. 1437 does) aim to "protect the public from further crimes of the defendant." There is here a recognition of the unfairness of basing a penalty on supposed further activity of the defendant, rather than actual past practices. The same objection also applies to the provision included in S. 1437's provision that parole not be granted where there is "undue risk that a prisoner will fail to conform to his conditions of parole."

Specific analysis will be made below as to what S. 1437 provides with respect to probation, parole, and other alternative sanctions to imprisonment. At this point, a general over-all comment on the bill's approach is that it clearly demonstrates a preference, and indeed a bias, in favor of incarceration and imprisonment rather than in place of alternative sanctions to imprisonment. Concededly,

it does permit the use of traditional alternatives to imprisonment, including probation, parole, and fines, subject to the guidelines and policy statements of the proposed U.S. Sentencing Commission. However, it does not mandate the use of alternative sanctions for any crime (an exception is possession of 10 to 100 grams of marijuana, for which only a $500 fine is authorized). Probation is statutorily prohibited for offenders convicted of Class A felonies, or who are convicted of "Trafficking in an Opiate" or "Using a Weapon in the Course of a Crime," offenses which are required to be punished by imposition of a two-year mandatory minimum sentence except under sharply limited circumstances (the defendant was less than eighteen years of age, had significantly impaired mental capacity, was under unusual duress, or was an accomplice with a minor role). Fines can be assessed against any defendant found guilty of an offense, subject to the purposes of sentences mentioned above, the Sentencing Commission's guidelines, and the defendant's financial capabilities.

S. 204 is significantly more in line with progressive and creative concepts of penology and correction. Under S. 204, alternatives to imprisonment are required for criminal offenses which are not "serious." Serious offenses are defined as those which involve a "substantial degree of harm or risk and a high degree of culpability on the part of the person who commits such criminal offense." These offenses "involve (1) the infliction, risk, or threat of substantial bodily injury; or (2) involves the infliction of risk of substantial abuse of a public office, a public or private trust, or of government processes, or the deprivation of a substantial portion of the livelihood of a victim of such criminal offense."

S. 204 illustrates the correctional path that S. 1437 should (but does not) take. S. 204 would establish a number of alternatives to imprisonment, both old and new. These include: (1) intermittent confinement for days, evenings, or weekends, or portions thereof; (2) supervision in the community; (3) a fine or forfeiture; (4) a curfew or travel restrictions; or (5) community service. S. 204 further provides that the Attorney General, after consulting with the Sentencing Commission provided by that bill, is to establish or designate an office within the Department of Justice that shall be responsible for implementing and carrying out any alternative sanctions.

It is in proposals for alternative sentencing and diversion of offenders, particularly to community-based correctional programs, that the real hope for alleviating crime through the correctional system is found. What S. 1437 exemplifies is a swing of a pendulum away from modern and progressive concepts of penology. There are a number of reasons for this swing, not all by any means justifiable. It should be stated bluntly that the emphasis in S. 1437 upon determinate sentencing, mandatory imprisonment, incarceration to "reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense" (Sec. 2003(a)) offers little hope for alleviating crime, although unquestionably it will be of service to politicians in giving them an opportunity to tell the voters back home that they have "done something about crime."

Here, as ever, Judge David L. Bazelon, has written wise words:

"Mandatory incarceration, determinate sentencing, and other similar ideas are thus the first steps in a thousand-mile journey, but in precisely the wrong direction—towards repression. Mandatory incarceration means nothing more than locking up those who manifest symptoms of the underlying ill. If it reduces crime, it will do so only because repression and fear can be effective. Mandatory incarceration, however, will not cure—or even address the roots of the disease. Determinate sentencing is also an ostrich-like response; it expressly eliminates from the sentencing process any effort to learn about the circumstances that foster the behavior of a particular offender. As a result, we forfeit an opportunity to learn what must be done to prevent him—and others like him—from committing future offenses." (*"Civil Liberties—Protecting Old Values in the New Century"*, 51 New York University Law Review 505, at 510, 1976.)

Unquestionably, for the hardened criminal, imprisonment is proper. S. 1437 leans, however, despite lip service given toward alternatives to imprisonment, toward an infatuation with incarceration for most defendants. It evades recognition of the simple truth that there cannot be a just criminal code, or a just program for sentencing, without there being a just economic system. It is no mystery that there is a link between continuing unemployment, particularly of the youth, and more specifically of black and other minority youth, and continuing street crime. Fewer jobs unquestionably result in more crime. The rather simplistic approach taken by the emphasis upon incarceration in S. 1437 cannot escape that truism. It is probable that a one percent increase in the rate

of unemployment will wipe out any deterrent effect that the certainty of imprisonment exemplified by S. 1437 could conceivably bring about. Enthusiasm for determinate sentencing and mandatory incarceration is strongly suggestive of leaping on a bandwagon. In this case, however, that bandwagon appears to be located on S.S. Titanic.

The prestigious journal, *Crime and Delinqueney*, Vol. 21, July 1975, (No. 3), p. 295, quoted the following from an article by Tom Wicker, "Jobs and Crime," *New York Times*, April 4, 1975:

"Crime was sharply up in 1974, according to Federal Bureau of Investigation statistics, and Attorney General Edward Levi thinks that bears out his prediction that rising unemployment would cause more crime. With unemployment generally above 8 percent and as high as 41 per cent for black teen-agers, there is little reason to doubt Mr. Levi's analysis. . . .

"As reported by the Los Angeles Times, the FBI statistics show the incidence of crime to have risen by 17 per cent in 1974, compared to only 6 per cent in 1973. Violent crimes—murder, rape, robbery, and assault—more than doubled to 11 from 5 per cent; property crimes tripled, from 6 to 17 per cent in 1974. Crime statistics are not entirely reliable for many reasons, but these FBI figures seem to reflect a definite upward trend.

"That these increases at least to some extent are the product of rising unemployment can hardly be doubted. For one thing, the crime increases were sharpest in the last three months of 1974, when the economic recession was gathering speed and producing large-scale layoffs and business failures.

"For another, cities where unemployment was at its worst suffered the biggest increases in the incidence of crime . . .

"These figures were entirely predictable. As Mr. Levi suggested in his confirmation hearings, when jobs are not available, when layoffs are widespread, and when the first-fired are likely to be those least skilled and least educated, hence least able to get and keep whatever work may be available—particularly when prices are also rising—an increase in crime is almost bound to result, as the jobless seek some way to maintain themselves, or their families, or their drug habits, or their installment payments, or their loan shark, or all of these . . .

"High unemployment . . . is likely to result—as the FBI figures suggest—in precisely the most-feared forms of crime. Since layoffs disproportionately affect the poor, the unskilled, and the disadvantaged, they stimulate muggings, robbery and assault, which are predominantly crimes of the poor, often against other poor people. And one high-risk class of potential offenders—ex-convicts—are particularly affected by hard economic times. It is difficult enough for ex-cons to find work during periods of prosperity, and all but impossible in a recession—which is one good reason why recidivism rates are estimated as high as 70 per cent . . .

"Maybe full employment and reduced economic disparities would do more to make the streets safe than any number of policemen."

Reference to the link between rising unemployment and rising crime is not made here in any spirit of vaguely idealist exculpation of the street criminal. Clearly, violent crime must be curbed. No sensible person disagrees with that truism. The problem, which in this writer's judgment, S. 1437 fudges is how to deal with it meaningfully and effectively.

As this writer has elsewhere written (Crystal, *The Proposed Federal Criminal Justice Act of 1975: Sentencing—Law and Order With a Vengeance*, 7 Seton Hall Law Rev. at 41–42 (1975); the major flaw with a "law and order" approach, which looks to increased penalties as a solution to crime is that it ignores the reality that, sooner or later, most prisoners will return to society; and unless they are adequately rehabilitated, the prison will simply have proved to have been a training school for further crime. Moreover, the very factors that inevitably produce plea bargaining—the inadequacy both of the law-enforcement system which processes those accused of crime and of the penal system which houses and maintains those convicted of crime—make it clear that a program which emphasizes the imposition of increased terms of imprisonment for enlarged classes of offenders threatens to break down the penal system itself.

The question of variability of sentencing to which the Sentencing Commission provisions of S. 1437 address themselves is clearly an important one. However, it must be viewed in the context of what S. 1437 itself provides as to length of sentencing, severity of fine, and availability of probation, parole, and alternative methods of imposing sanctions and penalties upon the convicted offender. Attention is now turned to these specific aspects of S. 1437's sentencing provisions.

VII. THE SENTENCING MAXIMA IN S. 1437 ARE STILL UNACCEPTABLY OVERLONG

The harsh sentencing provisions and extended prison terms mandated by S. 1 were sharply criticized by authoritative commentators. Reviewing these heavy imprisonment maxima, the National Council on Crime and Delinquency observed, for example, that, "Unless one takes pride in a swollen, expensive, wasteful prison system, Chapter 23 [of S. 1 of the 94th Congress] requires serious reconsideration." *Senate Judiciary Subcommittee Hearings on S. 1*, Part XII, at 182. ACLU noted that, "S. 1 sets harsh, retributive sentences for many crimes," and that, further "The sentencing schemes of S. 1 are skewed in favor of long-term prison sentences, despite the overwhelming recommendation of penologists and lawyers who have studied the correctional system that sentences instead be sharply reduced." *Hearings*, Part XII, at 208.

The American Friends Service Committee, New York Metropolitan Region, declared in an analysis of S. 1 that:

"The sentencing provisions run directly counter to every reform proposal of recent years, including several federal commissions and the American Bar Association, calling for lower sentences and reduced discretion. S. 1 combines high maximum sentences with mandatory or optional add-on sentences. As *Struggle for Justice* points out, long sentences do not deter or rehabilitate; they embitter human beings and destroy their lives. This is known to anyone who has been imprisoned and to most corrections officials."

The alarming ferocity of the sentencing provisions of the last Congress' S. 1 have been somewhat modified by changes made as a result of compromise. There has been some lowering of mandatory minimum sentences and the maximum sentences for lesser felonies. This is made clear by the following tabular comparison between S. 1, S. 1437, and H.R. 2311.

SENTENCING PROVISIONS—AUTHORIZED TERMS (MAXIMUM)

	S. 1	S. 1437	H.R. 2311
Felony:			
Class A	Life or any part	Life or any period of time	15 yr.
Class B	30 yr	25 yr	7yr.
Class C	15 yr	12 yr	4 yr.
Class D	7 yr	6 yr	2 yr.
Class E	3 yr	3 yr	No corresponding felony classification.
Misdemeanor:			
Class A	1 yr	1 yr	1 yr.
Class B	6 mo	6 mo	6 mo.
Class C	30 days	30 days	30 days.
Infraction	5 days	5 days	No corresponding infraction classification.

Some examples of maximum sentences provided by S. 1437 are the following: *Class A felonies:* Treason, murder, sabotage, and kidnapping.

Class B felonies: Armed rebellion, aircraft hijacking, racketeering, and trafficking in an opiate.

Class C felonies: Impairing military effectiveness, bribery, manslaughter, rape, burglary, robbery, and counterfeiting.

Class D felonies: Perjury, sexual assault, using a weapon in the course of a crime, gambling, and attacking a foreign power.

Class E felonies: Obscenity, graft, obstructing an election, impersonating an official and entering a foreign armed force.

In sharp contrast, under S. 204, no period of imprisonment may be imposed in excess of five years, except for the offenses of murder, manslaughter, forcible rape, aircraft hijacking, kidnapping or treason, or any attempt or aiding or abetting of such offenses.

It should be noted that in all other Western countries, the period of incarceration is much shorter, with no increase in the public danger. Cf. Justus Freimund, Director, Action Service Division, National Council on Crime and Delinquency, *Hearings*, Part XII, at 185.

The ABA Standards for Sentencing, § 3.1(d) provide that "for most offenses . . . the maximum authorized prison term ought not to exceed ten years except in unusual cases and normally should not exceed five years", with sentences of twenty-five years or longer "reserved for particularly serious offenses or . . . for certain particularly dangerous offenders."

Even as revised, the sentencing maxima provided in Sec. 2301(b) of S. 1437 clearly exceed the ABA Standards for Sentencing so far as Felony Classes A, B, and C are concerned, and exceed those same standards with respect to Class D felonies insofar as the ABA Standards provide that authorized prison terms "normally should not exceed five years." S. 204 has been drafted in conformance with the ABA Sentencing Standards. S. 1437 has not been so drafted, even though the original savagery of S. 1 has been somewhat alleviated. Accordingly, it still fails to correct the valid criticisms made of S. 1 by the ABA (*Hearings*, Part XI, p. 377), by the Association of the Bar of the City of New York (*Hearings*, Part XI, at 7765, by the Special Committee on S. 1 of the California State Bar Association, and by other prestigious national groups which were quoted in Point II of this memorandum.

The sentencing maxima in S. 1437 are still unreasonably and unacceptably long, and violate the ABA Standards for Sentencing.

VIII. THE FINES PROVIDED BY S. 1437 ARE EXCESSIVELY HEAVY AND HARSH

A. Existing law

Existing federal criminal laws tend to have fines between $500 and $1,000 for misdemeanors and $10,000 to $25,000 for felonies.

B. Fine provisions of S. 1437

S. 1437 would provide fines for the individual of $100,000 for a felony, $10,000 for a misdemeanor and $1,000 for an infraction, and in the case of an organization defendant, for a felony $500,000, for a misdemeanor $100,000, and for an infraction $10,000 (Sec. 2201(b). S. 1 had identical fines. H.R. 2311 would impose upon an individual defendant fines as follows: For a felony $100,000, for a misdemeanor $10,000, for an infraction $500; and in the case of an organization, for a felony $500,000, for a misdemeanor, $10,000, and for an infraction, $5,000. Sec. 2201(b) of H.R. 2311.

In addition, S. 1437 provides that fine may be set not to exceed twice the gain obtained or loss imposed. Sec. 2201(c). H.R. 2311 similarly provides. Sec. 2201(c) of H.R. 2311.

The Special Committee of the California State Bar Association recommended against the adoptions of the fine provisions in S. 1. Since those provisions have been retained in S. 1437 intact, its disapproval continues to have validity.

This authoritative committee of the California State Bar Association analyzed the Fine provisions of S. 1 (and therefore of S. 1437) as follows (App. M–9—M–10 of Committee Report):

"Although the financial sanction is a positive one, it does give the appearance that criminal conduct can be 'bought off.' Although a large financial fine may appear to be a heavy burden for an individual, it may not in fact be a serious burden for a corporate financial organization. The fine could be a serious economic threat to the positive efforts at rehabilitation of a defendant on probation. The statute does not, but should clearly, spell out that a person financially unable to pay the fine *at the time of sentence* should not be subject to a fine, for this economic burden would seriously tax future livelihood of the defendant when he may need to make a new start in life. Such sanction is far less important than the positive re-integration of the defendant into society as a productive member. The principles set forth in Williams v. Illinois, 339 U.S. 235 (1970), and Tate v. Short, 401 U.S. 395 (1971), that an indigent cannot be confined because of his impecunious status should be clearly articulated in this proposed legislation. Also, the creation of a lien for an unpaid fine will create an unnecessary burden that would probably injure the credit of someone seeking to enter into or continue in legitimate business. The cost of maintaining the accountability of the lien system (§ 3813) might exceed the total of the fines recouped, especially in cases involving small fines. The lien unnecessarily burdens transfer of property and unfairly impunges the credit standing of defendants and those that may be dependent upon them."

In addition the fine itself may clearly have a chilling effect upon the exercise of constitutionally guaranteed freedoms, particularly with respect to such purportedly Contempt offenses, as Sec. 1331, Criminal Contempt, Sec. 1332, Failing to Appear as a Witness, Sec. 1333, Refusing to Testify or to Produce Information, Sec. 1334, Obstructing a Proceeding by Disorderly Conduct, and Sec. 1335, Disobeying a Judicial Order. Imposition of a fine against an individual of $100,000 for a felony, and $10,000 for a misdemeanor is a potent legal weapon to coerce compliance with an order not having legal validity. There is a potential-

ity of a similar chilling effect upon the exercise of the right to strike, contained in the modification of the Hobbs Act (Extortion, Sec. 1722) if an ambitious United States Attorney can successfully claim that violence in a labor dispute ("threatened or feared", p. 118 of S. 1437) was not "minor" or can be claimed not to be "incidental to peaceful picketing or other concerted activity in the course of a bona fide labor dispute." A similar chilling effect results from the imposition of a heavy fine against labor unions and their members from a charge that a labor dispute violated Sec. 1723, the blackmail section, where there was a dispute over a closed shop, cf. Sec. 1723(a)(3), or put an employer in fear that his property would be subjected to "economic loss or injury to his business or profession" (precisely what all strikes and labor disputes are all about, as the sanction interposed by labor).

A specific instance of how the bill, S. 1437, carries forward intact a surreptitious attack upon civil liberties is provided by Sec. 1333, dealing with Refusing to Testify or to Produce Information, *inter alia* "in an official proceeding that is conducted under the authority of Congress or of either House of Congress." This is penalized as a Class E felony (Sec. 1333,(f), p. 72 of S. 1437). Thereby, the penalty for refusal to cooperate with congressional committees, e.g., the Senate Internal Security Subcommittee, is increased from one year in prison and a thousand-dollar fine as provided by present law to three years and/or one hundred thousand dollars fine.

This one example (and others could readily be cited) puts into proper focus the euphemistic claim made by Senator McClellan in introducing S. 1437 that "95 per cent of the bill has been noncontroversial and * * * it contains many provisions which are universally recognized to be clear and substantial improvements." *Cong. Rec.*, May 2, 1977, S 6834, 3rd column.

IX. S. 1437 CLEARLY DISFAVORS PROBATION

1. *Existing law*

Under existing law, the district judge may grant probation if the ends of justice will be satisfied and the best interest of the public as well as the defendant will be served thereby. The defendant may be placed on probation on such terms and conditions as the court deems best. For any offense for which the maximum imprisonment is more than six months, other than death or life imprisonment, the court may impose the sentence and provide that up to six months be spent in a jail-type facility (i.e., the so-called "split sentence") and suspend the remainder of the sentence and place the defendant on probation or place the defendant on probation subject to certain conditions. The period of probation is limited to five years. 18 U.S.C. § 3651.

B. Corresponding provisions of S. 1437, § 2101–2106, 3016, 3801-3810.

Under S. 1437, the period of probation for a felony would not be less than one and not more than five years. For a misdemeanor it would not be more than two years, and for an infraction not more than one year. Probation is denied where (1) the offense is a Class A felony, (2) the offense is one for which probation has been expressly precluded; or (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense. Sec. 2101 (a) and (b).

Sec. 2102(a) dealing with factors to be considered in imposing a term of probation provides that, "The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation *shall* consider the factors set forth in section 2003(a) to the extent that they are applicable." (Emphasis supplied). This clearly gives no preferential consideration to probation. Conditions of probation are spelled out in great detail. Sec. 2103 (pp. 172–173). S. 1437 has the term of probation run concurrently with parole or other term of probation (Sec. 2104(b)), except that it does not run during any period in which the defendant is imprisoned in connection with a conviction for a federal, state or local crime. Sec. 2104(b). A felony probation must spend at least one year on probation. Sec. 204(c).

The provisions contained in Sec. 2102(a) that, in determining whether probation is to be granted and if so, its terms, the district court "shall consider the factors set forth in section 2003(a) to the extent that they are applicable" is in actuality a caution to the court that probation should be the exception rather than the rule. This is in keeping with the law-and-order approach which S. 1437 carries on virtually intact from S. 1. Clearly, probation is not favored in S. 1437, any more than it was in the predecessor bill, S. 1. It appears almost

as "a second choice. "The Special Committee on S. 1 of the California State Bar Association recommended against the probation provisions of S. 1 "because serious aspects of probation have not been properly dealt with. "Committee Report, App. M–11. The criticism remains valid, and the probation provisions of S. 1437 should similarly be rejected by the Congress.

These provisions are flatly inconsistent with the ABA Standards for Probation. Standard § 1.3(a) provides: "Probation should be the sentence unless the sentencing court finds that: (1) confinement is necessary to protect the public from further criminal activity by the offender; or (ii) the offender is in need of correction treatment which can most effectively be provided if he is confined; or (iii) it would unduly depreciate the seriousness of the offense if a sentence of probation were imposed." Section 3101(a) of the Brown Commission so provided. The American Bar Association approved this provision of the Brown Commission. It rejected Section 2102 of S. 1 because it "does not have any such presumption in favor of probation." *Hearings*, Part XII, at 377. Here again we are afforded a startling confirmation as to how euphemistic is the claim that "95 percent of the bill has been noncontroversial." See McClellan, *Cong. Rec.* May 2, 1977, S. 6834, 3d Column.

In the sharpest possible contrast with S. 1437, H.R. 2311 provides the essential *presumption in favor of probation*. Sec. 2302 of H.R. 2311 thus provides: "A term of imprisonment shall not be imposed unless the court finds that a sentence of probation is inappropriate under section 2101(b)."

S. 1437 thus deliberately turns its back upon the recommendations of prestigious bar associations and the best thinking of penologists a virtual presumption *against* the grant of probation rather than in favor of such grant. This is done despite the Brown Commission's finding that "probation is likely to be the most effective form of sentence in a great many cases." *Working Papers*, (of Brown Commission), vol. II at 1268. For the patent bias of S. 1437 in favor of a law-and-order approach toward probation, see this writer's expression of views elsewhere. Crystal, *the Proposed Federal Criminal Justice Act of 1975: Sentencing—Law and Order With a Vengeance*, 7 Seton Hall Law Rev. at 42–49. This writer there concluded (p. 49) in words which have continuing applicability to S. 1437:

"S. 1 [read S. 1437] disregards the progressive and enlightened approach recommended by the Brown Commission, the American Bar Association, and the American Law Institute. Nowhere does it place suitable emphasis on the positive qualities of probation. It does not require federal sentencing judges to consider the propriety of probation before imposing a harsher sentence. * * * The S. 1 approach does little more than encourage the storage of human beings. Penological experience has demonstrated the unlikelihood that imprisonment serves any sort of rehabilitative purpose. Since the rehabilitative value of imprisonment has yet to be demonstrated, the 'storage of offenders' approach to corrections embodied in S. 1 [and still embodied in S. 1437] is without justification. This policy can only result in persistently high crime rates and excessive penal system costs."

A particularly indefensible provision applicable to probation is that subsection of Sec. 2003(a)(2) which requires the court, in considering the particular sentence to be imposed, to weigh the need for the sentence imposed "(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." This is a profoundly unfair and even racist provision carried into S. 1437 from the predecessor bill, S. 1. This Subcommittee has previously been advised of the inequity and gross unfairness of this provision. A statement of Melvin L. Wulf, Legal Director, American Civil Liberties Union, on behalf of ACLU, stated (*Hearings*, Part XII, at 210:

"Section 2102 instructs a judge, in granting probation, to consider the need" to provide the defendant with educational or vocational training, medical care, or other correctional treatment in the most effective manner.' Such factors only reinforce the criminal justice system's discrimination against the poor, the sick, and the uneducated. The constitutional guarantees of due process and equal protection of the law require courts to weigh evenly the claims of rich and poor, skilled and unskilled. Freedom from imprisonment and the chance to try again should not depend on an absence of past suffering. 'Effective' provision of job training and medical care in most cases does not require isolation of the offender from the community in which he will ultimately have to learn to live. The Congress should legislate to provide these services outside of prison, instead of incarcerating people just to obtain them. S. 1 [read S. 1437] similarly stacks the decision-making process against the granting of parole and fails to provide for a preference to parole over continued imprisonment. Yet parole, like probation, can be crucial in encour-

aging offenders to establish law-abiding lives. See *Morrissey* v. *Brewer*, 408 U.S. 471, 484 (1972)."

The tilting of the scales *against* probation in S. 1437 is completely indefensible in the light of what has been learned about community programs and diversion to the community representing the most encouraging approach toward achieving rehabilitation. The probation provisions of S. 1437 accordingly merit rejection by the Congress, as the authoritative national organizations heretofore cited, make plain beyond dispute.

X. S. 1437 VIRTUALLY ABOLISHES PAROLE

With respect to parole ineligibility, the revision of S. 1 to convert it into S. 1437 has resulted in substantially weakened provisions relating to a defendant's entitlement to parole.

S. 1 provided in Sec. 2301(d):

"(d) Authorized terms of parole ineligibility.—The authorized terms of imprisonment for felonies that may be required to be served prior to eligibility for parole are *not more than one-fourth the term of imprisonment* authorized by subsection (b) [of section 2301 of S. 1], or by subsection (c) if an extended term is imposed, or ten years, whichever is less. For a misdemeanor or an infraction, no term of parole ineligibility may be required to be served." (Emphasis supplied).

S. 1437 goes far beyond S. 1 in this regard and virtually abolishes parole by providing that a term of parole ineligibility may be set at 9/10 of the sentence imposed. This is achieved by Sec. 2301(c) of S. 1437, providing:

"(c) Authorized terms of parole ineligibility.—The authorized terms of imprisonment that may be required to be served prior to eligibility for parole is any term found appropriate by the court in light of the provisions of section 2302(b), but no term of parole ineligibility may extend into the last one-tenth of the sentence imposed."

Thus, where in S. 1, the prisoner was eligible for parole after having served one-fourth of his sentence, he may now be barred from eligibility for parole until he has served 9/10 of his sentence. This converts sentencing into actuality into mandatory minimum sentencing at 9/10 of the full sentence, and is a startling *worsening* of the already too harsh sentencing provisions of S. 1. Once again one is compelled to question the accuracy of the claim that 95 percent of S. 1437 is non-controversial. McClellan, *Cong. Rec.*, May 2, 1977, at S. 6834 (3d column).

By contrast, H.R. 2311 authorizes a minimum term of imprisonment, without entitlement to parole, *for Class A or B felonies only*, of up to one-third of the prison term actually imposed. (Sec. 2301(c) of H.R. 2311).

The same striking differences exist between S. 1437 and H.R. 2311 with respect to the criteria to be applied by the Parole Commission in granting parole.

Under S. 1437 (Sec. 2302(b)), the court is mandated to consider the factors set forth in section 2003(a) to the extent that they are applicable. As earlier noted in consideration of these criteria, parole is permissible if the court does not provide for parole ineligibility. A prisoner may be released from imprisonment on parole by the Parole Commission if "having regard for the guidelines and any pertinent policy statements concerning parole issued by the Sentencing Commission pursuant to 28 U.S.C. 994(f), the [Parole] Commission is of the opinion that:

"(1) his release at that time is consistent with the applicable factors that led to the imposition of his particular sentence under the provisions of part III of this title;

"(2) there is no undue risk that he will fail to conform to such conditions of parole as would be warranted under the circumstances; and

"(3) his release at that time, in light of his conduct at the institution, would not have a substantially adverse effect on institutional discipline." (Sec. 3831(c)).

Reference in Sec. 3831(c) dealing with criteria for release to the guidelines (contained in Sec. 2003(a)) requires that the Parole Commission consider whether the prisoner's release on parole complies with the statutory need for such release not to interfere with or impede (1) adequate deterrence to criminal conduct, (2) protection of the public from further crimes of the defendant, (3) reflection of the seriousness of the defense, promotion of respect for law, and provision of just punishment for the offense, and (4) provision for the defendant of needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. The prior discussion of

the invalidity of these law-and-order criteria with respect to probation and its denial applies equally here. Moreover, these are the criteria as they are set forth in the main body of S. 1437.

The Sentencing Commission which is to be established by Chapter 58 of S. 1437 is mandated to establish in its term guidelines applicable to both the district court's determination of whether to consider parole ineligibility and for how long a period (Sec. 994, pp. 302–303) and for controlling the exercise of discretion by the Parole Commission (which already exists in law) (Sec. 994(f)) (p. 304). This power given to the Sentencing Commission provides:

"(f) The Commission, by vote of a majority of the members, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to the United States Parole Commission:

"(1) guidelines consistent with those promulgated pursuant to section (a)(1) of this section for use of the United States Parole Commission in determining whether to parole a prisoner and in determining the length of the term and conditions of parole; and

"(2) general policy statements regarding application of the guidelines or any other aspect of parole that in the view of the Commission would further the purposes set forth in section 101(b) of title 18, United States Code [i.e., Section 101(b) of S. 1437, p. 12)]."

The analysis previously made of the Sentencing Commission and of the manner it is to be appointed (by the Judicial Conference) has made it clear that this is a surreptitious way of turning effective control of all sentencing policy, including that relating both to parole and to probation, to a secret, unresponsive group of top federal judges dominated by Chief Justice Warren Burger. As there indicated, it is gross abdication of constitutional responsibility for Congress to delegate to a group of judges, dominated by the titular head of a Supreme Court majority that has severely eroded constitutional protections through its rigid, repressve decisions, power to make binding national policy on parole, probation, and sentencing. When this vast grant of power to the Judicial Conference and its chairman, Chief Justice Burger, is contemplated in the light of the already retrogressive guidelines set forth in the main body of S. 1437, it becomes clear that S. 1437 presents this country with a grave constitutional problem. The seemingly innocuous power to appoint the membership of the Sentencing Commission granted to the Judicial Conference by Sec. 991 of Chapter 58 (p. 301) is in actuality a grant of power to make national policy on virtually all of sentencing, and thereby makes the Judicial Conference the ultimate determinant of the sentencing policy of this country, even though that power constitutionally rests in Congress and the executive department, including the President.

There are other serious criticisms to be made of the parole provisions of S. 1437. Parole is auomatically added to the sentence, rather than included in it, as now (Sec. 2303). If parole is revoked, the parolee can be returned to prison and ordered to serve the term of his original sentence minus the portion of the original sentence served in confinement prior to the parole. Sec. 3835(e) (p. 272). It should be noted that violating a condition of parole (Sec. 3835 (a) and (b)) can be a non-criminal act such as failing to stay away from an old hangout, quitting school or discontinuing medical treatment.

A sentence to imprisonment for a felony or a Class A misdemeanor under S. 1437 automatically incudes a separate term of parole. This term shall be set by the Parole Commission, having regard for the guidelines and policy statements of the Sentencing Commission. For a Class A or Class B felony, the term shall be not less than one year nor more than five years; for Class C, not less than one year nor more than five years; for Class C, not less than one year nor more than three; for Class D, not less than one year nor more than two for Class E, not less than six months nor more than one year; and for a Class A misdemeanor, not less than three months nor more than six months. Sec. 3834(b) of S. 1437.

A sentence to imprisonment also automatically includes a separate contingent term of imprisonment of ninety days in the case of a felony, or thirty days in the case of a felony, or thirty days in the case of a Class A misdemeanor, which must be served in the event of a recommitment for violation of a condition of parole and the remaining unserved portion of the offender's sentence is less than ninety days. Sec. 2303 (p. 178).

If a term of parole ineligibility is not set by the court, the Parole Commission shall consider the parole of a prisoner sixty days before he will complete

the service of one-fourth of the term of imprisonment or the first year of the term of imprisonment, whichever is earlier (and provided that he is serving a prison term greater than a year). If parole is denied, the Parole Commission shall reconsider in one or two years. The parole criteria have already been set out in this statement.

The limitation of parole exemplified by S. 1437 is in actuality a means of surreptitiously achieving mandatory, minimum, "presumptive" sentences the length of which are to be effectively set, not by Congress but instead by operation of the guidelines to be established by the Sentencing Commission composed of designees of the Judicial Conference. We are dealing here basically with a system of automatic, mandatory sentences. This needlessly eliminates exercise of discretion and individualization of sentencing by the district judge. Once a defendant is committed, it needlessly eliminates Parole Commission discretion. Parole (and probation, as well as other non-imprisonment sentences) should be available for almost all crimes, according to the nature of the defendant as revealed by a competent presentence report.

What is being sought here is equality of sentences. However, there is a false equality being sought here. Sameness and uniformity are totally different from equality. Identical sentences imposed on two quite different, disparate defendants do not achieve equality; they ignore important differences.

One may properly inquire: What is the purpose of restricting parole to the vanishing point, as S. 1437 does? (S. 204, Section 11 completely abolishes parole).

Concededly, investigation of prison conditions has resulted in fault having been found with parole systems. However, obviously, abolition of parole does not cure its defects, and equally clearly prevents use of its sound advantages. The main defect of parole, as utilized, has been failure to give due attention to the suitability of prisoners for release. Restricting grant of parole to the vanishing point, or doing away with it altogether, does not cure illiberality; it does not permit liberality at all. The principal victims here are the prisoners.

Congress has a non-delegable responsibility to make policy in this important field. The impatient attempt to achieve determinate sentencing exemplified by S. 1437 takes exactly the wrong course. As noted in the next section, there should be *more* release of prisoners to the community, not less. No harm is done, and useful individualization is maintained. If an effective correctional apparatus exists for early conditional release. This can properly be done by the Parole Commission, and by parole boards. They should be strengthened rather than being eliminated.

The United States Supreme Court has recognized that "the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system." *Morrissey* v. *Brewer*, 408 U.S. 471, 477 (1972). The purpose of parole is to serve as an intermediate step in the reintegration of convicted offenders into society without requiring that sentences of imprisonment be fully served. S. 1437 goes far beyond even S. 1 in unduly extending the period of time for which the Government may impose its domination and control over offenders by providing that a term of parole shall be an automatic add-on to a term of imprisonment in certain cases, by permitting denial of parole until 9/10 of the sentence has been served, and by giving the proposed Sentencing Commission power to impose unduly restrictive standards on the discretion of the Parole Commission to release a prisoner on parole prior to the expiration of his sentence. See Crystal, *The Proposed Federal Criminal Justice Act of 1975: Sentencing—Law and Order With a Vengeance*, 7 Seton Hall Law Rev. at 63–70. As noted there for S. 1 (and S. 1437 is even worse in important respects than S. 1) the net effect of this proposed federal criminal code so far as parole is concerned is to limit unreasonably the opportunity of a nondangerous offender to obtain parole prior to the expiration of his prisoner term, thereby limiting his ability to reintegrate into the community. This is flatly at odds with the wise and sensible provision of the Brown Commission that "release should be favored unless some public purpose was, in the opinion of the Parole Board, served by detention." See Schwartz, *The Proposed Federal Criminal Code*, 17 Crim. L. Rep. 3203, 3204 (1975).

XI. S. 1437 UNWISELY TURNS ITS BACK UPON HOPEFUL INNOVATIONS IN PENOLOGY, INCLUDING PROBATION AND EARLY RELEASE TO OR DIVERSION OF THE OFFENDER TO THE COMMUNITY UNDER SKILLED SUPERVISION

The approach taken toward sentencing in S. 1437 is simplistic and probably unworkable. It abandons hope for motivating the convicted offender to rehabilitate himself, and settles for the punitive tactic of incarcertaion for a fixed,

determinate term, the illusory concept of "deterrence" and use of the sentence for the supposed fear-creating values of (Sec. 2003 (a)(2) (C)) "to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense." In so doing, it reflects a disillusioned view reflected to some extent in the literature dealing with sentencing, probation, and parole, but which nevertheless minimizes the creative types of sentencing that do offer hope for rehabilitation and a lessening of recidivism for a significant number of those convicted of breaking the law.

The concepts of determinate sentencing, lessening or ending of parole, and the other "tough" views of sentencing exemplified by S. 1437 did not, of course, come from nowhere. One important source for these views is the book by Judge Marvin E. Frankel, Criminal sentences: *Law Without Order*, Hill and Wang, New York, 1973). These views have been summarized in two important articles by Richard A. McGee, president of the American Justice Institute, Sacramento, California: *A New Look At Sentencing, Part I* 38 Federal Probation, No. 2, June 1974, pp. 3–8: *A New Look at Sentencing, Part II*, 38 Federal Probation, No. 3, September 1974, pp. 3–11.

Nevertheless, despite these views (which must be regarded as minority views), penological experts do *not* have the hopeless, vindictive point of view toward offenders which is exemplified in actuality by S. 1437 (even though some of its proponents, including Senator Kennedy will disclaim any such intention).

Thus, Judge Lawrence W. Pierce, U.S. District Judge, Southern District of New York, in a keynote address delivered August 12, 1973, at the Annual Meeting of the American Correctional Association, Seattle, Washington (38 Federal Probation, June 1974, No. 2, pp. 14–23) expressed hope and confidence that rehabilitation and lessening of recidivism *is* possible, albeit not in prison. He told his audience:

"I propose that we consider shorter prison sentences for offenders who are convicted of crimes which do not involve violence or acts of moral turpitude: I proposed that we consider yet another use for the isolated rural prisons that dot the landscape in most of our states; and I propose that we consider an implementation of the community-based center concept structured on a truly noncoercive basis."

Speaking from his vast expertise as a distinguished federal district judge, and addressing himself without illusions to the problem of the dangerous offender (a problem fully recognized by this writer), Judge Pierce, after having urged expanded use of the community-based center concept of correction, stated (38 Federal Probation at 18:

"Now, clearly there are serious questions to be raised with respect to such an approach:

"(1) The most glaring problem is the dangerous offender. Any person who has demonstrated through his prior acts that he is a danger to others has to be incapacitated. Accurate identification of such persons is the core of the problem * * * Suffice it to say as I have indicated that the greater number of persons sentenced to prison in a given year are convicted of nonviolent crimes—as many as 90 percent of our Federal offenders sent to prison and 63 percent of those sent to State prison. It is from among these offenders that one would expect to find prime candidates for this approach.

"(2) A major problem would be gaining community acceptance of community-base centers. This will not come easily. I am one of a handful of administrators who can make that statement from firsthand knowledge, having presided over the setting up of one of the first major community-based center networks in the country. A great deal will depend upon a judicious selection of sites, skillful community organization work to promote understanding of the purposes of the centers, and careful screening out of those offenders who would be likely to fulfill the dire predictions which are certain to be made. And it must be acknowledged that even with the best of screening, mere assignment to such a program is certainly in and of itself not going to convert convicted offenders into model citizens any more than present correctional efforts do."

Other experts have expressed similar views. The President's Commission on Law Enforcement and the Administration of Justice conducted in 1972 one of the most comprehensive studies ever made on the American correctional system. Community-based programs, the Commission concluded, were by-and-large less costly than institutional incarceration and usually at least as effective in reducing recidivism and in some cases significantly more so. See Claude Pepper, Chairman, Select Committee on Crime, U.S. House of Representatives, 36 Federal Probation, December 1972, No. 4, 34. Congressman Pepper called for pro-

bation in lieu of incarceration (p. 5), for parole supervision (p. 6), for halfway house use (p. 7), work release (p. 7), and for other innovative and creative methods of motivating the offender to be law-abiding.

For other explanations of the vital role which diversion of offenders to community-based programs will have, see, *e.g.*, Robert M. Carter, Director, Center of the Administration of Justice, University of Southern California, Los Angeles, *The Diversion of Offenders*, 36 Federal Probation, December 1972, No. 4, pp. 31–36; John M. Pettibone, Director, Division of Parole and Probation, Maryland Department of Public Safety and Correctional Services, *Community-Based Programs, Catching Up With Yesterday and Planning for Tomorrow*, 37 Federal Probation, September 1973, No. 3, pp. 3–6.

In an important policy statement, the Board of Directors, National Council on Crime and Delinquency, strongly recommended that the nondangerous offender should not be imprisoned. 21 Crime & Delinquency 315–322 (October 1975, No. 4). The NCCD there urged diversion of the nondangerous offender to community-based programs (pp. 318–319). For other helpful articles, see Sol Rubin, Probation or Prison: *Applying the Principle of the Least Restrictive Alternative*, 21 Crime & Delinquency, pp. 331–336 (1975); David Gilman, Counsel, National Council on Crime and Delinquency. *The Sanction of Improvement: For Whom, for What, and How*, pp. 337–347 (1975).

These hopeful, innovative programs offer the way out of the nation's dilemma about what to do about crime. They should be resorted to. It is here that hope for curbing crime through use of sentencing and the correctional apparatus truly lies.

The mandatory minimum sentences imposed in accordance with guidelines to be established by a Sentencing Commission reflecting the views ultimately of the Judicial Conference and the conference's chairman, Chief Justice Warren Burger, offers at most a temporary stop-gap. Certain offenders, admittedly, will be taken out of circulation in the community for a certain period of time. Economic conditions will inevitably create other troubled human beings in the same pool of sociological problems. And meanwhile, those who are incarcerated and subjected to the only "solution" offered by S. 1—simply "storage" in prisons—will be subjected to the lessons to be learned in those prisons described in 1967 in this conclusion by the President's Commission of Law Enforcement and the Administration of Justice:

"Life in many institutions is at best barren and futile, at worst unspeakably brutal and degrading. To be sure, the offenders in such institutions are incapacitated from committing further crimes while serving their sentences, but the conditions in which they live are the poorest possible preparation for their successful reentry into society, and often merely reinforce in them a pattern of manipulation or destructiveness." (President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, Washington, U.S. Government Printing Office, 1978, 1967, p. 159; quoted in Pepper, *Prisons in Turmoil*, 36 Federal Probation 3 (Dec. 1972, No. 4).

It is futile and illusory to expect that a prison sentence, even one of determinate length, or one pursuant to a mandatory minimum sentence in accordance with Sentencing Commission guidelines and directives, will change the susceptibility toward criminal conduct by one exposed to these brutalizing conditions.

XII. THERE IS DENIAL OF PROCEDURAL DUE PROCESS OF LAW AND VIOLATION OF OTHER RIGHTS OF DEFENDANTS IN PERMITTING THE GOVERNMENT TO APPEAL THE LENGTH OF SENTENCES

Section 3725, p. 257, gives either the defendant or the government the right to file an appeal challenging the final sentence imposed for a sentence. This is a commendable improvement over existing law so far as the right of the defendant to appeal a sentence is concerned. It is quite otherwise where the new right given the government is concerned. The government has this right under Sec. 3725(b) "if the sentence includes a fine or a term of imprisonment or a term of parole ineligibility lower than the minimum established in the guidelines that are issued by the Sentencing Commission.

H.R. 2311 properly permits only an appeal *by the defendant* of a sentence (Sec. 3725). The defendant may so appeal regardless of the fractional amount of the maximum authorized sentence which has been imposed. Further, under H.R. 2311 an appellate court may not increase the sentence. The standard of review under Sec. 3725(c) is whether the sentence is "excessive, having regard for (1) the nature and circumstances of the offense and the history and characteristics

of the defendant; (2) the purposes of sentencing required to be considered * * * and (3) the opportunity of the district court to observe the defendant."

The writer has elsewhere reviewed the constitutional problems raised by this right to be given the government to appeal the length of sentence. These include questions of double jeopardy, see, *e.g., Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874), as well as the potentiality for retaliatory cross-appeal by the government, made as a matter of course, whenever convicts seek review of their sentences. This clearly constitutes a deprivation of due process by chilling a convict's exercise of his right to appeal. See, Crystal, *The Proposed Federal Criminal Justice Act of 1975: Sentencing—Law and Order With A Vengeance*, 7 Seton Hall Law Rev. at 70–80.

XIII. SENTENCING DISPARITY MAY BE REMEDIED WITHOUT ABANDONING CREATIVE METHODS OF SENTENCING AFFORDING HOPE FOR REHABILITATION

There is no challenge made here that disparity in sentencing calls for significant changes to be made in our sentencing procedures. That unmistakable fact does not justify, however, the regressive approach taken in S. 1437 which would abandon virtually all innovative, creative methods of sentencing (albeit lip service is paid to these methods, e.g., Sec. 991(b)(1)(C) directing the Sentencing Commission to establish sentencing policies and practices which will, *inter alia*, "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."

There is clearly room for modifying the elements in existing sentencing practice which make for disparity in sentencing:

"There is a so-called 'indefinite' sentence with a maximum fixed by the judge and an automatic one-third of that maximum for parole eligibility. Or, there is a so-called 'indeterminate' sentence, the judge fixing both minimum and maximum Third choice—the judge may fix the maximum and provide that there shall be no minimum. Fourth—commitment for the maximum allowable by law, subject to a study and return to court for possible reduction of the term. Then if the defendant is under 26 years of age there are several more choices. There are few if any states with such a variety of forms of commitment." (Sol Rubin, "Federal Sentencing Problems and the Model Sentencing Act", 41 Federal Rules Decisions 506, at 507, 1967).

Unquestionably, there is value in establishing a Sentencing Commission (provided its members are appointed by the President with the advice and consent of the Senate, thereby assuring democratic control over the Commission rather than being made part of the judiciary and designated by the Judicial Conference as is unwisely provided in S. 1437). Such a democratically appointed and established Commission could establish a uniform system of sentences to eliminate the contending varieties now existing in the federal system. However, it should and must lessen sentence variability without going to the other extreme so as to achieve an illusory and false uniformity. Each defendant has a different background to be evaluated by the district court's expertise aided by efficient pre-sentencing reports. Individualization of sentencing must be permitted to continue. The ABA Standards make clear that the norm should *not* be imprisonment. There should be full utilization of community-release and other hopeful programs where the defendant is nondangerous. The bias which S. 1437 shows in favor of determinate sentencing required to be served without probation, parole, release to a community-based program, or other correctional alternative to imprisonment is unwise and should be rejected.

S. 1437 plainly and unmistakably exhibits excessive zeal to reject hopeful concepts of creative and innovative sentencing. The concept of imprisonment which is basic to the sentencing structure of S. 1437 is in actuality a retreat to the mistakes of the past. Conceding readily that the dangerous offender requires imprisonment, one must demand explanation why community-based programs which do offer a hope for rehabilitation of the non-violent offender are so completely minimized in the sentencing philosophy that permeates S. 1437. When the specific sentencing provisions of S. 1437 are analyzed, they come down to no more than determinate sentencing, mandatory minimum sentences, and severe (and unjustified) restrictions upon the grant of probation and parole. Just as the child in Hans Christian Anderson's tale of the *Emperor's New Clothes* saw with clear vision (and said so publicly) that the emperor was naked, so it must be stated with candor that S. 1437 offers little in its sentencing scheme other than incarceration of offenders under guidelines to be established by appointees of a

Judicial Conference dominated by Chief Justice Warren Burger. The decisions of the Burger Court majority which have virtually raped the Constitution and have precipitously retreated from the decisions of the Warren Court protecting the legal rights of defendants in criminal trials stand as ominous omens of the hardnosed guidelines for sentencing which may reasonably be expected to be promulgated by a Sentencing Commission appointed and created in Warren Burger's image.

Admittedly, the claims made for the Sentencing Commission and the emotional impact upon a populace fearful of street crime to be assured that criminal offenders will go to prison for determinate sentences will have political advantage. That is hardly a valid reason for justification of a federal criminal code that demonstrably turns its back on virtually all advances made in penology and correction. It appears clear that a legitimate concern about disparity in sentencing is being skillfully manipulated to minimize or reject hand-won lessons that diversion of the offender to carefully supervised community programs offers real hope for winning the offender away from a life of crime and recidivism.

The innumerable fallacies inherent in the sentencing scheme of S. 1437 become readily apparent when the correct questions are asked. What happens to unclogging the already overcrowded courts, particularly the appellate courts in the federal judiciary, if there is to be appeal of any sentence exceeding the Sentencing Commission guidelines? Either the courts will be flooded with appeals and further clogged, or the district courts will be coerced into abandoning individual sentencing and appraising the likelihood of rehabilitation of the particular defendant, and imposing instead the sentence coming within the Sentencing Commission standards. That will of necessity mean that the Sentencing Commission becomes the ultimate arbiter of sentencing in the federal system, and that it will be the Sentencing Commission, not Congress, which makes policy in this important area of criminal law. Can there be economy in prison costs if incarceration (another term for simple storage of human beings) is to be the norm for non-violent as well as violent offenders? Are we to engage in an ever-increasing program of building prisons to house the inmates sent to prison to meet the S. 1437 and Sentencing Commission guidelines of Sec. 2003(a)(2)(C)—the claimed need of the sentence "to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense"?

Is this not simply the law and order approach voiced by former President Richard M. Nixon, who decried the "sense of permissiveness" that characterized America in the 1960's and who contended that "the only way to attack crime in America is the way crime attacks our people—without pity."?

And is effective control of the sentencing policies of this country to be delegated to the appointees of a secret, all-powerful group of jurists chaired and dominated by a chief justice who has presided over a Supreme Court majority which has steadily dismantled the constitutional protections laboriously erected by the Warren Court?

It appears clear that, despite the overwhelming public opposition that blocked enactment of Senate Bill No. 1 in the last Congress, there is now an attempt being made to form a wholly improbable alliance between liberals and conservatives (under the claim of compromise of opposing positions) that will in actuality effectively surrender meaningful power over sentencing policies to Chief Justice Burger and a Supreme Court majority whose restrictive views of constitutional rights have by now been made shockingly plain to those who value constitutional freedoms.

Professor Carole E. Goldberg of UCLA's Law School, Co-Chairperson of Southern California ACLU's National Legislation Committee, has warned that S. 1437 is "fraught with serious omissions, uncertainties, deferrals, lost opportunities, and reductions in civil liberties." Those same defects permeate the sentencing provisions of the bill.

XIV. THE PROVISIONS FOR MULTIPLE SENTENCES OF IMPRISONMENT

Sec. 2304, dealing with multiple sentences of imprisonment, provides that where multiple terms of imprisonment are imposed on a defendant at the same time, or where a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively (1) if the offense consists of a Chapter 10 offense (criminal contempt, criminal con-

spiracy, or criminal solicitation, and another offense that was the sole objective of the attempt, conspiracy or solicitation, and (2) for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

Multiple terms of imprisonment run concurrently unless the court affirmatively orders otherwise. If multiple terms of imprisonment are ordered to run consecutively, and included terms of parole ineligibility also run concurrently. It the terms are ordered to run consecutively, the maximum aggregate term may not exceed the maximum authorized term for an offense one class higher than that of the most serious offense of which the defendant was convicted. (Sec. 2304(c)).

Sec. 2304 of H.R. 2311 while closely paralleling Sec. 2304 of S. 1347, does nevertheless vary in important respects, most notably the fact that it does not in every instance permit aggregation of all offenses to create a maximum term one class higher than the most serious offense for which the defendant was convicted. As explained by Congressman Kastenmeier, setting forth the terms of the predecessor House bill, H.R. 10850, a person found guilty of two or more Class C felonies may be sentenced to the maximum authorized for a Class B felony *if* each offense was committed as part of a different course of conduct or if each involved a substantially different criminal objective. Class D felonies may be similarly aggregated to the maximum authorized for a Class C felony, and Class A misdemeanors may be aggregated to the maximum authorized for a Class D felony. No other offenses are subject to aggregation beyond the maximum authorized for the most serious offense involved. This approach was recommended by the Brown Commission. See, Kastenmeir, *Cong. Record*, February 24, 1976, H 1275; H.R. 2304(c).

The criteria imposed by S. 1438 on courts in determining whether consecutive or concurrent sentences should be imposed are the same harsh criteria used in determining the lengths of sentences and the appropriateness of probation, i.e., Sec. 2304(b) dealing with factors to be considered mandates the district court to consider the factors set forth in Section 2003(a). Here again, the court is referred to criteria, which include the "need . . . to reflect the seriousness of the offense," and to "promote respect for law" (Sec. 2003(a)(2)(C)). These fail sufficiently to restrain federal courts from aggregating sentences to the point of injustice. See Crystal, *The Proposed Federal Criminal Justice Act of 1975: Sentencing—Law and Order With a Vengeance*, 7 Seton Hall Law Rev. at 49–52.

It is the ABA's position that "[c]onsecutive sentences are rarely appropriate. (ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures. §3.4(b) (Approved Draft 1968).

Such sentences can ordinarily only be justified in cases involving habitual offenders because of the risk such offenders pose to the public.

It should also be noted that, in addition, Section 1823(b) of S. 1437 overrides the discretion-granting provisions of Section 2304 by compelling the imposition of consecutive sentences for any other term of imprisonment imposed upon the defendant, unless the defendant meets specified criteria, i.e., that at the time of the offense he was under eighteen years of age; his mental capacity was significantly impaired although not sufficiently to constitute a defense to prosecution; he was under unusual or substantial duress, although not sufficient duress to constitute a defense to prosecution or he was an accomplice, the conduct constituting the offense was principally the conduct of another person; and his participation was relatively minor (Sec. 1823(a), p. 157).

S. 1437 is wholly remiss in its failure to limit by statute cumulative sentencing to *only* those truly exceptional cases where the protection of the public *requires* the long-term sequestration of an offender. Under no circumstances should the sentencing be mandatory, *viz.*, Sec. 1823(a). S. 1437 is deficient in this important aspect of sentencing.

XV. SURREPTITIOUS OVERRIDING OF FEDERAL YOUTH CORRECTIONS ACT BY S. 1437

One of the far from obvious booby-traps of S. 1437 is that it effectively overrides the Federal Youth Corrections Act of 1950 (18 U.S.C. 5005–5026). The Sentencing Commission is given power to make guidelines, including consideration of the age of the offender. Sec. 994(d)(1) *et seq.* of Chapter 58 of S. 1437. The bill does not include the Federal Youth Corrections Act, so that it appears

clear that the Sentencing Commission provisions will preempt the earlier Federal Youth Corrections Act.

The latter act, adopted in 1950, was one of the great experiments in federal sentencing. It was initiated to provide "treatment and supervision" rather than imprisonment for youthful offenders committed to the Attorney General. 18 U.S.C. 5005–5026. See also, *Dorszynski* v. *United States*, 418 U.S. 424 (1974). The Great experiment has not worked as well as was hoped, but it nevertheless does permit some specialized consideration and even possible treatment for youthful offenders, a person under the age of 22 years at the time of conviction (18 U.S.C. 5005(e)), and such treatment can even be extended to persons who have not yet obtained their 26th birthday at the time of conviction (18 U.S.C. 4209). This is of particular importance since the unemployment of youth, particularly of minority youth in the Inner Cities, is a disturbing cause of crime. A youthful offender may be granted probation or sentenced to an indefinite term of confinement not to exceed four years' custody followed by two years' special parole which could in effect be a total of six years' confinement. The average sentence now spent by a person under the Federal Youth Corrections Act is approximately 18 to 24 months in confinement. The Special Committee on S. 1 of the California State Bar Association observed that because of the inadequate Bureau of Prisons' facilities, these youths are not isolated and are handled with the general adult prison population. (It may be noted that since homosexual abuse of young prisoners is a problem in a prison community this presents a serious threat). The committee further noted that one very serious defect of this legislation is that it can be applied to a misdemeanor offense as well as a felony. *United States* v. *Leming*, —— F. 2d —— (9th Cir. 1975): *United States* v. *LaRue*, —— F.2d —— (9th Cir. 1975). The committee found the principal asset of this important legislation to be a provision for a certificate to set aside conviction upon completion of the expiration of sentence or completion of probation. 18 U.S.C. 5021. The certificate setting aside sentence has somewhat dubious effect on state law. However, it has given an important advantage for legally admitted alien residents who have been involved in a narcotics transaction involving a small amount of narcotics. These defendants have been granted an exception to the general rule requiring automatic deportation for trafficking in narcotics. In *Tatum* v. *United States*, 310 F.2d 854 (D.C. Cir. 1962), the court (which included Chief Justice (then Circuit Judge) Berger as a member of the panel) held that such a certificate was an expungement and better than a pardon. If the Federal Youth Corrections Act is permitted to be utilized, the future may witness achievement of the beneficial Congressional purpose in enacting this important statute.

However, S. 1437 (like its predecessor bill, S. 1) completely eliminates the provisions for the Federal Youth Corrections Act.

Considering the legal effect of the failure of S. 1 to provide for continuation of the Federal Youth Corrections Act, the Special Committee on S. 1 of the California State Bar Association advised that Association that its opinion and recommendation on this issue was as follows:

"In light of the Draconian range of penalities in S. 1, the provisions of the Federal Youth Corrections Act merely affords an option to the sentencing judge who may impose the regular sentence. 18 U.S.C. 5010(d). The elimination of this worthwhile legislation for youthful offenders is a serious deficit, and no alternative for youthful offenders is a serious deficit, and no alternative is offered by S. 1. The Committee recommends against the sentencing provision of S. 1 for failure to include such a provision."

The recommendation has continuing validity. No more than S. 1 did does S. 1437 provide for continuation of this innovative and creative legislation which affords real hope for youth which has come into conflict with the criminal law system. Instead, this legislation is obviously to be subsumed into the jurisdiction of the Sentencing Commission. And once again, it becomes clear that the ultimate determination is to be made by appointees of a Judicial Conference controlled and dominated by Chief Justice Warren Burger, and who can be handpicked to reflect his views, similarly to the manner in which the four Nixon appointees on the Supreme Court were carefull chosen by that disgraced former President to represent his "strict construction" views of law and the Constitution.

CONCLUSION

The foregoing analysis has attempted to deal in some depth with the major sentencing provisions of S. 1437. Of equal importance, it has sought to confront

the underlying sentencing philosophy of this omnibus proposed federal criminal code. What has turned up in instance after instance has been retrogression, overkill, zeal for imprisonment, and a harsh, retributive sentencing philosophy totally at odds with the approach which holds out real hope for an end to the vicious cycle of arrest, incarceration, release to the streets without hope of employment or inner motivation, recidivism, and re-arrest and re-incarceration.

There is nothing wrong with the concept of assured punishment as a deterrent, but the bias and prejudices which permeates S. 1437, just as it did S. 1, is for retribution, revenge, simple storage and incarceration of law breakers, and an unfounded hope that such imprisonment will somehow teach the offender a lesson, or at least "reflect the seriousness of the offense," "promote respect for law" and "provide just punishment for the offense." Sec. 2003(a)(2)(C). Simple imprisonment has not worked in the past. S. 1437 offers no real hope it will work in the future. The sentencing provisions of S. 1437 are simplistic and bottomed essentially upon the premise that the crime problem of this country will somehow be alleviated if enough persons are incarcerated. The approach is self-defeating. Existing prisons can be filled past capacity (inviting a future Attica). More prisons can be built (and undoubtedly will be if S. 1437 becomes law). Yet so long as the mechanical concept of false unformity implicit in S. 1437, and equally so in the Sentencing Commission it envisages, are accepted as guidelines for sentencing policy in the federal criminal law system, there will be no real alleviation of the problem of crime. The difficulty is that there is a seemingly inexhaustible supply of fresh candidates for incarceration in the federal (and state) prisons and jails as long as the social problems that are the root causes of crime remain unsolved.

There is no disagreement here with the wisdom of incarceration for a long prison term of the truly dangerous offender. Society must be adequately protected. However, that is not what S. 1437 limits itself to. *All* offenders are to be swept up in its mechanical, juggernaut approach. The all-powerful Sentencing Commission is to establish guidelines. The overwhelming probability is that those guidelines will reflect the harsh, vindictive views of sentencing and of the Constitution that may be expected from the architect of the Burger Court majority and its startling view of the Bill of Rights and constitutional freedoms.

"S. 1 cannot be adequately amended to avoid creating serious voids and retrogressions in existing federal criminal practice, and the Committee recomends that the State Bar make every attempt to defeat this unwise proposed legislation."

That conclusion is equally applicable to S. 1437. The legislative "compromise" which has converted S. 1 into S. 1437 has failed to remove the taint of the antidemocratic, repressive approach toward criminal law and civil liberties which permeated S. 1, and which still infects S. 1437. And that taint is equally prevalent in the sentencing provisions, as the foregoing analysis has made clear.

The sentencing provisions of S. 1437 emerge, upon analysis, as retrogressive, unworkable, illusory, and unwise. The concern of the public about violence and crime, particularly street crime, is concern over a serious national problem. However, S. 1437, like S. 1 before it, offers simplistic panaceas, in the form of determinate sentencing, restrictions on probation and parole, a skewing of correctional approaches away from such hopeful concepts as diversion of the offender to carefully supervised community programs. The seemingly "tough" approach exemplified by S. 1437 will work no better than did the incarceration of the prisoners sent to Attica, Rahway, Trenton State Prison, or any of the other gloomy cages for men and women that have utterly failed to do anything more than put those convicted of crime out of sight and mind for a certain period of time.

But beyond even the harshness and vindictive approach which mar S. 1437, and which will unquestionably mold the guidelines to be promulgated by the Sentencing Commission which is touted as the major reform of S. 1437 lies a constitutional crisis of unprecedented dimensions.

Congress has the constitutional obligation to formulate legislation. The Constitution does not provide for delegation of that authority to the judiciary, where the important area of a national policy about sentencing is concerned. Yet that is what is squarely involved in the indefensible provision of the Sentencing Commission provisions of S. 1437 (Sec. 991(a) (p. 301)), that the Sentencing Commission "shall consist of nine members *designated by the Judicial Conference of the United States.*" To enact this proposal will be to surrender control over sentencing policy to a tight, secretive group of jurists, the Judicial Conference, dominated by their chairman, Chief Justice Warren Burger, and who will have

the opportunity to designate as members of the Sentencing Commission those who will reflect his views, and those of his colleagues comprising the Burger Court majority. This abdication of legislative responsibility will, if enacted, effectively delegate to the most repressive element in the federal judiciary policy-making which is constitutionally the province and the responsibility of Congress.

This is not legislation. It is instead indefensible capitulation to the type of stifling of Bill of Right protections which has typified the decisions of the Burger Court majority. The purported compromise of S. 1 is thus seen to emerge as an unprecedented grant of delegated power to the Burger Court majority through the device of delegating authority over sentencing and the making of binding guidelines upon a Judicial Conference answerable only to itself and tightly controlled by Chief Justice Warren Burger.

Nowhere in the Constitution, our great charter of freedom, is such delegation of legislative power to the judiciary sanctioned. And this Congress should defeat this startling power grab by the judiciary.

Dark Doings Among the Judges

(By John P. MacKenzie[1])

"Sunlight," said Justice Louis D. Brandeis, "is the best of all disinfectants." Yet one enormously influential body of high-level jurists, the Judicial Conference of the United States, has been meeting in the dark for so many decades that by now one almost hesitates to throw its proceedings open to the cleansing sunlight and fresh air.

Twice a year, this government-financed body meets secretly in a large, rarely used room in the cavernous Supreme Court Building—that awesome edifice in which even the great Brandeis said he felt uncomfortable, and where, Justice Harlan Fiske Stone complained, the Justices perch like "nine black beetles in the temple of Karnak."

But why should the public care about this secret society of a few dozen eminent judges? Why not just let the judicial "beetles" doze away on their perches, safe from the glare of publicity?

The answer is that, whatever its original intended functions, this conference of respected jurists, chaired and guided by Chief Justice Warren Burger, has slowly become a secret lobby, a powerful policy-shaping instrument that is in no way accountable for its often questionable actions.

Not content with lobbying for higher salaries for judges (a perhaps understandable preoccupation), the group has lately gone on to influencing congressional deliberations on wiretap legislation and similar key policy matters. As things stand, the Judicial Conference is fast becoming a secret governmental force to be reckoned with.

Both the conference and the edifice in which it meets are monuments to William Howard Taft, who was Chief Justice from 1921 until he died in 1930, too soon to see the shrine built, but not too soon to launch the judicial organization and become its first presiding officer. Taft was an activist Chief Justice, though an advocate of what is called "judicial restraint" in deciding whether courts should intervene in any but the most conventional kinds of legal disputes. Until recently, Taft was probably the undisputed titleholder of "foremost empire builder" in American judicial history since the Founding Fathers. A modern challenger is the current and fifteenth Chief Justice, Warren E. Burger, whose designs for a more "efficient" and less activist federal bench often are first aired—if that word can be applied to the hermetically sealed meetings—before the U.S. Judicial Conference.

Chief Justices have many collateral duties thrust upon them, but Burger, who has sought and gained more renown as a judicial administrator than as a jurist, has accepted the conference chairmanship with gusto and spends long hours on its work. The members (11 chief judges of the regional U.S. courts of appeals, 11 federal district judges elected by their peers from those same regions, and representatives from claims and patents courts) often are no match for a well-prepared presiding officer, even if the judges were inclined to resist his leadership.

---

[1] John P. MacKenzie, former Supreme Court reporter for The Washington Post, is currently studying clients of legal services programs under a grant from the Edna McConnell Clark Foundation.

What does the conference actualy do? An attempt to help outsiders find out was quietly launched a few years ago—and just as quietly buried last year. James E. Doyle, a U.S. district judge in Madison, Wisconsin, advanced the modest proposal that the conference meetings be thrown open to the public. He told his colleagues that after attending a number of these meetings as a conference member, he couldn't think of any discussion he had heard that couldn't have been held in the open. His proposal was drowned in apathy and opposition led by Burger. The subject itself became classified. Burger refused to discuss the details. Terrified staff members, taking that cue, were struck dumb when questioned. Judge Doyle himself found the topic too hot to talk about. "No comment," he replied to inquiries. Was he the initiator of such a proposal? "No comment on that either," he answered.

The closest to a reasonable explanation was an on-the-cuff remark by Burger to a group of news reporters. Asked what prevented the opening of the conference to the public, he replied, "Would you open up the editorial conference of your newspaper to all members of the public?" The questioner protested that the press was not part of the government (and thus not bound to do what the Constitution might require of government institutions). "Oh, you're *not* government?" Burger quipped, "I thought you were the fourth branch of government." It was reminiscent of Burger's frequent comments from the bench during a recent series of First Amendment cases. He never tired of noting the irony that the press was seeking confidentiality for its informants but was unwilling to let the government take "effective steps" to protect *its* secrets from the prying press.

Whether or not the press can be likened to government, there's little doubt that the Judicial Conference performs important governmental tasks—judicial, legislative, and executive. It has come a long way since 1922, when Congress heeded Taft's call for a body to cope with case-load arrears and possibly do something about the disparity among courts in their sentencing of convicted criminals. Those two problems remain as baffling as ever, but the conference has branched out into other fields. One is lobbying, and not just for higher federal-court payrolls. One recalcitrant congressman predicted early that the conference would become "a legally constituted and publicly financed propaganda organization on behalf of the federal judiciary." His predictions have been borne out several times.

One notable instance occurred in 1967, when the conference, then led by the late Chief Justice Earl Warren, voted to volunteer its views to Congress on the wisdom of then pending wiretap bills. It was an odd stance, one that came to light only in the fine print of the conference's report and the satisfied reactions of wiretap advocates. The conference, with its roster of senior and prominent jurists, could be expected to properly comment on the practicality of specific provisions in a bill, but this body went beyond that: it chose a pro-tap bill in preference to a bill banning all wiretapping, and it favored a bill that was clearly unconstitutional under existing Supreme Court precedents. Activists and advocates of judicial restraint alike let the resolution pass, since there was no recorded dissent. Subsequent inquiries by several members of the Judicial Conference as to what had happened yielded the inescapable conclusion that many of them had no idea of what they had done.

Chief Justice Warren and Chief Justice Burger have inspired many studies in contrast, but they are alike in their passion for conference secrecy. Congress could cool that passion by bringing the conference under the lash of disclosure and public access now required of government advisory committees and agencies by the Freedom of Information Act. The judicial branch is not covered by the information law—indeed, the alarming fact is that these same secretive jurists are the ones with power to say what that law means—but there is little reason to exempt the conference, especially when it is not performing strictly judicial work.

That was the view of former senator Sam J. Ervin, Jr. (D-N.C.). Like many other lawmakers, Ervin found other fields to conquer than the Judicial Conference. But he said this in 1970:

"They certainly do not act as judges when they vote to approve or disapprove of pending legislation, or adopt rules of financial disclosure for their colleagues. Why, then, should the conference meet in secret? I believe that when judges act as policy makers and lobbyists it follows that their discussions should be public. If the conference supports or opposes a bill, the Congress and the public should have free access to the conference's debate on that proposal. The Congress should know how carefully the Judicial Conference researches its positions so that it can attach relative weights to them."

WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM,
Cottage Grove, Oreg., July 6, 1977.

Senator JOHN MCCLELLAN,
Chairman, Senate Judiciary Subcommittee of Criminal Law and Procedures, Senate Office Building, Washington, D.C.

Be it *Resolved*, That

The Cottage Grove Branch of the Women's International League for Peace and Freedom urges defeat of S. 1437 because we feel it contains many elements of the universally opposed S. 1.

Specifically, we oppose the immunity provision which effectively subverts the Fifth Amendment by forcing testimony. We also oppose the wiretapping provision which requires and pays landlords and custodians to cooperate.

As a peace organization, we are especially concerned with the section entitled "Leading a Riot" which could be used against speakers crossing state lines.

We firmly believe in our right to peacefully assemble and peacefully demonstrate and the sections on demonstrations would infringe upon our rights guaranteed by the Constitution.

Our criticisms of S. 1437 are numerous. Therefore, we suggest that the subcommittee table S. 1437 and substitute it with the scholarly criminal code revision written by constitutional lawyers on the Brown Commission.

We ask that this statement be made a part of the public record of the June 1977 hearings on S. 1437.

Sincerely,

BIRDY HOELZLE,
Corresponding Secretary.

REPORT WITH RECOMMENDATIONS TO THE CRIMINAL JUSTICE SECTION COUNCIL FROM THE COMMITTEE ON CRIMINAL CODE REVISION, AMERICAN BAR ASSOCIATION—AUGUST 1977

RECOMMENDATION

The Committee on Criminal Code Revision, joined by the chairperson and vice chairperson of the CJS Committee on Sentencing, Probation, Parole and Reintegration of Offenders, request Council approval of the following resolution:

BE IT RESOLVED, That the Criminal Justice Section—building on ABA positions already taken on S. 1 (94th Congress) and in the ABA Standards for Criminal Justice—support sentencing provisions in S. 1437 (95th Congress), the pending Federal criminal code bill, to the following extent:

1. A Sentencing Commission should be created, but should be composed of 5 members—not 9, as the bill provides. Three members should be designated by the Judicial Conference of the United States and 2 appointed by the President with advice and consent of the Senate. (The bill provides that all members would be designated by the Judicial Conference.) Further, not more than 2 members should be judges; the other 3 should be broadly representative of the criminal justice system. (The bill provides no restrictions on the Commission's make-up.)

2. The committee approves the concept of guidelines which the Sentencing Commission would promulgate for use by sentencing courts in determining what sentence to impose. For the foreseeable future, however, these guidelines should only be advisory. Until reliable empirical data and experience have been gathered and examined, and until the content of the guidelines is known, drastic revision of present procedures should be implemented cautiously. While the committee does not support the guidelines enforcement mechanism in S. 1437—a defendant can appeal any sentence above the guidelines and the government any sentence below—it does support the already-existing ABA policy favoring appellate review of sentences.

3. S. 1437 provides the sentencing judge with the option of applying either an indeterminate or a determinate sentence. The committee supports this approach. When an indeterminate sentence is given, however, the committee believes that the sentencing judge—and not the Parole Commission—should arrive at a release date. The committee recognizes problems which have occurred with the existing parole system. The Committee proposes that the Parole Commission have the initial responsibility for undertaking a review of the release question and then prepare recommendations for presentation to the judge who handled the original sentencing decision. If, however, the parole commission does not act within a set period of time, or if, once having initiated an inquiry it decides

not to proceed, the judge can initiate action sua sponte. Action by the judge and by counsel would necessarily be governed in such circumstances by the Code of Judicial Conduct and the Code of Professional Responsibility.

REPORT

Background

The Committee on Criminal Code Revision has followed developments with respect to the introduction May 2 of the new federal criminal code bill (S. 1437, 95th Congress), which represents a carefully-structured compromise between conservative and liberal supporters. As the Council is aware, the section has been deeply involved in study of the proposed code since the initial drafts of the Brown Commission were available some eight years ago. The committee chairperson attended a series of hearings in June held by the Senate Judiciary Subcommittee on Criminal Laws and Procedure. These focused almost exclusively on the sentencing proposals in the bill—which would dramatically revamp existing federal sentencing procedures.

The committee has also reviewed S. 1437 vis-a-vis already-established ABA policies, including policy formulated in 1975 on S. 1 and positions contained in the ABA Standards for Criminal Justice. These policies already cover many key areas in the bill. The committee has also alerted other section committees to areas in the legislation covering subjects within their jurisdictions.

The ABA's present policies on sentencing (largely contained in the ABA Standards Relating to Sentencing Alternatives & Procedures) do not address the question of a sentencing commission, nor the concept of sentencing guidelines. The committee thus decided to focus on these provisions. Three committee members (8 were invited, but due to conflicts five were unable to attend) met July 9 with representatives of the CJS Committee on Sentencing, Probation, Parole and Reintegration of Offenders. Staff from the Senate and House Judiciary Committees and the Justice Department also attended. The committee carefully reviewed and discussed S. 1437's provisions proposing a Sentencing Commission and other sentencing sections. [Relevant pages of the legislation are attached to this report, as is a chart comparing ABA policy with S. 1 and S. 1437.]

Sentencing Commission

The bill provides dramatic revisions in the present federal sentencing system, aimed, according to its sponsors, at bringing fairness and certainty to the sentencing process and reducing disparities. S. 1437 would create a 9-person Sentencing Commission, with members designated by the Judicial Conference, and created as a part of the judicial branch. The Commission would establish guidelines to cover both offender and offense characteristics—including such factors as the nature and degree of the harm caused, the offender's role in the offense, the community view of the gravity of the offense, and the offender's family ties and responsibilities. [See attached Xerox of bill's provisions for complete list.] Judges would be obliged to consider the guidelines—but not necessarily to follow them. If the judge sentenced above the range or below it, however, reasons for doing so would have to be spelled out, and sentence appeal would be available to the offender (if above the range) and to the government (if below). Government appeals would have to be approved by the Attorney General or his designee.

The present draft of S. 1437 retains the parole system; but remarks by Attorney General Bell and others who have urged abolition of the system appear to have made it likely that the bill will be amended to phase out parole.

Comments on committee recommendations

At its July 9 meeting, the committee carefully examined the bill's provisions for a Sentencing Commission and related features. Many members had serious doubts about the workability and effectiveness of a sentencing guidelines system. While recognizing that sentencing disparities exist, the committee felt that individualized treatment of persons coming before the sentencing court is essential—and that a guidelines system could lead to a mechanized decisionmaking process. Use of alternatives to imprisonment, in particular, do not appear to be sufficiently recognized in the legislation. After much debate, the committee arrived at the recommendations outlined at the beginning of this report.

The committee supports the concept of a Sentencing Commission but feels this body would be more workable if reduced to 5 members. Nine members would

perpetuate the numerical make-up of the Parole Commission, perhaps inappropriate in light of the new approaches. The committee feels strongly the Commission must represent all segments of criminal justice and not reflect only a judicial voice. It recommends that the bill specify that no more than 2 members may be judges, and that the remainder be named from diverse segments of the system—such as defense lawyers, prosecutors, penologists, and correctional personnel. S. 1437 further provides that the Judicial Conference of the U.S. name all members. The committee is aware of the sentiment widely expressed during the June hearings that all members of the Commission be Presidentially-appointed. The Committee suggests that a mixture of selection methods—with 3 designated by the Conference and 2 appointed by the President with advice and consent of the Senate—will increase the body's representativeness and lessen its becoming a political vehicle.

The committee debated at length the desirability of sentencing guidelines. Several members were deeply concerned over the ability of guidelines to cover all offenders. Some questioned whether guidelines would depersonalize the sentencing process and institutionalize decisionmaking.

The committee finally agreed, however, that a sentencing guidelines system should be tried—but only on an advisory basis for the foreseeable future. This is particularly critical because, until the legislation is enacted and the Sentencing Commission created and operational, no one knows what the guidelines will contain. Further, if instituted initially on an advisory basis, empirical data can be compiled on experience with their use. Until then, the committee does not believe the guidelines should be enforced, as S. 1437 provides, by appellate review of sentences outside the guidelines.

The question of determinate sentences was also examined by the committee. It agrees that the indeterminate sentence has received deserved criticism. There is a lack of certainty for both the offender and for society. However, the committee supports the approach contained in S. 1437, wherein both options are available to the sentencing judge. When an indeterminate sentence is given, the committee does not favor the Parole Commission's setting the release date, since it recognizes the host of problems which have plagued the present parole system. The sentencing judge should make the release decision, based on investigation and recommendations of the Parole Commission. If the Commission refuses to initiate this process by a set time, or having started it refuses to carry it forward, the judge would be authorized to act *sua sponte*. Recognizing potential problems, the committee has also made special note of the fact that behavior of both judge and counsel under such circumstances must be governed by the Codes of Judicial Conduct and of Professional Responsibility.

The committee also supports provision of sufficient research monies to the Justice Department's new Office for Improvements in the Administration of Justice to permit it to undertake badly-needed empirical research on the federal level on use of the proposed sentencing guidelines system. If the Department is unable to undertake this or if such is not available, perhaps other public monies or private foundations may be applied to for grants to accomplish these ends.

The committee discussed additional areas which are not presented to the Council for action, since they represent subjects on which the Association has already taken a position. For example, the committee strongly reasserts the ABA's prior objection (in 1975 S. 1 policy) to the fact that the bill contains no presumption for probation. The use of probation and alternatives to imprisonment is an underlying concept of the ABA Standards on Sentencing Alternatives and Procedures. The committee also reasserted ABA support for appellate review of sentences, policy spelled out in the ABA Standards for Appellate Review of Sentences.

Congressional timetable

It would appear that full Senate Judiciary Committee action on S. 1437 will not occur until after the August recess. Senate floor action by October seems debatable. Even if passed by the Senate, House consideration is unlikely to begin before the Second Session of the 95th Congress. There is thus opportunity for timely Section and ABA action on these provisions of the proposed federal criminal code.

Respectfully submitted,

WILLIAM GREENHALGH,
Chairperson, Committee on
Criminal Code Revision.

UNIVERSITY OF CALIFORNIA, BERKELEY,
SCHOOL OF LAW (BOALT HALL),
Berkeley, Calif., December 30, 1975.

Senator PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: I am responding to your letter of December 15 concerning section 1302 of S. 1.

I agree with your staff that the courts could construe this offense as not applying to protected first amendment rights to assemble and petition the government. The crux is, as your letter suggests, that the conduct must be "intentional" to constitute the offense. As the committee report points out, and as apparently specified by § 1302(a) in the bill, this means that to establish the specified offense the government would have to prove "that the offender had a conscious objective or desire to obstruct or impair a function and to do so by physical interference or obstacle." Particularly in light of the first amendment concerns, this would seem to be the appropriate construction of the statute by its own terms. Buttressed by the explicit statement in the committee report, this outcome seems to be as clear as possible at this stage. On this basis, I believe that the passage of the ACLU Statement which you quote in your letter is wrong.

On this basis also I believe that this offense would not be subject to a valid vagueness or overbreadth attack. As to vagueness, the terms used in the section seem to me sufficiently clear and specific, both to give notice to individuals who may be involved and to provide the means for judicial check on arbitrariness of officials. Indeed, I find it hard to conceive what more specific terms could be used to accomplish the legitimate purposes of this section. As to overbreadth, while I suppose that one could not be certain that the provision by its terms could not encompass some protected activity, it does not seem to me that the section is vulnerable to a charge of "substantial overbreadth" such as would be necessary to invalidate it on its face. This is particularly true because the thrust of the provision as drafted is not directed toward speech or assembly activity. (Of course, if in particular circumstances there was an effort to use this provision to prosecute individuals for conduct which is protected under the first amendment, the courts would presumably hold that the statute could not validly apply to such conduct. But that of course—desirably—is true for any statute.)

I hope you find this helpful.

Sincerely,

PAUL J. MISHKIN,
Emanuel S. Heller, Professor of Law.

UNIVERSITY OF PITTSBURGH, SCHOOL OF LAW, *June 9, 1977.*

Hon. JOHN MCCLELLAN,
U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: I have recently had the opportunity to review the Criminal Code Reform Act of 1977, S. 1437, H.R. 6869, and believe it to be a substantial improvement over S. 1 introduced in the 94th Congress. Your personal commitment to the concept and necessity for recodification of our Federal criminal laws is highly commendable, and your perseverance and hard work in preparation of S. 1437, H.R. 6869 is greatly appreciated by all those who understand the magnitude of the political and intellectual labors you undertook to perform.

Obviously, however, no individual will agree with all details of the new proposed Code. Hence, I must note that I have serious concern about delegating to the proposed United States Sentencing Commission decisionmaking authority over sentencing norms which, it appears to me, is essentially legislative in nature. Moreover, I am troubled by the vagueness of the language of the "Impairing Military Effectiveness" offense (§ 1112), with the overly severe grading of the offense of "Obstructing a Proceeding by Disorderly Conduct" (§ 1334), with the equivocation as to the necessity for compulsory notice to affected parties previously subjected to lawful wire intereception (§ 3105(b)(1)), and with retention of the partially unconstitutional and wholly undesirable sections on the admissability of confessions (§§ 3713–3714).

However, the provision which causes me the most concern in S. 1437, H.R. 6869, is the section "creating" a federal obscenity offense—§ 1842. In brief, there is absolutely no reason to have a Federal obscenity statute on the books and there are a number of reasons why such a statute is undesirable. The regulation and scope of nonprotected speech in a local community, if arguably of legitimate concern to any governmental body (a proposition I would disavow), are certainly not the regulatory business of the Federal Government. Isn't that what federalism is all about? Let the States deal with obscenity within permissible constitutional perimeters.

Section 1842, questionable in and of itself due to its reliance upon the shaky *Miller* standards and its antiquated supporting policies, encourages the kind of Federal prosecutorial abuses which we observed in Tennessee during the past 2 years. Furthermore, as the recent Supreme Court case, *Smith* v. *United States*, 45 L.W. 4495 (No. 75–1439, May 23, 1977), demonstrates, the mere existence of a Federal obscenity statute totally nullifies an individual state's (Iowa in the *Smith* case) efforts to tailor its own obscenity laws to the demands and mores of the community. *Smith* was a case where "[t]he transaction offended no one and violated no Iowa law. Nonetheless, because the materials proves 'offensive' to third parties [on a national level] who were not intended to see them, a federal crime was committed." 45 L.W. at 4500 (Dissenting Opinion of Justice Stevens). Again, it is neither necessary nor desirable to have the Federal Government overruling the will of the States in this area. There should not be a Federal obscenity statute.

Let me note, again, in closing, that the foregoing vigorous objections notwithstanding, I think S. 1437, H.R. 6869, on the whole, a masterful job. Codification is urgently needed and the present vehicle, if it can withstand additional substantive compromise and alteration (other, of course, than the compromises I propose!), is an extremely workable and attractive piece of legislation.

Thank you very much for your personal efforts in getting it introduced.

Sincerely yours,

JOHN M. BURKOFF,
Assistant Professor of Law.

HARVARD LAW SCHOOL,
Cambridge, Mass., January 7, 1976.

Hon. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HART: I am sorry that the holidays delayed my response to your letter of December 15 inquiring about Section 1302 of S. 1, the bill to reform the Criminal Code.

The ACLU criticism of Section 1302 is, in my opinion, a forced and false interpretation which would appear plausible only to one determined to find reasons for seeking to defeat the bill. I am quite sure that the Committee Report and line of authorities exemplified by *Screws* v. *U.S.*, 325 U.S. 91, would lead to a narrow and constitutional interpretation.

An "influx of cars carrying demonstrators to the chosen site" would violate Section 1302 only if the site were consciously chosen in such a way as to interfere with the performance of governmental functions. My imagination is not quite up to visualizing a realistic example, but one can abstractly conceive a situation in which the accused plan to have a long cavalcade of traffic block a necessary movement of the National Guard despite normal traffic controls.

It should be noted that conduct is criminal under Section 1302 only when physical interference with the government's performance of its functions conjoins with a specific intent thus to interfere. The right to demonstrate or to speak at a time and place causing large crowds to assemble is subject to regulation where the public concern is with the physical consequences of the demonstration or the selection of the particular time and place, rather than with the ideas expressed or the consequences of their expression. Section 1302 falls in this category because it is concerned only with physical interference or obstacles; it is subject to the further safeguard that physical obstruction must be the specific purpose of the defendant. I cannot say that there is no conceivable circumstance in which the application of Section 1302 might be unconstitutional, but I feel quite sure that it is not subject to attack upon grounds of vagueness or overbreadth. Being confined to the intentional use of physical obstacles, the relevant test for

overbreadth is less stringent than with a statute proscribing words alone. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).

May I take the occasion to say that it is a pleasure to hear from you again.

With best wishes.

Sincerely,

ARCHIBALD COX.

DISTRICT OF COLUMBIA BAIL AGENCY,
OFFICE OF THE DIRECTOR,
Washington, D.C., June 1977.

Hon. THEODORE KENNEDY,
U.S. Senate, Chairman, Subcommittee on Antitrust and Monopolies,
Russell Senate Office Building, Washington, D.C.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws,
Russell Senate Office Building, Washington, D.C.

DEAR SENATORS KENNEDY AND MCCLELLAN: I would like to offer for your consideration some comments on portions of S. 1437 (Criminal Code Reform Act of 1977) recently introduced by you. I am particularly interested in the provisions that address questions of release or detention of persons charged with offenses and awaiting trial. I would respectfully ask that my comments be entered as a portion of the Hearing Record should that be appropriate.

The provision which causes me the most concern is § 3503 of Chapter 35. This section as it stands mandates pretrial detention of those charged with capital offenses if "Such a risk of flight or danger is *believed to exist* . . . [the judge has reason to believe that no conditions of release will reasonably assure that the person will not flee or will not pose a danger to any other person or to the community . . .] . . . the person *shall be ordered detained.*" (Emphasis supplied.)

The debates over pretrial detention and the injection of considerations of danger into the bail hearing have raged for years. On the one hand, subsequent to the Judiciary Act of 1789 and the Eighth Amendment to the Constitution, no American could be denied Bail (pretrial) in noncapital cases.

Many offenses carried capital punishment then and do not today, e.g., burglary, rape, murder, armed robbery, etc. Just as clearly, however, the theory on which Bail was denied was one which presumed that a defendant facing the ultimate in punishment (death) if convicted would be so motivated to flee that no Bail could be set that would insure appearance.

On the other hand, despite the lip service paid to the principle that "risk of flight is the only proper purpose for Bail," every magistrate who has ever set Bail has done so with at least a concern about danger. Although unarticulated, danger has played and continues to play the most significant role in the fixing of Bail. Your efforts in this bill to put the issue of danger in the open and on the record is commendable. I believe, however, that some additional provisions might be appropriate.

To change a legal principle which is considered a traditional if not a Constitutional one with a short paragraph may provide short shrift to some of the serious issues that need resolution. Were it not for six (6) years of experience with both the detention and danger issues in the District of Columbia, nearly ten (10) years of experience around the nation in providing Technical Assistance to other jurisdictions experiencing problems with pretrial detention and release, and nearly fifteen (15) years of experience arguing and debating the principles involved in the bail setting process I would not have proposed these suggestions. I sincerely hope they will aid you and your colleagues and staffs.

I recommend to your attenion D.C. Code § 23–1321–1332 (particularly § 1322–1332). These statutory sections provide a comprehensive release law that includes the presumption of release, consideration of danger, protection of the rights of those accused held in pretrial detention without bail, and a total approach to the problem posed by trying to predict danger, flight, appearance, etc.

To be perfectly candid, when the law was first proposed in 1969 and 1970 I was adamantly opposed to the idea of openly permitting detention without Bail *and* to allowing danger to be a criterion in fixing conditions of release. My reasons included: a belief in a Constitutional right to release (this right derived from a combined treatment of the Judiciary Act of 1789, the Eighth

Amendment to the Constitution, and the words of the United States Supreme Court in *Carlson* v. *Landon* and *Stack* v. *Boyle.*) ; a then recent study commissioned by the Department of Justice of the United States at a cost of $360,000 which concluded that danger could not be predicted; and a belief that wholesale detention without Bail would occur. Experience has proved otherwise and reflection has convinced me that although there are some minor flaws in the law, for the most part, it is a good one. It is the only statute I have seen that provides the means to eliminate the hyprocrisy that permits the unfettered pretrial detention of the poor under the fiction of a money bond "high enough to insure appearance." And, at the same time, it permits magistrates to detain those who pose a serious risk of either flight or danger.

Specifically, the D.C. law has the following provisions which could enhance S 1437 :

A proscription against the use of financial conditions to assure safety (1321). (I believe financial conditions should be eliminated altogether. Both the American Bar Association in its Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, and the National Advisory Commission on Criminal Justice Standards and Goals recommend the abolition of Bail Bondsmen and suggest that dollar amounts bear little or no relationship to risk of flight or appearance. I think that if financial conditions can be eliminated the decision becomes simply release or detention. If release is appropriate then consideration of those conditions best designed to effect return to court or safety can commence. Under such a system no one would be detained because of financial inability to post bond and conversely the very wealthy who should be detained would not be able to secure release.) ;

A direction to confine those detained in facilities other than those where convicted criminals are housed (1321) (h) (1)) ;

Three very precise definitions of the type defendant who may qualify for a detention hearing (1322(a)) ;

A precise definition of the kind of hearing prerequisite to the issuance of a detention order (1322(b)&(c)) ;

A provision for speedy trial (within 60 days) or release of a pretrial detainee (1322(d)) ;

A separate provision for treatment of those on probation or parole (1322(e)) ;

Provisions for appeal (1324) ;

Penalties (1327–1329) ; and

Definitions of crimes that qualify by crime rather than by punishment (1330).

I urge you to consider providing the safeguards and protections afforded by the D.C. law to those who may be detained. § 3503 does not provide any of the protections afforded in the D.C. law nor do any of the other provisions. At the same time § 3504 (Release Pending Sentence or Appeal) is infinitely more sensible than its D.C. counterpart.

I appreciate your attention to these matters and would be most willing to answer any questions you may have.

Yours truly,

BRUCE D. BEAUDIN,
Director, District of Columbia Bail Agency.

PREPARED STATEMENT OF THE AMERICAN LIBRARY ASSOCIATION

Founded in 1876, the American Library Association is the oldest and largest library association in the world. It is a nonprofit, educational organization representing over 35,000 librarians, library trustees, and other individuals and groups interested in promoting library service. The Association is the leader of the modern library movement in the United States and, to a considerable extent, throughout the world. It seeks to improve libraries and librarianship and to create and publish literature in aid of this objective.

THE RIGHT TO KNOW: LIBRARY SERVICE IN THE UNITED STATES

Libraries are repositories of knowledge and information, and are established to preserve the records of the world's cultures. In the United States, under the First Amendment, libraries play a unique role by fulfilling the right of all citizens to have unrestricted access to these records for whatever purpose they might

have. The Association's interpretation of the First Amendment as it applies to library service is set forth in the Library Bill of Rights (attached). Under this interpretation, it is the responsibility of the library to provide books and other materials presenting all points of view concerning the problems and issues of our times. The Library Bill of Rights further states that no library materials should be proscribed or removed because of partisan or doctrinal disapproval, and that the right of an individual to the use of the library should not be denied or abridged because of age, race, religion, national origin or social or political views.

In sum, libraries foster the wellbeing of citizens by making information and ideal available to them. It is not the duty of librarians to inquire into the private lives of library patrons, nor is it their duty to act as mentors by imposing the patterns of their own thoughts on their collections. Citizens *must* have the freedom to read and to consider a broader range of ideas than those that may be held or approved by any single librarian, or publisher or government or church.

CURRENT ANTIOBSCENITY LAWS

In general terms, the American Library Association rejects antiobscenity laws as unwarranted intrusions upon those basic freedoms which Justice Cardozo once described as the matrix of all our other freedoms. Antiobscenity laws, which are directed not at the control of anti-social action but rather at the control of communication, represent a form of censorship ultimately aimed at the control of the thoughts, opinions, and basic beliefs of citizens in a free democracy.

Antiobscenity laws confront American librarians with a very special dilemma. Under the most recent rulings of the U.S. Supreme Court (including *Smith, dba Intrigue* v. *U.S.*, decided May 23, 1977) the "community standards" by which the obscenity of a work will be determined cannot be ascertained until after the prosecution has been initiated and the jury impaneled.

This means that librarians disseminating works having sexual content must do so at their peril. On the one hand, if they refuse to disseminate a work because they believe it to be obscene, librarians infringe the First Amendment rights of their patrons if that belief is wrong. On the other hand, if they disseminate a work having sexual content, they are subject to criminal prosecution, fine, and imprisonment if a jury ultimately deems the work obscene.

The American Library Association believes that librarians must have the absolute right, free from the chilling effect of the threat of criminal prosecution, to procure and disseminate all works and materials which have not been held obscene by a court of competent jurisdiction, and the right to continue to do so with immunity until they are so held.

This right becomes even more essential to the fair and honest performance of libraries and librarians because of those rulings of the Supreme Court which make clear:

First, that any librarian disseminating any work describing or depicting normal or abnormal intercourse, excretion, masturbation, or the genitals, is vulnerable to federal criminal prosecution, notwithstanding express exemption from such prosecution under state law.

Second, that the determination of a jury that a work is obscene is a question of fact which is substantially unreviewable on appeal.

Third, that the general existence and ready availability of other works substantially comparable in nature, content, descriptions, and representations to the work which prompts the prosecution does not establish that the work in question satisfies community standards.

Fourth, "guilty knowledge," that is, knowledge of the obscenity of the work, is not required for conviction so long as the disseminator is aware that the work includes the descriptions or depictions which the jury ultimately determines to be obscene.

SECTION 1842 OF S. 1437

Although Section 1842 would apply to the non-commercial dissemination of materials in only certain cases, none of the above concerns generated by the rulings of the Supreme Court is eliminated for librarians. Section 1842 applies to dissemination to minors, and library service to minors employs more librarians today than all other forms of library service combined.

Accordingly, Section 1842 of S. 1437 should be amended to exempt librarians or, alternatively, to provide that no criminal prosecution for disseminating an

obscene work shall be initiated until the work has first been adjudged obscene in a prior *in rem* proceeding.

Attachment.

LIBRARY BILL OF RIGHTS

THE COUNCIL OF THE AMERICAN LIBRARY ASSOCIATION REAFFIRMS ITS BELIEF IN THE FOLOWING BASIC FOLICIES WHICH SHOULD GOVERN THE SERVICES OF ALL LIBRARIES

1. As a responsibility of library service, books and other library materials selected should be chosen for values of interest, information and enlightenment of all the people of the community. In no case should library materials be excluded because of the race or nationality or the social, political, or religious views of the authors.

2. Libraries should provide books and other materials presenting all points of view concerning the problems and isues of our times; no library materials should be proscribed or removed from libraries because of partisan or doctrinal disapproval.

3. Censorship should be challenged by libraries in the maintenance of their responsibilty to provide public information and enlightenment.

4. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.

5. The rights of an individual to the use of a library should not be denied or abridged because of his age, race, religion, national origins or social or political views.

6. As an institution of education for democratic living, the library should welcome the use of its meeting rooms for socially useful and cultural activities and discussion of current public questions. Such meeting places should be available on equal terms to all groups in the community regardless of the beliefs and affiliations of their members, provided that the meetings be opened to the public.

Adopted June 18, 1948.

Amended February 2, 1961, and June 27, 1967, by the ALA Council.

PREPARED STATEMENT OF PROF. JOHN MONAHAN[1] ON THE CRIMINAL CODE REFORM ACT OF 1977 (S. 1437)

I have for some time been involved with the application of behavioral science research to the problems of crime and criminal law, especially as that research relates to the disposition of criminal and mentally disordered offenders. It is my belief that the provisions of the Criminal Code Reform Act of 1977 dealing with criminal sentencing (sections 2001–2008) and with mentally disordered offenders (sections 3611–3617) reflect the most sophisticated and current empirical research in these areas and represent a marked advance over current law.

My reasons for supporting the sentencing provisions were set forth in an article in *The Washington Post* on April 30, 2977, which I would like to submit for the record. In brief, behavioral scientists have not distinguished themselves at the task of forcing rehabilitation on those offenders they predict will be dangerous. Indeterminate sentences have failed a fair test of their usefulness, and should be replaced by strict guidelines promulgated by a Sentencing Commission and reflected in this bill.

The right of appeal from excessively onerous or excessively lenient sentences, as well as the establishment of a federal Victim Compensation Fund, are additional factors to recommend passage of S. 1437.

The one point I would like to stress to the Subcommittee is that abandoning forced rehabilitation as a purpose of criminal sentencing does *not* imply a lessened commitment to provide increased access to *voluntary* rehabilitative services to those federal prisoners who wish to avail themselves of them. I have dealt with this issue in a June 3, 1977 article in *The Los Angeles Times*, which I would also like ot submit for the record.

My sole reservation regarding the provisions of S. 1437 concerning mental disease or defect is that I believe the time limits for examination and treatment are grossly excessive. Sixty days for a psychiatric or psychological examination (section 3617) is at least 30, and probably 50, days too many. A *second* six-

---

[1] John Monahan, Ph. D. is a Fellow in Law and Psychology at Harvard Law School, and Assistant Professor in the Program in Social Ecology, University of California, Irvine.

month commitment for persons found incompetent to stand trial (section 3611) is likewise unnecessary and subject to abuse. I would urge the Subcommittee to reduce the time limits substantially.

[From the Los Angeles Times, June 3, 1977]

PRISONS: A RETREAT FROM REHABILITATION

PUNISHMENT MAKES STRONG COMEBACK, BUT THERE ARE REASONS FOR CAUTION

(By John Monahan)

Across country, the death knell is being sounded for rehabilitation programs in our prisons.

Conservatives, who have always opposed the concept of rehabilitation, are watching in silent satisfaction as liberals and academics rush to recant their faith in the ability of psychiatrists and psychologists to alleviate prisoners' antisocial tendencies. Once derided as barbaric and ineffectual, punishment is making a strong comeback as the radical-chic answer to the problem of crime in America.

The reasons for this new negativism toward prisoner rehabilitation are not hard to ascertain. Research projects by the hundreds have failed to document any positive effect of even the most intensive therapy on the attitudes, let alone the behavior, of offenders once they are released from prison.

Meanwhile, prisoner-rights groups complain that existing rehabilitation programs are, more often than not, forced on them. Such programs, they also charge, have turned prison life into an Orwellian nightmare where inmates, denied a firm date for getting out, are reduced to playing endless games to prove that they have achieved "insight" into the psychic causes of their crime.

Given the lack of evidence that forced rehabilitation works and the ever-rising crime rate, the patience of even the most tolerant community is bound to wear thin. It was not surprising, then, that Sens. Edward M. Kennedy (D-Mass.) and John L. McClellan (D-Ark.) last month introduced a new federal criminal-sentencing bill that omitted any mention of "treatment" or "rehabilitation."

True, the time is long overdue to limit this power of psychiatrists and psychologists in deciding, almost single-handedly, who goes to prison and how long they stay here. These "experts" should also be deterred from forcing their wares on a—quite literally—captive audience.

However, it should be clearly understood that treatment has always been the exception in prison rather than the rule. Most of the time "rehabilitation" has just been a convenient excuse for placing enormous discretion in the hands of prison administrators. Not infrequently, it has also served as a way of rationalizing actions taken against prisoners—such as administering painful drugs—that would plainly be viewed as "cruel and unusual" if they were labeled punishment. Indeed, fewer than 100 full-time psychologists work in the entire federal penal system, which gives some indication of the priority actually accorded rehabilitation.

Yet our hasty retreat from the excesses and overpromises of the "rehabilitative ideal" poses a serious danger not only for prisoners after their release but also for the larger society. The danger is that legislators at both federal and state levels will seek to cut expenditures and balance budgets by seizing on the current climate of pessimism about rehabilitation to justify eliminating even the woefully inadequate amount of treatment now being provided.

Though research shows that coerced participation in rehabilitation programs fails to change prisoners' behavior once they leave the institution, that does not mean rehabilitation efforts are wholly worthless. *Voluntary* treatment may well help many prisoners control their behavior, especially if participation in therapy could be divorced from parole consideration and if prisoners were afforded the same confidentiality that exists in private practice. Even if it could be proved that such treatment does nothing to reduce future crime, inmates should at least have ready access to psychological care—just as the courts have ruled they have the right to adequate medical and dental services.

The resurrection of deterrence and retribution as the guiding principles of penal policy in this country will surely please those who have long favored throwing away the key and letting prisoners rot in their cells—and "rot," unfortunately, is exactly the right word.

Conditions in many of our prisons would disgrace any self-respecting kennel owner. No judge would purposely sentence a man to serve time in a place where

repeated homosexual rapes and other forms of violence are the norm, and yet that is precisely what a prison term often means.

In a recent civil suit in Alabama, state officials admitted that all but 30 of 1,100 inmates in one prison had been physically or sexually assaulted. When Gov. George C. Wallace charged that court-ordered reforms of the state prison system had created a "hotel atmosphere," Judge Frank Johnson—the man who mandated the changes—replied this way: "The elimination of conditions that will permit maggots in a patient's wound for over a month before his death does not constitute creation of a hotel atmosphere."

By all means Americans should stop telling criminal offenders that we put them in prison for their own good: It is for our good, not theirs, that prisons exist. But we should think twice before eliminating psychological services from prison budgets, and at all costs we must avoid becoming complacent about what goes on inside prison walls.

As Dostoevsky observed in "Memoirs From the House of the Dead," "The degree of civilization in a society can be judged by entering its prisons."

[From the Washington Post, April 30, 1977]

Prisons: A Wary Verdict on Rehabilitation

(By John Monahan)

It was only a few years ago that psychiatrist Karl Menninger declared that the real "crime" in criminal justice was society's punishing offenders rather than offering them psychiatric treatment. Ramsey Clark more recently announced that "we know corrections can rehabilitate."

Yet a bill to totally restructure criminal sentencing, introduced by Sen. Edward Kennedy (D-Mass.), does not once mention the words "treatment" or "rehabilitation." Instead, prison is now to provide "just punishment for the offense" and "to afford adequate deterrence to criminal conduct," notions anathema to liberals only a few years ago.

What has happened to cause such a rapid change of heart on the basic purpose of imprisonment?

For one thing, rehabilitation by almost all accounts has failed to live up to the promises of Menninger, Clark and others. Literally hundreds of research studies of prison treatment programs have reached the same conclusion: There is no difference in the future crime rates of inmates given treatment and those in the control group, who simply sat in their cells. And this holds whether the treatment in question is psychotherapy, "behavior modification," job training or education. "The cage," Norval Morris and Gordon Hawkins conclude in their new book, "Letter to the President on Crime Control," "is not a sensible place in which to cure the criminal."

Even if prison treatment is ineffective, the "rehabilitative ideal" could be partly salvaged if it could be shown that psychologists and psychiatrists could predict which offenders were so dangerous they needed to be isolated from society. The rest could then be kept out of prison and given social services in the community. Yet here too research has popped the rehabilitative balloon, finding that for every correct prediction of future criminality there are at least two mistakes.

As if the data weren't bad enough, prisoner groups and prisoner advocates such as Jessica Mitford have charged that the supposedly humane and enlightened rehabilitation approach actually has resulted in longer sentences and worse prison conditions than the "eye for an eye" justice it was meant to replace. Many unusual if not cruel procedures have been fobbed off as "treatment," while the indeterminate sentence has made archaic the movie stereotype of the convict chalking off the remaining days of his sentence on the cell wall: You never know when you're getting out. Dissatisfaction with such ambiguity was cited by the McKay Commission as a major cause of the Attica uprising.

As C. S. Lewis put it: "To be re-made after some pattern of 'normality' hatched in a Viennese laboratory to which I never paid allegiance to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success—who cares whether this is called Punishment or not?"

Add to these concerns a steadily rising crime rate, and it is not difficult to see why the "justice model" is gaining on the "treatment model" of imprisonment.

The Kennedy bill—on which hearings will be held shortly—would establish a sentencing commission to promulgate strict guidelines for judges to use in sentencing convicted offenders. Judges could sentence outside the guidelines, but they would have to put their reasons in writing. If the sentence were higher than the maximum prescribed by the guidelines, the defendant would have the right to appeal. If it were lower than the minimum given in the guidelines, the government could do likewise.

The bill would not eliminate treatment services in prison, but rehabilitation would no longer be a *purpose* of incarceration. If a convict wanted to participate in treatment programs, that would be encouraged. But if not, that would be acceptable too, since in neither case would it affect his or her release date, which would have been set by the judge at the time of conviction.

Several states, including Maine and California, have already abolished indeterminate sentences and eliminated rehabilitation as a purpose of imprisonment. There is little doubt that the pendulum is on the move and that prisons will once again be a place where people go to be punished rather than cured. Enforced rehabilitation and indeterminate sentences were noble social experiments. But, like prohibition, their time has come and gone.

STATE OF NEW JERSEY,
DEPARTMENT OF LAW AND PUBLIC SAFETY,
Trenton, N.J., June 16, 1977.

HON. JOHN L. MCCLELLAN,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR MCCLELLAN: I am writing to inform you that at a regular meeting of the National Association of Attorneys General held in Indianapolis earlier this week, the Association unanimously adopted in principle the Criminal Code Reform Act of 1977 (S. 1437). A copy of the resolution is attached for your information.

The Association also authorized the creation of a subcommittee of its Committee on Criminal Law and Procedure to monitor the progress of the legislation, to report to the membership on significant developments, and to take positions on behalf of the membership in the course of the legislative process.

