are the costs of an inadequate criminal justice system when counties cannot or do not provide effective services?

The most qualified probation and parole officer cannot work effectively in a vacuum, separated from other facets of criminal justice system or from the community as a whole. Thus, other problems are suggested:

4. There is need for a mandatory, statewide reporting system, a system providing comprehensive, meaningful and current statistics on a broad spectrum of activities related to all levels of probation and parole.

Such a system could probably appropriately be tied into the Texas Criminal Justice Information System (TCJIS). Without such statistics, it is not possible to accurately determine needs, to describe existing programs, or to evaluate the effectiveness of such programs.

5. There is a need to extend probation and parole not only to all of the counties, but also to employ these approaches more extensively in general as an alternative to institutionalization.

Economic advantages have already been mentioned, but can be cited again. Direct benefits include the fact that the per person cost is characteristically greater for institutionalization. Indirect cost benefits include the fact that the individual in the community, if he can secure employment (or continue his education), will ultimately contribute to the tax base rather than taking from it. Certainly, inmates (at least in the adult facilities) provide goods and services to the state, many of them going to the support of the institutional system itself. But recent court actions suggest that they may soon be doing so only at the legal minimum wage rate.

Actual or potential economic advantages are not the only values

accruing to community-based treatment. It is in the community that the adult or juvenile offender has committed his offense and, ultimately, it is in the community that he must try to adjust within the law. His ability to "adjust" to the institutional environment in no way guarantees his ability to adjust outside that environment. Mental health personnel have become increasingly aware of this and correctional personnel are beginning to recognize it. As Robison and Smith point out:

> It is difficult to escape the conclusion that the act of incarcerating a person at all will impair whatever potential he has for crime-free future adjustment and that, regardless of which "treatments" are administered while he is in prison, the longer he is kept there the more will he deteriorate and the more likely is it that he will recidivate.[5]

A strong statement? Yes, but Robison and Smith are not alone in their conclusions. Certainly, no one would seriously argue that no offender should be institutionalized. What is being argued for is a more judicious use of institutionalization and, in many cases, earlier release on parole for those who are committed.

As was mentioned earlier, such release provides the only meaningful, statewide means of supervising ex-inmates and of assisting those who do want to make a more acceptable adjustment to do so. For the probationer, community-based treatment can remove the stigma of institutionalization, a stigma which too often creates problems in getting employment and/or furthering education. For both the probationer and parolee, it can help to maintain (or re-establish) family ties in a context where the whole family could participate in the re-adjustment process.

To those who would argue that such extended non-institutional alternatives would necessitate a virtual "army" of probation and parole officers, several suggestions may be offered as to why this does not have to be true. These suggestions are implicit, if not explicit, in subsequent discussion of problems and current trends. Admittedly, however, more probation and parole officers will be needed, whether because the state improves the system or because it fails to improve it.

6. While standards can be established and services extended, such actions will help solve only part of the probation and parole problem. The very considerable problem still remains of what type of services should be provided, under what circumstances, and how they can most efficaciously be provided.

Thus, there is a need for a good deal more research, research that could be made available to all aspects of the criminal justice system and appropriately used as a vehicle for informing the public. Some of this would involve the statistical data base discussed earlier, but it would go beyond this to address a variety of questions. For example, are there viable means of predicting probation and parole success or at least predicting adjustment problems and taking preventive action? Can these means be improved? Is there some reasonable way of determining the most effective term of community-based treatment for different types of offenders? What are the most effective methods of supervision/treatment for different types of offenders? Who will respond best to individual contact, to group experiences, to a combination of these two, to remaining in the family context, to remaining in (or returning to) the community but in a setting outside the family home?

These and many more questions need to be answered if probation and parole are to be maximally effective. Certainly, services should not and cannot be suspended pending such answers. But the state can experiment with a variety of adequately funded, and adequately evaluated, programs and possibilities in an ongoing effort to unravel the problem: who, what, when, where, how and why? A beginning has been made, largely through projects funded by the Criminal Justice Council, but much remains to be done.

7. Pending expansion and sophistication of research into probation and parole, use can be made of existing knowledge.

Such use leads to delineation of several other problem areas. One of these is the need for working with members of the offender's family as well as with the offender himself.

The nature of family relationships is an important component in the social-psychological adjustment problems that may ultimately find expression in delinquent or criminal behavior. If the probationer remains in (or the parolee returns to) an unchanging family (or, perhaps more accurately, a family undergoing more or less negative change), his chances of making a good adjustment are diminished. This is not necessarily to focus "blame" on the family nor to attribute significant pathology to it. While it may be what we commonly call "pathological," it may also simply be confused or unaware. In any event, the family is a factor.

8. In some cases, no family is available. More often (and more often than many might want to believe), its members are not willing to cooperate meaningfully. In still other instances, family re-adjustment is

> necessarily such a protracted process that some other placement for the "offender" is called for, at least temporarily.

This is most apt to be so in the case of the juvenile, of course, where his only "offense" has been running away from an intolerable home situation. This raises the problem of where that other placement will be. Too often the choice has been the family home, regardless of its negative aspects, or institutionalization in a correctional facility. Thus, there is a need for interim houses, not only the traditional foster-home program which itself needs expanding, but also for group homes. For both juveniles and some adults there is a need for "day-care" facilities (though a more felicitous name might be found, especially for older juveniles and adults). These would be centers in which the offender would participate in appropriate special programs during the day (e.g., counseling, remedial education, vocational training, etc.) and from which he would return to his own home at night.

For parolees (again both juvenile and adult) there is a need for halfway houses. Even where the family situation is not undesirable, these halfway houses can help the parolee make the transition from institution to community in a setting where the individual has both freedom and responsibility, more of each than he had in the institution but less than he will ultimately have outside it.

Both increasing work with the families of offenders and the construction of group homes, etc., represent current trends in probation and parole, as well as problems. Two other current trends may be noted. They are included in this section, along with the preceding two, because they are also salient problem areas, largely because of their limited implementation.

9. The first of these is the integration and cooperation of probation and parole with other community resources such as community mental health services, various rehabilitation services, college and university resources, the public schools and prospective employers.

Certainly progress has been made in this integration, especially in some of the more urbanized areas where such resources are more apt to be found. Still, there is a need for continued expansion of these cooperative efforts, expansion in geographical terms, but also to pull in more facilities and to explore new and better ways of working together. To the extent that this has not been done, it has often been due more to the apathy or reluctance of various aspects of the community than to that of the criminal justice system. Perhaps this has been especially true of the public schools and of the employing community. In the final analysis, crime and delinquency are social-psychological problems that can only be effectively alleviated by the combined efforts of the individual offender and the community. To one degree or another, this means the total community.

10. While cooperation between community resources continues to constitute a problem, as well as a current trend, so does volunteerism. There is a need to recruit and utilize additional appropriate volunteers at all levels of probation and parole and to utilize them with maximal effectiveness.

Probation began in this country as a volunteer effort, and it has come to be realized that volunteers can serve as valuable adjuncts to any formal system though they are not, in themselves, sufficient. This is no less true in parole.

Of the 15 states having the largest prison population, Texas is one of only three which does not use the National Volunteer Parole

Aide Program sponsored by the American Bar Association's Young Lawyers Section and the Commission on Correctional Facilities and Services. Under this program, a volunteer (usually a lawyer) spends 6 to 8 hours a month with a single parolee during his first critical year out of the institution. Before beginning, each volunteer participates in training sessions and subsequently works in tandem with the parolee's regular officer. Variations on such a program are possible in both probation and parole, though working with the regular officer is an important element, as is some training (usually in quite short, though fairly intensive, sessions).

Such volunteerism has several potential advantages, advantages already demonstrated in several programs. For example, it permits someone's spending more time with each offender than his regular probation or parole officer characteristically could. It provides the offender with a model of someone who is interested in him even though he (the volunteer) "doesn't have to be." Certainly, many professional personnel are as equally and as sincerely interested. But, at the same time, many probationers and parolees do not perceive the professionals in this way, at least initially feeling that "it's just part of their job." Too, successful volunteer programs such as have been reported in various areas can increase community involvement even beyond the volunteers themselves. Similarly, they can increase community understanding of both the professional probation and parole officer and the offender.

This compendium has presented a number of rather major problem areas in probation and parole reflecting the current status of these

systems in Texas. An effort has been made to define particular needs rather explicitly and to discuss some of the ramifications of meeting or not meeting them.

The Texas Criminal Justice Council (and, doubtless, others) are aware of these problems. As mentioned several times, the council has provided a variety of grants in an effort to explore some solutions. It is continuing to do so. The first necessary steps have been taken, but the journey remains a long one.

It was suggested earlier that the most qualified probation and parole officers could not work effectively separated from other facets of the criminal justice system. Similarly, no system of probation or parole can be expected to be effective outside the context of the larger society. It is suggested here that attitudinal and opinion aspects of that larger society may themselves constitute problems. Among orientations that may impede change are:

1. There is a tendency to adhere to a basically talion principle in dealing with the offender (sometimes under the guise of deterrence) in spite of years of experience militating against faith in the ultimate effectiveness of such an approach in itself.
2. Probably related to this, at least in part, is the prevalence of misconceptions about crime and delinquency. Such misconceptions again persist in the face of solid [illegible]ce to the contrary. Evidence has shown, for ex[illegible], that offenses are more likely to be committed [illegible] property than against persons and that offenses

against persons are more likely to be committed by those whom the individual knows than by strangers.

3. There is a penchant for simplistic solutions to problems, solutions often based on "simple and sovereign" concepts of causation. Further, when such solutions are not successful, there is some tendency to lose patience and move on toward other equally simplistic answers or to conclude that the problem is insoluble. Yet crime and delinquency are not simple problems, simply caused. Neither are they amenable to simple solutions.
4. Finally, there is a predilection for focusing on immediate and more apparent costs, with a concomitant disregard of the costs of alternative courses and of future financial benefits. Were Texas to undertake meaningful solutions to the personnel and system problems previously delineated, it would admittedly require a fairly large expenditure of funds over the next few years. But such expenditures should be weighed against other costs. "Human" costs, such as poorly adjusted or lost lives, cannot meaningfully be translated into dollar terms. But the comparative costs of institutionalization and community-based treatment can be calculated, as can court costs and property loss or damage. With an appropriate data base, potential savings in reduced

> recidivism can be estimated. Estimable, too, if less accurately, are the potential economic benefits of changing unproductive (if not anti-productive) citizens into productive ones.

If solutions to these problems (labeled as essentially attitudinal or orientational) are to be forthcoming, it will require extensive education of the public and, in some cases, of political leaders and of professionals within the criminal justice system. Yet such a program of education or awareness may well be prerequisite to solutions to the problems of the probation and parole system itself.

## Current Trends in Probation and Parole

Perhaps the context of orientation is the most appropriate for considering current trends in probation and parole, for certainly orientational modifications have occurred. For years an essentially non-productive debate raged over contentions that the offender had deliberately chosen to trangress society's laws and expectations, that he was the hapless victim of an adverse society, or that he was mentally ill. None of these positions, in itself, took adequate cognizance of the fact that an individual does have some responsibility for his decisions but that, also, some societal conditions are criminogenic and that the person who behaves in ways that are significantly deleterious to himself and/or society is less than maximally well-adjusted.

To the extent that mental health was an issue, it was generally in terms of what is characteristically called the "medical model." In effect, the individual was "healthy" if he was not demonstrably "sick."

That definition has changed in many quarters so that real mental health implies the presence within the individual of potential and forces for positive growth. In this context, the roles of both the individual and society can be recognized, whether it be the larger society, the community or neighborhood, or the societal microcosm we call the family.

More recently, increasing recognition has also been given to the fact that undesirable behavior (e.g., crime and delinquency) can be learned, just as desirable behavior can be. With this recognition an important, if not primary, function of the criminal justice system can appropriately be seen as one of education or re-education (some may find socialization or re-socialization preferable terms). To accomplish this function, institutionalization may be necessary in some cases. But probation, parole and their adjunctive services can play a vital role. Burdman, for example, estimates that only 15 per cent of offenders need long-term restraint and 15 per cent need short-term community-oriented confinement, while 70 per cent could be supervised in non-institutional community-based programs.[6]

In either event, a learning approach (coupled with the broader view of what constitutes mental health) carries with it important implications. For one thing, it is known that in the educational process different individuals respond differentially to diverse teaching approaches. While many students conform more or less successfully to monolithic methodology, a discouraging number do not. Among those who do respond essentially successfully, it has been found that actual learning levels are often somewhat less than maximal. Among those who do not, it has been found that successful learning is indeed often

possible when alternative approaches are available. Analogously, more success in probation and parole can be anticipated where diverse and multi-faceted programs are provided (as they are being to some extent).

A second implication comes from a rather extensive body of replicated research in learning. That is, it is known that undesirable responses can be extinguished (or at least suppressed) through punishment. But, it is also known that the use of punishment alone in no way guarantees that at least equally undesirable responses will not replace the initial ones. Behavior is most successfully influenced through reinforcement (i.e., the removal of a noxious stimulus or the presentation of a positive reward) or through punishment appropriately combined with reinforcement.

The most obvious applications of this established principle are in the institutional setting, but there are also applications in probation and parole. An individual will not learn to respond in socially (and personally) acceptable ways without being given an opportunity and some reinforcement for doing so. In many cases, this can be done most effectively in the community to which the individual is ultimately expected to adjust.

Orientational changes often operate in tandem with operational changes and this has been the case in the fields of probation and parole. In part at least, current trends in these systems are reflective of the modified viewpoints discussed.

Several of these trends have already been pointed out: increasing attention to family counseling; the construction of group homes,

halfway houses, and the like; cooperation of probation and parole systems with other community resources, and the utilization of volunteers. Other more or less inter-related trends can be noted.

In recent years a variety of supervision/treatment methods have been instituted, at least on an experimental basis. For example, some success has been found in the use of paraprofessionals i.e., paid personnel who have less than the minimum recommended educational or experiential preparation but who can provide defined adjunctive or supportive services.

In 1966, Ohio began a program called "shock probation." Here, the convicted offender is required to spend only one to three months in an institution, after which he is released to an essentially probationary status. Since initial incarceration is often one of the most traumatic aspects of institutionalization, the short-term experience is considered to have positive learning value without the counterproductiveness of long-term imprisonment. Over the years, the recidivism rate under this program has been only 9 per cent compared to a national average estimated to be about 7 to 9 times as high. An approach usually reserved for first offenders, shock probation has been extended to several other states.

In still other instances, caseload size has been varied. Results here have been somewhat mixed but, as might be expected, it has been found generally that the quality of officer-offender contact is an important variable in determining the effect of intensity (or quantity) of contact. In short, smaller caseloads alone are not a panacea.

Too, behavior shaping or "behavior modification" techniques have been tried in the community. As is the case with reduced caseloads, such techniques are not a universal panacea. Still, they have been shown to be successful in the community. In fact, they may well be more successful here than in an institution since the context is "real life" and desirable responses can be more easily generalized.

Besides broadening the approaches to probation and parole, there has tended to be a call for broadening their use in general, probating more offenders and paroling those institutionalized after shorter periods of incarceration. No nationwide statistics were found reflecting the extent to which this call has actually been translated into action. However, California has experimented extensively with community-based treatment in lieu of institutionalization in recent years, especially for youthful and young adult offenders. In a related effort, Massachusetts is in the process of phasing out all centralized institutions for juveniles, moving to a system of community-based treatment which includes probation and small institutions.

Somewhat tangentially, there has been increasing use of work-release programs (in Texas as elsewhere), providing transitional assistance in adjustment prior to ultimate parole. Such transitional assistance often also includes both formal and informal lectures and group discussions regarding such questions as applying for a job and establishing credit, aspects of life which may seem almost mundane to many but which may demand new or different skills of the offender and be important to his not recidivating.

Several trends may be noted with respect to the rules or conditions characteristically imposed for both probation and parole. There has been a move toward reducing their number and, many would argue, making them more rational. Strict constructionism of such rules as not associating with "vicious and immoral persons" (e.g., other offenders) may create awkward situations for the probationer or parolee who has other offenders in his family or immediate neighborhood or who is employed where other offenders also are.[7] Basically unenforceable rules, such as not using "foul language," only invite gamesmanship and contempt for the law. Also, in some places probationers and parolees have been invited to participate with their officers in setting up their conditions. Evidence has shown that this does not result in lax rules as some might fear. In fact, such participation seems often to engender in the offender a sense of responsibility to abide by what he construes as a contract.

Along with these other trends have come suggestions that clear criteria for revocation be established, criteria consistent from one area of a state to another. This need not imply mandatory revocation upon infraction. Rather it is meant to eliminate a tendency to somewhat capricious revocation, generally without opportunity for review. This has been a problem especially in the case of parole. Evidence here indicates that re-commitment may be at least as much a function of the officer's orientation as it is of the offender's behavior (clearly casting doubt on some recidivism statistics).

There have also been new moves in the granting of parole itself. Not only is automatic, periodic review recommended by many, but so also

is providing the inmate with a written statement definitively outlining the reasons for the board's decision where parole is denied. Increasing attention is also being given to the inmate's right of appeal in such cases and to his right to representation at the time of review and/or appeal. Too, recommendations have been made that parole board members themselves be required to meet certain appropriate educational and experiential standards before appointment.

Finally, there is growing sentiment for de-criminalizing some offenses (specifically certain "victimless crimes") and for eliminating as official delinquencies "offenses" which would not be crimes by adults (e.g., incorrigibility, truancy or running away from home). In the latter, the juvenile probation officer might still have contacts with the juvenile. But such contacts would be on a non-official basis, more likely involving other community resources (if a cooperative relationship has been established) and avoiding the stigmatization by adjudication for the young person.

## Some Closing Comments

Braden points out that:

> Constitution-makers should recognize that their task is three-dimensional, so to speak. They should strive for a consensus of interests and pressures of the day, but always in the context of the flow of history--the preservation of the good from the past and the passing on of a document that will meet the needs of the future . . . . A constitution should be a document for all seasons.[8]

This requires that a constitution be a basic framework, setting forth the rights of the people and the powers, relationships and limitations of each level of government. If it departs from this fundamental frame-

work to include basically statutory provisions, it will, of necessity, eventually become a hodgepodge of amendments. As with a building which a series of owners have each modified to suit their immediate purposes, both form and function may be lost.

While a number of problems in probation and parole have been presented, their solution is basically a statutory matter. Thus, while these systems are of concern to those responsible for constitutional revision, they are not seen as issues for inclusion in the constitution per se.

Nonetheless, the implementation of solutions to the problems in probation and parole is a matter of considerable importance, as is the consideration and possible implementation of the various current trends in these areas. It is important not for the sake of innovation and change itself, but for the sake of every citizen in the state, all of whom would be the ultimate beneficiaries of a maximally effective criminal justice system.

## Footnotes

[1]An Act creating the Texas Adult Probation Board and providing for its powers and duties; amending Vernon's Annotated Code of Criminal Procedure, (V.A.C.C.P.), as amended, by adding Article 42.121, by amending Sections 6a and 10, Article 42.12, and by adding Section 3d, Article 42.12; and by declaring an emergency. p. 1.

[2]The statistics in this and the next section are derived from a variety of sources. Some of them are necessarily estimates since, for example, the State has no mandatory reporting system for juvenile delinquency or adult probation. Nonetheless, they represent the most accurate and up-to-date information available. Sources used were: Annual Report of the Texas Youth Council to the Governor for the Fiscal Year Ending August 31, 1972. Austin, Texas: Texas Youth Council, 1973, passim; Criminal Justice Council, 1973 Criminal Justice Plan for Texas. Austin, Texas: Office of the Governor, 1973, pp. 38-49; Ledbetter, J. C., Director, Adult Probation Department, Dallas, Texas, personal correspondence, May 11, 1973; Twenty-fourth Annual Statistical Report: Fiscal, 1971. Austin, Texas: Texas Board of Pardons and Paroles, 1972, passim; Towns, R. E., Director of Parole, Texas Youth Council, Austin, Texas, personal correspondence, June 6, 1973.

[3]Statistics such as these must be interpreted with some caution. Caseloads will vary from one area of the state to another. Furthermore, such figures do not necessarily imply that that many cases are carried simultaneously. For whatever reason, individuals will leave the case roll although others will, of course, be added. Even making such allowances, however, the conclusion that caseloads are characteristically too high seems inescapable.

[4]V.A.C.C.P., Article 42.12, as amended.

[5]James Robison and Gerald Smith, "The Effectiveness of Correctional Programs," Crime and Delinquency, XVII, 1 (January, 1971), 71-72.

[6]Milton Burdman, "Realism in Community-based Correctional Services," Annals of the American Academy of Political and Social Sciences, CCCLXXXI (January, 1969), 75.

[7]This is not as ridiculous an example as it may first appear to be. There is at least one case on record where parole was revoked because work conditions required such association though there was no evidence of extra-employment contact.

[8]George D. Braden, Citizens' Guide to the Texas Constitution. Austin, Texas: Texas Advisory Commission on Intergovernmental Relations, 1972, pp. 5-6.

## SUMMARY OF RECOMMENDATIONS

In this report the criminal justice system was initially examined with an emphasis on a total "systems" perspective. The various functional areas were then considered individually. It is, however a fundamental belief of the contributors that it is necessary to appreciate the inter-relationships of the various agencies as well as to have knowledge of the organization and operations of each of the components. While an argument can be made that the criminal justice system is in reality a "non-system", the need to maintain an awareness of the "forest" and not a preoccupation with the individual trees is crucial to an understanding of the administration of criminal justice in Texas.

In examining criminal justice in Texas from this perspective, the most striking conclusion from the standpoint of constitutional revision which emerged was the agreement that most of the changes needed, should not be included in the new constitution. It is the consensus of the contributors to this report that, with the exception of the judiciary, the other agencies, such as the prosecutor's office or the corrections agencies, should not even be mentioned in the constitution. Because of the difficulty of obtaining constitutional changes, and the desire to maintain maximum flexibility, these matters ought to be dealt with by statute rather than through constitutional provisions. Then as new demands, approaches, tools and needs become apparent, changes will be more readily possible through legislation.

Recognizing that most of the recommendations included here should be implemented through statute, it nevertheless should be useful to have the more important recommendations listed in a single chapter. The following constitutes a listing of the major recommendations extracted from various sections of the text.

## Law Enforcement

1. Provide standardized training and testing of all law enforcement officers;

2. Make the office of sheriff statutory rather than constitutional allowing for the office to be abolished in those counties where it is not needed;

3. Make the office of constable statutory rather than constitutional so that the office may be abolished in those counties where it is not needed;

4. Encourage regional law enforcement planning under the Department of Public Safety.

## Prosecution

1. Require the prosecuting offices to follow the American Bar Association's standards with regard to sentencing practices;

2. Divorce the measure of effectiveness of the prosecuting offices from the conviction rate;

3. Enact a statutory scheme for the appointment by the courts of special prosecutors for cases which the prosecutor will not handle;

4. Formulate administrative techniques to guide the publication of standards for prosecutorial discretion;

5. Create a public defender system to protect the constitutional rights of indigents in criminal cases.

## Courts

1. Merge the Court of Criminal Appeals and the Supreme Court;

2. Unify the judicial system under the supervision of the Supreme Court;

3. Simplify the court system by providing a single integrated trial court;

4. Simplify the court system by providing only two levels of appellate courts, (the Supreme Court and courts of appeals).

## Institutional Corrections

1. Develop and enforce uniform standards for the maintenance and operation of juvenile detention facilities;

2. Require juvenile courts to report annual statistical information regarding the use and status of juvenile detention facilities in their jurisdiction;

3. Initiate studies to determine the incidence of mentally defective delinquents and develop alternatives for their treatment;

4. Expand the halfway house programs to the major urban areas of the state;

5. Create a jail inspection commission which would be charged with the responsibility of annually inspecting all jails in the state and would have the authority to close any which did not meet minimum standards;

6. Encourage local communities to explore the utility and cost effectiveness of diversionary programs as an alternative to some sentences to the county jail;

7. Create a mandatory reporting mechanism to provide annual statistical information on county jails and their operations;

8. Develop a mandatory release program to provide parole supervision for all persons released from the state's prison system;

9. Improve the salary schedule for correctional officers;

10. Maintain the self sufficiency programs of the Texas Department of Corrections.

## Probation and Parole

1. Extend probation and parole services (both adult and juvenile) to all counties in the state.

2. Create a mandatory, state-wide reporting system to provide information on a broad range of activities related to all levels of proba tion and parole.

3. Implement the minimum educational/experiential standards of the American Correctional Association for the employment of probation and parole officers.

4. Improve the salary schedules for probation and parole officers.

5. Employ probation and parole more extensively in general as an alternative to institutionalization.

6. Initiate research in the area of community-based programs to determine the best means to success and the modifications needed in the present operations.

7. Create centers in which offenders could participate in appropriate special programs during the day (counseling, vocational training, etc.) and from which they would return to their homes each day.

8. Establish additional halfway houses for both juvenile and adult parolees.

9. Stimulate integration and cooperation of probation and parole with other community resources.

10. Encourage the use of volunteer probation and parole workers.

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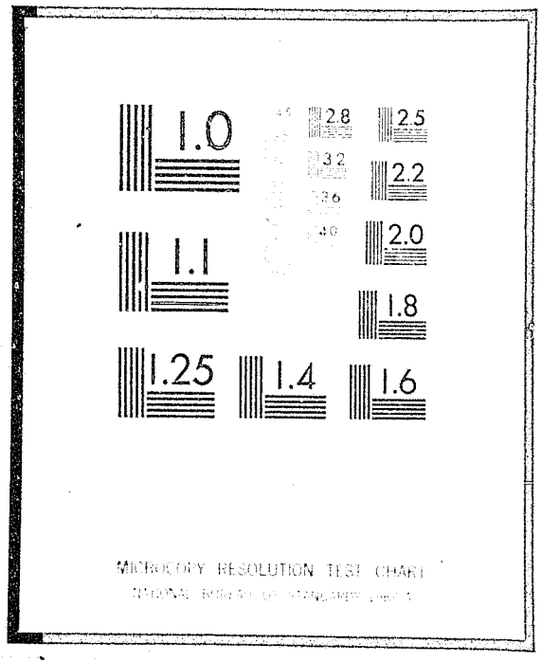




REFORM OF THE FEDERAL CRIMINAL LAWS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON

CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

S. 1 THRU S. 10

PART II

Printed for the use of the Committee on the Judiciary

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



PART XI—S. 1 AND S. 1400

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

# REFORM OF THE FEDERAL CRIMINAL LAWS

THURSDAY, JUNE 13, 1974

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

The subcommittee met, pursuant to recess, at 10:15 a.m., in room 2228 Dirksen Senate Office Building, Senator Roman Hruska presiding.

Present: Senator Hruska.

Also present: Paul C. Summitt, chief counsel; Douglas R. Marvin, minority counsel; Dennis C. Thelen, assistant counsel; and Mabel A. Downey, clerk.

Senator HRUSKA. The subcommittee will come to order.

The chairman is not able to be here because of other official Senate duties. He asked me to preside.

We will resume our hearings on the bills S. 1 and S. 1400 having to do in each instance with the revision of the title 18 Criminal Code of the United States. We are favored this morning by the presence from the Association of the Bar of the City of New York, Raymond L. Falls and Andrew M. Lawler. It is my understanding that Judge Asch had originally been assigned to this occasion and he is not able to be here.

Am I correct?

Mr. FALLS. That is correct. Judge Asch is chairman of our committee, which is a special committee of the bar to study the Criminal Code. He is unable to be here, so we are here in his stead.

Senator HRUSKA. We welcome both of you here. We have received your report.

Have you a statement on the report, Mr. Falls?

Mr. FALLS. Yes; we do have some comments, Senator. We do not have an additional written statement.

Senator HRUSKA. Go ahead.

## STATEMENT OF RAYMOND L. FALLS, JR., SECRETARY OF THE COMMITTEE ON THE FEDERAL CRIMINAL CODE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK; ACCOMPANIED BY ANDREW M. LAWLER, JR., MEMBER OF THE COMMITTEE ON THE FEDERAL CRIMINAL CODE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. FALLS. Let me begin with a few preliminary comments. We indicated when we testified 2 years ago on the Brown Commission

bill that we approach this problem, as I am sure the subcommittee does, with a great awareness indeed, perhaps being intimidated by the massiveness of the task, that anyone faces who attempts the task that the Brown Commission attempted and that this subcommittee is attempting, to review and codify the entire criminal law system in the United States.

Our committee of the association was especially appointed some 3 or 4 years ago, initially to study the Brown Commission proposal, and 2 years ago we submitted to the subcommittee a printed report and gave testimony at that time. Since that time, of course, we have introduced into the Senate S. 1 and S. 1400, which represent two separate attempts at codification of the criminal law, each of which differs in some particulars, in many particulars, from the Brown Commission bill.

During the period since those bills were introduced we have made further study of S. 1 and S. 1400 in an attempt to compare them with the Brown Commission bill and to make our recommendations with respect to drafting problems in one or another of the bills, and to express our preference and recommendations as among the various provisions of the three bills. We have delivered to the clerk of the subcommittee today copies of our tentative report comparing the three bills. We hope within the next few weeks to provide the subcommittee with copies of a final printed report, which we would like to ask be made part of the record.

The tentative report that we delivered today is, however, substantially complete and final in terms of the recommendations and opinions expressed. I should point out, too, that our present report should be read together with the report that we submitted 2 years ago, because we have not attempted to recanvass all the issues that we spoke to in that original report and in our testimony 2 years ago.

Senator HRUSKA. Note will be taken of that and will be regarded accordingly.

Mr. FALLS. Thank you.

Again, a few general views with respect to the whole question of codification. One cannot study a proposal of this sort without sometimes having a question or a qualm about whether the game is worth it, whether the project should be pursued at all, because there are certainly risks involved in a project of this kind. I suppose it is impossible in writing a bill so large and so comprehensive and dealing with such a variety of questions to achieve perfection or anything close to it. There is always the risk that any codification will contain in it ambiguities, unintended changes in the law, or erroneous policy judgments, either because they were consciously arrived at erroneously or because of inadvertence.

We think, however, that those risks are outweighed by the advantages of proceeding with the codification. We think that the project should go ahead. There has been an enormous amount of effort spent on it both by the Brown Commission and by this subcommittee, by various public groups, and we think that there are advantages to be achieved that outweigh the risks involved.

First of all, we think that any of the three bills that have been considered—the Brown Commission bill, S. 1 or S. 1400—achieve a certain desirable objective in terms of rationalizing the law and making



it more coherent and understandable. One example is the separation of the jurisdictional bases of Federal criminal law from the substantive offenses so we do not have a whole series of crimes, the only difference in which is that there is a different jurisdictional base.

Another area in which we think that all the bills would achieve some desirable consistence or coherence is in the area of sentencing, grading of offenses, where we arrive at a system that is more systematic, more understandable and more coherent. I think that codification is also desirable because it offers the opportunity, which is achieved in varying degrees in the three bills, of effecting appropriate reforms and codifying things that have never been codified in the past, but perhaps should be.

For example, all of the bills contain for the first time a general Federal statute dealing with attempts, rather than having this treated in a piecemeal fashion. We think this is desirable. All bills attempt to codify the offense of entrapment that previously had not been codified and as to which there is a great deal of confusion and ambiguity in the decided cases.

So, the sum and substance of it is that we think that codification is a desirable thing. We think it should be done with great care and with further study.

One final advantage of the codification is, because of its coherence and the systemization of the criminal law, it provides a better base on which to build in the future. I think it would be easier to perceive areas in which further reforms are necessary and to devise them when you have a better rationalized and more coherent base from which to start.

One further general comment: We have not attempted to arrive at a judgment or recommendation as to which of the three bills, is the best. We think that they are all still in a study stage. We think that each of them is preferable to the others in some respects, and we would hope that a final bill, if one is passed, would not be any of the existing bills, but a further bill that adopts the best features of each, perhaps in some areas adopts features better than any of them.

The only other general comment that I have before I proceed to a discussion of some particular points, and this perhaps is not a terribly important comment, but the numbering systems, the section numbering systems, differ among the bills, and we have worked with these bills now in some detail and we must say that the numbering system in S. 1 we find very difficult to work with. For example, there exists a section 1-1A4(27). It is broken down in a way that we think will be very difficult to use and we would prefer the system used either in the Brown Commission proposal or S. 1400.

We are not going to try to discuss all of the points made in our rather thick report. But we would like to touch briefly on some of those that we think are the most significant. And I will proceed in a rather nonsystematic fashion from point to point, from some of the earlier chapters of the bill, just to draw attention to some of these items that we think are worth comment here.

Let me say, by the way, before I do that, I think that one of the most important aspects of this program is the very careful work necessary just as a matter of lawyer-like drafting. Of course, there are a lot of policy decisions that have to be made and warrant a lot

of discussion and attention, but when we are rewriting the whole criminal law it is very important in our view that every section be looked at very carefully from the point of view of what it will mean when it becomes the law of the land, whether it will be understandable or whether it will have the effects that people intend.

The first specific point: We note that both S. 1 and S. 1400 have abandoned the efforts that the Brown Commission bill made to try to define the effects of presumptions and the effects of burden of proof. There are a lot of long sections in the Brown Commission bill. We approve of that abandonment. We think that the sections in the Brown Commission bill that were dropped off were almost metaphysical and too difficult to understand, and we think that this is an area that is probably impossible to codify effectively.

Next, I draw attention to the grounds of Federal jurisdiction. I am sure you are aware that both S. 1 and S. 1400 try to define the various bases of the Federal jurisdiction—interstate commerce, use of the mails or the like—and then to make those jurisdictional bases applicable to substantive offenses insofar as they seem appropriate.

Now, S. 1 defines—we think these are generally pretty well defined, but S. 1 defines as a ground of Federal jurisdiction a receiving of Federal financial assistance jurisdiction which makes certain Federal substantive offenses applicable where they occur in connection with buildings owned by an organization or a government or a program receiving Federal financial assistance. The substantive offenses to which that jurisdictional base applies generally are things like arson, malicious mischief and the like.

We have two problems with that particular provision. First of all, as far as we can tell, the phrase "Federal financial assistance" is not defined, and it seems to us that this is a serious defect, because it could mean anything from direct Federal aid of some kind to merely a tax exemption. We think that is objectionable, first on the grounds of ambiguity. We think it is also probably objectionable on the grounds that it reaches too far.

Should it really be a Federal crime every time somebody builds a fire in a building that may in some way indirectly be benefited by the Federal Government?

For example, I suppose every State government gets Federal aid.

Should every building owned by a State government in which a crime of this kind occurs give rise to a Federal prosecution?

Senator HRUSKA. What is that section?

Mr. FALLS. In S. 1 it is section 1-1A4(58). That illustrates the problems with the numbering system in S. 1.

Another point—this also has to do with jurisdiction—in the Commission bill there was at some point what we call piggyback jurisdictional provisions, which provided that where a crime, for example, like murder, was committed during the commission of or in direct flight from a crime as to which there was Federal jurisdiction, there would also be Federal jurisdiction of that additional crime. That is, as I say, was in the Brown Commission bill, section 201(b).

Senator HRUSKA. You are aware, are you not, that with regard to piggyback jurisdiction there has been some modification of that concept?

Mr. FALLS. I am not sure that I was. We noted in examining the bills that we had before us that there was a piggyback provision in the



Brown Commission bill and in S. 1400, but not in S. 1. Maybe there has been a change.

Senator HRUSKA. The Association of State Attorneys General made quite an imposing case against it and there has been a modification.

State your objection; it should strengthen the position that we have taken by defining the problem further.

Mr. FALLS. I am not sure I know what your modification is. We thought the piggyback provision was a good idea.

My next point is with respect to provisions in, I think, all three bills—the Brown Commission, S. 1 and S. 1400—which attempt to define the circumstances under which an organization is culpable for the acts of its agents. We found the provisions in the Brown Commission bill to be confusing. Our recommendation initially was that this should be case law rather than being codified. We read the corresponding provisions of S. 1 and S. 1400 and we have the same problem, and we still feel that there ought not be an attempt to codify that in any of them.

If it is to be codified, we are not satisfied with the provisions of either S. 1 or S. 1400.

Senator HRUSKA. Is that the provision that imposes liability upon officers of the corporation for all acts of their employees?

Mr. FALLS. It goes both ways. There are some provisions dealing with the liability of the organization, a corporation, for the acts of its agents. Then it also purports to define the liability of the agent for the acts that he performs on behalf of the corporation.

Senator HRUSKA. What is your suggestion in that regard?

Mr. FALLS. The suggestion as to both provisions is that they not be codified, that they be left for judicial development.

Senator HRUSKA. That would leave it pretty wide open for the court, would it not?

Is it not desirable to give some statutory structure to this area so that the courts and the people who are governed by the statute would have something to go by.

Mr. FALLS. That is always a hard choice. There are obviously areas where codification is helpful. There are some areas where we think the problems are such that they are difficult to define in the statute and where the courts can handle them better. We are not aware that the courts have experienced problems in this area, and we perceive in all three bills that there has been great difficulty in arriving at a suitable definition, which persuades us at least so far, that maybe the definitional problem is so difficult that it ought to be dropped. For example, in S. 1400 there is one provision that talks about the organization being liable for acts of the agent in the course of his employment. There is another provision as to the liability of the corporation in areas where the agent acts in an area where he has been given responsibility and where he is acting for the corporation's benefit.

Now, I must say that it is very difficult for me to perceive the precise difference between those two and the extent to which they overlap or do not overlap.

In that same bill there is a provision making the organization liable for the acts of the agent within the scope of his actual or apparent authority. I question whether the organization—suppose the organiza-

tion has forbidden the agent to do something, but on traditional agency concepts he has apparent authority?

Should the organization be criminally responsible?

I guess we have two problems. One—we get down to a little more detail on this in our report—we think there are problems with the definitions that exist, and we have remaining doubts that this particular provision can be codified in an effective way.

The next point to which I would like to speak is on the question of the defense of insanity. In our original report we recommended and endorsed the position of the minority of the Brown Commission which took the view that insanity should not be a separately recognized defense. It should be a defense only in those circumstances where it negates a state of mind that is an essential element of the offense. I think an example might be that which was given in the working papers of where a fellow choked his wife to death, but thought he was squeezing a lemon, because he was so insane that he could not tell the difference.

There would be no intent to kill because he would not know what he was doing in that sense. The minority of the Brown Commission recommended that that be the limit of the insanity defense. S. 1400 has taken that view, and that is the view that we endorse. There, of course, has been a lot written on this and a lot of debate on it. I do not propose to try to summarize that here.

But I think that the various considerations and the balancing of them is well stated at pages 248 to 254 of the working papers, and I think that the principal thrust of the argument there, as I say it does balance the considerations, the principal thrust of it is, if you have an insanity defense beyond what I have just described, you get into an endless and not very helpful metaphysical kind of debate whether a man is responsible. And the suggestion was made there that this is not the way to go about this thing; that that kind of debate gets down to angels dancing on the head of a pin, as to whether the man should be "responsible" or not. The better way is not to treat it as a separate defense.

In most of these situations where the offense has been committed with the requisite intent then something has to be done with the individual, the question largely is, What should be done? Should he have psychiatric treatment? Should he be incarcerated or what?

The position taken in the working papers and by the minority of the Brown Commission was the better way to deal with the problem is after conviction, to then determine what is the best way to deal with the problem. The question also arises in determining whether the man was capable of standing trial and so on. I guess the point that impresses me most is the argument that the endless debate over whether a man, as I say, is in the ethical, moral sense, "responsible", is one that is not terribly helpful. It is a diversion of psychiatric and perhaps legal effort.

Senator HRUSKA. From your reading of S. 1400 in this regard, which you state that you prefer, is it true that there is a class of cases to which the insanity defense would not extend under S. 1400?

Mr. FALLS. Oh, yes.

Senator HRUSKA. That does apply now?

Mr. FALLS. Yes.



Senator HRUSKA. Those cases involving, for example, irresistible impulse?

Mr. FALLS. That is correct.

Of course, the law may be somewhat unclear even if it is not changed. But the minority of the Brown Commission and S. 1400, and the one we endorsed, would unquestionably narrow the insanity defense against what it would be under existing law, and that is a conscious judgment.

The next point to which I would like to speak is the question of the entrapment defense. All three of these bills attempt for the first time to codify the defense of entrapment. It has been codified, I understand, in a number of States. In this instance we think codification is a good idea because there is considerable ambiguity and confusion in the cases. That ambiguity stems in large part from the conflicting views as to whether really the purpose of the entrapment defense is to discourage the Government from doing things that it should not do, or police officials and so on of doing things that they ought not to do by the way of setting up devices of entrapment, or whether the focus should be on the guilt or innocence of the particular offender, whether you should determine whether the circumstances of the entrapment and the circumstances of his conduct and background are such as to conclude that he was innocent of anything for which he should be punished.

The Brown Commission took the view that the focus of the entrapment defense should be on whether there has been a governmental impropriety, really. It should be treated in the same fashion as a coerced confession. The question really is not whether the particular offender or defendant is guilty or innocent. Once you find that there is a coerced confession or conduct amounting to an objectionable entrapment, that is enough.

S. 1400 and S. 1 both in one way or another lean toward the other view, that you should take into account and allow as a way the Government can avoid the entrapment defense an investigation as to whether the defendant had a predisposition to commit the crime.

We favor the view taken by the Brown Commission for two reasons. First of all, we think and are persuaded by the working papers that in this instance the proper focus should be whether the government has been guilty of impropriety in the entrapment. The principal purpose of the defense is to discourage law enforcement officials from doing things like this. If it can be shown that they did do them, then the entrapment defense should operate without an exhaustive inquiry into the precise attitudes of the defendant.

The second reason why we favor that view is because once you get into the total question of the defendant's predisposition and whether he committed such crimes before, you tend to turn the trial into an evaluation of the defendant's attitudes and background and his guilt or innocence of other antisocial behavior, which we think is probably inappropriate. As the working papers also point out, to the extent that predisposition to commit that offense will avoid the entrapment defense, it encourages law enforcement officials to be lax in their approach to this kind of problem then you are dealing with someone that has committed crimes in the past. They figure that they can get away with entrapment in a situation like that because they can always say, well, oh, well, he has done it before.

The final point to which I would like to speak——

Mr. SUMMITT. I take it you do not consider predisposition as immaterial, but for policy reasons would eliminate it from consideration?

Mr. FALLS. We agree with the Brown Commission approach in saying that it should be considered immaterial because to make it material, first of all, leaves a loophole in the entrapment defense which diminishes the desired impact of discouraging improper conduct by law enforcement officials. And second, because it opens up a very difficult line of inquiry when you get into the question of whether there was or was not a predisposition.

So we would make it as a—well, the Brown Commission bill has language something like, that the entrapment would exist if a law enforcement official—and I cannot quote you exactly—had taken actions which might induce a person who had otherwise lawful inclinations to commit the crime. That is still a test that has nothing to do with this particular defendant. It is a question, looking at the law, it is an objective test.

It is a question of looking at the law, at what the law enforcement official did, to see if it is the kind of thing that might be expected to make a law abiding person to do something that was unlawful. The kind of thing that we probably think is undesirable is to make the availability of the defense turn on a particular inquiry as to the disposition of the particular defendant.

Mr. SUMMITT. As I understand the majority rule in the Supreme Court cases, it is really a meshing of the two, is it not? Don't they treat both predisposition and action of the law enforcement officer as material to a determination of whether this particular individual had been enticed into committing a crime that he otherwise would not have committed?

Mr. FALLS. I am not sure whether this will clarify the law or change it. Maybe Mr. Lawler will have some better feeling on that.

As I said, one reason for codifying this defense is that there is some difference of views in the cases and there are cases that sometimes emphasize the predisposition and sometimes look at it the other way. This may affect a change in the law.

Mr. SUMMITT. As I understand the provisions in S. 1400 and perhaps S. 1 also, they are mainly directed at codifying the Supreme Court majority opinions in this area.

Is that accurate?

Mr. FALLS. I am not certain. I do not disagree with you. All I am saying, as a matter of policy we were persuaded by the idea that whatever the courts have said, predisposition of the particular defendant ought not to be a factor.

Mr. SUMMITT. Would some of your problem be solved if you made it a pretrial determination by the judge as a matter of law, so that he could inquire into both sides?

Mr. FALLS. I think that would be preferable. I do think that would be preferable. That would help to meet the problem of the kind of inquiry one has to get into to determine whether predisposition exists.

It would not meet the point—and this is really a flatout question of policy—How important is it to dissuade law enforcement officials from engaging in entrapment?



If you think that is of overriding importance, as for example, the importance of dissuading law enforcement officials from coercing confessions, then you would say, I suppose, let us just make it a defense and not let the judge or the jury inquire into whether there was a predisposition. I think it is a question as to how important that is.

Mr. SUMMITT. There are two values here. The law enforcement officer's job is also to solve crimes and to use effective, as well as appropriate, methods to do so.

Mr. FALLS. None of these questions are easy.

Mr. SUMMITT. If we are always critical of the law enforcement officer sometimes we lose sight of the fact that you are dealing with some serious criminals too, such as heroin pushers.

Mr. FALLS. As I say, these are value judgments. To the extent that you have a very broad entrapment defense, some people will go free who ought not to have gone free. That is the kind of balancing that we are constantly doing.

Mr. SUMMITT. Thank you.

Mr. FALLS. The other matter I want to comment on is on the matter of conspiracy. We have a number of comments in our report on this.

The commission bill, the Brown Commission bill, would have eliminated the so-called Pinkerton rule that a party to a conspiracy is guilty of all crimes committed by any other party to the conspiracy which are reasonably foreseeable. S. 1 does not contain any specific provision on the point. S. 1400 codifies the Pinkerton rule.

As we indicated in the previous report, we agree with the approach of the Brown Commission in abolishing the Pinkerton rule. We think that it sweeps too widely in making people responsible for crimes where they do not have the kind or degree of culpability which we think they ought to have in order to be held responsible for those crimes.

Second, in our original report, we urged that the present law be changed by narrowing the conspiracy, the offense of conspiracy, in another way. None of the bills, neither the Brown Commission bill or S. 1 or S. 1400, has adopted the suggestion and we reiterate it.

The kind of language that we suggested that we thought ought to be incorporated would require for a person to be guilty of the crime of conspiracy that he take or commit himself to take some significant act in furtherance of a conspiracy, that it not be enough that merely he is a part of a conspiratorial group and that somebody takes an overt act, but that he either takes or commits himself to take a significant step. Again, it is a question of the kind and degree of culpability that ought to be necessary to punish a person for what can be a very serious crime.

That finishes the comments I have. Mr. Lawler is prepared to comment on the provisions which define the various substantive offenses. I have gone through what were chapters 1 through 7 and 10 of the Brown Commission bill, and Mr. Lawler will direct himself to sections 11 through 18, I believe, again hitting just some of the more significant points.

Mr. LAWLER. As stated by Mr. Falls, the committee has attempted a section by section analysis of the proposed bills, and the existing law in our written report, which is a rather lengthy report. We have at times expressed a preference for one or another section of the various

proposed bills, and at other times we have merely indicated problems which we think exist in the entire area.

Unfortunately, this type of comparative analysis of four different sections does not lend itself very easily to an oral presentation. I know that during the committee meetings when a subcommittee would report on a particular section and they would attempt to indicate the distinctions between the various bills, it was very difficult to follow at times unless you had the three bills open before you and you could compare the language of the various bills. So that in dealing with these chapters, that is, 11 through 18, we would rely primarily upon our written report.

I will pick out certain sections which the committee feels, or that I feel, deserve some additional comment.

In chapter 11 itself, I would direct myself first to the section on treason. The committee has expressed a preference for the Brown bill. We have expressed that preference because the Brown bill limits itself more than the other bills, and it limits the offense of treason by applying only to nationals of the United States; second, to times when the United States is engaged in international war; and third, to participation in or facilitation of military activity to aid the enemy or to obstruct the victory of the United States. We feel that that particular language is preferable to the language chosen by the other sections.

But within even the Brown bill we would strongly recommend that there be a statutory definition of the term war. It is a term that is used within those sections, and we think that in applying the section for treason in a criminal trial, in light of the serious penalties involved, a statutory definition of the term war would be quite helpful.

Next, in dealing——

Mr. SUMMITT. Excuse me.

Do you have any suggestions as to what the content of that definition might be?

Mr. LAWLER. We have not suggested a particular definition. It was discussed at a committee meeting, and it was clear that we were going to have some difficulty in defining the exact concept of war.

Mr. SUMMITT. Previously in relation to something else you suggested that, because the area was so complex it could not be logically codified, we should therefore leave it undefined and let the courts give it content on a case-by-case basis.

Why does not that same principle apply here?

Mr. LAWLER. I believe in the past we pointed out various considerations which should be taken into account in defining a term such as war. And perhaps the end result will be that you will find that it is so difficult that is it going to have to be defined by the courts.

I will acknowledge a certain—I would not say inconsistency, but in Mr. Falls' remarks he has suggested leaving to the courts certain areas rather than attempting to codify. Here we are indicating that a statutory definition would be helpful.

I think that the main reason for the suggestion was that, because of severe penalties that we are dealing with in the section on treason, that the Code should define exactly what is meant by war in dealing with this section. We do not have a proposed definition; perhaps we can address ourselves to that problem.



Mr. SUMMITT. I wonder if the culpability standard for the defense would not help you. If you had to "know" that the conduct was engaged in in a time of "war," and if the Government had to prove that knowledge, would not that solve your problem?

Mr. LAWLER. It would certainly resolve one of the main objections.

I think what the committee had in mind were various situtations that have existed within the last 10 years where there has been conflict but there has been no declared war and the chances of that type of situation repeating itself again.

With respect to the equivalent of the Smith Act, that is the advocacy of insurrection, the committee was disturbed by the language chosen by S. 1400, which proscribes, among other things, incitement of conduct which then or at some future time would facilitate the overthrow of the United States.

This language appears to be designed to dilute the test of clear and present danger test that is contained in various cases. We do not approve of the language of S. 1400, and we consider it of dubious constitutionality, to the extent that it may affect those existing cases.

Mr. MARVIN. If the clear and present danger test were of clear constitutional dimension, would it not be read into the statute anyway?

Mr. LAWLER. If it were, then, it might result in the unconstitutionality of a section that tries to dilute that standard. If we acknowledge that as the prevailing standard, to pass a section that contains language that would attempt to change it would be ineffective.

This is an area in which the committee has some rather strong feelings, areas of free speech and legitimate advocacy. We think within these particular sections the language should be very carefully drafted so that criminal statutes do not limit or chill the right of free speech of various individuals.

Again within this same section, the working papers of the Brown Commission have suggested that an attempt to commit advocacy would not be a crime unless a substantive offense of prohibited advocacy actually occurred. To that extent, S. 1, we feel, is preferable because it eliminates attempts or solicitation within these particular sections.

We have concluded our analysis of this particular section by indicating that we feel that the Brown Commission bill and the S. 1 version are preferable to the S. 1400 section, but again urge that careful consideration be given to the wording of any section which deals with making criminal any type of advocacy.

In dealing with the section on the misuse of national defense and classified information, specifically that section that deals with disclosing classified information, it is our conclusion that the language contained in S. 1 is more carefully drafted and preferable to the other two sections. We have made a suggestion in this particular area that a defense of improper classification be added as an affirmative defense in this section. We are aware of the problems inherent in creating a defense of improper classification as it relates to needs and the legitimate concern of the Government to protect classified information, even at a public trial.

We think that any such defense or the language of it would have to be carefully drafted. However, we do feel that a defense of improper

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classification should be considered and should be passed to cover this particular section.

Mr. SUMMITT. Is that section 1124 in S. 1400?

Mr. LAWLER. I believe it is section 1122.

Mr. SUMMITT. Thank you.

Mr. LAWLER. Skipping to chapter 14 which deals with the Internal Revenue sections, the three proposed bills have reworded the language now contained in the tax evasion sections. Various commentators for tax reviews have indicated that the language of these sections might be interpreted by the court as weakening the standard that would have to be proven before someone might be convicted of tax evasion. Specifically, they indicated that the removal of the word "willfully" from those sections might be construed as creating a new standard.

We, therefore, have recommended that the term "willfully" be included in any section that deals with tax evasion.

In addition, the law, as it presently exists, requires that the Government must establish a substantial tax deficiency before a conviction for tax evasion would lie. Again, we would recommend that that particular standard be included in any tax evasion section. We think that there should be a requirement that a substantial tax deficiency exist before someone be convicted of a felony in the Federal court.

As to the punishment, we have previously indicated that we prefer one penalty for tax evasion. And to that extent, S. 1400 contains or follows that particular recommendation and creates or makes all tax evasions class D felonies, and we approve of that particular approach to penalties for tax evasion.

Mr. SUMMITT. The culpability standards defined in chapter 3 of this bill are limited to four terms.

How would you define "willfully" in this context?

What kind of content would you give to the word "willfully"?

Mr. LAWLER. I do not know if I can paraphrase it right now. Most of the criminal sections as they now exist include "willfully." There is a standard charge which is given by the court as to what "willfully" means. I think it would be our view that that standard charge be followed. And the committee would be glad to provide a definition of "willfully," if that would be of some help. But I think the standard definition of "willfully" would prevail.

Mr. SUMMITT. Maybe if you would submit a definition for us to look at.

Mr. MARVIN. You say a deficiency should be an element of the defense?

Mr. LAWLER. As the law presently exists, no tax conviction may result unless there is a showing of a substantial tax deficiency. That is an element now that the Government must establish at trial. We believe that that should be contained in any criminal section dealing with tax evasion, the requirement that there is a substantial tax deficiency.

Mr. MARVIN. Conceptually, isn't that approach inconsistent with the attempt provisions which would codify the law of attempt and would apply throughout the code? Under the law of attempt, a person is criminally liable if he intends to engage in certain prohibited conduct and does engage in some conduct but for one reason or another, fails to consummate the offense. Take an example in a tax fraud case.



Suppose the person intends to deprive the Government of certain tax moneys that he thinks he owes and files his return with that intent. However, he makes a mistake in failing to remember that he could have carried over certain losses or could have taken certain deductions. As a result, although he intended to defraud the Government and did everything he could to do so, there is, in fact, no tax deficiency.

My question is this: If he intended to defraud the Government in not paying taxes, but, in fact, he does not owe a deficiency, should he nevertheless be subject to conviction for attempt to evade taxes?

Mr. LAWLER. We think that would be covered by other sections; that is a false statement in a return is also a crime. It can be covered in that type of section.

For a tax evasion conviction itself, we think there should be a substantial tax deficiency. Other than that, it can be handled in different sections with, perhaps, different penalties.

Turning to chapter 16——

Mr. FALLS. I might point out in that, as I read in S. 1, you see in the tax evasion provision which is graded from a class B to a class D felony, that would require that there be due and owing a substantial tax liability. But disregarding a tax obligation, which is a class D felony, does not have that element.

Mr. LAWLER. In chapter 16, dealing with kidnaping, both S. 1400 and S. 1 contain an additional grade of crime. That is, they distinguish between a kidnaping where the victim is released alive but with serious injury from a kidnaping where a victim is released unharmed. We think that is a helpful distinction, and we approve of the inclusion of the additional grade within both of those sections.

Also, with respect to jurisdiction, S. 1, unlike the other two drafts, provides for Federal jurisdiction over kidnaping where the mails are used in furtherance of the crime. We approve of the broadening base for the jurisdiction of kidnaping. We suggest in our report the inclusion in the kidnaping section of language similar to that presently contained in the security sections for giving Federal jurisdiction over kidnaping. That is language equivalent to, "by the use of any means or instrumentalities of transportation or communication in interstate commerce, or by use of the mail."

In other words, we think that the crime of kidnaping, which is clearly a serious one, should contain within it the broadest possible jurisdictional base, because we think there is an overriding consideration for allowing the Federal Government, for investigative purposes, and also for prosecution, to become involved in kidnaping.

Again, we approve of the approach of S. 1, and we suggest even going beyond the terms of S. 1 for providing a broad jurisdictional base for the crime of kidnaping.

Mr. SUMMITT. The time limit for the FBI getting into the case is not sufficient to cover that?

Mr. LAWLER. The time limit for the FBI, as I understand it, merely relates to getting them into the investigation. There really is no logical basis for the 24- or 48-hour rule. There is no reason for it. If the FBI is going to get involved, it seems to me they should get involved immediately. If broadening the jurisdictional base would do that, we are in favor of it.

With respect to chapter 17, the mail fraud provisions, both S. 1 and S. 1400 enlarge upon the Brown Commission bill as far as the type of conduct which is covered by mail fraud. We approve of that. We were critical of the Commission bill because we thought that it unduly restricted the concept of mail fraud to larceny.

Members of the committee have found that the mail fraud section has been very helpful as far as protecting consumers and allowing law enforcement officials to become involved in various situations.

Of the two sections, the committee has found that S. 1 is preferable because by its terms it covers one who either devises or engages in a scheme of fraud, whereas S. 1400 only seems to cover one who has actually devised the scheme.

In addition, from a practical point of view, we approve of the concept that multiple mailings may be handled as a single offense. As it is presently handled now in the Federal courts, each separate mailing constitutes a separate offense, and that allows for multicount indictments, which sometimes may be useful for the Federal Government. As a practical matter, it really makes no sense. Generally, it is one scheme, and a certain number of letters are sent out. We approve of the concept of handling that as a single offense rather than as multiple offenses with various mailings.

Again, in section 17, addressing myself to the theft of records sections, which deal not only with theft but with receiving stolen property, we have found in our analysis of the sections that the definitions of theft and property are very broad. As an example, S. 1400 defines property as including intellectual property and information.

One of the ways in which it would appear that this particular section can be used as it is presently constituted would be in the prosecution of newspapers or reporters receiving papers or intellectual property or information. We are concerned that this particular section in the theft section be used as a form of censorship or that it have chilling effect on the publication of various documents. We consider this to be a very sensitive area, and we question whether this particular subject—that is, the possible prosecution of reporters or newspapers for receipt or publication of various documents—should be handled simply within the theft sections, or whether they be contained in other sections which really devote themselves to the sensitive nature of this type of problem.

In chapter 18, we have previously taken policy positions with respect to various criminal sections contained therein, and we have reviewed both S. 1 and S. 1400, and we adhere to our conclusions reached in the original report.

That is, with respect to firearms, we support the Commission majority in the view that Congress should ban the production and possession of or trafficking in handguns, with certain exceptions. And we also question the wisdom of including Federal gambling sections and sections dealing with prostitution.

With respect to gambling, I should state I was a member of the minority position which stated that as long as there were going to be State gambling sections, it seemed to make sense that the Federal Government assist the States in the enforcement of those laws. I say that in the anticipation of some question on the subject.

Those generally would be the comments that we would have with respect to chapters 11 through 18.



If there are any additional questions, or if it is felt that we might be helpful in submitting some additional documents or analysis, obviously, we will be happy to do so.

Mr. FALLS. I would like to conclude then with a few comments on the sentencing provisions. I will be brief.

In general, we approve of the efforts of all three bills to bring uniformity to sentencing structure. We approve of the classification of offenses by grade and the effort made to make more consistent and to level out the sentencing limit.

We do have some criticisms, however, of some of the provisions in the sentencing area. First of all, we believe that the recent trend toward liberal use of probationary sentencing or the granting of parole is commendable. Enough is now known about the ineffectiveness and sometimes the counterproductiveness of incarceration to conclude that out-of-prison efforts to direct and correct offenders should be encouraged. For this reason, we prefer the Brown Commission approach in this area, because the Commission, in effect, in its bill created a preference for dispositions that did not involve a prison sentence. It established a series of findings that should be made in order for there to be a prison sentence imposed.

S. 1400 goes the other way. It creates a presumption in favor of imprisonment and says that there should be probation only if certain requirements are met. And S. 1 sort of stands in the middle by saying that certain things should be taken into account but without seeming to create a predisposition either way.

The intent of the Brown Commission bill that was indicated, I think, in the working papers or in the comment was to discourage the automatic imposition of prison sentences and to require that the court really mandate or provide for a prison sentence after concluding that it was the necessary and appropriate thing to do. We believe that the approach taken in the Brown Commission bill is better, and we would recommend that it be adopted.

We think that all three bills fail to do something that badly needs doing in the probation and parole fields. This may be something more appropriately done in the Federal Rules of Criminal Procedure, and it is something that, in act, may be under study in that connection. But we think that the procedures and processes of probation a... parole should be systematized and should be defined.

We think that some kind of minimum due process standard should be employed, including the right to counsel, the right to a hearing, and an appellate view in areas of this kind, in view of the importance of the decisions that are made in that area.

The next point; we disapprove of the provisions for mandatory minimum sentencing in S. 1400. There are no comparable provisions in the Brown Commission bill or in S. 1. This is something that is discussed, we think, rather effectively in the working papers at pages 1251 to 1258.

It is there pointed out that the idea of mandatory minimums has been much criticized by the American Bar Association, the American Law Institute, judges and prosecutors, on the basis that it takes away from the court, and the prosecutor for that matter, the discretion that they think appropriate in connection with probation and parole. Beyond that, madatory minimums have historically been subverted or circumvented merely by having the prosecutor use a different charge

to which the mandatory minimum is not applicable, sometimes by subterfuge and sometimes by charging a crime of which the defendant is not guilty.

The next point, and this is something on which, obviously, books could be written, or one could speak for a long time, which I do not propose to do—we oppose the death penalty. And we, therefore approve of the position taken in the Brown Commission bill and disapprove of the positions taken in S. 1 and S. 1400.

We took this position in our original report. As I say, books can be and have been written on this subject. I would like to make two points.

First of all, we have seen no persuasive evidence to support the proposition that the death penalty has been an effective deterrent, particularly when we recognize that many of the crimes for which it has been imposed are of a kind which are essentially not deterrable, crimes committed in moments of passion, illness or the like. And we have seen no evidence that persuades us that the moratorium over the past 7 years has provided any basis for changing that conclusion.

This lack of any firm evidence to support the deterrent effect of the death penalty, in the light of, we think, the apt characterizations in the *Furman* case, for example, as to the impact of the death penalty, I think Justice Brennan described it as uniquely degrading to human dignity; Justice Stewart, that it is the degradation of all that is in our concept of humanity, it is the kind of thing that is an emotional issue and so on. Our judgment is that there should be no death penalty.

We think that there is serious question whether any of these three bills would meet the standards of the Supreme Court in *Furman* v. *Georgia*. Those standards are obviously difficult to distill from the many opinions in that case, apart from the opinions of the judges that thought that it should be in all events and all instances unconstitutional. The opinions of the other judges that went to make up the majority have been and can be read as indicating that any situation in which there is discretionary imposition of the death penalty is unconstitutional.

While all three of these bills to a greater or a lesser extent try to lay down guidelines to make clear the circumstances in which the death penalty will be imposed, it appears to be a virtually impossible task. And each of them leaves considerable room for the application of standards that are inherently vague. So we think that none of them is likely to meet the test of *Furman* v. *Georgia*, and there is serious question whether any bill, any workable bill, can be drafted which would meet the standards of *Furman* v. *Georgia*, just because it is so difficult to identify in advance by a clear definition a set of circumstances in which the death penalty will always be appropriate.

The final comment is with respect to appellate review of sentencing. We think there should be appellate review of sentencing. The Brown Commission bill proposed such a provision but did not detail the supporting provisions which would make appellate review meaningful.

We think in order for appellate review to be effective that there should be a requirement of a statement by the sentencing court of the bases and reasons for the sentence. Without that, the appellate review cannot be effective.



S. 1400 has no provision for appellate review of sentencing, and S. 1 provides for appellate review only in very limited circumstances. Indeed, the provisions are susceptible of the interpretation that it really did not intend to broaden the scope of appellate review much beyond what the courts have already been willing to do. So that we would urge that there be appellate review of sentencing and that it be implemented by provisions concerning findings in support of the sentence that would make review effective.

Mr. SUMMITT. Would you have some provision in the scheme of an appellate review of sentencing for the Government to appeal an inadequate sentence?

Mr. FALLS. That is not something on which the committee as a whole has made a recommendation. We do not think—this is a related question; it is not directly responsive. We do not think that when the defendant appeals on the sentence that the court should be free to award a heavier sentence, because we think that would deter such appeals.

Frankly, I do not think that we have really come to a conclusion as to whether the Government should be able to appeal an inadequate sentence. But we would be happy if you would want to request a comment on that, we would be happy to consider it.

As we did when we appeared last time, we are happy to respond if we can to any question you would like to address to us. That was done when we appeared here before, and we did respond on several particular points that were raised.

Mr. SUMMITT. This point has come up before in the hearings on sentencing review as to whether the Government should have the right to appeal.

Mr. FALLS. I know it has been discussed.

Mr. SUMMITT. What standard would you apply for appellate review of sentencing?

Mr. FALLS. Inevitably, it cannot be terribly precise. S. 1 uses as a basis for reviewing a sentence abuse of discretion. That, as it has been used in cases, has been given a narrow meaning and has given so little review on appeal that we would feel that it would amount to no review at all.

I suppose what one must do is pick a phrase which would indicate that you are mandating to the appellate courts that they do more than they have done in the past. But I do not think that it can be awfully precise because I suppose the objective is that across the country and in whatever court that you will apply more or less the same sentence for the same offense in the same circumstances, and I think that it has to be a fairly general mandate that will enable the courts of appeals to try to introduce uniformity.

Mr. SUMMITT. You would go further than just trying to correct the outrageous sentence.

Mr. FALLS. I would think so. Our feeling is it is important that there be a reasonable uniformity in applying the same sentence for the same offense in substantially the same circumstances.

The only way to do that, it seems to us, is to have some centralized look at the thing. As I say, I do not see how that can be done according to a very detailed set of specifications. I think there has

to be some leeway. I think it would have to be a fairly general kind of mandate in this particular instance.

Mr. SUMMITT. Could early eligibility for parole solve part of that problem?

Mr. FALLS. I do not know that it would solve the problem. You know, one of the reasons, I suppose, for consistent uniform sentences is to give people the feeling that justice is being done. I think that they get a good feeling that it is not being done, even if the situation is later corrected, if a man in one court is sentenced for 15 years and someone in the same circumstances in another court is sentenced to 5, even though the situation may ultimately be corrected by some action.

Mr. SUMMITT. In essence, a parole board may review the case after 6 months. That is a review of the sentence, in a sense.

Mr. FALLS. I agree with you that that diminishes the undesirable impact of inconsistent sentences. I do not think that it removes the problem. It helps.

Mr. LAWLER. I would think that substantial improvement would have to be made with the parole board, though, because no one is satisfied right now as to uniform standards being applied when individuals come up for parole.

The other problem, of course, is—it is probably not so much present—with the difference between a 10- or 20-year sentence where the individuals come up at the same time. It is probably more aggravated in a situation between a suspended sentence and someone who receives a 2½ or 3-year sentence, because just going to jail obviously disrupts family life as far as the ability of the individual to hold a job, et cetera.

That situation is the one that cannot be remedied by parole. That is the discrepancies between different districts and even within a single district, with the same situation resulting in a suspended sentence or 18 months in prison.

Mr. FALLS. I think that there is an example some years ago, when some fellow pled guilty to an antitrust offense out in the Midwest some place, for which no one was ever sent to jail. He was sent to jail and committed suicide.

This is the kind of thing we are discussing.

Well, that is all we have, unless you have some further questions.

Senator HRUSKA. This is a very comprehensive presentation, and we are grateful to you. Either in the analysis of the bill or in its writing or revision, one cannot consider any more than one section at a time, one page at a time. Of course, that process is going on now and the final drafting process is in progress.

It would be helpful in connection with your report here if you could furnish us with an index on it and perhaps number the pages.

Is there an index in the process of preparation?

Mr. FALLS. Our final committee report will have both an index and consecutively numbered pages. This will be furnished the subcommittee as soon as it is printed.

Senator HRUSKA. It would be very helpful and it will be used for the printed record if we receive it in time. [See p. 7692.]

Mr. FALLS. Surely.

Senator HRUSKA. Thank you very much for coming.



Did you appear before the Brown Commission?

Mr. FALLS. We were before the subcommittee.

Senator HRUSKA. This is your second go-around here then? I thought you also appeared before the Brown Commission, or submitted a statement.

Mr. FALLS. I do not think so.

Senator HRUSKA. The subcommittee will stand in recess, subject to the call of the Chair.

[The printed report of the Special Committee on the Proposed New Federal Criminal Code of the Association of the Bar of the City of New York, referred to above, follows:]

[Whereupon, at 11:30 a.m., the subcommittee recessed, subject to the call of the Chair.]

# The Association of the Bar of the City of New York

42 West 44th Street
New York, N.Y. 10036

## THREE VERSIONS OF A PROPOSED NEW FEDERAL CRIMINAL CODE

(Brown Commission Bill; S.1; and S.1400)

*By*

The Special Committee on the Proposed
New Federal Criminal Code

July, 1974



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# THREE VERSIONS OF A PROPOSED NEW FEDERAL CRIMINAL CODE

(Brown Commission Bill; S.1; and S.1400)

In May 1972 this Committee published a 96-page report entitled "The New Criminal Code Proposed by the National Commission on Reform of Federal Criminal Laws."* Since that time two additional legislative versions of the proposed code have been introduced, S.1, 93d Cong., 1st Sess. (1973), introduced by Senators McClellan, Ervin and Hruska of the Subcommittee on Criminal Laws & Procedures of the Senate Judiciary Committee, and S.1400, 93d Cong., 1st Sess. (1973), introduced by Senator Hruska and others at the request of the Department of Justice. H.R. 6046, 93d Cong., 1st Sess. (1973) is identical to S.1400, and H.R. 10047, 93d Cong., 1st Sess. (1973) is the same as the original proposal of the National Commission, chaired by former Governor Edmund Brown of California.

This report analyzes the three proposals in the light of our earlier report (cited as "Report"), to which extensive reference will be made to avoid repetition. The three proposals will be referred to as S.1, S.1400 and "Brown Commission" or "C." Chapter numbers utilized in the headings of this report follow those of the Brown Commission bill.

In many respects our earlier criticisms of the Brown Commission report have been taken into account by the Subcommittee staff in its preparation of S.1 and by the Department of Justice in S.1400. For the reasons which follow, however, we believe that further revisions of each of the three bills are necessary before they would be ready for enactment into law. We urge that in further study of the three bills an effort be made to combine the best features of each, and that, where all three bills are defective, those defects be corrected.

* For other Association comment, see Special Committee on Consumer Affairs, "The Proposed New Federal Criminal Code and Consumer Protection," 27 Record of The Ass'n of the Bar of the City of New York 324 (May 1972), also in "Reform of the Federal Criminal Laws," Hearing before the Subcommittee on Criminal Laws & Procedures, Senate Judiciary Committee, 92d Cong., 2d Sess., part III, subpart B (March 1972) at 1827-28.





## Chapters 1 and 2

## PRELIMINARY PROVISIONS AND FEDERAL PENAL JURISDICTION

*General Purposes*

S.1 §1-1A2 and §1-1A3 contain a statement of the general purposes and rule of construction for the Code. These provisions shorten and simplify the statement of general purposes as contained in C. §102, which is probably to the good. The emphasis in these provisions of S.1 on the necessity of "giving due notice of the offenses," on the "fundamental principle" that no one should be subject to punishment "unless his conduct was prohibited by law," and on the mandate that the Code be construed "according to the fair import of its terms" will presumably insure that only conduct which is clearly prohibited by the language of the statute will be punished, whether that objective is achieved by reference to a doctrine of "strict construction" or otherwise. (cf. Report pp. 6-7).

The only quarrel one might have with the statement of general purposes in S.1 is the suggestion that the Code "aims at the articulation of the nation's fundamental system of public values and its vindication through the imposition of merited punishment." (§1-1A2). It is perhaps too grandiose to suggest that a code directed at defining only those kinds of conduct which merit criminal punishment is an articulation of "the nation's fundamental system of public values." Moreover, the suggestion that the Code's objective is the vindication of those values through punishment perhaps emphasizes too much a doctrinaire implementation of society's desire for vengeance at the expense of a pragmatic approach to the discouragement and prevention of antisocial behavior.

Turning to S.1400, the statement of general purposes contained in §102 of that bill seems unobjectionable, and appears to us to be a somewhat better statement than that contained in §1-1A2 of S.1.

*Burden of Proof and Presumptions*

We note with satisfaction that the effort contained in C. §103 to define burden of proof and the effects of presumptions has been abandoned in both S.1 and S.1400. (See Report pp. 7-8). As we noted in our original report, we found the Brown Commission provisions on these subjects confusing in many respects.

*Principles of Construction*

As has been noted, S.1 §1-1A3 defines briefly the rule of construction to be followed in applying the principles of the Code. It has no precise counterpart in the Brown Commission bill. It states simply the concept that no one should be found guilty and subjected to punishment "unless his conduct and its accompanying culpability was prohibited by law" and provides "the code shall be construed in the light of this principle as a whole according to the fair import of its terms to achieve its general purposes." We find this provision unobjectionable except that the phrase "as a whole" seems misplaced and should probably follow the words "should be construed."

The provisions of §103 of S.1400 relating to the principles of construction to be followed in applying the Code are more complicated and less satisfactory. Thus, the last sentence of S.1400 §103(a) reads as follows:

> "Except to the extent necessary to assure fair notice of the conduct constituting an offense, the rule of strict construction does not apply to this title."

We do not believe that the courts' utilization of the principle of strict construction has in the past produced undesirable results and we disapprove this provision. We believe further that the sentence quoted above may cause considerable confusion since the courts may be in doubt as to just how far it was intended that the rule of strict construction be preserved. The quoted sentence





indicates that it is not to be entirely abrogated. Just what change in existing law is intended is far from clear.

*General Definitions*

The general definitions of S.1, incorporated in §1-1A4, differ in significant ways from the definitions in the Brown Commission bill.

First, the definitions of the principal bases of federal jurisdiction, which had been set out in C. §201 have now been included among the general definitions. This seems appropriate. The additional jurisdictional bases set out in S.1 also seem appropriate for the most part. Thus, S.1 §1-1A4 (25) broadens the "federal public servant jurisdiction" to include situations in which the federal public servant is "victimized because of his official duties" as well as situations where, at the time of the offense, he is engaged in the performance of those duties.

There seems to be an oversight in that S.1 §1-1A4 (26) defines "felony" as an offense for which a sentence of imprisonment for one year or more is authorized, whereas S.1 §1-1A4 (46) defines "misdemeanor" as an offense for which a sentence to a term in excess of 30 days but not in excess of six months is authorized, thus leaving a gap between the two definitions.

S.1 §1-1A4 (27) and S.1 §1-1A4 (28) define in what seems to be an appropriate way a "financial institution jurisdiction."

S.1 §1-1A4 (58) defines a "receiving Federal financial assistance" jurisdiction. We have two comments with respect to that provision. First, there appears nowhere in the bill any definition of the phrase "Federal financial assistance." In view of the many and varied activities of the Federal government which might be thought to constitute "Federal financial assistance," we think that, if there is to be such a base of jurisdiction, that phrase should be defined. For example, if an organization is receiving a tax exemption, is it receiving "Federal financial assistance?" Second, it appears that the only offenses as to which the base of jurisdiction is

made applicable are arson, malicious mischief and related offenses in which an explosive or destructive device is used (see Subchapter B of Chapter 8). It is the apparent objective to permit the Federal government to become involved whenever an explosion or similar catastrophic occurrence might conceivably relate to, or express hostility toward some Federal program, although this is not an element of the offense or a part of the jurisdictional base. Indeed, so long as the offense involves "a government receiving Federal financial assistance," as all State and local governments do, Federal jurisdiction exists even though the offense is wholly unrelated to any Federal program. Presumably every throwing of a cherry bomb in a school washroom would become a Federal crime. We believe that the sweep of this jurisdictional provision is too wide.

Certain of the other definitions in S.1 present problems. Thus, S.1 §1-1A4 (12) defines the commerce jurisdiction of the United States to include an offense where "the property which is a subject of the offense is moved or is moving in interstate or foreign commerce . . ." The corresponding provision in the Brown Commission bill made subject to federal jurisdiction offenses in which "the property which is the subject of the offense is moving in interstate or foreign commerce or constitutes or is part of an interstate or foreign shipment . . ." (C. §201(i)) S.1 might be read to apply to an offense involving property if that property ever moves or has moved in interstate or foreign commerce. Moreover, the language of C. §201(i) more clearly applies to an interstate shipment which happens to be at rest at the moment of the offense. We believe that a more precise definition than that embodied in S.1 is desirable and that the provision of the Brown Commission bill is preferable.

We also have some difficulty with the definition of "force" contained in S.1 §1-1A4 (30). This provision of the bill defines force to include "physical action, threat, or menace against another . . ." The inclusion of "threat" and "menace" in this definition does not seem well articulated with some of the other provisions of S.1.





Thus, S.1 §2-8D1(a) defines armed robbery in terms of taking property of another "from the person or the immediate presence of another" and using "force *or threat of causing immediate bodily injury* . . ." This obviously makes no sense if "force" already includes a "threat . . . against another." The same problem exists in S.1 §2-8D2, defining robbery.

This definition also has a questionable effect in combination with the provisions of S.1 §§1-3C4(a) and 1-3C4(b), defining self-defense, and defense of others. S.1 §1-3C4(a), for example, allows a person to "defend himself against immediate and unreasonable use of force by another person." Was this intended to allow the defense where there is only an "immediate and unreasonable use" of a "threat"? The definition of "force" would have that effect.

Defining force to include a "threat" also leads to a confusing definition of "deadly force" in S.1 §1-1A4 (21). In the last sentence of that definition it is provided that:

> "A threat to cause death or serious bodily injury does not constitute deadly force, so long as the person's intent is limited to creating an apprehension that he will use deadly force if necessary . . . ."

It may be very difficult to draw the line between a threat whose intent is limited to creating an apprehension that deadly force will be used "if necessary" and a threat intended to produce some other apprehension.

We believe it would be better not to include "threat" and "menace" in the definition of "force" but rather to refer specifically to "threat" in the substantive provision where such a reference is appropriate.

The separate definition of "deadly force" quoted above is, in any event, apparently unnecessary. So far as we can discover, the term is not used anywhere in the bill, although it had been used in earlier drafts. We believe that the degrees of force are



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adequately dealt with by the definitions of the various circumstances in which the use of force is justifiable contained in S.1 §1-3C4(a)-(e). Presumably the nature and degree of force used is one of the things to be considered in determining whether the defendant's conduct is "reasonable" and "necessary", and the force "proportionate" as these terms are used in subparagraphs (a)-(e).

Some of the provisions of S.1 §1-3C4 justifying the use of force go beyond the provisions of prior drafts, and, in our view, are too permissive in some areas in allowing force to be used. For example, unlike the Brown Commission bill, S.1 §1-3C4(c) would extend to the defense of property the provision that excessive force is justified when the defendant is in a state of consternation, fear, or fright. We think such a provision appropriate when death or bodily injury are threatened, but not when only property is at stake. We continue to believe that it is best not to try to codify these defenses.

Similarly, we believe that S.1 §1-3C4(d) may go too far in protecting the use of excessive force by private vigilantes when it allows the use of excessive force resulting from consternation when the defendant is attempting to prevent or terminate criminal conduct.

Indeed, the phrase "excessive force" is itself objectionable. We believe that the phrase "more than proportionate force" would be better.

The use of the "consternation, fear or fright language" is also of doubtful propriety in S.1 §1-3C4(e) where it would apparently allow, among other things, the use of excessive force by a consternated doctor or guardian, without any other limitation. Indeed, this provision is at least defective in apparently allowing the use of force by a doctor without reference to whether he is dealing with a medical problem or situation.

We note that the provisions relating to corporate criminal responsibility which appeared in C. §402 have been substantially





revised and now appear in S.1 §1-2A7. As revised, those provisions are substantially in accord with our recommendations.

We are unclear, however, as to the function of S.1 §1-2A7(a)(2) since everything included in that subdivision appears also to be included in S.1 §1-2A7(a)(1).

The definitions contained in §111 of S.1400 differ in many respects in their language from those of S.1, and each of the bills defines some terms that the other does not.

In most respects we do not regard the differences between the definitions in the two bills as of great importance. There are, however, a few as to which we believe some comment appropriate.

We note that, unlike S.1, S.1400 contains a definition of "affirmative defense." We believe that such a definition is desirable.

We also note that S.1400 defines "felony" as any offense for which imprisonment for a term of more than one year is authorized and a "misdemeanor" as an offense for which a term of imprisonment of one year or less, but more than five days, is authorized. As we have noted above, S.1 defines a misdemeanor to include an offense for which a term of imprisonment between thirty days and six months is authorized. We have already noted the apparent hiatus between the definitions of misdemeanor and felony in S.1 and believe that it should be corrected. We also believe, however, that an offense for which the authorized prison sentence is less than thirty days is not sufficiently serious to be classified as a misdemeanor and therefore prefer, in this respect, the provisions of S.1.

We will reserve our comments on the particular jurisdictional bases chosen for each substantive offense for that part of this report which deals with the substantive offenses. A few general observations, however, are appropriate.

S.1400 makes considerable use of "piggy-back" provisions of a kind which were included in the Brown Commission bill, but

which were omitted from S.1 (see *e.g.*, §1601(d)4 of S.1400). We believe that these piggy-back provisions are desirable in that they permit federal prosecution of offenses committed in connection with the perpetration of an offense as to which federal jurisdiction exists.

We believe that the "special aircraft jurisdiction" as defined in §203(d) of S.1400 may be too broadly defined insofar as it applies to any aircraft in flight, anywhere in the world, which is owned by a citizen of the United States or a corporation created under the laws of any state, or which is leased without crew to a lessee who has his principal place of business in the United States. Thus, a private plane owned, for example, by Standard Oil would fall within the federal jurisdiction if it were in flight anywhere. The provisions of S.1 do not go so far.

There are some differences between the provisions concerning extra-territorial jurisdiction contained in §204 of S.1400 and the corresponding provisions of S.1. For example, we believe that §204(c) contains better and more comprehensive language than its counterpart, §1-1A7 of S.1. Similarly, we believe that S.1400 §204(g) and (h) are preferable to S.1 §1-1A7(c). S.1 §1-1A7(c) provides for federal jurisdiction of an offense committed by a national of the United States anywhere (unless the conduct is lawful under the jurisdiction of the law where it occurs), whereas the provisions of S.1400 have a more limited reach.

We prefer the provisions of §205 of S.1400, to the effect that federal jurisdiction over an offense is not preemptive, to its counterpart, §1-1A6(g) of S.1, in that §205 makes it explicit that federal jurisdiction does not preempt court martial jurisdiction or the jurisdiction of Indian tribes, whereas §1-1A6(g) does not.





## Chapter 3

## BASIS OF CRIMINAL LIABILITY; CULPABILITY; CAUSATION

Chapter 3 of the Brown Commission bill dealt with the basis for criminal liability, culpability and causation. These subjects are dealt with in S.1, Part I, Chapter 2 and S.1400, Part I, Chapters 3 and 4. The provisions of S.1400 on these subjects appear to be better drafted and to be preferable to those of S.1.

S.1 §1-2A1 defines "culpability" to include action with criminal negligence, and then further provides that except otherwise stated, culpability is required with respect to each element of an offense. This means that the general standard is established that negligence is sufficient to establish criminal liability for any violation of the Code, except where otherwise specifically provided. Most of the provisions of S.1 do define a higher degree of culpability, but we do not believe that the general proposition should be that negligence is sufficient to merit criminal punishment other than where an exception is expressly set up. We prefer the approach of S.1400 §303 which requires intentional, knowing or reckless conduct for a felony or misdemeanor except where otherwise specified.

S.1 §1-2A1(c)(4) provides that, unless otherwise expressly stated, culpability is not required with respect to the legal result that conduct constitutes an offense or is prohibited by law "under an offense defined outside this Code." This is confusing because it is obviously not the intent of S.1 to require knowledge that conduct violates the law in regard to most of the crimes defined in the Code. We prefer the formulation of S.1400 §303(c) to the effect that "except as otherwise expressly provided, knowledge or other culpability is not required as to the fact that conduct is an offense or as to the existence, meaning, or application of the law determining the elements of an offense."

## Chapter 4

## COMPLICITY

The complicity requirements of S.1 §1-2A6 adopt entirely new language not contained in the existing 18 U.S.C. §2. We perceive no reason not to carry forward the existing language, which has worked well, as is done in S.1400 §401. Both S.1400 and §1-2A6 of S.1 make it clear that the fact that the defendant does not belong to a class capable of committing the crime directly, or that a person committing the crime directly had a defense, would not preclude prosecution. We endorse this result.

S.1 §1-2A7 and S.1400 §402 both seek to define the liability of an organization for the conduct of its agent. Similarly, S.1 §1-2A8 and S.1400 §403 seek to define the liability of an agent when acting for an organization. As we pointed out in our original report, we believe it would be preferable not to codify these matters but rather to leave them to case law development. (Report, pp. 11-14).

As between the provisions of S.1 §1-2A7 and S.1400 §402, we believe that S.1 is generally more satisfactory since the definition employed in S.1 §1-2A7(a)(1) is general enough to permit appropriate judicial development. S.1400 §402 might, on the other hand, lead to confusion or other undesirable consequences. For example, it is not at all clear that a corporation should be criminally responsible for an agent's conduct which is within his apparent authority but outside his actual authority (S.1400 §402(a)(1)(A)). Moreover, the reach of S.1400 §402(a)(1)(B), and the extent of its overlap with S.1400 §402(a)(1)(A) are unclear. On the other hand, S.1 §1-2A7(a)(2) seems to be completely included within S.1 §1-2A7(a)(1) and, if these provisions are adopted, should be omitted.

Both S.1 §1-2A8 and S.1400 §403 carry forward language which is objectionable on the grounds pointed out in our original report (Report, pp. 12-14).





## Chapters 5 and 6

## RESPONSIBILITY DEFENSES AND DEFENSES INVOLVING JUSTIFICATION

S.1400 deals with these defenses in Chapter 5. In our prior report and the Commission's proposed code, responsibility defenses were treated in Chapter 5 and justification defenses in Chapter 6.

### Responsibility Defenses

*Juveniles*

The Commission's proposed code and S.1 deal with the treatment of youthful offenders in §501 and §1-3B3, respectively. No corresponding section appears in S.1400. The committee approved §501 of the Commission's code and recommends that a similar provision be included in S.1400.

*Intoxication*

§503 of S.1400 appears to be an improvement over §502 of the Commission's code and §1-3C1 of S.1. §503 provides that intoxication is a defense in two situations: (1) when it is not self-induced and (2) when it caused the defendant to lack the state of mind required and the state of mind is knowledge or intent. This seems to us substantially in accord with present law and a sound result. S.1 would, in our view, broaden the defense of self-induced intoxication too far in allowing it whenever it negates any element of the offense.

*Insanity*

§502 of S.1400 provides for an insanity defense similar to the minority proposal of the Commission, which we approved. §502 provides that it is a defense if the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. The minority proposal of the Commission, §503, provided that mental disease or mental defect is a defense

if it negates the culpability required as an element of the offense charged. We regard these two formulations as being not significantly different.

§1-3C2 of S.1 adopts, in effect, the proposal of the American Law Institute, recently adopted by the Court of Appeals for the District Court of Columbia in *United States* v. *Brawner*, 471 F.2d 969 (D.C. Cir. 1972); the defendant is not responsible if as a result of mental disease or defect he lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Judge Bazelon concurring in part and dissenting in part, pointed out that this new test was not substantially different from the previous one set down by the Court of Appeals for the District of Columbia Circuit in its 1962 *en banc* decision in *McDonald* v. *United States*, 312 F.2d 851, and argued for an extremely broad test providing that the defendant is not responsible for criminal conduct if the defendant's capacity was so substantially impaired that he cannot justly be held responsible. The *Brawner* case was also decided by an *en banc* court and contains an exhaustive analysis of the problem.

For the reasons stated in our previous report, we approve §502 of S.1400. See also Committee on Federal Legislation, "The Dilemma of Mental Issues in Criminal Trials," 41 N.Y. State Bar J. 394 (Aug. 1969); 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 229-260 (1970); Goldstein & Katz, "Abolish the Insanity Defense — Why Not?," 72 Yale L.J. 853 (1963); Menninger, The Crime of Punishment 117-118 (1968).

### Defenses Involving Justification or Excuse

The remaining sections in Chapter 5 of S.1400 deal with: mistake of fact or law, §501 (1-3C6 of S.1); official misstatement of law, §532; duress, §511 (1-3C7 of S.1); public duty, §521 (1-3C3 of S.1); protection of persons and property, §§522, 523 and 524 (1-3C4 of S.1). Our prior report stated that these defenses are not appropriate for codification. We, therefore, recommended that





these provisions be eliminated and that it be made clear that the code does not attempt an inclusive codification of all available defenses. In our view, these defenses should be left for a case-by-case development. The provisions of S.1400 are substantially improved over the Commission's proposed code and S.1. They are more generally stated and easier to understand. We nevertheless adhere to our prior recommendation that these defenses not be codified.

We also note that S.1 §1-3A1(b) specifically provides that the defenses listed are not exclusive. S.1400 does not appear to contain such a provision and we believe that it should. See Report, p. 15.

With regard to duress, S.1400 §511 prohibits the defense in cases of treason, armed rebellion or insurrection, espionage and murder. S.1 §1-3C7(b)(1) precludes the defense only in cases of murder. We believe that S.1 is preferable. In view of the recent wave of kidnappings and alleged brainwashing of victims, there seems to be good reason to allow duress as a defense to the other offenses.

## Chapter 7

## TEMPORAL AND OTHER RESTRAINTS IN PROSECUTION

Chapter 7 of the Brown Commission bill contained nine sections covering generally the statute of limitations, double jeopardy, multiple related offenses and entrapment. Chapter 3 of S.1 is headed "Bars and Defenses to Criminal Liability" and encompasses much of what formerly appeared in Chapter 7. S.1 does not appear to contain any sections comparable to the sections on multiple related offenses and double jeopardy in the Brown Commission bill. S.1400 deals with limitations of time by amending the existing provisions of Chapter 13 of Title 18 (S.1400, §279(i)), and deals with entrapment in §531 of the proposed new Federal Criminal Code. It also omits the provisions of the Brown Commission bill relating to multiple related offenses and double jeopardy.

*Time Limitations*

Both S.1 and S.1400 appear to contemplate, as did the Brown Commission bill, that the statute of limitations is tolled when a complaint is filed, rather than when an indictment or information is filed. We approved this change in our original report (Report, p. 18) and do so now. We note that S.1400, in its amendment to Section 3281(e)(1) of Title 18 specifically provides that a prosecution is commenced on the filing of a complaint. S.1 does not appear to do so, and we regard this as a defect.

Both S.1 (§1-3B1(b)) and S.1400 (amended §3281(c) of Title 18), like the Brown Commission bill (C. §701(3)), provide that there shall be no time bar to a prosecution for murder. We approve this provision (see Report, p. 19). S.1400 adds to the crimes for which there is no time bar treason, sabotage and espionage when they constitute Class A felonies. The inclusion of these additional crimes in this category depends on policy judgments as to the seriousness of these crimes on which we express no opinion. We note with approval that neither S.1 nor S.1400 contains provisions, of the kind we criticized in the Brown Commission bill (Report, p. 19), which would provide for shortened periods of limitations if the defendant could make certain showings.

S.1400 adopts a general limitation period of five years for all offenses except those for which there is no limitation (amended §3281(b) of Title 18). S.1, on the other hand, provides a limitation of 10 years for Class A felonies, 5 years for any other crime, and 1 year for a violation. The pattern of S.1 is generally in accord with the recommendations in our original report (Report, pp. 18-19) and we prefer its provisions.

S.1 §1-3B1(d)(1) and (2) contain provisions not included in S.1400, which provide for an extension of the statute of limitations in situations involving fraud, breach of fiduciary obligation, or official misconduct by a public official. The extension is for one year beyond discovery of the fraud or two years after the public official leaves office. In each instance the maximum extension is three





years beyond the time when the statute would otherwise have expired. Situations involving fraud or official misconduct in office involve opportunities for concealment which seem to us to warrant those extensions and we therefore approve these provisions.

Both S.1 (§1-3B1(d)) and S.1400 (amended §3281(d) of Title 18) provide that, where a complaint, indictment or information is dismissed for an error or irregularity, an additional period is allowed for commencement of a new prosecution even though the period of limitation has expired. S.1400 allows an additional 3 months. S.1 allows an additional 6 months, or, if no regular grand jury is in session in the appropriate jurisdiction, an additional 6 months after the grand jury is convened. It seems to us that, particularly if a prosecution may be commenced by complaint, a fixed period of three months is enough.

Section 701 of the Brown Commission bill would have altered prior law by no longer tolling the statute of limitations while the defendant is a fugitive. As we noted in our original report (Report, p. 20), such tolling may be less necessary if the prosecution is begun, and the statute stopped running, by the filing of a complaint. S.1400 provides that the statute is tolled while the defendant conceals himself to avoid justice or is beyond the territorial limits of the United States (amended §3281(f) of Title 18). S.1 §1-3B1(e)(1) provides that the statute is tolled when the defendant is continuously absent from the United States or has "no reasonably ascertainable place of abode or work in the United States". Both the "to avoid justice" requirement and "no reasonably ascertainable place of abode or work" provisions may present substantial problems of proof. On balance, we prefer the approach of the Brown Commission bill.

S.1 §1-3B1(e)(2) would toll the statute "when a prosecution against the defendant for the same conduct has been commenced and is pending." We are unclear as to the policy behind this provision. It seems to us inappropriate to toll the statute generally with respect to prosecutions which might be brought because a

prosecution is pending. Moreover, serious problems may arise in determining whether "the same conduct" is involved in the prosecution which tolls the statute and in a prosecution later commenced.

Both S.1 (§1-3B1(g)(1)) and S.1400 (amended §3281(e)(2)(A) of Title 18) provide, in substantially similar language, that, if a prosecution is timely commenced as to a charge, it is timely commenced as to an offense included within that charge, with certain limitations. These provisions appear to us appropriate.

S.1 §1-3B1(g)(2) provides additionally that a prosecution is timely commenced as to an offense as to which a defendant enters a plea of guilty or *nolo contendere*. This would appear to complement the foregoing provision by facilitating a defendant's plea to a lesser offense as to which the statute has run where he is charged with a more serious offense as to which the statute has not run. It seems to us appropriate.

Existing law (18 U.S.C. § 3287) provides for the wartime suspension of the statute of limitations with respect to certain crimes relating to the war effort. S.1 §1-3B1(h) provides for a general wartime suspension of statutes of limitations as to all crimes. S.1400 omits any provision for a wartime suspension. We believe S.1400 to be preferable in this respect. Certainly there appears no warrant for a general suspension of statutes of limitations in wartime.

*Entrapment*

The Brown Commission bill proposed to codify the defense of entrapment (C. §702), which had previously been dealt with by judicial decision. It would have made entrapment an affirmative defense and prevented the government's defeating the defense by showing the defendant's propensity to commit the crime. In our original report we approved the proposed provision (Report, pp. 20-21).

S.1400 §531 makes entrapment a defense but appears to require the defendant to show that he had no predisposition to





commit the offense. This section would also require that defendant show that he committed the offense "solely" as a result of the inducement by a law enforcement officer or his agent. S.1 §1-3B2 makes entrapment a bar to prosecution and seems to straddle the predisposition question by providing that the methods used by the law enforcement officials must create a "substantial risk" that the conduct would be committed by persons not "ready to commit it" and providing further that "a risk is less substantial where a person has previously engaged in similarly prohibited conduct and such conduct is known to such officer as [sic] a person assisting him." We are persuaded by the Working Papers (Vol. 1, pp. 303-28) that the test of entrapment should be an objective one unrelated to the defendant's predispositions, intentions, or guilt. Moreover, the submission of proof on the question whether the defendant had "previously engaged in similarly prohibited conduct" would apparently extend the trial to include the defendant's guilt or innocence of one or more crimes other than the particular one charged. We prefer the formulation of the Brown Commission bill and disapprove the provisions of both S.1 and S.1400 in this respect.

## Chapter 10

## ATTEMPT, CONSPIRACY & SOLICITATION

*Criminal Attempt*

The applicable sections are:

C. §1001, S.1 §1-2A4 and S.1400 §1001.

Both S.1 and S.1400 define attempt in substantially the same manner as the Commission Bill. Both S.1 and S.1400, however, omit the requirement that the conduct "strongly" corroborate the actor's intent (Section 1-2A4(d) of S.1 and Section 1001(a) of S.1400). We question this revision as it tends to blur the distinction between mere preparation and attempt. We prefer the formu-

lation of the Brown Commission and reiterate our previous comments on it (Committee Report, pp. 23-24).

Both S.1 (Secs. 1-2A4(b) and S.1400 (Sec. 1001(b)) eliminate the defense of factual and legal impossibility as does the Brown Commission bill. We repeat our endorsement of this provision, which eliminates an illogical defense (Committee Report, p. 24).

S-1 contains a provision (Sec. 1-2A4(e)) not found in either the Brown Commission bill or S.1400 that attempts a partial definition of what constitutes a "substantial step" toward commission of the crime which is required to make one liable for an attempt. We question the wisdom of attempting to define "substantial step" because it should depend upon all the circumstances of the particular case, which could be infinitely various. For example, one could be guilty of attempt under (e)(4) merely because one entered a building one lawfully entered every day or under (e)(5) merely because one lawfully possessed a gun which had been in one's possession for years. Such circumstances should not, in many instances, be viewed as "substantial" steps.

Both S.1400 (Sec. 1001(c)) and S.1 (Sec. 1-2A4(f)) adopt the formula of Section 1001(3) of the Brown Commission Report with regard to the grading of offenses insofar as it provides that an attempt is a crime of the same degree as the substantive offense, except an attempt to commit a Class A felony is a Class B felony. Both S.1 and S.1400, however, go on to delete the provision of Section 1001(3) that provides that if the evidence at trial shows that the crime did not come "dangerously near" to completion, then the attempt will be a crime of one grade below the substantive offense.

We oppose the deletion and adhere to the recommendation we made with regard to the grading provisions of Section 1001(3) of the Commission Report which was that:

(a) The maximum for an attempt to commit a felony be approximately one-half the maximum for the substantive offense;





(b) An attempt to commit a misdemeanor be the same grade as the substantive offense; and

(c) There be no offense consisting of an attempt to commit an infraction (Report, pp. 25-6).

*Criminal Conspiracy*

The applicable sections are:

C. §1004, S.1 §1-2A5 and S.1400 §1002.

Both S.1 and S.1400 define the offense in essentially the same way as the final report of the Commission. We reiterate strongly the position we took regarding the Commission's formulation. The Committee holds the view that the present conspiracy law, which all three proposed bills essentially codify, is far too sweeping and that its scope should be reduced. We therefore recommend the formulation set forth at page 31 in our initial report.

Both S.1 (Sec. 1-2A5(c)) and S.1400 (Sec. 1002(c)), are substantially the same as Section 1004(4) of the Commission's bill and preclude various defenses such as those based upon the immunity, acquittal or irresponsibility of those with whom the defendant conspired. This provision has previously been approved by the Committee (Report, p. 32).

Paragraph 1-2A5(e) of S.1 defines the parties in the same manner as Commission Report, which we have previously approved (Report, p. 32).

Paragraph 1-2A5(f) of S.1 is new and we strongly disapprove of it. It defines the objectives of a conspiracy in such a way that a party would be liable for conspiracy to commit a serious crime if he "could reasonably expect" that one or more of his co-conspirators has agreed or will agree to participate in "reasonably related conduct" to the crime agreed to. This could result in a defendant being found guilty of conspiring to commit substantially

more serious crimes than he ever agreed would be committed. Such a result would expand the scope of the conspiracy law when the Committee believes its scope should be narrowed.

