U.S. Department of Justice
Office of Justice Programs
Office for Victims of Crime

Victims of Crime

PROPOSED MODEL LEGISLATION

In Cooperation with:

The National Association of Attorneys General,
Crime Victims Project

and

The American Bar Association,
Criminal Justice Section,
Victim Witness Project

DISCLAIMER

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U.S. Department of Justice

Office of Justice Programs

Office of the Assistant Attorney General *Washington, D.C. 20531*

"That night I changed from a law-abiding citizen, with a childlike belief in the justice system, to someone awakened to the reality of crime, criminal rights and injustice for the victim."

These words of an innocent victim of crime manifest a serious crisis in the American criminal justice system. The United States is a nation of laws. If laws are to be obeyed, they must be respected; to be respected, they must be just. A system that fails to be equitable cannot survive. Our system was designed to be the fairest in history but in recent years, it has lost the balance that has been the cornerstone of its wisdom.

In the wake of a violent crime, a person naturally turns to the justice system for help. Too often he has instead been met by further harm. Frightened by the potential for future attacks, many victims have not felt adequately protected. Confused by a complex system, often they have neither been informed nor consulted about their case. Anxious to put their lives back to some semblance of what they were before the crime occurred, victims frequently have been made to endure endless questioning, intimidation and harassment. If they have survived the ordeal to see the offender convicted and sentenced, victims have often been shocked to learn by accident that the criminal has been released without having served his full sentence.

By the end of this process, the victims have felt more despair than justice. Many vow never to cooperate again, and they tell their friends and families to stay away from the courts. More than half of all violent crime victims never report the offense to law enforcement. The system is absolutely dependent upon the victims' cooperation to hold criminals accountable, thereby preventing future crimes as well. In return for their great sacrifice, the victims of crime deserved to be treated with dignity and compassion.

With this understanding, the President's Task Force on Victims of Crime made 68 recommendations to improve the treatment of victims. Some proposals require only common sense and courtesy. Others require changes in the law. The desire to enact these changes is growing in the states, and the need for careful analyses of the related legal and public policy issues is needed. The model statutes which follow were written to provide that assistance. In general they meet three basic needs of innocent citizens stricken by crime: to be consulted, to be respected, and to be protected. If enacted, these laws specifically would:

--maintain the confidentiality of a victim's discussions in counseling
--require that the effect of the crime on the victim be considered at the defendant's sentencing
--open parole hearings
--permit hearsay at preliminary hearings
--limit the disclosure of victim addresses and phone numbers
--extend the statute of limitations for offenses against children

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I. PRIVILEGED VICTIM/COUNSELOR COMMUNICATIONS

PRIVILEGED VICTIM/COUNSELOR COMMUNICATIONS

President's Task Force Recommendation

Legislation should be proposed and enacted to ensure that designated victim counseling is legally privileged and not subject to defense discovery or subpoena.

Proposed Legislation*

SECTION 101. FINDINGS AND PURPOSE

A. The legislature and people of this State find and declare that:

1. The emotional and psychological injuries that are inflicted on victims of family violence and sexual assault are often more serious than the physical injuries suffered;

2. Counseling is often a successful treatment to ease the real and profound psychological trauma experienced by these victims and their families;

3. In the counseling process, victims of family violence and sexual assault openly discuss their emotional reactions to the crime. These reactions are often highly intertwined with their personal histories and psychological profile;

4. Counseling of family violence and sexual assault victims is most successful when the victims are assured their thoughts and feelings will remain confidential and will not be disclosed without their permission; and

5. Confidentiality should be accorded all victims of family violence and sexual assault who require counseling whether or not they are able to afford the services of private psychiatrists or psychologists.

B. Therefore, the legislature and people of this State declare the purpose of this Act is to extend to all victims of family violence and sexual assault a testimonial privilege encompassing the contents of communications with a victim counselor and to render immune from discovery or legal process the records of such communications maintained by the counselor.

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*Drafted with the assistance of the American Bar Association Criminal Justice Section Victim Witness Project.

SECTION 104. SCOPE AND APPLICATION

[This Act shall not be construed to relieve victim counselors of any duty to report suspected child abuse or neglect required under ____ or any evidence that the victim is about to commit a crime.]

SECTION 105. NO COMPULSORY DISCLOSURE OF COMMUNICATIONS

A. A victim, a victim counselor without the consent of the victim, or a minor or incapacitated victim without the consent of a custodial guardian or a guardian ad litem appointed upon application of either party cannot be compelled to give testimony or to produce records concerning confidential communications for any purpose in any criminal action, suit, or other judicial, legislative, or administrative proceeding.

B. A victim counselor or a victim cannot be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location, or telephone number of a safe house, abuse shelter, or other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding.

SECTION 106. WAIVER

A. A victim does not waive the protections afforded by this Act by testifying in court about the crime.

1. However, if the victim partially discloses the contents of a confidential communication in the course of testifying, then either party may request the court to rule that justice requires the protections of this Act be waived, to the extent they apply to that portion of the communication.

2. Any waiver shall apply only to the extent necessary to require any witness to respond to counsel's questions concerning the confidential communication that are relevant to the facts and circumstances of the case.

B. A victim counselor cannot waive the protections afforded to a victim under this Act. However, if a victim brings suit against a victim counselor or the agency, business, or organization in which the victim counselor was employed or served as a volunteer at the time of the counseling relationship and the suit alleges malpractice during the counseling relationship, the victim counselor may testify or produce records regarding confidential communications with the victim and is not liable for doing so.

Commentary

The December 1982 Final Report of the President's Task Force on Victims of Crime recommended that legislation be enacted making designated victim counseling legally privileged and not subject to defense discovery or subpoena.

This legislation seeks to address this goal by creating a testimonial privilege for certain confidential communications between victims of sexual assault or family violence and their counselors. The privilege prevents either party in a criminal or civil case from compelling disclosure of the communications without the victim's consent.

Institutionalization of crime victim counseling resulted from the 1960's and 1970's efforts of the women's movement to ameliorate social and psychological injuries of rape victims. By the end of the 1970's the success of such efforts had spread to the family violence arena, which began offering similar counseling for victims of that crime. Today hundreds of programs around the country offer counseling to victims of sexual assault and family violence.

Unfortunately, however, counseling may not benefit victims and, in fact, may add to their trauma if the confidential communications exchanged between victims and counselors during treatment are able to be utilized as evidence in criminal proceedings. As pointed out by the President's Task Force on Victims of Crime, victims often speak to their counselors about their fears and feelings arising from the crime. Such reactions may be related to their personal histories and psychological make-up. Victims who are under the impression that they are revealing such information solely for therapeutic purposes are often dismayed and feel betrayed when their counselors are compelled to disclose their communications before the public at an open trial. Victims who realize in advance that their communications may be subject to disclosure may avoid counseling altogether.

To further the truth-finding process, the general rule in American jurisprudence is that anyone called upon by either party in a case must testify as to any knowledge which may bear on the case. United States v. Nixon, 418 U.S. 683 (1974); United States v. Dionisio, 410 U.S. 1 (1973); Branzburg v. Hayes, 408 U.S. 665 (1972). However, there are certain narrowly defined exceptions or "privileges" which exempt some information from this general rule. These include, for example, communications between attorneys and their clients, physicians and their patients, and priests and penitents.

John H. Wigmore, noted evidence scholar, has identified four elements necessary for establishing a privilege. These are: (1) the communications must originate in confidence; (2) confidentiality must be essential to the proper maintenance of the relationship; (3) the relationship must be one society deems worthy of protecting; and (4) disclosure must injure the relationship more than it benefits the litigation. To determine the appropriateness of extending the testimonial privilege to the counselor-victim relationship, the relationship might therefore be examined in the light of these elements. See 8 Wigmore, Evidence section 2285 et. seq. (McNaughton Rev. 1961), and authorities cited therein.

investigations to legal issues, the legislature is able to consider additional factors. Moreover, a legislative privilege removes the uncertainty surrounding a judge-made privilege. One court's extension of legal principles to a particular fact situation may not be found persuasive by other courts in different or even similar circumstances.

SECTION 101. FINDINGS AND PURPOSE

A. The legislature and people of this State find and declare that:

1. The emotional and psychological injuries that are inflicted on victims of family violence and sexual assault are often more serious than the physical injuries suffered;

2. Counseling is often a successful treatment to ease the real and profound psychological trauma experienced by these victims and their families;

3. In the counseling process, victims of family violence and sexual assault openly discuss their emotional reactions to the crime. These reactions are often highly intertwined with their personal histories and psychological profile;

4. Counseling of family violence and sexual assault victims is most successful when the victims are assured their thoughts and feelings will remain confidential and will not be disclosed without their permission; and

5. Confidentiality should be accorded all victims of family violence and sexual assault who require counseling whether or not they are able to afford the services of private psychiatrists or psychologists.

B. Therefore, the legislature and people of this State declare the purpose of this Act is to extend to all victims of family violence and sexual assault a testimonial privilege encompassing the contents of communications with a victim counselor and to render immune from discovery or legal process the records of such communications maintained by the counselor.

This section provides guidance to courts which may have occasion to interpret the legislature's intent in enacting this legislation.

Sexual assault and family violence can have a devastating impact on victims, inflicting both physical injuries and psychological trauma. Many victims of these crimes experience a series of symptoms known as "post-traumatic stress." Counseling is a very effective treatment for these symptoms and their underlying causes. However, for counseling to be truly effective, victims need assurance that their discussions with their counselors will remain confidential unless they authorize disclosure. Confidentiality provides a foundation for trust, thus encouraging open, uninhibited discussions. There may also be a therapeutic value to empowering victims to decide whether or not what

E. Victim Counseling:
Assessment, diagnosis, and treatment to alleviate the adverse emotional or psychological impact of a sexual assault or family violence on the victim. Victim counseling includes, but is not limited to, crisis intervention.

F. Victim Counseling Center:
A private organization or unit of a government agency which has as one of its primary purposes the treatment of victims for any emotional or psychological condition resulting from a sexual assault or family violence.

G. Victim Counselor:
[Any employee or supervised volunteer of a victim counseling center or other agency, business, or organization that provides counseling to victims who is not affiliated with a law enforcement agency or a prosecutor's office and who has successfully completed ____ hours of academic or other formal training or has had a minimum of _____ years of experience in providing victim counseling, and whose duties include treating victims for any emotional or psychological condition resulting from a sexual assault or family violence.]

or

[Any person not affiliated with a law enforcement agency or a prosecutor's office who meets such standards as may be set by the State for victim counselors.]

Confidential Communication

This definition recognizes as privileged any communications between a victim and a victim counselor made in confidence in the course of a counseling relationship for counseling purposes. The definition sets forth six objective elements necessary for the privilege: (1) an exchange of information, (2) between a victim (3) and a counselor (4) not affiliated with a law enforcement agency, (5) in private or in the presence of a third party who is present to facilitate communication or to further the counseling process, and (6) in the course of counseling the victim. The elements pertaining to the victim and victim counselor are discussed under the separate definitions of those terms.

A communication is any transmission or conveyance of information. See In re Walsh, 623 F.2d 489 (7th Cir.), cert. denied 449 U.S. 994 (1980), Gulf Oil Corp. v. Harris, 425 P.2d 957 (Okl. 1967). Information can be conveyed by any manner of medium, including speech, writing, and physical gesture. In a counseling setting, body language and other non-spoken forms of expression are frequently relied on by counselors for insight into a victim's true feelings.

The broad definition of communication does not, however, protect all facts about the victim nor all communications between the victim and the counselor. As is the rule with other privileges, "independently observable" facts of which non-privileged persons are aware or can easily become aware are not protected. These are objective manifestations never intended to be conveyed exclusively to the counselor nor intended to form the basis for treatment. For example, the fact that the victim's arm is in a cast and sling is an independently observable fact, presumably known to persons other than the counselor. The legislation does not exempt counselor testimony about such facts.

Victim Counseling

The emotional reaction of a victim to crime has been described as a normal response to an abnormal situation. Victim counseling is the process whereby the adverse effects of that normal response on the victim's future life are identified and treatment to ameliorate them is provided.

Victim Counseling Center

A victim counseling center is an organization or unit of a larger institution which in whole or in part provides psychological counseling for victims. Rape crisis centers, victim service centers, or rape trauma teams in large, urban hospitals are among the types of organizations intended to be covered by the definition.

Victim Counselor

Traditionally, individuals with whom communications are privileged (e.g., attorneys, psychiatrists, physicians, priests) have been easily identified in terms of their academic or professional qualifications. To date, there are no comparable widely recognized objective standards by which to identify individuals as victim counselors. Persons who counsel victims range from trained psychiatrists, psychologists, and social workers to "peer" counselors (victims who--at least initially--rely primarily upon their personal experience with victimization in counseling other victims). Some jurisdictions which have adopted a sexual assault counselor privilege and/or a domestic violence counselor privilege do specify certain qualifications, primarily consisting of hours of training in certain areas (California, Connecticut, Illinois, Iowa, Massachusetts, Minnesota, New Hampshire, New Jersey, Pennsylvania, Utah, and Wyoming).

It is not the function of this proposed legislation to identify specific qualifications appropriate to designate individuals as qualified victim counselors. Nevertheless, it is necessary that those individuals to whom the counselor-victim privilege applies be identified either statutorily or administratively; otherwise, any relative, friend, or even stranger who seeks to advise the victim may later attempt to assert the privilege on behalf of the victim. Obviously, this would defeat the purpose of the legislation, which is to protect (designated) victim counseling by qualified counselors.

The proposed legislation distinguishes between victim counselors who are affiliated with victim counseling organizations and those not affiliated with such organizations. Depending on the circumstances in their own states with respect to the need for counselors, the availability of various types of counselors, and the availability of counseling centers, legislators may wish to include one or both of these. (Enactment of any provision for state agency action may also require amendment of other legislation pertaining to the duties and responsibilities of that agency.) Whether one or both provisions are enacted, the legislation will require persons who hold themselves out as counselors under the act to have taken the necessary affirmative action to be designated victim counselors prior to establishing counseling relationships for which the privilege is claimed.

obtain advice in furtherance of a future intended crime or fraud (See McCormick on Evidence, section 95). This of course would also be true in the victim-counselor situation should victims seek such advice from their counselors.

SECTION 105. NO COMPULSORY DISCLOSURE OF COMMUNICATIONS

A. **A victim, a victim counselor without the consent of the victim, or a minor or incapacitated victim without the consent of a custodial guardian or a guardian ad litem appointed upon application of either party cannot be compelled to give testimony or to produce records concerning confidential communications for any purpose in any criminal action, suit, or other judicial, legislative, or administrative proceeding.**

B. **A victim counselor or a victim cannot be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location, or telephone number of a safe house, abuse shelter, or other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding.**

This section establishes two actual privileges--one to protect confidential communications between the victim and the victim counselor; the other to protect identifying information about victim counseling centers. The subsection (A) privilege attaches solely to the victim, and may be invoked or waived solely by the victim. See In re Grand Jury Proceedings, Detroit, Michigan, August 1977, 434 F. Supp. 648 (E.D. Mich. 1977 aff'd per curium 570 F.2d 562 (6th Cir. 1978)). In the case of a minor victim, the privilege may be invoked by a person in a responsible adult position. Where there is no clearly established responsible adult custodian, either party may request the court to appoint a guardian ad litem to protect the victim's interests. The privilege applies in both civil and criminal proceedings.

To invoke the privilege, a victim must affirmatively assert it and establish a proper foundation for it. See In re Walsh, supra., p. 6, and United States v. Gurtner, 474 F.2d 297 (9th Cir. 1973) holding that failure to raise a timely assertion of a privilege constitutes a waiver of the privilege. As with other privileges, this may be done through a simple voir dire of the victim.

Subsection (B) defines the limited extent to which the legislation creates a privilege for victim counselors. It permits victim counselors to keep confidential the location of safehouses or shelters for victims or information which may be used to discern their location. Generally, these are battered wife or incest shelters intended to be inaccessible to the perpetrator. This privilege can be likened to a privilege which protects trade secrets or matters of national security. It is disclosure of the information itself—rather than of a communication—which may not be compelled. Information about the location of shelters in most instances is of little value to a criminal prosecution, so allowing counselors to refuse to disclose it will not seriously injure most criminal litigation. However, where the information is made a material fact of litigation, its disclosure may be compelled.

the facts, are protected. See also 8 Wigmore, Evidence section 2327 (McNaughton Rev. 1961). However, if the victim provides partial information about a confidential communication, he may be required to provide additional information discussed in the communication. For example, on the one hand, were a victim questioned as to whether or not the assailant used a gun during the commission of the crime, the victim could not claim the privilege even if the fact of a weapon was discussed in a counseling relationship, since the question relates specifically to the facts and circumstances of the crime. Thus by answering the question, the victim does not imply a waiver concerning discussions with the counselor about the presence or absence of a gun. On the other hand, if the victim were asked if he told his counselor the assailant had a gun, the privilege could be claimed since the question relates to the broader issue of the counselor-victim relationship. Thus, if the victim fails to claim the privilege and instead answers the question, the court, upon application of either party, must decide whether or not justice requires the privilege be considered waived in whole or in part. If waiver is found to be total, the court may require the victim or the victim counselor to respond to all questions about the facts and circumstances of the case discussed during the counseling relationship; if partial, it may require response only to facts and circumstances relating to specific facts (e.g., to the absence or presence of a gun). In no event, however, may the court require disclosure of information not directly related to the facts and circumstances of the crime.

By precluding the victim counselor from waiving the privilege, subsection (B) makes clear that the privilege belongs to the victim and not to the counselor. Nevertheless, if the victim initiates a civil action against the counselor or the counselor's employer, the counselor may for defense purposes disclose information which he or she would otherwise not be free to disclose.

Subsection (C) provides that the counselor-victim privilege should not be construed as limiting any other privilege which may be available to the victim (e.g., attorney-client, physician-patient, priest-penitent).

II. VICTIM IMPACT STATEMENTS

VICTIM IMPACT STATEMENTS

President's Task Force Recommendation

Legislation should be proposed and enacted to require victim impact statements at sentencing.

Proposed Legislation*

SECTION 101. FINDINGS AND PURPOSE

A. The legislature and the people of this State find and declare that:

1. Protection of the public, restitution to the crime victim and the crime victim's family, and just punishment for the harm inflicted are primary objectives of the sentencing process;

2. The financial, emotional, and physical effects of a criminal act on the victim and the victim's family are among the essential factors to be considered in the sentencing of the person responsible for the crime;

3. In order to impose a just sentence, the court must obtain and consider information about the adverse impact of the crime upon the victim and the victim's family as well as information from and about the defendant; and

4. The victim of the crime or a relative of the victim is usually in the best position to provide information to the court about the direct impact of the crime on the victim and the victim's family.

B. Therefore, the legislature and the people of this State declare that the purpose of this Act is to require the sentencing court to solicit and consider a victim impact statement prior to sentencing a convicted offender who has caused physical, emotional, or financial harm to a victim as defined herein.

SECTION 102. SHORT TITLE

This Act shall be known and may be cited as "The Victim Impact Statement Act."

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*Drafted with the assistance of the American Bar Association Criminal Justice Section Victim Witness Project.

B. Prior to imposition of sentence in both felony and misdemeanor cases, the victim or victim representative may also submit a victim impact statement in one or both of the following ways:

1. By presenting an oral victim impact statement at the sentencing hearing. However, where there are multiple victims, the court may limit the number of oral victim impact statements.

2. By submitting a written statement to the probation department, which shall append such statement to the presentence report of the defendant.

SECTION 106. ACCESS TO WRITTEN VICTIM IMPACT STATEMENTS

The court shall make available copies of the statement to the defendant, defendant's counsel, and the prosecuting attorney. These parties shall return all copies of the statement to the court immediately following the imposition of sentence upon the defendant.

SECTION 107. CONSIDERATION OF THE VICTIM IMPACT STATEMENT

Any victim impact statement submitted to the court under section 105 shall be among the factors considered by the court in determining the sentence to be imposed upon the defendant.

SECTION 108. LIMITATION

This statute shall not be construed to require a victim or victim representative to submit a victim impact statement or to cooperate in the preparation of a victim impact statement.

defendant, there is logic in at least allowing the sentencing court to consider "collateral" adverse consequences which flowed from the crime--particularly if they could or should have been foreseen. No matter how persuasive, such information will not result in a sentence outside the range legislatively or otherwise authorized for the crime. Moreover, consideration of the impact on the victim need not result in harsher punishment. In certain instances, however, it may result in a more appropriate sentence—e.g., restitution to the victim or the victim's family instead of incarceration.

SECTION 101. FINDINGS AND PURPOSE

A. The legislature and the people of this State find and declare that:

1. Protection of the public, restitution to the crime victim and the crime victim's family, and just punishment for the harm inflicted are primary objectives of the sentencing process;

2. The financial, emotional, and physical effects of a criminal act on the victim and the victim's family are among the essential factors to be considered in the sentencing of the person responsible for the crime;

3. In order to impose a just sentence, the court must obtain and consider information about the adverse impact of the crime upon the victim and the victim's family as well as information from and about the defendant; and

4. The victim of the crime or a relative of the victim is usually in the best position to provide information to the court about the direct impact of the crime on the victim and the victim's family.

B. Therefore, the legislature and the people of this State declare that the purpose of this Act is to require the sentencing court to solicit and consider a victim impact statement prior to sentencing a convicted offender who has caused physical, emotional, or financial harm to a victim as defined herein.

In establishing the rationale for the legislation, this section declares three primary objectives of the sentencing process which require the court to have information about the impact of the convicted defendant's conduct on the victim, the victim's family, and potential victims in the community at large. Nothing in the declaration precludes sentencing courts from setting additional objectives—for example, to address defendants' needs; however, such additional objectives may not displace the objectives of the statute, nor relegate them to less than primary status.

The section recognizes that existing criminal justice procedures intended to establish the guilt or innocence of a defendant may not elicit information about the crime's impact. The overwhelming majority of cases are plea bargained. In such cases, victims are sometimes not interviewed by the prosecutor, rarely allowed to participate in the negotiations, and virtually never given the opportunity to speak to the court. When cases do go to trial, victim participation is limited to responding to questions of counsel or the court pertaining to the crime and rarely to its consequences to the victim. Thus,

Families of victims, particularly seriously injured or homicide victims, may suffer tremendously as a result of the crime. Consideration at sentencing of the impact of the crime on the family of a homicide victim has been looked upon with favor by at least one court (Clemans v. Alaska, 680 P.2d 1179 (1984)).

The fact that a victim is deceased, physically or mentally incapacitated (whether as a result of the crime or for other reasons), or unable because of age to provide a victim impact statement does not diminish the importance of making information about the crime's impact available to the sentencing court. Thus the legislation provides for a victim representative to serve in such a victim's stead. Where the victim has a spouse or other close relative, such persons may represent the victim. At the court's discretion, a non-family member who has had a close personal relationship with the victim may be appointed for this purpose.

SECTION 104. NOTICE TO VICTIM OR VICTIM REPRESENTATIVE

A. If a defendant is convicted of a felony involving one or more identifiable victims who suffered death or physical, emotional or financial injury, the probation department (prosecuting attorney) shall notify the victim or the victim representative in writing of the date, time, and place of the sentencing hearing and advise him or her of the opportunity to present a victim impact statement.

B. A copy of any relevant rules and regulations pertaining to the victim impact statement and the hearing shall accompany the notice.

C. The notice and the copy of any relevant rules and regulations shall be sent to the last known address of the victim or the victim representative at least ___ days prior to the sentencing hearing.

Providing the opportunity to present victim impact statements would be of limited value if no responsibility were assigned for informing victims of the opportunity or the date of the sentencing. Many victims are not present when the sentencing date is set. This is particularly true when the case involves a negotiated plea or plea of nolo contendere. Moreover, it would be unrealistic to expect the average victim to be aware of the legislation. Therefore, the proposed legislation designates a specific agency to provide appropriate victim notification. Since written victim impact statements are usually appended to the presentence report, in jurisdictions where the probation department is responsible for developing the presentence report that agency is likely to be the logical one to undertake this additional responsibility. Where this is not feasible, the prosecutor's office might be a suitable alternative.

The section also recognizes the court's authority to make rules governing the submission of impact statements, and requires whatever rules are adopted to be included with the notice of the sentencing hearing. For example, to expedite the sentencing process, the court may require that written statements be postmarked or delivered to the courthouse within a specified number of days before the sentencing hearing. For scheduling and organizational purposes, the court may require victims or victim representatives who wish to provide oral statements at the hearing to make their wishes known several days in advance. Where there are numerous victims, it may provide that

Where this is not possible, the legislation requires the department to submit a victim impact statement affirming that an effort has been made, albeit unsuccessfully, to consult with the victim or victim representative and containing relevant factual information available from other sources. The extent to which the department is obligated to seek out and verify such information should be specified in its own rules and regulations.

Under most circumstances, the victim or the victim representative may appear personally to speak to the sentencing judge (or jury). A number of courts already allow this informally. Several states, including Arizona (Ariz. Rev. Stat. Section 12-253 (1982)), California (Cal. Const. art. 1, section 283 (1982)), and Connecticut (1981 Conn. Acts 324), specifically provide for it by law. Objections to oral victim impact statements have been raised on the grounds that they may be highly emotional and therefore unduly influence the sentencing court. While it is true that the statute may result in some emotional presentations by victims or their representatives, these are unlikely to be more emotional or in greater numbers than the widely accepted presentations by defendants and their families and friends at sentencing hearings. In neither case is there reason to fear that the judge—whether imposing sentence or presiding over a sentencing jury—cannot discern relevant information or will be so swayed by emotional appeals as to be unable to apply the law faithfully. Of course, if a victim or victim representative is disruptive or threatening in the delivery of the statement, the court may decline to continue hearing it, just as it may decline to continue hearing a disruptive or threatening statement by or on behalf of the defendant.

A victim unable or not wishing to present an oral statement is provided the opportunity to have written comments about the crime's impact attached to the presentence report ordered by the court prior to sentencing. The comments may be prepared by the victim or victim's representative.

SECTION 106. ACCESS TO WRITTEN VICTIM IMPACT STATEMENTS

The court shall make available copies of the statement to the defendant, defendant's counsel, and the prosecuting attorney. These parties shall return all copies of the statement to the court immediately following the imposition of sentence upon the defendant.

Providing the defendant access to the written impact statement is fair to both defendant and victim. From the defendant's point of view, such a provision will ensure that the victim's contentions will be as subject to scrutiny and challenge as other sections of the presentence report which might contain information detrimental to the defendant. From the victim's point of view, information submitted in light of possibilities for challenge—and particularly information which is challenged but stands up to the challenge—is likely to be accepted with less skepticism by the court than information not subject to challenge. Authority to provide access beyond that required under this section resides solely in the victim or victim representative, except insofar as disclosure is required by the state's privacy laws or the Freedom of Information Act.

III. OPEN PAROLE HEARINGS

OPEN PAROLE HEARINGS

President's Task Force Recommendation

Legislation should be proposed and enacted to open parole release hearings to the public.

Proposed Legislation*

SECTION 101. FINDINGS AND PURPOSES

A. The legislature and people of this State find and declare that:

1. **The criminal justice system functions best when it is accountable to the public through open proceedings;**

2. **Only the most compelling reasons justify the closing of criminal justice proceedings in a free society;**

3. **Closed parole hearings insulate parole boards from accountability to the public and from their special obligations to the victims of crimes committed by the inmates seeking parole;**

4. **The public's interest in protecting victims from further harm outweighs parole applicants' interests in having parole board proceedings closed; and**

5. **Factual information submitted to parole boards by victims will enhance the ability of parole boards to make informed decisions about the danger posed by criminals seeking early release from incarceration.**

B. Therefore, the legislature and the people of this State declare the purposes of this Act are:

1. **To promote parole board accountability by opening parole board hearings to the public;**

2. **To reduce the incidence of crimes committed against prior victims and other innocent members of the public by criminals granted unwarranted early release from incarceration;**

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*Drafted with the assistance of the American Bar Association Criminal Justice Section Victim Witness Project.

H. Victim Representative:
A spouse, parent, child, sibling, or other relative of a deceased or incapacitated victim or of a victim who is under ___ years of age, or a person who has had a close personal relationship with the victim and is designated by the court to be a victim representative.

SECTION 104. OPEN HEARINGS

A. General

1. [In accordance with section ___ of the ___ code (governing open meetings)], parole hearings and parole revocation hearings shall be open to the public, except as provided in subsection (B).

2. The vote of each board member on each formal action of the board shall be noted in the public record. Formal actions include, but are not limited to, actions taken under (B) of this section.

B. Exceptions and Limitations

1. The board may restrict the number of individuals allowed to attend parole or parole revocation hearings in accordance with physical limitations or security requirements of the hearing facilities.

2. The board may deny admission or continued attendance at parole or parole revocation hearings to individuals who:

   a. threaten or present danger to the security of the institution in which the hearing is being held;

   b. threaten or present a danger to other attendees or participants; or

   c. disrupt the hearing.

3. Upon formal action of a majority of the board members present, the board may close parole and parole revocation hearings in order to:

   a. deliberate upon the oral testimony and any other relevant information received from applicants, parolees, victims, or others; or

   b. provide applicants and parolees the opportunity to challenge confidential information which they believe detrimental to their applications or revocation proceedings.

4. Upon written request of the [attorney general] [chief law enforcement official responsible for an ongoing criminal investigation] and formal action of a majority of the parole board members present, the board may hold closed parole or parole revocation hearings to protect ongoing investigations.

whom the board failed to notify as required in (B)(1) of this section has the opportunity to have a written victim impact statement considered by the board, pursuant to (D)(2) of this section.

2. No later than _____ days after a parole hearing resulting in parole of an applicant or a parole revocation hearing resulting in continued parole of a parolee, the board shall cause to have its decision published in a newspaper of general circulation in the city or county where the crime was committed, together with a notice that any victim whom the board failed to notify as required in (B)(1) of this section has the opportunity to have a written victim impact statement considered by the board, pursuant to (D)(2) of this section.

D. Failure to Provide Required Advance Notice

1. Prior to a parole hearing or parole revocation hearing, a party to whom the board failed to provide the notice required in subsections (B)(1) and (B)(2) may request the board to postpone the scheduled hearing. Upon that request, the board shall postpone the scheduled parole or parole revocation hearing in order to provide a reasonable opportunity for the party to attend the hearing and, if that party is a victim, to submit a victim impact statement. However, in no event shall the hearing be postponed more than ___ days nor less than ___.

2. If within ___ days after a parole or parole revocation decision has been noted in the public record, the board receives a written victim impact statement from a party to whom the board failed to provide the notice required in (B)(1) of this section, the board shall consider the statement. If the board finds that the victim impact statement warrants a new hearing, it shall schedule such a hearing, subject to all notification requirements under (B) of this section. However, in no event shall the new hearing be scheduled for more than ___ days after the original hearing.

E. Notice Sent to Last Known Address

Any notice required to be provided to the victim or victim representative by this section shall be mailed to the last known address of the victim or the victim representative. It is the responsibility of the victim or victim representative to provide the Department of Correction and the board a current mailing address.

SECTION 107. PAROLE BOARD RULES

Within 90 days of the effective date of this Act, the board shall develop rules governing attendance at board hearings and submission and use of victim impact statements. The rules shall govern:

1. the requirement that those requesting notification of parole and parole revocation hearings keep the board advised of their current addresses and telephone numbers;

Commentary

The December 1982 Final Report of the President's Task Force on Victims of Crime recommends that legislation be proposed and enacted to open parole release hearings to the public. Commentary accompanying the recommendation suggests several premises for it. One is that parole boards less "insulated" from public scrutiny would make more responsible decisions. Another is that open parole hearings would increase public confidence in the criminal justice system. In addition, the Task Force points out that the potentially serious implications which parole board decisions present to victims in particular and to the public at large outweigh the secrecy interests of parole applicants.

A separate but related Task Force recommendation urges that victims of crime, their families, or their representatives be allowed to attend parole hearings and inform the parole board of the effects of the victimization. The report states that victims have a legitimate interest in seeing that their attackers are appropriately punished, and are not released prematurely to harm others. Acknowledging that a prisoner's behavior while incarcerated should be a factor in parole decisions, the Task Force points out that the nature of the prisoner's conduct while at large is vital--and the victim is in the best position to know just how dangerous and ruthless the parole applicant was when he or she was in the community.

Policies and practices regarding public attendance at parole hearings vary considerably from state to state. Parole statutes in some states--such as Florida[1] and Nevada[2]--specify that the hearings are to be open to the public. Parole hearings in other states--including Nebraska,[3] North Dakota,[4] Oklahoma,[5] Tennessee,[6] and Utah[7]--are governed by the general open meetings acts which open up most, if not all, administrative meetings and hearings to the public. Colorado has open meetings as a result of a Parole Board ruling, rather than as a result of legislation. Other states--including Idaho,[8] Louisiana,[9] Maryland,[10] and Pennsylvania[11]--specify or allow that the hearing be closed. At least one state--West Virginia[12]--allows the inmate to decide whether the hearing should be open or closed. Another--South Dakota[13]--has wide discretionary power and, although not legislatively required to do so, holds public parole board meetings. Wyoming statutes and rules are silent on the question of open parole hearings. Parole boards in Georgia[14] and Virginia[15] do not hold hearings; instead, parole board members individually conduct "desk reviews" of the inmate's file.

Policies and practices regarding victim attendance and participation also vary from state to state. Some states (e.g., Missouri[16]) which do not generally or necessarily hold open hearings nonetheless allow specific persons to attend. Others not only provide that victims may attend the hearing, but also that certain victims may participate in it (e.g., Arizona,[17] Arkansas,[18] California,[19] Connecticut,[20] Florida,[21] Massachusetts,[22] Missouri,[23] New Hampshire,[24] and Rhode Island[25]). The Georgia Board, which does not hold formal hearings, allows victims to speak to individual board members.[26] In West Virginia[27] attendees may speak if granted permission of the Board. Some states, either in addition to or in lieu of allowing direct victim participation at the hearing, provide statutorily or by rule for information about victims to be brought to the parole board's attention. For example, Arizona,[28] Nevada,[29] and South Dakota[30] provide

5. Factual information submitted to parole boards by victims will enhance the ability of parole boards to make informed decisions about the danger posed by criminals seeking early release from incarceration.

B. Therefore, the legislature and the people of this State declare the purposes of this Act are:

1. To promote parole board accountability by opening parole board hearings to the public;

2. To reduce the incidence of crimes committed against prior victims and other innocent members of the public by criminals granted unwarranted early release from incarceration;

3. To facilitate the attendance of victims and members of the public at parole hearings;

4. To ensure that victims have the opportunity to provide relevant information to parole boards; and

5. To require parole boards to consider and give appropriate weight to information presented by victims about inmates' and parolees' crimes and other factors relevant to their parole and parole revocation proceedings.

These findings and purposes draw heavily from the commentary accompanying the President's Task Force recommendations relating to parole hearings. Their purpose is to clarify to the legislators and courts who may later have reason to analyze the legislation that it is intended to open parole board hearings to the public, facilitate the opportunity for victims and members of the public to attend parole board hearings, and enable victims to provide relevant information to parole boards.

SECTION 102. SHORT TITLE

This Act shall be known and may be cited as "The Open Parole Hearings Act."

SECTION 103. DEFINITIONS

As used in this Act, the following words and phrases shall have the meanings indicated, unless the context clearly indicates otherwise.