I have been appointed Chairman of this subcommittee. The balance of the membership consists of Attorneys General Diamond of Vermont, Edmisten of North Carolina, Hansen of Utah, La Follette of Wisconsin, MacFarlane of Colorado, and Mendicino of Wyoming.

Our subcommittee will endeavor to complete its analysis of the bill at the earliest possible date so that your staff can be advised of any proposed amendments or supplements to the bill. We will also decide at an early date whether one or more members of the committee will be asked to testify.

I will appreciate being advised of the member of your staff with whom any necessary contacts can be made, and will also want to be advised of significant developments that may affect the work of our committee.

You and Senator Kennedy are to be congratulated for the significant accommodations that have been made in drafting S. 1437. I anticipate that the final legislative product will be a significant step in the advancement of the federal criminal justice system, and the NAAG is anxious to assist in the final enactment of a measure that will advance your purposes, and at the same time be mindful of the responsibilities of the states in the area of criminal justice.

Sincerely yours,

WILLIAM F. HYLAND,
Attorney General.

Attachment.

Resolution concerning the Criminal Code adopted by the National Association of Attorneys General. Larry Derryberry, Attorney General of Oklahoma, Committee on Criminal Law and Law Enforcement.

RESOLUTION XVI.—REVISION OF FEDERAL CRIMINAL CODE

Whereas the Congress of the United States is considering Senate Bill 1437 and House of Representatives Bill 6869, which would revise the federal criminal code; and

Whereas a majority of the states have enacted modernized criminal codes; and

Whereas the Congressional proposals represent the culmination of a ten-year effort to enact a comprehensive and simplified criminal code to replace the present complex, inconsistent and often archaic statutes; and

Whereas previous objections of National Association of Attorneys General to portions of the earlier version of the code have substantially been addressed in the present version: Now, therefore, be it

Resolved by the National Association of Attorneys General at its 71st Annual Meeting, in Indianapolis, Indiana, June 12–15, 1977, That its membership endorse in principle the concept of a comprehensive Federal criminal code; and be it further

Resolved, That a subcommittee of the National Association of Attorneys General Committee on Criminal Law and Procedure be appointed by the Chairman of that committee to monitor the progress of SB 1437 and HR 6869, and to report to the membership on significant developments; and that said subcommittee be authorized to take positions on behalf of the National Association of Attorneys General membership concerning these proposals except in respect to issues concerning which the subcommittee determines there is substantial controversy among the National Association of Attorneys General membership.

PUBLIC DEFENDER SERVICE,
FOR THE DISTRICT OF COLUMBIA,
Washington, D.C., July 14, 1977.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: I am writing to request your assistance in obtaining an amendment to the Criminal Justice Act (18 U.S. Code § 3006A) which would permit the District of Columbia Public Defender Service to provide defense services in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, with the approval of the Judicial Conference of the United States and with the permission of the federal judges in this jurisdiction. The proposed amendment would delete from subsection (*l*) 18 U.S. Code § 3006A the language ", other than subsection (h) of section 1,". This would then provide to the federal courts in the District of Columbia the same options that are available to federal courts in the rest of the country. The brief memorandum enclosed explains the background of the problem and the need for the amendment. I would, of course, be happy to provide any additional information which you might think desirable.

We would greatly appreciate your support in this matter.

Respectfully,

J. PATRICK HICKEY, *Director.*

Enclosure.

PROPOSED AMENDMENT TO 18 U.S. CODE § 3006A (FEDERAL CRIMINAL JUSTICE ACT)

The Criminal Justice Act, which authorizes payment to private attorneys who represent indigent defendants in criminal cases in the federal courts, also gives all federal courts except those located in the District of Columbia the option of establishing a defender office to furnish representation in a portion of the criminal cases. This option is contained in subsection (h) of 18 U.S.C. § 3006A which, by virtue of subsection (*l*), is made inapplicable to the District of Columbia. The District of Columbia Public Defender Service has, with the agreement of the Chief Judges of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, suggested the deletion of this language in subsection (*l*) to allow those courts to establish a defender office if they so desire.

BACKGROUND

Prior to the 1970 reorganization of the court system in the District of Columbia, nearly all criminal cases were handled in the United States District Court here. Representation was provided to indigent defendants in those cases by staff attorneys employed by the Legal Aid Agency and by private attorneys appointed

by the court. The Legal Aid Agency was a defender office established for the District of Columbia by Congress in 1960 (Public Law 86–531, 74 Stat. 229) ; its funds were part of the appropriation for the District of Columbia.

In 1970, Congress amended the Federal Criminal Justice Act, the statute authorizing payment to private attorneys who represent indigent defendants, to allow federal courts with sufficient volume of criminal cases to establish defender offices. However, the amendments provided that the authorization to establish defenders would not apply in the District of Columbia because the District already had its own defender office, the Legal Aid Agency. See H. Rep. 91–1546, 91st Cong., 2d Sess. 3 (1970). (The Public Defender Service is the statutory successor to the Legal Aid Agency, created by Congress as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Public Law 91–358.)

However, as much of the criminal jurisdiction previously handled by the United States District Court was transferred to the local courts pursuant to the Court Reform and Criminal Procedure Act of 1970, the Public Defender Service likewise transferred most of its attorneys to the local courts and ceased to provide any significant amount of legal services in cases in the United States District Court or the United States Court of Appeals. These courts have been left to rely almost exclusively on private appointed counsel to furnish representation.

The proposed amendment would enable the Public Defender Service to become in part a community defender with the approval of the Judicial Conference of the United States. If that approval is forthcoming, the Public Defender Service would create a unit to provide legal services in the United States District Court and the United States Court of Appeals for the District of Columbia Circuit which would be financed by grants from the Criminal Justice Act appropriation. Furthermore, the chief judges of the federal courts in this jurisdiction to which services would be available would continue to participate in the appointment of the governing board of the Public Defender Service.

Attorneys and other personnel employed with these funds by the Public Defender Service would only be utilized to provide representation in the District of Columbia federal courts, after appointment by the federal judges and magistrates here, who would also continue to have the authority to appoint private counsel under the Criminal Justice Act.

[Hastings Law Center]

A Consumer's Guide to Sentencing Reform—Making the Punishment Fit The Crime

(By Franklin E. Zimring)

In its current crisis the American system of criminal justice has no friends. Overcrowded, unprincipled, and ill-coordinated, the institutions in our society that determine whether and to what extent a criminal defendant should be punished are detested in equal measure by prison wardens and prisoners, cab drivers and college professors. What is more surprising (and perhaps more dangerous), a consensus seems to be emerging on the shape of desirable reform—reducing discretion and the widespread disparity that is its shadow, abolishing parole decisions based on whether a prisoner can convince a parole board that he has been "reformed," and creating a system in which punishment depends much more importantly than at present on the seriousness of the particular offense.

A number of books and committee reports that have endorsed these goals and proposed various structural reforms to achieve them are the stimulus for this essay. While diverse in style, vocabulary, and emphasis, at least six books in the past two years have proposed eroding the arenas of discretion in the system.[1]

---

[1] Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974) : James Q. Wilson, *Thinking About Crime* (New York: Basic Books, 1975) ; Ernest van den Haag, *Punishing Criminals* (New York: Basic Books, 1975) ; Andrew von Hirsch, *Doing Justice—The Choice of Punishments, the Report of the Committee for the Study of Incarceration* (New York: Hill and Wang, 1976) ; David Fogel, *We are the Living Proof: The Justice Model of Corrections* (Cincinnati: W. H. Anderson, 1975) : Task Force on Criminal Sentencing, *Fair and Certain Punishment—Report of the Twentieth Century Task Force on Criminal Sentencing* (New York: McGraw-Hill, 1976).

The central concern of these books, the coercive control of convicted offenders, is very much an issue for bioethics. Imprisonment, while centuries old, is essentially a form of experimentation with human subjects. Various new treatment technologies available to the prison system have been widely discussed among those concerned about the impact of scientific knowledge on social institutions ; but the basic problems posed by imprisonment itself have been less widely recognized.

Some authors, such as James Q. Wilson and Ernest van den Haag, see reform as a path to enhancing crime control. Others, such as Andrew von Hirsh, the Twentieth Century Fund Committee, and David Fogel, advocate reform for less utilitarian reasons, with titles or subtitles such as "Doing Justice," "A Justice Model of Corrections," and "Fair and Certain Punishment."

This essay cannot comprehensively review such a rich collection of literature, nor is it politic for me to oppose justice, fairness, or certainty. Rather, I propose to summarize the present allocation of sentencing power in the criminal justice system and discuss some of the implications of the "structural reforms" advocated in some current literature.

MULTIPLE DISCRETION IN SENTENCING

The best single phrase to describe the allocation of sentencing power in state and federal criminal justice is "multiple discretion." Putting aside the enormous power of the police to decide whether to arrest, and to select initial charges, there are four separate institutions that have the power to determine criminal sentences—the legislature, the prosecutor, the judge, and the parole board or its equivalent.

The *legislature* sets the range of sentences legally authorized after conviction for a particular criminal charge. Criminal law in the United States is noted for extremely wide ranges of sentencing power, delegated by legislation to discretionary agents, with extremely high maximum penalties and very few limits on how much less than the maximum can be imposed. In practice, then, most legislatures delegate their sentencing powers to other institutions. For example, second-degree murder in Pennsylvania, prior to 1973, was punishable by "not more than 20 years" in the state penitentiary.[2] Any sentence above twenty years could not be imposed; any sentence below twenty years—including probation—was within the power of the sentencing judge.

The prosecutor is not normally thought of as an official who has, or exercises, the power to determine punishment. In practice, however, the prosecutor is the most important institutional determinant of a criminal sentence. He has the legal authority to drop criminal charges, thus ending the possibility of punishment. He has the legal authority in most systems to determine the specific offense for which a person is to be prosecuted, and this ability to select a charge can also broaden or narrow the range of sentences that can be imposed upon conviction. In congested urban court systems (and elsewhere) he has the absolute power to reduce charges in exchange for guilty pleas and to recommend particular sentences to the court as part of a "plea bargain"; rarely will his recommendation for a lenient sentence be refused in an adversary system in which he is supposed to represent the punitive interests of the state.

The *judge* has the power to select a sentence from the wide range made available by the legislature for any charge that produces a conviction. His powers are discretionary—within this range of legally authorized sanctions his selection cannot be appealed, and is not reviewed. Thus, under the Pennsylvania system we studied, a defendant convicted of second-degree murder can be sentenced to probation, one year in the penitentiary, or twenty years. On occasion, the legislature will provide a mandatory minimum sentence, such as life imprisonment for first-degree murder, that reduces the judge's options once a defendant has been convicted of that particular offense. In such cases the prosecutor and judge retain the option to charge or convict a defendant for a lesser offense in order to retain their discretionary power.[3] More often the judge has a wide range of sentencing choices and, influenced by the prosecutor's recommendation, will select either a single sentence (such as two years) or a minimum and maximum sentence (not less than two nor more than five years) for a particular offender.

The *parole or correctional authority* normally has the power to modify judicial sentences to a considerable degree. When the judge pronounces a single sentence, such as two years, usually legislation authorizes release from prison to parole after a specified proportion of the sentence has been served. When the judge

---

[2] The old Pennsylvania statute is used as an example because we have recently studied the distribution of punishment in Philadelphia for those convicted of criminal homicides occurring during the first five months of 1970. *See* Franklin E. Zimring, Joel Eigen, and Sheila O'Malley, "Punishing Homicide in Philadelphia: Perspectives of the Death Penalty," *University of Chicago Law Review* 43 (1976), 227.

[3] *Ibid.*, pp. 229–41.

has provided for a minimum and maximum sentence, such as two to five years, the relative power of the correctional or parole authority is increased, because it has the responsibility to determine at what point in a prison sentence the offender is to be released. The parole board's decision is a discretionary one, traditionally made without guidelines or principles of decision.

This outline of our present sentencing system necessarily misses the range of variation among jurisdictions in the fifty states and the federal system, and oversimplifies the complex interplay among institutions in each system. It is useful, however, as a context in which to consider specific proposed reforms; it also helps to explain why the labyrinthine status quo has few articulate defenders. With all our emphasis on due process in the determination of guilt, our machinery for setting punishment lacks any sanctioned principle except unguided discretion. Plea bargaining, disparity of treatment, and uncertainty are all symptoms of a larger malaise—the absence of rules or even guidelines in determining the distribution of punishments. Other societies, less committed to the rule of law, or less infested with crime, might suffer such a system. Powerful voices are beginning to tell us we cannot.

PAROLE UNDER ATTACK

Of all the institutions that comprise the present system, parole is the most vulnerable—a practice that appears to be based on a now-discredited theoretical foundation of rehabilitation and individual predictability. The theory was that penal facilities rehabilitate prisoners and that parole authorities could select which inmates were ready, and when they were ready, to reenter the community. The high-water mark of such thinking is the indeterminate sentence—a term of one-year-to-life at the discretion of the correctional authority for any adult imprisoned after conviction for a felony. Ironically, while this theory was under sustained (and ultimately successful) attack in California, New York was passing a set of drug laws that used the one-year-to-life sentence as its primary dispositive device. Yet we know (or think we know) that prison rehabilitation programs "don't work," and our capacities to make individual predictions of future behavior are minimal.

So why not abolish parole in favor of a system where the sentence pronounced by the judge is that which is served by the offender? The cost of post-imprisonment sentence adjustments are many: they turn our prisons into "acting schools," promote disparity, enrage inmates, and undermine both justice and certainty.[4]

There are, however, a number of functions performed by parole that have little to do with the theory of rehabilitation or individual predictability. A parole system allows us to advertise heavy criminal sanctions loudly at the time of sentencing and later reduce sentences quietly. This "discounting" function is evidently of some practical importance, because David Fogel's plan to substitute "flat time" sentences for parole is designed so that the advertised "determinate sentences" for each offense are twice as long as the time the offender will actually serve (since each prisoner gets a month off his sentence for every month he serves without a major disciplinary infraction). In a system that seems addicted to barking louder than it really wants to bite, parole (and "good time" as well) can help protect us from harsh sentences while allowing the legislature and judiciary the posture of law and order.

It is also useful to view the abolition of parole in terms of its impact on the distribution of sentencing power in the system. Reducing the power of the parole board increases the power of the legislature, prosecutor, and judge. If the abolition of parole is not coupled with more concrete legislative directions on sentencing, the amount of discretion in the system will not decrease; instead, discretionary power will be concentrated in two institutions (judge and prosecutor) rather than three. The impact of this reallocation is hard to predict. Yet parole is usually a statewide function, while judges and prosecutors are local officials in most states. One function of parole may be to even out disparities in sentencing behavior among different localities. Abolishing parole, by decentralizing discretion, may increase sentencing disparity, at least as to prison sentences, because the same crime is treated differently by different judges and prosecutors. Three discretions may be better than two!

There are two methods available to avoid these problems. Norval Morris argues for retaining a parole function but divorcing it from rehabilitation and individual

---

[4] Fogel, pp. 196–99.

prediction by providing that a release date be set in the early stages of an offender's prison career. This would continue the parole functions of "discounting" and disparity reduction, while reducing uncertainty and the incentive for prisoners to "act reformed." It is a modest, sensible proposal, but it is not meant to address the larger problems of discretion and disparity in the rest of the system.[5]

LEGISLATIVE SENTENCING

A more heroic reform is to reallocate most of the powers now held by judges and parole authorities back to the legislature. Crimes would be defined with precision and specific offenses would carry specified sentences, along with lists of aggravating and mitigating circumstances that could modify the penalty. The three books with "justice" or "fairness" in their titles advocate this "price list" approach, albeit for different reasons and with different degrees of sophistication. The Twentieth Century Fund study goes beyond advocating this approach and sets out sections of a sample penal code, although all members of the committee do not agree on the specific "presumptive sentences" provided in the draft.

There is much appeal in the simple notion that a democratically elected legislature should be capable of fixing sentences for crimes against the community. Yet this is precisely what American criminal justice has failed to do, and the barriers to a fair and just system of fixed sentences are imposing. The Twentieth Century Fund scheme of "presumptive sentences," because it is the most sophisticated attempt to date, will serve as an illustration of the formidable collection of problems that confront a system of "fair and certain" legislatively determined punishments. In brief, the proposal outlines a scale of punishments for those first convicted that ranges (excluding murder) from six years in prison (aggravated assault) to probation (shoplifting). Premeditated murder is punished with ten years' imprisonment.

Burglary of an empty house by an unarmed offender has a presumptive sentence of six months; burglary of an abandoned dwelling yields a presumptive sentence of six months' probation. The sample code clearly aims at singling out violent crimes such as armed robbery for heavier penalties, while the scale for nonviolent offenders led two of the eleven Task Force members to argue that the "range . . . appears to be unrealistically low in terms of obtaining public or legislative support." Repeat offenders receive higher presumptive sentences, under specific guidelines.

The Task Force proposal produces in me an unhappily schizophrenic response. I agree with the aims and priorities of the report, at the same time that I suspect the introduction of this (or many other) reform proposals into the legislative process might do more harm than good.

ROADBLOCKS TO REFORM

Why so skeptical? Consider a few of the obstacles to making the punishment fit the crime:

1. *The incoherence of the criminal law.*[6] Any system of punishment that attaches a single sanction to a particular offense must define offenses with a morally persuasive precision that present laws do not possess. In my home state of Illinois, burglary is defined so that an armed housebreaker is guilty of the same offense as an eighteen-year-old who opens the locked glove compartment of my unlocked station wagon. Obviously, no single punishment can be assigned to crimes defined in such sweeping terms. But can we be precise? The Task Force tried, providing illustrative definitions of five different kinds of night-time housebreaking with presumptive sentences from two years (for armed burglary, where the defendant menaces an occupant) through six months' probation. The Task Force did not attempt to deal with daylight or nonresidential burglary.

The problem is not simply that any such penal code will make our present statutes look like Reader's Digest Condensed Books; we lack the capacity to define into formal law the nuances of situation, intent, and social harm that condition the seriousness of particular criminal acts. For example, the sample code provides six years in prison for "premeditated assault" in which harm was intended and two years for serious assaults where vital harm was not intended. While there may be some conceptual distinction between these two mental states, one cannot confidently divide hundreds of thousands of gun and knife attacks

[5] Morris, pp. 47–50.
[6] Task Force Report, pp. 55–56.

into these categories to determine whether a "fair and certain punishment" is six years or two.

Rape, an offense that encompases a huge variety of behaviors, is graded into three punishments: six years (when accompanied by an assault that causes bodily injury); three years (when there is no additional bodily harm); and six months (when committed on a previous sex partner, with no additional bodily harm). Two further aggravating conditions are also specified.[7] Put aside for a moment the fact that prior consensual sex reduces the punishment by a factor of six and the problem that rape with bodily harm has a "presumptive sentence" one year longer than intentional killing. Have we really defined the offense into its penologically significant categories? Can we rigorously patrol the border between forcible rape without additional bodily harm and that with further harm—when that distinction can mean the difference between six months and six years in the penitentiary?

I am not suggesting that these are problems of sloppy drafting. Rather, we may simply lack the ability to comprehensively define in advance those elements of an offense that should be considered in fixing a criminal sentence.

2. *The paradox of prosecutorial power.* A system of determinate sentences reallocates the sentencing power shared by the judges and parole authorities to the legislature and the prosecutor. While the judge can no longer select from a wide variety of sanctions after conviction, the prosecutor's powers to select charges and to plea-bargain remain. Indeed, a criminal code like that proposed by the Twentieth Century Fund Task Force will enhance the relative power of the prosecutor by removing parole and restricting the power of judges. The long list of different offenses proposed in the report provides the basis for the exercise of prosecutorial discretion: the selection of initial charges and the offer to reduce charges (charge-bargaining) are more important in a fixed-price system precisely because the charge at conviction determines the sentence. The prosecutor files a charge of "premeditated" killing (ten years) and offers to reduce the charge to "intentional" killing (five years) in exchange for a guilty plea. In most of the major crimes defined by the Task Force—homicide, rape, burglary, larceny, and robbery—a factual nuance separates two grades of the offense where the presumptive sentence for the higher grade is twice that of the lower grade.[8]

This means that the disparity between sentences following a guilty plea and those following jury trial are almost certain to remain. Similarly, disparity between different areas and different prosecutors will remain, because one man's "premeditation" can always be another's "intention." It is unclear whether total disparity will decrease, remain stable, or increase under a regime of determinate sentences. It is certain that disparities will remain.

The paradox of prosecutorial power under determinate sentencing is that exorcising discretion from two of the three discretionary agencies in criminal sentencing does not necessarily reduce either the role of discretion in sentence determination or the total amount of sentence disparity. Logically, three discretions may be better than one. The practical lesson is that no serious program to create a rule of law in determining punishment can ignore the pivotal role of the American prosecutor.

3. *The legislative law-and-order syndrome.* Two members of the Twentieth Century Fund Task Force express doubts that a legislature will endorse six-month sentences for burglary, even if it could be shown that six months is above or equal to the present sentence served. I share their skepticism. When the legislature determines sentencing ranges, it is operating at a level of abstraction far removed

---

[7] The aggravating factors are (1) "the victim was under 15 or over 70 years of age" and (2) the victim was held captive for over two hours. Task Force Report, p. 59.

[8] The presumptive sentence for rape doubles with an assault causing bodily injury. The penalty for armed robbery where the offender discharges a firearm is three years if the offender did not intend to injure and five years if intent can be established. The presumptive sentence is two years if the weapon is discharged but the prosecutor cannot or does not establish that "the likelihood of personal injury is high." The penalty for armed burglary doubles when the dwelling is occupied. An armed burglar who "brandishes a weapon" in an occupied dwelling, receives twenty-four months while a nonbrandishing armed burglar receives eighteen. Assault is punished with six years when "premeditated" and committed with intent to cause harm. Without intent, the presumptive sentence is two years. See *Fair and Certain Punishment*, pp. 38–39, 56–59. Threat of force in larceny means the difference between six and twenty-four months. As I read the robbery statute, armed taking of property by threat to use force is punished with a presumptive sentence of six months on page 40 of the report, while the same behavior receives twenty-four months on pages 60–61.

from individual case dispositions, or even the allocation of resources to courts and correctional agencies. At that level of abstraction the symbolic quality of the criminal sanction is of great importance. The penalty provisions in most of our criminal codes are symbolic denunciations of particular behavior patterns, rather than decisions about just sentences. This practice has been supported by the multiple ameliorating discretions in the present system.

It is the hope of most of the advocates of determinate sentencing that the responsibilities thrust on the legislature by their reforms will educate democratically elected officials to view their function with realism and responsibility—to recognize the need for priorities and moderation in fixing punishment. This is a hope, not firmly supported by the history of penal policy and not encouraged by a close look at the operation and personnel of the state legislatures.

Yet reallocating power to the legislature means gambling on our ability to make major changes in the way elected officials think, talk, and act about crime. Once a determinate sentencing bill is before a legislative body, it takes only an eraser and pencil to make a one-year "presumptive sentence" into a six-year sentence for the same offense. The delicate scheme of priorities in any well-conceived sentencing proposal can be torpedoed by amendment with ease and political appeal. In recent history, those who have followed the moral career of the sentencing scheme proposed by Governor Edmund Brown Sr.'s Commission on Law Reform through the Senate Subcommittee on Crime can testify to the enormous impact of apparently minor structural changes on the relative bite of the sentencing system.[9]

If the legislative response to determinate sentencing proposals is penal inflation, this will not necessarily lead to a reign of terror. The same powerful prosecutorial discretions that limit the legislature's ability to work reform also prevent the legislature from doing too much harm. High fixed-sentences could be reduced; discretion and disparity could remain.

4. *The lack of consensus and principle.* But what if we could trade disparity for high mandatory sentences beyond those merited by utilitarian or retributive demands of justice? Would it be a fair trade? It could be argued that a system which treats some offenders unjustly is preferable to one in which all are treated unjustly. Equality is only one, not the exclusive, criterion for fairness.

This last point leads to a more fundamental concern about the link between structural reform and achieving justice. The Task Force asks the question with eloquent simplicity: "How long is too long? How short is too short?" [10] The question is never answered in absolute terms; indeed, it is unanswerable. We lack coherent principles on which to base judgments of relative social harm. Current titles of respectable books on this subject range from *Punishing Criminals* to *The End of Imprisonment*, and the reader can rest assured that the contents vary as much as the labels. Yet how can we mete out fair punishment without agreeing on what is fair? How can we do justice before we define it?

Determinate sentencing may do more good than harm; the same can be said for sharp curtailment of judicial and parole discretion. Such reforms will, however, be difficult to implement, measure, and judge. Predicting the impact of any of the current crop of reform proposals with any degree of certainty is a hazardous if not foolhardy occupation.

Not the least of the vices of our present lawless structures of criminal sentencing is that they mask a deeper moral and intellectual bankruptcy in the criminal law and the society it is supposed to serve. The paramount value of these books and reform proposals is not the "structural reforms" that each proposes or opposes. It is the challenge implicit in all current debate: no matter what the problems with particular reforms, the present system is intolerable. The problems are deeper than overcrowding or lack of coordination, more profound than the structure of the sentencing system. These problems are as closely tied to our culture as to our criminal law. They are problems of principle that have been obscured by the tactical inadequacies of the present system.

---

[9] Compare the Final Report of the National Commission on Reforms of Federal Criminal Laws (Government Printing Office, 1971) with Senate Bill 1, 94th Cong. 1st Session (1975). Among other things, the Senate bill changes a presumption in favor of probation to a presumption against probation, increases the number of felonies in the proposed code and increases the length of authorized sentences by a considerable margin. See Louis Schwartz, "The Proposed Criminal Code," *Criminal Law Reporter*, 17 (1975), 3203.

[10] Task Force Report, p. 4.

Consumer Protection and Recent Versions of the Proposed New Federal Criminal Code

(*By* the Special Committee on Consumer Affairs)

In 1971, the National Commission on Reform of Federal Criminal Laws submitted its report proposing a new federal criminal Code. A number of provisions of this draft were criticized by this Committee and others as injurious to consumer protection, principally the weakening of the mail fraud statute (18 U.S.C. 1341) by substitution of a mere larceny law.[1] The subsequent versions of the Code eliminated the features found objectionable in these respects.[2] In other respects, however, there have been wide differences of opinion in regard to varying provisions of the proposed new criminal Code.[3] The principal rival versions are S. 1, 94th Cong., 1st Sess. (1975) as reported by the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, and H.R. 12504, 94th Cong., 2d Sess. (1976) sponsored by Representative Kastenmeier and twenty other Members of the House of Representatives as an alternative to S. 1.

S. 1 and the Kastenmeier bill are identical in regard to the principal features which would affect consumer protection. These features are aimed at remedies against deliberately fraudulent schemes of the type injurious to both the consumer and legitimate business. We recommend that these features be adopted as part of any proposed new federal criminal code, or separately in the event that action on the balance of the Code is significantly delayed because of controversies over other issues.

The principal provisions contained in both rival versions of the Code, designated by the same section numbers in both bills, are as follows:

Section 1734, entitled "Executing a Fraudulent Scheme," re-enacts the substance of the present mail fraud section (18 U.S.C. 1341) with the significant extention that it applies to the use of any interstate or foreign communication facility as well as the mails, by virtue of the jurisdiction set forth in subsection (e). This is somewhat broader than the present wire fraud statute (18 U.S.C. 1343), which refers to the transmission of sound signals *in* interstate commerce. Section 1734 also expressly covers "pyramid sales schemes," involving endless chain promotions whereby each victim can make money by inducing others to join in the scheme on the promise that they can do likewise, etc. Such schemes have been repeatedly held illegal under the mail fraud statute.[4] However, prosecution has often been difficult and consequently more specific legislation was passed by the Senate and unanimously approved by this Committee.[5] Pyramid sales frauds seriously injure both legitimate franchisers who are hurt by the fear generated and the public, and warrant specific prohibition.

Section 2201(c) of both bills authorizes a fine not to exceed twice the gross gain derived or the gross loss caused, whichever is greater, in case of an offense through which pecuniary gain is directly or indirectly derived, or by which personal injury or property damage or other loss is caused. This is far more realistic than existing maximum fines, such as the $1,000 maximum authorized by the present mail fraud section (18 U.S.C. 1341). Since the mail fraud statute is the principal criminal sanction against deliberately fraudulent schemes,[6] a realistic maximum fine is important.

---

[1] Special Committee on Consumer Affairs, "The Proposed New Federal Criminal Code and Consumer Protection," 27 Record of The Association of the Bar of The City of New York 734 (May 1972); Reform of the Federal Criminal Laws, Hearing Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, 92nd Cong., 2d Sess., Part III (B) at 1553–58, 1827–29 (1972).

[2] E.g., S. 1, 94th Cong., 1st Sess. § 1734 (1975); H.R. 12504, 94th Cong., 2d Sess. § 1734 (1967). See Reform of the Federal Criminal Laws, Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, 92nd Cong., 1st Sess., Part IX at 6479 (1973).

[3] See generally Association of the Bar of The City of New York, Special Committee on the Proposed New Federal Criminal Code, "The Criminal Code Proposed by the National Commission on Reform of Federal Criminal Laws" (1972); "Three Versions of the Proposed New Federal Criminal Code (July 1974).

[4] E.g., *United States* v. *Armentrout*, 411 F.2d 60 (2d Cir. 1969) and cases cited.

[5] S. 1939, 93d Cong., 2d Sess. (1974); S. Rept. No. 93–1114, 93d Cong., 2d Sess. (1974); "Report on Legislation To Prohibit Pyramid Sales Transactions," 30 Record of The Association of the Bar of the City of New York 209 (March 1975).

[6] E.g., *United States* v. *Armentrout, supra*; *Zorluck* v. *United States*, 448 F.2d 239 (2d Cir. 1971) (fraudulent health service); *Adams* v. *United States*, 347 F.2d 665, 666 (5th Cir. 1965) (misrepresentation of value of nurses training course); *Williams* v. *United States*, 268 F.2d 972, 974 (10th Cir. 1966) (misleading solicitation by telephone solicitors); *Friedman* v. *United States*, 347 F.2d 697, 699, 709 (8th Cir. 1965) (subtle physical detention until unconscionable contracts for dance lessons signed).

Part V, Chapter 40, subchapter C, section 4021 of both bills provides authority to the Attorney General to sue for injunctive relief where the antifraud provision (section 1734) is violated.[7] This is in accord with the unanimous recommendations of the Special Committee on the Proposed New Federal Criminal Code of this Association, which has recommended general authority for equitable relief as a sanction against criminal conduct in fraud and other cases.[8] Such a provision is vital to prevent continuation of serious criminal conduct detrimental to the public.[9]

We recomend that these important improvements in federal sanctions against deliberately fraudulent schemes be adopted as expeditiously as practical either as part of the proposed new Code if one is agreed upon, or by separate legislation if it is not.

Respectfully submitted,

Special Committee on Consumer Affairs: Rhoda H. Karpatkin, *Chairperson;* Dougals V. Ackerman; Sheila G. Birnbaum; David Caplowitz; Martin Cole; Evan A. Davis; Jane Detra; James D. Dougherty; Albert W. Driver, Jr.; Robert J. Egan; Carl Felsenfeld; Emilio Gautier; Richard A. Givens; John H. Hall; Leon Harris; Carol H. Katz; James J. Lack; Michael B. Maw; Sheila Rush Okpaku; Barbara B. Opotowsky; John B. O'Sullivan; David Paget; Don Allen Resnikoff; Donald K. Ross; Irving Scher; Philip Schrag; Andrew B. Schultz; Paul S. Shemin; Hon. Edward Thompson; Joseph L. Torres.

CITIZENS COMMITTEE FOR A JUST CRIMINAL CODE,
June 30, 1977.

JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: The enclosed is the written testimony of the Citizens Committee for a Just Criminal Code on S. 1437, the "Criminal Code Reform Act of 1977".

We thank you for the opportunity to testify in these hearings and would appreciate receiving a copy of the proceedings as soon as it is available.

Sincerely yours,

SHELVIN SINGER, *Chairperson.*

PREPARED TESTIMONY OF SHELVIN SINGER ON S. 1437

The Citizens Committee for a Just Criminal Code is dedicated to the single issue of securing passage of a federal criminal code which is consistent with the open and free spirit upon which American freedoms, the Constitution and the Bill of Rights are based; and to defeat all attempts by Congress to enact a repressive criminal code. The CCJCC is an outgrowth of the "Greater Chicago Town Meeting on Senate Bill One", held on January 18th, 1976, which was attended by over 500 representatives of 135 co-sponsoring groups who came to "alert and inform the community of the dangers of the bill and to encourage communication from constituents to Senators and Representatives". At this writing, 44 organizations and many more individuals officially participate in the CCJCC.

At the June 23rd, 1977 meeting of the Citizens Committee for a Just Criminal Code, guidelines and principles for the following statement on S. 1437, "The Criminal Code Reform Act of 1977", were approved for submission to the Subcommittee on Criminal Laws and Procedures for consideration and action:

In 1976, the CCJCC advised participating and other interested organizations and individuals that a "bias toward authoritarian government permeates S. 1"

---

[7] H.R. 12504 also authorizes similar relief in certain other cases.

[8] The Association of the Bar of The City of New York, Special Committee on Proposed New Federal Criminal Code, the New Criminal Code Proposed by the National Commission on Reform of Federal Criminal Laws 81 (1972); Three Versions of A Proposed New Criminal Code 71 (1974); Reform of the Federal Criminal Laws, Hearings Before the Subcommittee on Criminal Laws and Procedures of the Committee on the Senate Judiciary Committee, 93d Cong., 1st Sess., Part IX at 6482–84 (1973); *see also Pugach* v. *Dollinger*, 275 F.2d 503, 507 (2d Cir. 1960).

[9] See Brief for the United States at 7–8, *Zorluck* v. *United States*, 448 F.2d 339, 342 (2d Cir. 1971); Comment, "Roadblocks to Remedy in Consumer Fraud Litigatoin," 24 Case-Western Reserve L. Rev. 141, 147 (1972).

and that an alternative code introduced in the House as H.R. 10850 "seeks to restore the balance between the rights and liberties of citizens and powers of government".

On June 23rd, 1977, a full meeting of the CCJCC approved a statement by Professors Thomas Emerson, Vern Countryman, and Carole Goldberg[1] entitled, "Analysis of S. 1437, the McClellan-Kennedy Criminal Code Reform Act of 1977", in which it was succinctly stated: "We continue to support revision and codification of the Federal Criminal Code. But we do not believe that such reform should be achieved at the price of sacrificing our civil liberties."

This statement sums up the commitment and belief of the CCJCC and we urge the Subcommittee on Criminal Laws and Procedures to adopt this same standard in their consideration of any bill purporting to reform and codify federal criminal laws. Despite changes from the text of Senate Bill One in the 94th Congress, we do not believe that Senate Bill 1437 meets this standard.

OUTLINE OF REPRESSIVE PROVISIONS

The Emerson/Countryman/Goldberg statement outlines twelve repressive and potentially repressive features of S. 1437 that contribute to the assessment of the likely unamendability of the bill. In brief these are: (1) the inchoate offenses which are dangerously vague and overbroad so as to criminalize innocent behavior; (2) "official secrets act" provisions in the bill as well as those left intact in present law; (3) provisions attempting to protect the executive branch of government from political opposition; (4) provisions infringing upon First Amendment rights to demonstrate and protest with regard to proceedings of the judicial branch; (5) provisions to shield military and defense operations from political opposition; (6) provisions dangerously limiting the right of assembly and demonstrations in general; (7) provisions that will increase the dangers inherent in political investigations and political surveillance; (8) provisions that would provide for overbroad extensions of police powers; (9) provisions that will endanger legitimate union activities; (10) provisions aimed at obscenity, but which are so broad as to endanger legitimate free speech; (11) reforms of the penalty and sentencing procedures that do not address the deficiencies of the present-day criminal justice system, and which remove legitimate law-making discretion from the Congress; (12) probation and parole provisions which do not conform to the reforms recommended by the Brown Commission.

A broad, national citizens movement, of which the CCJCC was a part, grew up last year to oppose S. 1 and criticize its anti-democratic provisions. This movement was instrumental in preventing passage of the bill by our Bicentennial Congress. It is apparent that some of the specific criticisms of that movement led to changes in text which were unsuccessfully proposed as amendments last year, and carried over into the text of S. 1437 this year. However, a study of the total impact of these changes reveals that in large part they are token and illusory and do not address the fundamental repressive character of the bill.

The CCJCC is especially cognizant of the failure of the drafters of the bill to propose reform in important areas of present law, particularly espionage, electronic eavesdropping, labor rights, and codification of general defenses.

The piecemeal introduction of S. 1382 and S. 1566, bills providing for an expanded federal death penalty and a legitimizing of government wiretapping abuses, betray the original mandate given to the National Commission on Reform of Federal Criminal Laws (Brown Commission) to "improve the federal system of criminal justice".

AN ALTERNATIVE

The CCJCC urges that H.R. 2311, "The Federal Criminal Law Revision and Constitutional Rights Preservation Act of 1976", be considered as a basis for writing a just criminal code. The only satisfactory procedure in consideration of such omnibus legislation is to start the legislative process with an acceptable bill. H.R. 2311, a revision of H.R. 10850 in the 94th Congress, is based upon sound democratic principles and such defects as appear can be cured, or changes made, in the course of the regular legislative process.

NEED FOR FURTHER HEARINGS

The democratic process requires that bills, such as S. 1437 and H.R. 2311, which will have far-reaching consequences for the American people, should re-

[1] Statement submitted as testimony before this Subcommittee on June 21, 1977.

ceive the fullest possible public scrutiny and input prior to passage. The five days of hearings on S. 1437 which have already taken place are woefully inadequate to meet this basic requirement. This is particularly evident in light of the fact that the majority of these hearings was devoted to a very small part of the bill, the sentencing provisions, almost totally ignoring the important civil rights and civil liberties provisions which aroused wdespread public protest last year.

The CCJCC urges the Subcommittee on Criminal Laws and Procedures to hold fruther extensive hearings on proposals to reform and revise the criminal code. We urge that the text of H.R. 2311 be considered in these hearings as a basis for a constructive and democratic alternative to S. 1437.

UNIVERSITY OF COLORADO AT BOULDER,
SCHOOL OF LAW,
BOULDER, COLO., JUNE *30, 1977*.

KENNETH R. FEINBERG,
Office of Senator Edward M. Kennedy,
U.S. Senate, Washington, D.C.

DEAR KEN: I like the sentencing provisions of your bill very much, and you are right that plea bargaining in the federal courts is sufficiently different from that in the state courts that the concerns which I expressed in my California talk are substantially less applicable. Of course the bill does pass the most critical sentencing issues on to the Commission. I believe, however, that this approach is not only "politic" but exactly right on the merits in light of our limited knowledge.

It was good to see you, if only briefly. I wish that I could persuade you to build on the sensible base that your sentencing bill establishes by starting work on the Anti-Plea-Bargaining Act of 1982. Who knows? It might be possible to turn the criminal justice system into something vaguely rational.

Anyway, congratulations on a nice job. If you're making a list of legal academics who endorse the sentencing reforms of S. 1437, please add my name.

Sincerely yours,

ALBERT W. ALSCHULER,
Professor of Law.

In the United States District Court for the Western District of Wisconsin

75–C–493, decided May 6, 1977 (W. D. Wis.)

HAYWARD BROWN, PETITIONER
v.
NORMAN CARLSON AND GEORGE RALSTON, RESPONDENTS

75–C–607

HAROLD LOUIS WALLS, PETITIONER
v.
GEORGE RALSTON AND NORMAN CARLSON, RESPONDENTS

75–C–544

NORMAN WEAVER, PETITIONER
v.
GEORGE RALSTON AND NORMAN CARLSON, RESPONDENTS

ORDER

These are petitions for writs of habeas corpus properly before this court by virtue of 28 U.S.C. § 2241 (1970). Petitioners are currently inmates at the Federal Correctional Institution, Oxford, Wisconsin. They were sentenced pursuant to 18 U.S.C. § 5010(c), which is a part of the Federal Youth Corrections Act (YCA), 18 U.S.C. §§ 5005–5026. Each petitioner alleges that Oxford is not the

type of institution specified in the YCA for his confinement. In addition, petitioner Brown alleges that he has not been sent to a classification center or agency before being sent to a designated institution despite the requirements of 18 U.S.C. § 5014. Because the issue presented in each of these petitions regarding the propriety of each petitioner's confinement at Oxford is identical, I have consolidated the petitions for the purposes of this opinion. I now "dispose of the matter as law and justice require." 28 U.S.C. § 2243.

FACTS

On the basis of the entire record in each case, I find as fact those matters set forth in this section of this opinion.

On January 19, 1954, the Deputy General of the United States issued a memorandum (memo no. 64) to the clerks of the United States District Courts, the United States Attorneys, the United States Marshals, and the United States Probation Officers, informing them that the Director of the Bureau had certified, pursuant to 18 U.S.C. § 5012, that proper and adequate treatment facilities and personnel were available for the implementation of the YCA for the judicial districts of the First, Second, Third, Fourth, Fifth (except for districts in Texas and Louisiana), Sixth and Seventh Circuits. The memorandum stated that the availability of facilities for commitment of youths from the remaining districts would be announced as soon as possible. The memorandum continued:

"The Federal Correctional Institution at Ashland, Kentucky, is being converted into a Classification Center and treatment facility for youth offenders as contemplated by the Act, and most youths between the ages of 18 and 22 will be committed to this institution. The National Training School for Boys, Washington, D.C., will be designated for selected youth offenders. Under exceptional circumstances and where the youth presents an unusual custody risk, the Federal Reformatory, Chillicothe, Ohio may be designated initially."

On October 4, 1956, the Attorney General issued another memorandum (memo no. 62, supplement No. 1) to the same addressees, informing them that the Director had certified that proper and adequate treatment facilities and personnel were available for the implementation of the YCA for the judicial districts of the Eighth, Ninth (except for Alaska, Hawaii, and Guam), and Tenth Circuits, and for the districts of Texas and Louisiana. The memorandum continued:

"The Federal Correctional Institution at Englewood, Colorado, is being converted into a classification center and treatment facility for youth offenders as contemplated by the Act, and most youths between the ages of 18 and 22 sentenced under the provisions of the Act from the districts listed above will be committed to this institution. Under exceptional circumstances and particularly where the youth presents an unusual custody risk, the Federal Reformatory, El Reno, Oklahoma, may be designated."

On June 16, 1975, the Director issued a policy statement (number 7300.13E) on the subject of "delegation of transfer authority." By this statement, the Director delegated to the chief executive officer of each federal facility, and to the Bureau's regional director of the appropriate region, the power to transfer offenders from one federal institution to another or to an approved non-federal facility. The policy statement included general guidelines, a statement of limitations and regulations, a statement on relationship with other governmental agencies, and a statement of procedures, to assist those to whom the transfer authority was being delegated. Also, attached to the policy statement was an appendix which provided current information as to the mission of each federal correctional institution and described the population, characteristics, commitment areas, security limitations, and significant program resources of each institution. The delegates were instructed to preserve the integrity of the missions of the respective institutions when selecting an institution as the place to which a particular offender was to be transferred.

The policy statement's guidelines provide that a "significant number of transfers will be for the purpose of placing newly committed offenders in institutions for which they more properly classify." They provide that at "an inmate's initial classification, the staff should attempt to plan a complete program for the entire period of confinement, including both institutional and post-release phases," and that in making the plan, "all of the resources of the Federal Prison System should be considered." Also, they state that generally, "transfer consideration is most appropriately given at the time of intake screening, initial classification, or at regularly scheduled interviews." They instruct that transfer should be considered when it becomes apparent that the offender's program or

other needs will be best served by the programs at another facility, when the continuity of a training program or treatment program or both requires it, and when the resources of the present institution are inadequate to meet the offender's needs. It appears from the policy statement that more particular reasons for transfers may include: that the transferee institution is geographically closer to the point at which the offender is to be released; that poor institutional adjustment or attempts at escape indicate the need for closer supervision and controls; that medical attention is required or that it has been completed; that work release or study release is possible at the transferee institution; that the transferee is a community center; that overcrowding at the transferor institution requires it; or that there is a need to build up the population at the transferee institution.

With specific reference to the YCA, policy statement 7300.13E provides:

"*Youth Corrections Act* commitments shall be classified at the receiving institution, where the initial parole hearing will also be given. Following this hearing, or any appropriate time thereafter, the youth offender may be transferred by delegated authority to another more appropriate *youth* institution without referral to the Regional Case Management Branch. Youth offenders recommended for an adult correctional facility at the time of initial classification or at any later date, shall be referred to the Regional Administrator, Case Management Branch for approval. [At this point reference is made to another portion of policy statement 7000.13E relating to the timing of transfers in relation to initial parole hearings for YCA offenders. The reference does not appear to be pertinent to the issues in the present cases.]

"Any youth offender, having once been authorized for transfer to an adult Federal Correctional Institution, may be transferred under delegated authority to some other, more appropriate, adult FCI. However, any youth offender authorized for transfer to a penitentiary by the Regional Office may not be transferred to another penitentiary under delegated authority; each transfer of this nature must be approved by the Regional Case Management Branch."

In the descriptions of individual correctional institutions embodied in Appendix A to policy statement 7300.13E, there are occasional references to YCA, but there is no systematic statement of those to which YCA offenders may or may not be committed initially or transferred. As to Oxford specifically, there is no reference to YCA; it is said that the "population is composed of medium to long term young male adults," that Oxford is not suitable for juvenile offenders and that the age range is "21 to 28 at time of commitment."

Among the 56 institutions operated by the Bureau of Prisons, there are 12 facilities which are classified either as juvenile and youth institutions (4) or as young adult institutions (8).

Apparently as a matter of operating policy, not made explicit in memorandum no. 61, memorandum no. 62 (supplement no. 1), or policy statement number 7300.13E, above, the Bureau has designated these 12 institutions as the standard institutions for initial commitment of prisoners sentenced under the YCA.

The Bureau does not maintain any institution which is used exclusively for prisoners serving YCA sentences (hereafter referred to as "YCA offenders"). At least 27 percent of the population of each Bureau of Prisons institution is composed of prisoners serving adult sentences (that is, sentences not imposed under YCA).

The Federal Correctional Institution, Oxford, Wisconsin, is classified as a medium security young adult institution. The inmates at Oxford are persons who have been committed to medium and long-term sentences, and they have an age range of 21 to 28 years at the time of commitment. The average age of all inmates at Oxford on May 5, 1976, was 24.98 years.

Among the May 5, 1976, population at Oxford, 12 percent of the inmates were serving commitments under YCA sentencing provisions and the remaining inmates were serving commitments under adult sentencing provisions. Persons serving YCA sentences at Oxford are not separated from those serving adult sentences, either in their treatment programs or in their housing units.

The Bureau does not maintain any institutions which are used exclusively as centers for initial study or classification of prisoners, but instead uses each of its institutions as the site of a classification center for prisoners designated to serve sentences there. It is an infrequent occasion on which, either before or after the admission and orientation program at such institution has been completed, the initial designation of an institution for service of sentence is

changed because it has been determined that an improper designation has been made.

Upon arrival at Oxford, new inmates are placed in an admission and orientation program, which lasts approximately three weeks and which provides new inmates with information about the treatment programs available at the institution. The new inmates are given physical and dental examinations, and undergo educational and psychological testing.

At the conclusion of the admission and orientation period at Oxford, an inmate is assigned to one of three functional units there, on the basis of an evaluation by the institution's psychology department of the personality traits observed and studied by the case manager, correctional counselor, and unit officer during the admission and orientation period. The three functional units at Oxford are divided into: (1) the most manipulative and criminally oriented inmates; (2) the inmates least likely to revert to crime when released; and (3) an intermediate group of inmates. About two weeks after an inmate has been assigned to one of the three functional units, a classification interview is provided him by four staff members to discuss his treatment needs, goals, and institutional program preferences. No distinction is made between YCA and non-YCA offenders in the course of this admission, orientation, and assignment procedure.

Oxford was originally designed architecturally by the State of Wisconsin as an institution for youth offenders, and since its acquisition by the Federal Bureau of Prisons it has always been used by the Bureau as an institution for youthful offenders. The ratio of inmates to case managers is 63 to 1, and to counselors 75 to 1. At federal adult institutions, equivalent ratios on the average are 100 to 1, and 85 or 90 to 1.

The rehabilitative programs available to inmates at Oxford include adult basic education, general educational development, 11 college courses (for the spring semester of 1976) taught by the faculty of the University of Wisconsin at Baraboo, one group counselling program conducted by a clinical psychologist, additional group counselling programs, vocational training in food management leading to an associate of arts degree, vocational training in drafting, transactional analysis group thereapy, a self-improvement organization seminar conducted by inmates, a self-improvement seminar conducted by outside consultants, and federal prison industries training in plastic products manufacturing and electronic cable assembly.

Inmates are not assigned to the various programs. The inmates are responsible for voluntary selection and participation in programs. YCA offenders are given no priority in these programs.

The Bureau has determined that the 12 institutions which it designates for the confinement of YCA offenders and the treatment programs made available there to YCA offenders, meet the requirements of the YCA. Based upon criteria of age, offense, prior record, security requirements, and special treatment needs, the Bureau has determined that many other offenders not sentenced under YCA, will also benefit from confinement in the same institutions, and from the opportunity to participate in the same treatment programs. Therefore, the members of the latter category (which is far more numerous than the YCA offender category) are confined in the same institutions and are given the opportunity to participate in the same treatment programs as those designated for YCA offenders.

As of spring 1976, there were approximately 2700 YCA offenders in confinement in the United States. If they were confined in a few institutions, perhaps five, from which all other offenders were excluded, it would be more difficult in some degree to maitain ties with their families and communities than it is when YCA offenders are distributed among 12 institutions.

With respect to administrative remedies, although the records in these cases are not explicit, the parties appear to agree, and I find, that the administrative procedures available to these petitioners are as they are described in *Cravatt* v. *Thomas*, 399 F. Supp. 956, 961 (W.D. Wis. 1975).

75-C-493

On July 30, 1975, petitioner Brown was convicted of possession of: 3 unregistered destructive devices (Molotov cocktails); destruction by explosion of a Planned Parenthood clinic in Detroit, Michigan; and causing personal injury to a doctor. On the date of conviction, petitioner Brown was 20 years old. He has no other adult convictions. He has served one juvenile commitment for breaking and entering, and has been arrested several times. On July 30, 1975, he was

sentenced by the United States District Court for the Eastern District of Michigan to an 8-year commitment "for treatment and supervision pursuant to Title 18, U.S.C. § 5010(c)."

After being temporarily detained one day at the Oakland County Jail, Pontiac, Michigan, and eight days at the Federal Correctional Institution, Milan, Michigan, petitioner was transported to the Federal Correctional Institution, Oxford, which was designated by the Bureau of Prisons as the place for service of petitioner's sentence. At no time prior to incarceration at Oxford was petitioner committed to any classification center or agency for study and analysis.

Upon arrival at Oxford, petitioner was placed in the institution's admission and orientation program. At the conclusion of that program petitioner was placed in the functional unit provided for those inmates considered to be most manipulative and criminally oriented.

Petitioner Brown has participated in several educational programs since his arrival at Oxford. He has not been separated from inmates serving adult sentences in either his treatment programs or in his housing unit.

75–C–544

Petitioner Weaver was found guilty of armed bank robbery. On the date of conviction, petitioner Weaver was 23 years old. The United States District Court for the Northern District of Ohio, Eastern Division, found that he was "suitable for handling under the Federal Youth Correction Act as a young adult offender, Title 18, Section 4209, U.S.C." and on June 18, 1975, sentenced him to a term of imprisonment of eight and one-half years, pursuant to 18 U.S.C. § 5010(c).

On July 1, 1975, petitioner Weaver was delivered to the Federal Correctional Institution at Milan, Michigan. On August 20, 1975, he was transferred to the Federal Correctional Institution, Oxford. Petitioner has not been separated from inmates serving adult sentences in either his treatment programs or his housing unit.

75–C–607

On April 7, 1975, petitioner Walls was sentenced by the United States District Court for the District of Minnesota pursuant to 18 U.S.C. § 5010(c). On April 17, 1975, he was delivered to the Federal Correctional Institution at Oxford, Wisconsin. He has not been separated from inmates serving adult sentences in either his treatment programs or his housing unit.

OPINION

In 75–C–493 and 75–C–544 respondents contend that since petitioners have not exhausted their administrative remedies, their claims should not be considered by this court at this time.[1]

In the absence of a statutory requirement, the application of the exhaustion doctrine to a particular case is within the court's discretion. *Cravatt* v. *Thomas*, 399 F. Supp. 956, 968 (W.D. Wis. 1975). The more closely the particular administrative procedures resemble court procedures, the more forceful the argument that the aggrieved party should be required to exhaust those procedures. Inmate grievance procedures differ from court procedures in significant respects. Accordingly, respondents in cases such as these must "make a showing of particularized need" that an inmate should be required to exhaust the inmate grievance procedures. *Cravatt* at 969. Respondents have failed to make this showing.

Respondents make two somewhat contradictory arguments. The first is that since the petitioners are seeking a transfer to another institution which is more suitable for service of their sentence, the issue is factual, and the Bureau should be given the opportunity to consider whether the facts of each petitioner's particular case warrant a transfer. This argument views the petitions too narrowly. They are not simply claims by members of the general population of the federal correctional institutions system that in their particular cases one existing correctional institution is more suitable than another, but rather they are claims that respondents are failing to confine them as YCA offenders in the kind of institution, and to afford them the kind of programs, which Congress directed. Even were I to view petitioners' claims so narrowly, respondents have made no showing that the procedures available to petitioners would serve as adequate fact-finding vehicles, or that the administrative record would provide any assistance in the course of subsequent judicial inquiry.

[1] I conclude that the controversies in these cases satisfy the criteria for ripeness set forth in *Cravatt* v. *Thomas*, 399 F. Supp. 956, 965–966 (W.D. Wis. 1975).

Respondents' second argument is that even though this court might generally be reluctant to require exhaustion absent a more formal administrative procedure, a more formal procedure is not necessary in these cases because the "thrust of petitioner[s]' contentions before the Court are directed not at factual determinations by the Bureau in [their] cases[s] but rather at the legality of a general Bureau policy." But if the issue in question in these cases is purely legal, a requirement of exhaustion is inappropriate. *Cravatt, supra*, at 970.

I conclude that exhaustion of the Bureau's grievance procedures should not be required in these cases.

A. The statutory scheme

Section 4082 of Title 18, which was enacted long before 1950, when the YCA became law, provides in part:

"(a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served.

"(b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another."

The Attorney General has delegated to the Director of the Bureau of Prisons the power to designate places of confinement conferred by § 4082. 28 C.F.R. § 0.96(c).

The YCA sets forth for the discretionary use of federal judges a system for the sentencing and treatment of eligible young offenders. As defined in 18 U.S.C. §§ 5006(e) and (f), a "youth offender" is a person under the age of twenty-two at the time of conviction, and a "committed youth offender" is one who is sentenced pursuant to 18 U.S.C. §§ 5010(b) or (c):

"(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or

"(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter."

Sections 5017(c) and (d) provide:

"(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

"(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction."

Under certain circumstances a federal judge may also sentence young adult offenders (offenders between the ages of 22 and 25, inclusive, at the time of conviction) pursuant to the provisions of the YCA. 18 U.S.C. § 4216.

Section 5014 states, in part:

"Classification studies and reports

"The Director shall provide classification centers and agencies. Every committed youth offender shall first be sent to a classification center or agency. The classification center or agency shall make a complete study of each committed youth offender, including a mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental

or physical defect or other factor contributing to his delinquency. In the absence of exceptional circumstances, such study shall be completed within a period of thirty days." [2]

Section 5015(a) states:

"(a) On receipt of the report and recommendations from the classification agency any Director may—

"(1) recommend to the Division [now to the Parole Commission] that the committed youth offender be released conditionally under supervision; or

"(2) allocate and direct the transfer of the committed youth offender to an agency or institution for treatment; or

"(3) order the committed youth offender confined and afforded treatment under such conditions as he believes best designed for the protection of the public."

Section 5011 provides:

"TREATMENT

"Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment. The Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment. Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment."

Section 5012 provides:

"No youth offender shall be committed to the Attorney General under this chapter until the Director shall certify that proper and adequate treatment facilities and personnel have been provided."

Other pertinent provisions of the YCA will be referred to in the following discussion.

B. The congressional history

The legislative history reveals that the YCA was the outgrowth of studies which concluded that the period of life between 16 and 22 years of age is the time when special factors operate to produce habitual criminals.[3] Then existing methods of dealing with criminally inclined youths were found inadequate in avoiding recidivism.

"By herding youth with maturity, the novice with the sophisticate, the impressionable with the hardened, and by subjecting youth offenders to the evil influences of older criminals and their teaching of criminal techniques, without the inhibitions that come from normal contacts and counteracting prophylaxis, many of our penal institutions actively spread the infection of crime and foster, rather than check it." H.R. Rep. No. 2979, 81st Cong., 2d Sess. (1950) (hereinafter H.R. Rep. No. 2979); 1950 U.S. Code Cong. Service, p. 3985.

As a result of this dissatisfaction with existing methods of dealing with young offenders, Congress established a system of sentencing and treatment designed to:

". . . promote the rehabilitation of those who in the opinion of the sentencing judge show promise of becoming useful citizens, and so will avoid the degenerative and needless transformation of many of those persons into habitual criminals. . . . The underlying theory of the bill is to substitute for retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies. It departs from the mere punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation." H.R. Rep. No. 2979; 1950 U.S. Code Cong. Service, pp. 3983, 3985.

---

[2] At the time each of these petitioners was sentenced, the remainder of Section 5014 read: "The agency shall promptly forward to the Director and to the Division a report of its findings with respect to the youth offender and its recommendations as to his treatment. At least one member of the Division, or an examiner designated by the Division, shall, as soon as practicable after commitment, interview the youth offender, review all reports concerning him, and make such recommendations to the Director and to the Division as may be indicated." These provisions have since been modified to provide that the agency report go to the Parole Commission and that the youth offender receive a parole interview promptly after commitment.

[3] Although the YCA has been amended a number of times since 1950, the amendments are not relevant to the issues presented in these cases.

Thus, by enactment of the YCA, Congress hoped to provide a better method for treating certain young offenders to be selected by the sentencing judges, and thereby to rehabilitate these offenders. *Dorszynski* v. *United States*, 418 U.S. 424, 433 (1974). Rehabilitation is the "underlying theory" of the YCA (H.R. Rep. No. 2979; 1950 U.S. Code Cong. Service, p. 3985). This House committee report, as well as Senate Report No. 1180, 81st Congress, 1st Session, 1949, emphasize the objective of rehabilitation as contrasted with what were perceived as traditional goals in the confinement of non-YCA offenders. They include pointed discussion of the programs of individualized treatment embodied in the English Borstal system, on which the YCA was said to have been modeled.

C. The merits

The general and pronounced pattern in the federal correctional scheme is that sentencing judges decide whether an offender is to be imprisoned, but "imprisonment" is left undefined by Congress and by the court's judgment. The word is defined, and the everyday reality of life in confinement is determined administratively by the Bureau of Prisons. The Bureau decides where the offender is to be confined and to what regimen he or she is to be subjected. If changes in the places or the forms of confinement are to occur, either for a particular offender during a particular term or for offenders generally throughout the system, the decisions are to be made by the Bureau.

The YCA represents a sharp departure from this pattern of remarkably wide administrative discretion. The harsh question for the court in the present cases is how to respond when it appears that an executive agency is failing to obey a legislative command. Congress has said rather bluntly that offenders aged 18 through 25, sentenced by courts under YCA, are to be segregated from other offenders for purposes of classification and then treatment. The fact appears to be that the Bureau is not segregating them.

When the question is put so baldly, the answer may appear easy. It is not. The reason it is not is that the Bureau has been left to struggle with painful anomalies. The source of these anomalies is that the Congressional departure from the general pattern of administrative discretion is limited to a single group of offenders. The result is that the Bureau is called upon to reconcile a relatively rigid institutional arrangement reflecting a relatively specific correctional theory, imposed by the Congress as to one group of offenders, with a highly flexible institutional arrangement responsive to a variety of correctional theories administratively developed for all other offenders. It is not for me to evaluate the wisdom of either the general pattern of administrative discretion or the YCA departure from the pattern. But some comments on the anomalies arising from their co-existence may illuminate the issue.[4]

A core difficulty lies in assigning a workable meaning to the term "rehabilitation," and thus in prescribing the ingredients of a rehabilitative treatment program.

There is no doubt that in enacting the YCA, Congress had in mind some rather specific kind of program. Under the provisions of §§ 5010(b), 5017(c) and 5020, if one is convicted of a crime for which the maximum sentence is two years, for example, and if the sentencing judge chooses to impose sentence under the YCA, one may be confined for as long as six years. The hoped for rehabilitation obviously comprises "the quid pro quo for a longer confinement but under different conditions and terms than a defendant would undergo in an ordinary prison." *Carter* v. *United States*, 306 F. 2d 283, 285 (D.C. Cir. 1962). In accord, *Cunningham* v. *United States*, 256 F. 2d 467, 472 (5th Cir. 1958); *Sero* v. *Oswald*, 351 F. Supp. 522, 526, n. 4 (S.D.N.Y 1972). Also, under § 5010(d), if the offender is under 22 years of age at the time of conviction, the court must impose a YCA sentence unless the court affirmatively finds that the offender "will not derive benefit from treatment under subsection (b) or (c). * * * " And under § 4216, if the offender is 22 years of age or older but not yet 26, the court may impose a YCA sentence if it affirmatively finds reasonable grounds to believe that the offender "will benefit from the treatment provided under the [YCA] * * *" These provisions of the YCA would be inexplicable had not Congress intended

[4] My reservations about the very institution of prisons, and my belief that they lie as a dark continent in federal constitutional law, have been expressed. *Morales* v. *Schmidt*, 340 F. Supp. 544 (W.D. Wis. 1972). But in the present cases, there is no challenge to the federal constitutionality of any particular attribute of confinement, such as censorship, limits on visitations, and so on.

the treatment of YCA offenders to differ from what it understood to be the prevailing treatment of non-YCA offenders, young and old.

Yet the term "treatment" which appears throughout the Act, §§ 5010(b), 5010(c), 5010(d), 5010(e), 5011, 5012, 5014, 5015(a), 5020 5025(a), 5025(b), and 5025(c), is defined no more precisely than "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders * * *" § 5006(f). If the Federal Correctional Institution at Oxford housed only YCA offenders, and if the program or programs offered were identical to those now offered to all inmates there, I could not conclude that the Bureau was failing to provide the "treatment" required by the YCA. No doubt, there is a wide array of rehabilitatively oriented treatment programs, all of which would fall within the range permitted by the YCA. I will refer to such programs in this opinion as "YCA-type" treatment programs.[5]

A second difficulty in dealing with this Congressional intervention with respect to only one segment of the population of federal correctional institutions is related to the first. The legislative history of the YCA suggests that in 1950 Congress viewed the federal correctional institutions as a monolith of retribution in which it was necessary to carve legislatively a niche of rehabilitation for a certain category of young offenders. I doubt that this view was accurate in 1950, but if so, it is no longer accurate. For some time, the theory and practice of corrections have been in a highly volatile state. See, generally, for example, Norval Morris, *The Future of Imprisonment* (University of Chicago Press, 1974); II Corrections Magazine, March 1976, at 3–8, 21–26. Considerable flexibility has developed within the federal correctional institutions—as well as within many state institutions—with varying degrees of emphasis upon retribution, rehabilitation, specific and general deterrence, and simple physical incapacitation, with yet more variety in techniques and methods intended to achieve one or more of these goals. Although controversy persists particularly whether rehabilitation can be coerced during physical confinement, and although the quantity and quality of rehabilitative opportunities available on a voluntary basis leave much to be desired, nevertheless such opportunities in the form of education and counseling and psychiatry, among others, do exist for older as well as younger offenders, for those with much criminal experience as well as for those with little. I have no doubt that there remain in the federal correctional system certain physical facilities and certain treatment programs that would fall clearly outside the permissible range for YCA offenders generally. But the current reality is that YCA-type physical facilities and YCA-type treatment programs are being afforded to many confined offenders who were not sentenced under YCA. It would surely be unreasonable to assume, and so to construe the YCA, that Congress intended to bar from YCA-type treatment programs all offenders not sentenced under the YCA.

This brings us to a third and related difficulty: that the responsibility for deciding whether certain offenders should participate in YCA-type treatment programs has been divided between sentencing judges and the Bureau.[6] It is true that for those under 22 years at the time of conviction, and for those 22 or older but under 26 years, the responsibility for the initial decision is assigned to the sentencing judges, and that if the sentencing judges decide affirmatively, the Bureau may not disregard, initially at least, the judicial command that the offenders participate in YCA-type treatment programs. But even for those under 22 whom the sentencing judges have decided will not derive benefit from YCA-type treatment programs (§ 5010(d)), the Bureau is not foreclosed from providing the opportunity to participate in such programs. This is more clearly true for those 22 or older but under 26 as to whom the sentencing judges have refrained from affirmative findings that the offenders will benefit from YCA-type treatment programs (§ 4216). It is yet more clearly true of those for whom sentencing judges are powerless to prescribe YCA-type treatment programs, namely, all those 26 or older at time of conviction. During the period of confinement, the Bureau has abundant opportunity to observe from offenders' attitudes and performances whether participation in YCA-type treatment programs is indicated. In any given case, this opportunity for the Bureau persists long after the brief moment at which the sentencing judge makes his or her evaluation. Whether

---

[5] The uncertainties concerning the kind of treatment program called for by the YCA are sharply revealed in the several opinions by members of the court in *Harvin v. United States*, 445 F. 2d 675 (D.C. Cir. 1971).

[6] This discussion of the comparative roles of the sentencing courts and the Bureau is limited to cases in which there is to be physical confinement. Nor does it reach the matter of the opportunity under the YCA for the setting aside of convictions, § 5021.

similar or divergent standards are used by sentencing judges, on the one hand, and the Bureau, on the other, in discharging the divided responsibility for decision has not been shown and is a question probably not amenable to empirical determination. The same may be said of a comparison of the degrees of care exercised in the judicial and administrative processes. But it is reasonable to suppose that the standards, vague as they no doubt are, are highly similar, and it seems necessary to presume that an adequate degree of care marks both the judicial and the administrative processes.

Thus, absent the enactment of the YCA, it would appear that the following would be a rational arrangement: The Bureau would classify initially all committed offenders 18 years of age or older, and would reexamine their classifications from time to time, in order to identify those for whom YCA–type treatment programs, that is, rehabilitatively oriented programs, should be provided. The Bureau would determine the content of such programs and the physical facilities within which they would be provided, and would make such changes in manner and places of treatment as might appear necessary or desirable from time to time. With respect to the grouping of those deemed eligible for YCA-type treatment, the Bureau would exercise its discretion. If the Bureau considered it sound theory and practice to avoid "herding youth with maturity, the novice with the sophisticate, the impressionable with the hardened," as Congress apparently believed in 1950, the Bureau could develop standards to effect such segregation. However, it is not graven in stone that confinement exclusively with one's peers in age is more effective or desirable than confinement in an institutional community whose membership more closely reflects the age variations encountered outside correctional institutions. If the Bureau considered it sound, it could effect integration among the young and the mature, the novice and the sophisticate, the impressionable and the hardened, or, more sensibly, it could attempt evaluations of the quality of the maturity, sophistication, and hardness of particular offenders in determining the groups within which they should reside.[7]

Against the background I have described and in view of the specific language of the YCA, there must be decided the central question in this case: how much discretion remains in the Bureau in the cases of offenders committed by sentencing judges under the YCA (to whom I will continue to refer as "YCA offenders")? More particularly, the questions are: (1) whether a YCA offender must be the subject of special classification procedures; and (2) whether, once it has been determined through the classification procedures that he or she is to be physically confined, the YCA offender must be segregated from non-YCA offenders for treatment.

(1) *Classification.*

Following the decision by a sentencing judge to commit a young person for treatment under the YCA, the Bureau is called upon by the Act to engage in a special classification process in special classification centers or agencies. This classification study is clearly required to precede a decision by the Director as to the appropriate treatment in a particular case and, therefore, clearly to precede the designation of the particular institution within which the offender is to be confined. § 5015(a). From Memo No. 64 dated January 19, 1954 and Memo No. 62 (supplement no. 1) dated October 4, 1956, it appears that the Bureau shared this understanding in the years closely following upon the enactment of the YCA. The institution at Ashland, Kentucky, was "being converted into a classification center and treatment facility as contemplated by the Act," as was the institution at Englewood, Colorado, and "most youths between the ages of 18 and 22 will be committed to" one or the other of these institutions, depending upon geography. The administrative history between about 1956 and about 1975 is unrevealed in this record,[8] but it does reveal that there is presently no compliance, save only that there is operative some generalized Bureau decision that one or another of a group of 12 institutions will be designated as the initial place of confinement and the place at which the classification process will occur in the cases of YCA offenders, and that none of another group of 44 institutions will be so designated.

---

[7] The present record does not reveal the quality of the maturity, sophistication, or hardness of the particular non-YCA offenders who are presently confined with the petitioners at Oxford. Petitioners have presented their cases on the flat contention that no such integration is permissible, without regard to the characteristics of the particular non-YCA offenders with whom they are confined.

[8] Some difficulty has arisen from the apparent absence of a continuing and formalized procedure for the certification by the Director that proper and adequate YCA treatment facilities and personnel are in place. § 5012. See *Robinson* v. *United States*, 474 F.2d 1085, 1090–1091 (10th Cir. 1973); *United States* v. *Lowery*, 335 F. Supp. 519 (D.D.C. 1971).

I do not suggest that this record supports a finding that the designation of the place of confinement is not performed YCA case by YCA case, or that it is not performed sensitively and intelligently. But the record does compel a finding that the designation does not involve or await the special classification studies for YCA offenders provided for in § 5014, and apparently intended in 1954 and 1956 to be performed at Ashland and Englewood when they had been converted into "classification centers . . . as contemplated by the Act."

Conceivably the 12 institutions currently designated as the places of confinement for YCA offenders could be viewed as the modern counterparts of the YCA classification centers to which Ashland and Englewood were to be converted. Thus, rather than only two such YCA classification centers, 12 would now be available. But this theory would be vindicated only if it were shown that each of the 12 centers performs a special YCA classification process for the YCA offenders, after which each YCA offender is promptly committed for confinement to that one of the 12 institutions most appropriate in his or her case. It is true that in policy statement 7300.13E, issue June 16, 1975, on the subject of interinstitutional transfers of all offenders, YCA and otherwise, there is a suggestion that the initial designation is to be viewed as rather tentative—as simply a designation to a "classification center," so to speak, physically located within a particular institution at which the classification process is to be engaged in, followed by a determination as to which one of the 56 institutions would be most appropriate and by a prompt transfer thereto. But no showing has been made in this record that this is how the classification and designation system actually works nationwide or at Oxford, or that there is anything special about how it works in the cases of YCA offenders either nationwide or at Oxford. Rather, it appears that at Oxford, for YCA offenders and non-YCA offenders alike, the admission and orientation program looks to a decision as to which one of the three functional units at Oxford is appropriate to the case.

It is plain that the classification procedure afforded YCA offenders as a category is not distinct and segregated from that afforded many non-YCA offenders as another category. This lack of discrimination between the two categories was not contemplated by Congress when it enacted the YCA.[9]

(2) *Treatment.*

Subject only to the qualifying phrase "insofar as practical," Congress has expressly commanded the Director to designate, set aside, and adapt institutions and agencies to be used only for treatment of YCA offenders, and to segregate youth offenders from other offenders. § 5011. From this language it appears that Congress views segregation itself as an essential element of the treatment to be afforded those offenders committed by sentencing judges under the YCA.

But there is not a single Bureau institution which is used only for the treatment of YCA offenders. Whether there is any institution housing both YCA offenders and non-YCA offenders within which these two categories are segregated is not clear from this record, but it is clear that they are not segregated at Oxford.

Faced with this apparent discrepancy between the statutory command and the actual practice, I understand respondents to argue, first, that despite § 5011 the Bureau enjoys unlimited discretion in deciding the places of confinement and the treatment programs for all offenders, YCA and otherwise; and, second, that in fact, "insofar as practical," institutions and agencies have been designated, set aside, and adapted for use only for treatment of YCA offenders, and YCA offenders are segregated from other offenders.

It is true that 18 U.S.C. § 4082(b) confers broad authority upon the Attorney General to designate "any available, suitable, and appropriate institution or facility" for the confinement of persons committed to his or her custody by sentencing courts and for the transfer of such persons from institution to institution, and that the Attorney General has elegated this authority to the Director. 28 C.F.R. § 0.96(c). Also, § 5015(a) of the YCA itself provides that upon receipt of the report and recommendation from the classification agency the Director may: recommend to the Commission that the offender be conditionally released; transfer the offender to an agency or institution for treatment; or order the offender "confined and afforded treatment under such conditions as he believes best designed for the protection of the public." Section 5011 of the Act provides

[9] It should be noted that with respect to classification procedures, as distinct from treatment, the Act contains no saving provision to the effect that there be segregation only insofar as practical.

that treatment shall be undergone "in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment."

I am aware, also, that in *Sonnenberg* v. *Markley*, 289 F.2d 126 (7th Cir. 1961), it was held that the choice of the place of confinement of a person committed to the custody of the Attorney General under the Juvenile Delinquency Act (18 U.S.C. § 5031 et seq.) lay so wholly within the discretion of the Attorney General that a penitentiary might be chosen. However, at that time the Juvenile Delinquency Act contained no requirement that, following a finding of delinquency, juvenile delinquents were to be confined separately from other persons. In 1974, the Act was amended to require such segregation. 18 U.S.C.A. § 5039 (1976).[10]

Familiar rules of construction require that the authorization contained in the broad sweep of § 4082(b) be considered limited by the later enacted YCA which was directed to a particular category of offenders. Also, the broad language of §§ 5015(a) and 5011 must be construed within the narrowing and interrelated provisions of YCA which so clearly confine the Director's exercise of discretion as to choice of institutions and choice of treatment.

I conclude that the Bureau does not enjoy complete discretion in designating the place of confinement of YCA offenders. On the contrary, subject to an important qualification, § 5011 plainly requires that institutions and agencies be designated, set aside, adapted, and used only for the treatment of YCA offenders, and that YCA offenders be segregated from non-YCA offenders.

Therefore, the ultimate question must be answered: whether the Bureau's practice is permissible because the words "insofar as practical" appear in § 5011, which reads:

"TREATMENT

"Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment. The Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment. Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment."

It is not easy to find a construction of § 5011 which gives effect to its arrangement and its punctuation, and also gives common sense effect to "insofar as practical."

One conceivable construction is easy to discard. In this opinion I have discussed at length several anomalies resulting from a Congressional departure, with respect to a certain group of offenders, from the dominant and general pattern of remarkably wide administrative discretion. But it cannot be supposed reasonably that by inserting the words "insofar as practical" in § 5011, Congress intended to permit the Bureau to decide that, by reason of these anomalies or by reason of added costs in facilities and staff, the entire statutory scheme of segregation is impractical and then simply to refrain, wholesale, from implementing the scheme. So to construe the Act would be to infer Congressional willingness that its major command be nullified by the executive. That is, it would be to infer Congressional acquiescence in executive recalcitrance similar to the practice of executive impoundment of Congressionally appropriated funds, a practice so vigorously and recently criticized by Congress. Such a radical construction must yield to a more reasonable view.

The last sentence of § 5011, which opens with "insofar as practical" consists of three clauses: (1) "such institutions and agencies shall be used only for treatment of committed youth offenders," (2) "and such youth offenders shall be segregated from other offenders," (3) "and classes of committed youth of-

---

[10] In *Coats* v. *Markley*, 200 F. Supp. 687 (S. D. Ind. 1962), it was held, with heavy reliance upon *Sonnenberg*, *supra*, that in the choice of confinement of a person sentenced under the YCA, the Attorney General enjoys discretion as complete as that the Attorney General enjoyed under the Juvenile Delinquency Act, as the latter act read when *Sonnenberg* was decided. In *Coats*, the court made no reference to the explicit provisions of the YCA calling for segregated confinement. I consider it necessary to attempt a fresh analysis.

fenders shall be segregated according to their needs for treatment." Clause (3) appears to have no bearing on the present cases. Two initial questions concerning clauses (1) and (2) are: whether "insofar as practical" modifies only (1) or both (1) and (2); and whether (1) and (2) can be rescued from redundancy.

I conclude that "insofar as possible" modifies both (1) and (2); there seems no reason to attach this safety valve to the requirement that the institutions and agencies be used only for YCA offenders, but to withhold it from the requirement that YCA offenders be segregated from other offenders.

The apparent redundancy between (1) and (2) is more difficult to solve. If a group of YCA offenders are housed in an institution used only for the treatment of YCA offenders, it follows that they have been segregated from non-YCA offenders. But I am obliged to give meaning to each clause and thus to avoid redundancy, if I reasonably can, and this seems possible. That is, I conclude that if and when it is not practical to house one or more YCA offenders in an institution or agency used only for the treatment of YCA offenders, and the said YCA offender or YCA offenders are housed with non-YCA offenders, then, insofar as practical, the two categories of offenders are to be segregated from one another within the institution or agency in which they are both housed. An example might be a training program in a particular skill which the Bureau desires to make available both to YCA offenders and to non-YCA offenders and for which unusually expensive equipment and high salaried instructors are required. Practical considerations, particularly the conservation of funds, might dictate that a single physical facility be maintained for this particular training program, and that there be brought successively to that facility for the necessary training periods "classes" consisting of some YCA offenders and some non-YCA offenders. While it might be impractical for the two categories to attend segregated classes and laboratories, it might nevertheless be practical to segregate them for all other purposes within the single facility during the training period.

I have undertaken to analyze the last sentence of § 5011. There remains the need to synthesize that last sentence with the two sentences which precede it.

The first sentence reads: "Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varities of treatment." In this sentence, no mention is made of segregation of YCA offenders from non-YCA offenders, and the references to maximum security institutions and to hospitals, for example, may be thought to imply non-segregation.

The second sentence reads: "The Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment." Obviously, this must be read in conjunction with the first sentence, and it seems to imply that from the universe of all the "institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies," then existing or later to come into existence, the Bureau was to designate certain ones, set them aside for YCA offenders, and adapt them for treatment of YCA offenders. Read together, the first two sentences imply at least some degree of segregation of YCA offenders because they would be housed within those institutions and agencies set aside and adapted for their treatment.

Then, of course, the first clause of the third and final sentence makes explicit what was implicit, namely, that those institutions and agencies designated and set aside from the all-encompassing universe of institutions and agencies, and adapted by the Bureau for the treatment of YCA offenders, are to be used only for that purpose, "insofar as practical."

From all this, I can conclude only that Congress has commanded that within a universe consisting of all the institutions and agencies housing all offenders sentenced to confinement by federal courts, there was to be created and there is now to be maintained a smaller universe consisting of those institutions and agencies designated, set aside, and adapted for the treatment of the YCA offenders. And I can conclude only that the institutions and agencies within this smaller universe are to be used exclusively for the treatment of YCA offenders. To speak more concretely, I conclude that the YCA requires that the 2,400 or so YCA offenders in confinement (to use the spring 1976 figure) are to be distributed within a segregated network of maximum security, medium security, and minimum security institutions, some of which (presumably the

minimum security institutions) would be hospitals, farms, and forestry camps, and some of which (perhaps maximum and medium, as well as minimum security institutions) would be training schools, and some of which (with provision for whatever degree of security may be appropriate) would be yet "other agencies that will provide the essential varieties of treatment."

However, this segregation of YCA offenders within the smaller universe of YCA institutions and agencies need be maintained only "insofar as practical."

It is conceivable that because Congress envisaged a transitional period in the wake of enactment of the YCA, the phrase "insofar as practical" was inserted in part to ease the transition. But it is unlikely that this was the exclusive reason, particularly in light of § 5012, which defers the time at which judges might commence to commit offenders under YCA until the time at which the Director should certify "that proper and adequate treatment facilities have been provided."

I conclude that the presence of the phrase "insofar as possible" in § 5011 means that the Bureau is free to depart from the statutory norm of segregation occasionally, in the presence of unusual and unforeseen circumstances, and for only so long as may be necessary. I construe it to mean, also, that the Bureau is free to depart from the statutory norm for longer periods of time, even semi-permanently, with respect to limited numbers of YCA offenders. One example of such an exception might be the need for an unusually expensive and specialized training facility of the sort I have mentioned. Another example might be that if experience reveals that at any given time a number of YCA offenders require confinement under maximum security conditions, but that this number is consistently small (50 to 100, for example), the Bureau would be free to house them in existing maximum security institutions in which non-YCA offenders are also housed; provided, however, that within such maximum security institutions, the YCA offenders are segregated from the other offenders "insofar as practical."

By 1977, of course, any reasonable transition period under YCA is long past. In the present cases there has been no showing that the departures from a scheme of segregation are only occasional, that they are compelled by unusual circumstances, or that they have been brief. Nor has there been a showing that in the particular case of any of these petitioners, the Bureau has concluded, either at the time of the initial designation of a place of confinement or subsequently by reason of his behavior during confinement, that it is necessary that he be specially expected from a scheme of segregation. On the contrary, the record shows that the Bureau has made non-segregation the continuing norm.

I conclude that in the case of petitioner Brown, the Youth Corrections Act has been violated by the Bureau's failure, prior to the designation of Oxford as his place of confinement, to perform a separate and distinct classification procedure in the kind of classification center contemplated by the Act. In the case of each of the three petitioners, I conclude that the Youth Corrections Act has been violated, and is being violated, by confinement in an institution not used only for youth offenders committed under the Act and by confinement in which petitioners are unsegregated from offenders not committed under the Act.

Order

It is ordered that the petition for habeas corpus in each of the above-entitled cases is granted, and that:

1. Petitioner Brown in 75–C–493 is to be released unconditionally on the 91st day following entry of this order unless, prior to that time, he is placed in a center used solely for the classification of offenders committed by sentencing courts pursuant to the Youth Corrections Act; and unless he is thereupon accorded a procedure separately and distinctly designed for the classification of offenders so committed; and unless, if the Director then orders him to be confined, he is then confined in an institution used only for offenders so committed.

2. Petitioner Walls in 75–C–607 is to be released unconditionally on the 91st day following entry of this order unless, prior to that time, he is confined in an institution used only for offenders committed by sentencing courts pursuant to the Youth Corrections Act.

3. Petitioner Weaver in 75–C–544 is to be released unconditionally on the 91st day following entry of this order unless, prior to that time, he is confined in an institution used only for offenders committed by sentencing courts pursuant to the Youth Corrections Act.

Entered this 6th day of May, 1977.

By the Court:

JAMES E. DOYLE,
District Judge.

STATEMENT OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC., PRESENTED TO THE SENATE JUDICIARY SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

My name is Gerald Oliver. I am President of the Associated Builders and Contractors, Inc. I am pleased to have this opportunity to present this statement on behalf of the Association. We wish to thank the Subcommittee for the opportunity to present our views on S–1437, a bill to revise the Federal Criminal Code.

To begin, the Subcommittee and the sponsors of this legislation are to be credited for a most worthy purpose in their efforts to revise and reform the Federal Criminal Code. Specifically, we will restrict our remarks to Chapter 15, offenses involving individual rights (Sub-Chapter A) and Chapter 17, offenses involving property (Sub-Chapters A and C). Property destruction during a labor dispute has been a matter of long concern to our members. At present, uncontrolled willful labor violence can result in many thousands of dollars damage to property at a factory, construction site or elsewhere but in the absence of bombing or as an objective of robbery or extortion, there is no crime under federal law. This situation arises from an unfortunate Supreme Court decision in the *Enmons* case in which the Court ruled in a 5–4 decision that federal law (Hobbs Act) did not pertain to violent destruction of an employer's property if the damage was done to promote "legitimate collective bargaining objectives". This decision has left employers almost totally vulnerable to parties who resort to violent destruction of property to win collective bargaining demands or to drive an employer out of business or to compel him to discontinue certain business connections.

It is appropriate here to point out the history of this labor unrest. In the late 1960's wage settlements in the construction industry were exorbitant. Inflation became rampant and, in response, owners sought alternative methods of construction. For the most part, this meant using Merit Shop and open shop contractors. And, as more and more work went to these firms, the Building Trades Unions became increasingly frustrated and numerous violent confrontation took place. These incidents most often occur on the actual construction site but at times spill over into nearby areas where construction workers reside and commute to work. The violence has been carried out by both large groups of persons and by a handful of individuals. The nature of the violence ranges from destruction of the physical site and to equipment and machinery.

Employers who became the targets of this violence sought protection from the courts but found little relief. The National Labor Relations Act as now written does view labor violence as an unfair labor practice but the remedy is not one of criminal prosecution. An employer can sue for damages but such action is long after the fact and, more importantly, the Act fails to provide immediate relief to restore order on a job site. In this same vein, state and local laws have proved equally ineffective for several reasons. The very nature of labor unrest often divides community feeling and tiers of law enforcement buck passing most often result in nonenforcement. Moreover, labor violence usually occurs in such locations and either at night or with such size and ferocity that local and state officials are unable to cope with them.

In short, there is an immediate and justifiable need for federal involvement to provide adequate protection for employers, employees and the general public. Surely, it cannot be the will of Congress to exclude from federal law terrorists and racketeers who hide out in unions and engage in supposedly legitimate labor activities. Willful property destruction is in every sense of the word a means of extortion and we are pleased to see that it is inter alia, the intent of S–1437 to reverse the *Enmons* decision.

In this connection, we believe there are certain aspects of S–1437 that should be clarified to provide adequate federal jurisdiction relating to property destruction. Since this element of violence is the main one to prescribe, we propose that the word "violence" be substituted for "force or the threat of force" under Section 1506 so the section would read: "A person is guilty of an offense if, *by violence or threat of violence*, he intentionally obstructs or interferes with: 1) peaceful picketing employees in the course of a bona fide labor dispute affecting wages, hours, or conditions of labor; or 2) the exercise by employees of rights of self-organization or collective bargaining." We also propose that unions do not cloak extortionate demands under the guise of an objective which can be legimately

sought through collective bargaining. Therefore while we support the inclusion of Section 1722, we propose that the affirmative defense to prosecution under Subsection (a)(1) be amended to read: "that the threatened or feared injury was an ordinary, customary, or reasonably likely result of conduct flowing from an incidental to peaceful picketing or other concerted activity in the course of a bona fide labor dispute."

We believe it is questionable under Sub-Chapter A of Chapter 17 (damages by arson and explosion) whether construction site projects would be covered when "the property that is the subject of the offense is used in actively affecting interstate or foreign commerce, and is damaged by a destructive device." It appears arguable that property under construction is not "used in an activity affecting interstate or foreign commerce." A motel, for instance, is used in an activity affecting interstate commerce, but might not be considered as used when "under construction." This should be clarified. Moreover, a potential loophole arises by the use of language which calls for damage "by a destructive device." Suppose a valuable piece of machinery is set on fire by hand rather than a bomb, or mechanical device. Would the law not apply because no destructive device were used? We feel such activity should be covered.

Under the sections covering *extortion*, it appears to be the unmistakable intent to reverse the *Enmons* decision while at the same time preserving the right to peaceful picketing. We wish to point out that the *Enmons* case did not involve a construtcion site but rather an operating utility and question whether a reversal of that decision would necessarily make it applicable to construction site property.

Finally, we note that construction work would be covered for extortion under S–1437 if to any degree the job received federal financing. This form of protection is highly desirable but should be broadened to protect a building which is 100 percent privately financed.

In conclusion, we believe that S–1437 is a move in the proper direction. If the courts give it favorable interpretation it could substantially solve the problem with respect to damage to property. However, we strongly urge that the Subcommittee favorably view the strengthening amendments suggested by this Association.

STATEMENT OF GLENN KING, EXECUTIVE DIRECTOR, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE (IACP)

I appreciate the opportunity to submit a statement to the Senate Subcommittee on Criminal Laws and Procedures to express the beliefs of the International Association of Chiefs of Police (IACP) regarding the Criminal Code Reform Act of 1977.

The IACP is a membership organization with more than 11,000 members from sixty-four nations. The majority of its membership, however, is from the United States and is directly affected by the proposed legislation.

The IACP supports the enactment of S. 1437 with the exceptions and suggestions that I will detail in my testimony. These exceptions and suggestions are necessary to enable state and local law enforcement agencies to protect the citizens of our country.

As you know, the purpose of S. 1437 is to establish justice in the context of a federal system by:

(a) Defining and providing notice of conduct that indefensibly causes or threatens harm to those individuals or public interests for which federal protection is appropriate;

(b) Prescribing appropriate sanctions for engaging in such conduct that will:

(1) Deter such conduct;

(2) Protect the public from persons who engage in such conduct;

(3) Assure just punishment for such conduct;

(4) Promote the correction and rehabilitation of persons who engage in such conduct; and

(c) Establish a system of fair and expeditious procedures for:

(1) investigating such conduct by means that will lead to the indentification of persons engaged in such conduct;

(2) Determining the guilt or innocence of persons charged with engaging in such conduct; and

(3) Imposing sanctions upon persons found guilty of such conduct.

If enacted S. 1437 would codify all the criminal law provisions contained in the different titles of the United States Code into one orderly title within the Code.

The IACP supports the purpose of S. 1437. If enacted, S. 1437 would provide remedies for the confusion present in the varying statutes. S. 1437 would establish, for the first time, an integrated Code of virtually all statutes and rules concerning federal crimes and the federal criminal justice process. Probably the single most important contribution is the setting forth of the law in a far more comprehensive, orderly, and simple manner than the existing statutes.

EFFECT ON STATE AND LOCAL LAW ENFORCEMENT

The bill as drafted does nothing to impair the availability or terms of any civil or administrative remedy or penalty. Court powers remain unrestricted in civil proceedings to compel compliance with an order, decree, process, writ or rule, or to direct compensation to a complainant for loss.

Federal jurisdiction over an offense includes jurisdiction over those offenses committed in the general, special, and extraterritorial jurisdictions of the United States. General jurisdiction covers that territory within the United States. Special jurisdiction covers such territories as government-owned lands or land leased to the government: organized territories or possessions of the United States, Indian lands; or an island, rock of key that, at the discretion of the President, appertains to the United States: and a facility for exploration or exploitation of natural resources constructed or operated on or above the outer continental shelf. The federal government also maintains jurisdiction over the special maritime jurisdiction and the special aircraft jurisdiction.

Extraterritorial jurisdiction includes jurisdiction over an offense committed outside the general or specific jurisdictions if the victim or intended victim is a United States official, federal public servant outside the United States for the purpose of performing his official duties, or the offense is treasonous in nature.

The proposed legislation provides that Federal jurisdiction over an offense *does not generally preclude a state or local government from exercising its concurrent jurisdiction to enforce its laws applicable to the same criminal conduct.* Therefore, state and local governments would maintain their present power to enact and enforce laws to protect the health, safety, and welfare of their citizens. The exception is that the United States Attorney General may order exclusive jurisdicion over an offense where the victim is a United States official, a foreign official or a member of his immediate family, or an official guest of the United States and the crime is specified in Chapter 10 or Chapter 16 of the bill (serious crimes against the person).

The IACP supports this concept in that the Association believes it is vital for effective law enforcement to permit state and localities flexibility in enforcing laws and protecting the health, safety, and welfare of their citizens.

CULPABLE STATE OF MIND DEFINED

Chapter 3 sets forth and defines the *culpable states* of mind required to be proved with respect to conduct. The terms used to describe the different states of mind are "intentional," "knowing," "reckless," and "negligent" and variants thereof.

The International Association of Chiefs of Police supports this Chapter in that by defining the culpable state of mind and the requisite proof for conviction, much of the confusion that currently exists will be clarified.

CAPITAL PUNISHMENT

Federal crimes would be completely reclassified under S. 1437. The death penalty as punishment for conviction for certain crimes would be abolished and replaced with life imprisonment. However, the penalty provisions of 49 U.S.C. 1472(I)(1)(B) (Aircraft Piracy) will remain in place. Under the aforementioned section anyone who commits or attempts to commit aircraft piracy and if the death of another person results from the commission or attempted commission of the offense, the offender may be punished by death or by imprisonment for life.

The IACP vehemently opposes the abolishment of the death penalty. We believe that the abolition of capital punishment would endanger the lives of many innocent victims of criminal depredations. The Association believes that the death penalty should be imposed for premeditated murder, murder committed during the perpetration of a crime, and the killing of a law enforcement officer or corrections officer during the perfomance of his or her duties.

Under the reclassification of crimes there would be five classes of felony, three classes of misdemeanor, and one class of infraction. The classifications are set forth as follows:

CLASSIFICATION OF FELONIES

Class A felony, punishable by life imprisonment or any period of time, possibility of fine up to $100,000.

Class B felony, punishable by imprisonment for not more than 25 years; possibility of fine up to $100,000.

Class C felony, punishable by imprisonment for not more than 12 years; possibility of fine up to $100,000.

Class D felony, punishable by imprisonment for not more than 6 years; possibility of fine up to $100,000.

Class E felony, punishable by imprisonment for not more than 3 years; possibility of fine up to $100,000.

CLASSIFICATION OF MISDEMEANORS

Class A misdsdemeanor, punishable by imprisonment for not more than 1 year; possibility of fine up to $10,000.

Class B misdemeanor, punishable by imprisonment for not more than 6 months; possibility of fine up to $10,000.

Class C misdemeanor, punishable by imprisonment for not more than 30 days; possibility of fine up to $10,000.

CLASSIFICATION OF INFRACTION

An offense punishable by imprisonment for not more than 5 days; possibility of fine up to $1,000.

The legislation eliminates the Federal Youth Offenders Act as well as the Narcotics Addict Rehabilitation Act. Both of these pieces of legislation provide for special treatment of certain qualifying individuals. Through these acts certain individuals were afforded leniency by the courts.

The IACP supports the elimination of these acts. While both of the acts were needed and appropriate at the time of their passage, subsequent experience while operating under their provisions has raised significant questions as to whether they should be continued. Specifically, most individuals involved in the administration of Criminal Justice, including judges, prosecutors, attorneys, and correctional administrators, have abandoned the so-called "medical model", based upon research and experience which clearly indicate that change in a criminal offender cannot be coerced. This does not mean, however, that offenders should not be provided the maximum opportunity to change their pattern of behavior through the provision of educational, vocational and other kinds of correctional programs.

ELIMINATION OF GOOD TIME CREDITS

Another significant provision of S. 1437 is the elimination of good time credits which operate under present law to reduce the time the offender must serve if he is not previously released on parole. Provision is made for parole release, but the elimination of good time will mean that if an offender fails to gain parole release, he will serve the entire sentence imposed.

The IACP supports the elimination of good time credits. However, the Association does see a need for an incentive to the offender. Consequently, the IACP supports the parole provision of Subchapter D of Chapter 38—Post Sentence Administration.

We believe that it must also be noted that under present law, good time operates in a significant percentage of cases to reduce the actual time served by offenders. Thus the "hard time" served under the maximum statutory sentences

provided by S. 1437 without good time may be longer than the "hard time" served under the longer termed sentence under present law. Consequently, we believe that judges should take this into account in sentencing offenders under the proposed legislation.

SENTENCING COMMISSION

Probably one of the most significant provisions of S. 1437 is the establishment of a Sentencing Commission to promulgate sentencing guidelines for federal district court judges. As drafted the legislation provides that the Sentencing Commission will consist of nine members chosen by the Judicial Reform Commission. The Sentencing Commission will be charged with establishing sentencing guidelines to eliminate the indiscriminate discrepancies that exist in sentences currently imposed by federal judges. In determining the particular sentence to be imposed under Section 2003(a), the court must consider the nature and circumstances of the offense and the history and characteristics of the defendant; what punishment will afford adequate deterrence as well as protect the public from further crimes of the defendant; the seriousness of the offense; and the educational, vocational, and medical needs of the offender that will be most effective in dealing with the offender.

The court may impose a sentence outside the guidelines promulgated by the Sentencing Commission. At the time of sentencing the court must state, in open court, the general reasons for the imposition of a particular sentence, and, if the sentence is outside the range described by the Sentencing Commission, the reason for the imposition of a sentence outside such range.

After the court hands down a sentence, either the defendant or the government may seek review. In other words, if the defendant feels that the imposition of a particular sentence is outside the commission's guidelines, i.e., the sentence is too harsh, he may seek appeal; or if the government feels that the imposition of a particular sentence is too lenient, it may seek appeal.

The court, in imposing a sentence on a defendant who has been found guilty of an offense causing bodily injury, property damage or other loss, may order, in addition to the sentence, the defendant to make direct restitution to a victim of the offense in an amount and manner set by the court. Although there is a similar provision under current law, the court may only order direct restitution if the defendant is placed on probation.

The International Association of Chiefs of Police supports the concept of a Sentencing Commission. The association believes that the irrational variation in sentence under present law raises questions as to the rationality of the Federal criminal justice system. However, the Association believes that the statute should prescribe certain members for the Commission. These prescribed members include:

1. The Attorney General of the United States;
2. The head of the Corrections System;
3. The head of the Parole System;
4. Representatives from the law enforcement arms of the Department of Justice and the Treasury Department; and
5. Four Federal Judges.

The aforementioned composition would provide the balance required to establish workable sentencing guidelines in that it would provide representation from all aspects of law enforcement.

PAROLE INELIGIBILITY

If the court imposes a term of imprisonment it must designate the portion, if any, of the term to be served as a term of parole ineligibility. The authorized term of imprisonment that the court may require to be served prior to the eligibility for parole is any term found appropriate by the court in light of the totality of the circumstances surrounding the commission of the crime. However, no term of parole ineligibility may extend into the last one tenth of the sentence.

Upon motion of the Director of the Bureau of Prisons "for extraordinary and compelling reasons," the court "may reduce an imposed term of imprisonment or term of parole ineligibility to the time that the defendant has served in imprisonment." This provision expands the present law which permits the court, upon motion of the Bureau of Prisons, to make an offender immediately eligible for parole by reducing any minimum term to the time the defendant has served.

The IACP supports the concept of parole ineligibility. However, the association opposes the restriction against extending parole ineligibility to the last tenth of the sentence.

The association supports the concept providing the Director of the Bureau of Prisons authority to motion the court if he feels, for compelling reasons, that an injustice has been done.

MANDATORY SENTENCING

S. 1437 provides for an indeterminate sentence system with the maximum term indicated. Except for Trafficking in an Opiate, section 1811 and Using a Weapon in the course of a Crime, section 1823, no mandatory prison terms are provided. Under section 1811 the court may not sentence the defendant to probation but must sentence him to a term of imprisonment of not less than 2 years and to a term of parole ineligibility of not less than 2 years, with the sentence to run consecutively to any other imprisonment imposed.

Section 1823(a)(1) provides if a person is guilty of an offense and displays or uses a firearm or a destructive device, the court may not sentence the defendant to probation but must sentence him to a term of imprisonment of not less than 2 years with a term of parole ineligibility of 2 years. If a person is guilty of possessing a firearm or destructive device during the commission of a crime, the court must sentence the defendant to a term of imprisonment of 1 year with a term of parole ineligibility of one year. Again, as in the offense of Trafficking in an Opiate, the sentence must run consecutively to any other sentence imposed.

The IACP supports the concept of mandatory minimum prison sentences. The association believes that mandatory minimum sentences are the best method of dealing with the above-mentioned crimes. We believe that mandatory sentences for these serious crimes is the only method to provide the protection our citizens deserve and the deterrence necessary to minimize the commission of these offenses.

MULTIPLE SENTENCE

Section 2304, Multiple Sentences of Imprisonment, provides that multiple terms of imprisonment run concurrently unless the court orders that the terms are to run consecutively. This codifies the presumption of current sentencing laws where a subsequent Federal sentence is imposed on an offender presently serving a prior Federal sentence. However, the reverse is true when a Federal sentence is imposed upon an offender presently serving a State sentence. In this case, if the Federal judge remains silent, case law and the application of statutory law dictate that the Federal sentence will be computed to run consecutively.

Section 2304(c) provides that the aggregate of consecutive terms of imprisonment to which a defendant may be sentenced may not exceed such term as is authorized by the proposed legislation for an offense one grade higher than the most serious offense for which he was found guilty.

The IACP supports the concept of multiple sentences. It is not clear, however, whether this aggregate sentencing limitation applies only to sentences imposed at the same time, or for any subsequent sentencing situation. If the limitation is applied to any subsequent sentencing situation, offenders who commit a series of crimes for which the maximum penalty is no greater than that for which they are presently incarcerated would achieve a certain degree of unwarranted immunization from possible criminal sanctions. The most they could get in terms of a new prison term is the difference between their present sentence and the maximum penalty for the next grade higher. If the limitation is only intended to apply to sentences imposed at the same time, we are not opposed to this provision. But, we do urge that the aforementioned ambiguity be cleared up.

JUVENILES

Under S. 1437, the provisions for placing committed juveniles are much more restrictive than present law. Under current law, "no juvenile committed to the custody of the Attorney General may be placed or retained in an adult jail or correctional institution in which he has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on

criminal charges." S. 1437 proposes that a juvenile cannot be held "in an official detention facility in which an adult convicted of an offense or awaiting trial on a charge of an offense is held in official detention."

The IACP opposes this provision. It places an unnecessary burden on the states to provide separate detaining facilities. Many States simply do not have juvenile facilities for these individuals. If these juveniles cannot be placed in a State facility, and this provision will significantly reduce the number of State facilities available, we may be forced to establish one or two Federal juvenile facilities, which means that most of the offenders placed there will be thousands of miles away from their families.

TREATMENT OF NARCOTICS

Pursuant to section 1813(a), it is no longer a Federal offense for a person to possess 10 grams or less of marihuana.

The IACP opposes the decriminalization of marihuana. We are trying to hold the line State by State and we believe that the decriminalization of marihuana will severely weaken the position of the States.

S. 1437 also modifies current law in the regulation of opiates. The proposed legislation sets forth different grades of offenses for the possession of an opiate, depending on quantity, as well as different grades of offenses for trafficking in an opiate. If an individual is found guilty of possessing less than 100 grams of an opiate, he is guilty of a class A misdemeanor punishable by imprisonment for not more than 1 year. If an individual is found guilty of possession of 100 grams or more, he is guilty of a class D felony, punishable by imprisonment for not more than 6 years.

Under current law there is no delineation drawn as to the quantity possessed. An individual found guilty of possession of an opiate shall be sentenced to a term of imprisonment of not more than 1 year for the first offense and 2 years for subsequent offenses.

S. 1437 differentiates the possible penalties for trafficking in an opiate based on the quantity of the opiate trafficked in. If an individual is found guilty of trafficking in less than 100 grams of an opiate he is guilty of a class C felony, punishable by imprisonment of not more than 12 years. Whereas, if an individual is convicted of trafficking in 100 grams or more of an opiate, he is guilty of a class B felony, punishable by imprisonment of not more than 25 years.

Under current law if an individual is found guilty of trafficking in an opiate, he may be sentenced to a term of imprisonment of not more than 15 years regardless of the quantity involved.

RECOMMENDATION

The IACP supports the concept treating traffickers of large quantities of opiates more severely than traffickers of small quantities. However, due to the seriousness of the aforementioned offense, and the societal problems as a result of trafficking in opiates, the IACP believes that the quantity stipulation of 100 grams is much too high. The association believes that the quantity stipulation for both possession and trafficking in an opiate should be 30 grams. Thirty grams of pure heroin has a value of $2,000. Only then will society be able to reach the level of deterrence necessary to reduce the occurrences of this offense.

Furthermore, the IACP believes that with the possession of 30 grams or more of an opiate that the intent to traffic need not be proved; but rather may be presumed, relieving the Government of its burden of proof. We believe that it is evident that an individual possessing 30 or more of an opiate does not intend to keep the substance for his personal use.

RIOTING

Subchapter D of chapter 18 provides a uniform set of offenses for rioting, with increased penalties for rioting in a prison setting. Section 1381 provides that it is a class D felony for a person, during a riot in a correctional facility, to urge participation in, lead, give commands, instructions or directions in furtherance of the riot. It is a class A misdemeanor for persons who participate in a riot within a correctional facility.

The IACP supports the special penalty provision for prison rioting. The association feels however, that the disparity between leading a riot and participating in a riot is unwarranted. The association, therefore, suggests that the penalty for participating in a riot should be raised to a class E felony.

Chapter 10 pertains to the crimes of Criminal Attempt, Criminal Conspiracy, and Criminal Solicitation. Section 1001 defines Criminal Attempt as an offense where the actor is acting with the State of mind otherwise required for the commission of a crime and he intentionally engages in conduct that, in fact, amounts to more than mere preparation for the commission of the crime.