Paragraph 1-2A5(g) of S.1 provides that a conspiracy continues until all its objectives are either accomplished, frustrated or abandoned. There is no attempt as in Paragraph 1004(3) of the Commission bill or Section 1002(b) of S.1400, to determine whether measures for concealing the crime other than silence are to be considered part of its objectives. We believe such acts of concealment and obstruction of justice should not be considered part of its objectives for the reasons set forth in our previous comments on §1004(3) of the Commission's bill (Report, p. 32).

The Committee approves of the grading provisions of Section 1-2A5(h) of S.1 and which are in accordance with our recommendation on the Commission bill. Our recommendation was that conspiracy should be penalized equally with the most serious substantive offense which is the object of the conspiracy, except that a conspiracy to commit a Class A felony should be a Class B felony (Report, p. 32). We disapprove of the penalty provisions of S.1400 which provide excessive penalties for conspiracy to violate certain enumerated offenses.

Section 1004(5) of the Commission bill eliminates the "Pinkerton rule" that each co-conspirator is guilty of all substantive offenses committed by any other co-conspirator which are reasonably foreseeable and in furtherance of the objects of the conspiracy. S.1 contains no such provision and S.1400 specifically provides in Sections 1002(d) and 401(a)(3) for the retention of the "Pinkerton rule". We strongly adhere to our prior recommendation that elimination of the Pinkerton rule is "obviously desirable" (Report, p. 32), as the rule unfairly attaches liability for the substantive offense to individuals who have not committed the substantive offense or aided and abetted the commission of the substantive offense.





*Criminal Solicitation*

The applicable sections are:

C. §1003, S.1 §1-2A3, S.1400, §1003.

In our original report, we expressed criticism of a too broadly drawn solicitation offense (Report, pp. 29-30). Subject to those comments we make the following observations:

Section 1-2A3(a) of S.1 defines solicitation simply as a request, command or inducement, without any requirement that it be made under circumstances "strongly corroborative" of the intent that the crime be committed, and without any requirement that the person solicited commit any overt act in response thereto. In these two respects, it represents a departure from Section 1003 of the Commission bill. With regard to the previous requirement that the person solicited perform an overt act, we approve of this deletion for the reasons stated in our comment on Section 1003 (Report, p. 30). For the reasons also set forth in our comment to that section, we disapprove of the deletion of the requirement that circumstances be "strongly corroborative" of the defendant's intent (Report, p. 29).

Section 1003(a) of S.1400, which defines this offense, does require that solicitation be made under circumstances "strongly corroborative" of the intent that the crime be committed and omits the requirement of an overt act and is, therefore, in conformance with the Committee's recommendations. However, S.1400's provision is limited only to certain specified offenses. While its applicability to these offenses appears apt, there are other offenses, such as those involving official corruption, which are not included and are particularly appropriate for inclusion in such a list.

Section 1-2A3(c) of S-1 and Section 1003(b) of S.1400 are substantially identical to Section 1003(3) of the Commission bill and preclude defenses based on incapacity of the person solicited. We have previously approved this provision (Committee Report, p. 30). The sole difference is that S.1400 provides that the



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capacity of the person solicited may be relevant in determining the solicitor's intent. The Committee approves that position.

We should also note, however, that Section 1-2A4(d)(7) of S.1 would result in making one who solicits a minor or lunatic or other incompetent to commit an offense guilty of both an attempt and of a solicitation. Under common law, one would be guilty of attempt, but not solicitation, under such circumstances. The most logical solution to this conflict, we feel, is to provide guilt under the solicitation section as now provided, and to eliminate the conduct as a "substantial step" resulting in liability for attempt.

The grading provision of S.1 (Section 1-2A3(e)), contains the same provision as that contained in Section 1003 of the Commission bill that solicitation is an offense of the class next below that of the crime solicited. The grading provision of S.1400 (Section 1003(c) is the same except that solicitation of perjury (a Class D felony) is also a Class D felony.

For the same reasons set forth in our comment to Section 1003 (Report, p. 30), we disapproved of the grading provisions of S.1 and S.1400. We believe solicitation to commit a Class A felony should be a Class C felony, and a solicitation to commit any other felony should be a Class A misdemeanor. There should be no crime of solicitation to commit a misdemeanor or lesser offense.

*General Provisions*

Both S.1 and S.1400 agree with Section 1005(1) of the Brown Commission bill in that these offenses cannot be accumulated to produce attempts to conspire or to solicit, etc. The relevant provisions are Sections 1-2A3(b), 1-2A4(b) and 1-2A5(b) of S.1 and Section 1004(a) of S.1400. We reiterate our approval of these provisions as clearly desirable (Report, p. 33).

Section 1004(b) of S.1400 is in accord with Section 1005(2) of the Commission bill which assimilates the definition of attempts and conspiracies outside the chapter to the definition contained in the chapter. We reiterate our approval of that provision and our





suggestion that solicitation be added if the overt act requirement is eliminated (Report, p. 33).

Both S.1 and S.1400 have provisions regarding the defense of renunciation, which is set forth in Section 1005(3) of the Commission bill. The applicable provisions are Sections 1-2A3(d), 1-2A4(d) and 1-2A5(d) of S.1 and Section 1004(c) of S.1400. The renunciation provisions of S.1 are substantially the same as the Commission bill, with which we have previously expressed agreement (Report, p. 33). There is one change, however, of which we disapprove, relating to conspiracy. Section 1-2A5(d) provides that renunciation can only be accomplished by notifying a law enforcement officer. This seems to us to be unnecessary because the objects of the conspiracy could be totally frustrated under some circumstances without contacting the police. For example, if five men conspire to steal a certain painting, the crime could be prevented by warning the museum and causing them to move the painting and notifying one's fellow conspirators that this has been done. Under existing law, this would satisfy the defense of renunciation. We believe it should continue to do so.

The renunciation provision of S.1400 is substantially the same as the Commission bill insofar as it relates to attempt and solicitation. However, S.1400 contains no renunciation provision regarding conspiracy. The Committee sees no reason why the defense of renunciation should not be applicable to the crime of conspiracy and we, therefore, strongly disapprove of this omission.

## Chapter 11

## NATIONAL SECURITY

We will consider here only certain of the most troublesome provisions relating to national security in S.1 and S.1400 and the comparable provisions in the Brown Commission bill. The national security sections of the Brown Commission bill were covered in more detail in the Committee's original report at pp. 36-44.

*Treason*

S.1 §2-5B1 is similar to the present treason statute, 18 U.S.C. §2381, which in turn is based upon the following language of Art. III Section 3 of the Constitution:

> "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court."

Neither S.1 nor 18 U.S.C. §2381 expressly incorporates the two-witness rule of the Constitution. While the coverage of S.1 §2-5B1 is limited to "nationals" (rather than all persons "owing allegiance to the United States," as in current law) that term is defined in S.1 §2-5A1(a) to include both United States citizens and persons who "owe allegiance" to the United States.

S.1400 §1101 substantially extends the definition of treason set forth in the Constitution to cover offenses comparable to armed insurrection (see S.1 §2-5B3 and C. §1103). Thus, a person is guilty of treason who, while "in fact" owing allegiance to the United States—thus seeming to eliminate any defense based on the subjective loyalties of an alien—either adheres to the foreign enemies of the United States and intentionally gives them aid and comfort (a Class A felony) *or* levies war against the United States "by engaging in armed rebellion or insurrection against the authority of the United States or a state with intent to:

> "(A) overthrow, destroy, supplant or change the form of government of the United States; or
>
> (B) sever a state's relationship with the United States." (a Class B felony)

Neither S.1 nor S.1400 adopts the approach of the Brown Commission in C. §1101, which was more carefully to define and thus to limit the offense of treason by applying its terms only (a) to "nationals" of the United States (more narrowly defined than in





S.1400), (b) to times when the United States is engaged in international war, (c) and to participation in or facilitation of "military activity of the enemy with intent to aid the enemy or prevent or obstruct a victory of the United States." The Brown Commission proposal would also provide a defense to a defendant who genuinely believed he was not a national of the United States.

This Committee continues to favor the approach of the Brown Commission, with the additional recommendation that an effort should be made to formulate a statutory definition of "war" for the purposes of this and other sections of the Code (see original report, p. 37). As between the comparable provisions of S.1 and S.1400, the Committee prefers S.1, which at least tracks closely the language of the Constitution, and strongly disapproves of S.1400 because it believes that the emotionally charged terms of "treason" and "traitor" should not be extended beyond their traditional meanings,* particularly since, in S.1400, the death penalty is involved.

*Armed Insurrection*

Sections 1103(1) and 1103(2) of the Brown Commission bill are somewhat more narrowly defined counterparts of present 18 U.S.C. §§ 2383 and 2384 which deal, respectively, with "rebellion or insurrection" and "seditious conspiracy". The principal modifications of the present law in the Brown Commission bill are (a) the addition of the word "armed" and (b) a distinction in sentencing between a leader of a group involving 100 or more and a mere participant.**

S.1 §2-5B3(a)(1) is substantially the same as C. §§1103(1) and 1103(2), except that it is somewhat more clearly drafted and that

* The general subject of military activity aga . the United States is dealt with in S.1 §2-5B2, which is substantially similar to §1102 of the Brown Commission bill. The section is omitted from S.1400. It overlaps the treason sections and extends coverage to military activities of non-nationals (other than those carried out as a member of enemy armed forces in accordance with the laws of war) within the territory of the United States.

** 30 years, 15 years.

it reduces the group from 100 to 50 for culpability of a leader. S.1400, as noted above, incorporates a counterpart of the armed insurrection offense into its definition of the greater offense of treason. Similarly, S.1400 §1102, under the caption "Armed Rebellion or Insurrection", broadens what is limited in the other bills to conduct done with intent to overthrow the government to that done with "intent to oppose the execution of any law of the United States" (a Class C felony). This Committee opposes this step-up in coverage of the armed insurrection statute and agrees with the conclusion of the Working Papers that non-political offenses should be left to other sections of the Code.

*Advocacy of Armed Insurrection*

The equivalent of the "Smith Act", present 18 U.S.C. §2385, is found in C. §1103(3), S.1 §2-5B3(a)(2) and S.1400 §1103. The latter provision, entitled "Inciting Overthrow or Destruction of the Government" very substantially dilutes the judicial limitations imposed on the Smith Act restrictions on "advocacy" and membership in a long line of Supreme Court cases. S.1400 §1103, among other things, proscribes incitement of "conduct which then or at some future time would facilitate" the overthrow of the United States Government (compare *Noto* v. *United States*, 367 U.S. 290, 298-99 (1961)) and, in the context of "organizing" offenses, extends the Smith Act to recruitment of members for, as well as mere "joining" of, an organization which has as a purpose such incitement (compare *Noto* v. *United States, supra,* and *Scales* v. *United States*, 367 U.S. 203 (1961) which limit the comparable coverage of the Smith Act to organizers, and active members who facilitate illegal incitement or advocacy). These and other features of S.1400 appear to be designed to dilute the Constitutional "clear and present danger" tests which have been imposed on the Smith Act and to proscribe mere advocacy in much the same way as New York's criminal anarchy statute (former New York Penal Law §§160 and 161). We oppose S.1400 §1103 and suggest also that it is of dubious constitutionality.





Brown Commission §1103(3) and S.1 §2-5B3(a)(2) are intended to restate present law more closely, including Constitutionally imposed limitations on restricting "advocacy". Both bills appear to be improvements on the Smith Act. The Brown Commission version, as pointed out in the Working Papers, (a) specifies that the requisite intent must be to induce or cause others to engage in armed insurrection, (b) attempts to incorporate the "clear and present danger" test by requiring that advocacy, to be illegal, must be done "under circumstances in which there is substantial likelihood . . . [that it] will imminently produce a violation" of the armed insurrection provisions and (c) limits the "organization" offense to the organizer of an association engaging in unlawful advocacy, or an "active member" who facilitates such advocacy. For similar Constitutional reasons, C. §1103(4) seems to be designed to assure that attempt, conspiracy, facilitation or solicitation of the substantive offenses cannot be punished unless the substantive offense itself was "imminent". In this respect, however, the Brown Commission bill does not go as far as the Working Papers (p. 434), which provided that "inchoate" advocacy should be punishable only if the substantive offense of prohibited advocacy actually occurred.

S.1 §2-5B3(b), which covers this point, goes further than the Brown Commission in that it altogether eliminates as crimes attempt and solicitation either of armed insurrection or of incitement of armed insurrection. On the other hand, S.1 §2-5B3(a)(2)—the "organization" offense—is itself written in terms of organizing or being an active member of a "conspiracy" (rather than an "association", as in the Brown Commission version) which engages in the advocacy of armed insurrection.

While both the Brown Commission and S.1 versions are far preferable to S.1400, they, too, in the provisions concerning organizations and inchoate offenses, come dangerously close to the Constitutional limits on prohibition of mere advocacy unrelated to imminent action and should be restudied.

*Paramilitary Activities*

As we stated in our report on the Brown Commission bill, C. §1104 was "designed to outlaw private armies," which are not prohibited under existing law except for the registration requirements of 18 U.S.C. §2386. Under §1104, collecting, using or training in the use, of "weapons for political purposes by or on behalf of an association of ten or more persons" would be proscribed. The statute distinguishes in sentencing between leaders of 100 or more persons (Class B felony)° and other offenders (Class C felony).°°

Section 2-9D1 of S.1 has been put under a new section—subchapter D—Firearms and Explosives. It proscribes comparable activity but substitutes "intent to influence the conduct of government or public affairs in the United States" for "political purposes." The extra penalty for "leadership" is triggered with a group of 50, rather than 100 and there is a complicated system of grading for aggravated offenses varying from Class A to D felonies.†

S.1400 §1104 imposes a uniform Class D felony penalty‡ for collection, etc., of weapons for an organization "which has as a purpose the taking over of, the control of, or the assumption of the functions of, an agency of the United States government or of any state or local government, by force or threat of force" (rather than for "political purposes").

The language of S.1400 seems the most precise of the three in defining the proscribed purpose and the Committee recommends it over the Brown Commission version and S.1.

*Espionage*

The Brown Commission provision on espionage, §1112, was an effort to codify in simplified form the offenses covered by 18 U.S.C.

° 15 years.

°° 7 years.

† 30 to 6 years.

‡ 7 years.





§§793-798, as well as disclosure of information restricted under the Atomic Energy Act (42 U.S.C. 2274) and information relating to intelligence gathering and communication matters (18 U.S.C. §§798 and 952). The peacetime offense is limited to "revealing" national security information to a foreign power or an agent thereof "with intent that such information be used in a manner prejudicial to the safety or interest of the United States." In time of war, the offense is extended to one who "elicits, collects or records, or publishes or otherwise communicates national security information with intent that it be communicated to the enemy." The offense is graded as a Class B felony, except that it is a Class A felony if committed in time of war or if the information directly concerns certain critical military or defense matters.

The comparable provision of S.1, §2-5B7, substitutes a requirement of "knowledge that the information is to be used to the injury of the United States or to the advantage of a foreign power" for the intent requirement of C. §1112 and extends the peacetime offense to gathering and obtaining, as well as "revealing," national defense information. The information covered is defined much as in the Brown Commission bill, and the grading provisions are similar.

S.1400 §1121 extends the coverage and severity of the espionage offense well beyond the other two bills. The definition of covered information is somewhat broader. The culpability element of the offense is satisfied by proof of either intent that national defense information be used, or "knowledge that it *may be* used," to the prejudice of the United States. The offense includes obtaining or collecting such information, in peacetime, not only for a foreign power, but also "with knowledge that it *may be* communicated to a foreign power." Class A felony treatment—and this, under S.1400 §2401, the death penalty—is prescribed for offenses committed during a presidentially declared "national defense emergency" as well as in time of war.

The more carefully delineated coverage and penalty provisions of the Brown Commission bill and S.1 are, in this Committee's

view, clearly preferable to the S.1400 provisions.* Even those bills, however, while they mark a considerable improvement over existing law, should, in our view, be carefully re-examined in view of the lessons recently learned in the Ellsberg case and the aftermath of Watergate as to the potential for abuse in overly broad executive branch definitions of "national security information" and related offenses.

*Misuse of National Defense and Classified Information*

The Brown Commission bill covers in Sections 1113, 1114, and 1115, with some modifications, the offenses presently contained in 18 U.S.C. §§793(c), (d) and (e) and 798 and 50 U.S.C. §783(b). Section 1113 covers the mishandling of national security information and imposes a penalty where "reckless disregard of potential injury to the national security" is present but the intent required under the espionage statute is lacking. Section 1114 covers the misuse of classified intelligence communications information and is comparable to current law except that the culpability requirement is "knowingly" instead of "knowingly and willfully" and the grading of the offense is somewhat lower. Section 1115 relates to the disclosure of general classified information, but only when it is by a public servant and when the communication is to an agent or a representative of a foreign government or a communist organization. This is similar to present law except that the Brown Commission version covers former public servants. Faulty classification is no defense.

S.1 §2-5B8 recasts all of these provisions into one section requiring for all offenses that the conduct be done "in a manner harmful to the safety of the United States." The culpability requirement for the equivalent of C. §1113 is "knowingly" rather than, as in the Brown Commission bill, "reckless disregard of

* We note that § 2-5B7 of S.1 in requiring proof of "*knowledge* that the information is to be used to the injury of the United States or to the advantage of a foreign power" (emphasis supplied) would impose a very heavy burden. It would, we think, be better to substitute "intent" for "knowledge."





potential injury to the national security." There is in S.1, however, no offense for the communication by public servants of general classified information to foreign governments.

S.1400, §1122 is the same as S.1 §2-5B8(1) except that the gloss of "manner harmful to the safety of the United States" is not added to the "knowingly" requirement. S.1400 §1123 is comparable to the remaining provisions of S.1 §2-5B8 except that (a) the culpability requirements are somewhat reduced, (b) the violation covered in S.1 §2-5B8(a)(2) is not limited to public servants, and (c) there is an added general offense, applicable to anyone "in possession or control" of information relating to the national defense for "recklessly" permitting its loss, destruction, theft, or communication to unauthorized persons. More importantly, S.1400 adds a section not found in S.1 covering "Disclosing Classified Information." This section is not limited to public servants or to communications with foreign governments, covers all classified information, not only that relating to special intelligence communications matters, and specifically precludes the defense that the classified information was improperly classified.

The treatment of these matters in S.1 is clearly more carefully and more wisely circumscribed and is preferred by this Committee to the overly broad terms of S.1400. Although the Committee recognizes the necessity of protecting information truly essential to the national security, it recommends further review of this entire area—even the far preferable provisions of S.1—in view of the danger of misuse of such "national security" provisions against the inquiry and legitimate interest of concerned citizens. The Committee particularly urges reconsideration of the question whether improper classification should be a defense. We favor such a defense, with appropriate safeguards against undue discovery.

## Chapter 12

## FOREIGN RELATIONS, IMMIGRATION AND NATIONALITY

The provisions of this chapter relate to matters of foreign relations which in many respects go beyond the particular expertise of this Committee. There are, however, matters of drafting on which we think some comment appropriate.

S.1400 §1201 and S.1 §2-5C1 are substantially comparable, both representing modernized versions of 18 U.S.C. §960. Both sections are designed to prohibit individuals from launching, or engaging in, attacks against other nations with which the United States is not at war. Section 1201 changes the same-numbered section of the Brown Commission bill by using the term "military attack" instead of "air attack" or "military expedition" and by omitting any prohibition against providing substantial resources to a "military expedition".

The term "military attack" is defined as any "warlike" assault or invasion. The word "warlike", in the view of the Committee, is too imprecise to define properly the kind of assault which is prohibited. The use of the word "warlike" is merely an extension of the same infirmity from which both S.1400 §1201 and S.1 §2-5C1 suffer in defining the protected target nations of military attacks: the failure to define "war". S.1 §2-5C1 states that it is unlawful to launch an attack "against a nation with which the United States is not at 'war' "; S. 1400 §1201 states that it is illegal to launch an attack "against a foreign power with which the United States is at peace." Is the meaning of "peace" merely the obverse of that of "war"? Defining "war" for these purposes is very difficult, but, in the Committee's view, it is important enough to warrant the attempt. It can by no means be clear, for instance, whether the United States is at war with the Cambodian rebels when there is no declaration of war or resolution, in either house of Congress, authorizing the action and no appropriation for the continuation of bombing.





S.1 §2-5C1(a)(3) states that a "person" is guilty of an offense if he knowingly "engages in combat hostile to a nation with which the United States is not at war *within the territory of any foreign nation.*" (emphasis added) The language goes far beyond S.1400 §1201 and C. §1202. S.1 §2-5C1 purports to subject to criminal treatment a person who might decide to go abroad to engage in a cause in which he believes. As the Working Papers point out (Vol. 1, pp. 486-87), the individual's right to go abroad, a traditional tenet of the United States foreign policy, "should be maintained as a basic foreign policy question".

The outlawing of conduct hostile to a friendly nation within the territory of any foreign nation would prohibit the formation of forces on foreign soil, such as the Abraham Lincoln Brigade in the Spanish Civil War, and would abrogate the right to go abroad to participate in a war as did, for instance, the many Americans who volunteered as ambulance corpsmen serving British and Canadian forces during the First World War.

The use of the word "person" in S.1 §2.5C1, when combined with the prohibition against conduct "within the territory of any foreign nations", would seem also to import that a non-American national could be convicted under this section for acts performed in a foreign country. The Committee assumes that the use of the word "person" represents inadvertence in drafting rather than an attempt to subject any individual of whatever nationality to the prohibitions of this section.

Even if the word "national" is substituted for the word "person", however, the Committee believes that it is questionable to use *criminal* sanctions to regulate conduct which takes place abroad without threatening to disrupt United States foreign policy, and which may not be criminal in the nation where committed.

The Committee thus recommends that a person be guilty of the offense only, as in §1202 of the Brown Commission bill,

"if, within the United States, he agrees with another to engage in conduct hostile to a friendly nation within the territory of any foreign nation . . ."

S.1400 §1202 adopts the two most important subsections of §1202 of the Brown Commission bill and adopts this Committee's recommendation that the conspiracy be substantially effected within the United States. This section, designed to replace 18 U.S.C. §956 (Conspiracy to Injure Property of Foreign Government), adds specific coverage of murder of foreign officials. This addition seems desirable in view of the increasing resort to violence directed towards embassy officials throughout the world.

S.1 §2-5C2, which restates §1203 of the Brown Commission bill and S.1400, prohibits the recruiting for enlistment in foreign armed forces but deletes the requirement that this recruitment or enlistment be "within the United States." This deletion presents the same anomaly as that in S.1 §2-5C1 because a "person" need not be an American national and the statute would prohibit all enlistment and all recruitment in any country for whatever purpose. The Committee strongly recommends that the phrase "within the United States" be included in this provision.

The detailing of the affirmative defense, S.1400 §1203(b), is surplusage to this section, and it is the Committee's view that, as suggested at the Comment to §1203 of the Brown Commission bill, these matters be dealt with in Title 22 of the United States Code. (Report, pp. 46-47)

S.1400 §1211 and S.1 §2-5C3 are designed to limit felony treatment of violations of certain statutes and regulations governing international transactions to demonstrably serious situations. Both sections require that a person act with specific intent to conceal a matter from a government agency or with knowledge that his conduct will obstruct the administration of a statute or government function.





The Comment to this section in the Brown Commission bill and the related portions of the Working Papers take the view that these statutes essentially deal with the:

"normally legitimate conduct of exporting goods, services, money or credit . . ."

and that, contrary to the policy of the proposed Code, they

"indiscriminately provide serious felony penalties for virtually any violation, including the most trivial."

In order to prevent examples of the kind cited by the draftsmen (a ten-year prison term for failure by an exporter to a U.N.-quarantined nation to make appropriate presentation of an "original" license with the required notations thereon "in ink"), S.1400 §1211 would limit felony treatment to violations of the listed statutes where the act is committed,

". . . with intent to conceal a transaction from a government agency authorized to administer the statute or with knowledge that his unlawful conduct substantially obstructs, impairs or perverts the administration of the statute or any government function."

Penalties would be limited to those provided for Class D felonies in both sections.

While the intent of the draftsmen to limit felony treatment only to the most serious violations of the many regulatory provisions covered by the listed statutes is laudable, and one with which we agree, it is unclear to us whether the new section is designed to preempt the penalty provisions of the existing statutes, or only to supplement them. The existing statutes are proposed to be kept in their present titles, with their penalty provisions being reduced to misdemeanors or to regulatory offenses. Yet nowhere is it made clear whether the provisions of the proposed code impose limits on fines which may be imposed under the provisions of other titles. Without a much clearer statement of the precise changes

which are intended to be effected in the statutes listed in S.1400 §1211 and S.1 §2-5C3, it is virtually impossible to evaluate the impact of the section.

S.1 §2-5C4, which corresponds to S.1400 §1204, supplements the other neutrality provisions by making it a felony to violate a restrictive order on departures of vessels where the order is designed to restrict the delivery of the vessels or of goods to a foreign nation engaged in armed hostilities. Under S.1 §2-5C4, a person is guilty of a Class D felony "if he knowingly causes *or aids* the departure from the United States of a vessel or vehicle the departure of which is in fact prohibited" by a restrictive order. This is objectionable, in the first place, because it would make a person guilty of the felony even if he did not know, and had no reason to know, that the departure was prohibited. Moreover, the inclusion of the words "or aids" is, in the view of the Committee, a mistaken over-extension of the criminal sanction. It might cover, for instance, a dock worker who frees from a cleat a line of an illegally departing ship or an air traffic controller who clears an illegally departing plane for takeoff despite the fact that neither the dock worker nor the air traffic controller is aware that he is aiding a criminal act. The requirement that the conduct be performed "knowingly" means only that the actor "be aware of the quality of his conduct" and of "attendant circumstances." (§1-2A1(1)(3)).

The Committee recommends that a clause similar to S.1 §2-5C3 (a) and S.1400 §1204(a) (requiring a specific intent to conceal and/or knowledge that one's conduct substantially obstructs a governmental function) also be included in this section.

S.1400 §1204, although it omits the "or aids" language of S.1 §2-5C4, seems to the Committee undesirable in view of its excessive complexity. The Committee finds the phrase "during a war in which the United States is a neutral nation" especially troublesome because both the terms "war" and "neutral" are undefined and are extremely elusive of definition. S.1 §2-5C4 limits the





scope of its violation to statutes, regulations and orders, and it is therefore more amenable to firm and equitable enforcement.

S.1400 §1205 ("Disclosing a Foreign Diplomatic Code or Correspondence") attempts to subject to criminal penalty conduct which jeopardizes confidential communications between foreign governments and their representatives in the United States. The section specifically prohibits the knowing communication of

> ". . . (1) a diplomatic code of a foreign government, or any matter prepared in such a code; or
>
> "(2) any matter intercepted while in the process of transmission between a foreign government and its diplomatic mission in the United States to which he obtained access as a federal public servant."

The Committee notes that the section nowhere specifies the prohibited recipients of the communication of a diplomatic code. It should be noted that S.1400 §521(a)(1) would provide a defense to a person who communicated any of these matters pursuant to his duty as a public servant or at the direction of a public servant.

S.1 §2-5C5 is a combination of sections 1122 and 1206 of the Brown Commission bill dealing with the failure of foreign agents to register with the government. This subject matter is covered by S.1400 §§1127 and 1128.

Although the offense retains Class C felony treatment, the upper-range imprisonment for a "dangerous special offender", or recidivist, could make applicable a prison term as long as 10 years, which represents a continuation of the penalty provided in 18 U.S.C. §951 rather than the shorter penalty for violation of an almost identical section in 22 U.S.C. §611 *et seq.* The Committee believes that, as expressed in the Working Papers, the penalty should be more in the range of the penalty provided for in the current 22 U.S.C. §611 *et seq.* This could be accomplished with respect to S.1 §2-5C5 by making the offense a Class D felony which, if accompanied by the aggravating or recidivist circumstances



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specified in §1-4B2, could result in the maximum penalty of six years.

S.1400 §§1221 through 1226 and S.1 §§2-5D1 through 2-5D3 deal with immigration, naturalization and passports. As in the case of the provisions relating to foreign relations, these sections do not represent a fundamental substantive departure in policy. The principal changes are in the area of grading of offenses, transferring to other titles lesser offenses which are regarded as regulatory, and eliminating as duplicative existing offenses which are covered elsewhere in the general sections governing such things as bribery and forgery.

In general, the Committee approves the effort in S.1400 to distinguish between less serious offenses, which are treated as Class A misdemeanors, and those more serious, which are treated as Class E felonies. Thus, for example, S.1400 §1221 (Unlawful Entry Into the United States) combines the offense now defined in 8 U.S.C. §1325 (unlawful entry) and 8 U.S.C. §1326 (reentry after deportation). Grading, however, is changed so that felony treatment applies only if entry is accomplished by the use of false documents or if reentry occurs after previous arrest and deportation for conviction of a felony involving moral turpitude. All other offenses are given Class B misdemeanor treatment on the theory that, when combined with available administrative remedies such as deportation, any stronger criminal sanction would be inappropriate. This result seems sound. The present penalty of a maximum of two years' imprisonment for any reentry after deportation seems excessive and unnecessary in view of the fact that sentences are almost invariably suspended and the violator again deported.

The Committee is of the opinion that the punishment provided for in S.1 §§2-5D1 through 2-5D3 is unnecessarily harsh and burdensome even where the minimum penalty might be imposed. In S.1 §2-5D1(d)(2) the penalty for using forged reentry documents could be as much as ten years in prison. In light of the prevailing administrative practice of deportation in such situations, the ten-





year penalty seems excessive. S.1 §2-5D1(d)(2) does provide, however, that the person using a forged reentry document must know it to be forged or counterfeit or the property of another person in order to be subject to felony treatment. This requirement of knowledge is omitted from S.1400 §1221(c)(1)(a) and should be inserted.

S.1400 §1222 and S.1 §2-5G1(a)(1) cover crimes presently made felonies under 8 U.S.C. §1234(1), but distinguish between ordinary offenses, which are treated in S.1 as Class D felonies and in S.1400 as Class B misdemeanors, and those where aliens are smuggled into the country for commercial purposes or where the immigrant intends (with the knowledge of the smuggler) to commit a felony in the United States. These more serious crimes are treated as Class E felonies in S.1400 and as Class C felonies in S.1.

The offense of hindering the discovery of an illegal entrant into the United States is covered by S.1400 §§1223 and S.1 2-5D2. The offense requires that the person act with the specific intent to hinder, delay, or prevent the discovery or apprehension of an alien who is in the United States in violation of law. Section 1223(1)(a) of the Brown Commission bill had stated that the person was guilty if he harbored or concealed the alien; the revised bill provides that the person may be guilty if he "*aids*, shelters, *employs*, or conceals" the alien. The inclusion of persons employing the alien represents a major extension of the coverage of the section, and the Committee believes the expansion to be unwise and unnecessary. Even though the section requires that a violator act with specific intent mentioned above, the section might easily be used for warrantless prosecution of employers who *knowingly* employ aliens.

The Committee therefore recommends that the word "employs" be stricken and that "harbors" be replaced in the text, or, if the word "employs" is ultimately retained, that language comparable to the following proviso in the Working Papers (at Vol. 1, p. 514) be placed in the statute itself:

"*Effect of Mere Employment.* Nothing in this section shall be construed so that, by itself, employment of the alien by the actor, including the usual and normal practices incident to employment, constitutes a violation of this section."

The inclusion in S.1 §2-5D2 of the word "aids" is also an expansion of the coverage which the Committee deems unwarranted. A person who, although acting with intent to delay the discovery of the illegal alien, merely gives directions or performs some minor service for the alien would, under this section, be subject to a term of six years' imprisonment.

S.1400 §1223(a)(4) and S.1 §2-5D2(a)(3) both make it a crime for anyone to conceal, alter, mutilate, or destroy any document or record regardless of its admissibility in evidence. This provision broadens tremendously the responsibility of citizens to preserve and make available to law enforcement officials evidence of crime. Such a provision, in our view, raises a serious question of policy as to the breadth of the obligation which the criminal law should place on individuals to preserve and make available information. (Cf. Report, p. 50)

S.1400 §§1224 and 1225 substantially duplicate S.1 §2-5D3. Although the Committee approves the sentencing provisions of S.1400 §§1224 and 1225 and believes they should be included in S.1 §2-5D3, the Committee believes that the latter section is a more succinct and a better restatement of present law.

## Chapter 13

## OBSTRUCTION OF GOVERNMENT FUNCTIONS

S.1400 adds a provision for obstructing a government function by fraud, Section 1301, which is not found in the other bills, and we see no objection to this provision.

The original Committee Print (Nov. 10, 1972) of the bill which became S.1 added an affirmative defense to the crime of hindering





law enforcement. It made it a defense if the party charged was the parent, spouse or child of the defendant. This affirmative defense has been deleted in both S.1 (Section 2-6B3) and S.1400 (Section 1311). We believe that there should be such an affirmative defense.

The bail jumping provisions of both S.1 and S.1400 basically adopt the approach we suggested originally of making the penalty for bail jumping the same as that which could be imposed for the underlying offense (Report, p. 51).

Both S.1400, in Section 1315, and S.1, in Section 2-6B6, expand the crime of introducing contraband into a correctional institution to include "any object". (S.1 is slightly more limited since the term "any object" is limited to those proscribed by statute, rule, regulation or order; S.1400 would apply to an object introduced "surreptitiously" even if it were not proscribed by statute, rule, regulation or order.) The Brown Commission bill would limit the contraband to any item useful for escape. While it may be argued that there should be some statutory prohibition which would preclude a prisoner from being furnished with correspondence or other information which would enable him to direct others in the conduct of some illegal enterprise, it does seem that these statutes are too broad since they make it a felony to introduce any proscribed article into a prison. Thus, the proposed statute could make criminal the introduction of food by members of an inmate's family or love letters from a wife or girl friend. We believe that these additional provisions of S.1 and S.1400 should not be adopted unless they are carefully limited.

S.1400 splits obstruction of justice into three sections — (1) witness bribery, Section 1321; (2) corrupting a witness or informant, Section 1322; (3) tampering with a witness, Section 1323. All of these are contained in a single obstruction of justice provision in S.1, Section 2-6C1. Similarly S.1400 splits into two sections (Sections 1332 and 1333) the provisions found in Section 2-6C2 of S.1 relating to impeding justice. While the purpose of

S.1400 is apparently to differentiate these crimes for sentencing purposes, it does not appear to us that these crimes are substantially different and, therefore, a single sentencing provision within which the judge will have substantial discretion would seem adequate. For this reason we prefer the approach found in S.1.

S.1 (§2-6C1) provides a broad catch-all provision for anyone who endeavors in any manner to obstruct or impede the due administration of justice. This was suggested by this Committee originally (Report, p. 50) and we approve such a section.

S.1400 adds a provision (Section 1324) not found in either of the other bills making it a crime to retaliate against a witness or informant, which seems to be desirable.

Section 1326 of S.1400 limits the prohibition of communication with a juror to a communication made with an intent to improperly influence the juror's official actions. We believe that jury tampering should be so limited.

A major difference between S.1 and S.1400 has to do with the issue of materiality in the false statement provision—Section 2-6D2 (a)(1) of S.1 and Section 1343(a)(1)(A) of S.1400. S.1400 requires that the false statements be material, whereas S.1 does not. In this regard S.1400 is more like the original Brown Commission bill (§1352(2)(a)), and it is our opinion that there should be a materiality provision in the false statement statute.*

S.1400 omits the provision penalizing the unauthorized disclosure by a public official of information disclosed to the government in confidence. Such a provision is found in Section 2-6F1 of S.1 and Section 1371 of the Brown Commission bill. We believe there should not be such a provision.

S.1 has a provision (Section 2-6F2) not found in either of the other two bills which prohibits a person from privately addressing

* All three bills make false swearing an offense, irrespective of materiality, where the statement is made under oath or affirmation in an official proceeding. (C. §1352(1); S.1 §2-6D2(a)(1); S.1400 §1342.)





a public servant without disclosing the fact that he has been retained "for compensation or not" to do so. We believe that this provision is too broad and, therefore, recommend that it not be adopted.

## Chapter 14

## OFFENSES INVOLVING INTERNAL REVENUE AND CUSTOMS

All three bills proscribe two types of federal tax crimes—"Tax Evasion" and "Disregard of Tax Obligation." Additionally, however, S.1400 adds a misdemeanor crime (§1402(a)(6)) for falsely claiming a personal exemption in an income tax return—a reasonable congressional reaction to an obvious problem. All the bills seek to embrace within their reach commonly encountered methods of tax exasion, (*e.g.*, filing a false return; concealing assets; failing to pay over withheld taxes; destruction of property under governmental control; and failure to file a return), and S.1 and S.1400 prohibit evading taxes in "any other manner". (S. 1 §2-6G1(a)(vi); S.1400 §1401(a)(6)).

The bills employ a verbal formulation for the element of mental culpability ("with intent to evade") which may significantly lessen the standard of culpability as it is defined by present law. That is to say, present law (I.R.C., §7201) requires that criminal evasion be done "willfully". We believe that the word "willfully" should be incorporated into the Brown Commission bill and in S.1 because of a danger that the definition in §2-6G1(c)(1) of S.1 ("a conscious objective to engage in such conduct and to cause the result, with knowledge that the attendant circumstances exist") would not carry over all the connotations which the courts have found in the word "willfully". That comment is even more applicable with respect to S.1400, which bill defines "intentionally" in terms of a "conscious objective or desire to engage in the conduct *or* cause the result" (§302(a)) and has no specific definitional provisions for

tax crimes [see, The Proposed Federal Criminal Code; Its Effect on Tax Offenses, 26 Tax Lawyer, No. 3, pp. 485 *et seq.*]. Since there apparently exists no reason for reducing the standard of culpability for tax crimes, this issue should be re-examined and, in any event, the S.1 definition is to be preferred over the approach used in S.1400.

The three bills also warrant study concerning their treatment of the present requirement that there can be no tax crime conviction without a showing of "a substantial tax deficiency." That requirement is codified only in S.1 (§2-6G1(a)(2)). S.1 also—consistently with the suggestion in our initial report (p. 55)—eliminates the provision of the Brown Commission bill which would create a misdemeanor where the evasion involves less than $500. In contrast, S.1400 proscribes and makes a felony the criminal filing of a tax return "which understates the tax." S.1400 is seriously at odds in this respect with the views of this Committee. We believe that the requirement of a substantial tax liability should be preserved. Also for the reasons expressed in our initial report, this Committee's view is that S.1400's treatment of all tax evasions as a Class D felony is preferable to the grading approach embodied in the other bills.

Except for the provisions of S.1400 already noted, the three bills proscribe the same forms of "knowing" disregard of tax obligation. Here, again, the Tax Lawyer comment previously mentioned raises a question whether the "knowingly" standard establishes a norm less than that now required for misdemeanor convictions. That concern is obviously more disturbing *vis a vis* S.1, which treats both tax crimes as felonies. In this Committee's opinion, the offenses in question should be treated as misdemeanors—the approach adopted by S.1400.

Finally, we approve of the provision in §1403(c) of S.1400 excluding from the purview of tax crimes interim reports, information returns and returns of estimated tax.





*Unlawful Trafficking in Taxable Objects*

Like the Brown Commission bill, S.1 combines in a single provision (§2-6G3) all trafficking in taxable objects in violation of any federal statute or regulation. S.1400, on the other hand, incorporates by reference the criminal prohibitions in the Internal Revenue Code dealing with such items as alcohol and cigarettes (§1411). Both the Brown Commission bill and S.1 treat violations not involving distilled spirits as misdemeanors; S.1400 treats them as felonies. Violations involving distilled spirits, consistently with present law, are classed as felonies in both S.1 and S.1400, unlike the Brown Commission bill which would punish the casual consumer of distilled liquors as a misdemeanant (§1404). On that subject, this Committee supports the notion that such casual consumers should be treated more leniently. Additionally, this Committee still considers valid its comments in its initial report concerning the creation of presumptions for the trafficking crime, a technique employed in all three bills either expressly or, in the case of S.1400, by incorporation of statutory presumptions now present in the Internal Revenue Code (C. §1405; S.1 §2-6G3(e); S. 1400 §1411(b)).

*Smuggling*

The three bills, each of which seeks to simplify definitions of customs offenses, are all subject to the criticisms leveled by this Committee in its initial report (Report, p. 58). For example, each version contains the overly broad and superfluous statement that the smuggling offense is committed when one "knowingly evades examination by the government of an object being introduced into the United States" (C. §1411(1)(a); S.1 §2-6G4(a)(1); S.1400 §1421 (a)(3)). The criticisms by this Committee of the grading system employed in the Brown Commission bill apply with equal force to the substantially identical provisions of S.1 and almost to that extent to the corresponding provisions of S.1400. S.1400 does, however, eliminate an objectionable upgrading provision (*i.e.*, the

object was brought in for use in a business) and improves slightly upon another provision (*i.e.*, by providing for misdemeanors where the duty which would have been due is less than $500).

## Chapter 15

## CIVIL RIGHTS AND ELECTIONS

S.1400 and the Brown Commission bill both place offenses dealing with civil rights and elections in Chapter 15, whereas S.1 distributes them among two chapters and four subchapters. In addition, S.1400 has the same numbering system as the Brown Commission bill.

*Protection of Federal Rights Generally*

C. §1501, drawing on the post-Civil War statutes, would punish as a Class A misdemeanor only a conspiracy to injure any citizen in the free exercise of his federal constitutional rights. S.1 §2-7F1(a)(1) improves over §1501 by following our Committee's suggestion (Report, p. 61), that it not be limited to citizens, and by following our Committee's further suggestion (Report, pp. 60-1), that it make injuring a person in the free exercise of a federally-secured right a crime, rather than making a conspiracy to do so a crime.

S.1400 §1501 also deletes the conspiracy provision and makes it a Class A misdemeanor for anyone knowingly to deprive a person of his civil rights. S.1400 §1501 also accepts our criticism of C. §1501 and extends the protection of the law to aliens as well as citizens. In these respects, there is little to choose between S.1 and S.1400.

S.1400 §1501, unlike the corresponding provision in S.1, §2-7F1(a)(2), drops the provision of C. §1501(b), drawn from the post-Civil War statutes, regarding going about on the highways in disguise.





The Committee also notes that both S.1 §2-7F1(a)(1) and S.1400 §1500 make the maximum jail penalty one year. Present 18 U.S.C. §241, from which the sections under discussion are drawn, makes the maximum 10 years imprisonment.

S.1 §2-7F1(a)(3) is substantially the same as C. §1502, on which we commented in our earlier report. (pp. 61-62)

S.1400, in its Section 1502, substitutes for the broad provision of C. §1502 a provision which would make it an offense, while acting under color of law, knowingly to engage in conduct which constitutes a violation of the rights of person and property, as defined in chapters 16 and 17, thereby depriving another of federal rights. The question whether the right involved is a federal one is made a question of law. S.1400 §1502(b). This section would appear to narrow significantly the sweep of C. §1502 and S.1 §2-7F1(a)(3) in that it would punish a deprivation of federally secured rights only when the elements of some other offense are present. Thus, if the deprivation were effected without any offense to person or property of the kind defined in chapters 16 and 17 of S.1400, there would be no crime. We think this an undesirable limitation.

*Interference with Participation in Specified Activities*

Present 18 U.S.C. §245(b), derived from the Civil Rights Act of 1968, is confusingly worded. The confusion was not appreciably clarified in C. §1511-1515, nor has it been clarified in S.1 §2-7F2 through §2-7F4 and S.1400 §1511-1513. The problem of unwillingness to undertake extensive revision, which our Committee noted in Report, p. 60, is still with us, and most criticisms of these sections of S.1 and S.1400 turn out to be criticisms of present 18 U.S.C. §245(b). S.1 and S.1400 adopt our suggestion, Report, p. 63, that C. §1516 be deleted. This section required certification by the Attorney General before the offenses condemned in C. §§1511-1515, S.1 §§2-7F1 through 2-7F4, S.1400 §§1511-1513, could be prosecuted.

The Brown Commission was divided over the question whether economic coercion should constitute a means of violating a person's civil rights, see Comment to C. §1511, and its draft included the words "[or by economic coercion]" in C. §§1511-1515 in brackets. Both S.1 and S.1400 delete references to economic coercion. For the reasons stated in our original report (Report, p. 62), we agree with the deletion.

S.1400 §§1511 and 1512 are sufficiently comparable to the same-numbered sections of the Brown Commission bill not to require comment.

Our Report, pp. 62-3, found C. §1515 unsatisfactory because it did not provide for general protection of freedom of speech and freedom of assembly and because it makes the lawful conduct of the person being protected an element of the offense. S.1 §2-7F4(a)(3) also makes lawful and peaceful conduct on the part of the person interfered with an element of the offense. S.1400 §1513 does not include this requirement and we prefer it in that aspect. Since both S.1 §2-7F4(a)(3) and S.1400 §1513 are limited to protecting speech and assembly opposing denial of federal rights and benefits for such reasons as race and religion, neither bill deals with the problem of protecting free speech and assembly in general.

The provisions of C. §1513 (Interference With Persons Affording Civil Rights to Others) and C. §1514 (Interference With Persons Aiding Others to Avail Themselves of Civil Rights) are carried forward in both S.1 (§2-7F4(a)(1) and (2)) and S.1400 (§1511(a)(5) and (6)).

*Abuse of Federal Official Authority*

Our Committee believed that C. §1521(b) should be deleted as too broad (Report, p. 63). That section made it a Class A misdemeanor for a federal public servant to exceed his authority in making an arrest or a search and seizure. S.1 §2-7F5 is even





broader than C. §1521, and we therefore oppose it for the reasons stated in our original report.

S.1400 has no provision comparable to C. §1521, except insofar as the conduct proscribed in C. §1521 is embraced by the general language of S.1400 §§1501 and 1502.

*Protection of Political Processes*

S.1 §2-6H1, "Election Fraud", is related to C. §1531, "Safeguarding Elections", and poses no particular problems.

S.1400 §§1521 and 1522 break C. §1531 into two parts. S.1400 §1521 is entitled "Obstructing an Election", and S.1400 §1522 is entitled "Obstructing Registration". The reason for the distinction is that obstructing an election is made a Class E felony, S.1400 §1521(b), for which the maximum term of imprisonment is three years, S.1400 §2301(b)(5), whereas obstructing registration is made a Class A misdemeanor, S.1400 §1522(b), for which the maximum term of imprisonment is one year. S.1400 §2301(b)(6). Obviously a person who is prevented from registering cannot vote, and there is no reason for penalizing one type of obstruction less than the other.

C. §1532, "Deprivation of Federal Benefits for Political Purposes", has a counterpart in S.1 §2-7F2(a)(1), and in S.1400 §1523. C. §1533 has a counterpart in S.1 §2-6E5 and in S.1400 §1524. C. §1534 has a counterpart in S.1 §2-6H2 and in S.1400 §1524. No comment on these sections is required.

C. §1535, "Troops at Polls", has not been carried into S.1 and S.1400. Its substance is probably covered by S.1 §2-6H2(a)(4) and S.1400 §1521(a)(1), which penalize in general terms obstruction of elections.

*Foreign Political Contributions*

C. §1541, dealing with political contributions by agents of foreign principals, has a counterpart in S.1 §2-6H3 and S.1400

§1526. Our Report, pp. 59-60, questioned the value of C. §1541 and recommended at least the reduction of the offense to a Class A misdemeanor. We repeat the recommendation.

*Protection of Legitimate Labor Activities*

S.1 §2-7F6 is derived from C. §1551 but has been broadened to protect activities of employers as well as employees. It makes criminal the intentional interference by force or threat of force with "an employer engaged in maintaining open access to a plant or other business establishment." C. §1551 has no counterpart in S.1400.

*Interception of Private Communications*

C. §1561 makes it an offense intentionally to intercept "any wire or oral communication by use of any electronic, mechanical, or other device", and to disclose the contents of what was intercepted, in the absence of certain defenses. S.1 §2-7G1(a)(1) makes it an offense to intercept "any private communication by use of an evesdropping device", a "private communication" being defined as "an oral communication" meeting certain requirements, S.1 §2-7G1(e)(5).

It is undoubtedly possible to intercept a telegraph message as it goes over the wires, but that is not an oral communication. It is also possible to intercept a picture copy of a writing being sent by means of a telecopier; this, too, would not be an oral communication. Thus the coverage of S.1 is more narrow than that of the Brown Commission's bill, which applies both to oral and wire communications.

S.1400 §1532 applies to both wire and oral communications, and is preferable to S.1 §2-7G1.

C. §1562, "Traffic in Intercepting Devices", has a counterpart in S.1 §2-7G2 which, however, is limited to devices for intercepting "private communications", as defined above. S.1400 §1533, like C.





§1562, applies to devices for intercepting both oral and wire communications and we prefer it for the reasons stated above.

C. §1563, the definitions section for the provisions on interception of private communications, has a counterpart in the definitions subsections of S.1 §§2-7G1 and 2-7G2, and in S.1400 §1534.

C. §1564 deals with the interception of correspondence, either by damaging or destroying it to prevent delivery, or by opening or reading sealed correspondence, or by divulging the contents of sealed correspondence wrongfully opened. The counterparts are S.1 §2-7G3 and S.1400 §1531, except that S.1400 §1531 excludes the damaging or destroying of correspondence. That particular offense is, however, covered in S.1400 §1703(a).

## Chapter 16

## OFFENSES AGAINST THE PERSON

*Murder (Homicide) and Included Offenses*

(C. §1601-1603, S.1 §2-7B1-7B4, S. 1400 §1601-1603)

The Brown Commission bill provides that murder culpability is established by proof that the act was committed "intentionally" or "knowingly". S.1 only provides for "intentionally", while S.1400 only provides for "knowingly". Since S.1400 §302(f) provides that where the culpability requirement is "knowingly" it is also satisfied by "intentionally", S.1400 has the same effect as the Brown Commission bill. While under S.1 a "knowing" homicide would presumably fall under either §2-7B2 (Reckless Homicide) or §2-7B3 (Manslaughter) (inasmuch as §1-2A1(d) defines "recklessly" to include "knowingly"), it seems clearly more appropriate to include knowing homicide under Murder.

Both the Brown Commission bill and S.1400 include a modified felony murder provision and the reckless causing of death under circumstances manifesting extreme indifference to human life

("reckless indifference") as part of the murder section, while S.1 places these two provisions in a separate reckless homicide section. Under either organization, all are classified as Class A felonies. The organization takes on importance in view of the death penalty which is applicable to the "murder" section of each of the three drafts. By separating the reckless indifference and felony murder provisions, S.1 excludes the death sentence from these offenses. As noted in our original report, a majority of the Committee favors abolition of the death penalty. However, if a death penalty is to be adopted, it is more properly applied to intentional or knowing murder than to a homicide resulting from reckless indifference.

As stated in our prior Report (p. 64) there is great difficulty in creating a practical and understandable distinction between a reckless killing showing an indifference to human life and a simply reckless killing. We still believe that the difference between these two is difficult for lawyers to verbalize and will be impossible for laymen jurors to comprehend. Therefore, we repeat our recommendation that these two purportedly different offenses would best be treated as a single offense of manslaughter, requiring the proof of recklessness. In the alternative, a separate section should be created, limited only to the reckless indifference offense. We further recommend that the crime of felony murder be included in the murder section.

The felony murder provisions in all three bills are similar except in two respects:

a) S.1 (§2-7B2) contains no provision for an affirmative defense, as specified in the other two bills, of non-involvement in a killing which was not reasonably foreseeable to the defendant.

The Committee believes that the affimative defense approach is the best method of dealing with this problem. We favor the phraseology in S.1400, which is simpler than that contained in the Commission bill.

b) S.1400 includes the aircraft hijacking felony as an included offense, while the other two bills do not. We believe this serious offense should be included.





With regard to jurisdiction, we concur with the inclusion in S.1400 of jurisdiction for the offense of murder based on the transmittal of the killing device through the mails, a jurisdictional basis overlooked in the other two drafts; and the provision for jurisdiction where the offense occurs during the commission of, or immediate flight from the commission of, certain specified offenses over which there is federal jurisdiction.

*Threatening the President*

(C. §1615, S.1 §2-7C5, S.1400 §1618)

The three proposed sections are substantially similar. They each require proof that the threat was "likely" (C. and S.1) or "reasonably" (C.) to be taken seriously.

As discussed at pages 66 and 67 of our original report, a substantial portion of the Committee believes that the elements involving proof of communication to the official and the probable seriousness of the threat should both be deleted, thus defining the crime as any threat to commit any crime of violence against the President, *et al.* This would not alter the effect of the decision of the United States Supreme Court in *Watts* v. *United States*, 394 U.S. 705 (1965) which prohibits any prosecution unless a "real" threat was intended and not just political hyperbole. That holding would presumably be read into this statute to define what is in fact a "threat". These members of the Committee also question the absolute bar against the prosecution of allegedly non-serious threats, which they believe should be left to the prosecutor's discretion on the basis of the facts involved. While S.1 attempts to modify this principle by providing that it is no defense that the threat was falsely made or was made as a joke, it does not prevent the "joke" argument from defeating the prosecutor's burden of showing that the threat would be taken seriously.

A majority of the Committee, however, feels strongly that the protection of political advocacy should be expressly provided for in the statute. Recognizing the difficulties of proof in placing the



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burden on the prosecutor to establish that the threatening words were uttered under circumstances in which the threat is likely to be taken seriously, this part of the Committee would propose that the section instead provide for an affirmative defense that the threat was not an expression of settled purpose and, under the circumstances, was not likely to be taken seriously.

*Kidnapping*

(C. §1631, S.1 §2-7D1, S.1400 §1621)

While all three bills are similar, we believe that S.1400, with certain revisions, is superior.

Both S.1400 and S.1 contain three grades of the crime while the Commission bill contained only two. Unlike the Commission bill, S.1400 and S.1 distinguish between a kidnapping where the victim is released alive but with serious injury from a kidnapping where the victim is released unharmed. Such a distinction can provide an incentive not to harm the victim and is thus appropriate.

Both S.1400 and S.1 exclude the involuntary servitude restraint from the highest grade kidnapping section and place it in the lesser-included offenses. This is preferable to the Commission bill which included the involuntary servitude restraint in both sections and left the distinction between the two grades unclear in this respect.

S.1400, unlike the other two proposals, provides for a rebuttable presumption of interstate transportation of a victim where he has been restrained for more than twenty-four hours (S.1400 §1624). We do not believe any such presumption should be created and recommend the deletion of the subsection.

S.1, unlike the other two drafts, provides for federal jurisdiction over kidnapping when the mails are utilized as part of the crime. We favor this additional jurisdictional base. The Committee would go beyond the proposals contained in the three bills in expanding federal jurisdiction over kidnapping. Consideration should be given





to including in any kidnapping statute a provision basing federal jurisdiction on language similar to that contained in Federal Securities laws (e.g., Title 15 §77q ". . . by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails . . .").

The major difference between S.1 and S.1400 is that S.1 provides for compounding of the grade of the offense where other offenses are committed. It is unclear what this provision actually means. One might assume this compounding only occurs where these other offenses (*e.g.* murder or rape) are committed on the victim. We do not believe it advisable to provide for the same grade of kidnapping for rape as for murder of the victim since it would destroy any incentive to release a victim alive following a kidnapping-rape. If the compounding section applies when the enumerated offenses are not committed against the kidnapping victim, the provision provides no specification of the relationship, in time or place, to the kidnapping which would be required in order for the compounding to occur. We therefore disapprove of this compounding provision. Moreover, if it must be shown that the defendant was guilty of Murder (a Class A felony) to make the kidnapping a Class A felony there seems little purpose in the provision.

*Felonious Restraint*

(C. §1632, S.1 §2-7D2, S.1400 §1622)

S.1400 again appears to contain the preferable provision. The Commission bill, unlike the other two bills, attempts to draw a distinction between abducting and restraining a victim. The distinction between the two terms, as set forth in C. §1632, is, at best, difficult to comprehend and, as shown by the omission of such distinction in S.1 and S.1400, unnecessary.

S.1 again provides for compound grading. For the reasons set forth in the preceding section on kidnapping, we disapprove this compounding.

*Aircraft Hijacking*

(C. §1635, S.1 §2-7D4, S.1400 §1625)

Both S.1 and S.1400 define the offense of aircraft hijacking more broadly than does the Commission bill. Thus, both proposals apply to an unlawful seizure of an aircraft whether it is in flight or not. We favor the broadening of the application of this provision to attempt to deter an extremely serious offense which affects large numbers of innocent bystanders and knows no national boundary lines. While we believe, as is noted above in the discussion of general definitions, that the special aircraft jurisdiction is defined too broadly in S.1400, we approve of the special jurisdictional provisions applicable to aircraft hijacking which are contained in S.1400 §1625(c)(2).

In addition, we believe the grading of the offense in S.1400, providing for a lesser grade for hijacking where no one is injured, is preferable to induce the release unharmed of crew members and passengers.

*Commandeering of a Vessel*

(C. §1805, S.1 §2-7D5, S.1400 §1626)

The three proposed sections are substantially similar in definition and jurisdiction. The only major difference relates to grades of offense. S.1 grades the offense so that it is a Class B felony if committed by a crew member and otherwise a Class C felony. S.1400 provides for substantially reduced grades, D and E, and, in addition to the distinction drawn by S.1, includes in the higher grade an offense committed on the high seas by anyone. The Commission bill provided for Class B and C felonies, with the difference based solely on whether the offense was committed on the high seas.

We believe that commandeering of a vessel is extremely serious whether done by a crewman or another, particularly where such acts may be done for political or terroristic motives. We, therefore, do not favor a distinction in grade based on the identity of the defendant. Nor do we believe that the distinction in grade based upon whether or not the vessel is on the high seas, serves any legitimate purpose. As was previously noted, aircraft hijacking is not graded on the basis of whether the aircraft is hijacked on the ground or in the air, but is based on the release unharmed of passengers and crew members. We recommend that a similar distinction apply in this analogous offense involving vessels.





*Maiming and Assault*

(C. §1611-12, S.1 §2-7C1-C2, S.1400 §1611-12)

We were critical of the Commission's handling of assault because the provision on aggravated assault categorized all serious bodily injury assaults as Class C felonies. We suggested, at page 65 of our prior report, that a Class B felony be provided for the intentional infliction of a permanently crippling or seriously maiming injury.

Both S.1 and S.1400 contain provisions like those recommended in our initial report. While S.1400 categorizes these serious assaults as Class C felonies, the authorized terms of imprisonment in S.1400 (see §2301) in fact permit a higher sentence than the comparable Class B felony classification in S.1.

*Reckless Endangerment*

(C. §1613, S.1 (no provision), S.1400 §1615)

We have previously criticized Section 1613 of the Commission bill for attempting to distinguish between two grades of endangerment, involving the creation of "a substantial risk of serious bodily injury or death to another," where the circumstances reflect the accused's "extreme indifference to the value of human life", and where no such circumstances exist. We believe that this distinction is unworkable and suggest that all reckless endangerments be Class A misdemeanors.

S.1400 is substantially identical to the Commission bill.

S.1 has avoided this problem simply by eliminating this concept of reckless endangerment from the bill.

We believe a section on reckless endangerment should remain in the adopted legislation, but reiterate our view that the unworkable distinction based on finding of extreme indifference to the value of human life be eliminated.

*Criminal Coercion*

(C. §1617, S.1 §2-9C4, S.1400 §1723)

In our original report, at pages 67-68, we criticized the Commission bill because of its possible "chilling effect" on legitimate activities by citizens to pressure others to desist from anti-social behavior. We therefore suggested that the crime of coercion based on a threat to prosecute for a crime require proof of corrupt intent.

S.1 avoids much of this problem by eliminating certain of the more controversial provisions. S.1400 limits the crime of coercion to "obtain[ing] property of another" by threats, unlike the Commission bill which defined the crime as including the use of the specified threats to "compel another to engage in or refrain from conduct."

We believe, however, that further tightening is necessary especially because of S.1400's broad definition of "property" (§111, p. 17) to include, e.g., "tangible or intangible personal property . . . contract right . . . information . . . credit . . . anything of value . . .", and because the general attempt provision would not require that property actually pass for the crime to be committed (§1001, p. 32).

Unless the section is narrowed, legitimate activities might be deterred. See our earlier report, pp. 67-68; Special Committee on Consumer Affairs, "The proposed New Federal Criminal Code and Consumer Protection", 27 Record of The Association of the Bar of the City of New York, 324 (1972).





Consequently, we believe that our original recommendation that the crime be required to be committed corruptly, i.e., with evil intent to obtain personal gain by unfair means – and not in the course of a bona fide dispute – should be adopted.

*Rape*

(C. §1641, S.1 §2-7E1, S.1400 §1631)

As set forth in our initial report, the Committee agreed with the Commission bill that Class A felony treatment for consensual sexual intercourse should be limited to cases involving children under the age of 10. For the reasons stated at pages 69-70 of our report the Committee was divided on the issue of recommending the creation of a Class C felony to cover consensual sexual intercourse with a person between the ages of 10 and 14.

S.1, in Section 2-7E2, would treat consensual sexual intercourse as a Class D felony if the victim is between 13 and 16 years old, Class C if between 10 and 13, and Class B if under 10. S.1400 grades all rape as a Class C felony and raises the minimum age of consent to 12. The Committee remains divided on the issue of the minimum age of consent for the reasons discussed in our report.

We generally approve of the provision in S.1400 (§1631(c)(2)) which grants jurisdiction over a rape where it is committed in conjunction with certain other cognizable federal crimes. However, we have some difficulty with the draftsmanship of this jurisdictional subsection. Under this subsection there would be federal jurisdiction over a rape committed during the immediate flight from the commission of the offense of tampering with a witness in a federal proceeding. Putting aside the inherent improbability of such a crime, there will necessarily be serious problems relating to the exact conduct and time period covered by the term "immediate flight from . . ." as used in this subsection. This same observation applies equally to the jurisdictional subsections of §1632 and §1633.

*Sodomy*

(C. §1643-1644, S.1 §2-7E1, S.1400 §1631)

The Commission bill unnecesarily separates the crime of sodomy from the crime of rape. Both S.1 and S.1400 include both in one section by defining the crime as a sexual act, rather than limiting it to sexual intercourse. The Committee agrees with this approach. We note, however, that S.1, unlike S.1400, contains no definition of "sexual act" or "sexual contact." Such definitions are necessary.

*Sexual Abuse of a Minor*

(C. §1645, S.1400 §1633)

S.1400 is substantially identical to the Commission bill, excepting the addition in S.1400 of an affirmative defense that the defendant believed the other person to be at least 16 years of age.

S.1 includes no comparable provision, its provisions concerning sexual acts with underage persons being limited to the statutory rape section (§2-7E2).

As indicated in our original report, at page 70, a majority of the Committee approves of the inclusion of an age differential in a provision dealing with sexual abuse of minors. The Committee, however, continues to be divided on the exact formula to be utilized in dealing with this issue.

*Sexual Abuse of Wards*

(C. §1646, S.1 §2-7E3, S.1400 §1643)

In our initial report, we recommended that this crime, when committed by someone in a supervisory disciplinary official authority over the other person, should be treated as a more serious felony. We support the S.1 provision for doing just that. Otherwise, all three bills are substantially similar.





## Chapter 17

## OFFENSES AGAINST PROPERTY

Chapter 17 of S.1400 "Offenses Against Property" represents a simpler approach to the law than either Chapter 17 of the Brown Commission bill or Chapter 8 of S.1. The penalties imposed by S.1400 are generally equal to or lighter than those provided for by the Commission proposal or by the more complicated and redundant sections of S.1 for such crimes as Arson, Burglary, Robbery, etc. Insofar as the format and content of S.1400 are more representative of a "Common Law" approach to the subject matter, that bill is preferable in our opinion.

*Mail Fraud*

Both S.1 (§2-8D5) and S.1400 (§1734) continue the important protection of the public against fraudulent activities provided by the mail fraud statute (18 U.S.C. §1341) rather than replacing it with a weaker larceny statute as proposed by the Brown Commission (C. §1332, §1741). In this respect S.1 and S.1400 follow our earlier recommendations (Report, pp. 74-75) and the views of the Association's Special Committee on Consumer Affairs in its report "The Proposed New Federal Criminal Code and Consumer Protection," 27 Record of The Association of the Bar of the City of New York, 324 (1972). See also "Reform of the Federal Criminal Laws," Hearings Before the Subcommittee on Criminal Laws & Procedures, Senate Judiciary Committee, 92d Cong., 2d Sess., Part III(B), p. 1827-28 (1972); Report of the Committee on Federal Legislation, New York County Lawyers Association, *Id.* at 1398, 1399-1400; compare "Reform of the Federal Criminal Laws," Hearings Before the Subcommittee on Criminal Laws & Procedures, Senate Judiciary Committee, 93d Cong., 1st Sess., Part IX, p. 6481-6482 (1973). We accordingly prefer S.1 and S.1400 to the Commission bill on this point. The differences between the S.1 and S.1400 versions of the antifraud statute are minor, S.1 extending jurisdiction to cover acts "affecting" inter-

state commerce, see *Polish National Alliance* v. *NLRB*, 322 U.S. 643 (1944). This would be desirable in order to include frauds such as those by auto repair shops preying on interstate travelers.

The provision of S.1 (§2-8D5) is also preferable to §1734 of S.1400 in that the former covers one who ". . . devises or engages in a scheme to defraud . . ." while the latter covers one who ". . . having devised a scheme or artifice to defraud . . . engages in conduct with intent to execute such schemes or artifice." The S.1 section directly and clearly covers one who has not devised the scheme but nonetheless engages in it, while in the S.1400 section both the devising and the execution of the scheme must be present to complete the crime.

The concept of multiple mailings being chargeable as only one offense when done as part of one scheme rather than being chargeable as separate counts, as under the present law, is another advantage of the S.1400 provision.

*New Crimes*

§1704 of the Commission bill, covering release of destructive forces, commented on without objection by this Committee, has been included in S.1 as §2-8B3 but has been omitted from S.1400. §1713 of the Commission bill covering breaking into or concealment within a vehicle, also commented on without objection by this Committee, has been overlooked in S.1 but is included by inference in S.1400 in §§1711 and 1712 (see §1714(d)). Section 1734 of the Commission bill covering theft of property lost, mislaid or delivered by mistake appears as §2-8D3(b)(4) of S.1 and is absent from S.1400.

*Doubtful Crimes*

Question has been raised by this Committee in its prior report as to the desirability of including various crimes in a Federal Criminal Code (Report, p. 73). Section 1733 of the Commission bill covering theft of services (§2-8D3(b)(8) of S.1), is such a





section as is §1735 of S.1400 (§2-8D7 of S.1), interference with a Security Interest, which seems redundant in that certain aspects of the crime are covered by the theft sections, §1731 of S.1400, §2-8D3 of S.1, and insofar as are not covered ought not to be.

The Securities Violations sections—§1761 of S.1400, §2-8F5 of S.1, and §1772 of the Commission bill merely incorporate by reference existing sections of other titles of the U.S. Code without setting forth any substantive matter respecting the crimes. In our earlier report (p. 82) we disapproved the automatic reduction in grade of all non-Title 18 crimes to misdemeanors (which the Brown Commission proposal and S.1400 effect). If our views are followed, we see no need whatever for the inclusion of these sections relating to securities violations in Title 18. This comment does not include §2-8E4 of S.1 which is the substantive crime of trafficking in specious securities and codifies existing law.

*Consolidated Crimes*

The theft sections—§1731 of S.1400, §1731 *et seq.* of the Commission bill and §2-8D3 of S.1—put all kinds of theft provisions in a central place and are desirable. Section 1741 of S.1400, §2-8E1 and §2-8E2 of S.1, and §1751 of the Commission bill are all-inclusive forgery and counterfeiting sections. The definitions of counterfeiting and forgery in §1744(b) and (c) of S.1400 draw a distinction between the two terms, a completely false item being a counterfeit and a partially false item being a forgery. S.1 §2-8E1 defines a counterfeit as a false governmental writing and §1751 of the Commission bill makes no distinction between forgery and counterfeiting except that it grades the crime more severely if the forged or counterfeited writing is an obligation or security of the United States. The Commission approach in §1751 seems preferable, as there seems no need for the proposed distinctions.

*Theft of Records*

The Brown Commission bill defines (§1732) "theft" and "receiving stolen property" as including any "government file,

record, document, or other government paper," with there being no requirement that the government record have any monetary value.

*S.1400, §1731* provides:

"Theft" . . . "A person is guilty of an offense if he knowingly: (1) takes or exercises unauthorized control over; (2) makes an unauthorized use, disposition or transfer of . . . property of another."

". . . There is federal jurisdiction over an offense described in this section if . . . the property is owned by, or is under the care, custody or control of the United States or is being produced, manufactured, constructed or stored for the United States."

"Property" is defined as including "intellectual property and information."

*"Section 1732—Receiving Stolen Property"*. "A person is guilty of an offense if he receives . . . (stolen) property."

*"Section 1742—Unauthorized Use of a Writing"*: "A person is guilty of an offense if with intent to . . . harm a government . . . he knowingly possesses a writing which has been issued without authority."

*"Section 1301—Obstructing a Government Function by Fraud"*: "A person is guilty of an offense if he intentionally obstructs, impairs or prevents a government function by defrauding the government in any manner."

*S.1, §2-8D4* makes it a crime to receive stolen property and defines property as including "any government file, record, document or other government paper" taken without authorization from any government servant.

Prior to 1970 and the Pentagon papers case, theft was not considered to be a crime applicable to the dissemination by news media of government reports. That case demonstrates, however,





that these sections can be used to impose censorship through the threat of criminal sanctions. The Solicitor General advanced the argument in *U.S.* v. *Washington Post* (The Pentagon Papers) that the government's ownership rights in the Pentagon papers were similar to those of Mrs. Hemingway in a Hemingway manuscript —in effect asserting a common law proprietary interest in government reports.

S.1400 reflects this position by providing (§1731(d)(B)) that property includes, among other things, information owned, controlled or stored by the United States.

Under the theft and related sections in all of the bills, punishment is provided for the steps involved in publication of government reports (receipt, possession, etc.) regardless of content or of its effect on the welfare of the nation.

The receipt of government reports and their publication by the news media in the public interest must not be subject to the "chilling" effect of the threat of criminal prosecution merely because the government does not want the public to know what is in the government report. This is prior restraint long condemned by the Supreme Court (*Near* v. *Minnesota*, 283 U.S. 697). We believe that the provisions of these bills may go too far in the direction of imposing penalties on activities connected with the publication of governmental information. We also seriously question whether the boundaries of criminality in this area should be dealt with through concepts such as "theft" and "receipt of stolen property" rather than through special provisions tailored to the requirements of this sensitive area.

## Chapter 18

## OFFENSES AGAINST PUBLIC ORDER, HEALTH, SAFETY AND SENSIBILITIES

Chapters 18 of S.1400 and the Commission bill and Chapter 9 of S.1 deal with Public Order.

*Riot Bill*

The Riot sections—§1801 *et seq.* of the Commission bill, §1801 *et seq.* of S.1400, and §2-9B-1 *et seq.* of S.1—fall within the category of crimes this Committee considers unnecessary in the Federal Law (see Report, pp. 76-77). There are enough existing state, civil and criminal avenues of redress available.

*Firearms*

The Firearms and Explosive sections—§1811 *et seq.* of the Commission bill, §1801 *et seq.* of S.1400, and §2-9D2 *et seq.* of S.1—do not go far enough. As we said in our original Report, the Committee supports the Commission majority in its view that Congress should ban production, possession and trafficking in hand guns, with stated exceptions for the military, police, etc., and that it require registration of all firearms (Report, p. 77).

*Drugs*

The drug sections of S.1 and S.1400—§2-9E1 and §1821 *et seq.*, respectively—essentially follow the 1970 Drug Act. §1821 of S.1400 selects heroin and morphine for special, more stringent treatment, which we consider laudable, especially by contrast to the Commission Bill which at §§1822 *et seq.* changes the 1970 Drug Act treatment by singling out hashish, a canabis derivative, for more stringent treatment than marijuana, another canabis derivative. This whole subject is discussed in greater detail in our original Report (pp. 77-80).





*Gambling*

§§1831-1932 of the Commission Bill, §§2-9F1—2-9F2 of S.1 derived therefrom, and §§1831-1832 of S.1400 are little different except for degree. S.1 is different in that it includes redundant sections dealing with crimes raging in scope from murder to extortion, which sections are needlessly prolix and unnecessary. As in our prior report on the Commission Bill, we question the inclusion of federal criminal sanctions against gambling. In our view, this is a subject which should be left to state and local regulation, and we suggest that the gambling provisions be dropped (Report, p. 80).

*Prostitution*

§§1841 *et seq.* of the Commission Bill, §§2-9F3—2-9F4 of S.1, and §1841 of S.1400 endeavor to broaden the Mann Act, 18 U.S.C. §2421, along the lines of the existing gambling business laws, 18 U.S.C. §1955. This Committee holds to its previously expressed view that existing state and local sanctions are sufficient and supports regulation of prostitution rather than treatment of it as a crime (Report, p. 80).

## Chapters 30-36

## SENTENCING

This portion of this report will compare the sentencing provision of S.1 and S.1400 with the provisions of the Brown Committee bill, which were analyzed in the original report of the Committee, pp. 81-95. The discussion will be divided into seven sections, following the order in which they were presented in the original report.

I. General Sentencing Provisions

II. Probation and Unconditional Discharge

III. Imprisonment

IV. Fines

V. Parole

VI. Disqualification from Office and Other Collateral Consequences of Conviction

VII. Life Imprisonment and the Death Penalty.

Analysis of the provisions dealing with appellate review of sentencing, dealt with in the original report on page 94, will be included in a separate section.

I. *General Sentencing Provisions*

A. *Classification of Offenses*

C.—Sec. 3002
S.1—Sec. 1A5
S.1400 Sec. 105

Following is a chart of the classification of offenses under the three bills:

| | *Felonies* | *Misdemeanors* | *Infractions* |
|---|---|---|---|
| Commission | A, B, C. | A, B. | one class |
| S.1 | A, B, C, D, E. | one class | one class |
| S.1400 | A, B, C, D, E. | A, B, C. | one class |

S.1 also introduces, in Sec. 1A5, the notion of the "compound" offense (discussed elsewhere in the Committee report), and classifies it the same as a "designated" offense.

*Comment:*

The increase in felony categories and concomitant reduction in misdemeanor categories in S.1 is possibly a reaction to the trivialization of federal crime in the Commission bill. It may be, however, that the availability of a convenient felony label will not ameliorate the problem discussed in our earlier report concerning the danger of encouraging both plea bargaining and the assumption of jurisdiction by federal prosecutors. In any event, the pro-

IV. Fines

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liferation of *both* felony and misdemeanor categories in S.1400 is difficult to understand. The availablity of nine classes of crime seems quite excessive.

B. *Miscellaneous General Provisions*

C.—Sec. 3001
S.1 Sec. 1-4A1
S.1400—Sec. 2001

These are introductory sections, the noteworthy features of which are as follows:

(1) *Death penalty*—retained in both bills, these provisions will be discussed below.

(2) *Organizations*—as with the Commission bill, both bills deal with special sanctions against organizations, S.1 adds to the penalty for organizations that of "suspension of the right to affect interstate or foreign commerce" for as long as a natural person could be jailed for the same offense. S.1400 and S.1 provide for "notice sanctions," under which an organization would have to publicize its conviction to affected persons.

(3) *Probation*—S.1 introduces the concepts of "strict" and "limited" probation.

(4) *Restitution*—S.1 permits the court to order restitution.

(5) *Split sentences*—S.1 modifies the Commission bill by permitting the court, in granting probation, to order the defendant committed "at whatever time or for such intervals within the period of probation as the court determines".

(6) S.1400 classifies generally all crimes contained in Titles other than Title 18.

*Comment:*

Most of the issues raised in this section will be discussed in the following sections. Three need be noted here.



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(1) *Organizations.* The sanctions against organizations enumerated in the Commission bill were deemed by the Committee to be inappropriate in certain respects for reasons stated in our initial report. (See p. 81). The new provision in S.1 raises additional problems. While suspending all of the organization's business for a period of time might well be an effective deterrent, it might also be an unfair punishment to those without blame who depend on the organization for their income. We stress again our view that provisions for equitable relief against organizations would be appropriate. We would also note that none of the bills expressly provides for probation sentences against organizations, which we would recommend.

(2) *Split sentences.* The original draft made it clear that the "splitting" was to be done as part of the original sentence. (See Sec. 3106). The language of Sec. 1-4A1 (6) is not so clear, and seems to suggest that the court can maintain jurisdiction over this matter throughout the probationary term. If this is a correct interpretation, it seems that S.1 introduces a degree of uncertainty for the defendant, and raises questions as to the need for procedural and substantive standards for the alteration of the sentence.

(3) S.1400 classifies generally all non "Title 18" offenses (Sec. 2002). For reasons expressed in our original report, we disapprove this section. (See pages 33-36.)

II. *Probation and Unconditional Discharge*

C.—Sec. 3101

S.1—Sec. 1-4D1

S.1400—Sec. 2101 et seq.

A. *Terms of Probation*

(1) S.1 provides for placing persons convicted of either a felony or a misdemeanor on probation for up to five years, and for a violation up to one year. The provision, like the Commission bill, contains a long list of criteria to be considered by the





judge before granting probation. Unlike the Commission bill, it expresses no priority for probation over imprisonment.

S.1400 provides for up to five years probation for felonies, two years for misdemeanors and one year for infractions. Unlike either the Commission bill or S.1, S.1400 seems to create a preference against probation, providing that probation may be granted if it "will not" "unduly depreciate the seriousness of the defendant's crime", fail to constitute "just punishment", and fail to afford "adequate sentencing". (Compare the Commission bill, which states that probation shall be granted *unless* these conditions exist.)

(2) S.1 eliminates unconditional discharge, and permits conditional discharge. S.1400 eliminates both.

(3) S.1400 unlike the Commission bill or S.1, precludes probation sentences in certain cases, i.e., where mandatory minimum sentences are required.

B. *Revocation*

S.1 and S.1400 both contain exhaustive lists of probation conditions, and provide for revocation in a manner similar to the Commission bill.

*Comment:*

1. We noted in our original report that the chief fault in the Commission bill was its failure to require the court to give reasons for its denial of probation. The failure of either S.1 or S.1400 to make such provision creates the same problem.

2. We approved the Commission bill's statement of preference for probation sentences, and therefore disapprove the failure of S.1 to state a policy, and even more the presumption favoring imprisonment in S.1400.

3. We feel that the extension of the permissible term of probation in S.1 to five years in misdemeanor cases is excessive, and prefer the two year periods in the Commission bill and S.1400.

4. The provision in S.1 for "strict" and "limited" probation contains no definition of those terms and their meaning is therefore unclear.

5. S.1 eliminates unconditional discharge, but substitutes "discharge without supervision . . . under conditions", which is tantamount to an unconditional discharge or suspended sentence. This seems an appropriate dispositional alternative, particularly in view of the heavy burdens on probation services now, and we disapprove the elimination of this type of sentence in S.1400.

6. We find unacceptable the provisions in both S.1 and S.1400, which permit the court to impose the maximum term of imprisonment after revocation of probation. (See our commentary on the Commission bill, at pp. 84-5, which was similar).

7. We disapprove of the elimination in S.1400 of the possibility of a probation sentence implicit in those crimes carrying a mandatory minimum sentence.

8. We urge again the vital importance of dealing with the procedural rules concerning probation and probation revocation, without a proper treatment of which the substantive provisions are rendered relatively meaningless. See our original report, pp. 85-6.

III. *Imprisonment*

C.—Sec. 3201-3202
S.1 Sec. 1-4B1
S.1400 Sec. 2301

A. *Maximum Sentences*

Following is a chart of the maximum terms under the three bills:

UPPER RANGE FELONIES

| *Crime* | *Commission* | *S.1* | *S.1400* |
|---|---|---|---|
| Class A | 30 | 30 | |
| Class B | 15 | 20 | N/A |
| Class C | 7 | 10 | |
| Class D | N/A | 6 | |





LOWER RANGE CRIMES

| *Crime* | *Commission* | *S.1* | *S.1400* |
|---|---|---|---|
| *Felonies* | | | |
| Class A | 20 | 20 | Life or any years |
| Class B | 10 | 10 | 30 |
| Class C | 5 | 5 | 15 |
| Class D | N/A | 3 | 7 |
| Class E | N/A | 1 | 3 |
| *Misdemeanors* | | | |
| Class A | 1 | 6 mos. | 1 |
| Class B | 30 days | (one class) | 6 mos. |
| Class C | N/A | — | 30 days |
| Violation (Infraction) | none | 30 days | 5 days |

*Comment:*

In keeping with our earlier position, we will not comment on the designation of various maximum sentences, since we feel that we have no basis upon which to determine that one number of years is preferable to another. We do urge, however, that close consideration be given to the need to increase penalties over those contained in present law. Clearly, Title 18 gives the court very broad scope in sentencing, and we feel that no increase in penalties should be made unless a need for such an increase is shown. Certain of the differences between S.1400 and the other bills, however, deserve comment.

1. While we acknowledge the value of limiting the discretion of the court in imposing very severe sentences—the thought behind upper-range sentencing in the Commission bill and S.1—we feel that those provisions are unworkable, overbroad and ill-defined (see our original report, pp. 87-88) and prefer the more general approach of S.1400. S.1, it should be noted, defines "spe-

cial offenders" in substantially the same rather complex way as the Commission bill. It also "defines" the dangerous offender as one who needs to be confined longer than normal to protect society.

Rather than analyze the provision of these sections again, it seems sufficient simply to repeat earlier comments (see pp. 87-88): They are cumbersome and extremely broad. Moreover, S.1, unlike the Commission bill, requires no hearing before imposition of even upper range sentences. The failure of S.1 to provide for a hearing and written findings in these cases, therefore, compounds the error in the Commission bill of not providing for these fundamental matters in all sentencing procedure. As a general comment to S.1, then, we feel that a rationalization of the whole sentencing process, including provision for appellate review (see infra) is in order. If this were done, all of the appropriate criteria enumerated in both bills could be considered by the court in every case, and scrutinized on appeal, with the end result, hopefully, of a more predictable sentencing procedure than we have now. (See the first two paragraphs of our original report, p. 89).

2. S.1400 and S.1 both provide for jail terms for violations (infractions). We approve the Commission approach, which would eliminate jail in these cases.

B. *Minimum Sentences*

The Commission bill permits minimum terms of up to one-third the maximum imposed only in Class A and B felonies, in "exceptional" cases. S.1 permits minimum terms in all categories of up to 25% of the maximum imposed, also restricting the court to cases described as those which would justify imposition of upper-range sentences and requiring the court to state its reasons in detail. S.1400 permits minimum terms in A, B, C, or D felonies of up to 20% of the maximum imposed, up to 30 years if a life sentence is imposed, or up to 10 years if a maximum of over 30 years is imposed.

In addition to these provisions permitting judges to impose minimum sentences, S.1400 requires mandatory sentences in various





crime categories, including certain weapon and drug offenses. It also "mandates" the death penalty in certain cases, to be discussed in the death penalty section below.

*Comment:*

We generally approve of the approach of the Commission bill and S.1 which provide for the imposition of minimum terms in the discretion of the court, and restrict minimum sentencing to "exceptional" cases. S.1400 also gives the court discretion, but contains no limiting language. To this extent, we disapprove of S.1400.

We disapprove of the legislatively created mandatory minimum sentences in S.1400, for reasons well expressed by the Commission. See Working Papers, Vol. I, pp. 1251-1258. As the Commission report observes, mandatory minima have been unevenly applied in practice and evaded by both judge and prosecutors. Moreover, they are inconsistent with contemporary thought concerning the rehabilitative process.

C. *Miscellaneous Imprisonment Provisions*

1. *Separate terms of parole* — S.1400 adds to the term of imprisonment an automatic term of parole, to be set by the Parole Commission, of 1-5 years for all felonies and Class A misdemeanors. (Sec. 2303) This provision also calls for a "contingent term of imprisonment" of one year for felonies and 90 days for Class A misdemeanor. The effect of this provision is to guarantee that a person whose parole is revoked will spend at least those periods in jail, even if the time remaining on their maximum terms is less than that.

*Comment:*

We will reserve our comments on this provision until we deal with the subject of parole generally, below.

2. *Resentence* — S.1 provides that if, on appeal or collateral attack, a conviction is reversed in part, the case "shall" be remanded for resentencing on the charges sustained, with the court free to

impose any authorized sentence, even a higher one than that originally imposed. (Sec. 1-4A2)

*Comment:*

The Commission bill (Sec. 3005), approved by our Committee, followed the holding of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and prohibited any increase in sentence on retrial unless the increase could be justified by post-conviction conduct of the defendant. This section deals with an issue not raised by *Pearce*, which dealt only with the reversed charges. (As did the Commission bill) The section raises a nice constitutional question, however, because the evil which the Court addressed in *Pearce* was the inhibiting effect on the right to appeal brought about by the rule under attack there. Quite clearly, Sec. 1-4A2 would undermine *Pearce* whenever a single count was sustained. There would therefore appear to be serious constitutional problems with the section in that it would produce the kind of chilling effect on the right to appeal described in *Pearce*.

Even if the section is constitutional, however, it appears to be unwise in policy terms. It would clearly inhibit appeals, or at least force defendants to narrow their grounds for appeal. The section should be disapproved.

(3) *Disqualification*—S.1 provides that the court may order disqualification:

(a) of a Federal employee, up to 10 years from any Federal office;

(b) of any agent of any "organization" or "member of a profession", from exercising "similar functions" in "the same or other organization" or from practicing his profession for up to ten years. In the alternative, "conditions" may be placed on the employment of such person. (Sec. 1-4A3)

The section requires that the disqualification be "reasonably related" to the character of the offense, and provides that for good cause it may be lifted at any time.





*Comment:*

Many of our objections to the original draft (Sec. 3501-3505) are applicable to this section, which contains additional grounds for objection.

Federal officers—our position was that disqualification should be automatic, not discretionary. The same objection could be made here. Moreover, this provision, unlike the original, does not enumerate the crimes which would subject the person to disqualification. We believe that such an enumeration is essential. It would seem that such an enumeration is appropriate, and better than the vague "reasonable relation" restriction of subsection (d) (discussed supra) and that in those cases (e.g., involving the public trust), disqualification should be mandatory.

Organizations and professions—the comments just made apply here too. Moreover, the language employed is extremely vague. There is no limit on the type of organization (see Sec. 1-1A4(51), which defines the term to include any group organized for any purpose), and no definition of profession. There is no definition of the word "agent". Most of all, perhaps, the court is given no real guidance as to when the disqualification (or imposition of "specified conditions"—also undefined) shall be imposed.

4. *Criminal Forfeiture*—S.1 mandates the forfeiture of any property "used, intended for use, or possessed" in violation of Sec. 2-9C1 (Racketeering Activity), which appears to include a significant proportion of the crimes enumerated in the Code. The section provides for an application by the United States Attorney, followed essentially by civil forfeiture proceeding.

*Comment:*

This section is new. It appears to be part of the Committee bill's overall, and probably quixotic, effort to legislate organized crime out of existence. There seems no objection in principle to

depriving criminals of ill-gotten gains. It is another question, however, to *prove* that specific property was "used in, intended for use in or possessed" for these purposes.

5. *Joint Sentences*—S.1 provides that defendants convicted of several crimes shall, if not sentenced specifically for any of them, receive a joint sentence. If imprisonment is imposed, the maximum sentence may be as much as 75% of the total of the term authorized for each offense. The same 75% rule is also applied to fines. (Sec. 1-4A5)

S.1400 provides for concurrent sentences unless the court "having regard to the nature and circumstances of the offense and the history and characteristics of the defendant, . . . is of the opinion that a (consecutive) term is warranted". The limit on such an "aggregate" term is one grade higher than the most serious felony of which the defendant was convicted; three years if two or more Class A misdemeanors are involved; or one year in all other cases.

*Comment:*

S.1 and S.1400 radically change the Commission bill of which we approved. Unlike the Commission bill, these sections state no policy against consecutive sentences; no prohibition against consecutive sentences where the charges are closely related to each other (e.g., conspiracy and substantive offenses); no attempt to distinguish felonies from misdemeanors; no requirement that the court give reason for imposing consecutive sentences; and no provision for credit for time served in state institutions. The sections seem, in contrast to the Commission bill woefully inadequate, and unnecessarily punitive.

6. *Persistent misdemeanants*—Neither S.1 nor S.1400 contains the Commission bill's provisions on persistent misdemeanants. (Sec. 3003)





*Comment:*

Neither bill seems to us deficient in this regard.

7. *Presentence Commitment for Study*—S.1 is silent on this subject, which is now embodied in 18 U.S.C. 4208, and included in substantially the same form in the Commission bill (Sec. 3004) and S.1400.

*Comment:*

We approve the provision of the Commission bill and S.1400.

8. *Credit for Time Served*—All these bills provide for credit for time served. We might note that S.1400 makes no specific reference to credit for time served in state custody for acts upon which the federal conviction was based, as does the Commission bill (Sec. 3204(8)). We also note the provision in S.1 (Sec. 1-4B3) which permits the Bureau of Correction, in its discretion, to give credit "for excellent performance in vocational training, educational development", etc.

*Comment:*

We approve in general all these provisions. S.1400 should be clarified to assure credit for state prison time. Moreover, the provision in S.1 allowing the Bureau of Correction to give credit seems a good one.

IV. *Fines*

C.—Sec. 3301
S.1 Sec. 1-4C1
S.1 Sec. 2201

A. *Fine Limits*

The Commission bill and S.1400 both relate fine limits to the class of crime, although the amounts differ substantially. (e.g., a Class C felony in the Commission bill carries a $5,000 maximum;

in S.1400 the Class C maximum is $100,000). The approach in S.1 is different: under it the judge may impose a daily fine for a minimum of 10 days to a maximum of 3 years, with daily rates ranging up to $1,000 for an A or B felony.

All three bills provide for alternative procedure in which fines totalling twice the gain or loss resulting from the crime may be imposed.

*Comment:*

Our objection to the Commission bill was that the maximum fines were too low, particularly in view of the difficulty of proving the alternative (double the gain or loss) fine. The problem does not appear to exist with either the S.1 or S.1400 formulation.

B. *Response to Nonpayment*

S.1 and S.1400 are similar to the Commission bill, permitting imprisonment for intentional nonpayment. S.1 and the Commission bill provide for a maximum of 6 months in felony cases; the limit in S.1400 is 1 year. The Commission bill provides for 30 days in non-felony cases, S.1 for 60 days and S.1400 for 6 months for a Class A misdemeanor, and 30 days for all others.

All three bills provide for installment payment.

*Comment:*

We have no opinion as to the differences in maximum penalties for non-payment. We approve installment payment provisions. Finally, we note that all of the bills leave unclear whether imprisonment may be repeated for repeated failures to pay.

V. *Parole*

C.—3401
S.1—Sec. 1-2F3
S.1400 Sec. 4201





A. *Time of Release*

With some variation, all three bills give the Parole Board the power to release the prisoner at any time, although in the Commission bill parole within the first year of a sentence in excess of three years is to be granted only in exceptional circumstances.

There is a greater difference between the bills with respect to mandatory release on parole. The Commission bill requires release generally after service of two thirds of the sentence. S.1 requires release two years prior to the expiration of a sentence of 10 years or more, and one year prior to a shorter sentence. S.1400 does not require parole until the expiration of the sentence and, as noted above, gives the Parole Board authority at that time (or earlier) to impose any term of parole between 1 and 5 years.

*Comment:*

The difference in the parole provisions of the three bills is closely analogous to that in their probation provisions. The Commission bill mandates earlier release, and expressly favors parole over continued imprisonment. S.1 takes a middle position on mandatory release, and is silent on priorities. S.1400 mandates no early release, and suggests a stricter parole standard, parallel to that in its probation provisions. (e.g., parole may be granted if the Board ("Commission") is of the opinion that the defendant's release "would not fail" to afford adequate deterrence).

We favor the Commission bill's provisions on early release and its expression of priority for parole over continued imprisonment.

B. *Revocation*

The bills differ in a number of respects on revocation, although they are basically similar.

(a) S.1 enumerates sanctions short of revocation, while the others do not.

(b) S.1 also provides for a right to counsel at the revocation hearing. The Commission bill does not deal with the subject, and S.1400 omits any reference to counsel in its hearing provision (Sec. 4207(c)). S.1 also provides for some articulation of the grounds of the Parole Board's decision, while the others do not.

(c) The Commission bill provides that the defendant, after the revocation, is to receive credit for his street time, S.1 is not clear on this matter, while S.1400 denies such credit.

*Comment:*

We approve the provisions of S.1 which enumerate sanctions short of revocation and provide for counsel and a statement of fact at the revocation hearing. We approve of the Commission bill's credit provisions.

In general, however, we have the same objections to S.1 and S.1400 as we expressed in our original report on the Commission bill, to wit, the failure of all of them to provide for a real due process proceeding at both the parole granting and parole revocation stages. When it is considered that the parole authority has actual sentencing power at least equal to and very often greater than the court itself, the desirability of such procedures seems clear.

C. *Review of Parole Decision*

All three bills virtually eliminate the power of the courts to review the action of the parole authority, either in granting or revoking parole.

*Comment:*

This approach compounds the fault in the parole provisions discussed in the preceding section. We reiterate here our original remarks (Report, p. 91) and add that in our view it is deplorable as a matter of policy to allow *any* administrative body, least of all one with the power over personal freedom, virtually absolute discretion.





VI. *Disqualification From Office*

Neither S.1 nor S.1400 deals with these matters.

*Comment:*

See pages 91-92 of our original report, and Section III. C.3 supra.

VII. *Sentence of Death*

C.—Sec. 3601—alternate
S.1—Sec. 1-4E1
S.1400—Sec. 2401

The Commission bill recommended abolition of the death penalty, a position approved by this Committee. At the outset, therefore, we note that neither the alternate formulation of the Commission, nor the provisions of S.1 and S.1400 are approved.

Rather than restate at this point the reasons for our opposition to the death penalty, however, we shall comment upon the features of the three bills dealing with the subject.

*The Commission Bill* [Alternate formulation]

Sec. 3601 provides for the death penalty upon conviction of intentional murder or treason. It provides for a separate trial, by jury unless waived, and not bound by the rules of evidence, to determine whether the death sentence should be imposed. It leaves the ultimate decision on death to the judge, even if the jury votes for death, but requires a life sentence if the jury cannot agree.

Sec. 3603 provides certain exceptions to the death penalty provisions:

(a) if the defendant is under 18.

(b) if the defendant's physical or mental condition "calls for leniency".

(c) if the evidence does not foreclose "all doubt" respecting the defendant's guilt or

(d) if there are other substantial mitigating circumstances.

Sec. 3604 proceeds to define various aggravating and mitigating circumstances, including the following:

(a) mitigating circumstances

1. extreme mental or emotional disturbance;
2. unusual pressures or influences or domination by another;
3. mental capacity impaired as a result of mental disease or defect;
4. the defendant was "young";
5. minor complicity;
6. belief in moral justification plausible under ordinary standards of morality; and
7. no significant prior record.

(b) Aggravating circumstances:

1. known creation of great risk of death to another or risk of substantial impairment of national security;
2. treason for pecuniary gain;
3. prior conviction for murder or violent felony, or substantial history of serious assaultive behavior;
4. commission of more than one murder;
5. great risk of death to several people;
6. felony murder;
7. murder for profit;
8. especially heinous, atrocious or cruel act, manifesting exceptional depravity;





9. murder of law enforcement officer;
10. murder of President or Vice-President.

*S.1*

This bill also limits the death penalty to murder or treason cases. It provides however, that a sentence of death or life imprisonment "shall be imposed" rather than "may be imposed", as in the Commission bill. A separate trial, with a right to a jury is also provided. No express reference is made to the admissibility of normally inadmissible evidence. The bill also leaves final discretion in the judge, even if the jury votes for death. The bill includes a list of mitigating and aggravating circumstances, but it does not prohibit the death penalty under specific circumstances as does the Commission bill. The language of the section on mitigating and aggravating circumstances is virtually identical to the Commission bill.

*S.1400*

This bill provides that the death penalty "shall be imposed" if the conditions of the statute are met. It provides for the death penalty in certain circumstances upon conviction for Class A felonies under the laws prohibiting treason, sabotage, espionage, or murder (q. v.). The bill has no separate section on mitigating or aggravating circumstances. Rather, it restricts the death penalty to certain aggravated circumstances under the various crimes covered:

(a) Treason, sabotage and espionage: Death shall be imposed if there had been a prior conviction for one of these crimes for which death or life imprisonment was imposable, if the defendant "knowingly created a grave risk of substantial danger to the national security"; or if the defendant knowingly created a grave risk of death to any person.

(b) Murder: Death is authorized if the defendant

(1) committed the crime while committing one of a number of enumerated crimes;



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(2) had been convicted, in a state or federal court, for any crime for which life imprisonment or death could have been imposed;

(3) had been convicted twice, in federal or state courts, of felonies "involving the infliction of serious bodily injury" upon another person;

(4) created a grave risk of death to a person other than the victim;

(5) committed the offense in an especially heinous, cruel or depraved manner;

(6) committed the offense for profit;

(7) committed the offense against the President or a successor, chief of foreign state, foreign dignitary, or a "United States official".

Like the Commission bill, S.1400 precludes the death penalty in certain circumstances:

(1) if the defendant is under 18 (same as Commission)

(2) impaired mental capacity (only a mitigating circumstance in the Commission bill and S.1)

(3) minor complicity (also only a mitigating circumstance in the other bills)

(4) no reasonable foreseeability that the conduct in the course of the murder would cause or create a grave risk of causing death.

A separate sentencing procedure is intended in S.1400 also. A right to jury trial is also included. It should be noted, however, that the sentencing procedure is not invoked at all (i.e. no death penalty can be imposed) if the government stipulates that none of the aggravating conditions described above exist, or that one of the preclusions of the death penalty does exist.

At the hearing, the defendant has the right to most presentence information. Evidence going to aggravation of the circumstances





must conform to the rules of evidence, but these rules do not apply to evidence which would preclude the death sentence. The burden of proving aggravation is on the government, and of proving preclusion on the defendant.

Finally, unlike the other bills, no discretion is left to the judge when the trial is by jury.

### Comment Concerning the Death Penalty

As previously stated, the Committee strongly disfavors the death penalty. Given this view, we would favor that legislation which would most likely limit the possibility that persons will be sentenced to death. This, in turn, suggests to us the need for such legislation to severely limit the categories of crimes to which the penalty would apply, and at the same time give the sentencing authority the greatest latitude in determining whether to apply it.

No consideration of proposed death penalty legislation, however, can ignore the impact of *Furman* v. *Georgia*, 408 U.S. 238 (1972), which, while open to debate on a number of grounds, seems to us at the least strongly to suggest constitutional prerequisites which must be met in any such legislation.

We will analyze the bills from these two perspectives.

1. *Policy considerations*

(a) *Limitations as to crimes for which death can be imposed.*

The Commission bill and S.1 both limit the death penalty to the crimes of intentional murder and treason. S.1400 is broader, providing for the penalty in sabotage and espionage cases as well, and is therefore even less desirable than the other two bills.