A. Applicant:
An inmate whose parole application is before the parole board.

B. Board:
The parole board as established in Article ___ of the [state code].

C. Parolee:
The subject of parole revocation proceedings.

2. **The vote of each board member on each formal action of the board shall be noted in the public record. Formal actions include, but are not limited to, actions taken under subsection (B) of this section.**

B. Exceptions and Limitations

1. **The board may restrict the number of individuals allowed to attend parole or parole revocation hearings in accordance with physical limitations or security requirements of the hearing facilities.**

2. **The board may deny admission or continued attendance at parole or parole revocation hearings to individuals who:**

   a. **threaten or present danger to the security of the institution in which the hearing is being held;**

   b. **threaten or present a danger to other attendees or participants; or**

   c. **disrupt the hearing.**

3. **Upon formal action of a majority of the board members present, the board may close parole and parole revocation hearings in order to:**

   a. **deliberate upon the oral testimony and any other relevant information received from applicants, parolees, victims, or others; or**

   b. **provide applicants and parolees the opportunity to challenge confidential information which they believe detrimental to their applications or revocation proceedings.**

4. **Upon written request of the [attorney general] [chief law enforcement official responsible for an ongoing criminal investigation] and formal action of a majority of the parole board members present, the board may hold closed parole or parole revocation hearings to protect ongoing investigations.**

Section 104 provides that parole hearings shall be open to the public, subject only to specified limitations. Since a number of states already have open meeting or "government in the sunshine" laws, language is provided for the legislature to tap into such existing statutes. If the state does not have such a law or if the subsequent provisions of the proposed legislation require substantially greater public access than existing law, the legislature may omit reference to existing legislation by disregarding the bracketed material.

Both subsections (A)(1) and (A)(2) are intended to ensure public access to the parole decisionmaking process. Subsection (1) applies to public access to the hearings themselves; subsection (2) applies to the creation of a record which members of the public may examine subsequently.

subsection (B)(2) is expected to be instrumental in reducing the number of unnecessary closed hearings or portions of hearings. The provision is similar to provisions in state open meeting laws such as Nebraska's (Section 84-1410), which requires that the vote to hold a closed session must be taken in open session and that the vote of each member on the question of holding a closed session and the reason for the closed session must be recorded in the minutes.

Public access to some parole or parole revocation hearings may jeopardize ongoing criminal investigations. This might be the case, for example, when the subject of a hearing is a government informant or when the alleged violation is part of a larger criminal scheme. Subsection (B)(4) therefore authorizes the board to make an exception to the open hearing policy if requested to do so by high-level officials with jurisdiction over investigations involving subjects of hearings as potential witnesses or suspects. However, in these instances or in instances where an inmate has cooperated with authorities in the past, the board may decide that closing the meeting would, in itself, be an indication of the inmate's cooperation. When this is the case, the parole board might instead receive and consider a confidential written statement concerning such cooperation outside the public parole hearing, in the same way it might receive confidential information about the inmate's emotional or mental health. Such statements would not be public under this statute, though explicit exemption from public access may be necessary if all or a portion of the inmate's file is public under existing state policy.

SECTION 105. FINALITY OF BOARD DECISIONS

A board decision to grant parole or to not revoke parole shall become final 30 days after it has been noted in the public record unless within that time the board schedules a new hearing, pursuant to section 106(D)(2). A board decision to revoke parole shall become final immediately.

Finality of board decisions is delayed for several purposes. The delay ensures that the notification of the release required under section 106(C)(1) and (2) is made prior to the release itself so that victims, law enforcement officials, and other members of the community may take whatever steps they feel are necessitated by the release decision. For example, victims may wish to move, upgrade the security of their homes, or obtain unlisted telephone numbers. Law enforcement officials may wish to make plans to provide extra protection to either the inmate or individuals who claim they have been threatened by the inmate. The delay also provides victims who learn of the inmate's parole application only after the hearing has been held the opportunity to make a meaningful written victim impact statement, as provided in section 108(D)(2).

SECTION 106. NOTIFICATION

A. Notice of Future Parole Eligibility

Within 90 days of an inmate's incarceration for a felony offense the (Department of Correction) shall notify the victim or the victim's representative of the earliest possible date the inmate will be eligible for parole consideration. A copy of the rules developed under section 107 shall be included with the notice.

and, if that party is a victim, to submit a victim impact statement. However, in no event shall the hearing be postponed more than ____ days nor less than ___.

2. **If within ___ days after a parole or parole revocation decision has been noted in the public record, the board receives a written victim impact statement from a party to whom the board failed to provide the notice required in (B)(1) of this section, the board shall consider the statement. If the board finds that the victim impact statement warrants a new hearing, it shall schedule such a hearing, subject to all notification requirements under (B) of this section. However, in no event shall the new hearing be scheduled for more than ___ days after the original hearing.**

E. Notice Sent to Last Known Address

Any notice required to be provided to the victim or victim representative by this section shall be mailed to the last known address of the victim or the victim representative.

It is the responsibility of the victim or victim representative to provide the Department of Correction and the board a current mailing address.

Section 106 requires the parole board to provide certain notices about scheduled parole and parole revocation hearings and about parole decisions once these are rendered. It also provides limited remedies when such requirements are not met.

There is considerable confusion on the part of the general public about the relationship between sentencing and parole eligibility. Knowledge of the sentence imposed by the court may give a victim or victim representative the wrong impression of the length of time an inmate will actually be confined, resulting in a false sense of security or a missed opportunity to attend or participate in the parole process. Subsection (A), therefore, requires that shortly after an inmate is incarcerated, the Department of Corrections or other responsible state agency inform the victim or the victim's representative of the earliest possible date the inmate will be eligible for parole. Receipt of such information allows the victim to live in relative security for the period preceding the parole eligibility date and to make whatever plans appear warranted in anticipation of a release once the possibility of parole is imminent. (For example, the victim may wish to move or obtain a new, unlisted, telephone number prior to the inmate's release--but may not wish to take such actions until they are necessary.)

To ensure that victims or victim representatives are informed of their own responsibilities with respect to future notifications from the parole board, subsection (A) also requires that early on they be sent the parole board rules in which these are set forth.

A somewhat different "up front" approach to linking the victims and the parole process has been taken by New Jersey. Legislation (S.B. 1095) signed in January of 1984 requires prosecutors at the time of sentencing to notify the victims that they will be given the opportunity to present oral or written statements at the parole hearing, provided they keep the parole board apprised of their mailing address.

Subsection (B)(3) requires the parole board to give advance notice of forthcoming hearings to a newspaper of general circulation in the city or county where the crime was committed. This is somewhat broader than a Nebraska[47] statute that requires reasonable efforts to notify news media which request notification of forthcoming hearings. Like the Nebraska statute, however, the decision whether or not to publish the notice is left to the discretion of the newspaper. Requiring publication would entail substantial cost to the parole board since space in the paper would have to be purchased for this purpose. It is expected that the public demand for such information may exert sufficient pressure on newspapers to publish it as news. Some states may wish to go further, however, and require the parole board to publish the notice. This is the approach taken by New Hampshire.[48]

Many--probably most--victims will not attend parole or parole revocation hearings. Time, distance, and financial cost will undoubtedly discourage many. Some will feel emotionally unable to attend. Others will fear reprisal. Still others will not wish to renew their involvement with the criminal justice system. And, of course, some simply will not have the interest.

Whatever their particular reasons for not attending parole or parole revocation hearings, most victims will want to know the outcome. Subsection (C)(1) requires that all victims or victim representatives who have met the board's requirements (e.g., provided current address and telephone numbers) for notification and have not waived the notice shall be notified of the board's decision. The subsection also requires that the prosecutor's office which prosecuted the case and the branch of the court which sentenced the inmate or parolee receive this information. Some jurisdictions already require notification of parole decisions when the decisions will result in release. For example, the Federal Bureau of Prisons' policy requires notice to victims whenever the inmate is released to the community (as well as when the inmate escapes or dies). Florida[49] requires the county law enforcement agency where the inmate will be released to be notified of the release date.

Subsection (C)(2) concerns publication of the board's decision in a newspaper of general circulation. Unlike publication of notices about forthcoming hearings, publication of decisions is not discretionary with the board. Mandatory publication is intended to provide an objective means of keeping the community advised of the parole board's activities. Moreover, in addition to providing notice about parole decisions, this subsection and preceding subsection (C)(1) are intended to act as double-checks to ensure that victims who for one reason or another did not know they were entitled to submit a victim impact statement for consideration at the hearing are informed that they may submit one prior to the decision's becoming final.

Section 106(D) provides certain remedies for victims who did not receive the required advance notice of parole or parole revocation hearings. Under subsection (1), victims who learn about a scheduled hearing after the required notice was to have been given but before the hearing has taken place may require the board to postpone the hearing to give them a reasonable opportunity to attend and, if they wish, to submit victim impact statements. Under subsection (2), victims who do not learn of the hearing until after it has taken place may submit a written statement which the parole board must consider, provided it is received before the decision has become final. If the board

impact statements and potential challenges to the information provided. The knowledge that impact statements will be accessible to the inmate or parolee may inhibit some victims from submitting statements or from being as forthright as they might otherwise be. Nevertheless, it is only fair that they are aware in advance of the rights of inmates and parolees. Otherwise, they may put themselves in potential danger or subject themselves to unwanted and unintended publicity concerning personal matters. Similarly, information about verification and challenges to impact statements should be included.

Information about electronic and print media is extremely important. Victims and others wishing to attend or participate in parole hearings should have advance knowledge of potential coverage. Those who have been caught unaware and photographed, televised, questioned, and even followed home by eager press persons have on occasion been extremely unnerved--and embittered--by the experience.

SECTION 108. VICTIM IMPACT STATEMENTS

A. Receipt and Consideration

The board shall receive and consider victim impact statements.

B. Availability of Written Victim Impact Statements

1. **Written victim impact statements shall not be made available to the public without written consent of victims or their representatives.**

2. **The board shall make written victim impact statements available to applicants or parolees no later than ____ days before the hearing. However, in no event shall applicants, parolees, or their attorneys be provided the residential or business address of victims or victim representatives or any information which, if disclosed, might result in harm, physical or otherwise, to any person.**

C. Investigation and Challenge of Assertions

1. **Assertions made in a victim impact statement may be investigated and verified by the board.**

2. **In parole hearings an applicant, parolee, counsel for an applicant or parolee, or any other person on behalf of an applicant or parolee may provide the board information challenging assertions made in a victim impact statement and present witnesses at the hearing to give testimony challenging the assertions in a victim impact statement. Only members of the board may question the victim concerning assertions made in the statement.**

3. **In parole revocation hearings, the parolee shall have the opportunity to respond to the victim impact statement either orally or in writing.**

Moreover, arguments for keeping other types of reports confidential from the inmate do not apply to victim impact statements. Diagnostic, evaluative, and correctional progress reports are prepared by professional, disinterested parties. Their quality or accuracy is not likely to be enhanced by inmate access, and their release may result in emotional or psychological injury to the inmate or inhibit the inmate's rehabilitation. Impact statements, on the other hand, are prepared by interested parties. Inmate access may help ensure that they do not contain inaccurate or misleading information. In addition, the fact that the inmate has access to the information and, as provided in section 108(C) below, may challenge it, not only is expected to encourage accurate and complete statements in the first place, but to increase the credibility of that information which is not challenged or which is unsuccessfully challenged.

The above notwithstanding, section 108(B)(2) denies for all purposes access by applicants, parolees, or their attorneys to information that would identify the victim's business or residential address. This approach is taken in the Federal Bureau of Prisons Victim and Witness Notification Policy section 551.152. On the one hand, the victim's address is unlikely to add much to the hearing or further the purposes of an open proceeding. On the other hand, precluding its disclosure will protect the victim from real or perceived intimidation or harassment. The provision does not, of course, prevent the applicant or the applicant's attorney from seeking the assistance of an intermediary such as the parole board in setting up a meeting with the victim at a mutually agreed upon "neutral" site if such a meeting is considered desirable.

Parole hearings are not adversary hearings and do not require that defendants have the opportunity to cross-examine victims and representatives who submit impact statements. (See Wolff v. McDonnell, 418 U.S. 539 (1974).) Nevertheless, section 108(C)(1) provides that information in impact statements is subject to investigation and verification by the parole board. Moreover, under section 108(C)(2), applicants and persons on behalf of applicants may provide the board information to challenge the assertions made in the statements, and may present witnesses at the hearing to challenge such assertions. These provisions are expected to encourage the submission of factual and true impact statements, as well as to provide safeguards when inaccurate statements are intentionally or unintentionally submitted. They are in conformity with the requirements of Wolff which recognized that prisoners facing loss of good behavior credits should be allowed to present documentary evidence and witnesses on their own behalf when doing so does not jeopardize safety or correctional goals. The opportunity is limited, however, to witnesses who voluntarily testify on behalf of the inmate; subpoenas to compel testimony are not authorized. Cross-examination of the person who submitted the statement is not intended by this provision though, of course, the board may ask whatever questions it wishes of the individual, including questions submitted to it by the applicant or the applicant's attorney. Finally, no right to state-appointed or state-provided counsel is intended by this subsection.

While section 108(A) and (B) concern consideration of parole for inmates still incarcerated, section 108(C) concerns potential revocation of paroles previously granted. The scope of parole revocation hearings is considerably narrower than that of parole hearings since only two questions are at issue: were the conditions of parole violated and, if so, was the violation sufficiently serious to warrant revocation? The fact that many victims will not be able to provide statements relevant to these questions

FOOTNOTES

1. Fla. Stat. Ann. section 947.06 (West 1983).
2. Nev. Rev. Stat. section 213.130.
3. Neb. Rev. Stat. section 84-1408.
4. N.D. Cent. Code section 44-04-19.
5. Okla. Stat. Ann. tit. 25, section 301 (West 1977).
6. Tenn. Code Ann section 8-44-102.
7. Utah Code Ann. section 52-4-1.
8. Policies and Procedures of the Idaho Commission for Pardons and Paroles.
9. Rules, Regulations, Criteria, Policies, Procedures and Guidelines of the Louisiana Board of Parole.
10. Code of Maryland Regulations, section 12.08.01.18C(1) (1975).
11. Board of Pardons, Clemency in Pennsylvania.
12. West Virginia Board of Probation and Parole Procedural Rules, section 506.
13. S.D. Codified Laws Ann. section 23-58-7 (1977).
14. February 10, 1984, Letter from Chairman of the Georgia State Board of Pardons and Paroles to the Director of the American Bar Association Criminal Justice Section Victim/Witness Project.
15. Virginia Parole Board Policy Manual.
16. Missouri Hearing Procedure Policy.
17. Ariz. Rev. Stat. Ann. section 31-411(F).
18. Ark. Stat. Ann. section 43-2819 (1983).
19. Cal. Penal Code section 3043 (Deering 1982).
20. 1983 Conn. Acts 83-416.
21. Fla. Stat. Ann. section 947.06 (West 1983).
22. Mass. Gen. Laws Ann. ch. 127, section 133A.

47. Neb. Rev. Stat. section 84-1411.

48. N.H. Rev. Stat. Ann. section 651-A:11

49. Fla. Stat. Ann. section 947.175

50. Nev. Rev. Stat. section 84-1410.

51. Cal. Penal Code section 3043 (Deering 1982).

52. Neb. Rev. Stat. section 84-1408.

53. Rules, Regulations, Criteria, Policies, Procedures and Guidelines of the Louisiana Board of Parole.

54. 501 KAR 1:011, section (7)(13).

55. S.D. Codified Laws Ann. section 23-58-7 (1977).

IV. HEARSAY AT PRELIMINARY HEARINGS

HEARSAY IN PRELIMINARY HEARINGS

President's Task Force Recommendation

Legislation should be proposed and enacted to ensure that hearsay is admissible and sufficient in preliminary hearings, so that victims need not testify in person.

Proposed Legislation*

SECTION 101. FINDINGS AND PURPOSE

A. The legislature and the people of this State find and declare that:

1. Requiring the victim to appear and testify at a preliminary hearing is an imposition that should be eliminated to the extent the ends of justice allow; and

2. For a judicial determination at a preliminary hearing of whether probable cause exists to believe a defendant committed a crime, it should be sufficient that a law enforcement officer or other appropriate party testify concerning the facts as provided by the victim.

B. Therefore, the legislature and the people of this State declare that the purpose of this Act is to ensure the admissibility and sufficiency of hearsay evidence of victims in preliminary proceedings to determine probable cause in criminal prosecutions.

SECTION 102. ADMISSIBILITY OF HEARSAY IN PRELIMINARY PROCEEDINGS

In any pretrial or preliminary proceeding, hearing, or examination in connection with a criminal case, where the issue to be determined is whether probable cause exists to believe a defendant has committed the crime with which the defendant is accused, hearsay evidence shall be admissible, and the finding of probable cause may be based upon hearsay evidence in whole or in part. No victim or witness shall be required to appear unless the court, in light of the evidence and arguments submitted by the parties, determines that the appearance of the victim or witness likely would lead to a finding that there is no probable cause, or unless other compelling circumstances exist.

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*Drafted with the assistance of the Crime Victims Project of the National Association of Attorneys General.

The Supreme Court has ruled that though the Fourth Amendment requires a "fair and reliable" judicial determination of probable cause as a condition for any significant pretrial detention, the finding need not be made at an adversary hearing. [2] The determination that there are facts and circumstances sufficient to warrant a prudent person in believing that a suspect has committed an offense can be made using written testimony and hearsay, without recourse to formal rules of evidence, since the preliminary hearing is not a minitrial on the issue of guilt, but is rather an investigation into the reasonableness of the basis for the charge. [3] The Court has emphasized another reason why full-scale preliminary hearings should not be required:

> Criminal justice is already overburdened by the volume of cases and the complexities of our system. The processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice. A constitutional doctrine requiring adversary hearings for all persons detained pending trial could exacerbate the problem of pretrial delay. [4]

The Federal Rules of Criminal Procedure explicitly authorize the use of hearsay at preliminary probable-cause examinations, and the practice is well-established in the Federal system. [5] Present practice in the states varies, but more than half permit hearsay of victims in preliminary hearings; approximately one-fourth require an adversarial preliminary examination in which hearsay is not generally admissible to support a probable cause finding. (Some states permit preliminary hearing hearsay only from children, certain experts, or to prove ownership of property.) [6]

It should be noted that grand juries, in returning indictments charging individuals with crimes, traditionally have not been bound by technical rules of evidence. Normally, an individual indicted by a grand jury is denied a preliminary examination, since the function of both proceedings is the same: to determine whether there is probable cause to believe the individual has committed a crime. There is, therefore, no practical reason to require more stringent evidence standards in a preliminary hearing than in a grand jury proceeding, and to do so may encourage prosecutors to make use of grand juries rather than preliminary examinations. [7]

5. Federal Rules of Criminal Procedure, Rule 5.1: Preliminary Examination:

> (a) Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

6. States allowing victims' hearsay at probable cause hearings include: Arizona (Rule of Cr.P. 5.4(c)); Colorado (People v. Williams, 628 P.2d 1011 (Colo. 1981) and People v. Quinn, 516 P.2d. 420 (Colo. 1973)); Delaware (Super. Ct. Cr. Rule 5.1); Florida (Rule of Cr.P. 3.133(b)); Georgia (Super. Ct. Rule 26.2(B)(1)); Hawaii (Rule of Cr.P. 5); Illinois (People v. Jones, 221 N.E.2d 29 (Ill.App. 1966) and People v. Blackman, 414 N.E.2d 246 (Ill.App. 1980)); Indiana (no authority specifically on point but source contacted stated victim hearsay at preliminary hearings is permitted); Iowa (Rules of Cr.P. section 813.2 rule 2(4)(b)); Kentucky (Ky. Rev. Stat.Rule of Cr.P. 3.14(2)); Louisiana (La. Code of Cr. P. art.294, see also, State v. Sterling, 376 So.2d 103 (La. 1979) and State v. Antoine, 344 So.2d 666 (La. 1977)); Maryland (59 Op. Att'y. Gen. 182 (1974)); Minnesota (State v. Rud, 359 N.W.2d 573 (Minn. 1984), Minn.Rule of Cr.P. 11.03, 18.06 subd. 1); Mississippi (Beard v. State, 369 So.2d 769 (Miss. 1979), quoting Gerstein v. Pugh language concerning hearsay at preliminary hearings, 420 U.S. 103 (1975)); Montana (Rules of Evidence section 101); Nebraska (Delay v. Brainard, 156 N.W.2d 14 (Neb. 1968), Neb. Rev. Stat. 27 section 1101(4)(b)); New Hampshire (State v. Arnault, 317 A.2d 789 (N.H. 1974)); New Jersey (State v. Engle, 493 A.2d 1217 (N.J. 1985)); New Mexico (Rule 16(c) Magis. Ct., Rule 18 Munic. Ct., Rule 53(c) Metro. Ct.); North Dakota (Rule of Cr.P. 5.1(a), State v. Morrissey, 295 N.W.2d 307 (N.D. 1980)); Oregon (Or. Rev. Stat. section 135.173); Pennsylvania (Commonwealth v. Branch, 437 A.2d.748 (Pa.Super. 1981); Rhode Island (State v. Brown, 488 A.2d 1217 (R.I. 1985)); South Carolina (State v. Jones, 259 S.E.2d 120 (S.C. 1979)); Utah (Utah Code Ann. section 77-35-7(d)(1); Vermont (Rule of Cr.P. 5(c)) (preliminary hearings in Vermont are nonadversarial and affidavits showing probable cause are read to determine if state has made out its prima facie case); Washington (court rules substantially follow Federal Rules of Evidence; see also, Wash. Rev. Code Ann. section 9A.44.120 which says a statement made by a child under the age of 10 describing any act of sexual contact is admissible as evidence in criminal proceedings when certain conditions are met); West Virginia (Rule of Cr.P. 5.1(a)(1) to (3)); Wyoming (Rule of Cr.P. 7(b) and Rule of Evidence 1101(3)); District of Columbia (Rule of D.C. Super. Ct. 5(d)(1)).

States not permitting victims' hearsay at probable cause hearings include: Alabama (Ala.Code section 15-11-6); Alaska (Rules of Evidence apply to trials and preliminary hearings, but preliminary hearings are very rarely held due to the

purpose of the preliminary examination should be to determine whether there is sufficient evidence to justify subjecting the defendant to the expense and inconvenience of trial. (Weinberg and Weinberg, the Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968, 67 Mich. L. Rev. 1361, 1369-1399 (1969).) But Rule 5.1 "rejects this view for reasons largely of administrative necessity and the efficient administration of justice," according to the committee. Further, the committee pointed out, the preliminary examination is not the proper place to raise the issue of the admissibility of evidence, since that is for the trial court to decide. Giordenello v. United States, 357 U.S. 480, 484 (1958). (Federal magistrates are not required to be lawyers, and may not be able to deal with the technical rules of hearsay.)

V. VICTIM AND WITNESS ADDRESS CONFIDENTIALITY

VICTIM AND WITNESS ADDRESS CONFIDENTIALITY

President's Task Force Recommendation

Legislation should be proposed and enacted to ensure that addresses of victims and witnesses are not made public or available to the defense, absent a clear need as determined by the court.

Proposed Legislation*

SECTION 101. FINDINGS AND PURPOSE

A. The legislature and people of this State find and declare that:

1. The full cooperation of victims and witnesses in reporting, aiding in the investigation of, and testifying concerning crimes is vital to the effective working of the criminal justice system;

2. Fear of intimidation and invasion of privacy are major reasons for the lack of cooperation of victims and witnesses in the criminal justice process;

3. Victims of and witnesses to crime can be exposed to the risk of being threatened and harassed by some defendants if their whereabouts are made known to those defendants;

4. The privacy of victims and witnesses can be invaded unnecessarily by unwarranted disclosure of their addresses to the public, which normally has no overriding need to know such personal information;

5. Helping to ensure the confidentiality of victim and witness addresses will increase cooperation in the criminal justice process, and therefore improve public safety; and

6. To the extent possible, law enforcement officers, prosecutors, and the courts should assist in this effort by holding confidential the addresses and telephone numbers of victims and witnesses.

B. Therefore, the legislature and the people of this State declare the purpose of this Act to be to protect victims of and witnesses to crime from risk of harassment, intimidation, and unwarranted invasion of privacy, by prohibiting the unnecessary disclosure of their addresses and telephone numbers to the defense and the public.

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*Drafted with the assistance of the Crime Victims Project of the National Association of Attorneys General.

4. any person or agency, upon written consent of the victim or witness or the parents, spouse, or other person legally responsible for the care of the victim or witness except as may otherwise be required or provided by the order of a court; or

5. any person who, either prior to or after the trial of the case involving the victim or witness, makes application to a court having jurisdiction over the alleged crime, and is authorized by court order to receive such information. The court order shall issue only after:

   a. the person making the application demonstrates to the satisfaction of the court that good cause exists for disclosure to that person;

   b. the court is reasonably assured by the prosecuting attorney that the victim or witness is known not to be at risk of personal harm resulting from the disclosure, or is adequately protected from such risk; and

   c. notice has been given to the victim or witness affected by the order, or the parents, spouse, or other person legally responsible for the care of that victim or witness, and to the prosecuting attorney at least 120 hours before the signing of such order. The victim or witness, or the parents, spouse, or other person legally responsible for the care of that victim or witness, affected by the order may appeal to the appropriate court the decision to order disclosure, and there shall be no disclosure until such appeal is heard and decided.

SECTION 105. DEFENSE INTERVIEWS

Prior to trial, upon request of counsel for the defendant to interview a victim or witness, the prosecuting attorney shall ensure that the victim or witness sought to be interviewed is informed of that request and of the right of the victim or witness to either grant or refuse that request. The prosecutor shall ask if the victim or witness will consent to such an interview, and shall ensure that the defense counsel is informed of the response of the victim or witness. If the victim or witness consents to be interviewed, the prosecuting attorney shall so inform the defense counsel, and shall offer to the victim or witness space for a meeting in the prosecuting attorney's offices or, at the option of the prosecuting attorney, some other appropriate neutral site. The prosecuting attorney shall not be required to but may attend the meeting. The victim or witness shall be free to make other arrangements to contact or meet with counsel for the defense, and the prosecuting attorney shall not interfere with nor impede those arrangements. Nothing in this section shall be construed as prohibiting defense counsel from contacting the victim or witness directly for the purposes of interviewing the victim or witness, if the defense counsel has obtained lawfully the address or telephone number of the victim or witness from a source other than the prosecutor.

Commercial agencies or companies and for-profit organizations are not to be considered organizations whose primary and bona fide purpose is to provide services, counseling, or other assistance to victims of crime.

B. A private victim-service organization which is denied access by the prosecuting attorney or other designated official to the addresses and telephone numbers of victims may request review by the state attorney general of the decision. The state attorney general may order the release of addresses and telephone numbers of victims and witnesses if in the opinion of the attorney general the organization meets the criteria set forth in subsections A(1), A(2), and A(3).

C. Public and private victim-service agencies or organizations, and the employees or volunteers who work for them, who are provided or otherwise obtain the addresses or telephone numbers of a victim or witness of a crime shall keep such information confidential. It shall be unlawful, except for purposes directly connected with the provision of services to the victim or witness or with the administration of the agencies' or organizations' programs or services, for any victim-service agency or organization, or any person employed or affiliated with such agency or organization, either as an employee, volunteer, or other worker, to disclose, solicit, receive, make use of, or authorize or knowingly permit the use or disclosure of the addresses or telephone numbers of the victim or witness, absent written consent of the victim or witness.

If the defense counsel petitions a court prior to trial for address information, the court may release the information only if good cause for disclosure exists and the court is reasonably assured by the prosecuting attorney that the victim or witness is known not to be at risk. Further, notice of intended disclosure must be given to the affected victim or witness at least 120 hours before release, and the victim or witness may appeal the court's decision. No disclosure will take place until the appeal is heard and decided.

When victims or witnesses testify, they are frequently asked for their home address, sometimes by the prosecutor. The proposed legislation directs prosecutors to stop soliciting this sensitive information; they should object to defense efforts to obtain it. Only when the defense is able to establish that the address is clearly relevant to credibility or to the facts of the case should the question be allowed.

Private victim and witness service organizations frequently request the addresses and telephone numbers of victims for the purpose of offering assistance to them. The vast majority of victims should have no objection to being contacted by these organizations, particularly if those organizations are required to keep address information confidential. Since the most crucial time for a victim to receive aid may be in the first few days after a crime, and since some victims may be in no condition then, emotionally or physically, to seek help, it is important that assistance groups are able to make known promptly the availability of services. The statute stipulates that only nongovernmental victim-service groups who are approved by the prosecuting attorney shall receive victim and witness information. The prosecuting attorney shall base his or her decision on whether the private group is bona fide and offers services that will be of benefit to victims. A negative decision by the prosecuting attorney may be appealed to the state attorney general.

This proposed legislation cannot assure complete privacy of victims and witnesses. Often, address and telephone information is available from other public sources, most notably the telephone book. But the statute does make clear that the government will not be the instrument for invading the privacy of victims and exposing them to harm or unwanted publicity. Victims and witnesses are brought into the criminal justice system through no choice of their own. They place their trust and hopes for justice in a government that is supposed to protect and serve them. There is no justification for further victimization on the government's part through release of sensitive identifying information.

SECTION 101. FINDINGS AND PURPOSE

A. The legislature and people of this State find and declare that:

1. The full cooperation of victims and witnesses in reporting, aiding in the investigation of, and testifying concerning crimes is vital to the effective working of the criminal justice system;

2. Fear of intimidation and invasion of privacy are major reasons for the lack of cooperation of victims and witnesses in the criminal justice process;

SECTION 104. CONFIDENTIALITY OF VICTIM AND WITNESS ADDRESSSES AND TELEPHONE NUMBERS

The residence and business addresses and telephone numbers of any victim of or witness to a crime shall be confidential. No report, paper, picture, photograph, court file, or other document that relates to a crime and contains the residence or business address or telephone number of a victim or witness, and that is in the custody or possession of any public officer or employee, including the prosecuting attorney, the police, and any clerks, officials, or employees of any state court, shall be made available for public inspection, unless the residence and business addresses and telephone numbers of the victim and witness have been deleted. No such public officer or employee shall disclose the residence or business address or telephone number of such a victim or witness except to:

1. the public officers and employees, including police, prosecutors, probation and prison officers and employees, and court officials and employees, not to include counsel for the defense, who are charged with the duty of investigating, prosecuting, or keeping records relating to the crime or the defendant, or with performing any other act when done pursuant to the lawful discharge of their duties;

2. any government agency or entity which provides compensation or services to victims or witnesses, or which investigates or adjudicates claims for such compensation or services;

3. any organization or group which has as its primary purpose the provision of counseling, services, or other assistance to victims of crime, and which requires the addresses or telephone numbers of victims to offer such services, and which is approved for receipt of such information in accordance with the provisions of section 106, except that under no circumstances shall a victim's or witness' residence or business address or telephone number be disclosed to entities who seek this information for commercial purposes;

4. any person or agency, upon written consent of the victim or witness or the parents, spouse, or other person legally responsible for the care of the victim or witness except as may otherwise be required or provided by the order of a court; or

5. any person who, either prior to or after the trial of the case involving the victim or witness, makes application to a court having jurisdiction over the alleged crime, and is authorized by court order to receive such information. The court order shall issue only after:

    a. the person making the application demonstrates to the satisfaction of the court that good cause exists for disclosure to that person;

    b. the court is reasonably assured by the prosecuting attorney that the victim or witness is known not to be at risk of

survey, "fear of reprisal" was cited by 28 percent of the witnesses who refused to cooperate in the prosecution of crime. [6] Thirty-nine percent of the witnesses prepared to testify in cases in another jurisdiction reported that they had the same fear. [7] Intimidation is more than a crime in itself; it "inherently thwarts the processes of the justice system itself." [8] The ABA has warned that "this can have a dramatic effect on the criminal justice process, since thousands of cases must be dropped annually when witnesses fail to appear or cooperate." [9] This concern was cited by the U.S. Congress in adopting Federal Rule of Criminal Procedure 16, which makes the names and addresses of witnesses nondiscoverable: "Discouragement of witnesses and improper contact directed at influencing their testimony were deemed paramount concerns in the formulation of this policy." [10]

Protecting the privacy of victims and witnesses, even when intimidation or harm is not at issue, is also a major reason for limiting disclosure of addresses and telephone numbers. Such disclosure has been restricted in several states with regard to victims of sexual crimes. [11] Many newspapers follow policies not to disclose the identities or residences of sex-crime victims, because of the possible stigmatization or embarrassment of the victim. Privacy is a legitimate concern of other victims as well, who may not wish to be exposed to media and public attention as a result of an event over which they had no control.

Criminal events are certainly matters of legitimate public concern. But disclosure of information of little or no public importance, that also tends to expose an individual to harassment, danger, and loss of personal privacy, serves no useful social purpose. The public right to know must be balanced against the individual right to personal security and privacy. The addresses and telephone numbers of victims and witnesses are matters of trivial public concern compared to the possibility of harm resulting from their disclosure or publication. The full and vigorous reporting of crimes and their investigation and prosecution will not be hampered by restricting access to this information. [12]

Some states have attempted to protect the confidentiality of personal information relating to crime victims by prohibiting its publication, even though access to it may be gained. [13] Such attempts have been ruled unconstitutional by the U.S. Supreme Court, however, at least when the information is legally obtained, either through inspection of public records or attendance at public trials or hearings. [14] The Court has suggested that the proper way to protect confidentiality would be through "means which avoid public documentation or other exposure of private information." [15] In other words, if constitutional guarantees of freedom of press and expression will not countenance restrictions on publishing information already made public, then the information must be prevented from becoming public. Section 104 responds to the Court's suggestion, by placing stringent restrictions on access to victim and witness addresses and telephone numbers. It makes no attempt to restrict publication of information lawfully obtained through any means, including inspection of public records or attendance at public trials or hearings.

Three states recently have passed legislation providing substantial address protection to victims. [16] Michigan law provides that the address and telephone number of the victim shall not be in the court file or ordinary court documents unless contained in a transcript of the trial or used to identify the place of the crime. In addition, based

Discovery poses special problems in the disclosure of victim and witness identifying information. As noted above, names and addresses are not discoverable under the Federal rules. Only in exceptional cases, upon a showing of materiality, reasonableness, or particularized need, will a Federal court order the release of this information. [29] The Federal rules are in accord with traditional common law principles, which hold that a defendant is not entitled, as a matter of right, to inspection or disclosure of evidence in the possession of the prosecution. The rule has been relaxed in some recent cases, though, and it is well established that a trial court has the discretionary power to permit discovery when the evidence requested is relevant and material to the case, favorable to the accused, or necessary to ensure a fair trial or protect a defendant's constitutional rights. [30] Moreover, a number of states have statutes or rules that specifically require that the accused be notified prior to trial of the witnesses to be called by the prosecution, [31] and some require disclosure of address information as well. [32] "Open-file" policies are also in effect in some states, either as mandated by statute or as established by local practice. [33] Prosecutors in these states routinely provide victim and witness information to defense counsel. California, for example, requires that the prosecutor make accessible for inspection and copying by the defendant or defense counsel copies of police, arrest, and crime reports. [34] But California, by a law passed in 1984, specifically exempts from the requirement of disclosure to the defendant the addresses and telephone numbers of any victim or witness. [35] This information need only be provided to counsel for the defendant, absent a finding of good cause by a court, or unless the defendant is self-represented. (California also excepts "privileged information" if the defendant or defense counsel is notified that the information has been withheld. [36])

Jurisdictions with open disclosure laws or practices are forced to rely on protective orders when intimidation, tampering, or the safety of a witness is at issue. Some observers have concluded that these states have not experienced unusual problems of witness intimidation. [37] As a practical matter, though, protective orders are resorted to only in unusual circumstances, such as cases involving organized crime, major drug deals, or undercover government agents or informants. Protective orders generally are not used to address the vast majority of intimidation situations, and the large percentage of witnesses who fear reprisal have never been able to rely on special court action to ensure their protection or privacy. When 7,500 witnesses in one jurisdiction alone (Brooklyn, an admittedly large jurisdiction) may be intimidated each year, [38] reliance on protective orders would be an inefficient waste of court and prosecutor time and resources.