Criminal attempt is an offense of the same class as the crime attempted, except that, if the crime attempted is a class A felony, the attempt is a class B felony.

Criminal conspiracy is defined in section 1002 as an offense where one person agrees with one or more persons to engage in conduct, the performance of which would constitute a crime or crimes, and he or one of the persons in fact engages in any conduct with intent to effect any objective of the agreement.

Criminal conspiracy is an offense of the same class as the most serious crime that was an objective of the conspiracy, except that if the most serious crime that was the objective of the conspiracy is a class A felony, the conspiracy is a class B felony.

Criminal solicitation, a new crime under S. 1437, is defined in section 1003. A person is guilty of such an offense if, with intent that another person engage in criminal conduct, and, in fact, under circumstances strongly corroborative of that intent he commands, entreats induces or otherwise endeavors to persuade such other person to engage in such conduct.

The offense of criminal solicitation is of the class next below that of the crime solicited.

The IACP supports the concept of the addition of the offense of criminal solicitation in that it enables law enforcement agencies to prosecute individuals more readily than the current conspiracy statutes. Under current conspiracy statutes if a higher up in an organized crime syndicate orders a person in the lower ranks to commit a crime and that individual is arrested prior to commission of the crime, there is no conspiracy in that no agreement exists between the two parties to the crime. Whereas, with the new offense of criminal solicitation the higher up may be reached for ordering another to commit a crime. This addition compliments the range of conspiracy.

S. 1437 substantively leaves the current law provisions for the interception of a private oral communication and immunity intact. The IACP wholeheartedly supports these practices. We, in law enforcement, realize the need for such operations and capabilities in the fight against crime. Without the ability to intercept communications and offer immunity much of law enforcement's intelligence capabilities to detect crime prior to the commission as well as solving crime after commission will be greatly hindered.

With the aforementioned exceptions and suggestions, the International Association of Chiefs of Police urges passage of S. 1437. There is an urgent need for reform in the present structure of the law. S. 1437 embodies the needed reform and its passage will significantly reduce the irrationality of the present system, and will enable the federal sentencing system to function swiftly and with more certainty. Passage of S. 1437 would result in a fair and workable Federal Criminal Code. Furthermore, the enactment of the proposed legislation would give law enforcement agencies at all levels the guidelines and direction necessary for efficient law enforcement.

Attached you will find a chart that the IACP drew up comparing maximum allowable sentences under current law with those provided under S. 1437.

Thank you.

The following is a chart comparing maximum punishment for major crimes between S. 1437 and existing Federal law. It must be noted that under Section 1823 of S. 1437 (Using a Weapon in the Course of a Crime) a mandatory prison sentence, of not less than 2 years to run consecutively to any other term of imprisonment, is provided if a person displays or otherwise uses a firearm or destructive device during the commission of a crime. Consequently, an additional penalty may be tacked onto many of the offenses listed below.

Crime	Present law	S. 1437
Murder 1	Death (life) invalidated by decisional law.	Life, number degrees, includes felony murder.
Murder 2	Life	
Voluntary manslaughter	10 yr	12 yr.
Involuntary manslaughter	3 yr	Negligent homicide, 6 yr.
Mayhem	7yr	Punishable as maiming, 12 yr.
Assault with a deadly weapon	5 yr	Punishable as menacing, 1 yr ; lus; provided weapon was firearm sec. 1823 applies.
Assault with a deadly weapon on Federal officer or employee.	10 yr	Same as above no special provision may be punished as aggravated battery if serious bodily injury, 6 yr.
Kidnapping	Life	Life if actor does not voluntarily release victim alive, 12 yr in other cases.
Aircraft hijacking	20 yr	25 yr.
Aircraft hijacking with death resulting	Death	Death penalty provisions of 49 U.S.C. 1472(i)(1)(B) apply.
Rape	Death invalidated by decisional law, life.	12 yr. Sec. 1823 may apply if firearm involved in threat.
Arson:		
Unoccupied structure	5 yr	12 yr.
Occupied structure	20 yr	Do.
Burglary	do	Do.
Robbery:		
Person	15 yr	Do.
Bank	20 yr	Do.
Drug offenses:		
Trafficking in an opiate	15 yr	If 100 g or more or distributing to a minor—25 yr—12 yr in other cases.
Possession of an opiate	1 yr	Less than 100 g 1 yr more than 100 g 6 yr.
Trafficking in drugs	15 yr	12 yr if drug is a schedule I or II drug (21 U.S.C. 812) 6 yr if other than above or less than 300 g of marihuana; 3 yr if drug is a schedule IV drug 1 yr if drug is schedule V.
Possession of a drug	1 yr	1 yr if substance is other than opiate or marihuana.
Trafficking in marihuana	5 yr	6 yr if more than 300 g, 1 yr if between 100 and 300 g, 6 mo if less than 100 g.
Possession of marihuana	1 yr	No offenses if 10 g or less, 30 days or $500 fine, if more than 10 g.

CITIZENS COMMISSIONS ON HUMAN RIGHTS.
Washington, D.C., July 15, 1977.

DEAR SENATOR: This submission is presented to the members of the Judiciary Committee in regards to Sub-Chapter B of Chapter 36, Senate Bill 1437, involving offenders with mental disease or defect.

We are concerned with the provisions of this Sub-Chapter which, if enacted, would empower the State to deny American citizens basic freedoms guaranteed by the United States Constitution and provided for under the Nuremberg Code and the Universal Declaration of Human Rights.

Under this bill, a person could be arrested and held involuntarily in a mental institution for up to 60 days to determine competency to stand trial. If found incompetent, the person could then be held for up to a year in the mental hospital without ever being convicted of a crime. And if the person is found not guilty by reason of insanity, he or she could be detained indefinitely, even beyond the sentence prescribed by the courts.

As will be shown in this submission, "clear and convincing" evidence from the fields of psychology, psychiatry and law enforcement technology does not exist to allow for the accurate assessment of mental states or the predicable alleviation of the symptoms of mental illness. Yet under Sub-Chapter B even the suspicion of mental illness becomes grounds for forcible mental incarceration by the State without due process of law.

For this reason, we recommend that Chapter 36, Sub-Chapter B be deleted from Senate Bill 1437 and legislation be initiated which conforms to the human rights codes mentioned above, and in addition, by providing effective rehabilitation programs for those who are found to be guilty of commiting a crime.

We respectfully request that our submission be brought to the attention of the Judiciary Committee with the full expectation that this nation's founding principles of life, liberty and the pursuit of happiness shall not be abridged.

Sincerely,

KATHLEEN WILTSEY,
Regional Director.

A Submission Regarding Senate Bill 1437 Chapter 36, Subchapter B, July 15, 1977

Part I: A brief outline of chapter 36, subchapter B, of S. 1437

This Subchapter is entitled "Offenders with Mental Disease or Defect." It outlines the procedures involved in (1) the Determination of Mental Competency to Stand Trial, (2) the Determination of the Existence of Insanity at the Time of the Offense, (3) the Hospitalization of a Person Acquitted by Reason of Insanity, (4) the Hospitalization of a Convicted Person Suffering from Mental Disease or Defect, & (6) the Hospitalization of a Person Due for Release but Suffering from Mental Disease or Defect.

This subchapter would include any individual, whether they have a history of violence, insanity, criminality, or not.

Section 3611 of this Subchapter states that at any time after the commencement of a prosecution for an offense, and before the sentencing of the defendant, a motion can be made by the attorney for the government that a hearing be held to determine the mental competency of the defendant to stand trial. If the court grants this motion, the defendant must undergo a psychiatric examination for the purposes of determining his mental competency to stand trial. This psychiatric examination may include commitment to a mental institution for up to 60 days. This commitment takes place before the defendant has been proven guilty, before he has been considered violent or dangerous, before he has been considered mentally incompetent to stand trial, and before he is afforded a hearing.

The next step is for the hearing to be conducted for the purpose of determining the mental competency of the defendant to stand trial. If the defendant is found to be "mentally incompetent to the extent that he unable to understand the nature and consequences of the proceeding against him or to assist properly in his defense," he may be committed to a mental institution for up to one year, with or without his consent. This additional commitment takes place before the defendant is found to be guilty or even violent or dangerous. It is purely a result of his assumed ignorance of the legal consequences facing him at that time.

After this commitment, the defendant may be given another hearing, at which time, if he is found to be "presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another," he may be committed to a mental institution for an indefinite period of time. This commitment takes place before the defendant has been found to be guilty of any crime.

Section 3612 of this subchapter is concerned with the procedures to be followed if a motion is made that a psychiatric examination be conducted for the purpose of determining if the defendant was insane at the time of the offense. If this issue of insanity is raised, the defendant is to be found either (1) guility, (2) not guilty, or (3) not guilty by reason of insanity.

Section 3613 of this subchapter deals with the procedure for hospitalization of a person found "not guilty by reason of insanity" as described above. Again, this involves a psychiatric examination which may include commitment to a mental institution for up to 60 days.

Following this is a hearing and then disposition of the defendant which may include commitment to a mental institution for an indefinite period of time. This procedure, again, is carried out before the defendant is found to be guilty of any crime.

Sections 3614 and 3615 of this subchapter deal with the hospitalization of convicted persons and imprisoned respectively. The procedures are similar to those carried out in the previous sections, requiring psychiatric examination, hearing, and disposition of the person.

Section 3616 of this subchapter deals with persons due for release but found to be suffering from a mental disease or defect at the time of release. The procedure followed in this case is again similar to that described in the above sections, including a psychiatric examination, hearing, and then disposition.

Section 3617 of this subchapter explains the general provisions for this Subchapter. The definition for "insane" is given in this section and is stated as "a mental disease or defect of a nature constituting a defense to a federal criminal prosecution." The psychiatric examinations, psychiatric reports, and the hear-

ings are explained in full in this section, as well as specific responsibilities and rights of the significant parties involved in the proceedings. This is the last section in Subchapter B of Chapter 36.

PART II: THE FUNCTION OF THE PSYCHIATRIST UNDER S. 1437, CHAPTER 36, SUBCHAPTER B, VERSUS PSYCHIATRIC QUALIFICATIONS TO CARRY OUT THIS FUNCTION.

The psychiatrist or clinical psychologist under the authority of S. 1437, has an important function in determining the past, present, and future mental state of the individual under consideration. This determination is arrived at through a psychiatric examination. The individual, if he is not already incarcerated in prison or in a mental hospital or other facility, may be committed to a mental hospital for up to 60 days for the purpose of this examination. The final paragraph of section 3617 reads as follows:

"For the purpose of an examination pursuant to an order under section 3611, 3612, 3613, or 3614, the court may commit the person to be examined for a reasonable period, but not more than sixty days, to the custody of the Attorney General for placement in a suitable mental hospital or another facility designated by the court as suitable."

The commitment and examination procedure should be considered in light of the possible consequences of forced commitment and in light of statistical evidence of psychiatrists ability to determine the mental state of individuals. To commit an individual to a mental institution for any purpose, on the word of a psychiatrist amounts to a blatant denial of the right to freedom and due process. Evidence of this is presented in a study by D. L. Rosenhan[1], professor of psychology and law at Stanford University. In this study, 8 sane individuals had themselves committed to 12 mental institutions in order to determine if the staff could detect their sanity. During their entire stay (length of commitment ranged from 7 to 52 days; the average being 19 days) none of the "pseudopatients" were detected as being sane by the staff or psychiatrists.

This same study also exemplified the detrimental effects of commitment to a mental institution. Dr. Rosenhan describes some of the observations of the "pseudopatients":

"The data I have presented does not do justice to the rich daily encounters that grew up around matters of depersonalization and avoidance. I have records of patients who were beaten by staff for the sin of having initiated verbal contact. During my own experience, for example, one patient was beaten in the presence of other patients for having approached an attendant and told him, 'I like you.' Occasionally, punishment meted out to patients for misdemeanors seemed so excessive that it could not be justified by the most radical interpretations of psychiatric canon. Nevertheless, they appeared to go unquestioned. Tempers were often short. A patient who had not heard a call for medication would be roundly excoriated, and the morning attendants would often wake patients with, 'Come on, you ——— ———, out of bed!'"

Rosenhan concludes: "The consequences to patients hospitalized in such an environment—the powerlessness, depersonalization, segregation, mortification, and self-labeling-seem undoubtedly countertherapeutic."

The beatings of patients by staff and countertherapeutic atmosphere in the institutions is not unique to the Rosenhan study. In California in January 1976, just prior to reports of many suspicious patient deaths in the State hospitals there, the Commission on California State Government Organization and Economy published a report[2] after their review of the State Department of Health facilities. They described what they found on one ward of Sonoma State Hospital:

"In summary, the facilities on the Phoenix Ward not only were physically unfit for human habitation but provided conditions hazardous to the patients' health. The unsatisfactory environment was not offset by any obvious treatment programs or by warm, personal patient-staff relationships."

Investigations were done in March of this year amidst charges of neglect and violence at Creedmoor Hospital in New York.[3] The following May, District

---

[1] D. L. Rosenhan, "On Being Sane in Insane Places," Science, vol. 179, p. 250, 1973.
[2] Commission on California State Government Organization and Economy, January 1976 Report.
[3] Sunday Newsday, the Long Island Newspaper, Queens Edition, Mar. 6, 1977.

Attorney John Santucci ordered another investigation of Creedmoor as a result of 180 allegations of patient abuse or neglect, including six deaths.[4]

In Massachusetts, Worcester State Hospital Superintendant David J. Myerson described the state hospital system as one of "If you squeal, we'll beat you up." Such are the cruel and unusual punishments which a psychiatric examination under S. 1437, Chapter 36, Subchapter B would inflict upon defendants not yet convicted of any crime.

The stigma attached to being committed to a mental hospital for examination should also be examined. If the diagnosis comes out negative, the individual still has the stigma of being put in the mental institution, to carry with him into his trial or later in life. As a 'stigma' can be a difficult thing to classify statistically, the reader should subjectively monitor his response to a somewhat unlikely but communicative statement such as the following: "Gentlemen, I would like to present our next nominee for President of the Elks Club, John Doe, just released from Metropolitan State Psychiatric Hospital with a clean bill of health." And if the individual is diagnosed as mentally ill, the stigma is even more far reaching.

In the Rosenhan study, each of the 'sane' individuals was released with a diagnosis of "schizophrenia in remission." Rosenhan believes that this indicates, in the institution's eyes, the individual was not sane, nor had he ever been sane. For an individual to carry a label of "schizophrenia in remission", or any psychiatric label, for the rest of his life, could be damaging and also could effect a court trial, if this information were known by the judge or jury.

Since the psychiatrist or clinical psychologist will be examining the individual to determine their mental state, the current statistics of success or failure in his area should be examined.

In a 1972 study by Wenk, Robinson, and Smith,[5] 7000 parolees were assigned to categories of potential aggressiveness based on their case histories and psychiatric reports. In a one year follow up study, it was found that for every correct identification of a potentially aggressive individual, there were 326 incorrect ones. Another 1972 study by Kozol, Boucher and Garofalo[6] lasted 10 years and involved almost six hundred previous offenders. Each offender was examined by two psychiatrists, two psychologists and a social worker. A complete case history was compiled and a full battery of psychological tests were administered. During a five year follow-up period, it was found that 65 percent of individuals identified as dangerous did not commit a dangerous act.

Steadman and Keveles[7] followed 121 patients upon their release from two hospitals for the criminally insane in New York State. These patients were believed to be some of the most dangerous mental patients in the state of New York. Steadman and Keveles followed the patients for an average of 2½ years of freedom. In that time, only one patient was convicted for a violent act and eight others were convicted for non-violent crimes.

In an article published in January 1975,[8] Steadman (the same as above) and Concozza, after completing studies of their own and analysing other studies were led to the conclusion that:

"Because Americans continue to support statutes that permit and demand preventive detention, they should become aware of how such laws actually operate and of the consequences of the misleading assumptions upon which the laws are based. They should know that we cannot define or predict dangerousness, and that there is no correlation between it and mental illness."

Based on this data, it is apparent that psychiatric examinations and diagnoses are unreliable indicators of the individuals mental state and his potential for violence.

Another function designated to the psychiatrist under S. 1437, is to treat the individual who is committed to the psychiatric hospital. The statistics of this type of treatment should be examined before it is assumed that commitment to a mental hospital and psychiatric care will assist in the individual's competency to stand trial or reduce his potential for causing serious bodily injury or damage.

---

[4] Newsday, the Long Island Newspaper, May 7, 1977.

[5] E. Wenk, J. Robinson, G. Smith, "Can Violence Be Predicted," Crime & Delinquency, vol. 18, p. 393, 1972.

[6] H. Kozol, R. Boucher, and R. Garofalo, "The Diagnosis and Treatment of Dangerousness," Crime & Delinquency, vol. 19, p. 371, 1972.

[7] H. Steadman and G. Keveles, "The Community Adjustment and Criminal Activity of the Baxtrom Patients: 1966–1970," American Journal of Psychiatry, vol. 129, p. 304, 1972.

[8] H. Steadman and J. Concozza, "We Can't Predict Who Is Dangerous," Psychology Today, 1975.

The current methods of treatment employed by psychiatrists are chemotherapy (drugging), aversion therapy, psychotherapy, Electro Shock Therapy, and psychosurgery. Each of these methods has inherent in it the potential for seriously harming the individual. In a January 1977 study published in the American Journal of Psychiatry by Dr. Frederic Quitkin,[9] it was found that tardive dyskinesia, a serious and sometimes irreversible effect of antipsychotic drug use was becoming more and more common among chronically hospitalized psychiatric patients. The existence of the disease was found to vary among hospitals and ranged from 2% to 56% of the patients. The disease consists of "repetitive, involuntary movements of the mouth, lips, and tongue and is sometimes accompanied by choreiform movements of the limbs or trunk." In a 1975 study appearing in the American Journal of Psychiatry[10] by Drs. Carpenter, McGlashan, and Strauss, it was found that the use of antipsychotic drugs increased the chances for a schizophrenic patient to have future relapses: "In any case, in an illness with so many paradoxes, we raise the possibility that antipsychotic medication may make some schizophrenic patients more vulnerable to future relapse than would be the case in the natural course of their illness."

Wade Hudson a former mental patient describes the effects of the psychotropic drug prolixin[11]: "One injection every week or two and you have a nation of zombies, easily controlled. * * * My entire body felt like it was being twisted up in contortions inside some unseen wringer."

Aversion therapy consists of punishing the patient, either physically or socially, for conduct considered wrong. In the Commission on California State Government Organization and Economy's January 1976 report, the observers were led to the following conclusion about this type of therapy:

"Aversive conditioning, however, seems to be an inhuman type of practice, regardless of the conditions under which it is administered. Hospitals may utilize a variety of battery-generated devices including cattle prods and electric belts. Even if such therapy is considered as a last resort, if consent is obtained from a parent or guardian, and if trained personnel are utilized in such treatment, we question the legitimacy of this treatment as substitutes for other more humane and personal treatment modalities."

The effects of Electric Shock Treatment (sometimes called ECT—Electroconvulsive Therapy) are in many cases permanently damaging to the individual. ECT causes brain damage, memory loss, and the inability to learn new information. In a study done by I. M. Allen in 1959 and published in the New Zealand Medical Journal,[12] he found that damage was done to brain tissue as a result of ECT. He states that:

"The various physical signs and disturbances of function following electric shock treatment reported in the literature and found in the cases on which this paper is based, left no doubt that definite neurological variations, which could be found on detailed examination and many of which were irreversible, were left after electric shock treatment."

Dr. Allen also stated:

"The observations recorded in this paper left no doubt about the conclusions to be drawn from them and call for little comment. Their clinical implications demand, however, the most careful consideration.

"They confirmed the appearance of irreversible physical changes in the brain after and as a result of electric shock treatment. They gave no indication of the frequency with which these changes occurred; but suggested that physical changes, some of which might be irreversible with increase in the number and frequency of treatments, but showed at the same time that they could appear and be irreversible after very few treatments."

Dr. Karl Pribam, head of Stanford University's Neuropsychology Institute was quoted in the Sept/Oct 1974 issue of the American Psychiatric Association Monitor as saying: "I'd rather have a small lobotomy than a series of electroconvulsive shock . . . I just know what the brain looks like after a series of shock—and it's not very pleasant to look at."[13]

---

[9] Frederic Quitkin, M.D., et al., "Tardive Dyskinesia: Are First Signs Reversible?", American Journal of Psychiatry, vol. 134, January 1977.

[10] William T. Carpenter, et al., "The Treatment of Acute Schizophrenia Without Drugs: An Investigation of Some Current Assumptions," American Journal of Psychiatry, vol. 134, p. 14, 1977.

[11] Los Angeles Times, Aug. 19, 1975, Part I, p. 20.

[12] I. M. Allen, "Cerebral Lesions From Electric Shock Treatment," New Zealand Medical Journal, vol. 58, p. 369, 1959.

[13] Karl Pribam, American Psychiatric Association Monitor, September-October 1974.

A study published in the New England Journal of Medicine in 1946 by Norman and Shea,[14] as well as documenting prolonged memory impairment as a result of ECT, stated that some cases where 50 treatments were given showed symptoms indicating organic brain damage.

A more recent study on patients receiving 50 or more shock treatments was published in the Journal of Clinical Psychology in 1972 by Goldman, Gomer, and Templer.[15] This study led them to the following conclusion:

"The significantly greater error scores obtained by the ECT Ss (subjects) on both the Bender-Gestalt and the Benton (tests) after a relatively long time period since the last course of treatment suggest that ECT causes irreversible brain damage."

It is a well known fact among those who have studied it, that memory loss occurs as a result of electric shock treatment. In a 1975 study done by Squire and Chace and published in the Archives of General Psychiatry,[16] it was found that:

"The percentage of subjects with memory complaints was 63 percent after bilateral ECT, 30 percent after unilateral ECT, and 17 percent after hospitalization without ECT. Subjects with complaints related only to the period of hospitalization were not scored as having perceived memory impairment."

Exactly why the authors decided to ignore memory complaints related to the period of hospitalization is not known, although to consider this time period would certainly increase the percentages of those complaining of memory loss. The memory complaints were made from 6 to 9 months after receiving electric shock.

Instances of learning impairment as a result of ECT are particularly plentiful. In a bibliography of 500 studies on ECT done between 1939 and 1963 and published by the Department of Health, Education, and Welfare,[17] all of the studies regrading learning showed an impairment in the ability to learn.

Some of the effects of ECT cannot be accurately described by statistics. In the book *Shock Treatment Is Not Good For Your Brain*, written by John Friedberg and published in 1976, the author interviews people who have undergone electric shock treatment. Some excerpts of these interviews appear below:

"A. The last thing I remember is graduating high school in June of 1964. I was seventeen, and the next thing I remember is being in the hospital (at nineteen). I mean I have no memory of anything, it's just what I've been told. And some of the things I can reconstruct—I went back to the same college. I don't have any idea—I mean I've read on my transcript what classes I took."

"Dorothy Molinare"

"Q. Just a little more about the effects of shock treatment. Were any of your skills affected, like reading?

A. It slowed my reading way down. Those things are horrible, man.

Q. Do you ever have dreams about the shock treatments?

A. Yes. In fact, I can close my eyes, and think about it, and I can relive it up to the point of the electricity and I have to open my eyes. Well, that's the horror in my life."

William Freeman

"Q. Try to (describe the shock) in words if you can.

A. It's like an atomic bomb that runs horizontally through your brain."

"Q. And when you woke up what did it feel like?

A. That pain right through your head. And all you know, all you're aware of is that pain. That's all you're aware of is this jolting pain going through your mind. You know. And you can't remember anything. You don't know why you're alive, how you got there, your mother's name— all you know is the pain, that all you are is this brain with a pain going through it. And if you're depressed then that's the reason."

"Alan Rogers"

---

[14] Jacob Norman and John T. Shea, "Three Years Experience With Electric Convulsive Therapy," New England Journal of Medicine, vol. 234, p. 857, 1946.

[15] H. Goldman, F. Gomer, and D. Templer, "Long Term Effects of Electroconvulsive Therapy Upon Memory and Perceptual Motor Performance," Journal of Clinical Psychology, vol. 28, p. 32, 1972.

[16] Larry Squire, Ph. D., Paul M. Chase, "Memory Functions Six to Nine Months After Electroconvulsive Therapy," Archives of General Psychiatry, vol. 32, p. 1557, December 1975.

[17] "Studies on Electroconvulsive Therapy 1939–1963. A Selected Annotated Bibliography," U.S. Dept. of H.E.W. Public Health Service, No. 1447, Series No. 64.

There is evidence that shock is used as a form of punishment by psychiatrists, as presented in a paper by Robert R. Dies in 1968.[18] Dies concludes that the patient is being punished for his supposed "illness." "The patient is punished for his pathology and the psychological rug is virtually pulled out from under him. Upon release from the hospital the patient usually encounters the same environment in which his pathology developed. Without alternative solutions it is to be expected that many patients will again develop the same symptomatic methods of responding." Also, it was found in a study published in the Archives of Neurology and Psychiatry, in 1959 by Rabiner and Gralnick,[19] that the most accurate predictor of whether shock would be prescribed for the patient, was a lack of rapport between the doctor and the patient. The patient's diagnosis and symptomatology played no part in the choice of shock by the psychiatrist. Currently, money appears to be the greatest motivation for giving shock. In a 1975 letter to Representative John Vasconcellos of California, from Drs. Thomas Rusk and Randold Read, they stated that:

"The abuses of ECT, as they exist now, seem to fall into two major categories; first is the financial abuse. ECT in California is extremely lucrative and this encourages its overuse. In Canada, and especially in Quebec where the amount of money paid the psychiatrist for giving ECT has dropped to somewhere between $5 and $10 a treatment as opposed to the $40 to $59 here, the use of ECT has dropped precipitously. It is no secret that psychiatrists who heavily use ECT and medications for that matter, treatments that can be exploited for maximum earning per hour, frequently have incomes in excess of $100,000 to $200,000 per year. On the other hand, psychiatrists who restrict their practices to mild to moderate use of medication, rarely have incomes in excess of $60,000 * * * The other abuse of ECT, less frequent but still present, is its use as punishment for patients in hospitals. Although not as common as it was previously, ECT is often used as a threat to induce patients to change their behavior. If this were occurring in prisons, public outcry would definitely arise; and yet, the subtle means of control such as telling an unruly patient "you're very depressed today and will need some more shock treatment" must raise questions of cruel and unusual punishment."

Psychosurgery is a process whereby healthy brain tissue is destroyed in order to alter behavior. In a publication by the National Institute of Mental Health in 1973 [20] psychosurgery was defined thusly:

"Psychosurgery can be defined as surgical removal or destruction of brain tissue or the cutting of brain tissue to disconnect one part of the brain from another with the intent of altering behavior."

The adverse effects of this type of treatment include grand mal seizures, dependence on drugs, loss of emotion and drive, postoperative seizures, and a cognitive deficit (reduced ability to think). This information comes from the findings of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research as summarized in a 1977 paper by Gerald S. Coles and published in "State and Mind." [21]

There is sufficient evidence to conclude that psychiatric treatment is damaging to the individual. His condition is complicted by the harmful side-effects of psychiatric drugs, he is humiliated through aversion therapy, his ability to remember, think, and learn new things is reduced through ECT and psychosurgery. One of the purposes of commitment is to increase the individual's competency to stand trial. It can be seen that his competency to stand trial, as well as do other things, is decreased and not increased through psychiatric treatment. The other reason for commitment under S. 1437 is to reduce the criminal tendencies of the individual so that he can be returned to society and not pose a threat. The effectiveness of psychiatric treatment on criminal behavior is discussed in the next section.

The psychiatrists's ability to treat criminal behavior has not been confirmed in any conclusive studies. A result of this is the rising crime rate in the United

---

[18] Robert R. Dies, "Electroconvulsive Therapy: A Social Learning Interpretation," The Journal of Nervous and Mental Disease, vol. 146, 1968.

[19] Edwin L. Rabiner and Alexander Gralnick, "Transference—countertransference phenomena in choice of shock," AMA Archives of Neurology and Psychiatry, vol. 81, p. 517, 1959.

[20] Brown, Wienckowski, Bivens, "Psychosurgery: Perspective on a Current Issue," National Institute of Mental Health, 1973.

[21] Gerald S. Coles, "Psychosurgery—Too Much Thinking Can Cause Emotional Distress," State and Mind, vol. 5, p. 12, 1977.

States. From 1955 to 1975, the incidence of violent crime increased by nearly 600 percent in the United States according to the FBI Uniform Crime Reports.[22] The overall crime index (taking into account the increase in population) also rose during these same years by more than 380 percent. Perhaps the most frightening statistic in the crime rate is that for offenses committed by those under 18 years of age; from the years 1955 to 1975, the crime rate for this age group increased more than 2,000 percent according to the FBI and as tabulated in two Bureau of the Census publications.[23, 24] As the crime rate has increased in recent years, so has the amount of money spent on prisoners in Federal institutions, which includes treatment of these individuals. From 1969 to 1977, the amount of money spent on the custody, care and treatment of prisoners in Federal institutions has increased by more than 250 percent according to the U.S. Government publication, *Budget of the United States Government, 1976*.[25]

There is evidence in existence that indicates psychiatric treatment may cause criminal behavior. The following three incidents were reported in the Los Angeles Free Press in the June 24–30, 1977, issue: Last April in a Chicago suburb, Thomas Venda brutally stabbed a young woman after being released by the Illinois Department of Mental Health. Gregory Canatis of Midwest City, Okla., ate part of his fathers' body after stabbing him and hitting him in the head with a brick. He had been released from the psychiatric ward of an Oklahoma Hospital in February of 1976. Just hours after seeing a psychiatrist, Freddie Prinze, the talented young comedian, shot and killed himself. These are of course individual cases, although incidents such as these are not uncommon. The Citizens Commission on Human Rights reviewed over 500 accounts of violent crimes committed over the past 5 years in the United States. It was found that more than half of the crimes were committed by individuals who had been previously released from psychiatric institutions as certifiably sane. Upon release, these individuals committed over 250 murders, rapes, and assaults.[26]

There have been studies done which show that the incidence of violent crimes increases after release from a mental hospital. In a study by Rappeport and Lassen, published in the American Journal of Psychiatry in 1966,[27] there is evidence that female patients (the only patients studied) were more violent after their release than before entering the mental hospital:

"The clear indication that our women are more assaultive than the general population, particularly after hospitalization, causes us much concern and may in some way be related to factors connected with persons who are identified as mentally ill."

In a study completed in 1975 and published in the American Journal of Psychiatry in February 1976,[28] the authors studied the arrest rates for 867 patients who were discharged from the psychiatric division of Bellevue Hospital. The author's found the following to be true:

"Arrests for violent offenses involving *bodily harm* (emphasis added) occurred 1½ times more frequently during the 2-year period after admission, but arrests for violent offenses with potential for harm and arrests for non-violent offenses occurred at about the same frequency before and after admission."

Under sections 3613(d) and 3616(d) of S. 1437, "Determination and Disposition," if the person is found to be suffering from a disease which may result in *bodily harm* (emphasis added) or property damage, he is to be placed in a mental hospital. From the evidence given above, this would appear to be countertherapeutic. The exact wording of the "Determination and Disposition" sections is given below so that the similarity of these situations can be observed:

"If, after the hearing, the court finds by clear and convincing evidence that the acquitted person is presently suffering from a mental disease or defect as a result

---

[22] FBI Uniform Crime Reports, 1955–76.

[23] "Historical Statistics of the United States," U.S. Dept. of Commerce, Bureau of the Census.

[24] "Statistical Abstract of the United States, 1976," U.S. Dept. of Commerce, Bureau of the Census.

[25] "Budget of the U.S. Government, vols. 1969–76.

[26] Copies of this study are available upon request from the Citizens Commission on Human Rights.

[27] Jonas R. Rappeport and George Lassen, "The Dangerousness of Female Patients: A Comparison of the Arrest Rate of Discharged Psychiatric Patients and the General Population," American Journal of Psychiatry, vol. 123, p. 413, 1966.

[28] Arthur Zitrin, Anne Hardesty, Eugene Burdock, and Ann Drossman, "Crime and Violence Among Mental Patients," American Journal of Psychiatry, vol. 133, p. 142, 1976.

of which his release would create a substantial risk of serious *bodily injury* (emphasis added) to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the state in which the person is domiciled if such state will assume responsibility for his custody, care, and treatment. If such state will not then assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable mental hospital, or in another facility designated by the court as suitable, until such state will assume such responsibility or until the person's mental condition is so improved that his release would not create a substantial risk of serious *bodily injury* (emphasis added) to another person or serious damage to property of another."

From the above discussion, the statistics point to the fact that the person's mental condition upon release from a mental hospital would create an even greater risk of serious bodily injury to another person or serious damage to property of another than if he were never admitted to the hospital.

There is also evidence that the overall incidence of crime (taking into consideration all crimes and not just violent crimes) is not reduced by reason of institutionalization in a mental hospital. In the study by Steadman and Keveles mentioned earlier,[29] of 1,000 patients released from two New York State Hospitals for the criminally insane, for the time period 1966–70, it was revealed that "There was no relationship between the number of arrests and the number of incarcerations before the Baxtrom institutionalization and the number of arrests or number of convictions after the patients' release."

One study by Guze, Woodruff, and Clayton,[30] indicated that criminal activity among mental patients is closely related to sociopathy (antisocial personality), alcoholism, and drug dependence. A 1967 study by Giovannoni an Gruel[31] confirmed the high incidence of alcoholism among mental patients who committed crimes. In their report entitled "Socially Disruptive Behavior of Ex-Mental Patients," they stated that 65.8 percent of the 156 patients involved in at least one offense, also had a problem with alcohol. The 1974 study by Guze, Woodruff, and Clayton concluded that:

"The results are consistent with those previously obtained from studies of convicted felons. Sociopathy, alcoholism, and drug-dependence are the principal psychiatric disorders associated with serious crime."

Furthermore:

"The implications of these results are important. To the degree that psychiatrists may be involved in the prevention or treatment of criminality, they must deal chiefly with sociopathy, alcoholism, and drug-dependence. These disorders are generally resistant to currently available treatment. At the same time, because populations at high risk for these conditions may be easily identified, hope for prevention must depend on further research with children and adolescents so recognized. Until more is known about prevention of these conditions, or until more effective treatments are developed, psychiatrists should be modest in their claims."

From the evidence presented in this section, it can be stated that psychiatric diagnosis and treatment are in-accurate and ineffective at best. In many cases the diagnosis and treatment are damaging to the individual and to society, especially in the case of treatment of mentally ill offenders.

PART III: VIOLATION OF HUMAN RIGHTS CODES

As S. 1437 involves the forced institutionalization of individuals and other restrictions of persons not yet convicted of any offense, its correlation with various codes of human rights should be closely examined.

The Universal Declaration of Human Rights was adopted by the United Nations in 1948 and is their code of human rights today. Specific points of this declaration are violated by S. 1437 as follows:

Article 9 of the Universal Declaration of Human Rights reads:

---

[29] See footnote 7, p. 9457.

[30] Samuel B. Guze, Robert A. Woodruff, Jr., Paula J. Clayton, "Psychiatric Disorders and Criminality," JAMA, vol. 277, 1974.

[31] Jeanne M. Giovannoni, Lee Gruel, "Socially Disruptive Behavior of Ex-Mental Patients," 1967.

"No one shall be subjected to arbitrary arrest, detention or exile." The last paragraph of section 3617 of S. 1437 reads as follows:

"For the purpose of an examination pursuant to an order under section 3611, 3612, 3613, or 3614, the court may commit the person to be examined for a reasonable period, but not more than sixty days, to the custody of the Attorney General for placement in a suitable mental hospital or another facility designed by the court as suitable."

The "order" referred to above is based on "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect." The detection of "mental disease or defect" rendering the individual "mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist in his defense," or "for the treatment of which he is in need of custody for care or treatment in a mental hospital."

It has been previously shown in this report that the detection of "mental disease" and the "need of custody for care or treatment in a mental hospital" are uncertain parameters. Also, the statement "mentally incompetent to the extent that he is unable . . . to assist in his defense," is sufficiently arbitrary so as to violate Article 9 of this Declaration.

In addition, under section 3617 (c) of S. 1437, "PSYCHIATRIC REPORTS," it is stated "A psychiatric report ordered pursuant to this subchapter shall be prepared by the examiner designated to conduct the psychiatric examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the government." The report is to contain, "(4) the examiners' opinions as to diagnosis, prognosis, and . . .

(C) if the examination is ordered under section 3613 or 3616, whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another; or

(D) if the examination is ordered under section 3614 or 3615, whether the person is presently suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a mental hospital."

The information required of the psychiatrist in this report, has been shown to be of such a nature that he is unqualified to provide it accurately. It is therefore arbitrary and, if accepted as authoritative or expert information in the hearing, would lead to an arbitrary detention or exile of the individual, for an indeterminate period of time. Likewise, section 3613, part (d):

"If, after the hearing, the court finds by clear and convincing evidence that the acquitted person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General . . . the Attorney General shall hospitalize the person for treatment in a suitable mental hospital, or in another facility designated by the court as suitable, until such state will assume such responsibility or until the person's mental condition is so improved that his release would not create a substantial risk of serious bodily injury to another person or serious damage to property of another."

Article 10 of the Universal Declaration of Human Rights reads:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Under section 3611 part (a) of S. 1437, the defendant may not be given a "fair and public hearing" "in the determination . . . of any criminal charge against him." The statement which denies the defendant this right reads as follows:

"At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the government may file a motion for a hearing to determine the mental competency of the defendant."

This may deny the defendant the right to face criminal charges against him and instead, his sanity or potential for causing harm would be on trial.

Article 11 of the Universal Declaration of Human Rights reads:

"(1) Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

PART IV: CHAPTER 36, SUBCHAPTER B OF S. 1437 WITH RESPECT TO INTERNATIONAL HUMAN RIGHTS

Now, more than ever, the United States needs to agree upon a firm stand on human rights. President Carter's recent statements regarding human rights in the Soviet Union and elsewhere were only ineffective to the degree that no firm policy regarding human rights had been established or followed in the United States. Human rights and laws ensuring them must be developed and adhered to in the United States before we can criticize other countries.

It is now a well known fact that dissidents and others in the Soviet Union are declared insane and committed to mental institutions for indeterminate sentences, as reported in the February 21, 1977 issue of Time[32] and the June 1977 issue of *Psychology Today*.[33] This is more convenient than a lengthy court trial, especially when the individual has committed no crime. It is also noteworthy that the length of hospitalization for mental patients is indeterminate in that country, whereas if the defendant were put on trial, his prison sentence, if he were found guilty, would probably be less than the time spent in the mental institution. This type of violation of human rights must be guarded against in the United States.

In the Soviet Union, many psychiatrists have prostituted themselves by declaring many sane individuals insane. One of the methods used in Russia to find people insane is described in an interview with Soviet dissident Valdimir Bukovsky, and published in June 1977 in *Psychology Today*.[34] In an exchange with E. Fuller Torrey, a Washington psychiatrist. Bukovsky described the method as follows:

"Bukovsky: Most of the political prisoners are diagnosed as schizophrenics. Anything they do, any protest they make, even a hunger strike is said to be proof of the diagnosis. Torrey: G. V. Morozov, the head of the Serbsky Institute, has even written that argumentativeness is an important symptom of schizophrenia.

Bukovsky: Then I guess it's a pretty common disease even in the United States if that is its definition."

Bukovsky has spent 12 years in prisons, labor camps, and internal exile. He was diagnosed as schizophrenic by Soviet psychiatrists although upon his release in December of 1976, he was diagnosed by a group of British psychiatrists and found to be completely sane. Bukovsky estimates that there are at least 2,000 political prisoners in Russian mental institutions today.

The problem of political exile to mental institutions is not unique to the Soviet Union. In the United States, Ezra Pound was declared to be insane and unfit to stand trial. He was subsequently incarcerated in Saint Elizabeth's Hospital, in Washington, D.C., for 13 years. Another case is that of General Edwin Walker who resisted integration at the University of Mississippi in 1962. He was hospitalized against his will to determine his sanity and was thereby discredited. Leonard Frank was committed to a California mental hospital because, "he couldn't or wouldn't work and spent most of his time reading or doing nothing. (He) grew a beard, ate only vegetarian food and lived the life of beatnik." This was according to the Certificate of Medical Examiners. His case is documented in the book, *Shock Treatment Is Not Good For Your Brain* by John Friedberg. Frank is Jewish, and as a result of his "religious preoccupations" he was given 50 insulin-induced comas and 35 electroshock treatments. The confusions that these shock treatments caused were described as desirable by Dr. Robert E. James, who wrote Frank's father, "it helps him get away from the concerns about his beard, diet and religious preoccupations."

If the individual, under S. 1437, section 3611, is "charged with a penal offense," he may not be given a "public trial at which he has had all the guarantees necessary for his defense." In fact, he may not be allowed any defense to the charges at all and simply found to be mentally incompetent to stand trial and committed to a mental institution.

Article 18 of the Universal Declaration of Human Rights reads:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

Under S. 1437, Chapter 36, Subchapter B, the individual's fredom of thought, conscience, or religion may be denied. For instance, if the individual decides to

---

[32] "The Dissidents V. Moscow," Time, p. 20, Feb. 21, 1977.
[33] "The Serbsky Treatment," Psychology Today, June 1977, p. 38.
[34] See footnote 33.

proceed with his defense in a specific way (which may be contrary to his counsel's advice), this may be interpereted as an inability to assist in his defense. It is stated in section 3611 of S. 1437, that the court shall grant a motion to conduct a hearing if:

"There is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to * * * assist in his defense."

If the hearing confirms this resistance to "assist in his defense," the individual may be determined mentally incompetent to stand trial and could spend up to 1 year in a mental hospital during which time his thoughts and conscience may be altered against his will through the use of psychotropic drugs, electric shock treatment, behavior modification, or psychosurgery, as described in Part II of this report. Article 22 of the Universal Declaration of Human Rights reads:

"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

Chapter 36, Subchapter B, of S. 1437, in its entirety, violates this article by requiring a forced commitment of the individual to a mental hospital. The "free development of his personality" can be violated by forcing the individual to undergo psychiatric treatment such as psychotropic drugs, electric shock treatment, behavior modification, or psychosurgery. These forms of treatment, as discussed in PART II of this report, alter the development of personality and in many cases damage personality permanently.

The Bill of Rights of the United States Constitution has been an accepted code for human rights of this country. One section of the Bill of Rights is severely violated by S. 1437. This is Amendment VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Another issue which could lead to a violation of human rights is that of the right to a public trial in lieu of a hearing where his sanity and not his guilt is on trial. The circumstances leading up to this "sanity" hearing are well covered previously in this report.

Another issue which could lead to a violation of human right is that of the definition of 'insanity' given in section 3617. The definition is as follows: "As used in this subchapter, 'insanity' means a mental disease or defect of a nature constitution a defense to a federal criminal prosecution." This definition is sufficiently circular that it does not describe what insanity is and thus can be misinterpereted.

S. 1437, Chapter 36, Subchapter B, gives free reign to any political power, to have political enemies placed in mental institutions against their will for indeterminate periods of time. Although the more basic issue here is human rights for all persons, whether politically oriented or not, the consequences of forsaking these rights and allowing individuals to be committed to mental institutions against their will without having committed any crime may be as frightening as Bukovsky states:

"Torrey: If we don't fight the abuse of psychiatry in the Soviet Union and elsewhere, what are the consequences?

Bukovsky: If the abuses begin in your country then it will be too late. If you try and fight it once it begins they will probably just call you insane and put you away."

PART V: SOLUTION

Instead of instituting Chapter 36, Subchapter B, of S. 1437, a solution to this complex problem can be arrived at by initiating legislation which conforms to the human rights codes mentioned in part IV, and in addition, by providing effective rehabilitation programs for those who are found to be guilty of committing a crime. Amendment VI of the Bill of Rights is stated as follows:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

In using this as a guideline, the following procedure would serve to conform to this and preserve the individual's rights:

1. The accused is to be given a public trial by an impartial jury, regardless of his actual or supposed mental state. He is to have the assistance of counsel for his defense. He and his counsel are to be informed of the nature and cause of the accusation. He is to be confronted with the witnesses against him and is to have compulsory process for obtaining witnesses in his favor. He is to be afforded all guarantees necessary for his defense.

2. If he is found innocent of all charges against him, he should be released, regardless of actual or supposed mental state.

3. If he is found guilty, the offender or his counsel, or the attorney for the government may file a motion for a hearing to determine the mental competency of the individual. The court shall grant the motion or shall order a hearing on its own motion if there is reasonable cause to believe that the offender is mentally incompetent and in need of specialized rehabilitation. A board made up of a minister, layman, medical doctor, and lawyer, should carry out an examination of the individual and a study of his personal history. If he is found to be in need of specialized rehabilitation by reason of mental incompetence, he should be given an opportunity for such rehabilitation in programs maintained by the state. The individual shall be placed in a secure environment in accordance with already existing security regulations for prisoners. However, his safety and the safety of society or those in his immediate environment shall not be jeopardized by reason of his mental incompetency.

4. Rehabilitation facilities shall be established and maintained and shall afford people the opportunity to recover in a peaceful environment, restore their previous abilities, and release them as confident individuals, well able to cope with situations they encounter in their environment.

Rehabilitation shall include:

a. Basic educational training that will assist the individual in understanding the society which he will be returned to, and which will assist him in understanding the magnitude of his crime and its impact on that society.

b. Vocational training that will assist the individual in contributing to and surviving in the society which he will be returned to.

c. If the individual is addicted to drugs or alcohol, effective rehabilitation programs shall be available for him to take part in.

d. Regular medical care, physical exercise and proper nutrition.

e. Freedom from psychiatric experimentation.

f. The right to refuse, after having been given thorough information on its consequences and possible side effects, harmful psychiatric treatments such as forced drugging, electric shock treatment, behavior modification, aversion therapy, psychotherapy, and psychosurgery, or any other type of psychiatric treatment. The individual must understand the consequences and possible side effects of this treatment and consent to its administration, before the treatment can be given.

5. The individual's progress should be reviewed monthly by the board responsible for his disposition to ensure that he is making progress toward becoming rehabilitated. These recommendations would guarantee a jury trial for all offenders and ensure that no psychiatric or other form of punishment is inflicted upon offenders. Freedom from cruel and unusual punishment is guaranteed under Amendment VIII of the U.S. Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[From the Congressional Record, May 2, 1977]

By Mr. McCLELLAN (for himself and Mr. Kennedy):

S. 1437. A bill to codify, revise, and reform title 18 of the United States Code, and for other purposes; to the Committee on the Judiciary.

THE CRIMINAL CODE REFORM ACT OF 1977

Mr. McCLELLAN. Mr. President, today I introduce for myself and Senator Kennedy, the Criminal Code Reform Act of 1977.

I am very pleased to introduce this bill because it marks a long step toward attaining an important and historic goal for which I and many others have been working for over 10 years—a truly modern Federal Criminal Code.

The need for codification and revision of the Federal criminal laws is uncontroverted. Our present Federal statutes have been enacted in a haphazard manner over the course of the past 200 years. Many of them have become outdated or contain inconsistent provisions, and others no longer reflect the values and culture of our modern society. Their complexity, their overlapping nature, and their lack of uniformity make it difficult for both layman and lawyer to know what the law is, and very difficult, indeed, for courts to apply the law with equal and balanced justice. The obsolescence of some Federal criminal statutes and the cumbersomeness of others often operate to hinder the administration of justice.

On November 8, 1966, the Congress undertook to do something about the prevailing unsatisfactory condition of our Federal criminal laws. By statute, it established the National Commission on Reform of Federal Criminal Laws. This Commission was chaired by former Gov. Pat Brown of California and became known as the Brown Commission. It was mandated to make a "full and complete review and study of the statutory and case law of the United States" for the purpose of recommending to the Congress legislation to improve the Federal system of criminal justice. Pursuant to that mandate, the Commission, on January 7, 1971, issued its final report in the form of a draft criminal code that was to serve, in the Commission's words, as a "work basis" for necessary reform by the Congress.

The Commission's work and report have served as just that—a "work basis." Within a month or two thereafter, the Senate Subcommittee on Criminal Law and Procedures, which I am privileged to chair, opened the first of a 4-year series of hearings on the Brown Commission report and on the whole question of criminal law codification and reform.

During the course of those hearings, testimony was received from judges, lawyers, bar associations, and from private citizens and groups of every political persuasion and point of view culminating in over 8,500 pages of testimony and exhibits contained in 15 volumes of printed hearings.

After several preliminary drafts were studied and analyzed, the Criminal Justice Reform Act of 1975 evolved and was introduced by me on January 15, 1975, with 10 cosponsors. It undertook to incorporate the best of the earlier versions and the recommendations made by those who submitted their view to the subcommittee.

Obviously, a bill of that nature, covering the whole spectrum of criminal law, could hardly be expected to receive unanimous acceptance and approval. No one would agree with all that it contains. It was not primarily drafted to please, nor does it reflect, the exclusive views, conclusions, or judgments of any one person—not of myself, or of any other individual Senator.

When I reported the measure to the full Senate Committee on the Judiciary on October 21, 1975, I said:

I again assert that no sponsor or supporter of this bill regards all of its provisions as sacrosanct. There are areas of the bill—provisions thereof—which no doubt may well be improved by amendment. That is our legislative and democratic procedure to which I subscribe and which I fervently respect. And I shall have no hesitancy in supporting proposed changes in the bill which, in my judgment, strengthen and improve it.

Constructive counsel and suggestions are certainly welcome and will be appreciated at all stages of consideration of this measure. But efforts to slander the bill or disseminate false information calculated to perpetuate a deception regarding its merits I reject as being neither constructive nor in the public interest.

We have always known that there would be honest differences of opinion about some of its provisions, and that, in the spirit of compromise, concessions, and accommodations would have to be made in order to achieve the goal of criminal law reform earnestly sought by so many for so long. Unfortunately, deliberate consideration and debate of the true merits of the various provisions of the bill were clouded and impeded by an unprecedented campaign of flagrant distortions, half-truths and misrepresentations by some groups and individuals to defeat the measure at any cost.

Recognizing the gravity of public concern and also conscious of the great need for reform of the Federal criminal laws, on February 11, 1976, Senators Mansfield

and Scott, majority and minority leaders of the Senate, respectively, in an effort to effectuate a reasonable compromise and promote the bill's enactment, suggested to the four Senators then most actively involved in the processing of the criminal code bill—Senators Hruska, Kennedy, Hart, and myself—that some 13 controversial provisions in the bill either be deleted or returned to current law. We felt that by excising these controversial provisions the remaining 95 percent or more of the bill could and should be enacted. Former Governor Brown joined in this approach, writing that the defeat of the bill "would be a severe blow to criminal law reform in this country."

Senator Hruska and I were willing to accept the recommendations of the leadership. On March 8, Senators Hart and Kennedy responded to the leadership's initiative by submitting to Senator Hruska and myself a significantly expanded list of provisions to be modified, deleted, or returned to current law. The points in controversy in the intervening weeks had grown from 13 to 22.

On March 25, 1975, Senator Hruska and I issued a response in which we felt we went a long way in meeting the letter and spirit of the leadership's initiative to deal with controversial parts of the bill and the issue posed by the expanded list. Unfortunately, it was not possible to work out all of the details before the end of the 94th Congress.

Notwithstanding the delay, this studied response by Senator Hruska and myself with respect to the controversial parts of the criminal code bill has continued to be the basis for working with Senator Kennedy and the new administration—particularly Attorney General Bell and his staff—to produce the bill I am introducing today.

Mr. President, I believe the bill introduced today is a product of the give and take that inevitably must be a part of the legislative process. Sixteen of the 22 major issues involved were resolved using the approach suggested by the leadership last Congress of adopting a policy of retaining current law. This was accomplished in some instances, by deleting some sections in favor of relying on case law rules developed by the courts over the past 200 years;[1] in other instances, by deleting certain modifications of current law;[2] and, in still others, by retaining current statutory law verbatim and including, if anything, simply a cross-reference to the current statutes;[3] or by adopting language that all agree will duplicate current law with no significant change.[4]

Mr. President, the remaining 6 of the 22 issues are resolved in such a way as to change current law but in a balanced approach recognizing significant opposing views in each case. Current law is substantially strengthened in the bill by adopting a carefully drafted general Federal solicitation offense section 1003, and by providing new mandatory minimum prison sentences for those who traffic in heroin, section 1811. On the other hand, some aspects of current law were eliminated by deleting the so-called "Smith Act" dealing with persons who advocate overthrow of the Government by unlawful means, section 1103, by deleting the offense for malicious spreading of false information during wartime with intent to aid the enemy, section 1114, and by leaving to the various States the responsibility of determining the proper sanction and its enforcement—whether criminal or civil—for simple possession of not more than 10 grams of marihuana, section 1813.

Mr. President, these latter three issues all involve parts of current Federal law that for one reason or another are no longer prosecuted. The Supreme Court has so severely restricted the applicability of the provisions of present law with respect to advocacy of unlawful overthrow of the Government that no prosecutions have been brought in more than 15 years.

In the same vein, the current version of the wartime offense of spreading false statements concerning the war effort with intent to aid the enemy is seldom used and, when used, has most often been applied to war dissenters expressing opinions rather than conveying false information. For example, Mr. President, a man was prosecuted for distributing a pamphlet claiming that World War I was fought to protect J. P. Morgan investments. Other cases can be cited.

---

[1] Defenses (chapter 5) and identification testimony (section 3714).

[2] Obstruction or delaying of goods or services that impair military effectiveness (section 1111 and 1112) and riot jurisdiction based on interference with a federal governmental function (section 1831(c)(5)).

[3] Espionage and related offenses (sections 1121–1124) and death penalty for causing death during an aircraft hijacking (49 U.S.C. 1472, 1473).

[4] Treason (section 1101), obscenity (section 1842), wiretapping authority (sections 3101–3108), and admissibility of confessions (section 3713).

Similarly, Mr. President, I am informed that the Federal Government has long ago abandoned efforts to prosecute persons in possession of small amounts of marihuana, preferring instead to defer to State and local authorities. While I have some misgivings about changing the law in this regard, I completely agree that this minor offense should be left to State and local enforcement, and that the limited Federal resources should be reserved for apprehension and conviction of those who traffic in narcotics and dangerous drugs.

Finally, Mr. President, the sentencing system has been revised in two respects worth noting. A sentencing guideline system has been adopted to attack the problem of unwarranted sentencing disparity between judges. It would not eliminate judicial flexibility; but it would provide guidance to the trial judge and a bench mark for a defendant or the Government to appeal clearly unreasonable sentences. The other substantive change involves creation of sentencing authority for the trial judge to bar parole for nine-tenths of the term of imprisonment imposed, as a replacement for the current law provision for automatic parole eligibility after one-third of the sentence. This change justified a concomitant modest reduction of the maximum terms of imprisonment authorized.

I wish to say at this time, Mr. President, that on some of these issues I thought the criminal code bill under consideration last Congress contained better provisions than current law or those now proposed. In particular, I felt very strongly about the provisions designed to provide the Federal system with a constitutional procedure for imposition of the death penalty for certain serious and heinous crimes. As an accommodation to facilitate consideration of the criminal code bill I am willing to process separately a capital punishment bill in the Senate and, upon favorable action by the Senate on the separate legislation, to determine at that time, whether it should be added to the code bill.

While I have spent some time today discussing the controversial issues in the bill, Mr. President, it is perhaps more important to note that 95 percent of the bill has been noncontroversial and that it contains many provisions which are universally recognized to be clear and substantial improvements.

The bill represents a true codification that is, in short, a modern, workable penal code. Some of the general advantages flowing from this codification include:

All Federal felonies presently scattered throughout the 50 titles of the United States Code are brought within a single title.

Overlapping offenses are consolidated. Present Federal law contains some 70 theft provisions, 80 forgery and counterfeit statutes, 50 false statement crimes, and more than 70 arson or property destruction. In contrast, the bill has one basic theft section; and perjury and false statement sections are reduced to three. Similar reductions occur throughout.

Gaps in present law are filled. For instance, the current Federal bank robbery statute does not cover extortion, and the Federal extortion statutes do not cover banks. This combination fails to protect against an increasingly common extortion situation where a robber informs a bank officer that their spouse will be killed if the officer does not deliver bank funds as directed. The bill remedies this and similar situations.

Inconsistencies are dealt with in a more effective manner. Current law often inexplicably uses different language and penalties to apply to essentially the same conduct. For example, the penalty for making a false statement to a Federal agency may vary from a minor penalty to 5-years imprisonment, depending on which provision of current law is invoked. By consolidation, the bill eliminates this and similar problems.

The bill is simpler than present law. In current Federal law, no one provision has any necessary relationship to any other. One can find theft offenses under robbery chapters, under extortion chapters, under Indian chapters, under mail chapters, and so on. In this bill, similar offenses are consolidated and placed in a single chapter according to the type of criminal conduct. For example, chapter 16 contains crimes against the person.

The bill standardizes the terms and requirement of "criminal intent." Under current law there are dozens of terms denoting the mental states involved in criminal offenses, for example, willingly, knowingly, maliciously, willfully, corruptly, et cetera. Following the example of the Model Penal Code and the final report of the Brown Commission, the bill incorporates only four carefully defined culpability terms.

The bill provides an improved framework for extraditing criminals who flee the United States by defining crimes solely in terms of the type of criminal conduct involved and stating separately the basis for Federal jurisdiction. In the Vesco matter, for example, extradition was denied because the Federal jurisdictional factor was incorporated as an element of the offense, and the country to which Vesco had fled had no jurisdictional element in its fraud statute. This separation of jurisdictional matters from the elements of the offense should also simplify Federal prosecutions and prevent unjust multiplication of criminal charges. Under current mail fraud provisions, for example, the mailing of 10 fraudulent soliciations would lead to 10 mail fraud counts. Under the bill, the charge would be a single count of fraud with Federal jurisdiction based on use of the mails.

Similarly, under current law, robbery of a Federal credit union located on Federal property would violate at least three separate Federal robbery statutes that differ in the description of the criminal conduct, penalty, and bases for Federal jurisdiction. Under this bill, a single robbery offense would be charged—with the three bases for Federal jurisdiction.

The bill thus provides, through codification, numerous important general advantages for every participant in the criminal justice system.

A complementary goal of the codification process is substantive reform within the context of a sound respect for past judgments of Congress and the courts. Examples of reform efforts in the bill include the following:

The bill carries forward in an improved fashion those parts of current law designed to protect and foster civil rights. Under existing law when interference with civil rights is by a private party, the prosecutor must establish a conspiracy. The bill eliminates that need. Under existing law only citizens are protected. The bill extends coverage to all persons. Under existing law, when a State official deprives a person of a constitutional right, the Government must establish that that was his specific intent. The bill imposes a standard of recklessness as to the effect on a person's civil rights.

One aspect of current law forbids some forms of discrimination against women, but where force is used to discriminate, the law only applies to racial or religious discrimination. The bill expands the section to forbid the use of force, or threats of force, to discrimination on the grounds of sex.

The bill contains improved provisions protecting the right to privacy, including prohibitions against private, nonconsensual electronic eavesdropping, trafficking in eavesdropping devices, intercepting correspondence, and governmental disclosure of certain private information submitted to the Government by citizens.

The bill contains improved rape provisions. In line with reforms being carried out in some States, the bill expressly eliminates the requirement of corroboration of the victim's testimony, and severely restricts inquiry into the past sexual conduct of the victim. While not applying criminal sanctions to the sexual conduct of consenting adults, the bill expands coverage of rape to cover homosexual rapes.

The bill provides better coverage for white collar crimes. It contains an expanded statute of limitations for concealable crime such as fraud. Realistic fine schedules insure that criminal penalties cannot be written off as a mere cost of doing business. An improved means of fine collection is provided by utilizing many of the devices presently used to collect taxes. A new provision is included to outlaw pyramid sales schemes which have bilked the public of hundreds of millions of dollars over the past few years. Under the bill fraudulent schemes may be stopped through the use of Federal injunctive provisions. Perpetrators of such schemes may also be required to give notice of conviction to their victims.

The bill contains improved provisions to fight organized crime. A new serious offense of operating a racketeering syndicate is included to supplement the offenses in current law directed at organized crime.

The bill provides, for the first time in Federal law, a civil hospitalization procedure for Federal defendants who are found not guilty by reason of insanity.

The bill contains an improved series of provisions relating to governmental corruption to deal more effectively with Watergate-type situations. Provision is made for Federal prosecution of a person who commits any crime for the purpose of influencing the outcome of a Federal election. These provisions would reach the serious "dirty tricks" that were exposed in the course of the Watergate investigations. The bill prohibits anyone from soliciting a political contribution in a Federal facility. Current law only covers public servants and thus would not include an official of a political party. This situation was discussed in the

report of the Watergate special prosecution force. That report called for a lengthening of the 3-year statute of limitations created for campaign legislation of 1974. The bill does this. It removes any doubt that grand juries may file special reports relating to governmental misconduct—with appropriate due process safeguards—with regard to all Federal officials.

As discussed earlier, the bill, for the first time, creates an orderly system of sentencing in Federal courts to replace the chaotic variety of existing terms of imprisonment and penalties often applied to identical conduct.

The bill places reasonable restrictions on the imposition of consecutive sentences.

It provides, for the first time in Federal law, for appellate review of sentences to help deal with unjustifiable disparity common under current law.

The bill incorporates the progressive features of parole legislation recently enacted. Imposition of a prison sentence under the bill carries with it an automatic parole component graduated according to the seriousness of the offense.

The bill would establish, for the first time in Federal law, a program to compensate the victims of violent Federal crimes with funds derived from criminal fines. This program would attempt to provide innocent victims with financial assistance to cover personal injuries resulting from specified crimes.

Mr. President, these then are some of the benefits long sought by those who would modernize and make more effective the criminal justice system of this country. Hopefully, we can move forward to enactment in due course this Congress.

Mr. President, I would be remiss if I did not mention and acknowledge with deep appreciation the long labors of my former colleague and ranking minority leader of the Subcommittee on Criminal Laws and Procedures, Senator Roman Hruska, in the effort to achieve a modern criminal code. His wise counsel was indispensable to the work of the National Commission on Reform of Federal Criminal Laws on which we both were privileged to serve from 1966 until its final report was made to the President and the Congress in January 1971. In the months of hearings and study conducted by the Subcommittee on Criminal Laws and Procedures spanning Senator Hruska's last 6 years in the Senate, he was tireless in his dedication to make the new criminal code a reality.

Mr. President, without detracting from the efforts of many others, I sincerely venture the observation that we would never have reached the point of introducing this bill today without the efforts of Senator Hruska. He provided the highest example of bipartisan cooperation that is indispensable for consideration of a bill of this magnitude. I will miss his assistance and advice as the measure is processed.

I wish to add, Mr. President, that I appreciate the efforts and cooperation of the distinguished Senator from Massachusetts in reaching this historic point. I have disagreed with him on some difficult issues on which we both have strong feelings. He did not have to get involved. With considerable commitment of time and a willing acceptance of the risks that inevitably accompany legislative involvement with controversial issues, he accepted the responsibility of identifying the major issues and worked with me in the spirit of give and take to attain a bill that I believe will be viewed from all perspectives as a step forward. I know that he has been willing to assume the responsibility and the accompanying risks out of the conviction—which I share with him—that the bests interests of this Nation is involved and this legislation is urgently needed.

Mr. President, the bill I introduce today contains all substantive provisions of the proposed Federal Criminal Code. In the near future I will introduce an amendment to the bill which will add the many technical changes which must be made in other titles of the United States Code in order to conform them with this proposed new title 18.

I ask unanimous consent that an outline of the provisions of the bill be printed in the Record.

The Proposed Criminal Code Reform Act of 1977

OUTLINE OF SIGNIFICANT PROVISIONS

The bill provides for the first time in the history of the Federal Government as integrated Criminal Code. It would replace existing Title 18 of the United States Code in its entirety.

The bill contains hundreds of improvements. A brief overview of the bill containing most of the important matters proposed, is set out below.

FORMAT OF THE CODE

The bill is divided into two titles. Title I would replace Title 18 of the United States Code. It consists of five interlocking Parts.

Part I embodies the general provisions and principles of the Code. Included in this part are chapters on jurisdiction, culpability, complicity, and defenses.

Part II consists of all the offenses defined in such a way that the reader knows: (1) the elements of the offense; (2) the requisite state of mind (culpability); (3) the circumstances under which the Federal government can prosecute the offender (jurisdiction); and (4) the authorized sentence for violation of the offense (grading).

In order to determine whether criminal liability is to be imposed in a given situation, a reader must engage in the following analysis:

Are the objective elements of some offense in the Code satisfied?

Is the necessary state of mind (i.e., *mens rea*) present with respect to each element? To determine this, one must consider the definition of the offense in light of the culpability principles of Chapter 3.

Does the accused have a defense to the charge, or is the prosecution barred for any reason? General defenes and bars applying to all offenses, are described or discussed in Chapter 5. Others are stated with the definition of the offense itself if peculiarly applicable to a specific offense or type of offense.

Does the Federal government have jurisdiction to prosecute? Determining the extent of Federal jurisdiction of an offense requires reference to the general provisions of jurisdiction in Chapter 2 and the jurisdictional subsection, if any, included in the section defining the offense.

What is the authorized sentence upon conviction for the offense? Each section defining an offense contains a subsection which describes the grade of the offense, or, in some cases, the different grades which might apply depending on the circumstances. The sentences available for a given grade are set out in Part III of the Code.

Part III embodies all the sentencing provisions. Among other things, it defines the classes of grading, states what types of sanctions may be imposed and mandates the use of sentencing guidelines.

Part IV contains the procedural sections of existing Title 18.

Part V contains provisions on ancillary private civil remedies, such as civil actions against racketeering offenders.

Title II of the bill contains those revisions which occur outside of Title 18 of the United States Code. This includes such things as establishment of a Sentencing Commission responsible for promulgating sentencing guidelines, amendments to the Federal Rules of Criminal Procedure, and technical conforming amendments.

PART I. GENERAL PROVISIONS AND PRINCIPLES

Chapter 1. General provisions

This chapter sets forth the general purposes of the Code, provides general principles of construction, and defines over one hundred terms that are commonly used in the Code and in the Federal Rules of Criminal Procedure.

Chapter 2. Jurisdiction

The general Code treatment of federal jurisdiction is introduced in this chapter. The Code defines offenses in terms of the underlying misconduct (e.g., kidnapping) just as a state penal code does, and in a separate subsection of each offense it specifies the particular circumstances under which the federal government may exercise jurisdiction over the criminal conduct (e.g., transportation of the victim across a state line). The basis for federal jurisdiction is not an element of the offense, but it will still have to be proved to the court beyond a reasonable doubt. This approach to federal jurisdiction permits far clearer definitions of offenses, and allows consolidation of numerous existing offenses into a single offense with several jurisdictional bases (e.g., the Code contains only one theft offense, with a listing of several specified circumstances permitting the federal government to prosecute for the theft). It also allows simplified instructions for juries.

The jurisdictional bases in the Code have been tailored to avoid unnecessary expansion of existing federal jurisdiction.

The Code contains provisions for ancillary federal jurisdiction over certain offenses—primarily violent offenses—committed in the course of other federal offenses. For example, if the federal government prosecutes for a civil rights violation the Code will also permit it to prosecute for an assault or a murder committed in the course of the civil rights violation.

The chapter also sets forth principles of extraterritorial jurisdiction. In doing so it fills several gaps in current law (e.g., it permits a criminal trial of a former serviceman for a murder he committed overseas prior to being discharged).

Chapter 3. Culpable states of mind

This chapter defines the specific mental states (the "*mens rea*" elements) that are used throughout the Code in defining an offense. The current Title 18 uses 79 different terms to define the requisite mental state. Like the Model Penal Code and most modern state codes, this chapter reduces the number of terms used to describe the state of mind to four: intentional, knowing, reckless or negligent. The simplification should permit far more clarity and uniformity of interpretation.

Chapter 4. Complicity

This chapter sets forth those circumstances under which a person may be criminally liable for the acts of another individual or for the acts of an organization. The accomplice liability section includes a codification of the doctrine of *Pinkerton* v. *United States*, making a co-conspirator guilty of each specific offense committed in furtherance of the criminal conspiracy if it was reasonably foreseeable that the specific acts would be performed in furtherance of the unlawful agreement.

One significant section in this chapter is the organization liability provision. It codifies current case law by making an organization liable for the acts of its agent committed within his express, implied or apparent authority.

Chapter 5. Bars and defenses to prosecution

A general statute of limitations and a bar to prosecution on grounds of immaturity are set out in this chapter. The generally recognized common law defenses, including mistake of fact or law, insanity, intoxication, duress, exercise of public authority, protection of persons, protection of property, unlawful entrapment, and official misstatement of law, are all left uncodified for further development by the courts through case law. (It is expected that sometime in the next few years the Congress may be able to attempt a codification of the basic elements of the more common defenses.)

PART II. OFFENSES

Chapter 10. Offenses of general applicability

This chapter codifies the attempt, conspiracy and solicitation offenses. There is under current law no Federal attempt statute of general applicability, although many of the individual offenses contain attempt provisions. This section makes it an offense to attempt to commit any Federal crime. The attempted offense in most instances carries the same penalty as the completed offense on the theory that a defendant who begins to commit an offense should not benefit from the happenstance causing its interruption. In order to encourage the abandonment of a criminal enterprise, a voluntary, complete, and effective avoidance of the offense constitutes an affirmative defense.

The conspiracy section reflects current law, as developed through judicial interpretations of the present general conspiracy statute.

With the exception of subornation of perjury, there is no solicitation offense in current Federal law. The National Commission on Reform of Federal Criminal Laws recommended a general offense covering the solicitation of another to commit any Federal offense, an approach adopted in this bill.

Chapter 11. Offenses involving national defense

Three series of offenses relating to treason, sabotage, and espionage are set out in this chapter.

The treason series generally codifies current law. It adds a new section, however, penalizing use of weapons by para-military groups that intend to take over

a function of government by force. Such an offense was recommended by the National Commission on Reform of Federal Criminal Laws.

The Smith Act is repealed in its entirety.

The sabotage series of offenses generally codifies the current law statutes, except that a current law provision dealing with the spreading of false military information in wartime with intent to aid the enemy has been deleted.

The current law offenses relating to espionage and release of classified information have not been revised. Because of the controversy surrounding this area, the existing statutes are moved, unchanged, to title 50 of the United States Code, with the Code simply cross-referencing to those provisions.

Chapter 12. Offenses involving international affairs

This chapter is divided into two subchapters. The first subchapter encompasses those offenses that pertain to foreign relations, such as disclosing a foreign code or engaging in an unlawful international transaction. The second subchapter covers offenses involving immigration, naturalization, and passports such as unlawful entry into the United States or improper use of a passport. The offenses covered here are basically a codification of present law. One major change, however, would make it an offense to conspire within the United States to assassinate a foreign official (Section 1202).

The Logan Act, prohibiting private communication with a foreign government with intent to influence its actions in a dispute with the United States, is repealed This was recommended by the National Commission on Reform of Federal Criminal Laws and has been incorporated in all prior versions of this bill.

Chapter 13. Offenses involving government processes

The offenses encompassed by this calendar are those that constitute obstructions of Government functions, whether they be obstructions of justice, contempt offenses, offenses involving false statements, or offenses involving official corruption. For the most part, the chapter reflects current law. However, certain reforms are introduced.

Current law contains an offense of conspiracy to defraud the Government but no substantive offense of defrauding the Government. The current offense has therefore been subject to criticism for punishing a conspiracy to commit an act that is not in itself punishable. Section 1301 establishes the substantive offense of defrauding the Government.

Section 1312 gears the punishment for bail pumping to the nature of the underlying offense. Thus, it will be punished as a felony if the defendant is awaiting trial for a felony, but as a misdemeanor if the underlying offense is a misdemeanor. This reduces the incentive to jump bail in the hope of facing a reduced penalty after sufficient time has passed that the Government's case has grown stale. The section also makes it an offense to fail to surrender for service of sentence, a possible loophole in current law.

Current law covers tampering with witnesses and informants by means of force or threats only in a general obstruction of justice statute. Section 1323 spells out the prohibited conduct in detail, at the same time including a catch-all clause to insure that the coverage of current law is maintained.

The contempt offenses are defined more clearly, the general criminal contempt statute is limited to a six-month penalty, and certain defenses are added to cover impossibility of compliance with court orders and non-compliance with illegal court orders.

The perjury series adds a new offense, false swearing, as a lesser-included perjury offense where the false statement is not material. Like the perjury offense now appearing in 18 U.S.C. 1623, the "two witness" rule is abolished and a defense of retraction is provided. A single false statement offense consolidates over 50 false statement statutes appearing in current law; an oral false statement to a government official is an offense only if an investigator first advises the declarant that making such a false statement is an offense or if it is volunteered to an investigator. A new defense of retraction is added to the false statement offense.

Finally, under Section 1356 public servants are prohibited from using their own official actions or information gained because of their position for private gain while they remain public servants or for one year after they leave public service. As a statute of general applicability, this offense is new to Federal law.

Chapter 14. Offenses involving taxation

This chapter would incorporate Federal criminal tax offenses currently in the Internal Revenue Code of 1954 (Title 26, United States Code). This approach was suggested by the National Commission on Reform of Federal Criminal Laws. This is consistent with a fundamental precept of codification requiring that all felony offenses be included in Title 18.

The chapter is divided into two subchapters. The first subchapter would cover internal revenue offenses and the second subchapter would contain customs offenses.

Chapter 14 generally recodifies existing law. However, one particularly significant change is introduced with respect to prosecutions for tax evasion (section 1401). Under existing law, a successful tax evasion prosecution requires a "net" tax deficiency. Thus, if one were to intentionally understate his income with the intent to evade taxes but, due to oversight or neglect, failed to take available deductions adequate to offset the undeclared income, the case against him would fall under existing law. Section 1401, read together with Section 1001 (Attempts), eliminates the "net" deficiency requirement. Thus a taxpayer could be prosecuted for understating his income with a criminal intent, despite the fact that no tax was actually due and owing because of overlooked deductions.

It should be noted that an offense where there is no "net" deficiency is a Class E felony (3 years). However, if there exists a "net" deficiency of $100,000 or less, the penalty is a Class D felony (6 years). Where a "net" deficiency in excess of $100,000 exists, the sanction is upgraded to a Class C felony (12 years).

Chapter 15. Offenses involving individual rights

This chapter covers offenses involving civil rights, political rights, and privacy.

Civil Rights. Basic coverage of present civil rights statutes is retained, but language has been added to broaden the coverage with respect to sex discrimination. In addition, the coverage is extended to protect all persons, not just citizens. The current statute covering *conspiracy* to deprive a person of his civil rights under color of law is modified to cover an offense by a single individual or organization. Also the statute is modified to make it clear that the criminal state of mind required for the offense applies to the conduct which deprives a person of a right under the Constitution and laws of the United States and does not impose a further requirement that the defendant specifically intend to infringe a federally guaranteed right. Other sections carry forward the coverage of the Civil Rights Act of 1968.

The civil rights provisions also represent an excellent example of use of ancillary Federal jurisdiction as a grading mechanism. The basic offenses are generally graded as Class A misdemeanors (1 year); however, Federal jurisdiction also exists for serious crimes against persons and property committed in the course of such offenses. Thus, a civil rights offense involving a murder would permit Federal prosecution for murder. This treatment is similar in concept to the granting provided in present 18 U.S.C. 245.

Election Offenses. Section 1511 for the first time in Federal law provides a specific series of statutes covering fraud. Heretofore, frauds in connection with a Federal election could be reached only under the general civil rights conspiracy statute. In addition, the bill prohibits engaging in any criminal conduct for the purpose of influencing an election, thereby reaching serious "dirty tricks" conduct such as the Watergate burglary.

The basic offenses applicable to obstructing or influencing elections are primarily directed at elections of Federal officers. However, the bill would for the first time in Federal law permit Federal prosecution for such conduct ostensibly directed at the election of a State or local official if it is a mixed election, that is, an election involving candidates for both Federal and State or local offices.

Privacy. Section 1524 protects from disclosure certain information required to be furnished to the government by private citizens or to obtain a Federal benefit.

Wiretapping. Due to the recent vintage of the wiretap and surveillance warrant provisions and the controversy that surrounds the subject, the bill carries present law provisions forward without substantive change. There is added an offense for possession of an eavesdropping device with intent that it be used unlawfully. It might be noted that due to consolidation and standardization of offenses flowing from codification, there may be some contraction or expansion of the criminal conduct in different areas for which a warrant could issue.

In addition, the offense of mail interception is broadened to protect all forms of non-oral communication.

Chapter 16. Offenses against the person

This chapter contains all of the offenses which protect the person as an individual. Included here are such offenses as murder, manslaughter, maiming, reckless endangerment, kidnapping, aircraft hijacking, and rape. By and large, while the chapter clarifies and simplifies the basic offenses, no substantive changes are made.

The offense of rape, and the other sexual offenses in the sections that follow, apply without distinction as to the sex of the offender or of the victim; forcible sodomy is included in the definition of the offense. It might be noted that the statutory rape provision (Section 1643) can be committed by females but eliminates consensual acts between peers from the offense. No particularized evidentiary requirements or instruction requirements are included. Corroboration requirements are expressly eliminated. No defense or grading distinction is based upon the promiscuity of the victim. Inquiry into the prior sexual conduct of the victim is severely restricted.

The reckless endangerment provision is new to Federal law. It was suggested by the National Commission on Reform of Federal Criminal Laws and a similar statute has been enacted in New York. It provides for a penalty for engaging in any criminal conduct which recklessly endangers the life of another.

Chapter 17. Offenses against property

Chapter 17 incorporates and consolidates the many varied property offenses found throughout the United States Code into some 81 sections. It is in this chapter that the provisions relating to arson, burglary, securities violations and their related offenses are found. It is also in this chapter, perhaps more than in any other, that the consolidation and reduction of unnecessarily repetitious offenses, one of the significant benefits of codification, can be found. By separating the jurisdictional element from the definition of the substantive offense, for example, Section 1731 is able to incorporate the 70-odd theft provisions under current law in the area of property offenses. But some reforms are also accomplished.

Section 1722, defining the offense of extortion is designed to correct a "loophole" arising out of the recent Supreme Court decision, *United States* v. *Enmons*. In that case, the Court held that the Hobbs Act, which prohibits the obstruction of interstate commerce by extortion, was not applicable to otherwise extortionate conduct when that conduct was used to extort property to which the defendant purported to have a legitimate claim. Such an interpretation is inconsistent with the construction under other Federal extortion provisions (See *United States* v. *Pignatelli*, 125 F. 2d 643 (2d Cir. 1942)) and essentially creates a Federal "claim of right" defense. Section 172 focuses on the means used rather than the ends sought and would bring such conduct within the definition of extortion. Recognizing the serious nature of extortion an affirmative defense is provided for minor incidents of violence that may occur in the cause of legitimate picketing.

Section 1734 makes it an offense to execute a scheme to defraud, which in large measure carries forward the existing law on mail and wire frauds. A new consumer fraud provision similar to the measure that passed the Senate in the 94th Congress is included. One of the significant features of these sections lies in their relationship to the procedure part of the code, where a new statutory injunction remedy is provided to restrain violations, a remedy that should be of considerable importance in protecting potential victims of "white collar" crime. Such a remedy would parallel the effective injunction relief that has long been available for violations of the fraud provisions of the Securities and Exchange Act. Section 1731 also prohibits fraud involving pyramid sales schemes.

Chapter 18. Offenses involving public order, safety, health and welfare

This chapter is divided into seven subchapters.

Subchapter A incorporates a series of organized crime offenses which generally mirror current law under the Organized Crime Control Act of 1970. However, several innovations are worthy of note. First, a distinction is made between simple "racketeering" and "operating" a racketeering syndicate—the former is punished at a C felony level (12 years) and the latter at a B felony level (25 years).

Second, a new offense entitled "Washing Rocketeering Proceeds" (§ 1803) is created to proscribe the takeover of legitimate businesses with the proceeds of a racketeering enterprise. Finally, Federal loansharking laws are strengthened to reach grossly usurious credit transactions, which in present 18 U.S.C. 892 are stated in terms of a prima facie case for proving an extortionate extension of credit.

Subchapter B contains the various Federal drug offenses. The drug offenses are primarily a codification of the 1970 statutes except that simple possession of more than 100 grams of an opiate (which would carry a retail value of at least $4,000) is made a more serious offense that a simple possession of other drugs, and except that simple possession of 10 grams or less of marijuana left to the states to prosecute. The several provisions of current law providing for a doubling of the penalty for repeat offenders are eliminated. There is added, however, a two-year mandatory minimum sentence for trafficking in an opiate unless the offense was committed, under one of four specified mitigating circumstances.

Subchapter C codifies existing penal provisions involving firearms and explosives. The offense of using a firearm in the course of committing a federal crime is made subject to a mandatory minimum penalty of two years' imprisonment, to be served consecutively within the sentence for the underlying offense, unless one of four specified mitigating circumstances is present.

Subchapter D contains the riot offenses. The riot offenses of existing law are substantially narrowed, both in terms of the definition of the substantive offenses and in terms of the federal ability to prosecute. An incitement to riot may not be prosecuted unless a riot actually occurs. A riot is defined to require at least ten participants instead of three as in current law.

Subchapter D covers gambling, obscenity, and prostitution offenses. Section 1842 contains a definition of obscene material consistent with recent Supreme Court decisions respecting obscenity. The section proscribes any dissemination of obscene material to a minor or to any person in a manner affording no opportunity to avoid exposure to such material. In addition, it proscribes the commercial distribution of obscene material as defined in the section. In general, Federal jurisdiction applies to the offense when the mails or interstate commerce is involved.

With respect to gambling and prostitution, the Code seeks to reach the operators of a gambling or prostitution ring but leaves lesser offenses in this area to State law.

The balance of Chapter 18 covers public health offenses, certain other relatively minor miscellaneous offenses, such as the assimilated crimes act applicable in Federal enclaves. The assimilated crimes act is continued in order to reach minor, uncodified offenses committed in federal enclaves, but because of the existence of a complete federal Code there will be less occasion for its use than has existed in the past. Accordingly, the penalty for assimilated crimes is limited to a one-year maximum.

PART III. SENTENCES

It is in Part III that the sentencing scheme for the entire United States Code, and not merely Title 18, is set out. The sentencing provisions are significantly different from current law. Uniform grading categories are provided to facilitate a penalty structure of consistent penalties for conduct of a similar nature or seriousness. Maximum fines are substantially increased. A provision is added to require notice to fraud victims. For the first time in Federal law, a judge can include an order of restitution to the victim as part of any sentence. The special dangerous offender provisions of current law are incorporated in a more effective form in sentencing guidelines provisions. The Code sets forth four generally recognized purposes of sentencing—deterrence, protection of the public, assurance of just punishment, and rehabilitation.

These specific provisions are important but are overshadowed by the structural and procedural changes in sentencing. A sentencing commission is created and directed to establish guidelines to govern the imposition of sentences for all federal offenses, taking into consideration factors relating to the purposes of sentencing, the characteristics of the offender, and the aggravating and mitigating circumstances of the offense. In sentencing offenders, a judge will be expected to sentence within the range specified in the guidelines, although if he considers the guideline range inappropriate for a particular case he is free to sentence above or below the guideline range as long as he explains his reasons for doing

so. If an offender is sentenced above the range specified in the guidelines he may obtain appellate review of his sentence; if he is sentenced below the range specified in the guidelines the government may obtain appellate review of the sentence. The system is designed to promote greater uniformity and fairness, while retaining necessary flexibility. A parole system is retained under the current draft of the bill. However, the trial judge has the authority to sentence a defendant to imprisonment without eligibility for parole for up to nine-tenths of the sentence imposed. The sentencing guidelines will include guidelines on imposing terms of parole ineligibility.

PART IV. ADMINISTRATION AND PROCEDURE

The chapters appearing in this part consolidate, clarify, and codify existing procedural sections of Title 18. Except for the provisions noted below, the codification is accomplished without substantial change in the existing law.

The provisions concerning court-authorized wiretapping have been modified slightly. The statute permitting wiretapping without court order in emergencies is limited specifically to offenses involving treason, sabotage, or espionage, or to offenses involving a risk of death. The provision of current law stating that nothing contained in the wiretapping chapter shall be construed to limit the constitutional power of the President is eliminated because of the controversy it has provoked and because it is without any legal effect.

The extradition statutes are materially modernized and simplified.

The jurisdiction of United States Magistrates is expanded to encompass all misdemeanors, and to permit trial of offenses carrying six months or less without the necessity of obtaining a waiver of jury trial.

An entirely revised series of provisions dealing with mental competency is included in order to overcome the inadequacies of the current law. Included is a provision for the civil commitment, if justified, of an individual who is acquitted by reason of insanity. Although state commitment proceedings may be preferred, federal commitment proceedings are provided to ensure that a genuinely dangerous individual will not be released prematurely.

The ability of the federal government to collect fines that have been imposed by the courts is substantially increased as a result of permitting recourse to the Internal Revenue Service lien procedures.

PART V. ANCILLARY CIVIL PROCEDURES

Chapter 40 covers public civil remedies. It expands the civil forfeiture proceedings of existing law, carries forward existing provisions involving civil restraints of racketeering, and provides the Department of Justice with authority to seek injunctions against general fraud schemes and consumer fraud activities.

Chapter 41 covers private civil remedies. It carries forward civil actions against racketeers and eavesdropping offenders, and adds a civil action against fraud offenders.

More important is the chapter's creation of a system to compensate the victims of violent federal crimes; funding for such compensation will be derived from collected fines.

Mr. KENNEDY. Mr. President, today I join the distinguished senior Senator from Arkansas in introducing "the Criminal Code Reform Act of 1977." The purpose of this comprehensive legislation is to reform, modernize, and codify the entire Federal criminal code. It has the support of the Department of Justice and Attorney General Griffin Bell, who has been especially helpful and cooperative in drafting the legislation.

The Criminal Code Reform Act of 1977 constitutes the most important attempt in 200 years to reorganize and streamline the administration of Federal criminal justice. It is a major undertaking, of critical importance to our people. As I have repeatedly stated in recent months, I view this legislation as the cornerstone of the Federal Government's commitment to the critical problem of crime in America. I believe it is the key to progress on every other front, and that is why I have made this effort one of my principal legislative goals in the current Congress.

This legislation follows in the wake of various State code recodifications. Since 1970, well over half the States have either reformed their criminal laws or are currently doing so. The Federal Government has a similar responsibility to act. Public attitudes reflect a growing sense of frustration at the inability of Govern-

ment to deal with crime and the inequities of our criminal justice system. We owe it to the public to put our Federal house in order and to restore the confidence of the people that we are making progress once again.

The bill introduced today is not a hastily conceived idea. It is the culmination of an ongoing 11-year effort to develop a just, workable, modern Federal criminal code. The main impetus for this effort was the decision of President Lyndon Johnson in 1966 to establish the National Commission on Reform of Criminal Laws. This Commission, chaired by the former distinguished Governor of California, Edmund G. Brown, concluded, after almost 5 years of hearings and careful research that a completely new comprehensive codification of the Federal criminal law was necessary. Piecemeal change was ruled out as inconsistent with the goal of genuine reform.

Few have disagreed with this conclusion of the Brown Commission. Judges, academicians, law enforcement officers, and civil libertarians alike have all agreed on the need for prompt development of comprehensive, logically organized, and internally consistent Federal criminal law.

The plain fact is that the current Federal criminal code is a disgrace. Congresses over the years have enacted over 3,000 criminal laws which are currently on the books, piling one on top of another, until today we have a code that looks more like a Tower of Babel than a comprehensible criminal code. There are no standardized definitions. Offenses are scattered throughout all 50 titles of the U.S. Statutes, with no organization or consistency from one provision to the next.

For example, there are 80 separate theft offenses and 70 counterfeiting and forgery offenses, all with their own conflicting language and definitions. The interpretation and application of such multiple statutes inevitably results in inconsistencies, loopholes, and hypertechnicalities.

In addition, there are almost 80 seperately defined culpability terms, ranging from "wontonly" and "lasciviously" to "maliciously," and "corruptly." Such terminology cannot help but breed uncertainty and widely disparate interpretation of the law.

The current code is archaic. Many provisions should have been repealed years ago. For example, the Logan Act of 1799—enacted during the administration of President John Adams—prohibits private communications to a foreign government. It is still a crime "to impair military effectiveness by a false statement," even though this provision has not been invoked since World War I. In a lighter vein, it remains a Federal crime to lie to a ship's captain or to detain a Government carrier pigeon. Such provisions are an embrassment to the very idea of an enlightened Federal criminal code.

Nor, is the current dilemma limited to the flaws and confusion of existing sections. The omissions are also significant. The Federal law currently lacks effective criminal provisions designed to meet many contemporary problems—consumer and election fraud, environmental pollution, white collar crime, and organized crime.

Most importantly, the current Federal criminal code is harsh and unfair. I am referring primarily to the serious problem of sentencing disparity which offends the precept of equal justice under law.

There is a deep public conviction today that justice means different things for the rich and different things for the poor that it is available only to those with money to hire an expensive lawyer.

When we talk about how current laws promote injustice, how they mean different things to the rich and the poor, the one flaw that stands out above the rest is our sentencing policy. Sentencing in America today is a national scandal. Every day the system breeds massive injustice. There are no guidelines to aid judges in the exercise of their discretion. There is no appellate review of sentences. Judges are free to roam at will, dispensing ad hoc justice in ways that defy both reason and fairness. Different judges hand out widely differing sentences to similar offenders convicted of similar crimes. Some offenders, including many repeat offenders, escape jail altogether while others—convicted of the very same crime—go to jail for excessive periods.

The impact of such sentencing disparity on our criminal justice system is devastating. Certainty of punishment is a joke. To all who come in contact with it, the "system" is seen for what it is—a game of chance in which offenders play the odds and gamble on avoiding punishment.

Sentencing disparity also tilts the process against the young and poor and nurtures a growing public cynicism about our institutions. The youth who goes for a joyride or commits a petty larceney is sentenced to a year in jail. Too often

the tax evader, the price fixer, the polluter, or the corrupt public official receive suspended sentences on the unthinking ground that the stigma of their convictions is punishment enough.

The judges are not to blame. The problem cannot be traced to "weak" judges who "coddle" criminals. The great majority of our Federal judges try to perform their sentencing duties in a responsible, diligent manner. But they must act without guidelines or review, because there are no standards or review procedures in our current criminal code. The law invites injustice by conferring unlimited discretion on judges to impose sentences within vast statutory limits.

A convicted bank robber can be sentenced anywhere from a term of probation to 25 years in prison, a rapist anywhere from probation to life imprisonment.

This use of broad discretion has backfired; there has been a notorious increase in arbitrariness and injustice. In the last few years study after study has been published documenting the nature and scope of sentencing disparity.

Many of the leading authorities of our criminal justice system—Dean Norval Morris of the University of Chicago Law School and the Honorable Marvin E. Frankel, U.S. district judge for the southern district of New York, to name just two—have written about the critical flaws which threaten the criminal sentencing process. And just a few months ago, Chief Justice Warren E. Burger also commented that "some form of review procedure is needed to deal with this dilemma" of disparity.

Nor is sentencing disparity the only problem. Sentencing maximums are inconsistent and irrational—if one robs a federally insured bank today a 25-year term of imprisonment is possible; but if one robs a post office, the maximum term is only 10 years. If one commits a minor mail fraud of $200 by sending three letters through the mail 15 years can be imposed; but if a major $25,000 mail fraud is committed by sending only one letter through the mail, the maximum is just 5 years.

And only occasionally, as if by accident, are the criminal fines which are imposed related to the amount of actual injury inflicted or gain realized by the offender.

In plain terms, the present penalty structure of the Federal criminal law must be completely revised.

The Criminal Code Reform Act of 1977 is designed to deal with these and other injustices found in current law. The bill completely reorganizes the code in a logical and consistent manner. Over 70 current statutes relating to arson and property destruction are consolidated into just three sections. The one theft section in the bill replaces over 70 current theft and fraud statutes, with the penalty for the offense varying depending on the kind and value of the property stolen. Similarly, five forgery and counterfeiting offenses replace the 80 offenses found in current law, while 50 statutes involving perjury and false statements have been consolidated into four sections.

In place of 80 current levels of culpability, all undefined, this reform bill, defines just four: intentional, knowing, reckless, and negligent. This simplification will permit far greater clarity and uniformity. In addition, over 100 definitions are listed to insure uniform interpretation. The new bill thus provides a common dictionary to make it understandable on its face.

Every effort has been made to draft offenses simply, uniformly, and precisely. Verbose and technical language such as that which appears in the current mail fraud statute—has been avoided. Instead, a conscious effort has been made to speak in common English.

Mr. President, although these new features in the bill basically result from our effort to codify current law, the proposed bill goes well beyond mere codification. It is a reform effort as well.

First and foremost, the new bill overhauls the entire Federal sentencing process by adopting many of the sentencing reforms I suggested in S. 181, "the sentencing guidelines bill," introduced with broad, bipartisan support, including the cosponsorship of Senator McClellan, on January 10. I view the sentencing provisions as the key reform of the entire bill. The bill sets forth four generally recognized purposes of sentencing—deterrence, protection of the public, assurance of just punishment, and rehabilitation. A sentencing commission is created and directed to establish guidelines to govern the imposition of sentences for all Federal offenses, taking into consideration factors relating to the purposes of sentencing the characteristics of the offender, and the aggravating and mitigating circumstances of the offense.

In sentencing offenders, a judge will be expected to sentence within the range specified in the guidelines, although if he considers the guideline range inappropriate for a particular case he is free to sentence above or below the guideline range as long as he explains his reasons for doing so. If an offender is sentenced below the range specified in the guidelines, the Government may obtain appellate review of the sentence. If an offender is sentenced above the range specified in the guidelines, the offender may appeal. This system is designed to promote greater uniformity and fairness, while retaining necessary judicial flexibility. Under this new approach, the gross disparities in sentencing found in current law should be significantly reduced.

In addition, each offense in the bill is described as a certain grade of felony or misdemeanor or as an infraction, as is common under most modern State codes. This provides a shorthand method of referring to the penalties and other considerations that apply to the offense.

Finally, maximum fines are substantially increased—a new, effective weapon against white collar crime—and an important new section mandates notice to victims of consumer fraud in order to facilitate class actions for recovery of losses. No longer will the white collar offender be able to write off a criminal fine as simply a cost of doing business.

But the bill goes well beyond current law in a number of other important respects. There are new provisions designed to further protect civil liberties and civil rights, provisions drafted to meet modern social, political and economic problems, provisions, designed to improve the administration of criminal justice and important new provisions which will improve the Federal Government's law enforcement capability:

A. NEW PROVISIONS TO PROTECT CIVIL LIBERTIES AND CIVIL RIGHTS

First. The Logan Act is repealed. This law (18 U.S.C. 951) has been on the books since 1799 and prohibits private communications with a foreign government with intent to influence foreign policy. It has long outlived its usefulness and is looked upon today as little more than an ancient relic. Nevertheless, on occasion it is dusted off and used to raise the spectre of prosecution against those who may disagree with official Government policy. In the late 1960's those American citizens who communicated directly with the North Vietnamese Government in an effort to achieve a breakthrough for peace were threatened with prosecution under this section. It is time it was repealed.

Second. New defenses are added to protect the press from "gag orders." A major improvement over the current law of contempt (18 U.S.C. 401). Under current law the invalidity of a judicial order is not a defense to the crime of contempt. Under this bill it is a defense to contempt if the order is clearly invalid and there was not sufficient time to litigate its validity.

Third. The coverage of the present civil rights laws is expanded. Current law (18 U.S.C. 241) deals only with conspiracies to violate civil rights. Under this bill there need be only one offender, that is, no conspiracy need be found for civil rights violations.

Fourth. The bill changes the Supreme Court decision of *Screws* v. *United States* (325 U.S. 91) (1946). Current law requires a finding that a defendant had a specific intent to deprive the victim of his federally protected civil rights, an almost impossible standard to prove—that is, it is not enough, for example, to show that the defendant intended to assault or maim the victim; the Governmen must also prove to the jury's satisfaction that the assault was done with a specific intent to intimiate the victim from exercising, for example, his right to vote. The bill eliminates this requirement and replaces it with a standard of "recklessness."

Fifth. The Civil Rights Act of 1968 (18 U.S.C. 245; 42 U.S.C. 3631) is expanded to prohibit discrimination based on sex as well as race, color, religion, or national origin. This provision primarily covers equal employment opportunity but would also reach equal access to restaurants and inns as well as public education.

Sixth. The offense of rape is completely modernized. Special corroboration of the vistim's testimony is no longer required. Proscriptions are inposed upon the ability of the defense at trial to explore the prior sexual history of the victim. In this way, the law will treat rape victims like any other victim of a criminal assault. It is hoped that this new provision will serve as a model for States to incorporate into their own criminal codes.

Seventh. Important new provisions are directed at the procedures for the commitment of offenders with mental disease or defect. The scope of these provisions

and the civil liberties protection provided for, are much more comprehensive than those found in current law—chapter 313 of title 18, United States Code. For example, the time for an examination to determine competency is limited to 6 months instead of 1 year; the hospitalization standard is raised to "clear and convincing evidence" and requires a showing of "substantial risk of serious bodily injury to another person or serious damage to property of another"; that is, danger to oneself is not a justification for Federal commitment; also, in order to impose hospital conditions at Federal institutions, the Attorney General is required to consult with the Secretary of HEW "in establishing standards for facilities used in the implementation of this subchapter." Other provisions prevent the Federal Government from committing or detaining an individual once the criminal charges have been dropped for reasons unrelated to that mental illness.

B. NEW MODERN PROVISIONS NOT FOUND IN CURRENT LAW

First. A detailed series of election offenses is created in the wake of the 1972 Presidential campaign to prohibit sabotage of political campaigns. Obstructing an election, obstructing registration and obstructing a political campaign of a Federal election. The bill also makes it illegal to distribute campaign literature without accurately identifying the sponsor, such as the "dirty tricks" aspect of the 1972 Presidential campaign. Currently, the only principal statute for prosecuting election fraud is an 1870 statute (18 U.S.C. 241) which is broadly designed to prohibit any interference with a Federal right—including voting. In light of the events of recent years a specific set of election offenses is needed. The Watergate burglary was a Federal offense only because it occurred in the District of Columbia.

Two. A new provision making environmental pollution a class A misdemeanor with special increased fines is established.

Third. A victim of crime compensation program is created for certain violent Federal crimes committed against the person. Claims are filed with a Federal Compensation Board. Financed by criminal fines and other sources, payments of up to 50,000 for "pecuniary loss" may be awarded to the victim or surviving dependent. But the recipent has an ongoing duty to cooperate with law enforcement authorities in prosecution of the case.

Four. Major new fraud offenses are established to deal with fraudulent pyramid sales schemes and consumer frauds, crimes which are often directed against those elderly and minority citizens most unable to bear the economic hardship of being victimized.

C. NEW TECHNICAL PROVISIONS TO IMPROVE THE ADMINISTRATION OF JUSTICE

First. The bill contains new provisons for ancillary Federal jurisdiction over certain limited offenses, primarily violent common law offenses committed in the course of other Federal offenses. For example, under this provision, if the Federal Government prosecutes for a Federal civil rights violation, this bill will also permit it to prosecute for an assault or a murder committed in the course of that civil rights violation. I believe that this approach to ancillary jurisdiction, recommended by the Brown Commission, represents one of the most significant contributions made by the new codification. The time, expense, and uncertainty of multiple trials can be avoided by permitting prosecution for all of an individual's offenses committed as part of a single course of conduct.

Second. The extradition statutes—now found in 18 U.S.C. 3181–3185—are substantially modernized and simplified to make extradition of fugitives possible. The bill clearly designates the procedures that are required for extradition, the events which must occur prior to surrender of a fugitive and the time limitations under which all parties are required to act.

Third. The jurisdiction of Federal magistrates is expanded to help relieve court congestion and backlog. The failure of our criminal justice system to dispense swift justice not only undercuts the Federal crime-fighting effort but, even more importantly, contributes to the growth of injustice. Steps must be taken now to help relieve our courts of their crushing caseloads. One way is to expand the role of our Federal magistrates by allowing them to assume jurisdiction over a limited number of civil and criminal cases which otherwise would fall on the shoulders of the Federal district judge. These new provisions have been drafted and recommended by the Attorney General as one innovative way to combat judicial delay and I look forward to his upcoming testimony concerning these sections.

D. NEW PROVISIONS TO IMPROVE THE FEDERAL GOVERNMENT'S LAW ENFORCEMENT CAPABILITY

First. The legislation expressly designates the offenses over which the United States can claim extraterritorial jurisdiction, including overseas corporate bribery.

Second. The bill takes a broad view of the liability of an organization for the acts of its agents, an important white collar crime weapon.

Third. The bill creates a new offense of conspiracy in the United States to assassinate a foreign official outside the United States.

Fourth. The bill eliminates the archaic common law requirement of the need for two witnesses to prove perjury other than before a grand jury and also allows the Government to prove perjury by showing that the defendant made or affirmed two or more mutually inconsistent statements without indicating which statement was false.

Fifth. The legislation expands the tax evasion offense to include cases where there is no net tax liability involved—that is an attempt to evade taxes.

Sixth. The bill creates a new offense prohibiting the possession of eavesdropping devices with intent to use them illegally.

Seventh. The bill expands the offense of intercepting mail to include all forms of correspondence, for example, telegrams and Morse code transcriptions.

Eighth. The legislation creates a new offense of trafficking in stolen property, which is directed toward the professional fence who deals in stolen goods for a living.

Ninth. The bill expands existing law to cover the counterfeiting and forging of corporate securities and notes and bonds of State and local governments.

Tenth. The legislation expands existing laws regarding commercial bribery, for example bribery in the banking industry or bribery of employees of a contractor who has a contract to which the United States is a party.

Eleventh. The legislation creates a new offense of operating a racketeering syndicate which is aimed at leaders of organized crime. In addition, the legislation makes it an offense to "launder" the proceeds of organized crime by investing the gains of illegal operations in other legitimate businesses. By making the laundering of these proceeds a crime, this bill helps to strip away the financial machinations of organized crime.

Twelfth. The bill creates a lesser included offense of loansharking involving grossly usurious rates of interest.

Thirteenth. The legislation provides innovative civil injunction procedures to be used against perpetrators of consumer frauds or those engaged in organized crime racketeering. Since investigation of such schemes often takes months, if not years, before the case is ready for criminal prosecution, innocent people may continue to be victimized while the investigation is in progress. This bill allows the Attorney General, prior to commencing a criminal action, to bring a suit to enjoin such schemes. This injunction procedure is similar to that already used with great success in SEC cases.

Fourteenth. The new bill not only substantially increases the maximum amount of fines that can be imposed, but also provides that, for those offenses in which a defendant derived personal gain or caused property loss, the amount of fine imposed can be increased to twice the gain derived or twice the gross loss caused, whichever is greater.

Fifteenth. An important section of the bill makes it a crime to interfere with organized labor activities.

Sixteenth. Finally, a provision allows the Attorney General to initiate a civil forfeiture proceeding to recover property used or possessed in the course of violating various specific crimes, such as bribery, smuggling, counterfeiting, forgery, or firearms offenses.

Mr. President, these are just some of the major provisions that help to highlight the need for prompt enactment of this important legislation.

We are, of course, all aware of the storm of controversy which surrounded this bill's predecessor in the last Congress. Along with many others, I viewed S.1 as a setback to the goal of true criminal code reform. I say it as promising, not eliminating, injustice. During the past months, however, I have worked to come up with an alternative to S. 1, an alternative that would reflect changes which I and others perceived as essential to any new Federal criminal code effort. This bill is the product of that effort. It reflects the careful thought of a large number of distinguished and concerned people. Various Senators, including Senator

Abourezk and former Senators Roman Hruska and Philip Hart; representatives of the Department of Justice, including Attorney General Bell. Edward Levi, and Elliot Richardson; leading members of the academic community, in particular, Alan Derhowitz of the Harvard Law School and Louis Schwartz of the University of Pennsylvania Law School; the various member and staff of the Brown Commission; and, especially, the dean of the Senate when it comes to law enforcement matters, the distinguished Senator from Arkansas (Mr. McClellan). They have all labored tirelessly to work out the many controversial areas and to perfect an altogether new bill worthy of broad-based support.

The major objectionable provisions of S.1 have been modified or eliminated entirely from this bill: the so-called Official Secrets Act has been deleted, the insanity defense has been restored, the Smith Act has been repealed, provisions expanding the death penalty have been eliminated, a Federal disorderly conduct provision has been struck, provisions dealing with demonstrations at a courthouse and riot have been carefully drafted to take into account civil liberties objections, the extortion offense has been rewritten to protect organized labor activities, possession of small amounts of marihuana is no longer a Federal crime, the "inherent power disclaimer" section of the current wiretap law has been deleted, and emergency warrantless wiretaps have been restricted.