(b) *Circumstances under which persons accused of the enumerated crimes can be sentenced to death.*

Both the Commission bill and S.1400 preclude the death penalty under certain circumstances (e.g., if the defendant is under 18).

In this respect, they are preferable to S.1, which contains no such section. The Commission bill, since for the most part it precludes the death sentence in a wider range of circumstances, is preferable to S.1400.

Further qualification of the death penalty exists in all three bills. It is difficult to determine, however, whether the approach in S.1 and the Commission bill is more limiting than in S.1400. The former two contain nearly identical lists of aggravating and mitigating circumstances. How they would be applied, however, is inherently unclear. S.1400 eschews this approach, in a sense simply defining for each crime category the aggravating circumstances which must be found before the death penalty can be imposed. On balance the approach in S.1 and the Commission bill is to be preferred over S.1400, for the reason that it seems to allow the sentencing authority to reject the death penalty in a broader range of circumstances.

(c) *Final authority over the decision.*

All three bills provide for a separate jury trial to determine whether the death sentence should be imposed. Unlike the other two, however, S.1400 does not give the judge a veto power over the jury's verdict of death, and is in that respect, we feel, less desirable. On the other hand, S.1400 requires that the government stipulate either that the aggravating circumstances do exist, or that the preclusions do not. Ideally, from the perspective of providing checks on the death penalty, the two approaches should be combined. If a choice between the two had to be made, however, it would seem more appropriate to leave the final decision to the judge.

2. *Constitutionality*

It is impossible, of course, to state with certainty whether the statutes under consideration here meet the standards established in *Furman* v. *Georgia*. That case spawned nine separate opinions, with five Justices joining only in a per curiam opinion holding that





the imposition of the death penalty in the cases before them constituted cruel and unusual punishment under the 8th Amendment. We will not attempt a detailed analysis of the separate opinions, but refer the reader to Professor Michael Meltsner's recent book, *Cruel and Unusual: The Supreme Court and Capital Punishment*, which after exhaustive treatment of the course of the capital punishment litigation, suggests that the following can be derived from *Furman:*[*]

While two of the Justices, Brennan and Marshall, concluded that capital punishment was unconstitutional in any form, the other three Justices in the majority—Douglas, Stewart and White—condemned the death penalty because it had been administered in an arbitrary and unfair manner. Justice Douglas observed that it had been administered in a manner which discriminated against the weak—while blacks, poor, and the mentally defective were being executed, "the Leopolds and Loebs are given prison terms". Justice Stewart found that there was no rational basis to distinguish between those who had been executed and those who had not. Justice White stressed the infrequency of execution, holding that this had made the penalty "pointless" and "needless".

Professor Meltsner raises the question whether, given the majority view, "every death penalty which authorizes discretionary selection of the condemned" is void. He concludes:

> "While Douglas, Stewart and White did not specifically address themselves to the constitutionality of narrowly defined capital crimes, their reasoning left little room to reconcile such laws with the Eighth Amendment. Douglas most plainly condemned all discretionary capital punishment, reserving only the question 'whether a mandatory death penalty would . . . be constitutional.' Stewart, while concluding that the 'case is a strong one' for the Brennan-Marshall position that 'the death penalty is constitutionally impermissible in all circumstances . . .' found it 'unnecessary to reach (that) ultimate question' . . . Justice White agreed that the discretionary

[*] See pages 292-305.

aspect of capital punishment rendered it unconstitutionally cruel and unusual. He also reserved decision on the question of the constitutionality of a 'statute *requiring* the imposition of the death penalty for first degree murder, for more narrowly defined categories of murder or for rape . . .' While the language is subject to interpretation, a fair reading supports rejection of any form of *discretionary* death sentencing." (at page 300)

The crucial question remaining after *Furman*, it would seem, is whether a death penalty statute can be drafted so as to eliminate arbitrariness in the imposition of the death penalty. The Chief Justice, in his dissent, suggests that states might pass narrow statutes designed to reach the "worst" cases, by "providing standards for juries and judges to follow in determining the sentence in capital cases, or by more narrowly defining the crimes for which the penalty is to be imposed." Professor Meltsner points out, however, that the Supreme Court itself, in *McGautha* v. *Calif.*, 402 U.S. 183 (1971), found that sentencing standards—

". . . were constitutionally unnecessary, in large part because attempts 'to identify before the fact the cases in which the penalty is to be imposed' have been uniformly unsuccessful. The implication seems to be that even assuming narrowly drafted offenses or suitable guidelines, the likely prospect is that juries or judges will use their discretion in as freakish a manner as they have in the past." (op. cit. at page 301)

We conclude from our analysis of *Furman* that all of the statutes under consideration here seem to fail to meet the standards set there, even giving the opinions of the majority their narrowest reading. If the constitutional infirmity to which Justices Douglas, Stewart and White referred was the potential in death penalty cases for discriminatory, arbitrary and standardless imposition of the penalty, we feel that all three of the statutes are extremely vulnerable.

1. *Commission bill*—Written before *Furman*, this bill permits, but does not require, the imposition of the death penalty and hence would seem not to qualify as a "mandatory" death stat-





ute at all. Moreover, its preclusion section leaves open the widest kind of discretion, e.g., barring the death penalty if the defendant's physical or mental condition "calls for leniency", or if the evidence does not foreclose "all doubt" respecting the defendant's guilt. "Substantial mitigating circumstances" can also avoid the death penalty, and the terms used in this section almost invite the kind of discriminatory application condemned by the majority in *Furman*. A person otherwise punishable by death can be excused if his "emotional disturbance" was "extreme", if he was subject to "unusual" pressures, or his mental capacity "impaired", or indeed, if he was "young" (which, given the preclusion of those under 18, is especially unclear). On the other hand, the judge or jury can consider the murder an aggravated one (it is, however, not clear from the statute why they should, unless aggravating factors can affect mitigating ones—although this is nowhere prescribed) if the crime was "especially heinous, atrocious or cruel", or manifested "exceptional depravity", or if the defendant had a "substantial history" of assaultive behavior.

Finally, the judge may overrule the jury's death verdict, presumably for reasons of his own—a commendable check on the use of the death penalty, but clearly one which opens the way to arbitrary imposition of the sanction.

*S.1*

S.1 contains many of the defects of the Commission bill. Ironically, the absence of a preclusion section in the bill, which we condemned above because it might lead to more death penalty decisions, softens one of the constitutional objections made to it.

*S.1400*

This bill probably comes the closest of the three to meeting the requirements of *Furman*. That it falls far short, in our judgment, of compliance with *Furman* suggests to us that the problem of drafting death penalty legislation which is both evenly applicable and yet properly considerate of human values is insurmountable.

The reason why S.1400 seems closer to the *Furman* standard is that it more precisely defines the conditions under which the death penalty is to be imposed. While the categories of potential defendants are broad (to which we object on policy grounds stated above), they are more definite than in the other two bills, which rely, without providing real guidance to the sentencing authority, on vague aggravating and mitigating circumstances.

We do not, however, mean to overstate the distinction; for in some respects the three statutes are identically broad. Thus, S.1400, like the others, lists as a prerequisite to the imposition of the death penalty cases in which the crime was committed in an "especially heinous, cruel, or depraved manner." Moreover, S.1400 goes farther than the other two bills in permitting discretion by *precluding* cases in which the defendant's "mental capacity was significantly impaired" (but short of insanity) or where the defendant was under "unusual or substantial duress" (but short of legal duress).

Finally, as noted, S.1400 permits the prosecutor to determine when the death penalty provisions will come into play. His failure to certify a case as a death penalty case would seem to close the issue, and to give rise to precisely the danger of arbitrary imposition of the penalty condemned in *Furman*.

### Appellate Review of Sentencing

In this section we will compare the appellate review of sentencing provisions of S.1 and S.1400 with the provisions of the Brown Commission bill, which was analyzed in the original report of the Committee, p. 94.

*Appellate Review*

C. – Suggests amendment of 28 U.S.C. 1291
S.1 — Sec. 3-11E3
S.1400 – silent





S.1 provides for appellate review by a defendant and by the government only with respect to "upper-range imprisonment for dangerous special offenders." *Accord*, 18 U.S.C. 3576, enacted in 1970 as part of the Organized Crime Control Act of that year. It does not require the sentencing court to make any findings. It authorizes a court of appeals to affirm the sentence, impose any sentence (including an increased sentence) which the sentencing court could originally have imposed or remand for further sentencing proceedings. However, only if the government appeals the sentence can the court of appeals impose a more severe sentence than that imposed by the trial court.

S.1400 does not provide for any appellate review of sentences.

*Comment:*

Appellate review of sentences is not new. It once existed by statute in the federal courts and now exists in several of our states and in the military courts. See A.B.A. Project on Minimum Standards for Criminal Justice, *Standards Relating to Appellate Review of Sentences*, approved by the A.B.A. House of Delegates in February, 1968, p. 14. Moreover, there is substantial agreement within the legal community to embody federal appellate review within the revised federal penal code. As Judge Frankel has observed: "I stump [for it] as one step toward the rule of law in a quarter where lawless and unchecked power has reigned for too long." Marvin E. Frankel, *Criminal Sentences*, p. 85 (1st ed. 1972).

The Brown Commission proposed that a court of appeals shall have "the power to review the sentence and to modify or set it aside for further proceedings." We noted in our original report that this proposal was intended only to reflect the Commission's view that some kind of review of sentencing be provided. We agreed with the concept of appellate review as a way of creating some uniformity out of the morass of sentencing disparity and urged that:

A. findings of fact be required of the trial court; and

B. a *certiorari* procedure be adopted under which an appellant would have to convince—with attendant briefs and oral argument—an appellate court of the merits of his appeal before a full review.

We took no position on the right of the government to appeal nor on the possibility of increasing sentences by the appellate court.

While we still agree with the concept of appellate review, we disagree with the provisions of S.1. Specifically, the limitation of appellate review to so called "dangerous special offenders" ° is illogical and fails to meet the problem of sentencing disparity.

Excessively lengthy and inappropriate sentences are not, of course, necessarily limited to "dangerous special offenders." For example, in recent years one of the most consistent areas of disparity in sentencing has been the disposition of draft cases,°° obviously an area seldom covered by the dangerous special offender provision. And, perhaps more fundamentally, a selective exercise of review would fail to meet the aim of allowing appellate courts to evolve uniform sentencing guidelines through decisions on all types of sentences.

Moreover, with respect to the upper-range imprisonment for dangerous special offenders S.1 provides:

> "Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused."

° Definition, at §1-4B2(b), includes: previously convicted of two felonies and imprisoned for one – pattern of criminal conduct which constituted a substantial source of his income or in which he manifested special skill or expertise – aggressive conduct – firearm – conspiracy.

°° It has been common in this area for individual judges to exercise one sentencing policy for all draft defendants. Thus, one judge would consistently impose probation, another the maximum five years imprisonment. See "Sentencing Selective Service Violators: A Judicial Wheel of Fortune.", 5 Colum. J. Law and Soc. Problems 164 (1969).





It is not at all clear that this language will be interpreted by the courts as authorizing broader sentence review for the defendant than the limited review currently undertaken in a number of federal circuits.

The first two areas to be included in the circuit courts' review under S.1 (whether the procedure was lawful and whether the findings were erroneous) fall within the general area of review of the sentencing process. Federal appellate courts presently distinguish sharply between that kind of review and review of the propriety of the sentence itself. While refusing to review particular sentences, the courts have already recognized their authority to review—on due process grounds°—the sentencing process. Thus, although appellate courts preclude themselves from reviewing the discretionary judgment of the trial court in imposing a particular sentence, they will—even without statutory authorization—currently review whether all facts necessary to make that judgment were correctly presented and considered.°° Therefore, the first two provisions of S.1 may well be interpreted by the courts as no more than a codification of a form of review currently recognized as proper.

The last area of review proposed by S.1 (abuse of discretion) would also create problems of interpretation because of existing case law. The phrase "abuse of discretion" as currently used has been given a particularly restricted definition in the context of sentence review. Although appellate judges have consistently stated that they will review a sentence only for "abuse of discre-

° Following the decision of the Supreme Court in *Townsend* v. *Burke*, 334 U.S. 736 (1948).

°° Cases recognizing this authority have vacated sentences in order to correct a variety of procedural errors including the consideration of false information concerning prior convictions, consideration of prior illegal convictions, the imposition of a longer sentence because the defendant chose to exercise his right to a trial or to an appeal, the consideration of illegally seized evidence in sentencing, and violations of statutory sentencing procedures.

tion", in practice this is virtually never found,* and this standard has in fact been used as the equivalent of refusing any form of sentence review. Therefore, there is at least a possibility that the choice of "abuse of discretion" as the statutory scope of review may be viewed by the courts as authorizing no more than the restricted review presently available.

In summary, then. S.1—whether by design or inadvertence—is susceptible to interpretation as merely a codification of current practice and therefore falls short of the desirable purpose of such a provision: to unequivocally mandate appellate review of the propriety of a particular sentence to an individual defendant in light of all the relevant factors.

Moreover, there is no provision for an appeal taken from the district court's review of its own sentence, either pursuant to 28 U.S.C. §2255 or to F.R. Crim. P. 35, as distinguished from the original sentencing. For the sake of comprehensiveness and clarity, provision for such a procedure should be specifically made.

We feel that a defendant, as a matter of right, should be able to appeal to an appellate court any sentence, regardless of its length** and whether the product of a plea or a trial. For such an appeal to proceed in an orderly fashion, findings of fact by the sentencing court should be made mandatory. We do not believe that a sentence should be permitted to be increased on a defendant's appeal because of the likely inhibiting effect (see *North Carolina* v. *Pearce*, 395 U.S. 711 (1969).

In so recommending, we realize that these appeals will create an additional burden for the federal circuit courts.† However, in

* In perhaps a handful of cases the argument may be made that a circuit court (primarily the Sixth Circuit) has reversed based on a finding of abuse of discretion. Such cases are rare.

** "... the sentence which is minor when compared to more serious sanctions is neither less likely to be excessive for that reason, nor necessarily of less importance to the particular defendant involved." ABA Standards, *supra* at 18.

† See Friendly, *Federal Jurisdiction: A General View*, 36 (1973).





our view this right is so basic to the proper administration of criminal justice that the appellate courts should—indeed must—accept this responsibility.

THE SPECIAL COMMITTEE

ON THE

PROPOSED NEW FEDERAL CRIMINAL CODE

OF THE

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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July 18, 1974

# REFORM OF THE FEDERAL CRIMINAL LAWS

MONDAY, JUNE 17, 1974

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

The subcommittee met, pursuant to recess, at 10:40 a.m. in room 2228, Dirksen Senate Office Building, Senator Roman Hruska presiding.

Present: Senator Hruska.

Also present: Paul C. Summitt, chief counsel; Douglas R. Marvin, minority counsel; Dennis C. Thelen, assistant counsel; and Mabel A. Downey, clerk.

Senator HRUSKA. The subcommittee will come to order.

The acting chairman apologizes for his tardiness. It was occasioned by an appearance on the floor to engage in a debate which is in progress, and my turn came at 10 o'clock. I fulfilled my obligation, I am now here to take the place of Senator McClellan who is the chairman of this subcommittee. He is busy presiding over meetings of the Appropriations Committee, and asked me to take charge here.

Our first witnesses this morning will be Mr. Joseph L. Nellis, general counsel and Dr. Melvin A. Gravitz, secretary, for the Council for the Advancement of the Psychological Professions and Sciences.

Gentlemen, will you take your place at the witness table and proceed in your way to testify. You have submitted a statement to the committee and it will be placed in the record in its entirety at the conclusion of your remarks.

## STATEMENT OF JOSEPH L. NELLIS, GENERAL COUNSEL, COUNCIL FOR THE ADVANCEMENT OF THE PSYCHOLOGICAL PROFESSIONS AND SCIENCES, ACCOMPANIED BY DR. MELVIN A. GRAVITZ, SECRETARY, COUNCIL FOR THE ADVANCEMENT OF THE PSYCHOLOGICAL PROFESSIONS AND SCIENCES

Mr. NELLIS. Thank you, Mr. Chairman.

Mr. Chairman, we greatly appreciate the opportunity to present the views of the Council for the Advancement of the Psychological Professions and Sciences on the question of possession and dissemination of obscene material as regulated by section 1851 of S. 1400, the "Criminal Code Reform Act of 1973." In a few minutes I will discuss the comparable provisions of S. 1.

I am Joseph L. Nellis. I am a practicing attorney here in Washington, D.C. I am the general counsel of the Council for the Advancements of the Psychological Professions and Sciences, which we call

CAPPS for short. I am accompanied today by Dr. Melvin Gravitz, a practicing clinical psychologist here in Washington who is secretary of CAPPS and a member of our executive committee who will be able to answer any questions you might have with respect to the viewpoint of the psychotherapist on this subject.

CAPPS is a public-policy organization addressing issues principally of interest to professional psychology. We have previously testified on such subjects as vocational rehabilitation, health maintenance organizations, aging and the problems of the aged, medicare/medicaid, community mental health centers, and national health insurance.

We are taking no position on the overall question of the definition of obscene material and the access of the general public to the materials so defined. That is a thicket which the Supreme Court is in and we do not have to get into that one I do not think, Mr. Chairman. We are very concerned, however, over the proposal in section 1851(c) of S. 1400, to restrict the dissemination of material so defined. As presently drafted, S. 1400 would allow a psychologist to disseminate such material only, one, if he was affiliated with an institution of higher learning, either as a member of the faculty or as a matriculated student teaching or pursuing a course of study related to such material, or two, if the receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist. Psychologists should be listed equally with medical practitioners and psychiatrists as individuals who may authorize receipt of such material, and there are two good reasons for this. These restrictions would needlessly interfere with the effective functioning of psychologists in diagnosing and treating mental illnesses and emotional disturbances and psychological problems of which there seem to be an increasing number in the world today, and thus they will result in detrimental and unintended effects on the practice of psychology; and they will not serve the public interest.

The problems raised by these restrictions are in areas completely tangential to the control of the public flow of obscene material. In their professional practice and scientific research, psychologists must often use sexually explicit materials. In a psychotherapeutic setting, these materials are used to deal with many psychological problems, such as marital difficulties, where such material is used in counseling; feelings of inadequacy, where such materials are used to impart information to persons whose problems may stem from lack of knowledge; and behavior modification, when deviant behavior can be adjusted by use of sexually explicit materials and negative reinforcement.

To block access to such materials, Mr. Chairman, by the psychologist and his clients would seriously restrict the practice of accepted and useful forms of therapy, for which no suitable replacement currently exists and would ultimately result in persistence of otherwise-remediable mental illnesses and emotional disturbances. We believe that a proposal to regulate the dissemination of "obscene materials" that deprives professional psychologists of an essential therapeutic resource incurs a cost to society and to the affected individuals which is unjustified.

S. 1400 presently recognizes the validity of the foregoing arguments by permitting the dissemination of materials by licensed medical



practitioners and psychiatrists. However, it fails to recognize the equal status of psychologists to use sexually-explicit materials in psychodiagnosis and psychotherapy covering problems not necessarily related to sexual disfunctioning. It contravenes the spirit of legislation in 46 States and the District of Columbia which grants psychologists licenses or certificates to provide mental health services to patients.

Psychology is recognized as an autonomous discipline in such federally-supported programs as the CHAMPUS health benefits program for dependents of military personnel and military retirees; CHAMPVA for veterans and the families of veterans outside the institutional network of the Veterans Administration; and the Aetna Governmentwide Federal Employees Health Benefits insurance plan which covers several million Federal employees, annuitants and beneficiaries. I would like to also mention H.R. 9440, which has passed the House of Representatives and is now pending in the Senate Post Office and Civil Service Committee. This bill mandates freedom-of-choice for all individuals covered by Federal Employees Health Benefits contracts, insuring direct access to psychologists without mandatory medical referral or supervision.

Nineteen States now have such "freedom-of-choice" statutes covering psychologists and such legislation is pending in six additional State legislatures.

The American Psychiatric Association, in its position statement on psychiatrists' relationships with nonmedical mental health professionals, has recognized the importance of psychologists and other providers of mental health services in both institutional settings and in independent practice.

The position of the National Association for Mental Health on national health insurance recognizes licensed or certified independent mental health service providers such as psychologists.

It would clearly be unreasonable, therefore, to expect psychologists to seek the approval each time of a medical doctor or psychiatrist for each patient exposed to obscene materials.

There also exists a strong possibility that S. 1400 as drafted would foreclose legitimate areas of scientific research to psychologists. The production and transfer of sexually explicit materials by psychologists not associated with institutions of higher learning would in effect be halted. While the affirmative defense in section 1851(c)(1) recognizes that possession of such materials is necessary for educational purposes, it fails effectively to exempt research, much of which is carried out by individuals in hospitals, research institutes and in private practice, not affiliated with an institution of higher learning. We fear that it will be insufficient to rely only on the definition of obscene materials in section 1851(b)(2) to demonstrate that the material "constitutes a minor portion of the whole product of which it is a part, is reasonably necessary and appropriate to the integrity of the product as a whole to fulfill an artistic, scientific, or literary purpose, and is not included primarily to stimulate prurient interest."

We would advocate an amendment to S. 1400 to include psychologists as professionals able to authorize receipt of materials defined as obscene. And the amendment would be very simple, Mr. Chairman, accomplished by including the word "psychologist" in section 1851 (c)(2) of S. 1400.

We also recommend the amendment of S. 1400 to cover psychologists and/or individuals working under the supervision of psychologists in research institutes, hospitals and similar institutions, and in private practice. We have an additional recommendation regarding S. 1, Mr. Chairman. The comparable provisions of S. 1, section 2–9F5, are drawn to generally allow trafficking or dissemination by "institutions or persons have scientific, educational, governmental or similar justification for possession of such material or item."

It seems clear that S. 1 intends to cover such persons as medical doctors, psychiatrists, and psychologists. While we do not advocate drawing up an unnecessary and burdensome laundry list of such institutions and persons, we do ask the Congress to express its intent to cover such institutions and individuals as are now under discussion.

Mr. Chairman, that concludes my prepared statement. Dr. Gravitz and I will be very pleased to answer any questions that you might want to direct to us.

Senator HRUSKA. Thank you very much. That is a very lucid statement. It seems to be quite reasonable.

Mr. NELLIS. Thank you, sir.

Senator HRUSKA. This subject will be considered by the subcommittee in its final draft efforts, and it will be a decision of the subcommittee, but you may be assured that the acting chairman is quite sympathetic with your objective here, and I will so express myself when we get to the final point of drafting.

Mr. NELLIS. Thank you, Mr. Chairman.

Senator HRUSKA. Thank you very much.

Mr. NELLIS. Thank you very much.

Dr. GRAVITZ. Thank you very much, sir.

Senator HRUSKA. Our next witness is John K. Van De Kamp, Federal public defender in Los Angeles, and Ms. Laurie Susan Harris who is deputy Federal public defender in Los Angeles.

They are appearing on behalf of the National Legal Aid and Defenders' Association. Their general subject is that of sentencing.

Mr. Van De Kamp, you may proceed.

## STATEMENTS OF JOHN K. VAN DE KAMP, FEDERAL PUBLIC DEFENDER, LOS ANGELES AND LAURIE SUSAN HARRIS, DEPUTY FEDERAL PUBLIC DEFENDER, LOS ANGELES; ON BEHALF OF THE NATIONAL LEGAL AID AND DEFENDERS' ASSOCIATION

Mr. VAN DE KAMP. Thank you, Mr. Chairman. My name is John Van De Kamp. I am the Federal public defender in Los Angeles. I might add by point of reference that I served for close to 9 years in the Department of Justice, in which I served as the U.S. attorney in Los Angeles, and as the director of the executive office for the U.S. attorneys here in Washington, D.C., from 1967 to 1969.

With me today is Laurie Harris who now works as a deputy Federal public defender in Los Angeles.

Senator HRUSKA. Now, Mr. Van De Kamp, you have presented to the committee a copy of your very comprehensive statement.

It will be printed in the record in such parts as the staff will determine, and I presume you will highlight it.



Mr. VAN DE KAMP. That's correct. We would be here for hours, maybe days, if I read it; I certainly have no intention of doing that this morning.

Senator HRUSKA. Very well.

Mr. VAN DE KAMP. I would, though, like to give an overview of our work and discuss briefly what I think are some of our most important recommendations.

Senator HRUSKA. That is fine.

Mr. VAN DE KAMP. First, let me express a word of appreciation for allowing us to testify. We feel that a progressive, integrated Federal Criminal Code is very badly needed after years of piecemeal amendment. I think that is one area in which you will find near unanimity among prosecutors, defense lawyers and everyone involved in the system.

I would also like to compliment this subcommittee for persisting in a deliberate and methodical way to give this code the kind of overhaul that is required. It has taken years, but it is only through the slugging kind of work you are doing and the hearings that you are holding that we are ever going to get this code out of Congress; I wish you Godspeed in finishing that task.

While we express disagreement with certain portions of S. 1 and S. 1400 relating to sentencing, we want to make it clear today that we are appreciative, not only of this subcommittee, but of the scholarship and the efforts of the Brown Commission and of the framers of S. 1 and S. 1400. Without their pioneering work the code would not be as far along as it is today. I think it can be fairly stated that all three of these efforts are, in terms of both structure and substance, great improvements over existing law.

We address ourselves this morning to sentencing and corrections for rather compelling reasons. We are interested in it on behalf of the National Legal Aid and Defender Association, because the code which comes out of Congress is going to have a very strong impact on our State legislatures and on our State criminal justice systems throughout the country.

Speaking more personally we are in court on a daily basis, and we see how our present code operates. We see how it short-changes people and we see where it needs improvement. Each year for example our office in Los Angeles will represent close to 2,000 individuals. Most of those cases are new Federal criminal filings. We get into them when a defendant is first arraigned; it is our responsibility as defenders to represent the indigent defendant through the system whether it results in an early dismissal or ultimately goes to the U.S. Supreme Court, as several of our cases have.

In 1974, our present fiscal year, nearly 750 of those 2,000 defendants will either plead guilty or be found guilty after trial; naturally, upon conviction they face the prospect of incarceration or other available criminal sanctions.

The pronouncement of sentence by the judge does not end our contact with a client. The unlucky ones who receive jail sentences, often remain in contact with us until after their release from the institution.

Further, our office represents those indigent defendants at the Federal correctional institutions at Terminal Island and at Lompoc,

who seek our assistance in parole revocation hearings. This year we handled about 75 of those hearings, which by necessity take us behind the walls of those institutions and in very close contact with correctional and board of parole personnel.

There are many ironies surrounding the manner in which sentences are imposed, Mr. Chairman, one of the most striking of which involves a comparison of our methods of adjudication of guilt to our methods for determining and executing sentences. The adjudicative process as it relates to guilt is a foaming sea of procedural rules which tie in with such various interests as the finding of the truth, protection of the public from unconstitutional acts by our law enforcement officers, and protecting the personal constitutional rights of each defendant. And beyond the trial level, there is a carefully structured system of appellate review designed to ferret out the slightest error.

But as a matter of fact, the adjudicative factfinding process is not utilized in most cases. Of those defendants we represent who are convicted nearly 85 percent plead guilty without a trial. For them, sentencing and punishment are the only issues.

By comparison to the care with which the less frequent problem of guilt is resolved, the protection in most jurisdictions surrounding the determination of sentence is miniscule. As Judge Sobeloff remarked a number of years ago, "it gives way to the widest latitude of judicial discretion." It is probably no understatement to say that in no other area of our law does one man exercise such unrestricted power as does the sentencing judge. No other country in the free world permits that condition to exist.

Naturally there are some restraints on judges. They operate in full view of the public. The defendant and his lawyer must be there. The government is usually represented by a prosecutor who is supposed to represent all of us. Friends and spectators may observe. If it appears the story is newsworthy, the press may cover it, and as a result, the proceedings and the sentence may be reported.

And so, perhaps, there are some restraints on the judge in sentencing, whether it is from his own compassion or his sense of fairness, from the impact of the advocacy of the litigants, from his feel for public reaction to the sentence—a public, which I might add in some instances operates in response to blind prejudice—or from all of those factors working together.

But those restraints virtually disappear once a defendant is incarcerated. For when jailed, the defendant no longer sees the light of day or the light of the law.

His good time may be forfeited in a hearing where correctional officers, his keepers, are his judges in a hearing where he has no right to a lawyer and where he may be unable to confront the witnesses against him. And his release on parole will depend in large measure on his rapport with his caseworker, the impression he makes on a Parole Board Examiner in what may be a 15-minute hearing, and on the general guidelines relating to the release of offenders on the basis of their offense issued not by Congress but by the Board of Parole. If a decision goes against a defendant trying for parole, no reason is given.

And even though the District Court Judge who sentenced the defendant may have ordered parole consideration at an early time, the



Board may and often does decide to continue the defendant's case to expiration of sentence following a hearing held but three or four months after the defendant may have begun serving his sentence. For a number of reasons nearly all of these decisions by the Parole Board are virtually unreviewable beyond the confines of the Parole Board itself.

With these facts in mind, therefore, we seek to bring the light of day and the light of law into the sentencing and probation and parole process, not to hamper society as it tries to deal with an offender, but to bring the correctional process into sight so that the public at large may get a better perspective on how effective its government is in dealing with offenders, and to bring a sense of fairness and rationality into a system which is so presently lacking in this regard.

We would therefore like to discuss some of the most important of our recommendations this morning; Ms. Harris will follow me and discuss some areas which I will not cover.

With respect to fines, we have pointed out that under S. 1 you have a setup where a minimum 10-day mandatory daily term for payment is provided. Alternatively we suggest that you set maximum fines which are extremely high. We do so because we think that the 10-day minimum mandatory daily term should be eliminated, and that a judge should retain discretion in imposing conditions for payment. For a defendant who receives a small fine, to have to pay it out over 10 days with daily visits to the court is inconvenient, not only to him but to court personnel as well.

Where a large fine is imposed by the judge on the theory that its imposition will create some form of public deterrence, if there is such a thing, breaking that fine into at least 10 daily allotments may tend to diminish the impact of that sanction on the public.

We commend the special sanctions which the Brown Commission recommended, and which have been carried over into S. 1's 1-4-A1(7). Since incarceration cannot be applied to corporations, and since fines may amount to a very small slap on the wrist to large, well-heeled corporations, we urge the passage of a somewhat modified provision which, upon conviction, would mandate notice to those persons or classes harmed by the offense, and on a discretionary basis allowing the court to compel notice through the media to the section of the public affected by the conviction. We make this recommendation on the basis that if there is such a thing as preventive deterrence, the knowledge that adverse publicity will result from its misconduct may be the most feared consequence of conviction for a corporation.

Criminal forfeiture is not part of the existing sentencing practice. In my years of practice I have never seen a forfeiture made part of a criminal proceeding. S. 1's 1-4-A4 would provide for mandatory forfeiture upon application of the government for any property used or intended for use in violation of those crimes listed in the racketeering sections. This sanction and its civil counterparts, like fines, can prove to be a substantial penalty to a defendant, but because of its mandatory features and because of its breadth to include innocent third parties, it can also work great injustice.

For example, when a judge is forced to take away a man's car which has been used in an offense, he may be forced to take away his transportation to gainful employment and his ability to support his family.

Or by ordering a professional photographer's camera forfeited, he may take away the tools of his trade.

Now, in some cases forfeiture can be justified, based on the nature of the offense and the offender, but a judge's hands should not be tied. He should have discretion. Further, the forfeiture sanction should be limited to a culpable defendant. It should not be used against innocent third parties.

For example, assume that I loan Ms. Harris my car and she goes out and uses that car in a narcotics transaction without my knowledge, gets caught and arrested. The car is seized. Should I be penalized? She should be appropriately sanctioned, but there appears to be little justification for making an innocent third party the subject of what is really a criminal sanction.

The forfeiture sanction, whether it be termed criminal or civil, needs new examination. Today's law allows law enforcement agencies to seize and hold subject to later administrative and court claims for return, claims which are often processed so slowly as to cause financial hardship on the owner of the property, so slowly that the property itself may be substantially depreciated before its return.

I can testify to that on a first-hand basis. I have seen cars seized from clients and then held for months pending a decision on a claim for remission filed with the Treasury Department. Sometimes the claims are successful and the car is ordered returned. But when is the car released? Often times 90, sometimes as long as 180 days after the car was seized. And only upon payment of storage fees.

I suggest today that the committee seek testimony on the use of forfeiture as it relates to criminal violations. I would frankly prefer to see it made a discretionary sanction available for judicial imposition in criminal cases in the same way as fines. My comments today of course do not relate to contraband seizures, which should remain on their present in rem basis.

With respect to probation, I think it is important that the code treat probation as a sentence, not as an event in lieu of sentencing. We support the concept that probation be considered as a proper disposition in each case unless confinement is necessary to protect the public from further criminal activity by the offender, and/or the need for treatment and supervision relating to an offender's potential for further criminal conduct cannot be provided through available community resources.

We take some issue with the criteria set up in S. 1, particularly the first standard which the court is to consider, that is "the need to maintain respect for law and to reinforce the credibility of the deterrent factors of the law." While warehousing a hardened criminal and a potential recidivist may well be justified in a particular case, the fuzzy concept of public deterrence is one which has often been used by trial judges as a justification for a jail sentence, and yet we know that a sanction does not have preventive deterrent capability unless the public is not only aware of the potential sanctions that will be imposed, and knows when it will be imposed. And I can tell you, Senator, that press coverage and public awareness is absent in all but the most extreme, extraordinary or bizarre Federal cases in our district. For this reason I would suggest that the provision be eliminated since it tends to shift the focus of the judge away from the offender to a concept which is rarely applicable.



We have commented more fully in our written report as to those criteria which should be considered in evaluating probation, many of which are already contained in the provision.

We are also concerned about the relationship of the probation officer to the offender. As it stands now, the probation officer is a quasi-law-enforcement officer operating as a part of the court system with loyalty as much to the district court which appointed him, as to the probation service and the correction service as a whole. The probation officer should serve as an officer of the court since his reports will be relied upon by the court, but since his principal job is as a guide, as a consultant, as a helper for the probationer or parolee, his law enforcement duties provide a role conflict inimical to his duties to his clients, and give him sweeping powers in terms of interrogation and search and seizure, which if used by a local policeman would be held unconstitutional. And as a result of these powers, probation officers have been called on by local policemen to do what they cannot do.

We think this should stop and I venture to say that many probation officers feel the same way.

As a result, we suggest that probation should be taken out of the court system and tied in with a Bureau of Corrections, if we call it that, independent of the Department of Justice. We also suggest that their special arrest and search and seizure powers be taken away, retaining in them, however, the power to make citizens arrests.

The Brown Commission has proposed appellate review of excessive sentences in criminal cases. Neither S. 1 nor S. 1400 provides for such review beyond the existing and seldom-used dangerous offender provisions. I cannot recall one case for example, Senator, where this dangerous offender provision has been used in our district, at least in which our office has been involved.

There has been legislation submitted with respect to appellate review of sentences aimed at giving the courts the power to reduce excessive sentences, and more indirectly at opening the sentencing process to the development and application of criteria which are rational and just. We strongly support the concept, and in particular would welcome passage of your bill, S. 716, which was introduced last year.

I think the need for sentencing review is manifestly clear. James Bennett, former Director of the Bureau of Prisons, has noted that "some judges are arbitrary and even sadistic in their sentencing practice. It is notoriously a matter of record that by reason of senility or virtually pathological emotional complex, some judges summarily impose the maximum on defendants convicted of certain types of crimes, or all types of crimes."

As in every other phase of the law, the judiciary should have both the power and the obligation to correct its own error. We therefore support the availability of a detached reviewing panel to review excessive sentences, and if appropriate, to reduce them.

The court of appeals, because of its detachment and discipline seems to us the best qualified to perform this role.

Now, much concern has been voiced about the potential for increased appellate workload which this may bring. Prof. Livingston Hall testified on that issue before this subcommittee in 1973 and observed

that the English appellate review system which has been in operation for years has not suffered increase in their appellate workload.

There are built-in limitations provided in S. 716 which will tend to cut down the appellate workload. For example, there is the implication that written opinions need not be filed in a case where a sentence is affirmed. We suggest other limitations. We would limit sentence review to situations where there is an actual order of incarceration, that is, where a sentence is suspended, no appellate review of the sentence will obtain. We would also require that prior to the filing of a sentencing appeal, the defendant apply at least once to the district court which sentenced him for modification under present rule 35.

But the most significant limitation on the workload would be created by the courts of appeals as over a period of time they develop what Professor Hall has called a "jurisprudence of sentencing."

Other limitations may ultimately be deemed appropriate. There is talk of limiting appellate review of sentences to cases where there is at least 1 year, 2 years, or 5 years of incarceration. Until we have had time to see the extent of the workload appellate review of sentences brings and until we have had time to develop a jurisprudence of sentencing, I think such limitations should be held in abeyance.

As we noted today, sentencing procedures such as they are, are at least visible, whereas the decisions rendered by parole boards are not, even though the decisions made there can be just as onerous. Parole legislation is now pending in Congress. I would particularly direct your attention to the bills introduced by Senator Bayh and Congressman Kastenmeier. Because of their pendency and the hearings underway, it has been our recommendation that a determination by you as to a specific parole system be deferred until study has been completed by the bodies now studying these bills.

On the other hand, we cannot refrain from saying that for too long parole boards have had untrammeled, unchecked, and nearly dictatorial powers over those whose lives they control. In making parole decisions, the board should be subject to the same due process requirements as the sentencing judge. To this end, we urge that consideration be given toward, one, fixing mandatory time for the parole board to review each offender's case, requiring at least yearly review, parole release for each offender, and in the case of an offender with a sentence of less than 1 year, a review within 3 months of confinement; two, that parole officers and probation officers be directed to assist the parolee in the preparation of a release plan and that the board provide notice to the offender of the information it considers relevant to the determination of readiness for release on parole; three, that the offender shall have and be entitled to an attorney (if necessary an appointed one) to assist him to prepare for the hearing, much the same way as provided in parole revocation hearings, not to make the hearing adversary in nature, but to insure that the potential parolee gets his story across.

I can testify personally as to what that means. I have sat through many parole revocation hearings. My practice is to interview the defendant twice before he goes into the hearing trying to get him to relate his story fully to me. Yet despite the preparation, I have seen many defendants who talked freely and openly with me freeze up once they get inside the hearing room. So my job in that revocation



story is to draw out of him through questions the information I know he wants to present.

My job as an attorney in a parole hearing would be essentially the same, that is, to ask the kinds of questions that enables him to get his full story out. That is important, for there can be nothing more frustrating to a person facing a parole release decision than to be inarticulate in the face of authority, to be inarticulate and then ultimately frustrated when the decision goes against you.

Four, that full disclosure of the information be made available to the defendant and his counsel, unless compelling reasons for nondisclosure are shown. In those cases where that information is relied upon, the board should so indicate in its findings. If irrelevant, the board will remove the material from the file and then seal it.

But generally, the decision should favor full disclosure to let the parolee know what he is up against. Full disclosure generally works in everyone's favor. I have been involved in parole revocation hearings where information has been revealed to me out of the file which was absolutely irrelevant to the particular case at hand. I once had a hearing at Lompoc, for example, where my client faced revocation on a burglary charge. In the course of the hearing the parole examiner said, "Well, isn't it true, Mr. Soandso, that you were involved in a bank robbery in Los Angeles with Henry Hopkins and Andrew Johnson?" I was somewhat startled.

And I said, "Mr. Alex, I know that case. I represented Henry Hopkins in that case. The man before you today is white and the two men you just named were black. What's more they lived more than 200 miles away. I know that case inside and out. There is absolutely no relevance between this man and the two men involved in that case." Somehow some part of the Hopkins-Jackson reports had been transferred into my clients parole jacket. If it had not been for that off-hand remark to me that the report was in the file, I never would have known nor would we have been able to straighten out the record. Had it not been disclosed the Board could well have taken that bit of information, assumed that my client was involved, and put his parole off for another couple of years without disclosing its reasons either to me or my client.

We believe full disclosure works in a beneficial way, to defendants, their counsel and to the parole board as a whole.

We also support a two step internal appellate review process: first, to a regional board member; second, to a national board. Such review process within the parole board would tend to minimize the potential for judicial review. The board of parole is now implementing such a two step review process.

I add to that that judicial review should not be foreclosed, as section 312(f)(7) would provide. There is no other administrative agency which has received a legislative grant of immunity for judicial review, as that proposed in this section. And there appears to be no justification for such preclusion in the parole process.

There is one area that we did not cover in the 160 page document which we supplied to the subcommittee; that is the subject of expungement and the removal of disabilities. The Brown Commission in sections 3503 and section 3504, dealt with this area. There is nothing comparable in S. 1 and S. 1400. In talking with your Chief Counsel

before this hearing this morning, I told him of some of our regulatory provisions in California. In California you have to have a State license to sell mattress ticking, you can imagine the other things which are subject to license there too. But if you have been convicted of a felony you are going to have a hard time getting a license to sell mattress ticking or any other kind of State license.

The provisions in the Brown Code that I have referred to would ameliorate this problem; they provide that after a successful period of time on probation, during which the defendant has not been convicted of another crime, the disqualifications or disabilities imposed by law as a consequence of conviction will terminate as a matter of law. We think that would be an appropriate addition to this code.

At present there are provisions in Federal law which are somewhat similar. For example, in title 21 U.S.C. 844(b), a narcotics misdemeanor, it is provided that a defendant who is convicted under that section may be placed on probation for a year and after successful completion of probation will have the case dismissed. In short, no conviction is entered in such a case and the impact of potential civil disabilities is minimized.

Because of the problems of getting employment and the importance of employment to an offender and his rehabilitation, we strongly urge this committee to take a look at that Brown Commission proposal for inclusion in this code.

Essentially, today, Senator, we are arguing for the proposition that procedural fairness and the establishment of standards under the rule of law will have a very great and favorable impact on the quality of justice. What is at stake here, as throughout the sentencing process and the correctional process, is not only a man's liberty, but society's interest in a just system that will do what we ask of it, a system which if necessary will habilitate or rehabilitate. We heartily endorse the words of Judge Bazelon, who in filing an opinion approving judicial review of certain administrative decisions by medical personnel in treating the mentally ill, wrote these words in the case of *Covington* v. *Harris*. He said, "Not only the principle of judicial review, but the whole scheme of American Government reflects an institutionalized mistrust of any such unchecked and unbalanced power over essential liberties. That mistrust does not depend upon an assumption of inveterate venality or incompetence on the part of men in power, be they presidents, legislators, administrators, judges, or doctors. Judicial review is only a safety catch against the fallibility of the best of men, and not the least of its services is to spur them to double-check their own performance and to provide them with a checklist by which they may readily do so."

This in a very real sense is what we are trying to do with sentencing and corrections.

Thank you.

Senator HRUSKA. Very well.

Ms. HARRIS. Mr. Chairman, as you know, if it is adopted the document before us today will be the first comprehensive Federal criminal legislation in the history of this country. It will replace laws that have been accumulating since 1790. On the off chance that it just might be another 200 years before this proposed code is replaced, we think it is of the highest importance that this code create a



system of criminal justice and not merely criminal law. The present code is very specific in its statement of offenses and its categorization of the penalties that should be imposed for violation of those laws. But there is not a single provision in our present law to explain how those sanctions should be applied.

The new code attempts to fill that gap, and in terms of that effort it is a significant addition to existing law. However, the standard that should be used to evaluate the new code is not a relative one. No provision should be adopted on the theory that "something is better than nothing," since among all of our laws, the criminal law most directly affects human life.

In the Federal District Court in Los Angeles, 75 percent of the defendants in criminal cases are indigent. Indigent defendants in the main commit crimes because of their poverty. Their poverty and the powerlessness that goes along with it, is a central fact in their lives.

One of the conclusions reached by the President's Commission on Civil Disorders was that our country was rapidly becoming two societies, one rich and one poor. The truth of this is seen in the Federal court, where three-fourths of the defendants are given lawyers at public expense. These offenders, our clients, have no leverage. They have no friends who are community leaders or bank officers. They have no credit. They have had limited access to educational or occupational opportunities. Very often they speak little or no English. They have no words to span the gap between themselves and the judge on the bench.

If we are going to pass criminal laws and impose penalties for breaking those laws we must understand who these penalties affect and when they are imposed.

The maximum prison term for income tax evasion is 5 years in prison. The maximum penalty for taking a stolen car across State lines is the same.

Statistics prepared by the Administrative Office of the United States Courts show that in 1969, 502 offenders were convicted in Federal courts of income tax evasion. Of this 502, 19 percent or 95 offenders went to prison, for an average term of 3 months. During that same year, 3,791 offenders were convicted of auto theft; 63 percent of 2,373 went to prison for an average term almost three times longer.

Most judges have never personally known a car thief or someone like him. But they have known someone like the offender who has cheated on his income taxes, or embezzled money from a bank, or committed perjury in a hearing. The broad latitude over sentencing which is given to the courts by our sentencing laws lets class bias operate, whether intentionally or not, and further increases the impact of sentencing on the poor. Our prisons are full of offenders of approximately the same background, who have committed the same offense, with the same prescribed penalty, and who have received shockingly different prison terms.

It is against this background that I would like to direct your attention to the proposed subchapter on imprisonment. Initially, I would point out that the grouping of offenses as proposed in this section is a significant improvement over existing law, and will help to reduce some of the disparities caused by our present system. For

this reason we favor adoption of such a system. However, we would urge two changes in the proposed structure: first, that the number of categories be reduced from five to three, so that the punishment will not be determined essentially by the nature of the offense, but by the nature of the offender; and second, that the maximum sentence authorized for each group of offenses be reduced.

All of the major law reform commissions and studies made over the past decade have concluded that no felony sentence should be longer than 5 years unless the offender is a murderer, a professional criminal or a persistent offender. The new Federal code should adopt this position, and authorize lengthy prison terms only for those offenders who present a particular danger to the community.

In connection with the reduction of prison terms we would urge a modification of section 1-4A5, which deals with consecutive sentences. As drafted, that provision ignores the two most serious problems in the area of consecutive sentencing—the absence of any limitation on the judge's authority to impose an endless string of consecutive sentences; and the use of the consecutive sentence in cases where the offenses charged all stem from a single act or omission.

We recommend that the code address these problems by adopting a legislative presumption in favor of concurrent sentencing which would permit consecutive sentencing only in the exceptional case.

Even though the high maximum terms which are proposed in this code reflect a justifiable legislative concern with the worst offenders, they have the inevitable tendency of increasing the sentence that is imposed in all cases. The American Bar Association has found that, "If the range is 20 years for an offense, where most offenders who should go to prison should get less than 5, the authorized range is an open invitation—and the results verify the hypothesis—to sentences which irrationally spread the whole gamut of the authorized term."

Statistics evaluating the length of sentences show that there are enormous disparities between the length of the maximum term authorized by the Congress, the sentence imposed by the judge, and the term actually served by the offender.

In 1969, the average sentence, served by offenders charged with offenses, which carry a 20- to 25-year maximum term, was less than one-fourth of that. This is graphic testimony from judges and from prison officials that the lengthy authorized terms are not needed and not used in most cases.

I believe it was Oscar Wilde who said that "experience is the name we give to our mistakes." We must learn from our experience with the present Federal Code that the practical consequence of this gap between authorized sentences and the terms actually served is the unjustifiably different treatment of virtually identical offenders.

Imprisonment is generally said to serve one of three functions—deterrence, rehabilitation or neutralization. The question which must be asked before approving long prison sentences is whether we are achieving any of these goals by putting people in our prisons. I think it is clear that we are not.

Rehabilitation is a myth, or as the head of the California Correctional System said in an interview I heard on Saturday, "Rehabilitation is a fantasy." The longer an offender stays in prison, the less able he is to adjust to society upon his release.



Our present high rate of recidivism and high crime rate demonstrate that the threat of serving a long prison term does not really deter anyone from committing crimes.

The remaining justification is neutralization—and neutralization is appropriate only in certain identifiable cases, and not as a general rule.

Section 1-4B2 creates a special upper-range term for dangerous special offenders. However, as drafted, this section provides no workable definition or criteria for using this term. Those definitions which are provided are tautological, and do not establish any standard for the court to use. Additionally, it unjustifiably extends existing law to cases where no need for such extension has been shown.

This criticism applies particularly to two provisions: first, the extension to offenses where a gun is used. Since a gun offense is already graded at the highest level, it is redundant to provide an additional upper-range sentence for these offenses. Second, the extension to offenses committed by offenders who have a so-called abnormal mental condition which manifests itself in "aggressive behavior." There is simply no scientific support for even suggesting that aggressive behavior is necessarily a manifestation of an abnormal mental condition, and there are too many other causes of aggressive behavior to permit that designation to be made. Even if it could be made, we would submit that this code should not classify offenders with mental problems as "dangerous special offenders" who should be sent to prison for extended terms. This is dark ages legislation, and inexcusably regressive.

Mentally ill offenders belong in hospitals where they can be treated, not locked up in prisons.

As drafted, the section on its face appears unconstitutional, because it fails to include any of the due process requirements, which are an essential component of its operation. However, in going through the code thoroughly, I found that the procedural provisions had been set forth in rule 32.2 of title II of the proposed "Rules of Criminal Procedure." Since this section is inoperative without the notice provisions and other due process safeguards, they should be included within the section itself, as they are under existing law, and as proposed in section 3202 of the Brown Commission Code.

We should not adopt special sentencing provisions for dangerous offenders unless the term of lower-range sentences is sharply reduced—so that there is a demonstrable need for legislation providing more severe penalties for dangerous offenders. Without such reduction, there is no acceptable rationale for adoption of extended term legislation.

I would now like to briefly discuss the correctional system to which offenders are sent upon conviction. Our primary comment about the chapter on corrections is that it should be redrafted to reflect the changes advocated in the more than 100 prison reform bills presently pending in Congress. Our secondary comment is that if the new code is intended to establish the "nature and character" of correctional facilities as it does in its proposed form, then it should include provisions for establishing separate care and treatment facilities for addicts, for alcoholics, and for mentally ill offenders. Such legislation is completely absent in our present code. As a result there are almost

no Federal treatment centers capable of providing adequate care to such offenders. As the rate of defendants with addictive problems increases, the failure of our institutions to meet their needs becomes even more critical. Along these lines, we would point out that a glaring omission in existing law is the failure of 18 U.S.C. 4244 to require that mentally incompetent offenders receive treatment while they are being held in custody—ostensibly until such time as they regain their competency. Needless to say, they do not often become competent without treatment or for a lasting period of time. I cannot overemphasize the urgency of providing psychiatric care for the mentally ill, or the need to establish institutions and outpatient centers which can offer treatment, rehabilitation and ongoing assistance to treat both the mentally ill and the addicted offender.

It is clear that this code reflects much work by the committee and by the committee staff. I appreciate both your work, and the opportunity that I have had to discuss it with you. My purpose in doing so has been to review what I perceive to be problems, and to suggest alternatives to particular provisions of the subchapter on imprisonment. My comments and criticisms have been offered both from a law reform perspective, and on behalf of my clients—who experience daily the impact of these sentencing provisions. I do not know that we will ever learn to prevent crime, but I do know that we can prevent some of its worst consequences by using the time we have to re-evaluate and revise the sentencing provisions of this bill. Thank you.

[The prepared testimony of John K. Van de Kamp and Laurie Susan Harris follows:]

TESTIMONY OF JOHN K. VAN DE KAMP, FEDERAL PUBLIC DEFENDER, LOS ANGELES AND LAURIE SUSAN HARRIS, DEPUTY FEDERAL PUBLIC DEFENDER

My name is John K. Van de Kamp. I am the Federal Public Defender in Los Angeles. From 1960–1967 I served in the United States Attorney's Office in Los Angeles, as United States Attorney and as Chief of its Criminal Division, and from 1967–1969 I served in the Department of Justice in Washington D.C. where I ultimately served as Director of the Executive Office for United States Attorneys. With me today is Laurie Harris, for over two years, Deputy Federal Public Defender in the Los Angeles office.

We are pleased to appear today at the Subcommittee's invitation to testify on behalf of the National Legal Aid and Defender Association. NLADA is the only national non-profit organization whose primary purpose is to assist in providing effective legal services for the poor, with members including the great majority of defenders offices, coordinated assigned counsel systems, and legal assistance programs in the United States. NLADA has a vital interest in the work you are doing, not only because it will shape federal criminal practice and procedure in the years ahead, but because of the substantial impact federal legislation is likely to have on State systems.

The two of us of course have a somewhat more down-to-earth interest in your work, since the lives of our clients will be affected by the decisions made in Congress. For these reasons then we have a keen interest in your work in developing a criminal code that is sound and progressive, and hope we can be of assistance to you.

Understanding that much of the testimony taken to date has dealt with such volatile issues as the jurisdictional reach of the code, the death penalty, the definition of insanity, organized crime and racketerring and national security sections, and other subjects which engender great debate within criminal law circles, we chose to turn to the broad area of the Code dealing with sentencing in order to evaluate the proposed sentencing provisions individually, and as they relate to the proposed system of corrections. We did so because among all the provisions of the Code, the sentencing sections have the most immediate and enduring impact on the lives of our clients and should be analyzed as an integrated unit, rather than on a piecemeal basis.



What follows is our evaluation, section by section, of those provisions of S. 1 dealing with sentencing, and where appropriate a discussion of the relevant sections of S. 1400 and those proposed by the National Commission on the Reform of Federal Criminal Laws.

## CHAPTER 4—SENTENCING

### SUBCHAPTER A—GENERAL PROVISIONS

#### 1–4A1—AUTHORIZED SENTENCES

(a) We approve the requirement that findings be made in every case in which a sentence is imposed, since it corrects one of the most criticized features of our present system—the total unaccountability of the judiciary for sentences imposed.

Requiring findings will remove what is presently a fundamental block to achieving the rehabilitative goals of the sentencing process:

"The absence of any explanation or justification for the sentence is among the more familiar and understandable sources of bitterness among people in prison. . . . More than one writer has taught that the hope of rehabilitating offenders is blighted at the onset by this rankling sense of injustice."[1]

(a) Should also include the requirement that "Such findings shall be sufficient to permit appellate review of any sentence imposed." The sufficiency of the court's findings could be assured by the code's inclusion of certain factors which the court must consider at the time of imposing sentence.

Such factors should be consistent with the presumption that:

"The court shall not impose a sentence of imprisonment upon a person unless, having regard to the nature and character of the offender and the circumstances of the offense, the court is satisfied that (a) confinement is necessary to protect the public from further criminal activity by the offender; and/or (b) the offender is in need of treatment and supervision which can only be provided in a correctional institution."[2]

Appropriate factors for the Court to consider in making this determination should be set forth in the code. Among the factors listed are those suggested by the National Commission on Reform of the Federal Criminal Law in § 3101 of its proposed Federal Criminal Code,[3] and include:

(a) the defendant's criminal conduct neither caused nor threatened serious harm to another person or his property;

(b) the defendant did not plan or expect that his criminal conduct would cause or threaten serious harm to another person or his property;

(c) the defendant acted under strong provocation;

(d) there was substantial grounds which, though insufficient to establish a legal defense, tend to excuse or justify the defendant's conduct.

(e) the victim of the defendants' conduct induced or facilitated its commission;

(f) the defendant has made or will make restitution or reparation to the victim of his conduct for the damage or injury which was sustained;

(g) the defendant has no history of prior delinquency or criminal activity, or had led a law-abiding life for a substantial period of time before the commission of the present offense;

(h) the defendant's conduct was the result of circumstances unlikely to recur;

(i) the character, history and attitudes of the defendant indicate that he is unlikely to commit another crime;

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[1] Frankel; *Criminal Sentences; Law without Order* (1972); pp. 43–44. The author, a United States District Court Judge for the Southern District of New York, traces the adverse effects of the court's present sentencing powers throughout the first part of this book, noting that, "The almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that proposes devotion to the rule of law." *Id* at p. 5.

[2] See Comment to § 4–D, *infra* wherein the inclusion of a statutory presumption in favor of probation is recommended and discussed.

[3] The National Commission on Reform of Federal Criminal Laws, hereinafter referred to as the Brown Commission, was established by Congress pursuant to Section 8 of Public Law 89–801, as amended by Public Law 91–39. The Commission Chairman was the Hon. Edmund G. Brown, the Vice-Chairman was Congressman Richard Poff, and its membership included Senators Sam J. Ervin, Jr., (D–N. Car.), Roman L. Hruska (R-Neb.), John L. McClellan (D-Ark.), Congressmen Robert W. Kastenmeier, (D-Wisc.), Abner J. Mikva (R-Ill.), Donald Scott Thomas (D-Tex.), Theodore Voorhees, (D.C.); United States Circuit Court Judge George C. Edwards, Jr., and United States District Court Judge A. Lem Higginbotham, Jr. and Thomas J. MacBride. The Advisory Committee to the Commission was headed by retired Supreme Court Justice and former Attorney General Tom C. Clark.

The Commission's Final Report is the result of nearly three years of deliberation by the Commission, its Advisory Committee, consultants and staff, and was submitted "as a work basis upon which the Congress may undertake the necessary reform of the substantive federal criminal laws." Because of its scope and significance, the Commission's proposed revision of Title 18 is used frequently as a point of reference throughout this comment.

(j) the defendant is likely to respond affirmatively to supervision and/or treatment in the community;

(k) the imprisonment of the defendant would entail undue hardship to himself or his dependents.

1–4–A2—RESENTENCE

As a general proposition, we join with the American Bar Association and others in opposing the imposition of a more severe sentence upon reconviction of the same offense in any case where the original sentence is set aside after appeal or collateral attack. The convicted offender's exercise of his right of appeal should not be jeopardized by his fear of punishment if his appeal is successful, and his original sentence set aside.[4]

Permitting a harsher sentence upon resentence contravenes the American Bar Association's Minimum Standards for Criminal Justice which provide that:

"Where a conviction or sentence has been set aside on direct or collateral attack, the legislature should prohibit a new sentence for the same offense which is more severe than the prior sentence less time already served."[5]

Additionally, the adoption of such legislation is disapproved by the Federal Judicial Conference.[6]

Pursuant to this proposed section, imposition of a more severe sentence upon remand is authorized in every case where the offender has been convicted of multiple offenses and his conviction "of one or more but not all of the offenses for which sentence was imposed" is set aside.

The provision is thus directed against a particular class of offender—the offender who has committed more than one crime. As drafted, it is likely to deter appeals by any prisoner serving a concurrent sentence, since, if his conviction on some (but not all) of the offenses is set aside, upon remand he may be given a sentence which would not only materially increase the sentence on the count sustained by the appellate court, but could be greater than the sentence originally imposed on all counts for which he was convicted.[7]

Insofar as this section is an attempted partial codification of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), its failure to incorporate the due process requirements set forth in that decision renders it void.

We recommend that this section be deleted from the Code. If it is retained, the procedural protections outlined in *Pearce* should be set forth in full since they must be followed whenever a more severe sentence is imposed upon resentence:

"Due Process of Law, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial and . . . also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

"In order to assure that absence of such a motivation we have concluded that whenever a judge imposes a more severe sentence upon defendant after a new trial, the reasons for his doing so must affirmatively appear.

"Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *North Carolina* v. *Pearce*, *supra*, at 725–726. (See also *Colten* v. *Kentucky*, 407 U.S. 104; *Chaffin* v. *Stynchcombe*, 412 U.S. 17; *Blackledge* v. *Perry*, No. 72–1660, U.S. Supreme Court (May 22, 1974).)

1–4–A3—DISQUALIFICATION

(a) The section as written makes disqualification from office after conviction discretionary in all cases, but a further step should be taken. Convictions involving violations of public trust should presumptively result in automatic disqualification from office.[8] Accordingly, Section (a) should read:

"A federal public servant who is convicted of one of the enumerated offenses shall, as part of his sentence, be disqualified from serving in the official position held at the time of the crime charged . . ."

"A federal public servant who is convicted of any other offense, or who holds any other federal position, may, as part of his sentence be disqualified from any or a specified Federal position or category of positions for such period, not in excess of the authorized term of imprisonment for such offense, as the court may determine to be in the interest of justice."

(b) In connection with the disqualification of a person who is an executive officer or agent of an organization, or a member of a licensed profession, we recommend that the clerk of the court be directed to notify the appropriate organization or agency of the defendant's conviction at the time he is sentenced. Such agency shall then have the discretion to take whatever action is deemed appropriate.[9]

(c) This paragraph should be revised so that disqualification or disability commences on the day it is imposed only in connection with the sentence of a federal public servant, so that any term of disqualification or other professional sanction imposed pursuant to (b) shall begin at a time fixed by the disqualifying agency.

Paragraph (c) in giving the court the power to discharge a person from disqualification "at any time after the sentence", gives the Court the power to exercise its discretion when the disqualification creates problems with the rehabilitation of the offender. We support this.

We approve (d) and (e), which require that any disability imposed under this section be "reasonably related to the character of the offense for which the defendant is convicted."

By enumerating specific crimes the conviction of which shall result in the disqualification of a federal public servant from a position held at the time of the crime charged, Congress has expressed its view that conviction of these crimes should cause disability.

A list of specific crimes should be written into this section the conviction of which shall result in automatic disqualification. Such a list is set forth in Section 3501 of the Brown Commission Code and includes:

(*a*) Treason and crimes affecting national security.

(*b*) Bribery and other crimes of unlawful influence upon public affairs and upon public officials.

(*c*) Unlawful acts under color of law.

(*d*) Embezzlement or fraud.

All of these offenses are serious, and are directly related either to positions of trust held by the defendant as a result of his federal public servant status, or to the basic integrity required of any person in such status.

When a crime is not among those enumerated, the court would have the discretionary power of disqualification.

S. 1400 has no comparable sentencing provision.

A definition of "federal public servant" should also be added to this section to avoid confusion as to when the listed sanctions are applicable. Because of the constitutional limitations, we recommend that this definition not apply to those in a position for which qualifications or provisions with respect to length of term or procedures for removal are prescribed by the Constitution.[10]

1–4A4—CRIMINAL FORFEITURE

(a) mandates that "in addition to any other sentence, the court shall order forfeited" . . . any property, real or personal, used, intended for use, or possessed in violation of section 2–9C1 (Racketeering Activity).

(b) permits the United States Attorney to petition for such forcitture; and, where such application is made, allows the court to enter such restraining orders and prohibition orders as are "in the interests of justice" (apparently for purposes of protecting the property.)

(c) authorizes the Attorney-General to seize and dispose of whatever property is ordered forfeited.

[4] If he has engaged in criminal conduct since his conviction, his subsequent criminal behavior can clearly be handled through the imposition of sentence in those other proceedings.

[5] Section 3.8 of the *Standards Relating to Sentencing Alternatives and Procedures* (Approved Draft, 1968).

[6] The Conference voted against any codification of the law relating to resentencing, on the grounds that it is a constitutional question which should be left to the Courts. *Federal Judicial Conference Meeting*, April, 1973.

[7] The possibility that this is a subtle form of dealing more harshly with the habitual offender is clearly raised by the wording of this section, and makes it arguably in violation of the Equal Protection Clause. Also note the possibility that in cases of multiple offenses a more severe sentence may permit imposition of an extended term or upper range sentence of imprisonment.

[8] See Report of the Association of the Bar of the City of New York, Report on the Proposed New Federal Criminal Law, pp. 91–92.

[9] Any provision of the Federal Code which attempts to disqualify persons licensed by the state to pursue certain professions appears to raise significant constitutional issues which could be avoided by adoption of the suggested reformation of (b).

[10] See Section 3501 (3) of the Brown Commission Code defining "Federal Position."

This section raises a number of policy questions which need to be met anew:

First: It makes forfeiture mandatory in all cases. Although the section is apparently intended to be applied as a sanction against a criminal defendant, it can and must hurt innocent third parties whose property is used by a defendant in pursuance of his criminal activity. The Supreme Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, No. 73–157, May 15, 1974, recently upheld the constitutionality of a Puerto Rican forfeiture statute against the claim of an "innocent" third party and discussed the purposes behind the statutes:

"Forfeitures of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and imposing in economic penalty, thereby rendering illegal behavior unprofitable." (citations omitted).

"To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing confiscation may have the desirable effect of indusing them to exercise greater care in transferring pospossession of their propterty. *Cf. United States* v. *One 1936 Model Ford Coach*, 307 U.S. 219, 238–241 (1939) (Douglas J. dissenting)."

In upholding the constitutionality of this particular statute, the Court in *Calero-Toledo* took note of 26 U.S.C. §7302, a bookmaking forfeiture provision aimed at imposing a penalty only upon those who were "significantly involved in a criminal enterprise" which led to the Court to hold that "innocents" had standing to seek remission even though the property might have been used illegally. *United States* v. *U.S. Coin and Currency*, 401 U.S. 715 (1971).

Second: The proposed section fails to provide notice or a hearing prior to the seizure of property.

In evaluating the use of criminal forfeiture in the sentencing process, the following observations are offered:

As a sanction it should fit within general sentencing philosophy, but before it is used, consideration should be given to the crime and to the offender. Criminal forfeiture should be available and authorized to assist in making reparations to a crime victim or to the state, or when it will deprive the offender of the pecuniary gain from the offense. It should also be used when the Court finds that it will deter the offender from further offenses.

There are a number of situations where forfeiture runs counter to public policy: for example, where it may deprive an offender of his means of income, *e.g.* a printer of his printing press, or of his access (his automobile) to gainful employment. Indeed, forfeitures in certain circumstances may work squarely against individual rehabilitation.

We therefore urge that criminal forfeiture be discretionary and that in Paragraph (a) "may" be substituted for "shall".

Furthermore, because sentencing is aimed at a particular offender, we recommend that criminal forfeiture be limited to the property of that particular defendant. This would not eliminate the seizure and forfeiture of property belonging to third parties, since it would be expected that civil *in rem* sanctions such as those discussed in *Calero-Toledo* would still be in existence. It is also hoped that these will be reevaluated as a group in the near future.

By proceeding in the manner suggested, the government must maintain its burden of proof by establishing in a judicial proceeding that the property is forfeitable, that the sanction is appropriate, and that it is used against a culpable party.

Section 3631 of S. 1400 is similar to the S. 1 proposal, and suffers generally from the same defects.

### 1–4–A5—JOINT SENTENCES

1–4–A5(a) provides that an offender who commits more than one offense, and is convicted for more than one offense "prior to the imposition of any sentence for any of such offenses," shall be sentenced to a joint sentence.

In its entirety this section reads:

"(a) General—An offender convicted at one time of more than one offense or at different times of one or more offenses all of which were committed prior to the imposition of any sentence for any of such offenses shall be sentenced to a joint sentence."

In its present form it is a poorly worded, unnecessary restatement of the court's existing authority to impose a joint sentence under the circumstances recited.[11]

[11] If the intent is to permit sentencing by a single judge in cases where the defendant has been convicted of offenses in more than one court of that same district, this intention is not made clear by the proposed wording.



Pursuant to paragraph (b), the maximum term of imprisonment which may be imposed pursuant to a joint sentence "shall not exceed seventy-five per centum of the total terms that are authorized for each of the offenses."

Paragraph (c) imposes this same limitation of "seventy-five per centum of the total of the fines authorized for each offense" in cases where the offender is sentenced to pay a fine.

This section is the proper place for the code to take a position with regard to the imposition of consecutive sentences. There are two particular problems in this area which must be addressed—

(1) the imposition of consecutive sentences where the same conduct is charged as a violation of more than one statute; and

(2) the imposition of consecutive sentences in general.

By neglecting to impose any restrictions on the use of consecutive sentences, the code has failed to address one of the most glaring problems in the area of judicial sentencing.

The use of consecutive sentences in cases where an offender is charged with more than one statutory violation, all committed through a single act or omission, has for years been the subject of critical comment and a target for reformers. An example of its potential for abuse is *Gore* v. *United States*, 357 U.S. 336 (1958), in which the defendant was convicted in federal court of six counts of violating three different federal statutes by a single sale of narcotics on each of two different days. He was sentenced as though he had committed three separate violations and was given three consecutive sentences for a single criminal act.

Commentators have advocated resolving this problem in one of two ways—either through provisions in the code which define offenses, or through provisions permitting conviction of more than one offense, but forbidding the imposition of consecutive sentences therefor.

This latter approach is recommended and could be adopted by inclusion of a provision that:

"Separate sentences of commitment imposed on a defendant for two or more crimes constituting a single criminal episode shall run concurrently." [12]

As to imposition of consecutive sentences in general, there is the very real problem of judicial abuse of discretion in ordering consecutive sentences. It is not sufficient to limit the maximum term of years that may be cumulatively imposed, unless the maximum is significantly lower than that authorized in this section. The proposed aggregate maximum term of not more than "seventy-five centum of the total of terms that are authorized for each of the offenses", can and will on occasion be used to justify the imposition of a virtually endless cumulation of sentences.

Adoption of this maximum term is inconsistent with the Code's stated goal of reducing disparity of sentences, will substantially reduce the effectiveness of classifying offenses, and is contrary to the recommendations of all other groups which have recently considered this question.[13] Moreover, it will promote the continued use of "overcharging."

For these reasons, we recommend adoption of a provision which both mandates concurrent sentences in crimes growing out of the same act or omission, and in other cases creates a rebuttable presumption in favor of concurrent sentences, making it clear that consecutive sentences are to be imposed only in exceptional cases. Such provision should be implemented by requiring the court to make detailed findings in any case where a consecutive sentence is ordered.[14] The Brown Commission's provisions on joint sentencing have been approved by the Judicial Council, and would be a good model for this section.[15]

An equally valid approach is taken in S. 1400 §2303, where the Code both creates a statutory presumption against consecutive sentences, and more tightly restricts the maximum term which may be imposed pursuant to a joint sentence. It is as follows:

"§ *2303. Concurrent and Consecutive Terms of Imprisonment*

"(a) Imposition of Multiple Sentences of Imprisonment.—When multiple sentences of imprisonment are imposed on a person at the same time, or when a

[12] Section 22, Model Sentencing Act. New York has also adopted this approach: See *e.g.* NY Rev. Pen. Law § 70.25(2) which forbids consecutive sentences for "two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other . . ."

[13] The American Bar Association Report, the Model Penal Code, and the Brown Commission, have concluded that the use of comulative punishment must be limited, except in those cases where the second offense is an escape, or a crime committed while the offender is in prison. See ABA Report, *supra* at 171–81.

[14] This requirement would go beyond that of 1–1A1 in that it mandates findings which must conform to the requirements of the section on joint sentences.

[15] See §3201, Concurrent and Consecutive Terms of Imprisonment.

term of imprisonment as imposed on a person who is already subject to an undischarged term of imprisonment, the sentences run concurrently unless the court orders that the sentences are to run consecutively if having regard to the nature and circumstances of the offense and the history and characteristics of the defendant, it is of the opinion that such a term is warranted. Multiple sentences ordered to run consecutively shall be treated as a single, aggregate term of imprisonment.

"(b) Aggregate Limit Where a Felony Is Involved. The aggregate maximum and minimum terms of imprisonment to which a defendant may be sentenced may not exceed such terms as are authorized by section 2301 for a felony one grade higher than the most serious felony for which he was found guilty.

"(c) Aggregate Limit for Misdemeanors and Infractions—The aggregate maximum term of imprisonment to which a defendant may be sentenced, when found guilty only of misdemeanors or infractions, may not exceed one year, except that a defendant found guilty of two or more Class A misdemeanors may be sentenced to an aggregate maximum term of imprisonment not exceeding that authorized by section 2301 for a Class E felony."

However, S. 1400 also exhibits the same failings as 1–4–A5 in that it fails to distinguish between separate crimes growing out of the same act or omission, and those crimes growing out of unrelated acts, and should be amended as discussed *supra*.

We would also recommend that this section be retitled "Concurrent and Consecutive Sentences" since the present heading of "Joint Sentences" is ambiguous and inappropriate.[16]

## Subchapter B—Imprisonment

### 1–4B2—Sentence of Imprisonment

The maximum sentence lengths proposed in S. 1 and S. 1400 are longer than those proposed in any other recent penal code revision, model legislation or sentencing studies, and are contrary to the reports and recommendations of all major task force studies of sentencing and corrections.[1] Because of the importance of these studies, and the consistency of their findings and conclusions, it is our recommendation that Congress adopt their proposals as to the maximum length of sentences. These reports were commissioned by the Congress to aid in the reform of the federal criminal law. Their findings are designed to promote that reform and should be implemented.

Accordingly, we recommend that the maximum term of imprisonment authorized for any felony offenses—except violent crimes—be five years.

This position was most recently taken by the National Advisory Commission on Criminal Justice Standards and Goals.

The Commission concluded that no prison sentence should exceed five years, unless the offender is a murderer, professional criminal, or persistent dangerous offender. The Commission further specifically recommended that courts impose prison sentences only as a last resort—and only after considering all other available alternatives.[2]

The ABA Report on Sentencing Alternatives and Procedures has also concluded that:

"The authorized sentence for most felonies should be in the five year range. Such a sentence is adequate for the vast majority of offenders who will be processed through the system." [3]

Apart from the fact that sentences as long as those proposed in S. 1 and S. 1400 serve no known rehabilitative goal, they provide an open invitation for the unequal treatment of similarly situated offenders. The possible range of sentence (*e.g.* 0–20 years for Class A felony) is so great that without providing any criteria for locating an offender within a particular range, each judge will do so on his own, and the results will be just as inconsistent and indefensibly disparate as under the present system.

[16] And a very poor pun, whether intended or not.

[1] See, for example, Oregon Rev. Crim. Code § 74 (proposed final draft, 1970); the Model Sentencing Act, § 8, which authorizes imposition of a 10-year sentence only for 7 specified "atrocious" crimes; ABA Sentencing Alternatives and Procedures; Task Force Report: Corrections, *supra*, Chapter 5.

[2] National Advisory Commission on Criminal Justice Standards and Goals, Task Force Report Corrections (1973). The Task Force, headed by the Hon. Joe Frazier Brown and funded by a $2.3 million grant from the Law Enforcement Assistance Administration published its findings last year. This Report is hereinafter referred to as The Task Force Report Corrections.

[3] ABA Report, Comment at 61 (1963).



Statistics evaluating the length of sentences served show that there are enormous disparities between the length of the maximum term authorized by Congress, the length of the sentence actually imposed by the court, and the amount of time served by the offender. Recent studies demonstrate that the average sentence imposed for crimes with an authorized maximum term of 20–25 years (*e.g.* bank robbery, both armed and unarmed, and armed postal robbery) is 10 years and 7.8 months. The average sentence served is approximately half of that, or four years and 8.9 months.[4] These figures graphically demonstrate that the people who are administering the federal system have found that only one-fourth of the maximum authorized term is actually needed or used even in the most serious cases.

High authorized maxima have the further negative effect of inhibiting objective consideration of the offender before the court. Although reflecting justifiable legislative concern with the worst offender, they have the inevitable psychological tendency of driving sentences up in all cases, and further impede a rational approach to sentencing.

The American Bar Association and the Model Penal Code both advocate that probation or some other nonincapacitative sentence should presumptively be imposed in every case unless the court finds specific affirmative reason why the offender should be committed.[5]

The Brown Commission takes the same position.[6]

We urge the adoption of legislation establishing the rebuttable presumption that: "the court shall deal with a person who has been convicted of a crime without imposing a sentence of imprisonment unless the court finds [according to certain specified criteria] that imprisonment is necessary for the protection of the public. . . ." [7]

*Grouping of offenses*

Grouping of offenses according to their relative seriousness is a method of reducing the disparities caused by our present penalty structure, since grouping would provide uniform punishment for offenses of the same or similar nature.[8] Concomittantly, grouping increases the consistency of the sentences imposed, and provides guidelines for new legislation.[9] Because of these potential benefits, it is recommended that the code adopt a system of grading; however, it is not recommended that the system be five-tiered as proposed in both S. 1 and S. 1400. Such discrete categorization overemphasizes the nature of the criminal act, making it the key factor in determining the length of sentence. New York recently adopted legislation creating five separate classes of felony offenses, with five degrees of punishment as proposed in B(2).[10]

This system was specifically chosen in order to punish the offense, rather than the offender:

"The approach of the sentencing structure is to rely upon the gravity of the offense as the legal criterion for the length and nature of the authorized sentence." [11]

The proposed federal system exhibits the same reliance on the offense as the determinant of punishment. A new federal code should not take this approach, since a more modern and progressive system would focus essentially on the offender, regarding the nature of the criminal act as but one factor to be considered in determining the penalty. Such an approach would require fewer categories for sentencing purposes.

The Model Sentencing Act, which emphasizes consideration of the individual, creates only two categories of felony offense. The Model Penal Code adopts three categories, thus compromising between concern with the seriousness of the offense, and the needs of the offender.[12]

We suggest the adoption of a grading system of three or less categories, patterned after that of the Model Penal Code. This would permit the punishment to be more reflective of each defendant's individual situation and better implement the other sentencing provisions of this code.

[4] See generally Federal Bureau of Prisons Statistical Tables, Fiscal year, 1965.

[5] See Model Penal Code § 7.01. ABA Report, *supra*, at 63–37. Brown Commission, *supra*, Working Papers Vol. II, pp. 1267–1270.

[6] § 3101(2).

[7] Model Penal Code § 7.01.

[8] See ABA Report, *Sentencing Alternatives and Procedures* p. 21(a) (Approved Draft, 1968), Commentary at 52; Model Penal Code § 6.01, (Official Draft, 1962) Model Sentencing Act, § 7.9, (1963) Pres. Commission, Challenge of Crime p. 142.

[9] See Comment, *Classification and Degrees of Offenses*—An Approach to Modernity 57 Ky L.J. 491 (1969).

[10] See NY Pen. Law § 55.05; 70.00 (McKinney, 1967).

[11] Commission Staff Notes, NY Pen. Law Art 70.

[12] Reducing the number of categories is believed to provide greater flexibility in sentencing, and best serve the function of reducing crime. See note, *Sentencing*, 19 UCLA L. Rev 523, at 457 (1972).

### 1–4B1(c)—MINIMUM TERM

We approve the elimination of any minimum term requirement as provided herein.[13]

At the present time, all offenders must serve a minimum term of one-third of the sentence imposed before they become eligible for parole. This minimum term is suspended only if the court affirmatively orders sentence imposed pursuant to 18 U.S.C. § 4208(a)(2), which allows review of the offender at any time.

However, as drafted, B1(c), this will not shorten the time served prior to parole review unless it is accompanied by a provision which fixes the time at which the offender must initially be considered for release. This time period should be the same as that specified in Chapter 12F(3), Parole Eligibility. For this reason, our recommendations as to eligibility are set forth pursuant to that section.

Assuming *arguendo* that a discretionary minimum term requirement is retained for the court to use in certain limited instances, this paragraph is too broad to adequately protect the offender.

It permits imposition of a minimum term when the court "having due regard to the nature and circumstances of the offense, and the history, character and condition of the offender, is of the opinion that such a term is required because of exceptional features such as those which warrant imposition of a term in the upper range." However, it includes no standards by which this determination shall be made.

Although it may be true that in certain cases imposition of a minimum term is thought necessary to assuage community fear of the early release of dangerous offenders, the imposition of any minimum term should not be permitted unless it is justified by findings made by the court at the time of sentencing. Additionally, no minimum term should be authorized in the absence of a 90-day study and presentence investigation.[14]

### 1–4B2—UPPER-RANGE IMPRISONMENT FOR DANGEROUS SPECIAL OFFENDERS

Separately classifying "dangerous special offenders" has been severly criticized, and is, at best, a dubious process.[15]

However, assuming *arguendo* that such classification is approved, there is no reason and no justification for its adoption unless the term of lower-range sentences is sharply reduced—so that there is a demonstrable need for legislation providing more severe penalties for the dangerous offender.

Assuming *inter alia* that this will be the case, we disapprove of this section *as written* for the following reasons:

1. The definition of "dangerous" set forth in subsection (b)(1) permits the court to find that an offender is dangerous "if a period of confinement longer than that otherwise provided is required for protection of the public."

No standards or criteria are provided for making this determination. Without such standards, any judicial attempt to apply this definition will be nothing more than an exercise in tautology.

Any code with extended term punishment must contain strictly drawn guidelines for determining dangerousness. Adoption of extended sentences without these guidelines would be irresponsible in the extreme. At a minimum, the guidelines should include the statutory requirements that the crime for which the offender is being sentenced is a serious felony which endangered the life or safety of another. It should additionally be required that an independent diagnostic analysis prepared prior to sentencing show, [beyond a reasonable doubt] that the offender possesses a propensity for violet crime.[16] Perhaps the best model for this legislation is the proposed Oregon Criminal Code which provides that the act for which the offender is having his term extended must be either a serious felony (Class A), or one in which the actor seriously endangered the life or safety of another. In the latter case, the offender must have been previously convicted of a felony. In either instance, there must be a finding based on a 90-day evaluative study, that the offender is suffering from a severe personality disorder and displays a propensity towards criminal activity. This approach thus concentrates upon those factors which indicate that in the past the offender has been a dangerous person, and that he is likely to continue as such.[17]

2. The categories in which the designation "special offender" may be made unjustifiably extend existing law to cases where no need for any such extension has been shown as follows:

(2)(i) extends the designation "dangerous special offender" to cases where the defendant has two prior felony convictions, and has been imprisoned pursuant to any one of those convictions—without placing any limit on the time during which those convictions must have occurred.

Present law, 18 U.S.C. § 3575, does include such a limitation, requiring that the most recent conviction have occurred within the past five years. Section 3202 of the Brown Commission Code, also includes such a time limit. At a bare minimum, S. 1 should contain the existing stipulation that less than five years have elapsed between the last felony conviction and/or the defendant's release on parole, or otherwise from confinement.

(2)(ii) provides that where the felony is committed as "part of a pattern of criminal conduct, in which the offender manifested special skill or expertise," the designation may be made. Special skill is defined as including "unusual knowledge" and/or "manual dexterity." This definition is far too broad and should be stricken from the code. If enacted, it would permit use of the designation in any case where any offense was accomplished by a planned scheme regardless of the relative seriousness of the offense itself.

(2)(iii) extends existing law to include the offender who has an "abnormal mental condition," which manifests itself in "aggressive conduct".

This is one of the most primitive paragraphs in the code and has the most potential for misuse. There is absolutely no scientific support for even suggesting that aggression is the product of an "abnormal" mental condition. Of course, there is a significant correlation between mental illness and certain aberrant conduct, including aggressive behavior. However, this conclusion is not support for the position advanced in this paragraph.

The invalidity of the categorization proposed makes the administration of this section impossible, since there is no criteria which exists to determine when aggression may be the product of an abnormal mental condition—and when it is merely anti-social behavior or the result of an anti-social personality, or marginal adjustment to society.

Incarceration is not a solution to the problem of the mentally ill or insane offender, and should not be treated as a solution by this code.

(2)(iv) authorizes imposition of an extended term in any case where the offender "used a firearm or other destructive device" while committing or running away from the offense.

The Code already authorizes higher punishment for those offenses committed with a gun by placing them in the highest category of offense (Class A). It is unnecessary to extend the designation to provide an additional upper-range term for these offenses. Unless the maximum lower-range terms are reduced, it defeats the purpose of placing gun offenses in the highest category to also separately designate them special offender offenses.

(2)(v) is a restatement of 18 U.S.C. § 3575 and authorizes special treatment when the felony was committed in furtherance of a conspiracy involving three or more persons, and the defendant had a controlling role. However, it misapplies § 3575 by making it applicable to conspiracies in general, since § 3575 was enacted as part of the Omnibus Crime Control Act of 1970, with the express purpose of controlling organized crime cases which ordinary criminal legislation did not reach. Its inclusion in the new code reflects continued and justifiable legislative concern with eliminating racketeering, gambling, and other illegal activities which cross state lines, but its wording is not sufficiently specific to prevent its being applied to almost any criminal conspiracy case. It should be narrowed so that it is directed only towards so-called "organized crime" cases, and does not become a statute of general application.

An alternative to limiting subsection (2)(b)(v) in this way would be to provide a narrowly defined offense for organized crime conduct, graded at the Class A

[13] The effects of this provision will be discussed as part of the Comment to Subchapter F—Parole; *infra*.
[14] See § 3201, Brown Commission Code.
[15] S. Halleck, *Psychiatry and the Dilemmas of Crime*, 313 (1967); Murrah, "The Dangerous Offender Under the Model Sentencing Act", 32 Fed. Prob. 3, 7 (June 1968); Report of the Association of the Bar of New York.
[16] See, *e.g.* Ore. Rev. Crim. Code §85 (1970). Model Penal Code §7.03(1)(2) Official Draft, 1962.



[17] *Comment: Sentencing*, 19 UCLA L. Rev. 526, at 544 (1972).

or B felony level, according to the number of persons involved in the criminal enterprise. This would be an alternative method for attempting to punish leaders of organized crime and would not require the extension of the special offender category to include them.

Subsection (c) states that "in support of findings under subsection (b)(2)(ii) it may be shown that the offender has had in his own name or under his own control income or property *not explained* as derived from a source other than criminal conduct." Initially, it should be noted that there is no provision requiring that any "findings" be made, or establishing any procedure for making such findings. Secondly, as worded, this paragraph may conflict with the requirements of the Fifth Amendment, since the defendant who does not testify about the circumstances of the offense alleged may not be *required* to explain the source of property under his control.

*Due process requirements*

Certain due process requirements must be met before the operation of this statute is constitutional. These requirements are not referred to in or by this section. However, they are established by Title II, Proposed Federal Rules of Criminal Procedure 32.2—Sentencing Dangerous Special Offenders. It is absurd not to have the notice provisions as well as all of the operating procedures stated within this section itself. There is no reason for proposing them as a federal rule, or for separating them from that part of the code to which they apply.[18] We therefore urge their removal from Title II and inclusion within this section.

1–4B3—DURATION OF IMPRISONMENT

Part (a) Restates 18 U.S.C. §3568, and provides that the offender begins serving his sentence on the date he is received at the institution where sentence is to be served.

Part (b), *Credits*, makes several changes in existing law:

(1) gives credit for all time spent in custody pursuant to the offense for which sentence was imposed.

(2) is an addition to present law, and gives credit to a defendant who is first arrested on one charge, and later prosecuted for another—which was committed before his arrest.[19]

(3) deletes Chapter 309 of Title 18—Good Time Allowances—and thus eliminates giving credit for good behavior while in prison. We approve this change. Theoretically, the Code's abolition of any minimum term requirement, and provision for relatively immediate parol eligibility makes credits for good time unnecessary.

However, whether or not these provisions eliminate the need for an additional system calculated to reduce time spent in prison, elimination of credit for good time will remove the problems presently caused by the institution's arbitrary used of its power. Because stripping an inmate of his credits is not required to be explained or justified to either the inmate or anyone else, it has continually been a source of much institutional friction.[20]

(4) gives credit for one-half of the time spent on probation or conditional discharge to the offender who has his conditional release revoked. We endorse this concept; under present law no such credit is given. However, we believe that full credit should be given, as recommended by the Brown Commission.[21] (The above endorsement is made on assumption that the "conditional release" is intended to include release on parole.)

SUBCHAPTER C—FINES

1–4C1—FINES

Paragraph (a)—Authorized Fines—is unobjectionable to the extent that it establishes a maximum fine for each class of offense, and requires that the amount of any fine imposed be determined by the offender's ability to pay.

[18] They are included within the provisions for an upperrange sentencing in both Section 3202, Brown Commission Code and, as noted, under 18 U.S.C. §3575.

[19] New York at the present time has such legislation. A virtually identical provision is also recommended by the Brown Commission; §3205.

[20] Brown Commission, supra, Working Papers, Vol. II, pp. 1299-1300.

[21] §3103(3)(a).



However, there appears to be little useful purpose served by adopting a legislatively fixed mandatory minimum daily term (10 days) for the payment of such fine. This provision is at odds with the broad discretionary power over sentencing given to the court elsewhere in this code,[1] and it may result in situations where a nominal fine, such as $50, must be collected in $5.00 installments for 10 days—potentially causing undue inconvenience and expense to both the court and the offender.[2] Where the court imposes a stiff fine in order to make the offender an example to others in his class, this provision calling for payment in at least 10 smaller amounts will diminish the public impact of the sanction.

Because of the foregoing, this section should be modified to eliminate the minimum daily term and to give the court the discretion to order payments made for any period up to the maximum specified above. If the dollar amounts set by this chapter are computed to their maximum amount, this section would read as follows:

Except as otherwise provided, the court, having regard to the nature and circumstances of the offense and the financial ability of the offender may sentence an offender to pay a maximum fine not to exceed:

(1) $1,095,000 for a Class A or Class B felony;
(2) $547,500 for a Class C or a Class D felony;
(3) $109,500 for a Class E felony; or
(4) $54,750 for a misdemeanor or a violation.

Such fine may be paid in a lump sum, on a daily basis for not more than 1,095 days, or in such other increments as the court shall direct.

Because of the substantial size of the maximum fines when computed and viewed in this way, consideration should be given to limitations, particularly with respect to misdemeanors and violations. With these lesser offenses, the maximum fine should be $1,000, so that they will not exceed the jurisdictional limitations imposed on U.S. Magistrates by existing law.

As to the maximum for felonies, we see no objection in making them very high, since their imposition is dependent upon the offender's financial situation, and the circumstances of his offense.

Paragraph (b) sets forth an alternative fine which provides that when an offender has been convicted of an offense through which he derived pecuniary benefit or caused personal injury, or damage, or loss, he may be sentenced to pay a fine which is as much as two times greater than the benefit to him or loss to others caused by his acts.

Paragraph (c) sets limits on the court's authority to impose fines by requiring the court to consider the offender's ability to pay, the burden on the offender, and the primary need for restitution to the victim. It should be approved as written.

§§ 2201–2202 of S1400 are similar in most ways to 1–4C1, although S. 1400 sets out smaller maximum fines and, as recommended, permits the court to provide for payments over a specified period of time or in specified installments. Unlike 1–4C1 it fails to establish a maximum period for payment. In that respect, S. 1's three-year maximum term appears desirable.

*Fines for Organization.*—Since fines are presently one of the few sanctions available against corporations, consideration might be given to a special higher level of maximum fines authorized for corporations. However, because of the extremely high dollar limits set forth in this chapter it would appear that a separate maximum for corporations is unnecessary.

*Special Sanctions for Organizations.*—Special organizational sanctions are provided for in S. 1's Section 1–4A1(7), as well as in S. 1400. They would be a new feature in federal criminal law.

Since it's impossible to jail a corporation, and fines may be absorbed as a cost of business, adverse publicity in appropriate cases could prove to be the most feared consequence of conviction to a corporation. The new section is therefore welcome.

Of first importance is requiring notice by the defendant organization upon conviction to those ostensibly harmed by its misconduct, so that those persons or organizations may determine whether or not to seek redress for whatever damage was done to them by the defendant organization. We differ with 1–4A1(7) in that we believe this notice should be mandatory.

[1] See Chapter 4, §1–4A1

[2] Some examples of hardship to the offender would include requiring him to travel to the courthouse each day, even though he may be ill or live either in a remote portion of the District, or outside of its boundaries. An example of hardship to the victim would include the situation in which the victim is relying on the money to pay medical or other expenses and needs a lump-sum payment from the offender in order to do so.

General disclosure of the conviction, both to customers and clients of the convicted organization, should also be available as a sanction to be applied on a discretionary basis. Disclosure will alert the general public to the misconduct of the organization and permits it to decide precisely what, if any, future relationship it will have with the convicted organization. Since an organization's success or failure is built in large measure on good will, the advance knowledge that evidence of misconduct may be widely disclosed is an important deterrent to organizational misconduct.[3]

We therefore support the following addition to the Code: "When an organization is convicted of an offense, the court shall require the organization to give notice of its conviction to the persons or class ostensibly harmed by the offense, and may require notice to the class or classes of the persons or sector of the public affected by the conviction by advertising in designated areas, or through designated media, or by other appropriate means."

### 1–4C2—RESPONSE TO NONPAYMENT OF FINE

Paragraph (a)—Response to Default—provides that when an offender sentenced to pay a fine defaults, the court may require the offender to show cause why he should not be imprisoned for non-payment. Paragraph (b) sets forth the defenses available to a defaulting offender and the maximum length of imprisonment to which he may be sentenced.

This provision is similar in many ways to S. 1400, § 2204, and to the Brown Commission § 3304. It is in marked variance to present federal law.[4]

Basically all three proposed codes provide a defense to an offender who shows that his default was not attributable to either an intentional refusal to obey the sentence of the court, or a failure to make a good faith effort to obtain the necessary funds for payment.

While finding these proposals superior to current law and agreeing with their basic thrust, some modifications are needed:

Paragraph (a)—The show cause order should be issued only after the court makes findings as to the sufficiency of the government's evidence. Therefore, before the show cause order may issue, the court should have before it information sufficient to establish by a preponderance of the evidence that the default was intentional or was attributable to a failure to make a good faith effort to obtain the necessary funds for payment. (See Brown Commission, Section 3304 and S. 1400, § 2204).

The purpose of such a provision is to insure that the Court causes some preliminary inquiry to be conducted before a show cause order issues against the defendant.

The sentence which provides that the Court may issue a warrant of arrest or a summons for his appearance should also be modified since it spells out no conditions when an arrest warrant should issue. Since the defendent is presumptively innocent of culpable default until the court finds otherwise in a judicial proceeding, the section should provide as follows: "A summons for his appearance should issue in all cases, except where the court finds that a summons will not adequately assure the presence of the defendant. In such a case the court may issue a warrant of arrest, directing the U.S. Marshal or the officers making the arrest to bring the defendant to the Court without unnecessary delay, at which time the Court shall establish conditions of release pending hearing consistent with the Bail Reform Act, 18 U.S.C. § 3146.

Paragraph (b)—Imprisonment—S. 1 is different from S. 1400 in two respects:

(a) The maximum term for a felony is 6 months in S. 1; in S. 1400 it is 1 year.

(b) Discretion is given to the court as to whether the sentence will be consecutive or concurrent to any term of imprisonment already imposed; S1400 mandates a consecutive term.

We support S. 1's handling of both features, consistent with the recommendation of the Brown Commission, Section 3304. The six month maximum is relatively the same as that deemed appropriate for contemptuous behavior in other situations (see 18 U.S.C. § 402), while the power to sentence concurrently is consistent with the concept that the judge should be afforded wide discretion in sentencing to imprisonment.

Paragraph (c)—No objection.

[3] See Brown Commission Working Papers, Vol. 1, pages 165–6, 191–3.

[4] See *Working Papers*, Brown Commission, *supra*, Vol. 2, p. 1328.



Addendum: S. 1400, § 2204(a) contains a provision placing responsibility for the payment of an organization's fines on those who are authorized to make disbursements; and "their superiors," and renders them subject to the sanction applied to a typical defendant. This provision should be added to § 1–4C2.

## SUBCHAPTER D—PROBATION

### 1–4D1—PROBATION AND CONDITIONAL DISCHARGE

Pursuant to paragraph (a), a defendant may be placed on probation with supervision, or without supervision under specified conditions of release. The maximum term of probation which may be imposed is five years for either a felony or a misdemeanor conviction, and not more than one year for a minor violation. Because a misdemeanor is a lesser offense, it is recommended that the Code adopt a shorter maximum term of probation in those cases, limiting the maximum probationary term to two years, as proposed in S.1400, §2102(a)(2), and recommended by the Brown Commission, §3201.

The importance of this section is that for the first time it treats probation as a form of sentence—not as an event which occurs in lieu of sentencing, as is presently the case.

(b) Establishes standards to be applied by the court in order to determine whether to release an offender on probation.

The purpose of listing the decision-making criteria is to implement the use of probation as a sentencing tool. This could best be accomplished by using this section to specify the circumstances which would make probation an *inappropriate* disposition. This approach is recommended because the success of probationary sentences indicates that probation should be regarded as the appropriate sentence in every case, unless affirmative reasons exist to indicate that imprisonment is necessary.[5]

As drafted, the criteria do not implement this approach, nor do they reflect any recognition that the court should first consider probation as the proper disposition. The standards are weighted against release on probation by their wording and their content. Apart from needing revision on the above ground, they require modification in order to establish a sufficiently specific standard to be workable.

The first standard listed for the Court to consider is "the need to maintain respect for law and to reinforce the credibility of the deterrent factor of the law." While deterrence is a valid function of the sentencing process, this method of stating that function is not.

In his work on deterrence, Zimring points out that a particular sanction cannot have a deterrent effect on the public unless the public is made aware that a particular sanction (a) is prescribed for certain conduct; (b) will be imposed to inhibit that conduct, and (c) has been imposed in a specific case. Communication of this latter factor is viewed as the single most important element of deterrence, since empirical data demonstrates that to have a deterrent effect, a sentence must be made known at the time it is imposed.[6]

Because of this, the "deterrent factor" is not operative unless and until the sentence is brought to the attention of the public. For this reason, there is no purpose in its inclusion as a criteria for the court to use, unless it is accompanied by the willigness of the federal government to assume responsibility for a massive media campaign of reporting the sentences imposed by various courts. Absent this commitment, listing deterrence as a criteria will result in judges imposing commitment in any case where they would like to see particular conduct (e.g., the crime committed) deterred, and cause needless incarceration of offenders who would not otherwise be imprisoned.

An additional problem is that its inclusion infers that imposition of a term of imprisonment is regarded as a deterrent, and will have a deterrent effect—even though all empirical evidence is to the contrary.

The second standard listed for the court to consider is "the need to protect the community." This is an undeniably important consideration; however, it is far too broad a standard to provide any real guidance to court. It should be re-stated, so that the court presumptively approves probation unless it finds that "an undue risk exists that the defendant will commit another crime if he is placed on proba-

[5] For documentation, see *ABA Report, supra*, Commentary at 62, 66, 72, 73, 80, 107–108; Working Papers pp. 130–1268. The ABA Report specifically recommends that every sentence involve the least amount of incapacitation of the offender as possible.

[6] See generally, Zimring and Hawkins *Deterrence—the Legal Threat in Crime Control*, University of Chicago Press (1073).

tion," or, that confinement is necessary to protect the public from further criminal activity by the offender.[7]

The third factor listed is "the need of the offender for continuing supervision and assistance." This is the first criteria to focus directly on the individual before the court. However, it fails to make clear that the court must determine whether that supervision can most effectively be provided in an institution or in the community.

The fourth standard refers to the "available resources of the Federal probation service." In its present form, this is vague at best, since it fails to indicate how those resources or lack of them should affect the sentencing decision.

In sum, the criteria listed in (b) should be replaced by a paragraph setting forth a presumption in favor of probation, as follows:

The Court shall place an offender on probation, unless it finds that confinement is necessary to protect the public from further criminal activity by the offender, and or that his need for treatment and supervision, relating directly to his potential for further criminal conduct, cannot be provided for through available resources in the community.

This standard should then be implemented through the adoption of factors, as listed in paragraph (c), and discussed *infra*.

(c) lists those factors which the court shall consider in determining whether or not to place a defendant on probation. Inclusion of these factors is new to federal law. For this reason, it is particularly important that they implement the proposed policy of more consistent use of probationary sentences. However, in their present form they neither reflect the premise that probation is presumptively appropriate, or effectively aid the court in evaluating the offender's amenability to probation. If this section is to be included in the Code, it should be revised.

Pursuant to (C)(1), the court is required to determine at the time of sentencing "whether the offender's release plan, if any, is adequate." If the Code is going to mandate that the court examine the offender's release plan, it is essential that the Code require that any presentence report prepared by the Probation Office, include such a "release plan."