Section 104 chooses instead to rely on initial statutory protection of the addresses and telephone numbers of victims and witnesses. To the extent that rules of discovery or open-file policies conflict with the provisions of section 104, they must be repealed or changed. Although other model pretrial standards call for disclosure of the addresses of prosecution witnesses, [39] it can be argued that these standards fail to recognize the severity of the witness intimidation and safety problem. According to the ABA, "existing state statutes are largely inadequate to deal with intimidation, as are procedures utilized by law enforcement and prosecutors." [40] Section 104 evinces a belief that instances of threats and actual harm to witnesses and victims are prevalent enough that a policy of nondisclosure is justified and necessary. The policy of treating those instances as exceptions requiring extraordinary remedial measures (protective court orders) should be reversed, so that nondisclosure is the norm, and disclosure occurs only in those situations

interview in the prosecutor's offices or at another appropriate site. The victim or witness, absent a court order to the contrary, may decline to be interviewed. The victim or witness is also free to make his or her own arrangements to meet with defense counsel, without interference from the prosecuting attorney.

Proceeding on constitutional due process grounds, or using statutory, ethical, or other rationales, courts have recognized almost invariably a defense right to interrogate witnesses prior to trial without interference by the prosecution. [44] The general rule is that the state cannot compel or prohibit any of its witnesses from speaking to defense counsel because there is no property right in any witness on the part of either the prosecution or the defense. [45] In some instances, courts have held that a prosecutor was guilty of misconduct, amounting to prejudicial error, by refusing to divulge or incorrectly divulging witnesses' addresses or whereabouts, or by ordering, instructing, or advising a witness against the advisability of consenting to an interview. [46]

One court has cited ethical and practical authority in speaking not only of the right, but also the duty of defense counsel to attempt to interview a witness prior to trial. [47] But while the right of the defense to attempt to interview a witness without interference is well established, so is the right of a witness to refuse to submit to pretrial questioning. [48] Criminal discovery in most states does not allow for depositions of prospective witnesses, except for the limited purpose of preserving the testimony of witnesses who are likely to be absent from trial, or where justice would otherwise be defeated. [49] Only a few states allow depositions solely for discovery purposes. [50]

Section 105 codifies these rights, and places no restrictions on defense attempts to interview a witness or on the witness' freedom to speak freely to any party. The section aids pretrial discovery and contact between the defense and prosecution witnesses, by affording an opportunity for the witness to be interviewed at a site other than his or her residence, thus alleviating any fears on the part of the witness that the interview could expose him to a risk of harassment, harm to person or property, or unwanted publicity. Defense counsel is also spared the inconvenience, expense, and even danger of locating the witness and making an attempt to interview.

Section 105 places the burden on the prosecutor to ensure that the defense-witness interview procedure is implemented correctly. This may be seen by some prosecutors as an undesirable increase in their pretrial responsibilities, but all of the required work may be performed by other personnel under the prosecuting attorney's supervision. The prosecutor is not required to attend the interview.

SECTION 106. DISCLOSURE OF ADDRESSES AND TELEPHONE NUMBERS DURING TRIAL

During a trial or hearing related to a criminal prosecution, the court shall require that the residence and business addresses and telephone numbers of any victim of or witness to the crime shall not be disclosed in open court, and that a victim or witness shall not be required to provide the addresses or telephone numbers of the victim or witness in response to defense or prosecution questioning, unless the court determines that there is a clear need for such disclosure because the information is necessary and relevant to the facts of the case or to the credibility of the witness. The burden to establish the need

intent of this section is to provide the judge the discretionary power to take actions necessary to ensure victim and witness safety and confidentiality.

SECTION 108. PUBLIC AND MEDIA ACCESS; DEFENSE DISCOVERY; RIGHT TO REPORT

Nothing contained in this Act shall be construed to require the court to exclude the public from any stage of the criminal proceeding or otherwise interfere with a defendant's discovery rights, the public's right of access to governmental records, or the right of news media to report information lawfully obtained.

One means to guarantee that at least the press and public at large would not be privy to personal information revealed at trial would be to restrict access to criminal proceedings. But two recent Supreme Court cases have firmly established that the press and general public have a constitutional right of access to criminal trials. [60] Though the right of access is not absolute, the denial of that right must be justified by a compelling state interest and tailored narrowly to serve that interest. [61] Given "that a presumption of openness inheres in the very nature of a criminal trial under our system of justice," [62] the instances in which trials could be closed permissibly are infrequent at best.

SECTION 109. VICTIM AND WITNESS SERVICE ORGANIZATIONS

A. The prosecuting attorney, or his designee, in the district in which a private victim-service organization makes a request for the addresses and telephone numbers of victims and witnesses may authorize the release to the victim-service organization of such information by the prosecutor's office, law enforcement agencies, or other public officers or employees, if the prosecuting attorney concludes:

1. the organization's primary and bona fide purpose is to provide services, counseling, or other assistance to victims of crime;

2. such services are of sufficient quality so that it will be in the best interests of victims and/or witnesses to be offered such services by the organization; and

3. the organization is not seeking the information for commercial purposes.

Commercial agencies or companies and for-profit organizations are not to be considered organizations whose primary and bona fide purpose is to provide services, counseling, or other assistance to victims of crime.

B. A private victim-service organization which is denied access by the prosecuting attorney or other designated official to the addresses and telephone numbers of victims may request review by the state attorney general of the decision. The state attorney general may order the release of addresses and telephone numbers of victims and witnesses if in the opinion of the attorney general the organization

FOOTNOTES

1. American Bar Association Criminal Justice Section, Committee on Victims, Reducing Victim/Witness Intimidation: A Package (Washington, D.C.: ABA, 1979), at 1.

2. Davis, Russell, and Kunreuther, "The Role of the Complaining Witness in an Urban Criminal Court" (Report of New York's Victim Services Agency and the Vera Institute of Justice, 1980). The Victim Services Agency concluded that as many as 7,500 victims are threatened each year in the Brooklyn Criminal Courts alone.

3. Connick and Davis, "Examining the Problem of Witness Intimidation," 66 Judicature 439, 442 (1983).

4. One witness, Bobby Edwards, was murdered within seven hours of his name being released by a New York County Court in 1983.

5. ABA, supra note 1, at 1 and 2. The ABA noted that the survey conducted by New York's Victim Services Agency (see note 2 supra) involved only witnesses actually participating in the court process and that therefore "data was limited to cases in which the crime was reported and an arrest was made, and did not cover the many cases in which - whether because of intimidation or other reasons - an incident was not reported to police, or no arrest was made." (p. 3.)

6. Cannavale and Falcon, Witness Cooperation (Lexington: D.C. Heath, 1976), reporting on a study performed by the Institute for Law and Social Research.

7. Davis, Russell, and Kunreuther, supra note 2.

8. ABA, supra note 1, at 1.

9. Id., at 2.

10. Conference Committee Notes, House Report No. 94-414.

11. Conn. Gen. Stat. Ann. section 54-86e: "The name and address of a victim of a sexual assault . . . or of an attempt thereof shall be confidential and shall be disclosed only upon order of the Superior Court, except that such information shall be available to the accused." Ohio and South Dakota suppress, upon request of the victim, the name of a sex-crime victim until the accused is arraigned, the charge is dismissed, or the case is otherwise concluded, whichever comes first. S.D. Codified Laws Ann. section 23A-6-22; Ohio Rev. Code Ann. section 2907.11. Wyoming restricts preindictment release of the identity of a victim of a sexual assault. Wyo. Stat. section 6-4-310. In providing the same protection to minor victims of sex offenses, the New York statute covers any "report, paper, picture, photograph, court file or other (document) in the custody or possession of any public officer or employee" which identifies the victim, but allows the accused access to the information. N.Y. Civ. Rights Law section 50-b(1). Minnesota authorizes law enforcement agencies to withhold public access to data that would reveal the identity of a victim of criminal sexual conduct or intrafamily sexual abuse. The

McGrath, 104 Mont. 490, 497, 67 P.2d 838, 841 (1937). The common law right of inspection, even as liberalized by the courts, is quite narrow and contains many technical and often arbitrary limitations. 73 Mich. L.R. 971, 1164. Statutory language and court rulings in a few states take the position that the passage of an open-records law does not abrogate the common law right of access. (See, e.g., N.Y. Pub. Off. Law section 88.10 (McKinney's): "Nothing in this article shall be construed to limit or abridge any existing right of access at law or in equity of any party to public records kept by any agency or municipality"); Irval Realty Inc. v. Board of Pub. Util. Commrs., 61 N.J. 366, 373, 294 A.2d 425, 429 (1972) ("the statute clearly was not intended to diminish or in any way curtail the common law right of examination. That right remains unaffected by this legislation"); People ex rel. Gibson v. Peller, 34 Ill. App. 2d 372, 374-75, 181 N.E.2d 376, 378 (1962). Tex. Atty. Gen. Open Records Dec. No. 25, at 3 (March 7, 1974), states that although records of the judicial branch are exempted from the Texas open-records act, the papers of the justice of the peace that were sought were required by law to be kept and thus were subject to the common-law right of inspection. See also An Overview of the Law Governing Access to Information Held by Public Agencies in the State of Illinois and the City of Chicago, 68 Nw. U. L. Rev. 223, 237 (1973) in Research Study, Public Access to Information, 68 Nw. U. L. Rev. 177 (1973).

19. The purpose of the Federal Freedom of Information Act, 5 U.S.C. section 552 et seq., a prototype for such statutes, was given by the United States Supreme Court in National Labor Relations Board v. Robbins Tire and Rubber Company, 437 U.S. 214, 242, 98 S.Ct. 2311, 2327, 57 L.Ed.2d 159 (1978): "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." See also GTE Sylvania, Inc. v. Consumers Union of the United States, 445 U.S. 375, 100 S.Ct. 1194, 63 L.Ed.2d 467 (1980). That sense of purpose also informs the numerous state enactments that include a declaration of policy in the legislation, e.g., Ark. Stat. Ann section 12-2802 (as amended 1976): "Declaration of Public Policy - It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy . . . ."; Me. Rev. Stat. Ann. tit. 1, section 401 (1975): Declaration of public policy, etc.: "The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business . . . ."

20. A typical exemption is 5 U.S.C. section 552(b)(7) of the Federal Freedom of Information Act, which excludes from public disclosure the following: "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by a confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel."

public right of access to public records "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." An Illinois provision states: "nothing in this section shall require the State to invade or assist in the invasion of a person's right to privacy." Ill. Rev. Stat. ch. 116, section 43.6 (1973). Other records excepted by various states include juvenile records, medical and public health records, income tax returns, scholastic records, personnel files, welfare records, records of adoption, circulation records of public libraries, credit histories, and personal information regarding prisoners, probationers, parolees, or employees of public agencies.

25. Houston Chronicle Publishing Co. v. Houston, 531 S.W.2d 177, 82 A.L.R. 3d (1975); Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 117 Cal. Rptr. 106 (1974).

26. Support for this position can be found in Hyde v. City of Columbia, supra note 12, a 1982 case in Missouri, a state whose open public records act did not contain at that time a police-records exception. The facts showed that after a victim of an attempted abduction reported the crime to police, her name and address were released to and published by a newspaper, and she was subsequently terrorized repeatedly by the assailant, who was still at large. The court concluded that despite the lack of a police-records exemption, "the name and address of a victim of crime who can identify an assailant not yet in custody is not a public-record under the Sunshine Law." The court said its ruling was "to avoid an absurd - even unlawful - application of the statute as written . . ."

27. Hyde, supra note 12, at 263.

28. Cavallero v. U.S., 553 F.2d 305 (1977).

29. United States v. Hearst, 412 F.Supp. 863 (N.D. Cal. 1975); United States v. Holmes, 346 A.2d 517 (D.C. 1975).

30. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963); State v. Horn, 101 Idaho 192, 610 P.2d 551 (1980); Lowe v. Commonwealth, 239 S.E.2d 112 (Va. 1977); People v. Wilken, 89 Ill. App. 3d 1124, 45 Ill. Dec. 489, 412 N.E.2d 1071.

31. States requiring names of witnesses to be disclosed prior to trial include Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Oregon, Tennessee, and Utah. Most states allow courts to modify this requirement in instances of intimidation or danger.

32. Arizona, for example, has long required the disclosure of witness names and addresses. Ariz. Rule of Cr. P. 15.1(a)(1). Other states requiring address disclosure are Florida (Fla. Rule of Cr. P. 3.220), Illinois (Ill. Code of Cr. P. art. 38 section 114.9), Indiana, Oklahoma, Nevada (Nev. Rev. Stat. section 74.087), and Utah.

Criminal Justice, "The Prosecution Function," provides that a prosecutor should not discourage or obstruct communications between prospective witnesses and defense counsel, and that it is unprofessional conduct for a prosecutor to advise any person to decline to give to the defense information that the person has the right to give. Cases citing these standards as a basis for a prosecutor's failure to cooperate in making witnesses available to the defense include: Gregory v. United States, 125 App. D.C. 140, 369 F.2d 185 (1966); United States v. Fink, 502 F.2d 1 (5th Cir. 1974), rev'd on other grounds, 425 U.S. 80, 47 L. Ed. 2d 592, 96 S. Ct. 1330; State v. Hammler, 312 So.2d 306 (La. 1975); State v. Reichenberger, 289 Minn. 75, 182 N.W.2d 692 (1970).

45. Barnett v. State, 8 Md. App. 35, 257 A.2d 466 (1969); State v. McDevitt, 297 A.2d 58 (Del. 1972); State v. Williams, 91 N.C. 599 (1884) (cited in Gallman v. State, 29 Ala.App. 264, 195 So. 768 at 770 (1940)): "It is competent for the prisoner or his counsel to converse with anyone supposed to have knowledge of the offense imputed and ascertain the facts so known. A party, even when the state is such, cannot by first summoning a witness deprive the other party, or the accused, of the testimony of the witness when favorable, nor of an opportunity of ascertaining what information he may possess, before putting him on the stand, as he might do should the state decline to introduce and examine him. His information ought to be sought and obtained voluntarily and fairly from the witness and not by what he may deem to be a constraint."

46. Gregory v. United States, 125 App. D.C. 140, 369 F.2d 185 (1966); State v. Hammler, 312 So.2d 306 (La. 1975); State v. Burri, 87 Wash.2d 175, 550 P.2d 507 (1976). In Illinois, courts have relied on a state statute entitling criminal defendants to a list of prosecution witnesses to declare that a prosecutor cannot direct witnesses not to speak with the defendant or his counsel, or otherwise deprive them of a fair opportunity for an interview in the preparation of the defense. People v. Jackson, 116 Ill. App. 2d 304, 253 N.E.2d 527 (1969); People v. Silverstein, 19 Ill. App. 3d 826, 313 N.E.2d 309 (1974) (rev'd on other grounds, 60 Ill. 2d 464, 328 N.E.2d 316). In Indiana, failure on the part of a prosecutor to produce an informant and two police officers in compliance with a court order was considered a denial of a defendant's right under statute to take depositions of the state's witness. Dorsey v. State, 254 Ind. 409, 260 N.E.2d 800 (1970), citing Ind. Code Ann. section 9-1610.

47. Gallman v. State, 29 Ala.App. 264, 195 So. 768, 770 (1940): "It is a mistake of a serious nature for a trial court, or opposing counsel, to assume or intimate that counsel for the defendant is not at full liberty to question, whenever he sees fit, any person who knows or is presumed to know the facts attendant upon the commission of the offense with which his client is accused. It is his solemn, sworn duty to ascertain, as far as he can, what the evidence is, and his duty is not at an end when he has examined, no matter how exhaustively, his client; he must see and talk with the witnesses. Sherwood's Legal Ethics, p. 121; Elliott's General Practice, Chap. 1, Sections 1-5; Chitty's Practice, Vol. 2, pages 21 and 53." See also State v. Williams, supra note 45.

48. "The witness is free to decide whether to grant or refuse an interview, and . . . it is not improper for the government to inform the witness of that right." United

> invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. . . . But no such case is presented here. . . .

Smith v. Illinois, 390 U.S. 129, 138, 88 S. Ct. 748, 19 L.Ed.2d 956 (1968):

> Yet when the credibility of a witness is in issue, the very starting point in "exposing falsehood and bringing out the truth" through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshhold is effectively to emasculate the right of cross-examination itself.

One reason for eliciting a witness' residence is to show that the witness is in the custody of law enforcement authorities and thus may have a motivation to testify favorably for the state. Johnson v. State, 30 Md.App. 512, 352 A.2d 371 (1976). The Supreme Court in Alford was careful to point out that the witness in question might have been incarcerated himself at the time of his testimony, obviously a significant reflection on his credibility.

52. See Alford v. U.S., id.

In Connecticut, a victim of a sexual crime need not divulge address or telephone information during a trial or pretrial evidentiary hearing if "(1) such information is not material to the proceeding, (2) the identity of the victim has been satisfactorily established, and (3) the current address of the victim is made available to the accused." Conn. Gen. Stat. Ann. section 54-86(d).

53. United States v. Alston, 460 F.2d 48, at 52 (1972):

> We think that a reasonable interpretation of this area of exception, acknowledged by Smith and Alford, to the usual requirement that the witness divulge background information would include an instance in which the physical safety of the witness or his family might be endangered by disclosure. Accord, United States v. Caldarazzo, 444 F.2d 1046 (7th Cir. 1971); United States v. Palermo, 410 F.2d 468 (7th Cir. 1969); United States v. Daddano, 432 F.2d 1119, (7th Cir. 1970) cert. denied, 402 U.S. 905, 91 S.Ct. 1367, 28 L.Ed.2d 645; United States v. Lawler, 413 F.2d 622 (7th Cir. 1969) cert. denied, 396 U.S. 1046, 90 S.Ct. 698, 24 L.Ed.2d 691; United States v. Lee, 413 F.2d 910 (7th Cir. 1969) cert. denied, 396 U.S. 1022, 90 S.Ct. 595, 24 L.Ed.2d 515; United States v. Teller, 412 F.2d 374 (7th Cir. 1969) cert. denied, 402 U.S. 949, 91 S.Ct. 1603, 29 L.Ed.2d 118; United States v. Baker, 419 F.2d 83 (2nd Cir. 1969) cert. denied, De Norscio v. United States, 397 U.S. 976, 90 S.Ct. 1096, 25

Shepardson and that she might be receiving something in return for her testimony. The court did not prevent such questioning, and cross-examination along these lines was in fact conducted. See United States v. Bennett, supra, 409 F.2d at 901. Moreover, cross-examination of Shepardson demonstrated considerable familiarity with her background and acquaintances, undoubtedly because Cavallero had personally been acquainted with her for approximately one year prior to the kidnapping. See United States v. Persico, supra, 425 F.2d at 1384; United States v. Baker, supra, 419 F.2d at 87.

55. Courts that have upheld restrictions on cross-examination as to a witness' residence have emphasized that the address is not essential information as long as the cross-examiner is able to elicit enough information otherwise to place the witness "in his proper setting." Alford, supra note 51, at 692. "The substance of Smith and Alford is to assure the admission of background that is an essential step in identifying the witness with his environment." U.S. v. Alston, supra note 53, at 51, quoting Alford, at 693. Courts have emphasized that the seminal Alford and Smith cases involved witnesses whose backgrounds, occupations, and general identity were unclear, and have limited address inquiries where witnesses were more well-known and facts about their association and background were disclosed. McGrath v. Vinzant, 528 F.2d 681 (1st Cir. 1976), cert. denied, 426 U.S. 902, 96 S.Ct. 1221, 48 L.Ed.2d 827.

56. Smith, supra note 51, concurring opinion of Justice White, joined by Justice Marshall:

> In Alford v. United States, 282 U.S. 687, 694, 51 S.Ct. 218, 220, 75 L.Ed. 624 (1931), the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of the witness. But in these situations, if the question asked is one that is normally permissible, the State or the witness should at the very least come forward with some showing of why the witness must be excused from answering the question. The trial judge can then ascertain the interest of the defendant in the answer and exercise an informed discretion in making his ruling. Here the State gave no reasons justifying the refusal to answer a quite usual and proper question. For this reason I join the Court's judgment and its opinion which, as I understand it, is not inconsistent with these views. I should note in addition that although petitioner and his attorney may have known the witness in the past, it is not at all clear that either of them had ever known the witness' real name or knew where he lived at the time of the trial.

Alston, supra note 53, at 53: "Of course, it should be the Government that comes forward with an explanation of its objection to the divulging of an address by any witness."

VI. STATUTE OF LIMITATIONS FOR OFFENSES AGAINST CHILDREN

STATUTE OF LIMITATIONS FOR OFFENSES AGAINST CHILDREN

Recommendation of the Attorney General's Task Force on Family Violence

States should enact laws to extend the statute of limitations in criminal cases of child sexual assault.

Proposed Legislation*

SECTION 101. FINDINGS AND PURPOSE

A. The legislature and people of this State find and declare that:

1. The children of this state face a serious threat of becoming victims of child abuse or of sex offenses directed against children;

2. Frequently, a child does not report a crime of this nature when it occurs for a variety of reasons, including the child's extreme youthfulness; the child's lack of knowledge that certain acts are criminal or that they can and should be reported; and the dominating or coercive influence of the perpetrator, who may be a parent, family member, or close acquaintance;

3. Limitations on the time within which to bring a criminal action, which may be justified for most offenses, serve to hinder unjustifiably the prosecution of those who prey on particularly young children, and thus endanger potential future victims; and

4. Because of the special nature of abuse and sex offenses against children, and the particularly heinous nature of these crimes, efforts to prosecute perpetrators should not be hampered by the normal statutory limitation period applicable to crimes against adults.

B. Therefore, the legislature and people of this State find and declare that the purpose of this Act is to protect the children of this State from child abuse and sex abuse by enabling prosecutions to be brought against perpetrators within a reasonable but more lengthened period of time than that which applies to other offenses.

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*Drafted with the assistance of the Crime Victims Project of the National Association of Attorneys General.

Commentary

It is understandable that children who have been sexually victimized often do not report the offense until some length of time has passed. A child may repress the incident, feel somehow responsible, or feel too ashamed to reveal it. If very young, they may not understand that the activity they are being subjected to is criminal, or that they can or should report it to someone. And if the offender is a member of the victim's family, a family friend, or an individual in some position of control or authority over the child, reporting may be difficult, if not impossible. Threats against the child to discourage reporting also are common. Because of these reasons, an offender can escape prosecution, since statutes of limitations in most states require that the government normally must bring a criminal action within a set period of time from the date of the offense.

In most states, the statutory limitation period beyond which prosecutions or civil lawsuits cannot commence varies according to the general type or severity of the crime or alleged injury. Misdemeanors may carry only a one-year statutory limit, while felonies may require prosecution within up to four years of the date of the offense. Capital offenses, such as murder, usually carry no time limitation at all, and manslaughter, arson, and forgery also may be excluded from limitation periods. For crimes or torts involving deception or professional malpractice, the time limit may not begin to run until the deception or professional malpractice is actually discovered or should reasonably have been discovered through the exercise of due diligence. The rationale in those cases is that it is, of course, impossible to bring an action when there is no knowledge an offense has occurred. The situation of child sexual abuse is analogous. Just as an adult who has been defrauded may not be aware a crime or injury has taken place until years later, so a child may not realize his or her sexual victimization is an offense until some time has passed. And just as a particularly successful defrauder could escape prosecution or litigation unless the statutory limit was extended, so could a child molester, particularly one who preys on very young victims or victims he can easily intimidate, be safe in knowing that many would not report his transgressions until no prosecution could proceed.

Section 104 of this act is substantially similar to section 775.15(7), Florida Statutes, effective October 1, 1984. Under that statute, the applicable limitation period for sexual offenses involving a child victim, including incest, begins to run when the offense is reported, or when the child turns 16, whichever comes first. In Alaska, prosecutions for sex offenses against children under the age of 16 must be commenced within a year of either the report of the offense or the time the child turns 16, so long as no more than five years have elapsed since the time of the offense (Alaska Stat., section 12.10.020(c)). Colorado recently lengthened to 10 years the time within which prosecutions for non-misdemeanor sex offenses against children can be initiated; the limitation period is five years for misdemeanor sex offenses (Colo. Rev. Stat. section 18-3-411). Minnesota and Washington lengthened their limitation periods from three years to seven years for any criminal sexual conduct involving a minor (Minn. Stats. Ann. chs. 496, 588; Wash. Rev. Code section 9A.04.080); Idaho has increased its limitation period from three years to five years for any felony committed against a child (Idaho Code Ann. section 19-402); Iowa has lengthened applicable periods one year if a child is the victim

VII. COMPETENCY OF CHILD WITNESSES

COMPETENCY OF CHILD WITNESSES

Recommendation of the Attorney General's Task Force on Family Violence

Judges should adopt special court rules and procedures for child victims. These should include . . . a presumption that children are competent to testify.

Proposed Legislation*

SECTION 101. FINDINGS AND PURPOSE

A. The legislature and people of this State find and declare that:

1. The testimony of children who are victims of or witnesses to crimes needs to be heard in court, in order for the criminal justice system to function properly;

2. The testimony of a child should not be considered lacking in credibility simply because of the fact of a child's age; and

3. Juries or judges acting as triers of fact in criminal proceedings should be allowed to determine the credibility of child witnesses in light of all the circumstances of the case, rather than by any preconceived notions that children are less credible or competent than other witnesses.

B. Therefore, the legislature and people of this State find and declare that the purpose of this Act is to ensure that children will be allowed to testify in criminal cases in which they may be called as victims or witnesses, and that their testimony will not be considered less credible simply because of their age.

SECTION 102. COMPETENCY OF CHILD VICTIMS AND WITNESSES

Notwithstanding any other provision of law or rule of evidence, a child, as defined by State law, who is a victim of or a witness to a criminal offense is competent to be a witness, regardless of age, and shall be allowed to testify in any judicial proceeding related to the offense. The trier of fact shall be permitted to determine the weight and credibility to be given to the testimony.

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*Drafted with the assistance of the Crime Victims Project of the National Association of Attorneys General.

Commentary

All the states recognize the centuries-old principle originating in English common law that there is no fixed age below which a child is incapable of testifying.[1] Almost half of the states, however, subject children below a certain age to special tests in order for them to qualify as witnesses,[2] and a number of others require all witnesses to meet some qualifying criteria.[3] In these states, children may be required to prove that they understand the nature of an oath or their duty to tell the truth, or they may be asked to demonstrate some capability for receiving impressions or remembering and relating facts accurately. Some children, particularly the youngest, though perfectly capable of relating the details of their own victimization, may be unable to understand or articulate unfamiliar or abstract concepts having to do with an oath or the truth, or initially may appear incapable of testifying competently because of fear or confusion concerning the proceedings. The result may be that the child is barred from testifying. And since the child victim is nearly always the only witness in cases of child molestation or abuse, the prosecution may not be able to proceed.[4]

Competency provisions in the Federal Rules of Evidence and more than a fourth of the states declare, with limited exceptions, every witness competent to testify in any judicial proceeding, regardless of age or any other special qualification.[5] Under those provisions, all witnesses, except those expressly deemed incompetent under the rules (as in Rules 605 and 606 barring the judge and jurors as witnesses in a case), are allowed to testify, and it is up to the trier of fact to determine the weight and credibility to be given the testimony. This is the most comprehensive means of removing obstacles to children testifying, since it eliminates not only age disqualifications, but such other grounds of incompetence as mental capacity, religious belief, conviction of a crime, and interest in the outcome of a case.[6]

Several states with qualifying tests for child witnesses have chosen instead to create special exceptions for child victims of abuse or sexual offenses. These statutes recognize the seriousness and special circumstances of those crimes, and the inherent and pressing need for the child's testimony. Missouri and Utah provide that children under 10 years of age are competent to testify about their own sexual victimization,[7] and Colorado's statute allows children to testify in sex-offense cases without specifying they must be victims themselves.[8] (In all of these states, children 10 years of age and older are presumed competent. States in which the age of competency is higher would have to except children up to that higher age to accomplish the same objective of ensuring their testimony in sex-offense prosecutions.) Minnesota, while declaring incompetent those children under 10 who lack capacity to remember or relate facts truthfully, specifically allows qualified child sex-offense victims to use language appropriate for their age in testifying.[9] Alabama, Delaware, Illinois, Iowa, Maryland and Tennessee also have laws eliminating the presumption of incompetency for child witnesses.[10]

Leading legal scholars have agreed that children should be allowed to testify in court and that any question of the credibility and weight to be given a child's testimony should be left to the jury or judge determining the facts in a case.[11] Studies have shown that young children have sufficient mental capacity and memory to testify to factual events, and that they have a high level of veracity.[12] Many experts are convinced that this is particularly true in cases of sexual abuse, since children generally have no

FOOTNOTES

1. More than 200 years ago the leading English case of Rex v. Brasier, 11 Leach 199, 168 Eng. Rep. 202, 203 (1779), enunciated the following principle:

> . . . that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath . . . for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain to the danger and impiety of falsehoods, which is to be collected from their answers to questions propounded to them by the court; but if they are found incompetent to take an oath, their testimony cannot be received.

In 1895, the U.S. Supreme Court held that a 5-1/2-year-old son of a murder victim was competent to testify (Wheeler v. United States, 159 U.S. 523, 524-525):

> That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence as well as his understanding of the obligation of an oath.

2. In seven states, a child above the age of 10 is presumed competent, while the court must determine the competence of those below that age: Ariz. Rev. Stat. Ann. section 12-2202; Idaho Code section 9-202; Ind. Code section 34-1-14-5 (applied to criminal matters via section 35-37-4-1; section 35-1-31-3); Mich. Stat. Ann. section 27A-2163; Minn. Stat. section 595.02(1) (f); Ohio Rev. Code Ann. section 2317.01; Wash. Rev. Code section 5.60.050; Wyo. R. Evid. 601 and 1102. In two states the age of presumed competence is 12: La. Rev. Stat. 15:469; N.Y. Crim. Proc. Law section 60.20 (Consol.). Five states use the common-law standard presuming competence for children at least 14: New Hampshire, Rhode Island, South Carolina, Virginia, and West Virginia. Other statutes subjecting child witnesses to special qualifying tests include Ga. Code sections 24-9-1 and 24-9-5; Hawaii Rev. Stat. section 621-16; and Texas Code Crim. Proc. Ann. art. 38.06.

3. Cal. R. Evid. 701; Kan. Stat. Ann. section 60-417; Ky. Rev. Stat. section 421.200; Me. R. Evid. 601; Mass. Gen. Laws ch. 233, section 20; Mont. R. Evid. 601; N.J. Rev. Stat. section 2A-81-1 and R. Evid. 17; N.C. R. Evid. 601; Vt. R. Evid. 601.

Code Ann. section 76-5-410.

11. Wigmore, Evidence section 509, at 601:

> A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure a priori the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire some degree of credibility, is futile and unprofitable. . . . Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let the story come out for what it may be worth.

McCormick, supra note 4, at 140-141.

12. B.V. Marin, D.L. Holmes, M. Guth, and P. Kova, The Potential of Children as Eyewitnesses: A Comparison of Children and Adults on Eyewitness Tasks, 3 Law and Human Behavior 295 (1979); Cohen and Harnick, the Susceptibility of Child Witnesses to Suggestion, 4 Law and Human Behavior 201, 202-3 (1980); Melton, Children's Competency to Testify, 5 Law and Human Behavior 73 (1981); Johnson and Foley, Differentiating Fact from Fantasy: The Reliability of Children's Memory, Journal of Social Issues 40:2, pp. 33-50 (1984); Goodman, The Child Witness: Conclusions and Future Directions for Research and Legal Practice, Journal of Social Issues 40:2, pp. 157-175 (1984).

13. In State v. Manlove, 441 P. 2d 229, at 231 (N.M. 1968), the court ruled that "a child that has an adequate sense of the impropriety of falsehoods, does understand the nature of an oath in the proper sense of the term even though he may not know the meaning of the word oath and may never have heard that word before."

14. Pattern Criminal Jury Instructions: Report of the Federal Judicial Center Committee to Study Criminal Jury Instructions, Federal Judicial Center (June 1982). Pattern Jury Instruction No. 28 and its accompanying commentary read as follows:

> **TESTIMONY OF A CHILD: CAUTIONARY INSTRUCTION**
>
> You have heard the testimony of _____, and you may be wondering whether his young age should make any difference. What you must determine, as with any witness, is whether that testimony is believable. Did he understand the questions? Does he have a good memory? Is he telling the truth?
>
> Because young children may not fully understand what is happening here, it is up to you to decide whether _____ understood the seriousness of his appearance as a witness at this

VIII. BAIL REFORM

BAIL REFORM

President's Task Force Recommendation

Legislation should be proposed and enacted to amend the bail laws to accomplish the following:

a. Allow courts to deny bail to persons found by clear and convincing evidence to present a danger to the community;

b. Give the prosecution the right to expedited appeal of adverse bail determinations, analogous to the right presently held by the defendant;

c. Codify existing case law defining the authority of the court to detain defendants as to whom no conditions of release are adequate to ensure appearance at trial;

d. Reverse, in the case of serious crimes, any standard that presumptively favors release of convicted persons awaiting sentence or appealing their convictions;

e. Require defendants to refrain from criminal activity as a mandatory condition of release; and

f. Provide penalties for failing to appear while released on bond or personal recognizance that are more closely proportionate to the penalties for the offense with which the defendant was originally charged.

Proposed Model: The Bail Reform Act of 1984*

The recommendations of the President's Task Force with regard to bail were made to address what the Task Force termed the "imbalance between the legitimate and necessary interest of the victim in protection and the interest of the accused in procedural safeguards . . ." [1/] This imbalance is nowhere more apparent than in the area of bail, according to the Task Force:

> The legal system exists to protect both the accused and the community. However, the bail system, as it currently operates in many jurisdictions, addresses only the protection of the defendant, and completely ignores the victims. To be just, a system must be devised that serves the rightful needs of both. [2/]

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*Analysis prepared with the assistance of the Crime Victims Project of the National Association of Attorneys General.

The broad base of support for giving judges the authority to weigh risks to community safety in pretrial release decisions is a reflection of the deep public concern about the growing problem of crimes committed by persons on release. The President's Task Force emphasized that this concern is particularly acute among victims:

> Victims who have been robbed or raped, and the families of those murdered by persons who were released on bail while facing serious charges and possessing a prior record of violence, simply cannot understand why these persons were free to harm them. When that same person is again released and returns to threaten or intimidate, these victims frequently lose all faith in a justice system so obviously unable to protect them. [13]

While such measures as restricting the movement and/or activity of a defendant if released and providing for revocation of release upon the commission of a crime during the pretrial period may serve to reduce the rate of pretrial recidivism, it appears that there is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or individual people. It is with respect to this limited group of offenders that legislatures are giving courts the power to deny release pending trial. The laws of 23 states and the District of Columbia now allow for pretrial detention when certain conditions indicating defendant dangerousness are met, [14] and a total of 32 states and the District of Columbia specifically recognize that defendant dangerousness is an appropriate consideration in setting conditions of pretrial release. [15]

These pretrial detention provisions vary considerably among the states, principally with regard to the circumstances under which detention is permitted. For example, only five states and the District of Columbia permit pretrial detention simply at the discretion of the judge in cases involving violence or a dangerous crime, with no record of prior criminal involvement necessary. [16] Just one state accepts a finding of likely future dangerousness as sufficient grounds for detention, regardless of the defendant's prior record or the nature of the current charge, [17] and two other states permit detention of defendants charged with specific non-capital crimes (forcible rape, armed robbery, or kidnapping for purposes of extortion). [18] The alleged commission of a felony by a defendant already on bail for another felony charge is specific grounds for detention in ten states and the District of Columbia. [19] Nine jurisdictions authorize detention of defendants with a prior criminal conviction. [20] Procedures for implementing these provisions are similarly diverse, with regard to whether special hearings are required, what standard of proof is to be applied, and the length of permissible detention. [21]

The Federal Bail Reform Act of 1984 is designed to assure a forthright means of detaining dangerous offenders, as well as offenders likely to flee, pending trial and during appeal. Specifically, the provisions: (1) allow pretrial detention of a defendant if no condition of release will assure his appearance or the safety of specific individuals or the community; (2) allow judges and magistrates to consider danger to the community or individuals in setting pretrial release conditions other than financial conditions; (3) permit the imposition of additional types of release conditions, including probationary-type supervision; (4) provide procedures for revoking the release of a defendant who has

those offenses while on pretrial release, and no more than five years have elapsed since the date of conviction or the defendant's release from imprisonment for the offense, whichever is later.