Perhaps most importantly, the size of this bill has been reduced from the 800 pages of S. 1, to a much more manageable 300 pages. This has been done by deleting the technical conforming amendments and by eliminating repetitive sections.

These are just a few of the improvements which distinguish this bill from its predecessor. Many, many other improvements have also been made.

Mr. President, I believe that this legislation is a major forward step in the ongoing effort to reform our Federal criminal laws and streamline the administration of criminal justice. It can still be improved and I look forward with anticipation to the hearings and debates over the next few months because I think we can do an even better job. But I am convinced that a point has now been reached where effective criminal code reform is nearing reality after more than a decade of waiting.

Just a few weeks ago, Edmund G. Brown, the distinguished chairman of the Brown Commission and a long-time supporter of criminal law reform, stated that "if the Criminal Code Reform Act of 1977 is adopted I think it will be one of the most constructive moves in the administration of criminal justice in this century." It is up to the Congress and this administration to make this "constructive move" a reality. Twenty-five years ago one of our Nation's most distinguished legal scholars, Herbert Wechsler, aptly expressed the profound impact that the criminal law has on our daily lives; in so doing he gave the Congress the mandate which should guide us in the months ahead:

Whatever view one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy.

If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its coils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community, for the individual.

95TH CONGRESS
1ST SESSION

S. 1437

IN THE SENATE OF THE UNITED STATES

MAY 2 (legislative day, APRIL 28), 1977

Mr. MCCLELLAN (for himself and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To codify, revise, and reform title 18 of the United States Code; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Code Reform Act of 1977".

TITLE I—CODIFICATION, REVISION, AND REFORM OF TITLE 18

SEC. 101. Title 18 of the United States Code, which may be cited as "18 U.S.C. §——" or as "Federal Criminal Code §——", is amended to read as follows:

"TITLE 18.—FEDERAL CRIMINAL CODE

"TABLE OF CONTENTS

"Subchapter B.—Offenses Involving Political Rights

"Sec.
"1511. Obstructing an Election.
"1512. Obstructing Registration.
"1513. Obstructing a Political Campaign.
"1514. Interfering with a Federal Benefit for a Political Purpose.
"1515. Misusing Authority over Personnel for a Political Purpose.
"1516. Soliciting a Political Contribution as a Federal Public Servant or in a Federal Building.
"1517. Making a Political Contribution as a Foreign National.
"1518. Making an Excess Campaign Expenditure.
"1519. Definitions for Subchapter B.

"Subchapter C.—Offenses Involving Privacy

"Sec.
"1521. Eavesdropping.
"1522. Trafficking in an Eavesdropping Device.
"1523. Possessing an Eavesdropping Device.
"1524. Intercepting Correspondence.
"1525. Revealing Private Information Submitted for a Government Purpose.
"1526. Definitions for Subchapter C.

"Chapter 16.—OFFENSES INVOLVING THE PERSON

"Subchapter A.—Homicide Offenses

"Sec.
"1601. Murder.
"1602. Manslaughter.
"1603. Negligent Homicide.

"Subchapter B.—Assault Offenses

"Sec.
"1611. Maiming.
"1612. Aggravated Battery.
"1613. Battery.
"1614. Menacing.
"1615. Terrorizing.
"1616. Communicating a Threat.
"1617. Reckless Endangerment.
"1618. General Provisions for Subchapter B.

"Subchapter C.—Kidnapping and Related Offenses

"Sec.
"1621. Kidnapping.
"1622. Aggravated Criminal Restraint.
"1623. Criminal Restraint.
"1624. General Provisions for Subchapter C.

"Subchapter D.—Hijacking Offenses

"Sec.
"1631. Aircraft Hijacking.
"1632. Commandeering a Vessel.

"Subchapter E.—Sex Offenses

"Sec.
"1641. Rape.
"1642. Sexual Assault.
"1643. Sexual Abuse of a Minor.
"1644. Sexual Abuse of a Ward.
"1645. Unlawful Sexual Contact.
"1646. General Provisions for Subchapter E.

"Chapter 17.—OFFENSES INVOLVING PROPERTY

"Subchapter A.—Arson and Other Property Destruction Offenses

"Sec.
"1701. Arson.
"1702. Aggravated Property Destruction.
"1703. Property Destruction.
"1704. General Provisions for Subchapter A.

"Subchapter B.—Burglary and Other Criminal Intrusion Offenses

"Sec.
"1711. Burglary.
"1712. Criminal Entry.
"1713. Criminal Trespass.
"1714. Stowing Away.
"1715. Possessing Burglar's Tools.
"1716. Definitions for Subchapter B.

"Subchapter C.—Robbery, Extortion, and Blackmail

"Sec.
"1721. Robbery.
"1722. Extortion.
"1723. Blackmail.
"1724. General Provisions for Subchapter C.

"Subchapter D.—Theft and Related Offenses

"Sec.
"1731. Theft.
"1732. Trafficking in Stolen Property.
"1733. Receiving Stolen Property.
"1734. Executing a Fraudulent Scheme.
"1735. Bankruptcy Fraud.
"1736. Interfering with a Security Interest.
"1737. Fraud in a Regulated Industry.
"1738. Consumer Fraud.
"1739. General Provisions for Subchapter D.

"Subchapter E.—Counterfeiting, Forgery, and Related Offenses

"Sec.
"1741. Counterfeiting.
"1742. Forgery.
"1743. Criminal Endorsement of a Written Instrument.
"1744. Criminal Issuance of a Written Instrument.
"1745. Trafficking in a Counterfeiting Implement.
"1746. Definitions for Subchapter E.

"Subchapter F.—Commercial Bribery and Related Offenses

"Sec.
"1751. Commercial Bribery.
"1752. Labor Bribery.
"1753. Sports Bribery.

"Subchapter G.—Investment, Monetary, and Antitrust Offenses

"Sec.
"1761. Securities Offenses.
"1762. Monetary Offenses.
"1763. Commodities Exchange Offenses.
"1764. Antitrust Offenses.

"PART I.—GENERAL PROVISIONS AND PRINCIPLES

"Chapter 1.—GENERAL PROVISIONS

"Subchapter A.—Matters Relating to Purpose and Application

"§ 101. General Purpose

"The general purpose of this title is to establish justice in the context of a federal system by:

"(a) defining and providing notice of conduct that indefensibly causes or threatens harm to those individual or public interests for which federal protection, through the criminal justice system, is appropriate;

"(b) prescribing appropriate sanctions for engaging in such conduct that will:

"(1) deter such conduct;

"(2) protect the public from persons who engage in such conduct;

"(3) assure just punishment for such conduct;

"(4) promote the correction and rehabilitation of persons who engage in such conduct; and

"(c) establishing a system of fair and expeditious procedures for:

"(1) investigating such conduct by means that will lead to the identification of persons who have engaged in such conduct and that will safeguard persons who have not engaged in such conduct;

"(2) determining the guilt or innocence of persons charged with engaging in such conduct; and

"(3) imposing merited sanctions upon persons found guilty of such conduct.

"§ 102. General Principle of Criminal Liability

"A person commits an offense under this title only if:

"(a) he directly or indirectly engages in conduct, or under a provision of chapter 4 is responsible for conduct, described as an offense in a section set forth in part II of this title;

"(b) the circumstances, if any, described in the section exist at the time of the conduct;

"(c) the results, if any, described in the section are caused by the conduct;

"(d) the states of mind described in the section, or required by the provisions of chapter 3, exist with respect to the described conduct, circumstances, and results; and

"(e) a defense or an affirmative defense that is properly raised and that is described in the section, described in a general-provisions section made applicable to the section, or otherwise recognized by law, did not exist at the time of the conduct.

"§ 103. Application

"Except as otherwise provided, the provisions of this title apply to prosecutions under any Act of Congress other than:

"(a) an Act of Congress applicable exclusively in the District of Columbia;

"(b) the Canal Zone Code; or

"(c) the Uniform Code of Military Justice (10 U.S.C. 801 et seq.).

This title does not apply to an Act of Congress described in subsection (a), (b), or (c) except in an instance in which specific reference is made to such an Act.

"§ 104. Civil Remedies and Powers Unimpaired

"Except as otherwise provided, nothing in this title affects:

"(a) the availability or terms of any civil or administrative remedy or penalty;

"(b) the power of a court, through civil proceedings, to compel compliance with its order, decree, process, writ, or rule; or

"(c) the authority of a court to direct the compensation of a complainant for loss.

"Subchapter B.—Matters Relating to Construction

"Sec.
"111. General Definitions.
"112. General Principles of Construction.

"§ 111. General Definitions

"As used in this title and in the Federal Rules of Criminal Procedure and in the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, unless the meaning is modified or replaced by a definition set forth in another section for application to a limited portion of this title, or unless a different meaning is otherwise plainly required:

"'abet' includes counsel, induce, procure, and command;

"'actor' means the person, or one of the persons, who engaged in the conduct charged, whether or not such person is the defendant or a defendant in the case;

"'affirmative defense' means a defense specifically designated as an affirmative defense that the defendant has the burden of proving by a preponderance of the evidence as prescribed by Rule 25.1 of the Federal Rules of Criminal Procedure;

"'agent' means a person authorized to act on behalf of another person or a government, and, in the case of an organization or a government, includes (a) a partner, director, officer, manager, and representative; and (b), except for the purpose of receipt of service of process, a servant and employee;

"'aid' includes facilitate;

"'aircraft' includes any craft designed for navigation in air or in space;

"'ammunition' includes an ammunition or cartridge case, a primer, a bullet, and a propellant substance designed for use in a firearm;

"'anything of pecuniary value' means (a) anything of value in the form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage; or (b) any other property or service that has a value in excess of $100;

"'anything of value' means any direct or indirect gain or advantage, or anything that might reasonably be regarded by the beneficiary as a direct or indirect gain or advantage, including a direct or indirect gain or advantage to any other person;

"'associate nation' means a nation at war with a foreign power with which the United States is at war;

"'attorney for the government' means a United States attorney, an assistant United States attorney, a special assistant United States attorney, a special assistant to the Attorney General, or

any other attorney of the Department of Justice authorized by statute, or by a rule, regulation, or order issued pursuant thereto to act as an attorney for the government;

"'Attorney General' means the Attorney General of the United States, and, unless issued in conjunction with a reference to another specified officer of the Department of Justice, includes any officer of the Department of Justice authorized to act for or on behalf of the Attorney General;

"'bar to prosecution' means a ground for terminating a prosecution in favor of a defendant on a ground unrelated to guilt or innocence;

"'bodily injury' includes (a) a cut, abrasion, bruise, burn, or disfigurement; (b) physical pain; (c) illness; (d) impairment of the function of a bodily member, organ, or mental faculty; and (e) any other injury to the body no matter how temporary;

"'building' means an immovable or movable structure that is at least partially enclosed, or a separate part of such a structure, and that is designed for use, or used, in whole or in part, as (a) an individual's permanent or temporary home or place of lodging; (b) a place for persons to engage in matters pertaining to government, an occupation or a business or a profession, education, religion, or entertainment; or (c) a place for the storage of property within which, because of its size or other characteristics, it is apparent that an individual could be present;

"'Canal Zone' includes (a) the area designated as the Canal Zone by sections 1 and 2 of title 2 of the Canal Zone Code; and (b) the corridor over which the United States exercises jurisdiction pursuant to the provisions of Article IX of the General Treaty of Friendship and Cooperation between the United States of America and the Republic of Panama, signed March 2, 1936, to the extent that the application to the corridor of the provisions of this title is consistent with the nature of the rights of the United States in the corridor as provided by treaty;

"'chapter' means a chapter of this title;

"'class', when used to refer by letter designation to a particular category of felony or misdemeanor, means a felony or misdemeanor carrying the incidents assigned to such designation by the provisions of part III of this title;

"'commission of an offense', or a variant thereof, includes the attempted commission of an offense, the consummation of an

offense, and any immediate flight after the commission of an offense;

"'communicate' means to impart or transfer information, or otherwise to make information available by any means, to a person or to the general public;

"'conduct' includes any act, any omission, and any possession;

"'conduct constituting an offense', or a variant thereof using the term 'crime' or 'felony' instead of 'offense', means conduct with the state of mind, under the circumstances, and with the results, required for the commission of the offense;

"'consent' includes willing assent, but does not include assent given by a person (a) who is legally incompetent to authorize the conduct assented to; (b) who is a member of a category of persons whose improvident consent is sought to be prevented by the law describing the offense; (c) who is, by reason of age, mental disease or defect, or intoxication, manifestly unable, or known by the actor to be unable, to make a reasonable judgment as to the nature or harmfulness of the conduct assented to; or (d) whose assent is induced by force, threat, intimidation, or deception;

"'court' includes a presiding judge;

"'court of the United States' means the Supreme Court of the United States, a United States Court of Appeals, a United States District Court established pursuant to 28 U.S.C. 132, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the Tax Court of the United States, the United States Customs Court, the United States Court of Customs and Patent Appeals, or the United States Court of Military Appeals;

"'crime' means a felony or a misdemeanor, but not an infraction;

"'crime of violence' means (a) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense;

"'dangerous weapon' means (a) a firearm; (b) a destructive device; or (c) any other weapon, device, instrument, material, or

substance, whether animate or inanimate, that as used or as intended to be used is capable of producing death or serious bodily injury;

" 'defense' includes (a) anything specifically designated as a defense by a statute, or by a regulation, rule, or order issued pursuant thereto; or (b) a specific exception, exclusion, or exemption from criminal liability described in a statute outside this title, or in a regulation, rule, or order issued pursuant thereto;

" 'destructive device' means an explosive, an incendiary material, a poisonous or infectious material in a form that can readily be used to cause serious bodily injury, or a material that can be used to cause a nuclear incident as defined in section 11 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2014(q)); and includes a bomb, grenade, mine, rocket, missile, or similar device containing an explosive, an incendiary material, or a material that can be used as a chemical, biological, or radiological weapon;

" 'dwelling' means an immovable or movable structure that is at least partially enclosed, or a separate part of such a structure, and that is designed for use, or used, in whole or in part, as an individual's permanent or temporary home or place of lodging;

" 'element of the offense' means any (a) conduct; (b) state of mind; (c) existing circumstance; or (d) result; that is specified by the section describing the offense or that, with respect to a state of mind, is required by section 303 for the commission of the offense;

" 'enterprise' includes any business undertaking by an organization or group;

" 'explosive' means a chemical compound, a mechanical mixture, or any other combination of materials, in proportions, quantities, or packaging that may be exploded by operation of fire, friction, concussion, percussion, nuclear fission, or nuclear fusion;

" 'felony' means an offense for which a term of imprisonment of more than one year is authorized by a federal statute, or would be authorized if a circumstance giving rise to federal jurisdiction existed, or, if qualified by the word 'state', 'local', or 'foreign', an offense for which such a term is authorized by such state, local, or foreign law;

" 'finance' includes providing indirect financing;

" 'firearm' means a weapon that can expel, or that can readily be

converted to expel, a projectile by the action of an explosive or a flammable rocket propellant, and includes such a weapon, loaded or unloaded, commonly referred to as a gun, pistol, revolver, rifle, shotgun, machine gun, bazooka, or cannon;

"'foreign commerce' means commerce between a state and a foreign country, or from a state to a foreign country, or from a foreign country to a state, or between places in the same state through a foreign country;

"'foreign dignitary' means (a) the chief of state or head of government, or the political equivalent, of a foreign power; (b) an officer of cabinet rank, or equivalent or higher rank, of a foreign power; (c) an ambassador of a foreign power; (d) the chief executive officer of an international organization; or (e) a person who has previously served in any such capacity;

"'foreign official' means (a) a foreign dignitary; or (b) a person of foreign nationality who is duly notified to the United States as an officer or employee of a foreign power;

"'foreign power' includes (a) a foreign government, faction, party, or military force, or persons purporting to act as such, whether or not recognized by the United States; and (b) an international organization;

"'found guilty' includes acceptance by a court of a plea of guilty or nolo contendere;

"'government' means (a) the government of a nation, a state, or a political subdivision thereof; (b) a branch of the foregoing, including the executive, legislative, and judicial branches; or (c) a government agency;

"'government agency' means (a) a subdivision of the executive, legislative, judicial, or other branch of a government, including a department, independent establishment, commission, administration, authority, board, and bureau; or (b) a corporation or other legal entity established by, and subject to control by, a government or governments for the execution of a governmental or intergovernmental program;

"'group' includes (a) an assemblage of persons; and (b) an association of persons, whether or not a legal entity;

"'high seas' means, in accordance with international law, those parts of the sea that are not included in the territorial sea or in the internal waters of a nation or state;

" 'immediate family' of a designated individual means (a) his spouse, parent, brother, sister, or child, or a person to whom he stands in loco parentis; or (b) any other person living in his household and related to him by blood or marriage;

" 'incite', or a variant thereof, means to urge other persons to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct;

" 'includes' is to be read as if the phrase 'but is not limited to' were also set forth;

" 'individual' means a human being who has been born and who has not died;

" 'in fact' means, in accordance with the provisions of section 303(a)(1), that the matter to which the phrase applies is not a matter as to which a state of mind must be proved;

" 'infraction' means an offense for which a term of imprisonment of five days or less is authorized by a federal statute, or would be authorized if a circumstance giving rise to federal jurisdiction existed, or, if qualified by the word 'state' or 'local', an offense for which such a term is authorized by such state or local law;

" 'intentional', or a variant thereof, has the meaning prescribed in section 302(a);

" 'international organization' means a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288);

" 'internationally protected person' has the meaning prescribed in section 2 of the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, as amended by section 221 of the Criminal Code Reform Act of 1977;

" 'interstate commerce' means commerce between one state and another state, or from one state to another state, or between places in the same state through another state;

" 'intoxication' means a disturbance of a mental or physical capacity resulting from the introduction of alcohol or a drug or other substance into the body;

" 'judge' means any judicial officer, and includes a justice of the Supreme Court and a magistrate;

" 'juror' means a grand juror or a petit juror, and includes a person who has been selected or summoned as a prospective juror;

" 'knowing', or a variant thereof, has the meaning prescribed in section 302(b);

" 'law enforcement officer' means a public servant authorized by law or by a government agency to conduct or engage in the prevention, detection, investigation, or prosecution of an offense;

" 'local' means of or pertaining to a political subdivision within a state;

" 'locality' means a political subdivision within a state;

" 'mail' includes a post card, postal card, letter, envelope, parcel, package, newspaper, magazine, circular, advertising matter, or mailbag or mail container, or anything contained therein (a) that has been left for collection in or adjacent to an authorized depository for mail matter; (b) that is under the care, custody, or control of the United States Postal Service; or (c) that, having been under the care, custody, or control of the United States Postal Service, has not been delivered to the person to whom it was addressed;

" 'military' means relating to the armed forces or their supporting agencies, whether land, sea, or air forces, in either an offensive or a defensive capacity;

" 'misdemeanor' means an offense for which a term of imprisonment of one year or less, but more than five days, is authorized by a federal statute, or would be authorized if a circumstance giving rise to federal jurisdiction existed, or, if qualified by the word 'state', 'local', or 'foreign', an offense for which such a term is authorized by such state, local, or foreign law;

" 'motor vehicle' means a self-propelled vehicle designed to run on land but not on rails;

" 'national credit institution' means (a) a bank with deposits insured by the Federal Deposit Insurance Corporation; (b) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation; (c) a credit union with accounts insured by the Administrator of the National Credit Union Administration; (d) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act, as amended (12 U.S.C. 1422), of the Federal home loan bank system; or (e) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States;

"'national defense emergency' means a national emergency that is proclaimed in accordance with title II of the National Emergencies Act (50 U.S.C. 1621 et seq.) and that involves military combat operations undertaken in connection with an actual or imminent war or armed attack by a foreign power against the United States or its armed forces;

"'negligent', or a variant thereof, has the meaning prescribed in section 302(d);

"'objective', when used with reference to a criminal conspiracy, includes the commission of a crime, escape from the scene of a crime, distribution of the fruits of a crime, and any measure for concealing, or obstructing justice in relation to, any aspect of the conspiracy;

"'offense' means conduct for which a term of imprisonment or a fine is authorized by a federal statute, or would be authorized if a circumstance giving rise to federal jurisdiction existed, or, if qualified by the word 'state', 'local', or 'foreign', conduct for which a term of imprisonment or a criminal fine is authorized by such state, local, or foreign law;

"'official action' means a decision, opinion, recommendation, judgment, vote, or other conduct involving an exercise of discretion by a public servant in the course of his employment;

"'official detention' means (a) detention by a public servant, or under the direction of a public servant, following arrest; following surrender in lieu of arrest; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings being held in abeyance; or pending extradition, deportation, or exclusion; or (b) custody by a public servant, or under direction of a public servant, for purposes incident to the foregoing, including transportation, medical diagnosis or treatment, court appearance, work, and recreation; 'official detention' does not include supervision or other restrictions (other than custody during specified hours or days) after release pending trial or appeal, pursuant to the provisions of subchapter A of chapter 35; after release on probation, pursuant to the provisions of chapter 21; after release on parole, pursuant to the provisions of subchapter D of chapter 38; or after release following a finding of juvenile delinquency, pursuant to the provisions of subchapter A of chapter 36;

" 'official guest of the United States' means a person of foreign nationality who has been designated by the Secretary of State as an official guest of the United States and who is in the United States pursuant to such designation;

" 'official proceeding' means a proceeding, or a portion thereof, that is or may be heard before (a) a government branch or agency; or (b) a public servant who is authorized to take oaths, including a judge, a chairman of a legislative committee or subcommittee, a referee, a hearing examiner, an administrative law judge, and a notary;

" 'omission' means a failure by a person to perform an act that he has a legal duty to perform;

" 'organization' means a legal entity, other than a government, established or organized for any purpose, and includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, estate, society, union, club, church, and any other association of persons;

" 'paragraph' means a paragraph of the subsection or subdivision in which the term is used;

" 'person' means (a) an individual; or (b), except when used to refer to the victim of an offense involving death or bodily injury, an organization;

" 'President' means (a) the President of the United States; or (b) a person who is acting as President under the Constitution and laws of the United States;

" 'President-elect' means the person who appears to be the successful candidate for the office of President, as ascertained from the results of the general election held to determine the electors of President and Vice President pursuant to 3 U.S.C. 1 and 2;

" 'property' means anything of value, and includes (a) real property, including things growing on, affixed to, and found in land; (b) tangible or intangible personal property, including rights, privileges, interests, and claims; and (c) services; except that, if used to refer to the object or possible object of damage, does not include intangible property or services;

" 'property of another' means property in which a person or government has an interest upon which the actor is not privileged to infringe without consent, whether or not the actor also has an interest in the property;

" 'public facility' includes (a) a facility of public or government communication, transportation, energy supply, water supply, or sanitation; (b) a facility of a police, fire, or public health agency; (c) a facility designed for use, or used, as a means of national defense; and (d) a part of any such facility or any property, structure, or apparatus used in connection with or in support of any such facility;

" 'public servant' means an officer, employee, adviser, consultant, juror, or other person authorized to act for or on behalf of a government or serving a government, and includes a person who has been elected, nominated, or appointed to be a public servant; a federal 'public servant' does not include a District of Columbia public servant;

" 'railroad vehicle' means a locomotive or car designed to run on rails;

" 'reckless', or a variant thereof, has the meaning prescribed in section 302(c);

" 'section' means a section within a chapter of this title;

" 'self-induced intoxication' means intoxication caused by a substance that the actor knowingly introduces into his body with knowledge that it has, or with reckless disregard of the risk that it may have, a tendency to cause intoxication;

" 'serious bodily injury' means bodily injury which involves (a) a substantial risk of death; (b) unconsciousness; (c) extreme physical pain; (d) protracted and obvious disfigurement; or (e) protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

" 'services' means anything of value resulting from a person's physical or mental labor or skill, or from the use, possession, or presence of property, and includes (a) repairs or improvements to property; (b) professional services; (c) private or public or government communication, transportation, energy, water, or sanitation services; (d) lodging accommodations; and (e) admissions to places of exhibition or entertainment;

" 'solicit', when used in the description of an offense, includes importune, approach with a request or plea, and try to obtain by asking for; and is not limited to the conduct constituting an offense under section 1003 (Criminal Solicitation);

" 'state' means a state of the United States, the District of Columbia, Puerto Rico, the Canal Zone, the Virgin Islands,

American Samoa, Johnston Island, Midway Island, Wake Island, Guam, Kingman's Reef, or any other territory or possession of the United States;

"'state of mind' has the meaning set forth in section 301(a);

"'stolen' property means property that has been the subject of any criminal taking, including theft, executing a fraudulent scheme, robbery, extortion, and blackmail, as those offenses are described in this title;

"'subchapter' means a subchapter of the chapter in which the term is used;

"'subdivision' means a subdivision of the rule in which the term is used;

"'subparagraph' means a subparagraph of the paragraph in which the term is used;

"'subsection' means a subsection of the section in which the term is used;

"'this title' means title 18 of the United States Code;

"'traffic' means (a) to sell, transfer, distribute, dispense, or otherwise dispose of to another person as consideration for anything of value; or (b) to buy, receive, possess, or obtain control of with intent to do any of the foregoing;

"'United States,' when used in a geographic sense, includes (a) all states; (b) all places subject to the special territorial jurisdiction of the United States that are described in section 203 (a)(4) and (a)(5); (c) all waters subject to the admiralty and maritime jurisdiction of the United States; and (d) the airspace overlying such states, places, and waters;

"'United States', when used in other than a geographic sense, means the government of the United States;

"'United States official' means a federal public servant who is the President, the President-elect, the Vice President, the Vice President-elect, a member of Congress, a member-elect of Congress, a delegate or a commissioner of Congress, a delegate-elect or a commissioner-elect of Congress, a Justice of the Supreme Court, or a member of the executive branch of government of cabinet rank;

"'value,' when stated in monetary terms, means the aggregate value in terms of (a) face, par, or market value; (b) original or replacement cost; or (c) wholesale or retail price; whichever of the foregoing is greatest;

"'vehicle' means a motor vehicle, railroad vehicle, vessel, or aircraft;

"'vessel' means a self-propelled or wind-propelled craft designed to navigate on or under water;

"'Vice President-elect' means (a) the person who appears to be the successful candidate for the office of Vice President, as ascertained from the results of the general election held to determine the electors of the President and Vice President pursuant to 3 U.S.C. 1 and 2; or (b) the person who is nominated by the President for the office of Vice President pursuant to the provisions of the Twenty-fifth Amendment to the Constitution of the United States;

"'violate' means to engage in conduct that is described as an offense proscribed, prohibited, declared unlawful, or made subject to a criminal penalty; and

"'war' means (a) a war declared by Congress pursuant to section 8 of Article I of the Constitution of the United States; (b) a war declared by a foreign power against the United States; (c) an armed attack by a foreign power against the United States or its armed forces; or (d) a situation in which armed forces of the United States are engaged in hostilities, or in which their imminent involvement in hostilities is clearly indicated by the circumstances, and concerning which the President has submitted or is required to submit a report to the Congress pursuant to section 4 of the War Powers Resolution (50 U.S.C. 1543).

"§ 112. General Principles of Construction

"(a) CONSTRUCTION IN GENERAL.—The provisions of this title shall be construed in accordance with the fair import of their terms to effectuate the general purposes of this title.

"(b) TITLES, HEADINGS, AND PARENTHETICAL EXPLANATIONS.—A title, heading, or parenthetical explanation shall not be construed as limiting or otherwise affecting the scope or application of the language of the chapter, subchapter, section, subsection, rule, or subdivision in which it appears or to which it refers.

"(c) NAMES OF OFFENSES.—A term that commonly is employed generically to refer to a kind of offense or to a group of offenses, but that also is employed as a title of a section describing an offense, shall be construed in its generic sense when it is used outside such section without reference to the number of such section.

"(d) NUMBER, GENDER, AND TENSE.—A term:

"(1) that is used in the singular includes and applies to the plural of the term;

"(2) that is used in the plural includes and applies to the singular of the term;

"(3) that signifies the masculine gender includes and applies to the feminine gender and the neuter gender; and

"(4) that is used in the present tense includes the future tense and, unless a different construction is plainly required. the past tense.

"Chapter 2.—JURISDICTION

"§ 201. Federal Jurisdiction

"(a) JURISDICTION IN GENERAL.—Federal jurisdiction over an offense described in this title includes:

"(1) the general jurisdiction of the United States, as set forth in section 202;

"(2) the special jurisdiction of the United States, as set forth in section 203; and

"(3) the extraterritorial jurisdiction of the United States, as set forth in section 204.

"(b) JURISDICTION APPLICABLE TO SPECIFIC OFFENSES.—

"(1) If, in a section describing an offense, there is a separate subsection in which one or more circumstances are specified as giving rise to federal jurisdiction over the offense, there is federal jurisdiction over the offense:

"(A) if such a circumstance exists or has occurred and the offense is committed within:

"(i) the general jurisdiction of the United States; or

"(ii) the special jurisdiction of the United States to the extent that such jurisdiction is specified as such a circumstance in the separate subsection; or

"(B) whether or not such a circumstance exists or has occurred if the offense is committed within the extraterritorial jurisdiction of the United States to the extent applicable under section 204.

Federal jurisdiction may be alleged as resting on more than one of such circumstances, but proof of any such circumstance is

sufficient to establish the existence of federal jurisdiction over the offense. Proof of more than one of such circumstances does not increase the number of offenses that may be found to have been committed. If federal jurisdiction over an offense exists by virtue of its commission during another offense, jurisdiction also exists over any lesser included offense.

"(2) If, in a section describing an offense, there is no separate subsection in which one or more circumstances are specified as giving rise to federal jurisdiction over the offense, there is federal jurisdiction over the offense if it is committed within:

"(A) the general jurisdiction of the United States;

"(B) the special jurisdiction of the United States; or

"(C) the extraterritorial jurisdiction of the United States to the extent applicable under section 204;

unless the offense is described as a violation of a statute outside this title, or of a regulation, rule, or order issued pursuant thereto, in which case there is federal jurisdiction over the offense to the extent applicable under that statute.

"(c) JURISDICTION NOT AN ELEMENT OF OFFENSE.—The existence of federal jurisdiction is not an element of the offense.

"§ 202. General Jurisdiction of the United States

"An offense is committed within the general jurisdiction of the United States if it is committed within the United States.

"§ 203. Special Jurisdiction of the United States

"An offense is committed within the special jurisdiction of the United States if it is committed within the special territorial jurisdiction, the special maritime jurisdiction, or the special aircraft jurisdiction of the United States, as set forth in subsections (a), (b), or (c).

"(a) SPECIAL TERRITORIAL JURISDICTION.—The special territorial jurisdiction of the United States includes:

"(1) real property that is reserved or acquired for the use of the United States and that is under the exclusive or concurrent jurisdiction of the United States, and a place purchased or otherwise acquired by the United States with the consent of the legislature of the state in which such place is located for the erection of a building or other structure;

"(2) an unorganized territory or a possession of the United States;

"(3) the Indian country, as defined in section 231(a) of the criminal Code Reform Act of (25 U.S.C. ——);

"(4) an island, a rock, or a key that may, at the discretion of the President, be considered as appertaining to the United States; and

"(5) a facility for exploration or exploitation of natural resources constructed or operated on or above the outer continental shelf as defined in section 2(a) of the Outer Continental Shelf Lands Act (43 U.S.C. 1331(a)).

"(b) SPECIAL MARITIME JURISDICTION.—The special maritime jurisdiction of the United States includes:

"(1) the high seas;

"(2) any other waters within the admiralty and maritime jurisdiction of the United States and outside the jurisdiction of any state;

"(3) a vessel within the admiralty and maritime jurisdiction of the United States, and outside the jurisdiction of any state, that belongs in whole or in part to:

"(A) the United States;

"(B) a state or locality;

"(C) a citizen of the United States; or

"(D) an organization created by or under the laws of the United States or of a state; and

"(4) a vessel registered, licensed, or enrolled under the laws of the United States, that is upon the waters of any of the Great Lakes or the waters connecting them, or upon the Saint Lawrence River where it constitutes the international boundary line.

"(c) SPECIAL AIRCRAFT JURISDICTION.—The special aircraft jurisdiction of the United States includes:

"(1) an aircraft that belongs in whole or in part to:

"(A) the United States;

"(B) a state or locality;

"(C) a citizen of the United States; or

"(D) an organization created by or under the laws of the United States or of a state;

"(2) a civil aircraft of the United States, as defined in section 101 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301);

"(3) a public aircraft of the United States, as defined in section 101 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301);

"(4) any other aircraft within the United States;

"(5) any other aircraft outside the United States:

"(A) that has its next scheduled destination or last point of departure in the United States, and that next lands in the United States; or

"(B) that has an 'offense', as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, committed aboard, and that lands in the United States with the alleged offender still aboard; and

"(6) any other aircraft leased without crew to a lessee who has his principal place of business in the United States, or, if the lessee has no principal place of business, who has his permanent residence in the United States;

during the period that such aircraft is in flight, which is, for the purpose of this subsection, from the moment when all the external doors of such aircraft are closed following embarkation until the moment when any such door is opened for disembarkation, or, in the case of a forced landing, until a competent authority takes over the responsibility for the aircraft and for the persons and property aboard.

"§ 204. Extraterritorial Jurisdiction of the United States

"Except as otherwise expressly provided by statute, or by treaty or other international agreement, an offense is committed within the extraterritorial jurisdiction of the United States if it is committed outside the general or special jurisdiction of the United States and:

"(a) the offense is a crime of violence and the victim or intended victim is:

"(1) a United States official; or

"(2) a federal public servant outside the United States for the purpose of performing his official duties;

"(b) the offense is treason, sabotage against the United States, espionage, disseminating national defense information, or disseminating or receiving classified information;

"(c) the offense consists of:

"(1) counterfeiting or forgery of, or uttering of a counterfeited or forged copy of, or issuing without authority, a seal, currency, security instrument of credit, stamp, passport, or

public document that is or that purports to be issued by the United States;

"(2) perjury or false swearing in a federal official proceeding;

"(3) making a false statement in a federal government matter or a federal government record;

"(4) bribery or graft involving a federal public servant;

"(5) fraud against the United States or theft of property in which the United States has an interest;

"(6) impersonation of a federal public servant;

"(7) any obstruction or impairment of a federal government function, if committed by a national or resident of the United States;

"(d) the offense consists of the manufacture or distribution of narcotics or other drugs for import into, or eventual sale or distribution within, the United States;

"(e) the offense consists of entry of persons or property into the United States;

"(f) the offense consists of possessing an explosive in a United States Government building;

"(g) the offense is committed in whole or in part within the United States and the accused participates outside the United States, or the offense constitutes an attempt, a conspiracy, or a solicitation to commit a crime within the United States;

"(h) the offense is committed by a federal public servant, other than a member of the armed forces who is subject to court-martial jurisdiction for the offense at the time he is charged with the offense, who is outside the United States because of his official duties; or by a member of his household residing abroad because of such public servant's official duties; or by a person accompanying the military forces of the United States;

"(i) the offense is committed by or against a national of the United States at a place outside the jurisdiction of any nation; or

"(j) the offense is comprehended by the generic terms of, and is committed under circumstances specified by, a treaty or other international agreement, to which the United States is a party, that provides for, or requires the United States to provide for, federal jurisdiction over such offense.

"§ 205. **Federal Jurisdiction Generally Not Preemptive**

"(a) IN GENERAL.—Except as otherwise expressly provided, the existence of federal jurisdiction over an offense does not, in itself, preclude:

"(1) a state or local government from exercising its concurrent jurisdiction to enforce its laws applicable to the conduct involved;

"(2) an Indian tribe, band, community, group, or pueblo from exercising its concurrent jurisdiction in Indian country to enforce its laws applicable to the conduct involved; or

"(3) a court-martial, military commission, court of inquiry, provost court, or other military court of the United States from exercising its concurrent jurisdiction to enforce the law applicable to the conduct involved pursuant to the Uniform Code of Military Justice (10 U.S.C. 801 et seq.), any other federal statute, or the law of war.

"(b) PREEMPTIVE JURISDICTION OVER CERTAIN OFFENSES.—Upon order of the Attorney General, the assertion of federal jurisdiction:

"(1) over an offense:

"(A) that has as a victim or intended victim a United States official, a foreign official or a member of his immediate family, or an official guest of the United States; and

"(B) that is described in:

"(i) section 1601 (Murder), 1602 (Manslaughter), 1603 (Negligent Homicide), 1611 (Maiming), 1612 (Aggravated Battery), 1613 (Battery), 1614 (Menacing), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), or 1623 (Criminal Restraint); or

"(ii) section 1001 (Criminal Attempt), 1002 (Criminal Conspiracy), or 1003 (Criminal Solicitation) if a crime that was an objective of the attempt, conspiracy, or solicitation is an offense set forth in subparagraph (A); or

"(2) over an offense that is described in:

"(A) subchapter B of chapter 15;

"(B) section 1355 (Trading in Public Office); or

"(C) section 1503 (Interfering with a Federal Benefit), 1504 (Unlawful Discrimination), or 1616 (Communicating a Threat), to the extent that it involves conduct proscribed by the Federal Election Campaign Act of 1971, as amended (2 U.S.C. 431 et seq.);

shall suspend, to the extent indicated in the order, the exercise of jurisdiction by a state or local government, under any state or local law applicable to the conduct involved, until the order is rescinded by the Attorney General.

"Chapter 3.—CULPABLE STATES OF MIND

"Sec.
"301. State of Mind Generally.
"302. 'Intentional', 'Knowing', 'Reckless', and 'Negligent' States of Mind.
"303. Proof of State of Mind.

"§ 301. State of Mind Generally

"(a) STATE OF MIND DEFINED.—As used in this title, 'state of mind' means the mental state required to be proved with respect to conduct, an existing circumstance, or a result set forth in a section describing an offense.

"(b) TERMS USED TO DESCRIBE STATES OF MIND.—The terms used to describe the different states of mind are 'intentional', 'knowing', 'reckless', and 'negligent', and variants thereof.

"(c) STATES OF MIND APPLICABLE TO CONDUCT, AN EXISTING CIRCUMSTANCE, AND A RESULT.—The states of mind that may be specified as applicable to:

"(1) conduct are either 'intentional' or 'knowing';

"(2) an existing circumstance are either 'knowing', 'reckless', or 'negligent'; and

"(3) a result are either 'intentional', 'knowing', 'reckless', or 'negligent'.

"§ 302. 'Intentional', 'Knowing', 'Reckless', and 'Negligent' States of Mind

"The following definitions apply with respect to an offense set forth in any federal statute:

"(a) 'INTENTIONAL'.—A person's state of mind is intentional with respect to:

"(1) his conduct if it is his conscious objective or desire to engage in the conduct;

"(2) a result of his conduct if it is his conscious objective or desire to cause the result.

"(b) 'KNOWING'.—A person's state of mind is knowing with respect to:

"(1) his conduct if he is aware of the nature of his conduct;

"(2) an existing circumstance if he is aware or believes that the circumstance exists;

"(3) a result of his conduct if he is aware or believes that his conduct is substantially certain to cause the result.

"(c) 'RECKLESS'.—A person's state of mind is reckless with respect to:

"(1) an existing circumstance if he is aware of a risk that the circumstance exists but disregards the risk;

"(2) a result of his conduct if he is aware of a risk that the result will occur but disregards the risk;

except that awareness of the risk is not required if its absence is due to self-induced intoxication. The risk must be of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

"(d) 'NEGLIGENT'.—A person's state of mind is negligent with respect to:

"(1) an existing circumstance if he ought to be aware of a risk that the circumstance exists;

"(2) a result of his conduct if he ought to be aware of a risk that the result will occur.

The risk must be of such a nature and degree that to fail to perceive it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

"§ 303. Proof of State of Mind

"Except as otherwise expressly provided, the following provisions apply to an offense under any federal statute:

"(a) REQUIRED PROOF OF STATE OF MIND.—A state of mind must be proved with respect to each element of an offense, except that:

"(1) no state of mind must be proved with respect to a particular element of an offense if that element is specified in the description of the offense as existing or occurring 'in fact'; and

"(2) no state of mind must be proved with respect to any element of an offense described in a statute outside this title, or described in this title as a violation of a statute outside this title, or described in a regulation or rule issued pursuant to such a statute, if the description of the offense does not specify any state of mind with respect to that element and the legislative purpose of the statute does not compel a contrary interpretation.

"(b) REQUIRED STATE OF MIND FOR AN ELEMENT OF AN OFFENSE IF NOT SPECIFIED.—Except as provided in subsection (a), if an element of an offense is described without specifying the required state of mind, the particular state of mind that must be proved with respect to:

"(1) conduct is 'knowing';

"(2) an existing circumstance is 'reckless'; and

"(3) a result is 'reckless'.

"(c) SATISFACTION OF STATE OF MIND REQUIREMENT BY PROOF OF OTHER STATE OF MIND.—If the state of mind required to be proved with respect to an element of an offense is:

"(1) 'knowing', this requirement can be satisfied alternatively by proof of an 'intentional' state of mind;

"(2) 'reckless', this requirement can be satisfied alternatively by proof of an 'intentional' or 'knowing' state of mind;

"(3) 'negligent', this requirement can be satisfied alternatively by proof of an 'intentional', 'knowing', or 'reckless' state of mind.

"(d) MATTERS OF LAW REQUIRING NO PROOF OF STATE OF MIND.—

"(1) EXISTENCE OF OFFENSE.—Proof of knowledge or other state of mind is not required with respect to:

"(A) the fact that particular conduct constitutes an offense or is required by, or violates, a statute or a regulation, rule, or order issued pursuant thereto;

"(B) the fact that particular conduct is described in a section of this title; or

"(C) the existence, meaning, or application of the law determining the elements of an offense.

"(2) JURISDICTION, VENUE, AND GRADING MATTERS.—Proof of state of mind is not required with respect to any matter that is solely a basis for federal jurisdiction, for venue, or for grading.

"(3) MATTERS DESIGNATED A QUESTION OF LAW.—Proof of state of mind is not required with respect to any matter that is designated as a question of law.

"(e) MATTERS PERTAINING TO BARS OR DEFENSES REQUIRING NO PROOF OF STATE OF MIND.—Proof of state of mind is not required with respect to an element of a bar to prosecution, defense, or affirmative defense.

"Chapter 4.—COMPLICITY

"§ 401. Liability of an Accomplice

"(a) LIABILITY IN GENERAL.—A person is criminally liable for an offense based upon the conduct of another person if:

"(1) he knowingly aids or abets the commission of the offense by the other person; or

"(2) acting with the state of mind required for the commission of the offense, he causes the other person to engage in conduct that would constitute an offense if engaged in personally by the defendant or any other person.

"(b) LIABILITY AS COCONSPIRATOR.—A person is criminally liable for an offense based upon the conduct of another person if:

"(1) he and the other person engage in an offense under section 1002 (Criminal Conspiracy);

"(2) the other person engages in the conduct in furtherance of the conspiracy; and

"(3) the conduct is authorized by the agreement or it is reasonably foreseeable that the conduct would be performed in furtherance of the conspiracy.

"§ 402. Liability of an Organization for Conduct of an Agent

"An organization is criminally liable for an offense if the conduct constituting the offense, in whole or in part:

"(a) is conduct of its agent, and such conduct:

"(1) occurs in the performance of matters within the scope of the agent's employment or within the scope of the agent's actual, implied, or apparent authority; or

"(2) is thereafter ratified or adopted by the organization; or

"(b) involves a failure by the organization or its agent to discharge a specific duty of conduct imposed on the organization by law.

"§ 403. Liability of an Agent for Conduct of an Organization

"(a) CONDUCT ON BEHALF OF AN ORGANIZATION.—A person is criminally liable for an offense based upon conduct that he engages in or causes in the name of an organization or on behalf of an organization to the same extent as if he engaged in or caused the conduct in his own name or on his own behalf.

"(b) OMISSION TO PERFORM A DUTY OF AN ORGANIZATION.—Except as otherwise expressly provided, whenever a duty to act is imposed upon an organization by a statute, or by a regulation, rule, or order issued pursuant thereto, an agent of the organization having significant responsibility for the subject matter to which the duty relates is criminally liable for an offense based upon an omission to perform the duty, if he has the state of mind required for the commission of the offense, to the same extent as if the duty were imposed upon him directly.

"(c) RECKLESS FAILURE TO SUPERVISE CONDUCT OF AN ORGANIZATION.—A person responsible for supervising particular activities on behalf of an organization who, by his reckless failure to supervise adequately those activities, permits or contributes to the commission of an offense by the organization is criminally liable for the offense, except that if the offense committeed by the organization is a felony the person is liable under this subsection only for a Class A misdemeanor.

"§ 404. General Provisions for Chapter 4

"(a) TREATMENT AS PRINCIPAL.—A person whose criminal liability is based upon section 401, 402, or 403 may be charged, tried, and punished as a principal.

"(b) DEFENSES PRECLUDED.—It is not a defense to a prosecution in which the criminal liability of the defendant is based upon section 401, 402, or 403 that:

"(1) the defendant does not belong to the category of persons who by definition are the only persons capable of committing the offense directly; or

"(2) the person for whose conduct the defendant is criminally liable has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution.

"Chapter 5.—BARS AND DEFENSES

"Subchapter A.—General Provisions

"§ 501. General Principle Governing Existence of Bars and Defenses

"Except as otherwise required by the Constitution or by a federal statute, the existence of a bar to a prosecution under any federal statute, or the existence of a defense or affirmative defense to a prosecution under any federal statute, including a defense or an affirmative defense of mistake of fact or law, insanity, intoxication, duress, exercise of public authority, protection of persons, protection of property, unlawful entrapment, and official misstatement of law, shall be determined by the courts of the United States according to the principles

of the common law as they may be interpreted in the light of reason and experience.

"§ 502. Application and Scope of Bars and Defenses

"The bars to prosecution, defenses, and affirmative defenses set forth in this title are not exclusive, but the general subject matters covered constitute bars or defenses only to the extent described.

"Subchapter B.—Bars to Prosecution

"Sec.
"511. Time Limitations.
"512. Immaturity.

"§ 511. Time Limitations

"(a) BAR TO PROSECUTION.—It is a bar to prosecution under any federal statute that the prosecution was commenced after the applicable period of limitation.

"(b) APPLICABLE PERIOD GENERALLY.—Except for a prosecution for a Class A felony or for an offense described in section 1121(a)(1) (Espionage), which may be commenced at any time, and except as otherwise provided in this section, a prosecution for an offense must be commenced, if the offense is:

"(1) a felony or a misdemeanor, within five years after the commission of the offense;

"(2) an infraction, within one year after the commission of the offense.

"(c) EXTENDED PERIOD FOR CONCEALABLE OFFENSES.—If the period prescribed in subsection (b) has expired, and if not more than three years have passed since the date of such expiration, a prosecution may nevertheless be commenced:

"(1) for an offense in which a material element is either fraud or a breach of a fiduciary obligation, at any time within one year after the facts relating to the offense became known to, or reasonably should have become known by, a federal public servant who is charged with responsibility for acting with respect to such circumstances and who is not himself an accomplice in the offense;

"(2) for an offense based on official conduct in office by a public servant, at any time during which the defendant is a public servant or within two years after he ceases to be a public servant; or

"(3) for an offense based on concealment of assets of a bankrupt or other debtor, at any time until the debtor has received a discharge or until a discharge has been denied.

"(d) TIME WHEN OFFENSE COMMITTED.—Except as otherwise provided by statute, for purposes of this section the commission of an offense occurs:

"(1) if the offense is other than a continuing offense, on the occurrence of the last remaining element of the offense; or

"(2) if the offense is a continuing offense involving:

"(A) criminal conspiracy, on the day of the occurrence of the most recent conduct to effect any objective of the conspiracy for which the defendant is responsible, or on the day of the frustration of the last remaining objective of the conspiracy, or on the day the conspiracy is terminated or finally abandoned;

"(B) a failure, neglect, or refusal to register, on the day the defendant registers as required, or on the day the duty to register ceases; or

"(C) a prolonged course of conduct which the statute plainly appears to treat as a continuing offense, on the day the course of conduct terminates.

"(e) COMMENCEMENT OF PROSECUTION.—For purposes of this section, the filing of a complaint before a judicial officer empowered to issue a warrant, or the filing of an indictment or information, commences a prosecution for the offense charged and for any necessarily included offense. A prosecution for an offense necessarily included in the offense charged shall be considered to have been timely commenced, even though the period of limitation for such included offense has expired, if the period of limitation has not expired for the offense charged and if there was, after the close of the evidence at the trial, sufficient evidence as a matter of law to sustain a conviction of the offense charged.

"(f) EXTENDED PERIOD FOR COMMENCEMENT OF NEW PROSECUTION.—If a timely complaint, indictment, or information is dismissed for any error, defect, insufficiency, or irregularity, a new prosecution may be commenced within six months after the dismissal becomes final even though the period of limitation has expired at the time of the dismissal or will expire within six months thereafter.

"(g) SUSPENSION OF PERIOD OF LIMITATION.—The period of limitation does not run while the person who committed or who is criminally liable for an offense is absent from the United States or is a fugitive.

"§ 512. Immaturity

"It is a bar to prosecution under any federal statute, other than a prosecution for an offense described in section 1601 (a) (1) or (a) (2) (Murder), that at the time of the commission of the offense charged the defendant was less than sixteen years old. This section does not bar a proceeding against such person as a juvenile delinquent pursuant to the provisions of subchapter A of chapter 36.

"PART II.—OFFENSES

"Chapter 10.—OFFENSES OF GENERAL APPLICABILITY

"§ 1001. Criminal Attempt

"(a) Offense.—A person is guilty of an offense if, acting with the state of mind otherwise required for the commission of a crime, he intentionally engages in conduct that, in fact, amounts to more than mere preparation for the commission of the crime, and that indicates his intent that the crime be completed.

"(b) Affirmative Defense.—It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant avoided the commission of the crime attempted by abandoning his criminal effort and, if mere abandonment was insufficient to accomplish such avoidance, by taking affirmative steps that prevented the commission of the crime.

"(c) Defense Precluded.—It is not a defense to a prosecution under this section:

"(1) that it was factually or legally impossible for the actor to commit the crime, if the crime could have been committed had the circumstances been as the actor believed them to be; or

"(2) that the crime attempted was completed.

"(d) PROOF.—In a prosecution under this section, any special proof provision that is specified in this title as applicable to the crime attempted is applicable also to an offense described in this section, unless a different application is plainly required.

"(e) GRADING.—An offense described in this section is an offense of the same class as the crime attempted, except that, if the crime attempted is a Class A felony, an offense described in this section is a Class B felony.

"(f) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the crime attempted is a federal crime with regard to which federal jurisdiction:

"(1) is not limited to certain specified circumstances; or

"(2) is limited to certain specified circumstances and any such circumstance exists or has occurred, or would exist or occur if the crime attempted were committed.

"§ 1002. Criminal Conspiracy

"(a) OFFENSE.—A person is guilty of an offense if he agrees with one or more persons to engage in conduct, the performance of which would constitute a crime or crimes, and he or one of such persons in fact engages in any conduct with intent to effect any objective of the agreement.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of every crime that was an objective of the conspiracy.

"(c) DEFENSES PRECLUDED.—It is not a defense to a prosecution under this section that one or more of the persons with whom the defendant is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution.

"(d) GRADING.—An offense described in this section is an offense of the same class as the most serious crime that was an objective of the conspiracy, except that if the most serious crime that was an objective of the conspiracy is a Class A felony, an offense described in this section is a Class B felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if any objective of the conspiracy is a federal crime with regard to which federal jurisdiction:

"(1) is not limited to certain specified circumstances; or

"(2) is limited to certain specified circumstances and any such circumstance exists or has occurred, or would exist or occur if any crime that is an objective of the conspiracy were committed.

"§ 1003. Criminal Solicitation

"(a) OFFENSE.—A person is guilty of an offense if, with intent that another person engage in conduct constituting a crime, and, in fact, under circumstances strongly corroborative of that intent, he commands, entreats, induces, or otherwise endeavors to persuade such other person to engage in such conduct.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for the commission of the crime, because he was incompetent or irresponsible, or because he is immune from prosecution or otherwise not subject to prosecution.

"(d) GRADING.—An offense described in this section is an offense of the class next below that of the crime solicited.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the crime solicited is a federal crime with regard to which federal jurisdiction:

"(1) is not limited to certain specified circumstances; or

"(2) is limited to certain specified circumstances and any such circumstance exists or has occurred, or would exist or occur if the crime solicited were committed.

"§ 1004. General Provisions for Chapter 10

"(a) DEFINITION.—As used in this chapter, a renunciation is not 'voluntary and complete' if it is motivated in whole or in part by:

"(1) a belief that a circumstance exists that increases the probability of detection or apprehension of the defendant or another

participant in the crime, or that makes more difficult the consummation of the crime; or

"(2) a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective.

"(b) INAPPLICABILITY TO CERTAIN OFFENSES.—It is not an offense under this chapter:

"(1) to attempt to commit, to conspire to commit, or to solicit the commission of:

"(A) an offense described in section 1001 (Criminal Attempt), 1002 (Criminal Conspiracy), or 1003 (Criminal Solicitation);

"(B) an offense described in section 1202 (Conspiracy against a Foreign Power) or 1764 (Antitrust Offenses); or

"(C) an offense described outside this title that consists of an attempt, a conspiracy, or a solicitation; or

"(2) to attempt to commit, to conspire to commit unless it was in fact completed, or to solicit the commission of, an offense described in section 1115(a)(3) (Obstructing Military Recruitment or Induction), 1116(a)(1) (Inciting or Aiding Mutiny, Insubordination, or desertion), or 1831(a)(1) (Leading a Riot).

"Chapter 11.—OFFENSES INVOLVING NATIONAL DEFENSE

"Subchapter A.—Treason and Related Offenses

"§ 1101. Treason

"(a) OFFENSE.—A person is guilty of an offense if, while owing allegiance to the United States, he:

"(1) adheres to the foreign enemies of the United States and intentionally gives them aid and comfort; or

"(2) levies war against the United States.

"(b) PROOF.—In a prosecution under this section, a person may not be convicted unless the evidence against him includes the testi-

mony of two witnesses to the same overt act, or unless he makes a confession in open court.

"(c) GRADING.—An offense described in this section is a Class A felony.

"§ 1102. Armed Rebellion or Insurrection

"(a) OFFENSE.—A person is guilty of an offense if he engages in armed rebellion or armed insurrection:

"(1) against the authority of the United States or a state with intent to:

"(A) overthrow, destroy, supplant, or change the form of the government of the United States; or

"(B) sever a state's relationship with the United States; or

"(2) against the United States with intent to oppose the execution of any law of the United States.

"(b) GRADING.—An offense described in this section is:

"(1) a Class B felony in the circumstances set forth in subsection (a)(1);

"(2) a Class C felony in the circumstances set forth in subsection (a)(2).

"§ 1103. Engaging in Para-Military Activity

"(a) OFFENSE.—A person is guilty of an offense if he engages in the acquisition, caching, or use of weapons, or in the training of other persons in the use of weapons, by or on behalf of an organization or group of ten or more persons that has as a purpose the taking over or control of, or the unauthorized assumption of the function of, a federal or state government agency, by force or threat of force.

"(b) GRADING.—An offense described in this section is a Class D felony.

"Subchapter B.—Sabotage and Related Offenses

"Sec.
"1111. Sabotage.
"1112. Impairing Military Effectiveness.
"1113. Violating an Emergency Regulation.
"1114. Evading Military or Alternative Civilian Service.
"1115. Obstructing Military Recruitment or Induction.
"1116. Inciting or Aiding Mutiny, Insubordination, or Desertion.
"1117. Aiding Escape of a Prisoner of War or an Enemy Alien.

"§ 1111. Sabotage

"(a) OFFENSE.—A person is guilty of an offense if, with intent to impair, interfere with, or obstruct the ability of the United States or

an associate nation to prepare for or to engage in war or defense activities, he:

"(1) damages, tampers with, contaminates, defectively makes, or defectively repairs:

"(A) any property used in, or particularly suited for use in, the national defense that is owned by, or is under the care, custody, or control of, the United States or an associate nation, or that is being produced, manufactured, constructed, repaired, transported, or stored for the United States or an associate nation;

"(B) any facility that is engaged in whole or in part, for the United States or an associate nation, in:

"(i) furnishing defense materials or services; or

"(ii) producing raw material necessary to the support of a national defense production or mobilization program; or

"(C) any public facility used in, or designated and particularly suited for use in, the national defense; or

"(2) delivers any property described in paragraph (1)(A) that has been damaged, tampered with, contaminated, defectively made, or defectively repaired.

"(B) a service of a public facility used in, or designated and particularly suited for use in, the national defense.

"(b) GRADING.—An offense described in this section is:

"(1) a Class A felony if the offense:

"(A) is committed in time of war; and

"(B) causes damage to or impairment of a major weapons system or a means of defense, warning, or retaliation against large scale attack;

"(2) a Class B felony if the offense:

"(A) is committed in time of war in any case other than that described in paragraph (1)(B); or

"(B) is committed during a national defense emergency;

"(3) a Class C felony in any other case.

"§ 1112. Impairing Military Effectiveness

"(a) OFFENSE.—A person is guilty of an offense if, in reckless disregard of the risk that his conduct would impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or to engage in war or defense activities, he engages in conduct described in paragraph (1) or (2) of section 1111(a).

"(b) GRADING.—An offense described in this section is:

"(1) a Class C felony if the offense:

"(A) is committed in time of war; and

"(B) causes damage to or impairment of a major weapons system or a means of defense, warning, or retaliation against large scale enemy attack;

"(2) a Class D felony if the offense:

"(A) is committed in time of war in any case other than that described in paragraph (1); or

"(B) is committed during a national defense emergency;

"(3) a Class E felony in any other case.

"§ 1113. Violating an Emergency Regulation

"(a) OFFENSE.—A person is guilty of an offense if he violates section 2 of title II of the Act of June 15, 1917, as amended (50 U.S.C. 192) (relating to promulgation of regulations concerning the anchorage and movement of vessels during a national emergency).

"(b) GRADING.—An offense described in this section is a Class D felony.

"§ 1114. Evading Military or Alternative Civilian Service

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) knowing that he is under a duty imposed by a federal statute governing military service, or by a regulation, rule, order, or presidential proclamation issued pursuant thereto:

"(A) to register for military service;

"(B) to report for and submit to examination to determine his availability for military or alternative civilian service;

"(C) to report for and submit to induction into military service; or

"(D) to report for and perform alternative civilian service;

he fails, neglects, or refuses to do so; or

"(2) with intent:

"(A) to avoid or delay the performance of the military or alternative civilian service obligation of himself or another person imposed by a federal statute governing military service, or by a regulation, rule, order, or presidential proclamation issued pursuant thereto; or

"(B) to obstruct the proper determination of the existence or nature of such an obligation;

he engages in conduct constituting an offense under section 1343(a)(1) (Making a False Statement).

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony if the offense is committed in time of war;

"(2) a Class E felony in any other case, except as provided in paragraph (3); or

"(3) a Class A misdemeanor under the circumstances set forth in subsection (a)(1)(A) if it occurs exclusively during a period in which only previously deferred registrants are subject to induction.

"§ 1115. Obstructing Military Recruitment or Induction

"(a) OFFENSE.—A person is guilty of an offense if, in time of war and with intent to hinder, interfere with, or obstruct the recruitment, conscription, or induction of a person into the armed forces of the United States, he:

"(1) creates a physical interference or obstacle to the recruitment, conscription, or induction;

"(2) uses force, threat, intimidation, or deception against a public servant of a government agency engaged in the recruitment, conscription, or induction; or

"(3) incites others to engage in conduct constituting an offense under section 1114 (Evading Military or Alternative Civilian Service).

"(b) GRADING.—An offense described in this section is a Class D felony.

"§ 1116. Inciting or Aiding Mutiny, Insubordination, or Desertion

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) with intent to bring about mutiny, insubordination, refusal of duty, or desertion by members of the armed forces of the United States, he incites such members to engage in mutiny, insubordination, refusal of duty, or desertion;

"(2) he aids or abets the commission or attempted commission of mutiny or desertion by a member of the armed forces of the United States; or

"(3) he interferes with, hinders, delays, or prevents the discovery, apprehension, prosecution, conviction, or punishment of a member of the armed forces of the United States, knowing that such member has deserted, or is charged with or being sought for desertion, by engaging in any conduct described in subparagraphs (A) through (D) of section 1311(a)(1) (Hindering Law Enforcement).

"(b) GRADING.—An offense described in this section is:

"(1) a Class C felony in the circumstances set forth in subsection (a)(1) if:

"(A) the offense is committed in time of war; or

"(B) the persons incited are engaged, or about to be engaged, in combat;

"(2) a Class D felony:

"(A) in the circumstances set forth in subsection (a)(1) in any case other than that described in paragraph (1); or

"(B) in the circumstances set forth in subsection (a)(2);

"(3) a Class E felony in the circumstances set forth in subsection (a)(3).

"§ 1117. Aiding Escape of a Prisoner of War or an Enemy Alien

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) aids or abets the escape or attempted escape of a person being held in the custody of the United States or an associate nation as a prisoner of war or as an enemy alien; or

"(2) interferes with, hinders, delays, or prevents the discovery or apprehension of:

"(A) a prisoner of war or an enemy alien, knowing that such prisoner or alien has escaped from the custody of the United States or an associate nation; or

"(B) an enemy alien, knowing that such alien is being sought for detention by the United States or an associate nation;

by engaging in any conduct described in subparagraphs (A) through (D) of section 1311(a)(1) (Hindering Law Enforcement).

"(b) GRADING.—An offense described in this section is a Class D felony.

"Subchapter C.—Espionage and Related Offenses

"§ 1121. Espionage

"(a) OFFENSE.—A person is guilty of an offense if he violates:

"(1) section 201 of the Espionage and Sabotage Act of 1954 (relating to gathering or delivering defense information to aid a foreign government), as amended by section 245 of the Criminal Code Reform Act of 1977 (50 U.S.C. ——); or

"(2) section 224(a) or 225 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2274(a) or 2275) (relating to communication and receipt of restricted data with intent to injure the United States or to secure an advantage to a foreign nation).

"(b) GRADING.—Notwithstanding the provisions of sections 2201(b), 2201(c), and 2301(b), the authorized sentence for a defendant found guilty of violating:

"(1) subsection (a)(1) is the sentence set forth in section 201 of the Espionage and Sabotage Act of 1954 (relating to gathering or delivering defense information to aid a foreign government), as amended by section 252 of the Criminal Code Reform Act of 1977 (50 U.S.C. ——);

"(2) subsection (a)(2) is the sentence set forth in section 224(a) or 225 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2274(a) or 2275).

"§ 1122. Disseminating National Defense Information

"(a) OFFENSE.—A person is guilty of an offense if he violates:

"(1) section 18 of the Subversive Activities Control Act of 1950 (relating to gathering, transmitting, or losing national defense information), as amended by section 251 of the Criminal Code Reform Act of 1977 (50 U.S.C. ——); or

"(2) section 224(b) of the Atomic Energy Act of 1954, as amended (4 U.S.C. 2274(b)) (relating to communication of restricted data with reason to believe the data will be used to injure the United States or to secure an advantage to a foreign nation).

"(b) GRADING.—Notwithstanding the provisions of sections 2201(b), 2201(c), and 2301(b), the authorized sentence for a defendant found guilty of violating:

"(1) Subsection (a)(1) is the sentence set forth in section 18 of the Subversive Activities Control Act of 1950 (relating to gathering, transmitting, or losing national defense information), as amended by section 251 of the Criminal Code Reform Act of 1977 (50 U.S.C. ——);

"(2) subsection (a)(2) is the sentence set forth in section 224(b) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2274(b)).

"§ 1123. Disseminating Classified Information

"(a) OFFENSE.—A person is guilty of an offense if he violates:

"(1) section 24 of the Act of October 31, 1951 (65 Stat. 719) (relating to disclosure of classified information), as amended by section 253 of the Criminal Code Reform Act of 1977 (50 U.S.C. ——); or

"(1) subsection (a)(1) is the sentence set forth in section 24 of 1950, as amended (50 U.S.C. 783(b)) (relating to communication of classified information by a federal public servant).

"(b) GRADING.—Notwithstanding the provisions of sections 2001 (b), 2201(c), and 2301(b), the authorized sentence for a defendant found guilty of violating:

(1) subsection (a)(1) is the sentence set forth in section 24 of the Act of October 31, 1951 (65 Stat. 719) (relating to disclosure of classified information), as amended by section 253 of the Criminal Code Reform Act of 1977 (50 U.S.C. ——);

"(2) subsection (a)(2) is the sentence set forth in section 4 of the Subversive Activities Control Act of 1950, as amended (50 U.S.C. 783).

"§ 1124. Receiving Classified Information

"(a) OFFENSE.—A person is guilty of an offense if he violates:

"(1) section 4(c) of the Subversive Activities Control Act of 1950, as amended (50 U.S.C. 783(c)) (relating to the receipt of classified information by a foreign agent or a member of a communist organization); or

"(2) section 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2277) (relating to disclosure of restricted data).

"(b) GRADING.—Notwithstanding the provisions of sections 2201 (b), 2201(c), and 2301(b), the authorized sentence for a person convicted of violating:

"(1) subsection (a)(1) is the sentence set forth in section 4 of the Subversive Activities Control Act of 1950, as amended (50 U.S.C. 783);

"(2) subsection (a)(2) is the sentence set forth in section 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2277).

"§ 1125. Failing to Register as a Person Trained in a Foreign Espionage System

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) fails to register with the Attorney General as required by section 2 of the Act of August 1, 1956 (50 U.S.C. 851) (relating

to registration of persons trained in foreign espionage systems); or

"(2) violates a regulation or rule issued pursuant to the authority conferred in section 5 of the Act of August 1, 1956 (50 U.S.C. 854) (relating to promulgation of regulations and rules for registration of persons trained in foreign espionage systems).

"(b) GRADING.—An offense described in this section is a Class D felony.

"§ 1126. Failing to Register as, or Acting as, a Foreign Agent

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) being an agent of a foreign principal, he fails to register with the Attorney General as required by section 2 of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 612);

"(2) he violates a provision of section 4(a) or 5, or a provision of section 7 relating to a violation of section 4(a) or 5, of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 614(a), 615, or 617), or a regulation, rule, or order issued pursuant thereto; or

"(3) being a federal public servant, he is or acts as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611 et seq.), in violation of 5 U.S.C. 9109.

"(b) DEFINITIONS.—As used in this section, 'agent of a foreign principal' and 'foreign principal' have the meanings set forth in section 1 of the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. 611).

"(c) GRADING.—An offense described in this section is.

"(1) a Class D felony in the circumstances set forth in subsection (a)(1) or (a)(2);

"(2) a Class E felony in the circumstances set forth in subsection (a)(3).

"Subchapter D.—Miscellaneous National Defense Offenses

"§ 1131. Atomic Energy Offenses

"(a) OFFENSE.—A person is guilty of an offense if he violates any of the following provisions of the Atomic Energy Act of 1954, as amended:

"(1) section 57 (42 U.S.C. 2077) (relating to unauthorized dealing in special nuclear material);

"(2) section 92 (42 U.S.C. 2122) (relating to the manufacture, transfer, or possession of an atomic weapon);

"(3) section 101 (42 U.S.C. 2131) (relating to the unlicensed manufacture, transfer, or possession of a utilization or production facility for special nuclear material); or

"(4) section 108 (42 U.S.C. 2138) (relating to suspension of licenses and recapture of special nuclear material) by interfering with a recapture or entry order.

"(5) section 223 (42 U.S.C. 2273) (relating to a violation of the Atomic Energy Act of 1954) or of a rule, regulation, or order pertaining to special nuclear material, source material, or byproduct material; or

"(6) section 226 (42 U.S.C. 2276) (relating to tampering with restricted data).

"(b) GRADING.—Notwithstanding the provisions of section 2201 (b), 2201(c), and 2301(b), the authorized sentence for a defendant found guilty of violating:

"(1) subsection (a)(1) is the sentence set forth in section 226 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2276);

"(2) subsection (a)(2), (a)(3), (a)(4), or (a)(5) is the sentence set forth in section 222 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2272);

"(3) subsection (a)(6) is the sentence set forth in section 223 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2273).

"Chapter 12.—OFFENSES INVOLVING INTERNATIONAL AFFAIRS

"Subchapter A.—Offenses Involving Foreign Relations

"§ 1201. Attacking a Foreign Power

"(a) OFFENSE.—A person is guilty of an offense if he launches or carries on, from the United States, a military attack or expedition against a foreign power with which the United States is not at war.

"(b) DEFINITION.—As used in this section, 'military attack or expedition' against a foreign power means:

"(1) any manned or unmanned warlike assault upon:

"(A) the territory of such foreign power;

"(B) the inhabitants or property in the territory of such foreign power, or

"(C) a vessel or aircraft of such foreign power; or

"(2) any organized warlike invasion of the territory of such foreign power whether launched from or carried on by land, sea, or air.

"(c) GRADING.—An offense described in this section is a Class D felony.

"§ 1202. Conspiracy against a Foreign Power

"(a) OFFENSE.—A person is guilty of an offense if, within the United States, he agrees with one or more persons to engage in conduct outside the United States, the performance of which would involve:

"(1) the death of a foreign official of a foreign power with which the United States is not at war; or

"(2) damage to or destruction of property owned by, or under the care, custody, or control of, a foreign power with which the United States is not at war, or a public facility located within the jurisdiction of such foreign power;

and he or one of such persons in fact engages in conduct with intent to effect any objective of the agreement.

"(b) DEFENSES PRECLUDED.—It is not a defense to a prosecution under this section that one or more of the persons with whom the defendant is alleged to have conspired has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense, was incompetent or irresponsible, or is immune from or otherwise not subject to prosecution.

"(c) GRADING.—An offense described in this section is a Class D felony.

"§ 1203. Entering or Recruiting for a Foreign Armed Force

"(a) OFFENSE.—A person is guilty of an offense if, within the United States, he:

"(1) contracts to enter the armed forces of a foreign power; or

"(2) induces another person to contract to enter the armed forces of a foreign power.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that:

"(1) the foreign power was an associate nation and the person who contracted to enter its armed forces was not a citizen of the United States; or

"(2) the foreign power was not then at war with the United States and the person who contracted to enter its armed forces was a citizen of the foreign power, and, in the case of a prosecution under subsection (a)(2), the person who induced the other person to contract to enter its armed forces was also a citizen of the foreign power.

"(c) GRADING.—An offense described in this section is a Class E felony.

"§ 1204. Violating Neutrality by Causing Departure of a Vessel or Aircraft

"(a) OFFENSE.—A person is guilty of an offense if, during a war in regard to which the United States is a neutral nation, he engages in conduct that causes the departure from the United States of a vessel or aircraft:

"(1) that is equipped as, or that is capable of service as, a warship or warplane, with knowledge that it may be used in the service of a belligerent foreign power;

"(2) that is the subject of a detention order issued pursuant to a federal statute designed to restrict or control the delivery of vessels, aircraft, goods, or services to belligerent foreign powers, or a regulation or rule issued pursuant thereto; or

"(3) that, in fact, has not been issued the clearance required by a federal statute designed to restrict or control the delivery of vessels, aircraft, goods, or services to belligerent foreign powers, or a regulation, rule, or order issued pursuant thereto.

"(b) GRADING.—An offense described in this section is a Class D felony.

"§ 1205. Disclosing a Foreign Diplomatic Code or Correspondence

"(a) OFFENSE.—A person is guilty of an offense if he communicates to any person:

"(1) a diplomatic code of a foreign government, or any information or matter prepared in such a code; or

"(2) any information or matter intercepted while in the process

mission in the United States;

to which he obtained access as a federal public servant.

of transmission between a foreign government and its diplomatic

"(b) DEFINITIONS.—As used in this section:

"(1) 'information' includes any property from which information may be obtained; and

"(2) 'intercept' has the meaning set forth in section 1525(d).

"(c) GRADING.—An offense described in this section is a Class E felony.

"§ 1206. Engaging in an Unlawful International Transaction

"(a) Offense.—A person is guilty of an offense if he violates:

"(1) section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c) (relating to economic and communication sanctions called for by the United Nations Security Council and ordered by the President);

"(2) section 7 of the Neutrality Act of 1939, as amended (22 U.S.C. 447) (relating to transactions involving securities or obligations of belligerent foreign powers);

"(3) section 38 of the Arms Export Control Act (22 U.S.C. 2778) (relating to regulation of the export and import of defense articles and defense services):

"(4) section 3(a) or 5(b) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 3(a) or 5(b)) (relating to trade with an enemy or an ally of an enemy of the United States); or

"(5) section 6(b) of the Export Administration Act of 1969 (50 U.S.C. App. 2405(b)) (relating to the export of prohibited goods and technological information to certain nations);

with intent to conceal any matter from a government agency authorized to administer such statute, or with knowledge that such conduct obstructs or impairs the administration of such statute or of any federal government function.

"(b) GRADING.—An offense described in this section is a Class D felony.

"Subchapter B.—Offenses Involving Immigration, Naturalization, and Passports

"Sec.
"1211. Unlawfully Entering the United States as an Alien.
"1212. Smuggling an Alien into the United States.
"1213. Hindering Discovery of an Alien Unlawfully in the United States.
"1214. Unlawfully Employing an Alien.
"1215. Fraudulently Acquiring or Improperly Using Evidence of Citizenship.
"1216. Fraudulently Acquiring or Improperly Using a Passport.
"1217. General Provisions for Subchapter B.

"§ 1211. Unlawfully Entering the United States as an Alien

"(a) OFFENSE.—A person is guilty of an offense if, being an alien, he:

"(1) enters the United States at a time or place other than a time or place designated for such entry under a federal statute, or a regulation, rule, or order issued pursuant thereto;

"(2) eludes examination or inspection by an immigration officer;

"(3) obtains entry into the United States by fraud; or

"(4) enters, or is present in, the United States after having been deported from the United States under an order of exclusion or deportation.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(4) that:

"(1) the Attorney General had expressly consented to the alien's reapplying for admission to the United States, prior to his reembarkation at a place outside the United States or prior to his application for admission from foreign contiguous territory; or

"(2) the alien had previously been deported under an order of exclusion and he was not required by a federal statute, or a regulation, rule, or order issued pursuant thereto, to obtain the advance consent described in paragraph (1).

"(c) GRADING.—An offense described in this section is:

"(1) a Class D felony if the actor uses a passport, certificate of naturalization or citizenship, immigrant or nonimmigrant visa, border crossing identification card, alien registration receipt card, or other document prescribed by statute or regulation for entry into, or as evidence of an authorized stay in, the United States, that is counterfeited or forged or that pertains to another person; or

"(2) a Class E felony if the offense is committed in the circumstances set forth in subsection (a)(4) and the alien previously has been convicted of that offense or of any federal, state, or foreign felony;

"(3) a Class B misdemeanor in any other case.

"§ 1212. Smuggling an Alien into the United States

"(a) OFFENSE.—A person is guilty of an offense if he brings into the United States an alien who he knows is:

"(1) not admitted for entry into the United States by an immigration officer; or

"(2) not lawfully entitled to enter or reside within the United States.

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony if the actor engages in the described conduct:

"(A) as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; or

"(B) with knowledge that the alien intends to engage, in the United States, in conduct constituting a federal or state felony;

"(2) a Class E felony ~~in any other case~~ if the actor engages in the described conduct knowing that the alien is a member of the class of aliens that, in fact, is excludable from the United States under section 212(a)(27), (28), or (29) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1182(a)(27), (28), or (29));

"(3) a Class A misdemeanor in any other case.

"§ 1213. Hindering Discovery of an Alien Unlawfully in the United States

"(a) OFFENSE.—A person is guilty of an offense if he interferes with, hinders, delays, or prevents the discovery or apprehension of an alien, knowing that such alien is unlawfully within the United States, by engaging in any conduct described in subparagraphs (A) through (D) of section 1311(a)(1) (Hindering Law Enforcement).

"(b) GRADING.—An offense described in this section is:

"(1) a Class E felony if the actor engages in the conduct:

"(A) as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value;

"(B) with knowledge that the alien intends to engage, in the United States, in conduct constituting a federal or state felony;

"(C) with intent to obtain anything of value for placing the alien in the employ of another; or

"(D) with intent that the alien be employed or continued in the employ of an enterprise operated for profit;

"(2) a Class A misdemeanor in any other case.

"§ 1214. Unlawfully Employing an Alien

"(a) OFFENSE.—A person is guilty of an offense if, being a farm labor contractor who has failed to obtain a certificate of registration,

or whose certificate has been suspended or revoked, pursuant to the Fair Labor Contractor Registration Act of 1963, as amended (7 U.S.C. 2041 et seq.), he violates section 6(f) of the Act (7 U.S.C. 2045(f)) (relating to employing the services of an alien not entitled to accept employment), or a regulation, rule, or order issued pursuant thereto.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1215. Fraudulently Acquiring or Improperly Using Evidence of Citizenship

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) obtains for any person, by fraud, United States naturalization, the creation of a record of permanent residence in the United States, or the issuance of a certificate or other documentary evidence of United States naturalization or citizenship;

"(2) uses a certificate or other documentary evidence of United States naturalization or citizenship, or a copy or duplicate thereof, that was unlawfully obtained; or

"(3) uses a certificate or other documentary evidence of United States naturalization or citizenship that was issued to another person, or a copy or duplicate thereof, as showing naturalization or citizenship of any person other than the person for whom it was lawfully issued.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1216. Fraudulently Acquiring or Improperly Using a Passport

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) obtains the issuance or verification of a United States passport by fraud;

"(2) uses a United States passport, the issuance or verification of which was unlawfully obtained; or

"(3) uses a United States passport that was issued for the use of another person.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1217. General Provisions for Subchapter B

"(a) DEFINITIONS.—As used in this subchapter:

"(1) 'alien', 'application for admission', 'border crossing identification card', 'entry', 'immigration officer', 'passport', 'United States', 'immigrant visa', and 'nonimmigrant visa' have the mean-

ings prescribed in section 101 of the Immigration and Nationality Act, as amended (8 U.S.C. 1101), and 'alien' includes an alien 'crewman' as defined in that Act;

"(2) 'fraud' includes conduct described in sections 1301(a) and 1343(a)(1) (A) through (E).

"(b) PROOF OF MATERIALITY.—To the extent that materiality is an element of an offense described in section 1211 through 1216, the provisions of section 1345(b)(2) that apply to section 1343 (Making a False Statement) apply also to such sections.

"(c) EXCEPTION.—The provisions of section 289 of the Act of June 27, 1952 (8 U.S.C. 1359), apply to this subchapter.

"Chapter 13.—OFFENSES INVOLVING GOVERNMENT PROCESSES

"Subchapter A.—General Obstructions of Government Functions

"§ 1301. Obstructing a Government Function by Fraud

"(a) OFFENSE.—A person is guilty of an offense if he intentionally obstructs or impairs a government function by defrauding the government in any manner.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the government function is a federal government function.

"§ 1302. Obstructing a Government Function by Physical Interference

"(a) OFFENSE.—A person is guilty of an offense if, by means of physical interference or obstacle, he intentionally obstructs or impairs a government function involving:

"(1) the performance by a federal public servant of an official duty;

"(2) the performance by an inspector of a specific duty imposed by a federal statute, or by a regulation, rule, or order issued pursuant thereto;

"(3) the delivery of mail; or

"(4) the exercise of a right, or the performance of a duty, under a court order, judgment, or decree.

"(b) DEFENSE.—It is a defense to a prosecution under this section that the government function was:

"(1) unlawful; and

"(2) conducted by a public servant who was not acting in good faith.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the government function is a federal government function.

"§ 1303. Impersonating an Official

"(a) OFFENSE.—A person is guilty of an offense if he pretends to be a public servant or a foreign official and purports to exercise the authority of such public servant or foreign official.

"(b) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the pretended capacity did not exist or that the pretended authority could not legally or otherwise have been exercised or conferred.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the pretended capacity or authority is that of a federal public servant; or

"(2) the pretended capacity or authority is that of a foreign official and the offense is committed within the general jurisdiction of the United States or within the special jurisdiction of the United States.

"Subchapter B.—Obstructions of Law Enforcement

"Sec.
"1311. Hindering Law Enforcement.
"1312. Bail Jumping.
"1313. Escape.
"1314. Providing or Possessing Contraband in a Prison.
"1315. Flight to Avoid Prosecution or Appearance as a Witness.

"§ 1311. Hindering Law Enforcement

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) interferes with, hinders, delays, or prevents, the discovery, apprehension, prosecution, conviction, or punishment of another person, knowing that such other person has committed a crime, or is charged with or being sought for a crime, by:

"(A) harboring the other person or concealing him or his identity;

"(B) providing the other person with a weapon, money, transportation, disguise, or other means of avoiding or minimizing the risk of discovery or apprehension;

"(C) warning the other person of impending discovery or apprehension; or

"(D) altering, destroying, mutilating, concealing, or removing a record, document, or other object; or

"(2) aids another person to secrete, disguise, or convert the proceeds of a crime or otherwise to profit from a crime.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(1)(C), and to a prosecution under any section incorporating by reference the provisions of subparagraph (C) of subsection (a)(1), that warning was made solely in an effort to bring the other person into compliance with the law.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the record, document, or other object would have been legally privileged or would have been inadmissible in evidence.

"(d) GRADING.—An offense described in this section is:

"(1) a Class D felony if the other person's crime is a Class A, B, or C felony, and the actor knows the general nature of the crime or is reckless with regard to the general nature of the crime;

"(2) a Class E felony if:

"(A) the other person's crime is a Class D felony, and the actor knows the general nature of the conduct constituting such crime or is reckless with regard to the general nature of such conduct; or

"(B) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value;

"(3) a Class A misdemeanor in any other case.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the crime that the other person has com-

mitted, is charged with, is being sought for, or is seeking to profit from, is a crime over which federal jurisdiction exists.

"§ 1312. Bail Jumping

"(a) OFFENSE.—A person is guilty of an offense if, after having been released pursuant to the provisions of subchapter A of chapter 35 or of subchapter A of chapter 36:

"(1) he fails to appear before a court as required by the conditions of his release; or

"(2) he fails to surrender for service of sentence pursuant to a court order.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the defendant from appearing or surrendering and that the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement that he appear or surrender.

"(c) GRADING.—An offense described in this section is:

"(1) a Class D felony if the person was released:

"(A) in connection with a charge of a Class A, B, C, or D felony; or

"(B) while awaiting sentence or pending review of sentence, appeal, or certiorari after conviction of any crime;

"(2) a Class E felony if the person was released in connection with a charge of a Class E felony; or

"(3) a Class A misdemeanor if the person was released in connection with a charge of a misdemeanor or for appearance as a material witness.

"§ 1313. Escape

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) escapes from official detention; or

"(2) fails to return to official detention following temporary leave, granted for a specified purpose or a limited period, pursuant to the terms under which such leave was granted.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that the bringing about or maintaining of the official detention was illegal, or that the committing or detaining authority lacked jurisdiction, if:

"(1) the offense did not involve escape from a prison or other facility used for official detention;

"(2) the offense did not involve a substantial risk of harm to the person or property of another; and

"(3) the official detention was not in good faith.

"(c) GRADING.—An offense described in this section is:

"(1) a Class D felony if the actor was in official detention:

"(A) on a charge of, or as a result of an arrest for, a felony; or

"(B) pursuant to his conviction of an offense other than an adjudication of juvenile delinquency;

"(2) a Class A misdemeanor in any other case.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the official detention resulted from an arrest made, or an order or process issued, under the laws of the United States;

"(2) the escape is from official detention by a federal public servant; or

"(3) the escape is from official detention in a federal facility.

"§ 1314. Providing or Possessing Contraband in a Prison

"(a) OFFENSE.—A person is guilty of an offense if, in violation of a statute, or a regulation, rule, or order issued pursuant thereto:

"(1) he provides to an inmate of an official detention facility, or introduces into an official detention facility:

"(A) a firearm or destructive device;

"(B) any other weapon or object that may be used as a weapon or as a means of facilitating escape;

"(C) a narcotic drug as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802); or

"(D) a controlled substance, other than a narcotic drug, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), or an alcoholic beverage; or

"(E) United States currency; or

"(2) being an inmate of an official detention facility, he makes, possesses, procures, or otherwise provides himself with

"(A) anything described in paragraph (1); or

"(B) any other object.

"(b) GRADING.—An offense described in this section is:

"(1) a Class C felony if the object is anything set forth in paragraph (1)(A);

"(2) a Class D felony if the object is anything set forth in paragraph (1)(B) or (1)(C);

"(3) a Class A misdemeanor if the object is anything set forth in paragraph (1) (D) or (1)(E);

"(4) a Class B misdemeanor if the object is any other object.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official detention facility is a federal facility.

"§ 1315. Flight to Avoid Prosecution or Appearance as a Witness

"(a) OFFENSE.—A person is guilty of an offense if he leaves a state or local jurisdiction with intent to avoid:

"(1) criminal prosecution, or official detention after conviction, for an attempt to commit, a conspiracy to commit, or the commission of a state or local felony in such jurisdiction;

"(2) appearing as a witness, giving testimony, or producing a record, document, or other object in an official proceeding in which a state or local felony in such jurisdiction is charged or being investigated; or

"(3) contempt proceedings, or criminal prosecution, or official detention after conviction, for failure to appear as a witness, to give testimony, or to produce a record, document, or other object in an official proceeding in which a state or local felony in such jurisdiction is charged or being investigated.

"(b) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if movement of the actor across a state or United States boundary occurs in the commission of the offense.

"Subchapter C.—Obstructions of Justice

"Sec.
"1321. Witness bribery.
"1322. Corrupting a Witness or an Informant.
"1323. Tampering with a Witness or an Informant.
"1324. Retaliating against a Witness or an Informant.
"1325. Tampering with Physical Evidence.
"1326. Improperly Influencing a Juror.
"1327. Monitoring Jury Deliberations.
"1328. Demonstrating to Influence a Judicial Proceeding.

"§ 1321. Witness Bribery

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) offers, gives, or agrees to give to another person; or

"(2) solicits, demands, accepts, or agrees to accept from another person;

anything of value in return for an agreement or understanding that the testimony of the recipient will be influenced in an official proceeding.

"(b) DEFENSES PRECLUDED.—It is not a defense to a prosecution under this section that:

"(1) an official proceeding was not pending or about to be instituted; or

"(2) the defendant, or other recipient or proposed recipient of the thing of value, by the same conduct also committed an offense described in section 1722 (Extortion), 1723 (Blackmail), or 1731 (Theft).

"(c) GRADING.—An offense described in this section is a Class C felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the official proceeding is or would be a federal official proceeding;

"(2) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(3) movement of a person across a state or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"§ 1322. Corrupting a Witness or an Informant

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) offers, gives, or agrees to give to another person, or solicits, demands, accepts, or agrees to accept from another person, anything of value for or because of any person's:

"(A) testimony in an official proceeding;

"(B) withholding testimony, or withholding a record, document, or other object, from an official proceeding;

"(C) engaging in conduct constituting an offense under section 1325 (Tampering with Physical Evidence);

"(D) evading legal process summoning him to appear as a witness, or to produce a record, document, or other object, in an official proceeding;

"(E) absenting himself from an official proceeding to which he has been summoned by legal process; or

"(2) offers, gives, or agrees to give anything of value to another person for or because of any person's hindering, delaying, or preventing the communication to a law enforcement officer of information relating to an offense or a possible offense.

"(b) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that:

"(1) an official proceeding was not pending or about to be instituted;

"(2) the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence; or

"(3) the defendant, or other recipient or proposed recipient of the thing of value, by the same conduct also committed an offense described in section 1722 (Extortion), 1723 (Blackmail), or 1731 (Theft).

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the official proceeding is or would be a federal official proceeding;

"(2) the law enforcement officer is a federal public servant and the information relates to a federal offense or a possible federal offense;

"(3) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(4) movement of a person across a state or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"**§ 1323. Tampering with a Witness or an Informant**

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) uses force, threat, intimidation, or deception with intent to:

"(A) influence the testimony of another person in an official proceeding; or

"(B) cause or induce another person to:

"(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

"(ii) engage in conduct constituting an offense under section 1325 (Tampering with Physical Evidence);

"(iii) evade legal process summoning him to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

"(iv) absent himself from an official proceeding to which he has been summoned by legal process; or

"(C) hinder, delay, or prevent the communication to a law enforcement officer of information relating to an offense or a possible offense; or

"(2) does any other act with intent to influence improperly, or to obstruct or impair, the:

"(A) administration of justice;

"(B) administration of a law under which an official proceeding is being or may be conducted; or

"(C) exercise of a legislative power of inquiry.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(1)(A) that the conduct engaged in to threaten or to intimidate consisted solely of lawful conduct and that the defendant's sole intention was to compel or induce the other person to testify truthfully.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that:

"(1) an official proceeding was not pending or about to be instituted; or

"(2) the testimony, or the record, document, or other object, would have been legally privileged or would have been inadmissible in evidence.

"(d) GRADING.—An offense described in this section is:

"(1) a Class D felony in the circumstances set forth in subsection (a)(1);

"(2) a Class E felony in the circumstances set forth in subsection (a)(2).

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the official proceeding is or would be a federal official proceeding;

"(2) the law enforcement officer is a federal public servant and the information relates to a federal offense or a possible federal offense;

"(3) the administration of justice, administration of a law, or exercise of a legislative power of inquiry relates to a federal government function;

"(4) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(5) movement of a person across a state or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense or in the distribution of the proceeds of the offense.

"§ 1324. Retaliating against a Witness or an Informant

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) engages in conduct that causes bodily injury to another person or damages the property of another person because of:

"(A) any testimony given, or any record, document, or other object produced, by a witness in an official proceeding; or

"(B) any information relating to an offense or a possible offense given by a person to a law enforcement officer; or

"(2) improperly subjects another person to economic loss or injury to his business or profession because of any matter described in subparagraph (A) or (B) of paragraph (1).

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the official proceeding is a federal official proceeding;

"(2) the law enforcement officer is a federal public servant and the information relates to a federal offense or a possible federal offense;

"(3) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(4) movement of a person across a state or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"§ 1325. Tampering with Physical Evidence

"(a) OFFENSE.—A person is guilty of an offense if he alters, destroys, mutilates, conceals, or removes a record, document, or other

object, with intent to impair its integrity or its availability for use in an official proceeding.

"(b) DEFENSE PRECLUDED.—It is not a defense to a prosecution under this section that:

"(1) an official proceeding was not pending or about to be instituted; or

"(2) the record, document, or other object would have been legally privileged or would have been inadmissible in evidence.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official proceeding is or would be a federal official proceeding.

"§ 1326. Improperly Influencing a Juror

"(a) OFFENSE.—A person is guilty of an offense if he communicates in any way with a juror, or a member of a juror's immediate family, with intent to influence improperly the official action of the juror.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the juror is a federal juror.

"§ 1327. Monitoring Jury Deliberations

"(a) OFFENSE.—A person is guilty of an offense if he intentionally:

"(1) records the proceedings of a grand or petit jury while the jury is deliberating or voting; or

"(2) listens to or observes the proceedings of a grand or petit jury, of which he is not a member, while the jury is deliberating or voting.

"(b) DEFENSE.—It is a defense to a prosecution under subsection (a)(1) that the actor was a juror of the jury that was deliberating or voting and that he was taking notes in connection with, and solely for the purpose of facilitating his performance of, his official duties.

"(c) GRADING.—An offense described in this section is a Class B misdemeanor.

"(d) JURISDICTION. There is federal jurisdiction over an offense described in this section if the grand or petit jury is a federal jury.

"§ 1328. Demonstrating to Influence a Judicial Proceeding

"(a) OFFENSE. A person is guilty of an offense if, with intent to influence another person in the discharge of his duties in a judicial

proceeding, he pickets, parades, displays a sign, uses a sound amplifying device, or otherwise engages in a demonstration:

"(1) in a building housing a court of the United States;

"(2) after being advised that such conduct is an offense, on the grounds of, or within 200 feet of, a building housing a court of the United States; or

"(3) in, or on the grounds of, or after being advised that such conduct is an offense, within 200 feet of, a building occupied or used by such other person.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(2) that the defendant's conduct:

"(1) did not occur while any judicial proceeding was in progress or within one-half hour before or after such proceedings; and

"(2) did not constitute:

"(A) making unreasonable noise;

"(B) obstructing the entry to or exit from a building housing a court of the United States; or

"(C) threatening or placing another person in fear that any person would be subjected to bodily injury or kidnapping, or that any property would be damaged.

"(c) GRADING.—An offense described in this section is a Class B misdemeanor.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the judicial proceeding is a federal judicial proceeding.

"Subchapter D.—Contempt Offenses

"§ 1331. Criminal Contempt

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) misbehaves in the presence of a court or so near to it as to obstruct the administration of justice;

"(2) disobeys or resists a writ, process, order, rule, decree, or command of a court; or

"(3) as an officer of a court, misbehaves in an official transaction.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(2) that the writ, process, order, rule,

decree, or command was clearly invalid and that the defendant did not have a reasonable opportunity to obtain a judicial review or a stay thereof prior to the disobedience or resistance charged.

"(c) POWER TO PROSECUTE.—A prosecution for an offense described in this section may be commenced by the court, the authority of which was the subject of the contempt, or by the Attorney General with the concurrence of the court.

"(d) SUCCESSIVE PROSECUTIONS.—A prosecution for an offense under this section is not a bar to a subsequent prosecution for an offense under another federal statute if the conduct charged as criminal contempt under this section also constitutes an offense under such other statute, or a regulation, rule, or order issued pursuant thereto. In a subsequent prosecution the defendant shall receive credit for any time spent in custody and any fine paid by him as a result of the prior criminal contempt proceeding.

"(e) GRADING.—An offense described in this section is a Class B misdemeanor. Notwithstanding the provisions of section 2201, the defendant may be sentenced to pay a fine in any amount deemed just by the court if the offense involves disobedience of or resistance to the court's temporary restraining order, preliminary injunction, or final order other than an order for the payment of money.

"(f) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the court is a court of the United States.

"§ 1332. Failing to Appear as a Witness

"(a) OFFENSE.—A person is guilty of an offense if he fails to comply with an order:

"(1) to appear at a specified time and place as a witness in an official proceeding;

"(2) to remain at a specified place where he is to appear as a witness in an official proceeding; or

"(3) to be sworn or to make an equivalent affirmation as a witness in an official proceeding.

"(b) BAR TO PROSECUTION.—It is a bar to a prosecution under this section that the official proceeding was conducted under the authority of Congress or of either House of Congress and that a certification pursuant to the provisions of section 104 of the Revised Statutes, as amended (2 U.S.C. 194), had not been issued.

"(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(1) or (a)(2) that uncontrollable cir-

cumstances prevented the defendant from appearing at the specified time and place or from remaining at the specified place, and that the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or remain.

"(d) GRADING.—An offense described in this section is a Class E felony.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official proceeding is a federal official proceeding.

"§ 1333. Refusing to Testify or to Produce Information

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) in an official proceeding that is conducted under the authority of Congress or of either House of Congress, he:

"(A) refuses to answer a question, after the presiding officer has directed him to answer and advised him that his refusal to do so might subject him to criminal prosecution; or

"(B) fails to comply with an order to produce a record, document, or other object;

and the question or object is in fact pertinent to the subject under inquiry; or

"(2) in any other official proceeding, he:

"(A) refuses to answer a question after a federal court or federal judge, or, in a proceeding that is conducted before a United States magistrate or referee in bankruptcy, the presiding officer, has directed him to answer and advised him that his refusal to do so might subject him to criminal prosecution; or

"(B) fails to comply with an order to produce a record, document, or other object.

"(b) DEFINITIONS.—As used in this section:

"(1) 'federal court' includes a court martial, military commission, court of inquiry, provost court, and any other military court of the United States;

"(2) 'federal judge' includes a military judge as defined in section 801(10) of title 10.

"(c) BAR TO PROSECUTION.—It is a bar to a prosecution under subsection (a)(1) that a certification pursuant to the provisions of section 104 of the Revised Statutes, as amended (2 U.S.C. 194), had not been issued.

"(d) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution:

"(1) under this section that the defendant was legally privileged to refuse to answer the question or to produce the record, document, or other object; or

"(2) under subsection (a)(1)(B) or (a)(2)(B) that uncontrollable circumstances prevented the defendant from producing the record, document, or other object, and that the defendant did not contribute to the creation of such circumstances in reckless disregard of the requirement to produce the record, document, or other object.

"(e) PROOF.—In a prosecution under this section, whether a matter is pertinent under subsection (a)(1) is a question of law.

"(f) GRADING.—An offense described in this section is a Class E felony.

"(g) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official proceeding is a federal official proceeding.

"§ 1334. Obstructing a Proceeding by Disorderly Conduct

"(a) OFFENSE.—A person is guilty of an offense if he obstructs or impairs an official proceeding by means of unreasonable noise, by means of violent or tumultuous behavior or disturbance, or by similar means.

"(b) GRADING.—An offense described in this section is a Class B misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official proceeding is a federal official proceeding.

"§ 1335. Disobeying a Judicial Order

"(a) OFFENSE.—A person is guilty of an offense if he disobeys or resists a court's temporary restraining order, preliminary injunction, or final order other than an order for the payment of money.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that the temporary restraining order, preliminary injunction, or final order was clearly invalid and that the defendant did not have a reasonable opportunity to obtain a judicial review or a stay thereof prior to the disobedience or resistance charged.

"(c) GRADING.—An offense described in this section is a Class E felony. Notwithstanding the provisions of section 2201, the defendant may be sentenced to pay a fine in any amount deemed just by the court.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the court is a court of the United States.

"Subchapter E.—Perjury, False Statements, and Related Offenses

"§ 1341. Perjury

"(a) OFFENSE.—A person is guilty of an offense if, under oath or equivalent affirmation in an official proceeding, he:

"(1) makes a material statement that is false; or

"(2) affirms the truth of a previously made material statement that is false.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official proceeding is a federal official proceeding.

"§ 1342. False Swearing

"(a) OFFENSE.—A person is guilty of an offense if, under oath or equivalent affirmation in an official proceeding, he:

"(1) makes a statement that is false; or

"(2) affirms the truth of a previously made statement that is false.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official proceeding is a federal official proceeding.

"§ 1343. Making a False Statement

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) in a government matter, he:

"(A) makes a material oral statement that is false to a person who he knows is:

"(i) a law enforcement officer; or

"(ii) a person assigned investigative responsibility by statute, or by a regulation, rule, or order issued pursuant thereto, or by the head of a government agency; and such statement is volunteered or is made after the

person has been advised that making such a statement is an offense;

"(B) makes a material written statement that is false;

"(C) omits or conceals a material fact in a written statement;

"(D) submits or invites reliance on a material writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

"(E) submits or invites reliance on a sample, specimen, map, photograph, boundary-mark, or other object that is misleading in a material respect; or

"(F) fraudulently uses a trick, scheme, or device that is misleading in a material respect;

"(2) in a credit institution record, with intent to deceive or harm the government or a person, he, as an agent of such credit institution, engages in any conduct described in subparagraphs (B) through (F) of paragraph (1); or

"(3) with intent to influence the action of a credit institution, he engages in any conduct described in subparagraphs (B) through (F) of paragraph (1).

"(b) GRADING.—An offense described in this section is:

"(1) a Class E felony, except as provided in paragraph (2);

"(2) a Class A misdemeanor if the statement was given to a law enforcement officer during the course of an investigation of an offense or a possible offense and the statement consisted of a denial, unaccompanied by any other false statement, that the declarant committed or participated in the commission of such offense.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the government is the government of the United States;

"(2) the government is a state, local, or foreign government and the falsity constituting the offense is that the declarant is a citizen of the United States; or

"(3) the credit institution is a national credit institution.

"§ 1344. Tampering with a Government Record

"(a) OFFENSE.—A person is guilty of an offense if he alters, destroys, mutilates, conceals, removes, or otherwise impairs the integrity or availability of a government record.

"(b) GRADING.—An offense described in this section is:

"(1) a Class E felony, except as provided in paragraph (2);

"(2) a Class A misdemeanor if the government record is of the kind described in section 1345(a)(3)(B).

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the government record is a federal government record.

"§ 1345. General Provisions for Subchapter E

"(a) DEFINITIONS.—As used in this subchapter:

"(1) 'credit institution record' means a record, book, or statement of a credit institution that is kept in the usual course of business by an agent of such institution;

"(2) 'oath or equivalent affirmation' includes a written unsworn declaration, certificate, verification, or statement described in section 1746 of title 28, United States Code;

"(3) 'government matter' means a matter within the jurisdiction, including investigative jurisdiction, of a government agency, and includes a government record;

"(4) 'government record' means a record, document, or other object: (A) belonging to, or received or kept by, a government for information or record purposes; or (B) required to be kept by a person pursuant to a statute, or a regulation, rule, or order issued pursuant thereto;

"(5) 'official proceeding' means a proceeding in which a federal law authorizes an oath to be administered; and

"(6) 'statement' means an oral or written declaration or representation, including a declaration or representation of opinion, belief, or other state of mind; for purposes of sections 1341 and 1342, a written statement made 'under oath or equivalent affirmation' includes a written statement that, with the declarant's knowledge, purports to have been made under oath or equivalent affirmation.

"(b) PROOF.—

"(1) In a prosecution under section 1341 or 1342, proof of the falsity of a statement need not be made by any particular number of witnesses or by documentary, direct, or any other particular kind of evidence.

"(2) In a prosecution under section 1341 or 1343, or under any section incorporating by reference any provision of section 1343, a falsification, omission, concealment, forgery, alteration, or other

misleading matter is material, regardless of the admissibility of the statement or object under the rules of evidence, if it could have impaired, affected, impeded, or otherwise influenced the course, outcome, or disposition of the matter in which it is made, or, in the case of a record, if it could have impaired the integrity of the record in question. Whether a matter is material under the circumstances is a question of law.

"(3) In a prosecution under:

"(A) section 1341 or 1342, if, in one or more official proceedings, a person under oath or equivalent affirmation makes or affirms; or

"(B) section 1343(a)(1)(B), if, in one or more government matters, a person makes;

statements which are inconsistent to the degree that one of them is necessarily false, both having been made within the applicable period of time limitations, the indictment, information, or other charge may set forth the statements in a single count alleging that the defendant knew or was aware of the risk that one or the other of the statements was false. Proof that the defendant made such statements constitutes prima facie evidence that he knew, or was aware of the risk, that one or the other of the statements was false, and such proof is sufficient for conviction. Under section 1341 or 1343, both such statements must be material.

"(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under:

"(1) section 1341 or 1342 that the actor clearly and expressly retracted the falsification in the course of the same official proceeding in which it was made if he did so before it became manifest that the falsification had been or would be exposed and before the falsification substantially impaired, affected, impeded, or otherwise influenced the course, outcome, or disposition of the official proceeding or of a related government matter;

"(2) section 1343 (a)(1) or (a)(3) that the actor clearly and expressly retracted the falsification and communicated the retraction to the same individual, agency, or institution to which the falsification had been communicated, if he did so within seven calendar days after the falsification had been received by the individual, agency, or institution, and if he did so before it became manifest that the falsification had been or would be exposed and before the falsification substantially impaired, affected, impeded,

or otherwise influenced the course, outcome, or disposition of the government matter or credit institution action, or of a related government matter or official proceeding.

"(d) DEFENSE PRECLUDED.—It is not a defense to a prosecution under section 1341 or 1342 that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not authorized to make the statement.

"Subchapter F.—Official Corruption and Intimidation

"§ 1351. Bribery

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) he offers, gives, or agrees to give to a public servant; or

"(2) as a public servant, he solicits, demands, accepts, or agrees to accept from another person;

anything of value in return for an agreement or understanding that the recipient's official action as a public servant will be influenced thereby, or that the recipient will violate a legal duty as a public servant.

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the official action or legal duty involved is that of a federal public servant;

"(3) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense;

"(4) movement of a person across a state or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(5) the offense occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1403 (Alcohol and Tobacco Tax Offenses), 1722 (Extortion), 1804 (Loansharking), 1811 (Trafficking in an Opiate), 1812 (Trafficking in Drugs), 1841 (Engaging in a Gambling Business), or 1843 (Conducting a Prostitution Business).

"§ 1352. Graft

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) he offers, gives, or agrees to give to a public servant or former public servant; or

"(2) as a public servant, or former public servant, he solicits, demands, accepts, or agrees to accept from another person;

anything of pecuniary value for or because of an official action taken or to be taken, a legal duty performed or to be performed, or a legal duty violated or to be violated by the public servant or former public servant.

"(b) GRADING.—An offense described in this section is a Class E felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1351(c) exists or has occurred.

"§ 1353. Trading in Government Assistance

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) he offers, gives, or agrees to give to a public servant; or

"(2) as a public servant he solicits, demands, accepts, or agrees to accept from another person;

anything of pecuniary value intended as consideration for advice or other assistance in preparing or promoting a bill, contract, claim, or other matter that is or may become subject to official action by such public servant.