Although S. 1 has no section on its chapter on probation requiring the preparation of presentence reports as part of the sentencing scheme, the court is given the discretion to order preparation of such a report in Title II, Rule 32(b), Presentence Investigation. If the Proposed Amendments to the existing Federal Rules of Criminal Procedure take effect on August 31, 1974 as expected, Proposed Rule 32 will supercede S 1's presentence provision. For this reason we offer no comment on S 1's presentence report provision, but would again stress that the *Code* should require preparation of a release plan.

Among the other factors listed for consideration are:

(2) Whether the offender's criminal conduct caused or threatened serious harm to another person or his property;

(3) Whether the offender planned or expected that his criminal conduct would cause or threaten serious harm;

(4) Whether the offender acted under strong provocation;

(5) Whether there were substantial grounds tending to excuse or justify the offender's criminal conduct, although failing to establish a defense;

(6) Whether the victim of the offender's conduct induced or facilitated its commission;

(7) Whether the offender has compensated or will compensate the victim of his criminal conduct for the damage or injury sustained;

(8) Whether the offender has a history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial period of time before the commission of the present offense;

(9) Whether the offender's criminal conduct was the result of circumstances unlikely to recur;

(10) Whether the history, character, and attitudes of the offender indicate that he is unlikely to commit another offense;

(11) Whether the offender is particularly likely to respond affirmatively to probation or conditional discharge;

(12) Whether the imprisonment of the offender would entail excessive hardship to him or his dependents;

(13) Whether the offender is elderly or in poor health;

(14) Whether the offender abused a position of trust or of public responsibility;

[7] See § 3101, Brown Commission.



(15) Whether the offender cooperated with law enforcement authorities in bringing other persons to justice;

(16) Whether the offender confessed or expressed remorse;

(17) Whether the offender sets an example for others because of his position;

(18) Whether such release would depreciate the seriousness of the offender's offense or promote disrespect for law; or

(19) Any other factors deemed by the court to be related to the criteria in subsection (b).

We would approve the inclusion of factors 2–9 and 12, 13, 14, 17 and 19 as relevant guidelines for the court. However, we would object to the inclusion of 10, 11, 15, 16, and 18 for the following reasons:

Factor (10), is "whether the history, character and attitude of the offender indicates that he is unlikely to commit another offense". This is a quality which is not susceptible of determination, and its inclusion will have no positive effect.[8] Additionally, it will operate unfairly against the offender with a previous record of conviction(s).

Factor (11), "whether the offender is particularly likely to respond affirmatively to probation" should be eliminated. This is not a factor to be evaluated at the time of sentencing but is rather the ultimate question facing the court, to be resolved through consideration of the other factor.

(15), "whether the offender cooperated with law enforcement authorities in bringing other persons to justice" should be deleted. It is neither relevant nor possible in a great number of cases, and will unfairly place a burden on the defendant who has been unable to cooperate.

Factor (16), "whether the offender confessed or expressed remorse" may unconstitutionally infringe the offender's Fifth Amendment privilege, and will detrimentally affect the offender who is appealing conviction after a plea of "not guilty", by requiring him to discuss the details of the offense with the probation officer and with the court at the time of sentencing.

Factor (18), whether release would depreciate the seriousness of the offense or promote disrespect for law is, again, a factor which cannot be evaluated by the court. As noted *supra*, the deterrent effect of a sentence is contingent upon its being made known to the public. Another problem with (18) is that in its present form it authorizes incarceration if imprisonment would promote respect for law, regardless if whether or not it would promote the offender's needs.

### 1–4D2—CONDITIONS OF RELEASE

The first sentence of (a)—General Conditions—which directs the court "in its discretion" to impose such conditions "as the court deems reasonable and appropriate to assist the offender to lead a law abiding life" is approved as written. However, the second sentence, which provides that "it shall be a condition in each case that the offender not commit another offense . . ." is disapproved on constitutional grounds, since it may have the effect of violating the offender's rights under the Fourth and Fifth Amendments.[9] To avoid constitutional infirmity, it should be revised to make it a condition of probation that the offender not be *convicted* of another offense while on probation. This re-wording would not prevent his probation being revoked if the *conduct* which resulted in his arrest violated any of the other conditions of his probation.

(b) lists those mandatory conditions which must be followed by all persons on probation, and directs the probationer to report to his probation officer as directed, inform him of any change of residence or job, and permit the probation officer to visit him. These conditions are appropriate to maintaining the necessary contact between the probationer and his probation officer. However, condition (b)(3), requiring that the offender "answer truthfully all reasonable inquiries by the probation officer," raises significant Fifth Amendment problems. Requiring the offender to answer *any* questions which the probation officer deems reasonable will have the effect of forcing the offender to choose between violating his probation or relinquishing his privilege against self-incrimination.

For example, if, as a condition of probation, the offender is compelled to answer all questions, he may be forced to provide information which can later be used

[8] "Research in the area of dangerous offender behavior (other than generalizations from case material) is practically nonexistent." Halleck, *supra*, at 313; and there is little agreement on how to predict dangerousness. Cf Mueller, Non-Punitive Detention: A Comparative Study, 2 Ottawa L. Rev. 425 (1968).

[9] For example, an offender who commits an offense but is not convicted of such offense because the evidence was obtained illegally, should not then be subject to a probation revocation based on the use of otherwise inadmissible evidence.

against him in a probation revocation hearing, or other criminal proceeding.

Additionally, this requirement forces the probation officer to assume the role of law enforcement officer. If the probation officer questions his clients knowing that they must answer his inquiries, and that he must report their answers, he may well be required to give them a *Miranda*-type warning prior to any interview. There is nothing more likely to interfere with the establishment of mutual trust or confidence than such a requirement. For these reasons, this requirement should be eliminated as a mandatory condition of parole.

(c) sets forth those "appropriate conditions" which the court may require an offender to maintain. Most of them are reasonable guidelines for the court to consider; however, several of them raise significant problems. Conditions (7) and (14) both authorize ordering the defendant to refrain from visiting or living in "specified" places, or "consorting with specified persons". We recommend the elimination of these provisions, since restricting the associations of convicted persons is both undesireable and potentially unconsitutional. Full-time enforcement generates friction between the offender and his probation officer, and ignores the realities of the defendant's living situation. As the Brown Commission has pointed out:

"It was decided not to include such a condition in the list offered here for the reason that it was too vague and uncertain in its meaning (as has been quipped, it really means in many cases 'don't go back to your friends and family') and because revocations on such a ground are very rare, at least in Federal practice, even though it is commonly stated condition."

Because the "appropriate conditions" set forth in the code are very general in nature there is a strong probability that their inclusion in the code will result in the court's imposing all (or virtually all) of the discretionary conditions, without evaluating their applicability on an individual basis.

Precisely because the imposition of such conditions is discretionary, it would be more consistent with the code's requirement of findings and with its earlier broad grant of power over sentencing to the trial court to eliminate any list of conditions and include instead the general direction that:

"The court may require the offender to comply with any condition of release deemed to be reasonably related to rehabilitating the offender and assisting him to lead a law-abiding life."

If done in this way, the court would be required to particularize the reasons for the imposition of certain conditions of release. This would both facilitate appellate review of sentencing and be more consistent with the policy of individualized sentencing which this code reflects.

### 1–4D4—RESPONSE TO NONCOMPLIANCE WITH CONDITIONS OF RELEASE

This section provides that at any time before the offender is discharged:

(a) "The court may summon the offender to appear before it or may issue a warrant for his arrest." This sweeping power requires specific limitations; if they are not provided, it will give courts unchecked power to harass. The following limitation appears in order: The summons may issue only if the court has probable cause to believe the offender has inexcusably failed to comply with a condition of his release. The authority to issue a warrant should be even more restricted, so that it is applicable only when there is probable cause to believe the offender has inexcusably failed to comply with a condition of his release in such a way as to be a danger to the community, or to himself, and where the court has reason to believe that the summons will not assure his presence. Upon execution of the warrant, the offender should be brought before the court without unnecessary delay, at which time the provisions of the Bail Reform Act shall be made applicable to him.

(b) authorizes the offender's probation officer, "if he has probable cause to believe that the offender has failed to comply with a condition of release," or if he has committed another offense, to make a warrantless arrest of the defendant, or to authorize any law enforcement officer to do so. This section must be redrafted for the reasons stated more fully in our comments on 3–12–F6. The probation officer should be removed from his role as law enforcement officer, with powers so excessive that if used by regular law enforcement personnel they would run counter to the constitution. His present position, (and that envisioned by this provision) is that of a pseudo-law enforcement officer, and is also contrary to his primary role as an offender's adviser, consultant, and supervisor. Congress can clarify this role by eliminating these arrest provisions.

If this section is retained, it should distinguish between those conditions which are grounds for the warrantless arrest and those which are not. Criteria need to



be set up so that this provision is triggered only when the defendant's noncompliance with a condition creates a substantial threat to the community or the offender's welfare. In any event, the section should limit the officer's power to those cases which are truly an emergency.

(c) authorizes the court to commit the defendant *without bail* whenever the court "has probable cause to believe that the offender has committed another offense," or learns that the defendant has been held to answer for another offense. Commitment without bail may continue until the second charge is resolved. The effect of this section is to punish the defendant for having been arrested or accused of committing a crime. Its language does violence to the presumption of innocence applicable in all criminal cases. Additionally, it ignores the fact that only 35% of all arrests result in prosecutions.[10]

Arbitrary denial of bail is a serious infringement of the defendant's constitutional rights. Under the Eighth Amendment and the Federal Bail Reform Act, an individual is presumptively entitled to reasonable bail in all cases, and where the offender has been released on bail from the court having jurisdiction over the new offense, it is clear that there has already been a judicial determination that he poses no threat to the community. Ordering incarceration, regardless of the fact that it is contrary to the recommendation of the court of primary jurisdiction, may also prevent the offender from effectively fighting the new charge lodged against him, and seriously inhibit his ability to defend himself. In this context, it may also interfere with his rights under the Sixth Amendment.

Therefore, if the court has probable cause to believe that the offender has committed another offense, and if, after hearing, it appears that he will not appear as required and that no conditions of release will assure his presence, we alternatively suggest that the defendant may be held without bail.

This section further provides that the time served awaiting disposition of the new charge shall be credited as time served for the original offense, "if the offender is not later convicted of such other offense." While this is unobjectionable, the offender who has been sentenced to probation derives no benefit from having "time credited for the original offense", unless his probation is revoked and a sentence of imprisonment is imposed.

(d) authorizes the court to revoke the defendant's probation and order him committed without bail pending a hearing, if the court is "satisfied that the offender has inexcusably failed to comply with the conditions of release." No standards are set for making this finding, i.e., what type of condition violation requires imprisonment, and no procedures are established for determining what is an "inexcusable" failure.

As we have indicated earlier, the rights of an offender in this case should be no different from those of a defendant facing a new charge. The presumption of innocence applies, and until a final resolution of factual and legal matters is made, reasonable conditions of release should remain available if they can adequately assure the defendant's presence.

(e) authorizes the court to impose any sentence originally available, upon revocation of probation. This section does not change existing law in cases where the court has suspended imposition of sentence, but will eliminate the situation presently created by suspending execution of sentence and placing the defendant on probation. This section is particularly important because it provides official recognition of the fact that it is not beneficial for the court to decide at time of sentencing what action will be taken sometime in the future if the defendant violates his conditions of release.

*Probation administration*

Although probation had its beginnings as an appendage to the local courts, in some 30 states adult probation services are not administered at the state level in conjunction with the administration of parole services. Fourteen states retained local administrations (13 by the courts), while in the remaining states probation services are administered on a statewide level, but through a separate board or agency.[11]

Because of the identity of interests of probation and correctional personnel, and with the overlap in their responsibilities, consideration should be given in the Code towards taking probation personnel out of the Court's administrative jurisdiction and placing it within the Bureau of Prisons (Corrections). This could be done by amending 3–12–B3.

[10] A revocation under these circumstances leads to the execution of the sentence originally imposed, or to a lesser sentence. Such a result is no longer possible under the code, since probation is itself a sentence rather than an intermediate event which occurs instead of sentence.

[11] ABA Standards Relating to Probation, Section 6.1, Commentary, p. 75, 76 (1970).

SUBCHAPTER E—SENTENCE OF DEATH

1-4E1—SENTENCE OF DEATH

(a) Authorizes imposition of the death penalty where the offender has been convicted of murder or treason.

(b) Sets forth standards for determining whether or not the death penalty is to be imposed, pursuant to §4E1(a).

1-4E-2—SEPARATE PROCEEDING TO DETERMINE SENTENCE OF DEATH

Pursuant to this section, the court is required to conduct a separate proceeding to determine whether or not the person convicted of murder or treason shall be sentenced to death or to life imprisonment.

We oppose authorizing imposition of the death penalty in any case. cf. *Furman* v. *Georgia*, 408 U.S. 238 (1972).

## CHAPTER 11

SUBCHAPTER D—SENTENCING

3-11D1—SENTENCING RECOMMENDATION OF THE ATTORNEY FOR THE GOVERNMENT

This section makes it mandatory for the government attorney to make a recommendation as to sentence in all cases. Since evaluation of the offender will already have been prepared by the probation office and will include input from the government, inclusion of this recommendation will serve no informational function and will make sentencing just one more adversary encounter between the defendant and the executive branch. As each U.S. Attorney's Office develops its own policy as to what modes of punishment are appropriate for certain categories of offense, disparity will further increase.

Any requirement of a sentencing recommendation by the government should therefore be made optional, and should be limited to those cases in which the prosecutor has been the government's primary attorney of record, and is thus personally familiar with the offender and the nature of his offense.[1] If this limitation is not imposed, the present form of this section will permit individual prosecutors to exercise bias regarding imprisonment for certain categories of offense, and will inhibit individualized consideration of the offender. It may also allow the exercise of personal antagonism against a defendant. These dangers will not be eliminated by the requirement that the Assistant U.S. Attorney give reasons for his recommended sentence.

## CHAPTER 11

SUBCHAPTER E—APPELLATE PROCEDURE

APPELLATE REVIEW OF SENTENCES 3-11E3

The Brown Commission in a proposed amendment to 28 U.S.C. Sec. 1291 proposed that there be appellate review in criminal cases, such review to include the power to review the sentence and to modify it or set it aside if the sentence were found to be excessive. The Brown Commission specifies neither the extent nor the form of the review. Under S. 1, appellate review is approved only with respect to sentences for dangerous offenders, but present infrequent use of this section (18 U.S.C. 3576) makes this merely a restatement of existing law, and does not appreciably extend review. S. 1400 does not recognize the concept of appellate review at all.

Last year, Senator Hruska and others introduced S. 716 which was referred to this Subcommittee. Under this bill, a defendant who had received a sentence of imprisonment or death was permitted to file an appeal following sentence, after the revocation or modification of an order suspending imposition or execution of sentence, or after resentence. Appeals by the government to increase a sentence were not provided for.

During the same period, January, 1973, the Committee on Rules of Practice and Procedure of the United States Judicial Conference proposed modification of

[1] This recommendation is made in recognition of the fact that in many of the larger districts, it is the practice of the United States Attorney's Office to assign assistants to handle all proceedings in a particular court on a given day, regardless of whether that assistant has been attorney of record in any of the cases calendared for that day.



Rule 35 of the Federal Rules of Criminal Procedure. This entailed the establishment of a "Sentence Review Panel" composed of three district court judges assigned to review motions to modify or to reduct "excessive sentences." Again, power was limited to reduction of excessive sentences. Review was to be limited to sentences which "may result in imprisonment for two (2) years or more."

The need for review of criminal sentences is manifestly clear, and the issue at hand is what form this review should take. With some minor reservations, we strongly urge that the Committee engraft into S. 1 an appellate sentencing review framework such as that embodied in S. 716.

(1) The Court of Appeals, not a panel of the District Court, should be the reviewing panel.

Since they handle a heavy sentencing volume and deal with defendants on a first-hand basis, trial judges often feel that they are best suited to handle review. However the detached neutrality of the court of appeals will best serve the ultimate ends of sentence review. For despite the best of intentions, proximity and mutual interest make it more difficult for a district court judge to fairly review and if necessary reverse the sentencing of a fellow district court judge.

Furthermore, as Professor Livingston Hall pointed out in his testimony before the Subcommittee on March 9, 1973, one of the objectives of sentence review is to "promote the development and application of criteria for sentencing which are both rational and just." This objective requires written opinions in those cases which could contribute substantially to the goals of sentence review. Such a jurisprudence can best be established on a circuit court level.

(2) Appellate Review should deal only with the modification and reduction of excessive sentences; it should not provide the government with an opportunity to apply to increase a sentence.

The Advisory Committee notes relating to Proposed Rule 35 from the Committee on Rules on Practice Procedure (1973) give many of the reasons which oppose allowing the prosecution to apply for sentence increase.

(1) There seems to be no inherent relationship between those defendants who deserve an increase and those who are likely to make an appeal. Compare Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L.J. 606, 621-622 (1965).

(2) The stigma of unfairness may attach to the review system, outweighing the value gained in the few cases in which an increased sentence is justified. See Report of the Interdepartmental Committee on the Court of Criminal Appeal, Meador Report, Appendix C, p. 142, ABA Standards Relating to Appellate Review of Sentences (Approved Draft, 1968).

(3) The power to increase sentence upon appeal by defendant might frustrate the objective of rehabilitation.

(4) The sixty years of experience in England with the power to increase sentences led to the conclusion that it does not serve a needed function. See Meador Report, Appendix C, pp. 144 and 157 of ABA Standards Relating to Appellate Review of Sentences (Approved Draft, 1968).

(5) There is some question as to whether such a provision would be constitutional. See *Kohlfuss* v. *Warden*, 149 Conn. 692, 183 A. 2d 626, cert. denied, 371 U.S. 928 (1962); and *Hicks v. Commonwealth*, 345 Mass. 89, 185 N.E. 2d 739 (1962), cert. denied, 374 U.S. 839 (1963), where the constitutionality of two state review statutes was questioned and yet the statutes withstood the attack. But compare United States ex rel. *Helenyi v. Wilkins*, 348 F. 2d 844, 859–860 (2d Cir. 1965) cert. denied, 383 U.S. 913 (1966); *People v. Henderson*, 60 Cal. 2d 482, 35 Cal Reptr. 77, 386 P. 2d 677 (1963). Also see Appellate Review of Sentences, Hearings on S 2722 Before the Subcommittee on the Judiciary, 89th Cong., 2d Sess. 106 (1966) (statement of Professor George).

To allow the government to seek an increase of sentence also raises the spectre of "appeal bargaining", i.e., the situation in which the defendant may have what he believes to be sound appellate issues but may be prevented from exercising his constitutional right by the direct or indirect threat of government appeal. While this might be a desirable method for decreasing the number of criminal appeals, it has dangerous ramifications. A prosecutor intent upon maintaining convictions, and a judiciary concerned with rapid turnover and the lessening of the number of cases flooding its dockets, could act vindictively by increasing sentences as a warning to defendants that they should file appeals with extreme caution.

(6) As long as appellate review of sentences is limited to excessive sentences and jurisprudence establishes general criteria as to what is excessive, there seems to be no reason to fear overburdening the appellate courts.

The spectre of a flood of litigation ascending to the Court of Appeals upon approval of an appellate review scheme has led some commentators and legislators to look for ways of limiting the deluge.

The proposed modification of Rule 35 mentioned heretofore carried a limitation to sentences of two years or more.

A one year minimum has been set elsewhere. See e.g., Conn. Gen. State Arr. Section S 1–195 (Supp. 1965); 10 U.S.C. 866(b) (1964) United States Military Court.

S. 716 carries no limits on the length of terms of incarceration to be covered. We basically concur with this approach; if after a sufficient period of experimentation it is determined that appeals engendered under this scheme are needlessly bogging down the performance of the appellate court in other matters, consideration could then be given to amending the section to provide such limitations.

There are some other limits which can be implemented, without any adverse impact on the defendant or the government:

Sentencing appeals should be made available only in the event of an order of incarceration. As a result, no right to appeal should apply in the case where a term of years has been suspended and the defendant placed on probation, until such time as probation is revoked and the defendant ordered to jail to serve the term.

Another suggested limitation on the unnecessary appeal would be the requirement that, prior to filing the appeal, the defendant must apply at least once to the sentencing Court for modification or reduction in sentence under Rule 35 of the Federal Rules of Criminal Procedure.

We therefore support the general policy expressed in S. 716 with these limitations and modifications in mind and urge that it be engrafted into S. 1.

## CHAPTER 12—CORRECTIONS

### I. GENERAL COMMENT AND EVALUATION

"The failure of major institutions to reduce crime is incontestable. Recidivism rates are notoriously high. Institutions do succeed in punishing, but they do not deter. They protect the community, but that protection is only temporary. They relieve the community of responsibility by removing the offender, but they make successful reintegration into the community unlikely. They change the committed offender, but the change is more likely to be negative than positive." [1]

For these reasons our prison system has been the subject of almost exhaustive review and study over the past several years. These studies have concluded that change—immediate change—is imperative.

In the 92nd Congress, legislative concern with upgrading the conditions in our prisons, and providing a minimum national standard of care, was demonstrated in the introduction of more than 100 bills directed towards revision of our prison system.[2] Most of them make it clear that maintenance of present structure is unacceptable and conducive to the disorder and violence which has characterized our prison system in recent years.[3]

The introduction to the Omnibus Correctional Reform Act of 1971 noted that "the correctional system of the United States is under-financed, over-taxed and does not provide effective correctional programs".[4]

This chapter provides no remedy for that situation. Adoption of this section will simply perpetuate all of the problems of our present structure—offering neither improvements nor reform. It ignores the opinions of most experts in the field of corrections that too many people are being locked up for too long.[5]

There can be no excuse for adopting this section as drafted.

[1] Task Force Report: Corrections, *supra*, p. 1.

[2] The most important of these bills include: S. 3918, 92nd Congress 2nd Session (1972); introduced by Senator Hruska, to create a National Institute of Corrections. H.R. 13690, (92nd Cong 2d Sess., 1972)—Manpower Training Bill; H.R. 12354, (92nd Cong 1st Sess., (1971)—Manpower Training Bill; H.R. 1437, (92nd Cong. 2d Sess., 1972)—Omnibus Penal Reform Act; H.R. 11605, (92nd Cong. 1st Sess., 1971)—The Omnibus Correctional Reform Act of 1971; S. 3185, (92nd Cong 2d Sess., 1972)—The Federal Corrections Reorganization Act.

[3] It is a decisive comment on the present state of prisons that legislation has been introduced in order to provide inmates with such things as drinking water, sufficient light and ventilation, and medical care. See H.R. 14327, 92nd Cong. 3rd Sess., 1972; as well as the legislation cited in footnote 2, *supra*.

[4] H.R. 11605, *supra*.

[5] Hearings on Corrections Practices; Their Faults and Shortcomings; House Judiciary Comm. SubComm. No. 3, 92nd Cong., 1st Sess., (1971).



We urge the Committee to scrap this proposed chapter, to review the various reform bills presently pending before it, and to adopt a program which will bring about the changes which must be made.[6]

### II. FACILITIES FOR ADDICTS AND ALCOHOLICS

Because this chapter specifies the character and establishment of federal correctional institutions, it would be appropriate to include provisions directing the construction and maintenance of separate institutions for addicts and alcoholics within this section if it were to be adopted.

The need to segregate these offenders, and to provide rehabilitative care, and hospitalization where necessary, exists independently of whether or not the offender is being processed through the criminal justice system or has been diverted from it.

Over the past few years, penalties for violations of narcotics laws have become increasingly severe.[7] While these penalties have not reduced illegal traffic in drugs, they have increased the number of committed offenders with drug problems.[8] Present drug abuse treatment programs in institutions have been largely unsuccessful, and such programs as the federal Narcotics Addicts Rehabilitation Act reach too few of the offenders in need of treatment.[9]

The number of arrests for narcotic offenses makes a coordinated treatment program essential to maintaining any balanced workload in the criminal justice system. There are numerous existing models for such drug treatment programs, and all have observed the distinction between hard-core addicts and first offenders charged with possession of dangerous drugs, so that their commitment has had no *adverse impact* on the community where such programs are based.

In light of all available medical and correctional data, no valid reason exists for failing to provide treatment alternatives to the alcoholic.

As long ago as the decision in *Powell* v. *Texas*,[10] the Supreme Court noted that facilities for the treatment of alcoholics in this country are "woefully lacking". To reduce the number of arrests for drunkenness, and to keep these people out of the criminal justice system, the President's Commission on Law Enforcement in 1967 recommended the creation of community detoxification centers operated under the auspices of local police departments.[11] Experimental programs were established pursuant to their recommendations in St. Louis, Missouri, Washington, D.C., and New York City and have had significant success.[12]

It is indisputable that incarceration will not cure the addict, the alcoholic, or the mentally ill offender and that our present prison system is totally unsuited to care for them. The need of these people for treatment can be met only in treatment facilities. For this reason, the code must authorize construction of facilities which can provide the medical attention and rehabilitative programs necessary to prevent the continuous re-cycling of these offenders through the courts and prisons.

(c) should be used for this purpose. It should be deleted in its present form and replaced by a separate section specifically authorizing the adoption of particular programs and the hiring of specialized administrators to deal with the problems of the convicted drug addict and alcoholic.

[6] As a general statement with regard to corrections, we would point out that the ABA's Commission on Correctional Facilities and Services has recommended that the ABA endorse the Correctional Standards proposed by the National Advisory Commission on Criminal Justice Standards and Goals, and have urged the ABA's House of Delegates to concur with the Commission that "top priority should be given to a concerted program of action to achieve:
1. Equity and justice in corrections.
2. Exclusion of socio-medical problem cases from corrections.
3. Shifting of correctional emphasis from institutions to community programs.
4. Manpower development.
5. Increased involvement of the public."
Individual Rights and Responsibilities Newsletter, Vol 1, No. 11 Winter 1973–1974.

[7] At the present time, more committed offenders have a drug problem than ever before. *Id.* at 352.

[8] Additionally, many persons confined for non-narcotic offenses are also drug users.

[9] Primarily because of its exclusionary provisions which makes NARA commitments unavailable pursuant to a conviction of violent crime, or to anyone with 2 or more prior convictions.

[10] 392 U.S. 514 (1967).

[11] The Challenge of Crime in a Free Society, 1967 pp. 236–237 President's Commission on Law Enforcement and Administration of Justice.

[12] The response to the voluntary aspect of the District of Columbia program demonstrates the compatibility of this program with law enforcement aims. Opening the D.C. center to walk-ins has resulted in a patient population that is 60% self-referred. *Nimmer*, Two Million Unnecessary Arrests, ABA Foundation (1971) p. 20.

For these reasons, we recommend adoption of the following standard, proposed by the National Advisory Commission on Criminal Justice Standards and Goals:

"1. The commitment of addicts to correctional institutions should be discouraged, and correctional administrators should actively press for the development of alternative methods of dealing with addicts, preferably community-based alternatives. Recognizing, however, that some addicts will commit crimes sufficiently serious to warrant a formal sentence and commitment, each institution must experiment with and work toward the development of institutional programs that can be related eventually to community programs following parole or release and that have more promise in dealing effectively with addiction.

a. Specifically trained and qualified staff should be assigned to design and supervise drug offender programs, staff orientation, involvement of offenders in working out their own programs, and coordination of institutional and community drug programs.

b. Former drug offenders should be recruited and trained as change agents to provide program credibility and influence offenders' behavior patterns.

c. In addition to the development of social, medical, and psychological information, the classification process should identify motivations for change and realistic goals for the reintegration of the offender with a drug problem.

d. A variety of approaches should provide flexibility to meet the varying needs of different offenders. These should include individual counseling, family counseling, and group approaches.

e. Programs should emphasize "alternatives" to drugs. These should include opportunities to affiliate with cultural and subcultural groups, social action alliances, and similar groups that provide meaningful group identification and new social roles which decrease the desire to rely on drugs. Methadone and other drug maintenance programs are not appropriate in institutions.

f. The major emphasis in institutional programs for drug users should be the eventual involvement of the users in community drug treatment programs upon their parole or release.

g. Because of the inherent limitations and past failures of institutions to deal effectively with drug addiction, research and experimentation should be an indispensable element of institutional drug treatment programs. Priorities include:

(1) Development of techniques for the evaluation of correctional therapeutic communities.

(2) Development of methods for surveying inmates to determine the extent of drug abuse and treatment needs.

(3) Evaluation of program effectiveness with different offender types.[13]

## CHAPTER 12—CORRECTIONS

### Subchapter C—Bureau of Corrections

#### 3-12-C1—ORGANIZATION, DIRECTOR, AND RESPONSIBILITIES

(a) Establishment—removes the Bureau of Prisons from the Department of Justice, and places it under the direct supervision of the Attorney General. Additionally, it authorizes changing the name of the "Bureau of Prisons" to the "Bureau of Corrections." This provision is deceptive. While ostensibly removing the Bureau from the Department of Justice jurisdiction, which is conceptually appropriate because of the implicit conflict of interest between the Department and the Bureau, it in fact provides that the Director shall serve "under the Attorney General", and provides in later sections that the Attorney General must approve his actions. (See 3-12-C1-4).

While there may be budgetary advantages in submitting the Bureau's budget as part of the Justice Department Budget, we believe there is greater interest in making the Bureau either an independent agency or bringing it under another federal agency such as HEW which does not have a built-in conflict of interest.

The name change is also inappropriate. As long as there are no provisions for the restructuring of our penal institutions, they will remain prisons, not correctional facilities. No euphemistic change of names will correct that situation.

(b) Authorizes the appointment of a "Director of the Bureau of Corrections" to be made by the President, by and with the advice and consent of the Senate. This provision specifically provides that it "shall be of no force and effect" as to the incumbent director. We suggest the inclusion of a provision directing that

[13] Task Force Report: Corrections, *supra*. Standard 11.5 Special Offender Types.



such appointment be made within one year after the adoption of the code. It is recommended that the term of service be no longer than six years; and that the appointment be made with the advice and consent of the Senate.

#### 3-12-C2—CHARACTER OF CORRECTIONAL FACILITIES

This provision directs that "the Federal correctional facilities shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of federal offenders according to the character of the offense committed, the character and mental condition of the offender, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the person committed to such facilities."

(b) Directs the Director of the Bureau of Prisons to set aside and adapt institutions and agencies for the specialized treatment of youthful offenders . . . "*Insofar as practical* such youthful offenders shall be segregated according to their needs for treatment". (emphasis added)

(c) Orders the Director to set aside or provide for separate institutions and agencies within the correctional system to give specialized treatment to narcotics addicts, drug abusers, and alcoholics.

Subpart (d) provides that the Secretary of HEW shall detail officers of the Public Health Service to the Department of Justice "for the purpose of supervising and furnishing medical, psychiatric . . . " and other related services to the federal correctional facilities.

## CHAPTER 12

### Subchapter E—Federal Correctional Industries

#### 3-12-E1—ORGANIZATION

Changes the name of the government corporation to "Federal Correctional Industries," and replaces the present administration of the corporation with a six-person Board of Directors, to be appointed by the President, and serve without compensation.

#### 3-12-E2(a)—SCOPE OF OPERATION

Establishes that the corporation "shall determine in what manner and to what extent industry shall be carried on in federal correctional facilities, for the production of goods and services for consumption in such facilities or for sale to government agencies."

This section further directs that any "goods and services produced by such industries may not be sold to the public in competition with private enterprise, unless the Secretary of Commerce certifies to the Attorney General that private enterprise would not be harmed."

Pursuant to (b)—Diversification—the Board of Directors is authorized to provide employment "where appropriate" for offenders in federal correctional facilities and to diversify prison operations so that no single private industry has an undue burden of competition from the products of the prison industry. This latter directive is intended to implement a stated goal of the diversification program—"to reduce to a minimum competition with private industry or free labor."

(c) Vocational Training—provides that the Board of Directors "may provide" for the vocational training of qualified offenders.

(d) Authorizes application of the provisions of this subchapter to those persons convicted of military offenses and confined in any facility under the jurisdiction of the Department of Defense.

(e) Similarly extends this chapter to the employment and training of offenders confined in correctional facilities within the District of Columbia.

Until as late as the 1920's, private enterprise exploited prison labor through various arrangements that allowed them to obtain inmate labor at virtually no cost. Additionally, prison industries—which paid little or no wages to inmates—sold inmate-produced products on the open market, in competition with private industry.[1]

As a reaction to these abuses of the prison work force, federal legislation was enacted to remove prison industries as either a source of goods or services for

[1] See generally, Cohen, Fred. The Legal Challenge to Corrections; Joint Commission on Corrections, Manpower and Training, 1969.

private enterprise. At the present time, this legislation is still operative and specifically forbids the hiring or contracting out of the labor of federal prisoners, and bars their use on government contracts.[2] Additionally, most states have banned the sale of prison-made goods except to the state or subdivisions thereof. The result of this approach to prison labor has been not only to shield prison industries from exploitation, but to effectively isolate them from the manpower training techniques and programs developed by private industry over the last half-century.

The radical change in social and economic conditions since the promulgation of this legislation, makes its retention as the philosophical base for the design of prison industries inappropriate. Maintaining these legislative prohibitions seriously hampers any effort to provide offenders with vocational skills which they can use to find work after their release. We urge their elimination from this section, and their repeal elsewhere in federal law.

The National Advisory Commission on Criminal Justice Standards and Goals has recommended that "[b]y 1975, each state with industrial programs operated by or for correctional agencies should amend its statutory authorization for these programs so that, as applicable, they do not prohibit:

1. Specific types of industrial activity from being carried on by a correctional institution;
2. The sale of prison products on the open market;
3. The transport or sale of products produced by prisoners;
4. The employment of offenders by private enterprise at full market wages and comparable working conditions;
5. The payment of full market wages to offenders working in state-operated prison industries." [3]

Their reasons for urging the repeal of present restrictive legislation, and adoption of the above standards are, in summary that:

1. "The inhibitory effect the laws have on the development and expansion of prison industries has caused the idleness characteristic of American Corrections, particularly on the local level . . . ."
2. "The effort toward reducing recidivism by assisting the reintegration of offenders into the free society requires liberalization of these laws . . . [since] industrial programs should provide experience in skills related to employment opportunities in the free community, not the purchasing needs of state government."
3. "Authorizing use of private enterprise and entry into the open market to prison industries will facilitate payment of full market wages to committed offenders. Such wage scales would reduce the fear of exploitation, provide the offender with a realistic employment situation with commensurate responsibilities, and create a sound financial base for his release." [4]

These factors, in combination with the apparent present failure of prison industries to provide meaningful job training to inmates requires revision of the present program. We submit that such revision can be effective only through repealing existing enactments against the mingling of prison labor and private enterprise, and involving private industry in the development of institutional job training programs.

## The Ex-Con's Unhappy Lot

Geraldine Bray is an articulate, attractive black woman and a graduate of the University of Massachusetts with a consuming ambition to go to law school and become a criminal lawyer. Twenty-six-year-old Gerrie Bray is also something else: an ex-convict. Nine years ago, Miss Bray stole a $34 check—and paid for it with six months in prison and eighteen months on parole. "They tell you when you go to prison that you do your time, fulfill your parole and then you are free," she recalled bitterly last week. "But that's a lie."

Until she won a pardon two weeks ago from Massachusetts Gov. Francis Sargent, a milestone reached only after eighteen months of relentless pleading, Gerrie Bray could not even get a job mopping the floor of a bank, let alone aspire to law school. At the bank, she would have been too close to money for the parole board's comfort. As for law school, she reports, "When I applied they told me I didn't have a chance . . . and that even if I did get in school, I would never be able to take the bar exams." With her hard-won pardon, Gerrie Bray now has a chance. But in Detroit, it would appear that time is running out for Collie Ray Brim, 26, another ex-con. He has less than a week left of the 30 days he was allotted

[2] For example, Executive Order 325-A, 1905, requires all government contracts to prohibit prison labor.
[3] Task Force Report: Corrections, *supra*, Standard 16.13—Prison Industries.
[4] Task Force Report Correction, *supra*, Commentary to Standard 16.13.



to find a job—or go back to the State Prison of Southern Michigan and serve the balance of a two- to ten-year sentence for armed robbery. Brim has knocked on any door he could find; the Michigan Employment Relations Commission, the Urban League, the Chamber of Commerce and a private job-procurement agency called Operation Help. "At Detroit Edison, I go down there, and the man found out [about his prison record], then turned me away," Brim said.

### AGONIZING

The plight of Gerrie Bray and Collie Ray Brim is all too often shared by the estimated 100,000 prisoners who each year walk out of the nation's prisons and reformatories. Most of them—particularly the long-termers—face problems enough in simply adjusting to a life without regimentation. Even more agonizing, a great many must find a job as a condition for remaining on the outside—and decent jobs, particularly in these days of energy crisis and a faltering economy, are increasingly difficult for the ex-con to find.

There are four basic reasons. First is the nature of the ex-prisoner himself. "We don't lock up many skilled people and middle-class people," points out Mark Dowie, co-director of Transitions to Freedom, a San Francisco prisoner-aid group. "We lock up the poor, the unskilled and the uneducated"—and they receive precious little training for postprison jobs while they are behind bars.

The attitude prevalent among many employers is a second problem. "It's like medieval witchcraft," snaps Rhoma Young, director of Contact, which helps virtually unemployable ex-convicts in the Los Angeles area. "People don't know, people don't want to know. The first thing employers will say is 'I'm afraid I'm going to get ripped off'."

Third, state licensing requirements often place nonsensical restrictions on the jobs an ex-con can take. In 46 states and the District of Columbia, for example, they cannot become barbers. In New York, he or she is prohibited from becoming an auctioneer, junk dealer, pharmacist, undertaker, embalmer or poolroom operator, among other things. In Kentucky, ex-cons are not even allowed to perform the foul job of cleaning septic tanks.

Finally, there are ironbound rules laid down by some state parole boards that, in some cases, work against the ex-con. For example, in Texas not long ago, a former drug-addict-turned-writer did such an exceptional job of rehabilitating himself and helping others during his thirteen-year term that impressed prison officials promptly hired him to teach in the prison school system when he was released. But the state parole board stepped in and said "no" because ex-cons are forbidden any contact with prisoners. As a result, instead of earning $955 a month in a stimulating teaching job, the man is now scraping by on $400 a month as a laborer in a Houston junkyard.

The result of all of this is an army of dispirited ex-convicts—and a massive stimulus to the nation's 70 per cent recidivism rate. Federal prison officials believe that the failure to find a decent job is the biggest single reason ex-cons find themselves back behind bars. Adds John DeLorean, former vice president of General Motors and now president of the National Alliance of Businessmen, which has a program to aid ex-convicts: "I am absolutely astounded by two facts. One, some 85 per cent of the crime in urban areas is committed by previous offenders. And two, on the average they are arrested within six weeks after leaving prison."

### SEARCH

Thomas Tudor is in that kind of bind right now. Three months ago, the 33-year-old Tudor, who served twelve years for various felonies, was released from Georgia State Prison with $25 in cash, the traditional ill-fitting suit and a bus ticket to Atlanta. Tudor then began a relentless search for work. He first went to a state manpower office. "They didn't have anything, so I went out and bought a paper and started through the want ads," he said. "I called a number of them, and the reaction was mostly the same: 'We don't have anything permanent,' or 'If you stay out of jail for a year or six months, come back and talk to us then'."

In Detroit, Walter Ryan, who spent 22 of his 61 years in prison for murder, faces the familiar problems, further complicated by his age. Before he went to prison, he did "mostly dishwashing, stuff like that." Now, he says, "no one wants someone my age."

In many cases, an ex-convict's problems do not end once he gets a job. "Sometimes a small-business man will feel like he's doing a guy a favor because he's hired an ex-offender," Rhoma Young says. "He will try and pay him less than

other employees, or not at all." A study done last year by the Wright Institute of Berkeley, Calif., found that the wage level of newly released prisoners was considerably lower than the state and national averages for the same jobs; the study concluded that parolees were forced to accept jobs that fell far below their own sense of dignity and self-worth.

The picture is not entirely bleak, of course. Ex-cons who do find work report that, in nearly every case, they are not hassled by fellow employees. And hundreds of companies, large and small, have programs that reach out to ex-cons. In California, for example, IBM, Hewlett-Packard, General Electric and Fairchild Camera and Instrument Corp., all in need of electronic technicians, plan to donate training equipment to San Quentin, recruit instructors, develop a curriculum—and eventually, hire all "graduates" when they are freed.

In San Diego, San Diego Marine Construction Corp. counts 45 ex-cons among its 650-man work force, working such skilled crafts as welding and machining and earning an average of $4.76 an hour. Not only that, the company sponsors in-house rap sessions, where ex-cons can talk out their problems with alcohol, drugs or simply the mechanics of adjusting to everyday life on the outside. "The program has been 90 percent successful," reports Jess Holbert, general manager of the firm. "We have dropouts, absenteeism and men who can't do the work. But the 90 percent who stay on the job are superior employees."

HELP

Moreover, most major cities have self-help programs—such as New York City's Fortune Society and San Francisco's Transitions to Freedom—to search out job opportunities and guide ex-cons to them; they are staffed largely by ex-convicts. In Chicago, Cecilio Berrios, a former heroin addict with a $100-a-day habit, not only works as a youth counselor out of Illinois Gov. Daniel Walker's Chicago Office but on his own founded Free, Inc., which counsels Hispanic addicts and ex-cons. "You're really alone when you're out there ripping and running like that," he recalls. "I want to help other Latinos to know what I never knew."

Finally, thousands of ex-cons *are* making it on the outside—some in spectacular fashion. When he was 17, Robert Wyrick was sentenced to 30 years in West Virginia's Moundsville state prison for robbery and burglary. By his own account "a bad-assed kid," Wyrick served four and a half years, including a bread-and-water stint in solitary confinement. "I deserved everything I got," Wyrick admits. When he was released, Wyrick went to Cleveland and managed to get a job as a bread-truck driver and began taking some college courses. Through an acquaintance in a creative-writing class, he landed a job with a suburban Cleveland newspaper. With experience, he developed into an outstanding investigative reporter, winning a Heywood Broun Award and a Nieman Fellowship at Harvard. Today, the 37-year-old Wyrick is a highly respected member of the Washington staff of Newsday.

George Freeman, 35, was a member of a team that pulled eight holdups in one fourteen-day period. Arrested in 1965, Freeman went to jail for four and a half years and his parole does not expire until next December. Freeman's first post-prison job was in a bumper factory at $1.50 an hour. Later, the Fortune Society opened an arts-and-crafts shop, and Freeman signed on as a clerk. Eventually, he rose to manager and later took a job as a $175-a-week salesman in the New York office of Bemis Co., a plastics and packaging firm. In 1972, Freeman left Bemis to join radio station WOR as a time salesman.

MODEL

Today he is earning $21,000 a year, has been praised by former New York City Correc ions Commissioner George McGrath as "the model parolee in the U.S." and even has political ambitions. "I'm glad I went through those experiences because now I can understand them," he told NEWSWEEK's Pamela Abraham last week. "It was hell, but for every negative stroke I've received in my life, I've had two positive strokes to counter it."

Still, for every Bob Wyrick and George Freeman, there are hundreds of Collie Ray Brims, Thomas Tudors and Walter Ryans, men whose chances for a productive life on the outside are as dreary as any prison cell. And even the "lucky" ones, like Boston's Gerrie Bray, can never quite escape their past. Despite her governor's pardon and her fine academic record, there is no guarantee she will be accepted at law school. "That's going to be a rough one," sums up Gertrude



Cuthbert, a member of the Massachusetts Parole Board, "because she still has to admit she was convicted. I just don't know whether a place like Harvard Law School is going to put much weight on a pardon. And certainly the bar association will not."

## CHAPTER 12—PAROLE

### I. GENERAL COMMENT AND EVALUATION OF SUBCHAPTER F

In light of the widespread agreement about the need for the virtually complete overhaul of the parole system, and the myriad alternative formulas for reform currently being advanced,[1] it is recommended that the code not take a position in favor of a particular parole structure without further evaluation of the various proposed models. In the absence of such evaluation, a legislative determination of the parole system to be adopted would appear premature at this time. It is therefore suggested that the code should not foreclose any options by adopting provisions detailing the structure and operation of the system itself. Instead, it is recommended that the code facilitate the reconstruction of the parole system by providing a general administrative framework for the system, and adopting standards of procedural due process to which the parole process must conform.[2]

This approach would have the dual advantages of permitting the use of all available resources to develop a new parole system, and of ensuring that whatever system is adopted will meet emerging constitutional requirements. Moreover, it would permit the inclusion in the code of a legislative directive for reform of the parole system, and allow Congress to fix a date by which detailed legislation must be adopted. Such legislation could then be made part of the code.

As noted, our primary recommendation is that the adoption of a specific parole system should be deferred until there has been further study and review of the available alternatives—possibly within the parole system itself. However, we submit the following comment in light of the fact that it may be the considered judgment of this committee and the Congress that reform of the federal parole system has already been too long delayed, and should properly be included as part of any new federal criminal legislation.

Statistics show that of 83,000 felons leaving state and federal prisons in 1970, 72 per cent were released on parole. Most recent estimates are that by 1975, more than 142,000 offenders will be under parole supervisions.[3] These figures demonstrate that parole is the dominant method of release for prison inmates today, and is likely to become even more so in the future.[4]

This reliance on parole has changed the decision-making process of parole administrators, since the key question which they must decide is no longer *whether* to release an offender, but *when, and under what conditions*. Because of this change, revision of the standards and practices governing parole release decisions is imperative.

The adoption of some form of parole system by all 50 states and the federal government reflects uniform acceptance of the theoretical basis for the parole concept—*e.g.*, that those persons who are close to the offender can best judge the precise time at which he is ready to be released, and should therefore have the responsibility for making that determination.

Unfortunately, there is little evidence available which supports this assumption, or indicates that it is possible to tell from the inmate's conduct when he is psychologically ready for release.[5]

This conclusion is corroborated by the report of the Citizens' Inquiry into Parole and Criminal Justice, released in March of this year.[6] This study group,

[1] Among the best of the current proposals for revision are bills sponsored by Senator Bayh and Congressman Kastenmeie, which are presently pending; the general Statement of Reorganization issued by Maurice Sigler (discussed *infra*); the framework recommended by the National Advisory Commission on Criminal Justice Standards and Goals in the Task Force Report on Corrections, *supra*.

[2] These requirements, set forth in detail *infra*, include, *inter alia*, adequate notice prior to any hearing, representation by counsel, publication of the standards governing the decision-making process, preparation of findings by the examiner, and provisions for a review and appeal process.

[3] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections (1967), pp. 6-8. Note: these figures do not include offenders released from jails, workhouses, or local institutions, but only those sentenced to serve terms in prison.

[4] This evaluation reflects both economic factors, and recognition of deleterious effects of lengthy confinement on the offender. The annual cost to the federal government of supervising an offender on parole is $231.20; the cost of institutional supervision is $1,012.60 per year. Task Force Report: Corrections, *supra*.

[5] See Brown Commission, *supra*, Working Papers, Vol. III, pp. 1468-1471.

[6] The 70-member task force spent a year and a half evaluating parole practices in New York state. Their 300-page report concludes that parole is "a tragic failure" which does little or no discernible good, and which should be drastically reformed pending its complete abolition. Nearly every finding of the study group is applicable to the federal parole system, and to the parole systems in all other states. The 70-member commission included Herman Schwartz of Buffalo University Law School as Executive Vice Chairman, Coretta King, William Van den Heuvel, Kenneth B. Clark, Victory Navasky and Arthur Miller.

headed by former Attorney-General Ramsey Clark, found that what is basically wrong with the parole system is "the utter inability of parole board members—however well-meaning and intelligent"—to predict who will and who will not commit new offenses. As the report puts it:

"The similarity between defendants granted parole and those denied is striking enough to suggest that despite its attempts at professionalism, and competence, the (New York) parole board is unable to distinguish the rehabilitated from the non-rehabilitated. The community supervision program, instead of helping parolees adjust to nonprison society, is usually irrelevant and sometimes harmful."[7]

One commentator who conducted an exhaustive series of interviews with parole administrators found that parole decisions are made by Parole Board members who review the offender's file, interview him, "and then apply some theory of human behavior or merely intuitive judgment in evaluating information. While such techniques are useful in parole decision making, the evidence is quite strong that over a large number of cases they result in a fair amount of error with respect to predicting the likelihood that a specific offender will succeed or fail on parole."[8]

One of the reasons for this is that:

"Officials charged with assessing release readiness—have meager grounds for evaluating an individual's likelihood of responsible behavior in the community. They have tended to be inclined favorably toward offenders who evidence cooperation and a good attitude. But, given the institutional environment, a 'good adjustment is not necessarily an indication of the behavior to be expected on the outside . . . [and] attempts to assess offenders' attitudes probably are even less successful than assessing behavior."[9]

Available data demonstrates that rather than leading to early release, the availability of parole does not reduce the amount of time spent in prison.[10] One of the most significant criticisms of present parole laws is that their administration has resulted in unnecessary increases in the already severe penalties imposed by our criminal justice system. This is accounted for in part by the tendency of parole boards to use parole as a way of equalizing sentences among offenders, and by the effect of social policy considerations on parole administrators.[11]

Given the dubious success ratio of the parole board in making a reliable diagnosis of when the offender should be released, it is particularly important that the examiner's decision be governed by identifiable standards, and subject to review.

Although due process protections have been extended to the parole *revocation* process (discussed *infra*), the parole *granting* process has remained subject to virtually no standards, and unlimited administrative discretion. As has been pointed out:

"Release on parole remains subject to final, absolute and thoroughly arbitrary administrative discretion. As the 2nd Circuit said in 1970, 'like an alien seeking entry into the U.S. . . . [the prisoner] does not qualify for procedural due process in seeking parole.' In line with this philosophy, not one American court has disturbed a decision denying parole for failure to conform to due process. To the contrary, by labeling the parole decision a matter of legislative grace, the courts have steadfastly refused to require the parole board to employ procedures or standards of any kind in exercising their unbounded discretion."[12]

In making the parole release decision, the Parole Board is in effect exercising a judicial function, and should be subject to the same due process requirements as the sentencing judge.[13]

[7] Columnist William Raspberry, reporting the results of the Citizens' Inquiry in the *Los Angeles Times*, Part 1, p. 12, Sunday, March 10, 1974.

[8] O'Leary, Issues and Trends in Parole Administration in the United States, 11 Amer. Crim. L. Rev., 97 103 (1972).

[9] Task Force Report: Corrections, *supra*, p. 245.

[10] See Task Force Report: Corrections, Chapter 12.

[11] The *Corrections Task Force* found that: "In addition to issues of equity, parole decision-makers sometimes respond to actual or anticipated public attitudes . . . . This public reaction issue is particularly acute in cases affecting society's core beliefs. Criteria having little to do with the question of risk may be used by parole officials in dealing with certain cases, particularly those involving crimes seen as 'heinous'. The concern is more for meeting general social norms and responding according to public expectations." *Id*, at 395.

[12] Parsons-Lewis, Due Process in Parole Release Decisions, 60 Calif. L. Rev. 1518, pp. 1520–21 (1972).

[13] As Judge Browning noted in his concurring opinion in *Sturm* v. *California Adult Authority*, 395 F.2d 446 (9th Cir., 1967), formal sentence, subject to parole board review is nothing more than "a device for transferring the sentencing function from the state court to the state administrative agency." *Id*, at 449.



It appears indefensibly inconsistent to create appellate review of judicial sentencing, and, at the same time, allow the Board of Parole absolute and unreviewable authority to determine how much time the offender shall spend in prison. As a general proposition, unlimited grants of authority to administrative agencies may not necessarily be harmful; however, in this instance, experience has demonstrated that it is both harmful and unjustifiable for the Parole Board to have non-reviewable authority over an inmate's freedom. This authority is not needed in order for the parole system to operate efficiently—since its present level of efficiency is inexcusably low; and it has not resulted in either the hoped-for uniformity of commitment period or early release of prisoners which it was designed to facilitate.[14]

It is therefore our recommendation that an alternative structure be designed, with the legislatively prescribed function of implementing those proposals for reform of the parole process which have been consistently agreed upon as crucial to productive change of the parole system. Such a structure should be modeled after those proposed by the National Advisory Commission, Parole Board Chairman Maurice Sigler, or the Joint Commission on Correctional Manpower and Training, among others.[15]

Additionally, we strongly urge that any enabling legislation included in the new code severely limit the Board's exercise of discretion by providing specific guidelines for its exercise and review.

## II. Subchapter F

### 3–12 F1—Parole Commission

This section establishes the structure of "the Parole Commission", designed to replace the existing Board of Parole.

Pursuant to (a), the Commission will operate as an independent agency within the Department of Justice, with "final authority in construing and administering all federal parole statutes with a separate budget." Because of its implicit conflict of interest with the Department of Justice, the Commission should either become an independent agency or assigned to another agency in the Executive Branch without the conflict of interest.

(a) further directs that the Commission be composed of "not less than five but not more than nine persons appointed by the President, with the advice and consent of the Senate." Each Commissioner shall serve for a 10-year term with opportunity for reappointment for one additional term. Among the Commissioners, "the President shall from time to time designate one to serve as Chairman."

Pursuant to S. 1400, the membership of the Parole Commission will consist of eight persons, each appointed to serve a six-year term. As in S. 1, the Chairman will be selected from among the members of the Commission; however, this designation shall be made by the Attorney General rather than the President. It is recommended that SI adopt the shorter term of office proposed in S. 1400, but that it maintain the proposed presidential designation of the Parole Commission Chairman in order to avoid any conflict of interest problems.

Additionally, to prevent the board members from becoming locked into their attitudes and wedded to any particular bureaucratic structure, this period of service should be limited to two terms.

3–12–F1(b) sets forth the duties of the Chairman, including the requirement that he "convene and preside, at least twice annually, at a meeting of the Regional Parole Examiners, for the purpose of considering, promulgating and overseeing a national parole policy."

3–12–F1(c) delineates the scope of the National Parole Commissioners' authority over the parole system, and specifies their specific duties within the parole structure. The broad powers granted to the Commissioners indicates the crucial role which this code has assigned to them. Review of these powers is necessary to an evaluation of parole system proposed in this chapter.

Pursuant to (c), the Commissioners shall, by majority vote:

1. "Promulgate such regulations as are necessary" to implement this subchapter;

[14] See generally Parsons-Lewis, *supra*; Task Force Report: Corrections *supra*, Chapter 12.

[15] Task Force Report: Corrections, *supra*, Standard 16.15—Parole Legislation. Statement of Reorganization, 2 Prison L. Rptr. 520 (Sept., 1973).

2. "Have authority to accept, reject, or modify any decision of any Regional Parole Examiner," upon motion of any Commissioner;
3. "Give reasons in detail for their decision in any appropriate case";
4. "Transfer to themselves the authority to grant, modify or revoke an order paroling an offender when the interest of justice so requires";
5. Create at least 5 federal parole regions, and;
6. Provide a reasonably balanced workload among the regions;
7. Hire, fix the compensation of, and assign Parole Examiners who are authorized to conduct hearings, act upon parole applications "and perform such other duties as will aid the commissioners to carry out the provisions of this subchapter"; and
8. Provide for the systematic collection and dissemination of the data obtained from research into the parole process and parolees.

(d) Then authorizes the Commissioners to delegate both their most basic decision-making functions, and the exercise of their primary authority to Regional Parole Examiners. These Regional Examiners are (at least) five persons, hired by the Commissioners, to essentially do whatever is necessary to implement and operate the proposed federal parole system. Their decisions are reviewable only by the Commissioners—assuming that the Commissioners are somehow made aware of specific decisions by the Examiners. No provision for review of the Commissioners' choice of who is hired as a Parole Examiner is contained in the Code, and there is no statement of criteria or minimum qualifications for this position.

Pursuant to the almost total delegation of powers authorized by (d), any Regional Examiner shall, with the agreement of one other examiner:
1. Grant or deny any application or recommendation for parole;
2. Specify reasonable conditions of parole;
3. "Modify, enlarge, or revoke any order paroling an offender";
4. Establish the maximum length of time which an offender whose parole has been revoked shall be required to serve;
5. Reparole any offender not otherwise ineligible;
6. Discharge an offender from supervision any time after he has been on parole for more than 1 year; and
7. "Exercise such other powers as are necessary to carry out the provisions of this subchapter".

This chapter additionally gives the Commission subpoena power; empowers any Commissioner or examiner to administer oaths to witnesses; and authorizes the payment of witness fees for parole hearings in the same amount as are paid to witnesses in the federal courts. In cases of non-compliance with a subpoena, the Commissioners are authorized to petition for judicial enforcement of their summons.

Paragraph (g)—"Rule Making"—grants the Commission additional authority to prescribe rules for parole proceedings, "consistent with generally accepted standards of due process." (This authority is "in addition to the powers set forth in 3–12 F1(c)(1).")

Apart from this vague reference to "due process" there is no description of what process is due, or at what stage of the proceedings the due process guarantees attach.

(h) requires that publication in the Federal Register, and opportunity for input from "interested persons" precede the Commissions' adoption of any rules promulgated pursuant to (g).

### 3–12–F2—DUTIES OF PROBATION OFFICERS AS TO PAROLE

This section states the minimum duties of the probation officer in connection with parole, and requires that the officer inform the offender of the conditions of his release, report his post-release conduct to the Commission, use all suitable methods to aid the offender under his supervision and to bring about improvements in his conduct, keep records of his work and an "accurate complete account" of all money collected from persons under his supervision. Additionally he shall perform such other duties as the Parole Commission or the Attorney General direct.

As drawn, this provision falls short of defining fully what a Probation Officer is required to do under the Code, and what he may be required to do in the future. As a result, it may be subject to frequent amendment, and should perhaps be the subject of administrative regulation.



For example, there is no duty to counsel with or assist offenders awaiting parole release, who are still under institutional supervision. Yet under recent proposals from the President's Advisory Commission on Criminal Justice Standards and Goals, this would be one of a probation officer's duties in the future.

Another problem with this provision is that (f) requires the probation officer to "perform such other duties with respect to offenders on parole as the Attorney General may direct." As noted earlier, the Attorney General, an adversary within the criminal justice process, should have no control or power over offenders once they have been sentenced, except by order of the Court.

In light of the recommendation that the parole structure be the subject of administrative regulation rather than statutory directive it would be inconsistent to endorse the statutory adoption of any specific list of duties as set forth in this section. However, if such legislation is adopted, the following duties of probation officers as to parole should be included:

Each probation officer shall

(a) Aid incarcerated offenders and their caseworkers in preparing a parole plan providing for re-integration into the community following release;

(b) Instruct each offender under his supervision regarding conditions of parole on which he has been released;

(c) Assist the offender in finding suitable housing, aftercare treatment, medical attention, and employment opportunity;

(d) Use all suitable methods, not inconsistent with the conditions imposed by the Commission, to aid each offender under his supervision and to bring about improvements in his conduct and condition;

(e) Keep informed of the conduct and condition of the offender under his supervision and report his conduct and condition to the Commission;

(f) Report to the Commission recommending the modification or enlargement of the conditions of parole;

(g) Keep records of his work; keep accurate and complete accounts of all money collected from persons under his supervision, give receipts for such money and receipts; make such reports to the Commission and to the Director of the Administrative Office of the United States Courts as may be required;

(h) Perform such other duties as the Commission may direct; and

(i) Perform such other duties with respect to offenders as are consistent with the provisions of this Code.

### 3–12 F3—PAROLE

(a) Authorization—directs that every offender not sentenced to a minimum term "shall be eligible for release on parole . . . at any time subject to the eligibility regulations of the Commission", and, that offenders sentenced to a minimum term shall be eligible for release upon completion of that minimum term.

(b) Mandatory Release Supervision—provides that offenders serving a maximum term of 10 years shall be released at least 2 years before that term expires; and that offenders sentenced to more than five years shall be released one year prior to the expiration of that term.

Although § 3–12 F3(a) has adopted the progressive position that an offender should be eligible for release at any time after imprisonment, (a) makes that eligibility "subject to . . . the regulations of the Commission." The offender is thus subject to the absolute and unchecked discretion of the parole authority, since this this chapter does not include any provision for review of the criteria for eligibility established by the Parole Commission.[16]

If this section is to be workable, an impartial standard for review must be adopted for its administration.[17]

Another problem with paragraph (a) is that although it makes the inmate eligible for release regardless of the amount of time already served, it fails to implement this approach by providing any standard for commencement of the parole release proceedings.[18]

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[16] Last year, the Administrative Conference of the United States unanimously recommended that the U.S. Board of Parole formulate standards to govern the grant or denial of parole 42 *USLW* 2331 (June 20, 1972). Inclusion of provisions designating when the inmate shall be considered for release, and guidelines for review are clearly within the scope of their recommendation.

[17] This proposed early eligibility for parole emphasizes the need for parole examiners to revise many of their standards and procedures for determining release to conform to empirical data collected over the past 20 years.

[18] At the present time, the Federal Parole Board points with pride to the fact that it has evolved *no* general standard for parole release. *Gaylin*, "No Exit," Harpers Nov., 1971, pp. 88–89. For this reason, among others, Davis has characterized the Federal Parole Board's performance as "about as low in quality as anything I have seen in the Federal government." *K. Davis*, Discretionary Justice: A Preliminary Inquiry (1969) pp. 130–133.

The danger of not including a mandatory time for review, is that, without such a requirement, a prisoner may spend an untenably long period of time in custody before being first considered for parole release.

Section 3401—Parole Eligibility—of the Brown Commission's proposed Federal Criminal Code, provides that:

"The Board of Parole shall consider the desirability of parole for each prisoner at least 60 days prior to the expiration of any minimum term, or if there is no minimum, at least 60 days prior to the expiration of the first year of sentence. . . . If parole is denied, the Board shall reconsider its decision at least once a year thereafter until parole is granted and shall, if parole is denied, issue a formal order [granting or denying parole] at least once a year."

Fixing a mandatory time for parole consideration is also recommended by the National Advisory Commission on Criminal Justice Standards and Goals:

"In authorizing parole for all committed offenders, the [parole] legislation should . . . require automatic periodic consideration of parole for each offender", and should specify those times at which the offender must initially be considered for review." [19]

Inclusion of a provision designating a specific time for review of each offender is an essential part of any legislative effort to reduce the arbitrariness of the present parole release process. We recommend adoption of the standard proposed by the Brown Commission, with the proviso that § 3401 be amended to provide for the offender who is serving only a one-year sentence. A separate provision should be adopted, making such offender eligible for parole review within three months of confinement.

S. 1400 which directs review of each prisoner "at least once a year [after he is first reviewed] until parole is granted", should not be adopted because it negates this requirement by adding the provision that no review is required if "it appears clear that a release order after an additional year would be inappropriate and reevaluation would be burdensome in which case the commission may defer further hearing for not more than three years." This provision lends itself to the most arbitrary interpretation and if adopted could be used to effectively eliminate any periodic review.

(c) Preparation for Parole Hearing—places the primary burden of preparing for release on the offender, directing that before any parole hearing, each offender "shall be requested to prepare a parole plan, setting forth the manner of life he intends to lead if released on parole, together with any other information he may wish to present to the Commission." The staff of the institution is required to give him "reasonable aid" in preparing this plan and securing information to be submitted. "If the offender is indigent, counsel shall be furnished."

Paragraph (c) should also provide for notice to the offender of what information the board considers relevant to its determination of the offender's readiness for release. As written the section does not fulfill that function.

A critical weakness of the present parole process is its failure to inform the offender of the criteria used by the Board in making its determination, and its reluctance to require the institution to provide aid to the offender in preparing for release. These defects could be cured in part by revision of this section to include the following requirements:

1. At least 90 days in advance of his hearing, the institution shall (a) give the offender notice of his hearing date; (b) provide him with a list of the criteria used by the board in making its parole-release decision; and, (c) furnish him with a written list of the specific information which he could consider including in his parole plan.[20]

2. The staff of the institution shall be required to provide assistance to the offender in the preparation of this plan; and shall have the responsibility of furnishing to the Commission a list of those employment options and/or community service resources which they have found to be available in the community where the offender intends to reside if released; and which have been contacted in connection with the offender.

3. In the event that implementation of this section shall require the assignment of additional personnel to any institution, the Parole Commission shall be responsible for such assignment and designation, pursuant to the provisions of § 3–12 F1(c)(9).

[19] Task Force Report: Corrections, *supra*. Standard 16.15—Parole Legislation.

[20] Among the data specified for inclusion should be a description of the offender's employment background, the nature and content of any rehabilitative, educational, or vocational programs participated in during confinement, the person or persons with whom the offender would reside upon release, and any treatment or vocational goals of the offender.



It is not clear whether, under this proposal the services of an attorney will be needed in connection with preparation of the pre-release plan. We therefore recommend that the requirement of furnishing counsel to the indigent offender operate *independently* of any requirement of institutional assistance, and be defined as a separate part of the pre-release process, *e.g.* "The offender shall be entitled to have an attorney appointed to assist him at least 30 days prior to any scheduled parole review hearing. The attorney shall be furnished with a copy of the offender's initial pre-sentence report and at the earliest possible time, shall be provided with a copy of whatever material is submitted to the Board by the Institution".

(d) Requires that whenever a sentence of more than one year is imposed, the Director "shall cause a complete study to be made of the offender and shall furnish to the [Parole] Commission a summary of the report together with any recommendations which, in his opinion, would be helpful in determining the suitability of the offender for parole."

Pursuant to this section, such a study will have to be made in the case of most offenders who come before the Board for review, since persons sentenced to terms of less than one year are not usually confined in prisons.

This paragraph does not indicate who will have the responsibility of preparing the "complete study," or who will make the recommendations furnished to the Director. Assuming *arguendo* that the responsibility will be delegated to the institutional staff, adoption of this section will have the effect of increasing the already enormous power which the institution has over the offender.

(d) further specifies that the Bureau shall furnish the Commission with:

(1) "A report by the institutional staff relating to the offender's personality, social history in the institution;

(2) The offender's prior criminal record, including reports of any previous parole experiences;

(3) A copy of the original presentence report;

(4) Any recommendations as to parole made at the time of sentencing by the court, the U.S. Attorney, or the probation officer;

(5) Reports of any physical or mental examinations of the offender;

(6) "Any relevant information which may be submitted by . . . the victim of the offense for which he is imprisoned";

(7) "Such other information as may be available."

The apparent goal of (d) is to provide the Parole Board with information about the offender, to be used in evaluating whether or not he is "ready" for release on parole. In order to serve that purpose, the information should (at a minimum) be reasonably related to those factors which are relevant to his release—the progress made since confinement, and the likelihood, if any, of recidivism. The information which this section requires to be transmitted to the Parole Board does not adequately fulfill that function.

(d)(1), which directs the institution to evaluate the offender's "adjustment to authority," and make recommendations as to his release is directly in conflict with the National Advisory Commission's recommendation that parole legislation "should not require a favorable recommendation by the institutional staff." [21] Their recommendation is based in part on the fact that:

"Correctional Administrators are responsible for what takes place in their institutions and are under pressure to "look good." They often interpret their role . . . as requiring attainment of uniform compliance with a set of official rules, policies, and regulations regimenting staff and inmate behavior." [22]

For this reason an invitation to the institution to evaluate the inmate's response to them, is regarded as an invitation to justify any failures which they may have experienced with a particular inmate. Because of the institution's vested interest in his adjustment, their comment will not be objective, but will reflect their interest in the achievement of their own goals. Unfortunately those goals are counterproductive to the parole process, since "the longer an offender is exposed to negative institutional environment, the less likely he is to adjust positively to the outside world when released." [23]

At the present time, parole authorities are criticized for being too closely tied to the institution and too remote from the realities of correctional programs.[24] This fact enhances the probable reliance of the examiner on the institution's

[21] Task Force Report: Corrections *supra* Standard 16.15—Parole Legislation.

[22] *Id.*, at 366.

[23] *Id.*, at p. 364.

[24] Parsons-Lewis, *supra* at 1554.

report. We therefore recommend that, in the event the institution is to have the responsibility of preparing a report on the inmate's adjustment, any requirement that they comment on the offender's suitability for parole be eliminated, and in fact legislatively prohibited.

The Task Force Report on Corrections states that:

"Perhaps the most pervasive short-comings in the parole release process are the undue emphasis in parole hearings on past events, and the extreme vagueness about the necessary steps to achieve parole." [25]

The requirements of (d) in no way alleviate these problems. Sections (3), (4), (5), and (6) all unduly focus on events which took place prior to the defendant's commitment and before any exposure to whatever rehabilitating effects institutionalization may be expected to have on him. While it is undeniably important that the Parole Board have information about the offender, it is of primary importance that the bulk of the information furnished have relevance to the parole release decision.

(d)(6), which authorizes the submission of "any relevant information" from the victim of the offense for which the offender is in prison is both internally inconsistent, and particularly inappropriate. The victim will in all probability, have had no contact with the offender since the offender was imprisoned. He should therefore have no information relevant to the offender's status at the time he is reviewed for release. Inviting him to comment is simply offering him an opportunity to raise unsubstantiated fears and old hatreds.

(d)(4), directs the Bureau to furnish the Parole Board with any recommendations for parole made at the time of the offender's sentencing. Such information is similarly irrelevant, since it has nothing to do with the offender's suitability for release at the time of his review.

It is recommended that (d) be revised to eliminate the submission of any data other than the institution's report and the results of any physical or mental examinations of the offender. Additionally, it should require the institution to take a more active role in the pre-release process by directing the institution to report on the availability of job opportunities for the offender if he is released, the likelihood of the offender's rejoining or being supported by his family, and other information directly relevant to how well he will function if he is released from the institution.

(e) Standards for Release on Parole—provides that the Commission, "having due regard for the character and circumstances of the offense, and the history, character, and condition of the offender, shall be guided by the need to maintain respect for the law, and to reenforce the credibility of the deterrent factor of the law, the need to protect the community, the need of the offender for continuing supervision and assistance, and the available resources of the Federal Probation Service".

(f) Lists those factors which, "when relevant and taken in context, are proper for consideration by the Commission" in determining whether to release an offender on parole. The factors enu nerated are virtually identical to those listed for consideration by the court in determining whether or not to place an offender on probation, and are subject to the same defects as noted, *supra;* as well as to the further criticism that the difference between parole and probation makes use of the same criteria for release inappropriate.

These sections listing the criteria for release are significant additions to federal law and practice, since the factors to be considered by the Parole Board have not previously been included in the federal code. We approve the adoption of such standards, in principle; however, we consider the adoption of the standards proposed an obstacle to achieving the goals of any reform of the federal parole system,

As drafted, these standards neither effectively limit the discretion of the parole board, nor provide a judicially enforceable guideline for the exercise of that discretion. More importantly, they inject factors into the decision-making process which are irrelevant to determining the readiness of the offender for release.

The parole release process is essentially a compromise or adjustment between the needs of the criminal justice system, and the needs of the offender.[26] Thus, the decision to grant or deny parole is often affected by considerations other than the likelihood of the offender to repeat his offense as noted previously.

This is done to support institutional discipline, or to avoid public criticism of the parole system.[27] Adoption of the standards proposed (e.g., "the need to re-

[25] Task Force Report: Corrections, *supra* at p. 423.
[26] In general, see Dawson, *supra.*
[27] Parsons-Lewis, *supra* at 1527.



enforce the credibility of the deterrent factor of the law") would simply legitimize the application of an admittedly improper standard, since this "need" has no relationship to the readiness of the offender for release.

The drafters of the Model Penal Code, and the National Commission on Reform of the Federal Criminal Law, have both concluded that there should be a legislatively adopted presumption in favor of parole, applicable in all cases unless specified countervailing factors can be shown to exist. The Brown Commission has similarly adopted this approach, recommending that legislation establishing criteria for parole should be patterned after § 305.9 of the Model Penal Code, and should:

1. Require parole over continued confinement unless specified conditions exist;
2. Stipulate factors that should be considered by the Parole Board in arriving at its decision;
3. Direct the parole decision towards factors relating to the individual offender and his chance for successful return to the community.[28]

We recommend adoption of this approach, and the formulation of such standards as will most clearly put the burden of proof on correctional authorities to justify continued imprisonment of the offender.

## III. Proposed Supplement to 3–12F3

The procedural protections and reforms discussed in this section are an integral part of any reconstitution of the federal parole system, and should be included in any new parole legislation.

### *A. The needed for findings*

At the present time, the absence of any requirement that the Board of Parole give the offender reasons for denying him parole is a fundamental shortcoming of the parole release process, and has been identified as an important cause of inmate tension.[29] Without exception, commentators on the parole process have urged the Board to furnish the offender with a statement of reasons when parole is denied. All recent proposals for reform of the parole process have included this requirement.[30]

In his recent Statement of Reorganization, U.S. Parole Board Chairman, Maurice Sigler noted that the proposed innovations,

> "which have been undergoing evaluation in a pilot project since October, 1972, will meet most of the frequent criticisms of the parole procedures. Included in the revision will be the right of the inmate to have a representative present at the parole hearing, speedier decisions made in the framework of a two axis set of guidelines, reasons when parole is denied, and a two-step appeal process. [31]

We recommend that this code conform to the position taken by the Board of Parole and adopt legislation requiring the Board to furnish a written statement of reasons when parole is denied.[32]

An integral part of this recommendation is the requirement that the material submitted by the institution to the Parole Board be disclosed to the offender and to his attorney prior to the parole hearing.

### *B. Disclosure*

The National Advisory Commission has recommended that disclosure be made in all cases, unless there are particular compelling reasons for nondisclosure of certain information, which can be itemized by the hearing examiner.[33] This is essentially the compromise which the Supreme Court approved for parole revocation hearings in *Morrissey* v. *Bewrer,* 408 U.S. 471 (1972).

Although the Supreme Court has not yet required disclosure in connection with the parole grant hearing, the court has held that disclosure is required in the

[28] Task Force Report *supra,* Standard 16.15—Parole Legislation.
[29] Task Force Report: Corrections, *supra,* Chapter 12.
[30] See, for example, Standard 12.3—The Parole Grant Hearing, *Id.,* at 422; Model Penal Code § 305.19; Rubin, "Needed—New Legislation in Correction" 17 Crime and Delinquency 392 (1971).
[31] Statement of Reorganization, U.S. Board of Parole reprinted, 2 Prison L. Rptr 521 (Sept., 1973). A representative criticism of the parole process calls for judicial inquiry into "the almost incredible freedom from procedural safeguards" enjoyed by the Board of Parole. Johnson, Multiple Punishment and Consecutive Sentences 58 Calif. L. Rev. 357, 390 (1970).
[32] Non-approval of this requirement would be contrary to the recommendation of all experts in the field, as noted *supra.*
[33] Task Force Report: Corrections, *supra* Standards 5.16 and 5.15.

parole revocation process.[34] While it is difficult to predict future court action, the trend in recent years has been to extend procedural requirements to administrative hearings. The fact that these requirements have been extended to protect interests less compelling than the prisoner's interest in his release makes it apparent that judicial recognition of the need for disclosure in the parole release process is both imminent and overdue.

For example, disclosure of charges and cross examination of adverse witnesses have been required in connection with hearings involving the termination of welfare benefits,[35] social security disability benefits,[36] and eviction from a public housing project.[37] However, while important, none of these situations involve the threatened loss of freedom which is attendant upon any parole release decision.

The argument against disclosure which is traditionally made is that disclosing either the identity of the informant or the persons corroborating their report may pose a threat to their safety and disrupt the security or stability of the institution. However, the offender is clearly denied the guarantees of due process if material which is not disclosed is relied upon by the Board to deny parole. Preventing the inmate from denying or explaining particular factual allegations about his conduct by not telling him about them robs the hearing of any meaning.[38]

In order to protect both the inmate and the institution, it is clear that there must be legislative accomodation of the competing interests involved.

A workable compromise would be to establish as a basic premise that all evidence in the file which is considered by the examiner must be disclosed. However, in cases where disclosure would create a risk to the safety of an informant, the examiner should have the authority to decide against disclosure. If he then relies on that information in making his decision, he must so indicate in his findings. This will then permit both review of his decision and of the material withheld. If the information is not relied upon, it must be removed from the file and sealed. As a result the appeal board will be unaware of its existence.

Another similar compromise has been proposed by Senator Bayh in S. 3937, his bill to reform the Federal parole procedures, previously referred to the Committee on the Judiciary.[39] Senator Bayh's bill recommends against disclosure only when the information:

(1) is not relevent to the determination of the Regional Board.

(2) is a diagnostic opinion which might seriously disrupt a program of rehabilitation; or

(3) was obtained in a promise of confidentiality. Whenever any of this information is relied upon, the Board must so state and "whenever feasible make available to the prisoner the substance of any information contained in any file, report, or other document, or any portion thereof to which this section applies." Additionally, the bill contains requirements that the examiner specify "with particularity" the reasons for his decision, so that review of the decision against disclosure may be made.

Such review should initially be part of any administrative appeal process, set up to enable offenders to challenge any denial of parole. The establishment of an appeal system will necessitate that findings be made and that the inmate be given prompt notice of the decision of the Parole Board.

Pursuant to Sigler's proposal for reorganization, a two-step appeal process would be created. We recommend consideration of this proposal as a possible guide: Decisions by the examiners may be appealed to the regional board member by the inmate within thirty days of its entry upon the record. Ninety days after the regional board member has entered a decision, the inmate may appeal to the three man appellate board in Washington, D.C. Cases which require special handling because of national security, organized crime, major violence, or sentences over forty-five years will be heard by two man examiner panels, but will be decided by five members. This decision may be appealed to the full board.

### 3–12 F4—CONDITIONS OF PAROLE

The vast majority of conditions outlined in this chapter are the same as those set forth in Chapter 4, Subchapter D, §4 D2—Conditions of Release, and have been evaluated *supra*.

[34] *Morrissey* v. *Brewer*, *supra* at 485–490.
[35] *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).
[36] *Richardson* v. *Perales*, 402 U.S. 389 (1971).
[37] *Escalera* v. *New York City Housing Authority*, 425 F.2d 853 (2nd Cir.), *cert denied* 400 U.S. 853 (1970).
[38] *Parsons-Lewis*, *supra*, at 1549–1551.
[39] Cong. Record, 92nd Cong., 2d Sess. September 12, 1972 s14576.



In general, we recommend that as few conditions of release be established as possible, and submit that there is no need to supplement the general conditions of parole with any legislatively established "appropriate conditions," since those can be imposed on an individual basis where needed.

### 3–12 F5—DURATION OF PAROLE

The approaches taken by this section, and Section 4206 of S. 1400 present certain policy considerations which should be reviewed.

(1) Commencement: Both this section and S. 1400, §4206, take the position that the period of parole commences on the day of the prisoner's release from imprisonment. S. 1 is unclear on its face as to whether the parole term will begin if the defendant is released to another jurisdiction's hold. §4206 clearly states that the term will not run during any period in which the defendant is incarcerated, eliminating any misinterpretation of the statute's application.

The ambiguity of S. 1's provision needs resolution, preferably in favor of parole beginning upon release from federal imprisonment, since by federal standards the defendant is ostensibly ready for parole.

Further, S. 1's paragraph (a) could use modification to deal with concurrent parole terms. The language of 4206(a) is appropriate in this regard:

"Periods of parole run concurrently with any federal, state or local periods of parole or probation for another offense to which the defendant is subject during the period."

(2) *Effect of imprisonment on other charges on Duration of Parole.*

S. 1 by implication appears to take the position that if the federal parolee is incarcerated on any other charges after commencement of parole, his parole time will continue to run unless revoked through formal proceedings. S. 1400 declares that parole shall not run during any period in which the defendant is imprisoned.

The S. 1 position in this respect appears desirable; if the defendant is incarcerated elsewhere and convicted, the charging court can take full account of the defendant's situation in passing sentence. And if the Parole Board wishes to revoke on the basis of a law violation it should institute formal proceedings affording the offender his due process rights before the parole time stops running; if acquitted on the other charges, he should not be further penalized.

(3) *Credit if any to be given towards the jail sentence as a result of "clean time."*

Existing law provides that if a defendant's parole is revoked, he must return to prison and complete his original sentence less time already served. The fact that he may have lived on the street for years as a law abiding citizen is not taken into account.

S. 1 takes a somewhat moderate view, giving the offender credit for fifty percent of the time elapsed between the parole of the offender and the commission of the violation for which parole is to be revoked.

S. 1400's 4207(c) takes the traditional position. Credit for reimprisonment of a parolee shall be given beginning on the date he returns to custody; in other words there is no credit for "street time."

This harsh approach ironically places a greater burden on the model prisoner who is released early in his sentence than on other prisoners who are considered worse risks and consequently are released at a later time in their sentence. This led the Brown Commission to the conclusion that full credit should be given for "clean time" on the street prior to the violation (Section 3403).

We agree with this approach. If the defendant is convicted of other serious law violations while a parolee, the sentencing court can take the probable impact of parole revocation and the term to be served into account at the time of sentencing.

### 3–12 F6—RESPONSE TO NONCOMPLIANCE WITH CONDITIONS OF PAROLE (A1–A3) SANCTIONS SHORT OF REVOCATION—WE APPROVE (A)4–(A)5 ISSUANCE OF ARREST WARRANT

The consequences of parole revocation are potentially more far-reaching than those attendant upon revocation of probation, and therefore require a higher standard of evaluation by the revoking agency. Statistical data reflect that the inmate whose parole is revoked serves a significantly longer period of time in custody following such revocation than does the inmate who is confined pursuant to a probation violation. Furthermore, the inmate released on parole finds his ability to stabilize himself in society after release markedly impaired. His adjust-

ment to the demands of normal life will usually take longer than that of an offender who is placed on probation after serving no time at all.

In addition to the factors cited above, a number of parole revocation cases handled by the Federal Public Defender's Office and originating out of FCI werminal Island and FCI Lompoc, have involved the issuance of noncompliance Tarrants for such technical violations as leaving the district without permission. These resulted in the arrest of the offender and his subsequent removal from family, home and employment, to prison. a(4) should be modified to provide that, "upon a finding of probable cause to believe that the offender has violated a condition of parole is such a way to be a danger . . . the offender may be arrested . . .", there be a preliminary determination by the Board as to whether he should be released or held for a full parole revocation hearing. This limitation on the issuance of warrants would tend to reduce th e issued by the probation office or Board of Parole as a result of personal pique at the offender's personality or idiosyncratic behavior. A revocation decision would thus be made only in the event of a serious breakdown in the offender's life while on parole.

(a)(5) would give the Board sanc ion to avoid the preliminary determination noted in (a)(4) and the power to order the offender arrested and held in accordance with the terms of his original sentence, awaiting full revocation hearing. We oppose this for practical as well as constitutional reasons. The preliminary hearing usually given to the offender upon his arrest by a probation officer may at a very early time supply mitigating evidence which could result in the withdrawal of a warrant. Early release, if justified, is desirable since it saves the taxpayer costs of incarceration. It also tends to promote the maintenance of the offender's stability in the community, particularly with respect to his employment which is apt to be lost after sustained absence.

(b) Emergency Situation: This is a preventive detention measure which allows a probation officer to arrest without a warrant when he has probable cause to believe that an offender has violated or "is about to violate a condition of parole", and when the time lost in awaiting Board approval of the warrant would create an undue risk to the public or to the offender.

This provision should be eliminated. First, it puts the probation officer in the role of a law enforcement officer rather than that of an adviser and consultant for the offender. Probation officers should not be authorized to make arrests. Secondly, if the probation officer has the required information, he may forward the information to the nearest law enforcement agency to take appropriate action. (See Comments *infra* Sections 1–4–D4) Thirdly, there is no crime in thinking about committing a crime. Indeed, even the Commission is unauthorized to issue a warrant on these grounds. Using the belief that an offender is about to violate a condition of parole as a basis for arrest simply does not comport with normative standards of criminal procedure, and entails a potential for abuse and harassment that should in this case be eliminated. Finally, with modern telecommunications there is ample opportunity for the probation officer to contact the Parole Commissioner on short notice in emergency situations to obtain authority for arrest.

(c) Hearing

The standard for revocation of parole and the procedural guidelines which must be followed have been set forth by the Supreme Court in *Morrissey* v. *Brewer*, 408 U.S. 471, (1972). The *Morrissey* standards as they relate to the preliminary and the revocation hearing should be adopted and codified in this section.

### 3–12(F)(7)—FINALITY OF PAROLE DETERMINATIONS

Pursuant to 3–12(f)(7):

"No court of the United States shall have jurisdiction to review or set aside any action of the Parole Commission, regarding, but not limited to, the release or deferrment of release of an offender whose maximum term is not expired, the imposition or modification of conditions of parole, or the reimprisonment of an offender for non-compliance of conditions of parole during the term of parole."

This section should be stricken in its entirety, and eliminated from any proposed federal code, since its adoption would be inimicable to achieving any reform of the federal parole system.

Preliminarily, it should be noted that the constitutionality of this provision is extremely doubtful. On its face it appears to contravene the due process requirements of the Fifth and Fourteenth Amendments, infringe upon the free exercise of rights guaranteed by the First and Sixth Amendments, and potentially offend the strictures of the equal protection clause.



In addition to these constitutional deficiencies, the section is in conflict with the fundamental principle of administrative law that decisions of an administrative agency must be subject to review.[40] Where these decisions affect "liberty" or "property" within the meaning of the Fourteenth Amendment, that review has heretofore been required to be judicial as well as administrative.[41] Without such review, it would be impossible to check administrative abuses of power, or to set aside decisions made by an agency acting in excess of its authority, in violation of its own regulations, or without regard to the requirements of procedural due process.

In *Arciniega* v. *Freeman*, 404 U.S. 4 (1971), the Supreme Court in a *per curiam* opinion, directed that the Federal Parole Board demonstrate satisfactory compliance with its own regulations before its actions may be judicially approved. This decision is but one in a continuing line of Supreme Court decisions extending the guarantees of procedural due process to administrative settings.

In *Shapiro* v. *Thompson*, 394 U.S. 618, 627 at Note 6 (1969), the Supreme Court held that a constitutional challenge to certain welfare regulations could not be avoided by the argument that public assistance benefits were a "privilege" and not a "right", thus voiding the right-privilege distinction as a basis for denying review. It is now settled that where the governmental action may cause a "grievous loss" of either liberty or property, constitutional scrutiny must be provided. In *Morissey* v. *Brewer*, 408 U.S. 471 (1972), the Supreme Court brought the parole revocation process firmly within the protective ambit of such review, by holding that:

"The liberty of parolee although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and others. It is hardly useful any longer to try to deal with problems in terms of whether the parolee's liberty is a 'right' or a 'privilege'. By whatever the name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment."

Our research has disclosed no other administrative agency which has received a legislative grant of immunity from judicial review such as that proposed in this section. While there is justifiable concern over the increasing number of cases filed in federal court, and the increasing number of appeals taken from both judicial and administrative decisions, it is not a rational response to this increased caseload to foreclose judicial review to whole segments of the population.

Recent opinions have make it clear that most of the tenets upon which a judicial hands-off policy towards correctional law were based are no longer viable. Both federal and state courts are examining prison and parole conditions in light of constitutional standards.[42]

The concept of judicial review of prison and parole decisions is not derogatory of the professionalism of correctional personnel, but is rather a necessary check on the power of the institutional agencies operative in this field. This has been well explained by Judge David Bazelon, of the U.S. Court of Appeals for the District of Columbia, in an opinion approving judicial review of certain administrative decisions made by medical personnel in treating mentally ill persons:

"Not only the principle of judicial review, but the whole scheme of American government reflects an institutionalized mistrust of any such unchecked and unbalanced power over essential liberties. That mistrust does not depend on an assumption of inveterate venality or incompetence on the part of men in power, be they presidents, legislators, administrators, judges, or doctors. Judicial review is only a safety catch against the fallibility of the best of men, and not the least of its services is to spur them to double check their own performance and to provide them with a checklist by which they may readily do so. *Covington* v. *Harris*. 419 F. 2d 17, 621 (D.C. Cir., 1969)".

*Diversion*

Litt'e mention of diversion programs is made in either S. 1 or S. 1400. Yet a significant portion of the National Advisory Commission's Report on Correction discusses models for diverting both young adult and adult offenders from the Criminal Justice System. And now pending in Congress are two bills H.R. 9007 and S. 798 which would establish pre-trial diversion programs in the district court.

[40] See generally 1 K. *Davis*, Administrative Law Treatise § 6.02 (1958).
[41] See *Graham* v. *Richardson*, 403 U.S. 365, 374 (1971).
[42] For examples of this increased judicial involvement, see Comment, "The Parole System", 120 Penn. L. Rev. 262 (1971).

Already in existence are two types of limited diversion programs; under the so-called "Brooklyn Plan" the U.S. Attorney may hold a prosecution in abeyance, usually the case of a minor, contingent on his good behavior over a specified period of time, during which the defendant will be supervised by a United States probation officer. Upon satisfactory completion of the informal probation, the case will be dismissed; or it may be dismissed subject to refiling in the event of a subsequent delinquency. For the defendant the program has the advantage of avoiding a conviction, and the collateral consequences such a conviction brings.

In 1973, 689 persons were received under probation supervision by means of this deferred prosecution program.[43]

There is still another type of diversion program. Under 18 U.S.C. 5001, the United States Attorney is authorized to divert those under 21 to the state which will assume jurisdiction over them.

3–13B2 of S. 1 would continue the diversion program of this latter type.

The diversion programs in H.R. 9007 and S. 798 would be far broader in their impact.

S. 798 introduced by Senator Burdick, provides that a committing officer upon recommendation of the attorney for the government may release a person charged with an offense against the United States by diverting him to a program of community supervision and services. The program, to be controlled by the Justice Department, provides for voluntary admission into the program by the defendant, who will be required to waive his rights to a speedy trial and the applicable statute of limitations. S. 798 offers diversion only "to persons accused of crime who accept responsibility for their behavior and their need for assistance." Criminal proceedings may be resumed upon the grounds that the "attorney for the government finds such individual is not fulfilling his obligations under the plan applicable to him, or the public interest so requires."

H.R. 9007 is similar in many respects; however, under this bill a federal judge or magistrate would have to order the release, upon the recommendation of the prosecution, to the appropriate agency. The Probation Department would be designated as the agency to provide the program. H.R. 9007 imposes no requirement of admission of guilt.

Senior Judge William J. Campbell (U.S. District Court, Northern District of Illinois) testified regarding both bills before a Subcommittee of the House Judiciary Committee early 1974. In his remarks Judge Campbell pointed to the "need" for such diversion programs.

"The goal of deferred prosecution is to intervene as early as possible following an offense—positive intervention with a maximum range of resources; counselling, vocational training. contract services, temporary housing, or whatever is needed for the offender to get a 'new show on the road'."

Indeed diversion statutes are a promising answer to criticism that application of criminal sanctions are an ineffective, overly harsh, and often counter productive means of controlling such evils as alcoholism and drug abuse. In addition such laws are intended to alleviate the mounting expense and court congestion which have resulted from processing thousands of persons charged with alcoholic and drug offenses through the conventional channels of the criminal justice system.

At first blush the goals of these diversion programs appear laudable. Yet there are substantial doubts about the efficacy of the programs devised to date.[44]

Those doubts were recently expressed in the course of testimony by NLADA representatives Philip Ginsberg, Marshall J. Hartman, and Nancy A. Goldberg before the Subcommittee on Courts, Civil Liberties and Administration of Justice of the House Committee on the Judiciary.

Their doubts center around whether such programs really do any good, i.e. questioning whether those who will be touched by such programs are really in need of rehabilitation. And they suggest that diversion will take the determination of guilt into a low visibility area where abuses of discretion are not readily seen or subject to review.

Their testimony calls Congress to take a wait and see attitude until such time as the diversion studies underway have been completed and as sufficient experimentation with various programs has been conducted and evaluated.

Their testimony follows:

[43] Annual Report of the Director of the Administrative Office of the U.S. Courts, 1973.
[44] Diversion of Drug Offenders in California, 26 Stanford Law Review, 923 (April, 1974).



TESTIMONY OF PHILIP GINSBERG, CHIEF DEFENDER, SEATTLE, WASH.; MARSHALL J. HARTMAN, NATIONAL DIRECTOR OF DEFENDER SERVICES, NLADA, AND NANCY ALBERT GOLDBERG, DEPUTY DIRECTOR OF DEFENDER SERVICES, NLADA

The National Legal Aid and Defender Association (NLADA) is particularly pleased to accept this Subcommittee's initation to appear before it today to testify on this most important legislation, H.R. 9007 and S. 798, entitled the Community Supervision and Services Act. NLADA is the only national, non-profit organization whose primary purpose is to assist in providing effective legal services for the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems, and legal assistance programs in the United States.

*Legislative purpose*

NLADA commends the authors of S. 798 for the high goals and principles enunciated in the preamble to this legislation. These goals include creating new and innovative alternatives to incarceration e.g. community rehabilitation programs, job training, etc. The same goals are implicit in the companion bill H.R. 9007. Penologists have long agreed that our penal institutions fail to rehabilitate offenders, but instead serve as schools for crime which only serve to teach those inmates who are eventually released from prison how to prey upon the public.

However, there is a pseudo-Aristotelian dichotomy in the reasoning that there are only two alternatives, i.e. that either we send offenders to prison or we enact pre-trial diversion programs such as that suggested by this proposed legislation. There is a third alternative which we must not overlook, and that is giving each accused individual a trial in a court of law as envisaged by the Sixth Amendment to the Bill of Rights with all of the constitutional protections which our U.S. Supreme Court has seen fit to apply to criminal proceedings, and when and if the individual is found guilty in a court of law, we may then place that individual in a community supervision and treatment program. To accord this special treatment only to persons willing to "accept responsibility for their behavior" or to those who have not yet been adjudicated guilty may well result in expending resources to rehabilitate persons who are in fact innocent of crime by chilling their desire to take the risk of a trial.

Requiring individuals to accept moral blame or responsibility prior to acceptance for deferral of prosecution is reminiscent of the plea bargaining system which has been so widely criticized of late for its degradation of the criminal justice system. Pre-trial diversion and plea bargaining are similar in that they are both short-cuts to conventional adjudication and are intended to save the taxpayer dollar by affording some defendants less than the full panoply of constitutional rights to which they are entitled by law. That is not to say that these defendants may not be benefited by many diversionary programs; however, we must be extremely watchful whenever justice becomes low in visibility and highly inbued with non-reviewable discretion whether by prosecutor, police, court or any other agency.

We would like to discuss a number of problems posed by H.R. 9005 and the companion bill, S. 798. Some of the problems which concern us are the placing of the responsibility for the initial decision and/or investigation for diversion within the prosecution function, the effect of diversion upon possible police misconduct, the question of whether admissions of guilt or responsibility are to be required of the subjects, the issues surrounding the reinstitution of charges, the effect of a speedy trial waiver, the participation of defense counsel, incursions upon the right to privacy, the lack of proven success in reducing recidivism, the potential regressive effects upon the criminal justice process where diversion is utilized in connection with bail and pretrial release procedures, and, in general, the potential abuses inherent in a system of justice which unlike the much-criticized plea bargaining system, is low in visibility and unreviewable.

*Who Initiates the Diversion Recommendation*

In H.R. 9007 it is the attorney for the Government who requests that an individual be considered for placement in a community supervision, or diversion, program. Placing the authority to initiate the investigation into the individual's suitability for diversion, and subsequently, the responsibility for recommending diversion, within the office of the prosecutor has a number of serious drawbacks. First, it tends to remove the element of voluntariness from the subject's decision to accept the program and to waive his right to speedy trial as well as a number of other constitutional rights which are impliedly waived by entering into the program. Even if no explicit threats are made to him by the prosecutor he may

anticipate harsher sentencing recommendations by the prosecutor for refusing to accept the prosecutor's deal. Second, there is the danger that prosecutors may divert those against whom they have a weak case or a case based upon illegally obtained evidence. Were the initial screening for diversion to take place within some other agency, the opportunity for selecting out only weak cases for diversion would be diminished. If the facts of the case are insufficient to prove guilt in a court of law, the chances are increased that diversion will be utilized for innocent defendants. A third and very basic reason why prosecutors should not initiate the diversion decision is the sanctity of the attorney-client privilege which protects communications made in confidence. When the prosecutor becomes privy to information regarding the client's suitability for diversion he may also uncover information relevant to the defendant's case and bearing upon the question of guilt or innocence. Defendants being interviewed by diversion project personnel tend to discuss matters relevant to their case, as they have difficulty in distinguishing which information is strictly relevant to determining their eligibility.

The same defect exists with regard to confidentiality of information whenever the initial interviewing is done prior to adjudication at the request of or by anyone who is not in the employ of the defendant's attorney. This information may be subpoenaed by the court unless it is a privileged communication. While the law does provide for an attorney-client privilege, there is no such privilege between social worker and client. This is one of the reasons why the ABA Standards Relating to Sentencing Procedures and Alternatives recommend that pre-sentence investigations be deferred until after an adjudication of guilt. Should the individual be found ineligible for the program or should the individual refuse to accept the program, the prosecution may be in possession of information obtained in violation of the defendant's privilege against self-incrimination. While S. 798 attempts to ensure that information may not be used upon resumption of the prosecution against a defendant whose diversion was terminated, there are no protections in the statute—and perhaps it is impossible to build in adequate protections—for the individual who is interviewed for admission into the program but never in fact participates in it. The problems here may be similar to the difficulties experienced in changing the law to provide only "use immunity" in exchange for testimony before a grand jury instead of the former practice of guaranteeing full "transactional immunity" e.g. there would be an enormous burden placed upon the prosecution to prove that none of the proscribed information led to information that was used in the prosecution. The most adequate protection is simply not to take such information from the defendant prior to trial. If such information is to be taken prior to adjudication it is NLADA's position that a defender or defense lawyer should be apprised immediately of the possibility of diversion so that he may be present at the initial interview.

If there is to be any diversion at all, it would be best handled either by an independent agency or a public defender office. Control by prosecutors in particular adds to the inherent coercion to accept the deal offered by the state. In plea bargaining, the abuses are less pronounced as the defense attorney may initiate plea bargaining discussions. In some areas of the country, for example, Seattle, Washington,[1] the initial interviewing and diversion recommendations are done by a paraprofessional within the public defender's office. This is beneficial not only because of the protection of the attorney-client privilege, but because of the greater likelihood that the defendant's decision to participate in the diversion decision will be truly voluntary and due to a real desire on the part of the defendant to participate in a particular rehabilitative program. Thus, the participation is also more likely to be successful.

*Effect upon Freedom from Unreasonable Searches and Seizures*

It is interesting to consider what the effect of diversion would be upon police misconduct. In a trial situation, evidence obtained by breaking into a person's house without a warrant would be excluded and, if no other substantial evidence existed, the case would be dismissed. However, if the person was subsequently enrolled in a diversion program the policeman's objective of obtaining grounds for an arrest would have been reached. Police would be encouraged to continue making similar illegal searches and seizures so long as they eluded challenge in court. Institutionalization of pre-trial diversion as an alternative to conventional adjudication may thus engender social effects which are both undesirable and unexpected.

[1] See the attached article by Philip Ginsberg describing the Seattle diversion program and the attached article by Nancy Goldberg which discusses which agencies are in control of diversion programs.



*Diversion and Admissions of Guilt or Responsibility*

While H.R. 9007 imposes no requirement of admissions of guilt, S. 798 treads very heavily upon the Fifth Amendment privilege against self-incrimination by offering diversion only "to persons accused of crime who accept responsibility for their behavior and admit their need for such assistance." This requirement is similar to the requirements imposed by the Gennessee County, Michigan, prosecutor's division program which has been criticized. Requiring a prospective divertee to admit guilt adds an element of coercion to the program which is constitutionally suspect, since diversion may result in dismissal of the prosecution. By withholding diversion from individuals who refuse to admit guilt or "moral responsibility" an unconstitutional chilling of the right to trial is accomplished. It is NLADA's position that no diversion program should require a defendant to violate his privilege against self-incrimination by pleading guilty or accepting moral blame. Such a requirement would pose a serious threat to our entire constitutional framework.