The second rebuttable presumption for pretrial detention arises in cases in which the defendant is charged with a drug-trafficking felony punishable by ten years or more of imprisonment, or with the use of a firearm to commit a felony. Obviously, the use of guns in committing a crime is a clear indication of dangerousness. Persons charged with major drug felonies also pose a significant risk of pretrial recidivism, since drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity. Furthermore, flight to avoid prosecution is particularly high among persons charged with major drug offenses because of the extremely lucrative nature of drug trafficking, and the fact that drug traffickers often have both the resources and foreign contacts to escape to other countries with relative ease to avoid prosecution for offenses punishable by lengthy prison sentences. Even the prospect of forfeiture of bond in the hundreds of thousands of dollars has proven to be ineffective in assuring the appearance of major drug traffickers.

(An amendment to add federal explosives and felony firearm offenses as another category of offenses for which pretrial detention on grounds of danger to the community is authorized is now under consideration by Congress. [23])

A detention hearing must be held, upon motion of the government, if the defendant is charged with a crime of violence, an offense for which the maximum sentence is life imprisonment or death, a drug-trafficking offense punishable by at least ten years, or if the defendant has two prior convictions for those offenses and is charged with any felony (section 3142(f)). The hearing also must be held if the government claims or if the judicial officer believes that there is a serious risk the defendant will flee, obstruct justice, or injure or intimidate a prospective witness or juror.

The detention hearing is to be held immediately upon the person's first appearance before the judicial officer unless a continuance is sought by either the defendant or the government. Since the defendant will be detained during such a continuance, the period of a continuance sought by the defendant and of one sought by the state is confined to five and three days, respectively. An extension of the continuance may be granted, however, for good cause.

The procedural requirements for the pretrial detention hearing are based on those of the District of Columbia statute which were held to meet constitutional due process requirements in United States v. Edwards. [24] The accused has a right to counsel, and to the appointment of counsel if he is financially unable to secure adequate representation. He is to be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The presentation and consideration of information at a detention hearing need not conform to the rules of evidence applicable in criminal trials.

The fact that a defendant is charged with any particular offense is not, in itself, sufficient to support a detention order. The judicial officer is required to consider the nature and circumstances of the offense, including whether it involved violence or drugs;

resources than others (well-to-do defendants buy their release, while poorer persons remain in jail). As the Senate Judiciary Committee pointed out:

> Providing statutory authority to conduct a hearing focusing on the issue of a defendant's dangerousness, and to permit an order of detention where a defendant poses such a risk to others that no form of conditional release is sufficient, would allow the courts to address the issue of pretrial criminality honestly and effectively. It would also be fairer to the defendant than the indirect method of achieving detention through the imposition of financial conditions beyond his reach. The defendant would be fully informed of the issue before the court, the state would be required to come forward with information to support a finding of dangerousness, and the defendant would be given an opportunity to respond directly. These bail procedures promote candor, fairness, and effectiveness for society, the victims of crime--and the defendant. [31]/

Under the Bail Reform Act, financial conditions of release are specifically limited to the purpose of assuring the appearance of the defendant. A defendant who is a danger to the community remains dangerous even if he has posted a substantial money bond. In addition, the statute expressly provides that a judicial officer may not impose a financial condition of release that results in the pretrial detention of the defendant (section 3142(c)):

> The purpose of this provision is to preclude the sub rosa use of money bond to detain dangerous defendants. However, its application does not necessarily require the release of a person who says he is unable to meet a financial condition of release that the judge has determined is the only form of conditional release that will assure the person's future appearance. Thus, for example, if a judicial officer determines that a $50,000 bond is the only means, short of detention, of assuring the appearance of a defendant who poses a serious risk of flight, and the defendant asserts that, despite the judicial officer's finding to the contrary, he cannot meet the bond, the judicial officer may reconsider the amount of the bond. If he still concludes that the initial amount is reasonable and necessary, then it would appear that there is no available condition of release that will assure the defendant's appearance. This is the very finding which, under section 3142(e), is the basis for an order of detention, and therefore the judge may proceed with a detention hearing pursuant to section 3142(f) and order the defendant detained, if appropriate. The reasons for the judicial officer's conclusion that the bond was the only condition that could reasonably assure the appearance of the defendant, the judicial officer's finding that the amount of the bond was reasonable, and the fact that the defendant stated that he was unable to meet this condition would be set out in

APPEAL OF ADVERSE BAIL DECISIONS

Release of potentially dangerous defendants is a matter of grave public concern, and bail decisions by individual judicial officers should be subject to review in the interest of public safety as well as the interest of defendants. The Bail Reform Act grants the government specific authority to appeal bail decisions to the same extent the authority is given defendants (section 3145). The appeal is heard by a court one step higher than the judicial officer who issued the original order. The statute stipulates that the appeal is to be heard promptly.

PRESUMPTION AGAINST POST-CONVICTION RELEASE

There is clearly no constitutional right to bail once a person has been convicted, [35] and the Bail Reform Act creates a statutory presumption against post-conviction release (section 3143). Once guilt of a crime has been established in a court of law, there is no reason to favor release pending imposition of sentence or appeal. The Act separately treats release pending sentence, release pending appeal by the defendant, and release pending appeal by the government.

To release a defendant who is awaiting sentence, or has filed an appeal or a petition for a writ of certiorari, a judicial officer must find by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the safety of any other person or the community. In the case of an appeal, the court must also affirmatively find that the appeal is not taken for the purpose of delay and that it raises a substantial question of law or fact that if decided in the defendant's favor is likely to result in reversal or an order for a new trial. In overcoming the presumption in favor of detention the burden of proof rests with the defendant.

Appeals by the government from orders of dismissal of an indictment or information and for suppression of evidence involve situations in which the defendant has not been convicted. In these instances, the defendant is to be treated under section 3142, the general provision governing release or detention pending trial. This means that the defendant may be detained if found to be a danger to the community or if no conditions of release will assure his appearance in court.

REFRAINING FROM CRIMINAL ACTIVITY AS A MANDATORY CONDITION OF RELEASE

The problem of crime committed by defendants on release was addressed again by the President's Task Force in recommending that all defendants be required to refrain from criminal activity as a mandatory condition of release. [36] The Bail Reform Act enacts this recommendation into law (section 3142(b)). The importance of the provision is twofold: first, to stress to released defendants that they must remain law-abiding during the term of their release; and second, to provide a basis for revoking release to return offending individuals to jail.

FOOTNOTES

1. President's Task Force on Victims of Crime, Final Report (December 1982), p. 23.

2. Id., p. 22.

3. The Bail Reform Act of 1984 was enacted as part of the Comprehensive Crime Control Act of 1984 (Public Law #98-473, H.J. Res. 648).

4. Arizona, California, Colorado, Florida, and Illinois.

5. National Association of Attorneys General, Resolution, Winter Meeting (1983).

6. American Bar Association, Standards Relating to the Administration of Criminal Justice: Pretrial Release, Standards 10-5.2, 10-5.8, and 10-5.9 (1978).

7. National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure, Rule 341 (1974).

8. National District Attorneys Association, National Prosecution Standards: Pretrial Release, Standard 10.8 (1977).

9. National Association of Pretrial Services Agencies, Performance Standards and Goals for Pretrial Release and Diversion, Standard VII.

10. President's Task Force Report, supra note 1 at 22-23.

11. Lazar Institute, Pretrial Release: An Evaluation of Defendant Outcomes and Program Impact 48 (Washington, D.C., August 1981).

12. Institute for Law and Social Research, Pretrial Release and Misconduct in the District of Columbia 41 (April 1980) (hereinafter cited as the INSLAW Study).

13. President's Task Force Report, supra note 1 at 22.

14. Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Nevada, New Mexico, New York, Rhode Island, Texas, Utah, Virginia, and Wisconsin. Many more states allow detention for offenses where the penalty is execution or life imprisonment. South Dakota and Washington require a finding of dangerousness even in capital offenses in order for pretrial detention to be allowed.

15. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Mexico, New York, North Carolina, South Carolina, South Dakota, Texas, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin.

16. Arizona, California, District of Columbia, Michigan, Virginia and Wisconsin.

28. The Iowa and Vermont Constitutions are typical:

Iowa Constitution, art. I, section 12: All persons shall, before conviction, be bailable, by sufficient sureties, except for capital offenses where the proof is evident, or the presumption great.

Vermont Constitution, ch. II, section 40: Excessive bail shall not be exacted for bailable offenses. All persons, unless sentenced, or unless committed for offenses punishable by death or life imprisonment when the evidence of guilt is great, shall be bailable by sufficient sureties. Persons committed for offenses punishable by death or life imprisonment, when the evidence of guilt is great, shall not be bailable as a matter of right. No person shall be imprisoned for debts.

29. Arizona, California, Michigan, Nebraska, Texas, Utah, and Wisconsin are examples of states that amended their constitutions to permit pretrial detention of dangerous defendants.

30. See S. Rep., supra note 26 at 10-11.

31. Id., at 11.

32. Id., at 16.

33. Inquiries into the source of property used to secure release are commonly referred to as Nebbia hearings. United States v. Nebbia, 357 F.2d 303 (2d Cir. 1966). The judicial officer may also decline accepting the property if the defendant refuses to explain its source. See United States v. DeMorchena, 330 F. Supp. 1223 (S.D. Cal. 1970), in which the court refused to accept a $50,000 surety bond secured by $55,000 delivered in cash to the bondsman until the defendant presented evidence as to the source of the money.

34. President's Task Force Report, supra note 1, at 23.

35. United States v. Baca, 444 F. 2d 1292, 1296 (10th Cir.), cert. denied 404 U.S. 979 (1971).

36. This concept was endorsed in the commentary to the Uniform Rules of Criminal Procedure, supra note 7 at 64, citing an Arizona case to the effect that it is permissible to condition the pretrial release by a requirement that the defendant conduct himself as a law-abiding citizen, State of California v. Cassius, 110 Ariz. 485 (1974).

BAIL REFORM ACT OF 1984
H.J. Res. 648
Comprehensive Crime Control Act of 1984

CHAPTER I—BAIL

SEC. 202. This chapter may be cited as the "Bail Reform Act of 1984".

SEC. 203. (a) Sections 3141 through 3151 of title 18, United States Code, are repealed and the following new sections are inserted in lieu thereof:

"§ 3141. Release and detention authority generally

"(a) PENDING TRIAL.—A judicial officer who is authorized to order the arrest of a person pursuant to section 3041 of this title shall order that an arrested person who is brought before him be released or detained, pending judicial proceedings, pursuant to the provisions of this chapter.

"(b) PENDING SENTENCE OR APPEAL.—A judicial officer of a court of original jurisdiction over an offense, or a judicial officer of a Federal appellate court, shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained pursuant to the provisions of this chapter.

"§ 3142. Release or detention of a defendant pending trial

"(a) IN GENERAL.—Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

"(K) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify;

"(L) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;

"(M) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

"(N) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

The judicial officer may not impose a financial condition that results in the pretrial detention of the person. The judicial officer may at any time amend his order to impose additional or different conditions of release.

"(d) TEMPORARY DETENTION TO PERMIT REVOCATION OF CONDITIONAL RELEASE, DEPORTATION, OR EXCLUSION.—If the judicial officer determines that—

"(1) the person—

"(A) is, and was at the time the offense was committed, on—

"(i) release pending trial for a felony under Federal, State, or local law;

"(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

"(iii) probation or parole for any offense under Federal, State, or local law; or

"(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

"(2) the person may flee or pose a danger to any other person or the community;

he shall order the detention of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B), the person has the burden of proving to the court that he is a citizen of the United States or is lawfully admitted for permanent residence.

"(e) DETENTION.—If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the

attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and a continuance on motion of the attorney for the Government may not exceed three days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or on his own motion, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether he is an addict. At the hearing, the person has the right to be represented by counsel, and, if he is financially unable to obtain adequate representation, to have counsel appointed for him. The person shall be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing.

"(g) FACTORS TO BE CONSIDERED.—The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

"(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

"(2) the weight of the evidence against the person;

"(3) the history and characteristics of the person, including—

"(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

"(B) whether, at the time of the current offense or arrest, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

"(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(2)(K) or (c)(2)(L), the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

"(h) CONTENTS OF RELEASE ORDER.—In a release order issued pursuant to the provisions of subsection (b) or (c), the judicial officer shall—

"(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

"(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section 3142 (b) or (c).

"(c) RELEASE OR DETENTION PENDING APPEAL BY THE GOVERNMENT.—The judicial officer shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3731 of this title, in accordance with the provisions of section 3142, unless the defendant is otherwise subject to a release or detention order.

"§ 3144. Release or detention 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 the presence of the person by subpena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142. 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 of a material witness 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.

"§ 3145. Review and appeal of a release or detention order

"(a) REVIEW OF A RELEASE ORDER.—If a person is ordered released by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court—

"(1) the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; and

"(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

The motion shall be determined promptly.

"(b) REVIEW OF A DETENTION ORDER.—If a person is ordered detained by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

"(c) APPEAL FROM A RELEASE OR DETENTION ORDER.—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly.

"§ 3146. Penalty for failure to appear

"(a) OFFENSE.—A person commits an offense if, after having been released pursuant to this chapter—

"(1) he knowingly fails to appear before a court as required by the conditions of his release; or

filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which his arrest was ordered for a proceeding in accordance with this section. To the extent practicable, a person charged with violating the condition of his release that he not commit a Federal, State, or local crime during the period of release shall be brought before the judicial officer who ordered the release and whose order is alleged to have been violated. The judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer—

"(1) finds that there is—

"(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or

"(B) clear and convincing evidence that the person has violated any other condition of his release; and

"(2) finds that—

"(A) based on the factors set forth in section 3142(g), there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or

"(B) the person is unlikely to abide by any condition or combination of conditions of release.

If there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, he shall treat the person in accordance with the provisions of section 3142 and may amend the conditions of release accordingly.

"(c) PROSECUTION FOR CONTEMPT.—The judge may commence a prosecution for contempt, pursuant to the provisions of section 401, if the person has violated a condition of his release.

"§ 3149. 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, and if so arrested, shall be delivered promptly to a United States marshal and brought before a judicial officer. The judicial officer shall determine in accordance with the provisions of section 3148(b) whether to revoke the release of the person, and may absolve the surety of responsibility to pay all or part of the bond in accordance with the provisions of Rule 46 of the Federal Rules of Criminal Procedure. The person so committed shall be held in official detention until released pursuant to this chapter or another provision of law.

"§ 3150. Applicability to a case removed from a State court

"The provisions of this chapter apply to a criminal case removed to a Federal court from a State court.".

(b) Section 3154 of title 18, United States Code, is amended—

(1) in subsection (1), by striking out "and recommend appropriate release conditions for each such person" and inserting in lieu thereof "and, where appropriate, include a recommenda-

"detained or conditionally released pursuant to section 3142 of this title".

(c) Section 3043 is repealed.

(d) The following new section is added after section 3061:

"§ 3062. General arrest authority for violation of release conditions

"A law enforcement officer, who is authorized to arrest for an offense committed in his presence, may arrest a person who is released pursuant to chapter 207 if the officer has reasonable grounds to believe that the person is violating, in his presence, a condition imposed on the person pursuant to section 3142 (c)(2)(D), (c)(2)(E), (c)(2)(H), (c)(2)(I), or (c)(2)(M), or, if the violation involves a failure to remain in a specified institution as required, a condition imposed pursuant to section 3142(c)(2)(J).".

(e) The section analysis is amended—

(1) by amending the item relating to section 3043 to read as follows:

"3043. Repealed."; and

(2) by adding the following new item after the item relating to section 3061:

"3062. General arrest authority for violation of release conditions.".

SEC. 205. Section 3731 of title 18, United States Code, is amended by adding after the second paragraph the following new paragraph:

"An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.".

SEC. 206. The second paragraph of section 3772 of title 18, United States Code, is amended by striking out "bail" and inserting in lieu thereof "release pending appeal."

SEC. 207. Section 4282 of title 18, United States Code, is amended—

(a) by striking out "and not admitted to bail" and substituting "and detained pursuant to chapter 207"; and

(b) by striking out "and unable to make bail".

SEC. 208. Section 636 of title 28, United States Code, is amended by striking out "impose conditions of release under section 3146 of title 18" and inserting in lieu thereof "issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial".

SEC. 209. The Federal Rules of Criminal Procedure are amended as follows:

(a) Rule 5(c) is amended by striking out "shall admit the defendant to bail" and inserting in lieu thereof "shall detain or conditionally release the defendant".

(b) The second sentence of rule 15(a) is amended by striking out "committed for failure to give bail to appear to testify at a trial or hearing" and inserting in lieu thereof "detained pursuant to section 3144 of title 18, United States Code".

(c) Rule 40(f) is amended to read as follows:

"(f) RELEASE OR DETENTION.—If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information, or

IX. SENTENCING REFORM

SENTENCING REFORM

President's Task Force Recommendation

Legislation should be proposed and enacted to abolish parole and limit judicial discretion in sentencing.

Proposed Model: The Sentencing Reform Act of 1984*

Noting that victims consistently express anger and frustration with most current sentencing and parole systems, the President's Task Force deplored the virtually unlimited discretion given judges in imposing sentences and the authority granted parole boards to shorten drastically the amount of time served. The Task Force urged that legislatures create sentencing commissions that would establish a set of sentencing guidelines, taking into account variations in types of offenses, the degree of harm caused victims, and the prior convictions and background of each defendant. The result would be reduced sentencing disparity and increased certainty in knowing the actual time a particular offender will serve ("truth-in-sentencing"). [1]

Studies have shown that similar offenders committing similar offenses often were given very different sentences. [2] Such disparity is unfair not only to the defendant, but also to victims and the public, who cannot depend with any certainty on how an individual judge's own philosophy and predilections will affect the sentence handed down. Further, traditional parole practices ensure that the sentences imposed rarely come close to being the actual time served, and critics view parole boards as much too ready to release prisoners early. The impetus toward change has been bolstered by a number of studies concluding that rehabilitative treatment has little discernible effect on offenders' recidivism. [3]

The past decade has seen significant changes to traditional sentencing practices in a number of states, as well as the Federal system. Sentencing is no longer dominated by adherence to a discretionary and rehabilitative model, whereby judges are allowed wide latitude in imposing sentences, and parole boards actually determine the amount of time served according to some judgment of a defendant's "rehabilitation." A number of states, often through legislatively created sentencing commissions or advisory committees formed by the judiciary, have developed guidelines setting sentence ranges based on the type and severity of the crime and the offender's individual background and criminal history. [4] In addition, many states either have abolished parole release for the majority of offenders or have set definite limits on its use. [5] Altogether, more than half the states have introduced a predominantly determinate sentencing strategy, and more than

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*Analysis prepared with the assistance of the Crime Victims Project of the National Association of Attorneys General.

The Senate Judiciary Committee pointed out that there are several goals any sentencing reform legislation should meet:

> First, sentencing legislation should contain a comprehensive and consistent statement setting forth the purposes to be served by the sentencing system and the kinds and lengths of sentences available for offenders.
>
> Second, it should assure that sentences are fair both to the offenders and to society, and that such fairness is reflected both in the individual case and in the pattern of sentences in all criminal cases.
>
> Third, it should assure that the offender, the government personnel charged with implementing the sentence, and the general public are certain about the sentence and the reasons for it.
>
> Fourth, it should assure the availability of a full range of sentencing options from which to select the most appropriate sentence in a particular case.
>
> Fifth, it should assure that each stage of the sentencing and corrections process, from the imposition of sentence by the judge, and as long as the offender remains within the criminal justice system, is geared toward the same goals for the offender and for society. 107/

The Committee concluded that current Federal law failed to accomplish any of these goals. The Sentencing Reform Act's solution was to revamp completely Federal sentencing procedures.

Authorized sentences under the Act are a term of probation, a fine, or a term of imprisonment (18 U.S.C. section 3551). A fine may be imposed in addition to any other sentence. The sentencing court, in determining the particular sentence to be imposed, must consider the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence imposed to reflect the purposes of sentencing; the kinds of sentences available; the guidelines established by the Sentencing Commission, as well as any pertinent policy statement issued by that body; and the need to avoid unwarranted sentencing disparity (section 3553(a)).

The court is instructed to impose a sentence within guideline ranges, absent some exceptional aggravating or mitigating circumstance not considered by the Commission (section 3553(b)). The reasons for a particular sentence must be stated in open court at the time of sentencing, and any deviation from the guidelines must be justified (section 3553(c)). If restitution to the victim is not ordered, the court must state its reasons for not so ordering. An order of forfeiture in certain drug cases is required (section 3554). The court also may order a defendant to give notice to any victims of a fraudulent offense (section 3555).

Fines (sections 3571-3574)

The Act sets maximum monetary fines that may be imposed for the various levels of criminal offenses, specifies the criteria to be considered before imposition of fines, and provides for the subsequent modification or remission of fines previously imposed. In so doing, it promotes the mechanism of fines as an effective sanction for white-collar crime and other highly profitable criminal offenses. There are no offenses for which a fine may not be imposed, and a fine may be imposed alone or in addition to any other sentence. Payment of a fine also may be made a condition of probation so that revocation of probation is available as a means of enforcing the fine.

The fine levels set forth in the Act are considerably higher than those generally authorized by most current statutes, and are designed to establish an effective scale for pecuniary punishment and deterrence that will reflect current economic realities. Penalties for organizations are set at higher levels than those for individuals, taking cognizance of the fact that a sum of money that is sufficient to penalize or deter an individual may not be sufficient to penalize or deter an organization, both because the organization is likely to have more money available to it and because the sentence for an organization obviously cannot include a term of imprisonment.

According to the Senate Judiciary Committee, it is intended that the increased fines permitted by the Act will help materially to penalize and deter white-collar crime and other highly profitable crime:

> Certainly no correctional aims can be achieved where the maximum sentence imposable is set at such a low level that it can be regarded merely as a cost of doing business - a cost that may in fact be more than offset by the gain from the illegal method of doing business. The need for such increased penalties is particularly apparent with regard to a corporate defendant which today can often divide a minor burden of payment among its many stockholders, or pass it on to consumers as a cost of doing business, with the result that lesser penalties may not be felt either by the corporation or by its multiple owners. 13/

In determining the amount of the fine, the court is specifically required to consider the ability of the defendant to pay in view of the defendant's income, earning capacity, and financial resources, and if the defendant is an organization, the size of the organization. The court also is required to consider the burden that the fine will place on the defendant and on his dependents, any payment of restitution by the defendant or any requirement that the defendant make reparation to the victim, any effort by an organizational offender to discipline the persons responsible for the offense or ensure against recurrence of the offense, and any other equitable considerations that are pertinent.

The court may authorize payment within a specified period of time or in installments. Clearly, if the defendant can earn the money to pay a certain fine over a period of time, there seems little justification for choosing imprisonment or a lesser fine if the higher fine would otherwise be clearly the most appropriate sentence.

jeopardy clause of the U.S. Constitution precludes increase of a sentence once imposed, the U.S. Supreme Court has ruled that such a procedure under Title X of the Organized Crime Control Act of 1970 (18 U.S.C. section 3576) is constitutionally sound. [16]

SENTENCING COMMISSION

The Presidentially appointed U.S. Sentencing Commission established by the Sentencing Reform Act in 28 U.S.C. sections 991-998 bears the responsibility for establishing a uniform sentencing system to accomplish the statutory purposes of just punishment, deterrence, incapacitation, and rehabilitation. The Commission is instructed by the Act to examine the offense and offender characteristics that judges now consider in making sentencing determinations, and decide which of those should be reflected in the guidelines, which might justify a departure from the guidelines, and which ones should not affect the sentence at all. The guidelines should serve to structure, rather than eliminate, judicial discretion in sentencing, by enabling judges to make decisions in individual cases in an informed, rational manner.

For each offense, the guidelines will specify a variety of appropriate sentences, including probation with minimal or stringent conditions, fines of various levels, and imprisonment for various terms, depending on the particular history and characteristics of the defendant and the circumstances of the offense. Consequently, a particular offense might have a dozen or more suggested sentencing ranges, only one of which would fit a given case. If the guidelines recommend a term of imprisonment for a particular category of offense committed by a particular category of offender, the maximum of the sentencing range recommended may not exceed the minimum of that range by more than 25 percent (section 994(b)). (Proposed amendments provide that if the maximum of the range is life imprisonment, the minimum shall not be less than 30 years. [17]) For a particular penal offense, therefore, while there might be numerous guideline ranges, each keyed to one or more variations in relevant factors, no one particular guideline range may vary by more than 25 percent from its minimum to its maximum. All the ranges together for that offense, however, would be expected to cover the spectrum from no, or little, imprisonment to the statutory maximum, or close to it, for the applicable class of offense. The breadth of the sentencing range provided in each guideline is a matter for the Commission to decide so long as it is within the 25 percent limit.

The statute lists a number of offense and offender characteristics that the Sentencing Commission is required to consider in fashioning guidelines (section 994(c) and (d)). The Commission must consider circumstances that would aggravate or mitigate the seriousness of an offense; the nature and degree of harm caused, including whether the offense involved property, irreplaceable property, a person or number of persons, or a breach of public trust; the community view of the gravity of a type of offense, and the public concern generated by that type; the deterrent effect a particular sentence may have on the commission of the offense by others; and the current incidence of the offense in the community and in the nation as a whole. Offender characteristics that must be considered include age; education; vocational skills; 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; physical condition, including drug dependence; previous employment record; family ties and responsibilities;

PAROLE

Parole is abolished by the Act for prisoners sentenced under the sentencing guidelines. [19] The sentence imposed by the judge will be the sentence actually served, minus a small reduction for a prisoner's compliance with institutional regulations. If the prisoner will need post-sentence supervision, the judge shall decide at the time of sentencing, based on factors known then, what the conditions of the release will be.

The Act recognizes that "truth-in-sentencing" can be achieved only by limiting parole as well as judicial discretion. In the federal system, as well as in most of the states, parole boards have had wide discretion to determine the actual release dates of prisoners, despite the sentence imposed by the court. Though existing parole guidelines may serve to control this discretion, they do not change the fact that a small group of parole commissioners, often removed from the public eye, can drastically shorten sentences according to their own ideas of the length particular offenders should serve. The credibility of the criminal justice system suffers severely as a result. As the President's Task Force on Victims of Crime wrote, "When victims hear the judge impose a life sentence, then meet the offender on the street a few years later because of his release on parole, they lose all faith in the system." [20]

One function supposedly served by parole boards has been to "even out" disparities in sentences imposed for similar offenses and offenders by different judges. With sentencing guidelines in place, the need for this function is eliminated. Sentencing courts, evaluating specific factors regarding the crime and the criminal, will impose punishment within set ranges, or explain publicly why they did not. Certainty in knowing the length of time a prisoner actually will serve will be the result.

11. Id., pp. 74-75.

12. S. 1236 and H.R. 2774, 99th Cong.

13. Supra note 8, p. 106

14. Supra note 12.

15. Supra note 8, p. 150.

16. United States v. DiFrancesco (449 U.S. 117 (1980)). According to the Court (pp. 136-137):

> The double jeopardy considerations that bar representation after an acquittal do not prohibit review of a sentence. We have noted ***the basic design of the double jeopardy provision, that is, as a bar against repeated attempts to convict with consequent subjection of the defendant to embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent. The considerations, however, have no significant application to the prosecution's statutorily granted right to review a sentence. This limited appeal does not involve a retrial or approximate the ordeal of a trial on the basic issue of guilt or innocence. Under section 3576, the appeal is to be taken promptly and is essentially on the record of the sentencing court. The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired. To be sure, the appeal may prolong the period and any anxiety that may exist, but it does so only for the finite period provided by the statute. The appeal is no more of an ordeal than any Government appeal under 18 U.S.C. section 3731 from the dismissal of an indictment or information. The defendant's primary concern and anxiety obviously relate to the determination of innocence or guilt, and that already is behind him. The defendant is subject to no risk of being harassed and then convicted, although innocent. Furthermore, a sentence is characteristically determined in large part on the basis of information, such as the presentence report, developed outside the courtroom. It is purely a judicial determination, and much that goes into it is the result of inquiry that is nonadversary in nature.

The Court also held that there was no double jeopardy problem with the fact that the defendant's sentence could be increased on successful government appeal of the sentence, making clear that the bar against double punishments applied to a total punishment in excess of the statutory maximum for the offense, not to an increase in the sentence within statutory limits. (DiFrancesco, at 138-139.)

SENTENCING REFORM ACT OF 1984
H.J. Res. 648
Comprehensive Crime Control Act of 1984

CHAPTER II—SENTENCING REFORM

SEC. 211. This chapter may be cited as the "Sentencing Reform Act of 1984".

SEC. 212. (a) Title 18 of the United States Code is amended by—

(1) redesignating sections 3577, 3578, 3579, 3580, 3611, 3612, 3615, 3617, 3618, 3619, 3620, and 3656 as sections 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, and 3672 of a new chapter 232 of title 18 of the United States Code, respectively;

(2) repealing chapters 227, 229, and 231 and substituting the following new chapters:

"CHAPTER 227—SENTENCES

determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study 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 the study, or by the expiration of any extension granted by the court, the United States marshal shall return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a), that they believe 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 and procedures available under this chapter.

"(c) PRESENTENCE EXAMINATION AND REPORT BY PSYCHIATRIC OR PSYCHOLOGICAL 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 or psychological examination and that the court be provided with a written report of the results of the examination pursuant to the provisions of section 4247.

"(d) DISCLOSURE OF PRESENTENCE REPORTS.—The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant.

"§ 3553. Imposition of a sentence

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. 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 reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

"(B) to afford adequate deterrence to criminal conduct;

"(C) to protect the public from further crimes of the defendant; 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 kinds of sentences available;

"(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the

ant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

"§ 3555. Order of notice to victims

"The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given 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 3553(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of $20,000.

"§ 3556. Order of restitution

"The court, in imposing a sentence on a defendant who has been found guilty of an offense under this title, or an offense under section 902 (h), (i), (j), or (n) of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant make restitution to any victim of the offense in accordance with the provisions of sections 3663 and 3664.

"§ 3557. Review of a sentence

"The review of a sentence imposed pursuant to section 3551 is governed by the provisions of section 3742.

"§ 3558. Implementation of a sentence

"The implementation of a sentence imposed pursuant to section 3551 is governed by the provisions of chapter 229.

"§ 3559. Sentencing classification of offenses

"(a) CLASSIFICATION.—An offense that is not specifically classified by a letter grade in the section defining it, is classified—

"(1) if the maximum term of imprisonment authorized is—

"(A) life imprisonment, or if the maximum penalty is death, as a Class A felony;

"(B) twenty years or more, as a Class B felony;

"(C) less than twenty years but ten or more years, as a Class C felony;

"(D) less than ten years but five or more years, as a Class D felony;

"(E) less than five years but more than one year, as a Class E felony;

"(F) one year or less but more than six months, as a Class A misdemeanor;

"(G) six months or less but more than thirty days, as a Class B misdemeanor;

"(H) thirty days or less but more than five days, as a Class C misdemeanor; or

"§ 3563. Conditions of probation

"(a) MANDATORY CONDITIONS.—The court shall provide, as an explicit condition of a sentence of probation—

"(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation; and

"(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13).

If the court has imposed and ordered execution of a fine and placed the defendent on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation.

"(b) DISCRETIONARY CONDITIONS.—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553 (a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

"(1) support his dependents and meet other family responsibilities;

"(2) pay a fine imposed pursuant to the provisions of subchapter C;

"(3) make restitution to a victim of the offense pursuant to the provisions of section 3556;

"(4) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;

"(5) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

"(6) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or 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, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, 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 during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense in section 3581(b), during the first year of the term of probation;

"(12) reside at, or participate in the program of, a community corrections facility for all or part of the term of probation;

"(13) work in community service as directed by the court;

"§ 3565. 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, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—

"(1) continue him on probation, with or without extending the term of modifying or enlarging the conditions; or

"(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A 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, and to impose another sentence, 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.

"§ 3566. Implementation of a sentence of probation

"The implementation of a sentence of probation is governed by the provisions of subchapter A of chapter 229.

"SUBCHAPTER C—FINES

"Sec.
"3571. Sentence of fine.
"3572. Imposition of a sentence of fine.
"3573. Modification or remission of fine.
"3574. Implementation of a sentence of fine.

"SUBCHAPTER C—FINES

"§ 3571. Sentence of fine

"(a) IN GENERAL.—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 this chapter, the authorized fines are—

"(1) if the defendant is an individual—

"(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $250,000;

"(B) for any other misdemeanor, not more than $25,000; and

"(C) for an infraction, not more than $1,000; and

"(2) if the defendant is an organization—

"(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than $500,000;

"(B) for any other misdemeanor, not more than $100,000; and

"(C) for an infraction, not more than $10,000.

"§ 3572. Imposition of a sentence of fine

"(a) FACTORS TO BE CONSIDERED IN IMPOSING 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—

"(h) STAY OF FINE PENDING APPEALS.—Unless exceptional circumstances exist, if a sentence to pay a fine is stayed pending appeal, the court granting the stay shall include in such stay—

"(1) a requirement that the defendant, pending appeal, to deposit the entire fine amount, or the amount due under an installment schedule, during the pendency of an appeal, in an escrow account in the registry of the district court, or to give bond for the payment thereof; or

"(2) an order restraining the defendant from transferring or dissipating assets found to be sufficient, if sold, to meet the defendant's fine obligation.

"(i) DELINQUENT FINE.—A fine is delinquent if any portion of such fine is not paid within thirty days of when it is due, including any fines to be paid pursuant to an installment schedule.

"(j) DEFAULT.—A fine is in default if any portion of such fine is more than ninety days delinquent. When a criminal fine is in default, the entire amount is due with thirty days of notification of the default, notwithstanding any installment schedule.

"§ 3573. Modification or remission of fine

"(a) PETITION FOR MODIFICATION OR REMISSION.—A defendant who has been sentenced to pay a fine, and who—

"(1) can show a good faith effort to comply with the terms of the sentence and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the installment schedule, may at any time petition the court for—

"(A) an extension of the installment schedule, not to exceed two years except in case of incarceration or special circumstances; or

"(B) a remission of all or part of the unpaid portion including interest and penalties; or

"(2) has voluntarily made restitution or reparation to the victim of the offense, may at any time petition the court for a remission of the unpaid portion of the fine in an amount not exceeding the amount of such restitution or reparation.

Any petition filed pursuant to this subsection shall be filed in the court in which sentence was originally imposed, unless that court transfers jurisdiction to another court. The petitioner shall notify the Attorney General that the petition has been filed within ten working days after filing. For the purposes of clause (1), unless exceptional circumstances exist, a person may be considered to have made a good faith effort to comply with the terms of the sentence only after payment of a reasonable portion of the fine.

"(b) ORDER OF MODIFICATION OR REMISSION.—If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances warrant relief, the court may enter an appropriate order, in which case it shall provide the Attorney General with a copy of such order.

"§ 3574. 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 229.

extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

"(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

"(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(n), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

"(d) INCLUSION OF AN ORDER TO LIMIT CRIMINAL ASSOCIATION OF ORGANIZED CRIME AND DRUG OFFENDERS.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

"§ 3583. Inclusion of a term of supervised release after imprisonment

"(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.