"(b) GRADING.—An offense described in this section is a Class E felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the public servant is a federal public servant.

"§ 1354. Trading in Special Influence

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) offers, gives, or agrees to give to another person; or

"(2) solicits, demands, accepts, or agrees to accept from another person;

anything of pecuniary value intended as consideration for exerting, or causing another person to exert, special influence upon a public servant with respect to his taking an official action or his performing a legal duty as a public servant.

"(b) DEFINITION.—As used in this section, the term 'special influence' means influence by reason of a relationship to the public servant by common ancestry or by marriage, or by reason of position as a public servant or as a political party official.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the official action or legal duty involved is that of a federal public servant.

"§ 1355. Trading in Public Office

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) offers, gives, or agrees to give to another person; or

"(2) solicits, demands, accepts, or agrees to accept from another person;

anything of pecuniary value intended as consideration for approval, disapproval, or assistance by a public servant or political party official in the appointment, employment, advancement, or retention of any person as a public servant.

"(b) GRADING.—An offense described in this section is a Class E felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the appointment, employment, advancement, or retention involved is that of a federal public servant.

"§ 1356. Speculating on Official Action or Information

"(a) OFFENSE.—A person is guilty of an offense if as a public servant, or within one year after his service as a public servant terminates, and in contemplation of the taking of an official action by himself as a public servant or by an agency with which he is or has been serving as a public servant, or in reliance on information to which he has or had access only in his capacity as a public servant, he:

"(1) acquires or disposes of a pecuniary interest in any property, transaction, or enterprise that may be affected by such official action or information; or

"(2) provides information with intent to aid another person in acquiring or disposing of such an interest.

92-465 O - 77 - 64

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the public servant is or was a federal public servant; or

"(2) the agency is a federal government agency.

"§ 1357. Tampering with a Public Servant

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) uses force, threat, intimidation, or deception with intent to influence a public servant with respect to his taking an official action or performing a legal duty as a public servant; or

"(2) communicates:

"(A) a threat to commit a crime of violence upon the person of the President or a potential successor to the Presidency; or

"(B) information, that he knows to be false, that a crime described in subparagraph (A) is imminent or in progress;

under circumstances in which the threat or information may reasonably be understood as an expression or reflection of serious purpose.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(1) that the conduct used to threaten or to intimidate consisted solely of lawful conduct and that the defendant's sole intention was to compel or induce the public servant to take official action properly or to perform his legal duty properly.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in:

"(1) subsection (a)(1) if the public servant is a federal public servant; or

"(2) subsection (a)(2) if the offense is committed within:

"(A) the general jurisdiction of the United States;

"(B) the special jurisdiction of the United States; or

"(C) the extraterritorial jurisdiction of the United States to the extent applicable under section 204.

"§ 1358. Retaliating Against a Public Servant

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) engages in conduct that causes bodily injury to another person or damages the property of another person; or

"(2) improperly subjects another person to economic loss or injury to his business or profession;

because of an official action taken or a legal duty performed by a public servant, or because of the status of a person as a public servant.

"(b) GRADING.—An offense described in this section is:

"(1) a Class E felony in the circumstances set forth in subsection (a)(1);

"(2) a Class A misdemeanor in the circumstances set forth in subsection (a)(2).

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the public servant is a federal public servant.

"§ 1359. General Provisions for Subchapter F

"(a) DEFINITIONS.—

"(1) As used in this subchapter:

"(A) 'anything of value' and 'anything of pecuniary value' do not include (i) concurrence in official action in the course of legitimate compromise between public servants; or (ii) support, including a vote, in any primary, general, or special election campaign solicited by a candidate solely by means of representation of his position on a public issue;

"(B) 'political party official' means a person who holds a position or office in a political party, whether by election, appointment, or otherwise;

"(C) 'potential successor to the Presidency' means (i) the President-elect; (ii) the Vice President; (iii) if there is no Vice President, the person next in order of succession to the office of President; or (iv) the Vice President-elect;

"(D) 'public servant' includes a person who has been officially informed that he will be nominated or appointed to be a public servant.

"(2) As used in sections 1351 through 1356, 'federal public servant' includes a District of Columbia public servant.

"(b) DEFENSES PRECLUDED.—It is not a defense to a prosecution under:

"(1) section 1351, 1352, 1354, or 1356 that the recipient was not qualified to act, whether because he had not yet assumed office, because he lacked authority or jurisdiction, or because of any other reason; or

"(2) sections 1351 through 1355 that the defendant, or other recipient or proposed recipient of the thing of value, by the same conduct also committed an offense described in section 1722 (Extortion), 1723 (Blackmail), or 1731 (Theft).

"Chapter 14.—OFFENSES INVOLVING TAXATION

"Subchapter A.—Internal Revenue Offenses

"§ 1401. Tax Evasion

"(a) OFFENSE.—A person is guilty of an offense if, with intent to evade liability for a tax or the payment of a tax, he:

"(1) files a tax return that understates the tax;

"(2) removes or conceals an asset, knowing that the tax is due or may become due;

"(3) fails to account for, or to pay over when due, a tax previously collected or withheld, or a payment received from or on behalf of another person with the understanding that it would be turned over to the United States for tax purposes;

"(4) alters, destroys, mutilates, conceals, or removes any property under the care, custody, or control of the United States; or

"(5) otherwise acts in any manner to evade liability for, or payment of, the tax.

"(b) GRADING.—An offense described in this section is:

"(1) a Class C felony if the tax liability involved is in excess of $100,000;

"(2) a Class D felony if the tax liability involved is $100,000 or less;

"(3) a Class E felony if no tax liability is involved.

"§ 1402. Disregarding a Tax Obligation

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) fails to file when due a tax return or an information return that he is required to file;

"(2) engages in an occupation or enterprise without having registered, or without having purchased a stamp, as required under the Internal Revenue Code of 1954, as amended;

"(3) fails to withhold or collect a tax that he is required to withhold or collect under the Internal Revenue Code of 1954, as amended;

"(4) fails to furnish to an employee a true statement regarding a tax withheld from the employee's remuneration, as required under section 6051 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 6051);

"(5) claims a personal exemption, to which he knows he is not entitled, in an income tax return; or

"(6) fails to deposit collected taxes in a special bank account as required, after notice, under section 7512 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7512), or, after having deposited funds in such an account, pays any of them to any person other than an authorized agent of the United States.

"(b) GRADING.—An offense described in this section is:

"(1) a Class A misdemeanor in the circumstances set forth in subsection (a)(1) through (a)(4);

"(2) a Class B misdemeanor in the circumstances set forth in subsection (a)(5) or (a)(6).

"§ 1403. Alcohol and Tobacco Tax Offenses

"(a) OFFENSE.—A person is guilty of an offense if he violates any of the following provisions of the Internal Revenue Code of 1954, as amended:

"(1) section 5601(a) (26 U.S.C. 5601(a)) (relating to unregistered stills, the application and bonding of distillers, and unlawful conduct in the production or use of distilled spirits);

"(2) section 5602 (26 U.S.C. 5602) (relating to evasion of tax imposed on distilled spirits);

"(3) section 5603(a) (26 U.S.C. 5603(a)) (relating to maintenance of required documents or alteration or destruction of such documents);

"(4) section 5607 (26 U.S.C. 5607) (relating to unlawful conduct concerning any denatured distilled spirits withdrawn free of tax);

"(5) section 5661(a) (26 U.S.C. 5661(a)) (relating to failure to pay tax imposed on wine and failure to comply with other statutes and regulations concerning bonding and gallonage taxes on wine);

"(6) section 5671 (26 U.S.C. 5671) (relating to evasion of tax imposed on beer and failure to keep and file required brewers' records);

"(7) section 5604(a) (26 U.S.C. 5604(a)) (relating to unstamped containers of distilled spirits and unlawful conduct involving stamps, stamped containers, or distilled spirits);

"(8) section 5605 (26 U.S.C. 5605) (relating to return of materials used in the manufacture of distilled spirits or from which distilled spirits may be recovered);

"(9) section 5608 (26 U.S.C. 5608) (relating to fraudulent claims for an allowance of drawback on distilled spirits and relanding of distilled spirits shipped for exportation);

"(10) section 5682 (26 U.S.C. 5682) (relating to breaking of locks or gaining of access to any place under the lock or seal of an internal revenue agent);

"(11) section 5691(a) (26 U.S.C. 5691(a)) (relating to nonpayment of special taxes concerning liquor, beer, or manufacture of stills); or

"(12) section 5762(a) (26 U.S.C. 5762(a)) (relating to refusal to pay or evasion of a tax imposed on tobacco related products, maintenance of true and accurate records, and unlawful conduct concerning tobacco-related products, stamps, or packages).

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony in the circumstances set forth in subsection (a)(1) through (a)(6);

"(2) a Class E felony in the circumstances set forth in subsection (a)(7) through (a)(12).

"§ 1404. Definitions for Subchapter A

"As used in this subchapter:

"(a) 'liability for a tax or the payment of a tax' means liability for, or payment of, the entire tax or any part thereof;

"(b) 'payment' includes collection;

"(c) 'tax' means a tax imposed by a federal statute, an exaction denominated a 'tax' by a federal statute, and any penalty, addition to tax, additional amount, or interest thereon; but does not include a tariff or customs duty, or a toll, levy, or charge that is not denominated a 'tax' by a federal statute;

(d) 'tax return' means a written report of a taxpayer's tax obligation that is required to be filed by a federal statute, or a regulation, rule, or order issued pursuant thereto; and includes a report of taxes withheld or collected, an income tax return, an estate or gift tax return, an excise tax return, and any other tax return of an individual or organization required to file a return or to pay a tax in conjunction with a tax return; but does not include an interim report, an information return, or a return of estimated tax.

"Subchapter B.—Customs Offenses

"§ 1411. Smuggling

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) introduces into the United States an object, the introduction of which a federal statute, or a regulation, rule, or order issued pursuant thereto:

"(A) prohibits absolutely; or

"(B) prohibits conditionally and all conditions for its introduction into the United States have not been complied with; or

"(2) evades assessment or payment when due of the customs duty upon an object being introduced into the United States; or

"(3) evades an examination by the government of an object being introduced into the United States.

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony if the value of the object, or the duty that was due or that would have been due on the object, exceeds $500;

"(2) a Class E felony if introduction of the object is prohibited, either absolutely or conditionally, because it may cause, or may be used to cause, bodily injury or property damage;

"(3) a Class A misdemeanor if the value of the object, or the duty that was due or that would have been due on the object, exceeds $100 but is not more than $500;

"(4) a Class B misdemeanor in any other case in which duty was due or would have been due on the object;

"(5) a Class C misdemeanor in any other case.

"§ 1412. Trafficking in Smuggled Property

"(a) OFFENSE.—A person is guilty of an offense if he traffics in an object that has been unlawfully introduced into the United States, such introduction having been in violation of section 1411.

"(b) GRADING.—An offense described in this section is an offense of the same class as that specified in section 1411(b) for the smuggling of the same kind of object.

"§ 1413. Receiving Smuggled Property

"(a) OFFENSE.—A person is guilty of an offense if he buys, receives, possesses, or obtains control of an object that has been unlawfully in-

troduced into the United States, such introduction having been in violation of section 1411.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that the defendant bought, received, possessed, or obtained control of the object with intent to report the matter to an appropriate law enforcement officer.

"(c) GRADING.—An offense described in this section is an offense of the class next below that specified in section 1411(b) for the smuggling of the same kind of object.

"§ 1414. General Provisions for Subchapter B

"(a) DEFINITIONS.—As used in this subchapter:

"(1) 'customs territory of the United States' has the meaning set forth in general headnote 2 to the Tariff Schedules of the United States;

"(2) 'introduce' means import, transport, bring into the United States from any place outside the United States, or into the customs territory of the United States from any place outside the customs territory of the United States but within the United States;

"(3) 'object' includes any article, good, ware, and merchandise, whether animate or inanimate;

"(b) PROOF.—In a prosecution under section 1412 or 1413:

"(1) possession of an object recently smuggled into the United States, unless satisfactorily explained, constitutes prima facie evidence that the person in possession was aware of the risk that it had been smuggled or in some way participated in its smuggling;

"(2) the purchase or sale of an object recently smuggled into the United States at a price substantially below its fair market value, unless satisfactorily explained, constitutes prima facie evidence that the person buying or selling the property was aware of the risk that it had been smuggled.

"(c) DETERMINING DUTY.—Smugglings committed pursuant to one scheme or course of conduct may be charged as one offense, and the value of, or the duty owing on, the objects introduced may be aggregated in determining the grade of the offense.

"Chapter 15.—OFFENSES INVOLVING INDIVIDUAL RIGHTS

"Subchapter
"A. Offenses Involving Civil Rights.
"B. Offenses Involving Political Rights.
"C. Offenses Involving Privacy.

"Subchapter A.—Offenses Involving Civil Rights

"§ 1501. Interfering with Civil Rights

"(a) OFFENSE.—A person is guilty of an offense if he intentionally:

"(1) deprives another person of; or

"(2) injures, oppresses, threatens, or intimidates another person:

"(A) in the free exercise or enjoyment of; or

"(B) because of his having exercised;

a right, privilege, or immunity in fact secured to such other person by the Constitution or laws of the United States.

"(b) PROOF.—In a prosecution under this section, whether the deprivation, injury, oppression, threat, or intimidation concerns a right, privilege, or immunity secured by the Constitution or laws of the United States is a question of law.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1502. Interfering with Civil Rights under Color of Law

"(a) OFFENSE.—A person is guilty of an offense if, acting under color of law, he engages in any conduct constituting an offense described in a section in chapter 16 or 17, and thereby deprives another person of a right, privilege, or immunity in fact secured to such other person by the Constitution or laws of the United States.

"(b) PROOF.—In a prosecution under this section, whether the deprivation concerns a right, privilege, or immunity secured by the Constitution or laws of the United States is a question of law.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1503. Interfering with a Federal Benefit

"(a) OFFENSE.—A person is guilty of an offense if, by force or threat of force, he intentionally injures, intimidates, or interferes with another person because such other person is or has been, or in order to intimidate any person from:

"(1) applying for, participating in, or enjoying a benefit, privilege, service, program, facility, or activity provided by, administered by, or wholly or partly financed by, the United States;

"(2) applying for or enjoying employment, or a perquisite thereof, by a federal government agency;

"(3) serving as a grand or petit juror in a court of the United States or attending court in connection with possible service as such a grand or petit juror;

"(4) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher or other election official, in a primary, general, or special election;

"(5) affording another person or class of persons opportunity to participate, or protection in order to participate, in any benefit or activity described in this section; or

"(6) aiding or encouraging another person or class of persons to participate in any benefit or activity described in this section.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1504. Unlawful Discrimination

"(a) OFFENSE.—A person is guilty of an offense if, by force or threat of force, he intentionally injures, intimidates, or interferes with another person:

"(1) because of such other person's race, color, sex, religion, or national origin and because such other person is or has been, or in order to intimidate any person from:

"(A) applying for, participating in, or enjoying, a benefit, privilege, service, program, facility, or activity provided or administered by a state or locality;

"(B) applying for or enjoying employment, or a perquisite thereof, by a state or local government agency;

"(C) serving as a grand or petit juror in a state or locality or attending court in connection with possible service as such a grand or petit juror;

"(D) enrolling in or attending a public school or public college;

"(E) applying for or enjoying the goods, services, privileges, facilities, or accommodations of:

"(i) an inn, hotel, motel, or other establishment that provides lodging to transient guests;

"(ii) a restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility that serves the public and that is principally engaged in selling food or beverages for consumption on the premises;

"(iii) a gasoline station;

"(iv) a motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment that serves the public; or

"(v) any other establishment that serves the public, that is located within the premises of an establishment described in this subparagraph or that has located within its premises such an establishment, and that holds itself out as serving patrons of such an establishment;

"(F) applying for or enjoying the services, privileges, facilities, or accommodations of a common carrier utilizing any kind of vehicle;

"(G) traveling in or using a facility of interstate commerce;

"(H) applying for or enjoying employment, or a perquisite thereof, by a private employer or joining or using the services or advantages of a labor organization, hiring hall, or employment agency; or

"(I) selling, purchasing, renting, financing, or occupying a dwelling; contracting or negotiating for the sale, purchase, rental, financing or occupation of a dwelling; or applying for or participating in a service, organization, or facility relating to the business of selling or renting dwellings; or

"(2) because such other person is or has been, or in order to intimidate any person from:

"(A) affording another person or class of persons opportunity to participate, or protection in order to participate, without discrimination on account of race, color, sex, religion, or national origin, in any benefit or activity described in this section; or

"(B) aiding or encouraging another person or class of persons to participate, without discrimination on account of race, color, sex, religion, or national origin, in any benefit or activity described in this section.

"(b) DEFENSE.—It is a defense to a prosecution under subsection (a)(1)(E)(i) that:

"(1) the defendant was the proprietor of the establishment involved or an agent acting on behalf of the proprietor;

"(2) the establishment was located within a building containing not more than five rooms for rent or hire; and

"(3) the building was occupied by the proprietor as his residence.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1505. Interfering with Speech or Assembly Related to Civil Rights Activities

"(a) OFFENSE.—A person is guilty of an offense if, by force or threat of force, he intentionally injures, intimidates, or interferes with another person because he is or has been, or in order to intimidate him or any other person from, participating in speech or assembly opposing a denial of opportunity to participate:

"(1) in a benefit or activity described in section 1503; or

"(2) in a benefit or activity described in section 1504, without discrimination on account of race, color, sex, religion, or national origin.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1506. Strikebreaking

"(a) OFFENSE.—A person is guilty of an offense if, by force or threat or force, he intentionally obstructs or interferes with:

"(1) peaceful picketing by employees in the course of a bona fide labor dispute affecting wages, hours, or conditions of labor; or

"(2) the exercise by employees of rights of self-organization or collective bargaining.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if movement of any person across a state or United States boundary occurs in the commission of the offense.

"Subchapter B.—Offenses Involving Political Rights

"Sec.
"1511. Obstructing an Election.
"1512. Obstructing Registration.
"1513. Obstructing a Political Campaign.
"1514. Interfering with a Federal Benefit for a Political Purpose.
"1515. Misusing Authority over Personnel for a Political Purpose.
"1516. Soliciting a Political Contribution as a Federal Public Servant or in a Federal Building.
"1517. Making a Political Contribution as a Foreign National.
"1518. Making an Excess Campaign Expenditure.
"1519. Definitions for Subchapter B.

"§ 1511. Obstructing an Election

"(a) OFFENSE.—A person is guilty of an offense if, in connection with a primary, general, or special election to nominate or elect a candidate for a federal office, he:

"(1) obstructs or impairs the lawful conduct of such election;

"(2) offers, gives, or agrees to give anything of value to another person for or because of any person's voting, refraining from voting, or voting for or against such candidate; or

"(3) solicits, demands, accepts, or agrees to accept anything of value for or because of any person's voting, refraining from voting, or voting for or against such candidate.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1512. Obstructing Registration

"(a) OFFENSE.—A person is guilty of an offense if, in connection with registration to vote at a primary, general, or special election to nominate or elect a candidate for a federal office, he:

"(1) obstructs or impairs the lawful conduct of such registration;

"(2) offers, gives, or agrees to give anything of value to another person for or because of any person's registering to vote;

"(3) solicits, demands, accepts, or agrees to accept anything of value for or because of any person's registering to vote; or

"(4) gives information, that he knows to be false, to establish his eligibility to vote.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1513. Obstructing a Political Campaign

"(a) OFFENSE.—A person is guilty of an offense if, during a campaign preceding a primary, general, or special election to nominate or elect a candidate for a federal office, and with intent to influence the outcome of such election, he:

"(1) engages in conduct constituting a crime under any section of this title;

"(2) engages in conduct constituting a felony under a law of the state in which the conduct occurs; or

"(3) publishes or distributes a statement concerning a candidate for federal office that does not contain, or that misrepresents, the name of the person or organization responsible for the publication or distribution.

"(b) GRADING.—An offense described in this section is:

"(1) a Class E felony in the circumstances set forth in subsection (a) (1) or (a) (2);

"(2) a Class A misdemeanor in the circumstances set forth in subsection (a)(3).

"§ 1514. Interfering With a Federal Benefit for a Political Purpose

"(a) OFFENSE.—A person is guilty of an offense if, with intent to interfere with, restrain, or coerce another person in the exercise of his right to vote at a primary, general, or special election to nominate or elect a candidate for a federal, state, or local office, he:

"(1) grants or threatens to grant to any other person;

"(2) withholds or threatens to withhold from any other person; or

"(3) deprives or threatens to deprive any other person of;

the benefit of a federal program or a federally supported program or a federal government contract.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1515. Misusing Authority over Personnel for a Political Purpose

"(a) OFFENSE.—A person is guilty of an offense if, as a federal public servant, he:

"(1) promotes, fails to promote, demotes, or discharges;

"(2) recommends the promotion, non-promotion, demotion, or discharge of; or

"(3) changes in any manner, or promises or threatens to change, the official position or compensation of;

another federal public servant, for or because of any person's giving, withholding, or neglecting to make a political contribution.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1516. Soliciting a Political Contribution as a Federal Public Servant or in a Federal Building

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) as a federal public servant, he:

"(A) solicits a political contribution from another person whom he knows to be a federal public servant; or

"(B) makes a political contribution to another person whom he knows to be a federal public servant, in response to a solicitation; or

"(2) he solicits or receives a political contribution in a federal building or facility.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that both the public servant soliciting the political contribution or making the political contribution in response to a solicitation and the public servant solicited for or receiving such contribution are members of, members-elect of, or candidates for, Congress.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"§ 1517. Making a Political Contribution as a Foreign National

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) as a foreign national, he makes or promises to make a political contribution; or

"(2) he solicits, accepts, or receives a political contribution from a foreign national or from a foreign power.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1518. Making an Excess Campaign Expenditure

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) he violates section 9035 of the Presidential Primary Matching Payment Account Act (26 U.S.C. 9035) (relating to campaign expense limitations); or

"(2) as an officer or member of a 'political committee', as defined in the Presidential Primary Matching Payment Account Act (26 U.S.C. 9032(8)), he consents to an expenditure in violation of section 9035 (relating to campaign expense limitations) of that Act.

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1519. Definitions for Subchapter B

"As used in this subchapter:

"(a) 'anything of value' does not include nonpartisan physical activities or services to facilitate registration or voting;

"(b) 'federal office' means the office of President or Vice-President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States;

"(c) 'foreign national' means:

"(1) a 'foreign principal' as defined in section 1 of the Foreign Agents Registration Act of 1938, as amended (22

U.S.C. 611), but does not include a person who is a citizen of the United States; or

"(2) a person who is not a citizen of the United States and who is not lawfully admitted for permanent residence within the meaning set forth in section 101 of the Immigration and Nationality Act, as amended (8 U.S.C. 1101);

"(d) 'political contribution' means:

"(1) as used in section 1515 and 1517, anything of value used or to be used for the nomination or election of any person to federal, state, or local office; and

"(2) as used in section 1516, a 'contribution' as defined in the Federal Election Campaign Act (2 U.S.C. 431(e)).

"Subchapter C.—Offenses Involving Privacy

"§ 1521. Eavesdropping

"(a) OFFENSE.—A person is guilty of an offense if he intentionally:

"(1) intercepts a private oral communication by means of an eavesdropping device without the prior consent of a party to the communication; or

"(2) discloses to another person, or uses, the contents of a private oral communication, knowing that such contents were obtained by conduct described in paragraph (1).

"(b) DEFENSE.—It is a defense to a prosecution under this section that the private oral communication was being transmitted over the facilities of a communications common carrier; and

"(1) the defendant was an agent of the carrier, acting in the usual course of his employment, who was engaged in:

"(A) service observing for mechanical or service quality control checks; or

"(B) any other activity necessarily incident to the rendition of service by the carrier or relating to the discovery of theft or the carrier's service; or

"(2) the defendant was acting in the usual course of his employment and was engaged in supervisory service observing.

"(c) GRADING.—An offense described in this section is a Class D felony.

"§ 1522. Trafficking in an Eavesdropping Device

"(a) OFFENSE.—A person is guilty of an offense if he intentionally:

"(1) produces, manufactures, imports, or traffics in an eavesdropping device, knowing that its design renders it primarily useful for surreptitious interception of private oral communications; or

"(2) advertises an eavesdropping device, knowing that:

"(A) its design renders it primarily useful for surreptitious interception of private oral communications, or

"(B) such advertising promotes the use of such device for surreptitious interception of private oral communications.

"(b) DEFENSES.—It is a defense to a prosecution under this section that the defendant was:

"(1) a communications common carrier, an agent of such a carrier, or a person under contract with such a carrier, and was acting for a purpose set forth in section 1521(b)(2); or

"(2) a person acting within the scope of a federal, state, or local government contract.

"(c) GRADING.—An offense under this section is a Class D felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the device is sent through the United States mail, or is moved across a state or United States boundary, in the commission of the offense; or

"(3) the advertisement is sent through the United States mail, or is moved across a state or United States boundary, or is transmitted by a communications facility that operates in interstate or foreign commerce, in the commission of the offense.

"§ 1523. Possessing an Eavesdropping Device

"(a) OFFENSE.—A person is guilty of an offense if, with intent that it be used in the course of conduct constituting an offense under section 1521 or 1522, he possesses an eavesdropping device.

"(b) DEFENSES.—It is a defense to a prosecution under this section that the defendant was:

"(1) a communications common carrier, an agent of such a carrier, or a person under contract with such a carrier, and was in possession of the eavesdropping device for a purpose set forth in section 1521(b)(2); or

"(2) a person in possession of the eavesdropping device within the scope of a federal, state, or local government contract.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1522 (d)(1) or (d)(2) exists or has occurred.

"§ 1524. Intercepting Correspondence

"(a) OFFENSE.—A person is guilty of an offense if he intentionally:

"(1) intercepts private correspondence without the prior consent of the sender or the intended recipient; or

"(2) discloses to another person, or uses, the contents of private correspondence, knowing that such contents were obtained by conduct described in paragraph (1).

"(b) DEFENSE.—It is a defense to a prosecution under this section that the private correspondence was being transmitted over the facilities of a communications common carrier; and

"(1) the defendant was an agent of the carrier, acting in the usual course of his employment, who was engaged in:

"(A) service observing for mechanical or service quality control checks; or

"(B) any other activity necessarily incident to the rendition of service by the carrier or relating to the discovery of theft of the carrier's service; or

"(2) the defendant was acting in the usual course of his employment and was engaged in supervisory service observing.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the private correspondence is mail; or

"(2) the private correspondence is being transmitted over the facilities of a communications common carrier.

"§ 1525. Revealing Private Information Submitted for a Government Purpose

"(a) OFFENSE.—A person is guilty of an offense if, in violation of a specific duty imposed upon him as a public servant or former public servant by a statute, or by a regulation, rule, or order issued pursuant thereto, he discloses information, to which he has or had access only in his capacity as a public servant, that had been provided to the

government by another person, other than a public servant acting in his official capacity, solely in order to comply with:

"(1) a requirement of an application for a patent, copyright, license, employment, or benefit; or

"(2) a specific duty imposed by law upon such other person.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the public servant or former public servant acquired the information as a federal public servant.

"§ 1526. Definitions for Subchapter C

"As used in this subchapter:

"(a) 'communications common carrier' has the meaning set forth for the term 'common carrier' in section 3(h) of the Act of June 19, 1934, as amended (47 U.S.C. 153(h));

"(b) 'contents', when used with respect to a communication, includes information, obtained from the communication itself, that concerns the existence, substance, purport, or meaning of the communication, or the identity of a party to the communication;

"(c) 'eavesdropping device' means an electronic, mechanical, or other device or apparatus that can be used to intercept a private oral communication, other than a telephone or telegraph instrument or facility or any associated component or equipment, furnished to a subscriber or user by a communications common carrier in the usual course of its business and being used in a manner for which it was designed;

"(d) 'intercept' means to acquire the contents of a communication in the course of its transmission to a party to the communication or before its receipt by the intended recipient, and includes the acquisition of such contents by simultaneous transmission or by recording;

"(e) 'private correspondence' means a communication, other than speech, sent by a person exhibiting an expectation, under circumstances reasonably justifying the expectation, that such communication is not subject to being intercepted, opened, or read, other than by an agent of a communications common carrier acting in the usual course of the business of such carrier, until received by the intended recipient, and includes telecom-

munications and mail other than a post card, postal card, newspaper, magazine, circular, or advertising matter;

"(f) 'private oral communication' means speech uttered by a person exhibiting an expectation, under circumstances reasonably justifying the expectation, that such speech is not subject to overhearing;

"(g) 'record' means to register sound by an electronic, mechanical, or other device in a manner that will permit its reproduction.

"Chapter 16.--OFFENSES INVOLVING THE PERSON

"Subchapter A.—Homicide Offenses

"§ 1601. Murder

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) he engages in conduct by which he knowingly causes the death of another person;

"(2) he engages in conduct by which he causes the death of another person under circumstances in fact manifesting extreme indifference to human life; or

"(3) in fact during the commission of an offense described in section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1111 (Sabotage), 1121 (Espionage), 1313 (Escape), 1601(a)(1) or (a)(2) (Murder), 1611 (Maiming), 1621 (Kidnapping), 1622 (Aggravated Restraint), 1631 (Aircraft Hijacking), 1641 (Rape), 1701 (Arson), 1711 (Burglary), or 1721 (Robbery) that he commits either alone or with one or more other participants, he or another person engages in conduct that in fact causes the death of a person other than one of the participants in such underlying offense.

"(b) DEFENSE.—It is a defense to a prosecution under subsection (a)(1) that the death was caused under circumstances, for which the defendant was not responsible, that:

"(1) caused the defendant to lose his self-control; and

"(2) would be likely to cause an ordinary person to lose his self-control to at least the same extent.

"(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(3) that the death was not a reasonably foreseeable consequence of:

"(1) the underlying offense; or

"(2) the particular circumstances under which the underlying offense was committed.

"(d) GRADING.—An offense described in this section is a Class A felony.

"(e) JURISDICTION.—There is a federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the offense is committed against:

"(A) a United States official;

"(B) a federal public servant who is engaged in the performance of his official duties and who is a judge, a juror, a law enforcement officer, an employee of an official detention facility, an employee of the United States Probation Service, or a person designated for coverage under this section in regulations issued by the Attorney General;

"(C) a foreign dignitary, or a member of his immediate family, who is in the United States;

"(D) a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with the visit of such official; or

"(E) an official guest of the United States; or

"(F) an internationally protected person;

"(3) the offense is committed by transmitting a dangerous weapon through the United States mail; or

"(4) the offense occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1111 (Sabotage), 1112 (Impairing Military Effectiveness), 1121 (Espionage), 1302 (Obstructing a Government Function by Physical Interference), 1313 (Escape), 1323 (Tampering with a Witness or an Informant), 1324 (Retaliating against a Witness or an Informant), 1357 (Tampering with a Public Servant), 1358 (Retaliating against a Public Servant), 1501 (Interfering with Civil Rights), 1502 (Interfering with Civil Rights under Color of Law), 1503

(Interfering with a Federal Benefit), 1504 (Unlawful Discrimination), 1505 (Interfering with Speech or Assembly Related to Civil Rights Activities), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1631 (Aircraft Hijacking), 1701 (Arson), 1702 (Aggravated Property Destruction), 1711 (Burglary), 1712 (Criminal Entry), 1713 (Criminal Trespass), 1721 (Robbery), 1722 (Extortion), or 1804 (Loansharking).

"§ 1602. Manslaughter

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) he engages in conduct by which he causes the death of another person; or

"(2) he engages in conduct by which he knowingly causes the death of another person under circumstances that would constitute an offense under section 1601(a)(1) except for the existence of circumstances in fact constituting a defense under section 1601(b).

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1601(e) exists or has occurred.

"§ 1603. Negligent Homicide

"(a) OFFENSE.—A person is guilty of an offense if he engages in conduct by which he negligently causes the death of another person.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1601(e) exists or has occurred.

"Subchapter B.—Assault Offenses

"§ 1611. Maiming

"(a) OFFENSE.—A person is guilty of an offense if, by physical force, he intentionally causes serious bodily injury, that is permanent or likely to be permanent, to another person.

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the offense is committed against:

"(A) a United States official;

"(B) a federal public servant who is engaged in the performance of his official duties and who is a judge, a juror, a law enforcement officer, an employee of an official detention facility, an employee of the United States Probation Service, or a person designated for coverage under this section in regulations issued by the Attorney General;

"(C) a foreign dignitary, or a member of his immediate family, who is in the United States;

"(D) a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with the visit of such official; or

"(E) an official guest of the United States; or

"(F) an internationally protected person;

"(3) the offense is committed by transmitting through the United States mail a dangerous weapon; or

"(4) the offense occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1111 (Sabotage), 1112 (Impairing Military Effectiveness), 1121 (Espionage), 1302 (Obstructing a Government Function by Physical Interference), 1313 (Escape), 1323 (Tampering with a Witness or an Informant), 1324 (Retaliating against a Witness or an Informant), 1357 (Tampering with a Public Servant), 1358 (Retaliating against a Public Servant), 1501 (Interfering with Civil Rights), 1502 (Interfering with Civil Rights under Color of Law), 1503 (Interfering with a Federal Benefit), 1504 (Unlawful Discrimination), 1505 (Interfering with Speech or Assembly Related to Civil Rights Activities), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1631 (Aircraft Hijacking), 1701 (Arson), 1702 (Aggravated Property Destruction), 1711 (Burglary), 1712 (Criminal Entry), 1713 (Criminal Trespass), 1721 (Robbery), 1722 (Extortion), or 1804 (Loansharking).

"§ 1612. Aggravated Battery

"(a) OFFENSE.—A person is guilty of an offense if, by physical force, he causes serious bodily injury to another person.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1611(c) exists or has occurred.

"§ 1613. Battery

"(a) OFFENSE.—A person is guilty of an offense if, by physical force, he causes bodily injury to another person.

"(b) GRADING.—An offense described in this section is:

"(1) a Class A misdemeanor unless it is committed in the course of an unarmed fight or affray that was entered into mutually;

"(2) a Class C misdemeanor in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1611 (c)(1), (c)(2), or (c)(3) exists or has occurred.

"§1614. Menacing

"(a) OFFENSE.—A person is guilty of an offense if he engages in physical conduct by which he intentionally places another person in fear of imminent bodily injury.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1611(c)(1) or (c)(2) existed or has occurred.

"§ 1615. Terrorizing

"(a) OFFENSE.—A person is guilty of an offense if he communicates:

"(1) a threat to commit, or to continue to commit, a crime of violence or unlawful conduct dangerous to human life; or

"(2) information, that he knows to be false, that the commission of a crime of violence is imminent or in progress or that a circumstance dangerous to human life exists or is about to exist;

and thereby causes any person to be in sustained fear for his or another person's safety; causes evacuation of a building, a public structure, or a facility of transportation; or causes other serious disruption to the public.

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony in the circumstances set forth in subsection (a)(1) if it causes any person to be in sustained fear that he or another will be killed, maimed, kidnaped, or raped;

"(2) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) a circumstance specified in section 1611(c) exists or has occurred;

"(2) the United States mail is used in the commission of the offense;

"(3) the threat or information is transmitted in interstate or foreign commerce;

"(4) the threat or information concerns property that is owned by, or is under the care, custody, or control of, a public facility that operates in interstate or foreign commerce; or

"(5) the threat or information concerns property that is owned by, or is under the care, custody, or control of, the United States.

"§1616. Communicating a Threat

"(a) OFFENSE.—A person is guilty of an offense if, with intent to alarm or harass another person, he communicates:

"(1) a threat to commit or to continue to commit a crime of violence, or unlawful conduct dangerous to human life; or

"(2) information, that he knows to be false, that the commission of a crime is imminent or in progress or that a circumstance dangerous to human life exists or is about to exist.

"(b) GRADING.—An offense described in this section is:

"(1) a Class A misdemeanor if the threat or information concerns a crime, conduct, or circumstance dangerous to human life;

"(2) a Class B misdemeanor in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) a circumstance specified in section 1615 (c)(2), (c)(3), (c)(4), or (c)(5) exists or has occurred; or

"(2) the offense is committed within the special jurisdiction of the United States.

"§ 1617. Reckless Endangerment

"(a) OFFENSE.—A person is guilty of an offense if he engages in conduct by which he places or may place another person in danger of death or serious bodily injury.

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony if the circumstances manifest extreme indifference to human life;

"(2) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States; or

"(2) the offense occurs during the commission of any other offense over which federal jurisdiction exists.

"§ 1618. General Provisions for Subchapter B

"(a) DEFINITION.—As used in this subchapter, 'public structure' means a structure, whether or not enclosed, where persons assemble for purposes of government, an occupation or a business or a profession, education, religion, or entertainment.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under:

"(1) section 1613 or 1614 that the conduct charged was consented to by the person injured or placed in fear; and

"(2) section 1611, 1612, or 1617 that the conduct charged was consented to by the person injured or endangered and that the injury and conduct charged were:

"(A) reasonably foreseeable hazards of joint participation by the actor and such other person in a lawful athletic contest or competitive sport; or

"(B) reasonably foreseeable hazards of:

"(i) an occupation, a business, or a profession; or

"(ii) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

"Subchapter C.—Kidnapping and Related Offenses

"Sec.
"1621. Kidnapping.
"1622. Aggravated Criminal Restraint.
"1623. Criminal Restraint.
"1624. General Provisions for Subchapter C.

"§ 1621. Kidnapping

"(a) OFFENSE.—A person is guilty of an offense if he restrains another person with intent to:

"(1) hold him for ransom or reward;

"(2) use him as a shield or hostage;

"(3) commit a felony; or

"(4) interfere with the performance of a government function.

"(b) GRADING.—An offense described in this section is:

"(1) a Class A felony if the actor does not voluntarily release the victim alive and in a safe place prior to trial;

"(2) a Class C felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the offense is committed against:

"(A) a United States official;

"(B) a federal public servant who is engaged in the performance of his official duties and who is a judge, a juror, a law enforcement officer, an employee of an official detention facility, an employee of the United States Probation Service, or a person designated for coverage under this section in regulations issued by the Attorney General;

"(C) a foreign dignitary or a member of his immediate family, who is in the United States;

"(D) a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with the visit of such official; or

"(E) an official guest of the United States; or

"(F) an internationally protected person;

"(3) movement of the victim across a state or United States boundary occurs in the commission of the offense; or

"(4) the offense occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1111 Sabotage), 1121 (Espionage), 1203 (Entering or Recruiting for a Foreign Armed Force), 1213 (Hindering Discovery of an Alien Unlawfully in the United States), 1302 (Obstructing a Government Function by Physical Interference), 1313 (Escape), 1323 (Tampering with a Witness or an Informant), 1324 (Retaliating against a Witness or an Informant), 1357 (Tampering with a Public Servant), 1358 (Retaliating against a Public Servant), 1501 (Interfering with Civil Rights), 1502 (Interfering with Civil Rights under Color of Law), 1503 (Interfering with a Fed-

eral Benefit), 1504 (Unlawful Discrimination), 1505 (Interfering with Speech or Assembly Related to Civil Rights Activities), 1701 (Arson), 1702 (Aggravated Property Destruction), 1711 (Burglary), 1712 (Criminal Entry), 1713 (Criminal Trespass), 1721 (Robbery), 1722 (Extortion), or 1804 (Loansharking).

"§ 1622. Aggravated Criminal Restraint

"(a) OFFENSE.—A person is guilty of an offense if he restrains another person:

"(1) under circumstances that in fact expose him to a risk of serious bodily injury;

"(2) by secreting and holding him in a place where he is not likely to be found;

"(3) by endangering or threatening to endanger the safety of any person; or

"(4) by holding him in a condition of involuntary servitude, slavery, or peonage.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in:

"(1) subsection (a)(1), (a)(2), or (a)(3), if a circumstance specified in secton 1621(c) exists or has occurred;

"(2) subsection (a)(4), if the offense is committed within the general jurisdiction of the United States or within the special jurisdiction of the United States.

"§ 1623. Criminal Restraint

"(a) OFFENSE.—A person is guilty of an offense if he restrains another person.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1621(c)(1), (c)(2), or (c)(3) exists or has occurred.

"§ 1624. General Provisions for Subchapter C

"(a) DEFINITIONS.—As used in this subchapter:

"(1) 'consent' does not include assent given by the victim if in fact he is less than fourteen years old or is incompetent and if his parent, guardian, or other person responsible for his welfare, has not acquiesced in the movement or confinement;

"(2) 'restrain' means to restrict the movement of a person unlawfully and without consent, so as to interfere with his liberty, by:

"(A) removing him from his place of residence or business; or

"(B) confining him in any place or moving him from one place to another, unless such confinement or movement is trivial.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under sections 1621 through 1623 that the actor is a parent or guardian of the person restrained and that the person restrained is less than eighteen years old.

"Subchapter D.—Hijacking Offenses

"§ 1631. Aircraft Hijacking

"(a) OFFENSE.—A person is guilty of an offense if he seizes or exercises control over an aircraft by force, threat, intimidation, or deception.

"(b) GRADING.—An offense described in this section is a Class B felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special aircraft jurisdiction of the United States; or

"(2) the offense is committed, by means other than deception, outside the special aircraft jurisdiction of the United States, and:

"(A) the offense is committed aboard an aircraft 'in flight', as defined in section 203(c);

"(B) the place of take-off or the place of landing of the aircraft is situated outside the territory of the nation in which the aircraft is registered; and

"(C) the actor is afterwards found in the United States.

"§ 1632. Commandeering a Vessel

"(a) OFFENSE.—A person is guilty of an offense if he seizes or exercises control over a vessel by force, threat, intimidation, or deception.

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony if the defendant is a member of the crew of the vessel or the offense is committed on the high seas;

"(2) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the offense is committed within the special maritime jurisdiction of the United States.

"Subchapter E.—Sex Offenses

"§ 1641. Rape

"(a) OFFENSE.—A person is guilty of an offense if he engages in a sexual act with another person who is not his spouse, and:

"(1) compels the other person to participate in such act:

"(A) by force; or

"(B) by threatening or placing the other person in fear that any person will imminently be subjected to death, serious bodily injury, or kidnapping;

"(2) has substantially impaired the ability of the other person to appraise or control conduct by administering or employing a drug or intoxicant, or by other means, without the knowledge or against the will of such other person; or

"(3) the other person is, in fact, less than twelve years old.

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States; or

"(2) the offense occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1323 (Tampering with a Witness or an Informant), 1324 (Retaliating against a Witness or an Informant), 1357 (Tampering with a Public Servant), 1358 (Retaliating against a Public Servant), 1501 (Interfering with Civil Rights), 1502 (Interfering with Civil Rights under Color of Law), 1601 (Murder), 1602 (Manslaughter), 1611 (Maiming), 1612 (Aggravated Battery), 1613 (Battery), 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1623 (Criminal Restraint), 1631 (Aircraft Hijacking), 1644 (Sexual Abuse of a Ward), 1711 (Burglary), 1712 (Criminal

Entry), 1713 (Criminal Trespass), 1721 (Robbery), 1722 (Extortion), or 1843 (Conducting a Prostitution Business).

"§ 1642. Sexual Assault

"(a) OFFENSE.—A person is guilty of an offense if he engages in a sexual act with another person who is not his spouse, and:

"(1) knows that the other person is incapable of understanding the nature of the conduct;

"(2) knows that the other person is physically incapable of resisting, or of declining consent to, the sexual act;

"(3) knows that the other person is unaware that a sexual act is being committed;

"(4) knows that the other person participates because of a mistaken belief that the actor is married to the other person; or

"(5) compels the other person to participate by any threat or by placing the other person in fear.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the offense is committed:

"(1) within the special jurisdiction of the United States;

"(2) in the circumstances set forth in subsection (a)(1), (a)(2), or (a)(3), and occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1623 (Criminal Restraint), 1644 (Sexual Abuse of a Ward), 1711 (Burglary), 1712 (Criminal Entry), 1713 (Criminal Trespass), or 1843 (Conducting a Prostitution Business); or

"(3) in the circumstances set forth in subsection (a)(5), and a circumstance specified in section 1641(c)(2) exists or has occurred.

"§ 1643. Sexual Abuse of a Minor

"(a) OFFENSE.—A person is guilty of an offense if he engages in a sexual act with another person who is not his spouse, who in fact is less than sixteen years old, and who in fact is at least five years younger than the actor.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that the actor reasonably believed the other person to be sixteen years old or older.

"(c) GRADING.—An offense described in this section is:

"(1) a Class E felony if the actor is twenty-one years old or older;

"(2) a Class A misdemeanor in any other case.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States; or

"(2) the offense occurs during the commission of an offense over which federal jurisdiction exists, that is described in section 1621 (Kidnapping), 1622 (Aggravated Criminal Restraint), 1623 (Criminal Restraint), 1644 (Sexual Abuse of a Ward), 1711 (Burglary), 1712 (Criminal Entry), 1713 (Criminal Trespass), or 1843 (Conducting a Prostitution Business).

"§ 1644. Sexual Abuse of a Ward

"(a) OFFENSE.—A person is guilty of an offense if he engages in a sexual act with another person who is not his spouse, who is in official detention, and who is under the custodial, supervisory, or disciplinary authority of the actor.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the official detention is under the laws of the United States;

"(3) the official detention is in a federal facility; or

"(4) the actor is a federal public servant.

"§ 1645. Unlawful Sexual Contact

"(a) OFFENSE.—A person is guilty of an offense if he engages in sexual contact with another person who is not his spouse, or causes such other person to engage in sexual contact with him, under circumstances that would constitute an offense under section 1641, 1642, 1643, or 1644 if such contact involved a sexual act.

"(b) GRADING.—An offense described in this section is of a class two grades below that of the corresponding offense in section 1641, 1642, 1643, or 1644.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if there would be federal jurisdiction over the corresponding offense described in section 1641, 1642, 1643, or 1644.

"§ 1646. General Provisions for Subchapter E

"(a) DEFINITIONS.—As used in this subchapter:

"(1) 'sexual act' means conduct between human beings consisting of contact between the penis and the vulva, the penis and the

anus, the mouth and the penis, or the mouth and the vulva; for purposes of this paragraph, contact involving the penis occurs upon penetration, however slight;

"(2) 'sexual contact' means a touching of the sexual or other intimate parts of a person to arouse or gratify the sexual desire of any person;

"(3) 'spouse' means a person with whom the actor is living as husband and wife, regardless of the legal status of their relationship, and does not include a husband or wife living apart under a judicial decree of separation.

"(b) PROOF.—In a prosecution under section 1641 through 1645:

"(1) corroboration of the victim's testimony is not required; and

"(2) except as otherwise required by the Constitution, evidence relating to the victim's prior or subsequent sexual behavior is not admissible.

"Chapter 17.—OFFENSES INVOLVING PROPERTY

"Subchapter A.—Arson and Other Property Destruction Offenses

"§ 1701. Arson

"(a) OFFENSE.—A person is guilty of an offense if, by fire or explosion, he:

"(1) damages a public facility; or

"(2) damages substantially a building or a public structure.

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the property that is the subject of the offense is owned by, or is under the care, custody, or control of, the United States; is

being produced, manufactured, constructed, or stored for the United States; or is subject to a security interest held by the United States;

"(3) the property that is the subject of the offense is located within the United States and is owned by, or is under the care, custody, or control of:

"(A) a foreign power;

"(B) a foreign dignitary, or a member of his immediate family, who is in the United States;

"(C) a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with the visit of such official; or

"(D) an official guest of the United States; or

"(E) an internationally protected person;

"(4) the property that is the subject of the offense is moving in interstate or foreign commerce, or constitutes or is a part of an interstate or foreign shipment;

"(5) the property that is the subject of the offense is used in an activity affecting interstate or foreign commerce, and is damaged by a destructive device;

"(6) the property that is the subject of the offense is owned by, or is under the care, custody, or control of, an organization receiving financial assistance from the United States, and is damaged by a destructive device;

"(7) the property that is the subject of the offense is owned by, or is under the care, custody, or control of, a public facility that operates in interstate or foreign commerce;

"(8) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense;

"(9) movement of a person across a state or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(10) the offense occurs during the commission of an offense, over which federal jurisdiction exists, that is described in section 1302 (Obstructing a Government Function by Physical Interference), 1313 (Escape), 1323 (Tampering with a Witness or an In-

formant), 1324 (Retaliating against a Witness or an Informant), 1357 (Tampering with a Public Servant), 1358 (Retaliating against a Public Servant), 1501 (Interfering with Civil Rights), 1502 (Interfering with Civil Rights under Color of Law), 1503 (Interfering with a Federal Benefit), 1504 (Unlawful Discrimination), 1505 (Interfering with Speech or Assembly Related to Civil Rights Activities); 1722 (Extortion); or 1804 (Loansharking).

"§ 1702. Aggravated Property Destruction

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) damages a public facility;

"(2) damages property and thereby causes a significant interruption or impairment of a function of a public facility; or

"(3) damages property in an amount that in fact exceeds $500.

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony:

"(A) in the circumstances set forth in subsection (a)(1) or (a)(2); or

"(B) in the circumstances set forth in subsection (a)(3) if the damage exceeds $100,000;

"(2) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) a circumstance specified in section 1701(c) exists or has occurred; or

"(2) the property is mail.

"§ 1703. Property Destruction

"(a) OFFENSE.—A person is guilty of an offense if he damages property.

"(b) GRADING.—An offense described in this section is:

"(1) a Class A misdemeanor if:

"(A) the damage exceeds $100; or

"(B) the property is mail other than a newspaper, magazine, advertising matter, or circular;

"(2) a Class B misdemeanor in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) a circumstance specified in section 1701(c)(1) through (c)(9) exists or has occurred; or

"(2) the property is mail.

"§ 1704. General Provisions for Subchapter A

"(a) DEFINITION.—As used in this subchapter, 'public structure' means a structure, whether or not enclosed, where persons assemble for purposes of government, an occupation or a business or a profession, education, religion, or entertainment.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under section 1701, 1702, or 1703 that the actor believed that his conduct was consented to by all holders of a legal interest in all property damaged and that he was not reckless in so believing.

"(c) PROOF.—In a prosecution under section 1701, 1702, or 1703, in establishing that property constitutes or is part of an interstate or foreign shipment within the meaning of section 1701(c)(4), proof of the designation in a way bill or other shipping document of the places from which and to which a shipment was made creates a presumption that the property was shipped or was being shipped as indicated by such document.

"Subchapter B.—Burglary and Other Criminal Intrusion Offenses

"§ 1711. Burglary

"(a) OFFENSE.—A person is guilty of an offense if at night, with intent to engage in conduct constituting a crime other than a crime set forth in this subchapter, and without privilege, he enters or remains surreptitiously within, a dwelling that is the property of another.

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the dwelling is owned by, or is under the care, custody, or control of, the United States; or

"(3) the dwelling is located within the United States and is owned by, or is under the care, custody, or control of:

"(A) a foreign power;

"(B) a foreign dignitary who is in the United States; or

"(C) an official guest of the United States.

"§ 1712. Criminal Entry

"(a) OFFENSE.—A person is guilty of an offense if, with intent to engage in conduct constituting a crime other than a crime set forth in this subchapter, and without privilege, he enters or remains surrepetitiously within, a building or vehicle that is the property of another.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the building or vehicle is owned by, or is under the care, custody, or control of, the United States;

"(3) the building contains a United States post office or postal facility, and, if the actor's entering or remaining was in a part of the building other than that in which the post office was located, the conduct intended would have affected the post office itself or something therein;

"(4) the building contains a national credit institution, and, if the actor's entering or remaining was in a part of the building other than that in which the credit institution was located, the conduct intended would have affected the credit institution itself or something therein;

"(5) the vehicle contains mail, or property that is moving in interstate or foreign commerce, or property that constitutes or is a part of an interstate or foreign shipment; or

"(6) the building or vehicle is located within the United States and is owned by, or is under the care, custody, or control of:

"(A) a foreign power;

"(B) a foreign dignitary who is in the United States; or

"(C) an official guest of the United States.

"§ 1713. Criminal Trespass

"(a) OFFENSE.—A person is guilty of an offense if, knowing that he is not privileged to do so, he enters, or remains within or on, premises that are the property of another.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that the actor's conduct was consented to by a holder of a possessory interest in the premises.

"(c) GRADING.—An offense described in this section is:

"(1) a Class A misdemeanor if the premises are highly secured government premises, or consist of a dwelling;

"(2) a Class B misdemeanor if the premises are so enclosed or secured as manifestly to exclude intruders, or consist of a building other than a dwelling;

"(3) a Class C misdemeanor if the premises consist of a place as to which notice prohibiting trespass is:

"(A) communicated to the actor by a person in charge of the premises or by another authorized person; or

"(B) posted in a manner reasonably likely to come to the attention of intruders;

"(4) an infraction in any other case.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the premises are owned by, or are under the care, custody, or control of, the United States;

"(3) the premises are located within the United States and are owned by, or are under the care, custody, or control of:

"(A) a foreign power;

"(B) a foreign dignitary who is in the United States; or

"(C) an official guest of the United States;

"(4) the premises consist of a vehicle that contains mail, or property that is moving in interstate or foreign commerce, or property that constitutes or is a part of an interstate or foreign shipment; or

"(5) the premises consist of public domain land, National Park System land, or National Wildlife Refuge System land, that has been closed to the public pursuant to a regulation issued by the Secretary of the Interior, or consist of national forest land that has been closed to the public pursuant to a regulation issued by the Secretary of Agriculture.

"§ 1714. Stowing Away

"(a) OFFENSE.—A person is guilty of an offense if, with intent to obtain transportation, he secretes himself aboard a vessel or aircraft that is the property of another and he is aboard the vessel or aircraft when it leaves the point of embarkation.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States; or

"(2) movement of the actor across a state or United States boundary occurs in the commission of the offense.

"§ 1715. Possessing Burglar's Tools

"(a) OFFENSE.—A person is guilty of an offense if, with intent that it be used in the course of conduct constituting an offense under section 1711, 1712, 1713, or 1714, he possesses an object that is designed for, or commonly used for, the facilitation of a forcible entry in the course of such an offense.

"(b) GRADING.—An offense described in this section is a Class A misdemeanor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the offense is committed within the special jurisdiction of the United States.

"§ 1716. Definitions for Subchapter B

"As used in this subchapter:

"(a) 'highly secured' premises means continuously guarded premises where display of visible identification is required of persons while they are on the premises;

"(b) 'night' means the period between thirty minutes after sunset and thirty minutes before sunrise;

"(c) 'premises' includes a building, a structure, other real property, and a vehicle.

"Subchapter C.—Robbery, Extortion, and Blackmail

"Sec.
"1721. Robbery.
"1722. Extortion.
"1723. Blackmail.
"1724. General Provisions for Subchapter C.

"§ 1721. Robbery

"(a) OFFENSE.—A person is guilty of an offense if he takes property of another from the person or presence of another by force and violence, or by threatening or placing another person in fear that any person will imminently be subjected to bodily injury.

"(b) GRADING.—An offense described in this section is a Class C felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the property is owned by, or is under the care, custody, or control of, the United States; is being produced, manufactured, constructed, or stored for the United States; or is subject to a security interest held by the United States;

"(3) the property is owned by, or is under the care, custody, or control of, a national credit institution;

"(4) the property is mail;

"(5) the offense in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of an article or commodity in interstate or foreign commerce;

"(6) the property is moving in interstate or foreign commerce, constitutes or is a part of an interstate or foreign shipment, or is in a pipeline system that extends across a state or United States boundary or in a storage facility of such a system;

"(7) movement of a person across a state or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(8) the offense is committed against:

"(A) a foreign dignitary, or a member of his immediate family, who is in the United States;

"(B) a foreign official who is in the United States on official business, or a member of his immediate family who is in the United States in connection with the visit of such official; or

"(C) an official guest of the United States.

"§ 1722. Extortion

"(a) OFFENSE.—A person is guilty of an offense if he obtains property of another:

"(1) by threatening or placing another person in fear that any person will be subjected to bodily injury or kidnapping or that any property will be damaged; or

"(2) under color of official right.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under subsection (a)(1) that the threatened or feared in-

jury or damage was minor and was incidental to peaceful picketing or other concerted activity in the course of a bona fide labor dispute.

"(c) GRADING.—An offense described in this section is:

"(1) a Class C felony in the circumstances set forth in subsection (a)(1);

"(2) a Class E felony in the circumstances set forth in subsection (a)(2).

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) a circumstance specified in section 1721(c) exists or has occurred;

"(2) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense;

"(3) the offense is committed by a federal public servant acting under color of office;

"(4) the offense is committed by a person pretending to be a federal public servant, a former federal public servant, or a foreign official;

"(5) the offense is committed to collect an extension of credit, as defined in section 1806(c);

"(6) the property consists of any part of the compensation of a person employed in the construction, completion, repair, or refurbishing of a federal public building, federal public work, or building financed in whole or in part by a loan or grant from the United States, and is obtained by threatening or placing any person in fear in relation to that person's employment; or

"(7) the property is obtained by threatening or placing a person in fear in relation to any person's employment under a grant or contract of assistance pursuant to the Economic Opportunity Act of 1964, as amended (42 U.S.C. 2701 et seq.).

"§ 1723. Blackmail

"(a) OFFENSE.—A person is guilty of an offense if he obtains property of another by threatening or placing another person in fear that any person will:

"(1) engage in conduct constituting a crime other than a crime described in section 1722;

"(2) accuse any person of a crime;

"(3) procure the dismissal of any person from employment, or refuse to employ or renew a contract of employment of any person;

"(4) improperly subject any person to economic loss or injury to his business or profession;

"(5) expose a secret or publicize an asserted fact, whether true or false, with intent to subject any person, living or dead, to hatred, contempt, or ridicule, or to impair his personal, financial, professional, or business reputation; or

"(6) take or withhold official action as a public servant, or cause a public servant to take or withhold official action.

"(b) DEFENSE.—It is a defense to a prosecution under this section, other than a prosecution under subsection (a)(1), that the defendant:

"(1) reasonably believed his conduct to be justified; and

"(2) intended solely to compel or induce the other person to take lawful and reasonable action to prevent or remedy the asserted wrong that prompted the defendant's conduct; and

"(3) with respect to an offense under subsection (a)(2), reasonably believed that the threatened accusation was true.

"(c) GRADING.—An offense described in this section is:

"(1) a Class C felony if the property has a value in excess of $100,000;

"(2) a Class D felony if:

"(A) the property has a value in excess of $500 but not more than $100,000; or

"(B) regardless of its monetary value, the property consists of:

"(i) a firearm, ammunition, or a destructive device;

"(ii) a vehicle;

"(iii) a record or other document owned by, or under the care, custody, or control of, the United States;

"(iv) a counterfeiting implement designed for the making of a written instrument of the United States;

"(v) a key or other implement designed to provide access to mail or to property owned by, or under the care, custody, or control of, the United States; or

"(vi) mail other than a newspaper, magazine, circular, or advertising matter;

"(3) a Class A misdemeanor if the property has a value in excess of $100 but not more than $500;

"(4) a Class B misdemeanor in any other case.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) a circumstance specified in section 1721(c) or section 1722 (c)(2) through (c)(7) exists or has occurred;

"(2) the fear in subsection (a)(1) or (a)(2) involves a federal crime; or

"(3) the fear in subsection (a)(6) involves federal official action.

"§ 1724. General Provisions for Subchapter C

"(a) DEFINITIONS.—As used in this subchapter:

"(1) 'counterfeiting implement' has the meaning set forth in section 1746(b);

"(2) 'written instrument" has the meaning set forth in section 1746(i).

"(b) PROOF.—In a prosecution under section 1722 or 1723(a)(1), (a)(3), or (a)(4), for the purpose of showing that words or other methods of communication employed as a means of obtaining the property in fact carried a threat, the court may permit the introduction of evidence concerning the reputation of the defendant in any community of which the victim was a member at the time of the offense charged.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under section 1722 or 1723 that the defendant, by the same conduct, also committed an offense described in section 1321 (Witness Bribery), 1322 (Corrupting a Witness or an Informant), 1351 (Bribery), 1352 (Graft), 1353 (Trading in Government Assistance), 1354 (Trading in Special Influence), 1355 (Trading in Public Office), or 1731 (Theft).

"Subchapter D.—Theft and Related Offenses

"Sec.
"1731. Theft.
"1732. Trafficking in Stolen Property.
"1733. Receiving Stolen Property.
"1734. Executing a Fraudulent Scheme.
"1735. Bankruptcy Fraud.
"1736. Interfering with a Security Interest.
"1737. Fraud in a Regulated Industry.
"1738. General Provisions for Subchapter D.

"§ 1731. Theft

"(a) OFFENSE.—A person is guilty of an offense if he obtains or uses the property of another with intent:

"(1) to deprive the other of a right to the property or a benefit of the property; or

"(2) to appropriate the property to his own use or to the use of another person.

"(b) GRADING.—An offense described in this section is:

"(1) a Class C felony if the property has a value in excess of $100,000;

"(2) a Class D felony if:

"(A) the property has a value in excess of $500 but not more than $100,000; or

"(B) regardless of its monetary value, the property consists of:

"(i) a firearm, ammunition, or a destructive device;

"(ii) a vehicle, except as provided in paragraph (4);

"(iii) a record or other document owned by, or under the care, custody, or control of, the United States;

"(iv) a counterfeiting or forging implement designed for the making of a written instrument of the United States;

"(v) a key or other implement designed to provide access to mail or to property owned by, or under the care, custody, or control of, the United States; or

"(vi) mail other than a newspaper, magazine, circular, or advertising matter;

"(3) a Class A misdemeanor if the property has a value in excess of $100 but not more than $500;

"(4) a Class B misdemeanor if:

"(A) the property has a value of $100 or less; or

"(B) the property is a motor vehicle or a vessel, the defendant is less than eighteen years old, and the defendant's intent involved deprivation or appropriation of a temporary rather than a permanent nature.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the property is owned by, or is under the care, custody, or control of, the United States; is being produced, manufactured, constructed, or stored for the United States; or is subject to a security interest held by the United States;

"(3) the offense is committed by a federal public servant acting under color of office;

"(4) the offense is committed by a person pretending to be a federal public servant, a former federal public servant, or a foreign official;

"(5) the property is obtained upon a representation that it will be used to cause a federal public servant to take or withhold official action;

"(6) the property has a value of $2,500 or more and is obtained through the use of one or more counterfeited, fictitious, altered, forged, lost, or stolen credit cards in a transaction or series of transactions affecting interstate or foreign commerce;

"(7) the property is mail;

"(8) the property is moving in interstate or foreign commerce, constitutes or is a part of an interstate or foreign shipment, or is in a pipeline system that extends across a state or United States boundary or in a storage facility of such a system;

"(9) the property has a value of $5,000 or more, or is a vehicle, and is moved across a state or United States boundary in the commission of the offense;

"(10) the property is owned by, or is under the care, custody, or control of, a national credit institution;

"(11) the offense is committed by a misrepresentation of United States ownership, guarantee, insurance, or other interest of the United States with respect to the property involved;

"(12) the offense is committed by impersonation of a creditor of the United States;

"(13) the property: (A) is owned by, or is under the care, custody, or control of, an Indian tribe, band, community, group, or pueblo that is subject to a federal statute relating to Indian affairs, or a corporation, association, or group organized under any such statute; or (B) is the subject of a grant, subgrant, contract, or subcontract pursuant to the Indian Self-Determination and Education Assistance Act (88 Stat. 2203) or the Act of April 16, 1934, as amended (25 U.S.C. 452 et seq.), and the offense is committed by an agent of a recipient of such a grant, subgrant, contract, or subcontract;

"(14) the property is owned by, or is under the care, custody, or control of, an employee benefit plan subject to a provision of title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.);

"(15) the property is owned by, or is under the care, custody, or control of, a trust fund established by an employer or by an employee organization as defined in section 3(4) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(4)) to provide a benefit to the members of an employee organization or to their families;

"(16) the property is owned by, or is under the care, custody, or control of, a labor organization as defined in section 3(i) and (j) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 402(i) and (j)), and the offense is committed by an officer, member, or employee of, or a person connected in any capacity with, such organization;

"(17) the offense is committed in connection with a loan, advance of credit, or mortgage insured by the United States Department of Housing and Urban Development;

"(18) the offense is committed by an agent or receiver of, or a person connected in any capacity with, a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958, as amended (15 U.S.C. 662), and the property is owned by, or is under the care, custody, or control of, such small business investment company;

"(19) the property is owned by, or is under the care, custody, or control of, a registered investment company, as defined in section 3(a) of the Investment Company Act of 1940, as amended (15 U.S.C. 80a-3(a));

"(20) the offense is committed by a futures commission merchant as defined in section 2(a) of the Commodity Exchange Act, as amended (7 U.S.C. 2), or by an agent thereof, and (A) the property is that of a customer and is received by such futures commission merchant to margin, guarantee, or secure trades or contracts of any customer; or (B) the property has accrued to a customer as the result of trades or contracts;

"(21) the property is owned by, or is under the care, custody, or control of, an organization engaged in interstate commerce as a common carrier, and the offense is committed (A) by a president, director, officer, or manager of such common carrier; or (B) by an agent of such common carrier riding in a vehicle of such common carrier that is moving in interstate commerce;

"(22) the offense is committed by an agent of, or a person connected in any capacity with, an agency receiving financial assist-

ance under the Economic Opportunity Act of 1964, as amended (42 U.S.C. 2701 et seq.), and the property is the subject of a grant or contract of assistance pursuant to such Act;

"(23) the property consists of any part of the compensation of a person employed in the construction, completion, repair, or refurbishing of a federal public building, federal public work, or building financed in whole or in part by a loan or grant from the United States, and is obtained or retained by fraud in relation to that person's employment;

"(24) the offense is committed by a trustee, receiver, custodian, marshal, or other court officer and the property consists of a part of the estate of a bankrupt against whom a petition has been filed under the Bankruptcy Act of 1898, as amended (11 U.S.C. 1 et seq.);

"(25) the property consists of a part of a grant, contract, or other form of assistance received, directly or indirectly, from the Law Enforcement Assistance Administration, pursuant to title I of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (42 U.S.C. 3701 et seq.);

"(26) the property (A) consists of a coupon, or of an authorization to purchase card, defined in section 3(c) and (m) of the Food Stamp Act of 1964, as amended (7 U.S.C. 2012(c) and (m)); or (B) is obtained by the use of such a coupon that has been obtained in violation of this section, that has been counterfeited in violation of section 1741, or that has been forged in violation of section 1742;

"(27) the property consists of agricultural products stored or to be stored in a licensed warehouse pursuant to the United States Warehouse Act (7 U.S.C. 241 et seq.), and licensed receipts have been or are to be issued for such products;

"(28) the property consists of money paid under a law administered by the Veterans' Administration for the benefit of a minor, an incompetent, or another beneficiary, and the offense is committed by a fiduciary of such beneficiary;

"(29) the property consists of money, a security, or another asset of the Securities Investor Protection Corporation;

"(30) the property consists of a note, stock certificate, treasury stock certificate, bond, debenture, or interest coupon, or a blank certificate of any of the foregoing, and is under the care, custody,

or control of a member of, or an organization insured by, the Securities Investor Protection Corporation; or

"(31) the property is a payment made pursuant to section 801 of the Presidential Election Campaign Fund Act, as amended (26 U.S.C. 9001 et seq.) or pursuant to section 9037 of the Presidential Primary Matching Payment Account Act (26 U.S.C. 9037), and the offense is committed by a person to whom such payment is made or to whom a portion of such payment is transferred.

"(32) the property is provided or insured under part B of title IV of the Higher Education Act of 1965, as amended (20 U.S.C. 1071 et seq.)

"§ 1732. Trafficking in Stolen Property

"(a) OFFENSE.—A person is guilty of an offense if he traffics in property of another that has been stolen.

"(b) GRADING.—An offense described in this section is an offense of the same class as that specified in section 1731(b) for the theft of the same kind of property.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1731(c) exists or has occurred.

"§ 1733. Receiving Stolen Property

"(a) OFFENSE.—A person is guilty of an offense if he buys, receives, possesses, or obtains control of property of another that has been stolen.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that the defendant bought, received, possessed, or obtained control of the property with intent to report the matter to an appropriate law enforcement officer or to the owner of the property.

"(c) GRADING.—An offense described in this section is an offense of the class next below that specified in section 1731(b) for the theft of the same kind of property.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if a circumstance specified in section 1731(c) exists or has occurred.

"§ 1734. Executing a Fraudulent Scheme

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) having devised a scheme or artifice:

"(A) to defraud; or

"(B) to obtain property of another by means of a false or fraudulent pretense, representation, or promise;

he engages in conduct with intent to execute such scheme or artifice; or

"(2) he transfers, or receives anything of value for, a right to participate in a pyramid sales scheme, or receives compensation from a pyramid sales scheme.

"(b) DEFINITIONS.—As used in this section:

"(1) 'anything of value' does not include:

"(A) payment made for sales demonstration equipment;

"(B) material furnished on a non-profit basis for use in making sales and not for resale;

"(C) time or effort spent in pursuit of sales or recruiting activities; or

"(D) payment having an aggregate value of $100 or less when calculated on an annual basis;

"(2) 'compensation' includes payment based on a sale or distribution made to a person who is a participant in a pyramid sales scheme or who, upon such payment, obtains the right to become a participant, but does not include payment based on a retail sale to an ultimate consumer;

"(3) 'conduct' includes a failure to state a fact necessary to avoid making a statement misleading;

"(4) 'pyramid sales scheme' means a plan or operation, whether or not involving the sale or distribution of property, that includes a means of increasing participation in the plan or operation under which a participant, upon payment of anything of value, obtains a right to receive compensation:

"(A) for his introduction of another person into participation in such plan or operation; or

"(B) for such other person's introduction of another person into participation in such plan or operation;

"(5) 'sale or distribution' includes a lease, rental, or consignment.

"(c) DEFENSE PRECLUDED.—It is not a defense to a prosecution under subsection (a)(2) that:

"(1) the plan or operation limits the number of persons who may participate, or imposes conditions with respect to the eligibility of participants; or

"(2) upon payment of anything of value a participant obtains, in addition to the right to receive compensation as described in subsection (b)(2), any other property.

"(d) GRADING.—An offense described in this section is:

"(1) a Class D felony in the circumstances set forth in subsection (a)(1);

"(2) a Class E felony in the circumstances set forth in subsection (a)(2).

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if, in the commission of the offense, the actor:

"(1) uses or causes the use of the United States mail;

"(2) uses or causes the use of any interstate or foreign communication facility, including a facility of wire, radio, or television communication; or

"(3) travels in, or causes or induces any other person to travel in, or to be transported in, interstate or foreign commerce.

"§ 1735. Bankruptcy Fraud

"(a) OFFENSE.—A person is guilty of an offense if, with intent to deceive a court or an officer thereof or to deceive or harm a creditor of a bankrupt, he:

"(1) transfers or conceals property belonging to the estate of a bankrupt;

"(2) receives a material amount of property from a bankrupt after the filing of a bankruptcy proceeding;

"(3) transfers or conceals, in contemplation of a bankruptcy proceeding, his own property or the property of another;

"(4) transfers or conceals, in contemplation of a state insolvency proceeding, his own property or the property of another;

"(5) alters, destroys, mutilates, conceals, or makes a false entry in a document affecting or relating to the property or affairs of a bankrupt, or withholds such a document from the receiver, trustee, or other officer of the court entitled to its possession; or

"(6) offers, gives, or agrees to give, or solicits, demands, accepts, or agrees to accept, anything of value for or because of acting or forbearing to act, or having acted or forborne to act, in a bankruptcy proceeding.

"(b) DEFINITIONS.—As used in this section:

"(1) 'bankrupt' means a debtor by or against whom a petition has been filed pursuant to the Bankruptcy Act of 1898, as amended (11 U.S.C. 1 et seq.), and, for purposes of subsection (a)(4), a debtor who is the subject of a state insolvency proceeding;

"(2) 'bankruptcy proceeding' means a proceeding, arrangement, or plan pursuant to the Bankruptcy Act of 1898, as amended (11 U.S.C. 1 et seq.);

"(3) 'harm' means to cause loss, deprivation, or reduction in value, with respect to any economic benefit.

"(c) GRADING.—An offense described in this section is:

"(1) a Class D felony if the property has a value in excess of $500;

"(2) a Class E felony in any other case.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in:

"(1) subsection (a)(4) if the offense in any way or degree affects, delays, or obstructs interstate or foreign commerce or the movement of an article or commodity in interstate or foreign commerce;

"(2) subsection (a)(1), (a)(2), (a)(3), (a)(5), or (a)(6) if the offense is committed within:

"(A) the general jurisdiction of the United States;

"(B) the special jurisdiction of the United States; or

"(C) the extraterritorial jurisdiction of the United States to the extent applicable under section 204.

"§ 1736. Interfering With a Security Interest

"(a) OFFENSE.—A person is guilty of an offense if, holding a legal interest in property subject to a security interest, he deprives the holder of the security interest of a right to the property or a benefit of the property by removing, concealing, encumbering, transferring, or converting such property.

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony if the value of the deprivation of the right or benefit exceeds $100,000;

"(2) a Class E felony if the value of the deprivation of the right or benefit exceeds $500 but is not more than $100,000;

"(3) a Class A misdemeanor in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States; or

"(2) the property is subject to a security interest held by the United States.

"§ 1737. Fraud in a Regulated Industry

"(a) OFFENSE.—A person is guilty of an offense if, with intent to defraud, he:

"(1) uses or reveals information relative to a formula of a product in fact acquired under the authority of section 3 of the Fed-

eral Insecticide, Fungicide, and Rodenticide Act of 1972, as amended (7 U.S.C. 1361(b));

"(2) violates section 912 of the Housing and Urban Development Act of 1970 (12 U.S.C. 1709–2) or section 239(b) of the National Housing Act, as added by section 302 of the Act of August 1, 1968 (12 U.S.C. 1715z–4(b) (relating to equity skimming in federally insured mortgages of single or multiple family dwellings); or

"(3) violates the provisions of section 1404 of the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1703) (relating to the sale or lease of lots in real estate subdivisions), or a regulation, rule, or order issued pursuant thereto;

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1738. Consumer Fraud

"(a) OFFENSE.—A person is guilty of an offense if, with intent to deceive or defraud a purchaser, he:

"(1) offers or advertises property for sale to a purchaser, knowing that such property will not be sold as so offered or advertised; or

"(2) makes a material statement that is false, concerning property that he offers or advertises for sale, sells, or has sold to a purchaser, with respect to:

"(A) the purchaser's need for the property;

"(B) the nature of the property, including its origin; its age; its grade, quality, style, or model; its ingredients or components; its quantity; its performance or safety characteristics; or its uses or benefits;

"(C) the sponsorship or approval of the property;

"(D) the comparison between the price or quality of the property and that of similar property offered or advertised for sale by the same or another person;

"(E) the prior ownership of the property;

"(F) the purchaser's need for the repair or replacement of the property;

"(G) the person's completion of the repair or replacement of the property; or

"(H) the purchaser's rights, privileges, or remedies with regard to the property.

"(b) DEFINITIONS.—As used in this section:

"(1) 'purchaser' includes a potential purchaser and an actual or potential lessee, assignee, or other transferee of property in exchange for anything of value; and

"(2) 'sale', or a variant thereof, includes a lease, assignment, or other transfer of property in exchange for anything of value.

"(c) GRADING.—An offense described in this section is a class A misdemeanor.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States; or

"(2) a circumstance specified in section 1734(e) exists or has occurred and the property offered or advertised for sale, or as to which a false statement is made, has a value of $10,000 or more when considered either alone or as one of a series of such offerings, advertisements, or statements.

"§ 1739. General Provisions for Subchapter D

"(a) DEFINITIONS.—As used in this subchapter:

"(1) 'counterfeiting implement' and 'forging implement' have the meanings set forth in section 1746 (b) and (d);

"(2) 'obtains or uses' means any manner of:

"(A) taking or exercising control over property;

"(B) making an unauthorized use, disposition, or transfer of property; or

"(C) obtaining property by fraud;

and includes conduct heretofore known as theft, stealing, larceny, purloining, abstracting, embezzlement, misapplication, misappropriation, conversion, obtaining money or property by false pretenses, fraud, deception, and all other conduct similar in nature;

"(3) 'written instrument' has the meaning set forth in section 1746(i).

"(b) PROOF.—In a prosecution under section 1731, 1732, or 1733:

"(1) possession of property recently stolen, unless satisfactorily explained, constitutes prima facie evidence that the person in possession of the property was aware of the risk that it had been stolen or that he in some way participated in its theft;

"(2) the purchase or sale of stolen property at a price substantially below its fair market value, unless satisfactorily ex-

plained, constitutes prima facie evidence that the person buying or selling the property was aware of the risk that it had been stolen;

"(3) in establishing that property constitutes or is part of an interstate or foreign shipment within the meaning of section 1731(c)(8), proof of the designation in a way bill or other shipping document of the places from which and to which a shipment was made creates a presumption that the property was shipped or was being shipped as indicated by such document.

"(c) BAR TO PROSECUTION.—It is a bar to prosecution under sections 1731, 1732, and 1733 that:

"(1) the subject of the offense was intangible property owned by, or under the care, custody, or control of, the United States;

"(2) the defendant obtained or used the property solely for the purpose of disseminating it to the public, and did not derive anything of value from obtaining, using, or disseminating it; and

"(3) the property was not obtained by means of conduct constituting an offense under section 1521 (Eavesdropping), 1524 Intercepting Correspondence), 1711 (Burglary), 1712 (Criminal Entry, or 1713 (Criminal Trespass), or constituting a trespass under civil law.

"Subchapter E.—Counterfeiting, Forgery, and Related Offenses

"§ 1741. Counterfeiting

"(a) OFFENSE.—A person is guilty of an offense if, with intent to deceive or harm another person or a government, he makes, utters, or possesses a counterfeited written instrument.

"(b) GRADING.—An offense described in this section is:

"(1) a Class C felony if the written instrument is or purports to be:

"(A) a written instrument of the United States; or

"(B) a security;

"(2) a Class D felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the written instrument is or purports to be:

"(A) made or issued by or under the authority of, or guaranteed by, the United States;

"(B) a security made or issued by or under the authority of a foreign government;

"(C) a security or a tax stamp, and is moved across a state or United States boundary in the commission of the offense;

"(D) a security issued by a national credit institution, and the offense is committed by an agent of such institution; or

"(E) a security that is a note, stock certificate, treasury stock certificate, bond debenture, or interest coupon, made or issued by an organization or by a state or local government; or

"(3) the government intended to be deceived or harmed is the government of the United States.

"§ 1742. Forgery

"(a) OFFENSE.—A person is guilty of an offense if, with intent to deceive or harm another person or a government, he makes, utters, or possesses a forged written instrument.

"(b) GRADING.—An offense described in this section is:

"(1) a Class C felony if the written instrument is or purports to be:

"(A) an obligation of the United States; or

"(B) an instrument that has a value in excess of $100,000;

"(2) A Class D felony if the written instrument is or purports to be:

"(A) made or issued by or under the authority of, or guaranteed by, the United States, a state or local government, or a foreign government; or

"(B) an instrument that has a value in excess of $500 but not more than $100,000;

"(3) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the written instrument is or purports to be:

"(A) made or issued by or under the authority of, or guaranteed by, the United States;

"(B) a security made or issued by or under the authority of a foreign government;

"(C) a security or a tax stamp, and is moved across a state or United States boundary in the commission of the offense; ~~or~~

"(D) a security issued by a national credit institution, and the offense is committed by an agent of such institution; or

"(E) a security that is a note, stock certificate, treasury stock certificate, bond, debenture, or interest coupon, made or issued by an organization or by a state or local government; or

"(3) the government intended to be deceived or harmed is the government of the United States.

"§ 1743. Criminal Endorsement of a Written Instrument

"(a) OFFENSE.—A person is guilty of an offense if, with intent to deceive or harm another person or a government, he:

"(1) signs or endorses a written instrument purportedly on behalf of another person or a government without authority to do so; or

"(2) utters or possesses a written instrument that has been so signed or endorsed.

"(b) GRADING.—An offense described in this section is:

"(1) a Class C felony if the written instrument is or purports to be:

"(A) an obligation of the United States; or

"(B) an instrument that has a value in excess of $100,000;

"(2) a Class D felony if the written instrument is or purports to be:

"(A) made or issued by or under the authority of, or guaranteed by, the United States, a state or local government, or a foreign government; or

"(B) an instrument that has a value in excess of $500 but not more than $100,000;

"(3) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the written instrument is or purports to be:

"(A) made or issued by or under the authority of, or guaranteed by, the United States;

"(B) a security made or issued by or under the authority of a foreign government;

"(C) a security or a tax stamp, and is moved across a state or United States boundary in the commission of the offense;

"(D) a security issued by a national credit institution, and the offense is committed by an agent of such institution; or

"(E) a security that is a note, stock certificate, treasury stock certificate, bond, debenture, or interest coupon, made or issued by an organization or by a state or local government; or

"(3) the government intended to be deceived or harmed is the government of the United States.

"§ 1744. Criminal Issuance of a Written Instrument

"(a) OFFENSE.—A person is guilty of an offense if, with intent to deceive or harm another person or a government, he:

"(1) issues a written instrument without authority; or

"(2) utters or possesses a written instrument that has been so issued.

"(b) GRADING.—An offense described in this section is a Class D felony.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the written instrument is or purports to be:

"(A) made or issued by or under the authority of, or guaranteed by, the United States;

"(B) a security made or issued by or under the authority of a foreign government;

"(C) a security issued by a national credit institution, and the offense is committed by an agent of such institution; or

"(3) the government intended to be deceived or harmed is the government of the United States.

"§ 1745. Trafficking in a Counterfeiting Implement

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) makes or traffics in a counterfeiting or forging implement; or

"(2) possesses a counterfeiting or forging implement with intent that it be used in making a counterfeited or forged written instrument.

"(b) GRADING.—An offense described in this section is:

"(1) a Class C felony if the implement is designed for or suited for the making of a counterfeited or forged obligation of the United States;

"(2) a Class D felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the implement is designed for or suited for the making of:

"(A) a written instrument purporting to be made or issued by or under the authority of, or guaranteed by, the United States;

"(B) a security purporting to be made or issued by or under the authority of a foreign government; or

"(C) a security that is a note, stock certificate, treasury stock certificate, bond, debenture, or interest coupon, made or issued by an organization or by a state or local government; or

"(3) the implement which is the subject of the offense is moved across a state or United States boundary in the commission of the offense.

"§ 1746. Definitions for Subchapter E

"As used in this subchapter:

"(a) 'counterfeited written instrument' means a written instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety;

"(b) 'counterfeiting implement' means an engraving, plate, hub, stone, paper, tool, die, mold, ink, photograph, negative, or other implement or impression designed for or suited for the making of a counterfeited written instrument;

"(c) 'forged written instrument' means a written instrument that purports to be genuine but is not because it: (1) has been falsely altered, completed, signed, or endorsed; (2) contains a false addition thereto or insertion therein; or (3) is a combination of parts of two or more genuine written instruments;

"(d) 'forging implement' means an engraving, plate, hub, stone, paper, tool, die, mold, ink, photograph, negative, or other implement or impression designed for or suited for the making of a forged written instrument;

"(e) 'obligation of the United States' means a bond, certificate of indebtedness, national bank currency, Federal Reserve note, Federal Reserve bank note, coupon, United States note, Treasury note, gold certificate, silver certificate, fractional note, certificate of deposit, stamp, canceled stamp, postage meter stamp, coin, gold or silver bar coined or stamped at a mint or assay office of the United States, or other representation of value of any denomination, issued pursuant to a federal statute, except a bill, money order, check, or draft for money, drawn by or upon an authorized officer of the United States;

"(f) 'security' means (1) an obligation of the United States; (2) a note, stock certificate, treasury stock certificate, bond, debenture, interest coupon; bill, check, draft, warrant, money order, money order blank, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest in or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, or certificate of interest in tangible or intangible property; (3) an instrument evidencing ownership of goods, wares, or merchandise; (4) a certificate for, receipt for, or warrant or right to subscribe to or purchase any of the foregoing; (5) an obligation, bank note, bill, coin, or bar issued by a foreign government and intended by the law or usage of such government to circulate as money; (6) a security of a foreign government; (7) a postage stamp, revenue stamp, or uncancelled stamp, whether or not demonetized, issued by a foreign government; or (8) any other written instrument commonly known as a security;

"(g) 'tax stamp' includes a tax stamp, tax token, tax meter imprint, or any similar evidence of an obligation running to a government or of the discharge of such an obligation;

"(h) 'utter' means to issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, use, certify, or otherwise give currency to;

"(i) 'written instrument' means (1) a security; (2) a commercial paper or document, or other commercial instrument containing written or printed matter or its equivalent; or (3) a symbol or evidence of value, right, privilege, interest, claim, or identification that is capable of being used to the advantage or disadvantage of any person; but, except as used in section 1745, does not include a written instrument that is the subject of a counterfeiting, forgery, criminal endorsement, or criminal issuance offense described outside this title;

"(j) 'written instrument issued under the authority of the United States' includes a warehouse receipt issued pursuant to the United States Warehouse Act (7 U.S.C. 241 et seq.) and an 'authorization to purchase card' as defined in section 3(m) of the Food Stamp Act of 1964, as amended (7 U.S.C. 2012(m)).

"Subchapter F.—Commercial Bribery and Related Offenses

"§ 1751. Commercial Bribery

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) he offers, gives, or agrees to give to an agent or fiduciary of another person, or

"(2) as an agent or fiduciary, he solicits, demands, accepts, or agrees to accept from another person who is not his employer, principal, or beneficiary;

anything of value for or because of the recipient's conduct in any transaction or matter concerning the affairs of the employer, principal, or beneficiary.

"(b) GRADING.—An offense described in this section is:

"(1) a Class E felony if what is offered, given, or agreed to be given, or solicited, demanded, accepted, or agreed to be accepted, has a value in excess of $100;

"(2) a Class A misdemeanor in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) a participant in the offense is an agent or fiduciary of:

"(A) a national credit institution;

"(B) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958, as amended (15 U.S.C. 662);

"(C) a bank holding company, a savings and loan holding company, or a person controlling a financial institution in such a manner as to be a bank holding company or a savings and loan holding company under the Bank Holding Company Act Amendments of 1956, as amended (12 U.S.C. 1841), or the Savings and Loan Holding Company Amendments of 1967 (12 U.S.C. 1730a);

"(D) a prime contractor holding a negotiated contract entered into by the United States government for the furnishing of supplies, materials, equipment, or services of any kind, or a subcontractor, as defined in section 2 of the Act of March 8, 1946, as amended (41 U.S.C. 52), holding a subcontract under such a prime contract;

"(E) an authorized committee or an eligible candidate, as defined in the Presidential Election Campaign Fund Act (26 U.S.C. 9002 (1) and (4)), and the conduct relates to a qualified campaign expenses, as defined in such Act (26 U.S.C. 9002(11)); or

"(F) an authorized committee or candidate, as defined in the Presidential Primary Matching Payment Account Act (26 U.S.C. 9032 (1) and (2)), and the conduct relates to a qualified campaign expense, as defined in such Act (26 U.S.C. 9032(9));

"(2) movement of a person across a state or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(3) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"§ 1752. Labor Bribery

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) being an employer, he offers, gives, or agrees to give anything of value to a labor organization, or to an officer, agent, or counsel of a labor organization, for or because of the recipient's conduct in any transaction or matter concerning such organization;

"(2) he offers, gives, or agrees to give anything of value to:

"(A) an administrator, agent, trustee, or counsel of an employee benefit plan;

"(B) an employer, agent, or counsel of an employer, any of whose employees are covered by such a plan;

"(C) an agent or counsel of an employee organization, any of whose members are covered by such a plan; or

"(D) a person who, or an agent or counsel of an organization that, provides benefit plan services;

for or because of the recipient's conduct relating to any transaction or matter concerning such plan;

"(3) he offers, gives, or agrees to give anything of value to an officer, agent, trustee, or counsel of a labor organization for or because of the recipient's conduct relating to:

"(A) the admission of any person to membership or to a class of membership, or the issuance to any person of the indicia of membership or of a class of membership, in the labor organization;

"(B) the work placement of any person by the labor organization; or

"(C) any transaction or matter concerning the expenditure, transfer, investment, or other use of the funds, money, securities, property, or other assets of the labor organization; or

"(4) he solicits, demands, accepts, or agrees to accept anything of value, the offering of which constitutes an offense described in subsection (a)(1), (a)(2), or (a)(3).

"(b) DEFINITIONS.—As used in this section:

"(1) 'administrator' has the meaning set forth in section (3)(16)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(16)(A));

"(2) 'anything of value' does not include bona fide salary, wages, fees, or other compensation paid in the usual course of business;

"(3) 'employee organization' has the meaning set forth in section 3(4) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(4));

"(4) 'employee benefit plan' includes (A) the meaning set forth in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)); and (B) any trust fund established by an employer or by an employee organization, or by both, to provide any benefit to the members of the organization or to their families;

"(5) 'employer' includes a group or association of employers, and a person acting directly or indirectly as an employer or as an agent of or in the interest of an employer;

"(6) 'labor organization' has the meaning set forth in section 3 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 402(i));

"(7) 'officer', when used with respect to a labor organization, has the meaning set forth in section 3(n) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 402(n));

"(8) 'work placement' means a scheme, system, or method whereby members of a labor organization or other persons gain employment or are referred for employment, and includes any such scheme, system, or method that establishes a priority or preference upon the basis of (A) seniority within the labor organization; (B) experience or competency in a particular trade or field of employment; (C) length of employment in a particular trade or field of employment or with specified employers or within a particular geographical area; (D) performance on an examination relating to an individual's ability to perform work in a particular trade or field or employment; (E) the date of registration on a list of persons available for work.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the employer or labor organization is engaged in, or the employee benefit plan covers employees engaged in, an industry that affects interstate or foreign commerce.

"§ 1753. Sports Bribery

"(a) OFFENSE.—A person is guilty of an offense if, with intent improperly to affect the outcome, result, or margin of victory of a publicly exhibited sporting contest:

"(1) he offers, gives, or agrees to give anything of value to a participant, official, or other person associated with the contest; or

"(2) as a participant, official, or other person associated with the contest, he solicits, demands, accepts, or agrees to accept anything of value.

"(b) DEFINITION.—As used in this section, 'publicly exhibited sporting contest' means a contest open to the public in any sport involving human beings or animals, whether as individual participants

or teams of participants, the occurrence of which is publicly announced in advance of the event.

"(c) GRADING.—An offense described in this section is a Class E felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(2) movement across a state or United States boundary by the actor, or by a participant, official, or other person associated with the sporting contest, occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"Subchapter G.—Investment, Monetary, and Antitrust Offenses

"§ 1761. Securities Offenses

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) violates any of the following provisions of:

"(A) the Securities Act of 1933, as amended:

"(i) section 5, as amended (15 U.S.C. 77e) (relating to the sale of unregistered securities);

"(ii) section 17, as amended (15 U.S.C. 77q) (relating to fraud in the offer and sale of securities); or

"(iii) section 23 (15 U.S.C. 77w) (relating to unlawful representations);

"(B) the Trust Indenture Act of 1939, as amended:

"(i) section 306, as added by the Act of August 3, 1939, as amended (15 U.S.C. 77fff) (relating to the sale of unregistered debt securities without qualified trust indentures); or

"(ii) section 324, as added by the Act of August 3, 1939, as amended (15 U.S.C. 77xxx) (relating to unlawful representations); or

"(C) the Securities Exchange Act of 1934, as amended:

"(i) section 9(a)(1) through (5) (15 U.S.C. 78i(a)(1) through (5)) (relating to manipulation of the price of securities on a national securities exchange); or

"(ii) section 10(b) (15 U.S.C. 78j(b)), by violating a provision of 17 C.F.R. § 240.10b–5 (relating to fraud in the purchase and sale of securities);

"(2) makes a false statement of a material fact, or omits to state a material fact required to be stated or necessary to make a statement not misleading, in a registration statement, offering circular, report, application, or other document filed or required to be filed, or kept or required to be kept, under:

"(A) the Securities Act of 1933, as amended (15 U.S.C. 77a et seq.);

"(B) the Trust Indenture Act of 1939, as amended (15 U.S.C. 77aaa et seq.);

"(C) the Securities Exchange Act of 1934, as amended (15 U.S.C. 78a et seq.);

"(D) the Public Utility Holding Company Act of 1935, as amended (15 U.S.C. 79 et seq.);

"(E) the Investment Company Act of 1940, as amended (15 U.S.C. 80a–1 et seq.); or

"(F) section 203 or 204 of the Investment Advisers Act of 1940, as amended (15 U.S.C. 80b–3 or 80b–4);

"(3) violates:

"(A) any of the following provisions of the Securities Exchange Act of 1934, as amended:

"(i) section 7(c), (d), or (f), as amended (15 U.S.C. 78g(c), (d), or (f) (relating to margin and credit financing of securities transactions);

"(ii) section 10(a) (15 U.S.C. 78j(a)) (relating to short sales of securities and use of stop-loss orders on national securities exchanges);

"(iii) section 14(a), as amended (15 U.S.C. 78n(a)), by violating a provision of 17 C.F.R. § 240.14a–9 (relating to solicitation of proxies);

"(iv) section 14(c), as amended (15 U.S.C. 78n(c)), by violating a provision of 17 U.S.C. § 240.14c–6) (relating to false information statements);

"(v) section 14(e), as amended (15 U.S.C. 78n(e)) (relating to fraudulent tender offers for securities); or

"(vi) section 16(c), as amended (15 U.S.C. 78p(c)) (relating to short sales of securities by officers, directors, and principal shareholders);

"(B) section 12(h) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79*l*(h)) (relating to the prohibition of political contributions by public utility holding companies and their subsidiaries);

"(C) any of the following provisions of the Investment Company Act of 1940, as amended:

"(i) section 7 (15 U.S.C. 80a–7) (relating to transactions by unregistered investment companies);

"(ii) section 17(a), (d), or (e) (15 U.S.C. 80a–17(a), (d), or (e)), or a rule thereunder (relating to conflicts of interest in the acquisition or disposition of property and securities by registered investment companies and their affiliates and by joint enterprises and profit sharing plans involving such persons);

"(iii) section 21, as amended (15 U.S.C. 80a–21) (relating to loans by registered investment companies to controlling shareholders or to others contrary to the policies of such companies);

"(iv) section 206 (1), (2), or (3) of the Investment Advisers Act of 1940, as amended (15 U.S.C. 80b–6 (1), (2), or (3)) (relating to fraud by investment advisers); or

"(4) fails to file a report or document required to be filed under:

"(A) section 16(a) of the Securities Exchange Act of 1934, as amended (15 U.S.C. 78p(a)) (relating to ownership reports by officers, directors, and major shareholders of registered corporations);

"(B) section 17(a) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79q) (relating to ownership reports of officers, directors, and major shareholders of registered public utility holding companies); or

"(C) section 30(f) of the Investment Company Act of 1940, as amended (15 U.S.C. 80a–29(f)) (relating to ownership reports of officers, directors, and major shareholders of registered closed end investment companies).

"(b) PROOF.—The provisions of section 1345 that apply to section 1343 (Making a False Statement) apply also to this section.

"(c) GRADING.—An offense described in this section is:

"(1) a Class D felony in the circumstances set forth in subsection (a) (1);

"(2) a Class E felony in the circumstances set forth in subsection (a) (2), (a) (3), or (a) (4);

"§ 1762. Monetary Offenses

"(a) OFFENSE.—A person is guilty of an offense if he fails to file a report, or to make or maintain a record, as required under:

"(1) section 411 of the National Housing Act, as added by section 102 of the Act of October 26, 1970 (12 U.S.C. 1730d) (relating to records and reports by institutions insured by the Federal Savings and Loan Insurance Corporation);

"(2) section 21 of the Federal Deposit Insurance Act, as added by section 101 of the Act of October 26, 1970 (12 U.S.C. 1829b) (relating to records and reports by banks insured by the Federal Deposit Insurance Corporation);

"(3) chapter 2 of title I of the Act of October 26, 1970 (12 U.S.C. 1951 et seq.) (relating to records and reports by uninsured banks and institutions); or

"(4) the Currency and Foreign Transactions Reporting Act (31 U.S.C. 1051 et seq.) (relating to records and reports concerning domestic currency transactions, exports and imports of monetary instruments, and foreign monetary transactions).

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony if the offense is committed:

"(A) in furtherance of any other violation of federal law; or

"(B) as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period;

"(2) a Class A misdemeanor in any other case.

Notwithstanding the provisions of section 2201(b)(1), the authorized fine is $500,000 if the offense is a Class D felony and $100,000 if the offense is a Class A misdemeanor.

"§ 1763. Commodities Exchange Offenses

"(a) OFFENSE.—A person is guilty of an offense if he violates:

(1) section 9(a) of the Commodity Exchange Act, as amended (7 U.S.C. 13(b)) (relating to the manipulation of the price of a commodity in interstate commerce), or section 9(c) or (d) of that

Act (7 U.S.C. 13(d) or (e)) (relating to transactions in commodity futures by commissioners, employees, or agents of the Commodity Futures Trading Commission); or

"(2) the eleventh paragraph of section 25(a) of the Act of December 23, 1913, as added by the Act of December 24, 1919 (12 U.S.C. 617) (relating to the prohibition on the use of corporate funds to manipulate the price of a commodity by an agent of a corporation organized to do foreign banking).

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1764. Antitrust Offenses

"(a) OFFENSE.—A person is guilty of an offense if he violates section 1, 2, or 3 of the Sherman Act of July 2, 1890, as amended (15 U.S.C. 1, 2, or 3) (relating to agreements in restraint of trade and monopolizing trade).

"(b) GRADING.—An offense described in this section is a Class E felony. Notwithstanding the provisions of section 2201(b)(2), the authorized fine for a corporation is $1,000,000, or the alternative authorized fine set forth in section 2201(c).

"Chapter 18.—OFFENSES INVOLVING PUBLIC ORDER, SAFETY, HEALTH, AND WELFARE

"Subchapter A.—Organized Crime Offenses

"§ 1801. Operating a Racketeering Syndicate

"(a) OFFENSE.—A person is guilty of an offense if he organizes, owns, controls, manages, directs, finances, or otherwise participates in a supervisory capacity in a racketeering syndicate.

"(b) PROOF.—In a prosecution under this section, proof that a person has shared in the proceeds from a racketeering syndicate to the extent of $5,000 or more in any thirty day period constitutes prima facie evidence that the person has organized, owned, controlled, man-

aged, directed, financed, or otherwise participated in a supervisory capacity in such syndicate.

"(c) GRADING.—An offense described in this section is a Class B felony.

"§ 1802. Racketeering

"(a) OFFENSE.—A person is guilty of an offense if, through a pattern of racketeering activity, he acquires or maintains an interest in, or conducts, an enterprise.

"(b) GRADING.—An offense described in this section is a Class B felony.

"§ 1803. Washing Racketeering Proceeds

"(a) OFFENSE.—A person is guilty of an offense if, by using or investing proceeds from a pattern of racketeering activity, he acquires or maintains an interest in, or establishes or conducts, an enterprise.

"(b) DEFENSE.—It is a defense to a prosecution under this section that the proceeds were used to purchase securities of the enterprise on the open market without intent to control or participate in the control of the enterprise, or to assist another person to do so, if the securities of the enterprise held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity after such purchase do not amount in the aggregate to one percent or more of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the enterprise.

"(c) GRADING.—An offense described in this section is a Class C felony.

"§ 1804. Loansharking

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) makes or finances an extortionate extension of credit;

"(2) makes or finances an extension of credit:

"(A) having, in fact, an aggregate value in excess of $100, including unpaid interest or similar charges and any other outstanding extensions of credit to the same debtor;

"(B) carrying a rate of interest that exceeds an annual rate of forty-five percent, calculated according to the actuarial method of allocating payments between principal and interest under which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal; and

"(C) concerning which the repayment, or the performance of any promise given in return, would not in fact be enforceable through civil judicial process against the debtor:

"(i) in the jurisdiction within which the debtor, if an individual, resided at the time the extension of credit was made; or

"(ii) in every jurisdiction within which the debtor, if an organization, was incorporated or qualified to do business at the time the extension of credit was made;

"(3) collects a repayment of an extension of credit that was made or financed unlawfully, such making or financing having been in violation of subsection (a)(1) or (a)(2); or

"(4) retaliates against any person for failing to repay an extension of credit made or financed in violation of subsection (a)(1) or (a)(2) by subjecting any person to bodily injury, kidnapping, or injury to reputation, or by damaging property.

"(b) PROOF.—In a prosecution under subsection (a)(1), if evidence is introduced tending to show the existence of the circumstances described in subsection (a)(2)(B) or (a)(2)(C), and direct evidence is not available to show the understanding of the creditor and the debtor concerning the possible consequences of a delay in making repayment or a failure to make repayment, for the purpose of showing that understanding the court may permit the introduction of evidence concerning the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension of credit.

"(c) GRADING.—An offense described in this section is:

"(1) a Class C felony in the circumstances set forth in subsection (a)(1);

"(2) a Class D felony in the circumstances set forth in subsection (a)(2);

"(3) a Class E felony in the circumstances set forth in subsection (a)(3) or (a)(4).

"§ 1805. Facilitating a Racketeering Activity by Violence

"(a) OFFENSE.—A person is guilty of an offense if, with intent to facilitate a racketeering activity, he engages in any conduct constituting an offense under a section in subchapter A or B of chapter 16.

"(b) DEFINITION.—As used in this section, 'racketeering activity' does not include conduct constituting a felony under section 1601 (Murder, 1602 (Manslaughter), 1611 (Maiming), 1612 (Aggravated Bat-

tery), or 1615 (Terrorizing), or under a state statute relating to murder.

"(c) GRADING.—An offense described in this section is a Class D felony.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(2) movement of a person across a state or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense or in the distribution of the proceeds of the offense.

"§ 1806. Definitions for Subchapter A

"As used in this subchapter:

"(a) 'creditor' means a person who makes an extension of credit, or who claims by, under, or through a person making an extension of credit;

"(b) 'debtor' means a person to whom an extension of credit is made, or a person who guarantees the repayment of an extension of credit or who undertakes to indemnify the creditor against loss from a failure to repay the extension of credit;

"(c) 'extension of credit' means a loan, a renewal of a loan, or a tacit or express agreement concerning the deferment of the repayment or satisfaction of a debt or claim, however the loan or renewal or agreement arose, whether it is acknowledged or disputed, and whether it is valid or invalid;

"(d) 'extortionate extension of credit' means an extension of credit with respect to which it is the understanding of the creditor and the debtor, at the time it is made, that delay in making repayment or failure to make repayment could result in the use of force, or in threatening or placing any person in fear that any person will be subjected to bodily injury, kidnapping, or injury to reputation, or that any property will be damaged;

"(e) 'pattern of racketeering activity' means two or more separate acts of racketeering activity, at least one of which occurred after the effective date of this subchapter, that have the same or similar purposes, results, participants, victims,

or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events;

"(f) 'racketeering activity' means:

"(1) conduct constituting a felony under section 1321 (Witness Bribery), 1322 (Corrupting a Witness or an Informant), 1323 (Tampering with a Witness or an Informant), 1351 (Bribery), 1352 (Graft), 1403 (Alcohol and Tobacco Tax Offenses), 1411 (Smuggling), 1412 (Trafficking in Smuggled Property), 1601 (Murder), 1602 (Manslaughter), 1611 (Maiming), 1612 (Aggravated Battery), 1615 (Terrorizing), 1621 (Kidnapping), 1701 (Arson), 1711 (Burglary), 1712 (Criminal Entry), 1721 (Robbery), 1722 (Extortion), 1723 (Blackmail), 1731 (Theft), 1732 (Trafficking in Stolen Property), 1734 (Executing a Fraudulent Scheme), 1735 (Bankruptcy Fraud), 1741 (Counterfeiting), 1742 (Forgery), 1745 (Trafficking in a Counterfeiting Implement), 1751 (Commercial Bribery), 1752 (Labor Bribery), 1753 (Sports Bribery), 1761 (Securities Offenses), 1762 (Monetary Offenses), 1804 (Loansharking), 1811 (Trafficking in an Opiate), 1812 (Trafficking in Drugs), 1821 (Explosives Offenses), 1822 (Firearms Offenses), 1841 (Engaging in a Gambling Business), or 1843 (Conducting a Prostitution Business);

"(2) conduct constituting a felony under a state statute relating to murder, kidnapping, arson, robbery, bribery, extortion, trafficking in narcotics or other dangerous drugs, or engaging in a gambling business; or

"(3) conduct defined as 'racketeering activity' in former 18 U.S.C. 1961(1) (B), (C), or (D) (part of section 901(a) of the Organized Crime Control Act of 1970).