*Reinstitution of Charges*

Both H.R. 9007 and S. 798 contemplate the termination of placement under community supervision of an individual who has failed in the program and resumption of the prosecution against him. Suppose the person has been placed in a drug program and he antagonizes the administrator of the program. According to the terms of H.R. 9007 a person could spend up to one year in the program. Once he has already "served" one year of his life in the drug program, does reinstitution of the prosecution smack of double jeopardy? H.R. 9007 is particularly troublesome in this regard, as Sec. 3173(4) appears to provide that the same judge that revokes the defendant's participation in a diversion program may be the one who later sentences him after trial. NLADA recommends that the statute provide that the same judge who revokes the program shall not hear the case.

S. 798 permits the resumption of criminal proceedings upon the extremely flexible grounds that, "the attorney for the Government finds such individual is not fulfilling his obligations under the plan applicable to him, or the public interest so requires." Considering the fact that an individual is susceptible to receiving punishment twice for the same offense, at a minimum, the statute should require credit for time served in the diversion program and a full-scale hearing prior to revocation of diversionary status at which the defendant is entitled to representation by counsel and to confront and cross-examine his accusers. Moreover, the hearing officer should be an impartial magistrate and not in the employ of the prosecutor's office as has been proposed in some quarters. A full-scale, two-stage hearing was required in the recent U.S. Supreme Case of *Morrisey v. Brewer*. Such a hearing is required whenever a substantial deprivation of rights is involved. (*Goldberg v. Kelly.*)

The system of pretrial diversion makes serious inroads upon the principle established in *North Carolina v. Pearce* that the defendant may not be given a harsher sentence once he has already been sentenced. Diversion may present a defendant with a "damned if you do, damned if you don't" situation: he may fear harsher sanctions if he refuses to agree to enrollment in a diversionary program, and at the same time be afraid to participate in such a program lest he face the risk of an increased sentence after trial should be "fail". As an example, during a recent discussion of diversion sponsored by the Illinois Academy of Criminology, a juvenile court judge was asked whether he took a youth's revocation of diversion into consideration in imposing "sentence" upon the youth. He replied, naturally if we have already had experience with the youth and he failed to work out in the program, the penalties imposed should be greater. According to a recent unpublished study, defendants who are terminated from pre-trial diversion programs are given the highest priority for prosecution and their failure to remain in the program is taken into account by judges in making sentencing determinations.

*Speedy trial*

H.R. 9007 explicitly, and S. 798 impliedly, require the defendant to waive his right to a speedy trial in order to participate in the program. In S. 798 there is a constructive waiver of the right since the individual must acquiesce to having his case continued for a period of twelve months. Suppose, however, that the defendant proved unsuccessful in the program and the prosecution were to be reinstated after one month. The statutes are silent on the question of whether the right to a speedy trial would be revived in this instance. It would be beneficial to include in the statute a provision to the effect that whatever rights of speedy

trial the defendant had prior to enrolling in the diversion program would automatically be revived, without his being required to demand them, upon recommencement of the prosecution.

*Need for defense counsel*

In order that the diversion program may withstand a constitutional test, the accused must knowingly and voluntarily waive his Sixth Amendment "right to a speedy and public trial by an impartial jury." In order that such a waiver be fully voluntary and intelligently made, the assistance of defense counsel is necessary. U.S. Supreme Court decisions, from *Gideon v. Wainwright* and *Argersinger v. Hamlin* (right to counsel at trial) through *Coleman v. Alabama* (counsel at preliminary hearing) and most recently, *Gagnon v. Scarpelli* (counsel at parole and probation revocation hearings) require the presence of counsel at each critical stage of the proceedings. In order to participate in the diversion program, the accused waives his right to a preliminary hearing, to confront and cross-examine his accusers, to a speedy trial, and to have a jury make determinations of fact; he may also forego the privilege against self-incrimination and the applicable Statute of Limitations. In addition to giving up the opportunity to prove himself innocent, he may be bypassing sentencing alternatives entailing a much lesser degree of supervision, such as probation. Since diversion may be the most critical, in fact, the only stage of the proceedings, for a defendant to forego his opportunity to put the state to the burden of proving his guilt, counsel must certainly be required at this stage. This view accords with that of the National Advisory Commission on Criminal Justice Standards and Goals, Courts Standard 2.2, which states, "Emphasis should be placed in the offender's right to be represented by counsel during negotiations for diversion and entry and approval of the agreement." The *Prosecutor's Manual on Screening and Diversionary Programs*, describing the diversionary program in Genesee County, Michigan states at p. 107, "given that most cases that would go to trial in the absence of CPA [Citizens Probation Authority] would require appointed counsel, paid from public funds, a further probable saving is realized by the CPA's case rarely involving defense counsel (Legal Aid)."

It is NLADA's position that counsel should be provided to the defendant at every stage of the diversion determination process, from initial questioning through the final decision to enter the program, and that this right must be plainly spelled out in the legislation even though the provision of counsel may be implicit in current federal procedures.

*Incursions upon the right to privacy*

The United States has made the right to privacy peculiarly its own pet privilege. It was as a result of persecution in other countries such as England, Germany, and Russia that many of our citizens fled to this land. Diversion programs of necessity make serious incursions upon the right to privacy in the home, since social workers, as part of their role in a diversion program, typically enter the home, interview members of the defendant's family, and ask many personal and embarrassing questions concerning life-style, morals, etc. We may well ask whether new concepts such as diversion, which come about as a panacea for financial anaemia in the criminal justice system, are not the first step toward Big Brotherism and "1984".

*Lack of Demonstrated Effectiveness in Reducing Recidivism Rates*

The present proposed legislation appears to be premature in that there has as yet been inadequate data showing that pretrial diversion programs accomplish positive results in reducing recidivism rates. This is because the clients typically accepted by these programs have been low-risk arrestees who most likely would not have become recidivists in any case. The eligibility criteria for most programs have excluded offenses involving violence and have, by and large, been limited to first offenders. Even in programs which have accepted persons charged with felony offenses, these were frequently in reality felonies only because of overcharging and would probably have gone to trial as misdemeanors.

Studies comparing recidivism rates have failed to employ control groups of individuals charged with the same type of crime as those enrolled in diversion programs. Thus, figures purporting to "prove" that pre-trial division has reduced recidivism are misleading. A great deal more study is needed of the effectiveness of these programs before we reach the stage where a legislative basis is in order. It is NLADA's position that legislation should not be enacted until there has been an opportunity to study more programs and to conduct more scientific evaluations and comparisons of programs.



*Diversion and Pretrial Release*

S. 798, Sec. 5, provides for the release of an arrested person to a community supervision program while awaiting trial. While H.R. 9007 has no comparable provision, the bill does not exclude the possibility that persons awaiting trial may be placed in diversion programs. NLADA strongly opposes the placing of persons intending to assert their innocence at trial in a diversion program.

First, this practice contravenes the basic American principle of justice that the accused person is presumed innocent until proven guilty. A person taken into a diversion program, on the other hand, is presumed to be in need of treatment. Not only does imposing such treatment fly in the face of the presumption of innocence, but it also may prove highly offensive to the innocent defendant and place unnecessary burdens upon the taxpayer dollar. Imagine the mental anguish for example, of the innocent young person wrongly accused of possessing narcotics who is forced to attend a narcotics rehabilitation program attended by hard narcotics users.

Secondly, pretrial diversion for those awaiting trial runs counter to the intent of the Federal Bail Reform Act of 1966 and to the U.S. Supreme Court's decision in *Stack v. Boyle*. In 1951, the high court held that the only purpose of imposing bail was to assure the defendant's appearance at trial. The Federal Bail Reform Act followed in 1966, setting forth minimum conditions of release on recognizance which could be imposed. However, the principle was clear that no conditions of release could be imposed unless they bore a reasonable relationship to assuring the defendant's appearance in court. Firmly wedded to these conditions was the presumption that a person who had not been adjudicated guilty should not be deprived of his liberty prior to trial. It would be difficult to justify the corrective treatment given to the accused in a diversion program on the grounds that it was necessary to assure his appearance in court. Moreover, as diversion programs require varying degrees of deprivation of liberty, it is necessary to exercise extreme caution to ensure that these programs do not become a subtle form of preventive detention.

Finally, there is a great deal of inherent coercion in a program permitting diversion at the stage or pretrial release determinations. It is difficult to imagine a defendant who has just been arrested knowingly, intelligently and voluntarily coming to a decision to accept a diversion program. An arrestee needs to be released to discuss the matter with family and friends as well as counsel before he can come to an intelligent decision. Moreover, in many cases the defendant may be informed that he will remain in custody unless he "cooperates" so that he can be released to a community supervision program. The threat of jail as the alternative to diversion will surely remove the element of voluntariness from any pretrial intervention program. It is for these reasons that NLADA opposes the use of pretrial diversion for defendants who intend to assert their innocence at trial and urges that placement in a community supervision program not be utilized as a condition of pretrial release.

In summary, NLADA is concerned about the likelihood of wasting society's resources as a result of diversion programs requiring rehabilitation services and close supervision over persons who have not been demonstrated to be in need of rehabilitation. NLADA is also concerned about taking the determination of guilt out of the daylight of the criminal justice process and placing it in a low visibility posture where abuses of discretion are not readily seen or subject to review. Instead of adversary proceedings in a court of law, the trend toward diversion may place control over the fate of an accused in the hands of well-intentioned social engineers, and may weaken our constitutional guarantees to a mere filament. Finally, reliance upon diversion to cure the ills of our criminal justice system may stem the pressure for needed reforms in sentencing and criminal codes. As federal defender Lew Wenzell stated at the NLADA's 51st annual Conference last October:

"Panaceas such as a plea bargaining and diversion are simply a substitute for having the legislature take a real look and see that, as a matter of fact, the criminal law is much too broad. We're trying to control too much conduct with it. Diversion, like plea bargaining, is like trying to cure a cancer with a band-aid."

NLADA wishes to reserve its judgment on the long-range merits of any specific pre-trial diversion system pending further study and evaluation of existing and new diversion programs. Moreover, it is the position of NLADA that passage of a federal statute at this time would tend to hamper the flexibility needed to enable the planners of diversion programs to experiment with various models and to determine which model produces the best results. At the present time, research in

this field is being conducted by the American Bar Foundation, the ABA Commission on Correctional Facilities and Services, the University of Chicago's Center for Studies in Criminal Justice, the American University research project, the National Center for State Courts under grants from the federal government and the National Science Foundation, and by the National Legal Aid and Defender Association in light of its recently published survey of the defense of indigents entitled *The Other Face of Justice*. We urge that Congress postpone its judgment until these and other studies currently underway have been completed so that their results can be taken into consideration.

Senator HRUSKA. Does it bother either of you that when you speak in terms of precluding consecutive sentencing that you are depriving the court of discretion, which is a large element in the sentencing process? It is the reverse, is it not, of mandatory sentencing?

Shouldn't the judge be able to impose the sentence that he thinks most appropriate in light of the individual case and the experience he has gained, if that means imposing consecutive sentences?

Does that bother you?

Mr. VAN DE KAMP. I think it depends on the facts of the case, Senator. Let me give you a hypothetical example, because we run up against this every week. I am a postman, and I take a piece of mail out of the mail that I am delivering and I open it. That piece of mail is a Government check and I try to forge it, and I am caught after I try to pass the check.

In that offense I have committed about four offenses. I have stolen from the mail as a postman. I am in possession of stolen mail. I have forged a Government check, and I have passed a forged Government check. Now, the U.S. attorney will not charge all of this in one count despite the fact that it is an episodic type of crime. He will charge four counts. And by and large, the case is apt to be bargained out by way of a plea of guilty to one of the counts. And the sentence will be on the one count.

On the other hand, it is possible that if I go to trial I will be convicted on all four counts. If so, at the time of sentencing the judge has discretion to impose a penalty of 30 years, that is by making the maximum sentence on each count consecutive with one another, where if I pleaded guilty to theft of mail the maximum I could receive would be 5 years.

Now, what concerns us is that in that kind of a situation the power to use consecutive sentences, even in episodic situations, has been used and misused by judges. What we suggest is that we take these episodic like offenses and provide one maximum so that consecutive sentences could not be imposed.

We are also saying if these are unrelated crimes—for example, if I steal that mail, and forge that check and then later go out and hold up a bank, then the court should retain discretion to make the sentences run consecutively.

Senator HRUSKA. But is that not covered?

Isn't it a question whether that it is an unduly excessive sentence?

If we provide for a review of sentences, will we not redress that problem and at the same time not run the risk of hamstringing the judges?

Mr. VAN DE KAMP. I think you would to a certain degree.

Senator HRUSKA. Would that not ameliorate the problem?

Mr. VAN DE KAMP. I think you can go both ways, or merely in one direction. However, both appellate review of sentences and a



tight statutory curtailment on maximum sentences would have the same type of practical impact.

Ms. HARRIS. I would like to clarify something, and that is that we are not advocating an absolute ban on the courts' authority to order consecutive sentences. What we are saying is that there should be a legislative presumption in favor of a concurrent sentence to limit the judge's arbitrary use of his sentencing authority and require him to make findings which would then permit appellate review if the sentence is excessive.

Senator HRUSKA. Well, there is a good deal of criticism, and well-based, perhaps, in the way it has been presented in other testimony. The complaint is that the sentence is too long, whether the judge strings three or four sentences together or whether he imposes the maximum in the first place. And it can be reached in another way—by appellate review.

Mr. Summitt, have you any question on that?

Mr. SUMMITT. I would like to ask Mr. Van de Kamp what his reaction is to the S. 1400 approach to this, which would permit consecutive sentencing but have an upper limit to it, which would be in the bill as now drafted the sentencing limit for the next felony degree up from the most serious crime charged in the indictment.

Mr. VAN DE KAMP. As I recall, S. 1400 did try to deal with episodic crimes and limit consecutive sentences. That approach, particularly if you had appellate review of sentences, would not bother us so much because it would tend to reduce present disparities by better control of sentencing maxima. We of course have dealt with this code on a seriatim basis. If I knew for a certainty that a specific form of appellate review of sentences were to be added to this code, Senator, I think we might actually revise some of our comments. Of all the things we've suggested today regarding sentencing, we regard our suggestions regarding appellate review of sentences as having the greatest favorable impact on sentencing.

Mr. SUMMITT. That is all, thank you.

Senator HRUSKA. You testify that the sentences are too long as provided for, both in S. 1 and S. 1400, and that they should be shortened. Is this same objective achieved by allowing parole to commence at an earlier date?

Ms. HARRIS. No; the existence of long authorized sentences has been shown to cause both unnecessary imprisonment and the imposition of unnecessarily long prison sentences. The problems which this creates will not be eased by the relatively early release of an offender, who should not have been imprisoned in the first place. Additionally, even though the new code provisions authorize earlier parole release, it does not require such release, and we can only speculate on how it will be used. I would prefer not to do that, and to eliminate the need to rely on early parole by shortening the terms of imprisonment authorized in this section.

Mr. VAN DE KAMP. I would like to add one comment to that, Senator. You have talked about the 5-year term which the Petersen Commission or the national advisory commission has recommended. We are not necessarily wedded to 5 years; it may well be that that parole term should be taken into account in establishing maxima; what to us is clear is that the 20- to 30-year maximums which are

provided for in the code are far too long and unnecessary since the dangerous or special offender can be dealt with under the special offender provision. As a result it becomes a matter of tailoring your regular maximum to this national advisory commission standards, with consideration given toward the use of mandatory parole term.

Senator HRUSKA. In your discussion of appellate review of sentencing, do you prescribe standards, or would you recommend standards for reviewing the sentences and modifying them?

Mr. VAN DE KAMP. I think the only language that we have used has been the word excessive. Of course that reflects the early thrust of the movement for appellate review of sentences, particularly in light of the very long sentences that have been imposed, sometimes without justification. James Bennett, whom I quoted earlier, has testified over the years about how the Bureau of Prisons has had to deal with those serving these long sentences; he considered the long sentences a detriment to the persons serving the sentences and to the Bureau of Prisons as it tried to deal with other offenders.

I think that the courts will probably have to work out a standard of review. I have no magic formula, but perhaps mere use of the word excessive is sufficient.

Senator HRUSKA. Mr. Marvin, have you any questions?

Mr. MARVIN. Just one, I believe.

You recommend a notice sanction which would require an organization to give notice of its conviction to a class ostensibly harmed by the offense, but how can the effect of a notice sanction really be measured before it is imposed? How can we measure the effect such a sanction will have on the customers of the organization? We have a whole industry on Madison Avenue which is designed to try to project how the consumer is going to react; what he will buy. Doesn't a notice sanction, in effect, call for punishment, the scope of which is going to be difficult to measure?

Mr. VAN DE KAMP. I think that is accurate. We call for two things, Mr. Marvin. First, mandatory notice to the class of persons affected. For example, take a simple trucking-type violation where someone has charged rates at a level lower than he was supposed to under ICC tariffs; in that kind of a situation, written notice, perhaps by letter, would be required to be sent to competing carriers giving the facts of the conviction. As a result the competition could determine whether they had been injured by the law violation, and if so take appropriate civil action.

When you talk about a food and drug violation, you get into the problem you have just mentioned. Suppose a beer company has been adulterating its beer. Should the public at large know about that? I believe so, because the fact they will have to give notice in such a situation is apt to produce a policy of preventive maintenance on the part of the corporation fearing the adverse reaction of a public informed of its violation.

I think what you say is true, that public reaction is perhaps indeterminate; but the company who violates the law takes the risk and if it violates the law, must pay the consequence, indeterminate though they may be.

Mr. MARVIN. Getting back to that beer company, though, if that sanction is imposed on the beer company it is not going to be selling as much beer. As a result, their stock may fall. In effect that punishes the innocent stockholders, doesn't it?



Mr. VAN DE KAMP. Yes, of course it is. But why shouldn't the stockholders be punished for the acts of their management. They put the management in a position of responsibility and they can remove them. The public at large, I think, has a right to know. I think the public at large can measure the gravity of the conviction—and measure it against the company's attempts to rectify the situation. For example, there would be nothing wrong with the beer company providing notice of its conviction and then notifying the public of its clean-up policies.

I think notice is in the interest of the consumer; if there is such a thing as preventive deterrence, then you have it here, because here the word must go out. You cannot jail a corporation, although many times you might like to.

Occasionally you can jail a captain of industry, as they did in the General Electric cases back in the late 1950's. Those short jail sentences had a profound impact on big business. In a less personally punitive way a notice sanction would have no less significant impact.

Mr. MARVIN. I think there is a same kind of impact with an antitrust violation—a corporation may be required to divest of some of its companies, and it may be fined.

Mr. VAN DE KAMP. I think it is the same kind of thing; I have seen a number of these kinds of cases in my 14 years of practice, for example ICC violations, Fair Labor Standards Act violations, etc., and I've seen the same companies come back into court time and time again on those types of violations. And I see the Government investigative agencies investigating those same organizations time and time again. They must return to them time after time and give them warning after warning. If you had the kind of teeth found in the notice sanction—I think you will find a lot fewer organizations violating the criminal law.

Senator HRUSKA. Of course, the argument of loss to stockholders, if it is followed through to its logical conclusion, would mean that a corporation never could be punished, would it not? Any sanction that is imposed on a corporation would have an impact either on the value of the stock or the reputation of the company or whatever.

Mr. VAN DE KAMP. That is right.

Senator HRUSKA. Now, if the argument is used that a stockholder is an innocent party and had no control and therefore the punishment should not be imposed, that would mean that corporations could break the law with impunity.

Mr. VAN DE KAMP. That is right. I agree with that.

Senator HRUSKA. Except for the liability on those actually participating.

Mr. VAN DE KAMP. That is what I am suggesting.

Senator KRUSKA. That is what many court decisions have used as a reasoning for imposing criminal penalties on the corporation itself.

Mr. VAN DE KAMP. Right.

Senator HRUSKA. Anything further?

You have some questions, Mr. Summitt?

Mr. SUMMITT. Mr. Van de Kamp, I have about three or four short questions. We may have, after studying your statement, more detailed questions which can be dealt with in writing.

Mr. VAN DE KAMP. We would be happy to do that; we would be very happy to assist this subcommittee in any way, Mr. Summitt.

Mr. SUMMITT. We have had a lot of discussion on appellate review of sentencing, particularly in terms of the defendant's interests. It has been argued that there should also be a right of appeal of a sentence on the part of the Government in order to have a balanced development of a jurisprudence of sentencing. Do you have any observations on that kind of approach?

Mr. VAN DE KAMP. Yes, I am opposed to that kind of approach because it seems to me that it's traditional in the American system of justice that the Government should only get one shot at a defendant, and that shot is at the trial court. If error is committed there, in terms of the fact-finding or in the sentencing, review should only be available to the defendant on appeal. In a sense the spirit behind the concept of double jeopardy argues against what you have just suggested.

Second, we have approached appellate review from a concern with excessive sentences. I do not think our proposal is going to produce an appeal in each case, thereby flooding the appellate courts, because once you get a jurisprudence of sentencing, sentencing is apt to proceed on a more rational basis. So too a more rational penalty maxima is bound to cut down on the potential for appeal. I think that if you give the Government the right to seek sentence increases on review you will tend to open appellate review much more than excessive sentences. I think the argument has gained some currency that the Government be allowed to appeal on the basis that it will limit the number of appeals. I believe that it may work to the contrary.

There's another aspect to this, and that's the specter of "appeal bargaining" it raises. A number of legal scholars have criticized plea bargaining in general and the Watergate plea bargaining in particular as a less than ideal way to resolve criminal cases. Plea bargaining is a fact of life in some courts. Ideally the practice should end.

I am concerned here that if the Government has the right to seek an increased sentence on appeal that you are going to find that power to increase used as a bargaining wedge with the defendant to prevent him from appealing his underlying criminal conviction. In other words, you will find defense lawyers and Government lawyers entering into deals, where the Government will agree not to seek to increase the sentence upon agreement by the defense not to appeal the conviction; that kind of thing is unseemly, and just compounds the ills of plea bargaining today. I would prefer to limit appellate review of sentences to defense motions to reduce excessive sentences. Again I underline the word "excessive", which is the key to our proposal. Our proposal will help produce a jurisprudence that once established should limit appellate review to the extraordinary case; it should not add appreciably to the workload of the appellate system; and once it's established our district courts will have some guidelines to operate under and as a result should impose more rational and less disparate sentences. That is all we are asking.

Senator HRUSKA. What about the situation, if counsel will yield, where a plea of guilty is entered, the sentence is imposed, and then the defendant appeals from that? Is that all right? Would we have the best of all worlds under that type of an arrangement where an agreement is reached, and it would be really the essence of plea bargaining, I suppose. Could he, under those circumstances, then, in your judgment, be permitted to appeal that type of an arrangement?

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Mr. VAN DE KAMP. It seems to me, Senator, that if the defendant entered into an arrangement or a plea bargain with the prosecutor and the judge under rule 11, that is, the defendant agrees to plead guilty upon the understanding there will be a top on the sentence—then he should not have the right to appeal, providing the arrangement is maintained by the court. He should keep his bargain. Most judges in our Federal court system, do not engage in plea bargaining. They refuse to tell the defendant before sentencing what sentence he or she will receive. Rather, they tell the defendant to take his chances. They will tell a defendant: "You realize what the maximum sentence is, do you not?"—They will have the defendant repeat what the maximum sentence is. The judge will say: "You know I could give the maximum to you? No promises are made, are there?" The defendant will usually respond in the affirmative. So the defendant pleads guilty. Let us assume in the rare case the judge gives him the maximum sentence and really hits him very hard. In that kind of a case where there has been no plea bargain, no advance understanding, the defendant should have the right to appeal the sentence, assuming the sentence can be deemed excessive.

Mr. SUMMITT. Let me ask you three questions dealing with the parole area.

One, you suggested judicial review of parole decisions. If such review were permitted, what kind of standards of review would you have, and do you think this would overburden the parole system.

Mr. VAN DE KAMP. Well, first of all, we are calling for a system of review within the Parole Board itself. We are asking for a two-scale review. First, to a regional member of the Board of Parole, and then, beyond that, if the parolee desires, to a national board. If the parolee is still unhappy, he should have the right to be able to petition a district court by way of a writ of habeas corpus on the basis that the action taken against him was in violation of his constitutional rights, for example that due process was not observed. In other words, he should be allowed to take it up for review as one might take up any other administrative agency decision, subject of course to the limitation on such a review by the exhaustion of remedies doctrine. I do not think you are going to find our district courts flooded with those kinds of actions. Of course, as long as we have the kind of system we have today with so few standards, litigation is apt to be engendered. I've already mentioned some of the present ills in the system. But once we have a bill such as Senator Bayh's or Congressman Kastenmeier's, which provide a decent due process system, I think you are going to find fewer cases finding their way to the district court. And I think that the internal review process is going to cut off many potential district court cases, because I have some confidence that the present board will correct or try to correct some of the present abuses in the system. The Bureau of Prisons has also set up an internal grievance procedure; and I'm told that many of the prisoner petitions are being acted upon in favor of the prisoners.

Mr. SUMMITT. You would agree that judicial review should be limited to a review of constitutional grounds?

Mr. VAN DE KAMP. I am sorry, on the what?

Mr. SUMMITT. On constitutional grounds.

Ms. HARRIS. No, and the reason for that is that it is imperative that the courts take a look at whether or not the parole agency acted in

compliance with its own regulations, or whether it abused its discretion, or acted arbitrarily. These are not constitutional violations themselves, but they are the reason for requiring review of decisions of administrative agencies.

Mr. SUMMITT. The Parole Commission bill that is being considered today contemplates use of hearing examiners. What role should they play? Should they be a decisionmaking body or should they be a recommending body?

Mr. VAN DE KAMP. I have not considered that before I came in today, but my first reaction is that they should be a recommending body; the responsibility for decisionmaking should rest with the Parole Board members who are responsible for the hiring of the parole examiners. The decisionmaking should be isolated in a fairly small board aware of the overall picture. Just as in sentencing you need some degree of uniformity in the parole grant process, and I think you'll probably best achieve that through keeping the real power in a small body.

Mr. SUMMITT. And the last question I have is should the Government have a right to appeal an "adverse" decision by the bottom level of the parole decisionmaking authority, where a prisoner is granted parole? Should they have a right to appeal that decision up through the system?

Mr. VAN DE KAMP. No. At that point the cards are stacked in favor of the Government. After all, it is the Bureau of Prisons that supplies most of the input to the Parole Board; most of the reports will come from the institutional people. And if the Department of Justice or another governmental agency wants to supply information to the Parole Board, it can do so at the same time as the parolee. I think the same argument would apply here as would apply to the notion that the Government should have the right to seek increases in sentences through appellate review.

Mr. SUMMITT. Certainly that position might make it desirable not to let hearing examiners be the decisionmaking authority. You would have hearing examiners releasing criminals without the Government being able to do anything about it. I think that meshes with what you said on the recommending authority of hearing examiners.

Mr. VAN DE KAMP. I am not sure I completely agree with you, but if we get to the same point by different means I find no objection.

Mr. SUMMITT. That is all I have, Senator.

Senator HRUSKA. Has California a death penalty statute?

Mr. VAN DE KAMP. We do now, Senator. In fact last Thursday or Friday, the first death penalty verdict was returned in our State since passage of our new statute.

Senator HRUSKA. I think there are, I believe the latest report is 31 or 32 States since the *Furman* v. *Georgia* case that have relegislated a death penalty. It is not exactly correct to say, as some have, that those statutes are passed in an effort to obviate the Supreme Court ruling. S. 1401, which the Senate approved in March, was not passed to escape the Supreme Court ruling; it was passed to comply with it.

I notice you treat the subject somewhat concisely when you say you opposed the death penalty in any instance, which is perfectly all right, and it honestly represents the viewpoint of the Chairman of the Brown Commission, incidentally, and he so testified. But a majority, a substantial majority on the Senate thought it would be an appropriate sentence in the most grevious of cases.



My personal hope is that the House will follow suit soon.

Have you any comment on the 31 States re-enacting that penalty?

Mr. VAN DE KEMP. First, we did not approach the death penalty in our papers outside of the concise way you mentioned. Since it is such a burning political issue, we felt we could spend our time more profitably in dealing with other provisions of the code which perhaps had not received such attention, yet which in the long run may have greater impact on Federal criminal defendants.

In 1972 there was an initiative on our California ballot to restore the death penalty in some cases. That initiative passed.

I think it is accurate to say based on public opinion polls, that somewhere over 50 percent of the population still believes the death penalty should be maintained. It is a percentage which has decreased from where it stood at 15 or 20 years ago.

We are very concerned as lawyers that no matter what kind of controls and techniques you devise to control the discretion of a judge or jury, we are going to end up with the same result; and that is discriminate and inequal imposition of the penalty. Those who receive the death penalty under the new statute, as in the past, will largely be the poor, the minority groups, the disadvantaged, the underprivileged, and the under-represented. To us, the death penalty is a blot on the American system of justice which the *Furman* decision gave us the opportunity to eradicate. If we return to it we are again going to find our death rows stacked up in the 31 States you mentioned, and a return to a practice which most civilized countries have eliminated.

I would add a word about the history of the death penalty and its so-called public deterrence. It is fairly clear, from my reading on the subject, that States where the death penalty has been repealed, did not find any measurable difference in the crime rate for death penalty crimes once the death penalty was repealed. To some people the death penalty is a measure of vengence, that's how they justify its usage. I would like to think that we are a progressive country with ideals which transcend barbaric notions. When we justify the use of the death penalty on the grounds of vengence it seems to me that we take several steps back from those great ideals. Ideals aside, if you want to approach it from a strictly practical basis, the death penalty does not seem to produce soundly beneficial results.

Senator HRUSKA. Have you read or studied S. 1401?

Mr. VAN DE KAMP. We did not do so for a comment for this Committee.

Senator HRUSKA. I just wondered, if you had done so, if you would still believe after going over its provisions and procedures whether it would be the poor that would pay the penalty, because we followed, in drawing up that bill, very religiously the decision of the Supreme Court in *Furman*. In that case, the Supreme Court held that the death penalty was being imposed unconstitutionally because in effect it discriminated against the poor, the less educated. The imposition was arbitrary. Our efforts in enacting S. 1401 were to insure that the penalty would not be imposed with discrimination. Whether the defendant is a millionaire or a bum, very intelligent or uneducated—when certain aggravating elements are present and none of the mitigating elements are present, the sentence will be imposed.

Mr. VAN DE KAMP. I understand that. I mean to cast no aspersions, of course, on the members who have passed the bill; and I have read

Mr. Connelly's Law Review article about the bill which is to the point that the bill is, a bona fide attempt to produce a death penalty statute taking into strict account the concerns of the Supreme Court. But I am concerned that no death penalty bill will ever really work fairly. For as long as the prosecutor retains the charging power, and with it the power to plea bargain out a death penalty case to a lesser offense, someone in the system has the power and ability to ignore what the Supreme Court has been talking about. On its face the bill may appear to deal with the problems of inequality, but it fails to deal with the management of the prosecutorial function in such a way that each prosecutor handles a so-called death penalty in the same way.

Senator HRUSKA. You mentioned a poll. Was that a recent poll, that 50 percent——

Mr. VAN DE KAMP. No. I recall polls on the subject during the 1972 California initiative on the death penalty. State and national polls were released every couple of months on the public's view of the death penalty. My recollection of the figures are vague.

Senator HRUSKA. A national poll?

Mr. VAN DE KAMP. Well, both national and California polls. I believe Gallup has polls on the subject, Mr Chairman. I am sure his organization can supply you with those polls. And the Field organization in California has run those polls in conjunction with California political campaigns there.

Senator HRUSKA. I wonder how valid a poll like that would be in view of the fact that 31 States have reenacted the death penalty? Now, those laws were enacted by people who have to answer to their constituents, and in the place of the lower legislative body, the more populous, the more numerous legislative body, they have mighty small districts and their neighbors get to know them. If their constituents were against the death penalty they would not return their representatives and those representatives know it.

Mr. VAN DE KAMP. I think you might have misunderstood me. I said that the polls that I have seen show support of over 50 percent, for the death penalty.

Senator HRUSKA. Yes, I understand that, and there has been a shift, a big shift. I know of no more effective poll than passage by State legislative. They are usually pretty politically oriented, and they know what the sentiment of their people is.

Mr. VAN DE KAMP. For whatever it is worth, I can report to you that I ran for Congress several years ago and the death penalty was an issue. I opposed the death penalty then, as I do now. A number of would-be constituents hit me very hard on that issue. I believe I know the kind of reaction that you get when you are out in the hustings. On the other hand, it seems to me that the supporters of the death penalty are extremely vocal, and are in many ways more strident than those who oppose it. Opposing the penalty does not seem to be the key to popularity in may circles.

Senator HRUSKA. Very well, have you anything further? We thank you for coming.

The committee will stand adjourned, subject to the call of the Chair.

[Whereupon, at 12:15 p.m., the subcommittee adjourned, to reconvene, subject to the call of the Chair.]

# REFORM OF THE FEDERAL CRIMINAL LAWS

FRIDAY, JULY 19, 1975

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

The subcommittee met, pursuant to recess, at 10 a.m., in room 2228, Dirksen Senate Office Building, Senator Philip A. Hart, presiding.

Present: Senators Hart and Hruska.

Also present: Paul C. Summitt, chief counsel; Douglas R. Marvin, minority counsel; Dennis C. Thelen, assistant counsel, and Mabel A. Downey, clerk.

Senator HART. The committee will be in order.

We resume the consideration of two proposed bills, namely, S. 1 and S. 1400; each to revise and reform and codify the Federal criminal laws.

Our first witness, and I suspect one who needs no introduction and who is responsible largely for the very crowded hearing room this morning, is the most dramatic example I have ever been able to cite in refutation of the proposition that there isn't anything anybody can do about the system.

The committee welcomes the man who has done a great deal of work to straighten out the system, Mr. Ralph Nader.

## STATEMENT OF RALPH NADER, WASHINGTON, D.C., ACCOMPANIED BY MORGAN DOWNEY, COUNSEL, PUBLIC CITIZEN

Mr. NADER. Thank you, Senator Hart.

With me today is Mr. Morgan Downey, an attorney who has been working with us on the issues involved in the reform of the Federal Criminal Code. This is the first fundamental overhaul of this code in many generations.

Mr. Chairman, thank you for your invitation to comment today on aspects of S. 1 and S. 1400, the proposals for the reform of the Federal Criminal Code.

Crime in the United States, like the moon, has its obvious side. But like its lunar counterpart, crime also has its dark side—the overworld exploration of which has only just begun.

Watergate and other recent scandals have forced the dark side into public visibility for all to see. This dark side of crime is that speciality of government officials and corporations, of genteel accountants and high-powered executives—formally called white-collar crime.

Attached to this testimony for the committee is a "Report on White-Collar Crime, 1973–1974" prepared by Public Citizen to shed more light on this hidden side of crime.

It describes cases that involve over 1,000 individuals, 150 corporations, 168 government employees, 160 corporate executives, 40 stockbrokers, and scores of politicians and lawyers who engaged in or are alleged to have engaged in white-collar crimes during 1973 and the first half of 1974. Among the defendants that were either convicted or sentenced were: A former Vice President of the United States, a former Attorney General of the United States, a former U.S. Senator, two members of the U.S. House of Representatives, a former U.S. court of appeals judge, four former White House aides, American Airlines, Gulf Oil, Minnesota Mining and Manufacturing Co., Goodyear Tire and Rubber Co., and American Voting Machines Corp. Numerous others have been indicted for white-collar crimes and are awaiting trial. There is obviously a very important distinction to be made between conviction and indictment and that distinction is made here.

These crimes, in themselves, a severely limited sample of the apprehended white-collar crimes in this period—impose a severe cost on the citizens of the United States. Some 30 percent of them are conservatively estimated to cost the victims $4 billion, including auto theft as reported by the FBI's "Uniform Crime Reports" for 1972.

That $4 billion is only 30 percent of the collection of cases brought together in this testimony, which in turn are only the tip of the iceberg.

Other, more comprehensive, estimates of the cost of corporate crimes and consumer frauds range from a low of $40 billion annually by the 1969 President's Commission on Law Enforcement and Administration of Justice, to $200 billion by Senator Philip Hart (D-Mich.).

The comparisons with street crime in any category are dramatic. Newspapers and television highlight bank robberies as major events, yet the white-collar criminal inside the bank through fraud and embezzlement took six times more money in fiscal year 1973 than did the holdup man.

The report focuses on the extent, nature, and responsibility for white-collar crimes. It provides a factual basis for legislative recommendations offered later in this testimony concerning the role of corporate management in the commission of offenses and the subsequent role of persons who blow the whistle on corporate misdeeds; the need for the enactment of prohibitions against various offenses such as environmental spoliation; and finally the development of more effective sanctions to help deter white-collar crime instead of the present system which imposes only the slightest obstacles to the perpetuation and success of white-collar crime.

It is important here, Mr. Chairman, to note that sometimes our language is not coordinated with the seriousness of the offenses. When I refer to environmental spoilation, the reference is made to the poisoning or the destruction of the basic prerequisites for human health and survival; namely, the land, air, and water, and it is, I think, appropriate to comment on Attorney General Saxbe's statement yesterday, when he came down very hard on land developers who ruined wetlands and estuaries. That emphasis coming from the Justice Department, I think, indicates a growing awareness of the health and safety consequences for present and future generations of this environmental destructive trend.



The other point on environmental destruction which should be made is that there are other societies on this planet—some of which might be called, because of our ethnocentric myopia, underdeveloped or primitive—and these societies make it a much more serious crime to contaminate the community's water, for example, than to commit a so-called "street offense."

An altercation between individuals is considered far less serious than the pollution of the community's water supply and for obvious reasons. The latter threatens the survival of the community itself and the former deals with the security of a smaller number of people.

The "Public Citizens Report" covers four areas of white-collar crime—stock frauds, consumer frauds, official corruption, and corporate crime. Each has a unique form, occasion, and methodology.

But underlying each type is a simple fact—the victims are honest taxpayers, decent businessmen, consumers, and the poor. Because of sophisticated duplicity and insulated predations, these victims lose their money, their health, and their trust in our political and economic institutions to criminal operators who hold positions of power in government, law, and business.

Ten major conclusions proceed from this report:

One, during the period covered by the report, the United States experienced a significant number of serious crimes which are undermining this country's basic economic institutions and which have produced severe economic consequences.

Examples include the failure of S. Arnholt Smith's U.S. National Bank, of Weis Securities, and Equity Funding Life Insurance Co. These crimes have weakened the confidence of consumers in the business and financial community.

Indeed, the U.S. Chamber of Commerce notes that in the last 20 years fraud was involved in the failure of about 100 banks in this country.

Two, it has been revealed that the political institutions of the country, be they political parties, State, local or Federal governments, have been the instruments for high level and widespread crimes. That is, we have had public financing of campaigns for many, many years, Mr. Chairman. It is the public financing that proceeds from, for example, the kickbacks of engineers and architects to government officials, pursuant to the acquiring of procurement contracts which are paid for by the taxpayer.

The Watergate scandals exemplify political corruption at the highest levels of government, but they have not been unique. Scandals have also pervaded the Congress, State governments—New Jersey and Maryland—and local governments—New York and Chicago.

If you talk to the district attorneys that comprise the economic crime project of the National District Attorneys Association—a leader of which is Robert Leonard, who is the prosecuting attorney in Genesee County, Mich.—you can become quite convinced that Maryland and New Jersey are not unique and that basically they are the territories of either historial accident or a particularly aggressive prosecuting attorney that have brought all this out. You can scratch in any jurisdiction in this country and these problems will be revealed.

When the professional engineers became, as a national organization, concerned about the Maryland situation, there wasn't forced——

Senator HART. When who become concerned?

Mr. NADER. The National Society of Professional Engineers. When they became very concerned about the involvement of professional engineers in corruption in Maryland with the payoffs. And there weren't many forceful statements saying that that was an isolated incident. All of them knew quite well that this was a national practice. It is a little more intense in some areas than others, but basically a national practice that had to be dealt with uniformly. It was not a case of a few rotten apples in the barrel.

The third conclusion, it is evident that crimes affecting our economic institutions are often closely interwoven with the corruption of government officials, such as documented by the Agnew and Queens, New York District Attorney Mackell cases and as alleged in several other cases mentioned in the report.

The fourth point, evidence exists that alleged underworld crime figures, in addition to their involvement in narcotics, gambling and other offenses, are becoming increasingly involved in overworld crimes, with the collaboration of insiders, dealing in stolen securities and stock frauds affecting economic institutions.

Another committee in the Senate has been investigating the massive scope of stolen securities and it is quite clear that this is now a many multibillion dollar situation on an annual scale.

Five, the conclusions of earlier white-collar crime studies notably that of sociologist Edwin Sutherland, that white-collar criminals exhibit a high rate of recidivism, are supported by the report.

Moreover, the 18-month period covered by the report shows that this recidivism is true not only for individuals but also for major corporations, such as Diamond International which pleaded guilty to an illegal campaign contribution and was indicted for price fixing paper labels as well.

Six, in a number of cases, the penalty imposed on white-collar criminals in proportion to the gravity of their offense, as opposed to the penalty imposed on street criminals in proportion to the gravity of their offense, is very lenient. Such leniency is due in part of statuory limits, and in part of judicial preferences for powerful, respectable white-collar defendants.

One again notes Attorney General Saxbe's speech before the National Association of District Attorneys a few weeks ago, where he made this point about the comparative leniency of those, as he said it, who would steal our freedoms, compared to the much harsher sentences to those who steal property.

Seven, the business community has shown itself either incapable or unwilling to police its own ranks or to aid law enforcement agencies in the detection and prosecution of white-collar crime. This is evident in the report's description of various stolen stock cases and the *Weis Securities* case.

I used the word unwillingly, Mr. Chairman, because for example it is quite easy to track down stolen securities and to stop this practice. Not only for traditional reasons of investigative competence but also for recent computerized systems that can track these stolen securities and expose their presence. But apparently many businesses don't want this to occur, because it is much easier to avoid the burden of knowledge when these securities are used for collateral or for other business reasons.



Eight, law enforcement agencies devote meager resources to the investigation and prosecution of white-collar crimes in relation to that expended on street crime. The Department of Justice's legal activities budget for fiscal year 1974 showed that the tax, antitrust, and consumer protection activities constituted less than 15 percent of the total legal activities, manpower and budget.

What is remarkable about the visible scope of business crime, Mr. Chairman, is that there is extraordinarily little resource devoted by law enforcement agencies and legislative agencies to detecting and analyzing and exposing and prosecuting the presence of such business crime. And yet, despite that, so powerful is the pressure on the society of this business crime that it overflows almost from its own momentum into public visibility.

As your Subcommittee on Antitrust and Monopolies showed, the presence of antitrust crime is really not sporadic at all, but can be considered epidemic at the local, State and Federal levels, whether it is plumbers, price fixing or giant corporations' price fixing. And I use the old-fashioned plumbers, before that word got a new significance.

Nine, increased manpower and greater budgets for law enforcement agencies to investigate and prosecute white-collar crime would be a productive investment in our economic and political institutions. It would reduce the increasing public resentment at two standards of justice, one for the powerful and one for the powerless, and reduce the spirit of lawlessness pervading the ranks of the wealthy and powerful.

As the National Advisory Commission on Standards and Goals for Criminal Justice has stated:

> the * * * robber * * * burglar and the murderer know that their crimes are pale in comparison with the larger criminalty 'within the system.' * * * As long as official corruption exists, the war against crime will be perceived by many as a war of the powerful against the powerless; law and order will be just a hypocritical rallying cry, and 'equal justice' will be an empty phrase.

Finally, the lack of information and understanding of white-collar crime constitutes a great obstacle to its eventual prosecution and elimination.

Even though the Federal Government, including the Law Enforcement Assistance Administration, spent over $70 million in 1973 for crime research and statistics, there has yet to be an official analysis of the corporate crimes, consumer frauds and official corruption that are devastating the country's economy and bringing its political institutions to the brink of ruin.

One can say, for example, that the political institution in Newark, N.J., has been brought to the brink of ruin and many other governmental processes are approaching that brink.

Our survey of U.S. Attorneys and State Attorneys-General verified that only a few of these officials maintain any useful data on white-collar crime.

For submission to the record, I would like to offer this letter dated July 13, 1974, by Robert Leonard, who is the Prosecuting Attorney in Michigan and a member of the Economic Crime Project of the National District Attorneys Association, which was written to a number of citizens. This is addressed to Senator Ribicoff and goes over some of the scope of business crime that they have uncovered and the problems of prosecuting such crime that they have delineated. That is basically what it is.

Senator HART. Without objection, it will be received.
[The letter from Robert F. Leonard, dated July 13, 1974, follows:]

ROBERT F. LEONARD,
*Prosecuting Attorney,*
*Genesee County, Mich., July 13, 1974.*

Hon. ABRAHAM A. RIBICOFF,
*U.S. Senator, Russell Senate Office Building,*
*Washington, D.C.*

DEAR SENATOR RIBICOFF: As Chairman of the Economic Crime Committee of the National District Attorneys Association, I am writing this letter to you and to every other member of the United States Senate in regard to your current consideration of the proposed Consumer Protection Agency Act, which is designated as S. 707. This letter is being sent to you in behalf of all the members of the National District Attorneys' Association's Economic Crime Task Force as well as in behalf of other participating officers of the N.D.A.A., all of whom acknowledge and concur in my writing to you the following statement of support for S. 707. The names of these several officers of the N.D.A.A. appear beneath my signature, *infra*. As representatives of the N.D.A.A., we believe it is incumbent upon us to express to you our position in regard to this important piece of proposed legislation which would establish, on the national level, an agency which we believe would be of tremendous benefit to every consumer throughout the United States.

We, as prosecutors, are all too familiar with the onslaught of economically-based crime which is directed toward the consumer. In our opinion, it is indeed unfortunate that the Congress of the United States has failed in the past to create such a Federal agency to protect consumers. We urge that the present opportunity to act favorably upon S. 707 should not be ignored.

As Chairman of this Economic Crime Task Force my colleagues and myself have within the last several months been actively engaged in the investigation of many forms of "white-collar" crime which have been perpetrated against the American consumer. For example, we have actively looked into the current practices and procedures of the oil industry in this country, among other things, in an effort to discover whether these actions have involved the violation of our state anti-trust and fraud laws. Our basic purpose has been to ferret out much conduct which is so difficult to observe and which has such a pervasive effect on the welfare of the American consumer. The unconscionable rise in the price of fuel and gasoline has had devastating impact on the economic welfare of many of our citizens. As a result, our organization and Task Force have pursued their obligations to the public to investigate this situation with vigor and immediacy.

I would like to here relate to you several of our experiences in this context which, I believe, point out with specificity the reasons why a national agency to protect the American consumer is necessary. In this regard, I would like to discuss some of the experiences that our Task Force has faced in the recent past as well as some of the pertinent experiences which I have experienced as Prosecuting Attorney in our consumer protection efforts on behalf of our citizens.

Let me first speak to some of the difficulties which the Economic Crime Task Force has faced in attempting to pursue its investigation of the oil industry and to gain cooperation from the supposedly concerned federal agencies. During the week of March 15, 1974, in preparing for a meeting with the oil company officials in April the member offices of the Energy Crisis Committee of the Economic Crime Task Force of the N.D.A.A. sent staff people to Washington, D.C., to attempt to collect data and to conduct interviews with legislative committees, administrative agencies and trade associations.

The Committee staff people received a generally unsatisfactory reception at the U.S. Department of Justice, the F.T.C., and at most of the legislative committees currently involved in similar investigations of the oil industry. These staff members had considerable difficulty in obtaining information from any of the legislative committees which concern the current investigations of the various aspects of the petroleum industry, and which information had not already been publicly disseminated. Two predominant attitudes of these legislative committees became apparent, in our opinion, both of which operated to impede any meaningful cooperation with our staff members.

First, the legislative committees involved here perceived the investigative efforts of the Energy Crisis staff as being merely local, narrow in scope, and therefore not "truly serious" and deserving of their full and co-equal cooperation.



Second, these committees displayed a patently "jealous" posture in relation to the data and information which they had collected. In effect, each committee seemed desirous of guarding its own information and of isolating the same for its own particular investigative purposes, notwithstanding that such information obviously would have been helpful to our common objective of investigating the petroleum industry.

This kind of a "balkanized" attitude on the part of these several legislative bodies was shared by the several, federal administrative agencies, which are also now involved in the investigation of the oil business. Thus, the U.S. Justice Department, the Federal Trade Commission, and the Federal Energy Office all took much the same "noncooperative" attitude in regard to our requests for information as the legislative committees had.

As a result of this lack of cooperation, the N.D.A.A.'s investigation of the oil industry has been denied the extremely valuable benefits of access to the vast amount of relevant information and evidence which has already been garnered on the national level.

Of course, we are well aware that these committees and agencies may have quite valid reasons for not disclosing to us at this time the content of certain information. We recognize that some of this information may be of a confidential nature. But this very fact confirms the basic need for a central, federal consumer agency which, as a part of the federal government itself, could have access to such information without violating any well-founded need for preserving this confidentiality. Such a federal agency would at least be granted initial "insider" access to this material which is apparently being denied to the various, "outside" state and local investigative units. The federal consumer agency would conversely present to all other other federal agencies and bodies a picture of permanence, stability, and peerage—all of which characteristics would promote intra-federal, inter-state and inter-local cooperation in investigative efforts.

Another example of the need for a CPA-type of law is my poor experience with the efforts and aid provided by the F.D.A. in our investigation of dangerous toys in our community. I would like now to bring to your attention our experience in this regard in relation to the area of dangerous toys.

The Consumer Protection Division of the Genesee County Prosecutor's Office has been involved in toy safety pursuits, investigations, and projects since before the Christmas toy season of 1971. In 1971 and 1972, toy safety regulation on the federal level was in the hands of the Food Drug Administration (F.D.A.). Our experience, in general, with the F.D.A. in this field was distressing and unrewarding. Although the F.D.A. had published a so-called "banned toy" list for public dissemination, its list was not only incomplete, but was moreover misleading, inaccurate, and was the result itself of highly questionable "safety-testing" procedures.

The F.D.A., in fact, appeared to us to wish to discourage action on our part to effect compliance by local retail toy outlets with the federal agency's own standards, as weak and incomplete as they were. Furthermore, the "safety-testing" standards of the F.D.A. were themselves specious, illusory, arbitrary, and wholly unscientific, and allowed toy manufacturers to easily make minimal and meaningless "alterations" or "revisions" to "banned" toys to technically bring them outside of the limited purview of the "banned toy" list with F.D.A. acquiescence and approval. F.D.A. regulation then, in our experience, was regulation in form only without substance and without true protection for children-consumers, the most helpless consumers of all.

In 1973, federal regulation of the toy industry passed from the F.D.A. to the newly created Consumer Products Safety Commission (C.P.S.C.). Although the C.P.S.C. appears to be more favorable to citizen and local agency input in regard to hazardous toys than was the F.D.A., the results of the C.P.S.C. have been no more substantial in ultimately protecting our children from dangerous toys than under former F.D.A. "leadership". The present "banned toy" list is still incomplete and inadequate. Although the C.P.S.C. appears to more actively encourage local attempts to effect compliance with its standards, it nevertheless appears just as recalcitrant to initiate prosecutions against the toy manufacturers for noncompliance, as was the F.D.A.

Thus, although the Genesee County Consumer Protection Division has identified hundreds of *per se* "banned toys" and other dangerous toys not technically on the "banned toy" list, and has further informed both the former F.D.A. and the present C.P.S.C. of these findings over the last some three years, not a single federal prosecution has been commenced in Genesee County, Michigan. It can safely be assumed that such lack of federal agency action on the local level has been repeated across the United States.

In December, 1973, my office filed 81 petitions in regard to dangerous toys found in Genesee County with the C.P.S.C. pursuant to its rules, wherein we requested the C.P.S.C., on behalf of all citizens in Genesee County, to abate the sale and marketing of such dangerous toys in our county. Now, some seven months later, the C.P.S.C., to our knowledge, has taken absolutely no action whatsoever in response to any of these 81 petitions.

The indifference and "do-nothing" attitude of the former F.D.A. and the more positive but as yet unproductive action of the C.P.S.C. toward helpless American children who use and play with such dangerous toys has further demonstrated to me the imperative demand for a concerned and active federal Consumer Protection Agency. The heretofore lack of concern on the part of these federal administrative agencies for our children has indeed been personally disheartening and distressing to me as Prosecuting Attorney of Genesee County, Michigan. I sincerely believe that a federal Consumer Protection Agency, being a federally equivalent agency of the C.P.S.C. and other federal agencies, would more likely be successful in abating this inexcusable neglect on the part of the federal government in this important sphere of activity which so strongly affects the interests of every American family.

Another area which has been of extreme concern to me, to my office, and to consumers throughout my county as well as throughout this nation, is the mobile home industry. Many Americans have, out of economic necessity, been forced in ever-increasing numbers to turn to this less expensive mode of living from conventional housing. They have concomitantly been required to accept the many fire and safety hazards which are inherent in the numerous, presently mass-produced mobile homes throughout this nation, which have been and are being manufactured under the most minimally protective "industry" codes and regulations which can be imagined. The current issues relating to this industry indeed involve the very life or death of the mobile home resident.

In Genesee County, Michigan, alone in the last few months at least 10 persons have died horrible and agonizing deaths in at least 22 mobile home fires. There have also been many other such fires and similar deaths across the state of Michigan in the same time period. The Consumer Protection Division of my office, as a result of these "fire trap" and "tinder box" consumer deaths, has waged an ongoing campaign and investigation to have greater and more protective "life-safety" rules and standards promulgated by the concerned state bodies and regulatory agencies in Michigan over the manufacture and sale of mobile homes in our state. The impact of our efforts has just recently begun to have been felt on the state level and has been reflected in the enactment of both rules and legislation creating somewhat higher but still inadequate "fire-safety" standards for mobile home construction in Michigan.

One of the primary reasons that our efforts and the efforts of other consumer groups have not met with greater success is the extreme and overwhelming industry-dominance and influence within the concerned state agencies, bodies, and *ad hoc* advisory committees which have the responsibility for adopting or enacting mobile home safety standards. This "pro-industry" bias which exists at the state level of government in Michigan has operated to deny all efforts to have the consumer interest fairly and impartially considered at that level in regard to the issue of mobile home safety. There does not exist in Michigan an independent, governmental agency with the technical expertise and resources to match those of the national mobile home manufacturers, of their component manufacturers, or of their respective insurance companies. Thus, our state government in Michigan has been and will be continually presented with a biased and one-sided set of documents, information, statistics, and experimental data which will surely support the desire and ends of the mobile home industry to keep building and safety standards to the bare minimum, notwithstanding the repeated tragedies associated with mobile home living.

Indeed, such a "pro-industry" bias and imbalance of financial and technical resources in regard to this business exists not only on the state level but also on the federal level of government. A gross example of this situation is reflected by recent action on the part of the National Bureau of Standards (N.B.S.) taken in 1973. Last year, the Mobile Home Manufacturers Association, the national trade association of mobile home manufacturers (M.H.M.A.), provided a substantial private grant of money to the N.B.S., a federal agency within the U.S. Department of Commerce, for the purposes of conducting experimental, scientific tests of the fire and flammability characteristics of mobile homes and their component materials. Although it would be presumptuous to believe that the N.B.S. would be at all "pro-industry" biased, either in the conducting of such tests or in the



compilation of the results therefrom because of the fact that the federal agency was in part privately funded by the industry itself, it can safely be assumed that the results of any such governmental testing may, when they are finally made public, clearly remain beneath a cloud of suspicion and doubt.

The public may very well *perceive* that such "official", governmental test results, paid for in part by the private industry which itself was the subject of such testing, necessarily must reflect some inherent bias in favor of the industry whose "gift" made the very tests possible in the first place. Neither the N.B.S. nor any other federal agency charged with the responsibility of vindicating the public interest should ever have to be placed in a position where its actions or published information are inherently "tainted" in the public eye because of any forced reliance upon private industry for necessary funding, either in whole or in part.

The proposed federal Consumer Protection Agency would cure and correct the very appearance of impropriety or bias alluded to above by itself providing necessary funds to other governmental or private agencies for research and testing in areas vitally affecting the consumer interest. The existence of the C.P.A. thus would obviate any need for federal testing agencies to turn to questionable private or industry sources of funding.

The "pro-industry" bias (and even the appearance of such bias) toward business and the interests of industry on the part of concerned governmental agencies, both on the federal and state level, certainly operates to the detriment of the public and the consumer. This bias directly results in the dissemination of misinformation, selective information favorable only to the industry side of a question and inadequate knowledge and understanding for the people. It is my hope that a federal Consumer Protection Agency would tend to at least give some semblance of balance in the resolution of the many important issues which affect the public interest, such as those concerning the mobile home industry in which I have been deeply and personally involved.

In this context, it is extremely relevant that another vital function of the proposed CPA will be to *independently* gather information to carry out its purposes effectively in behalf of the consumer. The CPA will have the authority to conduct and promote research and investigation into all matters which affect the consumer interest. The CPA will be able to publish and inform the public about matters closely connected to the public interest. It will provide *bona fide* information for public dissemination. It will provide such information from a centralized, uniform and authoritative source. It is the lack of just such a source of information that has so severely jeopardized the health, safety and well-being of the American public countless times in the past as a result of the public's uninformed use of dangerous and hazardous goods, among other things.

We are all aware that the Federal government should and must take positive leadership and initiative in the battle to protect our citizens from those forms of crime and improper business conduct which are perhaps the least observable crimes of all. We believe that it is imperative that the Federal government now take positive and immediate action to protect the American consumer.

Proposed Senate Bill 707, which would establish a Federal Consumer Protection Agency (C.P.A.) to represent and advocate the interests of all consumers throughout this nation before all the federal agencies and federal Courts, is a remarkable and laudable vehicle to further the above goals. We strongly urge every member of the U.S. Senate to favorably support, endorse, and vote for the enactment of this Bill into law.

Crimes against the consumer and economic crime are a *national* problem. Prosecutors on the state and local levels by themselves cannot deal with this problem in the most effective terms. National recognition of the problem is an essential precondition to effectively dealing with it on the local level. The proposed legislation would be a fundamental and necessary first step in the ongoing battle which we must wage to protect the American public and its economic welfare. There now exists in this country a strong lack of confidence in the processes of government and the ability of government to protect the individual in those areas where he most needs protection in this day and age of inflationary spirals. It is thus essential that this lack of confidence be dealt with on a firm and direct basis. Certainly, one of the major ways in which the public's confidence in its government can be restored is by the action of the U.S. Congress in creating a federal agency, the only purpose of which will be to directly serve and protect the economic interests of every individual in this nation. A federal Consumer Protection Agency can and must now be made a reality.

Such an agency, would serve and promote many worthwhile protections, goals and needs which are now demanded by the American consumer. The American people desperately need an effective "voice" in the policymaking decisions of the federal government which directly affect them. The establishment of the CPA would merely allow the side of the consumer to be heard. We cannot understand how any federal agency or business could properly object to this simple and basic expression of fundamental fairness.

The proposed CPA under S. 707 would additionally perform other vital functions on behalf of the consumer which we wholeheartedly support. The CPA would further serve as the focal point or "clearinghouse" in the federal government for complaints by consumers. This centralized function, which would further augment the effective access by the consumer to his government, will also certainly tend to enhance the average citizen's confidence in the processes of his government. It will help to restore the public's basic faith and trust in government at every level.

As Chairman of the Economic Crime Committee, and on behalf of the other designated public prosecutors and members of the foremost National Association of Prosecuting Officials in this nation, my colleagues and myself have felt a special and urgent obligation to express to you our unqualified endorsement and approval of the proposed consumer protection agency act as it is now embodied in S. 707.

It is our part as public Officials to help stem the current onslaught of economic crime against the American consumer on the state and local levels. However, this battle cannot be successfully waged merely on our levels. It is essential for the federal government to provide uniform, centralized and authoritative help in this task. The proposed federal Consumer Protection Agency would indeed provide such necessary help and direction. A centralized and integrated response to the plight of the American consumer on the federal level has been desperately needed for a long time. We strongly urge that every Senator respond to this serious plight at this time and endorse the passage of S. 707 into law.

Sincerely yours,

Robert F. Leonard, Chairman, Economic Crime Committee, National District Attorneys' Association, John O'Hara, President, Covington, Ky., Milton Allen, Baltimore, Md., Eugene Gold, Brooklyn, N.Y., Patrick Leahy, Burlington, Vt., Joseph Busch, Los Angeles, Calif., Edward Cosgrove, Buffalo, N.Y., Richard Gerstein, Miami, Fla., Carol Vance, Houston, Tex., John Price, Sacramento, Calif., George Smith, Columbus, Ohio, William Cahn, Mineola, N.Y., Donald Knowles, Omaha, Nebr., Edwin Miller, San Diego, Calif., Christopher Bayley, Seattle, Wash., Keith Sanborn, Wichita, Kans., Dale Tooley, Denver, Colo., Carl Vegari, White Plains, N.Y., Preston Trimble, President Elect, Norman, Okla., Brendan Ryan, St. Louis, Mo., Emmett Fitzpatrick, Philadelphia, Pa., Harry Connick, New Orleans, La., Bernard Carey, Chicago, Ill., Dennis DeConcini, Tucson, Ariz.

Mr. NADER. Thank you, Mr. Chairman.

Next, as to legislative recommendations, the following may be submitted. For white-collar crime to be eradicated, there must be a change of attitude in both local, State, and Federal law enforcement agencies, and in the public. There has to be an emphatic and distinct change in the basic philosophy and thrust of the Nation's laws that pertain to white-collar crime.

There are three general legislative areas that should be examined for their impact on this kind of crime.

The first is the culpability of corporate management. Too often, corporate executives have been able to use the invisible—but presently legal—shield of their corporation to mask their activities.

The second area concerns specific criminal offenses, four of which are of particular importance. And finally and most importantly, the sentencing procedure should be strengthened so that when all other moral, ethical, and economic considerations fail, the severity of sentencing will deter future white-collar crimes.



One, as to corporate management, the lack of accountability in our large corporate and governmental organizations is a failure of our present legal system. In fact, these large bureaucracies have become expert at defusing responsibility and accountability.

It is too easy for top levels of management to pressure employees to commit illegal acts or to participate in illegal activities. No better example of this exists than that of the President's former counsel, Charles Colson.

In a sworn statement, Colson said that President Nixon ordered him to do "whatever has to be done—whatever the cost" to stop leaks of classified information. Colson quoted the President as saying, in effect, "I don't give a damn how it's done." Colson then proceeded to obstruct justice.

Ironically, President Nixon's own proposal to reform the Federal criminal code, which he has submitted to Congress, would make such Machiavellian management an offense. Under proposed section 403 (a)(3) of S. 1400, a person in a supervisory capacity who so defaulted in the supervision of an organization as to permit or contribute to crime would be guilty of a misdemeanor.

The American Bar Association's Section of Corporation, Banking and Business Law has contended that such an offense would make executives reluctant to delegate responsibility. In fact, it would deter managers who exalt results over methods. It would mean that delegation cannot be mindless—that those who delegate in reckless and invidious ways—and this is a standard for the courts to judge and to jury—will share the burden if that delegation results in criminal activity. It would probably lead to other developments.

For instance, the corporation would designate a particular official in the company as the compliance officer and it would tend to focus responsibility. And once a compliance officer is announced, it is quite sure that he or she would have a vested interest to observe the law and would be a countervailing force against any more reckless patterns that might be filtering throughout that corporate structure.

The discovery of many white-collar crimes depends not on police operations, but on whistle-blowers inside a corporation who reveal illegal activities. Such was the case in the Equity Funding and Weis Securities matters.

Under the two proposals to reform the criminal code, persons who retaliate against a whistle-blower would be guilty of a felony. But, S. 1400 unnecessarily limits retaliation to bodily harm.

This virtually exonerates the use of the great corporate economic power against an employee or, in some cases, ignores the power of one corporation against a smaller corporation. This economic power involves firing, demoting, transferring, or reassigning personnel, altering fringe benefits and pension rights and blacklisting employees.

When one corporation informs on the illegal activities of another corporation, say for accepting kickbacks, the informing corporation may be at the economic mercy of the guilty corporation. It should be protected from the loss of business and other economic harm that a larger, more powerful corporation may exert.

But S. 1 does not limit harm to the definition in S. 1400. Instead, harm includes economic injury, which is an absolute necessity.

If people are to be permitted to cultivate their own free conscience, their own form of allegiance to their fellow citizens, they must be

protected from having their professional careers or employment destroyed. Their new ethic, expressed in S. 1, will eventually assure that employees have the right of due process within their organizations.

If carefully protected by law, ethical whistle-blowing can become another of those adaptive, self-implementing mechanisms which mark the relative difference between a free society that relies on free institutions and a closed society that depends on authoritarian institutions.

I would like to add to this point on corporate responsibility, it is more important that the comments here be taken in the context of a portion of the spectrum of recklessness that fit under our proposed revision of the criminal law, that is, it is very important to make sure that there is a standard of recklessness and not any recklessness would involve this kind of criminal enforcement, otherwise you can open the situation up to witch hunting accusations and pursuits that would eventually lead to an inhibition of any process of delegation. So, what we are referring to here obviously is a kind of standard of care and delegating and instructing that can be given the same type of relatively precise judicial content as the standard of reasonableness of care has been given in negligence cases under tort law.

Next, dealing with offenses, while there are literally hundreds of offenses contained in the proposals to reform the Federal criminal code that deserve mention, it is important particularly to endorse three new offenses proposed in S. 1 for inclusion in the criminal code. These are: Environmental Spoliation, Unfair Commercial Practices—Pyramid Selling Schemes and Regulatory Offenses.

The offenses of Environmental Spoliation, proposed in section 2–8F3 of S. 1—but not in S. 1400—would make it a felony to knowingly pollute the water, air or land in violation of a Federal statute or regulation when such violation is gross or the person or corporation manifests a flagrant disregard for the environment.

It might be added here the contrast between despoiling the flag and despoiling our environment, which the flag is supposed to represent, is quite instructive here. You can have mass movements against individuals who despoil the flag and the law can come down very hard, but the critical areas of our human environment, such as poisoning the Mississippi River or contaminating Lake Erie or polluting the air above New York City or smogging the city are not received with that level either of official or public indignation. And that is what I was referring to as the need for a drastic change of attitude. Even flags that are despoiled can be replaced, but it is rather difficult to replace Lake Erie or the Mississippi River. And this is instructive also for the attitude of corporate personnel, who spend a great deal of their time flag-waving and much less of their time trying to limit their corporate defecations into natural environments.

While more specific, narrower definitions should replace the terms "gross" and "flagrant disregard," the thrust and intention of this section is commendable. In some societies violence to the environment is or has been treated more seriously then altercations between individuals.

It is mandatory that our Nation perceive the destruction of our natural resources and our environment in its proper perspective; that we realize that society can survive individual and relatively sporadic instances of bribery and embezzlement, but that the ruination of our environment is a self-destructive and masochistic act; that



society can hopefully transcend the actions of some of its more venal and corrupt members, but for humanity to survive, it must first have an environment—land, air, and water—that can foster and satisfy it—aesthetically, spiritually, and physically.

In your home State of Michigan, Mr. Chairman, the Palisades nuclear plant, run by Michigan's Consumer Power Inc. has been involved in a situation that is now before the Justice Department. According to internal company documents, there was the release of radioactive material into the air on a number of occasions and this release was not reported as required by law to the Atomic Energy Commission. And, of course, radioactive material at those levels do not immediately provoke death and injury and pain and anguish, and they are invisible in their impact, but nevertheless they do increase the risk of cancer and lukemia and genetic damage in future years. And it is this kind of attitude that needs to be given much more strenuous attention by our criminal laws. If the criminal laws come down hard on a situation such as this, the next thing you will see is a very strong compliance officer with internal corporate powers appointed to make sure that it doesn't happen again, that is, external enforcement of the criminal law leads to deterrence in the form of structural reformulations of the locus of responsibility inside the corporation.

One might add that the deterrence of the criminal law is much higher vis-a-vis economic crimes than it is street crimes. Street crimes are often crimes of high emotion or other nonrational behavior or pressure and are less amenable to the deterrent function than crimes of planning, knowledge of forethought, and crimes that are committed by organizations that can do something about their repetition through reorganization and restructuring of executive authority.

Senator HART. Interrupting you there, if I could simply express very strong agreement with that point: We debated around here whether capital punishment is or isn't a deterrent. But, I would doubt if anybody would argue that for the white-collar type, that even 30 days in jail would not be a deterrent. Thirty days in jail really doesn't deter the kid who probably finds the food and comfort of jail better than his home surroundings, the street crime fellow, but 30 days in jail away from his home at Grosse Pointe is a very real deterrent and I am glad you made the point so clearly.

Mr. NADER. I might add to that that there was—well, we will be getting to that point later—but in some hardcore economic crime areas, such as stock thefts, Mr. Chairman, the penalty will have to be considerably greater. As one of the witnesses, who is a convicted criminal in these areas, testified before one of the Senate committees, there are a lot of people he said who would be willing to steal $2 million in stocks for 2 years in jail.

Senator HART. I have read your testimony and I noticed that footnote.

Mr. NADER. The second offense which is necessary to make the Federal Criminal Code a just and reasonably comprehensive law in unfair commercial practices, proposed in S. 1, section 2–8F4. This section is directed to several areas of consumer fraud that have bilked millions of dollars from trusting citizens. Such acts as the adulteration and mislabeling of goods, false advertising, and rigged sports events would be felonies punishable by a year in prison and $100 fine per day.

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But this section does not include another consumer fraud, the pyramid selling scheme, in which the right to sell or distribute a product is sold to persons, who in turn are encouraged to solicit other persons to join the pyramid of distributorships.

The intent is not to sell products—only to sell the rights to distribute them. Markets quickly become saturated with distributors. This is the kind of offense which has brought Glen Turner and William Penn Patrick before the courts.

The former Chairman of the Securities and Exchange Commission, William Casey, has estimated that consumers have lost over $300 million in such schemes. This committee should seriously consider including such schemes in the Federal Criminal Code.

The last offense on which I would like to comment is the regulatory offense of S. 1, section 2–8F6, which would establish uniform penalties for violations of regulatory laws and regulations. S. 1400 contains no comparable section.

Charles Maddock, representing the American Bar Association's section on corporation, banking, and business law, said when this section was first proposed:

> We reject the concept that any activity that is or may be regulated by the government is of such serious import to the public interest that a failure to abide by any regulation, rule, or order issued by anyone in authority in any of these areas (business and economic activity) should be punished as a crime.

There were Federal regulations for safety that affected the Texas Eastern Transmission Corp. storage tank on Staten Island when its explosion killed 40 people.

There were Federal regulations in effect which Georgia-Pacific Corp. allegedly violated when it was indicted for offering sulfuric acid for shipment in railway cars.

There were Federal regulations on drug safety when Abbott Laboratories was indicted for contaminated intravenous solutions. And there were Federal clearances required which Libbey-Owens-Ford allegedly disregarded when in 1970 it shipped bulletproof windows to the Portugal dictatorship in a scheme, as charged by the Federal Government, to give the Portugal military the ability to produce an armored amphibious vehicle after efforts to legitimately purchase them in the United States had failed.

Federal regulations contain safety standards for autos and tires, meat inspection, flammable fabrics, conflicts of interest requirements, prohibitions against deceptive advertising and mislabeling, and mandatory obligations for recordkeeping, and furnishing information.

The penalties for violating these regulations are contingent upon the variations in existing statutes. For there to be some consistency throughout the Government, penalties for violating agency statutes and regulations should span a uniform range.

We shouldn't have a situation, Mr. Chairman, for example, where a willful violation of meat inspection laws would receive a criminal penalty, but a willful violation of auto safety standards would not receive a criminal penalty because of the way the statutes were enacted into law at different periods in our history.

S. 1 would impose such uniformity. Under that bill, statutory penalties would range from 30 days to 6 years imprisonment and fines would range from $500 to $100,000, which itself is very low as a maximum.



Many companies, for example, would hardly be deterred by that level of fine. In the auto safety bill, the maximum is about $400,000. And when you are dealing with violations involving many tens of thousands of defective automobiles, that is a very modest fine, indeed, to a company like General Motors, which grosses $3.3 million an hour, 24 hours a day on the average.

Yet S. 1's regulatory offense section is concerned with only one of the components of criminal conduct—culpability. It ignores the other major component—the proportion of the harm inflicted upon the victim.

For this section of the bill to be effective and comprehensive, it should encompass both culpability and the gradient of harm caused by the violation of the statutes or regulations intended to protect consumers' health, safety, pocketbook and environment. Without such a provision, then, the bill simply equates relatively harmless transgressions with those that have the potential to inflict serious harm and possibly death on entire communities.

### 3. SENTENCING

a. Prison.—Former U.S. Attorney Whitney North Seymour, Jr.'s study of sentencing of white-collar criminals in the Federal court in New York City concluded that:

> The primary objective of deterrence should be focused on those deliberative and willful crimes which might be prevented by prompt and firm detection, prosecution and sentencing, e.g. white-collar crime, extortion, narcotics trafficking * * * In individualizing the sentence imposed for deterrent purposes, the term obviously should be increased where aggravated circumstances are present, and reduced in recognition of special efforts by the defendant to make amends such as voluntary restitution or active cooperation with law enforcement agencies to assist in apprehending and prosecuting other violators.

Our prisons are the shame of our Nation. They are often inhumane and barbaric, antiquated and medieval. There is a tendency in our judicial system to suit the prisoner to the prison, to imprison only those whose impoverished and poorly educated lives reflect the humanitarian impoverishment of America's prisons.

Though prisons were established to remove those people from society who pose a threat to its safety, too often those who pose the greatest threat never see the interior of a prison, except perhaps for brief and relatively luxurious terms in prison farms resembling country clubs.

It is not necessary or even desirable that all convicted criminals languish in jail for lengthy terms. But what is essential if this society is to retain the least semblance of a democracy and the merest facade of an equitable judiciary is that penalties be imposed fairly and indiscriminately to all offenders.

I have never forgotten a penalty imposed by a judge in the early 1950's in Colorado against two Indians who were convicted of stealing two horses. This is in the early 1950's, They were sentenced to 15 years in jail.

For example, in October 1973, Spiro Agnew resigned as Vice President, pleaded nolo contendere before a Maryland court, and was sentenced to a 3-year unsupervised probation and $10,000 fine for evading $13,551 in Federal income taxes on income which was allegedly given to him in bribes.

Yet the day before Agnew's resignation, Charles J. Glasgow, a Sacramento, Calif. draftsman, was sentenced in municipal court to 70 days in jail for fishing without a license and possessing seven striped bass under the legal size limit. He was also given an additional 15 days in prison for failing to appear in court.

And on the very day Agnew resigned, a Rhode Island man was sentenced to 4 months in prison and a $5,000 fine for evading $26,306 in corporate income taxes.

b. As to fines.—Fines, not prison sentences, have been used most frequently as the penalty for white-collar crimes. Yet it is precisely this monetary penalty that causes the least hardship for the white-collar criminal.

In the proposals to reform the Federal Criminal Code, fines have been maintained at a level that may seriously burden an individual, but may be miniscule to a wealthy defendant or a corporation. White-collar crime is profitable, and until the profit is removed from these crimes, they will continue.

Fines for corporations should be set at a percentage of that corporation's profits or assets. Fines have been questioned as inadequate deterrents because the cost is passed along to consumers or shareholders and because it is directed not at the individuals who caused the crime, but at that legal fiction, the corporation.

In fact, however, those individuals may be individually tried and sentenced. And, to the extent that a corporation faces competition in its field, it will not be able to pass along heavy fines to its customers.

Loss of profits will mean less capital for dividends for shareholders, reduction of debt and financing of expansion. This, in turn, decreases the attraction of that corporation's stock and investors will support more law-abiding companies.

This would also, in some cases, prompt shareholder action for new management. The issue here is not the severity of the prison sentences or of fines, but the proportionate equality. For unless penalties for crimes are just, then there is no justice.

c. Turning to corporate quarantine.—Until S. 1 was introduced, it was generally assumed that a corporation was immune from traditional limitations imposed on individuals by imprisonment. However, S. 1, section 1–4A1, provides that if the offender is an organization, its right to engage in interstate or foreign commerce may be suspended for the term authorized for imprisonment of individuals.

This sanction is not unlike that available to the Securities and Exchange Commission's suspension of brokerage firms from doing business for a certain period of time. Such a sanction may be appropriate for a large number of offenses. It overcomes the accounting problem that may accompany fines and it impresses the corporations' shareholders, employees and customers as to the severity of the offense.

However, S. 1 should be amended to protect innocent employees so that their pay or employment may be continued or compensated during the period of suspension. So, too, contracts and obligations of the corporation should be provided for in such a way as to mitigate the effects of suspension on innocent customers and lenders.

In addition to suspension, the legislation should allow a form of public trusteeship to permit continuation of the enterprise if it promises to fulfill certain conditions, much like the present system of probation, under the close government supervision for a period of time. Such



conditions would include reorganizing the board of directors and/or management, temporarily placing a Federal officer on the board to insure future compliance with Federal and State laws, liquidating the company and selling its assets to those with the strongest legal and moral claim to them, divesting certain property or operations, and seizing or recalling property.

In short, just as a company can be thrown into bankruptcy under a trusteeship by creditors, there needs to be a public trusteeship established for seriously repetitive criminal actions. This is very important, because it goes to the core of the institutional sanction that maximizes the application of justice and deterrence. It also keeps the corporation operating so its performance in a criminal sense does not radiate on innocent third parties throughout the country or the economy.

Finally, dealing with restitution and notice, restitution and notice are very important penalties for corporate crime and consumer fraud cases.

Both S. 1 and S. 1400 include restitution as a sanction that the sentencing court can impose in appropriate cases. While the criminal law has seldom attempted to restore losses to individuals, the restitution of money, either in the form of repayments to specific victims, or the lowering of the price of goods or services for a period of time, such as gasoline prices, is an effective sanction and should be enacted.

The history of the criminal law and its avoidance of requiring restitution is a classic reflection of the historic bias of the criminal law in its application almost exclusively towards poor people. Because when you apply the criminal law primarily to poor people, there indeed isn't much to restore by way of unjust enrichment. But when it is applied to wealthier institutions, the additional sanction of requiring restitution of unjust enrichment in addition to penalties would be a very important deterrent indeed. And it would make sure that this kind of corporate crime did not pay.

It is a penalty which can contribute to the re-creation of citizen trust that their Government is actually protecting their pocketbooks and economic security. As Philip Wilson, a confessed international stock swindler, told the Senate Permanent Investigations Subcommittee, "many people would be willing to do 2 years for stealing $2 million." This was stated on September 19, 1973.

The notice sanction both warns consumers of the kinds of frauds being committed and imposes a small penalty by tainting the corporation's reputation. S. 1, section 1–4A1 and S. 1400, section 2004, would require that an offender give appropriate notice of conviction to the person, class of persons or sector of the public affected by the conviction by advertising in designated areas or by designated media for a period of time.

Many consumer frauds and corporate crimes are woefully underreported. Consumers often do not know about various frauds and what can be done to avoid them.

Under this important section, the sentencing courts would be encouraged to order that consumers, shareholders, employees, and the public at large be informed of the activities of corporations they patronize. When appropriate, such notice would require television and newspaper advertisements and clauses in contracts, loans, prospectuses, and other documents.

There are other types of sanctions that are also possible. For instance, William O. Woolridge, the former top enlisted man in the U.S. Army was sentenced for accepting stock in a corporation in exchange for his endorsement of the company to supply Army service clubs. Part of his sentence required him to work for charitable organizations. Not only do such sentences benefit charitable organizations, but they would greatly aid the rehabilitation of the offender.

For example, the president of a coal company convicted of a mine safety health code violation could be ordered to work in his own mine to heighten his personal awareness of the hazards resulting from his actions or inactions.

The proposed revisions of the criminal code already contain a negative sanction that would disqualify professionals and executives from exercising their professional and organizational functions. Such a sanction is valuable, but it should be complemented by an affirmative authority for the courts to order the offender to perform socially useful activity.

It is apparent here that there is a vast unknown quantity of economic crime and political corruption in our society hindering the welfare and growth of the country. Our ability to master the great economic, social, and political challenges of the next quarter century and beyond will depend on our knowledge and understanding of how it is that our commercial and governmental institutions can breed such corruption and such contempt for the rule of law and principles of justice.

This also includes, as the report points out, union-based crimes, which are often also interlocked with either Government or business accessories.

We cannot turn away from seeking this knowledge; too much is at stake: the vitality of the economy, the accountability of the political and legal institutions, and the cords of justice and trust which bind society together.

To tackle this problem, the Congress must establish a National Commission on Economic Crime which will fully document and analyze the scope of white-collar crime; expose where governmental enforcement agencies and business entities and unions are failing in their responsibilities to discover and discourage deceit and illegalities; and recommend to the Nation those actions which must be taken if we are to achieve the dream of the founders of this Republic, "Equal Justice Under Law."

I would also like to note that great caution must be taken that these laws be read or interpreted either specifically or with discernible standards, otherwise there can be a proliferation of ambiguous laws and ambiguous interpretations that would begin encroaching on constitutional liberties and rights. And I think the section is the proposed bills before this committee on criminal coercision raises very serious questions as to the embrace of those prescriptions and the extent to which they intrude and inhibit the expression of constitutional rights. So that we must be, I think, very conscious of the need to establish standards and guidelines and not to permit certain types of political administrations to grieviously misuse the necessary expantion of the concept of the criminal code that must accompany this revision and must bring the law up to date with modern day technology and modern day organizational structure.



Thank you, Mr. Chairman.

Senator HART. Thank you, Mr. Nader, for a very effective presentation. You make no reference to it—and it is conceivable you haven't even thought about it in your anticipation of your appearance here this morning and there is of course no provision for it in either of the bills—but it is a matter of some kind of discussion and it bears on the problem of crime in public office, officeholders criminal activity.

Now, do you have any opinion as to the need or the desirability of an independent special prosecutor?

Mr. NADER. Yes; I think that is a very worthwhile recommendation. The old caution about who guards the guards is very applicable to the Justice Department, which is the chief prosecutor in the executive branch, and I think there needs to be an independent special prosecutor that would focus on political crimes of this nature.

I think it is important that the constitutional issue be confronted; that this special prosecutor can't be too independent of the executive branch, but I think it is a very worthwhile recommendation that was made by the Senate Watergate Committee.

In other countries they have recognized the need for an outsider to watch the insiders in the concept of the ombudsman. In Sweden, for example, the Ombudsman can take the lead in prosecuting judges who are involved in corrpution.

Senator HART. Thank you. Now you reminded Senator Hruska and me that the antitrust subcommittee has on occasions listened to and made comment about boardroom crime and the economic damage it does, and so on. You suggest that this isn't a sporadic thing. It is sort of epidemic, and I agree.

Several years ago, in a setting like this, you and I had a colloquy about making at least some of the antiturst offenses felonies, rather than misdemeanors and on that occasion you suggested that a felony status be given to per se coldturkey per se antitrust violations, and that is, of course, I think, a glaring example of the disparity in the treatment of street crime and boardroom crime.

Now, I notice in your statement today that you do not return to that suggestion. You do not comment with respect to it.

I want to raise it with you again, because I understand that this subcommittee has heard from certain antitrust law experts that the deterrent effect of a felony conviction is not really significant in efforts to reduce anticompetitive behavior.

Do you have any thoughts about handling per se antitrust violations now?

Mr. NADER. Again we are referring to the criteria of the gravity of the offense as well as the scope of the damage done to the victims. I can't see how observers can say that the dispatch for 30 days of General Electric and Westinghouse executives to jail in the early 1960's was a deterrent and then say that the imposition of a felony for such serious crimes would not be an additional deterrent.

And I think it is the general concensus in the antitrust bar that the General Electric sentences were a deterrent that radiated throughout the business world. I see no justification on the basis of equity as to why serious per se antitrust violations, knowlingly and willfully committed, are not subjected to the classification of a felony. You have other crimes that are misdemeanors and felonies.

I think there should be categories applicable here, because indeed there are.

Some antitrust crimes are far, far more serious than others and they should be treated accordingly.

Senator HART. You mentioned the sentencing of the former Vice President, Mr. Agnew. At the time he entered his nolo plea, there was some confusion in the public's mind as to exactly what that meant. And indeed I have listened to lawyers over the years trying to explain what a nolo plea means.

But have you given any thought as to the need for keeping the nolo contendere plea available in the Federal Criminal Code? It is a plea that I have never noticed used or made available to the disadvantaged of our society. It is a sort of a gentleman's guilty plea.

Do you think we really ought to hang on to that? I know there are prosecutorial advantages on occasion of having it, but on balance, do you think it is desirable?

Mr. NADER. Well, I think judges should be much stricter in their interpretation of it. For example, the judge in the Agnew case said he interprets the nolo plea to be equivalent to a guilty plea. And if that were so, he shouldn't have accepted the nolo plea. I think they should accept the nolo plea when the judges really believe that it is merited or that it is accordance with the particular facts of the case. But to say that we think it is equivalent to a guilty plea and let it stand as a nolo plea is a terribly confusing thing to the public.

For example, this issue, which would have been decided quite clearly, is now a little fuzzy, because there wasn't that clear cut determination that the evidence certainly warranted.

I think we are going to see more criminal lawyers use that nolo plea from now on for their underprivileged clients, however, as a result. The problem with our system of law, Mr. Chairman, is that we hold our politicians up to the lowest standards. And the higher the politicians, the lower the standard we hold them up to. So it is not surprising that they meet them.

For instance, it has been noted——

Senator HART. I would hope that you are not anticipating events of the next few months?

Mr. NADER. Well, as I was going to say, it has been noted that there is no organization in our country, whether it is a university or a corporation or even a union, where a dozen or more of the closest associates of the head of the operation were convicted or sentenced with that chief still staying in office. It just would not have occurred. And obviously, it would not have occurred in a parlimentary system, such as in Canada or Great Britian.

But requiring just an enormous amount of evidence, and tolerating an enormous amount of obstruction of delivering this evidence to the deliberating bodies, we are in effect saying that we are holding the highest officeholder in the land up to the lowest standards of performance.

Senator HART. Of course, the temptation to react and respond is enormous, but for obvious reasons, you will understand I shall resist the temptation.

Mr. NADER. Yes. I want to point out also, Mr. Chairman, that the ABA put out a press letter 2 days ago which was in the name of the incoming President of the American Bar Association, noting that one



of his main goals through the coming year of his tenure is to make sure that law students learn about legal ethics at law school.

And there is an expression of concern by this gentleman about the state of affairs with so many lawyers involved in so much political corruption, including the Watergate situation. And when I read that press release, it occurred to me that there were times in the past when people couldn't get the American Bar Association interested at all in white-collar crimes or political crimes.

This is an example of a major institution in our country whose members know full well what has been going on for the last 30 years, but who have now taken an official stand of concern only after others brought these crimes to the surface. And one way to judge an institution's sincerity is basically to classify its performance in time and ask the question: where were you when you could have known about it and you swept it under the rug?

The medical societies began to be concerned with nuitrition in some of their statements after the basic hunger prevalent in this country was disclosed by a few doctors working outside of organized medicine, as well as other people who were part of that task force. I think this holds true for many legislative bodies too.

The legislatures at the State level have done virtually zero in investigating procurement crimes at the State level. Some of them have never even bothered to write a letter asking about some of these irregularities. And so, when we ask ourselves, well, is Watergate and other situations going to bring about a better legal and political situation, the question is to ask derivatively, are these institutions that now are no longer uninformed and these institutions that should have informed themselves years ago, because they had the power and the leverage to do so, are they changing? And if they are not, then the Watergate situation may be a blot on the Nation's history, but it is going to change it very little.

For instance, just to amplify this, if these institutions were really responding, the moment the corruption involving engineers and architects and procurements contracts erupted in Maryland, then there should have been calls for inquiries by State legislatures and attorneys general in every State in the United States, because there is no secret to those who operate in the daily halls of economic and political life that these things go on all over the country.

St. Louis or Boston is not different than Baltimore or Chicago. And these calls have not been made, which indicates that basically there is an enormous reluctance, largely because of complicity or fear of the established institutions in our country both political and economic, to rout out economic crimes.

Senator HART. It is part of a comment that parallels what I have read occasionally as an explanation for judges' positions for sentencing to jail a disreputable defendant and going very gently on the defendant who looks like him, and that is part of the problem. There is just no doubt about it.

Mr. NADER. I wouldn't underestimate——

Senator HART. We do tend to understand why somebody is in trouble if that somebody is pretty much like me and we are quick to make harsh judgments about the fellow who doesn't look like me. That is part of this problem.

Well, I would like to add to the record at this point two very brief newspaper clippings. Usually it is generally assumed and quite correctly, that staff always does this thing for a Senator but I insist that these two I found myself and pulled out myself, hoping someday I could use them and you have given me the opportunity. Reading your testimony last night, I remembered them.

Each was printed in March of this year. It goes to the point of disparity of treatment. The first is a UPI story that appeared in the Detroit Free Press, March 30, and the caption is Jailed Co-ed To Be Set Free" and it states that:

Eve Pearson, the former college student sentenced to a year in prison for stealing a $5 rocking chair, will be released Monday, the Pardons and Parole Board said Friday.

It goes on to say that she spent three months in jail. And states:

Miss Pearson of Forest Park and Cathy Hess, also 20, were given one-year terms for taking the chair from an abandoned house near the Carrollton campus of West Georgia College where they attended classes.

The other one is dated the 4th of March this year from the Washington Star, and it is just one paragraph:

"Welfare Mother Jailed." And it states:

A mother of six children in Tallahasee has been sent to jail for ten days for collecting a $48 food stamp overpayment. The county judge in the case sentenced Catherine Clark, 43, to jail for failing to report income from one of several jobs that she holds as a maid—parenthetically, that would suggest that she is not one of those lazy ones—one of the families that employed her repaid the $48, but appeals for her release have failed. The judge said he could have sentenced her to a year in jail and a $1,000 fine.

[The newspaper article dated March 30, 1974, and the newspaper dated March 4, 1974, follow:]

[From the Free Press, Mar. 30, 1974]

JAILED COED, 20, TO BE SET FREE

ATLANTA—(UPI)—Eve Pearson, the former college student sentenced to a year in prison for stealing a $5 rocking chair, will be released Monday, the State Pardons and Paroles Board said Friday.

A board spokesman said Miss Pearson, 20, would be among 33 inmates of the women's prison at Millegeville to be freed under the state's early release program for good behavior.

She has served more than three months of her sentence.

Earlier this week, Fulton County Superior Court Judge G. Ernest Tidwell turned down a request for another review of her sentence. But Board Chairman Cecil McCall had said previously that the board would be reviewing the sentence again about April 1.

Miss Pearson of Forest Park and Cathy Hess, also 20, were given one-year terms for taking the chair from an abandoned house near the Carrollton campus of West Georgia College where they attended classes.

Miss Hess has appealed her conviction and remained free on bond.

[From the Washington Star-News, Mar. 4, 1974]

WELFARE MOTHER JAILED

A mother of six children in Tallahassee has been sent to jail for 10 days for collecting a $48 food stamp overpayment. The county judge in the case sentenced Catherine Clark, 43, to jail for failing to report income from one of several jobs she holds as a maid. One of the families that employs her repaid the $48, but appeals for her release have failed. The judge said he could have sentenced her to a year in jail and a $1,000 fine.



Senator HART. As you say, unless we can get some equity in the sentencing system, there is going to be an awful lot of people who regard this system as a sort of fraud.

Senator Hruska?

Senator HRUSKA. Thank you, Mr. Chairman.

This matter of sentencing and the instances that Senator Hart just cited are distressing. I know all of us are distressed about it.

In your statement, Mr. Nader, you have commented upon the unevenness of sentences. Many luring examples can be given either by being too lenient or too severe.

Now, what would you think, Mr. Nader, of a statutory provision that there would be an appellate review of sentences? We have had instances where perhaps even in Maine there would be the forging of a Government grant or check or postal money order, and the sentence would be 18 months. Then maybe in Oregon the sentence for the same offense would be 30 days without any circumstances in the forgery case being different. That is, neither of them have starving children at home or neither of them had to get medicine for their wives. The circumstances were the same.

And, of course, in that event, it doesn't seem right. There is a feeling, and a justified feeling on the part of many prisoners, that it isn't fair. When they get to prison, they say: "What are you here for?" and he answers "Well, car stealing." And they ask: "How much?" And he says: "18 months."

He asks: "How much did you get?" And the other prisoner says: "I got 5 years."

So what would you think of a system whereby sentences could be appealed from the trial judge? Right now there is no appeal in the Federal court system.

Mr. NADER. I think there should be an appellate process. One of the most awesome powers our legal system accords anybody is the power accorded to a judge to sentence people almost unfettered by any standards. And the ability of the judge to sentence somebody to 15 years in jail when another judge would sentence somebody to a year for the same type of offense is prima facie the argument for appellate review.

I think if uniformity is to be an objective partially obtained, it has to be obtained at an appellate level where these differences can be discerned and modified. You know, for years Professors Sheldon and Eleanor Gluck of the Harvard Law School have been talking about the sentencing disparity going back to the 1930's when they began their studies in the criminal law.

I know of almost nothing in the United States that has been so recurrently exposed and deplored as inequitable sentencing, but yet so little has been done about it. Next to migrant workers who are the object of hundreds of sympathetic newspaper editorials, I know of nothing that has been so uniformly denounced and about so little has been done in the last 40 years.

Senator HRUSKA. Research we have made on this subject indicates that the U.S. Federal jurisdiction is the only major court jurisdiction in a major country in the world that does not have an appellate review of sentencing. The trial judge is first and last in that regard.

This Brown report does include the recommendation and the endorsement of the principle of appellate review. And certainly in my book I hope we can get the job done, Mr. Nader.

At page 8 of your statement you brought attention to section 1324 of S. 1400 as being deficient because it restricts the retaliation against informants to retaliation by force. There isn't any restriction with reference to economic loss or injury and so on.

Previous witnesses and the students and the people engaged in redrafting S. 1 and S. 1400 have come across that deficiency and here is the language they are proposing, I ask, would it, in your judgment, serve the purpose? It would make it an offense for a person:

"To subject another person to economic loss or injury to his business or profession" because of any information he may have given the law enforcement officers and so on.

Would that language be sufficient in your judgment?

Mr. NADER. No. Because I would want a more strict standard. I would like a more elaborated and strict standard to cover intent, because such subjection of economic pressure might be inadvertent. This is why I attach my comments at the end of my testimony that we have to be very careful that these provisions are not written too vaguely, because they can be abused in the other direction, that is, to so inhibit people from effecting their own rights and authorities that the society would suffer as a result.

Senator HRUSKA. The exact language of the markup of that section is:

> A person is guilty of an offense if he subjects another person to economic loss or injury to his business or profession because of any matter described in subparagraphs (a) or (b) of paragraph 1.

And, of course, that relates to the giving of information to a law enforcement officer and so on.

I am sure that intent would be in there. I don't know how much more leverage one can get than to say subjecting a person to economic loss or injury. In other statutes, for example in the civil rights statutes, we find it in there. And I think that language was probably borrowed from other statutes which have been used for some time.

Mr. NADER. For example, it might be appropriate to use the word "knowingly."

Mr. HRUSKA. Knowingly? Well it can be. We debated that long and earnestly in consideration of the Brown Commission Report, and there were those who held—and some of them came from Harvard as you did—that "knowingly" was necessary, and some held that "knowingly" need not be there because that is part of the crime. And if it is inadvertent or an unintended act, perhaps unknowingly inflicted, then it wouldn't be considered a crime.

Some argued that when there was such strong feeling one way or the other that we put it in, and then we would be safe both ways.

You did go to Harvard?

Mr. NADER. Yes.

Senator HRUSKA. You graduated from Harvard Law School? That qualifies you for the Supreme Court, doesn't it?

Mr. NADER. Not under this administration. [Laughter.]

Senator HRUSKA. How long have you practiced law, Mr. Nader?

Mr. NADER. About 3 years, in the traditional sense.



Senator HRUSKA. Did you engage in any criminal practice; the defense or prosecution of cases?

Mr. NADER. No, with few exceptions, nothing other than small misdemeanors.

Senator HRUSKA. You proposed an increase in fine levels of an organization and you also suggest that fines should be set at a percentage of profits of an organization. S. 1400 provides for a $100,000 maximum for A, B, and C felonies, $50,000 for a D felony, $25,000 and then $10,000 for a misdemeanor. What would you think about raising the fine levels for an organization to a higher amount of say $500,000 for a felony or $100,000 for a misdemeanor and $10,000 for an infraction?

Mr. NADER. I don't think that is the way to go, Senator Hruska. First of all you have still a serious problem of disparity between corporations. And while this may be a very serious penalty for many small businesses, it doesn't have that much effect on many of the larger companies where the fine is on the institution.

There is also, I think something to be said in that area for allowing judicial discretion subject to appellate review to make the appropriate judgment. I am not in favor, in other words, of maximum financial penalties when they can be applied to institutions.

Senator HRUSKA. Well, your answer is kind of disappointing to me because I have been a cosponsor of a bill that would raise the penalties that way. Senator Hart introduced it and I am a cosponsor.

Mr. NADER. Well, in lieu of nothing——

Senator HRUSKA. So far we have failed in persuading the Congress that we had merit in our proposal that has been pending now for several years.

Mr. NADER. In lieu of nothing else, it is obviously preferable to have a half a million dollar fine in the antitrust laws than a $50,000 fine. But if I were to suggest what would be the optimum approach, it would be without a statutory limit.

Senator HRUSKA. I do not believe, and, in fact I know, that the bill that we introduced did not say that this is the sole and only penalty, because it included imprisonment as well as other penalties.

In regard to your point about the absence of an environmental spoilation provision in S. 1400, that is, a provision making it a felony to knowingly pollute water, land, air and so on, I should note that while there is not a provision by that name in the bill there is a provision in S. 1400 which covers that type of thing. It is section 1615, entitled "Reckless Endangerment." In addition to that provision, of course, the Clean Air Act and other environmental provisions are carried forward in their existing form in the conforming amendments part of the bill.

This is not the only instance in which that is done. In many statutes regulatory in character, there are specific penalties carried forward not in the substantive part of title 18 but in the conforming amendments to other titles.

There is a reference in the Clean Air Act, for example, that it will be punishable according to a certain grade, depending upon the conduct proscribed.

I thought that I would call that to your attention so that you would know that the matter is taken care of and it is considered very, very seriously.

Mr. NADER. I think the importance of my suggestion lies in the need to give ever more fundamental recognition to environmental destruction.

For example, there have been recommendations in law reviews to have any future amendments or consitutional conventions at the State level include environmental rights in the body of the State constitutions. I think that there is something to be said, Senator, for recognizing certain rights in more basic legal documents.

Even though there may be a statute for air and water pollution, something is to be said for recognizing it in the Federal Criminal Code specifically, and something is to be said for recognizing it in the constitutional documents.

I think our Founding Fathers would have recognized it in the U.S. Constitution had they been exposed to such level of environmental pollution.