"(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—The authorized terms of supervised release are—

"(1) for a Class A or Class B felony, not more than three years;

"(2) for a Class C or Class D felony, not more than two years; and

"(3) for a Class E felony, or for a misdemeanor, not more than one year.

"(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

"(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision. The court may order, as a further condition of supervised release, to the extent that such condition—

"(1) is reasonably related to the factors set forth in section 3553 (a)(1), (a)(2)(B), and (a)(2)(D);

rently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

"§ 3585. Calculation of a 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 arrives voluntarily to commence service of sentence 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.

"§ 3586. Implementation of a sentence of imprisonment

"The implementation of a sentence of imprisonment is governed by the provisions of subchapter C of chapter 229 and, if the sentence includes a term of supervised release, by the provisions of subchapter A of chapter 229.

"CHAPTER 229—POSTSENTENCE ADMINISTRATION

"Subchapter

"SUBCHAPTER A—PROBATION

"Sec.

"SUBCHAPTER A—PROBATION

"§ 3601. Supervision of probation

"A person who has been sentenced to probation pursuant to the provisions of subchapter B of chapter 227, or placed on probation pursuant to the provisions of chapter 403, or placed on supervised release pursuant to the provisions of section 3583, shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.

"§ 3602. Appointment of probation officers

"(a) APPOINTMENT.—A district court of the United States shall appoint qualified persons to serve, with or without compensation, as probation officers within the jurisdiction and under the direction of the court making the appointment. The court may, for cause, remove a probation officer appointed to serve with compensation,

"§ 3605. Transfer of jurisdiction over a probationer

"A court, after imposing a sentence, may transfer jurisdiction over a probationer or person on supervised release to the district court for any other district to which the person is required to proceed as a condition of his probation or release, or is permitted to proceed, with the concurrence of such court. A later transfer 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 or releasee that are permitted by this subchapter or subchapter B or D of chapter 227.

"§ 3606. Arrest and return of a probationer

"If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation or release, he may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. A probation officer may make such an arrest wherever the probationer or releasee is found, and may make the arrest without a warrant. The court having supervision of the probationer or releasee, or, if there is no such court, the court last having supervision of the probationer or releasee, may issue a warrant for the arrest of a probationer or releasee for violation of a condition of release, and a probation officer or United States marshal may execute the warrant in the district in which the warrant was issued or in any district in which the probationer or releasee is found.

"§ 3607. Special probation and expungement procedures for drug possessors

"(a) PRE-JUDGMENT PROBATION.—If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)—

"(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 3565.

"(b) RECORD OF DISPOSITION.—A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), 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) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under

of restitution, pursuant to section 3556, does not create any right of action against the United States by the person to whom restitution is ordered to be paid.

"(d) NOTIFICATION OF DELINQUENCY.—Within ten working days after a fine is determined to be delinquent as provided in section 3572(i), the Attorney General shall notify the person whose fine is delinquent, by certified mail, to inform him that the fine is delinquent.

"(e) NOTIFICATION OF DEFAULT.—Within ten working days after a fine is determined to be in default as provided in section 3572(j), the Attorney General shall notify the person defaulting, by certified mail, to inform him that the fine is in default and the entire unpaid balance, including interest and penalties, is due within thirty days.

"(f) INTEREST, MONETARY PENALTIES FOR DELINQUENCY, AND DEFAULT.—Upon a determination of willful nonpayment, the court may impose the following interest and monetary penalties:

"(1) INTEREST.—Notwithstanding any other provision of law, interest at the rate of 1 per centum per month, or 12 per centum per year, shall be charged, beginning the thirty-first day after sentencing on the first day of each month during which any fine balance remains unpaid, including sums to be paid pursuant to an installment schedule.

"(2) MONETARY PENALTIES FOR DELINQUENT FINES.—Notwithstanding any other provision of law, a penalty sum equal to 10 per centum shall be charged for any portion of a criminal fine which has become delinquent. The Attorney General may waive all or part of the penalty for good cause.

"§ 3613. Civil remedies for satisfaction of an unpaid fine

"(a) LIEN.—A fine imposed pursuant to the provisions of subchapter C of chapter 227 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). On application of the person fined, the Attorney General shall—

"(1) issue a certificate of release, as described in section 6325 of the Internal Revenue Code, of any lien imposed pursuant to this section, upon his acceptance of a bond described in section 6325(a)(2) of the Internal Revenue Code; or

"(2) issue a certificate of discharge, as described in section 6325 of the Internal Revenue Code, of any part of the person's property subject to a lien imposed pursuant to this section, upon his determination that the fair market value of that part of such property remaining subject to and available to satisfy the lien is at least three times the amount of the fine.

"(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(f), 6503(i), or 7508(a)(1)(I) of the Internal Revenue Code of 1954 (26 U.S.C. 6503(b), 6503(c), 6503(f),

"SUBCHAPTER C—IMPRISONMENT

"SUBCHAPTER C—IMPRISONMENT

"§ 3621. 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 subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

"(b) PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

"(1) the resources of the facility contemplated;
"(2) the nature and circumstances of the offense;
"(3) the history and characteristics of the prisoner;
"(4) any statement by the court that imposed the sentence—
"(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
"(B) recommending a type of penal or correctional facility as appropriate; and
"(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional 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 penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this 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 United States marshal 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.

"§ 3622. 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 purpose 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 a prisoner will honor the trust to be

of his life, shall receive credit toward the service of his sentence, beyond the time served, of fifty-four days at the end of each year of his term of imprisonment, beginning after the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

"(c) PRE-RELEASE CUSTODY.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

"(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner 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 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 Director.

"(e) SUPERVISION AFTER RELEASE.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment. The term runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release, except that it does not run during any period in which the person is imprisoned, other than during limited intervals as a condition of probation or supervised release, in connection with a conviction for a Federal, State, or local crime. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner.

(b) The chapter analysis of part II of title 18, United States Code, is amended by striking out the items relating to chapters 227, 229, and 231, and inserting in lieu thereof the following:

SEC. 213. (a) Chapter 235 of title 18, United States Code, is amended by adding the following new section at the end thereof:

"§ 3742. Review of a sentence

"(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

"(3) was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and the sentence is greater than—

"(A) the sentence specified in the applicable guideline to the extent that the sentence includes a greater fine or term of imprisonment or term of supervised release than the maximum established in the guideline, or includes a more limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the maximum established in the guideline; and

"(B) the sentence specified in a plea agreement, if any, under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; or

"(4) was imposed for an offense for which no sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and is greater than the sentence specified in a plea agreement, if any, under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure.

"(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

"(3) was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and the sentence is less than—

"(A) the sentence specified in the applicable guideline to the extent that the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guideline, or includes a less limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the minimum established in the guideline; and

"(B) the sentence specified in a plea agreement, if any, under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; or

"(3) was not imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, and is not unreasonable, it shall affirm the sentence.".

(b) The sectional analysis of chapter 235 of title 18, United States Code, is amended by adding the following new item after the item relating to section 3741:

"3742. Review of a sentence.".

SEC. 214. Chapter 403 of title 18, United States Code is amended as follows:

(a) Section 5037 is amended—

(1) by redesignating subsection (c) as subsection (d); and

(2) by striking out subsections (a) and (b) and inserting the following new subsections in lieu thereof:

"(a) If the court finds a juvenile to be a juvenile delinquent, the court shall hold a disposition hearing concerning the appropriate disposition no later than twenty court days after the juvenile delinquency hearing unless the court has ordered further study pursuant to subsection (e). After the disposition hearing, and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994, the court may suspend the findings of juvenile delinquency, enter an order of restitution pursuant to section 3556, place him on probation, or commit him to official detention. With respect to release or detention pending an appeal or a petition for a writ of certiorari after disposition, the court shall proceed pursuant to the provisions of chapter 207.

"(b) 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 eighteen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between eighteen and twenty-one years old, beyond the lesser of—

"(A) three years; or

"(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult.

The provisions dealing with probation set forth in sections 3563, 3564, and 3565 are applicable to an order placing a juvenile on probation.

"(c) 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 eighteen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between eighteen and twenty-one years old—

"(A) who if convicted as an adult would be convicted of a Class A, B, or C felony, beyond five years; or

(3) in subdivision (a)(2), by adding ", except that the court shall advise the defendant of any right to appeal his sentence" after "nolo contendere" in the second sentence;

(4) by amending the first sentence of subdivision (c)(1) to read as follows:

"A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.";

(5) by amending subdivision (c)(2) to read as follows:

"(2) REPORT.—The report of the presentence investigation shall contain—

"(A) information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

"(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances;

"(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

"(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

"(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

"(F) such other information as may be required by the court.";

(6) in subdivision (c)(3)(A), by deleting "exclusive of any recommendations as to sentence" and inserting in lieu thereof ", including the information required by subdivision (c)(2) but not including any final recommendation as to sentence,";

(7) in subdivision (c)(3)(D), delete "or the Parole Commission";

(8) in subdivision (c)(3)(F), delete "or the Parole Commission pursuant to 18 U.S.C. §§ 4205(c), 4252, 5010(e), or 5037(c)" and substitute "pursuant to 18 U.S.C. § 3552(b)"; and

(9) by deleting "imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c)," in subdivision (d).

(b) Rule 35 is amended to read as follows:

"Rule 35. Correction of Sentence

"(a) CORRECTION OF A SENTENCE ON REMAND.—The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a

appropriate official of a state or subdivision of a state for the purpose of enforcing such law.".

(g) The Table of Rules that precedes Rule 1 is amended as follows:

(1) The item relating to Rule 35 is amended to read as follows:

"35. Correction of Sentence.
"(a) Correction of a sentence on remand.
"(b) Correction of a sentence for changed circumstances.".

(2) The item relating to Rule 38 is amended to read as follows:

"38. Stay of Execution.
"(a) Death.
"(b) Imprisonment.
"(c) Fine.
"(d) Probation.
"(e) Criminal forfeiture, notice to victims, and restitution.
"(f) Disabilities.".

SEC. 216. (a) The Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates are amended by adding the following new rule at the end thereof:

"Rule 9. Definition

"As used in these rules, 'petty offense' means a Class B or C misdemeanor or an infraction.".

(b) The Table of Rules that precedes Rule 1 is amended by adding at the end thereof the following new item:

"9. Definition.".

SEC. 217. (a) Title 28 of the United States Code is amended by adding the following new chapter after chapter 57:

"CHAPTER 58—UNITED STATES SENTENCING COMMISSION

"Sec.
"991. United States Sentencing Commission; establishment and purposes.
"992. Terms of office; compensation.
"993. Powers and duties of Chairman.
"994. Duties of the Commission.
"995. Powers of the Commission.
"996. Director and staff.
"997. Annual report.
"998. Definitions.

"§ 991. United States Sentencing Commission; establishment and purposes

"(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least three of the members shall be Federal judges in regular active service selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four

"§ 993. Powers and duties of Chairman

"The Chairman shall—

"(a) call and preside at meetings of the Commission, which shall be held for at least two weeks in each quarter after the members of the Commission hold part-time positions; and

"(b) direct—

"(1) the preparation of requests for appropriations for the Commission; and

"(2) the use of funds made available to the Commission.

"§ 994. Duties of the Commission

"(a) The Commission, by affirmative vote of at least four members of the Commission, 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 all courts of the United States and to the United States Probation System—

"(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

"(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

"(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

"(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term; and

"(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively;

"(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

"(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

"(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

"(C) the sentence modification provisions set forth in sections 3563(c), 3573, and 3582(c) of title 18;

"(D) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

"(E) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

"(3) guidelines or general policy statements regarding the appropriate use of the probation revocation provisions set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of probation or supervised release set forth in sections 3563(c), 3564(d), and 3583(e) of title 18.

"(b) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each

"(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

"(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

"(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

"(h) The Commission shall assure that the guidelines will specify a sentence to a term of imprisonment at or near the maximum term authorized by section 3581(b) of title 18, United States Code, for categories of defendants in which the defendant is eighteen years old or older and—

"(1) has been convicted of a felony that is—

"(A) a crime of violence; or

"(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); and

"(2) has previously been convicted of two or more prior felonies, each of which is—

"(A) a crime of violence; or

"(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a).

"(i) The Commission shall assure that the guidelines will specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

"(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

"(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

"(3) 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;

"(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a

observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

"(o) The Commission, at or after the beginning of a regular session of Congress but not later than the first day of May, shall report to the Congress any amendments of the guidelines promulgated pursuant to subsection (a)(1), and a report of the reasons therefor, and the amended guidelines shall take effect one hundred and eighty days after the Commission reports them, except to the extent the effective date is enlarged or the guidelines are disapproved or modified by Act of Congress.

"(p) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

"(1) modernization of existing facilities;

"(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

"(3) use of existing Federal facilities, such as those currently within military jurisdiction.

"(q) The Commission, within three years of the date of enactment of the Sentencing Reform Act of 1983, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

"(r) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

"(1) the community view of the gravity of the offense;

"(2) the public concern generated by the offense; and

"(3) the deterrent effect particular sentences may have on the commission of the offense by others.

Within one hundred and eighty days of the filing of such petition the Commission shall provide written notice to the defendant whether or not it has approved the petition. If the petition is disapproved the written notice shall contain the reasons for such disapproval. The Commission shall submit to the Congress at least annually an analysis of such written notices.

"(s) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

"(t) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify by what amount the sentences of prisoners serving terms of imprisonment that are outside the applicable guideline ranges for the offense may be reduced.

time to time require and as may be produced consistent with other law;

"(9) monitor the performance of probation officers with regard to sentencing recommendations, including application of the Sentencing Commission guidelines and policy statements;

"(10) issue instructions to probation officers concerning the application of Commission guidelines and policy statements;

"(11) 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;

"(12) 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; and

"(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

"(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

"(14) publish data concerning the sentencing process;

"(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code;

"(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;

"(17) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

"(18) devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

"(19) study the feasibility of developing guidelines for the disposition of juvenile delinquents;

"(20) 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;

"(21) hold hearings and call witnesses that might assist the Commission in the exercise of its powers or duties; and

"(22) perform such other functions as are required to permit Federal courts to meet their responsibilities under section 3553(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 member or designated person such powers as may be appropriate other than the power to establish general policy statements and guidelines pursuant to section 994(a) (1) and (2), the issuance of general policies and promulgation of rules and regulations pursuant to subsection (a)(1)

REPEALERS

SEC. 218. (a) The following provisions of title 18, United States Code, are repealed:

(1) section 1;
(2) section 3012;
(3) sections 4082(a), 4082(b), 4082(c), 4082(e), 4084, and 4085;
(4) chapter 309;
(5) chapter 311;
(6) chapter 314;
(7) sections 4281, 4283, and 4284; and
(8) chapter 402.

Redesignate subsections in section 4082 accordingly.

(b) The item relating to section 1 in the sectional analysis of chapter 1 of title 18, United States Code, is amended to read:

"1. Repealed.".

(c) The item relating to section 3012 in the sectional analysis of chapter 201 of title 18, United States Code, is amended to read:

"3012. Repealed.".

(d) The chapter analysis of Part III of title 18, United States Code, is amended by amending the items relating to—

(1) chapters 309 and 311 to read as follows:

"309. Repealed.....
"311. Repealed.....";

and

(2) chapter 314 to read as follows:

"314. Repealed.....".

(e) The items relating to sections 4084 and 4085 in the sectional analysis of chapter 305 of title 18, United States Code, are amended to read as follows:

"4084. Repealed.
"4085. Repealed.".

(f) The sectional analysis of chapter 315 of title 18, United States Code, is amended by amending the items relating to—

(1) section 4281 to read:

"4281. Repealed."; and

(2) sections 4283 and 4284 to read as follows:

"4283. Repealed.
"4284. Repealed.".

(g) The item relating to chapter 402 in the chapter analysis of Part IV of title 18, United States Code, is amended to read as follows:

"402. Repealed.....".

SEC. 219. (a) Sections 404(b) and 409 of the Controlled Substances Act (21 U.S.C. 844(b) and 849) are repealed.

(b) Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by deleting the designation "(a)" at the beginning of the subsection.

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 220. The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended as follows:

(2) in paragraph (2), by deleting "not less than ninety days and".

(h) Section 3156(b)(2) is amended by deleting "petty offense as defined in section 1(3) of this title" and substituting "Class B or C misdemeanor or an infraction".

(i) Section 3172(2) is amended by deleting "petty offense as defined in section 1(3) of this title" and substituting "Class B or C misdemeanor or an infraction".

(j) Section 3401 is amended—

(1) by repealing subsection (g) and redesignating (h) to (g); and

(2) in subsection (h), by deleting "petty offense case" and substituting "Class B or C misdemeanor case, or infraction case,".

(k) Section 3670 (formerly section 3619) is amended by deleting "3617" and "3618" and substituting "3668" and "3669", respectively.

(l) Section 4004 is amended by deleting "record clerks, and parole officers" and substituting "and record clerks".

(m) Chapter 306 is amended as follows:

(1) Section 4101 is amended—

(A) in subsection (f), by adding ", including a term of supervised release pursuant to section 3583" after "supervision"; and

(B) in subsection (g), by deleting "to a penalty of imprisonment the execution of which is suspended and" and substituting "under which", and by deleting "the suspended" and substituting "a".

(2) Section 4105(c) is amended—

(A) in paragraph (1), by deleting "for good time" the second place it appears and substituting "toward service of sentence for satisfactory behavior";

(B) in paragraphs (1) and (2), by deleting "section 4161" and substituting "section 3624(b)";

(C) in paragraph (1), by deleting "section 4164" and substituting "section 3624(a)";

(D) by repealing paragraph (3);

(E) by amending paragraph (4) to read as follows:

"(3) Credit toward service of sentence may be withheld as provided in section 3624(b) of this title."; and

(F) by redesignating paragraphs accordingly.

(3) Section 4106 is amended—

(A) in subsection (a), by deleting "Parole Commission" and substituting "Probation System";

(B) by amending subsection (b) to read as follows:

"(b) An offender transferred to the United States to serve a sentence of imprisonment shall be released pursuant to section 3624(a) of this title after serving the period of time specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1). He shall be released to serve a term of supervised release for any term specified in the applicable guideline. The provisions of section 3742 of this title apply to a sentence to a term of imprisonment under this subsection, and the United States court of appeals for the district in which the offender is imprisoned after transfer to the United States has jurisdiction to review the period of imprisonment as though it had been imposed by the United States district court."; and

(C) by repealing subsection (c).

(2) in subsection (g)(3), by adding ", supervised release," after "parole", and by adding "supervised release," after "parole,".

SEC. 229. Section 504(a) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 504(a)) and section 411(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1111(a)) are amended—

(a) by deleting "the Board of Parole of the United States Department of Justice" and substituting "if the offense is a Federal offense, the sentencing judge or, if the offense is a State or local offense, on motion of the United States Department of Justice, the district court of the United States for the district in which the offense was committed, pursuant to sentencing guidelines and policy statements issued pursuant to 28 U.S.C. 994(a),";

(b) by deleting "Board" and "Board's" and substituting "court" and "court's", respectively; and

(c) by deleting "an administrative" and substituting "a".

SEC. 230. Section 411(c)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1111(c)(3)) is amended by adding "or supervised release" after "parole".

SEC. 231. Section 425(b) of the Job Training and Partnership Act is amended by deleting "or parole" the first place it appears and substituting ", parole, or supervised release".

SEC. 232. The Public Health Service Act (42 U.S.C. 201 et seq.) is amended as follows:

(a) Section 341(a) (42 U.S.C. 257(a)) is amended by deleting "or convicted of offenses against the United States and sentenced to treatment" and "addicts who are committed to the custody of the Attorney General pursuant to provisions of the Federal Youth Corrections Act (chapter 402 of title 18 of the United States Code),".

(b) Section 343(d) (42 U.S.C. 259(d)) is amended by adding "or supervised release" after "parole".

SEC. 232A. Section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472) is amended by inserting "notwithstanding the provisions of 18 U.S.C. 3559(b)," before the term "if" in paragraphs (i)(1)(B) and (n)(1)(B).

SEC. 233. Section 11507 of title 49, United States Code, is amended by adding ", supervised release," after "parole".

SEC. 234. Section 10(b)(7) of the Military Selective Service Act (50 U.S.C. App. 460(b)(7)) is amended by deleting "parole" and substituting "release".

EFFECTIVE DATE

SEC. 235. (a)(1) This chapter shall take effect on the first day of the first calendar month beginning twenty-four months after the date of enactment, except that—

(A) the repeal of chapter 402 of title 18, United States Code, shall take effect on the date of enactment;

(B)(i) chapter 58 of title 28, United States Code, shall take effect on the date of enactment of this Act or October 1, 1983, whichever occurs later, and the United States Sentencing Commission shall submit the initial sentencing guidelines promulgated to section 994(a)(1) of title 28 to the Congress within eighteen months of the effective date of the chapter; and

(ii) the sentencing guidelines promulgated pursuant to section 994(a)(1), and the provisions of sections 3581, 3583, and 3624 of

(B)(i) subject to supervision on the day before the expiration of the five-year period following the effective date of this Act; or

(ii) released on a date set pursuant to paragraph (3);

including laws pertaining to terms and conditions of release, revocation of release, provision of counsel, and payment of transportation costs, shall remain in effect as to the individual until the expiration of his sentence, except that the district court shall determine, in accord with the Federal Rules of Criminal Procedure, whether release should be revoked or the conditions of release amended for violation of a condition of release.

(5) Notwithstanding the provisions of section 991 of title 28, United States Code, and sections 4351 and 5002 of title 18, United States Code, the Chairman of the United States Parole Commission or his designee shall be a member of the National Institute of Corrections, and the Chairman of the United States Parole Commission shall be a member of the Advisory Corrections Council and a nonvoting member of the United States Sentencing Commission, ex officio, until the expiration of the five-year period following the effective date of this Act. Notwithstanding the provisions of section 4351 of title 18, during the five-year period the National Institute of Corrections shall have seventeen members, including seven ex officio members. Notwithstanding the provisions of section 991 of title 28, during the five-year period the United States Sentencing Commission shall consist of nine members, including two ex officio, nonvoting members.

SEC. 236. (a)(1) Four years after the sentencing guidelines promulgated pursuant to section 994(a)(1), and the provisions of sections 3581, 3583, and 3624 of title 18, United States Code, go into effect, the General Accounting Office shall undertake a study of the guidelines in order to determine their impact and compare the guidelines system with the operation of the previous sentencing and parole release system, and, within six months of the undertaking of such study, report to the Congress the results of its study.

(2) Within one month of the start of the study required under subsection (a), the United States Sentencing Commission shall submit a report to the General Accounting Office, all appropriate courts, the Department of Justice, and the Congress detailing the operation of the sentencing guideline system and discussing any problems with the system or reforms needed. The report shall include an evaluation of the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining, disparities in sentencing, and the use of incarceration, and shall be issued by affirmative vote of a majority of the voting members of the Commission.

(b) The Congress shall review the study submitted pursuant to subsection (a) in order to determine—

(1) whether the sentencing guideline system has been effective;

(2) whether any changes should be made in the sentencing guideline system; and

(3) whether the parole system should be reinstated in some form and the life of the Parole Commission extended.

SEC. 237. (a)(1) Except as provided in paragraph (2), for each criminal fine for which the unpaid balance exceeds $100 as of the effective date of this Act, the Attorney General shall, within one hundred and twenty days, notify the person by certified mail of his obligation, within thirty days after notification, to—

(A) pay the fine in full;

"(5) any other pertinent consideration.

"(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

"(1) modified or remitted pursuant to the provisions of section 3592;

"(2) corrected pursuant to the provisions of rule 35; or

"(3) appealed;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"§ 3592. Payment of a fine, delinquency and default

"(a) TIME AND METHOD OF PAYMENT.—Payment of a fine is due immediately unless the court, at the time of sentencing—

"(1) requires payment by a date certain; or

"(2) establishes an installment schedule, the specific terms of which shall be fixed by the court.

"(b) INDIVIDUAL RESPONSIBILITIES FOR PAYMENT.—If a fine is imposed on an organization, it is the duty of each individual authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization. If a fine is imposed on an agent or shareholder of an organization, the fine shall not be paid, directly or indirectly, out of the assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

"(c) RESPONSIBILITY TO PROVIDE CURRENT ADDRESS.—At the time of imposition of the fine, the court shall order the person fined to provide the Attorney General with a current mailing address for the entire period that any part of the fine remains unpaid. Failure to provide the Attorney General with a current address or a change in address shall be punishable as a contempt of court.

"(d) STAY OF FINE PENDING APPEAL.—Unless exceptional circumstances exist, if a sentence to pay a fine is stayed pending appeal, the court granting the stay shall include in such stay—

"(1) a requirement that the defendant, pending appeal, deposit the entire fine amount, or the amount due under an installment schedule, during the pendency of an appeal, in an escrow account in the registry of the district court, or to give bond for the payment thereof; or

"(2) an order restraining the defendant from transferring or dissipating assets found to be sufficient, if sold, to meet the defendant's fine obligation.

"(e) DELINQUENT FINE.—A fine is delinquent if any portion of such fine is not paid within thirty days of when it is due, including any fines to be paid pursuant to an installment schedule.

"(f) DEFAULT.—A fine is in default if any portion of such fine is more than ninety days delinquent. When a criminal fine is in default, the entire amount is due within thirty days of notification of the default, notwithstanding any installment schedule.

"§ 3593. Modification or remission of fine

"(a) PETITION FOR MODIFICATION OR REMISSION.—A person who has been sentenced to pay a fine, and who—

"(1) can show a good faith effort to comply with the terms of the sentence and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the installment schedule, may at any time petition the court for—

"(1) INTEREST.—Notwithstanding any other provision of law, interest at the rate of 1 per centum per month, or 12 per centum per year, shall be charged, beginning the thirty-first day after sentencing on the first day of each month during which any fine balance remains unpaid, including sums to be paid pursuant to an installment schedule.

"(2) MONETARY PENALTIES FOR DELINQUENT FINES.—Notwithstanding any other provision of law, a penalty sum equal to 10 per centum shall be charged for any portion of a criminal fine which has become delinquent. The Attorney General may waive all or part of the penalty for good cause.

"§ 3596. Civil remedies for satisfaction of an unpaid fine

"(a) LIEN.—A fine imposed as a sentence 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). On application of the person fined, the Attorney General shall—

"(1) issue a certificate of release, as described in section 6325 of the Internal Revenue Code, of any lien imposed pursuant to this section, upon his acceptance of a bond described in section 6325(a)(2) of the Internal Revenue Code; or

"(2) issue a certificate of discharge, as described in section 6325 of the Internal Revenue Code, of any part of the person's property subject to a lien imposed pursuant to this section, upon his determination that the fair market value of that part of such property remaining subject to and available to satisfy the lien is at least three times the amount of the fine.

"(b) EXPIRATION OF LIEN.—A lien becomes unenforceable at the time liability to pay a fine expires as provided in section 3598.

"(c) APPLICATION OF OTHER LIEN PROVISIONS.—The provisions of sections 6323, 6331, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805) 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' shall be construed to mean 'the Attorney General,' and references in those sections to 'tax' shall be construed to mean 'fine.'

"(d) EFFECT ON 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 purposes 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 (26 U.S.C. 6323(f)(1)(A)) and by subsection (c).

"(e) ALTERNATIVE ENFORCEMENT.—Notwithstanding any other provision of this section, a judgment imposing a fine may be

"He shall keep informed concerning the conduct, condition, and compliance with any condition of probation, including the payment of a fine or restitution of each probationer under his supervision, and shall report thereon to the court placing such person on probation. He shall report to the court any failure of a probationer under his supervision to pay a fine in default within thirty days after notification that it is in default so that the court may determine whether probation should be revoked.".

(e) Section 4209 of title 18, United States Code, is amended in subsection (a) by striking out the period at the end of the first sentence and inserting in lieu thereof "and, in a case involving a criminal fine that has not already been paid, that the parolee pay or agree to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense.".

(f) Subsection (b)(1) of section 4214 of title 18, United States Code, is amended by adding after "parole" the following: "or a failure to pay a fine in default within thirty days after notification that it is in default".

(g)(1) Section 3565 of title 18, United States Code, is repealed.

(2) The table of sections for chapter 227 of title 18, United States Code, is amended by striking out the item for section 3565 and inserting in lieu thereof the following:

"3565. Repealed.".

(h) Section 3569 of title 18, United States Code, is amended by—

(1) striking out "(a)"; and

(2) striking out subsection (b).

(i) This section shall be repealed on the first day of the first calendar month beginning twenty-four months after the date of enactment of this Act.

SEC. 239. Since, due to an impending crisis in prison overcrowding, available Federal prison space must be treated as a scarce resource in the sentencing of criminal defendants;

Since, sentencing decisions should be designed to ensure that prison resources are, first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society;

Since, in cases of nonviolent and nonserious offenders, the interests of society as a whole as well as individual victims of crime can continue to be served through the imposition of alternative sentences, such as restitution and community service;

Since, in the two years preceding the enactment of sentencing guidelines, Federal sentencing practice should ensure that scarce prison resources are available to house violent and serious criminal offenders by the increased use of restitution, community service, and other alternative sentences in cases of nonviolent and nonserious offenders: Now, therefore, be it

Declared, That it is the sense of the Senate that in the two years preceding the enactment of the sentencing guidelines, Federal judges, in determining the particular sentence to be imposed, consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant has not

been convicted of a crime of violence or otherwise serious offense; and

(3) the general appropriateness of imposing a sentence of imprisonment in cases in which the defendant has been convicted of a crime of violence or otherwise serious offense.

X. EMPLOYER ACCESS TO SEX OFFENSE CRIMINAL HISTORY RECORD INFORMATION

EMPLOYER ACCESS TO SEX OFFENSE CRIMINAL HISTORY RECORD INFORMATION

President's Task Force Recommendation

Legislation should be proposed and enacted to make available to businesses and organizations the sexual assault, child molestation, and pornography arrest records of prospective and present employees whose work will bring them in regular contact with children.

Proposed Legislation*

SECTION 101. FINDINGS AND PURPOSES

A. The legislature and the people of this State find and declare that:

1. The children of this state face a serious threat of becoming victims of sex abuse;

2. Any child can become the victim of sex abuse;

3. Persons who sexually abuse children are likely to seek out employment situations working with children to provide a steady source of potential victims;

4. Traditional methods for treatment and rehabilitation of persons who have sexually abused children have not proven successful for most child abusers who have undergone them, and some authorities believe that effective methods are unlikely to be developed in the foreseeable future;

5. Child sex abuse is a difficult crime to prosecute, and convictions in these cases do not accurately reflect the scope of the problem;

6. Present law impedes the release of criminal arrest records to non-law enforcement personnel;

7. Enabling employers to learn of present or prospective employees' sex offense criminal history records will increase the protections currently afforded to children and enhance employers' awareness of potential problems posed by employees who have a history of sex abuse; and

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*Drafted with the assistance of the American Bar Association Criminal Justice Section Victim Witness Project.

8. Because of the potentially adverse effects of releasing criminal history record information on the record subjects, such information should not be disseminated unless adequate protections exist to ensure that only information most crucial to responsible employment decisions be disseminated, and that it be disseminated under carefully defined circumstances.

B. Therefore, the legislature and the people of this State declare the purposes of this Act to be as follows:

1. To protect the children of this State from sex abuse by enabling employers and volunteer organizations that render services to children to use selected criminal history record information to help determine if a person in their service who works with or around children, or an applicant for such a position, will present a danger of sex abuse to the children served, and

2. To provide a means of disseminating selected criminal history information that protects the rights and interests of the persons whose records are disseminated.

SECTION 102. SHORT TITLE

This Act shall be known and may be cited as "The Sex Offense Criminal History Record Information Act."

SECTION 103. DEFINITIONS

As used in this Act, the following words and phrases shall have the meanings indicated, unless the context clearly indicates otherwise.

A. Authorized Employer Representative:
The chief executive officer or chief staff member of an employer, as defined in subsection (G), who has been authorized by the authorizing agency to receive on behalf of the employer sex offense criminal history record information about present and prospective employees of the employer.

B. Authorizing Agency:
The [options: state Health and Human Services, Child Protective Services, Attorney General, state police, or another appropriate state agency or licensing authority] which reviews, approves or disapproves applications from employer representatives for authorization to receive sex offense criminal history record information.

C. Central Record Repository:
A division of the executive branch of government responsible for collecting on a statewide basis criminal history record information specifically identifiable to an individual, including descriptions and notations of arrests, charges, and all

dispositions, if any, relating to specific statutory offenses, and for responding to requests from authorized employer representatives for sex offense criminal history record information.

D. Child:
Any person under ___ years of age.

E. Disposition:
An official determination indefinitely postponing or terminating further action in a criminal proceeding or an official outcome of a criminal proceeding, including but not limited to acquittal, dismissal of the charge, finding of not guilty or acquittal by reason of insanity, nolle prosequi decision, pretrial diversion decision, appeal, or a determination of guilt based on a conviction, guilty plea, or plea of nolo contendere; any sentence imposed in connection with such determination; and any grant of executive clemency or pardon.

F. Employee:
1. A person who renders time and services to an employer, and whose regular course of duties places that person in a position:

a. to exercise supervisory or disciplinary control over children; or

b. to have direct access to or contact with children served by the employer; or

c. to have access to information and records maintained by the employer relating to identifiable children served by the employer.

2. For the purposes of this Act, 'employee' includes any volunteer, any prospective employee, and any prospective volunteer.

G. Employer:
A business, non-profit or volunteer organization, a unit of such business or organization, or a unit of government not responsible for law enforcement, whose employees regularly render services to children, including but not limited to care, treatment, transportation, instruction, companionship, entertainment, or custody.

H. Employer Representative:
The chief executive officer or chief staff member of an employer, as defined in subsection (G), who applies to the authorizing agency for authorization to receive on behalf of the employer sex offense criminal history record information about present and prospective employees of the employer.

I. Sex Offense:
1. Any of the following offenses under the state criminal code:

a. Section *.*.*, relating to incest, sexual assault, sexual abuse, or molestation of a child;

b. Section * * *, relating to sexual assault, including rape, statutory rape, and sodomy,

c. Section * * *, relating to the production, distribution, or sale of pornography or pornographic materials,

d. Section * * *, relating to solicitation of children for the purposes of prostitution or other lewd or immoral purposes, or using children in any organized prostitution enterprise, or

e. aiding, abetting, attempting or conspiring to engage in any of the offenses in subsection (1a), (1b), (1c), or (1d).

2. An act constituting an offense enumerated in subsection (1) that is committed outside the state is a sex offense.

J. Sex Offense Criminal History Record Information:
Information relating to any sex offense enumerated in section 103(I) which is specifically identifiable to an individual, consisting of descriptions and notations of arrests, charges, and all dispositions, if any.

SECTION 104. SCOPE AND APPLICATION

A. Sex offense criminal history record information authorized for dissemination under the terms of this statute shall be disseminated to authorized employers subject to the limitations contained herein.

B. This Act permits an employer to consider an employee's sex offense criminal history record when making a decision to hire, retain, suspend, or discharge the employee.

C. This Act shall not be construed to restrict the release of criminal history record information authorized by other statutes. Conflicts which arise between this Act and other statutes shall be resolved in favor of the statute which authorizes maximum disclosure of information.

D. Except as provided in (E)(5) of this section, this Act exempts sex offenses from laws of this State or court orders authorizing the destroying, expunging, purging, or sealing of criminal history records to the extent such information is authorized for dissemination under this Act.