"(g) 'racketeering syndicate' means a group of five or more persons who, individually or collectively, engage on a continuing basis in conduct constituting racketeering activity, other than racketeering activity consisting solely of conduct constituting a felony under section 1841 (Engaging in a Gambling Business) or 1843 (Conducting a Prostitution Business) or under the law of a state relating to engaging in a gambling business;

"(h) 'repayment' includes (1) a return, in whole or in part, of an extension of credit, and (2) a payment of interest on, or of a charge for, an extension of credit.

"Subchapter B.—Drug Offenses

"§ 1811. Trafficking in an Opiate

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) manufactures or traffics in an opiate;

"(2) creates or traffics in a counterfeit substance containing an opiate;

"(3) imports or exports an opiate, or possesses an opiate aboard a vehicle arriving in or departing from the United States or the customs territory of the United States; or

"(4) manufactures or traffics in an opiate for import into the United States.

"(b) GRADING.—An offense described in this section is:

"(1) a Class B felony if:

"(A) the opiate weighs 100 grams or more;

"(B) the offense consists of distributing the opiate to a person who is less than eighteen years old and who is at least five years younger than the defendant; or

"(C) the offense is committed after the defendant had been convicted of a felony under federal, state, or foreign law relating to an opiate, or while he was on release pending trial for an offense described in subsection (a);

"(2) a Class C felony in any other case.

Notwithstanding the provisions of part III of this title, the court may not sentence the defendant to probation but shall sentence him to a term of imprisonment of not less than two years and to a term of parole ineligibility of not less than two years, with the sentence to run consecutively to any other term of imprisonment imposed upon the defendant, unless the court finds that, at the time of the offense, the defendant was less than eighteen years old; the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution; the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution; or the defendant was an accomplice, the conduct constituting the offense was principally the conduct of another person, and the defendant's participation was relatively minor.

"§ 1812. **Trafficking in Drugs**

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) manufactures or traffics in a controlled substance other than an opiate;

"(2) creates or traffics in a counterfeit substance other than a counterfeit substance containing an opiate;

"(3) imports or exports a controlled substance other than an opiate, or possesses a controlled substance other than an opiate aboard a vehicle arriving in or departing from the United States or the customs territory of the United States; or

"(4) manufactures or traffics in a controlled substance other than an opiate, and other than a substance listed in Schedule III, IV, or V, for import into the United States.

"(b) GRADING.—An offense described in this section is:

"(1) a Class C felony if the controlled substance is a narcotic drug listed in Schedule I or II other than an opiate;

"(2) a Class D felony if the controlled substance is:

"(A) a substance listed in Schedule I or II other than:

"(i) a narcotic drug; or

"(ii) 300 grams or less of marihuana; or

"(B) a substance listed in Schedule III;

"(3) a Class E felony if the controlled substance is a substance listed in Schedule IV;

"(4) a Class A misdemeanor if the controlled substance is:

"(A) a substance listed in Schedule V; or

"(B) 100 to 300 grams of marijuana;

"(5) a Class B misdemeanor if the controlled substance is less than 100 grams of marijuana;

unless the offense consists of distributing the controlled substance to a person who is less than eighteen years old and who is at least five years younger than the defendant, in which case the offense is of the class next above that otherwise specified.

"§ 1813. **Possessing Drugs**

"(a) OFFENSE.—A person is guilty of an offense if he possesses a controlled substance, other than 10 grams or less of marihuana.

"(b) DEFENSE.—It is a defense to a prosecution under this section that the controlled substance was obtained by the defendant from, or pursuant to a valid prescription or order issued by, a practitioner acting in the course of his professional practice.

"(c) GRADING.—An offense described in this section is:

"(1) a Class D felony if the controlled substance is 100 grams or more of an opiate;

"(2) a Class A misdemeanor if the controlled substance is:

"(A) less than 100 grams of an opiate; or

"(B) a substance other than an opiate or marihuana;

"(3) a Class C misdemeanor in any other case, but, notwithstanding the provisions of section 2201 (b) or (c), the authorized fine is $500.

"§ 1814. Violating a Drug Regulation

"(a) OFFENSE.—A person is guilty of an offense if he violates:

"(1) section 402 (a) or (b) of the Controlled Substances Act (21 U.S.C. 842(a) or (b)) (relating to the dispensing and manufacturing of controlled substances by registered manufacturers, distributors, and dispensers of controlled substances);

"(2) section 403(a)(1), (2), (3), or (5) of the Controlled Substances Act (21 U.S.C. 843(a)(1), (2), (3), or (5)) (relating to the distribution of controlled substances by registrants and the use of labeling implements to render a drug a counterfeit substance); or

"(3) section 1004 of the Controlled Substances Import and Export Act (21 U.S.C. 954) (relating to the importation for transshipment to another country of controlled substances).

"(b) GRADING.—An offense described in this section is:

"(1) a Class E felony in the circumstances set forth in subsection (a)(2);

"(2) a Class A misdemeanor in the circumstances set forth in subsection (a)(1) or (a)(3).

"§ 1815. General Provisions for Subchapter B

"(a) DEFINITIONS.—As used in this subchapter:

"(1) 'controlled substance', 'counterfeit substance', 'distribute' (incorporated through the definition of the term 'traffic' in section 111), 'manufacture', 'marihuana', 'narcotic drug', and 'practitioner' have the meanings set forth in section 102 of the Controlled Substances Act (21 U.S.C. 802);

"(2) 'customs territory of the United States' has the meaning set forth in section 1001 of the Controlled Substances Import and Export Act (21 U.S.C. 951);

"(3) 'dispense' (incorporated through the definition of the term 'traffic' in section 111) means to deliver a controlled sub-

stance to an ultimate user or research subject by, or pursuant to the order of, a practitioner, and includes the prescribing or administering of a controlled substance and the packaging, labelling, or compounding necessary to prepare the substance for such delivery;

"(4) 'import' means to import into the United States from any place outside the United States, or into the customs territory of the United States from any place outside the customs territory of the United States but within the United States;

"(5) 'opiate' means a mixture or substance containing a detectable amount of any narcotic drug that is a controlled substance listed in Schedule I or II, other than a narcotic drug consisting of (A) coca leaves; (B) a compound, manufacture, salt, derivative, or preparation of coca leaves; or (C) a substance chemically identical thereto;

"(6) 'Schedule I', 'Schedule II', 'Schedule III', Schedule IV', and 'Schedule V' refer to the schedules of controlled substances established by section 202 of the Controlled Substances Act (21 U.S.C. 812).

"(b) DEFENSE.—It is a defense to a prosecution under section 1811, 1812, or 1813 that the actor's conduct was authorized by the provisions of the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.).

"Subchapter C.—Explosives and Firearms Offenses

"§ 1821. Explosives Offenses

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) transports or possesses an explosive with intent that it be used, or with knowledge that it may be used, to commit a felony;

"(2) violates a provision included in subsection (a) through (k) of section 1103 of the Organized Crime Control Act of 1970, as amended by section 201 of the Criminal Code Reform Act of 1977 (15 U.S.C. ——) (relating to the regulation and licensing of the business of importing, manufacturing, or dealing in explosive materials);

"(3) violates:

"(A) section 4472(14) of the Revised Statutes of the United States, as amended (46 U.S.C. 170 (14));

"(B) section 902(h)(2) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472(h)(2)); or

"(C) section 110(b) of the Hazardous Materials Transportation Act (49 U.S.C. 1809(b)); or

"(4) possesses an explosive in a government building.

"(b) DEFINITION.—As used in this section, 'explosive' includes a destructive device; gunpowder, smokeless powder, or powder used for blasting material; and a fuze; detonator, or other detonating agent.

"(c) DEFENSE.—It is a defense to a prosecution under subsection (a)(4) that the possession was in conformity with the written consent of the government agency or person responsible for the management of such building.

"(d) GRADING.—An offense described in this section is:

"(1) a Class D felony in the circumstances set forth in:

"(A) subsection (a)(1); or

"(B) subsection (a)(2) if the violation is of a provision set forth in subsection (a) through (i) of section 1103 of the Organized Crime Control Act of 1970, as amended (15 U.S.C.—);

"(2) a Class E felony in the circumstances set forth in subsection (a)(3);

"(3) a Class A misdemeanor in the circumstances set forth in:

"(A) subsection (a)(2) if the violation is of a provision set forth in subsection (j) or (k) of section 1103 of the Organized Crime Control Act of 1970, as amended (15 U.S.C.—); or

"(B) subsection (a)(4).

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in:

"(1) subsection (a)(1) if the explosive is being transported, or has been transported, in interstate or foreign commerce;

"(2) subsection (a)(4) if the building is owned by, or is under the care, custody, or control of the United States.

"§ 1822. Firearms Offenses

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) transports or possesses a firearm or ammunition with intent that it be used, or with knowledge that it may be used, to commit a felony;

"(2) violates section 103 or 104 of the Gun Control Act of 1968, as amended by section 202 of the Criminal Code Reform Act of

1977 (15 U.S.C. —) (relating to the regulation and licensing of the business of importing, manufacturing, or dealing in firearms or ammunition);

"(3) violates section 5861 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 5861) (relating to the registration of importers, manufacturers, and dealers in firearms and the payment of a special occupational tax); or

"(4) violates section 1202 of the Omnibus Crime Control and Safe Streets Act of 1968 (15 U.S.C. —) (relating to the receipt, possession, or transportation of firearms by persons prohibited from engaging in such conduct).

"(b) DEFINITION.—As used in this section, 'firearm' includes a frame or receiver of a firearm and a firearm silencer or muffler.

"(c) GRADING.—An offense described in this section is:

"(1) a Class D felony in the circumstances set forth in subsection (a)(1), (a)(2), or (a)(3);

"(2) a Class E felony in the circumstances set forth in subsection (a)(4).

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in subsection (a)(1) if the firearm or ammunition is being transported, or has been transported, in interstate or foreign commerce.

"§ 1823. Using a Weapon in the Course of a Crime

"(a) OFFENSE.—A person is guilty of an offense if, during the commission of a crime, he:

"(1) displays or otherwise uses a firearm or a destructive device;

"(2) possesses a firearm or a destructive device; or

"(3) displays or otherwise uses:

"(A) a dangerous weapon other than a firearm or a destructive device; or

"(B) an imitation of a firearm or a destructive device.

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony in the circumstances set forth in subsection (a)(1);

"(2) a Class E felony in the circumstances set forth in subsection (a)(2) or (a)(3).

Notwithstanding the provisions of part III of this title, if the offense is committed in the circumstance set forth in subsection (a)(1) or (a)(2) the court may not sentence the defendant to probation but shall sentence him to a term of imprisonment of not less than two years for an offense described in subsection (a)(1) or one year for an

offense described in subsection (a)(2) and to a term of parole ineligibility of not less than two years for an offense described in subsection (a)(1) or one year for an offense described in subsection (a)(2), with the sentence to run consecutively to any other term of imprisonment imposed upon the defendant, unless the court finds that, at the time of the offense, the defendant was less than eighteen years old; the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution; the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution; or the defendant was an accomplice, the conduct constituting the offense was principally the conduct of another person, and the defendant's participation was relatively minor.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the offense occurs during the commission of any other offense described in this title over which federal jurisdiction exists.

"§ 1824. Possessing a Weapon aboard an Aircraft

"(a) OFFENSE.—A person is guilty of an offense if he possesses or secretes aboard an aircraft:

"(1) a dangerous weapon, other than a destructive device, that in fact is concealed and that is, or that would be, accessible to such person in flight; or

"(2) a destructive device that in fact is concealed.

"(b) DEFENSE.—It is a defense to a prosecution under this section that the actor's conduct was authorized under a regulation issued by the Administrator of the Federal Aviation Agency.

"(c) GRADING.—An offense described in this section is a Class A misdemeanor.

"(d) JURISDICTION.—There is federal jurisdiction over an offense described in this section if the offense is committed on an aircraft in, or intended for operation in, air transportation or intrastate air transportation as defined in section 101 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301).

"Subchapter D.—Riot Offenses

"Sec.
"1831. Leading a Riot.
"1832. Providing Arms for a Riot.
"1833. Engaging in a Riot.
"1834. Definitions for Subchapter D.

"§ 1831. **Leading a Riot**

"(a) OFFENSE.—A person is guilty of an offense if:

"(1) he causes a riot by incitement, or during a riot he incites participation in the riot; or

"(2) during a riot he urges participation in, leads, or gives commands, instructions, or directions in furtherance of, the riot.

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony if the riot involves persons in a facility used for official detention;

"(2) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the riot involves persons in a federal facility used for official detention; or

"(3) movement of a person across a state or United States boundary occurs in the execution or consummation of the offense.

"§ 1832. **Providing Arms for a Riot**

"(a) OFFENSE.—A person is guilty of an offense, if, with intent to promote a riot, he supplies, or teaches the preparation or use of, a firearm, a destructive device, or another dangerous weapon.

"(b) GRADING.—An offense described in this section is:

"(1) a Class D felony if it involves the supplying of a firearm or a destructive device;

"(2) a Class E felony in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) a circumstance specified in section 1831(c) exists or has occurred; or

"(2) the firearm, destructive device, or other dangerous weapon supplied is moved across a state or United States boundary in the commission of the offense.

"§ 1833. **Engaging in a Riot**

"(a) OFFENSE.—A person is guilty of an offense if he engages in a riot.

"(b) GRADING.—An offense described in this section is:

"(1) a Class A misdemeanor if the riot involves persons in a facility used for official detention;

"(2) a Class B misdemeanor in any other case.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the offense is committed in a federal facility used for official detention; or

"(3) the riot obstructs a federal government function.

"§ 1834. Definition for Subchapter D

"As used in this subchapter, 'riot' means a public disturbance (a) that involves ten or more persons as participants; (b) that involves violent and tumultuous conduct on the part of the participants; and (c) that causes, or creates a grave danger of imminently causing, injury to persons or damage to property. 'Riot' does not include orderly and lawful conduct for the purpose of pursuing the legitimate objectives of organized labor.

"Subchapter E.—Gambling, Obscenity, and Prostitution Offenses

"§ 1841. Engaging in a Gambling Business

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) owns, controls, manages, supervises, directs, conducts, finances, or otherwise engages in a gambling business;

"(2) receives lay-off wagers or otherwise provides reinsurance in relation to persons engaged in gambling;

"(3) carries or sends:

"(A) a gambling device;

"(B) gambling information; or

"(C) gambling proceeds;

from within a state to any place outside the state; or

"(4) otherwise establishes, promotes, manages, or carries on an enterprise involving gambling.

"(b) DEFINITIONS.—As used in this section:

"(1) 'gambling business' means a business involving gambling of any kind that, in fact:

"(A) has five or more persons engaged in the business; and

"(B) has been in substantially continuous operation for a period of thirty days or more, or has taken in $2,000 or more in any single day;

"(2) 'gambling device' means:

"(A) any device covered by section 1 of the Act of January 2, 1951, as amended (15 U.S.C. 1171), and not excluded by section 9 (2) or (3) of the Act of January 2, 1951, as added by section 6 of the Gambling Devices Act of 1962 (15 U.S.C. 1178 (2) or (3)); or

"(B) any record, paraphernalia, ticket, certificate, bill, slip, token, writing, scratch sheet, or other means of carrying on bookmaking, wagering pools, bingo or keno games, lotteries, policy, bolita, numbers, or similar games, or any equipment for carrying on card or dice games other than cards or dice used in such games;

"(3) 'gambling information' means information consisting of, or assisting in, the placing of a bet or wager, or the purchase of a ticket in a lottery or similar game of chance.

"(c) DEFENSE.—It is a defense to a prosecution:

"(1) under subsection (a)(1), (a)(2), or (a)(4) that the kind of gambling business or enterprise, the manner in which the business or enterprise was operated, and the defendant's participation therein, were legal in all states and localities in which it was carried on, including any state and locality from which a customer placed a wager with, or otherwise patronized, the gambling business or enterprise, and any state and locality in which the wager was received or to which it was transmitted.

"(2) under subsection (a)(3) that:

"(A) the gambling device was carried or sent into, or was en route to, solely a state and locality in which the use of such a device was legal;

"(B) the defendant was a common or public contract carrier, or an employee thereof, and was carrying the gambling device in the usual course of business;

"(C) the defendant was a player or bettor and the gambling device he was carrying or sending was solely a ticket or other embodiment of his claim;

"(D) the transmission of the gambling information was made solely in connection with news reporting;

"(E) the transmission of the gambling information was solely from a state and locality in which such gambling was legal into a state and locality in which such gambling was legal; or

"(F) the gambling proceeds were obtained by the defendant as a result of his lawful participation in gambling which was legal in all states and localities in which it was carried on, including any state and locality from which the defendant placed a wager or otherwise participated in gambling activity, and any state and locality in which his wager was received or to which it was transmitted.

"(d) ESTABLISHING PROBABLE CAUSE.—If five or more persons are engaged in a gambling business, and such business operates for two or more successive days, then, solely for the purpose of obtaining warrants for arrests, interceptions of communications, and other searches and seizures, probable cause that the business has taken in $2,000 or more in any single day shall be considered to be established.

"(e) GRADING.—An offense described in this section is:

"(1) a Class D felony in the circumstances set forth in subsection (a)(1) or (a)(2);

"(2) a Class E felony in the circumstances set forth in subsection (a)(3) or (a)(4).

"(f) JURISDICTION.—There is federal jurisdiction over an offense described in:

"(1) subsection (a)(1) or (a)(2) if the offense is committed:

"(A) within the general jurisdiction of the United States;

"(B) within the special jurisdiction of the United States; or

"(C) within the extraterritorial jurisdiction of the United States to the extent applicable under section 204;

"(2) subsection (a)(3) or (a)(4) if:

"(A) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(B) movement of any person across a state or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"§ 1842. Disseminating Obscene Material

"(a) OFFENSE.—A person is guilty of an offense if he:

"(1) disseminates obscene material:

"(A) to a minor; or

"(B) to any person in a manner affording no immediately effective opportunity to avoid exposure to such material; or

"(2) commercially disseminates obscene material to any person.

(b) DEFINITIONS.—As used in this section:

"(1) 'commercially disseminate' means to disseminate for profit;

"(2) 'disseminate' means:

"(A) to transfer, distribute, dispense, lend, display, exhibit, send, or broadcast, whether for profit or otherwise; or

"(B) to produce, transport, or possess with intent to do any of the foregoing;

"(3) 'minor' means an unmarried person less than seventeen years old;

"(4) 'obscene material' means material that:

"(A) sets forth in a patently offensive way:

"(i) an explicit representation, or a detailed written or verbal description, of an act of sexual intercourse, including genital-genital, anal-genital, or oral-genital intercourse, whether between human beings or between a human being and an animal; of masturbation; or of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship; or

"(ii) an explicit, close-up representation of a human genital organ;

"(B) taken as a whole, appeals predominantly to the prurient interest of:

"(i) the average person, applying contemporary community standards; or

"(ii) the average person within a sexually deviant class of persons, if such material is designed for, and is primarily disseminated to, such class of persons; and

"(C) taken as a whole, lacks serious artistic, scientific, literary, or political value.

"(c) AFFIRMATIVE DEFENSES.—It is an affirmative defense to a prosecution under this section that dissemination of the material was restricted to:

"(1) a person associated with an institution of higher learning, either as a member of the faculty or as an enrolled student, teaching or pursuing a bona fide course of study, or conducting or

engaging in a bona fide research program, to which such material is pertinent; or

"(2) a person whose receipt of such material was authorized in writing by a licensed or certified psychiatrist, psychologist, or medical practitioner.

"(d) GRADING.—An offense described in this section is a Class E felony.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the United States mail or a facility in interstate or foreign commerce is used in the commission of the offense; or

"(3) the material is moved across a state or United States boundary.

"§ 1843. Conducting a Prostitution Business

"(a) OFFENSE.—A person is guilty of an offense if he owns, controls, manages, supervises, directs, finances, procures patrons for, or recruits participants in, a prostitution business.

"(b) DEFINITIONS.—As used in this section:

"(1) 'prostitution' means engaging in a sexual act, as defined in section 1646(a)(1), as consideration for anything of pecuniary value;

"(2) 'prostitution business' means a business in which a person controls, manages, supervises, or directs the prostitution of another person.

"(c) DEFENSE.—It is a defense to a prosecution under this section that the prostitution business and the prostitution involved was legal in all states and localites in which it was carried on.

"(d) GRADING.—An offense described in this section is:

"(1) a Class D felony if the business involves prostitution, or recruiting for prostitution, of a person less than eighteen years old;

"(2) a Class E felony in any other case.

"(e) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States;

"(2) the United States mail or a facility of interstate or foreign commerce is used in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense; or

"(3) movement of any person across a state or United States boundary occurs in the planning, promotion, management, execution, consummation, or concealment of the offense, or in the distribution of the proceeds of the offense.

"Subchapter F.—Public Health Offenses

"§ 1851. Fraud in a Health Related Industry

"(a) OFFENSE.—A person is guilty of an offense if, with intent to defraud, he violates:

"(1) section 9, 10, 11, 14, or 17 of the Poultry Products Inspection Act, as amended (21 U.S.C. 458, 459, 460, 463, or 466) (relating to the marking, labeling, and packaging of poultry and poultry products);

"(2) section 10, 11, 19, 20, 24, 201, 202, 203, or 204 of the Federal Meat Inspection Act, as amended (21 U.S.C. 610, 611, 619, 620, 624, 641, 642, 643, or 644) (relating to the marking, labeling, and packaging of meat and meat products);

"(3) section 8 of the Egg Products Inspection Act, as amended (21 U.S.C. 1037) (relating to the marking, labeling, and packaging of eggs and egg products); or

"(4) section 301 of the Federal Food, Drug, and Cosmetic Act, as amended (21 U.S.C. 331) (relating to the adulteration and misbranding of a food, drug, device, or cosmetic).

"(b) GRADING.—An offense described in this section is a Class E felony.

"§ 1852. Distributing Adulterated Food

"(a) OFFENSE.—A person is guilty of an offense if in the distribution of an adulterated article he violates:

"(1) section 9, 10, 11, 14, or 17 of the Poultry Products Inspection Act, as amended (21 U.S.C. 458, 459, 460, 463, or 466) (relating to the distribution of adulterated poultry and poultry products);

"(2) section 10, 11, 19, 20, 24, 201, 202, 203, or 204 of the Federal Meat Inspection Act, as amended (21 U.S.C. 610, 611, 619, 620,

624, 641, 642, 643, or 644) (relating to the distribution of adulterated meat and meat products); or

"(3) section 8 of the Egg Products Inspection Act, as amended (21 U.S.C. 1037) (relating to the distribution of adulterated eggs and egg products).

"(b) DEFINITION.—The term 'adulterated', as used:

"(1) in subsection (a)(1) has the meaning set forth in section 4(g) of the Poultry Products Inspection Act, as amended (21 U.S.C. 453(g)), except for paragraph 8 thereof;

"(2) in subsection (a)(2) has the meaning set forth in section 2(m) of the Federal Meat Inspection Act, as amended (21 U.S.C. 601(m)), except for paragraph 8 thereof;

"(3) in subsection (a)(3) has the meaning set forth in section 4(a) of the Egg Products Inspection Act, as amended (21 U.S.C. 1033(a)), except for paragraph 8 thereof.

"(c) GRADING.—An offense described in this section is a Class E felony.

"§ 1853. Environmental Pollution

"(a) OFFENSE.—A person is guilty of an offense if he violates:

"(1) section 309(c)(1) of the Federal Water Pollution Control Act, as added by section 2 of the Act of October 18, 1972 (33 U.S.C. 1319(c)(1)) (relating to the control of water pollution and to permit conditions and limitations on water pollution);

"(2) section 113(c)(1) of the Clean Air Act, as added by section 4(a) of the Clean Air Act Amendments of 1970, and amended (42 U.S.C. 1857c-8(c)(1)) (relating to clean air standards and implementation plans and orders of the Administrator under the Clean Air Act);

"(3) section 11(a) of the Noise Control Act of 1972, as amended (42 U.S.C. 4910(a)) (relating to the manufacture, sale, and importation of products that violate noise emission standards); or

"(4) section 3008(d) of the Solid Waste Disposal Act (42 U.S.C. 692(d)) (relating to transportation and disposal of hazardous waste).

"(b) GRADING.—An offense described in this section is a Class A misdemeanor in the circumstances set forth in:

"(1) subsection (a)(1), unless prior to the commission of the offense the defendant has been convicted of an offense described

in subsection (a)(1), in which case the offense is a Class E felony.

"(2) subsection (a)(2), unless prior to the commission of the offense the defendant has been convicted of an offense described in subsection (a)(2), in which case the offense is a Class E felony;

"(3) subsection (a)(3), unless prior to the commission of the offense the defendant has been convicted of an offense described in subsection (a)(3), in which case the offense is a Class E felony;

"(4) subsection (a)(4), unless prior to the commission of the offense the defendant has been convicted of an offense described in subsection (a)(4), in which case the offense is a Class E felony.

Notwithstanding the provisions of section 2201(b), the maximum fine for a Class A misdemeanor described in this section is $25,000 per day of violation or the maximum fine otherwise available under section 2201 (b) or (c), whichever is higher, and the maximum fine for a Class E felony described in this section is $50,000 per day of violation or the maximum fine otherwise available under section 2201 (b) or (c), whichever is higher.

"Subchapter G.—Miscellaneous Offenses

"Sec.
"1861. Failing to Obey a Public Safety Order.
"1862. Violating State or Local Law in an Enclave.

"§ 1861. Failing to Obey a Public Safety Order

"(a) OFFENSE.—A person is guilty of an offense if he disobeys an order of a public servant to move, disperse, or refrain from specified activity in a particular place, and the order:

"(1) is issued in response to a fire, flood, riot, or other condition that creates a risk of serious injury to a person or serious damage to property; and

"(2) is, in fact, lawful and reasonably designed to prevent serious bodily injury to a person or serious damage to property.

"(b) GRADING.—An offense described in this section is an infraction.

"(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:

"(1) the offense is committed within the special jurisdiction of the United States; or

"(2) the public servant is a federal public servant.

"§ 1862. Violating State or Local Law in an Enclave

"(a) OFFENSE.—A person is guilty of an offense if, in a place within the special territorial jurisdiction of the United States as described in section 203(a)(1), (a)(2), or (a)(3), he engages in conduct:

"(1) that constitutes an offense under the law then in force in the state or locality in which such place is located;

"(2) that does not otherwise constitute an offense under a federal statute applicable in such place; and

"(3) that, in light of other federal statutes relating to similar conduct, was not intended to be excluded from the application of this section.

"(b) GRADING.—An offense described in this section is:

"(1) a Class A misdemeanor if the maximum term of imprisonment authorized by the state or local law is one year or more; or

"(2) a misdemeanor or infraction of the lowest class for which there is authorized under chapter 23 a term of imprisonment equal to or exceeding the maximum term authorized by the state or local law if the maximum term of imprisonment authorized by the state or local law is less than one year.

Notwithstanding the classification provided in this section, the term of imprisonment and the fine that may be imposed may not exceed the maximum authorized by the state or local law.

"(c) PROOF. In a prosecution under this section whether a law is 'then in force' under subsection (a)(1), or an issue under subsection (a)(2) or (a)(3), is a question of law.

"PART III.—SENTENCES

"Chapter 20.—GENERAL PROVISIONS

"§ 2001. Authorized Sentences

"(a) IN GENERAL.—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any federal statute shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in paragraphs (1) through (4) of section 101(b).

"(b) INDIVIDUALS.—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 2003, to:

"(1) probation as authorized by chapter 21;

"(2) a fine as authorized by chapter 22; or

"(3) a term of imprisonment as authorized by chapter 23.

A sentence to pay a fine may be imposed in addition to any other sentence.

"(c) ORGANIZATIONS.—An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 2003, to:

"(1) probation as authorized by chapter 21; or

"(2) a fine as authorized by chapter 22.

A sentence to pay a fine may be imposed in addition to a sentence to probation.

"§ 2002. Presentence Reports

"(a) PRESENTENCE INVESTIGATION AND REPORT BY PROBATION OFFICER.—A probation officer appointed by the court shall make a presentence investigation of a defendant found guilty of an offense and shall report the results of the investigation to the court before the imposition of sentence, pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure.

"(b) PRESENTENCE STUDY AND REPORT BY BUREAU OF PRISONS.—If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a felony, it may order that the defendant be committed to the custody of the Bureau of Prisons for a period of not more than sixty days. Such an order constitutes a provisional sentence of imprisonment for the maximum term authorized by section 2301(b) for the offense committed. The Bureau shall conduct a complete sudy of the defendant during such period, inquiring into such matters as the defendant's previous deliquency or criminal experiences; his social background; his capabilities; his mental, emotional, and physical health; and the rehabilitative resources or programs that may be available to suit his needs. The period of commitment may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of commitment, or by the expiration of any extension granted by the court, the Bureau shall return the defendant to the court for final sentencing, shall provide the court with a written report of the results of the study, and shall make to the court whatever recommendations the Bureau believes will be helpful to a proper resolution of the case. The report may include recommendations of the Bureau concerning the category of offense and category of offender set forth in the guidelines issued by the Sentencing Commission pur-

suant to 28 U.S.C. 994(a)(1) that it believes are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives available under this chapter.

"(c) PRESENTENCE EXAMINATION AND REPORT BY PSYCHIATRIC EXAMINERS.—If the court, before or after its receipt of a report specified in subsection (a) or (b), desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, it may order that the defendant undergo a psychiatric examination by two or more examiners, and that the examiners provide the court with a written report, pursuant to the provisions of section 3614.

"§ 2003. Imposition of a Sentence

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court, in determining the particular sentence to be imposed, shall consider:

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the need for the sentence imposed:

"(A) to afford adequate deterrence to criminal conduct;

"(B) to protect the public from further crimes of the defendant;

"(C) to reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense; and

"(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

"(3) the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant committed the offense; and

"(4) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

"(b) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the general reasons for its imposition of the particular sentence, and, if the sentence is outside the range described in subsection (a)(3), the reason for the imposition of a sentence outside such range.

"§ 2004. Order of a Criminal Forfeiture

"(a) FORFEITURE.—The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), or 1803 (Washing Racketeering Proceeds), shall order, in addition to the sentence that is imposed pursuant to the provisions of section 2001, that the defendant forfeit to the United States any property constituting his interest in the racketeering syndicate or enterprise involved.

"(b) PROTECTIVE ORDERS.—At any time after the arrest of the defendant for, or after the filing of an indictment or information charging, an offense for which a criminal forfeiture may be ordered under subsection (a), the court may enter a restraining order or injunction, may require a performance bond, and may take such other action as is in the interest of justice, with respect to any property subject to criminal forfeiture.

"(c) EXECUTION.—The Attorney General, upon such terms and conditions as are in the interest of justice, shall seize property that a defendant has been ordered to forfeit to the United States, and shall dispose of such property as soon as commercially feasible, making due provision for the rights of any innocent person. If any property cannot be disposed of for value the rights to such property shall not revert to the defendant.

"(d) APPLICABILITY OF CIVIL FORFEITURE PROVISIONS.—Except to the extent that they are inconsistent with the provisions of this section, all provisions of law relating to the remission or mitigation of civil forfeitures of property for violation of the customs laws, the compromise of claims with respect to such property, the disposition of such property, the proceeds from the sale of such property, and the award of compensation to informants with respect to such property, shall apply to criminal forfeitures ordered under this section. The duties imposed upon a customs officer or any other person with respect to the civil seizure, forfeiture, and disposition of property under the customs laws shall, with respect to property that has been ordered forfeited to the United States under this section, be performed by the Attorney General.

"§ 2005. Order of Notice to Victims

"The Court, in imposing a sentence on an individual who has been found guilty of an offense involving fraud or other deceptive practices, or on an organization that has been found guilty of any offense, may order, in addition to the sentence that is imposed pursuant to the provisions of section 2001, that the defendant give notice and explana-

tion of the conviction, in such form as the court may approve, to the class of persons or to the sector of the public affected by the conviction or financially interested in the subject matter of the offense, by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give such notice, the court shall consider the factors set forth in section 2003(a) to the extent that they are applicable.

"§ 2006. Order of Restitution

The court, in imposing a sentence on a defendant who has been found guilty of an offense causing bodily injury or property damage or other loss, may order, in addition to the sentence that is imposed pursuant to the provisions of section 2001, that the defendant make direct restitution to a victim of the offense in an amount and manner set by the court. The provisions of section 2202, 2203, 3812, and 3813 apply to an order to pay restitution as they apply to a sentence to pay a fine.

"§ 2007. Review of a Sentence

"The review of a sentence imposed pursuant to section 2001 is governed by the provisions of section 3725 and by the Federal Rules of Appellate Procedure.

"§ 2008 Implementation of a Sentence

"The implementation of a sentence imposed pursuant to section 2001 is governed by the provisions of chapter 38.

"Chapter 21.—PROBATION

"§ 2101. Sentence of Probation

"(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to a term of probation unless:

"(1) the offense is a Class A felony;

"(2) the offense is an offense for which probation has been expressly precluded; or

"(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense.

"(b) AUTHORIZED TERMS.—The authorized terms of probation are:

"(1) for a felony, not less than one nor more than five years;

"(2) for a misdemeanor, not more than two years;

"(3) for an infraction, not more than one year.

"§ 2102. Imposition of a Sentence of Probation

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF PROBATION.—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 2003(a) to the extent that they are applicable.

"(b) EFFECT ON FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence of probation can subsequently be modified or revoked, a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"§ 2103. Conditions of Probation

"(a) MANDATORY CONDITION.—The court shall provide, as an explicit condition of a sentence of probation, that the defendant not commit another federal, state, or local crime during the term of probation.

"(b) DISCRETIONARY CONDITIONS.—The court may provide, as further conditions of a sentence to probation to the extent that such conditions are reasonably related to the factors set forth in section 2003 (a)(1) and (a)(2) and to the extent that such conditions involve such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 2003(a)(2), that the defendant:

"(1) support his dependents and meet other family responsibilities;

"(2) pay a fine imposed pursuant to the provisions of chapter 22;

"(3) make direct restitution to a victim of the offense pursuant to the provisions of section 2006;

"(4) give to the victims of the offense the notice ordered pursuant to the provisions of section 2005;

"(5) work conscientiously at suitable employment or pursue conscientiously a course of study or of vocational training that will equip him for suitable employment;

"(6) refrain from engaging in a specified occupation, business, or profession bearing a reasonable relationship to the offense, or engage in such a specified occupation, business, or profession only under stated circumstances;

"(7) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

"(8) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

"(9) refrain from possessing a firearm, destructive device, or other dangerous weapon;

"(10) undergo available medical or psychiatric treatment as specified by the court and remain in a specified institution if required for that purpose;

"(11) remain in the custody of the Bureau of Prisons for any time or intervals of time, totaling no more than, the lesser of six months or the term of imprisonment authorized for the offense in section 2301(b), during the term of probation;

"(12) reside at, or participate in the program of, a community treatment facility for all or part of the term of probation;

"(13) work in community service as directed by the court;

"(14) reside in a specified place or area, or refrain from residing in a specified place or area;

"(15) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

"(16) report to a probation officer as directed by the court or the probation officer;

"(17) permit a probation officer to visit him at his home or elsewhere as specified by the court;

"(18) answer inquiries by a probation officer and promptly notify the probation officer of any change in address or employment; or

"(19) satisfy such other conditions as the court may impose.

"(c) MODIFICATION OF CONDITIONS.—The court may modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation.

"(d) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide to a defendant sentenced to probation a written statement setting forth all the conditions to which the sentence is subject with sufficient clarity and specificity to serve as a guide for the defendant's conduct and for such supervision as is required.

"§ 2104. Running of a Term of Probation

"(a) COMMENCEMENT.—A term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court.

"(b) CONCURRENCE WITH OTHER SENTENCES.—Multiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other. A term of probation runs concurrently with any federal, state, or local term of probation or parole for another offense to which the defendant is subject or becomes subject during the term of probation, except that it does not run during any period in which the defendant is imprisoned in connection with a conviction for a federal, state, or local crime.

"(c) EARLY TERMINATION.—The court may terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

"(d) EXTENSION.—The court may extend a term of probation, if less than the authorized term was previously imposed, at any time prior to the expiration or termination of the term of probation.

"(e) SUBJECT TO REVOCATION.—A sentence of probation remains conditional and subject to revocation until its expiration or termination.

"§ 2105. Revocation of Probation

"(a) CONTINUATION OR REVOCATION.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may:

"(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or

"(2) revoke the sentence of probation and impose any other sentence that was available under chapter 20 at the time of the initial sentencing.

"(b) DELAYED REVOCATION.—The power of the court to revoke a sentence of probation for violation of a condition of probation extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

"§ 2106. Implementation of a Sentence of Probation

"The implementation of a sentence of probation is governed by the provisions of subchapter A of chapter 38.

"Chapter 22.—FINES

"§ 2201. Sentence of Fine

"(a) IN GENERAL.—Subject to the provisions of section 2202, a defendant who has been found guilty of an offense may be sentenced to pay a fine.

"(b) AUTHORIZED FINES.—Except as otherwise provided in subsection (c) or any other provision of law, the authorized fines are:

"(1) if the defendant is an individual:

"(A) for a felony, not more than $100,000;

"(B) for a misdemeanor, not more than $10,000;

"(C) for an infraction, not more than $1,000;

"(2) if the defendant is an organization:

"(A) for a felony, not more than $500,000;

"(B) for a misdemeanor, not more than $100,000;

"(C) for an infraction, not more than $10,000.

"(c) ALTERNATIVE AUTHORIZED FINE.—In lieu of a fine authorized by subsection (b) or any other provision of law, a defendant who has been found guilty of an offense through which pecuniary gain was directly or indirectly derived, or by which bodily injury or property damage or other loss was caused, may be sentenced to pay a fine that does not exceed twice the gross gain derived or twice the gross loss caused, whichever is the greater.

"§ 2202. Imposition of a Sentence of Fine

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A FINE.—The court, in determining whether to impose a fine, and, if a fine is to be imposed, in determining the amount of the fine, the time for payment, and the method of payment, shall consider the factors set forth in section 2003 (a), to the extent they are applicable, including, with regard to the characteristics of the defendant under section 2003(a)(1), the ability of the defendant to pay the fine in view of:

"(1) the defendant's income, earning capacity, and financial resources;

"(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent upon the defendant;

"(3) any requirement imposed upon the defendant to make direct restitution or reparation to the victim of the offense; and

"(4) any other pertinent equitable consideration.

"(b) TIME AND METHOD OF PAYMENT.—At the time a defendant is sentenced to pay a fine, the court may provide for the payment to be made within a specified period of time or in specified installments. If no such provision is made a part of the sentence, payment is due immediately.

"(c) ALTERNATIVE SENTENCE PRECLUDED.—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be served in the event that the fine is not paid.

"(d) INDIVIDUAL RESPONSIBILITY FOR PAYMENT BY ORGANIZATION.—If a fine is imposed on an organization, it is the duty of the individuals authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization.

"§ 2203. Modification or Remission of Fine

"(a) PETITION FOR MODIFICATION OR REMISSION.—A defendant who has been sentenced to pay a fine, and who has paid part but not all thereof, may petition the court for:

"(1) an extension of the time for payment;

"(2) a modification in the method of payment; or

"(3) a remission of all or part of the unpaid portion.

"(b) ORDER OF MODIFICATION OR REMISSION.—If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the time or method specified, or that it would otherwise be unjust to require payment of the fine in the amount imposed or by the time or method specified, the court may enter an order:

"(1) extending the time for payment;

"(2) modifying the method of payment; or

"(3) remitting all or part of the unpaid portion.

"§ 2204. Implementation of a Sentence of Fine

"The implementation of a sentence to pay a fine is governed by the provisions of subchapter B of chapter 38.

"Chapter 23.—IMPRISONMENT

"§ 2301. Sentence of Imprisonment

"(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.

"(b) AUTHORIZED TERMS.—The authorized terms of imprisonment are:

"(1) for a Class A felony, the duration of the defendant's life or any period of time;

"(2) for a Class B felony, not more than twenty-five years;

"(3) for a Class C felony, not more than twelve years;

"(4) for a Class D felony, not more than six years;

"(5) for a Class E felony, not more than three years;

"(6) for a Class A misdemeanor, not more than one year;

"(7) for a Class B misdemeanor, not more than six months;

"(8) for a Class C misdemeanor, not more than thirty days;

"(9) for an infraction, not more than five days.

"(c) AUTHORIZED TERMS OF PAROLE INELIGIBILITY.—The authorized term of imprisonment that may be required to be served prior to eligibility for parole is any term found appropriate by the court in light of the provisions of section 2302(b), but no term of parole ineligibility may extend into the last one-tenth of the sentence imposed.

"§ 2302. Imposition of a Sentence of Imprisonment

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 2003(a) to the extent that they are applicable. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2). If the court imposes a term of imprisonment it shall designate the portion, if any, of the term to be served as a term of parole ineligibility.

"(b) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF PAROLE INELIGIBILITY.—The court, in determining whether to impose a term of parole ineligibility, and, if a term of parole ineligibility is to be imposed, in determining the length of the term, shall consider the factors set forth in section 2003(a) to the extent that they are applicable.

"(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT OR TERM OF PAROLE INELIGIBILITY.—The court may not modify a term of imprisonment or a term of parole ineligibility once it has been imposed except that:

"(1) upon motion of the Director of the Bureau of Prisons and upon notice to the attorney for the government, the court,

for extraordinary and compelling reasons, may reduce an imposed term of imprisonment or term of parole ineligibility to the time that the defendant has served in imprisonment; and

"(2) the court may modify an imposed term of imprisonment or term of parole ineligibility to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure.

"§ 2303. Parole Term and Contingent Imprisonment Term Included in Sentence of Imprisonment

"A sentence to a term of imprisonment in the case of a felony or of a Class A misdemeanor automatically includes, in addition to the specified term of imprisonment, a separate:

"(a) term of parole, the incidents of which are governed by the provisions of subchapter D of chapter 38; and

"(b) contingent term of imprisonment of:

"(1) ninety days in the case of a felony; or

"(2) thirty days in the case of a Class A misdemeanor;

that may, in the event of recommitment for violation of a condition of parole, be ordered to be served in lieu of the term of the original sentence minus the portion of the original sentence served in confinement prior to the parole, if the contingent term of imprisonment is longer.

"§ 2304. Multiple Sentences of Imprisonment

"(a) IMPOSITION OF CONCURRENT OR CONSECUTIVE TERMS.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively:

"(1) for an offense described in section 1001 (Criminal Attempt), 1002 (Criminal Conspiracy), or 1003 (Criminal Solicitation), and for another offense that was the sole objective of the attempt, conspiracy, or solicitation;

"(2) for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

Multiple terms of imprisonment run concurrently unless the court

orders that the terms are to run consecutively. If multiple terms of imprisonment are ordered to run consecutively, any included terms of parole ineligibility also run consecutively.

"(b) FACTORS TO BE CONSIDERED IN IMPOSING CONCURRENT OR CONSECUTIVE TERMS.— The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 2003(a).

"(c) LIMIT ON AGGREGATE OF CONSECUTIVE TERMS.—The aggregate of consecutive terms of imprisonment to which a defendant may be sentenced may not exceed such term as is authorized by section 2301 for an offense one grade higher than the most serious offense of which he was found guilty.

"(d) TREATMENT OF MULTIPLE SENTENCES AS AN AGGREGATE.— Multiple terms of imprisonment ordered to run consecutively shall be treated for administrative purposes as a single, aggregate term of imprisonment, and any included terms of parole ineligibility shall be treated as a single, aggregate term of parole ineligibility.

"§ 2305. Calculation of Term of Imprisonment

"(a) COMMENCEMENT OF SENTENCE.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or is received at, the official detention facility at which the sentence is to be served.

"(b) CREDIT FOR PRIOR CUSTODY.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences:

"(1) as a result of the offense for which the sentence was imposed; or

"(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

"§ 2306. Implementation of a Sentence of Imprisonment and Parole therefrom

"The implementation of a sentence to imprisonment is governed by the provisions of subchapter C of chapter 38. Parole from imprisonment is governed by the provisions of subchapter D of chapter 38.

"PART IV.—ADMINISTRATION AND PROCEDURE

"Chapter 30.—INVESTIGATIVE AND LAW ENFORCEMENT AUTHORITY

"Subchapter A.—Investigative Authority

"§ 3001. Investigative Authority over Offenses within this Title

"(a) SPECIFIC DESIGNATIONS.—Primary responsibility for detecting and investigating the commission of offenses described in this title is vested as follows:

"(1) offenses described in sections 1211, 1212, 1213, and 1214, and offenses arising from the administration or enforcement of the laws relating to immigration and nationality, are within the primary responsibility of the Immigration and Naturalization Service;

"(2) offenses described in subchapter A of chapter 14; offenses described in sections 1731, 1732, and 1733, if there is or may be jurisdiction over the offense as set forth in section 1731(c)(8) and the property consists of ammunition, a firearm, or a destructive device; offenses described in sections 1821(a)(2) and 1822; and offenses arising from the administration or enforcement of the laws relating to internal revenue; are within the primary responsibility of officers and employees of the Department of the Treasury assigned such responsibility by the Secretary of the Treasury;

"(3) offenses described in sections 1701, 1702, and 1703, if there is or may be federal jurisdiction over the offenses as set forth in section 1701(c)(5) or (c)(6), and offenses described in sections 1821(a)(1), 1821(a)(4), and 1823, are within the primary responsibility of officers and employees of the Department of the

Treasury assigned such responsibility by the Secretary of the Treasury, and, concurrently, are within the primary responsibility of the Federal Bureau of Investigation;

"(4) offenses described in subchapter B of chapter 14, and offenses arising from the administration or enforcement of the laws relating to customs, are within the primary responsibility of officers of the customs, as defined in section 401(i) of the Tariff Act of 1930, as amended (19 U.S.C. 1401(i));

"(5) offenses described in sections 1731, 1732, and 1733, if there is or may be federal jurisdiction over the offense as set forth in section 1731(c)(27) or (c)(28); offenses described in sections 1851 (a)(1), (a)(2), and (a)(3), and 1852; and offenses arising from the administration or enforcement of the laws relating to agriculture; are within the primary responsibility of officers and employees of the Department of Agriculture assigned such responsibility by the Secretary of Agriculture;

"(6) offenses described in subchapter E of chapter 17, other than offenses for which jurisdiction is based on section 1741(c)(2)(C), 1742(c)(2)(C), or 1743(c)(2)(C), if the tax stamp involved is a state or local tax stamp or if the security involved is described in section 1746 (f)(2), (f)(3), (f)(4), or (f)(8), and offenses arising from the administration or enforcement of the laws relating to counterfeiting and forgery, other than those specifically excepted by this paragraph, are within the primary responsibility of the United States Secret Service;

"(7) offenses described in subchapter B of chapter 18; and offenses arising from the administration or enforcement of the laws relating to controlled substances, are within the primary responsibility of the Drug Enforcement Administration;

"(8) offenses in which the subject of the offense is mail or property of the United States Postal Service; offenses described in section 1734(a) if there is or may be federal jurisdiction over the offense as set forth in subsection 1734(e)(1); and offenses arising from the administration or enforcement of the laws relating to mail; are within the primary responsibility of officers and employees of the United States Postal Service assigned such responsibility by the Board of Governors of the United States Postal Service;

"(9) offenses committed within the national park system that are not within the designated primary responsibility of another

federal agency are within the primary responsibility of the Department of the Interior;

"(10) offenses described in section 1731, if there is or may be jurisdiction over the offense as set forth in section 1731(c)(21), and offenses described in section 1763, are within the primary responsibility of officers and employees of the Commodity Futures Trading Commission assigned such responsibility by the Commission;

"(11) offenses described in section 1737(a)(1) are within the primary responsibility of officers and employees of the Environmental Protection Agency assigned such responsibility by the Administrator of the Environmental Protection Agency;

"(12) offenses described in section 1762(a)(4) are within the primary responsibility of officers and employees of the Department of the Treasury and of the Securities and Exchange Commission assigned or delegated such responsibility by the Secretary of the Treasury;

"(13) offenses described in section 1851(a)(4) are within the primary responsibility of the officers and employees of the Department of Health, Education, and Welfare assigned such responsibility by the Secretary of Health, Education, and Welfare;

"(14) offenses described in section 1131; offenses described in sections 1601, 1602, 1603, 1611, 1612, 1613, 1614, 1621, 1622, and 1623, if the victim of the offense is a United States official; offenses described in section 1631; and offenses described in sections 1601, 1602, 1603, 1611, 1612, 1613, 1614, 1615, 1616, 1641, 1642, 1643, 1644, 1645, 1721, 1731, 1732, 1733, 1824, and 1861, if the offense is committed within the special aircraft jurisdiction of the United States; are within the primary responsibility of the Federal Bureau of Investigation; and

"(15) all other offenses are within the primary responsibility of those law enforcement agencies designated by regulation, rule, or order issued by the Attorney General, except an offense that incorporates by reference a statute outside this title concerning which another agency is specifically assigned such responsibility by law.

"(b) REDESIGNATION.—A responsibility set forth in subsection (a) may be transferred to another law enforcement agency upon the writ-

ten consent of the head of both agencies involved and of the Attorney General.

"§ 3002. Investigative Authority Over Offenses Outside This Title

"(a) SPECIFIC DESIGNATIONS.—Primary responsibility for detecting and investigating the commission of offenses described outside this title is vested in:

"(1) the law enforcement agency specifically assigned such responsibility by law; or

"(2) the law enforcement agency designated by regulation, rule, or order issued by the Attorney General if no other agency is specifically assigned such responsibility by law.

"(b) REDESIGNATION.—A responsibility set forth in subsection (a) may be transferred to another law enforcement agency upon the written consent of the head of both agencies involved and of the Attorney General.

"Subchapter B.—Law Enforcement Authority

"§ 3011. Federal Bureau of Investigation

"The Director, Associate Director, Assistant to the Director, an Assistant Director, an inspector, and an agent of the Federal Bureau of Investigation of the Department of Justice may:

"(a) carry a firearm;

"(b) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(c) make an arrest without a warrant for an offense committed in his presence, or for a felony committed outside his presence if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(d) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(e) perform any other law enforcement duty that the Attorney General may designate.

"§ 3012. Drug Enforcement Administration

"Subject to the direction of the Attorney General, an officer or employee of the Drug Enforcement Administration may:

"(a) carry a firearm;

"(b) execute an order, warrant, administrative inspection warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, inspection, or production of evidence;

"(c) make an arrest without a warrant for an offense committed in his presence, or for a felony committed outside his presence, if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(d) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender;

"(e) make a seizure of property pursuant to the provisions of the Controlled Substances Act (21 U.S.C. 801 et seq.); and

"(f) perform any other law enforcement duty that the Attorney General may designate.

"§ 3013. Department of the Treasury

"(a) AUTHORITY.—Subject to the direction of the Secretary of the Treasury:

"(1) an agent of the United States Secret Service;

"(2) an officer of the customs, as defined in section 401(i) of the Tariff Act of 1930, as amended (19 U.S.C. 1401(i));

"(3) an agent of the Bureau of Alcohol, Tobacco, and Firearms whom the Secretary of the Treasury has charged with the duty of enforcing any criminal, seizure, or forfeiture provision of the laws relating to internal revenue; or

"(4) a criminal investigator of the Intelligence Division or of the Internal Security Division of the Internal Revenue Service whom the Secretary has charged with the duty of enforcing a criminal provision of the internal revenue laws or another criminal provision of the laws relating to the internal revenue;

may perform any of the functions and duties enumerated in subsection (b).

"(b) FUNCTIONS AND DUTIES.—Except as otherwise provided, an agent, officer, or investigator described in subsection (a) may:

"(1) carry a firearm;

"(2) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(3) make an arrest without warrant for an offense committed in his presence, or for a felony committed outside his presence if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(4) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(5) perform any other law enforcement duty that the Secretary of the Treasury may designate.

"(c) SPECIAL PROTECTION FUNCTION.—Subject to the direction of the Secretary of the Treasury, the United States Secret Service shall protect the person of:

"(1) the President and the members of his immediate family;

"(2) the President-elect and, unless such protection is declined, the members of his immediate family;

"(3) the Vice President, or other person next in the order of succession to the office of President, and, unless such protection is declined, the members of his immediate family;

"(4) the Vice President-elect and, unless such protection is declined, the members of his immediate family;

"(5) a person who is determined by the Secretary of the Treasury, after consultation with the advisory committee set forth in Public Law 90–331 (82 Stat. 170), to be a major candidate for President or Vice President, unless such protection is declined by such person;

"(6) a former President and his spouse, unless such protection is declined by such former President;

"(7) the spouse of a deceased former President until remarriage, unless such protection is declined by such spouse;

"(8) a minor child of a former President, until he reaches 16 years of age, unless such protection is declined by a parent or guardian of such minor child;

"(9) the chief of state or head of government, or the political equivalent, of a foreign power, who is in the United States;

"(10) an official guest of the United States who is ordered protected at the direction of the President, and

"(11) a federal public servant or other official representative of the United States who is performing a special mission outside the United States and who is ordered protected at the direction of the President.

"§ 3014. Postal Service

"Subject to the direction of the Board of Governors of the United States Postal Service, an officer or employee of the Postal Service who is performing a duty related to the inspection of a postal matter, related to the enforcement of a law regarding property of the Postal Service or federal property in the custody of the Postal Service, related to the use of the mails, or related to an offense arising from the administration or enforcement of the laws relating to the mails, may:

"(a) carry a firearm;

"(b) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(c) make an arrest without a warrant for an offense committed in his presence, or for a felony committed outside his presence if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(d) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(e) perform any other law enforcement duty that the Board of Governors may designate.

"§ 3015. United States Marshals Service

"(a) AUTHORITY.—A United States marshal and a deputy United States marshal may:

"(1) carry a firearm;

"(2) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(3) make an arrest without warrant for an offense committed in his presence, or for a felony committed outside his presence if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(4) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(5) perform any other law enforcement duty that the Attorney General may designate.

"(b) TEMPORARY CUSTODY OF PERSONS.—United States marshals shall provide for the safe-keeping of a person:

"(1) arrested;

"(2) held pending commitment to an official detention facility;

"(3) removed from a federal official detention facility to comply with an order or writ issuing from a court of competent jurisdiction; or

"(4) held under an order of transfer to a community treatment facility.

"§ 3016. United States Probation Service

"An officer of the United States Probation Service may:

"(a) carry a firearm pursuant to regulations issued by the Judicial Conference of the United States;

"(b) execute a warrant for the arrest of a probationer or parolee:

"(1) in the judicial district in which the officer was appointed; or

"(2) in any judicial district if the warrant was issued in the judicial district in which the officer was appointed; and

"(c) make an arrest without a warrant of a probationer or parolee in the judicial district in which the officer was appointed if the officer has reasonable grounds to believe that the person to be arrested has violated a condition of his probation or parole.

"§ 3017. Bureau of Prisons

Subject to the direction of the Attorney General:

"(a) an officer or employee of the Bureau of Prisons or of the Parole Commission may carry a firearm;

"(b) an officer or employee of the Bureau of Prisons may:

"(1) execute a warrant for the arrest of a parolee; and

"(2) make an arrest without a warrant for an offense described in section 1313 (Escape), 1314 (Providing or Possessing Contraband in a Prison), 1831 (Leading a Riot), 1832 (Providing Arms for a Riot), or 1833 (Engaging in a

Riot), if he has reasonable grounds to believe that the person to be arrested has committed or is committing the offense; and

"(c) the chief executive officer of a federal official detention facility and those members of his staff whom he designates may, without fee, administer an oath to and take an acknowledgment of an officer, employee, or inmate of such facility.

"§ 3018. Immigration and Naturalization Service

"Subject to the direction of the Attorney General, an officer or employee of the Immigration and Naturalization Service may:

"(a) carry a firearm;

"(b) execute an order, warrant, subpoena, or other process issued under authority of the United States for arrest, search or seizure, or production of evidence;

"(c) make an arrest without warrant for an offense committed in his presence, or for a felony committed outside his presence if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(d) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(e) perform any other law enforcement duty that the Attorney General may designate.

"§ 3019. Department of the Interior

"Subject to the direction of the Secretary of the Interior, an officer or employee of the Department of the Interior, charged with law enforcement responsibilities by the Secretary of the Interior may:

"(a) carry a firearm;

"(b) execute an order, warrant, subpoena, or other process issued under the authority of the United States for arrest, search or seizure, or production of evidence;

"(c) make an arrest without a warrant for an offense committed in his presence, or for a felony committed outside his presence, if he has reasonable grounds to believe that the person to be arrested has committed or is committing a felony;

"(d) offer and pay a reward for services or information assisting in the detection or investigation of the commission of an offense or in the apprehension of an offender; and

"(e) perform any other law enforcement duty that the Secretary of the Interior may designate.

"Chapter 31.—ANCILLARY INVESTIGATIVE AUTHORITY

"Subchapter A.—Interception of Communications

"§ 3101. Authorization for Interception

"(a) FEDERAL.—The interception of a private oral communication may be authorized or approved by order of a federal court of competent jurisdiction, pursuant to the provisions of section 3103, if:

"(1) the filing of an application for such an order is authorized by:

"(A) the Attorney General; or

"(B) an Assistant Attorney General specifically designated by the Attorney General;

"(2) the application is filed, pursuant to the provisions of section 3102, by a law enforcement officer of a government agency having responsibility for the investigation of the offense concerning which the application is made; and

"(3) the interception may provide or has provided evidence of the commission of an offense described in:

"(A) section 1101 (Treason), 1102 (Armed Rebellion or Insurrection), 1111 (Sabotage), 1112 (Impairing Military Effectiveness), 1118 (Aiding Escape of a Prisoner of War or an Enemy Alien), 1121 (Espionage), 1122 (Disseminating National Defense Information), 1123 (Disseminating Classified Information), 1124 (Receiving Classified Information), 1131 (Atomic Energy Offenses), 1321 (Witness Bribery), 1322 (Corrupting a Witness or an Informant), 1323 (Tampering with a Witness or an Informant), 1324 (Retaliating Against a Witness or an Informant), 1351 (Bribery), 1352 (Graft), 1601 (Murder), 1602 (Manslaughter), 1611 (Maiming), 1612 (Aggravated Battery), 1615 (Terrorizing), 1621 (Kidnapping), 1622 (Aggravated Criminal Re-

straint), 1631 (Aircraft Hijacking), 1701 (Arson), 1702 (Aggravated Property Destruction), 1721 (Robbery), 1722 (Extortion), 1723 (Blackmail), 1731 (Theft), 1732 (Trafficking in Stolen Property), 1735 (Bankruptcy Fraud), 1741 (Counterfeiting), 1742 (Forgery), 1752 (Labor Bribery), 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), 1803 (Washing Racketeering Proceeds), 1804 (Loansharking), 1805 (Facilitating a Racketeering Activity by Violence), 1811 (Trafficking in an Opiate), 1812 (Trafficking in Drugs), 1821 (Explosives Offenses), 1831 (Leading a Riot), 1832 (Providing Arms for a Riot), or 1841 (Engaging in a Gambling Business), or

"(B) section 1002 (Criminal Conspiracy) or 1003 (Criminal Solicitation), if an objective of the conspiracy or the crime solicited is an offense set forth in subparagraph (A).

"(b) STATE.—To the extent permitted by a state statute, the interception of a private oral communication may be authorized or approved by order of a state court of competent jurisdiction, pursuant to the provisions of applicable state law and in substantial conformity with the provisions of section 3102, if:

"(1) an application for such an order is filed, pursuant to the provisions of applicable state law and in substantial compliance with the provisions of section 3102, by the principal prosecuting attorney of the state or locality acting on behalf of a government agency having responsibility for the investigation of the offense concerning which the application is made; and

"(2) the interception may provide or has provided evidence of the commission of an offense involving:

"(A) bribery, murder, kidnapping, robbery, extortion, trafficking in a drug that is a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), or gambling;

"(B) theft, fraud, or a crime of violence that is a felony, that is designated in an applicable state statute as an offense for which interception may be ordered; or

"(C) a conspiracy or solicitation if an objective of the conspiracy or the crime solicited is an offense set forth in subparagraph (A) or (B).

"§ 3102. Application for an Order for Interception

"(a) APPLICATION.—An application for an order, or an extension of an order, authorizing or approving the interception of a private oral communication shall be made in writing under oath or equivalent affirmation to a court of competent jurisdiction and shall include the following information:

"(1) the identity of the law enforcement officer making the application and of the officer authorizing the application;

"(2) the authority of the applicant to make the application;

"(3) a complete statement of the facts relied upon by the applicant to justify his belief that an order should be issued, including:

"(A) details as to the particular offense that has been, is being, or is about to be committed;

"(B) the identity, if known, of the person involved in the commission of the offense whose communication is to be intercepted;

"(C) a particular description of the character and location of the facilities from which, or the place at which, the communication is to be intercepted; and

"(D) a particular description of the kind of communication sought to be intercepted;

"(4) a complete statement of other investigative procedures that have been tried in the investigation and that have failed, or that have not been tried in the investigation because they reasonably appear to be unlikely to succeed or to be too dangerous;

"(5) a statement of the period of time for which the interception is required to be maintained, and, if the character of the investigation is such that the authorization for interception should not automatically terminate when the described kind of communication has been first obtained, a particular description of facts establishing probable cause to believe that an additional communication of the same kind will occur thereafter;

"(6) a complete statement of the facts concerning all previous applications known to the applicant that have been made to any court for issuance of an order authorizing or approving the interception of a private oral communication involving any of the

same persons, facilities, or places specified in the application, and the action taken by the court on each such application; and

"(7) if the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

"(b) ADDITIONAL EVIDENCE.—The court may require the applicant to furnish additional testimony or documentary evidence in support of the application.

"§ 3103. Issuance of an Order for Interception

"(a) FINDINGS.—Upon an application made pursuant to section 3102, the court may issue an ex parte order, as requested in the application or as found warranted by the court, authorizing or approving interception of a private oral communication within the geographic jurisdiction of such court if the court determines on the basis of the facts submitted by the applicant that:

"(1) there is probable cause to believe that a person is committing, has committed, or is about to commit a particular offense set forth in section 3101;

"(2) there is probable cause to believe that a particular communication concerning the offense will be obtained through such interception;

"(3) other investigative procedures have been tried and have failed, or have not been tried because they reasonably appear to be unlikely to succeed or to be too dangerous; and

"(4) there is probable cause to believe that a facility from which, or the place at which, the communication is to be intercepted:

"(A) is being used, or is about to be used, in connection with the commission of the offense; or

"(B) is leased to, listed in the name of, or commonly used by a person who is committing, has committed, or is about to commit the offense.

"(b) ORDER.—An order issued under this section:

"(1) shall specify:

"(A) the identity, if known, of the person whose communication is to be intercepted;

"(B) the character and location of the facilities from which, or the place at which, the communication is to be intercepted;

"(C) a particular description of the kind of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(D) the identity of the government agency authorized to intercept the communication and of the person authorizing the application; and

"(E) the period of time during which the interception is authorized, and whether the interception must automatically terminate when the described communication has been first obtained; and

"(2) shall direct, upon the request of the applicant:

"(A) that a communications common carrier, landlord, custodian, or other person furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or other person is according the person whose communication is to be intercepted; and

"(B) that the applicant compensate, at the prevailing rates, such carrier, landlord, custodian, or other person for furnishing such facilities or technical assistance.

"(c) PERIOD AND MANNER OF INTERCEPTION.—An order issued under this section may authorize or approve the interception of a private oral communication for the period necessary to achieve the purposes of the authorization, or for thirty days, whichever is less. Extensions of an order may be granted, after an application for an extension made in accordance with the provisions of section 3102(a) and after findings concerning an extension in accordance with the provisions of subsection (a). The period of extension may be for the period necessary to achieve the purposes for which it was granted, or for thirty days, whichever is less. An order and extension of an order shall direct that the interception be executed as soon as practicable, be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this subchapter, and be terminated upon attainment of the authorized objective, or in thirty days, whichever is less.

"(d) PERIODIC REPORTS.—An order issued under this section may require that periodic reports be made to the court that issued the

order stating the progress made toward achievement of the authorized objective and the need for continued interception.

"§ 3104. Interception Without Prior Authorization

"(a) UNRELATED INTERCEPTION IN THE COURSE OF AN AUTHORIZED INTERCEPTION.—If a law enforcement officer, while engaged in intercepting a private oral communication in accordance with the provisions of this subchapter, intercepts a private oral communication that relates to an offense other than an offense specified in the order of authorization or approval, he may, in order to permit the disclosure or use of its contents or evidence derived from its contents during testimony in an official proceeding, make an application, in accordance with section 3102, for an order approving such interception as soon as practicable after the unrelated interception. The court shall enter such an order if it finds that the communication was otherwise intercepted in accordance with the provisions of this subchapter.

"(b) EMERGENCY INTERCEPTION.—Notwithstanding any other provision of this subchapter, a law enforcement officer may intercept a private oral communication without a court order if:

"(1) he is specially authorized to do so by the Attorney General, or by the principal prosecuting attorney of a state or locality acting pursuant to a statute of that state;

"(2) he reasonably determines that:

"(A) an emergency situation exists with respect to an offense described in section 1101 (Treason), 1111 (Sabotage), or 1121 (Espionage), or an offense that involves a risk of death;

"(B) the emergency situation requires a private oral communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained; and

"(C) there are grounds upon which an order could be entered under this subchapter to authorize such interception; and

"(3) an application for an order approving the interception is made in accordance with section 3102 as soon as practicable, but not more than forty-eight hours, after the interception has occurred or commenced.

In the absence of an order approving the interception, the interception shall terminate immediately when the communication sought is obtained or when the application for the order is denied, whichever is earlier. If the application for approval is denied, the contents of any

private oral communication intercepted shall be treated as having been obtained in violation of this subchapter, and a notice shall be served as provided in section 3105(b).

"§ 3105. Records and Notice of Interception

"(a) MAINTENANCE OF RECORDS.—

"(1) The contents of a private oral communication intercepted by any means authorized by law shall, unless impracticable, be recorded on a sound recording device, and be recorded in a manner that will protect the recording from editing or other alteration. As soon as practicable after the expiration of the period set forth in the order, or in an extension of an order, the recording shall be made available to the court issuing the order, shall be sealed under its direction, and shall be placed under such custody as the court may order. The recording may not be destroyed for a period of ten years, and may not be destroyed after that period except upon an order of the court. A duplicate recording may be made for use or disclosure to the extent that such use or disclosure is appropriate to the proper performance of official duties.

"(2) An application made and an order issued under this subchapter shall be sealed by the court issuing the order, and shall be placed under such custody as the court may direct, and shall be disclosed only upon a showing of good cause. The application and order may not be destroyed for a period of ten years, and may not be destroyed after that period except upon an order of the court.

"(b) SERVICE OF NOTICE TO PARTIES.—

"(1) Within a reasonable time, but not more than ninety days, after the termination of the period for which an interception is authorized by an order or an extension of an order, or after the filing of an application, that is subsequently denied, for an order of approval under section 3104(b), the court shall order notice to be served on the person named in the order or in the application, and on such other person who is a party to an intercepted private oral communication as the court may determine to be in the interest of justice. The notice shall include:

"(A) the fact and date of the issuance of the order or of the filing and denial of the application;

"(B) the period of the authorized, approved, or disapproved interception;

"(C) the fact that during the period a private oral communication was or was not intercepted.

"(2) The court, upon the filing of a motion by a person upon whom the notice is served, may make available for inspection by such person or his counsel any portion of the contents of an intercepted private oral communication, the evidence derived from such contents, the application, or the order, that the court determines to be in the interest of justice.

"(3) On an ex parte showing of good cause to the court, the serving of the notice may be postponed.

"**§ 3106. Use of Information Obtained from an Interception**

"(a) DISCLOSURE AND USE.—

"(1) A law enforcement officer who, in accordance with the provisions of this subchapter, has obtained knowledge of the contents of a private oral communication, including the contents of an unrelated interception as set forth in section 3104(a), or evidence derived from such contents, may disclose or use such contents to the extent that disclosure is appropriate to the proper performance of his official duties.

"(2) A person who, in accordance with the provisions of this subchapter, has received information concerning the contents of a private oral communication, including the contents of an unrelated interception for which an order has been issued as set forth in section 3104(a), or evidence derived from such contents, may disclose or use such contents while giving testimony under oath or affirmation in an official proceeding.

"(3) A privileged private oral communication that is intercepted in accordance with, or in violation of, the provisions of this chapter does not lose its privileged character because of its being intercepted.

"(b) SEAL.—The presence of the seal provided for by section 3105 (a), or a satisfactory explanation for the absence of such seal, is a prerequisite to the use or disclosure of the contents of an intercepted private oral communication, or evidence derived from such contents, in an official proceeding.

"(c) PRE-TRIAL NOTICE.—The contents of an intercepted private oral communication, or evidence derived from such contents, may not be received in evidence or otherwise disclosed in an official proceeding in a court unless each aggrieved person who is a party in the official proceeding has, not less than ten days before the official proceeding, been furnished with a copy of the court order, and the accompanying

application, under which the interception was authorized or approved. The ten day period may be waived by the court if it finds that it was not possible to furnish such person with the information ten days before the official proceeding, and that the person will not be prejudiced by delay in receiving the information.

"(d) SUPPRESSION OF EVIDENCE.—

"(1) An aggrieved person in an official proceeding before a government agency of the United States, a state, or a locality, may make a motion to suppress the contents of an intercepted private oral communication, or evidence derived from such contents, on the ground that:

"(A) the communication was unlawfully intercepted;

"(B) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(C) the interception was not made in conformity with the order of authorization or approval.

If the motion alleges that the evidence sought to be suppressed has been derived from the contents of an unlawfully intercepted private oral communication, and if the aggrieved person has not been served with notice of such an interception as provided by section 3105(b), the opponent of the allegation shall affirm or deny the occurrence of the alleged unlawful interception, but no such motion shall be considered if the alleged unlawful interception took place more than five years before the event to which the evidence relates.

"(2) The motion shall be made prior to the official proceeding unless there was no opportunity to make the motion or unless the aggrieved person was not aware of the grounds for the motion.

"(3) A court of competent jurisdiction, upon the filing of a motion by an aggrieved person, may make available for inspection by the aggrieved person or his counsel any portion of the contents of an intercepted private oral communication, or the evidence derived from such contents, the court determines to be in the interest of justice.

"(4) No part of the contents of a private oral communication that has been unlawfully intercepted, and no evidence derived from such contents, may be received in evidence in an official proceeding before a government agency of the United States, a state, or a locality.

"§ 3107. Report of Interception

"(a) JUDICIAL REPORT.—Within thirty days after the expiration of the period of interception authorized in an order, or extension of an order, entered under section 3103, or after the denial of an application for an order approving an interception, the court shall report to the Administrative Office of the United States Courts:

"(1) the fact that an order or extension was applied for;

"(2) the identity of the law enforcement officer and the government agency making the application and the person authorizing the application;

"(3) the kind of order or extension applied for;

"(4) the offense specified in the application for the order or extension;

"(5) the fact that the application for the order or extension was granted as applied for, was granted in a modified form, or was denied;

"(6) the period of interception authorized by the order or extension;

"(7) the nature of the facilities from which, or the place at which, the private oral communication was to be intercepted; and

"(8) any related information that the Administrative Office of the United States Courts may by regulation require.

"(b) PROSECUTIVE REPORT.—In January of each year, the Attorney General, or the principal prosecuting attorney of a state or locality, shall report to the Administrative Office of the United States Courts:

"(1) the information required by subsection (a) with respect to each application for an order, or extension of an order, made during the preceding calendar year;

"(2) a general description of the interceptions made under such orders or extensions, including:

"(A) the approximate nature and frequency of incriminating communications intercepted;

"(B) the approximate nature and frequency of other communications intercepted;

"(C) the approximate number of persons whose communications were intercepted; and

"(D) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

"(3) the number of arrests and summonses in lieu of arrests resulting from the interceptions, and the offenses which were the subjects of such arrests and summonses;

"(4) the number of trials resulting from the interceptions;

"(5) the number of motions to suppress made with respect to the interceptions, and the number granted or denied;

"(6) the number of convictions resulting from the interceptions, the offenses for which the convictions were obtained, and a general assessment of the importance of the interceptions in obtaining the convictions; and

"(7) any related information that the Administrative Office of the United States Courts may by regulation require.

"(c) ADMINISTRATIVE OFFICE REPORT.—In April of each year, the Director of the Administrative Office of the United States Courts shall transmit to the Congress a complete report concerning the number of applications made for orders and extensions of orders authorizing or approving the interception of private oral communications and the number of such orders and extensions granted or denied during the preceding calendar year. The report shall include a summary and analysis of the data required to be filed with the Administrative Office under subsection (a) and (b).

"(d) REGULATIONS CONCERNING REPORTS.—The Director of the Administrative Office of the United States Courts is authorized to issue regulations dealing with the content and form of the reports required to be filed pursuant to subsections (a) and (b).

"§ 3108. Definitions for Chapter A

"As used in this subchapter:

"(a) 'aggrieved person' means a person who was a party to an intercepted private oral communication or a person against whom an interception was directed;

"(b) 'communications common carrier' has the meaning set forth for the term 'common carrier' in section 3(h) of the Act of June 19, 1934, as amended (47 U.S.C. 153(h));

"(c) 'contents', when used with respect to a private oral communication, has the meaning set forth in section 1526(b);

"(d) 'court of competent jurisdiction' means:

"(1) a district court of the United States or a United States Court of Appeals; or

"(2) a state court of general criminal jurisdiction authorized by a statute of that state to enter an order authorizing interception of a private oral communication;

"(e) 'eavesdropping device' has the meaning set forth in section 1525(c);

"(f) 'intercept' means to acquire the contents of a communication through the use of an eavesdropping device and includes the acquisition of such contents by simultaneous transmission or by recording;

"(g) 'private oral communication' has the meaning set forth in section 1525(f).

"Subchapter B.—Compulsion of Testimony of Witnesses

"§ 3111. Compulstion of Testimony Generally

"(a) SELF-INCRIMINATION CLAIM PRECLUDED.—If a person refuses, on the basis of his privilege against self-incrimination, to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of:

"(1) a court or grand jury of the United States;

"(2) an agency of the United States; or

"(3) Congress or either House of Congress;

and the presiding officer informs the person of an order issued under this subchapter, the person may not refuse to comply with the order on the basis of his privilege against self-incrimination.

"(b) USE OF TESTIMONY AGAINST WITNESS PRECLUDED.—The testimony or production that is compelled under the order, and any information directly or indirectly derived from the testimony or production, may not be used against the person in any manner a criminal case, except in a prosecution for:

"(1) an offense described in section 1341 (Perjury), 1342 (False Swearing), or 1343 (Making a False Statement) that is committed in the course of the testimony or production; or

"(2) an offense involving a failure to comply with the order.

"§ 3112. Court or Grand Jury Proceedings

"(a) ISSUANCE OF ORDER.—If a person has been or may be subpoenaed to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of a court or grand jury of the United States, the district court for the judicial district in which the official proceeding is or may be held shall, upon the application of the United States attorney for the district pursuant to subsection (b), issue an order requiring the person to testify or to produce the record, document, or other object notwithstanding his

refusal to do so on the basis of his privilege against self-incrimination. The order shall become effective as provided in section 3111.

"(b) CRITERIA FOR ORDER.—A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, apply for an order under subsection (a) if in his judgment:

"(1) the testimony or the record, document, or other object may be necessary to the public interest; and

"(2) the person has refused or is likely to refuse to testify or to produce the record, document, or other object on the basis of his privilege against self-incrimination.

"§ 3113. Administrative Proceedings

"(a) ISSUANCE OF ORDER.—If a person has been or may be subpoenaed to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of an agency of the United States, the agency may, pursuant to subsection (b), issue an order requiring the person to testify or to produce the record, document, or other object notwithstanding his refusal to do so on the basis of his privilege against self-incrimination. The order shall become effective as provided in section 3111.

"(b) CRITERIA FOR ORDER.—An agency of the United States may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, issue an order under subsection (a) if in its judgment:

"(1) the testimony or the record, document, or other object may be necessary to the public interest; and

"(2) the person has refused or is likely to refuse to testify or to produce the record, document, or other object on the basis of his privilege against self-incrimination.

"§ 3114. Congressional Proceedings

"(a) ISSUANCE OF ORDER.—If a person has been or may be subpoenaed to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of Congress or of either House of Congress, the district court of the United States for the judicial district in which the official proceeding is or may be held shall, upon the application of a duly authorized representative of the House of Congress or the concerned subcommittee, committee, or joint committee of Congress pursuant to subsection (b), issue an order requiring the person to testify or to produce the record, document, or other object notwithstanding his refusal to do so on the basis of his privilege

against self-incrimination. The order shall become effective as provided in section 3111.

"(b) CRITERIA FOR ORDER.—A request for an order under subsection (a) may be made if:

"(1) the application for the order has been approved:

"(A) in the case of an official proceeding before a House of Congress by an affirmative vote of a majority of the members present in that House; or

"(B) in the case of an official proceeding before a committee, subcommittee, or joint committee of Congress by an affirmative vote of two-thirds of the members of the full committee; and

"(2) ten days or more prior to the day on which the application for the order was made, the Attorney General was served with notice of an intention to request the order.

"(c) POSTPONEMENT OF ORDER.—Upon application of the Attorney General, the court shall defer the issuance of an order under subsection (a) for a period of twenty days from the date of the application for the order, or for such lesser period as the Attorney General may specify.

"§ 3115. Definitions for Subchapter B

"As used in this subchapter:

"(a) 'agency of the United States' means an executive department, as defined in 5 U.S.C. 101; a military department, as defined in 5 U.S.C. 102; the Atomic Energy Commission; the China Trade Act registrar appointed under section 3 of that Act (15 U.S.C. 143); the Civil Aeronautics Board; the Commodity Futures Trading Commission; the Federal Communications Commission; the Federal Deposit Insurance Corporation; the Federal Maritime Commission; the Federal Power Commission; the Federal Trade Commission; the Interstate Commerce Commission; the National Credit Union Administration; the National Labor Relations Board; the National Transportation Safety Board, the Railroad Retirement Board; the Securities and Exchange Commission; the United States Victim Compensation Board; an arbitration board established under section 7 of the Railway Labor Act, as amended (45 U.S.C. 157); or a board established under section 5 of the Act of February 22, 1935 (15 U.S.C. 715d);

"(b) 'court of the United States' includes the Superior Court and the Court of Appeals of the District of Columbia.

"Subchapter C.—Protection of Witnesses

"§ 3121. Facilities for Witness Protection

"The Attorney General may provide for the security of government witnesses, potential government witnesses, and their immediate families, in official proceedings instituted against a person alleged to have engaged in racketeering activity or other offenses similar in nature, or involving offenses the investigation or prosecution of which is likely under the circumstances to cause the commission of an offense described in section 1324 (Retaliating against a Witness or an Informant). The Attorney General may provide housing facilities and otherwise provide for the health, safety, and welfare of such government witnesses and potential government witnesses, and their immediate families, if, in his judgment, testimony by such a witness might subject the witness or a member of his immediate family to a danger of bodily injury, and may continue to make such provision for as long as, in his judgment, such danger exists. The Attorney General is authorized to purchase, rent, or modify protected housing facilities for the purposes of this section.

"§ 3122. Reimbursement for Witness Protection Expenses

"The offer of facilities to a person under section 3121 may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by a state or local government of the cost of maintaining and protecting such person.

"§ 3123. Definitions for Subchapter C

"As used in this subchapter:

"(a) 'government' includes the federal government and a state or local government;

"(b) 'racketeering activity' has the meaning set forth in section 1806(f).

"Subchapter D.—Payment of Rewards

"§ 3131. Rewards for Apprehending Offenders

"The Attorney General may offer and pay an amount not to exceed $100,000 as a reward for the capture of, or for information leading to the arrest or conviction of, a person charged with the commission of a federal or state offense. Except as otherwise provided, no more than

$100,000 may be expended as a reward for the capture of, or for information leading to the arrest or conviction of, any one person. If the person charged is killed while resisting arrest, the Attorney General may pay all or part of the reward to the person who assisted in the capture or provided the information. A reward may not be paid to a public servant who has rendered services or furnished information while performing his official duties.

"Chapter 32.—RENDITION AND EXTRADITION

"Subchapter A.—Rendition

"§ 3201. Interstate Agreement on Detainers

"(a) Adoption of Agreement by the United States.—The United States, as a 'sending State' for purposes of Article III and IV, but as a 'receiving State' for purposes of Article III only, and the District of Columbia are parties to the Interstate Agreement on Detainers, as set forth in subsection (b), together with all jurisdictions joining the agreement in substantially the same form. All government agencies and public servants of the United States and of the District of Columbia shall cooperate with the party States in enforcing the agreement and in effectuating its purpose.

"(b) TEXT OF AGREEMENT.

" 'The contracting States solemnly agree that:

" 'ARTICLE I

" 'The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"'ARTICLE II

"'As used in this agreement:

"'(a) "State" shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"'(b) "Sending State" shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"'(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"'ARTICLE III

"'(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"'(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"'(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"'(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, information, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"'(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"'(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"'ARTICLE IV

"'(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"'(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"'(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"'(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"'(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"'ARTICLE V

"'(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"'(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"'(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"'(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"'(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"'(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or

for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"'(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"'(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"'(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"'(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"'ARTICLE VI

"'(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"'(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"'ARTICLE VII

"'Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"'ARTICLE VIII

"'This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"'ARTICLE IX

"'This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters.'

"§ 3202. Rendition of a Fugitive

"If the executive authority of a state demands the return of a person, as a fugitive from justice, from the executive authority of a state to which the person has fled, the demand must be accompanied by a copy of an indictment returned before a judge of the demanding state, or of an affidavit made before such a judge, charging such person with the commission of a state or local crime. The copy must be certified as authentic by the governor or chief magistrate of the state from which the person charged has fled. Upon receipt of the demand and accom-

panying documents, the executive authority of the state to which the person has fled shall:

"(a) cause the person to be arrested and held in official detention;

"(b) notify the executive authority of the demanding state, or his agent if one has been appointed to receive the fugitive; and

"(c) deliver the fugitive to the agent when the agent appears.

If no agent of the demanding state appears within thirty days of the date of arrest to take the fugitive into his custody, the person may be discharged. An agent who receives a fugitive into his custody may transport him to the state from which he has fled.

"§ 3203. General Provisions for Subchapter A

"(a) DEFINITIONS.—As used in section 3201:

"(1) 'Governor' means, with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Mayor of the District of Columbia;

"(2) 'appropriate court' means, with respect to the United States, a court of the United States, and with respect to the District of Columbia, the Superior Court of the District of Columbia, in which there is pending an indictment, information, or complaint, for which disposition is sought.

"(b) REGULATIONS, FORMS, AND INSTRUCTIONS.—The Attorney General, acting for the United States, and the Mayor of the District of Columbia, acting for the District of Columbia, shall issue regulations, forms, and instructions, and shall perform any other act necessary for carrying out the provisions of this subchapter.

"(c) RESERVATION OF RIGHT TO ALTER, AMEND, OR REPEAL.—The United States reserves the right to alter, amend, or repeal the Agreement set forth in section 3201(b).

"Subchapter B.—Extradition

"§ 3211. Scope and Limitation of Extradition Provisions

"(a) APPLICATION.—Extradition may be granted only pursuant to the provisions of an applicable treaty or other international agreement and of this subchapter.

"(b) LIMITATION.—The provisions of this subchapter relating to the surrender of a person who has been convicted of or charged with an offense by a foreign nation shall continue in force only during the existence in force of a treaty or other international agreement, bilateral or multilateral, concerning extradition between the United States and the foreign nation.

"(c) CONVICTIONS IN ABSENTIA.—Extradition may not be granted for a person convicted in absentia, unless:

"(1) the demanding government assures the Secretary of State that the proceeding will be reopened upon the request of the person to be surrendered; or

"(2) the person fled after having been present when his trial commenced.

"(d) AUTHORIZING EXTRADITION.—If an extradition treaty or other international agreement provides that the United States may extradite its own citizens or nationals, but does not require such extradition, the Secretary of State has authority to authorize the extradition of a United States citizen or national who has been found extraditable pursuant to the provisions of this subchapter.

"§ 3212. Extradition Procedure

"(a) ARRESTS WITH DOCUMENTATION.—

"(1) Upon the filing of a complaint under oath or affirmation charging that a person believed to be within the jurisdiction of the court has committed, within the jurisdiction of a demanding foreign government, an offense made estraditable in an applicable extradition treaty or other international agreement with the United States:

"(A) a court of the United States; or

"(B) a magistrate specially authorized by a court of the United States;

may issue a warrant for the arrest of the person charged.

"(2) The complaint may be filed only by:

"(A) the Attorney General:

"(i) pursuant to the provisions of an applicable treaty or other international agreement; or

"(ii) at the request of the demanding government; or

"(B) persons authorized by an appropriate authority of the demanding government to act on behalf of that government.

A complaint shall be accompanied by the documents required by the provisions of the applicable treaty or other international agreement, a copy of the diplomatic note to the Secretary of State re-

questing extradition, an acknowledgement from the Department of State of the diplomatic note requesting extradition, and a copy of the applicable treaty or other international agreement.

"(3) Upon arrest, the person shall be brought either to the court issuing the warrant of arrest or to the nearest federal district court. The extradition hearing shall be conducted by the court to which the person arrested is brought. If the person arrested is brought before a court other than the one that issued the warrant of arrest, the complaint and other documents filed with that court shall be forwarded by the issuing court to the court in which the hearing is to be conducted.

"(b) ARREST WITHOUT DOCUMENTATION.—

"(1) Upon the filing of a complaint under oath or affirmation by a person authorized to do so under subsection (a)(2):

"(A) a court of the United States; or

"(B) a magistrate specifically authorized by a court of the United States;

may issue a warrant for the provisional apprehension of the person sought.

"(2) The complaint shall state that a warrant of arrest or order of detention exists for the person in the foreign nation, shall specify the offense for which extradition is being sought, shall describe the circumstances that necessitate such arrest, and shall state, if the complaint is not filed by the Attorney General, that reasonable notice of the intention to make the complaint has been given to the Secretary of State.

"(3) The limitation period established by the applicable treaty or other international agreement, or by this subchapter, for the presentation of the documents required by the applicable treaty or other international agreement, shall be tolled by presentation of the documents to the Secretary of State. The failure to present the documents within the period prescribed by the applicable treaty or other international agreement, or by this subchapter, shall authorize the court to release the person from official detention, but such release does not terminate the proceeding.

"(c) OFFICIAL DETENTION.—

"(1) A person arrested under the provisions of subsection (a) shall be held in official detention until the completion of extradition proceedings unless good cause for his release is presented to the court. Release shall be granted only upon:

"(A) the posting of appropriate security;

"(B) the surrender of any travel documents, including a passport or a visa, in the possession of the person; and

"(C) the imposition of appropriate restrictions on his movements.

"(2) Unless unusual cause is presented to the court, a person arrested pursuant to the provisions of subsection (b) shall be held in official detention for the period, if any, specified in the applicable treaty or other international agreement, or for ninety days, whichever is less. If release is approved by the court, it may be granted only under the restrictions set forth in paragraph (1). Upon receipt by the Secretary of State of the documents specified in subsection (a), the person arrested shall be subject to the provisions of paragraph (1).

"(d) EXTRADITION HEARING.—

"(1) A person may not be extradited unless:

"(A) a hearing is held in which his extraditability is established; or

"(B) a hearing is waived pursuant to section 3214.

"(2) Unless otherwise specified by the applicable treaty or other international agreement, or by this subchapter, extraditability shall be found upon proof that:

"(A) the applicable treaty or other international agreement of extradition is in full force and effect;

"(B) the offense for which extradition is requested is made extraditable in the applicable treaty or other international agreement;

"(C) a criminal charge is pending against the person sought, or the person sought has been convicted of an offense in a court of the foreign nation but has not completed service of the sentence imposed;

"(D) the pending criminal charge, or the prosecution for the offense for which the person sought was convicted, was commenced within the period required by any applicable statute of limitations;

"(E) a warrant of arrest or order of detention is outstanding in the foreign nation against the person sought;

"(F) evidence exists that establishes probable cause to believe that the person sought and the person arrested are identical; and

"(G) evidence exists that establishes probable cause to believe that the person sought has committed, or has been convicted of, the alleged offense.

"(3) Defenses against extradition are limited to those provided by the applicable treaty or other international agreement, or by international law, or by this title.

"(e) PROOF AND ADMISSIBILITY OF EVIDENCE.—

"(1) Testimony of witnesses is not required in order to establish that the person is extraditable; extraditability may be established by properly certified documents alone.

"(2) A deposition, warrant, or other document, or a copy thereof, offered in evidence on behalf of the foreign nation upon the hearing of an extradition case, is admissible as evidence at the hearing for all the purposes of the hearing if:

"(A) it has been properly authenticated so as to entitle it to be received for similar purposes by the courts of the foreign nation from which the person is declared to be a fugitive;

"(B) a certificate to this effect has been executed by an appropriate official of the foreign nation;

"(C) the certificate of the foreign official has been certified by a diplomat or consular officer of the United States assigned to such foreign nation; and

"(D) the signature of such diplomatic or consular officer has been certified by the Secretary of State.

"(3) A certification or affidavit by the Secretary of State concerning the existence of a treaty or other international agreement, and concerning its status and effect, is admissible as evidence at the hearing and is conclusive proof of such matters. A certification or affidavit by the Secretary of State concerning the interpretation of a treaty or other international agreement is admissible as evidence at the hearing.

"(4) Hearsay evidence is admissible to establish the probable cause required by subsection (d) (2) (G), and probable cause may be established by hearsay evidence alone.

"(f) APPLICABLE LAWS.—The proof required by subsection (d) (2) (B), may be found sufficient only if the court determines that the basic elements of the offense in question substantially compare to the basic elements of an offense that is a federal offense or that is generally considered to be a crime under the criminal laws of the states. If the

applicable treaty or international agreement requires that the statute of limitations in the United States be considered, the time limitations set forth in section 511 are applicable to such offenses for purposes of this subchapter. The Federal Rules of Criminal Procedures are not applicable to this subchapter.

"(g) RESULTS OF HEARING.—

"(1) If, at the conclusion of the extradition hearing, the court conducting the hearing finds the evidence presented to be sufficient to meet the requirements of subsection (d)(2) and to sustain the charge under the provisions of the applicable treaty or other international agreement, it shall certify the record of the proceeding, including the finding as to extraditability on each charge for which extradition was requested as required by subsection (d)(2), to the Secretary of State. The certification shall be forwarded to the Secretary of State by the clerk of the court within ten days from the date of the finding and the order of committal.

"(2) If, at the conclusion of the extradition hearing, the court conducting the hearing finds the evidence presented to be insufficient to sustain any charge under the provisions of the applicable treaty or other international agreement, it shall state the reasons for the findings as to each such charge and certify the findings to the Secretary of State.

"(3) A person found extraditable shall be committed to the custody of the Attorney General until he is surrendered to a duly appointed agent of the demanding government or until the Secretary of State declines to issue a warrant of surrender.

"(h) NEW PROCEEDING FOR SAME FUGITIVE.—If the requisition of the foreign nation is denied, in whole or in part, by a court of the United States, that nation may, after notification to the Secretary of State, request the Attorney General to commence a new action in conformity with the court's decision required by section 3212(g)(2).

"§ 3213. Warrant of Surrender

"(a) ISSUANCE OF WARRANT.—Upon receipt of the record of the proceeding pursuant to the provisions of section 3212(g)(1), the Secretary of State may issue, pursuant to the request of the proper authorities of the demanding government, a warrant authorizing the surrender of a person committed under section 3212 to an authorized agent of the demanding government. The Secretary of State shall issue the warrant to surrender and forward it to the embassy of the foreign nation within thirty days of his receipt of the record of the proceedings unless an appeal is taken by the person sought and a

stay is granted by a court having jurisdiction. The Secretary of State's decision shall be based upon the provisions of the applicable treaty and this subchapter. The foreign embassy shall be advised of the limitations in section 3213(c) by the Secretary of State. If a request for extradition is denied, in whole or in part, the decision shall be forwarded expeditiously by the Secretary of State to the court of the district where the fugitive is detained and and to the foreign nation's ambassador.

"(b) WARRANT AS AUTHORITY.—Possession of a warrant of surrender by an agent of the foreign nation, duly appointed and designated to receive custody from the United States of a person ordered surrendered, constitutes authority for the agent to hold the surrendered person in his custody and safekeeping in any state through which it may be necessary for him to pass with the surrendered person en route to the nation to which extradition has been ordered.

"(c) TIME LIMITATION.—A person committed pursuant to section 3212(g)(3):

"(1) who is not surrendered to, and conveyed out of the United States by, a duly authorized agent of the demanding nation within:

"(A) sixty days after the commitment; plus

"(B) the time actually required expeditiously to convey the person out of the United States from the facility in which he was held in official detention; plus

"(C) the time, if any, during which the execution of the warrant had been stayed pursuant to the provisions of subsection (d); and

"(2) who gives reasonable notice to the Secretary of State, of his intention to apply for release;

may be ordered by a court of the United States to be released from official detention unless good cause is shown why such release should not be ordered.

"(d) STAY OF EXECUTION OF WARRANT.—The execution of the warrant of surrender may not be stayed by an appellate court of the United States unless good cause is shown.

"§ 3214. Waiver

"A person who is arrested for extradition to a foreign nation may waive the requirements of formal extradition proceedings, including the necessity of the issuance of a warrant of surrender by the Secretary of State, if, orally and in writing, he so advises the court before which an extradition hearing would be held that he knows of and

waives all rights guaranteed by the applicable treaty or other international agreement, and by this subchapter, in order that he might be returned as soon as practicable to such foreign nation. Such a waiver is irrevocable. If the demanding government and the court accept the waiver, the person shall be removed from the United States within fifteen days by an agent appointed by the demanding government. Possession of a certified copy of the waiver by the agent constitutes the same authority for the agent as that granted in section 3213(b). Except as otherwise provided by the applicable treaty or other international agreement, or by this subchapter, all rights available to a person extradited pursuant to such treaty or other international agreement are available to a person waiving extradition pursuant to this subsection. A person not removed from the United States within the fifteen day period prescribed in this section shall be released from official detention, but such release does not terminate the proceeding.

"§ 3215. Appeal

"The person sought, or the demanding government, may appeal to the appropriate United States Court of Appeals from a judgment on a request for extradition. A notice of appeal may be filed within seven days after the district court's decision regarding extraditability. The brief on behalf of the appellant shall be filed within ten days of the notice of appeal. The brief on behalf of the appellee shall be filed within ten days of the receipt of appellant's brief. An appeal under this section shall be decided expeditiously. No stay of the requirements of section 3212(g)(1) or (g)(2) may be granted except by the court of appeals before which the appeal is pending. No stay of the requirements of section 3212(g)(3) shall be granted.

"§ 3216. Return to the United States

"If a person is delivered, pursuant to an extradition request, by a foreign nation to a person who has been designated as an agent of the United States by the Secretary of State, the President has the power to take all necessary measures for the transportation and safekeeping of the surrendered person until he is returned to the jurisdiction that sought his return.

"§ 3217. General Provisions for Subchapter B

"(a) TRANSIT OF EXTRADITED PERSONS.—Except as otherwise provided, a person being escorted from the jurisdiction of one foreign nation to the jurisdiction of another as a result of his surrender for extradition shall be denied entry into the United States by the Immigration and Naturalization Service. If the person is required to transit

the United States, he may be permitted by the Immigration and Naturalization Service to enter the United States for the sole purpose of continuous transit, if prior notice of the required transit is given to the Secretary of State by a competent diplomatic official of the foreign nation seeking the transit.

"(b) PAYMENT OF FEES AND COSTS.—All costs and expenses incurred in connection with the extradition or return of a person at the request of:

"(1) a foreign nation, shall be borne by:

"(A) such nation, upon request made by the Secretary of State, if the demanding government is not represented by the Attorney General;

"(B) the United States, if the demanding government is represented by the Attorney General, except for costs and expenses for translations of extradition documents and for transportation of the person sought to the foreign nation;

"(2) a state, shall be borne by such state; and

"(3) the United States, shall be borne by the United States.

"Chapter 33.—JURISDICTION AND VENUE

"Subchapter A.—Jurisdiction

"§ 3301. Jurisdiction of District Courts Over Offenses

"(a) UNITED STATES DISTRICT COURTS.—The United States District Courts have original jurisdiction, exclusive of the courts of the states, over all offenses committed within the general, special, or extraterritorial jurisdiction of the United States.

"(b) DISTRICT COURTS OF THE CANAL ZONE, GUAM, AND THE VIRGIN ISLANDS.—The United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands have original jurisdiction over all offenses committed within the geographic jurisdiction of such courts or within the special or extraterritorial jurisdiction of the United States.

"§ 3302. Jurisdiction of United States Magistrates Over Offenses

"(a) JURISDICTION.—A United States magistrate has jurisdiction to try persons accused of, and to sentence persons found guilty of, misdemeanors and infractions committed within the judicial district or districts in which he serves, if he is specially designated by the district

court or courts to exercise such jurisdiction, and if he proceeds under such conditions as are imposed by the terms of the special designation. Subject to the terms of the special designation, the magistrate may exercise all authority of a district court with regard to trial, sentencing, and modification of sentences.

"(b) ELECTION BY DEFENDANT.—A person charged with a Class A misdemeanor may elect to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall explain to such person that he has a right to a trial before a judge of the district court, and that he has a right to a trial by jury before such judge. A magistrate shall not proceed to try such case unless the person, after such explanation, signs a written statement consenting to be tried before the magistrate, waiving trial before a judge of the district court, and waiving any right to a trial by jury that such person may have.

"(c) APPEAL TO DISTRICT COURT.—A person convicted by a magistrate may appeal from the conviction to a judge of the district court of the district in which the offense was committed.

"§ 3303. **Jurisdiction to Order Arrests for Offenses**

"(a) ARREST WITHIN THE UNITED STATES.—A person accused of an offense may be arrested anywhere within the United States by order of a federal judge, or of a judicial officer of the state in which the person is found.

"(b) ARREST OUTSIDE THE UNITED STATES.—A person accused of an offense may be arrested if he is outside the United States and outside the jurisdiction of any nation, and may be returned to the United States, by order of a federal judge, if the person:

"(1) is a fugitive from justice who has been charged with or convicted of any offense; or

"(2) is charged with an offense over which there is extraterritorial jurisdiction as set forth in section 204.

An officer executing a warrant ordered pursuant to this subsection may exercise all the powers of a United States marshal to the extent that such powers are needed for the execution of the warrant and for the safekeeping of the person arrested.

"(c) AUTHORITY OF A STATE JUDICIAL OFFICER.—A judicial officer of a state acting under subsection (a) may proceed according to the usual method of procedure in such state to the extent that such procedure is not inconsistent with the Federal Rules of Criminal Procedure, but his authority after the arrest is effected does not extend beyond determin-

ing whether to hold the person arrested, at the expense of the United States, for trial or to release him from official detention as provided by section 3502.

"Subchapter B.—Venue

"§ 3311. Venue for an Offense Committed in more than one District

"(a) IN GENERAL.—Except as otherwise provided, an offense begun in one judicial district and completed in another, or committed in more than one district, may be prosecuted in any district in which the offense was begun, continued, or completed.

"(b) CONSPIRACY OFFENSES.—A conspiracy offense, for purposes of subsection (a), is a continuing offense, and may be prosecuted in any district in which the conspiracy was entered into or in which any person engaged in any conduct to effect an objective of the conspiracy. A substantive offense that is committed pursuant to a conspiracy may be prosecuted with the conspiracy offense in any district in which the conspiracy offense may be prosecuted.

"(c) MAILS OR COMMERCE OFFENSES.—If federal jurisdiction to prosecute an offense is based upon the use of the mails, the movement of persons or property in interstate or foreign commerce or by mail, or the importation of an object into the United States, the offense, for purposes of subsection (a), is a continuing offense, and may be prosecuted in any district described in subsection (a) or in any district from, through, or into which the mail, commerce, or imported object moves.

"(d) TAX OFFENSES.—An offense:

"(1) described in section 1402(a)(1) (Disregarding a Tax Obligation); or

"(2) involving the use of the mail and described in section:

"(A) 1343 (Making a False Statement), if the offense involves a tax return as defined in section 1404(d); or

"(B) section 1401(a)(1) or (a)(5) (Tax Evasion);

may be prosecuted in any district in which the offense was begun, continued, or completed, unless the defendant, by motion filed within twenty days after arraignment in the district in which the prosecution is begun, requests to be tried in the district in which he was residing at the time the offense was committed.

"(e) HOMICIDE OFFENSES.—An offense described in section 1601 (Murder), 1602 (Manslaughter), or 1603 (Negligent Homicide) may be prosecuted only in the district in which the injury was inflicted, or in which the means were employed that caused the death, without regard to the place where the death occurred.

"(f) FLIGHT OFFENSES.—An offense described in section 1315 (Flight to Avoid Prosecution or Appearing as a Witness) may be prosecuted only in the district in which:

"(1) the original offense was alleged to have been committed; or

"(2) the person was to appear as a witness, give testimony, or produce a record, document, or other object.

"§ 3312. Venue for an Offense Committed outside any District

"(a) VENUE.—An offense begun or committed within:

"(1) any part of:

"(A) the special territorial jurisdiction of the United States as set forth in section 203(a);

"(B) the special maritime jurisdiction of the United States as set forth in section 203(b); or

"(C) the special aircraft jurisdiction of the United States as set forth in section 203(c);

that is outside of the jurisdiction of any judicial district; or

"(2) the extraterritorial jurisdiction of the United States as set forth in section 204;

shall be prosecuted in the district in which the defendant, or any one of two or more joint defendants, is arrested or is first brought after arrest. If the defendant or defendants are not arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the defendant, or of any one of two or more such defendants, or, if no such residence is known, the indictment or information may be filed in the District of Columbia.

"(b) CHANGE OF VENUE.—If the defendant arrives in the judicial district in which he is arrested, or to which he is first brought after arrest, due to emergency, illness, or other exigent circumstances resulting in an unscheduled arrival in that judicial district, the court may, on motion of a party, and in the interest of justice, transfer the proceeding to another judicial district.

"§ 3313. Venue if a New District or Division is Established

"(a) IN GENERAL.—If a new judicial district or division is established, or if a county or territory is transferred from one district or division to another district or division, a prosecution for an offense committed within such district, division, county, or territory prior to

the establishment or transfer shall proceed in the same manner as if the new district or division had not been created, or as if the county or territory had not been transferred.

"(b) REMOVAL UPON MOTION OF DEFENDANT.—A case proceeding as prescribed in subsection (a) may be ordered by the court to be removed to the new district or division for trial if, within twenty days after arraignment of the defendant in the district or division in which the indictment was returned or the information was filed, the defendant files a motion for such removal.

"Chapter 34.—APPOINTMENT OF COUNSEL

"§ 3401. District Plans for Appointment of Counsel

"(a) ESTABLISHMENT OF PLAN.—Each district court of the United States with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation:

"(1) who is charged:

"(A) with a felony or a Class A misdemeanor;

"(B) with an act of juvenile delinquency as defined in section 3606(b) including representation at a hearing pursuant to section 3603(a)(2)(C) or section 3603(a)(3)(C); or

"(C) with a violation of probation or parole;

"(2) who is under arrest, when such representation is required by law;

"(3) who is in custody as a material witness, or seeking collateral relief, as provided in section 3403(d); or

"(4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel, or for whom, in a case in which he faces loss of liberty, any federal law requires the appointment of counsel.

"(b) CHOICE OF PLAN.—Representation under the plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. The plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of the cases, a provision for:

"(1) attorneys furnished by a bar association or a legal aid agency; and

"(2) attorneys furnished by a defender organization established in accordance with the provisions of section 3404.

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit, and shall modify the plan when directed to do so by the judicial council. The district court shall notify the Administrative Office of the United States Courts of its plan and of any modification.

"§ 3402. Appointment of Counsel

"(a) COURT APPOINTMENT.—Counsel furnishing representation under a plan established pursuant to this subchapter shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In a case in which the defendant may be entitled to representation pursuant to a plan and appears without counsel, the court or magistrate shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives representation by counsel, the court or magistrate, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. The appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The court or magistrate shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or for other good cause shown.