Senator HRUSKA. Short of a constitutional provision, such conduct can be proscribed in a statute just as effectively. Here is the Clean Air Act and it says that whoever violates provisions of this act will be punished thus and so. This is also an appropriate place for such a statute.

Mr. NADER. Yes, that certainly is and I think this is as well.

Senator HRUSKA. Now, as to the liability of an organization—well, first, as I understand it, you support the provisions which make an organization criminally liable for the acts of its agents. That is true, isn't it?

Mr. NADER. Yes, under obvious standards.

Senator HRUSKA. Section 402 of S. 1400 does that by making an organization liable for the acts of its agents if the acts occurred in the performance of matters within the scope of the agents' actual implied or apparent authority.

Under this provision the organization would be liable for the acts, even if there was not any expressed authorization or even if the acts were contrary to the instructions.

Do you think this provision is sound and advisable?

Mr. NADER. This is 402?

Senator HRUSKA. I believe it is 402. Yes, section 402 of S. 1400.

Mr. NADER. Yes.

Senator HRUSKA. It is pretty far reaching, isn't it?

Mr. NADER. Yes, it is quite expandable. I wouldn't write it exactly that way, but it deals with a very critical problem of hierarchial organizations run by people who escape accountability, simply because they are remote in time and place from the actual commission of the crime, even though they might have approved the general policy and refused to get a feedback on the operation over time from their subordinates and looked the other way.

Senator HRUSKA. Now, an organization is defined in both bills. S. 1400 defines an organization as a legal entity including a corporation, company, association, firm, partnership, joint stock company, foundation, institution, union, club, church, and any other groups of persons organized for any purpose. It does not include an entity of organized government or government agents, however.

What kind of a group have you, Mr. Nader, in your public interest group? What do you call it?

Mr. NADER. We call it Public Citizen.



Senator HRUSKA. Is that a corporation?

Mr. NADER. Yes, a nonprofit organization.

Senator HRUSKA. So you would fall within that group?

Mr. NADER. Yes, but the Senate wouldn't.

Senator HRUSKA. Well, this provision has distressed many people because they foresee difficulties, for example, where a union will throw a picket line and they are told to picket according to the law, and behave themselves and not to injure anybody or damage property. But sometimes the picketers get a little overzealous and they tip cars over and break the windshields.

Under this section it would appear that the union could be held liable, doesn't it?

Mr. NADER. Yes. My problem with this section is that it excludes Government agencies. And in our testimony, for example, the city of Peekskill, N.Y., for instance, violated the pollution laws as a city and was subject to a felony for prosecution.

Of course, there are civil rights violations that can be engaged in by Government agencies. That is why I think that, if I am correct, I think that S. 1 includes the Government agencies under their definitions.

Senator HRUSKA. Pardon?

Mr. NADER. I think S. 1 includes "Government agency" under the definition of "organization," while S. 1400 does not.

Senator HRUSKA. The final words of this section are: "It does not include an entity organized as or by a Government agency for the execution of a Government program."

If it is a Government program that is being executed, then the agency, as an entity, would be excluded from liability. They are dealt with in a different way.

Mr. NADER. Yes, and I fail to see the reason for the exclusion.

Senator HRUSKA. But you don't think that that provision is unduly severe or that it is capable of abuse and perhaps involves people who issue these instructions from union headquarters and then find themselves in trouble and maybe on the way to jail?

Mr. NADER. It is capable of abuse. But that is why there needs to be two safeguards. One is to write the language as precisely as possible without ending up in a 200-page document.

Secondly, the second is for the institution to begin focusing compliance responsibility in specific hands in the corporation or other institution so that there develops a vested interest in compliance inside the corporation rather than a defused interest in compliance.

Senator HRUSKA. Well, what about the union officials? They get together and say "Boys, we are going to picket. There is going to be a truckers' strike." They say "We are not going to haul any more goods until we get better conditions for driving, more gas and so on." The union officials send these people out and some, as I say, sometimes become very excited stationing themselves on overpasses over superhighways and arming themselves with highpowered rifles with telescopic lenses, shooting at the people who were driving the big trucks.

Now what supervision is there that could be exercised by the president, the vice president or the strike council or anyone else in the union to contain such behavior?

Mr. NADER. Well, first, if we can speak through the view of a union counsel here, the first thing the union would do would be to issue written instruction to picketers, telling them what they can do and what they can't do and what is outside the scope of their employment.

You see there would be a whole defense prospect built in in anticipation of possible violation of section 402.

Now, if they send their people out six times and each time there is violence such as you describe, the law enforcement officials could, in effect, impute an implied ratification of that kind of violence. So, in contrast to that, the union would be under a stricter obligation after it happened the first time to make sure that it doesn't happen again.

All in all, what would happen is that the heads of unions would become much more concerned about what their people are doing out on the picket lines as a result of this kind of action. This would be true for heads of corporations as well.

Senator HRUSKA. Well, the way I read this statute, Mr. Nader, it doesn't matter whether the act is authorized. Certainly no union would authorize one of its pickets to arm themselves with rifles and shoot. But if it is within the scope of his area and he does something wrong—even if it is against instructions given—there is liability. That is the rule in corporation law, too. They send salesmen out and the salesmen gather together in a motel someplace from different companies. They say "Now boys, we are going to divide this territory and we are going to hold the prices at a certain level and all of us don't have to work so hard and we make more money."

Now, that is what you call dividing the market and regulating prices. Even if the sales manager sends them out and says "Don't you do anything like that," if they go ahead and do it, he is liable. It is within the scope of his duty to sell goods, and that is what he is out there trying to do in his own little way.

Mr. NADER. Mr. Downey has a comment on that.

Mr. DOWNEY. As I understand it from doing some research on these sections, both proposals S. 1 and S. 1400 are not that radical a change from existing principles applied in criminal law as far as conduct on behalf of organizations.

I think too that it should be stated that these distinctions will be left, as they are now, to the sense of the prosecutors, judge, and jury to determine, in any particular factual situation, whether the attempt made by the supervisory officer to prohibit any illegal conduct or to prevent any recurrence of illegal acts is sufficient enough to remove any liability from him.

I think this is how it is handled presently and I think it just has to depend on the facts of each case to determine when the supervisory officer would be liable for offense.

Senator HRUSKA. Yes, there is that factor, taken into consideration in prosecutorial processes.

There is a tendency—and I am sure that it is a fair tendency—that if there is removal, for example, of an official from the scene—there is no direct contact, no association. Whether it is a corporation official, a church official, or union official, it doesn't make any difference.



But, if he is stationed in San Francisco and something happened around in Pittsburgh, the fact that he is not present doesn't make him immune from liability.

Isn't that a situation that would be covered by the thought you just expressed?

Mr. DOWNEY. Again, I think it would depend on the facts of each case and that would be explored by the prosecutor and by the court at trial. But I think in a number of situations, responsibility is more tenuous than in others. So that we can't contend that in some cases delegation is made with the intent to benefit the organization or the supervisory officer.

I just think, in other words, that it depends on the facts of each case. And I think this language in S. 1 and S. 1400, restating, if I read it correctly, the current state of the law, do not work that great a change and I haven't been aware of the particular abuses as we were compiling this report.

As we compiled the report, we recorded corporations and presidents and labor unions and directors and things like that who were indicted and in no case did it particularly seem that the connection between the supervisory officer and the commission of a crime was such that a court dismissed the prosecution against the supervisory or even where that was that much of an issue in the reports that we had.

Senator HRUSKA. Of course, even in the example I gave of a union official in San Francisco, if there was a telephonic communication from him saying "Boys, it would be helpful if you could use a little rough-house stuff" and there were tapes made of that—and it is fashionable to use tapes—and that was introduced in evidence, maybe he would be connected with the crime because there was such a telephonic call, regardless of the geographic distance.

Mr. DOWNEY. Well, I would imagine there that the principles of accomplice viability apply in such situations.

Senator HRUSKA. Now, Mr. Nader, on page 15 you cite S. 1400, section 2004. Would you mind if I called to your attention the fact that it is 3004? But do not reprimand your secretary too much about it. It might have been late Friday afternoon when she slipped and punched the wrong keys. It is 3004.

That is all the questions that I have, Senator Hart.

Senator HART. Mr. Summitt?

Mr. SUMMITT. No questions.

Senator HART. I did not order printed in the record, but should, the Public Citizen's Staff Report identified in Mr. Nader's testimony and prepared by Mr. Downey, and Mr. Nader's complete statement.

[The full testimony of Mr. Ralph Nader and the Public Citizens Staff Report follows:]

STATEMENT BY RALPH NADER ON FEDERAL CRIMINAL CODE REFORM—(S. 1 AND S. 1400)

Mr. Chairman, thank you for your invitation to comment today on aspects of S. 1. and S. 1400, the proposals for the reform of the Federal criminal code. Crime in the United States, like the moon, has its obvious side. But like its lunar counterpart, crime also has its dark side—the overworld exploration of which has only just begun. Watergate and other recent scandals have forced the dark side into public visibility for all to see. This dark side of crime is that specialty of government officials and corporations, of genteel accountants and high-powered executives formerly called white-collar crime.

Attached to this testimony for the committee is a *Report on White-Collar Crime, 1973–1974* [1], prepared by the Public Citizen to shed more light on this hidden side of crime. It describes cases that involve over 1,000 individuals, 150 corporations, 168 government employees, 160 corporate executives, 40 stockbrokers, and scores of politicians and lawyers who engage in or are alleged to have engaged in white-collar crimes during 1973 and the first half of 1974. Among the defendants that were either convicted or sentenced were:

a former Vice President of the United States;
a former Attorney General of the United States;
a former United States Senator;
two members of the U.S. House of Representatives;
a former United States Court of Appeals judge;
four former White House aides;
American Airlines;
Gulf Oil;
Minnesota, Mining and Manufacturing Company;
Goodyear, Tire and Rubber Company;
American Voting Machines Corporation.

Numerous others have been indicted for white-collar crimes and are awaiting trial.

These crimes—a severely limited sample of the apprehended white-collar crimes in this period—impose a severe cost on the citizens of the United States. Some 30% of them are conservatively estimated to cost the victims four billion dollars,[2] four times the national loss from larceny, burglary and theft, including auto theft as reported by the FBI's Uniform Crime Reports for 1972. Other, more comprehensive, estimates of the cost of corporate crimes and consumer frauds range from a low of $40 billion annually by the 1967 President's Commission on Law Enforcement and Administration of Justice to $200 billion by Senator Philip Hart (D–Mich).[3] The comparisons with street crime in any category are dramatic. Newspapers and television highlight bank robberies as major events, yet the white-collar criminal inside the bank through fraud and embezzlement took six times more money in fiscal year 1973 than did the hold-up man.[4]

The *Report* focuses on the extent, nature and responsibility for white-collar crimes. It provides a factual base for legislative recommendations offered later in this testimony concerning the role of corporate management in the commission of offenses and the subsequent role of persons who blow the whistle on corporate misdeeds; the need for the enactment of prohibitions against various offenses such as environmental spoliation; and finally the development of more effective sanctions to help deter white collar crime instead of the present system which imposes only the slightest obstacles to the perpetuation and success of white-collar crime.

The *Report* covers four areas of white-collar crime—stock frauds, consumer frauds, official corruption and corporate crime. Each has a unique form, occasion and methodology. But underlying each type is a simple fact—the victims are

[1] The Report is a compilation of violations against which the law enforcement process have moved and which has been reported in three major newspapers, the *New York Times*, the *Washington Post* and the *Wall Street Journal*. Limited case study information was supplied by questionnaire responses from U.S. Attorneys, State Attorneys-General, and Law Enforcement Assistance Administration.

[2] This estimate is limited to those matters to which either the law enforcement agency or investigative reporters assigned a cost. Some of the most costly crimes had no dollar cost estimate; only one of the thirteen antitrust cases in the Report and Appendix contains a cost estimate. For other categories, such as auto repair and land frauds, no estimate was available although it is reasonable to assume that these frauds cost millions of dollars yearly.

[3] The Chamber of Commerce 1974 report "White-Collar Crime" said that the dollar impact of white-collar crime is certainly not less than $40 billion per year, excluding the costs of price fixing and industrial espionage. Senator Hart's estimate was made in a speech before the New York Consumer Assembly, New York City, on March 7, 1970 and reflects consumer abuses that are considered fraudulent, even if not prosecuted in the criminal courts. For example, a Department of Health, Education and Welfare, Office of Consumer Affairs Study "Consumer Auto Repair Problems, of June 1974" documents an "overwhelming increase in consumer complaints" on auto repair service received by State Consumer offices. The 36 states which cited specific complaint figures estimated that 62% to 100% of the complaints were valid. Yet prosecutions for auto repair fraud remain completely out of proportion to their frequency. In August of 1972, the Center for Auto Safety released a report showing that General Motors acknowledged a serious steering failure in all 1959 and 1960 Cadillacs, in the pitman arm. The Center, concluding that GM has chosen not to replace the weak steering arms in spite of the considerable risk of injury involved, has made repeated requests that the Department of Justice institute criminal proceedings against GM for conspiring to defraud the government by hiding the safety defect. The requests have been denied. (See, "The Recall That Never Was", Center for Auto Safety, August 1972.)

[4] In fiscal year 1973, $135.6 million was lost in bank frauds and embezzlements while $22 million was lost in robberies. Frauds and embezzlements have increased 313% since 1969, while bank robberies have increased 12%. See Hearings, Department of State, Justice and Commerce, the Judiciary and Related Agencies Appropriations for 1975, Part I, Appropriations Committee, House of Representatives, 93d Congress, 2d Session at p. 554, 559.



honest taxpayers, decent businessmen, consumers and the poor. Because of sophisticated duplicity and insulated predations, these victims lose their money, their health, and their trust in our political and economic institutions to criminal operators who hold positions of power in government, law and business.

Ten major conclusions proceed from this *Report:*

1. During the period covered by the report the United States experienced a significant number of serious crimes which are undermining this country's basic economic institutions and which have produced severe economic consequences. Examples include the failure of S. Arnholt Smith's U.S. National Bank, of Weis Securities and Equity Funding Life Insurance Company. These crimes have weakened the confidence of consumers in the business and financial community.

2. It has been revealed that the political institutions of the country, be they political parties, state, local or federal governments, have been the instruments for high level and widespread crimes. The Watergate scandals exemplify political corruption at the highest levels of government, but they have not been unique. Scandals have also pervaded the Congress, state governments (New Jersey and Maryland), and local governments (New York and Chicago.)

3. It is evident that crimes affecting our economic institutions are often closely interwoven with the corruption of government officials, such as documented by the Agnew and Queens (N.Y.) District Attorney Mackell cases and as alleged in several other cases mentioned in the *Report.*

4. Evidence exists that alleged underworld crime figures, in addition to their involvement with narcotics, gambling and other offenses, are becoming increasingly involved in overworld crimes, with the collaboration of insiders, dealing in stolen securities and stock frauds affecting economic institutions.

5. The conclusions of earlier white-collar crime studies, notably that of sociologist Edwin Sutherland, that white-collar criminals exhibit a high rate of recidivism, are supported by the *Report.* Moreover, the eighteen-month period covered by the Report shows that this recidivism is true not only for individuals but also for major corporations, such as Diamond International which pleaded guilty to an illegal campaign contribution and was indicted for price fixing paper labels as well.

6. In a number of cases, the penalty imposed on white-collar criminals in proportion to the gravity of their offense, as opposed to the penalty imposed on street criminals in proportion to the gravity of their offense, is relatively lenient. Such leniency is due in part to statutory limits, and in part to judicial preferences for powerful, respectable white-collar defendants.

7. The business community has shown itself either incapable or unwilling to police its own ranks or to aid law enforcement agencies in the detection and prosecution of white-collar crime. This is evident in the *Report's* description of various stolen stock cases and the Weis Securities case.

8. Law enforcement agencies devote meager resources to the investigation and prosecution of white-collar crime in relation to that expended on street crime. The Department of Justice's legal activities budget for fiscal year 1974 showed that the tax, antitrust and consumer protection activities constituted less than 15% of the total legal activities, manpower and budget.

9. Increased manpower and greater budgets for law enforcement agencies to investigate and prosecute white-collar crime would be a productive investment in our economic and political institutions. It would reduce the increasing public resentment at two standards of justice, one for the powerful and one for the powerless, and reduce the spirit of lawlessness pervading the ranks of the wealthy and powerful. As the National Advisory Commission on Standards and Goals for Criminal Justice has stated.

> the . . . robber . . . burglar and the murderer know that their crimes are pale in comparison with the larger criminality 'within the system' . . . As long as official corruption exists, the war against crime will be perceived by many as a war of the powerful against the powerless; law and order will be just a hypocritical rallying cry, and 'equal justice' will be an empty phrase.

The lack of information and understanding of white-collar crime constitutes a great obstacle to its eventual prosecution and elimination. Even though the Federal government, including the Law Enforcement Assistance Administration, spent over $70 million in 1973 for crime research and statistics, there has yet to be an official analysis of the corporate crimes, consumer frauds and official corruption that are devastating the country's economy and bringing its political institutions to the brink of ruin. Our survey of U.S. Attorneys and State Attorneys-General verified that only a few of these officials maintain any useful data on white-collar crime.

## LEGISLATIVE RECOMMENDATIONS

For white-collar crime to be eradicated, there must be a change of attitude in both local, state and federal law enforcement agencies, and in the public. There has to be an emphatic and distinct change in the basic philosophy and thrust of the nation's laws that pertain to white-collar crime.

There are three general legislative areas that should be examined for their impact on this kind of crime. The first is the culpability of corporate management. Too often, corporate executives have been able to use the invisible—but presently legal—shield of their corporation to mask their activities.

The second area concerns specific criminal offenses, four of which are of particular importance here. And finally and most importantly, the sentencing procedure should be strengthened so that when all other moral, ethical and economic considerations fail, the severity of sentencing will deter future white-collar crimes.

### 1. CORPORATE MANAGEMENT

The lack of accountability in our large corporate and governmental organizations is a failure of our present legal system. It is too easy for top levels of management to pressure employees to commit illegal acts or to participate in illegal activities. No Better example of this exists than that of the President's former counsel, Charles Colson. In a sworn statement, Colson said that President Nixon ordered him to do "whatever has to be done . . . whatever the cost" to stop leaks of classified information. Colson quoted the President as saying, in effect, "I don't give a damn how it's done." Colson then proceeded to obstruct justice. Ironically, President Nixon's own proposal to reform the federal criminal code which he has submitted to Congress would make such Machiavellian management an offense. Under proposed section 493(a)(3) of S. 1400, a person in a supervisory capacity who so defaulted in the supervision of an organization as to permit or contribute to crime would be guilty of a misdemeanor.

The American Bar Association's Section of Corporation, Banking and Business Law has contended that such an offense would make executives reluctant to delegate responsibility. In fact, it would deter managers who exalt results over methods. It would mean that delegation cannot be mindless—that those who delegate in reckless or invidious ways will share the burden if that delegation results in criminal activity.

The discovery of many white-collar crimes depends not on police operations but on whistle-blowers inside a corporation who reveal illegal activities. Such was the case in the Equity Funding and Weis Securities cases. Under the two proposals to reform the criminal code, persons who retaliate against a whistleblower would be guilty of a felony. But S. 1400 unnecessarily limits retaliation to bodily harm. This virtually exonerates the use of the great corporate economic power against an employee or, in some cases, ignores the power of one corporation against a smaller corporation. This economic power involves firing, demotion, transferring, or reassigning personnel, altering fringe benefits, pension rights and blacklisting employees. When one corporation informs on the illegal activities of another corporation, say for accepting kickbacks, the informing corporation may be at the economic mercy of the guilty corporation. It should be protected from the loss of business and other economic harm that a larger, more powerful corporation may exert.

But S. 1 does not limit harm to the definition in S. 1400. Instead, harm includes economic injury, which is an absolute necessity. If people are to be permitted to cultivate their own free conscience, their own form of allegiance to their fellow citizens, they must be protected from having their professional careers or employment opportunities destroyed. Their new ethic, expressed in S. 1, will eventually assure that employees have the right of due process within their organizations. If carefully protected by law, whistle-blowing can become another of these adaptive, self-implementing mechanisms which mark the relative difference between a free society that relies on free institutions and a closed society that depends on authoritarian institutions.

### 2. OFFENSES

While there are literally hundreds of offenses contained in the proposals to reform the federal criminal code that deserve mention, it is important particularly to endorse three new offenses proposed in S. 1 for inclusion in the criminal code. These are: Environmental Spoilation, Unfair Commercial Practices, Pyramid Selling Schemes, and Regulatory Offenses.



The offense of Environmental Spoilation, proposed in Section 2–8F3 of S. 1 (but not in S. 1400), would make it a felony to knowingly pollute the water, air or land in violation of a federal statute or regulation when such violation is gross or the person or corporation manifests a flagrant disregard for the environment. While more specific, narrower definitions should replace the terms "gross" and "flagrant disregard", the thrust and intention of this section is commendable. In some societies, violence to the environment is or has been treated more seriously than altercations between individuals. It is mandatory that our nation perceive the destruction of our natural resources and our environment in its proper perspective; that we realize that society can survive individual and relatively sporadic instances of bribery or embezzlement, but that the ruination of our environment is a self-destructive and masochistic act; that society can hopefully transcend the actions of some of its more venal and corrupt members, but for humanity to survive, it must first have an environment—land, air and water—that can foster and satisfy it—aesthetically, spiritually and physically.

The second offense which is necessary to make the federal criminal code a just and reasonably comprehensive law in Unfair Commercial Practices, proposed in S. 1, Section 2–8F4. This section is directed to several areas of consumer fraud that have bilked billions of dollars from trusting citizens. Such acts as the adulteration and mislabelling of goods, false advertising, and rigged sports events would be felonies punishable by a year in prison and $100 fine per day.

But this section does not include another consumer fraud, the pyramid selling scheme, in which the right to sell or distribute a product is sold to persons, who in turn are encouraged to solicit other persons to join the pyramid of distributorships. The intent is not to sell products—only to sell the *rights* to distribute them. Markets quickly become saturated with distributors. This is the kind of offense which has brought Glenn Turner and William Penn Patrick before the courts. The former Chairman of the Securities and Exchange Commission, William Casey, has estimated that consumers have lost over $300 million in such schemes. This committee should seriously consider including such schemes in the Federal Criminal code.[5]

The last offense on which I would like to comment is the Regulatory Offense of S. 1, Section 2–8F6, which would establish uniform penalties for violations of regulatory laws and regulations. (S. 1400 contains no comparable section.) Charles Maddock, representing the American Bar Association's Section on Corporation, Banking and Business Law, said when this section was first proposed,

> We reject the concept that any activity that is or may be regulated by the government is of such serious import to the public interest that a failure to abide by any regulation, rule, or order issued by anyone in authority in any of these areas (business and economic activity) should be punished as a crime.[6]

There were federal regulations for safety that affected the Texas Eastern Transmission Corporation storage tank on Staten Island when its explosion killed 40 people. There were federal regulations in effect which Georgia-Pacific Corporation allegedly violated when it was indicated for offering sulphuric acid for shipment in railway cars. There were federal regulations on drug safety when Abbott Laboratories was indicated for contaminated intravenous solutions. And there were federal clearances required which Libbey-Ford allegedly disregarded when in 1970 it shipped military engines to the Portugal dictatorship in a scheme, as charged by the Federal government, to give the Portugal military the ability to produce an armored amphibious vehicle after efforts to legitimately purchase them in the United States had failed. Federal regulations contain safety standards for autos and tires, meat inspection, flammable fabrics, conflicts of interest requirements,. prohibitions against deceptive advertising and mislabeling, and mandatory obligations for record keeping, and furnishing information.

The penalties for violating these regulations are contingent upon the variations in existing statutes. For there to be some consistency throughout the government, penalties for violating agency statutes and regulations should span a uniform range. S. 1 would impose such uniformity. Under that bill, statutory penalties would range from 30 days to 6 years imprisonment and fines would range from $500 to $100,000.[7]

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[5] Legislation to make pyramid selling schemes a crime has been proposed by Senator Walter Mondale (D-Minn.) in S. 1939.

[6] Hearings, Reform of Federal Criminal Laws and Procedures, 92nd Congress, 2nd Session, Pa II–B, p. 1637 (1972).

[7] For a discussion of fines, see p. 11.

Yet S. 1's Regulatory Offense section is concerned with only one of the components of criminal conduct—culpability.[8] It ignores the other major component—the proportion of the harm inflicted upon the victim. For this section of the bill to be effective and comprehensive, it should encompass both culpability and the gradient of harm caused by violation of the statutes or regulations intended to protect consumers' health, safety, pocketbook and environment. Without such a provision, then, the bill simply equates relatively harmless transgressions with those that have the potential to inflict serious harm and possibly death on entire communities.

### 3. SENTENCING

a. *Prison*

Former U.S. Attorney Whitney North Seymour, Jr.'s study of sentencing of white-collar criminals in the federal court in New York City concluded that:

> The primary objective of deterrence should be focused on those deliberative and willful crimes which might be prevented by prompt and firm detection, prosecution and sentencing, e.g. white-collar crime, extortion, narcotics, trafficking . . . In individualizing the sentence imposed for deterrent purposes, the term obviously should be increased where aggravated circumstances are present, and reduced in recognition of special efforts by the defendant to make amends such as voluntary restitution or active cooperation with law enforcement agencies to assist in apprehending and prosecuting other violators."

Our prisons are the shame of our nation. They are often inhumane and barbaric, antiquated and medieval. There is a tendency in our judicial system to suit the prisoner to the prison, to imprison only those whose impoverished and poorly educated lives reflect the humanitarian impoverishment of America's prisons. Though prisons were established to remove those people from society who pose a threat to its safety, too often those who pose the *greatest* threat never see the interior of a prison, except perhaps for brief and relatively luxurious terms in prison farms resembling country clubs. It is not necessary or even desirable that all convicted criminals languish in jail for lengthy terms. But what is essential if this society is to retain the least semblance of a democracy and the merest facade of an equitable judiciary is that penalties be imposed fairly and indiscriminately to all offenders.

For example, in October, 1973, Spiro Agnew resigned as Vice President, pleaded nolo contendere before a Maryland court, and was sentenced to a three-year unsupervised probation and $10,000 fine for evading $13,551 in federal income taxes on income which was allegedly given him in bribes. Yet the day before Agnew's resignation, Charles J. Glasgow, a Sacramento, California draftsman, was sentenced in municipal court to *70 days in jail* for fishing without a license and possessing seven striped bass under the legal size limit. He was also given an additional 15 days in prison for failing to appear in court. And on the very day Agnew resigned, a Rhode Island man was sentenced to four months in prison and a $5,000 fine for evading $26,306 in corporate income taxes.

b. *Fines*

Fines, not prison sentences, have been used most frequently as the penalty for white-collar criminals. Yet it is precisely this monetary penalty that causes the least hardship for the white-collar criminal. In the proposals to reform the federal criminal code, fines have been maintained at a level that may seriously burden an individual, but may be miniscule to a wealthy defendant or a corporation. White-collar crime is profitable, and until the profit is removed from these crimes, they will continue. Fines for corporations should be set at a percentage of that corporation's profits or assets. Fines have been questioned [9] as inadequate deterrents because the cost is passed along to consumers or shareholders and because it is directed not at the individuals who caused the crime but at that legal fiction, the corporation.

In fact, however, those individuals may be individually tried and sentenced. And, to the extent that a corporation faces competition in its field, it will not be able to pass along heavy fines to its customers. Loss of profits will mean less capital for dividends to shareholders, reduction of debt and financing of expansion. This, in turn, decreases the attraction of that corporation's stock and investors will support more law-abiding companies. This would also, in some cases, prompt shareholder action for new management. The issue here is not the severity of prison sentences or of fines, but their proportionate equality. For unless penalties for crimes are just, then there is no justice.

[8] The variations of culpability in S. 1 are: (1) non-culpable, (2) reckless, (3) knowing, (4) flaunting of regulatory authority and (5) dangerous.

[9] See Hearings, Reform of Federal Criminal Laws, Part III-B, p. 1069



c. *Corporate Quarantine*

Until S. 1 was introduced, it was generally assumed that a corporation was immune from traditional limitations imposed on individuals by imprisonment. However, S. 1, section 1–4A1, provides that if the offender is an organization, its right to engage in interstate or foreign commerce may be suspended for the term authorized for imprisonment of individuals. This sanction is not unlike that available to the Securities and Exchange Commission's suspension of brokerage firms from doing business for a certain period of time. Such a sanction may be appropriate for a large number of offenses. It overcomes the accounting problems that may accompany fines and it impresses on the corporations' shareholders, employees and customers the severity of the offense.

However, S. 1 should be amended to protect innocent employees so that their pay or employment may be continued or compensated during the period of suspension. So, too, contracts and obligations of the corporation should be provided for in such a way as to mitigate the effects of suspension on innocent customers and lenders. In addition to suspension, the legislation should allow a form of Public Trusteeship to permit continuation of the enterprise if it promises to fulfill certain conditions, much like the present system of probation, under the close government supervision for a period of time. Such conditions would include reorganizing the board of directors and/or the management, temporarily placing a federal officer on the board to insure future compliance with federal and state laws, liquidating the company and selling its assets to those with the strongest legal and moral claim to them, divesting certain property or operations, and seizing or recalling property.

d. *Restitution and Notice*

Restitution and notice are very important penalties for corporate crime and consumer fraud cases. Both S. 1 and S. 1400 include restitution as a sanction that the sentencing court can impose in appropriate cases. While the criminal law has seldom attempted to restore losses to individuals, the restitution of money, either in the form of repayments to specific victims, or the lowering of the price of goods or services for a period of time, such as gasoline prices, is an effective sanction and should be enacted. It is a penalty which can contribute to the re-creation of citizen trust that their government is actually protecting their pocketbooks and economic security. As Philip Wilson, a confessed international stock swindler, told the Senate Permanent Investigations Subcommittee, "many people would be willing to do two years for stealing $2 million." [10]

The notice sanction both warns consumers of the kinds of frauds being committed and imposes a small penalty by tainting the corporation's major asset—its reputation. S. 1 section 1–4AT and S. 1400 section 2004 would require that an offender give appropriate notice of conviction to the person, class of persons or sector of the public affected by the conviction by advertising in designated areas or by designated media for a period of time. Many consumer frauds and corporate crimes are woefully underreported. Consumers often do not know about various frauds and what can be done to avoid them. Under this important section, the sentencing courts would be encouraged to order that consumers, shareholders, employees and the public at large be informed of the activities of corporations they patronize. When appropriate, such notice would require television and newspaper advertisements and clauses in contracts, loans, prospectuses and other documents.

There are other types of sanctions that are also possible. For instance, William O. Woolridge, the former top enlisted man in the U.S. Army was sentenced for accepting stock in a corporation in exchange for his endorsement of the company to supply Army service clubs. Part of his sentence required him to work for charitable organizations. Not only do such sentences benefit charitable organizations, but they would greatly aid the rehabilitation of the offender. For example, the president of a coal mine convicted of a mine safety health code violation could be ordered to work in his own mine to heighten his personal awareness of the hazards resulting from his actions or inactions. The proposed revisions of the criminal code already contain a negative sanction that would disqualify professionals and executives from exercising their professional and organizational functions. Such a sanction is valuable, but it should be complemented by an affirmative authority for the courts to order the offender to perform socially useful activity.

It is apparent that there is a vast unknown quantity of economic crime and political corruption in our society hindering the welfare and growth of the country. Our ability to master the great economic, social and political challenges of the next quarter century and beyond will depend on our knowledge and understanding of

[10] Hearings, Senate Permanent Investigations Subcommittee, Sept. 19, 1973.

how it is that our commercial and governmental institutions can breed such corruption and such contempt for the rule of law and principles of justice. We cannot turn away from seeking this knowledge; too much is at stake; the vitality of the economy, the accountability of the political and legal institutions, and the cords of trust and justice which bind society together. To tackle this problem the Congress must establish a National Commission on Economic Crime which would fully document and analyze the scope of white-collar crime; expose where governmental enforcement agencies and business entities are failing in their responsibilities to discover and discourage deceit and illegalities; and recommend to the Nation those actions which must be taken if we are to achieve the dream of the founders of this Republic, "Equal Justice Under Law."

Thank you.

PUBLIC CITIZEN STAFF REPORT, WHITE COLLAR CRIME—JANUARY 1973-JUNE 1974

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### INTRODUCTION

This is a nation that has been built on schisms. We have had two separate social and judicial systems for blacks and whites; we have had divergent and glaring discrepancies in our economic system that encourages wide gaps between the remarkably affluent and the woefully poor. And one of the more important factors that encourages the latter is the dual judicial system of the United States, a judicial system that has two separate definitions of crime, each accompanied by two distinct categories of punishment. And each category has its own distinct perpetrators. In the case of street crimes, such as larceny, assault, auto theft, and rape, they are usually the impoverished and the undereducated. But white-collar crime—that often invisible manifestation of corporate and professional greed—appeals to those in the ranks of the brightest and the best, to those among the educated and affluent elite of America.

The term "white-collar crime" was first defined by sociologist Edwin Sutherland in 1949 in his book, "White-Collar Crime" as crime committed by a person of respectability and high social status in the course of his occupation. Sutherland maintained that white-collar crime should be placed in the social and political

realm of criminal law rather than in the civil realm because of the severe economic and social consequences of such behavior. Sutherland's study revealed that of the seventy largest industrial and mercantile corporations in the United States, 97.1% were recidivists. [1] It appeared that none of the official procedures used on businessmen for violations of law had been very effective in rehabilitating them or in deterring other businessmen from similar behavior.

What was true in 1949 was true before and after that date.

Shortly after Sutherland's book was published, Marshall Clinard wrote, "The Black Market", a study of the Office of Price Administration's enforcement of World War II price controls and commodity rationing. Clinard discovered that—

> Approximately one in every fifteen of the three million business concerns in the country were punished by some serious sanctions * * * the government collected some 73 million dollars in damages. Restricted to large concerns, namely, manufacturing and wholesale, approximately 70% of those concerns or two out of three concerns investigated during 1944 were found to be in violation. [2]

The most recent official comment on the scope of white-collar crime across the nation was contained in the 1967 Report of the President's Commission on Law Enforcement and Administration of Justice. Its report, *Crime and Its Impact: An Assessment*, estimated that white-collar crime cost the American economy about $40 billion annually.[1] [3]

Not only do white-collar crimes have the potential to garner astronomical profits for their perpetrators, but they also can alter the structure of American society. For instance, in 1949 General Motors was convicted by a federal jury in Chicago for having criminally conspired with Standard Oil of California and Firestone Tire Company to replace electric transportation systems with gas or diesel powered buses and to monopolize the sale of buses and related products to local transporation companies throughout the country. By 1949, GM had replaced more than 100 electric transit systems with GM buses in 45 cities. According to "American Ground Transport" by Bradford Snell—[4]

> Nowhere was the ruin from GM's motorization program more apparent than in Southern California * * * thirty-five years ago, Los Angeles was a beautiful city of lush palm trees, fragrant orange groves, and ocean-clear air. It was served by the world's largest electric railway network. In the late 1930's General Motors and allied highway interests acquired the local transit companies, scrapped their pollution-free electric trains, tore down their power transmission lines, ripped up their tracks and placed GM buses on already congested Los Angeles streets. The noisy, foul-smelling buses turned earlier patrons of the high-speed rail system away from public transit and, in effect, sold millions of private automobiles. Largely as a result, this city is today an ecological wasteland; the palm groves have been paved over by 300 miles of freeway; the air is a septic tank into which 4 million cars, half of them built by General Motors, pump 13,000 tons of pollutants daily. Furthermore, a shortage of motor vehicle fuel and an absence of adequate public transportation now threaten to disrupt the entire auto-dependent region.

For this criminal conspiracy to violate the antitrust, laws, GM and seven other corporate defendants were fined $5,000. Seven individuals including GM's Treasurer were each fined $1.00.

The electrical conspiracy of 1960 is perhaps the most celebrated recent case of corporate criminality. Twenty-nine corporations, the suppliers of almost all of the nation's heavy-voltage electrical equipment, were indicted for illegally carving up markets and rigging prices. This cost the public more than $1.2 billion. Fines totaled over $1.8 million. Seven executives, one a G.E. vice-president, were sent to jail for 30 days.

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[1] Among the white-collar crimes that have most bilked the American public were, according to the President's Commission on Enforcement and Administration of Justice:

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|---|---|
| Mail Fraud | $500 million |
| Securities Fraud | 75–100 million |
| Misrepresented Drugs | 500 million |
| Home Repair Frauds | 500–1 billion |
| Auto Repair Frauds | 100 million |
| Fraudulent Charitable Solicitation | 150 million |
| Credit Card Frauds | 20 million |



But the crackdown was mitigated by the Internal Revenue Service. Under the antitrust laws, victims of a conspiracy can file civil suits for up to three times the amount of their loss. As suits against the electrical companies increased, the IRS reversed its previous policy and ruled that these treble damages paid by the firms could be deducted from taxes as a legitimate business expense. In effect, then, the government underwrote corporate crime and undermined the penalty established by Congress.

The severity of white-collar crimes on the public cannot be denied. But it apparently is denied by Federal law enforcement agencies. The Federal Government neither reports nor analyzes white-collar crime. The long pages of the FBI's annual Crime Report are filled only with statistics on street crimes, and the more prevalent and far more costly genre of crime—white-collar—is completely ignored. The Annual Report of the Attorney General lists offenses prosecuted without any categorization by offender or seriousness of the offense. The same omission is found in the Annual Report of the Director of the Administrative Office of the United States Courts.

Because of this paucity of information and the subsequent distortion of the true nature of crime in America, Public Citizen attempted to compile and analyze white-collar crimes that were reported between January 1, 1973 and June 30, 1974. This Report is intended to aid the Judiciary Committees of the United States Senate and House of Representatives in their efforts to reform the Federal criminal code. To the extent that present Federal criminal laws neither deter white-collar crime nor prohibit certain behavior that is inimical to society, it is the responsibility of the Judiciary Committees to enact reform legislation which will further the prosecution and deterrence of white-collar criminals.

The contents of the Report represent only a small and far from representational sampling of white-collar crime in the Nation. The cases were collected from articles in three major newspapers, the *Wall Street Journal*, the *New York Times* and the *Washington Post;* thus the Report focuses only on those crimes occurring in either New York City or in Washington, D.C., or those receiving national attention. The Report's cases, therefore, constitute only a bare fraction of the white-collar crimes committed during the eighteen-month period of the study.

To supplement the newspaper sources, Public Citizen mailed a questionnaire to all 93 United States Attorneys and State Attorneys-General in March, 1974. The first part of the questionnaire concerned the manpower and budget of each attorney's prosecutorial office. If the office had a division concerned with prosecuting or investigating consumer complaints, then its manpower and budget was also requested. A description of such a unit's activities for 1973 was also requested.

The second part of the questionnaire requested information on the prosecutions of various crimes, including a comparative estimate of the monetary cost of street crime and white-collar crime, the number of criminal fines levied, the amount of restitution made in consumer fraud cases and the number of professionals indicted. The third part of the questionnaire surveyed attitudes. Respondents were asked whether they agreed with various statements concerning white-collar crime. These statements referred to judicial sentencing, statutory penalties, and effective prosecution.

Fifty state Law Enforcement Assistance Administration planning agencies were asked to what extent their office had requested or received funds to augment consumer complaint departments, investigative resources, and prosecution or research of consumer frauds and white-collar crimes.

The response to the questionnaire reflected the low priority and paucity of compiled information accorded white-collar crime. Only five of the 93 U.S. Attorneys responded. Several referred the questionnaire to the Department of Justice in Washington, D.C., from which there has been no response. Two attorneys, Charles Anderson, U.S. Attorney for the Middle District of Tennessee and Seymour Glanzer of the U.S. Attorney's office for the District of Columbia, provided valuable information. Questionnaires were returned from 27 state attorneys-general offices and from 32 of the 50 Law Enforcement Assistance Administration State planning agencies.

These crimes—a severely limited sample of the apprehended white-collar crimes in this period—impose a severe cost on the citizens of the United States. Some 30% of them are conservatively estimated to cost the victims four billion

dollars,[2] or four times the national loss from larceny, burglary and theft, including auto theft as reported by the FBI's Uniform Crime Reports for 1972. Other, more comprehensive, estimates of the cost of consumer frauds and white-collar crime include that of the 1967 President's Commission on Law Enforcement and Administration of Justice. The Commission's estimate of $40 billion loss in these crimes has received support from the Chamber of Commerce in their 1974 report, "White-Collar Crime". The comparative loss from street crimes and white-collar crimes is dramatic. Losses to banks from white-collar frauds and embezzlements took six times the amount of money stolen by bank robbers in fiscal 1973 ($135.6 million as opposed to $22 million). In addition, since 1969 frauds and embezzlements have increased 313% while robberies have increased barely 12%. [5] The *Report* lists individuals and corporations that have been convicted and also those who have been indicted. An indictment is the finding by a grand jury that a crime has been committed, that reasonable grounds exist for the conclusion that the defendant committed it, and that the defendant should be tried to determine his guilt or innocence. *In no way should it be presumed that an indictment is a finding of guilt.* Guilt is determined after a trial by judge or jury upon proof beyond a reasonable doubt. The activities of indicted defendants are included in the *Report* because their behavior has been judged serious enough by a law enforcement agency and a grand jury to merit a trial on the issue of guilt or innocence.

*Conclusions*

Ten major conclusions have been drawn from this *Report on White-Collar Crime:*

During the period covered by the report the United States experienced a significant number of serious crimes which are undermining this country's basic economic institutions and which have produced severe economic consequences. Examples include the failure of C. Arnholt Smith's U.S. National Bank, of Weis Securities and of Equity Funding Life Insurance Company. These crimes have weakened the confidence of consumers in the business and financial community.

It has been revealed that the political institutions of the country, be they political parties, State, local, or Federal Governments, have been instruments for high level and widespread crimes. The Watergate scandals exemplify political corruption at the highest levels of government, but they have not been unique. Scandals have also pervaded the Congress, State Governments (New Jersey and Maryland) and the local governments (New York and Chicago).

It is evident that crimes affecting our economic institutions are often closely interwoven with corrupt government officials, such as documented by the Agnew and Queens (N.Y.) District Attorney Mackell cases and as alleged in several other cases mentioned in the Report.

Evidence exists that alleged underworld crime figures, in addition to their involvement with narcotics, gambling and other offenses, are becoming increasingly involved in overworld crimes with the collaboration of insiders dealing in stolen securities and stock frauds affecting economic institutions.

The conclusions of earlier white-collar crime studies, notably that of sociologist Edwin Sutherland, that white-collar criminals exhibit a high rate of recidivism, are supported by the *Report*. Moreover, the eighteen-month period covered by the *Report* shows that this recidivism is true not only for individuals but also for major corporations, such as Diamond International, which pleaded guilty to an illegal campaign contribution and was indicted for price-fixing paper labels.

In a number of cases, the penalty imposed on white-collar criminals in proportion to the gravity of their offense, as opposed to the penalty imposed on street criminals in proportion to the gravity of their offense, is relatively lenient. Such leniency is due in part to statutory limits, and in part to judicial preferences for powerful, respectable white-collar defendants.

The business community has shown itself either incapable or unwilling to police its own ranks or to aid law enforcement agencies in the detection and prosecution of white-collar crime. This is evident in the *Report's* description of various stolen stock cases and the Weis Securities case.

Law enforcement agencies devote meager resources to the investigation and prosecution of white-collar crime in relation to that expended on street crime.

[2] This estimate is limited to those matters to which either the law enforcement agency or investigative reporters assigned a cost. Some of the most costly crimes had no dollar cost estimate; only one of the thirteen antitrust cases in the Report and Appendix contains a cost estimate; others such as auto repair and land frauds, had no estimate.



The Department of Justice's legal activities budget for fiscal year 1974 showed that the tax, antitrust and consumer protection activities constituted less than 15% of the total legal activities, manpower and budget for 1974.

Increased manpower and greater budgets for law enforcement agencies to investigate and prosecute white-collar crime would be a productive investment in our economic and political institutions. It would reduce the increasing public resentment at two standards of justice, one for the powerful and one for the powerless, and reduce the spirit of lawlessness pervading the ranks of the wealthy and powerful. As the National Advisory Commission on Standards and Goals for Criminal Justice has stated—

> the * * * robber * * * burglar and the murderer know that their crimes are pale in comparison with the larger criminality within the system * * * As long as official corruption exists, the war against crimes will be perceived by many as a war of the powerful against the powerless; law and order will be just a hypocritical rallying cry, and "equal justice" will be an empty phrase.

The lack of information and understanding of white-collar crime constitutes a great obstacle to its eventual prosecution and prevention. Even though the Federal Government, including the Law Enforcement Assistance Administration, spent over $70 million in 1973 for crime research and statistics, there has yet to appear an official analysis of the corporate crimes, consumer frauds and official corruption that are devastating this country's economy and bringing its political institutions to the brink of ruin. The questionnaire sent to all U.S. Attorneys, State Attorney Generals and Law Enforcement Assistance Administration verified that only a miniscule portion of these officials maintained any useful data on white collar crime.

## Chapter I—"Taking Stock in Crime"

"This Nation is blessed with having a securities market which is the finest in the world. It is the backbone of our economic system, for upon its health and continued stability rests the economic welfare of this country and its more than 200 million inhabitatnts."—*Securities Industry Study,* Committee on Interstate and Foreign Commerce, 1972, House of Representatives.

The northern tip of Manhattan includes Harlem with its black and Puerto Rican ghettos. It is regarded as one of New York's prinicpal centers of crime. The island's southern end houses Wall Street, the home of the New York and American Stock Exchanges, and the world's most prestigious law firms, accounting firms, banks and financial institutions, It, too, is a crime center. Yearly, it is the scene of the fleecing of thousands of investors. This genteel pickpocketing involves more money than would be dreamed of in the city's other end. Wall Street's crimes are committed by the wealthy and powerful, by lawyers, bankers, accountants. Their crimes are unarmed robbery and theft. But instad of snatching purses, these thieves snatch life savings. Instead of using a gun or knife, they use fountain pens.

### Part A. Stolen Securities and Corporate Irresponsibility

Stocks, bonds, notes and other paper certificates are Wall Street's lifeblood, exchangeable for fluctuating amounts of cash and representing control over the major corporations of the United States. They are held for customers and traded on stock exchanges by banks and by stock brokers. These paper instruments hold the wealth and power of American, Inc. In 1970, *$78 million* in government bonds, treasury notes and *$148 million*[1] of common and preferred stocks were reported stolen or missing. One authoritative source, W. Henry duPont, the president of Sci-Tek, a securities validation firm, has estimated that the dollar value of lost, missing and stolen government, state, municipal and corporate securities could be as high as *$50 billion.*[2]

Securities are stolen by employees of brokerage firms, by outsiders from brokerage houses, banks, and mail (often left unattended in the lobbies of Wall Street buildings) and from individuals. The employees may steal because they were recruited by organized crime or for their own personal gain. In August 1973, three men were caught stealing $360,000 from a brokerage house—two men were connected with organized crime and the third was an employee. New York City's Chief of Detectives said "This incident followed the classic pattern of organized crime, moving into financial institutions by getting an otherwise honest employee in its debt and then forcing him to do its will." [3]

Securities thefts are a lucrative and comparatively easy criminal activity because of lax protection given securities by brokerage houses and because sloppy

paperwork does not detect losses until weeks after a theft. Brokerage houses notoriously devote little attention to the work of "back rooms" where securities are transferred, recorded and preserved. They are more concerned with the profitable aspects of the business—selling and customer affairs. Their negligent handling of back-room activity contributed to the great stock market debacle of 1970, [4] in which several brokerage houses failed in a resemblance of the 1929 stock market crash. In that year a highly active market caught the brokerage houses by surprise. Unable to keep up with a massive flow of stocks, lost, stolen or misplaced stock certificates wreaked havoc in Wall Street offices.

Stolen securities are disposed of in several ways. Senator McClellan has said, "Occasionally, the disposition of securities is arranged with the connivance of friendly bankers who knowingly, for a price, or honest bankers who unknowingly, accept the stolen securities as collateral for loans." [5] Thieves who take stolen securities can: (1) sell the securities to brokerage houses for which the thief can get 100% of value but the transactions often take 3 to 5 days to complete; or (2) pledge the securities as collateral for loans from banks for 70 to 80% of value, or (3) rent them to businessmen who use the securities to bolster their assets, improve their financial condition and help survive an audit or obtain a loan; or (4) transport them outside the United States, sell them, or place them as collateral in trust accounts for letters of credit or certificates of deposit which are then brought back to the United States; or (5) if taken by elements of organized crime, can be used for their own purposes, such as aiding their entry into legitimate business. [6]

The securities are also used in a switch tactic to avoid detection. A hypothetical example would be the theft of 100 shares of IBM stock from brokerage house A. The stock is given to an employee of brokerage house B who takes 100 shares of IBM stock from B's vaults and replaces them with the 100 shares of the same stock from A. When A's theft is reported, a notice would go out listing the stocks and hopefully recovering them when they are traded. House B is unlikely to check its stock and B's shares will be freely marketable. [7]

The most shocking aspect of stolen securities is the complicity of legitimate businesses not only in providing opportunities for the crimes to occur but in frustrating law enforcement and, sometimes, in benefiting from the crime itself.

When he was Police Commissioner of New York City, Patrick Murphy testified that although the New York Police Department had a Stock and Bond Squad—

> . . . further efforts must come from the financial community itself, whose practices and attitudes have played into the hands of would-be thieves and complicated law-enforcement attempts to deter wrongdoers. [8] . . . We still encounter considerable reluctance on the part of industry representatives whether brokerage houses or banks concede the disappearance of valuable securities . . . In addition, as incredible as it may sound, brokers and banks frequently are totally unaware that hundreds of thousands of dollars worth of securities have been furtively removed from their vaults . . . The incidents of theft reported each year to the N.Y.C.P.D. are relatively few—several dozen or so—but each year theft or loss averages several hundred thousand dollars. [9].

Mr. Murray Gross, an aide to Frank Hogan, former District Attorney of New York said—

> If I were to describe the situation on Wall Street I would call it a free-for-all, as far as the thefts of securities are concerned, and that is what we are faced with. We are faced with a situation where thefts—where everybody is stealing be it the messenger, be it the clerk or even supervisory personnel. [10].

Hogan's aide testified that businessmen rent stolen securities to use as collateral for a loan to bolster their sagging finances or to get a good credit rating.

> This would include such institutions as insurance companies and brokerage houses. Presently many brokerage houses are in financial difficulty. Brokerage houses have to maintain certain ratios of assets to their liabilities. This is a perfect spot for stolen securities. They don't get negotiated. They just sit in the asset file of the brokerage house or the insurance company * * * the transfer of bearer securities is one of the rare instances where a thief can pass good title to a holder in due course. This may account for the apparent laxity in the acceptance of these instruments by reputable institutions. [11]

Two former executives of K & M Securities Corporation, a defunct over-the-counter brokerage firm, were sentenced in 1973 to prison for one to five years for conspiracy and theft of about $1 million of stock from another firm. The securities were stolen to bolster K & M's sagging capital position. The New York State Attorney General's office criticized two New York Stock Exchange member



firms for allegedly failing to cooperate in the prosecution of the two men, one of which fired an employee who became a witness. Mr. Pomerantz of the New York State Attorney General's office asked—

> How can we prosecute white collar crime if we cannot assure a prospective witness that his job is safe? It appears that the Wall Street community is not anxious to get rid of its sharpies and thieves. [12]

Senate testimony revealed that there is a private company, Sci-tek, that can quickly determine whether a particular stock or note is stolen. It provides this service by telephone for the stock exchange, brokerage houses and banks for pennies and within a few minutes. Yet only a small percentage of the financial community participates. Why? The answer is because of a legal doctrine that has been the protector of crime—and the bane of millions of consumers—the holder in due course doctrine. This is used in commercial transactions and allows one person to transfer or sell a note (such as an I.O.U. or stock) to another person who takes it free of any defects—such as fraud or misrepresentation—in how the seller came to be in possession of the particular piece of paper. Former Commissioner Patrick Murphy told the Senate Permanent Investigation Subcommittee—

> Investigators encountered reluctance to cooperate on the part of subsequent purchasers as brokerage houses, banks and investors claimed the legal status of innocent and unknowing "holder in due course" without any direct practical interest in the fact that the certificates were stolen * * * Insurance companies for their part, did not require their insured brokerage houses to report their losses to the police department. [13]

W. Henry duPont, President of Sci-tek testified—

> the banks are most reluctant to become involved in the Securities Validation System, primarily the major New York clearing banks. They continue to emphasize the fact that they have access to the National Crime Information Center [3] information and most importantly, they may jeopardize their holder-in-due-course status, that of a bona fide purchase. This attitude has also been relayed to other banks who occasionally consider joining the service. [14]

DuPont also described one New York bank that negotiated a security instrument it knew was stolen—

> One of the three reported stolen $5,000 municipal bonds that entered into our system by the New York City Division of Municipal Securities in June of 1972 was discovered by an inquiry and confirmed by a subsidiary New York City bank. This inquiry assumingly negated a payout in the real estate area of the subsidiary bank * * *. In January of 1973, the New York City Division of Municipal Securities was presented for payment with a $5,000 bond due January 1, 1973 from a nonsubscribing bank. By inquiry and confirmation, the transaction was negated immediately. This was the same bond that was confirmed by the subsidiary bank on July 19, 1972. [15]

The bank was identified as Bankers Trust Co. of New York. [16] This example confirmed DuPont's contention that banks do not want to know whether they are dealing in stolen goods.

During the hearings, Senator Edward Gurney (R-Fla) asked Hogan's aide, Murray Gross, "Have you run into any situations where banks were in collusion with organized crime?"

"No question about it," Gross flatly answered. [17]

Further disclosures about the involvement of banks in stolen securities schemes came from two sources who had operated within the crime underworld.

Gerald Zelmanowitz, a confessed front man for organized crime, testified that representatives and employees of some of New York's largest banks and brokerage houses helped him in illegal transactions in stolen and counterfeit securities. [16] Zelmanowitz told Senate investigators that he had paid IRS agents for several months to falsify documents for the purpose of evading taxes. Zelmanowitz named banks and brokerage firms in Switzerland and Belgium who participated in the laundering of stolen stocks and bonds which are filtered through various corporate structures and enterprises. "These conduits then funnel the funds back into the United States to be placed in the hands of attorneys, trusts and corporate structures, thereby infusing the monies into legitimate business," he said. [18]

A government undercover agent, Frank Peroff, testified that loan officers from many banks are involved in stolen security schemes. Peroff said in a *New York Times* interview of November 29, 1973 that a large amount of hotel and motel construction in the United States has been financed with stolen securities. Peroff said, "I'd say that it (stolen securities financing) is probably directly involved in half the narcotics action." The allegation of Zelmanowitz, made under oath,

[3] The National Crime Information Center contains a listing of stolen securities.

and of Peroff are being investigated by the Senate Permanent Investigations Subcommittee.

At the end of the hearings, Senator Gurney summarized the scandal of Wall Street,

> * * * to our dismay, we found that international bank secrecy laws, the acceptance of the bona fide purchaser defense (holder in-due-course), the absence of a national clearinghouse for stolen securities, the refusal of banks, brokerage firms, and insurance companies to cooperate with authorities, the neglect of back-office functions in favor of sales and promotions and the bull market of 1967 to 1970 were the principal factors behind the market in stolen securities. On top of this, we discovered the dangerous presence of organized crime in the fencing and disposal of these securities, corrupt bankers and brokers acting as conduits for the "washing" of securities and shady businessmen who rent stolen securities for collateralized loans. But perhaps the most disheartening result of our 1971 hearings has been the realization that few, if any, improvements have been made. This absence of corrective measures has been overshadowed only by a steady deterioration of the public's faith in America's financial institutions and the government agencies that oversee them. [19]

Small wonder that over 800,000 small investors have left the securities market.

PART B STOCK FRAUDS

Even more lucrative than stealing stocks is the manipulation of their value through false and fraudulent means. Stock which is inflated beyond its true value can be used for a host of purposes from acquiring a legitimate company to political campaign contributions. 1973 and the first half of 1974 saw many stock frauds from the gigantic Equity Funding fraud to lesser frauds, contained in the appendix to this Report. Numerous other frauds were disposed of by civil court cases, injunctions and S.E.C. administrative actions. Stock frauds produce immense profits for the criminal. For the victims the losses are often staggering. Stock in a company may be kept as a future retirement account, or as a source to pay for an education, or a collateral on a bank loan. When the stock fraud is committed, the investor not only loses the money he or she invested but also the dreams that that stock was going to buy.

*1. Equity Funding*

Equity Funding is to business what Watergate is to politics. In the spring of 1973, Wall Street was shocked by the news that one of the stock market's premier items was a fraud. Not that frauds are uncommon. But Equity Funding's fraud was so massive that it stunned the entire business community.

Equity Funding Life Insurance Co., (EFLIC) a subsidiary of Equity Funding Corporation of America, began its fraud by urging its employees to purchase life insurance policies with free premiums. They would then reinsure their employee policies with other life insurance companies. In reinsurance deals, a company that needs cash sells large blocks of the new insurance that it writes to another insurance company which has cash but wants more insurance in force. For every $1 premium the seller turns over, the buyer pays $1.80. The higher price takes into consideration the heavy first year commission the seller has paid to his salesman and affords a small profit to the seller. After EFLIC's initial experience with employees, many of whom discontinued their policies after the first year, the company's executives decided to write phony policies on a vast scale. [22] Of course these did not have a commission attached so the company could keep almost the entire re-insurance price. During the years of the fraud, Equity Funding was audited by Haskins & Sells, Peat, Marwick & Mitchell and Seidman and Seidman, none of which uncovered the fraud. [23]

Equity Funding needed cash because it had pioneered in the sale of combined insurance—mutual fund packages in which a purchaser agrees to invest a certain amount of money. The shares he receives are then used as collateral for a loan from Equity Funding for his insurance premium. The next year, the buyer again buys fund shares and another premium payment loan is made. This continues for ten years. The purchaser then sells enough of his fund shares to pay his total debt. But he still retains some fund stock and a policy with a tidy cash value.

This plan so intrigued Wall Street that Equity Funding's stock quickly became a hot item. But the very package plan that was so appealing also desperately needed cash. The remedy was heavy re-insurance of its new business.

But the fraud was like a pyramid—after the first year the buyer gets almost all the premium paid by the policyholder. But since there was no policyholder, EFLIC would have to produce the premium itself. It would then sell another bogus policy to raise the money. The next year the re-insurer has to get twice as much, and more bogus policies have to be sold.



Equity Funding was expanding during this period. By the end of 1972, it included two savings and loan associations, real estate and cattle operations, oil and gas ventures plus stock brokerage activities.[24] The future seemed tenuously prosperous for the company until March 6, 1973. Then Ronald H. Secrist, a former employee of Equity Funding, called an expert analyst in insurance stocks, Raymond L. Dirks, and blew the whistle on Equity Funding.[25]

Secrist told Dirks that he had not previously revealed the true story of Equity Funding because of "industry ethics".[26] After hearing Secrist's description, Dirks notified one of his clients of potential problems. He did not contact the S.E.C. or the New York Stock Exchange.[27] On March 27, other institutional holders began dumping blocks of Equity Funding stock. Eventually Dirks and his employer would be brought up by the New York Stock Exchange on disciplinary charges for violating the rules on inside information. Twelve blocks, totaling 1,245,400 shares with a market value of at least $20 million, were traded.[28]

On March 28, the S.E.C. slapped a trading suspension on the stock. During the period from Secrist's whistle-blowing to the trading suspension, Stanley Goldblum, President of Equity Funding, had placed an order to sell 50,000 shares of his own company's stock. Samuel B. Lowell, executive Vice-President had sold $50,000 of Equity Funding stock before trading was halted, as did Yura Arkus-Duntov, another vice-president.[29]

The California Insurance Department reported that 66% of the insurance policies of Equity Funding were bogus, or $2 billion out of $3 billion of life insurance claimed to be in force did not even exist.[30] The *New York Times* reported that losses to shareholders could exceed $300 million and that creditors, including banks and insurance companies, could lose additional millions.[31] The FBI found "a massive counterfeit securities operation" connected to the Equity Funding Corporation of America fraud case in which as much as $100 million could be involved.[32] These phony securities were reportedly used as assets in other schemes. Loans totaling $77 million allegedly made to Equity Funding Life policyholders to enable them to buy the insurance-mutual fund package were also phony.

The *Wall Street Journal* succinctly stated—

> The phony customer's phony pledges of their phony fund shares to buy phony insurance ultimately became numbers on a computer tape which then printed out phony assets for Equity Funding's phony books * * * the whole point of this was to report steady increasing earnings—earnings over which the company had absolute control—that kept the prices of Equity Funding stock up and thus enabled it to make major acquisitions for stock and to raise capital easily.[33]

The Equity Funding scandal undermines the accounting profession. The directors of the Illinois and California Insurance Departments told G. Bradford Cook, then chairman of the S.E.C., that the fraudulent practices of Equity Funding Corp. was largely hidden in the accounting department's computers. They would not have been detected except for an employee who decided to blow the whistle.[34] Since 1964, Equity Funding had issued public financial reports that were duly certified by accountants as "fairly presented in conformity with generally accepted accounting principles." The auditors failed to detect that $25 million in bonds claimed to be in a Chicago bank were not on deposit nor did they detect the non-existence of $77.7 million in I.O.U.'s for loans made to non-existent mutual fund shareholders.[35]

As a result of the fraud, the National Association of Insurance Commissioners announced that it would finance a study of its own surveillance techniques. The ease with which such a massive fraud could be conducted with the aid of a computer has proved disturbing to both accountants and insurance departments. [36] The Equity Funding computer books have kept 50 accountants employed for 10 months in attempting to verify the accounts. At last count the auditors have identified $143 million in fictitious or fraudulently inflated assets. [37]

Fred Levin, former executive vice-president of Equity Funding has pleaded guilty in federal court in Los Angeles to 4 counts of a 33 count indictment covering criminal conspiracy, wire-tapping of auditors and mail fraud. [38] Levin could receive 17 years in prison and fines totaling a maximum of $31,000. Levin is the third of 20 former employees and two of its independent auditors charged in a 105-count indictment. [39] Twenty-two persons have been indicted by a county grand jury in Illinois and eight former officials have been indicted for insurance fraud by a grand jury in Trenton, New Jersey for defrauding Bankers National Life Insurance Company and the New Jersey Banking Commission. [40]

*2. Arnholt Smith*

C. Arnholt Smith, a long-time friend and supporter of President Nixon, was indicted by a federal grand jury in San Diego, California on July 2, 1974 on charges of conspiring to defraud his own bank, U.S. National Bank of San Diego, of $170 million. Smith and a former executive of Westgate-California Corp., Smith's conglomerate, were indicted on 25 counts alleging that Smith and the executive had conspired since January 1969 to use the borrowing power of the Westgate-California company to obtain loans from the bank, misstating the purpose of the loans and covering up the transactions with false reports to bank examiners. Part of the scheme according to the indictment was the inducing of a witness to give misleading testimony to the SEC. At the time of its failure and subsequent acquisition by another bank, Smith's bank was ranked 83rd in the nation with nearly $1 billion in deposits. The Federal Deposit Insurance Corp. has paid $49 million in claims to foreign banks with another $42 million outstanding. [41]

Smith was found in contempt of court on June 5, 1974 for refusal to answer questions in the trial of a man accused of attempted extortion. Smith invoked the Fifth Amendment in the trial of Robert Daggett who is charged with offering to change grand jury testimony given by his brother if Smith would buy up to $20 million worth of property for him.[42]

In June, 1973, the SEC filed suit against Smith and his companies for violations of Federal securities laws. According to the S.E.C. false profits were manufactured through the sale of certain Westgate-California assets to purchasers who used the assets as collateral for loans that were used to pay off the assets.[43] The Internal Revenue Service issued a $22.8 million tax lien against Smith, the largest claim ever levied against an individual for a single tax year. The IRS wanted $19 million in personal income tax and $3.8 million in interest.[44] Without explanation, the government has announced that it will not criminally prosecute Smith on tax charges.[45]

In the late 1950's Smith was investigated by three IRS agents. Smith hired two of them before the examination was complete. An article in *Life* magazine in 1972 reported that the government had gathered evidence of possible illegal campaign contributions in 1970 for the Nixon campaign. That case was investigated by IRS agent David Stutz. Stutz was specifically ordered by the U.S. Attorney, Harry Steward, to drop the investigation. Steward knew Smith and another person under investigation. Stutz was later subpoenaed to testify at the bribery trial of San Diego Mayor Frank Curran on information he had gathered in the Smith investigation. Stutz was denied permission to testify by the IRS. Curran was acquitted and the next day received a congratulatory phone call from President Nixon. The San Diego District Attorney appealed directly to the White House for authorization for Stutz to testify and was refused in a letter from John Dean on behalf of President Nixon.

Smith contributed $50,000 to Nixon's 1972 campaign but it was returned after it was determined that the Civil Aeronautics Board was investigating some of Smith's activities. Smith's conglomerate owns Air California. In 1968 Smith donated $200,000 to Nixon's campaign and even watched the election night returns with Nixon.[46]

*3. The Four Season Case*

In one of the largest federal criminal securities fraud cases in history, eight officials of Four Seasons Nursing Centers of America, Inc., Walston and Co., (a brokerage house that was recently liquidated) and Arthur Andersen & Co., one of the Big Eight accounting firms, were indicted and charged with defrauding shareholders of Four Seasons and other companies by various schemes in 1969 to arouse interest in the stock and increase its price. The indictment charged 1 count of conspiracy, 39 counts of securities fraud, 27 counts of mail fraud and 3 counts of filing false reports with the S.E.C. and the American Stock Exchange. The defendants defrauded investors by misrepresenting and falsifying financial statements. In addition to the $200 million estimated lost by stockholders, the state of Ohio was defrauded by the company's financial statements into granting a $4 million loan to Four Seasons. European investors, too, were defrauded by falsely certified financial statements used to sell $15 million of Four Season debentures. Four principal defendants allegedly profited to the tune of $21 million. [47]

Two Walston & Co. officials have pleaded guilty to securities fraud and conspiracy. [48] The U.S. Attorney on the case had to request high bail and surrender of passports because he believed that two of the defendants had salted money away in Swiss, Spanish and Mexican bank accounts and might leave the country. [49]



Another of the eight defendants pleaded no contest to one count of fraud and agreed to testify against the remaining defendants. [50] Two of the three Andersen CPA's were acquitted. [51]

In June, 1973, Jack L. Clark, former chairman and president of Four Seasons and a principal figure in the fraud pleaded guilty to conspiring to violate federal laws. Clark had allegedly pocketed about $10 million from the fraud. The prosecutors asked for substantial punishment, stressing the need to deter white-collar crime. Clark was represented by Arthur Matthews of the law firm of Wilmer, Cutler and Pickering. Matthews has testified on securities before the Senate Subcommittee on Criminal Laws and Procedures and has written extensively on the subject. Matthews argued that imprisoning Clark would not protect the public or rehabilitate the defendant and that putting him on probation "would not unduly depreciate the seriousness of the crime." Matthews said Clark had led a previously blameless life, had built nursing homes for the elderly, was a devoted family man who coached baseball and football for youngsters. [52] The judge, who previously frustrated prosecutors by transferring the case from New York to Oklahoma sentenced Clark to one year in prison, no fine. Eligible for probation in four months, Clark could have been saddled with the sentence of 5 years imprisonment and a $10,000 fine.

*4. Weis Securities*

Called by the *Wall Street Journal*, ". . . potentially the biggest brokerage house debacle since the crisis days of 1970," [53] Weis Securities was charged in May 1973 with fraud by the Securities and Exchange Commission and the government-sponsored investors insurance fund sought liquidation of the firm. Weis Securities was a major New York Stock Exchange member with 43,000 customer accounts, 400 salesmen and 27 branch offices. The New York Stock Exchange charged five officers of Weis with filing false reports and keeping misleading books and records. [54] Weis had survived various audits until one employee of Weis told the New York Stock Exchange that accounting procedures in the reports were highly inaccurate and unethical. He was then fired. [55] The employee's charges were accurate. A brokerage house is required to limit its borrowing to 1,500% of its capital. Weis's borrowing was twice the amount permitted.[56] In July of 1973, the five top officers were indicted by a federal grand jury in New York on charges of conspiracy, securities fraud and mail fraud. [57]

*5. International Stock Funds*

The name "Bank of Sark" has become the vernacular term for the activities of an international conglomerate of white-collar criminals involved in stock frauds, stolen securities and other various frauds. Sark, an island off the English coast with loose banking laws, was the location of a phony bank that its auditors claimed held assets of $72.4 million. Bank of Sark notes, letters of credit, and certificates of deposit flooded the world in the 1960's and early 1970's. Numerous criminals used them to steal some $40 million from banks, insurance companies and businessmen. Jonathan Kwitny, a *Wall Street Journal* reporter, wrote of the Bank of Sark—

> Perhaps no other crime in history came to the attention of so many police departments Local and state authorities all across America puzzled over the worthless documents the bank issued. The FBI, the Securities and Exchange Commission, the Post Office, and the Comptroller General's Office assigned agents to the case. All levels of law enforcement in England and Continental Europe and even agencies as far away as Central and South America and Asia wrestled with the mystery. [58]

Philip Wilson, an American, is largely credited with being the founder of the Bank of Sark. During the 1960's, Wilson used investors' interests in the expansion of U.S. industries to foreign markets such as existed in South and Central America, the Channel Islands off England, Bermuda and the Bahamas, which do not have the taxes and regulatory control of industrialized nations. This expansion created investment opportu... es which Wilson saw as an opportunity to make a great deal of money. Wilson's Bank of Sark operatives used stolen securities, often provided by organized crime, to help in stealing money from banks and businesses.

Wilson has a master criminal's curriculum vitae. He pleaded guilty in November 1972 to conspiracy and mail fraud in the case of Trans-Continental Casualty Co. which sold millions of worthless securities in the United States [59] He was named as a co-schemer in a 1973 indictment against a Florida investment counselor and a mortgage broker. [60] And he was also named in 1973 in a federal indictment in connection with a scheme in which inflated financial statements were used to induce several persons and companies to purchase stock in First Liberty Mutual Fund Ltd. for which the Bank of Sark acted as custodian of assets. [61]

In June 1973, Wilson was enjoined by a federal district court judge from violating the registration and antifraud laws "in the securities of Normandie Trust Co.". [62] Normandie Trust Company is a Panamanian corporation that falsely advertized its worth at $170 million. It sold letters of credit and other securities in the United States. Both Trans-Continental and Normandie Trust had advertised that they had millions of dollars available for loans to businessmen or for investment in U.S. businesses. Businessmen who applied for loans were required to pay a substantial amount of money in advance for which they received a worthless letter of credit or loan commitment. The Department of Justice has called Trans-Continental, which eventually took in $40 million, the biggest mail fraud in history.

The twelve operatives of the Trans-Continental scheme were convicted of mail fraud but the work of Transcontinental was continued by another company called Anglo-Canadian Group. 17 persons associated with that company have been indicated on 29 counts of mail fraud and related offenses.

Wilson and other members of Trans-Continental scheme were not treated as ordinary convicts. Instead, they were incarcerated at special quarters in Ft. Meade in Maryland so that they could work with the Department of Justice concerning the operations of stock frauds. They do not wear prison uniforms and they have televisions, stereos, relaxed visitation rules, and government-supplied exercise equipment. They were even given Christmas furloughs. Neil Maxwell, a *Wall Street Journal* reporter, wrote that the Department of Justice—

> did grant at least some of the 12 immunity from prosecution by the Internal Revenue Service. The crooks apparently will be free to enjoy whatever part of the Trans-Continental loot they have salted away and can get their hands on when they get out. [63]

Wilson, testifying before the Senate Permanent Investigations Subcommittee in 1973 said—

> The scope of securities fraud as an organized criminal activity worldwide is probably one of the most important factors of law violators in white-collar crime being committed today. It is my estimation that there are approximately in the whole world 10,000 people operating in white-collar fraud as an organized criminal activity. In the United States alone there are approximately 2,500 people involved in this type of activity * * * of immense importance there must be recognition on the part of the courts that this type of crime must be dealt with severely because there are many people willing to do two years for stealing $2 million.

On January 9, 1974, the *Wall Street Journal* published another story on Wilson. Reporter Jonathan Kwitny revealed that, while in prison, Wilson was involved in a scheme to take over an Arkansas insurance agency. Part of the scheme involved "an effort to sell policies issued by a little known Caribbean-based insurance company" run by an old acquaintance of Wilson's. Wilson, Kwitny continued, is operating through Maltese Holdings Ltd, whose address is that of the U.S. Marshal's office in the United States Courthouse in Baltimore, Maryland.

*6. Salt Lake City, Utah*

Lest stock frauds be considered an exclusive problem of New York and other international financial centers, the experience of Salt Lake City, Utah reveals the prevalence of this crime. In response to the Public Citizen questionnaire on white-collar crime, [64] the State of Utah's Law Enforcement Planning Agency wrote, "Intelligence data gathered by the Utah Attorney General over the past three years indicates that Utah has become a principal target for substantial criminal activity in the securities area. The availability of thousands of defunct 'shell' corporations (often used as vehicles for criminal activities), the reputation of Utah as a leading center of the penny-stock market (stocks which sell for only a few cents), and a lack of adequate criminal enforcement in this area by the Securities Exchange Commission, the Utah Securities Commission, and county attorneys, has provided a favorable climate for business criminals, resulting in the loss of millions of dollars in the state through the fraudulent sale of unregistered and/or worthless and/or forged securities." A *Wall Street Journal* story [65] reported that, "Securities-industry executives here say at least eight local brokerage firms have been under scrutiny * * * Salt Lake has had an odious reputation among securities regulators for years and some SEC staffers refer to it as the 'sewer of the securities industry.' Some local officials estimate that more money is lost here each year from securities fraud than from any other crime. The problems stem from the speculative fever that dates back to the mining days before the turn of the century. Penny stocks, selling for a few cents a share, are a tradition in Utah, and most issues traded on the local Intermountain Stock Exchange sell for less than a dollar. Three firms and 14 persons have been indicted in Utah on stock fraud charges and the S.E.C. has promised more enforcement. [66]



*7. The Commodity Racket*

In 1973, commodity options grew favorably for investors. Commodity options is the buying or selling an option to purchase a certain amount of sugar, or other commodities. Option dealers are almost entirely unregulated due to a loophole in the Commodity Exchange Act of 1934. The Act does not cover world commodities such as sugar, cocoa and plywood. Option dealers operated without the disclosure policies or capital reserve requirements which are required for dealers in stocks.

At age 27, Harold Goldstein began trading in options on the West Coast in 1971 with $800. During his short career, Goldstein attracted a significant "following" and many malcontents. International City Bank and Trust Company of New Orleans won judgments against him for defaulting on two business loans; a group of 40 investors from Chicago sued him for diverting their funds for his own use and for making false and fraudulent statements; he was expelled from the West Coast Commodity Exchange for illegal major offenses, including diverting $4,500 of customers money to his own account; and he was sued by a Salt Lake City investment firm that charged that $200,000 worth of Phillips Petroleum securities the firm sold for him had actually been stolen.[67]

Goldstein's firm, Goldstein Samuelson, had quickly become the nation's largest seller of commodity options. But Goldstein basically paid off the first customers with other customer's money that should have been invested in options. In November 1972, the Securities and Exchange Commission sued Goldstein, charging fraudulent misrepresentations and omissions in the sale of some commodity options. The suit was settled by consent decree—a device in which the defendant claims that he never did anything illegal and he won't do it again.[68]

In February 1973, Goldstein attempted to wire $641,000 of the firm's customers' funds to a bank in Canada.[69] Shortly thereafter the Department of Agriculture's Commodity Exchange Authority accused Goldstein of violating federal commodity laws.[70] The S.E.C. which months earlier had let Goldstein off the hook with the consent decree, now charged that Goldstein Samuelson was "little more than a gigantic fraudulent scheme."[71] A temporary receiver, appointed by a court to oversee the firm, reported that liabilities for Goldstein Samuelson exceeded assets by $14.5 million—and perhaps by as much as $70 million.[72]

Goldstein, according to an Assistant U.S. Attorney, took many millions in customers dollars out of the United States and deposited much of the money in a Swiss bank. Goldstein is being investigated by the Federal Bureau of Investigation in Los Angeles and in Florida in connection with large amounts of stolen securities.[73]

In May, 1973, Goldstein was indicted on 15 counts of fraud and 1 count of perjury by a federal grand jury, thus ending an 18-month-old business which has parlayed an $800 investment to a $25 million-a-month fraud. Goldstein pleaded guilty to three counts of mail fraud and a possible sentence of 15 years in prison or a $3,000 fine or both.[74] In March, 1974, a federal judge sentenced Goldstein to 18 months in prison. During the trial, the prosecuting assistant U.S. Attorney had quoted a psychiatric report which said that, "the case with which Goldstein justifies criminal activity makes him quite a hazardous individual for the property and valuables of the ordinary citizen. His blase attitude implied he really didn't care what happened to his victims."[75]

Other commodity traders also did not fare well in 1973. A former employee of Goldstein Samuelson, Josef Rotter, was president of Commodity Options International, until it was placed in receivership on motion by the S.E.C. in April 1973. The receiver reported that $1.3 million out of $2.7 million which Commodity Options International had received from customers was missing.[76]

The Department of Agriculture barred "Q" Commodities Co. of Minneapolis and its owner, Kermit W. Quaintance, from trading on regulated commodities exchange for five years. In 1968, Quaintance was charged by the Commodity Exchange Authority with converting over $400,000 of his customer's funds to his own use. He was also charged with improper and inaccurate handling of customer funds and with filing false reports. In September, 1970 Quaintance and the firm were indicted for violating federal commodity laws. Quaintance pleaded guilty and was put on probation with the stipulation that would make him compensate his customers for their losses. "Q" Commodities also pleaded guilty and paid a $3,000 fine.[77]

*8. The International Telephone and Telegraph Case*

Richard Nixon has appointed four SEC Chairmen. The first was Hamer Budge who was in office less than five months when he met privately with officials of Investors Diversified Services, the country's largest mutual fund management company. They discussed an offer to Budge to become president of the company,

which at that time was trying to stop an SEC proposal that would have severely restricted its sales presentation.[78] The third was G. Bradford Cook whose involvement with suppressing the facts concerning Robert Vesco's contribution to the Nixon campaign is described in the official corruption section of this report. In between Budge and Cook (the fourth SEC Chairman is Ray Garrett) was William Casey. During Casey's tenure the SEC staff undertook an investigation of the largest merger in corporate history—that of International Telephone and Telegraph Company (ITT) and the Hartford Fire Insurance Company. The SEC staff had developed 34 boxes of evidence demonstrating an ITT attempt to favorably influence state and federal officials concerning the merger. Casey caused the quashing of the staff recommendation that ITT be charged with fraud.[79] Prompted by disclosure of the ITT offer of $400,000 contribution to finance the Republican National Convention in San Diego, allegedly made to influence the settlement of the antitrust cases, two Congressional committees began investigation. The House Commerce Committee requested the SEC files. Casey refused the Committee access and transferred the files to the Department of Justice.[80]

The SEC did file a civil suit in June 1972 against ITT for violations of federal securities laws and dealing in insider information. Two days after filing the suit it was settled by a consent decree by which ITT and its officers agreed they wouldn't violate securities laws in the future but would not concede past violations. Casey admitted in sworn testimony before the House Commerce Committee that he had consulted with the White House before transferring the documents, described as "politically sensitive".[81]

An internal SEC working paper revealed that ITT mounted a major effort to pressure the assistant attorney general in charge of the antitrust division into backing down on three antitrust suits against ITT. Officials enlisted in this effort included Vice President Spiro Agnew, Treasury Secretary John Connally, Commerce Secretary Maurice Stans and then White House aide Peter Peterson.[82] Under questioning, during his nomination hearings for Attorney General, Richard Kleindienst told the Senate Judiciary Committee that President Nixon had not intervened in the settlement of the ITT case, nor attempted to pressure him. Kleindienst's statement was later contradicted by the White House.[83] Kleindienst who once wrote in the *New York Times*, "Today, we who are associated with the criminal justice system in the United States believe we are doing everything we can to prevent crime," pleaded guilty to refusing to accurately testify before the Senate Judiciary Committee concerning that very statement. He was given a suspended sentence.

*9. Stock Loans*

Stock loans, a legitimate business transaction, are made by one firm to another so that the borrower can use the securities to make deliveries and for a variety of daily operating purposes. The borrower deposits with the lender cash equal to the full market value of the stock lent to him. For the firm receiving the cash, it is like an interest-free loan.

The SEC has been investigating brokerage house abuses in stock-loan activities. These include the practice of one firm's employees giving bribes and other inducements such as kickbacks, prostitutes and credit cards to employees at other firms in an effort to receive interest-free loans. In March of 1972, the U.S. Attorney's office in New York obtained an indictment against four securities industry men: a former stock-loan employee at Hayden, Stone, Inc. and three officials of Morgan, Kennedy & Co. The Morgan, Kennedy officials pleaded guilty to bribery to obtain $155,000 in interest-free loans. The abuses are violations of SEC antifraud laws, Federal Reserve Board regulations governing the issuance of stock market credit and New York Stock Exchange Rules.[84] In March 1973, a federal judge appointed a temporary receiver for Morgan, Kennedy.[85]

A New York Stock Exchange memo says that some firms are lending securities to other houses although there might not be a legitimate business purpose for the loan. "The reason may be to provide working cash to the lending broker or simply to improve the record of a stock-loan representative." [86]

Brokerage house employees have let employees at other houses use their credit cards as an inducement for loans. In addition, an SEC official alleged that there have been arrangements with bars and restaurants at which credit cards have been used for the tab to be inflated and the difference kickbacked to the employee to whom the credit card was lent.

*10. Insider Information*

When the SEC was established in the post-Depression era, one of its tasks was to promote investor confidence in the stock exchanges. That confidence is easily eroded if the Wall Street experts and corporate officers can trade stock on the basis of knowledge that is known only to them. The Securities Exchange Act and other laws were designed to provide investors with information on securities transactions by insiders. The use of insider information hurts small investors. If insiders know that a company has made a significant discovery or has otherwise improved its economic position, then that person can buy up the company's stock at less than its true worth, if the facts were known. So too, if the insider knows that a company is in economic difficulty, he or she can sell the company's stock at greater than its true worth.



The SEC requires corporate insider—officers, directors and holders of at least 10% of a company's stock to notify the SEC each time they increase or decrease their holdings. Rules governing inside information are designed to protect the small investor who does not have access to corporate reports and other information available to the "insiders". Criminal penalties are provided for willful violations, but no one has ever been imprisioned and only once has a fine been imposed.

A *New York Times* survey published on March 14, 1973 revealed that—

> There is a steady flow of inside information, much of it apparently used illegally, from Wall Street brokerage and investment banking firms to wealthy and powerful investors across the country, according to financial executives interviewed in the last two weeks * * * some Wall Street securities analysts admitted that they had consistently broken the rules, and the methods they used in employing inside information appeared to be increasingly sophisticated. One securities analyst said: "If we didn't break the rules we wouldn't be doing our job."

A major area of abuse comes in the form of brokerage house partners who also sit on corporate boards and are privy to much information. A New York lawyer was quoted in the *Times'* article as saying, "It's the kind of crime where you don't leave fingerprints."

## Chapter II. Crime in the Suites

Corporate crime has as many variations as the imagination of corporate officers and the inadequacies of law enforcement can devise. Businesses are subject to laws regulating trade, protecting workers, consumers and the environment, prohibiting monopolies and prohibiting corruption of respresentative government.

### A. ANTITRUST

1. On December 27, 1973, a Federal grand jury in Pittsburgh, Pennsylvania indicted the nation's six largest manufacturers of building supplies and 10 executives on charges that the companies conspired to fix prices and stabilize conditions in the sale of gypsum board. The companies included United States Gypsum, Georgia-Pacific, Kaiser Gypsum and National Gypsum. [1] Earlier that year a federal judge in Buffalo, New York awarded damages to several building supply dealers in San Francisco in their antitrust case against National Gypsum, U.S. Gypsum and Kaiser Gypsum. National Gypsum and U.S. Gypsum were ordered to pay $3.2 million in damages. The damages were awarded on the basis of a 1971 decision which found that the three companies had conspired to stablilze and maintain the price of gypsum wallboard from 1965 to 1968. [2] Also arising out of the antitrust case is an IRS charge that U.S. Gypsum owes the federal government more than $20 million in back taxes and $1 million in penalties for negligence or intentional disregard of federal tax law. According to the IRS, U.S. Gypsum paid its customers in cashiers checks in order to maintain the secrecy of its prices and then deducted the amounts under a provision of the tax code that allows write-offs for "unrestrained competitive price allowances." The IRS claims the checks were issued to further illegal price-fixing. [3]

2. On March 28, 1974, fifty-five private garbage carting companies were indicted by a Brooklyn, New York grand jury on charges of restraint of trade. Nine officials, including the president and vice-president of the Brooklyn Trade Waste Association, were indicted for perjury. The Brooklyn District Attorney, Eugene Gold, had bought a garbage truck and entered the carting business to investigate monopolistic practices. But even with rates 30% lower than the prevailing rate, only 19 out of 2,000 merchants signed up. Gold said that his two year investigation had disclosed that the garbage carting industry was controlled by organized crime. Gold said that the carting business in Brooklyn was a $60 million a year operation. Gold found that since his company could do the work for one-third the going rate, it was reasonable to assume that Brooklyn merchants, and eventually consumers, were being overcharged some $20 million a year. There are a total of 89 private carting companies operating in Brooklyn. [4]

3. In a civil antitrust case with criminal overtones, the state of New Jersey sued a dozen national companies, 175 smaller businesses and 24 political figures from Hudson County and Jersey City, N.J. The suit, filed in December 1973, asked for over $500 million in damages from the defendants for violating antitrust laws between 1957 and 1971. The suit charged the defendants with engaging in a pattern of preferential treatment for vendors who paid kickbacks to the public officials. The dozen national companies are Abbott Laboratories, American La France, Ashland Oil, Baxter Laboratories, Rockwell International, Hardee's Food Systems, W. R. Grace, Johnson & Johnson, Litton Industries, National Cash Register, International Telephone and Telegraph and E. R. Squibb & Sons. Among the public officials indicted are John V. Kenny, leader of the Hudson County Democratic organization, William Sternkopf, member of the Port Authority of New York and former Jersey City mayors Thomas Whelan and Thomas Gangemi. The civil complaint alleges that the suppliers submitted false bids; that contracts were rotated among suppliers by prearrangement; that some suppliers refrained from competitive bidding; that bids were adjusted after submission through cooperation among bidders and public officials; that specifications were drawn to circumvent public bidding laws; and that projects were split into smaller units to circumvent statutory bidding levels. Suppliers made kickbacks to officials to obtain preferential treatment, thus increasing the cost of governmental supplies in excess of legitimate prices. The higher prices and costs to the government meant higher taxes for the citizens [5]

### B. TAX EVASION

*U.S. News and World Report* revealed on Sept. 17, 1973 that "A tax-dodging spree, spreading rapidly, is costing the government in Washington at least 6 billion dollars a year and threatening to get completely out of hand." The $6 billion estimate is based only on individual tax returns. When business tax evasion is added, some put the loss at $30 billion. Former IRS Commissioner Johnnie Walters said, "Today we face serious problems in taxpayer compliance and a real danger of general deterioration. One reason for this is the fact that we are not enforcing the tax laws adequately." During one 12-month period, 1,100 cases of tax fraud were shelved because of lack of agents to press investigations. That was 40 times the number of cases shelved three years earlier.

The Philadelphia *Inquirer* published a series of articles from April 14 to April 20, on IRS enforcement. It concluded that—

> * * * the IRS is concentrating its enforcement efforts among low and middle income wage earners, instead of upper income individuals and large corporations, where taxpaying error is most likely to be found.

After reviewing the cases of four prominent tax avoiders and recounting IRS preferential treatment, the paper stated—

> For every prominent citizen the agency takes to court, there are thousands and thousands of individual taxpayers and businesses who are avoiding and evading payment of billions of dollars annually. Their errors and frauds go undetected, unprosecuted * * * Indeed, the administration of the nation's federal income tax is such that upper income taxpayers and businesses are encouraged to avoid paying the taxes they owe.

Several of the more significant tax evasion cases appear in the Appendix to the Report.

### C. ENVIRONMENTAL OFFENSES

The protection of the environment is, or should be, the subject of criminal law enforcement, much like the protection of the competitive enterprise system, or the protection from infringement of liberties. The use of the criminal justice system to enforce laws protecting the air, water and land from poisons and other contaminants underscores the importance which these natural resources have to society as a whole. In 1973 and the first half of 1974, four major criminal actions against polluters took place.

First, the Purex Corporation, Universal Oil Products, Dexol Industries, Aquatrol Inc., Mark Chemical, Flo-Ken Products and Mission Kleensweep Inc. were indicted by a federal grand jury in California on charges of violating the federal Insecticide, Fungicide and Rodenticide Act which prohibits interstate shipment of a product that is not registered with the federal government and bars products that are mislabelled, adulterated or misbranded.[6]

Second, in New York, the owner of a boat repair yard pleaded guilty for filling and dredging a wetlands area of Long Isand without a special permit. He was the first person to be convicted of New York State's Tidal Wetlands Law which seeks to protect marsh areas that are the home of wild birds and fish. He was fined $500.[7] Another case under that act has been brought against two Long Island, N.Y. real estate developers. They have been accused of destroying wetlands for the construction of a housing development.[8]



Third, American Cyanamid Co. was found guilty of discharging chemical wastes into a tributary of the Hudson River from its plant in Buchanan, New York.[9] (In an unrelated case, the Department of Justice asked the U.S. District Court in New York to hold American Cyanamid in criminal contempt for violating the terms of a 1964 judgment which had resolved a civil antitrust case against the company's production of a chemical compound used in the production of dinnerware and formica.)[10] Finally, the City of Peekskill, New York was fined $2,000 after pleading guilty to a criminal indictment which alleged that it had dumped fill along the edge of Peekskill Bay on the Hudson River without the necessary permission of the Army Corps of Engineers. A federal grand jury indicted the city February 5, 1974 after an inquiry, prompted by complaints from residents of the Peekskill area.[11]

### D. UNION CRIME

Labor unions give rise to criminal opportunities in much the same way as do corporations. Business management may be induced to bribe union leaders in an effort to secure favorable union action. Currier J. Holman, co-chairman of Iowa Beef Processors, Inc., was indicted by federal and a New York State grand jury on charges of conspiring to bribe labor union officials and supermarket meat buyers in New York. Iowa Beef, one of the nation's largest meat-packing firms was itself named in the indictment by New York State.[12]. Moe Steinman, a labor relations official for Shopwell, Inc. and Holman are charged in the indictment with conspiracy to bribe meat buyers to allow the sale of prebutchered beef by Iowa Beef at eight metropolitan area stores, a conspiracy which resulted in the payment of $993,397 in purported commissions. A conspiracy is also alleged to bribe union leaders to allow the sale of prebutchered beef which union rules forbid.[13]

Crime within unions included the case of Peter Ottley, former president of a local of the Hotel, Hospital, Nursing Home and Allied Services Employee Union, who was sentenced on May 1, 1974 to three months in prison and a $15,000 fine for aiding and abetting the embezzlement of union funds and failure to maintain adequate union financial records.[14]

On March 27, 1973, seven union leaders were indicted on 48 counts by a federal grand jury of conspiracy, extortion, evasion of income taxes, obstruction of justice and threats of violence in a pattern of racketeering in New York City's garment district. Four fur manufacturers were also indicted for making $35,000 cash pay-offs to the union leaders in order to permit the manufacturers to subcontract work to non-union shops in violation of the labor agreements.[15] Edward M. Shaw, head of a special government task force on organized crime said, "It seems to be perfectly clear that extortion and shakedowns are part of the pattern of the industry in the garment district."[16]

The four fur manufacturers have been found guilty, as have four of the seven union leaders.[17] One of the convicted manufacturers was Karl J. Schwartzbaum, who is also a former chairman of Sunshine Mining Co., operator of the largest silver mine in the United States.

The Teamsters Union was the subject of limited attention on the part of federal law enforcement agencies in 1973 and 1974. A National Labor Relations Board administrative law judge declared that for perhaps 15 years, a Chicago, Illinois Teamsters union local had resorted to "sheer racketeering" in organizing service station employees. The administrative law judge, reaching his conclusion in a massive NLRB investigation, called the union's practices "flagrant, egregious, widespread and corrupting" and ordered the union to repay thousands of Chicago-area workers initiation fees, dues, assessments, and health and welfare payments which were illegally collected.[18]

Five Teamsters union officials were convicted in Los Angeles of labor racketeering and obstruction of justice. The union officials had used economic pressure and threats of work stoppages to force Los Angeles meat packers to use one loading and unloading service to the exclusion of all others. The sentences ranged from 30 days in prison for two union agents to 4 years plus 5 years probation for the others.[19]

And finally, a federal grand jury in Chicago, Illinois returned a 12 count indictment charging seven individuals including a special consultant to the fund and three corporations with defrauding the Central State Teamsters' pension fund of over $1.4 million. [20]

## Chapter III Official Corruption

1973 was a year of unequalled revelation and prosecution of official corruption. In November of 1973, the National Advisory Commission on Criminal Justice Standards and Goals reported that corruption of public officials "stands as an impediment to the task of reducing criminality in America." The Commission stated that "The existence of corruption breeds further crime by providing for the citizen a model of official lawlessness that undermines any acceptable rule of law." "As long as official curruption exists," the report continued "the war against crime will be perceived by many as a war of the powerful against the powerless, 'law and order' will be just a hypocritical rallying cry, and 'equal justice under law' will be an empty phrase." The Report found that during the eighteen month period official corruption was widespread, affecting all levels of government.

### A. POLICE CORRUPTION

In addition to defrauding the public, cheating the government and illegally destroying competition, corporate criminals have perverted law enforcement police functions.

Police corruption is not a new development. The Knapp Commission in New York found in 1972 that a "substantial majority" of New York policemen were corrupt. In Chicago, 18 policemen were sentenced for periods ranging from 18 months to six years for extorting money from bar owners. [1] The defendants were among 57 policemen indicted in 1973 and the Mayor of Indianapolis, Indiana dismissed the chief and assistant chief of police because of widespread corruption in the 1,100 member department. [2]

A report in March, 1974, by the Pennsylvania Crime Commission revealed how legimitate businesses start policemen on the road to corruption and destroy the community effectiveness of police. The Crime Commission's Report concluded that police corruption in Philadelphia is "ongoing, widespread, systematic and occurring at all levels of the police department." Specifically, it found—

> a broad spectrum of businesses, large and small, making illegal direct payments to the police; they included banks, insurance companies, automobile dealers, restaurants, supermarkets, jewelers, construction companies, vendors, country clubs and moving companies. Businesses were found paying police officers in every one of the twenty-two police districts. [3]

Payments to the police were categorized as:

(a) payments made for clearly improper acts of policemen, including on-duty policemen acting as private guards and police officials providing confidential criminal records and intelligence information to private citizens.

(b) payments for services rendered during the course of duty such as extra protection or police escort services.

(c) gifts or payments made to incur "good will"; and

(d) payments by businesses in response to extortion demands by policemen or as brides to overlook traffic, building code or other violations.

The Commission claimed that over 900 policemen were involved in some form of corruption. One former police officer estimated that during 65% to 70% of the narcotics arrests in Philadelphia, part of the drugs seized were not turned in as evidence but were kept to be used for planting evidence against other defendants, to pay addicted informers or for sales or personal use. More than 200 officers received cash payments from businesses. One firm paid policemen over $23,000 annually. Gino's Inc., a fast food chain, provided officers with $70,000 in free food. Gino's also paid police officers over $89,000 during 1972 and the first half of 1973 to have a uniformed officer stationed in 15 of the company's outlets eight hours a day and seven days a week.

While one company official noted that the police service was "cheap at the price," the Crime Commission reported that such service deprived the citizens of Philadelphia the services of policemen whom the taxpayers were annually paying $264,000 in salaries. The Commission's report said—

> the payments by Gino's Inc. to Philadelphia police were the largest and most systematic found at any Philadelphia business investigated. They represent a particularly outrageous example of police officers individually contracting out extra police services to private persons in exchange for money.

Noting that a variety of other companies were also bribing the police, the Crime Commission charged that Philadelphia's police services "are open for bidding and the proceeds of the bidding go into the pockets of police officers, not the city treasury."[4]



### B. STATE AND LOCAL GOVERNMENT CORRUPTION

While the prevalence of official corruption was becoming increasingly apparent in Pennsylvania, one of its neighbors, New Jersey, was being completely inundated by official crime. Because of the state's appalling political corruption in 1973, its U.S. attorney, Harold Stern, compiled one of the nation's most impressive records of fighting white-collar crime. Heading the roster of Stern's successful prosecutions were:

(1) John A. Kervick, former New Jersey State Treasurer, who was convicted of extortion and bribery to fix a highway contract in return for a $27,000 kickback to the Democratic Party.[5]

(2) Peter Moraites, former Speaker of the State Assembly who received 16 months in prison for violating banking laws.

(3) Hugh Addonizio, mayor of Newak, was imprisoned 10 years for conspiracy and extortion.[6]

(4) Paul Sherwin, former Secretary of State was sentenced to 1 to 3 years in jail for demanding a $10,000 political kickback to the Republican State Finance Committee in return for attempting to fix a state highway contract.[7]

(5) Louis M. Turco, president of the Newark City Council who was indicted on 10 charges of mail fraud and four of income tax evasion. The indictment alleged that Turco, a lawyer, defrauded nine clients out of money in accident case settlements and that he sent false medical reports to five insurance companies. Turco was sentenced to 10 years in jail.[8]

(6) William H. Preis, vice-president of Grand Union Corporation pleaded guilty to perjury in connection with an alleged fraud in the financing of Governor Cahill's 1969 campaign.[9]

(7) Two former mayors of Atlantic City, New Jersey and four other former high officials were convicted of receiving kickbacks and were sentenced to prison terms ranging from 2½ years to 6 years.[10]

(8) Nelson G. Gross was indicted on charges relating to 1969 Republican gubernatorial campaign in New Jersey. He was charged with instigating perjury, obstructing justice, and conspiring to have campaign contributors write off their donations as business expenses. A federal jury convicted him in March. Gross was former chairman of the New Jersey Republican Party and former top State Department Narcotics Advisor in the Nixon Administration. He was found guilty on all counts [11]

(9) Ferdinand A. Heinize, Republican Mayor of Little Ferry, New Jersey, from 1969 to 1971 was convicted of misconduct and extortion from building contractors in connection with the construction of an apartment complex.

The New Jersey and Pennsylvania models of office corruption were repeated throughout the country during 1972 and the first half of 1973. It began to appear as if corruption—rather than service—was the *sine qua non* of government. By September, 1973, one year after his appointment as New York City's special prosecuter for corruption in the criminal-justice system, Maurice J. Nadjari, had obtained the indictments of 35 persons. This included one judge, one district attorney, the chairman of the city's tax commission, eight police sergeants, two detectives, and eight police officers. Nadjari had received 2,262 allegations of corruption, had begun 341 investigations on his own initiative, and had referred 528 cases to the city's five district attorneys.[12]

One of Nadjari's cases was that brought against Thomas J. Mackell, former District Attorney for Queens, New York. Mackell was indicted for obstructing the prosecution of a $4 million get-rich-quick scheme in which many members of his own staff had invested money. The scheme was a so-called Ponzi scheme in which investors are promised a high interest rate on their money. The early investors are paid off with the money brought in by later investors. As word spreads of the money to be made, more and more investors offer their money to the operator of the scheme. When the operator accumulates enough money to satisfy his greed, he skips town. Mackell's case was significant because Mackell like any District Attorney, was an extremely powerful official, whose decisions to prosecute or not to prosecute a case are unreviewed by any person or agency.