E. This Act applies to criminal history record information required by law to be kept and reported by law enforcement or judicial agencies to the central record repository. The following are excluded from the provisions of this Act:

1. information pertaining to law enforcement agencies' intelligence gathering activities and to other ongoing criminal investigations, if requested by a law enforcement agency to be excluded,

2. information obtained from a criminal justice agency report or other investigation report,

3. false or fictitious criminal history information intentionally fabricated and included in criminal history record files, where such information is for use in an ongoing undercover criminal investigation,

4. information for statistical or research purposes in which individuals are not identified and from which individual identities cannot be ascertained, and

5. juvenile criminal history record information which has been sealed by order of the court.

SECTION 105. ADMINISTRATION

A. Authority

1. The [options: state Health and Human Services, Child Protective Services, Attorney General, state police, or another state agency or licensing authority] is authorized to approve or deny employer representatives' requests for authorization to receive sex offense criminal history record information.

2. The [central record repository] is authorized to disseminate sex offense criminal history record information to employers authorized to receive such information.

B. Employment

The [options: state Health and Human Services, Child Protective Services, Attorney General, state police, or another appropriate state agency or licensing authority] and the central record repository may employ those officers and employees necessary to carry out the purpose of this Act.

C. Agreements and Compacts

The Attorney General is authorized to enter into compacts with other states for the reciprocal exchange of sex offense criminal history information to further the purposes of this Act.

SECTION 106. AUTHORIZATION FOR EMPLOYER REPRESENTATIVES TO RECEIVE SEX OFFENSE CRIMINAL HISTORY RECORD INFORMATION

A. Sex offense criminal history record information about employees may be disseminated under this Act only to employer representatives to whom the authorizing agency has granted prior authorization to receive sex offense criminal history record information.

B. An employer representative applying for authorization to receive sex offense criminal history record information about employees shall provide to the authorizing agency:

1. a plan for safeguarding any information obtained under this Act and for destruction of such information within 30 days of its receipt;

2. agreement that if authorization is granted, the employer representative will update the material information provided in the application throughout the period of authorization; and

3. such other information about the employer representative, the employer, and the employer's facilities that is necessary and proper for implementation of this Act and requested by the authorizing agency.

C. The authorizing agency shall process applications for authorization to receive sex offense criminal history record information. The process shall include conducting such investigations as may be deemed necessary to verify information provided by the employer representative.

D. The authorizing agency shall provide authorization to receive sex offense criminal history record information to any employer representative whose application conforms to the requirements under subsection (B) unless the authorizing agency determines that the employer representative:

1. does not represent an employer as defined in this Act; or

2. has provided materially false information.

E. If the authorizing agency approves the application of the employer representative, it shall provide timely written notice of the authorization to the employer representative and to the central record repository, such notice to include any limitations on the authorization.

F. If the authorizing agency finds that the employer representative is not eligible for authorization under subsection (D), the authorizing agency shall return the application to the employer representative with written reasons for its disapproval, and provide the employer representative an opportunity to resubmit the application with any additional information as reasonably may be required by the authorizing agency.

G. Authorization to receive sex offense criminal history record information shall be in effect for _____ years from the date of authorization. However, the authorizing agency may suspend or terminate authorization prior to its original expiration date if:

1. the authorized employer representative fails to provide the authorizing agency with timely written notice of material changes in the information furnished under subsection (B);

2. material changes in the information furnished under subsection (B) are of such a nature that the employer representative is no longer eligible for authorization under subsection (D);

3. the authorized employer representative or the employer has violated the provisions of this Act. If the authorizing agency has probable cause to believe an employer has violated this Act, it may suspend the authorization pending a determination that the alleged violation warrants further suspension or termination of the authorization.

H. If the authorizing agency suspends or terminates authorization of an authorized employer representative, it shall immediately provide written notice of this action to the employer representative and to the central record repository.

I. To implement this section, the authorizing agency shall develop rules and regulations governing authorization of employer representatives to receive sex offense criminal history record information about employees, including:

1. application procedures and requirements;

2. procedures for reviewing applications;

3. limitations on authorization;

4. procedures for suspending, terminating, and renewing authorization;

5. procedures for employer representatives to appeal the denial or revocation of authorization;

6. the setting of fee schedules not to exceed _____ to cover the costs of initial authorization and not to exceed ___ to cover the costs of renewed authorization, and;

7. procedures to assure compliance with the provisions of this section and the rules and regulations governing it.

SECTION 107. REQUEST FOR AND DISSEMINATION OF SEX OFFENSE CRIMINAL HISTORY RECORD INFORMATION

A. An authorized employer representative may request sex offense criminal history record information about any employee of the employer, provided the employee is within the scope of the authorization granted to the employer representative.

B. The central record repository shall process requests from authorized employer representatives for sex offense criminal history record information about specified employees, provided such requests conform to the requirements of the central record repository, including:

1. the name, address, and signature of the authorized employer representative and the name and address of the employer;

2. the name and address of the employer's facility in which the employee is employed or seeking to become employed;

3. the name, fingerprints, and other identifying information about the employee;

4. signed consent by the employee to a sex offense criminal history record information search;

5. the mailing address of the employee or a signed waiver of the right under this Act to be sent a copy of the information disseminated to the authorized employer representative as a result of the record search; and

6. signature of the employee indicating that the employee has been notified of:

   a. the types of sex offense criminal history record information subject to dissemination under subsection (D) of this section, or a description of such information;

   b. the employer's right to require a record check as a condition of employment;

   c. the employee's right to challenge the accuracy and completeness of any information which may be disseminated to the employer under this Act, in accordance with section ___ of [the state code].

C. Upon receipt of a request from an authorized employer representative for sex offense criminal history record information about an employee, the central record repository shall undertake a search for such information, provided the employee is not outside the scope of the employer authorization. The search shall be based on the employee's fingerprints provided by the authorized employer representative and shall include:

1. identifying sex offense criminal history record information about the employee which may exist in the state central record repository;

2. requesting out-of-state sex offense criminal history record information about the employee in accordance with agreements entered into with other states, including those entered into under section 105(C);

3. if the information pertains to an arrest reported more than 30 days prior to the date of the inquiry and no disposition has been reported, contacting appropriate officials in the local jurisdiction where the arrest or prosecution occurred to verify and update the information; and

4. determining whether the sex offense criminal history record information is subject to dissemination under subsection (D).

D. Sex offense criminal history record information about an employee shall be disseminated to an authorized employer representative who has requested it in accordance with the following provisions:

1. If the record check indicates a conviction for a sex offense or a conviction based on an arrest or on an initial charge for a sex offense, all sex offense criminal history record information about the incident shall be released;

2. If the record check indicates an arrest for a sex offense pending at the time of the inquiry or an initial charge for a sex offense pending at the time of the inquiry, all sex offense criminal history record information shall be released, or;

3. If the record check indicates two or more incidents resulting in arrest or initial charge for a sex offense, all sex offense criminal history record information shall be released.

E. Within ____ days of receipt of a request by an authorized employer representative for sex offense criminal history record information, the central record repository shall send written notice of the results of the search to the authorized employer representative and to the employee, except that if the employee has waived the right to receive the results of the search, notice shall be sent only to the authorized employer representative. The notice shall include:

1. a description of sex offense criminal history information subject to dissemination under subsection (D), and

2. if the search for sex offense criminal history record information revealed no information subject to release under this Act, a statement that the central record repository has no information subject to release under the Act, or

3. if the search for sex offense criminal history record information revealed information about the employee subject to release under this Act, a summary of the information and, if applicable, a statement that disposition information could not be verified for certain noted arrests. A statement of the purpose for which the information is being disseminated, the potential liabilities and penalties for its misuse, and the procedures by which the employee might challenge the accuracy and completeness of the information under Section ___ of [the state code] shall be included with any sex offense criminal history record information disseminated.

F. Immediately upon receipt of corrected or updated information disseminated under subsection (E)(3), the central record repository shall send written notice of the correction or updated information to the employee who was the subject of the

record search, unless the employee has waived the right to receive such notice, and to all employer representatives to whom notice of the results of the sex offense criminal history record search under subsection (E)(3) were disseminated within the three months prior to the correction, and upon request of the employee to any other employer representatives who previously received such information.

G. To implement this section the central record repository shall promulgate rules and regulations which may include reasonable fees to cover the costs of a sex offense criminal history record search.

SECTION 108. REDISSEMINATION

Under no circumstances shall an employer or any individual other than the subject of the record check redisseminate sex offense criminal history record information received under this Act except insofar as required to fulfill the purposes of the Act.

SECTION 109. SANCTIONS AND REMEDIES

A. Administrative Remedies

1. Notwithstanding any civil or criminal remedies provided by this Act, the rules and regulations of the authorizing agency shall provide administrative sanctions for authorized employers who violate this Act, including temporary or permanent revocation of authorization to receive sex offense criminal history record information.

2. The authorizing agency and the central record repository shall provide reasonable administrative penalties for their employees who violate the provisions of this Act. Such remedies may include suspension or termination of employment.

3. Employer representatives may appeal adverse decisions denying or revoking authorization in accordance with the rules and regulations of the authorizing agency.

4. Except as provided in section 107(B)(6)(c), all hearings held pursuant to the provisions of this Act shall be held in accordance with the Administrative Procedures Act, _____.

B. Civil Remedies

1. The following rights of action shall vest in the subject of a sex offense criminal history record check:

   a. a private right of action against an employer, employer representative, or an employee for redissemination of sex offense criminal history record information, either intentionally or through gross negligence;

b. a private right of action against the central record repository for dissemination of information not authorized for dissemination under the terms of this Act, or for the release of information to a person or organization not authorized to receive information under the terms of this Act, either intentionally or through gross negligence; and

c. a private right of action against the central record repository for failure to correct information disseminated under this Act, either intentionally or through gross negligence.

Punitive damages shall be awarded only upon a finding that the individual, organization, or agency acted with malice.

2. If an employee employed subsequent to the effective date of this Act commits a sex offense against a child served by the employer, the employer shall be liable for damages for any injuries suffered by the child as a result of such offense if at the time the employer employed the employee:

a. the employer was authorized or was eligible for authorization under this Act to receive sex offense criminal history record information;

b. the employee was the subject of sex offense criminal history record information which was available for dissemination to the employer under this Act; and

c. the employer failed, without good cause, to request such information pursuant to this Act.

The liability of the employer for damages under this section shall be reduced by the amount of damages awarded to the child as a result of a suit against the employee for injuries sustained as a result of the offense.

C. Criminal Penalties

1. It shall be unlawful for any person knowingly and willfully to:

a. use this Act to obtain or seek to obtain sex offense criminal history record information under false pretenses;

b. disseminate or attempt to disseminate information received under this Act, knowing that such information was received under this Act, in a manner other than in accordance with this Act; or

c. disseminate or attempt to disseminate false, inaccurate, or incomplete criminal history record information under this Act.

2. Each violation of this section shall constitute a separate offense, and be punishable as a [Class __] misdemeanor.

D. Limitations

1. Any cause of action brought under the terms of this Act shall be commenced within three years of its occurrence or of the time the party bringing the action should reasonably have become aware of the cause of action, whichever date is later. No action brought under the provisions of this Act shall survive the life of the injured party.

2. An authorized employer shall be held harmless in any employment discrimination suit claiming discrimination based on the provisions of this Act.

SECTION 110. SEVERABILITY

Should any part of this Act be declared invalid or unconstitutional, such declaration shall not affect the remaining provisions of this Act.

SECTION 111. AMENDING CLAUSE

The following provisions of the state code shall be amended to exempt sex offense criminal history record information from statutes authorizing the destroying, expunging, purging, or sealing of criminal history record information:

Sec. _____

Sec. _____

SECTION 112. EFFECTIVE DATE

This Act shall become effective 180 days after the day of its enactment.

Commentary

The December 1982 Final Report of the President's Task Force on Victims of Crime recommends that legislation be enacted to make available to businesses and organizations the sexual assault, child molestation, and pornography arrest records of prospective and present employees whose work will bring them into regular contact with children.

Sexual abuse of children by those entrusted to care for them is increasingly being recognized as a tragedy of considerable proportions.* Recent reports of incidents have come from all areas of the country. What has often appeared in the first instance to be an isolated event has, upon investigation, been shown to involve substantial numbers of children and sometimes complex, sophisticated sexual abuse rings.

Whether the current public awareness of child sex abuse perpetrated by employees of child-oriented facilities is reflective of an increase in the reporting of such incidents or of an actual increase in the incidence of such abuse is unknown. Probably both are true to at least some extent. On the one hand, a variety of barriers to reporting child sex abuse are slowly being lowered. Supportive services are beginning to be provided to victims and their parents. Unprecedented publicity about the problem and sex abuse education programs for both children and parents may also be responsible for increased reporting of individual incidents. On the other hand, the accessible pool of potential child victims in child-oriented facilities is increasing. Parents seeking more educational and social opportunities for their children and working parents seeking child care have contributed to an unprecedented demand for out-of-home services. There is little doubt that the situation is being exploited by those looking to satisfy their personal sexual desires or financial greed through sexual exploitation of children.

Few facts are known about child sexual abuse. Leroy G. Schultz, editor of The Sexual Victimology of Youth (Charles C. Thomas, 1980), has noted that "[s]exuality and children, by themselves, have not gained their share of research or policy resources, but when combined have produced a national avoidance-reaction." Partly as a result of this historic unwillingness to confront the reality of child sexual abuse and partly because of the difficulties in penetrating the secrecy surrounding it, there is a noticeable lack of reliable data on the incidence and effects of sexual victimization of minors. Moreover, until recently little serious attention has been paid to the social and legal barriers which stand in the way of an adequate response to the problem.

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*Only several years ago, child care professionals considered "child sexual abuse" almost exclusively an intrafamilial phenomenon. In the past several years, however, the term has been expanded to include extrafamilial abuse as well. Unless the context indicates otherwise, the term as used in this commentary refers to any sexual victimization of children without distinction between extra- and intrafamilial relations. This may range from intercourse to illicit fondling. It also includes exploitation of children for purposes of pornography and prostitution.

INCIDENCE OF CHILD SEXUAL ABUSE

The major efforts to estimate the number of cases of child sexual abuse are discussed by Dr. David Finkelhor in an article, "How Widespread is Child Sexual Abuse?" (Perspectives on Child Maltreatment in the Mid '80's, National Center on Child Abuse and Neglect, U.S. Department of Health and Human Services). These include a report by the American Humane Association that in 1982, 22,918 incidents of child sexual abuse were reported to state child protection authorities. A 1979 National Center on Child Abuse and Neglect study estimated that 44,700 cases of sexual abuse were reported or otherwise known to professionals in the year beginning April, 1979. Insofar as these statistics were obtained from child protection agencies, however, they do not address extrafamilial abuse (since until 1984 these agencies rarely received or recorded reports of abuse occurring outside the family) or any other unreported abuse. "This abuse," according to Finkelhor, "may well constitute the majority." (Ibid., p. 18.)

To obtain information about unreported as well as reported child abuse, several studies surveyed the general population or selected target groups of the population. Dr. Finkelhor himself undertook a study of college students which indicated that 19% of the women and 9% of the men had been sexually victimized as children. Another Finkelhor study found that 15% of the women and 5% of the men interviewed in a representative sample had been sexually abused as children. Sociologist Diana Russell apparently has found the highest rate of child sexual abuse. Through interviews of a random sampling of San Francisco women, she reports that 38% of the women had had a sexually abusive physical contact before they were 18 years old. If non-contact experiences were included, the figure rose to 54%. (Ibid.)

To date, all of the studies of the incidence of child sexual victimization have built-in limitations. These include representativeness, the quality of the questions asked, the source of the information, and the range of sex offenses covered (e.g., most estimates of the incidence of child sexual victimization do not include instances of pornographic exploitation and child prostitution). Despite their limitations, however, the studies have established that the problem is real and considerably more extensive than once thought.

As difficult as it has been to develop accurate estimates of the number of child sexual offense incidents, it is even more difficult to determine percentages concerning the relationship of the perpetrator and victim. Various estimates have held that parents, parent substitutes, or relatives are the perpetrators in 30% to 80% of all cases; that non-family members perpetrate 20% to 30% of all child abuse cases; and that only 3% to 10% of the offenders are total strangers. (See Child Sexual Abuse: Incest, Assault, and Sexual Exploitation, National Center on Child Abuse and Neglect, U.S. Department of Health and Human Services, Revised April, 1981.)

EFFECTS OF CHILD SEXUAL ABUSE

Little information is available about the seriousness and nature of the long-range effects of child sexual abuse. While a few victims may suffer no adverse effects and some may recover relatively quickly from any adverse effects, it is also clear that many children suffer lasting psychological injury. In addition, it has been noted by many who have worked with child sex offenders that often the offenders themselves were abused as

children, leading to speculation that there may be some sort of a cause-effect relationship between being sexually abused as a child and sexually abusing children as an adult. Shorter-range effects are, of course, more readily observable. These include physical trauma (genital and anal injuries), venereal diseases, pregnancy, and psychological symptoms (e.g., withdrawal, sleep disorders, inability to concentrate). Moreover, sexual abuse is often accompanied by severe physical abuse, resulting in non-genital injuries or even death.

BARRIERS TO AN ADEQUATE RESPONSE

The almost negligible attention which child sex abuse received until recently can be attributed to a number of factors. Social attitudes have played a significant role. Even quite young children are aware of the special nature of their sexual anatomy and the social taboos against displaying or letting others see or touch their private parts. Thus many children who have been abused are hesitant to tell their parents—either because they themselves believe they have violated these prohibitions or because they fear their parents will believe it. Moreover, if their molesters were "kind" (i.e., seductive), children may not want to get them in trouble. If their molesters were aggressive or cruel, they may simply be too scared to tell. This is particularly likely when the abusers are authority figures, and even more likely when the abuse is accompanied by explicit threats not to tell. Such warnings are extremely intimidating to children. Moreover, they reinforce their belief that they have participated in something "bad." The end result is that uncounted numbers of children carry the secret burden of their victimization throughout their entire childhood and often their entire lives.

The children who do try to tell a parent or other adult about their victimization often find it difficult to articulate the problem. Not only do they lack the necessary vocabulary, they also are confused about what really did happen to them. If they discern their parents' discomfort at their attempts to explain, they may be discouraged from continuing. Some parents may even tell their children to stop talking "nonsense."

Parents' failure to take action on reported abuse may be due to any of a number of factors. Some parents simply do not believe their children. They may know the abuser and find it incredible that he or she would commit such acts. They may be convinced that the reputation of the institution guarantees against such abuse. They may believe the children are fantasizing (without questioning where they learned the basic sexual information on which their stories are based). An undetermined number of parents may, in fact, believe their children, but fear there is something provocative or promiscuous about them which "asked for" the abuse. Probably a greater number of parents who believe their children simply want to spare them (and perhaps themselves as well) the social stigma of having been victimized by child sexual abuse. Also weighing heavy on many parents' minds is the traumatic psychological and emotional impact which is likely to occur when children become involved in the criminal justice process. Often this is judged to be worse than the effects of the crime itself. (See Brunold, The Sexual Victimology of Youth, Ibid.)

In addition to these and other social barriers which undoubtedly affect the reporting rates for child sex abuse, legal and practical barriers in the criminal justice system discourage successful prosecution of reported cases. Physical evidence is difficult to obtain. Often there simply was none. When there was, it may no longer exist by the

time the case is called to the investigator's attention (e.g., bruises, genital trauma, presence of semen). Even if the investigators are called in relatively soon, they may be untrained in the sophisticated techniques necessary to obtain and analyze relevant physical evidence.

While over half of the states now allow the weight and credibility of children's testimony to be decided by the judge or jury, the others still require that children under a certain age be found competent witnesses prior to providing testimony. Where competency is not found to exist, the result is likely to be exclusion of testimony from the only witness who knows the facts of the case. The determination of whether or not such children are competent to testify is made by the court on the basis of the children's responses to questions intended to establish their veracity, intelligence, memory, and verbal capacity. Thus the ability of the court to formulate and ask questions in a way children understand them and to evaluate responses in a way children intend them to be evaluated is crucial to the outcome of the examination. Inappropriate questions or invalid interpretations of responses may easily skew the relevance of the examination. (See Child Sexual Abuse and the Law, "Competency of Children as Witnesses," American Bar Association National Legal Resource Center for Child Advocacy and Protection, 1981.)

Furthermore, in child sex offense cases corroborative evidence is usually required to strengthen the child's testimony. This may formally be required by statute or judicial decision. It may also be required simply as a practical matter. (See Child Sexual Abuse and the Law, "The Corroboration of Sexual Victimization" by David W. Lloyd, American Bar Association National Legal Resource Center for Child Advocacy and Protection, 1981.)

Corroboration is difficult to obtain. Because of the nature of the offense, eyewitnesses are rare. When there are eyewitnesses, they, too, may be children. As noted above, physical evidence is often not available, particularly when the abuse comes to light substantially after the time it occurred. The "excited utterance" exception to the hearsay rule is often not applicable in these cases, since the victim rarely reports the incident immediately after it occurs.

Considerable efforts to improve methods of investigating and prosecuting child sex abusers have been prompted by the recent public outcry. For example, special child abuse units are being created in a number of police departments and prosecutors' offices. Techniques for collecting and preserving evidence are being improved. Sensitivity to specific problems of child witnesses is being encouraged, thus resulting in more and better witnesses. Some courts have liberalized the "excited utterance" hearsay exception to allow a longer period of time between the incident and the statement of a child abuse victim than would normally be allowed. While increased incarceration will temporarily separate child sex abusers from future potential victims, it is unrealistic to believe that this will in itself be sufficient to deter others from committing child sexual abuse. Special problems inherent in these cases are likely to preclude ever achieving satisfactory conviction rates. In those relatively few instances in which there is a conviction followed by incarceration, the offender may be free in a short period to resume his previous lifestyle. The sad fact is that, at least for the foreseeable future, society must look for additional preventive safeguards to protect its children from those individuals seeking to prey on them.

As a result of these and other obstacles, convictions in child sex offense cases are rare. Offenders are left relatively free to continue their abuse over an extended period of time.

CHILD SEXUAL ABUSE BY EMPLOYEES

In public hearings around the country, convincing evidence was repeatedly presented to the President's Task Force on Victims of Crime that extensive extrafamilial child sexual abuse is perpetrated by individuals who seek employment in or volunteer for positions that provide them ready access to children. While the vast majority of those who work with the young are dedicated and law-abiding, a dangerous few who choose occupations such as recreation director, school bus driver, teacher, and coach have only their sexual gratification or greed in mind. By engaging in conduct expressly forbidden by society, they cause untold harm to some of its most vulnerable members. Many of these individuals have previously been arrested for violent or exploitative acts against children—some a number of times. However, if they have not been convicted (and in some jurisdictions even if they have been convicted), privacy laws deny their employers or potential employers access to their records.

Laws prohibiting private access to arrest records rely on the firmly established and commendable presumption of innocence until guilt is proven. Difficulties arise, however, in applying this principle to child sexual abuse, in which laws relating to child testimony, institutional disinterest in or practical barriers to prosecuting these cases, and parental desire to spare the children the ordeals of testifying have combined to produce an abundance of arrests, but precious few convictions. As a result, even if a jurisdiction permits employers to check conviction records, the vast majority of arrested child sex abusers are able to go from job to job with little fear that arrests in connection with previous employment will ever be discovered by future employers. In allowing the situation to persist, society is, in effect, holding a record subject's rights to prevent disclosure of records whose relevance is triggered by their seeking work with children above children's rights to protection from very likely possibilities of sexual abuse. The President's Task Force on Victims of Crime has recommended that legislatures reverse this order of priorities by legislation carving out a narrowly defined exception to privacy laws by making sexual assault, child molestation, and pornography arrest records of prospective and present employees available to businesses and organizations who hire persons to work with or around children.

CONSIDERATIONS

In drafting legislation to implement the President's Task Force recommendation, a number of issues must be borne in mind. The dissemination of criminal history record information is a sensitive and complex matter even when its purpose is as laudable as the protection of children from sexual abuse. Constitutional issues pertaining to freedom of information, privacy, due process, and equal protection all come into play. Moreover, a number of federal statutes, including the Civil Rights Act, the Omnibus Crime Control and Safe Streets Act, as well as state statutes are relevant. (These are discussed in some detail in the appendix to this commentary.) Neither alone nor together are they insurmountable obstacles. However, they will of necessity greatly influence the shape of an appropriate legislation response.

CONCLUSION

The proposed legislation has been drafted with the foregoing considerations in mind. As a result, great effort has been taken to make the legislation as narrow as possible to achieve its sole purpose--providing a mechanism by which employers may make more informed decisions likely to result in reduced incidents of employee sex offenses against children.

Some will complain that the legislation is too narrow—that it does not include all arrest information or information about all offenses which may indicate a propensity toward child sexual abuse, nor does it mandate employee record checks. The drafters were mindful, however, that such a broadening of the legislation would be likely to increase greatly the dissemination of criminal history record information not indicative of child sexual abuse, but result in very few additional identifications of child sex abusers. Of course the legislation is not the sole mechanism for preventing child sexual abuse by employees and does not eliminate the need for other employer checks on employment suitability. Nevertheless, it is expected to be an enormously effective means of combatting such abuse.

Others will complain that the legislation is too broad—that it will deny employment of their choice to persons who are, in fact, suitable for working with children. While, unfortunately, this may be true in certain instances, the legislation has been drafted to reduce such instances to a minimum. It neither mandates that employers undertake record checks nor that employers deny employment because of the results of a record check. Where a person is denied a job because of a record, he or she may apply to another employer who may not undertake the check or, if the check is undertaken, may decide it is irrelevant to the job. The applicant may, of course, also seek employment which does not involve working with children where the legislation—and hence the record check—is not applicable.

Thus, the proposed legislation attempts to provide maximum employer access to relevant information with the least amount of resultant harm to employees or potential employees who present no threat of child sexual abuse. Nevertheless, it is not to be viewed as a "take it or leave it" proposition. Each state should review the legislation in the context of its own needs and concerns, and where appropriate, adapt it to meet these.

SECTION 101. FINDINGS AND PURPOSES

A. The legislature and the people of this State find and declare that;

1. The children of this state face a serious threat of becoming victims of sex abuse;

2. Any child can become the victim of sex abuse;

3. Persons who sexually abuse children are likely to seek out employment situations working with children to provide a steady source of potential victims;

4. Traditional methods for treatment and rehabilitation of persons who have sexually abused children have not proven successful for most child abusers who have undergone them, and some authorities believe that effective methods are unlikely to be developed in the foreseeable future;

5. Child sex abuse is a difficult crime to prosecute, and convictions in these cases do not accurately reflect the scope of the problem;

6. Present law impedes the release of criminal arrest records to non-law enforcement personnel;

7. Enabling employers to learn of present or prospective employees' sex offense criminal history records will increase the protections currently afforded to children and enhance employers' awareness of potential problems posed by employees who have a history of sex abuse; and

8. Because of the potentially adverse effects of releasing criminal history record information on the record subjects, such information should not be disseminated unless adequate protections exist to ensure that only information most crucial to responsible employment decisions be disseminated, and that it be disseminated under carefully defined circumstances.

B. Therefore, the legislature and the people of this State declare the purposes of this Act to be as follow.

1. To protect the children of this State from sex abuse by enabling employers and volunteer organizations that render services to children to use selected criminal history record information to help determine if a person in their service who works with or around children, or an applicant for such a position, will present a danger of sex abuse to the children served, and

2. To provide a means of disseminating selected criminal history information that protects the rights and interests of the persons whose records are disseminated.

The findings and purposes outline the reasons for the legislation and purposes it serves. They are intended to be guideposts for courts that may interpret the substantive sections of the act.

Findings 1 and 2 recognize the ubiquitous and indiscriminate nature of child sexual abuse. As discussed in the Introduction, there are no statistics on the full extent of the problem; however, it appears clear that any child, regardless of race, geographical situation, creed, sex, or social or economic status, is a potential victim.

Child sexual abuse is rarely a spontaneous event. Finding 3 notes that sex offenders affirmatively seek out employment which provides the opportunity to be around children on a regular basis. Such employment provides both a mask of respectability behind which child sex abusers may hide - often for years - and a ready pool of potential victims. While pedophiles unquestionably constitute an extremely low percentage of employees who work with children, the disproportionate harm resulting from their unfettered access to employment with children is considered sufficient to warrant the special protections of this proposed legislation.

Finding 4 concerns the limited success which has been achieved in treating child sex offenders. According to Dr. Ronald M. Costell ("The Nature and Treatment of Male Sex Offenders," Sexual Abuse of Children: Selected Readings, U.S. Department of Health and Human Services, November, 1980), therapeutic intervention via traditional psychotherapy or behavior modification techniques rarely works even with non-aggressive pedophiles and virtually never with aggressive or sadistic offenders. Moreover, only a small percentage of aggressive offenders have responded to long-term incarceration, with psychotherapy directed toward impulse control and the learning of appropriate social and sexual behaviors toward adult partners. Except for medical treatments to reduce libido, Dr. Costell reported no available treatment methods for the sadistic offender. In the past several years there have been several treatment programs experimenting with rehabilitation of pedophiles. Nevertheless, it is apparent that extra-family child sex offenders are highly resistant to change, and that recidivism is the norm, rather than the exception.

Findings 5 and 6 identify pertinent aspects of the legal system which contribute to the problem. The first concerns prosecutorial difficulties which result in relatively few convictions for child sex abuse. While formal corroboration requirements are no longer widespread barriers to prosecuting such cases, informally, corroboration is still a major factor in charging decisions in virtually all jurisdictions. Children are generally not considered credible witnesses. Parents are reluctant to allow their children to become involved in lengthy court proceedings likely to be frightening and traumatic in themselves, and perhaps to have longlasting social as well as psychological implications. Tangible evidence is often difficult to obtain. Thus in many instances, no charges are brought, or if brought, are dismissed. In others, the case is plea bargained to a non-sex offense (e.g., assault).

That convictions do not accurately reflect the scope of the problem has been recognized by Dr. A. Nicholas Groth, one of the first to attempt to treat child sex offenders. In a study of 148 offenders who sexually assaulted underage persons, Dr. Groth found that "it was a rare exception where the first conviction constituted the first such incident in the offender's life." (Men Who Rape: The Psychology of the Offender, A. Nicholas Groth and Jean Birnbaum, Plenum Press, New York, 1979.)

All states acknowledge the relevance of an individual's background to certain types of employment and, in fact, exercise their power to protect the public's health, safety, morals, and welfare by controlling access to certain occupations. As noted in its introduction, a 1973 American Bar Association survey on Laws, Licenses and the Offender's Right to Work identified almost 2,000 statutory provisions which affect the licensing of persons with an arrest or conviction record. However, relatively few pertained to occupations involving access to children. Moreover, these statutes did not address the issue of disseminating information to private employers.

Private employers who seek background information on employees or potential employees are often thwarted by privacy laws and court decisions prohibiting release of arrest record information. The reasons for such prohibitions are laudable—indiscriminate release of arrest information may adversely affect the employment opportunities of factually as well as legally innocent individuals. The effect is less beneficent, however, as it elevates the privacy rights of individuals with arrest records over the rights of employers to protect the children entrusted to their care from sex abuse. Many consider such a balance somewhat lopsided in light of the public nature of original arrest information, the tendency of child sex offenders to repeat their abuse, the difficulties in obtaining convictions in sex offense cases, the seriousness of child sex abuse, and the narrow employment rights involved.

Finding 7 notes that the opportunity for employers to obtain criminal history record information will increase the protections currently afforded to children. For some employers in some jurisdictions, available protections may include access to child abuse/neglect registries. However, such checks are done by name, rather than fingerprint, and consequently are of no value if an individual has changed his or her name. Probably the most common protection currently utilized by employers is seeking personal references on potential employees. However, employers who have discharged employees on the basis of allegations of child sex abuse may be unwilling to pass that information along for fear of being sued.

Undoubtedly, enactment of the legislation itself will raise the consciousness of employers to the problem of child sex abuse, thereby making them more alert to suspicious activity which they might otherwise have not noticed. Moreover, as discussed above, child abusers are often repeaters who seek out opportunities for their crime. Knowledge that their records may be checked is expected to discourage many of these potential repeat offenders from applying for child-oriented jobs. Those bold enough to apply are unlikely to be hired if potential employers find their records indicate a danger to children. Of course, for offenders who have escaped arrest, let alone conviction, the proposed legislation will have little immediate deterrent effect. There may be fewer such individuals, however, as reports of child sex abuse increase and investigation and prosecution techniques are improved. Some may fear that restricted opportunity for employment with children will only drive offenders to look outside the job site for prospective victims. However, even in the unlikely event that the proposed legislation should result in a slight increase of sex offenses outside the employment context, the restricted opportunity for certain individuals' regular, extended contact with potential victims is expected to result in a significantly larger decrease of offenses which will more than justify its enactment.

All of the above findings notwithstanding, Finding 8 recognizes that unlimited public access to sex offense criminal history record information might result in hardship for innocent persons and offenders whose offenses bear no relationship to sexual abuse of children. Since reputations and livelihoods are likely to be adversely affected by the release of any criminal history record information, the legislation limits the records which may be disseminated and the purposes for which they may be disseminated to those most essential for the protection of children.

SECTION 102. SHORT TITLE

This Act shall be known and may be cited as "The Sex Offense Criminal History Record Information Act."

SECTION 103. DEFINITIONS

As used in this Act, the following words and phrases shall have the meanings indicated, unless the context clearly indicates otherwise.

A. Authorized Employer Representative:
The chief executive officer or chief staff member of an employer, as defined in subsection (G), who has been authorized by the authorizing agency to receive on behalf of the employer sex offense criminal history record information about present and prospective employees of the employer.

Employers may be businesses, organizations, or units of government as well as individuals. This definition provides for an individual who will be responsible for specific activities under the legislation. While the authorized employer representative may delegate activities or, if necessary, redisseminate sex offense criminal history record information to associates involved in employment decisions for the employer, he or she is the sole individual authorized to request and receive such information directly from the central record repository.

B. Authorizing Agency:
The [options: state Health and Human Services, Child Protective Services, Attorney General, state police, or another appropriate state agency or licensing authority] which reviews, approves or disapproves applications from employer representatives for authorization to receive sex offense criminal history record information.

The authorizing agency is the state entity responsible for determining which employers may receive criminal history record information. It is to be distinguished from the central record repository which identifies the information to be released and releases it to authorized employers. Since the governmental entity serving as the authorizing agency will vary from state to state, it is bracketed in the proposal. Generally, it will be an already-existing state agency with responsibility for overseeing child protective services (e.g., Department of Human Resources; Department of Children and Youth; Bureau of Child Protection). It might also be employment related (e.g.,

Division of Employment Services) or law related (e.g., Attorney General or state police), though such agencies are less likely to be as knowledgeable about the problem of child sex abuse as agencies with child protective responsibilities.

Considerable judgment is required of the authorizing agency. On the one hand, it must be vigilant against indiscriminate approval of employers, thus authorizing unwarranted access to criminal history record information. On the other hand, it must be sufficiently flexible to qualify those employers with a legitimate need for the information.

C. Central Record Repository:
A division of the executive branch of government responsible for collecting on a statewide basis criminal history record information specifically identifiable to an individual, including descriptions and notations of arrests, charges, and all dispositions, if any, relating to specific statutory offenses, and for responding to requests from authorized employer representatives for sex offense criminal history record information.

Virtually all states have a central record repository responsible for managing state criminal history records. This is the logical agency to receive requests for information about particular individuals' records and, when appropriate, to disseminate it. The agency staff is presumably already trained in the technicalities of the records and the recordkeeping system, and is familiar with confidentiality requirements surrounding them. Moreover, in addition to administrative and fiscal advantages of utilizing an existing agency for dissemination purposes, containing the responsibility for the records rather than decentralizing it is likely to reduce both intentional and unintentional abuse by state employees.