"(b) DURATION AND SUBSTITUTION OF APPOINTMENT.—A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before a court or a magistrate through appeal, including ancillary matters appropriate to the proceedings and a proceeding under section 3603(a). If at any time after the appointment of counsel the court or magistrate finds that the person is financially able to obtain counsel or to make partial payment for the representation, the court or magistrate may, in the interest of justice, terminate the appointment of counsel or direct payment as provided in section 3403(c). If at any stage of the proceedings, including an appeal, the court or magistrate finds that a person is financially unable to pay counsel whom he had retained, the court or magistrate may, in the interest of justice, appoint counsel as provided in subsection (a) and authorize payment as provided in section 3403. The court

or magistrate may, in the interest of justice, substitute one appointed counsel for another at any stage of the proceedings.

"§ 3403. Compensation of Counsel

"(a) PAYMENT FOR REPRESENTATION.—

"(1) HOURLY RATE. An attorney appointed pursuant to section 3402, or a bar association, legal aid agency, or community defender organization that has provided the appointed attorney, shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $30 per hour for time expended before a court or a magistrate and $20 per hour for time reasonably expended out of court, or shall be compensated at such other hourly rate, fixed by the judicial council of the circuit, not to exceed the usual minimum hourly rate in the district for similar services. The attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the magistrate or court.

"(2) MAXIMUM AMOUNT.—For representation of a defendant before a district court or a magistrate, or both, the compensation to be paid to an attorney, or to a bar association, legal aid agency, or community defender organization, may not exceed $1,000 for each attorney in a case in which one or more felonies are charged, and $400 for each attorney in a case in which only misdemeanors or infractions are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney, or to a bar association, legal aid agency, or community defender organization, may not exceed $1,000 for each attorney in each court. For representation in connection with a posttrial motion made after the entry of judgment or in a probation or parole revocation proceeding, or for representation provided under section 3403(d) or 3617(d), the compensation may not exceed $250 for each attorney in each proceeding.

"(3) WAIVING MAXIMUM AMOUNT.—Payment in excess of any maximum amount provided in paragraph (2) may be made for extended or complex representation if:

"(A) the court in which the representation was rendered, or the magistrate if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation; and

"(B) the payment is approved by the chief judge of the circuit.

"(4) FILING CLAIM.—A separate claim for compensation and reimbursement shall be made to the district court for representation before the court or a magistrate, and to each appellate court for representation before that court. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the court or magistrate, and the compensation and reimbursement applied for or received from any other source in the same case. The court shall fix the compensation and reimbursement to be paid to the attorney, or to the bar association, legal aid agency, or community defender organization. In a case in which representation is furnished exclusively before a United States magistrate, the claim shall be submitted to the magistrate and he shall fix the compensation and reimbursement to be paid. In a case in which representation is furnished other than before a United States magistrate, a district court, or an appellate court, the claim shall be submitted to the district court, and the district court shall fix the compensation and reimbursement to be paid.

"(b) SERVICES OTHER THAN COUNSEL.—

"(1) WITH PRIOR REQUEST.—Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon a finding, after appropriate inquiry in an ex parte proceeding by the court or magistrate having jurisdiction over a matter, that the services are required in connection with the matter and that the person is financially unable to obtain them, the court or the magistrate shall authorize counsel to obtain them.

"(2) WITHOUT PRIOR REQUEST.—Counsel appointed under this chapter may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed $150 and expenses reasonably incurred.

"(3) MAXIMUM AMOUNT.—Compensation to be paid to a person for services rendered by him under this subsection or to be paid to an organization for services rendered by an employee thereof, shall not exceed $300, exclusive of reimbursement for expenses reasonably incurred, unless:

"(A) payment in excess of that limit is certified by the court or the magistrate, if the services were rendered in con-

nection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration; and

"(B) the amount of the excess payment is approved by the chief judge of the circuit.

"(c) RECEIPT OF OTHER PAYMENT.—If the court or magistrate finds that funds are available for payment by or on behalf of a person furnished representation, the court or magistrate may authorize or direct that such funds be paid to:

"(1) the appointed attorney;

"(2) the bar association, legal aid agency, or community defender organization that provided the appointed attorney;

"(3) any person or organization authorized pursuant to subsection (b) to render investigative, expert, or other services; or

"(4) the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section.

Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

"(d) DISCRETIONARY APPOINTMENT.—A person who is in custody as a material witness, or who is seeking relief under 28 U.S.C. 2241, 2254, or 2255, may be furnished representation pursuant to the plan whenever the court or magistrate determines that the interest of justice so requires and that the person is financially unable to obtain representation. Payment for such representation may be as provided in subsections (a) and (b).

"§ 3404. Defender Organizations

"(a) QUALIFICATIONS.—A district or a part of a district in which at least two hundred persons annually require the appointment of counsel may establish a defender organization as provided under subsection (b)(1) or (b)(2). Two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility for a defender organization to serve both areas. If the adjacent districts or parts of districts are located in different circuits, the plan for furnishing representation shall be approved by the judicial council of each circuit.

"(b) TYPES OF DEFENSE ORGANIZATION.—

"(1) FEDERAL PUBLIC DEFENDER ORGANIZATION.—A Federal Public Defender Organization shall consist of one or more full-time, salaried attorneys. An organization for a district or part of

a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the judicial council of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Only one Federal Public Defender may be appointed within a single judicial district. The Federal Public Defender shall be appointed for a term of four years, subject to earlier removal by the judicial council of the circuit for incompetency, misconduct in office, or neglect of duty. The compensation of the Federal Public Defender shall be fixed by the judicial council of the circuit at a rate not to exceed the compensation received by the United States attorney for the district in which representation is furnished, or, if two districts or parts of districts are involved, the compensation of the United States attorney receiving the higher compensation. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as are approved by the judicial council of the circuit, and other personnel in such number as are approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience in the office of the United States attorney in the district in which representation is furnished, or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor an attorney appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities, financial position, and proposed budget. The Director of the Administrative Office of the United States Courts shall submit, in a manner similar to and subject to the conditions of 28 U.S.C. 605, a budget for each organization for each fiscal year, and shall, out of the appropriations therefor, make payments to and on behalf of each organization. Payments under this paragraph to an organization shall be in lieu of payments under section 3403(a) or (b).

"(2) COMMUNITY DEFENDER ORGANIZATION.—A Community Defender Organization shall be a nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation. The organization shall be eligible to furnish attorneys and receive payments under section 3403 if its bylaws are set forth in the plan of the district or districts in which it will serve. Each organization shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and its anticipated caseload and expenses for the coming year. Upon application an organization may, to the extent approved by the Judicial Conference of the United States:

"(A) receive an initial grant for expenses necessary to establish the organization; and

"(B) in lieu of payments under section 3403(a) or 3403 (b), receive periodic sustaining grants to provide representation and other expenses pursuant to this chapter.

"§ 3405. General Provisions for Chapter 34

"(a) RULES AND REPORTS.—Each district court and judicial council of a circuit shall submit a report to the Administrative Office of the United States Courts on the appointment of counsel within its jurisdiction in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may issue rules and regulations governing the operation of plans for the appointment of counsel.

"(b) ADMINISTRATION.—The Director of the Administrative Office of the United States Courts shall supervise the making of payments under this chapter.

"(c) APPLICATION TO THE DISTRICT OF COLUMBIA.—The provisions of this chapter, other than section 3404, shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this chapter shall not apply to the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

"(d) NEW TRIAL CONSIDERED NEW CASE.—For purposes of compensation and other payments authorized by this chapter, an order by a court granting a new trial shall be considered to initiate a new case.

"(e) FEES AND COSTS ON APPEAL WAIVED.—If a person for whom counsel is appointed under this chapter appeals to an appellate court

or petitions for a writ of certiorari, he may do so without payment of fees and costs, or security therefor, and without filing the affidavit required by 28 U.S.C. 1915(a).

"Chapter 35.—RELEASE AND CONFINEMENT PENDING JUDICIAL PROCEEDINGS

"Subchapter A.—Release Pending Judicial Proceedings

"§ 3501. Release Authority Generally

"A person charged with an offense may be ordered released pursuant to the provisions of this chapter by a judge authorized to order the arrest and commitment of offenders, but a person charged with an offense for which a sentence of death is authorized may be ordered released only by a judge of a court of the United States that has original jurisdiction in criminal cases.

"§ 3502. Release Pending Trial in a Non-Capital Case

"(a) RELEASE CONDITIONS.—A person charged with an offense, other than an offense for which a sentence of death is authorized, shall, at his appearance before a judge, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judge, unless the judge determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. If such a determination is made, the judge shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release that will reasonably assure the appearance of the person for trial or, if no single condition will give that assurance, any combination of the following conditions:

"(1) a condition placing the person in the custody of a designated person agreeing to supervise him;

"(2) a condition placing restrictions on the person's travel, associations, or place of abode, during the period of release;

"(3) a condition requiring the execution of an appearance bond in a specified amount, and the deposit in the registry of the court,

in cash or other security as directed, of a sum not to exceed ten percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

"(4) a condition requiring the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

"(5) any other condition reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

"(b) FACTORS IN DETERMINING RELEASE.—In determining which conditions of release will reasonably assure the appearance of the person as required, the judge shall, on the basis of available information, take into account:

"(1) the nature and circumstances of the offense charged;

"(2) the weight of the evidence against the person; and

"(3) the history and characteristics of the person, including his character, mental condition, family ties, employment, length of residence in the community, financial resources, record of convictions, and record of appearance or nonappearance at court proceedings.

"(c) ORDER.—A judge authorizing the release of a person pursuant to this section shall issue an order containing a statement of the conditions of release imposed, shall advise him of the penalties applicable to a violation of a condition of his release, and shall advise him that a warrant for his arrest will be issued immediately upon such a violation. A failure to advise the person of the penalties applicable for failure to appear as required is not a bar or defense to a prosecution under section 1312 (Bail Jumping).

"(d) RECONSIDERATION.—A person concerning whom conditions of release are imposed, and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, may, upon application, have the conditions reviewed by the judge who imposed them. A person who is ordered released on a condition that requires him to return to custody after specified hours may, upon application, have the condition reviewed by the judge who imposed it. Unless the conditions of release are amended and the person is thereupon released on another condition, the judge shall set forth in writing the reasons for continuing the conditions imposed. If the judge who imposed conditions of release is not available, any other judge in the district may review such conditions.

"(e) MODIFICATION.—A judge ordering the release of a person on a condition specified in this section may at any time amend his order to impose additional or different conditions of release. If the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions, the provisions of subsection (d) are applicable.

"(f) EVIDENCE.—Any information may be presented and considered in connection with an order entered pursuant to this section regardless of its admissibility under the rules governing admission of evidence in criminal trials.

"§ 3503. Release Pending Trial in a Capital Case

"A person who is charged with an offense for which a sentence of death is authorized shall be treated in accordance with the provisions of section 3502, unless the judge has reason to believe that no conditions of release will reasonably assure that the person will not flee or will not pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, the person shall be ordered detained. Such an order is not appealable under section 3506, but may be reviewed under other provisions for review of conditions of release or orders of detention.

"§ 3504. Release Pending Sentence or Appeal

"(a) PENDING SENTENCE OR APPEAL BY THE DEFENDANT.—A person who has been found guilty of an offense and is awaiting sentence, or who has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3502, unless the judge has reason to believe that no conditions of release will reasonably assure that the person will not flee or will not pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for purposes of delay, the person shall be ordered detained. Such an order is not appealable under section 3506, but may be reviewed under other provisions for review of conditions of release or orders of detention.

"(b) PENDING APPEAL BY THE GOVERNMENT.—A person who is a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3724 (a) or (b) shall be treated in accordance with the provisions of section 3502.

"§ 3505. Release of a Material Witness

"If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown

that it may become impracticable to secure his presence by subpoena, a judge shall impose conditions of release pursuant to section 3502. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

"§ 3506. Appeal from Denial of Release

"(a) REVIEW.—A person:

"(1) who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued; and

"(2) whose application pursuant to section 3502 (d) or (e) has been reviewed by a judge other than:

"(A) a judge of the court having original jurisdiction over the offense with which he is charged;

"(B) a judge of a United States Court of Appeals; or

or

"(C) a Justice of the Supreme Court of the United States;

may file a motion for an amendment of the order with the court having original jurisdiction over the offense with which he is charged. Such a motion shall be determined promptly.

"(b) APPEAL.—In a case in which a person is detained after:

"(1) a court denies a motion under subsection (a) to amend an order imposing conditions of release; or

"(2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged;

an appeal may be taken to the court having appellate jurisdiction over such court. An order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3502. Such an appeal shall be determined promptly.

"§ 3507. Release in a Case Removed from a State Court

"If the judgment of a state court in a criminal proceeding is before the Supreme Court of the United States for review, the defendant may not be released from custody pending such review other than pursuant to the laws of such state.

"§ 3508. Surrender of an Offender by a Surety

"A person charged with an offense, who is released upon the execution of an appearance bond with a surety, may be arrested by the surety, delivered to a United States marshal, and brought before a judge. At the request of the surety, the judge shall order the person held in official detention, and shall endorse on the recognizance, or on the certified copy of the recognizance, the discharge and exoneretur of the surety. The person so committed shall be held in official detention until released pursuant to this chapter or to another provision of law.

"§ 3509. Security for Peace and Good Behavior

'A judge who may order an arrest pursuant to section 3303 may require a person to give security for peace and good behavior in a case arising under the Constitution and laws of the United States, to the same extent that a judge of the state in which the case arises would be authorized by state law if the case were a state case.

"Subchapter B.—Confinement Pending Judicial Proceedings

"§ 3511. Commitment of an Arrested Person

"(a) ORDER OF COMMITMENT.—A person who is arrested and charged with an offense or held as a material witness and who is not ordered released pursuant to the provisions of subchapter A, shall be ordered committed to the custody of the Attorney General for confinement in a facility for official detention. A copy of the order shall be delivered to the person in charge of the facility as evidence of his authority to hold the arrested person, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

"(b) DELIVERY OF ARRESTED PERSON FOR COURT APPEARANCE.—The person in charge of an official detention facility to whom an arrested person is delivered pursuant to the provisions of subsection (a) shall deliver the person to a United States marshal for the purpose of a court appearance on order of a court of the United States or on request of an attorney for the government.

"§ 3512. Discharge of an Arrested but Unconvicted Person

"A court of the United States may direct the United States marshal for the judicial district to furnish subsistence and transportation to the place of arrest or to the place of bona fide residence, under regulations promulgated by the Director of the Bureau of Prisons, to:

"(1) a person arrested for an offense but not charged with an offense in an indictment or information;

"(2) a person charged with an offense in an indictment or information but not convicted; or

"(3) a person held as a material witness;

upon the release of such person from official detention.

"Chapter 36.—DISPOSITION OF JUVENILE OR INCOMPETENT OFFENDERS

"Subchapter A.—Juvenile Delinquency

"§ 3601. Surrender of a Juvenile Delinquent to State Authorities

"(a) SURRENDER OF A JUVENILE.—If a juvenile is arrested and charged with an offense, other than a Class B or Class C misdemeanor or an infraction that is committed within the special territorial jurisdiction of the United States, the Attorney General shall forego prosecution and surrender the person to state jurisdiction unless, after investigation, he certifies that:

"(1) the state will not assume jurisdiction over the person, take him into custody, and proceed against him in accordance with its laws;

"(2) the state does not have available programs and services adequate for the needs of the juvenile; or

"(3) the offense charged is a Class A, B, or C felony and that federal prosecution is in the intertst of justice.

"(b) SURRENDER OF A PERSON BETWEEN EIGHTEEN AND TWENTY-ONE.—If a person who is between the ages of eighteen and twenty-one years old, is arrested and charged with an offense, the Attorney General may forego prosecution and surrender the person to state jurisdiction if, after investigation, he determines that:

"(1) the person has committed an offense or is a juvenile delinquent under the laws of a state that will assume jurisdiction over the person, take him into custody, and proceed against him in accordance with its laws; and

"(2) such disposition will be in the interests of justice.

(c) TRANSPORTATION.—The United States marshal of the district in which the person was arrested shall, upon written order of the Attorney General, transfer the person to such state or, if he is already in such state, to any other part of the state, and shall deliver him into the custody of the proper state authority.

(d) CONSENT OR DEMAND REQUIRED.—Before a person is transferred from one state to another under this section:

"(1) the person must consent to the transfer; or

"(2) a demand must be presented to the Attorney General from the executive authority of the state to which the person is to be returned, supported by an indictment or affidavit as prescribed by section 3202.

"§ 3602. Arrest and Detention of a Juvenile Delinquent

"(a) ARREST.—If a juvenile is taken into custody for an act of juvenile delinquency, the arresting officer shall immediately advise the juvenile of his legal rights in clear and non-technical language, shall immediately notify the Attorney General of such custody, and shall make reasonable efforts to notify the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also advise the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

"(b) DETENTION.—If the juvenile is not taken forthwith before a judge, he may be detained in a juvenile home or other suitable place of detention that the Attorney General may designate for such purpose, but, insofar as possible, he shall not be detained in a facility for official detention in which he has a regular contact with an adjudicated juvenile delinquent or an adult convicted of an offense or awaiting trial on a charge of an offense. If possible, the detention shall be in a facility located in or near the juvenile's home community. The juvenile while in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education and medical care, including any necessary psychiatric, psychological, or other care or treatment. The juvenile shall not be detained for a period longer than is necessary to produce the juvenile before a judge.

"(c) RELEASE.—The judge shall release the juvenile pending trial upon any condition set forth in section 3502 that will reasonably assure the presence of the juvenile before the appropriate court as required, unless the judge determines, after a hearing, that official detention pending trial of such juvenile is required to secure his safety or the safety of another person. If a juvenile is held in official detention pending trial pursuant to this subsection and is not brought to trial within

sixty days from the date upon which the detention was begun, the information shall be dismissed on motion of the juvenile or at the direction of the court, unless the Attorney General shows that additional delay was caused by the juvenile or his counsel, or consented to by the juvenile and his counsel, or would be in the interest of justice in the particular case. Delays attributable solely to court calendar congestion may not be considered to be in the interest of justice. Except in extraordinary circumstances, an information dismissed under this section may not be reinstituted.

"§ 3603. Juvenile Delinquency Proceeding

"(a) IN GENERAL.—A juvenile who is charged with committing an offense and who is not surrendered to state authorities shall be proceeded against as a juvenile delinquent:

"(1) unless, upon advice of counsel, he elects in a writing filed with the court to be treated as an adult and waives the bar to prosecution, if applicable, in section 512; or

"(2) unless:

"(A) he is less than sixteen years old;

"(B) the offense charged is an offense described in section 1601(a)(1) or (a)(2) (Murder); and

"(C) the court having jurisdiction over the offense charged, upon a motion filed by the Attorney General and after reasonable notice to:

"(i) the juvenile;

"(ii) his parents, guardian, or custodian; and

"(iii) counsel for the juvenile;

holds a hearing and determines that in the interest of justice the juvenile should be treated as an adult; or".

"(3) unless:

"(A) he is sixteen years old or more;

"(B) the offense charged is a Class A, B, or C felony; and

"(C) the court having jurisdiction over the offense charged, upon a motion filed by the Attorney General and after reasonable notice to:

"(i) the juvenile;

"(ii) his parents, guardian, or custodian; and

"(iii) counsel for the juvenile;

holds a hearing and determines that in the interest of justice the juvenile should be treated as an adult.

"(b) CRITERIA.—In making the determination required by subsection (a)(2)(C) and (a)(3)(C) the court shall consider and shall make findings of fact on the record with regard to:

"(1) the nature and circumstances of the offense;

"(2) the age and social background of the juvenile;

"(3) the extent and nature of the juvenile's prior delinquency record;

"(4) the likelihood of reform of the juvenile prior to his majority;

"(5) the availability of programs designed to treat the juvenile's behavioral problems; and

"(6) whether juvenile disposition will reflect the seriousness of the juvenile's conduct, promote respect for the law, and provide a just response to the conduct of the juvenile.

"(c) PROCEDURE.—Jurisdiction over juvenile delinquency proceedings shall be exercised by the District Courts of the United States, or alternatively, in the case of a misdemeanor or an infraction, by a United States Magistrate pursuant to section 3302. A juvenile may be proceed against for an act of juvenile delinquency only by information, and no criminal prosecution may be instituted for the offense charged. For purposes of a juvenile delinquency hearing, the court may be convened at any time and place within the judicial district, in chambers or otherwise. Prior to a juvenile delinquency hearing, a juvenile may be committed for an inpatient study pursuant to subsection (d) with the consent of the juvenile and his attorney.

"(d) COMMITMENT PENDING DISPOSITION.—If the court desires more information than is otherwise available to it as a basis for determining the appropriate disposition, the court may commit the juvenile to the custody of the Bureau of Prisons for a period of not more than thirty days for the purpose of observation and study at an appropriate classification center or agency. Such observation and study shall be conducted on an outpatient basis, unless the court determines that inpatient study and observation are necessary to obtain the necessary information. The Bureau of Prisons, under such regulations as the Attorney General may issue, shall conduct a complete study of the juvenile delinquent during such period, inquiring into such matters as the juvenile's previous juvenile delinquency or criminal experience, his social background, his capabilities, his mental, emotional, and physical health, the significant problem or problems involved in his juvenile delinquency, the rehabilitative resources or programs that may be

available to suit his needs, and any other factor which the Bureau may consider pertinent. By the expiration of the period of commitment the Bureau shall return the juvenile delinquent to the court for final disposition, shall provide the court and the attorney for the juvenile with a written report of the results of the study, and shall make to the court whatever recommendations the Bureau believes will be helpful to a proper resolution of the case. The court may grant additional time for the preparation of the report or recommendation.

"(e) DISPOSITION.—If the court finds a juvenile to be a juvenile delinquent, the court shall hold a hearing concerning the appropriate disposition. After the hearing the court may suspend the findings of juvenile delinquency, place him on probation, or commit him to official detention.

"(f) PROBATION.—The term for which probation may be ordered for a juvenile found to be a juvenile delinquent may not extend:

"(1) in the case of a juvenile who is less than nineteen years old, beyond the date when the juvenile becomes twenty-one years old; or

"(2) in the case of a juvenile who is between nineteen and twenty-one years old, two years.

The provisions dealing with probation set forth in sections 2103 and 2104 are applicable to an order placing a juvenile on probation.

"(g) OFFICIAL DETENTION.—The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend:

"(1) in the case of a juvenile who is less than nineteen years old, beyond the lesser of:

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term that could have been imposed if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between nineteen and twenty-one years old, beyond the lesser of:

"(A) two years; or

"(B) the maximum term that could have been imposed if the juvenile had been tried and convicted as an adult.

"(h) PLACE OF OFFICIAL DETENTION.—The Bureau of Prisons may designate as the place of official detention during the period of commitment a suitable public or private agency or foster home. No juvenile found to be a juvenile delinquent shall be held, except as necessary

for purposes of transportation or medical care, in an official detention facility in which an adult convicted of an offense or awaiting trial on a charge of an offense is held in official detention. A juvenile who has been committed shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care, including any necessary psychiatric, psychological, or other care and treatment. If possible, the Bureau of Prisons shall commit a juvenile to a public or private agency or foster home located in or near his home community.

"(i) CONTRACTING FOR NON-FEDERAL FACILITIES.—The Director of the Bureau of Prisons may contract with a public or private agency or foster home for the custody, care, subsistence, education, and training of juvenile delinquents.

"(j) STATEMENT BY JUVENILE.—A statement made by a juvenile during or in connection with a proceeding held pursuant to section 3603(a) is not admissible against him in a subsequent criminal proceeding.

"§ 3604. Parole of a Juvenile Delinquent

"A juvenile delinquent who has been committed to official detention under section 3603(g) may be released on parole by the Parole Commission at any time, under such conditions and regulations as the Commission considers to be appropriate, if the Commission is of the opinion that the criteria set forth in section 3831(c)(1) are satisfied. The provisions dealing with parole set forth in sections 3834 (c) through (h) and 3835 are applicable to an order releasing a juvenile delinquent on parole.

"§ 3605. Use of Juvenile Delinquency Records

"(a) SEALING OF RECORDS.—Throughout the juvenile delinquency proceeding, the court shall safeguard the record against disclosure to a person not authorized to receive it. Upon the completion of a juvenile delinquency proceeding, whether or not there is a finding of juvenile delinquency, the court shall order the entire record of the proceeding sealed. The court may release information concerning the sealed record to the extent necessary to comply with an inquiry in writing from:

"(1) another court;

"(2) an agency preparing a presentence report for another court;

"(3) the Director of a treatment agency or facility to which the juvenile has been committed by the court;

"(4) a law enforcement agency if the request for information is related to the investigation of an offense or a position within the agency;

"(5) an agency considering the person for a position immediately and directly affecting the national security; or

"(6) the victim if the request for information is related to the final disposition of the case.

The court may not release information concerning the sealed record to comply with any other inquiry, and responses to such inquiries shall be the same as responses made about persons who have never been the subject of a juvenile delinquency proceeding.

"(b) NOTICE.—The court exercising jurisdiction over a juvenile shall, in a written statement using clear and nontechnical language, inform the juvenile, and his parents, guardian, or other person responsible for his welfare, of his rights relating to the sealing of his juvenile record.

"(c) DUTY OF COURT OFFICERS.—An employee of the court or an employee of any other governmental agency, who, during the course of a juvenile delinquency proceeding, obtains or preserves information or a record relating to the proceeding in the discharge of an official duty, shall not disclose such information or record directly or indirectly to a person other than the judge, the counsel for the juvenile, the attorney for the government, or another person entitled under this section to receive sealed records.

"(d) FINGERPRINTS AND PHOTOGRAPHS.—Unless a juvenile who is taken into custody is prosecuted as an adult:

"(1) the fingerprints or photograph of the juvenile shall not be taken without the written consent of the judge; and

"(2) the name or photograph of the juvenile shall not be made public in connection with a juvenile delinquency proceeding by any medium of public information.

"§ 3606. Definitions for Subchapter A

"As used in this subchapter:

"(a) 'juvenile' means a person who is less than:

"(1) eighteen years old; or

"(2) twenty-one years old if he is charged with an act of juvenile delinquency committed when he was less than eighteen years old;

"(b) 'juvenile delinquency' means conduct constituting an offense engaged in by a juvenile.

"Subchapter B.—Offenders with Mental Disease or Defect

"Sec.
"3611. Determination of Mental Competency to Stand Trial.
"3612. Determination of the Existence of Insanity at the Time of the Offense.
"3613. Hospitalization of a Person Acquitted by Reason of Insanity.
"3614. Hospitalization of a Convicted Person Suffering from Mental Disease or Defect.
"3615. Hospitalization of an Imprisoned Person Suffering from Mental Disease or Defect.
"3616. Hospitalization of a Person Due for Release but Suffering from Mental Disease or Defect.
"3617. General Provisions for Subchapter B.

"§ 3611. Determination of Mental Competency To Stand Trial

"(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist in his defense.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 3617 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 3617(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable mental hospital, or in another facility designated by the court as suitable:

"(1) for such a reasonable period of time, not to exceed six months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

"(2) for an additional reasonable period of time, not to exceed six months, until:

"(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

"(B) the pending charges against him are disposed of according to law.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 3616.

"(e) DISCHARGE FROM MENTAL HOSPITAL.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. The court shall hold a hearing, conducted pursuant to the provisions of section 3617(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 35.

"(f) ADMISSIBILITY OF FINDING OF COMPETENCY.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

"§ 3612. Determination of the Existence of Insanity at the Time of the Offense

"(a) MOTION FOR PRETRIAL PSYCHIATRIC EXAMINATION.—Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, the court, upon motion of the attorney for the government, may order that a psychiatric examination of the defend-

ant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 3617 (b) and (c).

"(b) SPECIAL VERDICT.—If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure on motion of the defendant or of the attorney for the government, or on the court's own motion, the jury shall be instructed to find, or, in the event of a non-jury trial, the court shall find, the defendant:

"(1) guilty;

"(2) not guilty; or

"(3) not guilty by reason of insanity.

"§ 3613. Hospitalization of a Person Acquitted by Reason of Insanity

"(a) DETERMINATION OF PRESENT MENTAL CONDITION OF ACQUITTED PERSON.—If a person is found not guilty by reason of insanity at the time of the offense charged, the court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another. The court may make any order reasonably necessary to secure the appearance of the person at the hearing.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 3617 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 3617(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the acquitted person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the state in which the person is domiciled if such state will assume responsibility for his custody, care, and treatment. If such state will not then assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable mental hospital, or in another facility designated by the court as suitable, until such state will assume such responsibility or until the person's mental condition is so improved that his release would not create a substantial

risk of serious bodily injury to another person or serious damage to property of another.

"(e) DISCHARGE FROM MENTAL HOSPITAL.—When the director of the facility in which an acquitted person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of serious bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the acquitted person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 3617(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of serious bodily injury to another person or serious damage to property of another, the court shall order his immediate discharge.

"§ 3614. Hospitalization of a Convicted Person Suffering from Mental Disease or Defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF CONVICTED DEFENDANT.—A defendant found guilty of an offense, or the attorney for the government, may, within ten days after the defendant is found guilty, file a motion for a hearing on the present mental condition of the defendant. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a mental hospital.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 3617 (b) and (c). In addition to the information required to be included in the psychiatric report pursuant to the provisions of section 3617(c), if the report includes an opinion by the examiners that the defendant is presently suffering from a mental disease or defect but that it is not such as to

require his custody for care or treatment in a mental hospital, the report shall also include an opinion by the examiners concerning the sentencing alternatives available under part III of this title that could best accord the defendant the kind of treatment he does need.

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 3617(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court is of the opinion that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to probation or imprisonment, be committed to a mental hospital for care or treatment, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for care or treatment in a suitable mental hospital, or in another facility designated by the court as suitable. Such a commitment constitutes a provisional sentence to the maximum term authorized by section 2301(b) and 2304 for the offense of which the defendant was found guilty.

"(e) DISCHARGE FROM MENTAL HOSPITAL.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in a mental hospital, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to subsection (d) has not expired, the court shall hold a hearing, conducted pursuant to the provisions of section 3617(d), to determine whether the provisional sentence should be reduced. After the hearing, the court may order that the defendant be released, be placed on probation pursuant to chapter 21, or be imprisoned for the remainder of the provisional sentence or for any lesser term, or may impose any other sentence available under part III of this title.

"§ 3615. Hospitalization of an Imprisoned Person Suffering from Mental Disease or Defect

"(a) MOTION TO DETERMINE PRESENT MENTAL CONDITION OF IMPRISONED DEFENDANT.—A defendant serving a sentence of imprisonment, or an attorney for the government at the request of the director of the facility in which the defendant is imprisoned, may file a motion with the court for the district in which the facility is located for a hearing on the present mental condition of the defendant. The court

shall grant the motion if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a mental hospital. A motion filed under this subsection shall stay the release of the defendant pending completion of procedures contained in this section.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 3617 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 3617(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court is of the opinion that the defendant is presently suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a mental hospital, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable mental hospital, or in another facility designated by the court as suitable, until he is no longer in need of custody for care or treatment in a mental hospital or until the expiration of his sentence of imprisonment, whichever occurs earlier.

"(e) DISCHARGE FROM MENTAL HOSPITAL.—When the director of the facility in which the defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in a mental hospital, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the government. If, at the time of the filing of the certificate, the sentence imposed upon the defendant has not expired, the court shall order that the defendant be reimprisoned.

"§ 3616. Hospitalization of a Person Due for Release but Suffering from Mental Disease or Defect

"(a) INSTITUTION OF PROCEEDING.—If the director of a facility in which a person is hospitalized pursuant to this subchapter certifies that a person whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 3611(d), or against whom all criminal charges have been dismissed for reasons related to the mental condition of the person, is presently

suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another, and that suitable arrangements for state custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the government, and, if the person was committed pursuant to section 3611(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

"(b) PSYCHIATRIC EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted, and that a psychiatric report be filed with the court, pursuant to the provisions of section 3617 (b) and (c).

"(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 3617(d).

"(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the state in which the person is domiciled if such state will assume responsibility for his custody, care, and treatment. If such state will not then assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable mental hospital, or in another facility designated by the court as suitable, until such state will assume such responsibility or until the person's mental condition is so improved that his release would not create a substantial risk of serious bodily injury to another person or serious damage to property of another.

"(e) DISCHARGE FROM MENTAL HOSPITAL.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental

disease or defect to such an extent that his release would no longer create a substantial risk of serious bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the government. The court shall order the discharge of the person or, on the motion of the attorney for the government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 3617(d), to determine whether he should be released. If, after the hearing, the court finds by preponderence of the evidence that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of serious injury to another person or serious damage to property of another, the court shall order his immediate discharge.

"(f) RELEASE TO STATE OF CERTAIN OTHER PERSONS.—If the director of a facility in which a person is hospitalized pursuant to this subchapter certifies to the Attorney General that a person, against whom all charges have been dismisssed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the state in which the person is domiciled for the purpose of institution of state proceedings for civil commitment. If such state will not assume such responsibility, the Attorney General shall release the person upon receipt of notice from the state that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.

"§ 3617. General Provisions for Subchapter B

"(a) DEFINITION.—As used in this subchapter, 'insanity' means a menal disease or defect of a nature constituting a defense to a federal criminal prosecution.

"(b) PSYCHIATRIC EXAMINATIONS.—A psychiatric examination ordered pursuant to this subchapter shall be conducted by at least two licensed or certified psychiatrists or clinical psychologists. They shall be:

"(1) designated by the court if the examination is ordered under section 3611, 3612, 3613, or 3614; or

"(2) designated by the court, and shall include one psychiatrist or clinical psychologist selected by the defendant, if the examination is ordered under section 3615 or 3616.

For the purpose of an examination pursuant to an order under section 3611, 3612, 3613, or 3614, the court may commit the person to be examined for a reasonable period, but not more than sixty days, to the custody of the Attorney General for placement in a suitable mental hospital or another facility designated by the court as suitable.

"(c) PSYCHIATRIC REPORTS.—A psychiatric report ordered pursuant to this subchapter shall be prepared by the examiner designated to conduct the psychiatric examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the government, and shall include:

"(1) the person's history and present symptoms;

"(2) a description of the psychological and medical tests employed and their results;

"(3) the examiners' findings; and

"(4) the examiners' opinions as to diagnosis, prognosis, and:

"(A) if the examination is ordered under section 3611, whether the person is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

"(B) if the examination is ordered under section 3612, whether the person was insane at the time of the offense charged;

"(C) if the examination is ordered under section 3613 or 3616, whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another; or

"(D) if the examination is ordered under section 3614 or 3615, whether the person is presently suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a mental hospital.

"(d) HEARING.—At a hearing ordered pursuant to this subchapter the person whose mental condition is the subject of the hearing shall

be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3402. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

"(e) PERIODIC REPORTS BY MENTAL HOSPITAL.—The director of the facility in which a person is hospitalized pursuant to:

"(1) section 3611 shall prepare semiannual reports; or

"(2) section 3613, 3614, 3615, or 3616 shall prepare annual reports;

concerning the mental condition of the person and continuing recommendations concerning his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct.

"(f) ADMISSIBILITY OF A DEFENDANT'S STATEMENTS AT TRIAL.—A statement made by the defendant during the course of a psychiatric examination pursuant to section 3611 or 3612 is not admissible as evidence against the accused on the issue of guilt in any criminal proceeding.

"(g) HABEAS CORPUS UNIMPAIRED.—Nothing contained in section 3613 or 3616 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

"(h) AUTHORITY AND RESPONSIBILITY OF THE ATTORNEY GENERAL.—The Attorney General:

"(1) may contract with a state, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this subchapter;

"(2) may apply for the civil commitment, pursuant to state law, of a person committed to his custody pursuant to section 3613 or 3616; and

"(3) shall consult with the Secretary of the Department of Health, Education, and Welfare in the general implementation of the provisions of this subchapter and in the establishment of standards for facilities used in the implementation of this subchapter.

"Chapter 37.—PRETRIAL AND TRIAL PROCEDURE, EVIDENCE, AND APPELLATE REVIEW

"Subchapter A.—Pretrial and Trial Procedure

"§ 3701. Pretrial and Trial Procedure in General

"Pretrial and trial procedure in criminal cases in the district courts of the United States and before United States magistrates is governed by the provisions of this title, by the Federal Rules of Criminal Procedure, and by such other rules as the Supreme Court may prescribe.

"§ 3702. Rulemaking Authority of the Supreme Court for Rules of Criminal Procedure

"(a) PRESCRIPTION OF RULES.—The Supreme Court of the United States may prescribe amendments to the Federal Rules of Criminal Procedure and may otherwise prescribe rules of pleading, practice, and procedure with respect to proceedings prior to, including, and relating to the entry of judgment of conviction in criminal cases in the district courts of the United States or in proceedings before United States magistrates. Any provision of law in conflict with a rule prescribed pursuant to this section shall be of no further force or effect after such rule has taken effect.

"(b) EFFECTIVE DATE OF RULES.—Rules prescribed pursuant to this section shall be reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and shall take effect one hundred and eighty days after they have been reported. The Supreme Court may fix a later date upon which rules shall take effect, and may fix the extent to which they shall apply to proceedings then pending.

"Subchapter B.—Evidence

"§ 3711. Evidence in General

"The introduction, admission, and use of evidence in criminal cases in the district courts of the United States and before United States magistrates is governed by the provisions of this title and by the Federal Rules of Evidence.

"§ 3712. Rulemaking Authority of the Supreme Court for Rules of Evidence

"(a) PRESCRIPTION OF AMENDMENTS TO RULES.—The Supreme Court of the United States may prescribe amendments to the Federal Rules of Evidence. Any provision of law in conflict with an amendment prescribed pursuant to this section shall be of no further force or effect after such amendment has taken effect.

"(b) EFFECTIVE DATE OF AMENDMENTS TO RULES.—Amendments prescribed pursuant to this section shall be reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and shall take effect one hundred and eighty days after they have been reported, except that:

'(1) either House of Congress within that time may defer the effective date of any amendment so reported to a later date or until approved by Act of Congress;

"(2) either House of Congress within that time by resolution may disapprove any amendment so reported, in which event such amendment shall not take effect; and

"(3) any amendment so reported that creates, abolishes, or modifies a privilege shall not take effect until it is approved by Act of Congress.

The Supreme Court set a later date upon which such amendments shall take effect, and may prescribe the extent to which they shall apply to proceedings then pending.

"§ 3713. Admissibility of Confessions

"(a) ADMISSIBILITY IN GENERAL.—Unless otherwise required by the Constitution, a confession that is made voluntarily is admissible in evidence in a criminal case brought by the United States or the District of Columbia.

"(b) DETERMINATION OF VOLUNTARINESS.—Before a confession is received in evidence, the judge shall, out of the presence of the jury, determine any issue concerning the voluntariness of the confession. If the judge determines that the confession was made voluntarily, he shall admit the confession in evidence, shall permit the jury to hear relevant evidence on the issue of voluntariness, and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

"(c) FACTORS IN DETERMINING VOLUNTARINESS.—In determining an issue concerning the voluntariness of a confession, the judge shall

consider all the circumstances under which the confession was made, including:

"(1) the amount of time that elapsed between the arrest of the person who made the confession and his initial appearance before a judicial officer as required by Rule 5 of the Federal Rules of Criminal Procedure if the confession was made after arrest and before such appearance;

"(2) whether the person knew the nature of the offense with which he was charged or of which he was suspected at the time of the confession;

"(3) whether the person was advised or knew that he was not required to make a statement and that the statement could be used against him;

"(4) whether the person had been advised prior to questioning of his right to assistance of counsel; and

"(5) whether the person was without assistance of counsel when questioned or when making the confession.

The presence or absence of any of such factors is not conclusive as to the voluntariness of the confession.

"(d) EFFECT OF DELAY DURING DETENTION.—A confession made by a person between the time of his arrest or other official detention and his initial appearance before a judicial officer as required by Rule 5 of the Federal Rules of Criminal Procedure shall not be considered inadmissible solely because of delay in bringing the person before such judicial officer if:

"(1) the confession is found by the judge to have been made voluntarily;

"(2) the weight to be given the confession is left to the jury; and

"(3) the confession was made within six hours immediately following the person's arrest or other official detention, or within such additional time as is found by the judge to be reasonable in view of the distance that was required to be traveled to the nearest available judicial officer and in view of the means of transportation that was available.

"(e) SPONTANEOUS AND NONCUSTODIAL CONFESSIONS UNAFFECTED.—Nothing contained in this section precludes the admission in evidence of a confession made voluntarily by a person without interrogation by anyone, or by a person who was not under arrest or held in official detention.

"(f) DEFINITION.—As used in this section, 'confession' means any self-incriminating oral or written statement.

"§ 3714. Admissibility of Evidence in Sentencing Proceedings

"Any relevant information concerning the history, characteristics, and conduct of a person found guilty of an offense may be received and considered by a court of the United States for the purpose of ascertaining an appropriate sentence to be imposed, regardless of the admissibility of the information under the Federal Rules of Evidence, except to the extent that receipt and consideration of such information for purposes of sentencing is expressly limited by a section of this title relating to sentencing or by any other provision of law.

"Subchapter C.—Appellate Review

"§ 3721. Appellate Review in General

"Review by the courts of appeals of the United States and by the United States Supreme Court of decisions, judgments, and orders entered in criminal cases by district courts of the United States is governed by the provisions of this title and by the Federal Rules of Appellate Procedure.

"§ 3722. Rulemaking Authority of the Supreme Court for Rules of Appellate Procedure

"(a) PRESCRIPTION OF RULES.—The Supreme Court of the United States may prescribe amendments to the Federal Rules of Appellate Procedure and may otherwise prescribe rules of pleading, practice, and procedure with respect to appeals from decisions, orders, and judgments entered in criminal cases in the district courts of the United States. Any provision of law in conflict with a rule prescribed pursuant to this section shall be of no further force or effect after such rule has taken effect.

"(b) EFFECTIVE DATE OF RULES.—Rules prescribed pursuant to this section shall be reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and shall take effect one hundred and eighty days after they have been reported. The Supreme Court may fix a later date upon which such rules shall take effect, and may fix the extent to which they shall apply to proceedings then pending.

"§ 3723. Appeal by the Defendant

"A defendant may appeal to a United States Court of Appeals from a final judgment or order entered by a district court of the United States in a criminal case.

"§ 3724. Appeal by the Government

"(a) APPEAL FROM DISMISSAL.—The government may appeal to a United States Court of Appeals from a decision, judgment, or order, entered by a district court of the United States in a criminal case, dismissing an indictment or information or terminating a prosecution in favor of a defendant as to one or more counts, unless the double jeopardy clause of the United States Constitution prohibits further prosecution of the case.

"(b) APPEAL FROM ORDER SUPPRESSING EVIDENCE.—The government may appeal to a United States Court of Appeals from a decision or order, entered by a district court of the United States, suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, if:

"(1) the decision or order was not made during the interval between the time the defendant was put in jeopardy and the return of the verdict or finding on an indictment or information; and

"(2) the attorney for the government certifies to the district court or magistrate that the appeal is not taken for purposes of delay and that the evidence is a substantial proof of a fact material to the case.

"(c) APPEAL FROM ORDER DENYING AUTHORIZATION FOR INTERCEPTION.—The government may appeal to a United States Court of Appeals from a decision or order, entered by a district court of the United States, denying an application for an order authorizing or approving the interception of a private oral communication, if the attorney for the government certifies to the district court that the appeal is not taken for purposes of delay.

"(d) DILIGENT PROSECUTION REQUIRED.—An appeal by the government shall be diligently prosecuted.

"§ 3725. Review of a Sentence

"(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of a final sentence imposed for a felony if the sentence includes a fine or a term of imprisonment or a

term of parole ineligibility higher than the maximum established in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and that are found by the sentencing court to be applicable to the case, unless:

"(1) the sentence is consistent with policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

"(2) the sentence is equal to or less than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure; or

"(3) the sentence is that provided in an accepted plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

'(b) APPEAL BY THE GFVERNMENT.—The government may, with the approvel of the Attorney General or his designee, file a notice of appeal in the district court for review of a final sentence imposed for a felony if the sentence includes a fine or a term of imprisonment or a term of parole ineligibility lower than the minimum established in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and that are found by the sentencing court to be applicable to the case, unless:

"(1) the sentence is consistent with policy statements issued by the Sentencing Commission to 28 U.S.C. 994(a)(2);

"(2) the sentence is equal to or greater than the sentence recommended or not opposed by the attorney for the government pursuant to a plea agreement under Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedures; or

"(3) the sentence is equal to that provided in an accepted plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

"(c) REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals:

"(1) that portion of the record in the case that is designated as pertinent by either of the parties;

"(2) the presentence report; and

"(3) the information submitted during the sentencing proceeding.

"(d) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence imposed is clearly unreasonable, having regard for:

"(1) the factors to be considered in imposing a sentence, as set forth in part III of this title; and

"(2) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 2003(b).

"(e) DECISION AND DISPOSITION.—If the court of appeals determines that the sentence is:

"(1) clearly unreasonable, it shall state specific reasons for its conclusions and:

"(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), shall set aside the sentence and:

"(i) remand the case for imposition of a lesser sentence;

"(ii) remand the case for further sentencing proceedings; or

"(iii) impose a lesser sentence.

"(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), shall set aside the sentence and:

"(i) remand the case for imposition of a greater sentence;

"(ii) remand the case for further sentencing proceedings; or

"(iii) impose a greater sentence;

"(2) not clearly unreasonable, it shall affirm the sentence.

"Chapter 38.—POST-SENTENCE ADMINISTRATION

"Subchapter A.—Probation

"§ 3801. Supervision of Probation

A person who has been sentenced to probation pursuant to the provisions of chapter 21 shall, during the term of his probation, be supervised by a probation officer to the degree warranted by the conditions of his probation.

"§ 3802. Appointment of Probation Officers

"(a) APPOINTMENT.—A district court of the United States shall appoint qualified persons to serve as probation officers within the jurisdiction and under the direction of the court making the appointment. The court may, in its discretion, remove a probation officer previously appointed.

"(b) RECORD OF APPOINTMENT.—The order of appointment shall be entered on the records of the court, a copy of the order shall be delivered to the officer appointed, and a copy shall be sent to the Director of the Administrative Office of the United States Courts.

"(c) CHIEF PROBATION OFFICER.—If the court appoints more than one probation officer, one may be designated by the court as chief probation officer and shall direct the work of all probation officers serving in the court.

"§ 3803. Duties of Probation Officers

"A probation officer shall:

"(a) instruct a probationer under his supervision as to the conditions of his probation, and provide him with a written statement clearly setting forth all such conditions;

"(b) keep informed, to the degree required by the conditions of probation, as to the conduct and condition of a probationer under his supervision, and report his conduct and condition to the sentencing court;

"(c) use all suitable methods, not inconsistent with the conditions imposed by the court, to aid a probationer under his supervision and to bring about improvements in his conduct and condition;

"(d) be responsible for the supervision of any probationer known to be within the judicial district;

"(e) keep a record of his work, and make such reports to the Director of the Administrative Office of the United States Courts as the Director may require;

"(f) perform any other duty that the court may designate; and

"(g) perform any duty with respect to a person on parole that the Parole Commission may designate.

"§ 3804. **Transportation of a Probationer**

"A court, after imposing a sentence of probation, may direct a United States marshal to furnish the probationer with:

"(a) transportation to the place to which he is required to proceed as a condition of his probation; and

"(b) money, not to exceed such amount as the Attorney General may prescribe, for subsistence expenses while traveling to his destination.

"§ 3805. **Transfer of Jurisdiction over a Probationer**

"A court, after imposing a sentence of probation, may transfer jurisdiction over the probationer to the district court for any other district to which the probationer is required to proceed as a condition of his probation, with the concurrence of such court. A retransfer of jurisdiction may be made in the same manner. A court to which jurisdiction is transferred under this section is authorized to exercise all powers over the probationer that are permitted by this subchapter or chapter 21.

"§ 3806. **Arrest and Return of a Probationer**

"A probationer who has violated a condition of his probation may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him.

"§ 3807. **Special Probation and Expungement Procedures for Drug Possessors**

"(a) PRE-JUDGMENT PROBATION.—If a person found guilty of an offense described in section 1813 (Possessing Drugs):

"(1) has not, prior to the commission of such offense, been convicted of violating a federal or state law relating to controlled substances; and

"(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 2105.

"(b) RECORD OF DISPOSITION.—A non-public record of a disposition under subsection (a) shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a). A disposition under subsection (a) shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

"(c) EXPUNGEMENT OF RECORD OF DISPOSITION.—If a person whose case is the subject of a disposition under subsection (a) was less than twenty-one years old at the time of the offense, the court shall, upon application of such person, enter an order to expunge from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

"Subchapter B.—Fines

"§ 3811. Payment of a Fine

"A person who has been sentenced to pay a fine pursuant to the provisions of chapter 22 shall pay the fine immediately, or by the time and method specified by the sentencing court, to the clerk of the court. The clerk shall forward the payment to the United States Treasury for credit to the Victim Compensation Fund.

"§ 3812. Collection of an Unpaid Fine

"(a) CERTIFICATION OF IMPOSITION.—If a fine is imposed, the sentencing court shall promptly certify to the Attorney General:

"(1) the name of the person fined;

"(2) his last known address;

"(3) the docket number of the case;

"(4) the amount of the fine imposed;

"(5) the time and method of payment specified by the court;

"(6) the nature of any modification or remission of the fine; and

"(8) the amount of the fine that is due and unpaid.

The court shall thereafter promptly certify to the Attorney General the amount of any subsequent payment that the court may receive with respect to, and the nature of, any subsequent remission or modification of a fine concerning which certification has previously been issued.

"(b) RESPONSIBILITY FOR COLLECTION.—The Attorney General shall be responsible for collection of an unpaid fine concerning which a certification has been issued as provided in subsection (a).

"§ 3813. Lien Provisions for Satisfaction of an Unpaid Fine

"(a) LIEN.—A fine imposed pursuant to the provisions of chapter 22 is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b).

"(b) EXPIRATION OF LIEN.—A lien becomes unenforceable and liability to pay a fine expires:

"(1) twenty years after the entry of the judgment; or

"(2) upon the death of the individual fined.

The period set forth in paragraph (1) may be extended, prior to its expiration, by a written agreement between the person fined and the Attorney General. The running of the period set forth in paragraph (1) is suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended pursuant to section 6503(b), 6503(c), 6503(g), or 7508(a)(1)(I) of the Internal Revenue Code of 1954, as amended (26 U.S.C. 503(b), 6503(c), 6503(g), or 7508(a)(1)(I)), or section 513 of the Act of October 17, 1940, 54 Stat. 1190.

"(c) APPLICATION OF OTHER LIEN PROVISIONS.—The provisions of sections 6323, 6331 through 6343, 6901, 7402, 7403, 7405, 7423 through 7426, 7505(a), 7506, 7508, 7602 through 7605, 7622, 7701, 7805, and 7810 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 6323, 6331 through 6343, 6901, 7402, 7403, 7405, 7423 through 7426, 7505(a), 7506, 7508, 7602 through 7605, 7622, 7701, 7805, and 7810), and of section 513 of the Act of October 17, 1940, 54 Stat. 1190, apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except

to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities. For the purposes of this subsection, references in the preceding sections of the Internal Revenue Code of 1954 to "the Secretary or his delegate" shall be construed to mean "the Attorney General," and references in those sections to "tax" shall be construed to mean "fine."

"(d) EFFECT OF NOTICE OF LIEN.—A notice of the lien imposed by subsection (a) shall be considered a notice of lien for taxes payable to the United States for the purpose of any state or local law providing for the filing of a notice of a tax lien. The registration, recording, docketing, or indexing, in accordance with 28 U.S.C. 1962, of the judgment under which a fine is imposed shall be considered for all purposes as the filing prescribed by section 6323(f)(1)(A) of the Internal Revenue Code of 1954, as amended (26 U.S.C. 6323(f)(1)(A)), and by subsection (c).

"Subchapter C.—Imprisonment

"§ 3821. Imprisonment of a Convicted Person

"(a) COMMITMENT TO CUSTODY OF BUREAU OF PRISONS.—A person who has been sentenced to a term of imprisonment pursuant to the provisions of chapter 23 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed or until earlier released on parole pursuant to the provisions of subchapter D.

"(b) PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available prison facility, whether maintained by the federal government or otherwise and whether within or without the judicial district in which the person was convicted, that appears to be appropriate and suitable, considering the resources of the facility contemplated, the nature and circumstances of the offense, the history and characteristics of the prisoner, any statement by the court that imposed the sentence concerning the purposes for which the sentence to imprisonment was determined to be warranted or recommending a type of prison facility as appropriate, and any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2). The Bureau may at any time, having regard for the same

matters, direct the transfer of a prisoner from one prison facility to another.

"(c) DELIVERY OF ORDER OF COMMITMENT.—When a prisoner pursuant to a court order, is placed in the custody of a person in charge of a prison facility, a copy of the order shall be delivered to such person as evidence of his authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

"(d) DELIVERY OF PRISONER FOR COURT APPEARANCES.—The Bureau of Prisons shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the government.

"§ 3822. Temporary Release of a Prisoner

"The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period, if such release appears to be consistent with the purposes for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that the prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to:

"(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of:

"(1) visiting a relative who is dying;

"(2) attending a funeral of a relative;

"(3) obtaining medical treatment not otherwise available;

"(4) contacting a prospective employer;

"(5) establishing or reestablishing family or community ties; or

"(6) engaging in any other significant activity consistent with the public interest;

"(b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

"(c) work at paid employment in the community while continuing in official detention at the prison facility if:

"(1) the representatives of local union central bodies or similar labor union organizations are first consulted;

"(2) the paid employment will not result in the displacement of employed persons, or be applied in skills, crafts,

or trades in which there is a surplus of available labor in the community, or impair existing contracts for services;

"(3) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

"(4) the prisoner agrees to pay to the Bureau such costs incident to his official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

"§ 3823. Transfer of a Prisoner to State Authority

"The Director of the Bureau of Prisons shall order that a prisoner who has been charged in an indictment or information with, or convicted of, a state felony, be transferred to an official detention facility within such state prior to his release from a federal prison facility if:

"(1) the transfer has been requested by the Governor or other executive authority of the state;

"(2) the state has presented to the Director a certified copy of the indictment, information, or judgment of conviction; and

"(3) the Director finds that the transfer would be in the public interest.

If more than one request is presented with respect to a prisoner, the Director shall determine which request should receive preference.

"§ 3824. Release of a Prisoner

"(a) DATE OF RELEASE.—Except as otherwise provided, and unless earlier released on parole pursuant to the provisions of subchapter D, a prisoner shall be released on parole, pursuant to the provisions of section 3831, on the date of the expiration of his term of imprisonment. If the date of the expiration of a prisoner's term of imprisonment falls on a Saturday, a Sunday, or a legal holiday, the prisoner may be released by the Bureau of Prisons on the last preceding weekday.

"(b) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on parole prior to or on the expiration of his term of imprisonment, the Bureau of Prisons shall furnish him with:

"(1) suitable clothing;

"(2) an amount of money, not less than $200 nor more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

"(3) transportation to the place of his conviction, to his bona fide residence within the United States, or to such other place within the United States as may be authorized by the Parole Commission.

"§ 3825. Inapplicability of the Administrative Procedure Act

"The provisions of 5 U.S.C. 551 through 559, and 701 through 706, do not apply to the making of any determination, decision, or order under this subchapter.

"Subchapter D.—Parole

"Sec.
"3831. Consideration of a Prisoner for Release on Parole.
"3832. Pre-Parole Reports.
"3833. Parole Interview Procedure.
"3834. Term and Conditions of Parole.
"3835. Revocation of Parole.
"3836. Appeal from Parole Commission Determination.
"3837. Inapplicability of the Administrative Procedure Act.

"§ 3831. Consideration of a Prisoner for Release on Parole

"(a) ELIGIBILITY.—A prisoner who has been committed to the custody of the Bureau of Prisons to serve a term of imprisonment totaling six months or more is eligible for release on parole by the Parole Commission upon completion of the service of the term of parole ineligibility imposed by the sentencing court pursuant to the provisions of section 2301(c) and 2302(b), or upon completion of the first six months of the term of imprisonment, whichever is later.

"(b) FIRST CONSIDERATION.—The Parole Commission shall consider the parole of a prisoner serving a term of imprisonment totaling:

"(1) more than one year, at least sixty days prior to the later of:

"(A) the date upon which he will become eligible for parole; or

"(B) the date upon which he will complete the service of one-fourth of the term of imprisonment or of the first year of the term of imprisonment, whichever is earlier;

"(2) six months or more but not more than one year, at least sixty days prior to the date upon which he will become eligible for parole.

"(c) CRITERIA FOR RELEASE.—The Parole Commission shall grant parole to a prisoner who is eligible for parole if, having regard for the guidelines and any pertinent policy statements concerning parole issued by the Sentencing Commission pursuant to 28 U.S.C. 994(f), the Commission is of the opinion that:

"(1) his release at that time is consistent with the applicable factors that led to the imposition of his particular sentence under the provisions of part III of this title;

"(2) there is no undue risk that he will fail to conform to such conditions of parole as would be warranted under the circumstances; and

"(3) his release at that time, in light of his conduct at the institution, would not have a substantially adverse effect on institutional discipline.

"(d) RECONSIDERATION.—If parole is denied a prisoner, the Parole Commission shall reconsider parole at least once each year thereafter until parole is granted, unless at the time parole is denied the Commission determines that a release order after an additional year would be inappropriate, in which case the Commission may defer reconsideration for not more than two years.

"(e) MANDATORY RELEASE ON PAROLE AT EXPIRATION OF SENTENCE.—A prisoner serving a term of imprisonment totaling six months or more who is still in confinement on the date of the expiration of his term of imprisonment shall then be released on parole.

"§ 3832. Preparole Reports

"(a) PREPAROLE STUDY AND REPORT BY BUREAU OF PRISONS.—An adequate time prior to the date upon which a prisoner becomes eligible for parole, the Bureau of Prisons, under such regulations as the Attorney General may prescribe, shall conduct a complete study of the prisoner, inquiring into such matters as the prisoner's previous delinquency or criminal experiences; his social background; his capabilities; his mental, emotional, and physical health; and the rehabilitative resources or programs that may be available to suit his needs. At least ninety days prior to the date upon which the prisoner becomes eligible for parole, the Bureau shall provide the Parole Commission with a written report of the results of the study and shall make to the Commission whatever recommendations the Bureau believes will be helpful in determining the suitability of the prisoner for parole and in determining the appropriate terms and conditions of parole.

"(b) PREPAROLE REPORT BY PROBATION OFFICERS AND GOVERNMENT AGENCIES.—Upon request of the Parole Commission prior to its consideration of the parole of a prisoner or of any other matter within its jurisdiction, a probation officer or a government agency shall pro-

vide the Commission with whatever information is available to such officer or agency concerning a prisoner or parolee and shall, if not inconsistent with the public interest, make to the Commission whatever recommendations such officer or agency believes will be helpful with respect to the matter concerning which the request was made.

"(c) OTHER PREPAROLE INVESTIGATION.—The Parole Commission may make such other investigation as it may consider warranted.

"§ 3833. Parole Interview Procedure

"(a) INTERVIEW REQUIRED.—A prisoner whom the Parole Commission is required to consider for parole under the provisions of:

"(1) section 3831(b)(1) or (d), shall, within the time specified, be afforded a parole interview unless he signs a written waiver of such an interview;

"(2) section 3831(b)(2), shall, within the time specified, be afforded a parole interview unless:

"(A) he signs a written waiver of such an interview; or

"(B) the Commission, on the basis of the report and recommendations of the Bureau of Prisons, determines to release him on parole on the date upon which he will become eligible for parole.

"(b) NOTICE AND OPPORTUNITY FOR REPRESENTATION.—Prior to the parole interview, the prisoner:

"(1) shall be given a written notice of the time, place, and purpose of such interview; and

"(2) shall be allowed to select, as a representative to aid him in such interview, any person who qualifies under regulations or rules issued by the Parole Commission, the regulations or rules of which may not exclude attorneys as a class.

"(c) ACCESS TO REPORTS.—Following notification that a parole interview is scheduled, the prisoner shall be afforded reasonable access to such reports and other materials as are prepared by, or for the use of, the Parole Commission in making its determination, except that the prisoner shall not be afforded access to matters that, if they appeared in a report of a presentence investigation, would not be revealed to a defendant under the provisions of Rule 32 of the Federal Rules of Criminal Procedure. If access to any such material is withheld from the prisoner on such grounds, the Commission, or, if the material was withheld at the request of the Bureau of Prisons or another agency, the Bureau or such other agency, shall summarize the basic contents of the material to the extent that is possible without violating a pledge of

confidentiality or endangering any person, and the Commission shall furnish such summary to the prisoner.

"(d) RECORD OF INTERVIEW.—A complete record of a parole interview shall be retained by the Parole Commission. Upon request, the Commission shall make the record available to the prisoner.

"(e) NOTIFICATION OF DETERMINATION.—Not later than fifteen working days after the date of the interview, the Parole Commission shall notify the prisoner in writing of its determination. If parole is denied, or if discretionary conditions of parole are imposed other than those incorporated by reference in section 3834(c), the Commission shall include a statement of the reasons for such determination and, if possible, a representative of the Commission who participated in the parole interview shall hold a conference with the prisoner to explain such reasons.

"§ 3834. Term and Conditions of Parole

"(a) SETTING OF TERM AND CONDITIONS.—Upon a determination to release a prisoner on parole, the Parole Commission shall set the term and conditions of parole, having regard for:

"(1) the guidelines and any pertinent policy statements concerning parole issued by the Sentencing Commission pursuant to 28 U.S.C. 994(f);

"(2) the nature and circumstances of the offense and the history and characteristics of the parolee; and

"(3) the need:

"(A) to protect the public from further crimes of the parolee; and

"(B) to provide the parolee with the opportunity for such needed educational or vocational training, medical care, or other correctional treatment as can be provided effectively while he is on parole.

"(b) TERM OF PAROLE.—The Parole Commission, having regard for the guidelines and any pertinent policy statements concerning parole issued by the Sentencing Commission pursuant to 28 U.S.C. 994(f), shall set the term of parole:

"(1) for a Class A or Class B felony, at not less than one year nor more than five years;

"(2) for a Class C felony, at not less than one year nor more than three years;

"(3) for a Class D felony, at not less than one year nor more than two years;

"(4) for a Class E felony, at not less than six months nor more than one year; and

"(5) for a Class A misdemeanor, at not less than three months nor more than six months.

"(c) CONDITIONS OF PAROLE.—The Parole Commission shall provide, as an explicit condition of parole, that the parolee not commit another federal, state, or local crime during the term of parole. The Commission may provide, as further conditions of parole, to the extent that such conditions are reasonably related to the matters set forth in subsection (a)(2) and (a)(3), and to the extent that such conditions involve no greater a deprivation of liberty than is reasonably necessary for the purposes indicated in subsection (a)(3), and to the extent that such conditions are consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(f), any conditions set forth as discretionary conditions of probation in section 2103(b)(1) through (b)(10) and (b)(12) through (b)(18), and any other conditions it considers to be appropriate. If an alien prisoner subject to deportation is paroled, the Commission may provide, as a condition of parole, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The Commission shall provide to a parolee a written statement setting forth all the conditions to which the parole is subject with sufficient clarity and specificity to serve as a guide for the parolee's conduct and for such supervision as is required.

"(d) COMMENCEMENT OF TERM.—A term of parole commences on the day the parolee is released from imprisonment.

"(e) CONCURRENT WITH OTHER SENTENCES.—A term of parole runs concurrently with any federal, state, or local term of parole or probation for another offense to which the parolee is subject or becomes subject during the term of parole, except that it does not run during any period in which the parolee is imprisoned in connection with a conviction for a federal, state, or local crime.

"(f) EARLY TERMINATION.—The Parole Commission may terminate a term of parole previously ordered and discharge the parolee at any time after expiration of one year of parole if it is satisfied that such action is warranted by the conduct of the parolee and the interest of justice. The Commission shall review the status of a parolee after two years of continuous parole, and after each additional year of parole, to determine the need for his continued parole.

"(g) EXTENSION OF TERM OR MODIFICATION OF CONDITIONS.—The Parole Commission may extend a term of parole if less than the authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of parole, at any time prior to the expiration or termination of the term of parole.

"(h) SUBJECT TO REVOCATION.—A term of parole remains conditional and subject to revocation until its expiration or termination.

"§ 3835. Revocation of Parole

"(a) WARRANT FOR ARREST.—A warrant for the arrest of a parolee who is alleged to have violated a condition of his parole may be issued by the Parole Commission at any time prior to the expiration or termination of the term of parole. An officer authorized under subchapter B of chapter 30 to execute such a warrant may arrest the parolee and, upon such an arrest, shall return the parolee to the custody of the Bureau of Prisons.

"(b) PRELIMINARY APPEARANCE.—A parolee arrested on a warrant for violation of a condition of his parole shall be taken, without unnecessary delay, before the Parole Commission at a place reasonably near the place of the arrest or of the violation alleged, to determine if there is probable cause to believe that he has violated a condition of his parole. The parolee shall be given the opportunity to admit or deny, in whole or in part, the violation alleged, and to explain the circumstances of the matter. If the Commission, after a preliminary hearing, finds that there is probable cause to believe that the violation occurred, a revocation hearing before the Commission shall be ordered. If the parolee admits the violation alleged, the revocation hearing may be limited to matters concerning disposition.

"(c) TIME AND PLACE OF REVOCATION HEARING.—A revocation hearing shall be held by the Parole Commission, with respect to the parole of:

"(1) a parolee for whom such a hearing was ordered under subsection (b), immediately upon the finding of probable cause or within sixty days thereafter, at a place reasonably near the place of the arrest or of the violation alleged; or

"(2) a parolee who has been convicted of a federal, state, or local crime committed subsequent to his release on parole and who has been sentenced for such crime to a term of imprisonment of more than one hundred and eighty days and who has had placed against him a detainer on a warrant issued under subsection (a),

within one hundred and eighty days of such placement, at the prison facility in which he is confined.

(d) REVOCATION HEARING PROCEDURE.—Prior to the holding of the revocation hearing, the parolee shall be given reasonable notice of the conditions of parole alleged to have been violated, and of the time, place, and purpose of the scheduled hearing. At the hearing, the parolee shall be apprised of the evidence against him and shall be given opportunity:

(1) to be represented by retained counsel, or, if he is unable to retain counsel, by counsel provided pursuant to the provisions of chapter 34;

(2) to appear, to testify, and to present witnesses and documentary evidence on his own behalf; and

(3) to confront and cross-examine adverse witnesses, if he so requests, unless the Parole Commission specifically finds good cause for declining to allow confrontation.

Any relevant evidence may be received and considered at the hearing, regardless of its admissibility under the Federal Rules of Evidence, except to the extent that receipt and consideration of such evidence for purposes of parole revocation is expressly limited by a section of this title relating to parole or any other provision of law. At the conclusion of the hearing, the Commission shall determine on the evidence before it whether the parolee has violated a condition of his parole.

"(e) DISPOSITION.—If the Parole Commission determines that the parolee has not violated a condition of his parole, the warrant shall be withdrawn. If the Commission determines that the parolee has violated a condition of his parole, it may, after considering any pertinent policy statements concerning parole issued by the Sentencing Commission pursuant to 28 U.S.C. 994(f):

"(1) continue him on parole, with or without extending the term or modifying or enlarging the conditions; or

"(2) revoke parole, if such continuation, extension, modification, or enlargement is inappropriate in its opinion, and order the parolee imprisoned for:

"(A) the term of the original sentence minus the portion of the original sentence served in confinement prior to the parole; or

"(B) the contingent term of imprisonment provided in section 2303.

In determining the appropriate disposition, the Commission shall consider whether the violation was serious and whether the violation had been preceded by other violations.

"(f) DIGEST OF PROCEEDINGS.—In any case in which parole is modified or revoked, the Parole Commission shall prepare, and shall give to the parolee, a digest of the factors considered by the Commission and of the reasons for the disposition ordered by the Commission.

"(g) DELAYED ADJUDICATION.—The power of the Parole Commission to revoke parole for violation of a condition of parole extends beyond the expiration of the term of parole for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such violation.

"(h) CREDIT UPON REIMPRISONMENT.—Credit shall be given for reimprisonment of a parolee beginning on the date he is returned to the custody of the Bureau of Prisons.

"(i) REPAROLE.—A prisoner who has been reimprisoned following revocation of parole may be reparoled by the Parole Commission under the same provisions of this subchapter that govern initial parole, and such subsequent parole may be revoked by the Commission under the same provisions of this subchapter that govern initial revocation. If such a subsequent parole is revoked, the parolee may be reimprisoned for:

"(1) the term of the original sentence minus the portion of the original sentence served in confinement prior to the last parole; or

"(2) the contingent term of imprisonment provided in section 2303 if no part of such a term was served in the course of his reimprisonment after the initial revocation.

"§ 3836. Appeal from Parole Commission Determination

"(a) APPEAL IN GENERAL.—In any case in which, inconsistent with the guidelines for parole issued by the Sentencing Commission pursuant to 28 U.S.C. 994(f)(1):

"(1) parole is denied;

"(2) conditions of parole are imposed other than those set forth or incorporated by reference in section 3834(c); or

"(3) parole is modified or revoked;

the person to whom such decision applies may file with the National Appeals Board a written appeal from such decision not later than thirty days after the decision is rendered. In any case in which, inconsistent with the guidelines concerning parole issued by the Sentencing Commission pursuant to 28 U.S.C. 994(f)(1), any decision with respect to parole is rendered, the Attorney General may file with the National Appeals Board a written appeal from such decision not later than thirty days after the decision is rendered. An appeal shall be

decided by a majority vote of the three commissioners on the National Appeals Board within sixty days after receipt of the appellant's papers.

"(b) APPEAL IF ORIGINAL JURISDICTION RETAINED.—In accordance with regulations and rules issued by the Parole Commission, in any case in which original jurisdiction is retained by the Commission the initial decision shall be made by a majority vote of a panel of five commissioners. The panel's decision may be appealed on the motion of any commissioner on the panel, or on the application of the individual to whom such decision applies, or on the motion of the Attorney General, directly to the National Appeals Board, which shall either affirm the decision or schedule a review by the full Commission.

"(c) PARTICIPANT IN PRIOR DECISION BARRED.—No commissioner may participate as a member of the National Appeals Board in the consideration of an appeal from a decision in which he had earlier participated.

"§ 3837. Inapplicability of the Administrative Procedure Act

"The provisions of 5 U.S.C. 551 through 559, and 701 through 706, do not apply to the making of any determination, decision, or order under this subchapter.

"PART V.—ANCILLARY CIVIL PROCEEDINGS

"Chapter 40.—ANCILLARY PUBLIC CIVIL PROCEEDINGS

"Subchapter A.—Civil Forfeiture

"§ 4001. Civil Forfeiture Proceeding

"(a) PROPERTY SUBJECT TO FORFEITURE.—In addition to a proceeding under any other act of Congress, the Attorney General may initiate in a district court of the United States an in rem civil proceeding to have seized and forfeited to the United States any property, or the value thereof where specified, used, intended for use, or possessed in the course of an offense described in section:

"(1) 1204 (Violating Neutrality by Causing Departure of a Vessel or Aircraft), if the property consists of a vessel or aircraft or its contents;

"(2) 1206 (a)(2) or (a)(3) (Engaging in an Unlawful International Transaction) if the property consists of property being introduced into or exported from the United States in violation of such section, or the value thereof;

"(3) 1321 (Witness Bribery), 1322 (Corrupting a Witness or an Informant), or 1323 (Tampering with a Witness or an Informant), if the property consists of anything of value given or accepted in violation of such section;

"(4) 1351 (Bribery) or 1352 (Graft) if the property consists of anything of value given or accepted in violation of such section;

"(5) 1411 (Smuggling) if the property consists of an object introduced, or being introduced, into the United States, or the value thereof;

"(6) 1412 (Trafficking in Smuggled Property) if the property consists of an object introduced, or being introduced, into the United States, or the value thereof;

"(7) 1413 (Receiving Smuggled Property) if the property consists of an object introduced, or being introduced, into the United States, or the value thereof;

"(8) 1511 (Obstructing an Election), 1512 (Obstructing Registration), 1516 (Soliciting a Political Contribution as a Federal Public Servant or in a Federal Building), or 1517 (Making a Political Contribution as a Foreign National), if the property consists of anything of value given or received in violation of such section;

"(9) 1521 (Eavesdropping), 1522 (Trafficking in an Eavesdropping Device), or 1523 (Possessing an Eavesdropping Device), if the property consists of an eavesdropping device;

"(10) 1715 (Possessing Burglar's Tools) if the property consists of an object that is designed for, or commonly used for, the facilitation of a forcible entry in the course of an offense described in section 1711, 1712, 1713, or 1714;

"(11) 1734 (Executing a Fraudulent Scheme) if the property consists of fraudulently advertised property;

"(12) 1738 (Consumer Fraud) if the property consists of a fraudulently advertised property;

"(13) 1741 (Counterfeiting) if the property consists of a counterfeited written instrument;

"(14) 1742 (Forgery) if the property consists of a forged written instrument;

"(15) 1745 (Trafficking in a Counterfeiting Implement) if the property consists of a counterfeiting or forging implement;

"(16) 1751 (Commercial Bribery), 1752 (Labor Bribery), or 1753 (Sports Bribery), if the property consists of anything of value given or accepted in violation of such section;

"(17) 1821 (Explosives Offenses) if the property consists of an explosive;

"(18) 1822 (Firearms Offenses) if the property consists of a firearm or ammunition;

"(19) 1823 (Using a Weapon in the Course of a Crime) if the property consists of a firearm or a destructive device;

"(20) 1841 (Engaging in a Gambling Business) if the property consists of other than real property, or

"(21) 1842 (Disseminating Obscene Material) if the property consists of obscene material.

"(b) ORDER OF FORFEITURE.—If the court finds, by a preponderance of the evidence, that the property that is the subject of the proceeding had been used, intended for use, or possessed in the course of an offense set forth in subsection (a), and that the property consists of an object set forth in subsection (a), the court shall order such property to be forfeited to the United States.

§ 4002. Protective Order

"At any time after the initiation of a proceeding under section 4001, the court may enter a restraining order or injunction, may require a performance bond, and may take such other action as is in the interest of justice, with respect to any property subject to civil forfeiture.

"§ 4003. Execution of Civil Forfeiture

"The Attorney General, upon such terms and conditions as are in the interest of justice, shall seize property that a defendant has been ordered to forfeit to the United States, pursuant to section 4001, and shall, pursuant to regulations issued by the Attorney General, sell, retain, destroy, or make other appropriate disposition of such property, making due provision for the rights of any innocent person. If any property is not disposed of for value the rights to such property shall not revert to the defendant.

"§ 4004. Applicability of Other Civil Forfeiture Provisions

"Except to the extent that they are inconsistent with the provisions of this subchapter, all provisions of law relating to the remission or mitigation of civil forfeitures of property for violation of the customs laws, the compromise of claims with respect to such property, the disposition of such property, the proceeds from the sale of such property, and the award of compensation to informants with respect to such property, shall apply to civil forfeitures incurred, or alleged to have been incurred, under this section. The duties imposed upon a customs officer or any other person with respect to the civil seizure, forfeiture, and disposition of property under the customs laws shall, with respect to property used, intended for use, or possessed in violation of subsection (a), be performed by the Attorney General.

"§ 4005. Definitions for Subchapter A

As used in this subchapter:

"(a) 'counterfeited written instrument' has the meaning set forth in section 1746(a);

"(b) 'counterfeiting implement' has the meaning set forth in section 1746(b);

"(c) 'eavesdropping device' has the meaning set forth in section 1526(c);

"(d) 'forged written instrument' has the meaning set forth in section 1746(c);

"(e) 'forging implement' has the meaning set forth in section 1746(d);

"(f) 'introduce' has the meaning set forth in section 1414(a)(1);

"(g) 'object' has the meaning set forth in section 1414(a)(2);

"(h) 'obscene material' has the meaning set forth in section 1842(b)(4).

"Subchapter B.—Civil Restraint of Racketeering

"Sec.
"4011. Civil Action to Restrain Racketeering.
"4012. Civil Restraint Procedure.
"4013. Civil Investigative Demand.

"§ 4011. Civil Action to Restrain Racketeering

"(a) INITIATION OF ACTION.—The Attorney General may initiate a civil proceeding to prevent and restrain offenses under section 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), or 1803 (Washing Racketeering Proceeds).

"(b) JURISDICTION.—The district courts of the United States have jurisdiction to hear and determine proceedings initiated under this section, and to prevent and restrain the offenses set forth in subsection (a). In a proceeding initiated under this section, the court shall proceed as soon as practicable to the hearing and determination thereof.

"(c) PROTECTIVE ORDERS.—At any time after the initiation of a proceeding under this section, the court may enter a restraining order or injunction, may require a performance bond, and may take such other action as is in the interest of justice.

"(d) ESTOPPEL.—A conviction of a defendant for an offense under section 1801 (Operating a Racketeering Syndicate), 1802 (Racketeering), or 1803 (Washing Racketeering Proceeds) shall, as a final judgment or decree rendered in favor of the United States, estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States under this section or by a person under section 4101.

"(e) FINAL ORDERS.—Upon the determination of a proceeding under this section in favor of the United States, the court may issue appropriate orders, including an order:

"(1) directing a person to divest himself of an interest, direct or indirect, in an enterprise;

"(2) imposing reasonable restrictions on the future activities or investments of a person, including a prohibition against a person's engaging in an endeavor of the same kind as the enterprise engaged in;

"(3) directing dissolution or reorganization of an enterprise, making due provision for the rights of an innocent person.

"§ 4012. Civil Restraint Procedure

"(a) VENUE.—A proceeding under section 4011 or 4101 may be initiated in a United States District Court for any district in which the defendant in the proceeding resides, is found, has an agent, or transacts affairs.

"(b) ISSUANCE OF PROCESS.—In a proceeding under section 4011 or 4101, if it is shown that the interest of justice requires that any other party residing in another district be brought before the court, the court may cause such party to be summoned, and process for that purpose may be served in any judicial district of the United States by the United States marshal in such district.

"(c) SERVICE OF PROCESS.—In a proceeding under section 4011 or 4101, a subpoena issued by the court to compel the attendance of a witness may be served in any other judicial district, but no such sub-

poena shall be issued for service upon an individual who resides in another district at a place more than one hundred miles from the place at which the court is held without approval by a judge of such court upon a showing of good cause. All other process may be served on a person in any judicial district in which the person resides, is found, has an agent, or transacts affairs.

"(d) EXPEDITED ACTION.—In a proceeding under section 4011 or 4101, the Attorney General may file with the clerk of the court a certificate stating that in his opinion the case is of general public importance. A copy of the certificate shall be furnished immediately by the clerk to the chief judge, or in his absence to the presiding district judge, of the district in which the proceeding is pending. Upon receipt of the copy, the judge shall designate immediately a judge of that district to hear and determine the proceeding. The judge so designated shall assign the proceeding for hearing as soon as practicable, shall participate in the hearing and determination, and shall otherwise cause the proceeding to be expedited.

"(e) OPEN OR CLOSED PROCEEDINGS.—A proceeding under section 4011 may be open or closed to the public, at the discretion of the court, after consideration of the rights of the persons affected.

"§ 4013. Civil Investigative Demand

"(a) ISSUANCE OF DEMAND.—If the Attorney General has reason to believe that a person may be in possession, custody, or control of any documentary material that may be relevant to a civil proceeding under section 4011, he may, prior to the initiation of such proceeding, issue in writing and cause to be served on the person a civil investigative demand requiring the person to produce such material for examination. The civil investigative demand shall:

"(1) state the character of the conduct under investigation and the provision of law applicable;

"(2) describe the class of documentary material to be produced with sufficient definiteness to enable the material to be fairly identified;

"(3) state that the demand is returnable forthwith or prescribe a return date that provides a reasonably sufficient period of time within which the material can be assembled and made available for inspection and copying or reproduction; and

"(4) identify the document custodian to whom the material is to be made available.

"(b) LIMITATIONS.—No civil investigative demand may contain a requirement that would be held to be unreasonable if contained in a

subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation.

"(c) SERVICE.—Service of a civil investigative demand or a petition filed under this section may be made upon a person by:

"(1) delivering an executed copy to the person;

"(2) delivering an executed copy to the person's agent or to another person authorized by appointment or by law to receive service of process on behalf of the person;

"(3) delivering an executed copy to the principal office or place of business of the person; or

"(4) sending an executed copy by registered or certified mail addressed to the person at his principal office or place of business.

A verified return by the person serving the demand or petition, setting forth the manner of service, is prima facie evidence of service. A return reflecting service by registered or certified mail shall be accompanied by the return post office receipt of delivery of the demand.

"(d) CUSTODY.—

"(1) The Attorney General shall designate a person to serve as document custodian, and such additional persons as are necessary to serve as deputies to the document custodian.

"(2) A person upon whom a civil investigative demand has been served shall, at his principal place of business and on the return date specified in the demand, make the material available for inspection and copying or reproduction by the custodian designated. Upon written agreement between the person and the custodian, or upon order of the court, the material may be made available at such other place and at such later date as is agreed upon or ordered, and the person may substitute a copy for an original of all or any part of the material.

"(3) The custodian to whom the material is delivered shall take physical possession and shall be responsible for the use made of it and for its return. The custodian may prepare as many copies of such documentary material as may be required for official use, under regulations issued by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination by any person other than the Attorney General, without the consent of the person who produced the material. The material in the possession of the custodian shall be made available for examination by the person who produced the material, or his representative, under such reasonable terms and conditions as the Attorney General shall prescribe.

"(4) The custodian shall, upon request, deliver the material in his possession to an attorney for the government who has determined that the material is needed for his presentation in a proceeding before a court or grand jury. Upon the conclusion of the proceeding, the attorney shall return to the custodian any material that has not passed into the control of the court or grand jury through its introduction into the record of the proceeding.

"(5) Upon the completion of:

"(A) the investigation for which material was produced under this section; and

"(B) any proceeding arising from the investigation;

the custodian shall return, to the person who produced the material, all the material that has not passed into the control of a court or grand jury through its introduction into the record of the proceeding. A copy made under this subsection need not be returned.

"(6) If no proceeding has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of the investigation, the person who produced the material shall be entitled, upon written demand made upon the Attorney General, to the return of all the material produced by him. A copy made under this subsection need not be returned.

"(e) ENFORCEMENT.—

"(1) If a person fails to comply with a civil investigative demand served upon him pursuant to the provisions of this section, or if satisfactory copying or reproduction of any material cannot be done and the person refuses to surrender the material, the Attorney General may file and serve upon the person a petition for an enforcement order. The petition shall be filed in a district court of the United States for the judicial district in which the person resides, is found, has an agent, or transacts his affairs. If the person transacts business in more than one judicial district, the petition shall be filed in the district in which the person maintains his principal place of business, or in such other district in which the person transacts business as may be agreed upon by the parties to the petition.

"(2) Within twenty days after the service of a civil investigative demand upon a person, or at any time before the return date specified in the demand, whichever period is less, the person may file and serve upon the Attorney General a petition for an order

modifying or setting aside the demand. The time allowed for compliance with the demand shall not run while the petition is pending in the court. The petition shall specify each ground upon which the petitioner relies in seeking relief. The petition may be based upon a failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of the person.

"(3) At any time during which the document custodian has custody or control of material delivered by a person in compliance with a civil investigative demand, the person may file and serve upon the custodian a petition for an order requiring the performance by the custodian of a duty imposed upon him by this section.

"(f) JURISDICTION.—A district court of the United States in which a petition is filed under this section has jurisdiction to hear and determine the matter so presented, and to enter such order as may be required to effectuate the provisions of this section.

"Subchapter C.—Injunctions

"Sec.
"4021. Injunctions against Fraud.

"§ 4021. Injunctions against Fraud

"Upon evidence satisfactory to the Attorney General that a person is engaged in an act or practice that constitutes or could constitute a violation of section 1734 (Executing a Fraudulent Scheme), or 1738 (Consumer Fraud), the Attorney General may bring an action in a district court of the United States to enjoin such act or practice, and, upon a proper showing, a permanent or temporary injunction or restraining order shall be granted by the court together with such other equitable relief as may be appropriate.

"Chapter 41.—ANCILLARY PRIVATE CIVIL REMEDIES

"Subchapter
"A. Private Actions for Damages.
"B. Actions for Compensation of Victims of Crime.

"Subchapter A.—Private Actions for Damage

"Sec.
"4101. Civil Action against a Racketeering Offender.
"4102. Civil Action against a Fraud Offender.
"4103. Civil Action against an Eavesdropping Offender.

"§ 4101. Civil Action against a Racketeering Offender

"A person injured in his business or property by reason of a violation of section 1801 (Operating a Racketeering Syndicate), 1802

(Racketeering), or 1803 (Washing Racketeering Proceeds) shall have a civil cause of action against an offender in an appropriation district court of the United States and shall be entitled to recover;

"(a) three times the damages sustained; and

"(b) a reasonable attorney's fee and other litigation costs reasonably incurred.

"§ 4102. Civil Action against a Fraud Offender

"A person injured in his business or property by reason of a violation of section 1734 (Executing a Fraudulent Scheme) or 1738 (Consumer Fraud) shall have a civil cause of action against a convicted offender in an appropriate district court of the United States and shall be entitled to recover:

"(a) three times the damages sustained; and

"(b) a reasonable attorney's fee and other litigation costs reasonably incurred.

"§ 4103. Civil Action against an Eavesdropping Offender

"(a) CIVIL ACTION.—A person whose private oral communication is intercepted, disclosed, or used in violation of section 1521 (Eavesdropping) shall have a civil cause of action against an offender in an appropriate district court of the United States and shall be entitled to recover:

"(1) actual damages, but not less than liquidated damages of $1,000 or of $100 per day for each day of violation, whichever is the greater;

"(2) punitive damages; and

"(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

"(b) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a civil proceeding brought under this section or any other provision of law that the defendant acted in reasonable reliance on a court order or legislative authorization and believed in good faith that his conduct did not constitute an offense.

"Subchapter B.—Actions for Compensation of Victims of Crime

"Sec.
"4111. Establishment of a Victim Compensation Fund.
"4112. Claim for Compensation.
"4113 Limitation on Compensation.
"4114. Subrogation.
"4115. Definitions for Subchapter B.

"§ 4111. Establishment of a Victim Compensation Fund

"There is established in the Treasury of the United States a revolving fund, to be known as the Victim Compensation Fund, that shall be the depository of:

"(a) all criminal fines paid in the courts of the United States;

"(b) all funds reimbursed pursuant to section 4112(c) or 4113(c)(2);

"(c) all funds collected as a result of actions instituted pursuant to section 4114; and

"(d) all contributions to such Fund from public or private sources.

"§ 4112. Claim for Compensation

"(a) CLAIM.—The victim of an offense described in chapter 16 over which federal jurisdiction exists, or of an attempt to commit such an offense, or a surviving dependent of such a victim, may file a claim with the United States Victim Compensation Board for compensation in accordance with this subchapter.

"(b) HEARING ON CLAIM.—A hearing on a claim filed under this subchapter shall be open to the public unless the Board determines that, in the interest of justice, the hearing, or a portion of the hearing, should not be open to the public.

"(c) SCOPE OF COMPENSATION.—The Board, subject to the provisions of section 4113, shall order the payment of compensation to:

"(1) a victim who has suffered personal injury as a result of the offense;

"(2) the estate of a victim who has suffered personal injury as a result of the offense; or

"(3) a surviving dependent of a victim who has suffered death as a result of the offense.

"(d) AMOUNT AND PAYMENT OF COMPENSATION.—The Board shall determine the amount of, and shall order payment of compensation for pecuniary loss to be awarded to a claimant. If the pecuniary loss occasioned by loss of anticipated earnings or support continues for a period of ninety days or more, payment for the loss may be in the form of periodic payments during the period for which the loss continues or during a period of ten years, whichever is less.

"(e) EMERGENCY COMPENSATION.—If, prior to taking final action upon a claim, the Board determines that such claim is one with respect to which compensation will probably be ordered to be paid, the Board may order emergency compensation to be paid, not to exceed $1,500, pending final action on the claim. The amount of any emergency

compensation ordered and paid shall be deducted from the amount of any final order for compensation. If the amount of any emergency compensation ordered and paid exceeds the amount of the final order for compensation, or if no final order for compensation is made, the claimant may be ordered to make reimbursement to the Fund of the difference between such amounts.

"(f) RECONSIDERATION OF CLAIM.—The Board at any time may reconsider a claim and modify or rescind an order for the payment of compensation based upon a change in circumstances of the claimant.

"(g) BAR TO CLAIM.—No claim may be brought under this subchapter if the injury or the death was caused by the operation of a vehicle, unless the injury or death was intentionally inflicted through the use of the vehicle, or unless the vehicle was an implement used in the commission of an offense to which this subchapter applies.

"(h) BAR TO CLAIM PRECLUDED.—It is not a bar to a claim brought under this subchapter that, by reason of immaturity, incompetency, or otherwise, the person engaging in the conduct that caused the injury or death could not be convicted for the offense.

"(i) OTHER RIGHTS UNAFFECTED.—Except as otherwise provided, the availability or payment of compensation under this subchapter does not affect the right of any person to recover damages from any other person by a civil action for the injury or death.

"(j) EXECUTION OR ATTACHMENT BARRED.—An order for the payment of compensation under this subchapter is not subject to execution or attachment.

"§ 4113. Limitation on Compensation

"(a) PREREQUISITES TO RECOVERY OF COMPENSATION.—An order for the payment of compensation under this subchapter shall not be made unless:

"(1) the offense giving rise to the claim was reported to a law enforcement officer within seventy-two hours after its occurrence, unless the Board finds that the failure to report within such time was justified by good cause;

"(2) the claim is filed within one year after the date of the offense giving rise to the claim, unless the Board finds that the failure to file the claim within such time was justified by good cause; and

"(3) the claimant has suffered a pecuniary loss exceeding $100 or an amount equal to a week's earnings or support, whichever is less, as a proximate cause of the offense giving rise to the claim.

"(b) MAXIMUM AMOUNT OF COMPENSATION.—An order for the payment of compensation for pecuniary loss under this subchapter may not exceed a total of $50,000, including lump-sum payments and periodic payments, for each incident involving an offense against a victim.

"(c) RESPONSIBILITY OF VICTIM OR CLAIMANT FOR THE OFFENSE.—The Board, in determining whether to order payment of compensation and the amount of compensation to be ordered, shall consider the behavior of the victim or claimant with regard to the circumstances of the offense giving rise to the claim, shall determine whether the victim or claimant bears any share of responsibility for the offense because of provocation or otherwise, and shall:

"(1) reduce the amount of compensation to the claimant in accordance with its assessment of the degree of such responsibility attributable to the victim or claimant; or

"(2) deny compensation if the behavior of the victim or claimant was a substantial contributing factor to the offense giving rise to the claim.

"(d) CONTINUING DUTY OF VICTIM OR CLAIMANT TO COOPERATE.—The Board, upon finding that a victim or claimant has not substantially cooperated with all government agencies involved in the investigation or prosecution of the offense that gave rise to the claim, may deny, rescind, or reduce the amount of any order for the payment of compensation under this subchapter.

"(e) EFFECT OF COMPENSATION FROM OTHER SOURCES.—In the event that a claimant:

"(1) recovers damages from any other source based upon an offense giving rise to a claim under this section and subsequently files a claim under this section based upon such offense, in determining the amount of compensation to be awarded under this section such damages shall be assumed to compensate for losses other than pecuniary losses compensable under this subchapter unless the damages clearly compensate for pecuniary losses; or

"(2) receives compensation under this section and subsequently recovers damages from any other source based upon the offense that gave rise to compensation under this section, the claimant shall be ordered to make reimbursement to the Fund for the compensation previously paid to the same extent that compensation would have been reduced under paragraph (1) had recovery preceded compensation.

"§ 4114. Subrogation

"The Attorney General may, within three years after the entry of an order for the payment of compensation under this subchapter, institute, against an offender convicted by a federal, state, or local court of an offense giving rise to a claim under this subchapter, an action for the recovery of all or part of such compensation in the United States District Court for any judicial district in which such person resides or is present. A conviction of a defendant by a federal court of an offense involving the act giving rise to a claim under this subsection shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States under this section. Such court shall have jurisdiction to hear, determine, and render judgment in any such action. Any amounts recovered under this subsection shall be forwarded to the Treasury of the United States for credit to the Victim Compensation Fund.

"§ 4115. Definitions for Subchapter B

"As used in this subchapter:

"(a) 'dependent' means:

"(1) a spouse;

"(2) an individual who is a dependent within the meaning of section 152 of the Internal Revenue Code of 1954 (26 U.S.C. 152); or

"(3) a posthumous child;

"(b) 'pecuniary loss' means:

"(1) in the case of personal injury:

"(A) all appropriate and reasonable expenses necessarily incurred for ambulance, hospital, surgical, nursing, dental, prosthetic, and other medical and related professional services relating to physical or psychiatric care, including non-medical care and treatment rendered in accordance with a recognized method of healing;

"(B) all appropriate and reasonable expenses necessarily incurred for physical and occupational therapy and rehabilitation; and

"(C) actual loss of past earnings and anticipated loss of future earnings because of a disability resulting from the personal injury, at a rate not to exceed $150 per week, if the loss continues for a period of ninety days or more; and

"(2) in the case of death:

"(A) all appropriate and reasonable expenses necessarily incurred for funeral and burial expenses; and

"(B) loss of support to a dependent of a victim, not otherwise compensated for as a pecuniary loss for personal injury, for such period of time as the dependency would have existed but for the death of the victim, at a rate not to exceed a total of $150 per week for all dependents;

"(c) 'personal injury' includes bodily injury, pregnancy, mental distress, and nervous shock; and

"(d) 'offense described in chapter 16' does not include an offense over which there is federal jurisdiction only because the offense affects, delays, or obstructs interstate or foreign commerce or the movement of an article or commodity in interstate or foreign commerce, or because the offense occurred during the commission of an offense over which there is federal jurisdiction only for that reason, unless an indictment or information charging such an offense is filed in a court of the United States."

TITLE II—MISCELLANEOUS AMENDMENTS

PART A—AMENDMENTS RELATING TO COMMERCE AND TRADE, TITLE 15, UNITED STATES CODE

AMENDMENTS RELATING TO IMPORTATION, MANUFACTURE, DISTRIBUTION, AND STORAGE OF EXPLOSIVE MATERIALS

SEC. 201. (a) Title XI of the Organized Crime Control Act of 1970 (84 Stat. 952) is amended:

(1) by redesignating sections 1103 to 1107 as sections 1110 to 1114, respectively; and

(2) by deleting section 1102.

(b) Sections 841 through 848 of title 18, United States Code, as they existed on the day before the effective date of this Act, are hereby reenacted as sections 1102 through 1109 of title XI of the Organized Crime Control Act of 1970 (84 Stat. 952) and amended as follows:

(1) Section 1102 (formerly 18 U.S.C. 841) is amended:

(A) by deleting "Except for the purposes of subsection (d), (e), (f), (g), (h), (i), and (j) of section 844 of this

title, 'explosives'" in subsection (d) and inserting in lieu thereof "'Explosives'";

(B) by inserting a comma after the word "compound" in the first sentence of subsection (d);

(C) by deleting the word "chapter" wherever it appears in subsections (d), (j), and (m) and inserting in lieu thereof "title"; and

(D) by deleting the last sentence in subsection (d).

(2) Section 1103 (formerly 18 U.S.C. 842) is amended:

(A) by deleting the word "chapter" wherever it appears in subsection (a) and inserting in lieu thereof the word "title";

(B) by deleting "ship, transport, or cause to be transported" in subsection (a)(3)(A) and inserting in lieu thereof "ship or transport";

(C) by deleting the words "marihuana (as defined in section 4761 of the Internal Revenue Code of 1954) or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4721(a) of the Internal Revenue Code of 1954)" in subsection (d)(5) and inserting in lieu thereof "or addicted to marihuana or any depressant or stimulant substance or narcotic drug as those terms are defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)";

(D) by deleting "willfully" in subsection (f) and inserting in lieu thereof "knowingly";

(E) by deleting "847" in subsection (g) and inserting in lieu thereof "1108"; and

(F) by deleting "(as defined in section 4761 of the Internal Revenue Code of 1954) or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954)" in subsection (i)(3) and inserting in lieu thereof "or any depressant or stimulant substance or narcotic drug as those terms are defined in section 102 of the Controled Substances Act (21 U.S.C. 802)".

(3) Section 1104 (formerly 18 U.S.C. 843) is amended:

(A) by deleting "provisions of this chapter" in subsection (b) and inserting in lieu thereof "provisions of this title";

(B) by deleting "842(d) of this chapter" in subsection (b)(1) and inserting in lieu thereof "1103(d) of this title";

(C) by deleting "willfully" in subsection (b)(2) and inserting in lieu thereof "knowingly";

(D) by deleting "chapter" in subsection (b)(2) and inserting in lieu thereof "title";

(E) by deleting the word "chapter" wherever it appears in subsection (d) and inserting in lieu thereof "title";

(F) by inserting after the word "title" the second time it appears in subsection (d) the words "or, if the offense involved an explosive as defined in section 1821(b) of title 18, United States Code, any provision of section 1601 (murder), 1602 (manslaughter), 1611 (maiming), 1612 (aggravated battery), 1613 (battery), 1701 (arson), 1702 (aggravated property destruction), 1821 (explosives offenses), 1823 (using a weapon in the course of a crime), or 1001 (criminal attempt) of title 18, United States Code,";

(G) by deleting "842(d)" in subsection (d) and inserting in lieu thereof "1103(d) of this title"; and

(H) by deleting the word "chapter" wherever it appears in subsection (f) and inserting in lieu thereof the word "title".

(4) Section 1105 (formerly 18 U.S.C. 844) is amended to read as follows:

"SEC. 1105. (a) Any person who violates section 1103 of this title commits an unlawful act that is an offense described in section 1812 of title 18, United States Code.

"(b) Except as provided in section 4001 of title 18, United States Code, any explosive materials involved or used or intended to be used in any violation of the provisions of this title or any rule or regulation promulgated thereunder or any violation of any criminal law of the United States shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this title.".

(5) Section 1106 (formerly 18 U.S.C. 845) is amended:

(A) by deleting "Except in the case of subsections (d), (e), (f), (g), (h), and (i) of section 844 of this title, this" in subsection (a) and inserting in lieu thereof "This";

(B) by deleting "921(a)(16) of title 18 of the United States Code," in subsection (a)(5) and inserting in lieu

thereof "102(a)(16) of the Gun Control Act of 1968, as amended";

(C) by deleting "921(a)(4) of title 18 of the United States Code" in subsection (a)(5) and inserting in lieu thereof "102(a)(4) of the Gun Control Act of 1968, as amended";

(D) by deleting "by this chapter" in subsection (b) and inserting in lieu thereof "by section 1103 of this title"; and

(E) by deleting "under this chapter" in subsection (b) and inserting in lieu thereof "under this title".

(6) Section 1107 (formerly 18 U.S.C. 846) is amended:

(A) by deleting the word "title" in the third sentence and inserting in lieu thereof "chapter"; and

(B) by deleting the last sentence.

(7) Section 1108 (formerly 18 U.S.C. 847) is amended by deleting the word "chapter" each time it appears and inserting in lieu thereof "title".

(8) Section 1109 (formerly 18 U.S.C. 848) is amended by deleting "chapter" and inserting in lieu thereof "title or section 1821 of title 18, United States Code,".

(c) Section 1111 of the Organized Crime Control Act of 1970 (as redesignated by subsection (a)(1)) is amended:

(1) by deleting "Section 1716 of title 18" in subsection (c) and inserting in lieu thereof "Section 6018 of title 39";

(2) by deleting "831 through 836 of title 18, United States Code" in subsection (d) and inserting in lieu thereof "1101 through 1106 of the Criminal Code Reform Act of 1977"; and

(3) by deleting "Chapter 44 of title 18, United States Code" in subsection (e) and inserting in lieu thereof "Sections 102 through 109 of Title I of the Gun Control Act of 1968 (82 Stat. 1213), as amended, or section 1822 or 1823 of title 18, United States Code".

AMENDMENTS RELATING TO FIREARMS

SEC. 202. (a) Title I of the Gun Control Act of 1968 (82 Stat. 1213) is amended:

(1) by redesignating sections 103 to 105 as sections 110 to 112, respectively; and

(2) by deleting section 102.

(b) Sections 921 through 928 of title 18, United States Code, as they existed on the day before the effective date of this Act, are here-

by reenacted as sections 102 through 109 of title I of the Gun Control Act of 1968 (82 Stat. 1213) and amended as follows:

(1) Section 102 (formerly 18 U.S.C. 921) is amended by deleting the word "chapter" wherever it appears and inserting in lieu thereof the word "title".

(2) Section 103 (formerly 18 U.S.C. 922) is amended:

(A) by deleting "chapter" in subsection (a)(2) and inserting in lieu thereof "title";

(B) by deleting "1715 of this title" in subsection (a)(3) and inserting in lieu thereof "6017 of title 39, United States Code,";

(C) by deleting "the effective date of this chapter" in subsection (a)(3)(C) and inserting in lieu thereof "December 16, 1968";

(D) by deleting "chapter" in subsection (a)(6) and inserting in lieu thereof "title";

(E) by deleting "922(c)" in subsection (b)(3)(A) and inserting in lieu thereof "103(c)";

(F) by adding after the words "registered mail" in subsection (b)(3)(C)(ii) the words "or certified mail (return receipt requested)";

(G) by deleting "923 of this chapter" in subsection (b)(5) and inserting in lieu thereof "104 of this title";

(H) by deleting the word "chapter" the first time it appears in subsection (c) and inserting in lieu thereof "title";

(I) by inserting after the words "eighteen years or more of age;" in subsection (c)(1) the words "that I am not under indictment for, nor has an information been filed against me for, nor have I been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; that I am not a fugitive from justice; that I am not an unlawful user of or addicted to marijuana or any depressant or stimulant substance or narcotic drug; that I have not been adjudicated as a mental defective nor have I been committed to any mental institution;";

(J) by deleting "chapter 44 of title 18, United States Code" in subsection (c)(1) and inserting in lieu thereof "title I of the Gun Control Act of 1968, as amended";

(K) by deleting "923(g)" in the last sentence of subsection (c) and inserting in lieu thereof "104(g)";

(L) by deleting the words "drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954)" each time they appear in subsections (d), (g), and (h) and inserting in lieu thereof "substance or narcotic drug as those terms are defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)".

(M) by deleting the words "925 of this chapter" wherever they appear in the last sentence of subsection (d) and inserting in lieu thereof the words "106 of this title";

(N) by deleting "chapter" in subsection (e) and inserting in lieu thereof "title";

(O) by deleting "chapter" in subsection (f) and inserting in lieu thereof "title";

(P) by deleting subsections (i) and (j) and redesignating sections (k), (*l*), and (m) as subsections (i), (j), and (k) respectively;

(Q) by deleting "925(d) of this chapter" in subsection (j) (formerly subsection (*l*)) and inserting in lieu thereof "106 (d) of this title";

(R) by deleting "provisions of this chapter" in subsection (j) (formerly subsection (*l*)) and inserting in lieu thereof "provisions of this title"; and

(S) by deleting "923 of this chapter" in subsection (k) (formerly subsection (m)) and inserting in lieu thereof "104 of this title".

(3) Section 104 (formerly 18 U.S.C. 923) is amended:

(A) by deleting "chapter" in subsection (c) and inserting in lieu thereof "title";

(B) by deleting "922(g) and (h) of this chapter" in subsection (d)(1)(B) and inserting in lieu thereof "103(g) or (h) of this title";

(C) by deleting "willfully" wherever it appears in subsections (d)(1)(C) and (d)(1)(D) and inserting in lieu thereof "knowingly";

(D) by deleting "chapter" in subsection (d)(1)(C) and inserting in lieu thereof "title";

(E) by deleting the word "chapter" wherever it appears in subsection (d)(1)(E) and inserting in lieu thereof "title";

(F) by deleting the word "chapter" wherever it appears in subsection (e) and inserting in lieu thereof "title"; and

(G) by deleting the word "chapter" wherever it appears in subsection (g) and inserting in lieu thereof "title".

(4) Section 105 (formerly 18 U.S.C. 924 is amended to read as follows:

"SEC. 105. (a) A person who violates this title commits an unlawful act that is an offense described in section 1822 of title 18, United States Code.

(b) Except as provided in section 4001 of title 18, United States Code, any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this title or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States Code, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this title.".

(5) Section 106 (formerly 18 U.S.C. 925) is amended:

(A) by deleting the word "chapter" wherever it appears and inserting in lieu thereof "title"; and

(B) by inserting after the word "title" in the first sentence of subsection (c) the words "or of section 1822 of title 18, United States Code,".

(6) Section 107 (formerly 18 U.S.C. 926) is amended by deleting the word "chapter" wherever it appears and inserting in lieu thereof "title".