Two of Mackell's staff members were indicted for failing to report about $352,000 on their income tax that they had furtively earned from the illegal scheme.[13] The operator of the scheme was a Joseph Ferdinando. He received about $4 million from about 400 people, including 16 members of Mackell's staff and 38 police officers. Mackell assigned his son-in-law to the case, knowing that his son-in-law was an investor in Ferdinando's scheme.[14] At the trial, one victim of the fraud testified that she invested $17,000 because, "* * * if all those big people had money invested, it must be legal * * *" She lost $14,000.

In summation of the Mackell case, Nadjari told the jury, "The most dangerous men are not bad men. It is those with just enough good in them to appeal to our sense of charity and just enough evil to deceive us—of whom we must be the most alert." [15] The former D.A. was convicted of obstructing the prosecution of Ferdinando and was sentenced to six months in jail.[16]

The corruption of law enforcement and legislative officials is the indispensable lever that pries open the door for white collar and organized crime. Such corruption provides the blackmail that eases the continuation of such activities, it alters the role of the public official from that of a dutiful officer sworn to uphold the laws and protect the populace to that of an accomplice who willfully and consciously conspires to evade and transgress the very laws which he has either helped enact or is mandated to enforce. If our laws are to be treated as legitimate by the public, then first they must be treated with integrity by those pledged to enforce them. If the government itself violates the laws, then we no longer have a government, but illegality masquerading as an institution.

### C. FEDERAL HOUSING ADMINISTRATION SCANDALS

While the taint of scandal was infecting elected and appointed officials across the country, one federal agency was especially hard-hit by the disease—the Federal Housing Administration. Assistant Attorney General Henry Peterson said that more than 750 criminal cases were pending in May 1972 involving federal housing fraud. Justice Department claims that it was investigating FHA frauds in 20 cities at the beginning of 1974 which made the Department's activities one of the biggest white-collar prosecutions in the nation's history. By the end of 1973 there were 180 indictments, involving 317 persons engaged in inner-city programs of the Department of Housing and Urban Development, and 119 convictions.[17]

According to William Chapman of the Washington Post—

> It is a classic national case of white collar entrepreneurs reaping illicit profits from a government program designed to help the poor get decent housing. Subsidies aimed at low income families in the slums were harvested instead by brokers, speculators, lenders and government employees. Taxpayers are picking up a lot of the losses. Two government funds created to back up the program will be $1.5 billion in the red as a result next year.[18]

In most of the FHA cases, a real estate speculator would buy a home and perform cosmetic changes to hide its run down nature. An FHA employee would be bribed to inflate the value of the house. The house would then be sold at the exorbitant price to a low income purchaser who would make a down payment and have FHA insure the mortgage. After a while the run down, shoddy nature of the house would become apparent. The cost of repairs and the cost of the high mortgage payments would cause the tenant to default on the mortgage and often abandon the property. The real estate speculator takes a hefty profit. The FHA employee takes the bribe. But the purchaser is left without a home and with a credit rating in shambles. The Department of Housing and Urban Development is left with acquiring the property, paying off the mortgage and then managing the foreclosed property. Six years ago HUD did not own a single house in the Philadelphia area. Today it owns 4,176 single family residences and 10 apartment projects. In Detroit, HUD has had to acquire over 15,000 homes.

One FHA case involved the deputy director of FHA's Philadelphia office, John B. Boyle, and an area management broker for the FHA, Leo Bloom. Bloom's job entailed receiving a fee for managing a property whenever its mortgage was foreclosed by the FHA, arranging for repairs, and preparing it for the eventual sale. Bloom soon discovered that the job had considerable fringe benefits. Repair contractors, eager for his patronage, began kicking back to him as much as 10 percent of their profits. As the FHA acquired more property that he managed, Bloom's kickbacks rose to $40,000 and $50,000 annually.

In 1970, Bloom had a meeting with Boyle, who had become aware of Bloom's extracurricular activities. But Boyle did not intend to end Bloom's profitable sideline. Instead, he asked for his share of Bloom's kickbacks. As Bloom later said at trial in federal court—

> Mr. Boyle said that he was under the impression that I had an arrangement with various contractors that were doing FHA work and that he would like to have a piece of the cake.[19]

Boyle received a one year prison sentence.

Another FHA official, Michael J. Hughes, chief of the property management section, also joined the conspiring duo. For about three years, both he and Boyle received $100 a week from Bloom, who also sent one of his employees to Boyle's home with a case of liquor. But eventually federal investigators discovered the scheme. Boyle was imprisoned for a year; Hughes was fined; and Bloom, who had cooperated with federal prosecutors, went to prison for two years.



Other FHA officials in the Philadelphia area were tainted by other scandals. The Philadelphia area's top official, Thomas J. Gallagher Jr., was jailed for income tax charges that evolved from bribes that he had received. Seventeen real estate dealers were convicted or had pleaded guilty by the end of 1973. And a large government approved mortgage firm was fined $160,000 for making false statements to the FHA.[20]

### D. SMALL BUSINESS ADMINISTRATION

Another federal agency severely hit by white collar crime during 1973 and the first half of 1974 was the Small Business Administration. In November 1973, the House of Representatives' Subcommittee on Small Business suddenly announced that a bill relating to the SBA would not be seriously considered until charges of pervasive criminal corruption in the local offices of the SBA were clarified. These charges included kickbacks and underworld infiltration.

The Subcommittee's chief investigator, Curtis Prins, told the Subcommittee that scandals had infected at least 22 of the SBA's offices. These included offices in such major cities as New York, Philadelphia, Boston, Baltimore, Milwaukee, Dallas, Denver, Los Angeles, Atlanta, Chicago, Washington, Kansas City, New Orleans, Miami, San Diego, Cleveland and Richmond.[21]

Prins claimed that during his investigation, the White House had interfered on behalf of Bennie McRae, the owner of a Virginia construction company, a former defensive halfback for the Chicago Bears and the New York Giants, and co-chairman in 1968 and 1972 of Athletes for Nixon. Prins asserted that he had "evidence of White House pressure to facilitate loans and to cover up our investigation."[22]

And the former regional director in Philadelphia of the SBA, Russell Hamilton, accused Anthony Stacio, SBA's deputy administrator, of bowing to political influences when approving a $330,000 loan to Photo Magnetic Systems, Inc., of Bethesda, Maryland, which is partly owned by William Rentschler. Rentschler, an unsuccessful candidate for the GOP Senate nomination in Illinois, directed Richard Nixon's presidential campaign in Illinois in 1968 and 1972, and was a special advisor to the President on the National Voluntary Action Program.

Though the loan to Photo Magnetic Systems had originally been rejected by the SBA's Washington lending office, Stacio personally approved it. The firm has since defaulted on the loan and left the SBA with a $287,000 loss.[23]

### E. IMMIGRATION AND NATURALIZATION SERVICE

In May of 1973, the Department of Justice announced that it had amassed evidence of widespread corruption in one of its own branches—the Immigration and Naturalization Service in the Southwest Region. Charges have been brought against 11 persons including seven immigration officers. The Department of Justice's investigation found that immigration officers were engaged in smuggling aliens and narcotics into the United States, were selling documents necessary to enter the country, were allowing aliens into the United States temporarily for illegal purposes and were physically abusing some immigrants.[24]

### F. CAMPAIGN CONTRIBUTIONS

White collar crime in business and government is facilitated and abetted by lenient and corrupt public officials, by those whose contempt for the law is exceeded only by their contempt for society. White collar crime and political crime are symbiotic: both are equally corrupt; both are equally self-serving. But for white collar crime to exist and survive in the business world, political positions must be held by those who are willing to allow laws to be bent, broken and mutilated. So, some of the illegal profits often are reinvested by the white collar criminal as campaign contributions to help persuade the politician to wink or simply ignore the illegalities.

The term "Watergate" has become synonymous with political corruption and the abrogation of campaign finance laws. The financing of President Nixon's $50 million 1972 re-election campaign involved a number of questionable transactions. For instance, the president of Equity Funding, Stanley Goldblum, donated $30,000 worth of fraudulently inflated stock to the President's campaign.

[25] William Penn Patrick, whose Holiday Magic's pyramid sales schemes have been investigated by the Securities Exchange Commission and by the states of Wisconsin, California, Illinois gave Nixon $50,000 in 1968 and $5,000 in 1972.[26]

Perhaps the most notorious of the contributions to the President's campaign came from international financier Robert L. Vesco, who has been indicted by a federal grand jury for his involvement in what Philip A. Loomis, an SEC Commissioner, called "* * * one of the largest securities frauds ever perpetrated." In November, 1972, a two-year SEC investigation was concluded when the SEC filed a massive civil suit against Vesco and 40 of his associates that charges them with looting IOS, Ltd., a European mutual fund, of $224 million. Vesco allegedly directed the looting by selling blue-chip U.S. securities held by IOS Ltd. and transferring the proceeds to obscure, unmarketable, foreign corporations that he purportedly dominated. The proceeds were then used for the personal use of Vesco and the other defendants. Charged in the complaint were 21 individuals and 21 companies, banks and funds in the U.S. and abroad. These included three members of a prominent Wall Street law firm—Wilkie, Farr & Gallagher. The trio—2 partners and an associate—"lent their skills to facilitating and executing defendant Vesco's scheme to mulct the (IOS mutual) funds," according to the complaint. Other defendants included James Roosevelt, son of the late President Franklin D. Roosevelt and another lawyer.

Part of the millions that Robert Vesco is accused of diverting was traced to Richard C. Pistell, former chairman of General Host Corporation, a diversified food-products concern. General Host and Pistell were sued by the SEC after a 3-year investigation for fraud in an elaborate scheme to acquire control of Armour Company, a meat packer. [27] That suit was settled by a consent decree entered into in December 1973.

Vesco's arrangement with one of the companies involved demonstrates how corporate officers are unaccountable to the government. Vesco was president and Chief Executive of International Controls Corporation. He left that position and became a consultant to the company at the same $120,000 salary he had received as president. His expense account included use of private aircraft (a Boeing 707) and automobile, office facilities, entertainment and lodging of "standards of comfort not less than the standards of comfort maintained by Vesco in his personal life." Most importantly, Vesco was also indemnified "to the extent permitted by applicable law, so long as he acted in good faith with respect to the company and in a manner he reasonably believed to be in or not opposed to the best interests of the company." The indemnification holds Vesco harmless "against any losses, claims, damages, fines, expense or liabilities." It also applied to positions he held in other companies at the request of the Board of Directors of International Controls. The accountants for the firm were Lybrand, Ross Brothers and Montgomery which resigned the account a few weeks before the SEC filed its suit. Three members of Lybrand, Ross Brothers and Montgomery were convicted in 1968 of distributing false financial statements and mail fraud. They were given unconditioned pardons in 1972 by the President. Renamed, Cooper & Lybrand, the firm audited President Nixon's San Clemente real estate transactions in 1973. The SEC has challenged International Control's financial reports for 1970, 1971 and 1972 as being misleading.

Harry Sears, a director and member of the Board of Directors of International Controls, was a former majority leader of the New Jersey State Senate, a director of the New Jersey Bell Telephone Company and director of President Nixon's New Jersey re-election campaign. (Sears was on the board of Bahamas Commonwealth Bank of Nassau which is a defendant in the SEC suit and is prominently involved in transactions that allegedly defrauded the IOS mutual funds.) Sear's deposition to the SEC revealed that he had been the conduit of a secret $200,000 contribution from Vesco to Maurice Stans for President Nixon's Re-election campaign. The $200,000 was returned to Vesco a month after the SEC suit was instituted. Sears also persuaded former Attorney General John Mitchell to obtain Vesco's release from Geneva, Switzerland in December 1971. The $200,000 contribution was delivered after April 7, the date after which reporting was mandatory under a new federal law. Maurice Stans said that the contribution was not reported because "the money was constructively in the hands of the campaign committee even though it wasn't actually delivered." [28]

In March 1972 the IRS filed a $83,698 lien against Vesco's personal assets for payment of his 1972 federal income tax. In May, a special grand jury indicted John N. Mitchell, former U.S. Attorney General, Maurice H. Stans, former Secretary of Commerce, Harry L. Sears and Robert Vesco on 16 counts of conspiracy to defraud the United States and conspiracy to obstruct justice. Mitchell and



Stans were also charged with committing perjury before the grand jury. The indictment implied that G. Bradford Cook, the Chairman of the SEC, had, as general counsel, deleted from the SEC's civil complaint references to Vesco cash contribution. After a lengthy trial in New York, Mitchell and Stans were acquitted. [29]

During these past several years, Vesco has been investing heavily in Costa Rica, as well as living there since the original SEC civil suit. His investments include $60 million of IOS fund money and a $2.2 million loan to a company founded by President Figueres of Costa Rica. In July 1973 Vesco had President Figueres officially protest to President Nixon that adverse publicity about the SEC investigation might jeopardize the small Central American republic's reputation as "a showpiece of democratic development." The SEC also revealed that the New York bank account of President Figueres swelled by $325,000 from Vesco-linked companies in the Bahamas and Costa Rica, and by $255,000 from the Bahamas Commonwealth Bank, described by the SEC as a conduit for Vesco looted IOS Ltd. funds. [30]

The Nixon campaign's finance committee was indicted for failing to report the Vesco gift. In June, it was convicted for failing to report the contribution and fined $3,000—15% of the amount involved in the crime.

An outsider director of International Controls Corporation sued Vesco in June, 1973 for a corporation check of $25,000 that funded five $5,000 gifts to the Nixon 1968 campaign. If proved, this charge would violate federal law prohibiting corporate donations to candidates for federal offense. [31]

In June, 1973 Vesco, in addition to being under extradition proceedings, was indicted again for using interstate and foreign communications facilities in an attempted fraud to finance the $250,000 in gifts. [32] Vesco has thus far successfully defeated any attempt by the U.S. to extradite him from the Bahamas.

Violations of compaign finance laws do not occur in a vacuum. They are intended to benefit the donor, to secure from him a coveted government position, a profitable government contract or negligible enforcement of certain laws that pertain to his activities. Campaign contribution laws are violated to insure that private interests are heard above the public interest to insure that society is subservient to the privileged individual.

When the former Vice-President of the United States, Spiro Agnew pleaded nolo contendere (which the judge said was the equivalent to a guilty plea) to evasion of federal income taxes of money received as kickbacks from building contractors in Maryland, the *New York Times* and *Wall Street Journal* published detailed reports on the relationship of politicians to consulting engineers and highway contractors. The *Times* article in August, 1973, reported that a survey of Florida, Texas, California, Illinois, Massachusetts and New Jersey—

> showed that in four of them, contractors and consultants were expected to help pay a major share of campaign costs. This practice has led to such things in recent years as a candidate in Illinois reportedly being offered $250,000 in return for contractors being allowed to name the head of the state department of transportation and donations from consultants and contractors to help a former Florida Governor live "in style". Of the states surveyed, only Texas and California seemed free of taint. [33]

Not surprisingly, New Jersey led the *Times'* list of corrupt states. Among the individuals cited was Robert J. Burkhardt, a former New Jersey Secretary of State, who pleaded guilty to a Federal charge of conspiring to extort $30,000 from J. Rich Steers Inc., a New York construction company.

None of the numerous heads of corporations convicted for violating federal campaign laws has received a single day in prison or a fine exceeding $1,000. And virtually every illegal corporate contribution has been returned to the corporation that offered it.

The political arms of the dairy cooperatives had especially notorious roles in the political scandals that have swept the nation between 1971 and June 1974. In 1971 and 1972, the milk lobby contributed $422,500 to the Nixon re-election committee. Shortly after these contributions, the Department of Agriculture reversed its policy and raised milk price supports.

David Parr, a leader of the milk lobby and a former special counsel to Associated Milk Producers (A.M.P.I.), was indicted by a Federal grand jury for funneling $22,000 in corporate funds to Hubert Humphrey's 1968 presidential campaign. The funds were laundered through the Arkansas Electric Cooperatives Inc. and through two employees of Milk Producers Inc. The Electric Cooperatives Inc. and its general manager were each fined $2,500 and placed on three years probation.[34]

Another alleged accomplice in the AMPI scandal is Attorney Jake Jacobsen, who represented the organization when it made its controversial donation which supposedly reversed the Nixon Administration's policy on milk supports. In early February, 1974, Jacobsen, who was a White House aide to President Lyndon Johnson, was indicted for allegedly lying to a federal grand jury and misapplying funds of the First Savings and Loan Association of San Angelo, Texas.[35]

## Chapter IV Consumer Frauds

Some of the more common and prevalent white-collar crimes involve frauds against the consumer. These take a variety of forms and schemes, of which the more commonly publicized include: fraudulent advertising, home improvement and repair, charitable solicitations, television, appliance and auto repair, installment sales contracts, bait and switch retail sales tactics, unordered merchandise, food freezer and furniture plans, magazine, book and encyclopedia subscriptions, used automobile sales, correspondence schools, dance studios, computer dating, medical devices, and weight reducing plans.

### A. ENERGY

Many such frauds are perpetrated in response to sudden changes in the economy or in public taste. Those who commit them are able to take advantage of the victim's naivete or of a desperation to extricate oneself from an untenable or uncomfortable economic situation. The alleged energy crisis produced its own genre of schemes and violations of energy-related legislation and governmental rules. For instance, when the energy crisis was at its height in New Jersey, officials announced that they could do what federal officials maintained was impossible—obtain extra gasoline for the state. They had been told by two gasoline brokers that they could deliver to the Garden State an extra 1.3 million gallons of gasoline each week.[1]

In December, 1973, and January, 1974, the Internal Revenue Service spot checked 58,422 service stations and fuel dealers around the nation. It discovered that 14,494—almost 25%—had violated price controls on fuel. John Sawhill, then assistant head of the Federal Energy Office, estimated that such practices may have cost the American consumer up to $100 million during the winter energy crisis. He added that by April, 1974, refunds from pricing errors on violations had totalled $14.2 million in either lowered prices or outright refunds to individual consumers.[2]

More traditional consumer frauds usually involve swindles and con games. Among some of the more profitable consumer frauds during 1973 and the first half of 1974 were a home improvement fraud and incompetent work by unlicensed plumbers in New York City, numerous mail frauds in Newark, New Jersey, and Glenn Turner's remarkably successful pyramid-selling scheme.

### B. HOME IMPROVEMENT

In New York City, twelve persons, including the principal officers of eight home improvement companies, were indicted in March 1974, on 218 counts of grand larceny, forgery, and fraud stemming from charges that they hoodwinked owners of more than $110,000 in 1973 through shoddy or incomplete work. One of the charges specified that the defendants fraudulently and without the knowledge of home owners, obtained mortgages on the property in excess of the amount involved in the repair or improvement. They also used a bait-and-switch tactic by advertising their services at a low price, but pressured the property owner into more expensive work. The New York Department of Consumer Affairs said the schemes were "symptomatic of a city-wide problem that costs consumers millions of dollars each year." The State attorney general's office recovered $586,000 in other actions against home repair companies.[3]

### C. UNLICENSED PLUMBING

In April 1974, 70 persons in New York City were injured in a gas explosion that was caused by the work of an unlicensed plumber on a water tank. New York Mayor Abe Beame alerted prosecuters to "possible violations of the law," but the New York *Times* editorialized that—

> if any conviction results it will be a rare case. . . . In recent months, for the first time, the city has set up machinery to prosecute unlicensed plumbers. But it conceded that it is powerless to uncover more than a handful of them and is not convinced it should try.



New Yorkers spend $25 to $40 million a year on work by unlicensed plumbers. Some, possibly a good deal, of such work is shoddy. In some cases it is disastrous. In 1970, another gas explosion in a Chinese restaurant opposite New York's City Hall killed 11 persons. The State Supreme Court determined that an unlicensed plumbing firm had incompetently installed gas piping in the restuarant. According to Herbert Greenberg, a member of the plumbers license board and a partner in a large Bronx plumbing firm, "an electrician can start a fire, but if a plumber screws up he can poison a whole city. All it takes is a crossed connection—sewage and fresh water—to give a whole city typhoid." [4]

### C. MAIL FRAUDS

Across the river from New York, Newark, New Jersey was called the "mail fraud capital of the nation" by the director of the Newark Better Business Bureau, Robert Ruff. The New York *Times* reported that—

> This city (Newark) has become a center for mail frauds in which the unwary are being bilked of millions a year through advertisements, promoting work-at-home schemes, weight-reduction gimmicks, substances promising prolonged "bridegroom" strength, and sexual stamina and miracle cures for illnesses.

While discussing the operations of the work-at-home schemes, Ruff noted that—

> They prey largely on the elderly and the poor who often live on fixed incomes and for whom the seeming small dollar amounts involved may be significant. While the dollar amounts of the victim may be relatively small, the total take of the swindlers isn't. In one case, seven people who were connected . . . made more than $13 million.[5]

### E. PYRAMID SELLING SCHEMES

One of the most widely pursued schemes in the nation is Glenn Turner's pyramid selling operation. In this plan, distributor rights and products are sold to a progressively greater number of dealers. Profits are made by selling the *distributorships*—*not* through selling the products. Markets become quickly saturated with dealers without buyers. Those at the top of the pyramid make a large amount of money. Those at the bottom do not.

Many states have passed anti-pyramid selling laws and a federal law against pyramid selling has been introduced by Senator Walter F. Mondale (D-Minn.).[6] Four Salesmen for Dare to Be Great, a Glenn W. Turner enterprise, were given suspended sentences in December, 1972, after pleading guilty in Nashville, Tennessee, for violating Tennessee's anti-pyramiding law. The prosecutor said that he agreed to suspended sentences because the punishment for—

> the wrong done by the corporation shouldn't rest solely on the shoulders of these persons. When an operation is taking in thousands of dollars at a time from people, I feel the maximum penalty should be substantially greater than it is. The company which perpetrates such a scheme should be subject to a fine of several thousand dollars in my opinion . . .

The prosecutor added that the corporation could have been prosecuted, but that it was "hardly worth the effort" because of the low maximum fine.[7]

Branches of Glenn Turner enterprises have been legally challenged in 41 states in 1973 for securities violations, fraud or illegal pyramiding—chiefly by former subscribers who claim promises of substantial income were not fulfilled.

In May 1973, Glenn Turner, Attorney F. Lee Bailey, Koscot Interplanetary, Dare to Be Great, Inc. and Glenn W. Turner Enterprises were indicted by a federal grand jury in Orlando, Florida for alleged mail fraud and conspiracy. The defendants were charged with devising a scheme to defraud persons who could be induced to purchase multi-level distributorships for the sale of Koscot cosmetics and self-improvement courses called Dare to Be Great.[8] The long trial ended in a mistrial on May 30, 1974 because of a hung jury. A new trial has been scheduled.

The indictment charged that the defendants claimed distributors could earn $50,000 to $200,000 a year, but conceded that Koscot cosmetics were difficult to obtain without considerable delay; that Koscot would deduct service charges and participation fees from distributor commissions on retail sales: that distributors were required to pay for sales aides such as pamphlets and that a high percentage of existing distributors of Koscot had failed to recoup thier investments.

The indictment also maintains that the defendants trained distributors to make the same misrepresentations to others they were trying to recruit. The IRS has a $10,000,000 claim against Turner and nearly 80,000 claimants are trying to get nearly $1 billion from him. The trial jury acquitted Turner but in New York

City, he was convicted for contempt of court and for failing to observe the terms of a three-year-old consent order demanding that he cease his pyramid sales technique. Though Turner had bilked 1,604 New Yorkers out of $3.8 million, he was fined only $65,850.

Although he was sentenced to 169 days in jail, Turner has yet to serve any time.[9] Without apology, Turner recently announced his candidacy in Florida for the Democratic nomination for U.S. Senate seat, now held by Senator Edward Gurney, a Republican.[10]

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APPENDIX TO PUBLIC CITIZEN STAFF REPORT WHITE-COLLAR CRIME

| Defendants | Description | Sentence | Source |
|---|---|---|---|
| **I. STOCK THEFTS** | | | |
| 23 men | Indicted by a Federal grand jury in Tampa, Fla., in alleged plot to counterfeit millions of Walt Disney stock and TWA bonds; several of the men were also involved in attempted sale of stolen ITT, IBM, Westinghouse Electric stock and U.S. Treasury notes. Indicted for fraud by wire, interstate transportation of counterfeit stock and Federal bank fraud. | | Wall Street Journal, Apr. 16, 1973. |
| 16 persons—9 Americans, 7 Europeans | Indicted by Federal and State grand juries in New York for conspiring to cash $3,400,000 in stolen stocks and $14,500,000 in counterfeit corporate bonds. 2 defendants were in Federal custody on narcotics and counterfeiting charges; another is in Federal prison for part in gin rummy cheating ring at the Los Angeles Friars Club in 1967; another is the son of a member of the British House of Lords who is a fugitive in a 1971 stolen securities case. | | Wall Street Journal, July 12, 1973. New York Times, July 12, 1973. |
| 1 man | Arrested for possession of nearly $1,700,000 in counterfeit and stolen securities. Part of the securities were from an $800,000 theft from a Hayden Stone Inc. brokerage-house messenger. | | New York Times, Wall Street Journal, July 13, 1973. |
| 7 persons | Indicted in Los Angeles by a Federal grand jury for theft of $30,000,000 in stolen securities. | | |
| 1 man and 1 woman | Arrested for trying to sell a million dollar Treasury note which was part of a total of $15,300,000 in Treasury notes stolen from the Chase Manhattan Bank in December 1973. The man is a former stockbroker, presently an investment adviser. | | New York Times, May 17, 1974. |
| The head of a securities firm and 4 employees | Indicted by New York State grand jury on 79 counts of securities fraud, conspiracy, falsification of records, and commercial bribery. | | Wall Street Journal, Mar. 28, 1973. |
| 2 top officers of Bubble Up Corp. (Out of 20 defendants, 5 were acquitted and 15 pleaded nolo contendere or were found guilty). | Found guilty of leading a group of 20 persons in selling $4,000,000 of unregistered stock: original group included 7 former stockbrokers of Hornblower, Weeks, Hemphill & Noyes, 3 from Weis, Viosin & Co., and 1 from Barth and Co. | 1 to 10 years | Wall Street Journal, Apr. 2, 1973. |
| President of Swiss Bank, Paravicini Bank, Ltd. and a registered representative of Lehman Bros. | Indicted by a Federal grand jury on 4 counts of conspiracy and criminal violation of Federal Reserve System's credit requirements on securities trades. | | Wall Street Journal, June 8, 1973. |
| 5 men including 3 securities industry executives | Indicted by a Federal grand jury for a scheme to manipulate the stock of Health Evaluation Systems, Inc., in 1970. 1 executive allegedly received $100,000 in bribes. | | Wall Street Journal, July 11, 1973. |
| 6 men including a lawyer, 2 certified public accountants, 3 businessmen, and 1 corporation. | Indicted by a Federal grand jury for securities fraud in connection with Takara Partners, Ltd. | | Wall Street Journal, Mar. 2, 1973. |
| Akiyoshi Yamada, former partner in Takara Partners, Ltd. | Pleaded guilty to 3 indictments charging conspiracy to violate securities laws | 2 years | Wall Street Journal, June 27, 1973. |
| John Galanis, former partner in Takara, Ltd | Pleaded guilty to conspiring to pay money illegally to buy overvalued stock and conspiracy to file a false statement with the SEC. He was held responsible for the disappearance of $10,000,000 of investors money. | 6 mo. in prison and 5 years probation. | Wall Street Journal, Feb. 5, 1973. |
| Don Lowers, Akron Ohio, lawyer and businessman | Found guilty on 26 counts of violation of Ohio securities laws. He went bankrupt in 1972 owing $11,000,000 to 1,400 lenders. | 4 consecutive 1 to 5 prison terms. | Wall Street Journal, Jan. 23, 1973. |
| 15 persons and a securities firm (among the 15 were 2 attorneys). | Indicted by a Federal grand jury on 13 counts of mail and securities fraud in 1971 public offering of Automated Information Systems, Inc., which caused the price of Automated to rise from $1 to $5.50. | | Wall Street Journal, Sept. 26, 1973. |

| Defendants | Description | Sentence | Source |
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| 11 persons, including 5 securities salesmen, a lawyer, and 5 businessmen. | Indicted by Federal grand jury on charges of a fraudulent scheme involving stock market manipulation and kickbacks to a Swiss bank. The scheme is estimated to have cost 3 Denver, Colo., mutual funds $9,000,000. | ---------- | Wall Street Journal, Nov. 30, 1973. |
| 5 persons including 2 alleged organized crime figures---- | Indicted by a Federal grand jury in Newark, N.J., on charges of bilking thousands of small investors in a $1,500,000 stock conspiracy involving the Datacomp Service Corp. of Fort Lee, N.J. | ---------- | New York Times, Oct. 26, 1973. |
| Carmine Tramunti, reputed boss of a Mafia family------- | Convicted of perjury for his testimony in a 1972 stock fraud trial of Imperial Investment Corp. Tramunti is already serving 3 years for refusal to talk to a Brooklyn, N.Y. rackets grand jury. Tramunti was sentenced to 15 yrs in prison for narcotics conspiracy. The original Imperial Investment case resulted in a conviction in 1971 of Robert T. Carson, who was an aide to Senator Hiram L. Fong (R-Hawaii) for bribery conspiracy to quash the Imperial indictment in exchange for $100,000 contribution for President Nixon made to Richard Kleindienst, then deputy Attorney General. | 5 yr---------- | New York Times, Mar. 1, 1974; Oct. 26, 1973; Jan. 26, 1974; May 8, 1974. |
| John Dioguardi, reputed Mafia figure and 13 other persons. | Indicted by a Federal grand jury for mail fraud and conspiracy involving At-Your-Service-Leasing Corp. of New Jersey. Dioguardi is currently in Federal prison for bankruptcy fraud for 5 yr. At the completion of that sentence he is to begin serving 9 yr for stock manipulation. He was acquitted of rigging the stock of Imperial Investment Corp. 4 named co-conspirators are certified public accountants. | ---------- | Wall Street Journal, Apr. 25, 1974. |
| Baptist Foundation of America, 15 others, and a former president of BFA, Rev. T. Sherron Jackson. | Indicted by Federal grand jury in Los Angeles on 35 counts charging a highly sophisticated and intricate international conspiracy to defraud the public of more than $4,000,000. The indictment was the result of a 3 yr investigation. Jackson pleaded guilty to conspiracy to defraud and mail fraud. | 18 mo---------- | Wall Street Journal, Apr. 18, 1973; Apr. 18, 1974. |
| A New York lawyer, 2 financial consultants and a Swiss Banker. | Indicted on charges of conspiring to violate securities and mail fraud laws in sale of Training With the Pros, Inc. that resulted in more than $900,000. | ---------- | Wall Street Journal, Feb. 5, 1974. |
| Partner of Peat, Marwick, Mitchell & Co., largest U.S. accounting firm and 7 other persons. | Indicted by a Federal grand jury in New York for making false and misleading statements in proxy material of National Student Marketing Corp. whose 1971 stock market collapse cost investors over $100,000,000. Named as an unindicted co-conspirator was the former director of sales promotion of American Airlines who was indicted in 1973 for participation in a bribery and kickback scheme. | ---------- | Wall Street Journal, Jan. 8, 1974; Jan. 14, 1974; Jan. 29, 1974. |
| 2 stockbrokers and a lawyer---------- | Indicted for stock fraud and manipulation in the sale of Frigitemp Corp. stock in 1969 and 1970 by a Federal grand jury. | ---------- | Wall Street Journal, Jan. 11, 1974. |
| The former chairman, president and chief executive officer or Ecological Science Corp. | Indicted by a Federal grand jury 28 counts of conspiracy, mail fraud, securities fraud and filing false reports with the Securities and Exchange Commission and the American Stock Exchange. | ---------- | Wall Street Journal, June 13, 1973. |
| A New York tax lawyer---------- | Indicted on a Federal charge of using a Bahamian bank to violate credit requirements of the Federal Reserve System relating to stock purchases. | ---------- | Wall Street Journal, Aug. 11, 1973. |
| 2 officers of an Atlanta, Ga. brokerage firm and 2 officers of Federally funded bank. | Indicted by a Federal grand jury on 7 counts of furnishing false information to a Federally insured bank and 2 counts of making false entries on the bank's books representing drafts on fictitious sales of securities. | ---------- | Wall Street Journal, June 6, 1973. |
| 4 persons---------- | Indicted by a Federal grand jury in Los Angeles, Calif., for violation of securities and fraud laws in the sale of unregistered stock of Pollution Reduction Corp. of Wyoming. The 4 made materially false and misleading representations about an antipollution device. | ---------- | Wall Street Journal, Oct. 12, 1973. |
| 3 persons—including a lawyer and a businessman-------- | Found guilty in U.S. District Court in Washington, D.C., on mail fraud charges in connection with the fraudulent sale of more than $500,000 of stock in a nonexistent onyx mine in Arizona. Another lawyer and another businessman had pleaded guilty. | ---------- | Washington Post, Dec. 18, 1973. |
| **III. COMMODITY LAW VIOLATIONS** | | | |
| Roy D. Simmons, member Chicago Mercantile Exchange and Chicago Board of Trade. | Pleaded guilty to 2 violations of the Commodity Exchange Act in violating regulations on trading on shell-eggs and falsifying records to cover up the trading. | $15,000 fine and probation. | Wall Street Journal, Mar. 19, 1973. |
| Rawlin J. Stovall, President American Cash Commodities of Missouri, Inc. | Found guilty on 25 counts of mail fraud in the swindle of as much as $8,500,000 from 4,000 customers. He pleaded nolo contendere on behalf of his corporation to 19 counts of mail fraud. | ---------- | Wall Street Journal, Jan. 15, 1974. |
| 14 commodity option dealers---------- | Indicted by a Texas grand jury on securities fraud charges involving 12 concerns which collapsed last year leaving Texas investors with losses of $20,000,000 to $50,000,000. | ---------- | Wall Street Journal, Apr. 23, 1974. |
| **IV. ANTITRUST** | | | |
| 3 vending machine companies, AAV Companies, ARA Services, Inc. and Western Vending Machine Co. | Indicted on Federal charges of price-fixing and allocating customers and selling locations for cigarette vending machines in Cincinnati, Ohio, area, the 3 companies operate vending machines at 3,000 locations. | ---------- | Wall Street Journal, Jan. 17, 1973. |
| 11 corporations and 7 executives including Anpress Brick Co., American Brick Co., E. L. Ramm Co., Chicago Block Co., Illinois Brick Co., Heights Block., Inc., SGM Corp., North Field Block Co., Valley Block & Supply Co., Joliet Concrete Products, Inc., Joseph Metz & Sons. | Indicated by a Federal grand jury on charges of conspiring to fix concrete block prices in Chicago area. The indictment charged the companies with conspiring to raise and stabilize concrete block prices in a 9 county area that includes Chicago and parts of Indiana and Wisconsin. The defendant companies had about $12,000,000 in aggregate gross sales. | ---------- | Wall Street Journal, Apr. 20, 1973. |
| 5 companies and 5 officials including Indian Head, Inc., Brownell & Co., Newton Line Co., Nylon Net Co. & Wellington Puritan Mills, Inc. | Indicted on charges of conspiring to fix prices of nylon twine---------- | | Wall Street Journal, Dec. 12, 1972. |
| 6 individuals and 7 vending machine companies and the Georgia Automatic Merchandising Council, Inc., Defendants are ARA Services, Inc., Central Vending Service, Old Fashioned Foods, Sands & Co., Servomation of Atlanta, Inc., Macke Co. and Shamrock System, Inc. | Indicted on charges of conspiring to fix prices on hot and cold beverages sold in cups in Atlanta, Ga., area. | ---------- | Wall Street Journal, Aug. 9, 1973. |
| Combustion Engineering, Inc., of Stamford Conn. and American Colloid Co., of Skokie, Ill. | Indicted by a Federal grand jury in Philadelphia on charges of conspiring to fix prices of chromite sand used for making molds for iron and steel casings. The 2 companies accounted for more than 90 percent of the United States chromite sand sales, with combined sales exceeding $2,500,000. | ---------- | Wall Street Journal, Nov. 15, 1973. |
| 8 executives and paper label producers, Diamond International Corp., International Paper Co. of N.Y., Litton Industries, Inc., H. S. Crocker Co., Stecher-Traung-Schmidt Corp., Fort Dearborn Lithograph, Piedmont Label Co., Michigan Lithographing Co., H. S. Smythe Co. | Indicted by a Federal grand jury in California on charges of conspiring to fix prices. The 9 companies accounted for $90,000,000 in sales in 1971. | ---------- | Wall Street Journal, Mar. 13, 1974; New York Times, Mar. 14, 1973. |
| H. S. Crocker Co. and Stecher-Traung-Schmidt Corp------ | Named as defendants in Diamond International case, above, the Justice Department asked the Federal court to hold them in contempt for violation of a 1942 court order prohibiting them from fixing prices or allocating markets. | ---------- | Wall Street Journal, Mar. 13, 1974. |
| United States Steel Corp., Bethlehem Steel, Armco Steel, Ceco Corp., Laclede Steel Co., Border Steel Rolling Mills, Inc., Schindler Bros. Steel, Structured Metals, Inc., Texas Steel Co. | Indicted by a Federal grand jury on criminal charges of violating the Sherman Antitrust by price fixing, bid-rigging and contract allocation of steel reinforcing bars used in construction of highways, bridges, and buildings. They were also charged with conspiring to raise and stabilize prices and to eliminate competition between themselves and independent manufacturers. | ---------- | Wall Street Journal, May 1, 1974. |

| Defendants | Description | Sentence | Source |
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| **IV. ANTITRUST—Continued** | | | |
| 5 individuals and Armco Steel Corp., Ceco Corp., H. K. Porter Co., Laclede Steel Co., Southern Industrial Steel. | Indicted by a Federal grand jury for conspiring to allocate construction contracts requiring the use of reinforcing steel bars in Louisiana. The alleged antitrust conspiracy eliminated price competition in the sale of bars in an open and competitive market, increased the price of the bars and stabilized the market in Louisiana. | | Wall Street Journal, Apr. 24, 1974. |
| 5 individuals and Building Service Corp. of New Jersey, Yankee Building Maintenance Co., Metropolitan Maintenance Co., American Building Maintenance Corp., Atlantic Window Cleaning, Inc., Eastern Maintenance Co., International Services Co. of New Jersey, Middlesex Building Services, Pioneer Maintenance Corp., Trenton Window Cleaning Co. | Indicted by a Federal grand jury for antitrust conspiracy consisting of a continuing understanding and agreement among the defendants to allocate customers among themselves, refrain from soliciting business among customers allocated to each other and submitting rigged bids. | | Wall Street Journal, May 20, 1974. |
| Austin Steel Co., and a vice president; Whitlow Steel Co. and a vice president; Peden Industries, Inc., and a vice president; and Confederate Steel Corp. | They were found guilty of conspiring to restrain trade in the sale of reinforcing steel in the Houston, Tex., area. | Austin: $23,000 fine. Whitlow: $20,000 fine. Peden: $23,000 fine. Confederate: $6,000 fine. Austin vice president: $3,000 fine and 6 mo suspended sentence. Whitlow vice president: $3,000 fine and 9 mo suspended sentence. Peden vice president: fined $3,000. | New York Times, May 13, 1974. |
| Mobil Oil | Indicted for violation of New York State antitrust laws in "willfully, knowingly, corruptly, and unlawfully," forcing its gasoline dealers in the New York area to carry Mobil automotive accessories under threat of cancelling their leases. | | New York Times, July 2, 1974. |
| **V. VARIOUS WHITE-COLLAR CRIMES** | | | |
| American Voting Machines Corp. (AVM Corp.), 2 AVM officers, 4 employees of one of its independent sales representatives, 2 former Texas election commissioners. | Indicted on bribery, conspiracy and securities charges in connection with a scheme to bribe election commissioners into buying the company's voting machines, and violating SEC rules about loans to officers. AVM has pleaded no contest to the charges. (In April of 1972, AVM was charged with 5 counts of bribing a county elected official in Arkansas.) AVM's only competitor is Shoup Voting Machine, a unit of Macrodyne-Chatillon Corp., Shoup pleaded no contest last May to charges of paying $215,000 in bribes to a Louisiana official. Also, in 1972, 2 former Shoup officials pleaded guilty in Philadelphia to charges of mail fraud and conspiracy in relation to sales of voting machines in Tampa, Fla., and received jail sentences of up to 1 yr. | | Wall Street Journal, Jan. 11, May 14, June 14, Aug. 17, 1973; Mar. 28, 1974. Washington Star-News, June 18, 1974. |
| *Walter Rauscher, former American Airlines vice president.* | Convicted with Juan Homs, former sales promotion director of American Airlines and 4 printing companies and their presidents on charges of arranging kickbacks for the printing of the company's magazine "American Way." (Other defendants have been fined.) Juan Homs was also named in the National Student Marketing Stock fraud case as coconspirator. | Sentenced to 6 mo. | New York Times, Mar. 6, 1974. |
| Abbott Laboratories and 4 present and 1 former official | Indicted by a Federal grand jury on 60 counts of shipping adulterated or misbranded drugs dangerous to human health in violation of the Pure Food, Drug, and Cosmetics Act, in 1971, the Center for Disease Control reported that 150 cases of septicemia or blood poisoning and 50 deaths had been associated with the use of the Abbott solution in 25 hospitals. The Government is appealing the trial judge's dismissal of the case on the basis of prejudicial publicity. | Sentenced to 6 mo. | Wall Street Journal and New York Times May 30, 1973. Wall Street Journal, Apr. 26, 1973. Washington Post, June 5, 1974. |
| Libby Owens Ford | Indicted for violations of the Munitions Control Act for trading with Portugal by shipping bulletproof windows to Portugal without U.S. clearance. The Government charged an attempt to give Portgugal the technology to make its own armored amphibious vehicles after efforts to purchase them legitimately in the United States were blocked by the State Department. | | Wall Street Journal, Sept. 27, 1973. |
| Litton Systems, Inc., a subsidiary of Litton Industries and 4 officers. | Indicted for conspiring to import computer parts into this country by using false custom papers. Litton was charged with 120 counts of importing the parts by using false entry documents which undervalued the worth of the parts. Loss revenues are estimated at $216,000. (This case grew out of investigations of satellite plants in Mexico of U.S. industrial corporations which number 325.) The principal grand jury witness was a former Litton employee. Litton Industries facility at Pascagoula, Miss., was investigated by the General Accounting Office which found that officials had engaged in questionable procurement practices including possible kickbacks from subcontractors on shipbuilding projects for the Navy. | | New York Times, Nov. 9, 1973. Washington Post, Oct. 30, 1973. Wall Street Journal, May 21, 1973. New York Times, Nov. 15, 1973. |
| 9 former employees of the Grumman Aerospace Corp. and 7 officers of companies doing work for Grumman. | Pleaded guilty to a kickback scheme involving millions of dollars worth of Navy subcontracts. The employees took $400,000 to $500,000 in kickbacks over 4 years. The acting U.S. attorney said the Grumman case has uncovered similar payoff arrangements elsewhere in the defense industry. "We have leads which are being followed up in Georgia, Florida, Texas, Massachusetts, Connecticut, Rhode Island, and New Jersey." | | Washington Star-News, Apr. 10, 1974. |
| 7 officials of the Norfolk Shipbuilding & Drydock Corp. | Pleaded guilty to conspiracy in exchange for the dropping of charges that they had bribed Navy inspectors to pad repair cost estimates on ships in the shipyard. (Since 1971, 15 Government officials, a majority of them Navy ship inspectors, have been convicted of accepting gratuities from shipyards. | | Washington Post, Mar. 30, 1974. |
| 5 meatpacking companies and 13 persons including Highland Meat Packing Co., Apex Meat Co., O.K. Packing Co., Great Western Packing Co., and Globe Packing Co. | Indicted by a Federal grand jury in Los Angeles, Calif., on charges of bribing Department of Agriculture meat graders and inspectors to overlook meat that did not meet Federal standards. | | Wall Street Journal, Mar. 20, 1974. |
| 13 executives of New York area supermarket chains 3 officials of the meatcutters union, and 1 wholesale meat company, the Northern Boneless Meat Corp. | An investigation into a widespread system of payoffs and kickbacks resulted in these indictments for income tax evasion totalling $1,500,000. The meat company, one of its executives and a certified public accountant were accused of filing false corporate income tax forms. The payoffs were made by supermarket chains to labor bosses to buy labor peace; payoffs by meat suppliers to supermarket officials were made to obtain preferred counter space. | | New York Times, Mar. 26; Mar. 31, 1974. Wall Street Journal, Mar. 26, 1974. |
| 2 executives of a swimming pool company | Found guilty of conspiring to violate the Federal Truth in Lending Act by not informing customers that they had a right to cancel a pool purchase contract. | Each fined $1,000. | New York Times, Mar. 28, 1973. |

| Defendants | Description | Sentence | Source |
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| V. VARIOUS WHITE-COLLAR CRIMES—Continued | | | |
| Daniel D. Moore, former U.S. Deputy Comptroller of the Currency, president of a Massachusetts bank | Convicted on charges of conspiring to defraud 5 U.S. banks and 3 Swiss banks of $8,100,000. | | Wall Street Journal, Feb. 28, 1973. See oals Hearings, Department of State, Justice, and Commerce and Related Agencies Appropriations for 1975, Committee on Appropriations House of Representatives, pt. i, 93d Cong., 2d sess., p. 555. |
| A former supervisor of the securities department of Franklin National Bank and an independent securities trader. | Pleaded guilty to indictment on conspiracy grand larceny and falsifying business records. The 2 engaged in a stock swindle in which about $1,000,000 was stolen from financially troubled Franklin National Bank. | | New York Times, June 21, 1974. |
| | The Bank lost $63,000,000 in the 1st 5 mo of 1974 primarily from foreign exchange transactions. | | New York Times, June 21, 1974. |
| | The Federal Reserve Board has loaned Franklin, the 20th largest bank in the country, $1,200,000,000 and 11 banks have loaned it $259,000,000. | | New York Times, June 14, 1974. |
| | Franklin Bank is being studied by Senate Permanent Investigation Subcommittee investigators as a possible conduit for stolen Government securities. "The major reason for the Senate study," according to the New York Times, "was to determine whether other stolen securities were held by the Franklin and if so, whether they were used for collateral for loans from the Federal Reserve Bank of New York." | | New York Times, June 12, 1974; June 15, 1974. |
| | Franklin National Bank last year sued the Federal Deposit Insurance Co. and U.S. National Bank and C. Arnholt Smith demanding return of a $5,000,000 loan that Franklin made to U.S. National. | | Wall Street Journal, Nov. 29, 1973. |
| | Franklin claimed the loan was obtained through fraudulent misrepresentations. Franklin also had made loans to equity Funding totalling $10,000,000. | | Wall Street Journal, Apr. 26, 1973. |
| | Michele Sidona, an Italian financier who owns 22 percent of Franklin New York Corp., Franklin National Bank's holding company, offered a secret $1,000,000 to Maurice Stans for the 1972 Nixon reelection campaign. Stans said that he refused the contribution. | | Wall Street Journal, Mar. 2, 1973. |
| 2 sons of H. L. Hunt | Indicted by a Federal grand jury on charges of tapping the telephones of Hunt Oil Co. employees. | | Wall Street Journal, Mar. 2, 1973. |
| Bank of the Southwest and the chairman of a Waco, Tex. bank. | Indicted by a Federal grand jury on charges of conspiring to misuse $4,000,000 of the Waco bank's funds. The chairman of the Waco bank is also the chairman of the State bank supervisory agency. | | Wall Street Journal, June 21, 1973. |
| The former president and former chief loan officer of the Steel City National Bank of Chicago and 27 others. | Indicted by a Federal grand jury in Chicago for operating a fraudulent loan operation involving $3,000,000. | | Wall Street Journal, June 20, 1973. |
| Philip J. Goldberg, former president and chairman of Financial Security Life Insurance Co. | Convicted on charges that he used worthless insurance annuities to get more than $1,000,000 in loans. Financial Security went bankrupt in 1970. | 2 yr in prison and $14,000 fine. | Wall Street Journal, Oct. 9, 1973. |
| A trustee of the American Medical Association | Indicted for conspiracy and misapplication of nearly $1,800,000 in bank funds in indirect loans for his and a codefendant's benefit. | | Wall Street Journal, Sept. 10, 1973. |
| A Worcester, Mass., financier | Indicted on 7 counts of violating income tax laws. The indictment claimed the financier did not report $1.400,000 income of his $2,500,000 income in 1966, 67 and 68. He was also charged with filing false and fraudulent returns on $3,800,000 of income in 1966 through 1969. (In 1969, he pleaded guilty to charges of filing false statements with the SEC relating to the Fifth Avenue Coach Line, Inc. of New York. He was fined and put on unsupervised probation.) | | Wall Street Journal, Apr. 12, 1973. |
| Leon Weiss, a multimillionaire, his wife, and 2 corporations | Convicted of submitting fraudulent invoices for products manufactured in Thailand that were sold in military post exchanges in South Vietnam. | 18 mo in prison and a $176,000 fine. Mrs. Weiss fined $5,000 and given a 1-year suspended sentence for obstructing justice. 2 corporations each fined $11,000. | New York Times, May 31, 1973. |
| Texas Eastern Transmission Corp | A February 1973 explosion at the company's liquid natural gas storage tank in New York killed 40 workmen. The Department of Labor alleged that the corporation and 1 of its affiliates had failed to develop and maintain an effective fire-prevention program. Department of Labor only proposed a $25,600 civil fine. In March of 1974, a Staten Island, N.Y. grand jury indicted Texas Eastern on 40 counts of criminally negligent homicide. | | New York Times, July 20, 1973; Mar. 8, 1974. |
| Dr. Robert L. Wolff | Convicted of evading more than $62,000 in taxes | 2 mo in jail | New York Times, Jan. 19, 1974. |
| 3 companies and 3 persons including Hemisphere Sounds, Inc., Broken Arrow Production, Inc., and La Belle Enterprises, Inc. | Charged by the Federal Government in Oklahoma City of illegally duplicating major label 8 track stero tape recordings in violation of Federal copyright law. | | Wall Street Journal Mar. 21, 1974. |
| International Silver and a former executive | Indicted by a New York State grand jury for burglary, larceny, criminal impersonation and conspiracy in connection with a spying operation against a rival company. An agent of the company had already pleaded guilty to Federal and State charges of illegally entering an Oneida, Ltd., plant to steal secret silverplating processes. | | Wall Street Journal, May 21, 1973. |
| Harris P. Wolfson, former analyst with the Federal Home Loan Bank Board. | Pleaded guilty to soliciting a $200,000 bribe from the president of Fidelity Savings & Loan Association, Oakland. | | Wall Street Journal, Aug. 20, 1973. |
| A prominent physician | Indicted by a Federal grand jury in New York on income tax evasion of $39,000. He is a physician for President Nixon, former Governor Nelson Rockefeller and Secretary of State Henry Kissinger. He is also chief physician to United States Steel Corp. | | New York Times, Apr. 11, 1973. |
| William O. Wooldridge, former top-ranking Army enlisted man and 3 other noncommissioned officers. | Pleaded guilty to accepting bribes in connection with operations of servicemen's clubs in Vietnam. | Placed on probation with requirement to do charity work and sign over virtually all of assets to the Government. | New York Times, May 9, 1973; May 31, 1973. Washington Post, Sept. 16, 1973. |
| Stephen L. DeBurr, former Wasnington lobbyist for a New York law firm. | Pleaded guilty to charges that he lied on Federal income tax return. The case grew out of investigations of the practice of introducing "private bills" in Congress to stay the deportation of aliens. Another Washington lobbyist pleaded guilty to a similar charge in Federal court in Baltimore, Md. | | Washington Post, June 11, 1974. |
| The former president of GeoTek complex of companies 2 lawyers. | Indicted by a Federal grand jury in San Francisco, Calif., on 17 counts of using the mails to defraud investors and securities fraud in the sale of properties known as the GeoTek 1968 program, which allegedly involved $30,000,000 taken from 2,000 investors in a tax-shelter oil-drilling operation. | | Washington Post, June 18, 1974. New York Times, June 18, 1974. Wall Street Journal, June 18, 1974. |

| Defendants | Description | Sentence | Source |
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| **V. VARIOUS WHITE-COLLAR CRIMES—Continued** | | | |
| Chief accountant and bookkeeper of GeoTek, an oil-drilling concern. | Indicted by a Federal grand jury for lying to a grand jury and the SEC concerning the ownership of certain corporations. | | Wall Street Journal, Apr. 3, 1974. |
| The former president and chief executive officer of Cedars of Lebanon Hospital and 4 others. | Indicted on 64 counts of conspiracy, grand larceny, forgery, and cashing forged checks. Forged checks were worth $525,000. Richard Genstein, Dade County, Fla., State attorney said, "My office has reason to believe that part of the $525,000 and other funds totaling perhaps $1,000,000 more went to Washington to make political payoffs for the purpose of obtaining funds and approval for the Cedars' expansion." In 1970 Cedars received a $62,000,000 loan from the Federal Housing Administration for expansion despite opposition from local health experts. On Feb. 15, 1974, President Nixon praised the former president and called the hospital a model for his administration's privately financed national health insurance plan. The hospital, now under receivership, has debts totaling $13,000,000 and owes the IRS $814,000 for taxes withheld from its employees. The former president is at large and an international search for him is in progress. | | New York Times, May 24, 1974. |
| **VI. OFFICIAL CORRUPTION** | | | |
| Former Queens, N.Y., assistant district attorney | Indicted for accepting a bribe to quash a criminal case | | New York Times, July 13, 1973; Nov. 27, 1973. |
| New York State civil court judge | Indicted for conspiracy, perjury, grand larceny, and witness tampering in a scheme to funnel city funds into a play the judge wrote. | | New York Times, Apr. 23, 1974; Apr. 19, 1974. |
| 11 men, including assistant district attorney in Queens, N.Y. | Indicted for conspiring to sell $680,000 worth of cocaine, hashish, and other drugs. | | New York Times, Mar. 9, 1974. |
| 12 former and present members of a New York City Police Department, narcotics division, special unit. | Indicted for stealing cash from narcotics dealers, reselling heroin seized in arrests, offering bribes to fellow officers to hinder prosecution of drug traffickers. (More than 20 percent of 73 men assigned to New York City Police Department unit arresting major heroin dealers have been indicted.) | | New York Times, Mar. 9, 1974. |
| Former New York City police commissioner | Indicted on 6 counts of perjury during grand jury investigation of loan sharking | | New York Times, Mar. 21, 1974; Mar. 22, 1974. |
| 2 Brooklyn lawyers | Indicted for offering $25,000 bribe to a New York State supreme court justice to fix the case of a man indicted for murder. | | New York Times, Mar. 22, 1974. |
| 2 of New York City's process servers | Filing false affidavits about serving summonses | | New York Times, Mar. 6, 1973. |
| Examiner for New York State Dept of Motor Vehicles | Indicted for fraudulently approving forged applications for drivers' licenses by ineligible convicts or persons with physical defect. | | New York Times, Nov. 29, 1973. |
| Ted Gross, former Commissioner of New York City's Youth Services Agency. | Pleaded guilty to accepting bribes from the Urbanonics, Corp., management consulting firm and Game-Time, Inc., Michigan recreational equipment manufacturer. | 3 yr imprisonment | New York Times, June 29, 1973. |
| 8 men, including Acting director of New York City's Harlem Model Cities program and a candidate for New York's city council. | Indicted for bribery; 3 model cities officials were offered $71,000 to obtain almost $2,000,000 in federally funded Model Cities contracts. | | New York Times, Sept. 28, 1973. |
| A judge of Nassau (Long Island, N.Y.) family court | Indicted by State grand jury on charges of soliciting and receiving $8,000 in bribes for political favors while a State assemblyman in 1970 and 1971. | | New York Times, April 27, 1974. |
| Suspended president of New York City Tax Commission and New York's deputy commissioner of city purchasing detachment. | Indicted for scheming to fix 2,000 parking tickets | 90 days imprisonment. | New York Times, February 21, 1974. |
| Former director of New York City's municipal loan program Louis Reiter. | Indicted on 18 counts of extortion, receiving bribes, and unlawful gratuities and attempted extortion from owners seeking low-cost loans to rehabilitate slum housing; convicted. | 3 yr imprisonment; $11,000 fine. | New York Times, February 12, 1974. |
| New York City's chief tax collector | Indicted for filing fake and fraudulent income tax returns | | New York Times, December 23, 1973. |
| Assistant administrator to New York State's comptroller | Indicted for bribery, conspiracy, and grand larceny intended to secure lenient treatment for Brooklyn criminal defendant. | | New York Times, December 23, 9173. |
| 10 New York State tax examiners | Indicted for accepting bribes from businessmen in exchange for underestimating their annual sales taxes; cost New York State about $500,000 in tax revenues. | | New York Times, December 5, 1973. |
| New York City's former assistant city housing commissioner; and New York's former chief of plant management in bureau of administration services at housing and development administration. | Convicted of shaking down a provisional city employee | 6 mo imprisonment | New York Times, December 4, 1973. |
| New York City detective | Pleaded guilty to accepting $4,000 payoff from undercover informer to conceal informer's departure from United States. | 2 yr imprisonment | New York Times, October 2, 1973. |
| 3 police sargeants and 13 police officers in New York City | Convicted for systematically extorting $20,000 a month from gamblers in Bedford-Stuyvesant section of Brooklyn. | 1 to 3 yr imprison- | New York Times, October 4, 1973. |
| New York City detective | Indicted for allegedly committing perjury during Brooklyn grand jury investigation of a confidence woman's story of paying off detectives who had raided her motel room so she could escape. | | New York Times, June 14, 1973. |
| 5 New York City officials and a New York teacher | Indicted for using public funds in the school board election campaign of three of the defendants. | | New York Times, January 22, 1974. |
| 4 New York City jail aides | Indicted for selling heroin, cocaine, and marihuana | | New York Times, December 7, 1973. |
| 5 architectural firms; 19 persons including the brother of Kansas Governor, Governor's appointments secretary and a lawyer. | Indicted for allegedly demanding contributions for Governor's 1972 campaign in exchange for contract for the expansion of the University of Kansas Medical Center; contributions rated at 6 percent of the contract. | | Washington Post, January 23, 1974. |
| 71 precinct election judges in Chicago | Indicted for various vote frauds | | Wall Street Journal, February 20, 1973. |
| 40 Chicago policemen | Indicted for tavern shakedowns | | Wall Street Journal, February 20, 1973. |
| Several employees of county assessor's office in Chicago | Indicted for accepting bribes | | Wall Street Journal, Feb. 20, 1973. |
| Federal Judge Otto Kerner | Convicted on charges of accepting racing stock while Illinois governor | | Wall Street Journal, Feb. 20, 1973. |
| Former special investigator for Chicago Police Department | Indicted for evading taxes; obstructing justice | | New York Times, Jan. 22, 1973. |
| A millionaire contractor, a lawyer, an Arkansas businessman. | Indicted for bribery, mail fraud and conspiracy while funneling money to Illinois Secretary of State Paul Powell through a bogus company in return for a $7,000,000 Illinois contract to manufacture license plates in 1970 and 1971. | | New York Times, Feb. 1, 1974. |
| Illinois Cook County clerk | Indicted for bribery, mail fraud, evasion; accepted bribes totalling $180,000 from Philadelphia machine manufacturer, Shoup Voting Machine Corp. | | New York Times, March 8, 1973. |
| 2 Chicago aldermen | Indicted for extorting $18,000 for obtaining favorable Chicago city council decisions on property zoning. | | New York Times, March 29, 1973. |
| Chicago alderman | Indicted for conspiracy and mail fraud; held land in secret trusts and later sold it to Chicago and Cook County agencies at enormous profits; conflict of interest also charged because he held stocks in banks in which city funds were held without interest. | | New York Times, May 3, 1974. |
| Former Illinois State insurance inspector | Indicted on perjury involved in falsifying an insurance agen 'examination taken by the son of Chicago Mayor Richard Daley. | | Do. |

| Defendants | Description | Sentence | Source |
|---|---|---|---|
| **VI. OFFICIAL CORRUPTION—Continued** | | | |
| Cook County circuit court clerk | Indicted for conspiring to defraud Federal Government, to receive legal profits and to evade income tax payments in connection with an alleged $400,000 bribery scheme involving building projects. | | New York Times, March 8, 1973. Washington Post, April 20, 1974. |
| Northern Natural Gas Co., and 2 of its subsidiaries and 8 individuals including a former mayor of E. Chicago, Ind., a former mayor of Hammond, Ind., a Cook County engineer, and the former comptroller of east Chicago. | Indicted for an alleged $223,393 bribery scheme involving a pipeway right-of-way. | | Wall Street Journal, April 10, 1973. |
| U.S. Vice President Spiro T. Agnew | Pleaded nolo contendere to Federal income tax evasion; received kickbacks from engineers and construction companies while county executive of Baltimore, Md. | 3 yr. unsupervised probation; $10,000 fine. | New York Times, Nov. 11, 1973. |
| U.S. Senator Daniel Brewster | Convicted of receiving an unlawful gratuity in connection with 3d-class mail rate legislation. | | Washington Post, Oct. 14, 1973. |
| Baltimore County's (Md.) State Attorney Samuel Green | 16 counts of obstructing justice, conspiracy, subordination of perjury and misconduct in office. | 3 yr. imprisonment | Washington Post, Feb. 12, 1974. |
| Former Maryland State Representative Leonard Blonds | Soliciting and receiving a bribe from a bowling proprietors lobbying group which sought his influence to change a State law to permit beer licenses at bowling alleys. | | Washington Post, Oct. 14, 1973. |
| Maryland State Senator Clarence Mitchell III | Pleaded no contest to charges of failing to file Federal income tax returns from 1967 to 1970. | | New York Times, Apr. 11, 1973; Washington Post, Apr. 30, 1973. |
| Maryland State Delegate | Indicted on narcotics charges | | Washington Post, Oct. 14, 1973. |
| Baltimore labor leader | Convicted on charges of extortion | 15 years imprisonment. | Do. |
| 6 of Alabama's largest lobbies: Alabama Farm Bureau Federation, Alabama State Chamber of Commerce, Associated Industries of Alabama, Alabama Trucking Association, Alabama Textile Manufacturers Association, and Alabama Forestry Association. | Indicted on charges of violating the State's Corrupt Practices Act by secretly financing a front group in order to avoid disclosure of campaign financing. | | New York Times, Sept. 28, 1973. |
| Former Baltimore County (Maryland) Executive Dale Anderson. | Convicted of extorting more than $46,000 from 8 firms doing nonbid county work for Baltimore County; income tax evasion. | | Washington Post, Mar. 21, 1974. |
| Former Representative Cornelius Gallagher (Democrat of New Jersey.) | Convicted for tax evasion of $74,000 | 2 years imprisonment. | Wall Street Journal, Dec. 22, 1972. |
| Representative Bertram L. Podell (Democrat of New York.) | Indicted with his brother and law partner for allegedly accepting bribes totaling $41,350 to secure Federal approval of a Miami-Bahama air route for a Florida airline. | | Wall Street Journal, June 13, 1973; New York Times, Mar. 1, 1974. |
| Former Representative John Dowdy (Democrat of Texas) | Convicted for bribery, conspiracy and 5 counts of perjury for receiving a $25,000 payoff to help thwart a congressional investigation of a Washington, D.C. construction company that had swindled hundreds of low-income Washington homeowners in home improvement frauds. | 6 months imprisonment. | Washington Post, Jan. 23, 1974. |
| Former Representative Irving J. Whalley (Republican of Pennsylvania.) | Pleaded guilty to 3 counts of forcing kickbacks from his congressional employees and using proceeds to pay his relatives and cover his own travel and business expenses. | Suspended prison sentence because of his age and health; 3 years probation; $11,000 fine. | Washington Post, Oct. 16, 1974. |
| **VII. CAMPAIGN CONTRIBUTIONS** | | | |
| John W. Dean III, former counsel to the President | Pleaded guilty to conspiracy to obstruct justice and to defraud the United States. | Sentence deferred | New York Times, Feb. 24, 1973. |
| Herbert L. Porter, former scheduling director for Committee for the Re-Election of the President. | Pleaded guilty to making false statements to a Federal agency | | Do. |
| Charles Colson, former assistant to the President | Pleaded guilty to obstructing justice during the trail of Daniel Ellsburg | 1 to 3 yr | Washington Post, June 22, 1974. |
| Richard Kleindienst, former U.S. Attorney General | Pleaded guilty to failure to testify accurately before Senate committee during hearings to confirm his appointment as Attorney General. | 1 mo unsupervised probation. | New York Times, May 17, 1974. |
| Former assistant to the President | Indicted for obstructing justice by covering-up Watergate breakin | | Washington Post, Mar. 2, 1974. |
| John Erlichman, former assistant to the President | Convicted for obstructing justice in relation to the Ellsberg case | | Washington Post, July 13, 1974. |
| Former official of Committee to Re-Elect the President and former Justice Department official in charge of Internal Security. | Indicted for obstructing justice by covering-up Watergate break-in | | Congressional Quartery Mar. 2, 1974, p. 531. |
| Californian Lieutenant Governor | Indicted by Federal grand jury for perjuring himself before the Senate Judiciary Committee while testifying about an offer from a subsidiary of ITT Co. to pay the Republican party $400,000 if it held its convention in San Diego, Calif. He had told the Senate committee that Attorney General John Mitchell had not known of ITT Sheraton's offer until Sept. 17, 1971. Yet 6 weeks before that date, the Justice Department agreed to an out of court settlement of several anti-trust suits against ITT. These permitted the conglomerate to retain its controlling interest in the Hartford Fire Insurance Co. | | Wall Street Journal, Apr. 4, 1974. |
| Frederick LaRue, employee of Committee for the Re-Election of the President, formerly a Justice Department official. | Pleaded guilty to obstructing justice | Awaiting sentence | New York Times, Feb 24, 1974. |
| John Loeb, senior partner of Loeb, Rhodes & Co., brokerage house. | Pleaded nolo contendere to making $48,000 contribution to a candidate in the name of 8 employees. | $3,000 fine | New York Times, May 17, 1973. Wall Street Journal, June 1, 1973; June 8, 1973. |
| Herbert Kalmbach, President Nixon's personal lawyer | Pleaded guilty to raising $2,800,000 for 2 1970 congressional campaigns which channeled these funds into GOP House and Senate elections. Also, pleaded guilty to promising an ambassadorial appointment for a $100,000 contribution. | 6 to 18 mo. in prison and $10,000 fine. | Wall Street Journal, June 18, 1974. |
| Diamond International Corp. and one of its vice presidents, Ray DuBrowin. | Pleaded guilty to contribution of $5,000 to President Nixon's re-election campaign and $1,000 to Senator Muskie's primary election campaign. | Corporation fined $5,000; vice president fined $1,000. | Wall Street Journal, Mar. 8, 1974. |
| Goodyear Tire & Rubber Co. and Goodyear's chairman of the board, Russell de Young. | Pleaded guilty to illegally contributing $40,000 to President Nixon's reelection campaign. | Corporation fined $5,000; board chairman fined $1,000. | New York Times, Oct. 19, 1973; Nov. 16, 1973. Wall Street Journal, Aug. 13, 1973. |
| Minnesota Mining & Manufacturing Co. and chairman of the board Harry Heltzer. | Pleaded guilty to illegal $30,000 contribution to President Nixon's reelection campaign. | Corporation fined $3,000; board chairman fined $500. | Wall Street Journal, Aug. 20, 1973. New York Times, Oct. 19, 1973. |
| Braniff International Airlines and board chairman Harding L. Lawrence. | Pleaded guilty to an illegal $40,000 contribution to President Nixon's reelection campaign. | Braniff fined $5,000; Lawrence fined $1,000. | Wall Street Journal, Nov. 13, 1973. New York Times, Nov. 13, 1973; Nov. 16, 1973. |
| Ashland Petroleum Gabon Corp. and board chairman Orin E. Atkins. | Corp. pleaded guilty to illegal $100,000 contribution to President Nixon's reelection campaign; board chairman Atkins pleaded nolo contendere. | Corporation fined $5,000; Atkins fined $1,000. | New York Times, Nov. 14, 1973. Wall Street Journal, Nov. 14, 1973. New York Times, Nov. 15. 1973. |

| Defendants | Description | Sentence | Source |
|---|---|---|---|
| VII. CAMPAIGN CONTRIBUTIONS—Contributions | | | |
| Gulf Oil Corp. and its vice president and lobbyist Claude C. Wild, Jr. | Pleaded guilty to illegal $100,000 contribution to President Nixon's reelection campaign and $15,000 to campaigns of Representative Wilbur Mills (Democrat of Arkansas) and Sen. Henry M. Jackson (Democrat, Washington). | Gulf fined $5,000; Wild fined $1,000. | New York Times, Nov. 14, 1973; Nov. 15, 1973. Wall Street Journal, Nov. 14, 1973; Aug. 13, 1973. Washington Post, Dec. 13, 1973. |
| Phillips Petroleum Co. and board chairman W. W. Keeler | Pleaded guilty to illegally contributing $100,000 from corporate funds to President Nixon's reelection campaign. | Phillips fined $5,000; Keeler fined $1,000. | Wall Street Journal, Aug. 20, 1973. New York Times, Dec. 5, 1973. |
| First Interoceanic Corp. and former board chairman Dwayne O. Andreas. | Andreas convicted for illegal corporate contribution of $100,000 to Senator Hubert Humphrey's 1968 presidential campaign (Andreas also contributed $146,000 to Nixon's reelection campaign). | ---------- | Washington Post, Nov. 24, 1973. |
| Committee for the Reelection of the President | Pleaded nolo contendere to 8 charges of violating the Federal Elections Campaign Act by failing to disclose required financial data. | CRP fined $8,000 | Washington Post, Jan. 26, 1973. |
| Lehigh Valley Co-operative Farmers of Allentown, Pa | Pleaded guilty to illegal $50,000 contribution to Nixon's reelection. (Part of Lehigh funds allegedly used to secure the silence of the Watergate 7.) | ---------- | New York Times, May 7, 1974. |
| American Ship Building Co. and board chairman | Indicted for making illegal campaign contributions—$31,200 to Nixon's reelection, $23,500 to Hartke (Democrat of Indiana) and Daniel Inouye (Democrat of Hawaii). The chairman was also indicted for conspiracy, obstructing justice, obstructing a criminal investigation, and helping an individual give false statements to the FBI. | ---------- | Wall Street Journal, Nov. 13, 1973; Apr. 8, 1974. New York Times, Nov. 14, 1973. |
| John H. Melcher, Jr., general counsel of American Ship Building Co. | Pleaded guilty to helping cover up an illegal corporate contribution to President Nixon's reelection campaign. | ---------- | Wall Street Journal, Apr. 17, 1974. |
| Northrup Corp. and its board chairman and vice president | Pleaded guilty to illegal $150,000 contribution to Nixon's reelection | Board chairman and corporation fined $5,000; vice president fined $1,000. | Washington Post, May 2, 1974. |
| American Airlines | Pleaded guilty to illegal $55,000 contribution to Nixon's reelection. Former Board Chairman Spater told Senate Watergate Committee that contribution was motivated by "fear" of what would happen if contribution was not made. | ---------- | New York Times, Nov. 16, 1973. |
| E. Howard Hunt, White House consultant and former CIA employee; G. Gordon Liddy, White House aide and former Treasury Department employee; James W. McCord, former FBI and CIA agent, security coordinator for the Republican National Committee and the Committee for Re-Election of the President; Bernard Barker, Miami real estate businessman with a CIA background; and Virgilio R. Gonzalez; Eugenio Martinez; and Frank Sturgis. | Pleaded guilty to burglary conspiracy, and attempted wiretapping at the Democratic National Committee's headquarters in the Watergate building, Washington, D.C. | Hunt fined $10,000, given 2½ to 8 yr in prison; Liddy fined $40,000, given 6 yr, 8 mo to 20 yr in prison; McCord given 1½ to 5 yr in prison; Barker given 1½ to 6 yr in prison; Gonzalez given 1 to 4 yr in prison; Martinez and Sturgis each given 1 to 4 yr in prison. | New York Times, Feb. 24, 1974. |
| Jeb Stuart Magruder, former White House aide | Pleaded guilty to conspiracy to obstruct justice and defraud the United States | 10 mo to 4 yr in prison. | New York Times, Feb. 24, 1974. |
| Donald Segretti, California lawyer who organized CRP's campaign of espionage and "dirty tricks" against 1972 Democratic Presidential candidates. | Pleaded guilty to 1 count of conspiracy and 3 counts of distributing illegal campaign literature. | 6 mo in prison | New York Times, Feb. 24, 1974. |
| Egil Krogh, Jr., former White House aide and head of the White House's secret investigation unit known as the Plumbers. | Pleaded guilty to charges of conspiracy to violate the civil rights of Dr. Lewis Fielding, the former psychiatrist of Daniel Ellsberg, who leaked the Pentagon Papers to the press. | 6 mo in prison | New York Times, Feb. 24, 1974. |
| Dwight Chapin, President Nixon's former appointments secretary. | Convicted of deliberately lying twice to a grand jury about his connection with Donald Segretti. | ---------- | Washington Post, Apr. 6, 1974. |
| VIII. FHA SCANDALS | | | |
| Director of FHA's Philadelphia insuring office | Convicted of accepting bribes | 3 yr in prison; $40,000 fine. | |
| 50 individuals and firms, including Dunn & Bradstreet, and the Eastern Service Corp. | Indicted for conspiring to produce false credit records and false appraisals that were used to obtain FHA insurance for unduly high mortgages on dilapidated, overpriced 1- to 4-family houses in Brooklyn, N.Y.; scheme allegedly cost the government $200,000,000. | Mistrial declared on July 5 after jury deadlocked for 14 days. | New York Times, Nov. 18, 1973, July 6, 1974. |
| 3 former executives of a mortgage corporation and a former FHA official in Brooklyn. | 177-count indictment including bribery and conspiracy in connection with a mortgage fraud scheme. | ---------- | New York Times, Aug. 17, 1973. |
| 100 government officials, real estate speculators and repair contractors. | Indicted for conspiracy and bribery in an FHA fraud | ---------- | Detroit News, June 3, 1974. |
| 2 former officials of Mountain States Development Co., a mineral, oil, and gas development corporation. | Convicted on 3 counts of mail fraud and 7 counts of securities fraud | ---------- | Wall Street Journal, June 15, 1973. |
| 2 employees of a retail oil company | Indicted for allegedly shortchanging 2 Ocean County, N.J. municipalities in gasoline deliveries. | ---------- | New York Times, Jan. 20, 1974. |
| Nathan Lemler, director of Remedial Education, Inc., and Academic Improvement Center. | Convicted of grand larceny for bilking 19 families out of $256,000 by making false promises that their children would be placed in medical or dental schools. | ---------- | New York Times, Mar. 7, 1974. |
| Happauge, Long Island, insurance broker | Indicted for swindling more than 2,000 people out of at least $15,000,000 by promising that their investments of $1,000 to $190,000 would be repaid within 90 days with 20 percent interest. | Defendant fled United States. | New York Times, Mar. 15, 1974. |
| Kurt Borenstein, public relations assistant to New York State Attorney General Louis J. Lefkowitz. | Pleaded guilty to 5 counts of mail fraud in scheme that bilked 2,000 job seekers out of $1,300,000. | ---------- | New York Times, Apr. 10, 1973. |
| Chief officer and former operations manager of Les Myles Transmission, 1 of the largest franchise companies in United States. | Charged with possessing 180 stolen auto transmissions (Les Myles ads proclaim: "Les Myles coast to coast—the most trusted name in transmissions.") | ---------- | New York Times, May 3, 1974. |
| 3 New York City charter flight promoters | Indicated for stranding thousands of passengers in New York and abroad | ---------- | New York Times, May 9, 1973. |
| New York State charter flight corporation and 2 of its primary owners. | Indicted on 10 counts of false charter advertising and for violating New York State general business law. | ---------- | Do. |
| 3 real estate developers | Convicted for failing to register or provide an honest property report to the Office of Interstate and Sales (OILSR) of the Department of Housing and Urban Development. | ---------- | National Journal, vol. 5 No. 3 p. 90, 1973. |
| 8 businessmen | Indicted on mail fraud charges as part of fraudulent scheme to sell land in Yavapai County, Ariz.; sales exceeded $10,000,000. | ---------- | New York Times Feb. 13, 1974. |





40-422—75——18

Senator HART. Gentlemen, did you have anything you would like to add?

Mr. NADER. Well, just a minor point. Are you sure it is 3004?

Mr. DOWNEY. In our copy it is 2004.

Senator HART. That was intended to be an easy, light note on which to close. It really isn't that important.

Mr. NADER. I just don't want the record to reflect the wrong number. I see, it is 2004.

One more point, Senator. I think emphasis has got to be given to the reluctance of the FBI to compile crimes by property in addition——

Senator HART. Crimes by what?

Mr. NADER. By property. In other words, economic crimes are usually crimes by property interests against people or against other properties, such as, say, pollution from a factory or a stock swindle.

And economic crime data by the FBI is atrociously poor and this has been pointed out for years. And there seems to be no attempt to bring the resources of the Justice Department into line with the business crimewave that is going on now throughout the country.

And the fact that we had to pull together strands of information instead of being able to go simply to the Justice Department and say: "Let's have the data on all of these classifications" is an indication again of this institutionalized reluctance to apply law enforcement authority and resources toward economic crimes.

It is not necessary for the Justice Department to have the 10-most-wanted corporate criminals list, but it is necessary for it to begin seriously attempting to document this material. I understand that former Attorney General Richardson and Deputy Attorney General Ruckelshaus were on the verge of launching a major economic or corporate crime enforcement capacity in the Justice Department before their resignations last Fall.

But again and again and again it is pointed out that the Justice Department does not bring together this data; that it concentrates almost exclusively on street-crime situations. But still there seems to be very, very little movement in that direction.



And as we all know, any change in society begins by information. It is bringing together the data here that will launch a much more thorough approach toward this problem from the point of view of prevention and deterrence. I think we have enough information out now to warrant the assertion that there is a business crimewave spreading throughout this country, and enough of it has surfaced in prosecutions in New Jersey and elsewhere to indicate that it is a kind of organized overworld crime and that the phrase "organized crime" should no longer be used without specifying whether it is overworld or underworld. When there is a systematic practice of engineering and architectural firms in both local or state government and procurement officials involved in this, that is organized crime.

And when there is a systematic refusal to recall known defective products, that is organized crime of the overworld type.

And I think the list that can be drawn is one to develop a special approach for the Justice Department and instruct it to begin assembling this data systematically and make it available to people with minimum costs.

Senator HART. Perhaps because we always want to assume the best or are always willing to acknowledge that we are innocent, the general assumption, I think, that the days of the robber barons were worse by far than is the business scene today.

I think that is a pretty popular theory, generally accepted. Are you suggesting that the robber barons were minor leaguers as compared to the scene today?

Mr. NADER. Yes, but certainly in one respect they abused their labor far more than is possible today, generally speaking, except in certain areas such as migrant labor camps and that can't go on. Steelworkers can't be treated the way they were treated in the late 1890's.

But on all other scores, the level of economic crime obviously is much, much greater. First of all, the dollar value is much, much greater. When you see Equity Fund swindles on the order of $200 billion, that is mind boggling to a robber baron of the 1890's.

Second, unlike the late 1890's, Government has much more to give the criminal operators. There are licenses, there are subsidies, there are procurement contracts, there are many Government contracts in the civilian area. The cost of campaigning, for instance, has gone up.

So, that the big difference in terms of a brand new category is that corporate criminals, which in the past have preyed on the consumer, now also prey on the taxpayer via the Government, because Federal, State and local government has got half a trillion dollars to dispose of. While much of that is in payment to employees, still nearly $200 billion is in the form of Government contracts and other subsidies, et cetera that are forwarded to private parties.

Without any question, it is getting much worse and much, much bigger. It used to be when a $5 million or $10 million scandal was uncovered, it staggered the public's imagination. Now, you are dealing with several hundred million dollars scandals, whether it is the IOS scandal involving Vesco, or Equity Funding or Weis Securities or the Franklin National Bank, which I think is emerging as more than a case of mismanagement, but as a case of black market operations at the least, in terms of dealing with stolen securities.

Franklin National Bank has received over $1 billion credit from the Federal Reserve. I mean here is one bank that almost collapsed, but obviously is not allowed to collapse, because big business doesn't go bankrupt any more. They go to Washington.

But here is a large bank that almost collapsed. One could ask what would the Chase Manhattan Bank be into the Federal Reserve if it approached that kind of situation as Franklin National did?

Senator HART. Well, as you always do, you have heightened the sensitivity. I hope you have effectively challenged this piece of the system in the Congress.

Mr. NADER. May I just add one more point, Senator?

In your confirmation power over judges, there might be an opportunity to convey some of these concerns. The same is true in the



confirmation powers over attorney generals and deputy attorney generals. Sometimes I think there is a lost opportunity at these confirmation hearings because they are so brief, to not only convey some of these concerns from the Senate, but also perhaps to obtain a statement or a response from the upcoming Attorney General that such studies and such resources will be allocated.

Senator HART. That would come with better grace on our part if we were willing to cough up the money to enable them not just to develop statistics, but have the mechanisms to aggressively enforce major antitrust proceedings. But I feel uncomfortable because, in effect, we are saying "Why you go down there and file a case against these companies" but then Congress won't give them enough money to file an action.

Mr. NADER. That is why I think the publication of studies in this area will develop the climate which will envelope the members of the Appropriations Committees of the House and Senate to provide more budget.

Senator HART. Well, on Monday next we will see a little piece of the problem you are talking about. The Agriculture Appropriations bill is the device that is being used to attempt to weaken the line of business reporting amendment that was put on the Power bill. This really goes to the extent to which Congress is willing to arm the agencies to fight a good fight.

I know you have and are being helpful. If there are no further questions, gentlemen, thank you very much.

Mr. NADER. Thank you very much.

Senator HART. The committee welcomes our next witness, Ms. Mary Ellen Gale, counsel, who is associated with and appearing this morning as a spokesman for the American Civil Liberties Union.

The reform of the entire Federal Criminal Code is a mammoth and a difficult job. The contributions which the American Civil Liberties Union have made have been extremely helpful.

The advanced copy which you were thoughtful enough to furnish me, and I am sure to others, several days in advance indicates again a thorough, professional, and thoughtful analysis of a large number of the controversial issues in the code. We've had many witnesses over the past few years on the code reform, and I think, without exception, each was helpful. Many had further specific analysis and proposed language, but I think it has been peculiarly the nature of the testimony given by your organization, not only to analyze proposed provisions in detail but to make the subcommittee think about the larger issues of policy and purpose as to what the criminal code should do and what it should not do, and how the criminal law should go about doing what it is supposed to do.

Your testimony today, I am sure, will help us see the situation up close, but in some instances, I suspect it will also help us stand back and see whether the Emperor really has any new clothes at all.

So, with that welcome, and acknowledgement and appreciation for your being here, please proceed however you would like.

## STATEMENT OF MARY ELLEN GALE, COUNSEL, AMERICAN CIVIL LIBERTIES UNION, WASHINGTON, D.C.

Ms. GALE. Thank you very much, Senator Hart.

First, I have a 95-page document here which you will all be glad to know I am not planning to read. I would like to submit it for entry into the record.

Senator HART. It will be printed as though given in full.

[The prepared statement of Ms. Mary Ellen Gale in full follows:]

TESTIMONY OF MARY ELLEN GALE, STAFF COUNSEL, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION, ON S. 1400 AND S.1—BILLS TO REVISE, REFORM, AND CODIFY THE FEDERAL CRIMINAL LAW

*Biographical Sketch of Mary Ellen Gale, staff counsel, Washington office, ACLU*

Mary Ellen Gale, age 33, is staff counsel with the Washington Office of the American Civil Liberties Union. She is a member of the Virginia Bar.

Ms. Gale's home town is Glencoe, Illinois. She was graduated magna cum laude, Phi Beta Kappa, from Radcliffe College in 1962. She received her law degree from the Yale Law School in 1971.

Formerly a newspaper reporter and editor, Ms. Gale has also worked as a speech writer for Republican and Democratic candidates. She was a Reginald Heber Smith Fellow with the Legal Aid Society of Roanoke Valley, Roanoke, Virginia, before joining the ACLU staff in July, 1973.

### INTRODUCTION

My name is Mary Ellen Gale and I am staff counsel with the Washington Office of the American Civil Liberties Union.

The ACLU is a nationwide, non-partisan organization of 275,000 members dedicated to the preservation and promotion of individual rights and liberties guaranteed by the Constitution of the United States. One of the ACLU's primary missions is to encourage legislative advancement of civil liberties and to oppose legislative encroachment on them.

The ACLU strongly supports revision and reform of the federal criminal laws. This over-all goal of making the federal criminal law more rational and more predictable is a salutary one. Clear, coherent, and uniform laws serve the public by making it plain what conduct is lawful and what is forbidden. They give fair notice to citizens and law enforcement officials alike, thereby restricting the possibilities of arbitrary punishment. However, obtaining clear and coherent laws at the expense of the rights and liberties of our people would be a step backward.



In some ways the statutes before this Subcommittee are a distinct improvement on current law. Their definitions are clearer and their classification of offenses far more orderly. Most of the crimes they prohibit are just and proper concerns of the criminal law.

But these bills, as written, constitute a grave threat to civil liberties. Both of them, but especially S. 1400, would concentrate far more than ever before government power to withhold from our citizens information vital to public debate of national policy. Both of them would seriously curtail fundamental First Amendment rights to speak and publish vigorous dissent and to assemble peaceably to petition the government for redress of grievances. Both bills would misdirect government efforts at law enforcement away from violent or other serious offenses committed by private individuals against other private individuals, focusing instead on apprehension and punishment of those who displease government officials. Both bills would continue to permit the government to invade the privacy of our homes with electronic surveillance devices, in violation of Fourth Amendment limitations on government searches. Both would expand rather than contract conspiracy, attempt, and solicitation offenses which pose substantial threats to due process of law.

In the pages that follow, the ACLU expresses strong opposition to some specific provisions of S. 1400 and S. 1. We have tried to focus on those sections which are most dangerous to civil liberties and most antithetical to the guarantees of the Bill of Rights. In some cases, such as the obscenity sections, we urge that these provisions be eliminated altogether. In others, we suggest revisions or express concerns which, we believe, should guide those who may draft revised sections. We do not claim that we have raised every conceivable problem or proposed every possible reform, and, therefore, we ask that this Subcommittee permit the ACLU to submit supplemental suggestions or memoranda. We do believe that we have focused on serious civil liberties issues worthy of your most profound attention.

Reform of the federal criminal laws is an enormous undertaking. It must be done with deep concern for the civil rights and liberties of the individual citizens whose protection is, in fact, the reason why we have criminal laws.

### I. OFFENSES INVOLVING NATIONAL SECURITY

#### *A. The "Official Secrets" Act*

Six sections of S. 1400 and, to a lesser extent, the comparable provisions of S. 1, would reverse 200 years of democratic decision-making under the Constitution by preferring government secrecy to the freedoms guaranteed by the First Amendment. Sections 1121–26 of S. 1400 would deliver into the hands of the Executive complete and final control of information "relating to the national defense." The free flow of facts and opinions on which self-government ultimately depend would be dammed at its source. Our true national security, which springs from "uninhibited, robust, and wide-open" debate on public issues and public officials, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), would be destroyed by a misguided attempt at preservation. As a nation, we would come to resemble that village in South Vietnam which was destroyed in order to save it.

This is not a new perception. When Congress first debated the Espionage Act of 1917, two Senators marked off for future generations the parameters of debate over the protection of national security:

Senator NELSON. "[While] there are some expressions perhaps in the bill that may seem a little too drastic, yet I hold that when the safety of the country is at stake the rights of the individual must be subrogate to the great right of maintaining the integrity and welfare of the Nation."

Senator CUMMINS. "The Senator from Minnesota seems to think this is necessary for the safety of the United States. I do not; nor do I think we have a Nation worth saving if this is necessary. If the power that is here sought to be given to the Executive, coupled with these offenses that are for the first time described in American life, are necessary, I doubt whether the Nation could be preserved." 54 *Cong. Record* 3488 (1917).

We submit that Senator Cummins had the best of that exchange and that—so long as we remain a free, outspoken, and democratic society—he will always have the best of it.

Our opposition to the information control provisions of S. 1400 begins with the spirit which permeates them, a spirit of Executive distrust in the American people, in the press, and in the Congress itself. It is surely ironic that less than three years after the discredited Administration effort to suppress the Pentagon Papers in the name of national security, in the face of the Executive's ill-fated attempt to

withhold from Congress and the public the facts about Watergate, again in the name of national security, this Congress should now be asked to endorse future Executive usurpations. We urge Congress to protect its own prerogatives, as well as the rights and liberties of the people it represents, by refusing to elevate unjustified official secrecy to the status of law.

Secondly, we believe that the over-all thrust of these statutes is profoundly unconstitutional. They strike at the heart of free speech and due process of law. They sweep within their prohibitions the collection, communication, or publication of information relating to the national defense regardless of its origin. They set no standard whereby the conscientious citizen, public official, or news reporter may determine whether the information he possesses, gathers, or shares with others is constitutionally protected—or the subject of criminal sanctions. They use terms so broad and vague as to force men and women of good will to guess at the meaning of the law—and act at their peril. They encourage official abuse by inviting selective prosecution and adjudication on political or personal grounds. Coupled with the capital punishment provisions of S. 1401, passed earlier this year, they might even provide a mandatory death penalty for individuals who sought only to inform their fellow citizens on the great public issues of our time.

*1. Section 1121. Espionage.*

The American Civil Liberties Union recognizes that genuine espionage is a serious offense against the nation, requiring criminal sanctions and punishment. Because it is subject to serious abuse in times of national crisis, it must be closely and carefully defined. *See Gorin* v. *United States*, 312 U.S. 19 (1941). Instead, section 1121 broadly criminalizes the knowing collection or communication of "information relating to the national defense," with the intent that it be used or "knowledge that it may be used, to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power . . ."

These are terms fraught with confusion. What is "information relating to the national defense"? Or, more to the point, what is *not* "information relaring to the national defense"? The Supreme Court held in *Gorin*, *supra*, 312 U.S. at 31-32, that under a statute listing specific places and things, this was a question for the jury to determine. Sound public policy and constitutional law alike demand a carefully confined legal definition to give advance warning of what conduct is prohibited and to guide jury deliberations. Under the present terminology a newspaper report that bad weather had delayed an Air Force airplane test, that a prominent general was hospitalized for minor surgery, that the North Vietnamese had deployed troops in South Vietnam, or that U.S. troops were using defective rifles, would all be proper subjects for invocation of the espionage provisions. Yet the first two are probably trivial, the last two are not only proper but necessary to informed public debate, and all four are protected by even the narrowest reading of the First Amendment.

Granted that Congress cannot envision every prospective violation, criminal statutes which touch on First Amendment freedoms must nonetheless be written to forbid only the narrow class of conduct which genuinely endangers the public welfare. *NAACP* v. *Button*, 371 U.S. 415, 433, 438 (1963). The late Mr. Justice Harlan, a strict constructionist of the Bill of Rights, put it like this:

But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all-inclusive . . . prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause "narrowly drawn to define and punsih specific conduct as constituting a clear and present danger to a substantial interest of the State." . . . *Garner* v. *Louisiana*, 368 U.S. 157, 202 (1961) (concurring opinion) (citation omitted).

We suggest that the only categories of defense information which may properly be subject to prior restraint on publication are present or future tactical military operations, blueprints or designs of advanced military equipment, and secret codes. *See* Brief of American Civil Liberties Union, Amicus Curiae at 13, *New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

There are similar problems with the other statutory phrases. One reason why information about the general's gallstones or the Army's misfiring M-16's (no secret, of course, to the enemy) might be brought within the statute's sanctions lies in the provision that the only required intent is "knowledge" that the information "may be used . . . to the advantage of a foreign power." But *any* information with some relationship, no matter how tangential, to the national defense *may* be to the advantage of some foreign "government, faction, party or military force, or persons purporting to act as such," or "any international organization



(the definition of "foreign power" as given in section 111 of S. 1400). The International Red Cross may be interested to learn of our medical technology—and may use it to help the wounded enemy. A German political party may use statistics about disaffected or drug-abusing soldiers to back up a demand for removal of U.S. troops from German soil. These are among the "dangers" of free speech. The Constitution never guaranteed that free speech would protect us from the ridicule or hostility of foreign nations, or from the use of our ideas beyond our shores. Its authors claimed only that if we were not willing to run these risks, we would not be free—and the opinion of others would no longer matter.

Moreover, there seems little reason for stating the proposed standard of harm in the disjunctive: injury to the United States *or* advantage to a foreign power. "[I]f a communication does not work an injury to the United States, it would seem to follow logically that no government interest can be asserted to overcome the first amendment's guarantee of freedom of speech." Nimmer, "National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case," 26 *Stan. L. Rev.* 311, 350 and n. 92 (1974). *See United States* v. *Heine*, 151 F. 2d 813 (2d Cir. 1945), *cert. denied*, 328 U.S. 833 (1946), where Judge Learned Hand refused to apply a similar clause of a precursor statute to information which had never been classsified.

There is no greater certainty in the requirement of intent or knowledge that the information gathered or disseminated may be used "to the prejudice of the safety or interest of the United States." Are we more or less "safe" if the public knows or does not know of our defense needs? Is it in the "interest" of the United States to suppress the facts about our conduct of the war in Southeast Asia or to spread them on the public record for debate? The meaning of the First Amendment is that the government shall not have the power to limit public knowledge, save in narrow circumstances where national survival is in clear and present danger. *See, e.g., Whitney* v. *California*, 274 U.S. 357, 376-77 (1927) (Brandeis, J., concurring); *cf. Brandenburg* v. *Ohio*, 395 U.S. 44 (1969). As a former Secretary of State observed in 1822:

"No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers; but many have been brought to ruin and reduced to slavery, by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured." 1 E. Livingston, CRIMINAL JURISPRUDENCE 15 (1873 ed.), quoted in Nimmer, *supra*, 26 *Stan. L. Rev.* at 333.

*2. Section 1122. Disclosing National Defense Information*

Section 1122 makes criminal the knowing communication of "information relating to the national defense to a person not authorized to receive it." Section 1126 defines "authorized" as meaning authority to have access to, receive, possess, or control "as a result of the provisions of a statute or executive order, or a regulation or rule thereunder . . ." The statute thus delivers to Congress and the Administration the exclusive power to determine who shall, and who shall not, learn, speak, or write about a vast array of politically as well as militarily sensitive information. To state this proposition is to refute it. The Constitution permits no such law.

Moreover, by failing to require a specific intent to do an unlawful act, the statute "may be a trap for innocent acts," *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 164 (1972). It is so "lacking in ascertainable standards of guilt, that . . . it fail[s] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Palmer* v. *City of Euclid*, 402 U.S. 544, 545 (1971). No standard of conduct whatsoever is specified. Government officials are given a free hand to enforce their own ideas of what the law should be, and enforcement will depend on who is, or is not, annoyed by the disclosure. But criminal statutes this vague are plainly unconstitutional. *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971). In addition, § 1122 is overbroad in a constitutionally fatal sense, for it sweeps within its prohibition conduct which is not only innocent, but sanctioned by the First Amendment. *See, e.g., Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). An overbroad statute may be invalid even though it generally protects vital national interests which can on appropriate occasions outweigh First Amendment rights. *United States* v. *Robel*, 389 U.S. 258 (1967). *Cf. Gorin* v. *United States*, *supra*, 312 U.S. at 28, narrowing an espionage statute to apply only when scienter is established.

*3. Section 1123. Mishandling National Defense Information.*

Section 1123 has similar deficiencies of vagueness and overbreadth. Had this provision been law at the time of the revelation of the Pentagon Papers, every person through whose hands they passed could have been charged with this offense. Even members of Congress and their staffs might have been prosecuted. *See Gravel* v. *United States*, 408 U.S. 606 (1972). Reporters, editors, publishers, secretaries, and probably even printers could have been swept within the statute's reach. Indeed, the government attempted to use the similar, although perhaps not quite so voluminous, provisions of 18 U.S.C. §793(e) in prosecuting Daniel Ellsberg and Anthony Russo.

This provision also poses a unique constitutional difficulty, by making it a felony for one in unauthorized possession or control of "information relating to the national defense" knowingly to fail "to deliver it promptly to a federal public servant entitled to receive it." The Fifth Amendment forbids the enforcement of statutes which infringe the privilege against self-incrimination. The Supreme Court has repeatedly struck down efforts to short-circuit the investigative process (and the Constitution) by criminalizing the failure to register oneself as a probable criminal. *E.g., Haynes* v. *United States*, 390 U.S. 85 (1968) (failure to register a firearm); *Albertson* v. *S.A.C.B.*, 382 U.S. 70 (1965) (failure to register as a Communist Party member); *Leary* v. *United States*, 395 U.S. 6 (1969) (failure to comply with the Marijuana Tax Act). *Cf. Leary, supra*, 395 U.S. at 28, holding that the Fifth Amendment establishes a "right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act."

*4. Section 1124. Disclosing Classified Information.*

Section 1124 would make it a crime for a government official or former official to communicate classified information to "unauthorized" persons, regardless of his intent and regardless of the probable or even possible effect of his actions. Mere disclosure, with no shadow of purpose or capacity to damage the genuine national defense interests of the nation, would be a felony punishable by a $25,000 fine and three years in prison. Since the statute specifically precludes the defense that the information was improperly classified, presumably a government official who informed his neighbor of matters contained in both his classified file and the daily newspapers would be a potential criminal defendant.

Yet it has been estimated, by a security consultant with more than 45 years of military and civilian experience in the field of national defense information, that over 99 per cent of classified documents contain information in the public domain or do not warrant protection for other reasons. Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 92nd Cong., 2nd Sess., *Hearings on Reform of the Federal Criminal Laws*, Pt. III, Subpart D, at 3045 (Comm. Print 1972) (Testimony of William G. Florence). It may be suggested that the problems Mr. Florence spoke of have been overcome by President Nixon's new Executive Order No. 11,652 of March 8, 1972, ostensibly reforming the classification process. But Mr. Florence testified before this Subcommittee last month that he had tried—and failed—to obtain from the Department of Defense earlier this year some of the classified documents which were designated as public records by the presiding judge during the Russo-Ellsberg trial. The reason for denial of his request? The Pentagon Papers—which have been widely quoted in newspapers, discussed at the trial, recorded in the trial transcripts, and spoken, read, and argued about by millions of Americans (and foreigners)—are still classified.

But this is not all. Enactment of this statute would irreparably damage—if not virtually destroy—the freedom of the press upon which an informed public and democratic self-government itself rely. If the press is not to become merely a withered arm of government instead of the adversary force the Constitution intended, it must have sources other than official press releases for the information it publishes.