D. Child:
Any person under ___ years of age.

The age which defines a child under this legislation is expected to conform with the age which defines a child under other state acts recognizing special vulnerabilities of young persons and extending them special protections. For uniformity and administrative ease, it is suggested that this age be the outside age at which a person may be the victim of statutory rape or other statutory offenses. As this varies from state to state, no age is specified in the proposed legislation.

E. Disposition:
An official determination indefinitely postponing or terminating further action in a criminal proceeding or an official outcome of a criminal proceeding, including but not limited to acquittal, dismissal of the charge, finding of not guilty or acquittal by reason of insanity, nolle prosequi decision, pretrial diversion decision, appeal, or a determination of guilt based on a conviction, guilty plea, or plea of nolo contendere; any sentence imposed in connection with such determination; and any grant of executive clemency or pardon.

F. **Employee:**

1. **A person who renders time and services to an employer, and whose regular course of duties places that person in a position;**

   a. **to exercise supervisory or disciplinary control over children; or**

   b. **to have direct access to or contact with children served by the employer; or**

   c. **to have access to information and records maintained by the employer relating to identifiable children served by the employer.**

2. **For the purposes of this Act, 'employee' includes any volunteer, any prospective employee, and any prospective volunteer.**

Employees are paid staff members or volunteers whose responsibilities either entail direct access to the children served by their employers or facilitate access to the children served by their employers. The very nature of certain work requires direct contact with children. For example, teachers, camp counselors, and daycare providers must have regular, extended access to children. Other employees may have considerable access to children, too, even though the nature of their job does not in itself require it--for example, maintenance personnel in child care facilities. The responsibilities of still others, such as administrative and clerical personnel, may not entail "on the job" access to children but do provide opportunities to obtain information (e.g., addresses) which facilitates "after hours" access. Since direct or indirect access to children is the crucial concept in determining if a person working for an employer is covered by this act, a person's status (i.e., paid or volunteer, full-time or part-time, exempt or non-exempt under the Fair Labor Standards Act) is irrelevant to this definition. Nonetheless, the legislation leaves to the discretion of the employer those employees for whom criminal history record information will actually be sought. (See section 107(A).)

G. **Employer:**

A business, non-profit or volunteer organization, a unit of such business or organization, or a unit of government not responsible for law enforcement, whose employees regularly render services to children, including but not limited to care, treatment, transportation, instruction, companionship, entertainment, or custody.

Employers covered under this proposed legislation may be public or private, profit or non-profit. The regular services provided under their auspices must involve direct or indirect access to or contact with children. Thus babysitting services, daycare centers, schools, day or overnight camps, etc., would generally qualify as authorized employers under the act. Short-term services which do not involve substantial or prolonged contact with individual children generally would not--e.g., movie theaters offering Saturday matinees for children, fast food restaurants. However, even in these cases, individual employers should be given the opportunity to make a case for authorization. A fast food restaurant may, for example, make a convincing argument that the neighborhood character of the facility provides its employees continuing access to specific child clients generally unaccompanied by adults. The definition of employer explicitly excludes law enforcement units, not to deny them the limited access to records afforded

by this proposed legislation but rather to assure that the wider access which they now enjoy is not restricted by the legislation.

Legislators may wish to consider including under this (and related) definitions employers who exercise supervisory control over children in the course of providing them employment as well as services. Young employees are often vulnerable to the advances of older supervisors and co-workers who exercise authority and/or financial control over them.

H. Employer Representative:

The chief executive officer or chief staff member of an employer, as defined in subsection (G), who applies to the authorizing agency for authorization to receive on behalf of the employer sex offense criminal history record information about present and prospective employees of the employer.

Employment or other association with an employer is not sufficient for an individual to request authorization to receive sex offense criminal history record information on behalf of the employer. The individual must be the chief executive officer or the chief staff member. The provision limits the number of individuals associated with any one employer who might be authorized to receive the information, thus reducing the potential for abuse. It also requires that those who are ultimately authorized are in positions of responsibility within the organization.

I. Sex Offense:

1. Any of the following offenses under the state criminal code:

a. Section * * *, relating to incest, sexual assault, sexual abuse, or molestation of a child,

b. Section * * *, relating to sexual assault, including rape, statutory rape, and sodomy,

c. Section * * *, relating to the production, distribution, or sale of pornography or pornographic materials,

d. Section * * *, relating to solicitation of children for the purposes of prostitution or other lewd or immoral purposes, or using children in any organized prostitution enterprise, or

e. aiding, abetting, attempting or conspiring to engage in any of the offenses in subsection (1a), (1b), (1c), or (1d).

2. An act constituting an offense enumerated in subsection (1) that is committed outside the state is a sex offense.

The offenses covered by the legislation pertain to certain proscribed acts against children and certain sex-related acts which pose a threat to the population in general. To limit the legislation's scope to "child crimes" would preclude dissemination of a great deal of relevant information. Those who commit sex or sex-related offenses involving adults may also pose a danger to children. Moreover, state codes do not always provide

separate statutory offenses based on victims' ages. Where this is true, omitting the general offenses would of course prohibit dissemination of any record information about the offense, regardless of the age of a victim in a specific case. Finally, even where separate statutes do exist, sex offenses involving children are often prosecuted under general statutes. This is particularly so in more serious cases, and in cases where substantial evidence is available for the greater of several possible charges (e.g., rape, rather than statutory rape).

The definition of "sex offense" does not include statutory offenses which do not inherently involve sexual exploitation or abuse, although many other acts may of course pose considerable physical or psychological danger to children--and some may have sexual gratification as their objective. The purpose of the legislation is to authorize dissemination of sex offense-related criminal history record information. To include all offenses which in certain instances might be committed for purposes of sexual gratification would immeasurably and, in view of the limited purposes of this proposed legislation, unwarrantedly expand the scope of the legislation. Including "assault," for example, would result in a tremendous increase in the number of records authorized for release, the great number of which would have no relationship to sex abuse of children. Nonetheless, legislatures may wish to include certain other offenses, particularly if these are identifiable in the state code as child-specific.

J. Sex Offense Criminal History Record Information: Information relating to any sex offense enumerated in section 103(I) which is specifically identifiable to an individual, consisting of descriptions and notations of arrests, charges, and all dispositions, if any.

Sex offense criminal history record information is information which may be available to authorized employers under this act. It is collected and maintained by law enforcement agencies, and pertains to specific arrests, charges, and related dispositions for sex offenses covered by the act. The information may be maintained manually or by computer. Generally it is entered onto official forms or into computers for uniformity and facility of use by law enforcement agencies.

SECTION 104. SCOPE AND APPLICATION

A. Sex offense criminal history record information authorized for dissemination under the terms of this statute shall be disseminated to authorized employers subject to the limitations contained herein.

Subsection (A) mandates the release of individual employees' sex offense criminal history record information to authorized employers who request it. Such release is not discretionary with the centralized record repository or any other individual or agency.

B. This Act permits an employer to consider an employee's sex offense criminal history record when making a decision to hire, retain, suspend, or discharge the employee.

Subsection (B), permitting employers to consider the information in making employment decisions, explicitly states the legislative intent of the proposed legislation. The weight assigned to the information is left to the employer's discretion, just as the weight assigned to most other information available to the employer is left to the employer's discretion (exceptions are, of course, sex, race, etc.).

C. This Act shall not be construed to restrict the release of criminal history record information authorized by other statutes. Conflicts which arise between this Act and other statutes shall be resolved in favor of the statute which authorizes maximum disclosure of information.

Subsection (C) recognizes the potential for conflict between this legislation and other state statutes relating to dissemination of criminal history record information, and provides that such conflicts shall be resolved in favor of the legislation permitting the greatest dissemination of criminal history record information to employers. The proposed legislation is intended to ensure that employers have access to sex offense criminal history information where this may not already be available; it is not intended to restrict access to this or other criminal history information which the legislature has elsewhere made available.

D. Except as provided in (E)(5) of this section, this Act exempts sex offenses from laws of this State or court orders authorizing the destroying, expunging, purging, or sealing of criminal history records to the extent such information is authorized for dissemination under this Act.

Subsection (D) exempts the sex offense records under the proposed legislation from the destruction or sealing which might otherwise be required or authorized under other state statutes. Most states either automatically destroy or seal records at a given point or destroy or seal them after a certain point if requested to do so by the subject of the record. (See Privacy and the Private Employer, SEARCH Group, Inc., p. 33, 1981.) The purpose of purging and sealing laws is laudable. Persons accused but not convicted of offenses and persons who have been convicted but have served their sentence may be adversely affected in employment and other aspects of their lives if information about their record becomes known. Thus where such records serve no legitimate purpose, their destruction or sealing makes sense. It is the contention of the legislation, however, that continued availability of certain sex offense records does serve a legitimate and compelling purpose--the prevention of child sexual abuse. Reliance on the availability of recent criminal history records to provide information about the potential dangers of employees is unrealistic. While pedophiles are generally repeaters, arrests and particularly convictions are rare. Therefore, it is crucial to this proposed legislation that such records as do exist remain available so that, if and when appropriate, they may be released to potential employers. Section 111 of the proposed legislation provides an amending clause by which these exceptions may be made to sealing and expungement laws.

E. This Act applies to criminal history record information required by law to be kept and reported by law enforcement or judicial agencies to the central record repository. The following are excluded from the provisions of this Act:

1. **information pertaining to law enforcement agencies' intelligence gathering activities and to other ongoing criminal investigations, if requested by a law enforcement agency to be excluded,**

2. **information obtained from a criminal justice agency report or other investigation report,**

3. **false or fictitious criminal history information intentionally fabricated and included in criminal history record files, where such information is for use in an ongoing undercover criminal investigation,**

4. **information for statistical or research purposes in which individuals are not identified and from which individual identities cannot be ascertained, and**

5. **juvenile criminal history record information which has been sealed by order of the court.**

Subsection (E) provides that information governed by this legislation is limited to that which is required by law to be kept. Such information generally includes arrest, charges, pretrial status, and disposition. The legislation does not address the release of certain other information which presumably could be released if authorized or at least not proscribed by other statute or case law. This might include descriptive or narrative accounts of the crime, presentence reports, etc.

The release of false or fictitious criminal history information or statistical or research information is irrelevant to identifying individuals potentially dangerous to children. Thus, it is specifically excluded from the information to be released under this act.

Information contained in investigative reports is not obtainable through this legislation (unless, of course, the information has been forwarded to and released by the central record repository). This provision is to ensure that information disseminated under the legislation is the most accurate and current official version.

During the course of an investigation likely to be jeopardized by release of certain criminal history record information to authorized employers, law enforcement may temporarily bar its release. However, as soon as the investigation is completed, the bar on the information release should be affirmatively lifted and the information provided to employers who had requested it.

The last exception to the information to be released to private employers under this proposed legislation pertains to sealed juvenile records. Under state laws, most juvenile records are automatically sealed or destroyed at a given point to ensure that the spectre of crimes committed by juveniles does not follow them throughout their lives. Insofar as this is the public policy in a given state, it is recognized by the proposed legislation.

The American Bar Association/Institute of Judicial Administration Juvenile Justice Standards (Juvenile Records and Information Systems, Standard 17.3) call for destruction of adjudicated delinquents' records when: (A) no subsequent proceeding is pending as a

result of the filing of a delinquency or criminal complaint against the juvenile; (B) the juvenile has been discharged from the supervision of the court or the state juvenile correctional agency; (C) two years have elapsed from the date of such discharge; (D) the juvenile has not been adjudicated delinquent as a result of a charge that would constitute a felony for an adult.

Subsection (E)(5) does not exempt from dissemination relevant juvenile records which would not be sealed or destroyed under state sealing or purging laws reflecting the exceptions contained in the ABA/IJA Standards. Nor does it exempt from dissemination relevant juvenile records which would likely be sealed or destroyed in the future, but have not yet met the necessary criteria. As a practical matter, however, regardless of their sealing or purging statutes, most states will not allow employer access to juvenile records. If legislatures intend for employers to be given access, additional legislative action will probably be necessary, either to repeal statutes prohibiting dissemination or to provide explicit authorization for dissemination where authorization is required.

SECTION 105. ADMINISTRATION

A. Authority

1. **The [options: state Health and Human Services, Child Protective Services, Attorney General, state police, or another appropriate state agency or licensing authority] is authorized to approve or deny employer representatives' requests for authorization to receive sex offense criminal history record information.**

2. **The [central record repository] is authorized to disseminate sex offense criminal history record information to employers authorized to receive such information.**

Subsection (A)(1) of this section delegates to one agency the authority for designating employers who are eligible to receive criminal history record information. Subsection (A)(2) delegates to another agency the authority to disseminate information to authorized employers. While the names of the agencies and perhaps to some extent their primary functions will vary from state to state, in most cases already-existing agencies will be given added responsibilities rather than new agencies established.

In addition, the subsection addresses at least one federal requirement for dissemination of state and local records to private employers of child-oriented facilities. Regulations implementing the Omnibus Crime Control and Safe Streets Act of 1968, amended 1973 (28 CFR 20.21(b)(2)), prohibit states from disseminating non-conviction information collected with federal support to individuals or agencies unless "authorized by statute, ordinanace, executive order, or court rule, decision or order..." (Dissemination of conviction information and non-conviction information less than one year old requires no such authorization.) Enactment of this proposed legislation would appear to meet that requirement in states not already providing statutory or other authorization for such access.

B. Employment

The [options: state Health and Human Services, Child Protective Services, Attorney General, state police, or another appropriate state agency or licensing authority] and the central record repository may employ those officers and employees necessary to carry out the purpose of this Act.

Subsection (B) recognizes the possibility that the implementation of this proposed legislation may require additional employees in the agencies involved, and provides the authority for their retention.

C. Agreements and Compacts

The Attorney General is authorized to enter into compacts with other states for the reciprocal exchange of sex offense criminal history information to further the purposes of this Act.

Subsection (C) authorizes the Attorney General to enter into compacts with other states for the reciprocal exchange of sex offense criminal history record information. Such compacts will extend the range of the record search on a given individual beyond the borders of the state in which he or she is seeking work. They would be particularly appropriate with contiguous or nearby states, though some states may find that the transient nature of some pedophiles merits a wider network of state compacts.

Reciprocal compacts anticipated by this section would enable information which originated and is maintained in one participating state to be freely exchanged with another participating state, subject only to limitations of the compact, the laws of the two states, and certain federal regulations governing dissemination of records collected, stored, or disseminated by agencies receiving federal funds for such purposes. (See 23 CFR section 20.20-25.) Information received from other states would be available for dissemination to private (as well as public) employers within the state.

A state which has compacts with several states could also provide one of these states information which originated in, is maintained by, and was obtained from the other, if such third party redissemination is not prohibited by any of the relevant compacts. As with information which originated within the state itself, this information could be redisseminated to private employers.

Exchange of information obtained from federal criminal history records repositories is, of course, subject to restrictions of federal law, in addition to state law and compacts. At present, federal law prohibits states from exchanging criminal history record information which they obtained from federal record repositories. Under P.L. 92-554, the federal government may disseminate record information to officials of state and local governments for purposes of employment and licensing. However, such exchange is conditioned on non-redissemination of the information outside the receiving departments or related agencies. Redissemination for any purpose (including employer record checks) could result in the cancellation of a state's authorization to receive federal records not just for that purpose, but for all purposes (including law enforcement). Therefore, it is essential that all information received exclusively from federal sources be deleted from the information one state provides to another. For most

states this should be a relatively easy task to perform since federally received information is generally clearly distinguishable from state-generated information. Nevertheless, it is clear that the need to treat federally received information differently than state-generated information because of the redissemination restriction of P.L. 92-544 may produce various burdens at times. However, the safety that this proposed legislation will provide a state's children will amply justify the time and effort.

SECTION 106. AUTHORIZATION FOR EMPLOYER REPRESENTATIVES TO RECEIVE SEX OFFENSE CRIMINAL HISTORY RECORD INFORMATION

A. Sex offense criminal history record information about employees may be disseminated under this Act only to employer representatives to whom the authorizing agency has granted prior authorization to receive sex offense criminal history record information.

By limiting dissemination of sex offense criminal history record information to previously authorized employer representatives, this subsection substantially reduces the risk of the information's being distributed to individuals or organizations without a legitimate need for it. As provided in subsection (D) below, if the employer representative does not represent an employer as defined in the legislation or if the employer representative has provided materially false information to the authorizing agency, authorization will not be granted.

B. An employer representative applying for authorization to receive sex offense criminal history record information about employees shall provide to the authorizing agency:

1. a plan for safeguarding any information obtained under this Act and for destruction of such information within 30 days of its receipt;

2. agreement that if authorization is granted, the employer representative will update the material information provided in the application throughout the period of authorization; and

3. such other information about the employer representative, the employer, and the employer's facilities that is necessary and proper for implementation of this Act and requested by the authorizing agency.

Certain prerequisites must be satisfied by the employer representative prior to authorization. The first pertains to submission of a plan for responsibly maintaining any information which may be received if authorization is granted. The affirmative duty which this places upon applicants is intended to impress upon them the importance of security with respect to relevant records. At the same time, the provision accommodates different approaches from different employers. Regardless of the elements of their specific plans, employer representatives are likely to be held accountable if their failure to adhere to the submitted plans results in unlawful or negligent dissemination of record information.

The subsection also empowers the authorizing agency to require applicants for authorization to provide any information "necessary and proper" for implementation of the act. This would include information to help the authorizing agency determine whether or not the employer in question is an employer under the definition of this act—for example, a description of the services the employer provides to children. It may also include information to facilitate enforcement of the legislation and identification of those in the position to violate the legislation—for example, names and addresses of each facility the requested authorization would cover, and the names of each relevant facility's personnel who would have access to the record information.

In recognition that an authorized employer's situation may change, the subsection also enables the authorizing agency to require that, once authorized, the employer representative keep the agency up to date regarding any material changes which may affect eligibility for authorization or the agency's ability to enforce the legislation effectively.

C. The authorizing agency shall process applications for authorization to receive sex offense criminal history record information. The process shall include conducting such investigations as may be deemed necessary to verify information provided by the employer representative.

Subsection (C) grants the authorizing agency both the responsibility and power to process applications. Specifically included is the right to make whatever investigations the agency deems necessary to ensure that the application information is accurate and complete.

D. The authorizing agency shall provide authorization to receive sex offense criminal history record information to any employer representative whose application conforms to the requirements under subsection (B) unless the authorizing agency determines that the employer representative:

1. does not represent an employer as defined in this Act; or

2. has provided materially false information.

E. If the authorizing agency approves the application of the employer representative, it shall provide timely written notice of the authorization to the employer representative and to the central record repository, such notice to include any limitations on the authorization.

F. If the authorizing agency finds that the employer representative is not eligible for authorization under subsection (D), the authorizing agency shall return the application to the employer representative with written reasons for its disapproval, and provide the employer representative an opportunity to resubmit the application with any additional information as reasonably may be required by the authorizing agency.

Since the purpose of the proposed legislation is to protect children by making relevant sex offense criminal history record information available to employers, subsection (D) provides that all complete applications shall be approved as a matter of course unless the authorizing agency determines that the individual who submitted the application does not represent an employer as defined in section 103 or the application contains materially false information, i.e., information which substantially and without a legitimate foundation affects the validity of the application. If the individual who submits an application does not truly represent an organization he or she claims to represent, the application shall of course be denied. It shall also be denied if the organization the individual represents does not qualify as an "employer" under the act's definition.

Some legislators may wish to consider including in subsection (D) a third presumption for denial of authorization--the existence of a criminal history record by the employer representative. Making sensitive records available to individuals themselves the subject of records appears to some a potential source of abuse, possibly leading to blackmail of employee applicants or intentional recruitment of employees who have a history of sexual abuse for purposes of furthering or protecting illicit activities by the employer or employer representative. If such a provision is included in this subsection, appropriate language would also be required in section 106(B) to require the employer representative to permit the authorizing agency to undertake the record check. This would be particularly important if the check were to include arrest as well as conviction information. Submission of fingerprints for purposes of the search may also be required.

If the application is approved, the authorizing agency shall notify both the employer representative and the central record repository (subsection (E)) so that requests for information about specific employees may be made and appropriately handled. However, if the authorizing agency finds grounds for denial exist, it shall, under subsection (F) return the application to the individual who submitted it, together with written reasons for its disapproval. The employer representative will then have the opportunity to explain or provide additional information which might warrant approval of the application. If the third presumption discussed in the paragraph above is included and the application is denied because of the existence of a criminal history record, subsection (F) should also allow the employer representative to try to convince the agency that the record is false, incomplete, or irrelevant to the purposes of the act. Obviously an employer representative should not be denied authorization on the basis of incorrect or incomplete information about himself or herself. Moreover, certain prior records may not pose any threat to sexual abuse of children--for example, a conviction for failing to register for the draft or an unexpunged but "dated" shoplifting conviction. The authorizing agency should be given the discretion to determine the potential relevancy of such records.

G. Authorization to receive sex offense criminal history record information shall be in effect for _____ years from the date of authorization. However, the authorizing agency may suspend or terminate authorization prior to its original expiration date if:

1. **the authorized employer representative fails to provide the authorizing agency with timely written notice of material changes in the information furnished under subsection (B);**

2. **material changes in the information furnished under subsection (B) are of such a nature that the employer representative is no longer eligible for authorization under subsection (D);**

3. **the authorized employer representative or the employer has violated the provisions of this Act. If the authorizing agency has probable cause to believe an employer has violated this Act, it may suspend the authorization pending a determination that the alleged violation warrants further suspension or termination of the authorization.**

Once authorized, an employer should be able to obtain relevant sex offense criminal history record information for a given period of time unless authorization is expressly withdrawn for one or more of three specific reasons. The period of authorization is not specified in the legislation since there is unlikely to be any one "ideal" period for all states. In determining an appropriate period, legislatures should consider a number of factors including cost of re-authorization to the state and to the employer, ability of the authorizing agency to enforce the updating requirements, and anticipated differences among rates of abuse during longer and shorter periods of authorization.

Just as original authorization is contingent on providing the authorizing agency with certain information concerning the status of the employer or the employer representative, continued authorization is contingent on keeping the authorizing agency advised of fundamental changes in their status. If, on the basis of the updated information, the authorization is no longer warranted it should be revoked. Moreover, if the authorized employer representative fails to bring the updated information to the attention of the authorizing agency but the agency learns about it from another source, authorization shall be revoked. Violation of the provisions of the legislation is the third reason for authorization revocation. Unwarranted redissemination or use of the information received for purposes not intended by the legislation are among the possible violations.

In addition to ensuring the continued eligibility of authorized employer representatives, the updating requirements are intended to facilitate investigations if unlawful redissemination occurs.

H. **If the authorizing agency suspends or terminates authorization of an authorized employer representative, it shall immediately provide written notice of this action to the employer representative and to the central record repository.**

It is essential that the centralized record repository be informed as soon as the authorizing agency suspends or terminates an employer representative's authorization so that it can temporarily or permanently remove that individual from its list of individuals authorized to receive sex offense criminal history record information. The employer representative must also receive prompt notification so that he or she knows that further

requests for record information will not be honored until the period of suspension expires or unless the suspension or termination is successfully contested. It is anticipated that a copy of the rules for appeal of authorization revocation will accompany notice to the employer representative.

I. To implement this section, the authorizing agency shall develop rules and regulations governing authorization of employer representatives to receive sex offense criminal history record information about employees, including:

1. application procedures and requirements;

2. procedures for reviewing applications;

3. limitations on authorization;

4. procedures for suspending, terminating, and renewing authorization;

5. procedures for employer representatives to appeal the denial or revocation of authorization;

6. the setting of fee schedules not to exceed ____ to cover the costs of initial authorization and not to exceed ____ to cover the costs of renewed authorization, and;

7. procedures to assure compliance with the provisions of this section and the rules and regulations governing it.

The subsection requires the authorizing agency to develop rules and regulations governing applications for authorization and review of applications. These are intended to provide uniformity to the process and to give advance notice about the process to all concerned. Not all authorizations need be absolute; subsection (I)(3) enables the authorizing agency to reserve the right to specify certain limitations--for example, to restrict authorization to the employer's employees in certain facilities. In recognition that additional duties--and additional expenses--will be imposed on the agency by this act, subsection (I)(6) allows rules to contain legislatively-set fees to be passed along to the employer or employer representative.

SECTION 107. REQUEST FOR AND DISSEMINATION OF SEX OFFENSE CRIMINAL HISTORY RECORD INFORMATION

Section 107 sets forth certain requirements which must be met before an employer representative's request for criminal history record information may be processed.

A. An authorized employer representative may request sex offense criminal history record information about any employee of the employer, provided the employee is within the scope of the authorization granted to the employer representative.

Authorized employer representatives may request sex offense criminal history record information on some, all, or none of their employees who come within the scope of authorization. This discretionary approach may be questioned by some who feel that if record checks are to be undertaken at all, they should be mandatory. States may choose to take this route. However, the recommendation on which the proposed legislation is based does not mandate employers to initiate record checks; it merely mandates that they have access to relevant records. A requirement that employers who check any records check all records may result in unwarranted administrative and financial hardship for both the employer and the disseminating agency. Nevertheless, the potential for liability under section 109(B)(2) of the proposed legislation will be a strong incentive for record checks on most, if not all, employees.

B. The central record repository shall process requests from authorized employer representatives for sex offense criminal history record information about specified employees, provided such requests conform to the requirements of the central record repository, including:

1. the name, address, and signature of the authorized employer representative and the name and address of the employer;

2. the name and address of the employer's facility in which the employee is employed or seeking to become employed;

3. the name, fingerprints, and other identifying information about the employee;

4. signed consent by the employee to a sex offense criminal history record information search;

5. the mailing address of the employee or a signed waiver of the right under this Act to be sent a copy of the information disseminated to the authorized employer representative as a result of the record search; and

6. signature of the employee indicating that the employee has been notified of:

(a) the types of sex offense criminal history record information subject to dissemination under subsection (D) of this section, or a description of such information;

(b) the employer's right to require a record check as a condition of employment;

(c) the employee's right to challenge the accuracy and completeness of any information which may be disseminated to the employer under this Act, in accordance with section ___ of [the state code].

The central record repository must undertake a record check on a given employee if requested to do so by an authorized employer representative whose request meets certain requirements. These include information about the employer representative, the employer, and the employee. Certain assurances that the employee knows about the nature of the search and has consented to it are also required.

Whether those with sex offense criminal history records consent or refuse to consent to record checks, the purpose of the proposed legislation will be met--i.e., access to children by employees who portend a substantial threat to them will be significantly reduced. Under the act, refusal is per se sufficient reason to deny employment. Thus those who do not consent to the check would seldom be hired. Those who do consent and who have a discloseable record will also likely be denied employment unless they are able to convince the employer that the record is not indicative of a threat to children.

On the other hand, the fact that persons applying for employment must be informed of the nature of the record information which can be disseminated will substantially reduce the reluctance which those with arrest and conviction records might otherwise experience. Moreover, the notification required by this subsection that record subjects may review and challenge disseminated information may be similarly reassuring to those who have reason to believe their record is inaccurate or incomplete.

The fingerprint requirement of (B)(2) ensures the employee's consent to the record check. It also ensures that the record check is, in fact, undertaken on the employee, rather than on a fictitious individual or someone else whose name or identification the applicant provides to the employer.

The requirement that the mailing address of the employee be included in the request, unless specifically waived by the employee, is to ensure that the central record repository knows where to send the employee a copy of the information disseminated to the employer. If an employee does not want the information to be mailed, he or she may explicitly waive that right. (An employee, for example, may not want such information to be sent to his home since his wife who is unaware of the record may receive the mail.)

C. Upon receipt of a request from an authorized employer representative for sex offense criminal history record information about an employee, the central record repository shall undertake a search for such information, provided the employee is not outside the scope of the employer authorization. The search shall be based on the employee's fingerprints provided by the authorized employer representative and shall include:

1. identifying sex offense criminal history record information about the employee which may exist in the state central record repository;

2. requesting out-of-state sex offense criminal history record information about the employee in accordance with agreements entered into with other states, including those entered into under section 105(C);

3. **if the information pertains to an arrest reported more than 30 days prior to the date of the inquiry and no disposition has been reported, contacting appropriate officials in the local jurisdiction where the arrest or prosecution occurred to verify and update the information; and**

4. **determining whether the sex offense criminal history record information is subject to dissemination under subsection (D).**

To determine if the employee is a record subject of one or more sex offenses covered by this proposed legislation, the central record repository must conduct a search of all in-state records and, insofar as possible, out-of-state records. To ensure accuracy, the search is to be based on the employee's fingerprints. To ensure completeness, "old" arrest records showing no disposition must be checked with the local jurisdiction to determine if there is additional relevant information.

Information about in-state records is generally available from the repository itself. Local records of the employee's last place of residence might also be checked for recent information. Out-of-state information will probably only be available if the state has entered into agreements with other states, as provided for by section 105(C) of this proposed legislation or other laws.

D. **Sex offense criminal history record information about an employee shall be disseminated to an authorized employer representative who has requested it in accordance with the following provisions:**

1. **If the record check indicates a conviction for a sex offense or a conviction based on an arrest or on an initial charge for a sex offense, all sex offense criminal history record information about the incident shall be released;**

2. **If the record check indicates an arrest for a sex offense pending at the time of the inquiry or an initial charge for a sex offense pending at the time of the inquiry, all sex offense criminal history record information shall be released, or;**

3. **If the record check indicates two or more incidents resulting in arrest or initial charge for a sex offense, all sex offense criminal history record information shall be released.**

This subsection identifies three types of sex offense criminal history record information which are to be released to authorized employers.

The first relates to conviction information. This is information about a conviction and relevant preceding (e.g., arrest or initial charge) and succeeding (e.g., sentencing) events. Since convictions represent the justice system's determination that the subject of the record has, in fact, committed the alleged offense, the concern over dissemination of conviction information is less than the concern of dissemination of non-conviction data. This is particularly true when a legitimate nexus can be shown to exist between the record information and the purposes for which it is being sought.

Federal regulations governing state record dissemination do not address dissemination of conviction information to private individuals. Current state laws contain virtually no restrictions on disseminating conviction information for law enforcement purposes or for employment checks within law enforcement agencies. Conviction information is often made available to public agencies for employment and licensing purposes. Other statutes authorize access to private individuals with a "need to know." Several states explicitly include employers providing services to children among those persons for whom access is authorized.

The proposed legislation provides for authorized employer access to conviction information (1) where the conviction was for a sex offense covered by the act; and (2) where the conviction was for an offense stemming from an arrest or initial charge for a sex offense covered by the act. The purpose of (2) is to preclude certain individuals from escaping the intent of the act—for example, those who plead guilty to a non-sex offense "in exchange" for the dismissal of a sex offense charge.

Subsection (D)(2) pertains to release of pending criminal history record information (i.e., arrest information which is less than a year old and which is not accompanied by a final disposition). There are several bases for its release. First, arrests are public events generally effected by public employees. Information about them is already publicly available from police department "rap" sheets maintained chronologically in virtually every jurisdiction. Second is the recognition that the relatively recent activity alleged to have been committed by the person arrested may present an imminent and extremely dangerous threat to children. (In fact, Utah law has imposed an affirmative responsibility on arresting officers and county sheriffs to inform local school officials whenever school employees are arrested for offenses involving sexual conduct.) In the absence of intervening findings to the contrary or official dismissal of the case, the probable cause on which the arrest was based is sufficient justification of the release to authorized employers.

Subsection (D)(3) establishes criteria for dissemination of information pertaining to arrests or initial charges for specified offenses, irrespective of the outcome of the cases. If the record reflects two or more incidents, each resulting in an arrest or an initial charge for a designated offense, the information on all sex offenses must be released. If only one incident resulting in an arrest or initial charge is indicated, release of information about it is not authorized under the legislation (unless, as provided in subsection (D)(1), the case has resulted in a conviction or, as provided in subsection (D)(2), the case is pending at the time of the request for the record information).

Federal regulations (28 CFR section 20.21(b)) prohibit the states from disseminating non-conviction information to individuals and non-criminal justice agencies unless the states specifically authorize such dissemination. Understandably because of its non-conclusive nature, the states have been much more reluctant to authorize release of arrest record information than they have release of conviction information which, as noted above, indicates a formal conclusion of guilt. Statutes largely restrict dissemination of arrest information to law enforcement agencies for law enforcement purposes, including employment of law enforcement personnel. Few private employers have access to the information. (While a report of SEARCH Group, Inc., (SEARCH Group, Inc., and Privacy and the Private Employer, September 1981 draft, p. 33)

indicates that as of mid-1981, ten states plus the Virgin Islands provided statutory authority for private employers to obtain arrest as well as conviction data, the survey appears to include those statutes which authorize access if additional, independent authorization is provided. In fact, however, such independent authorization is rarely, if ever, granted. Moreover, private employers who work with children are not necessarily among those private employers who are able to obtain access to the information.)

The subsection is a compromise. Those seeking maximum protection for children may find it too restrictive concerning the arrest data which may be released. Such individuals point to the difficulties in obtaining even one arrest of a given sex offender, despite mounting evidence that sex offenders are generally repeat offenders. Others who fear misuse or unjustified use of arrest information may argue that the state's dissemination of information about arrests not accompanied by convictions officially encourages a presumption of guilt of individuals whom the justice system theoretically presumes innocent. The middle ground taken by the legislation, on the one hand, avoids the widescale release of uncorroborated information which would be possible if all arrest information were to be disseminated. On the other hand, it requires release of considerably more information than would be released if the legislation were limited to conviction information.

E. Within ____ days of receipt of a request by an authorized employer representative for sex offense criminal history record information, the central record repository shall send written notice of the results of the search to the authorized employer representative and to the employee, except that if the employee has waived the right to receive the results of the search, notice shall be sent only to the authorized employer representative. The notice shall include:

1. a description of sex offense criminal history information subject to dissemination under subsection (D), and

2. if the search for sex offense criminal history record information revealed no information subject to release under this Act, a statement that the central record repository has no information subject to release under the Act, or

3. if the search for sex offense criminal history record information revealed information about the employee subject to release under this Act, a summary of the information and, if applicable, a statement that disposition information could not be verified for certain noted arrests. A statement of the purpose for which the information is being disseminated, the potential liabilities and penalties for its misuse, and the procedures by which the employee might challenge the accuracy and completeness of the information under section ___ of [the state code] shall be included with any sex offense criminal history record information disseminated.

Subsection (E) requires that results of the record search be reported within a given time period determined reasonable by the legislature. In determining an appropriate period, legislators should be mindful of the needs of both potential employee and

potential employer with respect to a relatively fast turnaround time on requests. They should also be aware that too short a turnaround period may prove impractical from the point of view of the record repository.

If the record search reveals no sex offense criminal history record information suitable for dissemination under section 103(I) and section 107(D) of this proposed legislation, the authorized employer representative and the employee must be notified of this fact. If the search does uncover such information, a summary of it must be provided to each of these individuals. Dispositional information must be included where available; where not available, the fact of its unavailability must be affirmatively stated. Record information must also be accompanied by a statement of the purposes for the information disseminated, the liabilities and penalties for its misuse, and procedures whereby the employee may challenge it. With respect to the last, every state has in place procedures for record subjects to challenge the accuracy and completeness of their records and the legislation merely references those existing provisions; it does not create new ones.

F. Immediately upon receipt of corrected or updated information disseminated under subsection (E)(3), the central record repository shall send written notice of the correction or updated information to the employee who was the subject of the record search, unless the employee has waived the right to receive such notice, and to all employer representatives to whom notice of the results of the sex offense criminal history record search under subsection (E)(3) were disseminated within the three months prior to the correction, and upon request of the employee to any other employer representatives who previously received such information.

This subsection is to ensure that both the employee and employer representatives who have recently received incomplete or inaccurate sex offense criminal history record information about the employee receive updated information as soon as possible. Whether the record changes are prompted by the employee's challenge to the information originally disseminated or whether they are the result of a subsequent event (e.g., a trial), additional information brought to the recordkeeper's attention, or simple administrative "catch-up," is irrelevant to the section. Thus the corrected information may either be favorable or disfavorable to the employee.