(7) Section 108 (formerly 18 U.S.C. 927) is amended by deleting "chapter" and inserting in lieu thereof "title".

(8) Section 109 (formerly 18 U.S.C. 928 is amended by deleting the word "chapter" wherever it appears and inserting in lieu thereof "title".

(c) Section 110 (formerly section 103) is amended by deleting the words "the amendment made by this".

(d) Section 111 (formerly section 104) is amended by deleting "section 1715 of title 18" in subsection (c) and inserting in lieu thereof "section 6017 of title 39".

PART B—AMENDMENT RELATING TO FEDERAL RULES OF CRIMINAL PROCEDURE

SEC. 211. A new Rule 25.1 of the Federal Rules of Criminal Procedure is added after rule 25 to read as follows:

"Rule 25.1.—Burdens of Proof

"(a) Proof of Guilt—

"(1) PROOF OF OFFENSES.—The Government has the burden of proving each element of the offense beyond a reasonable doubt.

"(2) PROOF OF DEFENSES.—If a defendant raises a defense at trial and there is sufficient evidence of the defense to support a reasonable belief as to its existence, the Government has the burden of proving the nonexistence of the defense beyond a reasonable doubt.

"(3) PROOF OF AFFIRMATIVE DEFENSES.—If a defendant raises an affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

"(4) PROOF OF GRADING.—The lowest grade of an offense shall be applicable unless the Government proves the elements of a higher grade beyond a reasonable doubt.

"(5) PRESUMPTIONS.—If a statute provides that a given fact gives rise to a presumption, the statute has the following consequences:

"(A) TRIAL BY JURY.—In a case tried before a jury:

"(i) if there is sufficient evidence of the fact that gives rise to the presumption to support a reasonable belief as to the fact's existence beyond a reasonable doubt, the court shall submit the issue to the jury unless the evidence as a whole clearly precludes a reasonable juror from finding the presumed fact beyond a reasonable doubt; and

"(ii) in submitting to the jury the issue of the existence of the presumed fact, the court shall, upon request of the Government, charge that, although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards

the fact giving rise to the presumption as strong evidence of the fact presumed.

"(B) TRIAL BY COURT.—In a case tried before the court sitting without a jury, although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the court may arrive at that judgment on the basis of the presumption alone.

"(6) PRIMA FACIE EVIDENCE.—If a statute provides that a given fact constitutes prima facie evidence, the statute has the following consequences:

"(A) TRIAL BY JURY.—In a case before a jury:

"(i) if there is sufficient evidence of the fact that constitutes prima facie evidence to support a reasonable belief as to the fact's existence beyond a reasonable doubt, the court shall submit the issue to the jury unless the evidence as a whole clearly precludes a reasonable juror from finding the inferred fact beyond a reasonable doubt; and

"(ii) in submitting to the jury the issue of the inferred fact concening which the given fact is prima facie evidence, the court, upon the request of the Government, shall charge that, although the evidence as a whole must establish the inferred fact beyond a reasonable doubt, the jury may consider that the given fact is ordinarily a circumstance from which the existence of the inferred fact may be drawn.

"(B) TRIAL BY COURT.—In a case before the court sitting without a jury, although the evidence as a whole must establish the inferred fact beyond a reasonable doubt, the court may consider that the given fact is ordinarily a circumstance from which the existence of the inferred fact may be drawn.

"(b) Proof of Jurisdiction.

"(1) PROOF.—The Government has the burden of proving the existence of Federal jurisdiction over the offense, as set forth in 18 U.S.C. 201, beyond a reasonable doubt.

"(2) PRESENTATION TO COURT DURING TRIAL.—The existence of Federal jurisdiction over the offense is an issue to be decided by the court. The evidence relating to jurisdiction may be presented

by the Government in open court in the course of its presentation of the evidence relating to guilt. Any evidence relating to jurisdiction that is not so presented in open court may be presented to the court, out of the presence of the jury, during the course of the presentation of the Government's evidence relating to guilt or after the close thereof. At the close of the presentation of the Government's evidence relating to guilt and of any subsequent presentation of evidence relating to jurisdiction, the issue shall be determined by the court.

"(3) PRESENTATION TO COURT BEFORE TRIAL.—Upon a timely pretrial motion by the attorney for the Government, the issue of the existence of Federal jurisdiction shall be heard by the court before trial and, notwithstanding the provisions of rule 12(e), shall be determined before trial and may not be deferred for determination at a later time.".

PART C—AMENDMENTS RELATING TO FOREIGN RELATIONS AND INTERCOURSE, TITLE 22, UNITED STATES CODE

SEC. 221. Section 1116(b)(4) of title 18, United States Code, as it existed on the day before the effective date of this Act, is reenacted and redesignated as section 2 of the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons in lieu of the existing text of such section.

PART D—AMENDMENT RELATING TO INDIANS, TITLE 25, UNITED STATES CODE

SEC. 231. Jurisdiction Over Offenses Committed in the Indian Country.—

(a) As used in this section, the term "Indian country" includes:

(1) all land within the limits of any Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent, and including any right-of-way running through a reservation;

(2) all dependent Indian communities within the borders of the United States, whether within the original or subsequently acquired territory thereof, and whether within or without a State; and

(3) all Indian allotments, the Indian titles to which have not been extinguished, including any right-of-way running through such an allotment.

(b) Except to the extent specifically set forth in this Act, nothing in this Act is intended to diminish, expand, or otherwise alter in any manner or to any extent State or tribal jurisdiction over offenses within Indian country, as such jurisdiction existed on the date immediately preceding the effective date of this Act.

(c) Except as otherwise specifically provided, the general laws of the United States as to the punishment of offenses committed within the special jurisdiction of the United States shall extend to the Indian country.

(d)(1) Except as provided in paragraph (2) of this subsection, the general laws of the United States as to the punishment of offenses within the special jurisdiction of the United States shall not extend to offenses committed by one Indian against the person or property of another Indian or to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

(2) Any Indian who commits against the person or property of an Indian or other person any of the following felony offenses as defined in title 18, United States Code, namely, Murder (section 1601), Manslaughter (section 1602), Negligent Homicide (section 1603), Maiming (section 1611), Aggravated Battery (section 1612), Terrorizing (section 1615), Reckless Endangerment (section 1617), Kidnapping (section 1621), Aggravated Criminal Restraint (section 1622), Rape (section 1641), Sexual Assault (section 1642), Sexual Abuse of a Minor (section 1643), Arson (section 1701), Aggravated Property Destruction (section 1702), Burglary (section 1711), Criminal Entry (section 1712), Robbery (section 1721), Extortion (section 1722), Theft (section 1731), Trafficking in Stolen Property (section 1732), Receiving Stolen Property (section 1733), or incest shall be subject to the same law and penalties as all other persons committing any of the above offenses within the special jurisdiction of the United States. As used in this section, the offense of incest shall be defined and punished in accordance with such laws of the State in which the offense was committed as are in force at the time of such offense. In the event of a

criminal prosecution of an Indian for one or more of the foregoing offenses, this subsection shall not be construed to preclude a finding of guilty of a lesser included offense of such offense or offenses.

(e) The provisions of subsection (d) of this section shall not be applicable within the areas of Indian country listed in subsection (f).

(f)(1) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of:	Indian country affected
Alaska	All Indian country within the State, except that on Annette Islands the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(2) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or within any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(3) The areas listed in subsection (f)(1) are excluded from the special jurisdiction of the United States described in section 203 of title 18.

(g) Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same

extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

This subsection shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

(h) The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State, except that nothing contained in this paragraph shall be construed to deprive any Indian tribe, band, or community, or members thereof, of hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.

(i) Ninety days following the adoption of a resolution to that effect by the Indian tribe occupying the particular Indian country or part thereof affected by such grant or assumption, the United States shall reacquire such measure of the criminal jurisdiction granted to or assumed by a State pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), section 231(f), (g), or (h) of the Criminal Code Reform Act of 1977, or the Act of April 11, 1968 (82 Stat. 73), as shall have been determined in the resolution of such tribe.

The resolution authorized by this subsection shall be considered adopted only where the enrolled Indians within the affected area of such Indian country accept the resolution by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe when requested to do so by the tribal council or other governing body or by 20 per centum of such enrolled adults.

(j) No retrocession of jurisdiction pursuant to subsection (i) of this section shall deprive any court of a State of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such retrocession, if the offense charged in such action was cognizable under any law of such State at the time of commission of such offense. For the purpose of any such criminal action, such retrocession shall take effect on the day following the date of final determination of such action.

PART E—AMENDMENTS RELATING TO JUDICIARY AND JUDICIAL PROCEDURE, TITLE 28, UNITED STATES CODE

SEC. 241. A new chapter 58 of title 28, United States Code, is added after chapter 57, to read as follows:

"Chapter 58.—UNITED STATES SENTENCING COMMISSION

"§ 991. United States Sentencing Commission; establishment and purpose

"(a) There is hereby established as an independent Commission in the judicial branch a United States Sentencing Commission which shall consist of nine members designated by the Judicial Conference of the United States. A member of the Commission may be removed by the Judicial Conference only for cause.

"(b) The purposes of the United States Sentencing Commission are to:

"(1) establish sentencing policies and practices for the federal criminal justice system that:

"(A) assure the meeting of the purposes of sentencing as set forth in section 101(b) of title 18, United States Code;

"(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparity while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;

"(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

"(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 101(b) of title 18, United States Code.

"§ 992. Terms of office; compensation

"(a) Commissioners shall be designated for six-year terms, except that the terms of the first Commissioners shall be staggered so that:

"(1) three members are designated for a two-year term;

"(2) three members are designated for a four-year term; and

"(3) three members are designated for a full six-year term.

"(b) No Commissioner may serve more than two full terms. A Commissioner designated to fill a vacancy that occurs before the expiration of the term for which his predecessor was appointed shall be designated only for the remainder of such term.

"(c) A member of the Commission who is an employee of the Federal Government shall serve without compensation in addition to that received for his services as an employee of the Federal Government, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission. A member of the Commission who is not a Federal employee shall receive the highest daily rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332) when engaged in the actual performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

"§ 993. Designation of Chairman; powers and duties of Chairman

"(a) The Commission shall from time to time designate by majority vote one of its members to serve as Chairman.

"(b) The Chairman shall:

"(1) preside at meetings of the Commission; and

"(2) direct:

"(A) the preparation of requests for appropriations for the Commission; and

"(B) the use of funds made available to the Commission.

§ 994. Duties of Commission

"(a) The Commission, by vote of a majority of the members, and pursuant to its rules and regulations and, consistent with all pertinent provisions of this title and title 18, shall promulgate and distribute to all courts of the United States and to the United States Probation Service:

"(1) guidelines, as described in subsections (b) through (e), for use of a sentencing court in determining whether to impose a sentence to probation, a fine, a term of imprisonment, or a term of parole ineligibility and in determining the appropriate amount of a fine or the appropriate length of a term of probation, term

of imprisonment, or term of parole ineligibility to be imposed in a criminal case; and

"(2) general policy statements regarding application of the guidelines or any other aspect of sentencing that in the view of the Commission would further the purposes set forth in section 101(b) of title 18, United States Code.

"(b) The guidelines promulgated pursuant to subsection (a)(1) shall, for each category of offense involving each category of defendant, provide a suggested sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

"(c) In establishing categories of offenses for use in the guidelines, the Commission shall consider, but shall not limit its consideration to:

"(1) the grade of the offense;

"(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

"(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

"(4) the community view of the gravity of the offense;

"(5) the public concern generated by the offense;

"(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

"(7) the current incidence of the offense in the community and in the nation as a whole.

"(d) In establishing categories of defendants for use in the guidelines, the Commission shall consider, but shall not limit its consideration to, a defendant's:

"(1) age;

"(2) education;

"(3) vocational skills;

"(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

"(5) physical condition, including drug dependence;

"(6) previous employment record;

"(7) family ties and responsibilities;

"(8) community ties;

"(9) role in the offense;

"(10) criminal history, including prior criminal activity not resulting in convictions, prior convictions, and prior sentences; and

"(11) degree of dependence upon criminal activity for a livelihood.

"(e) A substantial sentence of imprisonment shall be provided in the guidelines for most cases in which the defendant has a history of several prior convictions for offenses committed on different occasions, in which the defendant committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income, or in which the defendant committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity.

"(f) The Commission, by vote of a majority of the members, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to the United States Parole Commission:

"(1) guidelines consistent with those promulgated pursuant to subsection (a)(1) of this section for use of the United States Parole Commission in determining whether to parole a prisoner and in determining the length of the term and conditions of parole; and

"(2) general policy statements regarding application of the guidelines or any other aspect of parole that in the view of the Commission would further the purposes set forth in section 101 (b) of title 18, United States Code.

"(g) Guidelines promulgated pursuant to subsection (a)(1) or (f)(1) shall be reported to the Congress by the Commission at or after the beginning of a regular session of Congress but not later than the first day of May, and shall take effect one hundred eighty days after the Commission reports them, unless within that time one House of Congress votes to disapprove them.

"§ 995. Powers of Commission

"(a) The Commission, by vote of a majority of the members present and voting, shall have the power to:

"(1) establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter;

"(2) appoint and fix the salary and duties of the Staff Director of the Sentencing Commission, who shall serve at the discretion of the Commission;

"(3) deny, revise, or ratify any request for regular, supplemental, or deficiency appropriations prior to any submission of

such request to the Office of Management and Budget by the Chairman;

"(4) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

"(5) utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor;

"(6) without regard to section 3648 of the Revised Statutes of the United States (31 U.S.C. 529), enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

"(7) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679 of the Revised Statutes of the United States (31 U.S.C. 655(b));

"(8) request such information, data, and reports from any Federal agency or judicial officer as the Commission may from time to time require and as may be produced consistent with other law;

"(9) arrange with the head of any other Federal agency for the performance by such agency of any function of the Commission, with or without reimbursement;

"(10) establish a research and development program within the Commission for the purpose of:

"(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices;

"(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

"(11) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

"(12) publish data concerning the sentencing processes;

"(13) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 2003(a) of title 18, United States Code;

"(14) collect systematically and disseminate information regarding effectiveness of sentences imposed;

"(15) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

"(16) devise and conduct a training program of short-term instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

"(17) make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy; and

"(18) perform such other functions as are required to permit federal courts to meet their responsibilities under section 2003(a) of title 18, United States Code, and to permit others involved in the federal criminal justice system to meet their related responsibilities.

"(b) The Commission shall have such other powers and duties and shall perform such other functions as may be necessary to carry out the purposes of this chapter, and may delegate to any Commissioner or designated person such powers as may be appropriate other than the power to establish general policies, guidelines, rules, and factors under subsection (a) and (b)(1).

"(c) Upon the request of the Commission, each federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions.

"(d) Regular meetings of the Commission shall be held not less frequently than quarterly to establish and consider revisions to its general guidelines, policies, and rules. Special meetings shall be held at the call of the Chairman, acting at his own discretion or pursuant to the petition of any five members. A simple majority of the membership shall constitute a quorum for the conduct of business.

"(e) Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member of any action taken by it.

"§ 996. Director and Staff

"(a) The Staff Director shall supervise the activities of persons employed by the Commission and perform other duties assigned to him by the Commission.

"(b) The Staff Director shall appoint such officers and employees as are necessary in the execution of the functions of the Commission, subject to the provisions of title 5, United States Code, governing appointments in the competitive service and the provisions of chapter 51 and subchapter II of such title, relating to classification and General Schedule pay rates.

"§ 997. Annual Report

"The Commission shall report annually to the United States Judicial Conference, the Congress, and the President of the United States on the activities of the Commission.

"§ 998. Definitions

"As used in this chapter:

"(a) 'Commission' means the United States Sentencing Commission;

"(b) 'Commissioner' means a member of the United States Sentencing Commission;

"(c) 'guidelines' means the guidelines promulgated by the Commission pursuant to section 994(a) or (f) of this title; and

"(d) 'rules and regulations' means rules and regulations promulgated by the Commission pursuant to section 995 of this title.".

SEC. 242. The analysis at the beginning of title 28, United States Code, is amended by adding after the item relating to chapter 57 the following new item:

"58. United States Sentencing Commission..... 991".

SEC. 243. The analysis at the beginning of Part III of title 28, United States Code, is amended by adding after the item relating to chapter 57 the following new item:

"58. United States Sentencing Commission..... 991".

PART F—AMENDMENTS RELATING TO WAR AND NATIONAL DEFENSE, TITLE 50, UNITED STATES CODE

SEC. 251. Section 793 of title 18, United States Code, as it existed on the day before the effective date of this Act, is reenacted and redesignated as section 18 of the Subversive Activities Control Act of 1950 in lieu of the existing text of such section.

SEC. 252. (a) Sections 794(a), 794(b), and 794(c) of title 18, United States Code, as they existed on the day before the effective date of this Act, are reenacted and redesignated as subsections (a), (b), and (c), respectively, of section 201 of the Espionage and Sabotage Act of 1954 in lieu of the existing text of such section.

(b) Section 798 of title 18, United States Code, as enacted by section 4 of the Act of June 30, 1953 (67 Stat. 133), and as it existed on

the day before the effective date of this Act, is reenacted and redesignated as subsection (d) of section 201 of the Espionage and Sabotage Act of 1954.

SEC. 253. Section 798 of title 18, United States Code, as enacted by section 24(a) of the Act of October 31, 1951 (65 Stat. 719), and as it existed on the day before the effective date of this Act, is reenacted and redesignated as section 24 of the Act of October 31, 1951 in lieu of the existing text of such section.

SEC. 254. The provisions of chapter 3 of title 18, United States Code (Culpable States of Mind), are not applicable to the amendments to title 50 set forth in section 241, 242, and 243 of this Act.

TITLE III—GENERAL PROVISIONS

SEC. 260. SEVERABILITY.—If a provision of this Act is held invalid, the validity of the other provisions of the Act shall not be affected. If an application of a provision of this Act to a person or circumstance is held invalid, the validity of the application of the provisions to another person or circumstance shall not be affected.

SEC. 261. TRANSITION.—(a) The Bureau of Prisons created under chapter 303 of title 18, United States Code, as that chapter existed before the effective date of this Act, is continued as the Bureau of Prisons established under section 571 of title 28, United States Code. The Director of the Bureau of Prisons in office on the effective date of this Act shall continue to hold office under section 571(b) of title 28, United States Code.

(b) The Federal Prison Industries created under section 4121 of title 18, United States Code, as that section existed prior to the effective date of this Act, is continued as the Federal Prison Industries created under section 581 of title 28, United States Code. A member of the board of directors shall continue to hold office under the provisions of section 581 of title 28, United States Code.

SEC. 262. AUTHORIZATION.—There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions and purposes of this Act.

SEC. 263. EFFECTIVE DATE.—This Act shall take effect on the first day of the first calendar month beginning twenty-four months after the date of enactment of this Act, except that chapter 58 of title 28, United States Code, shall take effect on the date of enactment of this Act.

95TH CONGRESS
1ST SESSION

S. 31

IN THE SENATE OF THE UNITED STATES

JANUARY 10, 1977

Mr. DOMENICI (for himself, Mr. CURTIS, Mr. STEVENS, and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Gun Control Act of 1968 to provide for separate offense and consecutive sentencing in felonies involving the use of a firearm.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 924 (c) of the Gun Control Act of 1968 (Public Law 90-618; 18 U.S.C. 924 (c)) read as follows:

"(c) Whoever—

"(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States; or

"(2) carries a firearm during the commission of any felony for which he may be prosecuted in a court

of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced for the additional offense defined in this subsection to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years.

"The execution or imposition of any term of imprisonment imposed under this subsection may not be suspended, and probation may not be granted. Any term or imprisonment imposed under this subsection may not be imposed to run concurrently with any term or imprisonment imposed for the commission of such felony.".

95TH CONGRESS
1ST SESSION

S. 45

IN THE SENATE OF THE UNITED STATES

JANUARY 10, 1977

Mr. MCCLURE (for himself and Mr. GOLDWATER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend chapter 44 of title 18 of the United States Code (respecting firearms) to penalize the use of firearms in the commission of any crime of violence and to increase the penalties in certain related existing provisions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 924 (c) of title 18 of the United States Code is amended to read as follows:

"(c) (1) Whoever—

"(A) uses any firearm to commit a crime of violence with respect to which the district courts of the United States have original and exclusive jurisdiction under section 3231 of this title, or carries a firearm during the commission of any such crime, or

"(B) uses any firearm transported in interstate or foreign commerce or affecting such commerce to commit, or carries such a firearm unlawfully during the commission of any crime of violence, and is convicted of such crime in a court of any State,

shall, in addition to the punishment provided for the commission of such crime, be sentenced to a term of imprisonment for not less than five years, nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for any term of years not less than ten, or to life imprisonment. Notwithstanding any other provision of law, the court shall not suspend the sentence in the case of any person convicted under this subsection, or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such crime of violence.

"(2) As used in this subsection, 'crime of violence' means any of the following crimes, or an attempt to commit any of such crimes: Murder, manslaughter, rape, mayhem, maliciously disfiguring another, abduction, kidnaping, burglary, robbery, housebreaking, larceny, any assault with intent to kill, or assault with intent to commit any offense punishable by imprisonment for a term exceeding one year.".

95TH CONGRESS
1ST SESSION

S. 181

IN THE SENATE OF THE UNITED STATES

JANUARY 11 (legislative day, JANUARY 10), 1977

Mr. KENNEDY, (for himself, Mr. ABOUREZK, Mr. BAYH, Mr. HASKELL, Mr. HUMPHREY, MCCLELLAN, Mr. MATHIAS, Mr. MATSUNAGA, and Mr. STEVENSON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, so as to establish certain guidelines for sentencing, establish a United States Commission on Sentencing, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 227 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3579. Imposition of a sentence of imprisonment

"(a) The court, in determining whether to impose a term of imprisonment within a range authorized under this title and, if a term of imprisonment is to be imposed, in

determining the length of that term within such range, shall consider—

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the need for the sentence imposed (A) to reflect the seriousness of the offense and promote respect for law by providing just punishment for the offense, (B) to afford adequate deterrence to criminal conduct, and (C) to protect the public from further crimes of the defendant;

"(3) whether other less restrictive sanctions have been applied to the defendant frequently or recently; and

"(4) any sentencing guidelines established by the United States Commission on Sentencing.

"(b) In every case in which the court imposes a term of imprisonment within the guidelines for sentencing promulgated by the Commission, the court shall make as part of the record, and disclose in open court to the defendant at the time of sentencing, a brief statement of the reason or reasons for the sentence imposed. A court may impose a term of imprisonment outside of the guidelines for sentencing promulgated by the Commission if it makes as a part of the record, and discloses to the defendant in open court at the time of sentencing, a statement of the specific reason or reasons for the particular sentence of imprisonment imposed.

Failure to so comply shall be grounds for vacating the sentence and resentencing the defendant.".

(b) The analysis of such chapter is amended by adding at the end thereof the following:

"3579. Imposition of a sentence of imprisonment.".

SEC. 2. (a) Chapter 229 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3621. Imposition of a sentence of fine

"The court in determining whether to impose a fine within a range authorized by this title, and, if a fine is to be imposed, in determining the amount of the fine within such range, the time of payment, and the method of payment, shall consider—

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the need for the sentence imposed (A) to reflect the seriousness of the offense and promote respect for law by providing just punishment for the offense, (B) to afford adequate deterrence to criminal conduct, and (C) to protect the public from further crimes of the defendant;

"(3) whether other less restrictive sanctions have been applied to the defendant frequently or recently; and

"(4) any sentencing guidelines established by the United States Commission on Sentencing.".

(b) The analysis of such chapter is amended by adding at the end thereof the following:

"3621. Imposition of a sentence of fine.".

SEC. 3. (a) Chapter 231 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"**§ 3657. Imposition of a sentence of probation**

"The court, in determining whether to impose a term of probation in accordance with the provisions of this chapter, and, if a term of probation is to be imposed, in determining the length of such term and the conditions of probation in accordance with such provisions, shall consider—

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the need for the sentence imposed (A) to reflect the seriousness of the offense and promote respect for law by providing just punishment for the offense, (B) to afford adequate deterrence to criminal conduct, and (C) to protect the public from further crimes of the defendant;

"(3) whether other less restrictive sanctions have been applied to the defendant frequently or recently; and

"(4) any sentencing guidelines established by the United States Commission on Sentencing.".

(b) The analysis of such chapter is amended by adding at the end thereof the following:

"3657. Imposition of a sentence of probation.".

SEC. 4. (a) Chapter 235 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3742. Review of sentence

"(a) Subject to the provisions of section 3576 of this title in any case in which a sentence is imposed for an offense, except a case in which the sentence is equal to or less than that recommended or not opposed by the attorney for the Government pursuant to a plan agreement under rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure or a case in which the sentence is equal to that provided in an accepted plea agreement pursuant to rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, an appeal to a United States court of appeals for review of such sentence may be filed by—

"(1) the defendant, within the time specified for the filing of a notice of appeal, if the sentence includes a fine or term of imprisonment more than the maximum established by the guidelines for sentencing promulgated

by the United States Commission on Sentencing or a maximum established by this title; or

"(2) the United States within the time specified for the defendant's filing of notice of appeal, if the sentence includes a fine or term of imprisonment less than the minimum established by the guidelines for sentencing promulgated by the United States Commission on Sentencing or a minimum established by this title.

"(b) Upon an appeal being filed pursuant to subsection (A) of this section, the clerk of the court that imposed the sentence shall certify to the court of appeals that portion of the record in the case that includes the presentence report, the information submitted during the sentence proceeding, and findings of the court upon which the sentence was based, the statement of reasons for the sentence imposed by the sentencing court and any additional portions of the record designated by the court of appeals.

"(c) Upon review of the record, the court of appeals shall determine whether the sentence imposed is not within the guidelines for sentencing promulgated by the United States Commission on Sentencing (hereinafter referred to as the 'Commission') and is unreasonable having regard for—

"(A) the reasonableness of the district court's

application of the guidelines established by the Commission;

"(B) the opportunity for the district court to observe the defendant; and

"(C) any findings upon which the sentence was based.

"(d) If the court of appeals determines that—

"(1) the guidelines for sentencing promulgated by the Commission were properly applied by the district court, the court of appeals shall affirm the sentence if the sentence imposed outside the guidelines for sentencing is not unreasonable; or

"(2) the guidelines for sentencing promulgated by the Commission were clearly erroneously applied by the district court, the court of appeals shall set aside the sentence and remand the case for further sentencing proceedings; or

"(3) the guidelines for sentencing promulgated by the Commission were properly applied by the district court, but that the sentence imposed outside the guidelines for sentencing was otherwise unreasonable, the court of appeals—

"(A) in the case of an appeal of a sentence by the defendant, may—

92-465 O - 77 - 79

"(i) remand the case of imposition of a lesser sentence to be determined by the district court; or

"(ii) remand the case for further sentencing proceedings; or

"(iii) impose a lesser sentence;

"(B) in the case of an appeal of a sentence submitted by the United States, may—

"(i) remand the case for imposition of a greater sentence to be determined by the district court; or

"(ii) remand the case for further sentencing proceedings; or

"(iii) impose a greater sentence.".

(b) The analysis of such chapter is amended by adding at the end thereof the following:

"3742. Review of sentence.".

SEC. 5. Part II of title 18, United States Code, is amended by adding at the end thereof the following new chapter:

"Chapter 238—UNITED STATES COMMISSION ON SENTENCING

"Sec.
"3801. Definitions.
"3802. United States Commission on Sentencing; structure and composition.
"3803. Powers and duties of Commission.
"3804. Powers and duties of Chairman.
"3805. Annual report.
"3806. Congressional review.

"§ 3801. **Definitions**

"As used in this chapter—

"(a) 'Commission' means the United States Commission on Sentencing;

"(b) 'Commissioner' means any member of the United States Commission on Sentencing;

"(c) 'rules and regulations' means rules and regulations promulgated by the Commission pursuant to section 3803 of this title.

"§ 3802. **United States Commission on Sentencing; structure and composition**

"There is hereby established as an independent Commission in the judicial branch, a United States Commission on Sentencing which shall be comprised of not less than five members appointed by the United States Judicial Conference. The Commission shall from time to time designate by majority vote one of its members to serve as Chairman and shall delegate to him the necessary administrative duties and responsibilities. The term of office of a commissioner shall be three years, except that the term of a person appointed as a commissioner to fill a vacancy shall expire at the end of three years from the effective date of this statute. A member of the Commission who is an employee of the Federal Government shall serve without compensation in

addition to that received for his services as an employee of the Federal Government, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission. A member of the Commission who is not a Federal employee shall receive the highest daily rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332) when engaged in the actual performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties.

"§ 3803. Powers and duties of Commission

"(a) The Commission, by majority vote, and pursuant to rules and regulations, shall promulgate and distribute to all Federal courts suggested sentencing ranges for specific offenses and guidelines shall be considered by the sentencing court in determining the appropriate sentence for a defendant and general policy statements regarding application of the guidelines or any other aspect of sentencing that in the view of the Commission would further the purposes of this title.

"(b) In promulgating suggested sentencing ranges for specific offenses and guidelines for sentencing the Commission shall consider, but shall not limit its consideration to—

"(1) the grade of the offense;

"(2) the circumstances under which the offense was

committed which mitigate or aggravate the seriousness of the offense;

"(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

"(4) the community view of the gravity of the offense;

"(5) the public concern generated by the offense;

"(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

"(7) the current incidence of the offense in the community and in the Nation as a whole.

The Commission shall also consider, but shall not limit its consideration to a defendant's age, mental and emotional condition, physical condition, particularly drug dependence, role in the offense, criminal history, including prior criminal activity not resulting in prior convictions and prior sentences, and degree of dependence upon criminal activity for a livelihood."

"(c) The Commission, by majority vote, and pursuant to rules and regulations, shall have the power to—

"(1) establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter;

"(2) deny, revise, or ratify any request for regular, supplemental, or deficiency appropriations prior to any submission of such request to the Office of Management and Budget by the Chairman;

"(3) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109 (b) of title 5, United States Code;

"(4) utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor;

"(5) without regard to section 3648 of the Revised Statutes of the United States (31 U.S.C. 529), enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or nonprofit organization;

"(6) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679 of the Revised Statutes of the United States (31 U.S.C. 655 (b));

"(7) request such information, data, and reports from any Federal agency or judicial officer as the Com-

mission may from time to time require and as may be produced consistent with other law;

"(8) arrange with the head of any other Federal agency for the performance by such agency of any function of the Commission, with or without reimbursement;

"(9) issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates directly to a matter with respect to which the Commission or any Commissioner or agent of the Commission is empowered to make a determination under this chapter; such attendance of witnesses and the production of evidence may be required from any place within the United States at any designated place of hearings within the United States;

"(10) establish a research and development program within the Commission for the purpose of—

"(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices;

"(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

"(11) collect systematically the data obtained from

studies, research, and the empirical experience of public and private agencies concerning the sentencing processes;

"(12) publish data concerning the sentencing processes;

"(13) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the criteria set forth in sections 3579, 3621, and 3657 of this title;

"(14) collect systematically and disseminate information regarding effectiveness of sentences imposed;

"(15) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

"(16) devise and conduct a training program of short-term instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

"(17) make recommendations to Congress concerning modification or enactment of sentencing and correctional statutes which the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy;

"(18) appoint and fix the salary and duties of the

staff director of the Commission, who shall serve at the discretion of the Commission.

"(d) The Commission shall have such other powers and duties and shall perform such other functions as may be necessary to carry out the purposes of this chapter or as may be provided under any other provisions of law and may delegate to any commissioner or designated person such powers as may be appropriate other than the power to establish general policies, guidelines, rules, and factors under subsection (b) (1).

"(e) Upon the request of the Commission, each Federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions.

"(f) The Commission shall meet not less frequently than quarterly to establish its general policies and rules.

"(g) Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member on any action taken by it.

"§ 3804. Powers and duties of Chairman

"The Chairman shall—

"(a) preside at meetings of the Commission;

"(b) assign duties among the regional offices, if any, in order to assure efficient administration;

"(c) direct (1) the preparation of requests for appropriations for the Commission, and (2) the use of funds made available to the Commission;

"(d) appoint and fix the basic pay of personnel of the Commission.

"§ 3805. **Annual report**

"The Commission shall report annually to each House of Congress, the United States Judicial Conference, and the President of the United States on the activities of the Commission.".

"§ 3806. **Congressional review**

"Such sentencing ranges for specific offense and guidelines for sentencing as are promulgated and distributed by the Commission pursuant to and in accordance with the provisions of this title shall not take effect until they have been reported to Congress by the Commission at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been thus reported. All laws in conflict with such sentencing ranges and guidelines for sentencing shall be of no further force or effect after such sentencing ranges and guidelines have taken effect.

95TH CONGRESS
1ST SESSION

S. 204

IN THE SENATE OF THE UNITED STATES

JANUARY 12 (legislative day, JANUARY 10), 1977

Mr. HART (for himself and Mr. JAVITS) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To establish the Federal Sentencing Commission; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Sentencing Standards Act of 1977".

FINDINGS; PURPOSE

SEC. 2. (a) The Congress finds that the present system of punishing persons convicted of Federal crimes fails to achieve fairness or consistency, or to protect the public, and that such system—

(1) results in the imposition of penalties that are frequently either unduly lenient or unduly severe;

(2) permits unwarranted, and unreviewable, disparity in sentences;

(3) operates without consistent and understandable rationale or standards; and

(4) undermines public confidence in the equity, impartiality, and effectiveness of Federal criminal justice.

(b) It is the purpose of this Act—

(1) to establish a method of promulgating standards for criminal sentences that will help deter crime and punish convicted criminal offenders fairly and equally;

(2) to establish in such standards the principle that the severity of a sentence should be commensurate with the gravity of the offense;

(3) to reduce the disparity between sentences imposed upon persons convicted of the same crime by requiring that such sentencing standards shall consist of presumptive sentences of varying severity for criminal offenses of varying degrees of gravity, with limited variations allowed for special aggravating and mitigating circumstances; and

(4) to allow each convicted offender sentenced to imprisonment to know at the time that such sentence

is imposed the actual duration of his confinement, but also to maintain appropriate incentives for good institutional behavior.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) "Parole Commission" means the United States Parole Commission in the Department of Justice established in section 4202 of title 18, United States Code;

(2) "Commission" means the Federal Sentencing Commission established in section 4;

(3) "criminal offense" means a category, or any subcategory thereof, established under section 6, of crimes punishable under any statute of the United States;

(4) "convicted offender" means any person who is convicted of or pleads guilty to a crime punishable under any statute of the United States;

(5) "imprisonment" means the requirement that any convicted offender live in any prison, jail, or other institution of confinement;

(6) "presumptive sentence" means a definite and specific penalty, established by the Commission, as provided in section 6, for a criminal offense of a particular gradation of gravity;

(7) "rule" means any rule, regulation, or schedule proposed or adopted by the Commission;

(8) "sentencing judge" means any judge of the United States, as defined in section 451 of title 28, United States Code, presiding at a trial in which any defendant is convicted of or pleads guilty to any criminal offense for which a presumptive sentence is in effect; and

(9) "sentencing standards" means the schedules, rules, and regulations for sentencing convicted offenders which the Commission establishes in accordance with the provisions of this Act.

FEDERAL SENTENCING COMMISSION

SEC. 4. (a) (1) There is established a commission to be known as the Federal Sentencing Commission. The Commission shall be composed of five members appointed by the President of the United States, by and with the consent of the Senate.

(2) Members of the Commission shall serve for terms of five years, except that of the members first appointed—

(A) one shall be appointed for one year;

(B) one shall be appointed for two years;

(C) one shall be appointed for three years;

(D) one shall be appointed for four years; and

(E) one shall be appointed for five years.

The member appointed under subparagraph (E) shall be or

have been a member of the Parole Commission or its predecessor, the United States Board of Parole.

(3) Any person appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed (A) only for the unexpired term of the member he succeeds, and (B) in the same manner as in the case of the original appointment.

(4) Members of the Commission shall receive compensation equivalent to the compensation paid at level IV of the Executive Schedule (5 U.S.C. 5315).

(b) (1) The Commission shall have an Executive Director who shall be appointed by the Commission. The Executive Director shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5316).

(2) With the approval of the Commission, the Executive Director may—

(A) appoint and fix the pay of such additional personnel as he deems necessary, and

(B) procure temporary and intermittent services to the same extent as is authorized by section 3109 (b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS–15 of the General Schedule (5 U.S.C. 5332).

(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities, of other agencies and departments of the United States Government. The heads of such agencies and departments may make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

(c) The Commission is abolished six years after the date of enactment of this Act unless, prior to that time, the Congress adopts a concurrent resolution disapproving the abolition of the Commission.

DUTIES OF COMMISSION; ADMINISTRATIVE PROVISIONS

SEC. 5. (a) The Commission shall—

(1) prescribe rules to carry out the provisions of sections 6, 7, 8, 9, 11, and 12 in accordance with the provisions of subsection (b);

(2) collect from each district court of the United States such detailed information (which each such court shall assist in providing) relating to sentencing practices in each such court as the Commission shall by rule require; and

(3) review the information collected pursuant to paragraph (2) in accordance with the provisions of subsection (c).

(b) (1) Not later than eighteen months after the date of enactment of this Act, the Commission shall publish in the Federal Register proposed rules to carry out the provisions of sections 6, 7, 8, 9, 11, and 12. Not earlier than sixty days, but not later than ninety days, after the date of publication of such proposed rules, the Commission shall hold public hearings to afford interested persons a reasonable opportunity to present data, views, or arguments concerning such proposed rules, in an oral presentation, or in writing prior to the hearing. The Commission shall consider fully all submissions respecting such proposed rules, revise such proposed rules on the basis of such submissions to the extent appropriate and consistent with the policy of this Act, and issue a concise statement of the principal reasons for adoption, and the reasons for overruling any considerations urged against adoption. All such procedures shall be consistent with the applicable provisions of sections 553 (b) and (c) of title 5, United States Code.

(2) The Commission, before adopting any such proposed rule under this section, shall transmit such proposed rule and such statement to the Senate and the House of Representatives.

(3) (A) If the Senate and the House of Representatives do not, through agreement to a concurrent resolution,

disapprove the proposed rule within forty-five calendar days after receipt thereof, then the Commission may adopt such rule and it shall thereupon become effective. The Commission may not adopt any rule which is disapproved under this subparagraph.

(B) For purposes of this paragraph, the term "Calendar days" does not include any calendar day (i) on which both Houses of the Congress are adjourned sine die, or (ii) during a recess by either House of three or more days.

(C) If such proposed rule consists of a schedule of presumptive sentences as provided in section 6, a schedule of aggravating or mitigating circumstances as provided in section 7, or a schedule of sanctions as provided in section 9 (a), any such resolution of disapproval must disapprove such schedule as a whole.

(c) Each year, during the two-year period after the date on which the first rules adopted as provided in subsection (a) become effective, the Commission shall review the information collected as required by subsection (a) (2) and shall reassess such rules accordingly. If the Commission finds, on the basis of such review, that modification of such rules is desirable, the Commission may modify such rules in accordance with the procedures set forth in subsection (b). At the end of such two-year period, the Commission shall conduct such a review at least once every three years, unless the

Commission is sooner abolished as provided in section 4. The Commission shall publish the results of all such reviews.

(d) The Commission shall transmit a report to the Congress each year. Each such report shall contain a detailed statement with respect to the activities of the Commission in carrying out its duties under this Act, and any recommendations for legislative or other action by the Congress which the Commission considers appropriate.

PRESUMPTIVE SENTENCES

SEC. 6. (a) The Commission shall establish, in accordance with the provisions in section 5, a schedule—

(1) setting forth gradations of gravity of criminal offenses;

(2) prescribing an appropriate gradation of gravity for each criminal offense;

(3) prescribing a presumptive sentence for each gradation of gravity.

(b) The severity of each presumptive sentence prescribed as provided in subsection (a) (3) shall be commensurate with the gravity of the criminal offense to which such presumptive sentence is assigned.

(c) (1) For the purpose of subsections (a) and (b), the Commission, in determining the gravity of a criminal offense, shall assess the degree of harm or risk of harm of the type of criminal conduct involved in such criminal offense

and the degree of culpability of a perpetrator engaging in that type of conduct.

(2) For the purpose of subsections (a) and (b), the Commission may establish, solely for purposes of this Act, subcategories of any criminal offense and assign different gradations of gravity to such subcategories, if it finds that such subcategories have distinct degrees of gravity. Whenever the Commission establishes such subcategories, it shall also prescribe the criteria that each sentencing judge must use to determine the applicable subcategory for the criminal conduct engaged in by such convicted offender. For purposes of this Act, such subcategory shall be considered to be the criminal offense of which the criminal offender was convicted.

MITIGATING AND AGGRAVATING CIRCUMSTANCES

SEC. 7. (a) The Commission shall establish, in accordance with the provisions of section 5, a schedule and rules—

(1) prescribing variations from any presumptive sentence established under section 6 on account of mitigating or aggravating circumstances;

(2) specifying which types of circumstances shall qualify as mitigating or aggravating circumstances that justify a variation from such presumptive sentence; and

(3) specifying, with respect to each such type of mitigating or aggravating circumstance, a particular amount or a maximum permitted amount of variation from such presumptive sentence.

(b) If a sentence of imprisonment is prescribed as the presumptive sentence, no variation on account of aggravating circumstances prescribed by the Commission under subsection (a) shall increase the duration of such imprisonment by more than 50 per centum.

(c) For the purpose of subsection (a), the Commission—

(1) shall not consider as an aggravating or mitigating circumstance, the anticipated effect on the future behavior of the convicted offender, or of any other person, of imposing a sentence more or less severe than the presumptive sentence; and

(2) may specify as a mitigating or aggravating circustance, any particular acts or circumstances surrounding the commission of a criminal offense which renders the degree of harm or risk of harm of the criminal conduct, or the degree of culpability of the offender in engaging in such conduct, greater or less than the gradation of gravity prescribed for such criminal offense under section 6.

(d) Notwithstanding the provisions in subsection (c), the Commission shall establish rules, consistent with the provisions of this section, which shall—

(1) prescribe as an aggravating circumstance the fact that a convicted offender has previously been convicted of a serious offense as defined in section 8 (b), and

(2) require the imposition of a sentence more severe than the presumptive sentence in any case in which such aggravating circumstance is present.

SENTENCES OF IMPRISONMENT

SEC. 8. (a) The Commission shall—

(1) prescribe a presumptive sentence of imprisonment under section 6 only for serious criminal offenses; and

(2) prescribe, with respect to serious criminal offenses, no presumptive sentence in excess of five years of actual imprisonment, except as otherwise provided in subsection (c).

(b) A criminal offense is serious for purposes of subsection (a) if, as determined under section 6(c)(1), it entails a substantial degree of harm or risk thereof and a high degree of culpability on the part of the person who commits such criminal offense. In determining whether the harm or

risk thereof is substantial, the Commission shall consider whether the conduct—

(1) involves the infliction, risk, or threat of substantial bodily injury; or

(2) involves the infliction or risk of substantial harm (other than of bodily injury), including but not limited to the substantial abuse of a public office, a public or private trust, or of government processes, or the deprivation of a substantial portion of the livelihood of a victim of such criminal offense.

(c) Subsection (a) (2) shall not apply to the criminal offenses of murder, manslaughter, forcible rape, aircraft hijacking, kidnapping, or treason, or any attempt or aiding or abetting of such offenses.

SENTENCES OF IMPRISONMENT

SEC. 9. (a) The Commission shall establish, in accordance with the provisions in section 5—

(1) a schedule of penalties other than imprisonment, to be asigned as presumptive sentences for criminal offenses for which imprisonment may not be prescribed as the presumptive sentence under section 8; and

(2) a schedule specifying the (A) terms and conditions applicable to such penalties, and (B) sanc-

tions which may be applied by any sentencing judge to any convicted offender who violates such terms or conditions.

(b) For the purpose of subsection (a) (1), such penalties may include—

(1) intermittent confinement for days, evenings, or weekends, or portions thereof;

(2) supervision in the community;

(3) a fine or forfeiture;

(4) a curfew or travel restrictions; or

(5) community service.

(c) For the purpose of subsection (a) (2) (A), the terms and conditions of such penalties prescribed by the Commission may include the duration, scheduling, and place of any intermittent confinement; the amount or method of calculating or determining any fine or forfeiture; and the nature, type, and extent of any supervision, curfew, travel restriction, or community service.

(d) For the purpose of subsection (a) (2) (B), no sanction that is imposed on a convicted offender for failing to comply with such terms and conditions may result in the imprisonment of such convicted offender for more than one year.

(e) The Attorney General shall, after consulting with the Commission, establish or designate an office within the

Department of Justice that shall be responsible for implementing and carrying out any penalties under this section which are prescribed by the Commission and imposed upon convicted offenders by any sentencing judge.

MAXIMUM SENTENCES

SEC. 10. No presumptive sentence prescribed by the Commission under section 6 for a criminal offense, including any variation thereof on account of aggravating circumstances prescribed by the Commission under section 7, may exceed in severity the maximum punishment for such offense prescribed by any other statute of the United States.

ABOLITION OF PAROLE; EARLY RELEASE FOR GOOD BEHAVIOR

SEC. 11. (a) Whenever the Commission prescribes imprisonment as a penalty under section 6, 7, or 8, the Commission—

(1) shall consider that such penalty refers to the period of time which convicted offenders must actually serve in confinement, except as otherwise provided in subsection (c); and

(2) may by rule prescribe that the release of convicted offenders from imprisonment shall be followed by a period of supervision in the community to aid the transition of such offenders to the community, and prescribe the terms and conditions of such supervision and

the sanctions which may be applied to any convicted offender who fails to comply with such terms and conditions, except that—

(A) the duration of any such supervision shall not exceed 10 per centum of the convicted offender's sentence of imprisonment; and

(B) no sanction for noncompliance with the terms and conditions of such supervision shall result in the imprisonment of a convicted offender for more than fifteen days.

(b) After the date on which the schedule established pursuant to section 6 becomes effective, the Parole Commission shall have no authority under section 4203 of title 18, United States Code, to grant parole to any prisoner except that the Parole Commission shall have the authority—

(1) to grant parole to any otherwise eligible prisoner who was sentenced before that date; and

(2) to administer any supervision in the community authorized by the Commission under subsection (a) (2).

(c) (1) Notwithstanding the provisions of subsection (a), the Commission may establish rules pursuant to which—

(A) each imprisoned offender is entitled to a deduction from the term of his imprisonment, if he has not

committed a serious disciplinary infraction while imprisoned; or

(B) any imprisoned offender who has committed such a serious disciplinary infraction may be penalized by an addition to the term of his imprisonment.

(2) If the Commission establishes rules as provided in paragraph (1), it shall, after consulting with the Attorney General, the Director of the Bureau of Prisons of the United States Department of Justice, and other appropriate officials, (A) prescribe the procedures for determining whether an imprisoned offender has committed a serious disciplinary infraction, and (B) define what constitutes a serious disciplinary infraction for purposes of this subsection.

(3) No rule established as provided in paragraph (1) shall permit—

(A) any deduction from the term of any convicted offender's imprisonment, pursuant to paragraph (1) (A) in excess of 15 per centum of the duration of such term if such term is three years or less, or 10 per centum of the duration of such term if such term is more than three years; or

(B) any addition to the term of any convicted offender's imprisonment, pursuant to paragraph (1)

(B), in excess of 10 per centum of the duration of such term.

(d) Whenever the Commission, in accordance with section 5(c), amends its schedule and rules under section 6 to reduce the severity of any presumptive sentence, or under section 7 in such a manner as could reduce the severity of any penalty imposed thereunder, the Commission may establish rules—

(1) prescribing that any such amendment shall apply retroactively to convicted offenders who were sentenced as provided in this Act prior to the effective date of such amendment and who still are undergoing punishment; or

(2) directing sentencing judges to reduce or terminate the punishment of such convicted offenders, consistently with the Commission's rules under paragraph (1).

DUTIES OF SENTENCING COURTS

SEC. 12. (a) (1) Each sentencing judge shall impose on any convicted offender the presumptive sentence assigned to the criminal offense of which he was convicted, except if a variation from the presumptive sentence is permitted or required by the Commission's rules under section 7, such judge shall vary such presumptive sentence only as provided in section 7.

(2) If the sentencing judge (A) varies any presumptive sentence, based upon the existence of any aggravating or mitigating circumstance, or (B) refuses, upon request by the defendant or the United States, to vary any presumptive sentence, such judge shall disclose the variation or refusal in open court, and make a statement for the record of the justification therefor, including a description of any such aggravating or mitigating circumstances and all other information, evidence, or other factors considered by the judge, in accordance with the rules which the Commission shall prescribe under this Act.

(b) The Supreme Court of the United States shall have the power, after consulting with the Commission, to prescribe rules of practice and procedure pursuant to section 3772 of title 18, United States Code, with respect to the imposition of sentences under this Act and under the rules of the Commission, except that the Supreme Court may delegate such power to the Commission, subject to such terms and conditions as the Supreme Court may prescribe.

APPELLATE REVIEW

SEC. 13. The convicted offender or the United States may appeal any sentence imposed under section 12 to the appropriate United States court of appeals solely on the ground that—

(1) the sentencing judge imposed such sentence in violation of a rule established by the Commission under this Act or of a provision of this Act; or

(2) any rule established by the Commission and related to such sentence is invalid, because (A) the Commission did not comply with the provisions in section 5 with respect to such rule, or (B) the presumptive sentence, aggravating or mitigating circumstances, or other parts of the sentencing standards adopted by the Commission are arbitrary and capricious.

95TH CONGRESS
1ST SESSION

S. 260

IN THE SENATE OF THE UNITED STATES

JANUARY 14, 1977

Mr. KENNEDY (for himself and Mr. MCCLELLAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, so as to impose mandatory minimum terms with respect to certain offenses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Section 13 of title 18, United States Code, is amended by striking out "and subject to a like punishment," and inserting the following new sentence: "Whoever is found guilty of a like offense under the provisions of this section shall be subject to a like punishment except that in those cases in which a person is convicted of committing any act which, according to the laws thereof in force at the time, constitutes—

"(a) the crime of burglary, where at night a person, with intent to engage in conduct constituting a crime, enters without privilege, or remains surreptitiously within, a dwelling that is the property of another; or

"(b) the crime of aggravated assault, where a person, by physical force, intentionally causes serious bodily injury to another person;

said person shall be sentenced to a term of imprisonment which may not be less than two years.".

SEC. 2. The third paragraph of subsection (b) of section 1111 of title 18, United States Code, is amended to read as follows:

"Whoever is guilty of murder in the second degree, shall be sentenced to a term of imprisonment which may not be less than two years and which may be up to life imprisonment.".

SEC. 3. Subsection (c) of section 924 of title 18, United States Code, is amended to read as follows:

"(c) Whoever, while engaged in the commission of any offense for which he may be prosecuted in a court of the United States, knowingly possesses, displays, brandishes, or otherwise uses a firearm, destructive device, or other dangerous weapon, shall, in addition to the punishment provided for the commission of such offense, be sentenced to a term

of imprisonment which may not be less than two years and which may be up to ten years. In the case of a second or subsequent conviction of a violation of this subsection, or in the case of a conviction under this subsection following a conviction of a State offense during the commission of which the defendant knowingly possessed, displayed, brandished, or otherwise used a firearm, destructive device, or other dangerous weapon, such defendant, with respect to such conviction under this subsection, shall be sentenced to a term of imprisonment which may not be less than four years and which may be up to twenty years.".

SEC. 4. Section 2031 of title 18, United States Code, is amended by striking out "imprisonment for any term of years or for life" and inserting in lieu thereof "shall be sentenced to a term of imprisonment which may not be less than two years and which may be up to life imprisonment".

SEC. 5. (a) Section 2111 of title 18, United States Code, is amended by striking out "shall be imprisoned for not more than fifteen years" and inserting in lieu thereof "shall be sentenced to a term of imprisonment which may not be less than two years and which may be up to fifteen years".

(b) Section 2112 of title 18, United States Code, is amended by deleting "shall be imprisoned not more than

92-465 O - 77 - 81

fifteen years" and inserting in lieu thereof "shall be sentenced to a term of imprisonment which may not be less than two years and which may be up to fifteen years".

(c) The third paragraph of section 2113 (a) of title 18, United States Code, is amended by deleting "or imprisoned not more than twenty years, or both" and inserting "and shall be sentenced to a term of imprisonment which may not be less than two years and which may be up to twenty years".

(d) The first paragraph of section 2113 (b) of title 18, United States Code, is amended by deleting "or imprisoned not more than ten years, or both" and inserting in lieu thereof "and shall be sentenced to a term of imprisonment which may not be less than two years and which may be up to ten years".

(e) Section 2113 (d) of title 18, United States Code, is amended by deleting "or imprisoned not more than twenty-five years, or both" and inserting in lieu thereof "and shall be sentenced to a term of imprisonment which may be less than two years and which may be up to twenty-five years".

SEC. 6. (a) Section 401 (b) (1) (A) of the Controlled Substances Act (21 U.S.C. 841 is amended (1) by adding after the words "more than $25,000, or both", the following sentence: "In the case of a controlled substance in schedule I which is the narcotic drug heroin, such person

shall be sentenced to a term of imprisonment of not less than two years or more than fifteen years, and a fine of not more than $25,000"; and (2) by adding after the words "more than $50,000, or both" the following new sentence: "In the case of a controlled substance in schedule I which is the narcotic drug heroin, such person shall be sentenced to a term of imprisonment of not less than two years or more than thirty years, and a fine of not more than $50,000.".

(b) Section 1010(b) (1) of the Controlled Substances Act 21 U.S.C. 960) is amended by adding after the words "not more than $25,000, or both" the following new sentence: "In the case of a controlled substance in schedule I which is the narcotic drug heroin, such person shall be sentenced to a term of imprisonment of not less than two years or more than fifteen years and fine of not more than $25,000.".

SEC. 7. (a) Title 18, United States Code, is amended by adding immediately after section 3578 the following new sections:

"§ 3579. Increased sentence for repeat offenders

"(a) Whoever has been found guilty of an offense described in the provisions of section 13 relating to burglary and aggravated assault as defined therein, section 1111 relating to murder in the second degree, section 2031, section 2111, section 2112, any provision of section 2113

(other than the provisions contained in the second paragraph of subsection (b) of such section), or section 924 (c) of this title, or section 401 (b) of the Controlled Substances Act, relating to the narcotic drug heroin in schedule I or the provisions of section 1010 of the Controlled Substances Act relating to the narcotic drug heroin in schedule I, and said person is found to be a repeat offender, pursuant to subsection (c) of this section shall be sentenced to imprisonment for an appropriate term which may not be less than four years and may be up to the maximum provided by law for such violation for which he was convicted. Otherwise the court shall sentence the defendant in accordance with the law prescribing penalties for such violation. The court shall place in the record its findings, including an identification of the information relied upon in making such findings, and its reasons for the sentence imposed.

"(b) Notwithstanding any other provision of this section, the court shall not sentence a repeat offender to less than any mandatory minimum penalty prescribed by law for such violation.

"(c) A defendant is a repeat offender for purposes of this section if the defendant has previously been convicted in courts of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any depart-

ment, agency, or instrumentality thereof, for a violation of any provision within the purview of subsection (a) of this section committed on an occasion different from the alleged violation referred to in subsection (a), or has previously been convicted in any State court of a violation of a State law involving murder in the second degree, rape, robbery, burglary, aggravated assault, the commission of any offense while knowingly possessing, displaying, brandishing, or otherwise using a firearm, destructive device, or other dangerous weapon, or the commission of any offense involving the manufacturing, distributing, selling, dispensing, possessing, or importing of the narcotic drug heroin. A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of this paragraph.

"§ 3580. Imposition and execution of sentence

"(a) Except to the extent otherwise provided by subsection (b), the imposition or execution of any mandatory minimum sentence pursuant to the provisions of section 13 (relating to burglary and aggravated assault), section 1111 (relating to murder in the second degree), section 924(c), section 2031, section 2111, section 2112, section 2113, or section 3579, of title 18, United States Code, or section 401 (b) (1) (A) or section 1010(b) (1), of the Controlled Sub-

stances Act, shall not be suspended, probation shall not be granted, and section 4202 and chapters 309, 311, and 402 of this title shall not be applicable.

"(b) Notwithstanding any other provision of this title, no mandatory minimum sentence shall be imposed, and the provisions of subsection (a) shall not be applicable, with respect to any individual sentenced pursuant to any provision of this title referred to in subsection (a) if—

"(1) the individual was less than sixteen years of age at the time of the commission of the offense for which he is to be sentenced;

"(2) the individual's mental capacity, at the time of the commission of the offense for which he is to be sentenced, was significantly impaired, although not so impaired as to constitute a defense to the prosecution;

"(3) the individual, at the time of the commission of the offense for which he is to be sentenced, was acting under unusual and substantial duress, although not such duress as would constitute a defense to the prosecution;

"(4) the individual to be sentenced was an accomplice, the conduct constituting the offense was principally the conduct of another person, and the individual's participation was relatively minor; or

"(5) as to the crimes enumerated in sections 2111,

2112, and 2113, no serious bodily injury was inflicted on the victim.

"(c) Whoever is convicted of an offense described in subsection (a) of this section shall be granted a hearing by the court prior to imposition of sentence to determine whether any of the factors enumerated in subsection (b) of this section are applicable. The hearing shall be held before the court sitting without a jury, and the defendant and the government shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. If it appears by a preponderance of the information, including information submitted during the trial, during the sentencing hearing, and in so much of the presentence report as the court relies on, that the defendant is subject to a term of imprisonment as set forth in subsection (a) of this section, the court shall so sentence the defendant. The court shall submit its findings in writing, including an identification of the facts relied upon in making its determination.".

(b) The analysis of chapter 227 of title 18, United States Code, is amended by adding at the end thereof the following:

"3579. Increased sentence for repeat offenders.
"3580. Imposition and execution of sentence.".

95TH CONGRESS
1ST SESSION

S. 888

IN THE SENATE OF THE UNITED STATES

MARCH 3 (legislative day, FEBRUARY 21), 1977

Mr. ROTH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18, United States Code, so as to provide for mandatory minimum sentences with respect to certain offenses against victims sixty years of age or older.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 13 of title 18, United States Code, is amended (1) by inserting "(a)" immediately before "Whoever", and (2) by adding at the end thereof the following new subsection:

"(b) Whoever is found guilty of a like offense, under the provisions of subsection (a) of this section, constituting, according to the laws in force at the time—

"(1) the crime of burglary, where at night a person,

with intent to engage in conduct constituting a crime, enters without privilege, or remains surreptitiously within, a dwelling that is the property of another; or

"(2) the crime of aggravated assault, where a person, by physical force, intentionally causes serious bodily injury to another person;

shall, if the victim of such offense is sixty years of age or older at the time thereof, be sentenced to a term of imprisonment which may not be less than two years and which may be up to the maximum provided by law for such like offense.".

(b) (1) Section 113(a) of title 18, United States Code, is amended by inserting immediately before the period at the end thereof a comma and the following: "except that, if the victim of the offense is an individual sixty years of age or older at the time thereof, the defendant so convicted of such offense shall be sentenced to a term of imprisonment which may not be less than four years and which may be up to twenty years".

(2) Section 113(b) of title 18, United States Code, is amended by inserting immediately before the period at the end thereof a comma and the following: "except that, if the victim of the offense is an individual sixty years of age or older at the time thereof, the defendant so convicted of such offense shall be sentenced to a term of imprisonment

which may not be less than two years and which may be up to ten years, and, in addition thereto, may be fined not more than $3,000".

(3) Section 113 (c) of title 18, United States Code, is amended by inserting immediately before the period at the end thereof a comma and the following: "except that, if the victim of the offense is an individual sixty years of age or older at the time thereof, the defendant so convicted of such offense shall be sentenced to a term of imprisonment which may not be less than one year and which may be up to five years, and, in addition thereto, may be fined not more than $1,000".

(4) Section 113 (d) of title 18, United States Code, is amended by inserting immediately before the period at the end thereof a comma and the following: "except that, if the victim of the offense is an individual sixty years of age or older at the time thereof, the defendant so convicted of such offense shall be sentenced to a term of imprisonment which may not be less than three months and which may be up to six months, and, in addition thereto, may be fined not more than $500".

(c) Section 114 of title 18, United States Code, is amended by inserting immediately before the period at the end thereof a comma and the following: "except that, if the victim of the offense is an individual sixty years of age or

older at the time thereof, the defendant so convicted of such offense shall be sentenced to a term of imprisonment which may not be less than one year and which may be up to seven years, and, in addition thereto, may be fined not more than $1,000".

(d) The third paragraph of section 1111 (b) of title 18, United States Code, is amended to read as follows:

"Whoever is guilty of murder in the second degree shall be imprisoned for any term of years or for life, except that, if the victim of the offense is an individual sixty years of age or older at the time thereof, the defendant so convicted of such offense shall be sentenced to a term of imprisonment which may not be less than fifteen years and which may be up to life imprisonment.".

(e) The second paragraph of section 1112 (b) of title 18, United States Code, is amended by inserting immediately before the period at the end thereof a comma and the following: "except that, if the victim of the offense is an individual sixty years of age or older at the time thereof, the defendant so convicted of such offense shall be sentenced to a term of imprisonment which may not be less than four years and which may be up to ten years".

(f) The third paragraph of section 1112 (b) of title 18, United States Code, is amended by inserting immediately before the period at the end thereof a comma and the fol-

lowing: "except that, if the victim of the offense is an individual sixty years of age or older at the time thereof, the defendant so convicted of such offense shall be sentenced to a term of imprisonment which may not be less than one year and which may be up to three years".

(g) Section 1113 of title 18, United States Code, is amended by inserting immediately before the period at the end thereof a comma and the following: "except that, if the victim of the offense is an individual sixty years of age or older at the time thereof, the defendant so convicted of such offense shall be sentenced to a term of imprisonment which may not be less than one year and which may be up to three years".

(h) Section 2031 of title 18, United States Code, is amended by inserting immediately before the period at the end thereof a comma and the following: "except that, if the victim of such offense was sixty years of age or older at the time thereof, the defendant so convicted of such offense shall be sentenced to a term of imprisonment which may not be less than five years and which may be up to life imprisonment".

(i) Section 2111 of title 18, United States Code, is amended by inserting immediately before the period at the end thereof a comma and the following: "except that, if the victim of any such offense was sixty years of age or older

at the time thereof, the defendant so convicted of such offense shall be sentenced to a term of imprisonment which may not be less than three years and which may be up to fifteen years".

(j) Section 1201 (a) of title 18, United States Code, is amended by inserting immediately before the period at the end thereof a comma and the following: "except that, if the victim of any such offense (other than a victim described in clause (4) of this subsection) was sixty years of age or older at the time thereof, the defendant so convicted of such offense shall be sentenced to a term of imprisonment which may not be less than five years and which may be up to life imprisonment".

SEC. 2. (a) Chapter 227 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3579. Mandatory minimum sentences

"The imposition or execution of any mandatory minimum sentence pursuant to the provisions of section 13, subsection (a), (b), (c), or (d) of sections 113, 114, 1111 (b) (including a sentence of life imprisonment for murder in the first degree), 1112 (b), 1113, 1201 (a), 2031, and 2111 of this title, invovling an offense the victim with respect to which was sixty years of age or older at the time of such offense, shall not be suspended, probation shall not

be granted, and chapters 309, 311, and 402 of this title shall not be applicable.".

(b) The analysis of chapter 227 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"3579. Mandatory minimum sentences.".

SEC. 3. The amendments made by this Act shall be applicable with respect to offenses committed on and after the date of the enactment of this Act.

95TH CONGRESS
1ST SESSION

S. 979

IN THE SENATE OF THE UNITED STATES

MARCH 10 (legislative day, FEBRUARY 21), 1977

Mr. BENTSEN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend certain provisions of title 18, United States Code, relating to the sentencing of defendants convicted of certain offenses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair and Certain Punishment Act of 1977".

SEC. 2. (a) The last paragraph of section 1111 (b) of title 18, United States Code, is amended to read as follows:

"Whoever is guilty of murder in the second degree, shall be sentenced in accordance with the provisions of chapter 228 of this title.".

(b) Section 1112 (b) of title 18, United States Code, is amended to read as follows:

"(b) Within the special maritime and territorial jurisdiction of the United States:

"Whoever is guilty of voluntary manslaughter, shall be sentenced in accordance with the provisions of chapter 228 of this title.

"Whoever is guilty of involuntary manslaughter, shall be sentenced in accordance with the provisions of chapter 228 of this title.".

(c) Section 1113 of title 18, United States Code, is amended by deleting "fined not more than $1,000 or imprisoned not more than three years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of this title".

(d) Section 1117 of title 18, United States Code, is amended by deleting "punished by imprisonment for any term of years or for life" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of this title".

(e) (1) The first paragraph of section 111 of title 18, United States Code, is amended by deleting "fined not more than $5,000 or imprisoned not more than three years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of this title".

(2) The second paragraph of section 111 of such title is amended by deleting "fined not more than $10,000 or imprisoned not more than ten years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of this title".

(f) Section 112 (a) of title 18, United States Code, is amended to read as follows:

"(a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official or official guest shall be sentenced in accordance with chapter 228 of this title. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be sentenced in accordance with such chapter 228.".

(g) (1) Section 113 (a) of such title is amended by deleting "for not more than twenty years" and inserting "in accordance with chapter 228 of this title".

(2) Section 113 (b) of such title is amended by deleting "by fine of not more than $3,000 or imprisonment for not more than ten years, or both" and inserting in lieu thereof "in accordance with chapter 228 of this title".

(3) Section 113 (c) of such title is amended by deleting "by fine of not more than $1,000 or imprisonment for not more than five years, or both" and inserting in lieu thereof "in accordance with the provisions of chapter 228 of this title".

92-465 O - 77 - 82

(4) Section 113(d) of such title is amended by deleting "by fine of not more than $500 or imprisonment for not more than six months, or both" and inserting in lieu thereof "in accordance with the provisions of chapter 228 of this title".

(5) Section 113(e) of such title is amended by deleting "by fine of not more than $300 or imprisonment for not more than three months, or both" and inserting in lieu thereof "in accordance with the provisions of chapter 228 of this title".

(h) The last paragraph of section 114 of such title is amended by deleting "fined not more than $1,000 or imprisoned not more than seven years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of this title".

(i) Subsections (b), (c), (d), and (e) of section 351 of such title are amended to read as follows:

"(b) Whoever kidnaps any individual designated in subsection (a) of this section shall be punished in accordance with the provisions of chapter 228 of this title.

"(c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished in accordance with the provisions of chapter 228 of this title.

"(d) If two or more persons conspire to kill or kidnap

any individual designated in subsection (a) of this section and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished in accordance with the provisions of chapter 228 of this title.

"(c) Whoever assaults any person designated in subsection (a) of this section shall be punished in accordance with the provisions of chapter 228 of this title.".

(j) (1) Section 1201 (a) of such title is amended by deleting "by imprisonment for any term of years or for life" and inserting in lieu thereof "in accordance with the provisions of chapter 228 of this title".

(2) Section 1201 (c) of such title is amended to read as follows:

"(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished in accordance with the provisions of chapter 228 of this title.".

(k) Subsections (b), (c), (d), and (e) of section 1751 of such title are amended to read as follows:

"(b) Whoever kidnaps any individual designated in subsection (a) of this section shall be punished in accordance with the provisions of chapter 228 of this title.

"(c) Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be pun-

ished in accordance with the provisions of chapter 228 of this title.

"(d) If two or more persons conspire to kill or kidnap any individual designated in subsection (a) of this section and one or more of such persons do any act to effect that object of the conspiracy, each shall be punished in accordance with the provisions of chapter 228 of this title.

"(e) Whoever assaults any person designated in subsection (a) of this section shall be punished in accordance with the provisions of chapter 228 of this title.".

(l) Section 2031 of such title is amended by deleting "suffer death, or imprisonment for any term of years or for life" and inserting in lieu thereof "be punished in accordance with the provisions of chapter 228 of this title".

(m) Section 2032 of such title is amended by deleting "shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years" and inserting in lieu thereof "shall be punished in accordance with the provisions of chapter 228 of this title".

(n) Section 2111 of such title is amended by deleting "imprisoned not more than fifteen years" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of this title".

(o) Section 2112 of such title is amended by deleting

"imprisoned not more than fifteen years" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of this title".

(p) (1) The third paragraph of section 2113(a) of such title is amended to read as follows:

"Shall be sentenced in accordance with the provisions of chapter 228 of this title.".

(2) Section 2113(d) of such title is amended by deleting "fined not more than $10,000 or imprisoned not more than twenty-five years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of this title".

(3) Section 2113(e) of such title is amended by deleting "imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of this title".

(q) Section 2114 of such title is amended to read as follows:

"§ 2114. Mail, money, or other property of the United States

"Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property

of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, or, if in effecting or attempting to effect such robbery, he wounds the person having custody of such mail, money, or other property of the United States, or puts such person's life in jeopardy by the use of a dangerous weapon, shall be sentenced in accordance with the provisions of chapter 228 of this title.".

(r) Section 2115 of such title is amended by deleting "fined not more than $1,000 or imprisoned not more than five years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of this title".

(s) Section 2116 of such title is amended by deleting "fined not more than $1,000 or imprisoned not more than three years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of this title".

(t) Section 2117 of such title is amended by deleting "fined not more than $5,000 or imprisoned not more than ten years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of this title".

(u) (1) The first sentence of section 16(b) of the Act of August 24, 1966, as amended (7 U.S.C. 2146), is amended by deleting "fined not more than $5,000, or im-

prisoned not more than three years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of title 18, United States Code".

(2) The second sentence of section 16(b) of such Act is amended by deleting "fined not more than $10,000, or imprisoned not more than ten years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of title 18, United States Code".

(v) (1) (A) The first sentence of section 12(c) of the Act of August 28, 1957, as amended (21 U.S.C. 461), is amended by deleting "fined not more than $5,000 or imprisoned not more than three years or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of title 18, United States Code".

(B) The second sentence of section 12(c) of the Act of August 28, 1957, as amended (21 U.S.C. 461), is amended by deleting "fined not more than $10,000 or imprisoned not more than ten years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of title 18, United States Code".

(2) (A) The first sentence of section 405 of the Act of March 4, 1907, as amended (21 U.S.C. 675), is amended by deleting "fined not more than $5,000 or imprisoned not more than three years, or both" and inserting in lieu thereof

"sentenced in accordance with the provisions of chapter 228 of title 18, United States Code".

(B) The second sentence of section 405 of such Act of March 4, 1909, as amended (21 U.S.C. 675), is amended by deleting "fined not more than $10,000 or imprisoned not more than ten years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of title 18, United States Code".

(w) (1) The first sentence of section 12 (c) of the Act of December 29, 1970, as amended (21 U.S.C. 1041), is amended by deleting "fined not more than $5,000 or imprisoned not more than three years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of title 18, United States Code".

(2) The second sentence of section 12 (c) of such Act of December 29, 1970, as amended (21 U.S.C. 1041), is amended by deleting "fined not more than $10,000 or imprisoned not more than ten years, or both" and inserting in lieu thereof "sentenced in accordance with the provisions of chapter 228 of title 18, United States Code".

(x) Section 13 of title 18, United States Code, is amended (1) by deleting "and subject to a like punishment" and (2) by adding at the end thereof the following: "Whoever is found guilty of a like offense under the provisions of this section shall be subject to a like punishment,

except that in those cases in which a person is convicted of committing any act which, according to the laws thereof in force at the time, constitutes the crime of burglary, where at night a person, with intent to engage in conduct constituting a crime, enters without privilege, or remains surreptitiously within, a dwelling that is the property of another, such person shall be sentenced in accordance with the provisions of chapter 228 of this title.".

SEC. 3. Title 18, United States Code, is amended by inserting immediately after chapter 227 thereof the following new chapter:

"Chapter 228—SENTENCING

"§ 3581. Sentence to be imposed

"(a) Whenever a defendant is found guilty of or pleads guilty to any offense under section 13 (involving the offense of burglary as specifically provided for in the text thereof), 111, 112(a), 113, 114, 351 (other than murder in the first degree), 1111 (other than murder in the first degree), 1112, 1113, 1114 (other than murder in the first degree), 1116 (other than murder in the first degree), 1117 (other than murder in the first degree), 1751 (other than murder in the first degree), 1201, 2031, 2032, 2111, 2112, 2113 (a), (d), or (e), 2114, 2115, 2116, 2117, of this title, or section 16 of the Act of August 24, 1966, as amended

(7 U.S.C. 2146(b)), section 12(c) of the Act of August 28, 1957, as amended (21 U.S.C. 461) (other than murder in the first degree), section 405 of the Act of March 4, 1907, as amended (21 U.S.C. 675) (other than murder in the first degree), or section 12(c) of the Act of December 29, 1970 (21 U.S.C. 1041) (other than murder in the first degree), the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the sentence to be imposed.

"(b) Such hearing shall be conducted for the purpose of determining—

"(1) the existence or nonexistence of any and all of the factors set forth in subsections (l) and (m) of this section;

"(2) the existence or nonexistence of extraordinary aggravating circumstances; and

"(3) the existence or nonexistence of extraordinary mitigating circumstances.

"(c) If, on the basis of such hearing, the judge determines that—

"(1) none of the factors set forth in subsection (l) of this section exists;

"(2) none of the factors set forth in subsection (m) of this section exists; or

"(3) there are no extraordinary aggravating or mitigating circumstances,

such judge shall, subject to subsection (n) of this section, sentence such defendant in accordance with the following:

"(1) In the case of the offense of murder in the second degree committed by a defendant under section 351(a), 1111, 1114, 1116, or 1751(a) of this title, or section 16 of the Act of August 24, 1966, as amended (7 U.S.C. 2146(b)), section 12(c) of the Act of August 28, 1957, as amended (21 U.S.C. 461), section 405 of the Act of March 4, 1907, as amended (21 U.S.C. 675), or section 12(c) of the Act of December 29, 1970 (21 U.S.C. 1041), the defendant shall be sentenced to a term of imprisonment of nine years.

"(2) In the case of the offense of voluntary manslaughter committed by a defendant under section 351(a), 1112, 1114, 1116, or 1751(a) of this title, or section 16 of the Act of August 24, 1966, as amended (7 U.S.C. 2146(b)), section 12(c) of the Act of August 28, 1957, as amended (21 U.S.C. 461), section 405 of the Act of March 4, 1907, as amended (21 U.S.C. 675), or section 12(c) of the Act of December 29, 1970 (21 U.S.C. 1041), the defendant shall be sentenced to a term of imprisonment of three years.

"(3) In the case of the offense of involuntary manslaughter committed by a defendant under section 351 (a), 1112, 1114, 1116, or 1751 (a) of this title, or section 16 of the Act of August 24, 1966, as amended (7 U.S.C. 2146 (b)), section 12 (c) of the Act of August 28, 1957, as amended (21 U.S.C. 461), section 405 of the Act of March 4, 1907, as amended (21 U.S.C. 675), or section 12 (c) of the Act of December 29, 1970 (21 U.S.C. 1041), the defendant shall be sentenced to a term of imprisonment of six months, and in addition thereto, may be fined not more than $1,000.

"(4) (A) In the case of the offense of an attempt to commit murder (other than an offense covered by section 113 of this title) committed by a defendant under section 1113, the defendant shall be sentenced to a term of imprisonment of two years, and in addition thereto, may be fined not more than $1,000.

"(B) In the case of the offense of an attempt to commit manslaughter (other than an offense covered by section 113 of this title) committed by a defendant under section 1113, the defendant shall be sentenced to a term of imprisonment of one year, and in addition thereto, may be fined not more than $1,000.

"(5) In the case of an offense of conspiracy to

murder committed by a defendant under section 1117, the defendant shall be sentenced to a term of four years.

"(6) (A) In the case of an offense of assault committed by a defendant under section 111, the defendant shall be sentenced to a term of imprisonment of six months, and in addition thereto, may be fined not more than $5,000, except that, if such defendant, in the commission of such assault, used a deadly or dangerous weapon, such defendant shall be sentenced to a term of imprisonment of three years, and in addition thereto, may be fined not more than $10,000.

"(B) In the case of an offense committed by a defendant under section 112(a), the defendant shall be sentenced to a term of imprisonment of six months, and in addition thereto, may be fined not more than $5,000, except that, if such defendant, in the commission of such offense, used a deadly or dangerous weapon, such defendant shall be sentenced to a term of imprisonment of three years, and in addition thereto, may be fined not more than $10,000.

"(7) (A) (i) In the case of the offense of assault with the intent to commit murder committed by a defendant under section 113, the defendant shall be sentenced to a term of imprisonment of four years.

"(ii) In the case of the offense of assault with the intent to commit rape committed by a defendant under section 113(a), the defendant shall be sentenced to a term of imprisonment of four years.

"(B) In the case of the offense of assault with intent to commit any felony (other than murder or rape) committed by a defendant under section 113(b), the defendant shall be sentenced to a term of imprisonment of two years, and in addition thereto, may be fined not to exceed $3,000.

"(C) In the case of the offense of assault with a dangerous weapon, with intent to do bodily harm and without just cause or excuse, committed by a defendant under section 113(c), the defendant shall be sentenced to a term of imprisonment of two years, and in addition thereto, may be fined not to exceed $1,000.

"(D) In the case of the offense of assault committed by a defendant under section 113(d), the defendant shall be sentenced to a term of imprisonment of one month, and in addition thereto, may be fined not to exceed $500.

"(E) In the case of the offense of simple assault committed by a defendant under section 113(e), the defendant shall be sentenced to a term of imprisonment

of fourteen days, and in addition thereto, may be fined not to exceed $300.

"(8) In the case of an offense committed by a defendant under section 114, the defendant shall be sentenced to a term of imprisonment of two years, and in addition thereto, may be fined not to exceed $1,000.

"(9) In the case of an offense committed by a defendant under section 2111, the defendant shall be sentenced to a term of imprisonment of three years.

"(10) In the case of an offense committed by a defendant under section 2112, the defendant shall be sentenced to a term of imprisonment of three years.

"(11) (A) In the case of an offense committed by a defendant under the first paragraph of section 2113(a), the defendant shall be sentenced to a term of imprisonment of three years, and in addition thereto, may be fined not to exceed $5,000.

"(B) In the case of an offense committed by a defendant under section 2113(d), the defendant shall be sentenced to a term of imprisonment of five years, and in addition thereto, may be fined not to exceed $10,000.

"(C) (i) In the case of an offense committed by a defendant under section 2113(e), involving the killing

of any person referred to therein, the defendant shall be sentenced to a term of imprisonment of nine years.

"(ii) In the case of an offense committed by a defendant under section 2113(e) involving the forcing of any person to accompany such defendant without the consent of such person, the defendant shall be imprisoned for seven years.

"(12) (A) In the case of an offense committed by a defendant under section 2114 involving an assault with intent to rob, steal, or purloin, the defendant shall be sentenced to a term of imprisonment of two years, except that, if such defendant, in attempting to effect such robbery, stealing, or purloining wounds the person having custody of such mail, money, or property referred to therein, or puts such person's life in jeopardy by the use of a dangerous weapon, the defendant shall be sentenced to a term of imprisonment of five years.

"(B) In the case of the offense of robbery committed by a defendant under section 2114, the defendant shall be sentenced to a term of imprisonment of three years, except that, if such defendant in effecting such robbery wounds the person having custody of such mail, money, or property referred to therein, or puts such person's life in jeopardy by the use of a dangerous

weapon, the defendant shall be sentenced to a term of imprisonment of five years.

"(13) (A) In the case of an offense committed by a defendant under section 2115 involving an attempt, such defendant shall be sentenced to a term of imprisonment of six months, and in addition thereto, may be fined not to exceed $1,000.

"(B) In the case of an offense committed by a defendant under section 2115 involving a forcible break-in, the defendant shall be sentenced to a term of imprisonment of one year, and in addition thereto, may be fined not to exceed $1,000.

"(14) (A) In the case of the offense of violent entry committed by a defendant under section 2116, the defendant shall be sentenced to a term of imprisonment of one year, and in addition thereto, may be fined not to exceed $1,000.

"(B) In the case of an offense committed by a defendant involving a willful or malicious assault under section 2116, the defendant shall be sentenced to a term of imprisonment of one year, and in addition thereto, may be fined not to exceed $1,000.

"(C) In the case of an offense committed by a defendant involving an interference under section 2116,

92-465 O - 77 - 83

the defendant shall be sentenced to a term of imprisonment of eight months, and in addition thereto, may be fined not to exceed $1,000.

"(15) (A) In the case of an offense of breaking a seal or a lock under section 2117 committed by a defendant, the defendant shall be sentenced to a term of imprisonment of six months.

"(B) In the case of an offense of entering under section 2117 committed by a defendant, the defendant shall be sentenced to a term of imprisonment of one year, and in addition thereto, may be fined not to exceed $5,000.

"(16) (A) In the case of the offense of kidnaping committed by a defendant under section 1751 (b), the defendant shall be sentenced to a term of imprisonment of twenty years, except that, if death results to any individual so kidnaped, the defendant shall be sentenced to life imprisonment.

"(B) (i) In the case of the offense of attempting to kill committed by a defendant under section 1751 (c), the defendant shall be sentenced to a term of imprisonment of fifteen years.

"(ii) In the case of the offense of attempting to kidnap committed by a defendant under section 1751

(c), the defendant shall be sentenced to a term of imprisonment of twelve years.

"(C) (i) In the case of an offense of conspiracy to kill committed by a defendant under section 1751 (d), the defendant shall be sentenced to a term of imprisonment of twelve years, except that, if death results to the individual who was the object of such conspiracy, such defendant shall be sentenced to a term of life imprisonment.

"(ii) In any case of the offense of conspiracy to kidnap committed by a defendant under section 1751 (d), the defendant shall be sentenced to a term of imprisonment of ten years, except that, if death results to the individual who was the object of such conspiracy, such defendant shall be sentenced to a term of life imprisonment.

"(D) In the case of an offense committed by a defendant under section 1751 (e), the defendant shall be sentenced to a term of imprisonment of two years, and in addition thereto, may be fined not to exceed $10,000.

"(17) (A) In the case of the offense of kidnaping committed by a defendant under section 351 (b), the defendant shall be sentenced to a term of imprisonment

of eight years, except that, if death results to any individual so kidnaped, the defendant shall be sentenced to life imprisonment.

"(B) (i) In the case of the offense of attempting to kill committed by a defendant under section 351 (c), the defendant shall be sentenced to a term of imprisonment of four years.

"(ii) In the case of the offense of attempting to kidnap committed by a defendant under section 351 (c), the defendant shall be sentenced to a term of imprisonment of three years.

"(C) (i) In the case of an offense of conspiracy to kill committed by a defendant under section 351 (d), the defendant shall be sentenced to a term of imprisonment of three years, except that, if death results to the individual who was the object of such conspiracy, such defendant shall be sentenced to a term of life imprisonment.

"(ii) In the case of the offense of conspiracy to kidnap committed by a defendant under section 351 (d), the defendant shall be sentenced to a term of imprisonment of two years, except that, if death results to the individual who was the object of such conspiracy, such defendant shall be sentenced to a term of life imprisonment.

"(D) In the case of the offense of assault committed by a defendant under section 351(c), such defendant shall be sentenced to a term of three months, and in addition thereto, may be fined not to exceed $5,000, except that, if personal injury results, such defendant shall be sentenced to a term of imprisonment of two years, and in addition thereto, may be fined not to exceed $10,000.

"(18) (A) In the case of the offense of kidnaping committed by a defendant under section 1201(a), such defendant shall be sentenced to a term of eight years.

"(B) In the case of the offense of conspiracy committed by a defendant under section 1201(c), such defendant shall be sentenced to a term of two years.

"(19) In the case of an offense committed by a defendant under section 13 constituting the crime of burglary as set forth therein, the defendant shall be sentenced to a term of imprisonment of one year, and in addition thereto, may be fined in such amount as may be provided by law.

"(20) In the case of an offense committed by a defendant under section 2031, the defendant shall be sentenced to a term of imprisonment of four years.

"(21) In the case of an offense committed by a defendant under section 2032, the defendant shall be

sentenced to a term of imprisonment for a term of two years.

"(22) In the case of an offense committed by a defendant under the first sentence of section 12(c) of the Act of August 28, 1957, as amended (21 U.S.C. 461), the defendant shall be sentenced to a term of imprisonment of six months, and in addition thereto, may be fined not more than $5,000, except that, if such defendant, in the commission thereof, used a deadly or dangerous weapon, such defendant shall be sentenced to a term of imprisonment of two years, and in addition thereto, may be fined not more than $10,000.

"(23) In the case of an offense committed by a defendant under the first sentence of section 405 of the Act of March 4, 1907, as amended (21 U.S.C. 675), the defendant shall be sentenced to a term of imprisonment of six months, and, in addition thereto, may be fined not more than $5,000, except that, if such defendant, in the commission thereof, used a deadly or dangerous weapon, such defendant shall be sentenced to a term of imprisonment of two years, and, in addition thereto, may be fined not more than $10,000.

"(24) In the case of an offense committed by a defendant under the first sentence of section 12(c) of the Act of December 29, 1970 (21 U.S.C. 1041), the

defendant shall be sentenced to a term of imprisonment of six months, and, in addition thereto, may be fined not more than $5,000, except that, if such defendant, in the commission thereof, used a deadly or dangerous weapon, such defendant shall be sentenced to a term of imprisonment of two years, and, in addition thereto, may be fined not more than $10,000.

"(25) In the case of an offense committed by a defendant under the first sentence of section 16(b) of the Act of August 24, 1966, as amended (7 U.S.C. 2146(b)), the defendant shall be sentenced to a term of imprisonment of six months, and, in addition thereto, may be fined not more than $5,000, except that, if such defendant, in the commission thereof, used a deadly or dangerous weapon, such defendant shall be sentenced to a term of imprisonment of two years, and, in addition thereto, may be fined not more than $10,000.

"(d) If the judge determines, on the basis of such hearing—

"(1) the existence of one or more of the factors set forth in subsection (m) of this section and the nonexistence of any of the factors set forth in subsection (l) of this section; or

"(2) the existence of one or more of the factors set forth in such subsection (m) and the existence of

one or more of the factors set forth in subsection (l), and that such existing factor or factors under subsection (m) substantially outweigh such factor or factors under subsection (l);

the judge shall, subject to the provisions of subsection (n) of this section, sentence such defendant to a term of imprisonment equal to that provided for such offense under subsection (c) of this section, except that such judge may increase such term of imprisonment by an amount not to exceed 40 per centum of the amount so provided for such offense under subsection (c).

"(e) If the judge determines, on the basis of such hearing—

"(1) the existence of one or more of the factors set forth in subsection (l) of this section and the nonexistence of any of the factors set forth in subsection (m) of this section; or

"(2) that the existence of any factor or factors set forth in such subsection (l) substantially outweigh the existence of any factor or factors set forth in such subsection (m);

the judge shall, subject to the provisions of subsection (n) of this section, sentence such defendant to a term of imprisonment equal to that provided for such offense under subsection (c) of this section, except that such judge may

impose a lesser sentence, in which case, he is authorized to reduce such term of imprisonment by an amount not to exceed 40 per centum of the amount so provided for such offense under subsection (c) of this section.

"(f) If the judge determines, on the basis of such hearing, that there exist extraordinary aggravating circumstances, the judge shall, subject to the provisions of subsection (n) of this section, sentence such defendant to a term of imprisonment equal to that provided for such offense under subsection (c), and in addition thereto, may increase such sentence by an amount not to exceed the maximum provided for such offense under subsection (h) of this section, and in addition thereto, may fine such defendant in an amount not to exceed twice the amount provided for such offense under subsection (c).

"(g) If the judge determines, on the basis of such hearing, that there exist extraordinary mitigating circumstances, the judge shall, subject to the provisions of subsection (n) of this section, sentence such defendant to a term of imprisonment equal to that provided for such offense under subsection (c), including suspension in whole or in part, unless the judge determines to impose a lesser sentence, in which case he is authorized to impose any sentence of imprisonment up to the amount provided for such offense under subsection (c), and in addition thereto, may fine such de-

fendant in an amount not to exceed the amount provided for under subsection (c) for such offense.

"(h) In any case in which a defendant is sentenced pursuant to this chapter to a term below that provided for the offense under subsection (e), the United States shall have the right, and in any case in which a defendant is sentenced pursuant to this chapter to a term above that provided for the offense under subsection (d), such defendant shall have the right, within sixty days following any such sentence, to appeal to an appropriate United States court of appeals for a review of such sentence solely for the purpose of determining if it is, and was imposed, in accordance with law. The court of appeals shall have jurisdiction to receive, consider, and act upon such appeal. The court shall have jurisdiction to affirm such sentence or to remand the case back to the trying court for correction by such court in accordance with the direction of the appellate court.

"(i) Except with respect to a sentence imposed pursuant to subsection (g) of this section, no judge of a United States court shall have jurisdiction to suspend any sentence imposed pursuant to this chapter and place on probation any such defendant so sentenced.

"(j) In any case involving a defendant sentenced pursuant to subsection (f) to a term in excess of that provided for under subsection (c) (by reason of an extraordinary

aggravating circumstance), or involving a defendant sentenced pursuant to subsection (g), to a term less than that provided for under subsection (c) (by reason of an extraordinary mitigating circumstances), the judge shall include, as a part of his decision, a detailed account as to his reason or reasons for so imposing such sentence.

"(k) The maximum sentence which may be imposed for an offense pursuant to subsection (f) shall be as follows:

"(1) In the case of the offense of murder in the second degree committed by a defendant under section 351(a), 1111, 1114, 1116, or 1751(a) of this title, or section 16 of the Act of August 24, 1966, as amended (7 U.S.C. 2146(b)), section 12(c) of the Act of August 28, 1957, as amended (21 U.S.C. 461), section 405 of the Act of March 4, 1907, as amended (21 U.S.C. 675), or section 12(c) of the Act of December 29, 1970 (21 U.S.C. 1041), the maximum term to which such defendant may be sentenced shall be imprisonment for life.

"(2) In the case of the offense of voluntary manslaughter committed by a defendant under section 351(a), 1112, 1114, 1116, or 1751(a) of this title, or section 16 of the Act of August 24, 1966, as amended (7 U.S.C. 2146(b)), section 12(c) of the Act of August 28, 1957, as amended (21 U.S.C. 461), sec-

tion 405 of the Act of March 4, 1907, as amended (21 U.S.C. 675), or section 12(c) of the Act of December 29, 1970 (21 U.S.C. 1041), the maximum term to which such defendant may be sentenced shall be ten years.

"(3) In the case of the offense of involuntary manslaughter committed by a defendant under section 351(a), 1112, 1114, 1116, or 1751(a) of this title, or section 16 of the Act of August 24, 1966, as amended (7 U.S.C. 2146(b)), section 12(c) of the Act of August 28, 1957, as amended (21 U.S.C. 461), section 405 of the Act of March 4, 1907, as amended (21 U.S.C. 675), or section 12(c) of the Act of December 29, 1970 (21 U.S.C. 1041), the maximum term to which such defendant may be sentenced shall be three years.

"(4)(A) In the case of the offense of an attempt to commit murder (other than an offense covered by section 113 of this title) committed by a defendant under section 1113, the maximum term to which such defendant may be sentenced shall be four years.

"(B) In the case of the offense of an attempt to commit manslaughter (other than an offense covered by section 113 of this title) committed by a defendant

under section 113, the maximum term to which such defendant may be sentenced shall be three years.

"(5) (A) In the case of an offense of assault committed by a defendant under section 111, the maximum term to which such defendant may be sentenced shall be three years, except that, if such defendant, in the commission of such assault, used a deadly or dangerous weapon, the maximum term for which such defendant may be sentenced shall be ten years.

"(B) In the case of an offense committed by a defendant under section 112(a), the maximum term to which such defendant may be sentenced shall be three years, except that, if such defendant, in the commission of such offense, used a deadly or dangerous weapon, the maximum term to which such defendant may be sentenced shall be ten years.

"(6) (A) (i) In the case of the offense of assault with the intent to commit murder committed by a defendant under section 113, the maximum term to which such defendant may be sentenced shall be twenty years.

"(ii) In the case of the offense of assault with the intent to commit rape committed by a defendant under section 113(a), the maximum term to which such defendant may be sentenced shall be twenty years.

"(B) In the case of the offense of assault with intent to commit any felony (other than murder or rape) committed by a defendant under section 113(b), the maximum term to which such defendant may be sentenced shall be ten years.

"(C) In the case of the offense of assault with a dangerous weapon, with intent to do bodily harm and without just cause or excuse, committed by a defendant under section 113(c), the maximum term to which such defendant may be sentenced shall be five years.

"(D) In the case of the offense of assault committed by a defendant under section 113(d), the maximum term to which such defendant may be sentenced shall be three months.

"(E) In the case of the offense of simple assault committed by a defendant under section 113(e), the maximum term to which such defendant may be sentenced shall be two months.

"(7) In the case of the offense of conspiracy to murder committed by a defendant under section 1117, the maximum term to which such defendant may be sentenced shall be life imprisonment.

"(8) In the case of an offense committed by a defendant under section 114, the maximum term to

which such defendant may be sentenced shall be seven years.

"(9) In the case of an offense committed by a defendant under section 2111, the maximum term to which such defendant may be sentenced shall be fifteen years.

"(10) In the case of an offense committed by a defendant under section 2112, the maximum term to which such defendant may be sentenced shall be fifteen years.

"(11) (A) In the case of an offense committed by a defendant under the first paragraph of section 2113 (a), the maximum term to which such defendant may be sentenced shall be twenty years.

"(B) In the case of an offense committed by a defendant under section 2113 (d), the maximum term to which such defendant may be sentenced shall be twenty-five years.

"(C) (i) In the case of an offense committed by a defendant under section 2113 (e) involving the killing of any person referred to therein, the maximum term to which such defendant may be sentenced shall be death.

"(ii) In the case of an offense committed by a defendant under section 2113 (e) involving the forcing

of any person to accompany such defendant without the consent of such person, the maximum term to which such defendant may be imprisoned shall be imprisonment for life or death.

"(12) (A) In the case of an offense committed by a defendant under section 2114 involving an assault with intent to rob, steal, or purloin, the maximum term to which such defendant may be sentenced shall be ten years, except that, if such defendant, in attempting to effect such robbery, stealing, or purloining, wounds the person having custody of such mail, money, or property referred to therein, or puts such person's life in jeopardy by the use of a dangerous weapon, the maximum term for such defendant may be twenty-five years.

"(B) In the case of the offense of robbery committed by a defendant under section 2114, the maximum term to which such defendant may be sentenced shall be ten years, except that, if such defendant in effecting such robbery wounds the person having custody of such mail, money, or property referred to therein, or puts such person's life in jeopardy by the use of a dangerous weapon, the maximum term for such defendant may be twenty-five years.

"(13) (A) In the case of an offense committed by a defendant under section 2115 involving an attempt, the

maximum term to which such defendant may be sentenced shall be three years.

"(B) In the case of an offense committed by a defendant under section 2115 involving a forcible breaking, the maximum term to which such defendant may be sentenced shall be five years.

"(14) (A) In the case of the offense of violent entry committed by a defendant under section 2116, the maximum term to which such defendant may be sentenced shall be two years.

"(B) In the case of an offense committed by a defendant involving a willful or malicious assault under section 2116, the maximum term to which such defendant may be sentenced shall be three years.

"(C) In the case of an offense committed by a defendant involving an interference under section 2116, the maximum term to which such defendant may be sentenced shall be two years.

"(15) (A) In the case of an offense of breaking a seal or a lock under section 2117 committed by a defendant, the maximum term to which such defendant may be sentenced shall be five years.

"(B) In the case of an offense of entering under section 2117 committed by a defendant, the maximum

term to which such defendant may be sentenced shall be ten years.

"(16) (A) In the case of the offense of kidnaping committed by a defendant under section 1751 (b), the maximum term to which such defendant may be sentenced shall be life imprisonment, except that, if death results to any individual so kidnaped, the maximum term for such defendant shall be death.

"(B) (i) In the case of the offense of attempting to kill committed by a defendant under section 1751 (c), the maximum term to which such defendant may be sentenced shall be life imprisonment.

"(ii) In the case of the offense of attempting to kidnap committed by a defendant under section 1751 (c), the maximum term to which such defendant may be sentenced shall be life imprisonment.

"(C) (i) In the case of an offense of conspiracy to kill committed by a defendant under section 1751 (d), the maximum term to which such defendant may be sentenced shall be life imprisonment, except that, if death results to the individual who was the object of such conspiracy, the maximum term for such defendant shall be death.

"(ii) In any case of the offense of conspiracy to kidnap committed by a defendant under section 1751

(d), the maximum term to which such defendant may be sentenced shall be life imprisonment, except that, if death results to the individual who was the object of such conspiracy, such maximum term for such defendant shall be death.

"(D) In the case of an offense committed by a defendant under section 1751(e), the maximum term to which such defendant may be sentenced shall be ten years.

"(17) (A) In the case of the offense of kidnaping committed by a defendant under section 351(b), the maximum term to which such defendant may be sentenced shall be life imprisonment, except that, if death results to any individual so kidnaped, the maximum term for such defendant shall be death.

"(B) (i) In the case of the offense of attempting to kill committed by a defendant under section 351(c), the maximum term to which such defendant may be sentenced shall be life imprisonment.

"(ii) In the case of the offense of attempting to kidnap committed by a defendant under section 351(c), the maximum term to which such defendant may be sentenced shall be life imprisonment.

"(C) (i) In the case of an offense of conspirary to kidnap committed by a defendant under section 351(d),

maximum term to which such defendant may be sentenced shall be life imprisonment, except that, if death results to the individual who was the object of such conspiracy, such maximum term for such defendant shall be death.

"(ii) In the case of the offense of conspiracy to kidnap committed by a defendant under section 351(d), the maximum term to which such defendant may be sentenced shall be life imprisonment, except that, if death results to the individual who was the object of such conspiracy, such maximum term for such defendant shall be death.

"(D) In the case of the offense of assault committed by a defendant under section 351(e), the maximum term to which such defendant may be sentenced shall be one year, except that, if personal injury results, such maximum term for such defendant may be ten years.

"(18)(A) In the case of the offense of kidnaping committed by a defendant under section 1201(a), the maximum term to which such defendant may be sentenced shall be life imprisonment.

"(B) In the case of the offense of conspiracy committed by a defendant under section 1201(c), the maximum term to which such defendant may be sentenced shall be life imprisonment.

"(19) In the case of an offense committed by a defendant under section 13 constituting the crime of burglary as set forth therein, the maximum term to which such defendant may be sentenced shall be six years.

"(20) In the case of an offense committed by a defendant under section 2031, the maximum term to which such defendant may be sentenced shall be life imprisonment or death.

"(21) In the case of an offense committed by a defendant under section 2032, the maximum term to which such defendant may be sentenced shall be fifteen years.

"(l) For purposes of this chapter, the mitigating factors to be considered in any such special sentencing hearing held for the purpose of determining the sentence to be imposed on any defendant within the purview of this chapter are as follows:

"(1) The defendant played a minor role in the offense for which such defendant is subject to sentencing.

"(2) The defendant committed the offense under some degree of duress, coercion, threat, or compulsion, insufficient to constitute a complete defense but which significantly affected the conduct of the defendant.

"(3) The defendant exercised extreme caution in carrying out the offense.

"(4) The victim or victims provoked the offense to a significant degree by their conduct.

"(5) The defendant believed he had a claim or a right to the property involved in such offense.

"(6) The defendant was motivated by a desire to provide necessities for his family or himself.

"(7) The defendant was suffering from a mental or physical condition that significantly reduced such defendant's culpability for the offense.

"(8) The defendant, because of his youth or old age, lacked substantial judgment in committing the offense.

"(9) The amounts of money or property taken were deliberately very small and no harm was done or gratuitously threatened against the victim or victims.

"(10) The defendant, though technically guilty of the offense, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to commit such offense motivated the defendant's conduct.

"(m) For the purposes of this chapter, the aggravating factors to be considered in any such special sentencing hearing held for the purpose of determining the sentence to

be imposed on any such defendant within the purview of this chapter are as follows:

"(1) The defendant was the leader of the criminal enterprise.

"(2) The offense involved several perpetrators.

"(3) The offense involved several victims.

"(4) The victim or victims were particularly vulnerable.

"(5) The victim or victims were treated with particular cruelty during the perpetration of the offense.

"(6) The degree of physical harm inflicted on the victim or victims was particularly great.

"(7) The amounts of money or property taken were considerable.

"(8) The defendant, though able to make restitution, has refused to do so.

"(9) The defendant had no pressing need for the money or property taken, but was motivated by thrills or by the desire for luxuries.

"(10) The defendant has threatened witnesses, or has a history of violence against witnesses.

"(n) In sentencing any defendant pursuant to subsection (c), (d), (e), or (g), the judge shall, if such defendant has one prior conviction for a felony in a court of the United States, the District of Columbia, the Common-

wealth of Puerto Rico, a territory or possession of the United States, any State, or any political subdivision thereof, committed on an occasion different from the offense for which such defendant is to be so sentenced, increase the amount of such sentence otherwise authorized by such subsection by an amount not to exceed 50 per centum thereof. In any case in which any such defendant has two such prior convictions, the judge shall increase such sentence by an amount not to exceed 100 per centum thereof. If such defendant has three or more such prior convictions, the judge shall increase such sentence by an amount not to exceed 200 per centum thereof, except that no sentence may be higher than that provided for in subsection (k). A conviction shown on direct or collateral review or at the sentencing hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of this subsection. Any increase in a sentence authorized by this subsection shall be in addition to any maximum sentence imposed pursuant to subsection (f).

"§ 3582. **Separate hearing**

"(a) With respect to any sentencing hearing held under this chapter, the court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the

defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or any part of a presentence report shall inform the parties of its actions and place in the record the reasons therefor. The court may require parties inspecting all or any part of a presentence report to give notice on any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing.

"(b) Any information relevant to any of the mitigating factors set forth in section 3581(l) may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials. Any information relevant to any of the aggravating factors set forth in section 3581(m) may be presented by either the Government or the defendant, if admissible under the rules governing the admission of evidence at criminal trials.

"(c) The Government and the defendant shall be given fair opportunity to rebut any information received at the hearing, and to present arguments as to the adequacy of the information to establish the existence of the factors set forth in subsections (l) and (m) of section 3581, or any prior convictions of such defendant.

"(d) The burden of establishing the existence of any of the mitigating factors set forth in section 3581(l) is on the defendant, and is not satisfied unless established by a preponderance of the evidence. The burden of establishing the existence of any of the aggravating factors set forth in section 3581(m) is on the Government, and is not satisfied unless established beyond a reasonable doubt.

"(e) A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. The burden of establishing the existence of prior convictions is on the Government, and is not satisfied unless established by a preponderance of the information, including information submitted during the trial of such conviction, the sentencing hearing, and the presentence report.

"(f) The imposition or execution of any sentence pursuant to this chapter or section 1111(a) of this title, other than a sentence imposed pursuant to subsection (g) of section 3581, shall not be suspended, probation shall not be

granted, and chapters 311 and 402 of this title shall not be applicable with respect to such sentence.

"(g) Notwithstanding the provisions of section 4161 of this title, each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life pursuant to a sentence imposed under this chapter, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

"Seven days for each month, if the sentence is not less than six months and not more than one year.

"Eight days for each month, if the sentence is more than one year and less than three years.

"Nine days for each month, if the sentence is not less than three years and less than five years.

"Ten days for each month, if the sentence is not less than five years and less than ten years.

"Twelve days for each month, if the sentence is ten years or more.

"When two or more such consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed.".

95TH CONGRESS
1ST SESSION

S. 1221

IN THE SENATE OF THE UNITED STATES

APRIL 4 (legislative day, FEBRUARY 21), 1977

Mr. SCOTT introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend chapter 44 of title 18 of the United States Code (respecting firearms) to penalize the use of firearms in the commission of any felony and to increase the penalties in certain related existing provisions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 924 (c) of title 18 of the United States Code is amended to read as follows:

"(c) Whoever—

"(1) uses any firearm to commit a felony with respect to which the district courts of the United States have original and exclusive jurisdiction under section 3231 of this title, or

"(2) uses any firearm transported in interstate or foreign commerce or affecting such commerce to commit any crime punishable by imprisonment for a term exceeding one year, and is convicted of such crime in a court of any State,

shall, in addition to the punishment provided for the commission of such felony or crime, be sentenced to a term of imprisonment for not less than one year, nor more than three years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for any term of years not less than five, nor more than ten years. Notwithstanding any other provision of law, the court shall not suspend the sentence in the case of any person convicted under this subsection, or give him a probationary sentence, nor shall the term of imprisonment run concurrently with any term of imprisonment imposed for the commission of such felony or crime.".

○