The three-month period is somewhat arbitrary, but is expected to be sufficiently broad to provide relevant information to employers who may still be considering or perhaps have recently hired record subjects while at the same time sufficiently narrow to restrict unnecessary dissemination to employers who are unlikely to have a present need for it. Should the employee request that employers who received the record information prior to the three months of its correction receive the corrected version, it must be sent to them. Some employees may feel the corrected information will bear favorably on their reputation, if not on an immediate job. Others may feel such additional dissemination--even if favorable—may serve as an unnecessary and potentially harmful reminder of the subject's contact with the criminal justice system.

G. To implement this section the central record repository shall promulgate rules and regulations which may include reasonable fees to cover the costs of a sex offense criminal history record search.

Rules anticipated under this subsection include procedures for authorized employer representatives to request sex offense criminal history record information about designated employees. They may also include procedures for the centralized record repository to use in responding to such requests. Since the volume of record requests generated by the legislation may be substantial, the agency's rulemaking powers extend to the setting of fees to cover processing costs.

SECTION 108. REDISSEMINATION

Under no circumstances shall an employer or any individual other than the subject of the record check redisseminate sex offense criminal history record information received under this Act except insofar as required to fulfill the purposes of the Act.

This section explicitly prohibits redissemination of information received under the act, except by the record subject. The purpose of the legislation is extremely narrow, and will not be furthered by redissemination. Moreover, redissemination portends significant potential for unwarranted harm to the record subject.

SECTION 109. SANCTIONS AND REMEDIES

Section 109 provides a number of specific sanctions and remedies for violations of the act. These protections are provided in light of the potential for serious harm, both to children and to criminal history record subjects, if the requirements of the legislation are not fully met.

A. Administrative Remedies

1. Notwithstanding any civil or criminal remedies provided by this Act, the rules and regulations of the authorizing agency shall provide administrative sanctions for authorized employers who violate this Act, including temporary or permanent revocation of authorization to receive sex offense criminal history record information.

2. The authorizing agency and the central record repository shall provide reasonable administrative penalties for their employees who violate the provisions of this Act. Such remedies may include suspension or termination of employment.

3. Employer representatives may appeal adverse decisions denying or revoking authorization in accordance with the rules and regulations of the authorizing agency.

4. Except as provided in section 107(B)(6)(c), all hearings held pursuant to the provisions of this Act shall be held in accordance with the Administrative Procedures Act,_____.

Subsection (A)(1) empowers the authorizing agency to develop and pursue administrative remedies against authorized employers who violate provisions of the act. Violations which result in unauthorized dissemination of criminal history record information, either to the employer or to third parties, are particularly serious and may be the basis for termination or suspension of authorization.

Under subsection (A)(2), the authorizing agency and the central record repository are required to develop administrative penalties for their employees who violate the act. Suspension or termination of employment would be appropriate sanctions for serious infractions.

Subsection (A)(3) explicitly authorizes employer representatives to utilize the procedures developed by the authorizing agency under section 106(I)(5) to appeal adverse decisions denying or revoking authorization.

Virtually every state has in place laws governing administrative procedures which would be applicable to remedies being sought for violations of this proposed legislation. Explicit reference to the citation may be provided in subsection (A)(4).

B. Civil Remedies

1. The following rights of action shall vest in the subject of a sex offense criminal history record check:

a. a private right of action against an employer, employer representative or an employee for redissemination of sex offense criminal history record information, either intentionally or through gross negligence;

b. a private right of action against the central record repository for dissemination of information not authorized for dissemination under the terms of this Act, or for the release of information to a person or organization not authorized to receive information under the terms of this Act, either intentionally or through gross negligence; and

c. a private right of action against the central record repository for failure to correct information disseminated under this Act, either intentionally or through gross negligence.

Punitive damages shall be awarded only upon a finding that the individual, organization, or agency acted with malice.

2. If an employee employed subsequent to the effective date of this Act commits a sex offense against a child served by the employer, the employer shall be liable for damages for any injuries suffered by the child as a result of such offense if at the time the employer employed the employee:

a. the employer was authorized or was eligible for authorization under this Act to receive sex offense criminal history record information;

b. the employee was the subject of sex offense criminal history record information which was available for dissemination to the employer under this Act; and

c. the employer failed, without good cause, to request such information pursuant to this Act.

The liability of the employer for damages under this section shall be reduced by the amount of damages awarded to the child as a result of a suit against the employee for injuries sustained as a result of the offense.

The civil remedies provided in subsection (B)(1) are for the subject of the sex offense criminal history record check. The subject may seek damages from an employer or employee for any violation of section 108. The subject may sue the central record repository for releasing information not authorized for release under the legislation or for releasing information to persons not authorized to receive it. A cause of action is also available against the central record repository when that agency willfully fails to make corrections to sex offense criminal history records. However, only if malice is shown can the responsible individual, organization, or agency be required to pay punitive damages.

Potential liability of employers who do not request record information is provided for in subsection (B)(2). Its purpose is to encourage employers to request record checks and to make those who fail to do so financially responsible when record subjects subsequently injure children. The subsection provides a "middle ground" between mandating record checks—which would exceed the scope of the Task Force recommendation—and allowing employers to disregard the legislation with complete impunity. On the one hand, employers who feel sufficiently confident of other means of checking employees' backgrounds (e.g., recommendations from trusted colleagues) are not compelled to undertake record checks. On the other, where there is doubt about the reliability of alternative means, employers will probably decide that it is in their better interest to request record checks.

The legislation does not explicitly make liable employers who request records, receive adverse information, and nonetheless hire employees who subsequently injure children. To do so would considerably expand the regulatory nature of the legislation, and significantly reduce employer discretion to weigh available information. Practically speaking, however, it is unlikely that many employers, once they have the information before them, will fail to take it into account. In the few instances where this might occur, there is nothing in the legislation to preclude the bringing of other tort actions against the employers. Depending on the weight of the record information, the employers may be found negligent.

C. Criminal Penalties

1. It shall be unlawful for any person knowingly and willfully to:

a. use this Act to obtain or seek to obtain sex offense criminal history record information under false pretenses;

b. disseminate or attempt to disseminate information received under this Act, knowing that such information was received under this Act, in a manner other than in accordance with this Act; or

c. disseminate or attempt to disseminate false, inaccurate, or incomplete criminal history record information under this Act.

2. Each violation of this section shall constitute a separate offense, and be punishable as a [Class _] misdemeanor.

Subsection (C) specifies certain acts or omissions which constitute criminal violations of the act. Violations are to be treated as misdemeanors, though considerable discretion is left to the legislature as to the grade of misdemeanor.

D. Limitations

1. Any cause of action brought under the terms of this Act shall be commenced within three years of its occurrence or of the time the party bringing the action should reasonably have become aware of the cause of action, whichever date is later. No action brought under the provisions of this Act shall survive the life of the injured party.

2. An authorized employer shall be held harmless in any employment discrimination suit claiming discrimination based on the provisions of this Act.

Subsection (D)(1) provides that the statute of limitations on suits brought under the legislation be three years in most circumstances. However, states may wish to vary this to bring it in line with comparable provisions in other statutes. While situations in which employees learn of violations of the proposed legislation considerably after the violations have occurred are expected to be few, the legislation takes them into account by allowing actions within three years of when the individual should "reasonably" have been aware of the violation.

Subsection (D)(2) explicitly states the legislature's intent that employer use of sex offense criminal history record information lawfully obtained under this proposed legislation as the basis for adverse employment decisions is not to be considered discrimination. A similar (though not quite as broad) repudiation of discrimination is contained in the section of the Wisconsin code (111.335) relating to employment relations. It states, "... it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensing, any individual who: (1) has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity..." The validity of the section is not affected even if the legislation results in the release of more criminal history record information about certain classes of individuals than about other classes of individuals (e.g., by race or sex). The nexus between the type of employment covered by the legislation and the type of sex offense criminal history record information covered by the legislation is sufficient to justify whatever disparities may result. Hawaii is among the states which include employer refusal to hire on the basis of arrest and court record as unlawful discrimination. However, an exception may be recognized if the refusal were based on "bona fide

occupational qualifications reasonably necessary to the normal operation of a business or enterprise, and which have a substantial relationship to the functions and responsibilities of the prospective or continued employment." Subsection (D) will not, of course, deny remedies available to employees or potential employees through other sources (e.g., the Equal Employment Opportunity Act). A suit alleging that an employer seeks criminal history record information only for certain classes of individuals would not, for example, be barred under this proposed legislation.

SECTION 110. SEVERABILITY

Should any part of this Act be declared invalid or unconstitutional, such declaration shall not affect the remaining provisions of this Act.

SECTION 111. AMENDING CLAUSE

The following provisions of the state code shall be amended to exempt sex offense criminal history record information from statutes authorizing the destroying, expunging, purging, or sealing of criminal history record information:

Sec._____

Sec._____

SECTION 112. EFFECTIVE DATE

This Act shall become effective 180 days after the day of its enactment.

APPENDIX

CONSTITUTIONAL CONSIDERATIONS

Public Right to Obtain Information

The Supreme Court has found the First Amendment to establish an individual's right to public information, especially relating to matters of public concern. Rosenbloom v. Metromedia, 403 U.S. 29 (1971). This right, however, is not absolute and is subject to certain limitations. See for example, Adderley v. Florida, 385 U.S. 39 (1966); Estes v. Texas, 381 U.S. 532 (1965); Branzburg v. Hayes, 408 U.S. 665 (1972). Nonetheless, once information has been placed in the public record, restrictions on access to it will likely be in violation of the First Amendment. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). In Houston Chronicle Publishing Co. v. City of Houston, 531, S.W.2d 177 (Tex. Ct. App. 1975) the court found a First Amendment right to information contained in court dockets and on police blotters. According to a 1981 report by SEARCH Group, the issue is not whether this information should or should not be considered public, but rather when and under what circumstances this information should be released or included in the public record. "And here," continues the report, "the Constitution does not provide definitive answers." (Privacy and the Private Employer, SEARCH Group, Inc., p. 20 (1981).)

Right to Privacy

The right to privacy is not explicitly mentioned in the Constitution. However, the courts have recognized the right on the basis that it is necessary to protect other constitutional rights. (See Stanley v. Georgia, 394 U.S. 557 (1969) regarding right to privacy as an essential component of First Amendment rights (freedom of speech); Terry v. Ohio, 392 U.S. 1 (1978); Katz v. United States, 389 U.S. 347 (1967); Payton v. New York, 445 U.S. 573 (1980) regarding rights to privacy as necessary to protect Fourth Amendment (freedom from unlawful searches and seizures) and Fifth Amendment (freedom from deprivation of life, liberty, and pursuit of happiness without due process of law) rights.)

The courts have also found the right to privacy in highly personal matters of marriage, procreation, and lifestyle inherent in the Ninth Amendment which states, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (See Olmstead v. United States, 237 U.S. 439 (1928) (Brandeis, J., dissenting) regarding the right to be left alone; Loving v. Virginia, 388 U.S. 1 (1967) regarding the right to choose one's spouse; Mayer v. Nebraska, 262 U.S. 390 (1923) regarding the right to work in one's profession; Griswold v. Connecticut, 381 U.S. 271 (1965) regarding a married person's right to receive information about contraception; Roe v. Wade, 410 U.S. 113 (1973) regarding the right to abortion.)

The courts have not found privacy interests in arrest records necessary to protect specified constitutional rights, nor have they found such interests inherent in the Ninth Amendment. In fact, the Supreme Court has recognized no constitutional right to privacy in arrest records.

In Paul v. Davis, 424 U.S. 643 (1976), Paul had been arrested for shoplifting. Over a year later, Davis, a local police chief, included Paul's name and mug shot on a flyer identifying persons arrested and convicted of shoplifting. The flyer was distributed to merchants in the metropolitan area. Paul, who was never convicted of the offense, sued, claiming a violation of the federal statute (42 U.S.C. 1983) which makes it unlawful to deprive a person of his constitutional rights under color of state law. Among the constitutional rights Paul claimed were violated was his constitutional right to privacy. The Court, however, refused to recognize a constitutional right to privacy, stating that an arrest is a public event and dissemination of information about the fact of the arrest is not violative of any right akin to those enumerated in the privacy cases or included among rights considered fundamental to the concept of ordered liberty.

Due Process

The Fourteenth Amendment of the Constitution requires that no person be deprived of life, liberty, or property without due process of law. Due process includes the opportunity to be heard and to have an individualized, fair, and accurate determination of the legitimacy of the threat to life, liberty, or property. In addition to claiming deprivation of constitutional privacy rights, Paul in Paul v. Davis, supra, also claimed distribution of the flyer injured his reputation, thereby depriving him of "liberty" protected by the due process clause. In addressing Paul's claims, the Court declared the issue a question of defamation to be settled in the state courts rather than a question of violation of the due process clause of the Fourteenth Amendment. According to the Court, a previous line of cases recognizing the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts "does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either liberty or property by itself sufficient to invoke the procedural protection of the Due Process Clause." Since Paul's due process claim was grounded upon the assertion that the damage to his reputation deprived him of some "liberty" protected by the Fourteenth Amendment, the Court did not further consider the difference which employment or other accompanying "tangible interests" might have had on its decision were these issues in question. (See also Board of Regents v. Roth, 408 U.S. 564 (1972).)

Were the Court to consider the case of an individual who successfully establishes that dissemination of his criminal history record adversely affected his opportunity for employment and, hence, his fundamental property interest, it is still far from certain that the Court would find a due process violation. Circumstances surrounding the purpose and scope of the dissemination would undoubtedly be examined. If the dissemination served a legitimate and compelling state goal in a rational manner, the Court would be unlikely to find it constitutes an arbitrary or capricious action violative of the due process requirements. (See Morrissey v. Brewer, 408 U.S. 471 (1972) and Wolff v. McDonnell, 418 U.S. 539 (1974).)

The purpose of the proposed legislation is to prevent sexual abuse of children by providing employers relevant information on which to base sound employment decisions. Protecting children from child sexual abuse certainly falls within the state's general power to protect the health and welfare of the populace. In light of the particular vulnerability of children and the fact that individuals who sexually abuse children are frequently repeaters, screening employees who work with children for indications of

relevant past behavior appears a rational approach to meeting this goal. (See Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).) Moreover, the narrow scope of the proposed legislation and the significant protections it provides to prevent release of irrelevant information, release of information to unauthorized persons, and release of information without the explicit approval of the record subject are appropriate and effective safeguards against arbitrary and capricious government actions.

A second constitutional consideration under the due process clause concerns the creation of "irrebutable presumptions." Presumptions which may prove valid in some situations may prove invalid in others. By definition, "irrebutable presumptions" preclude the opportunity for individualized determinations and thereby violate due process. (See Stanley v. Illinois, 405 U.S. 645 (1971) in which a statute denying unwed fathers custody of their children was found to constitute an irrebutable presumption because it precluded the opportunity for specific unwed fathers to demonstrate their fitness to raise their children.)

Dissemination of arrest and conviction information under the proposed legislation is not expected to create an irrebutable presumption that the record subjects are unsuitable for employment with children. The legislation merely informs authorized employers about sex offense criminal history records of potential and current employees. Employers are free to evaluate and assess this information on a case-by-case basis.

Equal Protection

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The provision does not require that all laws apply universally to all people or treat all people equally. Indeed, by their very nature, most laws impose on some individuals burdens not imposed on others, or confer special benefits on some individuals not conferred on others. Compliance with the Equal Protection clause does require, however, that such classifications as do exist be "based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." (Gulf, Colorado, and Santa Fe Railroad v. Ellis, 165 U.S. 150 (1897).)

In reviewing legislation under the Equal Protection clause, the courts apply one of two standards of review. One is "strict scrutiny" and is the most rigid standard of review a court can apply. To survive judicial review under the strict scrutiny standard, legislation must be found to address a compelling state interest through the least drastic means. The second standard is the "rational basis" standard, which is applied whenever strict scrutiny is not. To survive judicial review under this standard, the legislation need only be found to address a legitimate state interest through means that are rationally related to that interest. (New Orleans v. Dukes, 427 U.S. 297 (1976).)

There are three situations in which a court will apply strict scrutiny:

- if the legislation directly infringes on a fundamental constitutional right (e.g., the right to vote, Gray v. Sanders, 372 U.S. 368 (1963), Reynolds v. Sims, 377 U.S. 533 (1964); freedom of interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); rights of a unique personal

nature, Doe v. Bolton, 410 U.S. 179 (1973), Roe v. Wade, 410 U.S. 113 (1973); rights secured by the First Amendment, Williams v. Rhodes, 393 U.S. 23 (1968); or

- if the legislation overtly discriminates against a class of persons identified as deserving special attention by the court (i.e., because of race or alienage) (e.g., Korematsu v. United States, 323 U.S. 214 (1944); Strauder v. West Virginia, 100 U.S. 303 (1880)); or

- if the application and administration of the legislation discriminates against such a class of persons, even though the legislation appears neutral on its face (e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

It is highly unlikely that the proposed legislation would be found subject to strict scrutiny. The legislation does not infringe on a fundamental constitutional right to privacy, since there has not been established a fundamental privacy interest in criminal history records (see Paul v. Davis, supra., and accompanying discussion). Nor can it be said that the proposed legislation either overtly or indirectly discriminates against classes recognized by the courts to warrant special protections. The proposed legislation does not single out any racial or ethnic groups for special treatment. Moreover, the available statistics do not establish that persons of any race or nationality are disproportionately arrested or prosecuted for sexual offenses. Thus, none of the three conditions that trigger strict scrutiny are present in the proposed legislation.

The proposed legislation is expected to survive review under the "rational basis" standard as well. The interest at stake in this proposed legislation is protecting children from sexual abuse. There can be little doubt that this is at least a legitimate, if not compelling, state interest. Nor can there be much doubt that identifying persons working with children who have criminal records for sexual offenses is at least a rational, if not the least drastic, means for addressing this interest. The legislation contains procedures for limiting who is entitled to receive what information about whom, and when. Information released to employers under the legislation is limited to that involving sex or sex-related crimes. It must be verified for accuracy prior to release. The subject must be informed and give consent to the search beforehand, and there are civil and criminal remedies for improper dissemination.

The end result is that a limited amount of information about a limited number of persons may be released to a restricted group of recipients who may use it for one specified purpose.

FEDERAL STATUTORY CONSIDERATIONS

Title VII Civil Rights Act

Title VII of the Civil Rights Act of 1964 (42 USC 2000e-17 (1970), as amended (Supp. III 1973)) prohibits private employers from discriminating with respect to terms and conditions of employment based on race, color, religion, sex, or national origin. The Equal Employment Opportunity Act of 1972 extends the prohibition to public employers as well.

Employer intent to discriminate is not a prerequisite for a violation of Title VII, and inadvertent discrimination which results from otherwise neutral or harmless business practices is subject to the same censure under the Act as are deliberate attempts to treat certain employees differently than others (see Griggs v. Duke Power Company, 401 U.S. 424 (1971)). Thus while Title VII makes no reference to arrest records, it has been used as authority for prohibiting employers from denying employment on the basis of arrest information since proportionately more blacks than whites are arrested. For example, in Gregory v. Litton Systems, Inc. (472 F.2d 631 (9th Cir. 1972)), the court found that an employer who refused to hire applicants with arrest records discriminated racially—even though the practice was applied uniformly to all applicants regardless of their race. Of particular relevance to the proposed legislation, however, the court in Gregory applied to the arrest record situation an exception to the general prohibition against factually discriminatory employment practices which Griggs recognized in another context. It stated:

> The intentional use of a policy which in fact discriminates between applicants of different races and can reasonably be seen as so to discriminate is restricted by the statute, unless the employer can show a business necessity for it. In this context, business necessity means that the practice is essential to the safe and efficient operation of the business.

Thus, whether or not blacks, in fact, are arrested proportionately more often than whites for the sex offenses addressed by the proposed legislation, Title VII appears to offer no roadblocks to its enactment. In light of the evidence of widespread employee child sex abuse, it is unlikely any court would find employer access to selective arrest record information not "essential to the safe...operation of the (child-oriented) business."

Other court decisions based on Title VII have applied the "business necessity" exception of Griggs and Gregory to conviction records. In Green v. Missouri Pacific Railroad Company, 523 F.2d 1290 (8th Cir. 1975), the practice of denying employment to virtually all persons with convictions was found to violate equal opportunity when no business necessity could be established. Withdrawal of an offer of employment as a bellhop on the grounds that the applicant had been convicted for theft was upheld in Richardson v. Hotel Corporation of America, 332 F. Supp. 519 (E.D. La. 1971). In Lane v. Inman, 509 F.2d 187 (5th Cir. 1975), the court sustained the denial of a taxi permit to an applicant who had been convicted for marijuana offenses.

Omnibus Crime Control and Safe Streets Act

At least one federal statute relating directly to dissemination of state and local records is pertinent to the proposed legislation. Regulations implementing the Omnibus Crime Control and Safe Streets Act of 1968, amended 1973 (28 CFR 20.21(b)(2)), prohibit states from disseminating non-conviction information collected with federal support to individuals or agencies unless "authorized by statute, ordinance, executive order, or court rule, decision or order." (Dissemination of conviction information and non-conviction information less than a year old requires no such authorization.) Enactment of this proposed legislation would appear to meet that requirement in states not already providing statutory or other authorization for such access.

The Omnibus Crime Control Act of 1968 would appear significant on another front as well. It is this act which provides authority for such central repositories as the FBI's National Crime Information Center and Identification Division to gather and disseminate Federal and state criminal history record information. NCIC's Interstate Identification Index (III) provides for decentralized storage and interstate exchange of information. However, its use is limited to criminal justice agencies for criminal justice purposes. The Identification Division record may be used for certain employment and licensing purposes if authorized by Federal statutes, regulations, and executive orders. Even this repository, however, is precluded from disseminating records outside Federal, state, and local government agencies. (See discussion of 28 USC 534 and P.L. 92-544, below.)

Other

There are federal statutes which require or authorize use of federal criminal history records for non-governmental employment or registration purposes. For example, under 7 USC 12a(1), the Commodity Futures Trading Commission may require certain applicants to submit fingerprints to the Attorney General for identification and appropriate processing. Such applicants include persons applying for registration as futures commission merchants, associated persons of commodity trading advisors, commodity pool operators, associated persons of commodity pool operators, and floor brokers. Similarly, under 15 USC 78q(f)(2), every member of a national securities exchange, broker, dealer, registered transfer agent, and registered clearing agency must require each of its partners, directors, officers, and employees to submit fingerprints to the Attorney General for identification and appropriate processing.

Certain other federal statutes and regulations may appear at first blush to provide states the authority to extend the record checks anticipated by the proposed legislation beyond state record repositories to federal ones. Upon examination, however, it becomes clear that differing requirements of the proposed legislation and federal law preclude such an extension. For the purpose of the proposed legislation, therefore, record checks must be limited to state-originated and state-maintained records.

Under 28 USC 534, the Attorney General may exchange criminal history record information with "authorized officials of the Federal Government, the States, the cities, and penal and other institutions." In 1971, however, the U.S. District Court for the District of Columbia in Menard v. Mitchell, 328 F. Supp. 718, held that the statute does not authorize the Bureau to disseminate records outside the Federal Government for employment, licensing, or related purposes.

In response to Menard v. Mitchell, Congress passed P.L. 92-544 (section 2, 86 Stat. 1109 (1972)). This statute allowed federal dissemination of criminal history record information to officials of federally chartered or insured banking institutions and "if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employment and licensing." Although P.L. 92-544 was an appropriation for fiscal year 1973, the Office of Legal Counsel of the U.S. Department of Justice has interpreted it to grant the Department permanent authority to exchange criminal records under the circumstances it provides. This position is reflected in 28 C.F.R. section 20.33(a)(3).

A number of states have "activated" P.L. 92-544 through enacting laws authorizing

record checks for employment and licensing purposes. Some of these laws are specific, both as to relevant crimes and relevant employment. For example, the Alaska statute pertains only to "convictions involving contributing to the delinquency of a minor and any sex crimes of a person who holds or applies for a position in which the person has or would have supervisory or disciplinary power over a minor.". Other statutes are more general, authorizing record checks for employment or licensing purposes, regardless of the type of employment or licensing. Whatever the scope of such state laws, their enactment and subsequent approval by the Attorney General authorizes the federal government to provide designated state and local officials information on certain employees' or applicants' state and federal records maintained in federal record repositories. Recipient officials may utilize the information for employment and licensing purposes of their own agency or related agencies. However, providing it to private employers is not feasible since the federal statute specifies that redissemination of information outside the receiving departments of agencies is grounds for cancellation of further information exchange.

In October, 1984, Congress enacted P.L. 98-473, a continuing appropriation for fiscal year 1985. Included in that legislation was authorization for an additional $25 million under Title XX of the Social Security Act for training providers of licensed or registered child care services (as well as state licensing enforcement officials and parents) in child abuse prevention. States eligible for allotments under P.L. 98-473 were to have in place by September 30, 1985 "... provisions of state law, enacted in accordance with the provisions of Public Law 92-544 ... requiring nationwide criminal record checks for all operators, staff or employees, or prospective operators, staff or employees of child care facilities ..., juvenile detention, correction or treatment facilities, with the objective of protecting the children involved and promoting such children's safety and welfare while receiving service through such facilities or programs."

Like the proposed legislation, P.L. 98-473 promotes use of criminal history record checks to prevent child sexual abuse by employees. However, since P.L. 98-473 and the proposed legislation vary in a number of important aspects, they should be viewed as complementary, not mutually exclusive, means to the same end.

Public Law 98-473 record checks must be "nationwide" and "in accordance with the provisions of Public Law 92-544."

Because of the P.L. 92-544 restrictions discussed above, the proposed legislation pertains to state-originated and maintained records.

The range of relevant child-oriented facilities is narrower under P.L. 98-473 statutes than under those modeled on the proposed legislation. The facilities covered under the former statutes are limited to those providing child care or juvenile detention, correction, or treatment services. The proposed legislation potentially embraces any type of facility whose employees regularly come into contact with or have access to children. In addition, the facilities under the P.L. 98-473 statutes must be licensed or registered, whereas the proposed legislation includes private non-licensed or non-registered facilities as well.

Criminal history record checks under P.L. 98-473 are mandatory. Under statutes based on the proposed legislation, they are permissive, to be undertaken at the discretion of employers on all, some, or none of their employees.

Statutes based on the proposed legislation and those enacted to comply with P.L. 98-473 can also differ with respect to the offenses for which records may be sought and used. The proposed legislation authorizes dissemination of records only if they pertain to sex-related offenses. Public Law 98-473 statutes are not required to include such restrictions. When they authorize broader dissemination, the recipient agency, rather than the legislature, determines the relevancy of the offense to the employment in question.

Finally, disposition requirements for information authorized to be disseminated under P.L. 98-473 statutes are more stringent than those for information authorized to be disseminated under the proposed legislation. Conviction information and pending arrest information may be disseminated under either. However, the federal regulations governing dissemination of federal records prohibit dissemination of arrest data more than a year old if no active prosecution is pending and the data is not accompanied by disposition information. Under the proposed legislation, information about two or more arrests may be disseminated to employers regardless of whether or not an active prosecution is pending or whether or not the data is accompanied by disposition information, provided the recipient is informed if disposition information cannot be verified.

A final federal statute which might appear relevant to the proposed statute is the Privacy Act, 5 U.S.C. 552a, which prohibits federal agencies from disclosing individuals' records, including their criminal history records, except under certain specified conditions. An exception is provided, however, for instances when the record subject consents in writing to the dissemination — a condition which would be met under section 107(B)(4) of the proposed statute.

STATE STATUTORY CONSIDERATIONS

Public access to certain types of criminal history record information is generally available in all jurisdictions; access to other types varies considerably from jurisdiction to jurisdiction. Only one state requires that the criminal justice system initiate the dissemination of sex offense criminal history record information to certain individuals whose employees work with children. In Utah, police are required to inform school officials whenever a school employee is arrested for an offense involving sexual conduct.

Virtually every jurisdiction allows public access to information in its original form from the particular agency in which it originated. For example, police arrest blotters are available from the police station responsible for the arrest. Daily court docket information is available from the court in which the case was prosecuted. In most jurisdictions, however, such information is maintained chronologically, and the ease with which it may be obtained is dependent on knowledge of when a particular event occurred. With few exceptions, cross-reference indices developed to facilitate internal access are not available for external record checks.

Dissemination of criminal history record information by central repositories depends in large part on whether the jurisdiction is more concerned with the public's "freedom of information" or with the privacy of the record subject. Some states take the position that criminal history records are records of public events which should be accessible to the public, absent compelling reasons to the contrary. Others follow the approach of the National Advisory Commission Standards and Goals which would limit criminal history record dissemination to public agencies which have both a "need to know" and a "right to know." (See NAC Standards and Goals Criminal Justice System, Standard 8.3(1), (1973).)

Pending Information

Pending criminal justice matters are generally considered to be those less than a year old in which there has been no disposition, or those over a year old in which there has been no disposition but which are actively being prosecuted.

Information about pending criminal justice matters is usually available from the police department, prosecutor's office and often from the central record repository as well.

Conviction Information

Conviction information is information about an arrest which has resulted in a finding of guilt through a trial, a plea of guilty, or a plea of nolo contendere. According to the SEARCH Group's Privacy and Security of Criminal History Information Compendium of State Legislation: 1981 Supplement, in 1980 virtually all states allowed dissemination of conviction information between law enforcement agencies, generally for internal employment purposes as well as for direct law enforcement purposes. While several states explicitly prohibited non-criminal justice agency access to conviction records (including for public employment and licensing purposes), most allowed dissemination to such state agencies. Similarly, while the SEARCH Group's survey found seven states which expressly prohibited dissemination to the private sector (including employers), well over half allowed at least some private sector access (though not always to employers in child-oriented businesses). It might be noted, however, that a number of statutes are worded similarly to Utah's which limits access unless "authorized by statute, executive order, court rule, court order or local ordinance." It appears that the survey included these states among those authorizing private access though, in fact, additional independent authorization is necessary before employers may actually obtain access to the records.

Often legislation under which employers may gain access to conviction information is broad legislation which makes conviction information available to the general public or legislation which makes conviction information available to all employers who meet certain qualifications. In the past several years, however, more narrow statutes have been enacted to make certain conviction information available to employers whose employees work with children. For example, recently enacted statutes in Alaska, California, and Kentucky make sex offense conviction records available to certain employers whose employees provide care to children. An Indiana statute makes available all conviction (as well as pending case) information to employers if the record subject has "volunteered services that involve contact with, care of or supervision over a child who is

being placed, matched or monitored by a social services agency or not-for-profit corporation." In addition to its broad access statute, Connecticut provides that any youth service agency approved by the Department of Children and Youth Services may obtain conviction information for applicants whose primary duty is the care or treatment of children. New York provides "authorized" agencies access to conviction records of persons being considered for employment if the employment entails directly caring for or supervising children. (New York also requires authorized agencies, the state youth division, and licensed day care centers to inquire of the state Department of Social Services' Central Register for Child Abuse and Neglect regarding child abuse and neglect reports on prospective adoptive and foster parents, child care workers, and licensed day care center employees. Current employees may also be checked.)

As noted above, certain states which may or may not provide private employers access to conviction information provide it to public agencies for employment and/or licensing purposes. A 1973 survey of Laws, Licenses and the Offender's Right to Work (American Bar Association National Clearinghouse on Offender Employment Restrictions) found most licensing statutes which authorize record checks fall in one of three categories: (1) provisions which specifically refer to criminal offenses (e.g., "conviction of a felony") as grounds for denying a license; (2) provisions which phrase restrictions or requirements in such a manner as to give licensing agencies wide discretion to refuse a license to an applicant, such as the requirement that the applicant possess "good moral character"; and (3) provisions which bar licensing because of offenses involving "moral turpitude."

The ABA survey identified 1,948 statutory provisions affecting the licensing of persons with criminal history records. Relatively few of these statutes specifically addressed occupations involving work with children. For example, only three states (Montana, Pennsylvania, and Wyoming) were shown as requiring licenses for child day care operators. Only twenty-eight required licenses for teachers.

Since the ABA survey was undertaken, some additional activity has occurred to allow broader governmental access to records which might bear on an individual's suitability for working with children. For example, state agencies responsible for licensing child-related occupations in California, Georgia, and New Hampshire are now required to undertake record checks of license applicants. Similar agencies in Iowa and New York may utilize records for employment checks if they choose to do so. Colorado law prohibits the licensing of child care centers if the person applying for a license has been convicted of child abuse or an unlawful sexual offense. Moreover, the original license may be denied, suspended, revoked, or made probationary if the licensee, persons employed by the licensee, or persons who reside with the licensee have been convicted of any felony, child abuse, or unlawful sex offense. The Colorado licensing statute also provides for the denial (though not revocation) of a license if the record subject has been charged with child abuse or unlawful sexual offenses and the individual admits committing the act or a hearing officer finds that the charge is supported by substantial evidence.

Non-Conviction Information

Non-conviction information consists of information pertaining to charges which have resulted in acquittal, which have been dismissed, or which are over a year old and

are not being actively prosecuted. Since non-conviction information represents an accusation without a subsequent finding of guilt, it is extremely sensitive. Federal regulations (28 CFR 20.21(b)) require that states which have received federal funds for recordkeeping systems disseminate non-conviction information only to certain agencies and individuals including "individuals and agencies for any purpose authorized by statute, ordinance, executive order, or court rule, decision or order, as construed by appropriate state or local officials or agencies." Since private employer access to state records is not otherwise addressed by the federal regulations, any dissemination to private employers requires such independent state or local authorization. The regulations do not therefore per se limit dissemination of non-conviction information. They do, however, seek to ensure that whatever dissemination as does occur is the result of deliberate and affirmative action by the legislature or other authority.

Perhaps as a result of the federal regulations, over half of the states have enacted statutes precluding dissemination of non-conviction information in the absence of explicit independent authority. Some of these states require state or federal statutory authorization before non-conviction information may be disseminated. For example, Illinois prohibits the release of information "other than as provided...(in) state law, or when a governmental unit is required by state or federal law to consider such information in the performance of its duties." Others provide a wide range of independent authorization. For example, Hawaii allows access to non-conviction information if "authorized by statute, ordinance, executive order, court rule, decision or order as construed by appropriate state officials or agencies."

According to the 1981 Supplement (supra), in 1980, 35 jurisdictions authorized government non-criminal justice agency access to non-conviction information, and ten prohibited such access. Twenty-five authorized access to at least some individuals in the private sector; 14 prohibited access to the private sector (at least one of these - Kansas - has since repealed this prohibition).

As a practical reality, however, it is extremely difficult for private employers whose employees work with children to obtain access to non-conviction information. No jurisdictions have enacted implementing legislation for this purpose. In states where less stringent implementing authority is statutorily authorized, it is rarely invoked.

Non-conviction information is much more likely to be used by state agencies than by private employers to deny or revoke licenses of persons working with children. Such use has been sanctioned by the courts. For example, an arrest unaccompanied by a conviction for engaging in homosexual conduct was found sufficient to support the revocation of a teaching certificate in California (Board of Educators of the El Monte School District of Los Angeles County v. Calderon, 110 Cal. Rptr. 916, 35 Cal. App. 3d 490 (1977); accord Governing Board of Mountain View School District v. Metcalf, 111 Cal. Rptr. 724, 36 Cal. App. 3d 546 (1974) and Petit v. State Board of Education, 109 Cal. Rptr. 665, 10 Cal. App. 3d 29 (1973)). At least one state, however (New Mexico), explicitly excludes from consideration in connection with applications for public employment, license, or other authority records of arrest not followed by a valid conviction or misdemeanor convictions not involving moral turpitude.