In a study prepared by the Foreign Affairs Division of the Congressional Research Service for the Senate Foreign Relations Committee, the point is brought home. *See Hearings on Reform of the Federal Criminal Laws, supra*, at 3063–94. The study found "wide agreement that the great bulk of defense material is usually over protected—too highly classified for too long a time." *Id.* at 3077. And, it continued, high government officials—such as former Secretaries of Defense Melvin R. Laird and Clark M. Clifford—frequently "declassify" national defense information when it serves their purposes, revealing it to Congressional committees to justify budget requests or to news reporters to test out public opinion on a wide variety of subjects. *Id.* at 3080–81. There is a "high incidence



of leaks of classified information which appear to be approved by some one in authority . . ." *Id.* at 3081.

No wonder, then, that conscientious reporters turn to officials with different opinions and different facts at their command to test out in their turn the Administration's version of the truth. Veteran reporters and editors of the *New York Times* and *Washington Post* filed affidavits in the Pentagon Papers case, *see New York Times Co.* v. *United States*, 403 U.S. 713 (1971), to the effect that official and unofficial leaks were both a necessary source of information for a responsible press. Without the use of classified material, according to *Times* Washington Bureau Chief Max Frankel, "[t]here could be no adequate diplomatic, military, and political reporting of the kind our people take for granted . . ." Excerpts from Affidavit reprinted in *Hearings on Reform of the Federal Criminal Laws, supra*, at 3079.

As the Supreme Court declared in another context, the people of the United States

> may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969).

*And see* Justice Douglas' concurring opinion in *New York Times Co.* v. *United States*, 403 U.S. 713, 723–24 (1971);

> The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health.

The statute as written invites abuse. Every government official who handles classified information would speak in peril of violating its technical commands, and be subject to prosecution for politically embarrassing the government. Officials could be punished for expressing political views distasteful to the government, if a single classified fact could be found within their statements. Granting that the government has the right to protect limited categories of information from unauthorized disclosure by its employees, it need not make such transgressions criminal. Dismissal of those who release information with culpable intent or for personal gain should be a sufficient sanction.

*5. Section 1125. Unlawfully Obtaining Classified Information.*

This section makes it a crime for an agent of a foreign power to obtain or collect "classified information." Insofar as the section also precludes the defense that the information was improperly classified, and since it does not require proof of culpable intent, it would be subject to due process and free speech objections similar to those outlined above.

*6. Section 1126. Definitions for Section 1121 Through 1125.*

Objections to the definitions of "authorized", "classified information" and "information relating to the national defense" have been noted above. We strongly urge that if the latter phrase is retained, it be closely restricted to military or defense material which the government has a legitimate interest in keeping secret from the outside world as well as from the American people—*e.g.*, technical details of military weaponry, tactical details of military operations, the conduct or product of specific foreign covert intelligence gathering operations, and military contingency plans in respect of foreign powers.

*7. ACLU Proposed Statute on National Defense Information.*

The ACLU proposes the following statute to replace the correlative provisions of S. 1400. We suggest that Sections 1122, Disclosing National Defense Information and 1125, Unlawfully Obtaining Classified Information, be removed entirely and that Section 1123, Mishandling National Defense Information be rewritten along the lines of the proposals below, removing subsection (3) to prevent any requirement of self-incrimination.

*Section 1121. Espionage.* Strike the section in S. 1400 and substitute the following:

(a) Offense—A person is guilty of an offense, if, with intent that classified information relating to the national defense be used by a foreign power to injure the national defense, he or she knowingly:

(1) communicates such classified information directly to a foreign power or agent; or

(2) obtains such classified information in order to communicate the information directly to a foreign power or agent; or

(3) enters a restricted area with intent to obtain such information in order to communicate the classified information directly to a foreign power or agent.

(b) Grading—An offense described in this section is (1) a class A felony in time of war; (2) a class B felony at all other times.

*Section 1124. Disclosing Classified Information.* Strike the heading and section and substitute the following:

*Disclosing National Defense Information by Public Servants*

(a) Offense—A public servant or former public servant is guilty of an offense if, being or having been in authorized possession of classified information relating to the national defense, he or she knowingly communicates such information to a person not entitled to receive it with the intent to injure the United States.

(b) Exceptions to Liability as an Accomplice or Conspirator—A person not entitled to receive information relating to the national defense is not subject to prosecution as an accomplice within the meaning of section 401 for an offense under this section, and is not subject to prosecution for conspiracy to commit an offense under this section.

(c) Defense—It is a defense to a prosecution under this section (1) that the information was communicated for the purpose of providing the information to a member of the Senate or the House of Representatives; (2) that the information was not properly classified under the definition given in section 1126(f).

(d) Grading—An offense described in this section is a class E Felony.

*Section 1126. Definitions for Sections 1121 Through 1125—*

(a) "Information relating to the national defense "means:

(1) technical details of military operations or weaponry;

(2) the conduct or product of covert foreign intelligence gathering operations;

(3) military contingency plans in respect of foreign powers;

provided that such information would, if obtained by a foreign power, be used by that power to injure significantly the national defense of the United States, and that at the time of the offense the information had not previously been published.

(b) "Agent" means one in the employ or service of a foreign power who is acting on instructions of that power.

(c) "Public servant" is an employee of the United States or of a contractor who promises to abide by this section when given access to information relating to the national defense.

(d) "Knowingly communicates" as used in § 1124(a) means that the public servant knew or had reason to believe that the action which he took would cause injury to the national defense and acted without taking account of this knowledge and balancing it against the public's right to know.

(e) "A person not entitled to receive" is a person not authorized to receive information under a statute requiring such authorization or an executive order issued pursuant to this statute regarding information that Congress has authorized be kept confidential.

(f) "Classified information" means information properly classified pursuant to a valid statute, executive order, or regulation, and not declassified prior to the time of the alleged offense. It is a defense to a prosecution under this section that the information was not classified in conformity with the requirements of the statute, executive order, or regulation, or that the information was not reasonably subject to classification under the statute, executive order, or regulation.

(g) "Previously been published" means made public in any form. It is not a requirement of this section that publication was officially made or authorized by an officer of the government with authority to do so.

*8. Other Sections of S. 1400 Which Could be Used to Censor the Press and Withhold Information from the Public.*

Aside from the provisions included in the so-called "national security" chapter of S. 1400, several other sections of the proposed Criminal Code could be used to stifle the flow of vital information to the press and choke off public debate through lack of knowledge and fear of censure.



The most egregious is the combination of the definition of property in § 111, General Definitions, with the prohibitions of § 1731, Theft, and § 1732, Receiving Stolen Property. Section 111, for perhaps the first time in the history of Anglo-American law, defines "property" to include "intellectual property or information, by whatever means preserved, although only the means by which it is preserved have a physical location . . ." Under § 1731, theft is committed if one knowingly takes "unauthorized control over or makes unauthorized use, disposition or transfer . . . of property of another. . . . There is federal jurisdiction . . . if . . . the property is owned by, or is under the care, custody or control of the United States. . . ." As a recent article in the *Nation* warned:

> In these words is hidden the monstrous concept that all information in possession of the government, although paid for by the taxpayer and collected by public servants in the course of public duty, is transformed into the private property of the government bureaucracy. Criley, "Sneaking Up on the press: Nixon's 'Official Secrets Act,'" *The Nation*, March 2, 1974, pp. 265, 266.

The drafter of this section has publicly declared that reporters to whom "government-owned" information has been leaked would be subject to prosecution under § 1732 for receiving stolen property. *Id.* at 267. Indeed, government briefs in the Russo-Ellsberg case argued that both men were thieves and, by clear implication, that their newspaper recipients were receivers of stolen property.

Even if this Congress were to reject the "Official Secrets" sections of S. 1400, the above provisions would accomplish the same end unless revised to protect our First Amendment rights and liberties. Indeed, they would go much further, since the theft of any government information, whether or not classified and without regard to motive, would be a violation of the law. It would thus give the government the power to punish any leaks of embarrassing or inconvenient information.

Two more provisions of S. 1400 directly lend themselves to governmental oppression of the rights of speech and press. Indeed, Daniel Ellsberg was indicted under the present versions of both these sections. Section 1301, Obstructing a Government Function by Fraud, creates a new offense for one who "intentionally obstructs, impairs, or perverts a government function by defrauding the government in any manner." Since "government function" and "defrauding" are nowhere defined, the section grants wide prosecutorial discretion to harass the press for "impairing" efficient operations by exposing official decision-making processes or even outright chicanery on the basis of information which was the government's "property." See *Haas* v. *Henkel*, 216 U.S. 462 (1910) ("defraud of the United States" defined to include impairing any government function).

Section 1742, Unauthorized Use of a Writing, could similarly result in broad—and unconstitutional—suppression of information. The offense, which originally was limited to forgery of securities and the like, has been rewritten to criminalize a much wider class of behavior. Under § 1742, one may be guilty of a felony "if with intent to deceive or harm a government or person he knowingly . . . (1) issues a writing without authority to do so; or (2) utters or possesses a writing which has been issued without authority." There is federal jurisdiction if the writing is or purports to be "made or issued by or under the authority of . . . the United States . . ." It may be argued that the inclusion of this section with the commercial offenses precludes its use in a wider context. But the language of the statute—and the government's far-ranging briefs in the Russo-Ellsberg case—support no such complacence. The statute should be narrowed to reach commercial offenses only.

*9. "Official Secrets" Offenses in S. 1.*

The comparable provisions of S. 1 are less sweeping an invasion of our constitutional rights. But they too suffer from serious problems of vagueness and overbreadth. As with S. 1400, the definitions in S. 1, § 2-5A1, of "foreign power" and "national defense information" are far too broad for purposes of attaching criminal liability to conduct or speech. The latter definition, although arguably more restricted than that in S. 1400, includes information regarding "the military capability of the United States." Such a phrase leaves actual definition in the hands of the prosecutor and the jury, expanding or contracting the meaning of "military" to exclude or include such items of common knowledge as the number of men currently serving in the armed forces, the annual production of grain, or the shifting of foreign alliances.

*Section 2-5B7, Espionage,* uses much of the same vague language as S. 1400. The standard of culpability is "knowledge" that the national defense information the offender "gathers, obtains or reveals . . . for or to a foreign power or its agents" "is to be used to the injury of the United States or to the advantage of a

foreign power." Under § 1–2A1 (a) (3), to act "knowlingly" is to act with awareness that conduct will probably cause a prohibited result. A reporter revealing "national defense information" may well *know* that it could be described as "injuring" the United States by those who elevate government secrecy over public debate or that it may aid a foreign power in dealing with the United States, justifying itself to its own citizens, or in myraid ways that have nothing to do with our national defense. The statutory standard ignores *Gorin* v. *United States*, 312 U.S. 19 (1941), where the Supreme Court upheld an espionage statute against a challenge for vagueness partly on the ground that the statute required "bad faith" or "scienter." *Id.* at 28. If guilty intent was not present, the Court ruled, the criminal sanctions would not apply. *Id.*

Despite the decision in *United States* v. *Heine*, 151 F. 2d 813 (2d Cir. 1945), *cert. denied*, 328 U.S. 833 (1946), that for purposes of espionage, "information relating to the national defense" did not include information accessible through public sources, S. 1 includes no such exception. Its espionage section is thus wide open to abuse in much the same manner as that of S. 1400.

*Section 2–5B8, Misuse of National Defense Information*, gathers into one section offenses spread over several in S. 1400. Subsection (a) (1) is virtually identical with § 1122 of S. 1400 and is subject to the same criticisms. Although the subsection, like all the offenses included in § 2–5B8, requires the prohibited conduct to be done "in a manner harmful to the safety of the United States," this extra prosecutorial hurdle is too vague to deter unconstitutionally broad prosecutions.

Subsection (a) (3), similar to § 1123 of S. 1400, makes criminal the failure to deliver national defense information to a federal public servant "entitled to receive it" if the possession is "knowingly unauthorized." Subsection (a) (3) does require that there be a "demand" for the relinquishment. But this does nothing to solve the Fifth Amendment problems inherent in requiring one to supply incriminating evidence against himself. Moreover, since neither "unauthorized" nor "entitled" are further defined, everyone involved must act at his peril

Subsections (a) (4) and (5) prohibit the knowing use or communication to an "unauthorized" (undefined) person of "communications information," which is defined in § 2–5A1(3) (ii) to include "the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or a foreign power for cryptographic or intelligence surveillance purposes . . ." Under these sections, it might be a felony for someone to tell others about radar device construction observed during a motor trip, or for a newspaper to publish information concerning the communications satellite program. Once again, such vague statutes lend themselves to prosecutorial abuse, restrict the dissemination of information properly in the public domain, and sweep the ordinary citizen within an unpredictable net of criminality.

*Section 2–5B9, Violation of Wartime Censorship*, prohibits knowing communication with an enemy or its ally in time of war (undefined) where in violation of a federal statute, rule, regulation, or order. It could be used to curb news reporters and others' travels to the war zone or to allied countries for legitimate investigatory purposes. If this section had been law five or six years ago, and if the Vietnamese conflict was a "war," the issuing of a regulation under an existing federal statute might have prevented Harrison Salisbury's reports from North Vietnam or other reports based upon contact with "the other side." The First Amendment contemplates providing Americans with information from all sources in order that they may determine for themselves what is true and what is false and what public policy should be.

At the very least this statute should be limited to violation of federal statutes. Criminal liability should not be made to depend on rules, regulations, or orders issued through the administrative process. It is Congress' job to define federal crimes.

*Sections 2–8D3, Theft*, and *2–8D4, Receiving Stolen Property*, like the similar sections in S. 1400, could be used to punish the press and its sources, members of Congress, and other citizens attempting to subject government policy-making to outside debate. Subsection (d) (iii) of the theft provision defines property to include "any government file, record, document, or other government paper stolen from any government office or from any public servant." Although this provision is considerably narrower than the definition in S. 1400, it might still cover information transferred to reporters by officials with less than final control over its disposition. Moreover, the degree of knowledge required for the offense of receiving stolen property is merely that it "probably has been stolen."

The section says nothing about whether copying of documents later returned to their proper place, as done by Ellsberg and Russo, constitutes theft or not. But in

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foreign power." Under § 1–2A1 (a) (3), to act "knowlingly" is to act with awareness that conduct will probably cause a prohibited result. A reporter revealing "national defense information" may well *know* that it could be described as "injuring" the United States by those who elevate government secrecy over public debate or that it may aid a foreign power in dealing with the United States, justifying itself to its own citizens or in myraid ways that have nothing to do with our national defense. The statutory standard ignores *Gorin* v. *United States*, 312 U.S. 19 (1941), where the Supreme Court upheld an espionage statute against a challenge for vagueness partly on the ground that the statute required "bad faith" or "scienter." *Id.* at 28. If guilty intent was not present, the Court ruled, the criminal sanctions would not apply. *Id.*

Despite the decision in *United States* v. *Heine*, 151 F. 2d 813 (2d Cir. 1945), *cert. denied*, 328 U.S. 833 (1946), that for purposes of espionage, "information relating to the national defense" did not include information accessible through public sources, S. 1 includes no such exception. Its espionage section is thus wide open to abuse in much the same manner as that of S. 1400.

*Section 2–5B8, Misuse of National Defense Information*, gathers into one section offenses spread over several in S. 1400. Subsection (a) (1) is virtually identical with § 1122 of S. 1400 and is subject to the same criticisms. Although the subsection, like all the offenses included in § 2–5B8, requires the prohibited conduct to be done "in a manner harmful to the safety of the United States," this extra prosecutorial hurdle is too vague to deter unconstitutionally broad prosecutions.

Subsection (a) (3), similar to § 1123 of S. 1400, makes criminal the failure to deliver national defense information to a federal public servant "entitled to receive it" if the possession is "knowingly unauthorized." Subsection (a) (3) does require that there be a "demand" for the relinquishment. But this does nothing to solve the Fifth Amendment problems inherent in requiring one to supply incriminating evidence against himself. Moreover, since neither "unauthorized" nor "entitled" are further defined, everyone involved must act at his peril

Subsections (a) (4) and (5) prohibit the knowing use or communication to an "unauthorized" (undefined) person of "communications information," which is defined in § 2–5A1 (3) (ii) to include "the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or a foreign power for cryptographic or intelligence surveillance purposes . . ." Under these sections, it might be a felony for someone to tell others about radar device construction observed during a motor trip, or for a newspaper to publish information concerning the communications satellite program. Once again, such vague statutes lend themselves to prosecutorial abuse, restrict the dissemination of information properly in the public domain, and sweep the ordinary citizen within an unpredictable net of criminality.

*Section 2–5B9, Violation of Wartime Censorship*, prohibits knowing communication with an enemy or its ally in time of war (undefined) where in violation of a federal statute, rule, regulation, or order. It could be used to curb news reporters' and others' travels to the war zone or to allied countries for legitimate investigatory purposes. If this section had been law five or six years ago, and if the Vietnamese conflict was a "war," the issuing of a regulation under an existing federal statute might have prevented Harrison Salisbury's reports from North Vietnam or other reports based upon contact with "the other side." The First Amendment contemplates providing Americans with information from all sources in order that they may determine for themselves what is true and what is false—and what public policy should be.

At the very least this statute should be limited to violation of federal statutes. Criminal liability should not be made to depend on rules, regulations, or orders issued through the administrative process. It is Congress' job to define federal crimes.

*Sections 2–8D3, Theft*, and *2–8D4, Receiving Stolen Property*, like the similar sections in S. 1400, could be used to punish the press and its sources, members of Congress, and other citizens attempting to subject government policy-making to outside debate. Subsection (d) (iii) of the theft provision defines property to include "any government file, record, document, or other government paper stolen from any government office or from any public servant." Although this provision is considerably narrower than the definition in S. 1400, it might still cover information transferred to reporters by officials with less than final control over its disposition. Moreover, the degree of knowledge required for the offense of receiving stolen property is merely that it "probably has been stolen."

The section says nothing about whether copying of documents later returned to their proper place, as done by Ellsberg and Russo, constitutes theft or not. But in the Russo-Ellsberg trial briefs, the government, using similarly equivocal provisions of present law, argued that a government record is the information contained within it and not the pieces of paper on which it is in fact recorded. Under the government theory, Ellsberg and Russo were guilty of theft of the Pentagon Papers. This theory would establish government ownership of government "information" in much the same way as S. 1400 and would, similarly and drastically, reduce the sources of information vital to intelligent public discussion of important public issues.



### *B. Other Offenses Against the Nation*

*1. Treason.*

The National Commission on Reform of Federal Criminal Laws (hereinafter the Brown Commission), in trying to narrow the definition of treason, see *Working Papers of the National Commission on Reform of Federal Criminal Laws*, vol. I, at 419–27 (1970) (hereinafter *Working Papers*), reworded it so as to reach more broadly than ever before into areas of speech and conduct protected by the First Amendment. See *Testimony of the American Civil Liberties Union Before the Senate Subcommittee on Criminal Laws and Procedures on the Final Report of the National Commission on Reform of Federal Criminal Laws* 70–73 (1972) (hereinafter *1972 ACLU Testimony*).

Both S. 1400, § 1101, and S. 1, § 2–5B1, have substantially returned to statutory formulas which would presumably preserve the limits of existing law, including the necessity of an "intent to betray," *Cramer* v. *United States*, 325 U.S. 1 (1944). But the contours of present law are unclear. *Id.* at 46–47. *See, e.g.*, the comment in *United States* v. *Stephan*, 50 F. Supp. 738, 741–42 (E.D. Mich. 1943) to the effect that "In times of peace it is treason for one of our citizens to incite war against us." Incitement without proof of intent could well be no more than advocacy protected by the First Amendment even under a restrictive reading of present law as requiring an unequivocal "call to violence now or in the future" before advocacy may be punished. *Noto* v. *United States*, 367 U.S. 290, 298 (1961). See *Yates* v. *United States*, 354 U.S. 298 (1957). Under *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), the only speech which may be punished is that "directed" toward causing imminent lawless action and likely to produce it.

Similarly, the treatment of propaganda broadcasters as traitors, *Chandler* v. *United States*, 171 F. 2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); *Gillars* v. *United States*, 182 F. 2d 962 (D.C. Cir. 1950), raises grave constitutional doubts. One man's propaganda is another's free speech, as the bitter controversy over the war in Southeast Asia taught the nation. In order to avoid the prosecution and persecution of those who espouse unpopular doctrines, the crime of treason should at least be limited, as the Brown Commission suggested at one point, to "actual participation in a foreign war against the United States." *Working Papers*, vol. I, at 419–23.

Among the salient differences between S.1 and S.1400 in defining treason is that S.1 confines itself to United States "nationals," while S.1400 applies to persons "in fact owing allegiance to the United States." The latter formulation is clearly ambiguous and overbroad. Citizens of other nations should not be chargeable with treason against the United States. The need for clarification is illustrated by *Carlisle* v. *United States*, 83 U.S. 147, 154 (1873), which declared that aliens domiciled in the United States are covered because they owe temporary allegiance Moreover, S.1400 by the phrase "in fact" apparently bars the defense of failure to know that one owed allegiance to the United States. Such a defense is plainly crucial to intent.

S.1 provides a mandatory death penalty for treason under certain circumstances. The ACLU is unalterably opposed to capital punishment on moral, constitutional, and practical grounds. Inflicting the death penalty, as has so often been demonstrated, does not deter serious crime more effectively than severe prison sentences. It is a barbaric anachronism which diminishes the moral and political legitimacy of the society which practices it. *See Furman* v. *Georgia* 408 U.S. 238, 371 (1972) (Marshall, J., concurring).

*2. Military Activity Against the United States.*

Section 2–5B2 of S. 1 makes one guilty of an offense if "with intent to aid the enemy or to prevent or obstruct a victory of the United States, during a time of war and within the United States, he participates in or facilitates military activities of the enemy." There is no precisely comparable provision in S. 1400.

The section incorporates the Brown Commission's suggested redefinition of treason and is fraught with the same dangers. Since neither "facilitates," "military," nor "war" is defined by S. 1, the statute could arguably apply to an undeclared war, such as that in Southeast Asia, and to speech in praise of the goals,

tactics, ideology, governmental system, or any other aspects of the "enemy," if such speech might, for example, stir that enemy to renewed military vigor. This was the very charge frequently leveled against critics of the Vietnamese war whose loyalty, patriotism, sincerity, and deep concern about the future of the United States were beyond question. The apparent purpose and likely effect of this section of S. 1 is the stifling of political dissent, of conscience, and of loyal opposition. By its vagueness and overbredth, it authorizes sanctions against not only the genuine enemies of our nation but also those who express disapproval of or actively urge changes in government policy. In *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 640–41 (1943), Justice Jackson for the majority asserted the claims of conscience against the coercion of the state:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite but necessary to say that the First Amendment to our Constutition was designed to avoid these ends by avoiding these beginnings. . . . We set up government by the consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent.

It seems trite but necessary to say that Justice Jackson's words are as true now as when written. A provision like § 2–5B2 has no place in our constitutional scheme of government.

*3. Inciting Overthrow or Destruction of the Government.*

Section 1102 of S.1400 and Section 2–5B3(a)(2) of S.1 would re-enact the Smith Act, punishing mere advocacy of revolutionary change. The ACLU vigorously opposes such legislation in any form. According to *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969),

> the Constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except when such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

The S. 1 provision would make it criminal for one to advocate the "desirability or necessity of armed insurrection under circumstances in which there is substantial likelihood his advocacy will imminently produce, in fact," armed insurrection and where there is intent "to induce or otherwise cause" others to engage in armed insurrection. Although S. 1 appears designed to meet the *Brandenburg* test, it retains many of the constitutional difficulties with which the Smith Act was riddled. The standards are far too subjective to reach only those the statute ostensibly intends to cover. Since no overt act is necessary, it will always be open to the trier of fact to find "substantial likelihood" of armed insurrection where in fact there was none. Such a standard invites judgment on the basis of passion and prejudice against politically unpopular minorities. The speaker's intent is similarly likely to be judged by the words he uses, for no actions other than words are required.

Despite the ancient rule of criminal law that guilty intent and guilty act must coincide, that unfocused wickedness is not enough and there must be purpose to effect the specific criminal result or at least foresight of consequence, *e.g.*, *Regina* v. *Cunningham*, 41 Crim. App. R. 155, 3 Weekly L. R. 76 (1957); *Dennis* v. *United States*, 341 U.S. 494, 499–500 (1951), the statute further punishes one who "organizes a conspiracy which engages in such advocacy . . ." Thus the organizer of a political group, though he may have left it or have nothing to do with the illegal advocacy or even have opposed it, would be punished for the unforeseen acts of others. A law which so attenuates criminal responsibility invites selective enforcement against the most vocal and most successful opponents of the government. The Supreme Court has held that only members actively involved in an organization, and specifically found to possess guilty knowledge and intent, may be convicted of illegal advocacy under the former version of the Smith Act. *Scales* v. *United States*, 367 U.S. 203, 228 (1961); *Noto* v. *United States*, 367 U.S. 290, 297–300 (1961).

S. 1 further punishes one who, as an "active member" of a conspiracy which engages in illegal advocacy, "facilitates such advocacy." Under this provision, a



member who hired an auditorium for a speech later found to violate the statute, even though he neither attended it, knew of its contents in advance, or participated in it, could be convicted of a major felony. Those "active members" who applauded such a speech, without considering it to constitute illegal advocacy of immediate armed insurrection, would be similarly liable. Intent and act are totally divorced from each other by such a standard of culpability. Rights of free speech and association, guaranteed by the First Amendment, are destroyed.

Bad as S. 1 is, the incitement section of S. 1400 is far worse. It is a prescription for governmental tyranny. Under its loose language, entirely innocent conduct performed by not even a breath of suspicion of possible illegality, could be the basis for a major felony. "[T]he most theoretical proposals in the most unlikely circumstances carry penalties up to 15 years . . ." Schwartz, "The proposed Federal Criminal Code," 13 Crim. L. Rep. 3265, 3273 (1973).

Section 1103 punishes one who "with intent to bring about the overthrow or destruction of the government of the United States, or any state or local government, as speedily as circumstances permit," "incites others to engage in conduct which then or at some future time would facilitate the overthrow or destruction by force of that government." One is similarly liable who, with the prescribed intent, "organizes, leads, recruits members for, joins, or remains an active member of, an organization which has as a purpose the incitement" forbidden in the first subsection.

As with S.1, S. 1400 permits—indeed, encourages—the finding of criminal intent without the commission of a single act beyond speech itself. The connection between advocacy and "overthrow. . . of the government" is made yet more ambiguous by the failure to require either imminent danger or substantial likelihood of success. No "armed insurrection" is necessary. And the word "facilitate" could embrace incitement of others to make speeches or posters, or write letters, critical of government policy. Section 1103 of S. 1400 is a blueprint for, in Justice Jackson's phrase, "coercive elimination of dissent" and "extermination of dissenters." "The First Amendment to our Constitution was designed to void these evils by avoiding these beginnings." *Barnette*, *supra*, 319 U.S. at 641. This statute, which sanctions the punishment of mere "belief in an idea," *Scales*, *supra*, 367 U.S. at 274 (Douglas, J., dissenting), paves the way for destruction of our society more surely than the incitement it condemns.

*Sabotage.*

Sections 1111 and 1112 of S. 1400 and section 2–5B4 of S.1 prohibit impairing military effectiveness by damaging property. Although S.1 is apparently an attempt to limit the offense to military property, S. 1400 reaches out to embrace virtually everything and every activity that might be taken in relation to it. Section 1111 prohibits damage to or delay or obstruction of any United States property of that of "an associate nation," almost any other property, facility, or service that is or might be used in the national defense, or production or repair of such property. The required intent is "to impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or engage in war or defense activities." "Associate nation" is defined in Section 111 of S. 1400 as "a nation at war with a foreign power with which the United States is not at war." "War" is not defined.

Under the vague terms of § 1111, anti-Vietnam war demonstrators who "interfered with" public transportation by their very numbers could have been prosecuted for sabotage, a major felony. Nothing in the statute's language prohibits a jury from deducing "intent . . . to obstruct the ability of the United States . . . to . . . engage in war or defense activities" under such circumstances. Nothing would prevent prosecution under the general criminal attempt, conspiracy, and solicitation sections of S. 1400, *see* sections 100/–03, for speech encouraging such a demonstration. The section could be used to destroy the rights of association and assembly guaranteed by the First Amendment. It would make every public demonstration, no matter how peaceful and orderly, subject to criminal sanctions at the iron whim of official power. *See Cox* v. *Louisiana*, 379 U.S. 536, 557–58 (1965), where the Supreme Court, in striking down a similarly vague and overbroad statute, observed:

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

Section 1112 essentially repeats the offense outlined in § 1111, but lowers the level of required intent to "reckless disregard." It thus extends still further the opportunities for official suppression of that vigorous and effective dissent on which democracy relies.

Section 2–5B4 of S. 1 makes it criminal for a person "with intent to impair the military effectiveness of the United States" to "damage . . . or tamper . . . with anything of direct military significance to the United States . . . ." The latter phrase is defined in the statute to include an "armament or anyting else peculiarly suited for military use," even when only "in course of research and development." Since intent to impair military effectiveness could be read to include any opposition to development of weapons, no matter how costly or obsolete, editorials against the ABM, news stories exposing enormous cost over-runs and mechanical failure, or simply a citizen's public or private remarks against the situating of nuclear stockpiles in his hometown, could be prosecuted on the theory that they "damage" the objects of their disapproval. This section should be narrowed to apply only to culpable physical damage to or interference with military hardware.

*5. Impairing Military Effectiveness by False Statement.*

Section 1114 of S. 1400 makes it criminal for a person, in time of war (undefined) and with intent to aid the enemy or interfere with the United States' ability to engage in war or defense activities, knowingly to communicate a statement "which in fact is false" about "losses, plans, operations, or conduct of the military forces of the United States," of an associate nation, or of an enemy. It similarly punishes factually false statements about civilian or military catastrophe or "any other matter of fact which, if believed, would be likely to affect the strategy or tactics of the military forces of the United States or likely to create general panic or serious disruption." S. 1 contains no comparable provision.

Enactment of § 1114 would effectively destroy perhaps the most important function of a free press—the obligation to report fully and fairly in times of national crisis the discoverable facts about that crisis. It would make punishable as a major felony good-faith errors in news reports about a wide range of activity.

Moreover, there is nothing to prevent high-level official concealment of such facts as the bombing of Cambodia while a prosecutor pursues, tries, and obtains a conviction in the erroneous belief that such "facts" were false. The history of our involvement in Vietnam suggests that when the choice is between the official and the press version of the facts, the citizen may be better off trusting the press. Without it, we might never have learned of the massacre at My Lai, the widespread corruption and oppression of the South Vietnamese government, or the strange discrepancy between many battlefield reports and the observable facts.

A free press is going to make mistakes. Occasionally it is going to make major mistakes. Criminal liability for such errors cannot be made dependent on so vague an intent as "interference with" the "defense activities" of the United States. Such a standard would permit official harassment of politically disfavored publications. It would, in effect, impress the press into government service until such time as the state of "war" came to an end.

*6. Offenses Relating to Military Service.*

Both S. 1400 and S. 1 punish evasion of military service, obstruction of military recruitment or induction, and causing mutiny, insubordination, or refusal of duty. The S. 1 provisions, sections 2–5B5 and 2–5B6, are more narrowly drawn than the S. 1400 provisions, section 1115–17, but they still present serious problems.

Section 1115 criminalizes the failure to "satisfactorily complete" civilian substitute service, without requiring proof of culpability. Since "satisfactorily complete" is nowhere defined, it could be construed to mean anything from failure to show up on time one morning to failure to show up at all. It thus creates a special felony which could be used selectively against conscientious objectors.

The section also punishes conduct with intent to avoid or delay military service which "in fact" constitutes false swearing or making a false statement (which are made criminal by sections 1342 and 1343). Since section 303(e) specifies that "[c]ulpability is not required with respect to any factor specified in the description of the offense as existing 'in fact,' " section 1115 could be read to permit prosecution for innocent false statements without regard to the culpability requirements of sections 1342 and 1343, so long as the larger intent to avoid military obligation was found. Or it could be read to incorporate the knowledge of falsity that they require. Either way it could support conviction for conduct or speech which has nothing to do with actual avoidance of military service and thus again invites discriminatory prosecution on the basis of political beliefs, First Amendment-protected activity, or other impermissible criteria.



By contrast, S.1 section 2–5B5, prohibiting avoidance of military service, appears definite and limited. But it also provides that the offense is a continuing one until a person is no longer under a duty to register, thereby extending the possibilities of prosecution until long after the original offense may have occurred. In *Toussie* v. *United States*, 397 U.S. 112 (1970), the Supreme Court construed the Selective Service Act to require observance of the five-year statute of limitations both

> to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. *Id.* at 114–15.

Extending the time limit for prosecution is another invitation to selective prosecution. It also interferes with due process rights to a fair and speedy trial. For example, witnesses may well disappear and memories grow hazy over a 13-year period.

Section 1116 of S. 1400 forbids incitement of others to "in fact" evade military or substitute service, without regard to First Amendment protections of free speech or to actual connection between the "incitement" and the evasion. Section 1117 of S. 1400 similarly forbids the incitement of mutiny, insubordination, refusal of duty, or desertion, and the "facilitation" of even attempted mutiny or insubordination. The vagueness of the terms, the lack of proved or provable connection between the speech or other expressive conduct and the culpable activity, would permit application of the statute to such constitutionally protected activities as the organization of G.I. coffeehouses in opposition to the war or, indeed, to any speech which might encourage "insubordination." Section 2–5B6(a)(3) of S. 1 similarly makes it criminal for one to "intentionally cause . . . insubordination, mutiny, or refusal of duty . . ." The only definition of "cause" in S. 1 is the explanation in § 1–2A2 that conduct causes a result "when it is an antecedent but for which the result would not have occurred." Such a definition does little in practice to close the gap between speech and action. It does not even attempt to satisfy the prohibition in *Bradenburg* v. *Ohio*, 395 U.S. 444 (1969), of criminal sanctions against speech which is not likely to produce *imminent* lawless action.

## II. OFFENSES AGAINST PUBLIC ORDER

### *A. Rioting*

Although the Brown Commission Consultant's Report persuasively recommended sharp limitations on federal riot law because of constitutional difficulties and overlapping state jurisdiction, see *Working Papers*, vol. II at 991–1029, the Commission's *Final Report* (H.R. 10047), S. 1400, and S. 1 all contain anti-riot provisions which could substantially interfere with First Amendment rights. Like many of the offenses against national security, the anti-riot laws are broad and vague, sweeping within their terms conduct clearly protected by the First Amendment, failing to notify the law-abiding of what conduct is properly forbidden, and providing a convenient tool for discriminatory prosecution and governmental oppression of political adversaries.

Yet the Supreme Court has affirmed time and again that public peace cannot be preserved at the price of sacrificing public discourse and dissent, *e.g.*, *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971); *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949). In *Terminiello* the Court declared that

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups. 337 U.S. at 4–5.

Rioting is not protected by the First Amendment. But in this context only violent activity itself or conduct clearly and immediately productive of such activity should be punishable by the criminal law. Such conduct cannot be speech alone. See *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), holding that the government may forbid speech only when it is "directed to inciting or producing immenent lawless action *and* is likely to incite or produce such action." *Id.* at 447 (emphasis added). Speech which is the occasion for violence is not necessarily the cause of it. See *Working Papers*, vol. II at 1000: "What is obviously lacking is any requirement that the proscribed *speech* pose a clear and present danger of violence. The statute . . . refers [only] to the danger that the *violence* . . . on the part of the *rioters* will cause injury to person or property." [Emphasis in original.] A statute which allows government officials to determine when the connection suffices can only lead to the dangers the Court warned against in *Cox* v. *Louisiana*, 379 U.S. 536, 557–58 (1965): "It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not. . . ." *And see Hess* v. *Indiana*, 94 S.Ct. 326 (1973), in which the Court majority and dissenters read exactly opposite meanings into the same words uttered by a demonstrator in a moment of confusion and potential violence. Recovery of the actual meaning of speech in such moments from the memories of participants after the fact is at best an extraordinarily difficult task. A society which assigns criminal liability on the basis of such fragile distinctions runs too high a risk of penalizing the innocent.

*1. Inciting or Leading a Riot.*

Sections 1801 and 1805 of S. 1400 and section 2–9B1 of S. 1 prohibit inciting five or more persons to riot. Neither statute distinguishes between major and minor disorders in setting the penalty, as recommended by the Brown Commission. See § 1801(3) of its *Final Report*. Both statutes define a riot as a disturbance involving violent and tumultuous conduct which creates a danger of injury to persons or property or obstructs a government function. S. 1400 requires that the danger be "grave," S. 1, that it be "immediate," S. 1 further requires the injury involved to be "serious" and the obstruction to be "substantial." Either formulation is an improvement over the even more vague wording of the so-called Civil Rights Act of 1968, the first federal riot law. But neither approaches the constitutional standard enunciated by the Supreme Court in *Brandenburg* v. *Ohio*, *supra*, 395 U.S. at 447 (1969) (even advocacy of force or violation of law is protected speech except when it aims at and is likely to produce "imminent lawless action"). *But see United States* v. *Matthew*, 419 F. 2d 1177 (D.C. Cir. 1969) (upholding the constitutionality of the D.C. riot statute, similar to S. 1400).

Both statutes can be used to punish mere advocacy, even where no riot in fact occurs or where the connection between speech and violence is merely temporal. They thus substantially invade territory governed by the First Amendment. Tumultuous conduct which "obstructs a government function" may be no more than a noisy but peaceful demonstration temporarily blocking a government driveway. Such conduct is well within the constitutionally guaranteed right of assembly and petition.

Additionally, both statutes punish the giving of "commands, instructions, or directions in furtherance of" a riot. S. 1400 also makes it criminal to "urge participation in" or "lead" a riot. Again, *Hess* v. *Indiana*, 94 S.Ct. 326 (1973), amply demonstrates the difficulties encountered in determining who is trying to further a riot and who is trying to limit it. Such speech is protected not only by the First Amendment, but also by the Fifth Amendment guarantee of due process of law. The standards for punishment are so vague as to require potential violators, law enforcement personnel, and judge or jury to guess at their meaning. *See Lanzetta* v. *New Jersey*, 306 U.S. 451 (1938).

S. 1400 would substantially broaden federal riot jurisdiction. Interstate travel, use of the mail, or use of interstate commerce facilities, regardless of intent, "in the course of the planning, promotion, management, execution, consumption, or concealment of the offense," would be sufficient. There would be jurisdiction where "the riot obstructs a federal government function." Any realistic attempt to enforce such provisions would involve the creation and maintenance of a national riot police, since nearly every "tumultuous disturbance" of whatever description would fall into one or another of the jurisdictional categories. What such provisions really do is give the federal government unfettered discretion to second-guess state law enforcement officials, and to decide, perhaps for purposes far removed from legitimate law enforcement concerns, to prosecute those whom the state fails to charge or convict, or sentence in a manner acceptable to federal officials. Civil libertarians have long opposed the establishment of a roving federal police force as a substantial step toward governmental tyranny.



*2. Arming Rioters.*

Both section 1802 of S. 1400 and section 2–9B2 of S. 1 prohibit training others in the use of weapons with culpable intent—in S. 1400 intent to "promote" a riot and in S. 1 intent that the weapon be used in a riot. Neither section makes it clear whether a riot need occur nor requires any actual danger of imminent violence. Since there is nothing inherently wrong in teaching another to use a firearm under present law, and such teaching may involve no more than speech, the offense may create a trap for innocent talk. *Cf. Working Papers*, vol. II at 1002. In practice it could force defendants to prove lack of guilty intent instead of placing the burden of proof beyond a reasonable doubt where it belongs, on the prosecution. Advocacy which is protected by the First Amendment may be used to prove intention to "promote" a riot, a standard which neither clearly defines the prohibited conduct nor guides law enforcement officials or courts in determining where to draw the line between potential offenders and those protected by the First Amendment.

*3. Engaging in a Riot.*

The primary problem with section 1803 of S. 1400 and section 2–9B3 of S. 1, which prohibit "engaging in" a riot, is the discretion left to law enforcement officials by the vagueness of the term "engaging in." Such broad provisions can only encourage dragnet arrests, where police make the arbitrary determination that everyone within sight or reach is "engaging in" the disturbance, even though many of them may be persons who have committed no culpable act whatsoever or innocent bystanders caught up in unexpected circumstances. It invites arrest on the basis of such irrelevant factors as race, age, and manner of dress. The later invalidation of such arrests or the dismissal of charges cannot compensate the victims for restraint, incarceration, or such collateral consequences of arrest as, under current law, the inclusion of their fingerprints in crime control databanks and the refusal by public or private employers to hire them on the basis of their brush with the law. *See Sullivan* v. *Murphy*, 478 F. 2d 938 (D.C. Cir. 1973).

*4. Failing to Obey a Riot Control Order.*

Section 1804 of S. 1400 and section 2–9B4 of S. 1 would justify mass arrests for failure to obey a federal public servant's reasonable riot control order. Under S. 1400, no riot or violence need actually occur.

S.1 substantially follows the Brown Commission recommendation limiting the offense to orders given in the "immediate vicinity" of a riot by persons with supervisory authority over a public safety force. S. 1400 embraces disobedience in the vicinity of an "impending riot" as well. "Public servant" is defined in section 111 of S. 1400 as "an officer, employee . . . or other person authorized to act for or on behalf of a government or serving the government or any branch, department, or agency thereof. . . ." Nothing in section 1804 requires the public servant whose orders it is an infraction to disobey to be a public safety officer or have any specific authority related to the specific circumstances.

Under S. 1400, members of the press and public could be ordered to "move, disperse, or refrain from specified activity"—such as taking photographs—by any government official who objected to their presence or activity in an area where a riot was "impending." Such vague provisions give government officials broad powers to interfere with free speech and press and to control what the public learns about government response to protest demonstrations as well as to riots, or potential riots. But these are matters of which the public should be thoroughly and accurately informed.

*5. Disorderly Conduct.*

Section 1871 of S. 1400 would make it a violation of federal law to behave tumultuously, violently or threateningly, cause "unreasonable noise," use abusive or obscene language or behave obscenely in a public place, obstruct pedestrian or vehicular traffic or a public facility, persistently follow someone in a public place, solicit a sexual act in a public place, or engage in "any other conduct which creates a hazardous or physically offensive condition for no legitimate purpose." The required intent is merely to alarm or annoy another person or reckless disregard of the fact that another person is bothered by the prohibited conduct. Jurisdiction is limited to the special territorial, maritime, and aircraft jurisdiction of the United States.

The offenses encompassed by section 1871 are limited only by imagination. Is it a violation to yell or run in the halls of a federal building? to swear loudly enough to be overheard? To impede passersby by standing on a busy street corner in "Indian country"? To be noisy on an airplane? Such a law violates the rule of *Cox* v. *Louisiana*, 379 U.S. 536 (1965), by giving law enforcement officials virtually unfettered

discretion to apply a broad prohibitory statute against those whose speech or conduct is "annoying" to them or others. But the exercise of constitutional rights cannot be limited to those occasions on which it does not annoy others. *Cooper* v. *Aaron*, 358 U.S. 1 (1958). The Supreme Court has repeatedly overturned statutes which chill First Amendment rights. Such statutes cause the public to steer far wider of the prohibited zone of conduct than necessary, because they fail to give clear warning of what the law forbids. They give police the power to enforce them selectively "against those whose association together is 'annoying' because their ideas, their life-style, or their physical appearance is resented by the majority of their fellow citizens." *Coates* v. *City of Cincinnati*, 32 U.S. 611, 616 (1971). *See NAACP* v. *Button*, 371 U.S. 415 (1963). Even public obscenity, at least where it is essentially expressive conduct, is protected by the First Amendment. *Hess* v. *Indiana*, 94 S. Ct. 326 (1973); *Cohen* v. *California*, 403 U.S. 15 (1971) (reversing a state conviction for "offensive conduct" for use of a word, generally thought of as obscene, to express strong emotion about a political issue). And the general rule on solicitation of sexual contact, at least in tort law, has long been that "there is no harm in asking." *See e.g.*, *Samms* v. *Eccles*, 11 Utah 2d 289, 358 P. 2d 344 (1961).

### *B. Drugs*

The Brown Commission recommended that possession of marijuana be treated as a mere regulatory infraction, subject to a fine only, *see* Comment in its *Final Report* at 255. The final reoprt of the National Commission on Marijuana and Drug Abuse recommended that marijuana possession be decriminalized altogether. *See Marijuana: A Signal of Misunderstanding* (1972). Yet both S. 1400, section 1823, and S. 1, section 2–9E1, make possession a misdemeanor. In S. 1400 the penalty for a first offense can be as much as one year imprisonment and a $10,000 fine. In S. 1 the possible penalty is six months in jail and a fine of up to $50 per day. Under S. 1400 an offender previously convicted of violating state or federal drug laws may be convicted of a felony and punished by three years in jail and a $25,000 fine.

As the Brown Commission observed:

> available evidence does not demonstrate significant deletrious effects of marijuana in quantities ordinarily consumed; . . . any risks appear to be significantly lower than those attributable to alcoholic beverages; . . . the social cost of criminalizing a substantial segment of otherwise law-abiding citizenry is not justified by the, as yet, undemonstrated harm of marijuana use; and . . . jail penalties for use of marijuana jeopardize the credibility and therefore the deterrent value of our drug laws with respect to other, demonstrably harmful drugs. Comment to *Final Report* at 255.

The ACLU strongly endorses the decriminalization of marijuana possession and use. Important constitutional rights are at stake, including the right to privacy. *Cf., e.g., Stanley* v. *Georgia*, 394 U.S. 557 (1969). The fact that marijuana use may be morally "annoying" to many persons is not sufficient basis for making it criminal. *See Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971). The existence of such arbitrary penalties for conduct not clearly shown to be harmful encourages selective enforcement, police corruption, and the use of such police techniques as entrapment and illegal searches. It diverts millions of law enforcement dollars and thousands of man-hours away from investigation and prosecution of serious crime.

Although we approve of the special sentencing provisions in S. 1400, adding 18 U.S.C. § 5101 to permit court discretion in placing first offenders on probation without entering a conviction on their record, as a step in the right direction, we believe that decriminalization is long overdue.

In addition, the ACLU believes that criminal punishment of hard-drug addicts, whose use and possession of the drugs is fundamentally a result of illness rather than criminal intent, is a violation of the Constitution. *See Robinson* v. *California*, 370 U.S. 660 (1962), holding it unconstitutional to make addiction *per se* a crime; *Powell* v. *Texas*, 392 U.S. 514 (1968) (dissenting opinion). If the Eighth Amendment ban on cruel and unusual punishment forbids punishment for "an irresistible compulsion," according to Justice White, concurring in *Powell, supra*, 392 U.S. at 348, "I do not see how it can constitutionally be a crime to yield to such a compulsion." We agree.

Section 1821 of S. 1400 imposes mandatory minimum sentences for traffickers in heroin or morphine—five years if the drug weighs less than four ounces, ten years if it weighs four ounces or more, and life imprisonment without parole for second hard-drug offenders trafficking in four ounces or more. Mandatory minimum sentences have been specifically disapproved by the Brown Commission,



the President's Commission on Law Enforcement and Administration of Justice (National Crime Commission), and the American Bar Association. *Working Papers*, vol. II at 1062–63. Such harsh mandatory sentences destroy any possibility for rehabilitation based on the individual characteristics of the offender. Under their provisions an indigent narcotics addict who sells drugs only to support his own habit and has no other history of criminal behavior is discarded as an unworthy human being along with big-time dealers and major felons. But it is the little offender, without the backing of organized crime, who is most likely to be arrested and suffer the prescribed penalties.

### *C. Obscenity*

Both S. 1400 and S. 1 make it a federal felony to disseminate obscene material, thereby punishing the freedom of speech and press guaranteed by the First Amendment. The ACLU opposes any restriction on expression on the grounds that it is somehow obscene, immoral, shameful, or distasteful. The Constitution requires that such judgments be left to the individual rather than to the government. Justice Douglas, dissenting from the Supreme Court majority in *Miller* v. *California*, 93 S.Ct. 2607 (1973), outlined the dangers of determining that some forms of expression are beyond the protections of the Constitution:

> The idea that the First Amendment permits government to ban publications that are "offensive" to some people puts an ominous gloss on freedom of the press. That test would make it possible to ban any paper or any journal or magazine in some benighted place. . . . To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. . . . the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV or over the radio. By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be "offensive" to some. *Id.* at 2626.

A definition of obscenity that would both give fair warning of what is prohibited and limit itself to the truly pornographic has defied the best legal minds of the century. In *Miller, supra*, the Court majority confidently predicted that its newest test would single out protected "commerce in ideas" from punishable "commercial exploitation of obscene material." *Id.* at 2621. The Georgia Supreme Court responded two weeks later by holding that the widely acclaimed movie "Carnal Knowledge" was obscene. *Jenkins* v. *State*, 13 Crim.L. Rep. 2386 (July 2, 1973). In reversing that decision, *Jenkins* v. *Georgia*, 42 U.S.L.W. 5055 (U.S. June 24, 1974), the Supreme Court of the United States failed to relieve itself of "the awesome task of making case by case at once the criminal and the constitutional law." *Id.* at 5058 (Brennan, J., dissenting). The constitutional definition of obscenity remains uncertain.

Moreover, as the Supreme Court held in *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969), "a man's home is his castle" when it comes to determining what books he shall read there or what films he shall see there. Even obscenity laws which do not directly invade the home interfere with constitutionally protected privacy, for they limit the availability of materials for private use.

Section 1851 of S. 1400 and section 2–9F5 of S. 1 embody the classic defects of obscenity law. S. 1400 prohibits distribution of and advertisements for material containing explicit representation or detailed description of sexual intercourse or explicit close-up representation of human genitals. The only exception is for such material as "a minor portion * * * reasonably necessary and appropriate * * * to fulfill an artistic, scientific, or literary purpose." Even that exception fails if the material was "included primarily to stimulate prurient interest." Only a limited class of students and teachers in "institutions of higher learning" and persons with a medical prescription for pornography are exempt from the prohibition. It is no defense that the distributor did not believe the material to be obscene if he had general knowledge of its content.

Such standards are plainly impossible for policemen, prosecutors, judges, juries, counsel, publishers, or private citizens to apply. Everything from the Bible to "The Joy of Sex"—both national best-sellers—could be swept within their prohibition.

S. 1 takes a different route to an equally unconscionable result. Section 2–9F5 prohibits dissemination of material if taken as a whole it "has as its dominant theme an appeal to a shameful or morbid interest of an average person in sex, nudity," violence, or scatology and "exceeds the candor permissible" in representing or describing such matters. The standards to be applied are those generally accepted

in the judicial district where the offense occurred. S. 1 thus invites a local jury t dictate the standards for the rest of the community. It gives government th power to determine what is "shameful," who is "average," and how candid o may be in sexually—or violently—oriented speech. It encourages the suppressi of politically unpopular ideas under the guise of concern for public morali because of the words in which they are expressed.

Neither statute distinguishes between adults and children as targets for distrib tion of obscene material, between willing and unwilling adults, or between th full-time dealer in pornography and the man who lends a book to a friend. B even if they did, the ACLU believes that they would violate the First Amendment Censorship of children's reading or viewing must be left in the hands of individu parents, not turned over wholesale to the state. The effort to distinguish the adu panderer from the adult interested reader for purposes of punishment is one th Constitution clearly forbids. The state that begins by restricting access to sexuall oriented expression may end by restricting access to all expression that offend those in power.

No less than government attempts to control information about its own be havior or to stifle political dissent directly as "incitement," obscenity statute strike at the heart of due process and free speech. They attack the foundations o our constitutional democracy.

### III. OFFENSES AGAINST GOVERNMENT PROCESSES

Under the guise of protecting the integrity and neutrality of government oper tions, both S. 1400 and S. 1 would permit governmental interference with Fir Fifth, and Sixth Amendment rights. There is a genuine need to protect judici and administrative proceedings from corruption and intimidation. But this need must not be used to invade constitutional rights where the behavior curbed has a most, slight chance of deleterious effect. Public demonstrations directed primaril at public opinion must not be suppressed on the theory that they interfere with th sanctity of the judicial process. Vigorous advocacy must not be stifled under th label of criminal contempt.

#### *A. Obstructing a Government Function*

Section 1302 of S. 1400 and section 2-6B1 of S. 1 make physical interferenc with federal government functions a felony. Both statutes are another potentia weapon in the government's arsenal of criminal provisions which could be misused against lawful and peaceful demonstrations. Virtually every mass demonstratio would, at one moment or another, fall within their prohibition. Yet such demon strations can be an important contribution to the public debate on a wide variet of topics.

Under the unfettered terms of these statutes, it would be up to the prosecuto to determine whether a large demonstration on federal grounds or near federa buildings was or was not "physically interfering" with some government functio Even an influx of cars carrying demonstrators to the chosen site might constitu the proscribed felony. Since mass arrests on the basis of group behavior ar constitutionally forbidden by the particularity requirements of the Fourt Amendment, the statutes would lend themselves to selective abuse by law enforce ment officials who object to life-styles different from their own. *See e.g., Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971).

S. 1400 contains a companion provision, section 1301, prohibiting obstructio of a government function by "defrauding the government in any manner." Th provision could seriously curtail freedom of the press. See Part I.A.8 of th Testimony, *supra*.

#### *B. Demonstrating to Influence a Judicial Proceeding*

Section 1328 of S. 1400 and section 2-6C4 of S. 1 follow present statutory law in forbidding pickets and other similar demonstrations with intent to influence judicial proceeding if done within 200 feet of a courthouse. S. 1 includes th residences of judges, jurors, and witnesses within the prohibition. Although th ACLU generally endorses such statutes as necessary to protect due process rights we believe the statute should be written so as not to apply to demonstrators wh have no possibility of influencing or intimidating the court, and whose primary intent is to express opinions of the judicial process which are protected by th First Amendment.



#### *C. Criminal Contempt*

Section 1331 of S. 1400 and section 2-6C6 of S. 1 basically continue present law regarding criminal contempt. S. 1400 permits a sentence of up to six months; S. 1 leaves sentencing to judicial discretion. S. 1400 further specifies that a criminal contempt proceeding does not bar subsequent prosecution for another federal offense based on the same conduct. S. 1's silence on this question would accomplish the same result under present law. Neither statute provides for trial by jury.

The ACLU believes that there is serious question whether the double jeopardy clause of the Fifth Amendment permits more than one prosecution based on the same conduct. Such a bifurcation invites prosecutorial harassment. See Comment in the Brown Commission *Working Papers*, vol. I at 602. Because the criminal contempt power is unusually subject to judicial abuse, may evade impartial judicial review, and has been too often invoked against politically controversial defendants and their counsel, we endorse the recommendation in the original Brown Commission study draft that penalties be sharply curtailed to no more than five days imprisonment and a $500 fine. We also believe that a criminal contempt trial must be held before a neutral judge—not the one in whose court the alleged contempt occurred. *See Working Papers*, vol. I at 603. If longer penalties are to be imposed, there can be no substitute for the intervention of a jury between the court and the accused. Indeed, Supreme Court decisions require a jury trial in criminal contempt cases where a sentence longer than six months is imposed. *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966); *Bloom* v. *Illinois*, 391 U.S. 194, 208 (1968) (jury trial must be granted in contempt cases where "serious punishment . . . is contemplated").

The criminal contempt section of S. 1400 punishes one who "misbehaves in the presence of the court or so near thereto as to obstruct the administration of justice." The counterpart section of S. 1 prohibits "misconduct" in the same circumstances. Neither statute offers any further guide to judicial discretion. But the Supreme Court has held that before the "drastic procedures of the summary contempt power may be invoked," it must be clearly shown that the court has actually been obstructed in "the performance of a judicial duty." *In re McConnell*, 370 U.S. 230, 234 (1962).

Under S. 1400 and S. 1, there is a significant danger that vigorous representation or self-representation may be held subject to summary punishment, thereby chilling the Sixth Amendment right to effective assistance of counsel. *See Powell* v. *Alabama*, 287 U.S. 45 (1932); *McConnell*, *supra*. The vagueness of the term "misbehavior" or "misconduct" violates due process rights by leaving the trier of fact "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402–03 (1966). See *Smith* v. *Goguen*, 42 U.S.L.W. 4393, 4397 (U.S. March 25, 1974). The potential overbreadth of the term may invade First Amendment rights to present relevant public issues for discussion or decision, no matter how distasteful to the individual judge. *Cf. Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967).

#### *D. Refusing to Testify*

Section 1333 of S. 1400 would increase the maximum penalty for unprivileged refusal to testify before Congress or in court from one to three years imprisonment. It would also permit a fine of up to $25,000. Sections 3-10D1–5 of S. 1 provide for compelled testimony on a grant of immunity from use of the testimony or its fruits in "any criminal case." Although no penalty is set by the sections, failure to testify following immunity presumably would be punishable at judicial discretion under the criminal contempt provisions of S. 1.

S. 1400 makes proof of the legal privilege not to answer a question an affirmative defense, thus placing on the accused the burden of proof by a preponderance of the evidence. Where the privilege claimed is the Fifth Amendment one against self-incrimination, the attempt to supply such proof may itself invade the privilege. Requiring the defendant to negate one of the elements required for conviction may also violate the rule that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358 (1970). Congressional and police abuses of the Fifth Amendment have too long and dark a history already. The ACLU opposes any such statutory cramping of the Fifth Amendment's reach.

Similarly, raising of the maximum penalty can only increase the pressure to testify on witnesses whose claim to the privilege is marginal or uncertain, or who do not have the benefit of counsel to advise them. See, *e.g.*, *Yellin* v. *United States*, 374 U.S. 109, 123 (1963); *Sinclair* v. *United States*, 279 U.S. 263, 299 (1929),

holding that in a congressional hearing the witness who refuses to answer takes the risk of violating a statute penalizing unprivileged refusals to testify even if his belief in his right to the privilege, although wrong as a matter of law, was in good faith. The three-year sentence permitted by S. 1400 chills the exercise of protected rights, and promotes disrespect for the law as a mere guessing game between witnesses, counsel, and courts.

The immunity scheme of S. 1 is substantially the same as that of immunity statutes the ACLU has long opposed. Immunity is no substitute for the constitutional privilege not to incriminate oneself. A witness forced to testify by a grant of immunity may, under S. 1 and current Supreme Court rulings, be prosecuted for the conduct he testifies about if the evidence used against him is neither his testimony nor information obtained by use of that testimony. *See Kastigar* v. *United States*, 406 U.S. 441 (1972); *Zicarelli* v. *New Jersey State Investigation Commission*, 406 U.S. 472 (1972). Despite federal guarantees, it is highly difficult if not impossible to be certain that tainted evidence has not been put to some prohibited use somewhere within the prosecutorial machinery. *Kastigar*, *supra*, 406 U.S. at 469 (Marshall, J., dissenting). Moreover, it is not legally clear whether Congress can protect a witness against state prosecution. Such a decision may be within the state's authority to make.

Nor can a grant of immunity compensate for the damage done to a witness' privacy, especially where he is required to testify about his associations with others or to reveal his political or other opinions. Nothing in the immunity statute protects a witness from losing his job because his employer dislikes his notoriety. Compelling testimony invites trial by publicity without any of the safeguards required by the Constitution for criminal trial and conviction.

*E. Obstructing a Proceeding by Disorderly Conduct*

Section 1335 of S. 1400 and section 2–6C2 (a) (4) of S. 1 forbid obstruction of an official proceeding by noise, violent or tumultuous behavior or disturbance. The S. 1400 provision adds "or otherwise."

Like the criminal contempt and disorderly conduct statutes already discussed, *see* Parts III.C and II.A.5, *supra*, the provisions could be applied discriminatorily and unconstitutionally because of their vagueness and overbreadth. Noise or violent behavior which directly and intentionally interferes with courtroom proceedings is clearly punishable. But under these statutes, a judge could punish a witness or spectator who wept or laughed in the courtroom or even within earshot. Under S. 1400, a defense attorney who attempted to introduce a line of questioning opposed by judge or prosecutor might be found guilty of "obstructing" proceedings. Even an obstinate refusal to plea-bargain could fit within the very vague words of S. 1400. More likely, politically unpopular defendants whose demeanor or insistence on self-representation annoyed court or prosecutor could be punished for exercising their constitutional rights.

S. 1400 makes the offense a misdemeanor punishable by one year in prison. S.1 makes it a felony, although the prison term is the same. Categorizing such misconduct as a felony, with all the stigma the term carries, is much too harsh for behavior which may be only minimally culpable. Although S.1 requires "intentional" misconduct, as opposed to mere "knowing" misbehavior in S. 1400, few juries are likely to appreciate the differences between "intentionally," defined in S.1, section 1–2A1 as having "a conscious objective to engage in the conduct or cause the result," and "knowingly," being "aware that conduct will probably cause the result."

*F. Demonstrating Near a Temporary Residence of the President*

S. 1400 amends 3 U.S.C. to add section 209, authorizing the Secretary of the Treasury to designate "any building or grounds" as temporary residence of the President or temporary Presidential offices, and forbidding persons to enter or remain there or in any "posted . . . or . . . restricted area" the President may visit. The required intent is "to impede or disrupt the orderly conduct of Government business. . . ."

The statute effectively gives government officials the power to isolate the President from entirely lawful demonstrations which he or they dislike. The person of the President must of course be protected from physical danger. But nothing in the Constitution permits the Secretary of the Treasury or anyone else to protect him from the danger of opposing ideas and their vigorous expression. Under the terms of this statute, persons peacefully expressing their political opinions as protected by the First Amendment or engaging in the right to assemble and petition for redress of grievances may be removed to a "safe" distance beyond the reach of television cameras or the sight of official visitors from other nations.



*G. Disclosure of Confidential Information*

Section 2–6F1 of S. 1 makes it a felony for a public servant to disclose any information he has acquired in connection with "regulation, study, or investigation of an industry." It requires that he be acting "in violation of his obligation under a statute or rule, regulation, or order issued under such statute. . . ." No statute is specified. Yet the guarantee of due process requires that criminal laws be clear and definite. Under no circumstances should anyone be criminally punished for violating a "rule, regulation, or order" which is not part of the federal criminal statutes, and which can be promulgated or withdrawn by administrative procedures.

In addition, this section may prevent public officials from publicly discussing information they gain in the course of their employment—information of such vital public interest as oil reserves or food production. Such a restriction interferes significantly with freedom of the press and the public right to know the facts about industries which affect the public interest in any way. The statute would encourage collusion between regulators and regulatees by cloaking their activities from public scrutiny and could drive responsible public servants out of government work.

IV. DEFENSES

*A. Insanity*

Section 502 of S. 1400 effectively abolishes the insanity defense as it has been developed over the years by courts and commentators. The section provides that "mental disease or defect" is a defense only where as a result of it the defendant "lacked the state of mind required as an element of the offense charged." Since any defendant found to lack the requisite culpability must be acquitted under accepted principles of criminal law, the section classes the insane with all other defendants in assessing criminal responsibility. Given the present state of the criminal law, the insanity defense is necessary to prevent this result. As the former director of the Brown Commission has written:

> To fail to accord such a defense is to ignore the relevance to guilt of moral responsibility and power of choice. It is to use the gravest sanctions of the system of deterence we call the criminal law against people who are obviously undeterrable. It is to steer unequivocally sick people to jail rather than mental hospitals. Schwartz, "The Proposed Federal Criminal Code," 13 Crim.L.Rep. 3265, 3269 (1973).

By contrast S. 1, section 1–3C2, follows the lead of most of the federal Circuit Courts of Appeals in establishing mental disease or defect as a defense where as a result of it the accused "lacks substantial capacity to appreciate the character of his conduct or to control his conduct." *See, e.g. United States* v. *Currens*, 290 F.2d 751 (3d Cir. 1961); *Wade* v. *United States*, 426 F.2d 64 (9th Cir. 1970). The formula, slightly revised, is that of the Model Penal Code § 4.01 (Proposed Official Draft 1962). S. 1, like the Model Penal Code, excludes a defense based on "an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

The ACLU believes that the criminal law must separate the sick from the guilty. "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson* v. *California*, 370 U.S. 660, 667 (1962). The question is one of basic justice. See *United States*. v *Eichberg*, 439 F.2d 620 (D.C. Cir 1971), explaining the jury's role in determining criminal responsibility where the insanity defense has been raised:

> . . it measures the extent to which the defendant's mental and emotional processes and behavior controls were impaired at the time of the unlawful act. . . . The second [jury] function is to evaluate that impairment in light of community standards of blameworthiness, to determine whether the defendant's impairment makes it unjust to hold him responsible. *Id.* at 624–25.

The practical danger in merging the insanity test into the question of culpability is that criminal conduct is often viewed by juries as evidence of criminal intent. The focus is shifted from the defendant's culpability, where it belongs, on to "treatment criteria . . . as to [the defendant's] most appropriate disposition." Brown Commission *Working Papers*, vol. I at 248. But the constitutional protection against cruel and unusual punishment and the constitutional promise of due process prevent the criminal justice system from "disposing" of anyone unless he is found guilty beyond a reasonable doubt of a criminal offense.

The exclusion from S. 1's insanity defense of abnormalities manifested only by repeated criminal or antisocial behavior is unjustified. There is no intrinsic reason why repeated offenses may not stem from incapacity to refrain from criminal behavior as opposed to moral blameworthiness. Indeed, compulsive disorders like kleptomania are quite likely to be evidenced only by conduct society disapproves. *See United States* v. *Smith*, 404 F. 2d 720, 727 n. 8 (6th Cir. 1968). The question is one of fact, and should be answered by the jury on the basis of individual factors.

Both S. 1400 and S. 1 establish elaborate procedures for use of the insanity defense and for commitment to mental institutions of those acquitted by reason of insanity. Under S. 1400, 18 U.S.C. § 4221 would require pretrail notice of an insanity defense at the time the plea is entered. If notice is not given, the evidence is not admissible at trial. The court is authorized to order pretrial examination of the defendant by court-designated psychiatrists. The court may commit the defendant to a mental hospital for as long as 60 days for purposes of the examination. Section 3–11C5 of S. 1, although not requiring advance notice of the insanity defense, requires—rather than merely authorizes—the court to order that a defendant whose sanity is an issue in the case be examined by a panel of court-designated psychiatrists. If the defendant objects, the court is required to prohibit use of the insanity defense.

These punitive provisions ignore the constitutional requirements of due process of law. They treat the accused who raises the issue of insanity as if he had already been adjudged a criminal. Requiring pretrial notice of the insanity defense invades the adversary process and the Fifth Amendment privilege against self-incrimination. A defendant who pleads not guilty by reason of insanity may discover at trial that the government's case against him is too weak to stand alone or that another defense may better serve his interests. But by then it is too late. Making involuntary commitment the price of raising the insanity defense unconstitutionally burdens the right to defend oneself against criminal charges. Requiring that a defendant be examined by doctors of the court's choice is permissible only where he is plainly given the right and the opportunity to be examined and present testimony by doctors of his own choice as well. If his chosen psychiatrists are unqualified, the prosecution can so inform the jury.

Sections 18 U.S.C. § 4222 of S. 1400 and 3–11C8 of S. 1 establish procedures for civil commitment of those acquitted by reason of insanity. Both sections properly require a due process hearing before final commitment. In the protections that they accord, they are in general a significant improvement in procedural justice. But both sections also permit as a matter of course involuntary detention pending psychiatric examination and final disposition. The ACLU believes that involuntary commitment should be authorized only in cases where there is clear evidence of its necessity to protect the public from a potentially dangerous person and that the court should be required to so find, on the record and with reasons stated, before involuntary commitment is authorized for any period of time.

### *B. Intoxication*

Sections 503 of S. 1400 and 1–3C1 of S. 1 limit the intoxication defense to those instances where it negates an element of the offense. S. 1400 further requires that the element it negates be the state of mind necessary and that the state of mind necessarily be either intent or knowledge. Where the required state of mind is mere recklessness or negligence, intoxication is not a defense unless "not self-induced."

The ACLU believes that intoxication in some instances is itself the product of a physical and/or mental disease or defect for which the defendant cannot be blamed. Chronic alcoholism has been widely recognized as a disease. *See Powell* v. *Texas*, 392 U.S. 514 (1968); *State* v. *Pike*, 49 N.H. 399 (1869). Where chronic alcoholism or drug addiction produces intoxication, it should be a defense to criminal responsibility on the same grounds as mental disease or defect under the Model Penal Code formulation requiring acquittal of defendants who lacked substantial capacity to appreciate the wrongfulness of their conduct or to conform to the law.

### *C. Entrapment*

The present state of entrapment law is a disgrace to our system of justice. The most egregious police misconduct will not bar prosecution of an offender who might never have engaged in criminal conduct if the police had not inveigled him into it. The Supreme Court has recently reiterated its past approval of a



"predisposition" test under which the prosecution may refute entrapment by detailing the accused's past misconduct or criminal activity—thereby violating the principle that an accusedshould be tried solely on the offense charged and not required to justify his entire life. *See United States* v. *Russell*, 411 U.S. 423 (1973); *Working Papers*, vol. I at 319–20.

To its credit, the Brown Commission attempted to remove the predisposition question from the law and to establish an objective test of entrapment. *See* § 702 of its *Final Report*. S. 1400, and to a lesser extent S. 1, weaken the prohibition against entrapment and thus encourage police misconduct and corruption.

Under S. 1400, section 531, entrapment is a defense only where "the defendant was not predisposed to commit the offense charged and did so solely as a result of active inducement by a law enforcement officer . . . . [M]ere solicitation which would not induce an ordinary law-abiding person to commit an offense, does not in itself constitute unlawful entrapment." S. 1, section 1–3B2, defines prohibited entrapment as "methods of . . . encouragement" which "create a substantial risk that the conduct would be committed by persons other than those who are ready to commit it." S. 1 declares the risk "less substantial" where the defendant is known to have previously engaged in similar misconduct.

Neither statute requires probable cause to believe that the suspect is a likely potential offender. Yet, as the Brown Commission *Working Papers* note, vol. I at 319, inducement of criminal conduct violates privacy in much the same way as unfounded searches prohibited by the Fourth Amendment. Such inducement makes "inroads upon the freedom of the will." *Id.* A government policy sanctioning unlimited police intrusion into the decision making processes of individuals or groups for the purposes of ferreting out unsuspected crime can easily metamorphose into a justification for relentless pursuit of those considered "predisposed" by political opinions or associations to commit crimes. The "Government cannot be permitted to instigate the commission of a criminal offense in order to prosecute someone for committing it. *Sherman* v. *United States*, 356 U.S. 369, 372 (1958)." *Russell, supra*, 411 U.S. 423, at 439 (dissenting opinion).

It is no doubt necessary on occasion for law enforcement officials to use disguise and deception to procure evidence of serious criminal misbehavior. But such conduct should be strictly limited. Instedd, S. 1400 contemplates its expansion, by restricting the entrapment defense to offenses committed "*solely* as a result of *active* inducement. . . ." Under S. 1400 proof of entrapment would be virtually impossible. Overzealous police officers and their informers would be free to solicit intemperate criticism of our system of government and then prosecute it as revolutionary incitement or to organize a group dedicated to overthrowing the government or purchasing marijuana and then charge its memberrs with conspiracy. The possibilities are endless. Under such circumstances, the First Amendment rights of free speech and association would be not only chilled but frozen.

In *United States* v. *Russell*, *supra*, the Supreme Court, while approving present entrapment law, plainly left the way open to Congressional reform. 36 L. Ed. 2d at 374 & n. 9. Congress should take the opportunity to curb official lawlessness.

### *D. Public Duty*

Sections 521 and 532 of S. 1400—and to some extent sections 1–3C3 and 1–3C6 of S. 1—would insulate public officials and those acting at their direction from the prohibitions of the criminal law. The statutes would effectively divorce personal responsibility from official action, thereby setting a lower standard of conduct for every Federal employee from the President on down the scale. Such statutes are more than a flagrant invitation to official lawlessness. They are a signal to every citizen that the government is not really interested in evenhanded justice. They invite every citizen to follow the government's example and "get away with" whatever he can. As Justice Brandeis warned nearly half a century ago:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (dissenting opinion).

The principles so eloquently stated by Brandeis remain relevant today. In the last year we have repeatedly heard high federal officials attempt to justify perjury, wiretapping, and burglary—offenses that would be felonies if committed by

ordinary citizens—on the grounds that they were doing their duty as public servants. Under present law, which contains no provisions comparable to the proposed ones in S. 1400, United States District Judge Gerhard A. Gesell last week refused to countenance any exception to the Constitution or criminal laws for public officials on national security grounds:

> The Government must comply with the strict constitutional and statutory limitations on trespassory searches and arrests even when known foreign agents are involved . . . . To hold otherwise, except under the most exigent circumstances, would be to abandon the Fourth Amendment to the whim of the Executive in total disregard of the Amendment's history and purpose. *United States* v. *Ehrlichman, et al*, Crim. No. 74–116, Memorandum and Order (D.D.C. May 24, 1974).

If Congress changes the law to permit such a justification, no innocent citizen will be really secure from government lawlessness.

Section 521 makes it a defense to prosecution under any federal statute that the defendant "reasonably believed" his conduct was "required or authorized by law . . . to carry out his duty as a public servant, or as a person acting at the direction of a public servant . . . " Section 532 permits the defense that the defendant's conduct "in fact conformed with an official statement of law, afterward determined to be invalid or erroneous . . . which is contained in . . . an administrative grant of permission to the defendant . . . if the defendant acted in reasonable reliance on such statement of the law and with a good faith belief that his conduct did not constitute an offense."

Standards like "reasonable belief" and "reasonable reliance" in such circumstances offer virtually no guidance to law enforcement officials, judges, or juries. The statutes do not even suggest that conduct plainly lawless if done without official justification should have to overcome any higher hurdle of reasonableness than conduct which is ordinarily legal and within the scope of duty. They offer every defendant the opportunity—eagerly accepted by many of the Watergate defendants—to claim that he was merely a good soldier.

But public officials are not soldiers. The Brown Commission *Working Papers* are simply wrong when they equate the soldier's duty to obey commands with the public official's duty to carry out his superior's orders. *Id.* at 263. The public official's highest duty is to the public. He cannot escape the law's commands by reference to administrative permission to ignore them. *See Westbrook* v. *United States*, 13 F. 2d 280 (7th Cir. 1926). *Cf. Screws* v. *United States*, 325 U.S. 91, 129 (1945) (Rutledge, J., concurring). One fundamental lesson of Watergate is that we must encourage public officials to exercise independent judgment when faced with a supervisor's order which raises doubts in their minds.

It should be noted that Section 532 includes a perfectly legitimate defense for ordinary citizens—one that should not be confused with its grant of criminal immunity to public officials. The statute properly grants a defense to those who follow the law as laid down in statutes, Supreme Court decisions, other court or administrative decisions to which they are parties, official agency interpretations, or even administrative grants of permission to them as individuals—only to discover later that the authority they followed was wrong. The ACLU believes that such a defense—for private citizens—is an important shield for the innocent. Indeed, we suggest that this provision and its counterpart in S. 1, section 1–3C6(b), should permit individuals to rely on lower court and administrative decisions to which they are *not* a party, at least where there are no conflicting decisions in the same jurisdiction or at the same judicial or administrative level. Such a further protection accords with general principles of legal precedent and *stare decisis*.

Section 1–3C6 of S. 1, covering ignorance or mistake of law, is virtually identical with section 532 of S. 1400 and subject to the same criticisms concerning the dangers of official lawlessness. But S. 1's section 1–3C3, on execution of public duty as a defense, is significantly more limited than S. 1400. Under its provisions, the defense is not available if public servants and their agents act "in reckless disregard of the risk that the conduct was not required or authorized by law." Nonetheless, the ACLU believes that even this narrower justification for official misbehavior is not warranted.

Especially in light of current events, Congress should take a firm stand against limiting official responsibility for criminal acts. Public respect for public officials is already frighteningly low. Undermining it further may well destroy the bedrock of confidence on which democratic self-government rests.



### *E. Use of Force Against Criminals*

Section 521 of S. 1400 grants further license to private and official misconduct and contains an invitation to private and official violence.

First, it creates a defense based on reasonable belief that otherwise criminal conduct was required, or even merely authorized, in making a citizen's arrest or preventing the escape of one who has committed a felony. Although private persons have a role to play in law enforcement, it is arguable whether that role should include the use of force against any and all felons—some of whom are guilty of wholly non-violent crimes like tax evasion and bribery. Even non-violent criminal conduct directed against a felon is something the law should be slow to countenance. Under S. 1400, a private defendant could even argue that his burglary or wiretap was committed merely to seek out evidence of another's criminality in order to "make an arrest or prevent an escape" from justice. The possibilities—and dangers—and almost unlimited.

Moreover, the wording of section 521 makes the defense available only where the person arrested or prevented from escaping was in fact a felon. Any citizen attempting through legitimate means to help enforce the law would thus act at his peril, even where he had ample probable cause for arrest or apprehension of another. Under such an unpredictable law, everyone's rights suffer. Section 1–3C4 (d) of S.1, which permits the use of force to prevent an "in fact" offense, is subject to similar confusions and objections.

Secondly, section 521 permits the use of deadly force by custodial officers where such force is "reasonably believed . . . necessary" to prevent the escape of a prisoner "charged with or convicted of a crime." The crime charged could be petty theft, disorderly conduct, or obscenity, and the prisoner may be innocent of any wrongdoing—yet deadly force would still be authorized. The risk of injury or death to innocent bystanders is not even mentioned as a restraint. Such a provision has no place in modern law. It can only provoke unjustified killing.

### *F. Use of Force to Protect Persons or Property*

Both S. 1400 and S. 1, in different ways, sanction the use of force in situations which invite needless violence or brutality.

Under S. 1400, section 522, the victim who gives "provocation" apparently loses his right of self-defense altogether, regardless of what the provocation is, how slight it is, or how murderous the other person's response. Although the Brown Commission *Final Report* forbids the use of deadly force where a safe avenue of retreat is available, *see* § 607(b)(2), under S. 1400 the possibility of retreat, even with "complete safety to himself and others," is merely one factor to be considered in determining whether a defendant's use of deadly force was reasonably believed necessary to protect himself or another from the risk of death or serious injury. *See Brown* v. *United States*, 256 U.S. 335, 343 (1921). Such provisions are dangerously confusing. By granting the right to use extreme violence in some circumstances and denying it in others seemingly quite similar, they make the law quixotic and unpredictable. By denying the foolish or thoughtless provocateur the right of self-defense and granting the right to kill to those who might be able to run away, they encourage violence. *See Laney* v. *United States*, 294 F. 412 (D.C. Cir. 1923); *State* v. *Abbott*, 36 N.J. 63, 174 A. 2d 881 (1961).

Section 523 of S. 1400 similarly encourages the use of force in defense of property. The section permits the use of all force short of deadly force to eject a trespasser or prevent taking of or damage to property, no matter how trivial. It does not even suggest that the property owner ask the trespasser to leave, issue a warning, or use other non-violent means before resorting to force.

By contrast, section 1–3C4 of S. 1 permits "proportionate force" where the defendant's conduct "is reasonable and is believed in good faith to be necessary to defend himself against immediate and unreasonable use of force by another person." This formulation properly subjects the use of force by both an objective ("reasonable") and a subjective ("good faith") test, instead of merging the two. The idea of "proportionate force" limited to situations of "immediate" danger may help restrict self-defense to the bare minimum of force. Section 1–3C4 similarly limits the defense of property to the use of proportionate force. Like S. 1400, however, it contains no requirement that non-violent means of persuasion be tried first.

### G. Use of Force Against Supervised Persons

Section 3-1C4(c) of S. 1 permits the use of "proportionate force" when reasonable and believed "necessary" by parents or teachers against minor children, by persons caring for incompetents, by doctors (presumably against patients but the statute does not so specify), by persons in charge of a vehicle or an assembled group, by persons attempting to prevent another's suicide, and by "similar persons." Such a provision can only encourage tendencies toward violence in a class of persons—those caring for others—who should on the contrary be especially wary of using force against their often helpless charges.

The statute ignores the fact that children, incompetents, patients, and even suicides have the same rights as the rest of us to be free from physical coercion by others. Its vague terminology invites abuse. The concept of "proportionate force," which makes some sense as applied to self-defense and even defense of property, makes no sense at all in these circumstances. Is it "proportionate force" for a parent to strike a young child in retaliation, and therefore excusable even if the child is severely injured? May "incompetents"—a term which is less than clear, since many of the mentally ill are not legally incompetent—be physically punished for refusal to obey minor institutional rules? Where a person inflicting violence on another has a genuine intention to protect lives or safety, such as the person who tries to prevent suicide or keep order in a moving car, he presumably cannot be punished under the criminal law in any case, since he entirely lacks culpable intent.

The apparent purpose of the statute is to allow corporal punishment or coercion "for another's good" by parents and others in authority or control over another, when the situation does not clearly negate culpability. But even traditional corporal punishment of unruly students has been seriously questioned by educators, doctors, and lawyers. *See 1972 ACLU Testimony* at 17–22. There seems no good reason to extend it into new areas, especially not by means of a law which sets no specific standards for its infliction. Except in the case of the person seeking to prevent suicide, the statute does not even specifically require imminent danger of harm to anyone before "proportionate force" may be invoked. A law which sanctions the indiscriminate use of force by the strong against the weak is a barbaric reversal of the general purposes of the criminal law.

## V. THE INCHOATE OFFENSES

The criminal law has wrestled long and hard with the problem of when the law may intervene to prevent criminal conduct by imposing sanctions against activities which lead up to the actual criminal event. The ACLU acknowledges the importance of crime prevention and the logic of punishment which protects the innocent public before rather than after completion of the criminal act. At the same time, we believe that the so-called inchoate offenses—solicitation, attempt, and conspiracy—offer unparalleled opportunities for overzealous law enforcement which invades constitutional guarantees of freedom of the press, free speech, free association with others, and due process of law.

The combination of inchoate with substantive offenses can lead to such absurdities as the prosecution of outspoken public critics of the government for conspiracy to incite draft resistance. *See United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969). In such cases the conduct alleged to constitute a criminal offense is doubly removed from any act in itself criminal, the links connecting them may consist entirely of constitutionally protected speech and association, and there is seldom any possible proof that another's act originated in the speech or assembly prosecuted rather than springing from individual choice. Such prosecutions, with their unmistakeable overtones of political repression and enforced unanimity of public opinion, move far away from the general purposes of the criminal law and the theories under which inchoate offenses have been held punishable. *See Grunewald* v. *United States*, 353 U.S. 391, 402 (1957): "For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world."

Society unquestionably has a stake in punishing or deterring those who seek to undermine it by criminal activity. But it has at least as great a stake in clearly marking the limits of the criminal sanction. Laws which make political dissent evidence of criminality have no place in our system of constitutional self-government. The government which extends criminal punishment to responsible opposition attacks it own foundations. The government which sweeps within the label of criminality those who only may perhpas belong there, who may have lacked firm purpose, or drifted temporarily close to the margin of legality, makes more outlaws than it needs. *See Working Papers* at 362–63. It may even induce criminal behavior. *Cf.* Wootton, *Crime and the Criminal Law* 14 (1963): "one conviction, and still more one period of imprisonment, is a great impediment to a subsequent honest and respectable living; and . . . the experience of conviction, and still more of imprisonment, is itself only too likely to be criminogenic." Until we learn far more than we now know about deterrence of crime and rehabilitation of offenders, we have an obligation to society, as well as to the prospective victims and defendants, not to make too many criminals.



### A. Criminal Attempt

Section 1001 of S. 1400 and section 1–2A4 of S. 1 would give the federal government, for the first time, an across-the-board attempt statute applicable to all other offenses. Such a statute may have the virtue of uniformity, but it directs Congressional attention away from the salutary effort to determine, in respect to particular crimes, whether an attempt statute is wise or necessary. Do we really want to punish unsuccessful attempts in disorderly conduct, disseminate obscene books, or disclose classified information? Are such prosecutions an intelligent use of limited resources for combating serious crime? Moreover, the ACLU believes that punishing attempts to incite unlawful conduct seriously increases the danger of governmental prosecution for advocacy plainly protected by the First Amendment.

S. 1400 and S. 1 require both culpable intent with regard to the major offense and intentional engagement in conduct which furthers it. In S. 1400 the defendant's conduct must be such that it "in fact, corroborates his intent to complete the commission of the offense." In S. 1 the conduct must constitute "a substantial step toward commission of such crime." Although the S. 1 formula is more limited in its impact on vigorous political speech, either statute would chill protest activities from their very beginning. Under S. 1400, a mere declaration of intent to incite a crowd to anger against the government could constitute an attempted incitement of violent revolution. Under S. 1 making arrangements for a public assembly at which inflammatory speeches were to be made would presumably be enough for conviction. Under either statute news reporters gathering information for reports on issues of vital public interest might be subject to prosecution for attempts to obtain classified information if their research annoyed someone in authority. Reporters who importuned the President, Secretary of State, or other government officials for facts which the public has a right to know might find themselves facing prosecution on similar grounds.

These examples are not farfetched. Courts have not found it easy to define the meaning of "attempt" in the criminal law. Some well-known attempts to limit its scope, *e.g.*, *The King* v. *Barker*, 1924 N.Z.L.R. 865 (New Zealand 1924), have not found favor in American jurisdictions. Even Justice Holmes, as Chief Justice of the Supreme Judicial Court of Massachusetts, had his difficulties. *See Commonwealth* v. *Peaslee*, 177 Mass. 267, 272, 59 N.E. 55, 56 (1901):

> . . . preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still . . . need of a further exertion of the will to complete the crime.

*See also, Hyde* v. *United States*, 225 U.S. 347, 387 (1912) (Holmes, J. dissenting): "There must be a dangerous proximity to success." Neither S. 1400 nor S. 1 incorporates Holmes' salutary restriction on the reach of attempt doctrine. They leave wide open the possibliity that, as the Brown Commission *Working Papers* put it, vol. I at 357: "' Thinking out loud' coupled with some equivocal act [may] constitute a sufficient basis for conviction."

Both S. 1400, section 1004(c) and S.1, section 1–2A4 (d) permit a defense of "voluntary and complete renunication" of criminal conduct. The defendant must abandon his criminal effort and, if this does not prevent the crime in itself, take affirmative steps which do prevent it. A renunciation does not meet the "voluntary and complete" standard if motivated even in part by belief that "a circumstance exists which increases the probability of detection or apprehension . . ." or by a decision to postpone the criminal activity. Remembering that the offense involved is merely an attempt, such a high standard for renunciation may be a trap for the belatedly innocent who go along so long as criminal purposes are hazy but draw back when faced with the actual necessity for criminal behavior if their end is to be accomplished. One purpose of criminal sanctions is to deter people from making the ultimate decision to violate the law. If the sanctions work, the case for punishment is at best tenuous.

### B. Criminal Solicitation

Sections 1003 of S. 1400 and 1–2A3 of S. 1 make it a crime to endeavor to persuade another to do something which is "in fact" a criminal offense. S. 1400 is specifically limited to soliciting certain crimes, some of which are major offenses, such as treason, espionage, murder, and aircraft hijacking, but some of which are not—*e.g.*, refusing to testify and failing to be sworn. S. 1400 also requires "circumstances strongly corroborative" of the necessary intent. S. 1 contains neither of these limitations, but does preclude conviction for attempt to solicit criminal activity.

Under both of these statutes, the solicitor need not know that the conduct he endeavors to persuade another to undertake is criminal. He need only intend that the conduct occur. Thus under S. 1 he could be convicted for encouraging someone else to engage in what he thinks is constitutionally protected protest activity, and still be convicted for soliciting disorderly conduct. Under S. 1400, he could be convicted for soliciting espionage if he "induced" or "entreated" the publication of news reports about faulty rifles, flagging negotiations, or governmental chicanery later found to be "information relating to the national defense" which he knew could be used "to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power . . . ."

Since S. 1400 does not prohibit prosecutions for attempted solicitation, he could even be charged with attempted solicitation of, for instance, refusal to testify. What might constitute adequate "preparation to solicit" such a crime is anyone's guess. The connection between the punished conduct and prospective criminal activity in such cases is so remote as to defy national proof.

In suggesting a solicitation statute, the Brown Commission intended to provide punishment for those who *instigate* offenses and thereby are truly culpable. *Working Papers*, vol. I at 368. But terms like "endeavor to persuade" cast a much wider net. On their face they ensnare the speaker for nothing more than his speech, when no other criminal act has occurred. By deleting the Brown Commission's requirement of an overt act in response to the solicitation, see *Final Report* § 1003, both S. 1400 and S. 1 could be used to punish advocacy without the slightest possibility of producing lawless action. But the First Amendment plainly forbids this consequence. *E.g.*, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

### C. Criminal Conspiracy

Neither S. 1400 nor S. 1 in its definition of criminal conspiracy does anything to limit the "elastic, sprawling and pervasive" nature of the offense. *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring). As long ago as 1925, the federal judiciary expressed serious concern that conspiracy prosecutions were ranging far beyond the legitimate purpose of conspiracy law—to prevent the establishment of continuing group schemes for cooperative law-breaking—and being used "arbitrarily and harshly." *Annual Report of the Attorney General for 1925* at 5–6. Some twenty-five years later Justice Jackson again warned that "loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." *Krulewitch*, *supra*, 336 U.S. at 446 (concurring opinion). Twenty-five more years have passed, with conspiracy prosecutions for political dissent and mere advocacy drawing yet more criticism. Yet S. 1400 and S. 1 would leave conspiracy law in much the same state of confusion and overbreadth, subject to the same flagrant abuse, as it is now.

"The modern crime of conspiracy is so vague that it almost defies definition." *Krulewitch*, *supra*, 336 U.S. at 446 (concurring opinion). According to S. 1400, section 1002, conspiracy occurs when someone "agrees with one or more persons to engage in or cause the performance of conduct which, in fact, constitutes an offense or offenses, and he or one of such persons does or causes any act to effect any objective of the agreement." Section 1–2A5 of S. 1 defines conspiracy as a knowing agreement "to engage in or cause" conduct constituting a crime "in fact." As in S. 1400, one of the co-conspirators must engage in or cause "the performance of conduct to effect an objective . . . of the relationship."

As with criminal solicitation, the conspirator need not know that the conduct he agrees to engage in or cause is actually a crime. He can therefore be punished merely for an agreement, evidenced only by speech ordinarily protected by the First Amendment, to engage in other speech ordinarily protected by the First Amendment. The only consummation required is some act to effect an objective of the agreement or relationship. "Any act or omission, however otherwise innocent, other than those acts surrounding the hatching of the plot itself, performed by any member of the conspiracy, while the conspiracy remains yet afoot, fulfills the requirement." *Working Papers*, vol. I at 393 & cases there cited. Attendance at a meeting may be sufficient. *See Yates* v. *United States*, 354 U.S. 298, 333–334 (1957). The objective effected need not itself be criminal under the terms of either S. 1 or S. 1400. In short, one may be convicted of conspiracy on almost no proof at all of serious criminal intent or behavior seriously tending to accomplish a crime. The divorce between criminal act and criminal intent is virtually complete. *See United States* v. *Spock*, 416 F. 2d 165 (1st Cir. 1969).

The substantive law of conspiracy is made even more dangerous by the procedural anomalies that have grown up around it. Since the parties to a conspiracy need not be aware of the participation of others or know each other's identity, *Blumenthal* v. *United States*, 332 U.S. 539, 557–58 (1947), and since one coconspirator may be convicted on the hearsay evidence of another, *Krulewitch* v. *United States*, 336 U.S. 440, 443 (1949), a defendant may be convicted of conspiracy on the basis of collateral agreements or acts he knew nothing about, engaged in by persons he had never heard of. The rule that independent evidence of the conspiracy must be shown is vitiated if not lost at trial in the rule that the conspiracy may be proved after the hearsay has been admitted. "In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed." *Id.* at 453 (concurring opinion). Both S. 1400 and S. 1 ignore the limitation in *Spock*, *supra*, 416 F. 2d at 173, requiring that culpable intent be proved against each conspirator individually on the basis of his own conduct.

Although the Sixth Amendment grants the right to trial in the district where the crime was committed, a conspiracy prosecution may be brought anywhere any conspirator did any act to effect an objective of the conspiracy. Thus in the *Spock* case, *supra*, the government chose to try the case in Boston although several of the acts charged in the indictment took place in New York and Washington, D.C. The procedural law of conspiracy permits the government to engage in forum-shopping for the place where a conviction is thought most likely to be obtained.

The political misuses of conspiracy law have been amply demonstrated in the last few years. The more ordinary abuses, against less publicized defendants, were well-known as much as fifty years ago. One test of any revision or reform of the Federal Criminal Code is its willingness to grapple with and end the abuses of this prosecutorial tool. Both S. 1400 and S. 1 totally abdicate Congressional responsibility in this critical area of the law.



## VI. WIRETAPPING AND ELECTRONIC SURVEILLANCE

The ACLU has long opposed wiretapping and electronic surveillance by anyone—including the government—for any reason. The use of electronic devices to invade the privacy of conversations in homes and offices, in telephone booths, and nearly anywhere else is a flagrant violation of the Fourth Amendment ban on dragnet searches and seizures, the Fifth Amendment privilege against self-incrimination, and the constitutional right of privacy. The electronic ear does not discriminate between conversations about criminal activity and conversations entirely within the protection of the First Amendment. It does not separate the intimate discussions of friends from the clandestine plotting of criminals. It sweeps up everything in its way. As Justice Brandeis observed in *Olmstead* v. *United States*, 277 U.S. 438, 475–76, 478 (1928) (dissenting opinion):

> . . . The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.
>
> . . . The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . . . They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most value by civilized men.

The threat to privacy from electronic surveillance was so great, so pervasive, and so alien to the spirit of the Constitution, Brandeis wrote, that even intrusions in the name of law enforcement must be banned. "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding." *Id.* at 479.

Despite studies indicating that, from the government's point of view, the costs of electronic surveillance far outweigh its purported benefits, Schwartz, *Report on Costs and Benefits of Electronic Surveillance* (ACLU 1973), both S. 1400 and S. 1 essentially re-enact the electronic surveillance provisions of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510–20. The ACLU vigorously opposed Title III at the time it was under consideration by Congress. We oppose its re-enactment now. Despite its requirement that a neutral magistrate issue a warrant based on "probable cause" and on the failure of ordinary investigative techniques, Title III has greatly expanded the use of electronic surveillance. The number of "intercept applications" authorized has risen from 174 in 1968 to 864 in 1973. State participation in the government's wiretapping and electronic surveillance program has steadily increased. Report of the Director of the Administrative Office of the United States Courts, printed in Cong. Rec. S 7104–05 (May 6, 1974). Further, the typical federal wiretap in 1972 involved the interception of 1,023 conversations among 66 persons over an average period of more than three weeks. See Cong. Rec. S 7934 (April 30, 1973) (remarks of Sen. McClellan). As Senator McClellan noted in inserting the 1973 report into the Congressional Record, only two applications for intercept orders were denied in 1973. In the overwhelming majority of cases, then, the neutral magistrate has accepted the government's word that such surveillance was necessary and would be carefully limited within statutory guidelines.

Yet there have been extraordinary abuses—abuses involving wholesale deception of the courts by the Administration. Despite the requirement that only the Attorney General or an Assistant Attorney General specially designated by him could authorize federal applications for intercept orders, 18 U.S.C. § 2516, a requirement designed by this Congress to insure that only a "publicly responsible official" would set law enforcement policy in this sensitive area, S. Rep. No. 1067, 90th Cong., 2d Sess., 96–97 (1968), a large number of such orders were routinely approved by an executive assistant to the Attorney General and submitted to the courts in the name of an Assistant Attorney General who had, in fact, nothing to do with their authorization. As a result, the Supreme Court has now held that evidence gathered under those orders cannot be admitted in court. *See generally, United States* v. *Giordano*, 42 U.S.L.W. 4642 (U.S. May 13, 1974).

Moreover, the Administration on its own interpreted the Congressional authorization to permit electronic surveillance of political dissidents without court order, under the rubric of national security. It persisted in this practice until the Supreme Court unanimously ruled that the Fourth Amendment forbids such warrantless searches in "domestic security" cases. *United States* v. *United States District Court*, 407 U.S. 297 (1972). As the Court there noted,

> National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. * * * Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." *Id* at 313–14.

The Court emphasized that

> The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society. *Id.* at 314.

In reaching its decision, the Court held that the existing legislation did not attempt to confer surveillance powers on the President. *Id.* at 308. But S. 1400, 18 U.S.C. § 3126 would reverse this ruling by excepting the President from the statutory restrictions. The ACLU believes that all language reserving inherent Presidential power should be eliminated. However, if any such power at all is reserved it must be consistent with the holding in *United States* v. *United States District Court, supra,* that the Fourth Amendment controls where "there is no evidence of any involvement, directly or indirectly, of a foreign power." 407 U.S. at 309. If it is to exist at all, this concept needs to be carefully and narrowly defined in the statute. Such a definition should, as a minimum, incorporate the guidelines offered by the Justice Department two years ago and confirmed by Attorney General William Saxbe last week: "substantial financing, control by or active collaboration with a foreign government or agencies thereof in unlawful activities directed against the government of the United States." Testimony of Deputy Assistant Attorney General Kevin T. Maroney, *Hearings on Warrantless Wiretapping before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary,* 92nd Cong., 2d Sess., 12 (June 29, 1972); Washington Post, May 24, 1974, at A 20.



If such narrow authority is reserved to permit electronic surveillance in the absence of probable cause, that reservation should not be total. Such electronic surveillance should remain subject to statutorily-established warrant and judicial review requirements in order to obtain some accountability in this very sensitive area.

S. 1400, 18 U.S.C. §§ 3125–31, would continue present law authorizing electronic investigation of a long list of federal offenses. Insofar as S. 1's electronic surveillance sections, 3–10C1–5, shorten the list and confine surveillance to major crimes, they are less intrusive than S. 1400 into constitutional rights. However, both S. 1400 and S. 1 continue the Title III provision for emergency surveillance without court order for up to 48 hours. S. 1, section 3–10C3(h) authorizes such government surveillance with respect to "national security interests"—an apparent violation of the holding in *United States* v. *United States District Court, supra.* Nothing in that opinion permits warrantless "domestic security" wiretaps even in alleged emergency situations. S. 1400, 18 U.S.C. § 3129(g) limits such emergency searches to "conspiratorial activities characteristic of organized crime." The ACLU strongly believes that this loophole too should be eliminated. Either formula is so vague as to permit warrantless surveillance of political dissidents or other disfavored groups of people.

Both S. 1400, 18 U.S.C. § 3128(c) and S. 1, section 3–10C3(g), authorize the use of evidence of crimes other than those specified in the court order authorizing the interception. This provision only exacerbates the dragnet qualities of electronic search and seizure. It permits law enforcement officials "to rummage for months on end through every conversation, no matter how intimate or personal, carried over selected telephone lines," *United States* v. *United States District Court, supra,* 407 U.S. at 325 (Douglas, J., concurring) in an effort to uncover evidence of criminal activity. It makes a mockery of the requirement for a warrant specifying in advance the offense of which evidence is ostensibly sought.

S. 1400, 18 U.S.C. § 3131, continues the present specific authorization of recovery of civil damages by those whose conversations are illegally intercepted. S. 1, section 3–10C5(g), does not. The ACLU strongly believes that if there is to be any wiretapping, this provision—virtually the only protection this statute offers against sweeping electronic invasion of private rights—must remain in the law. We further oppose the provision in both subsections that good faith reliance on "legislative authorization" is a "complete defense" to any civil action (S. 1) or civil or criminal action (S. 1400) based on illegal electronic surveillance. Since bad faith is extremely difficult to prove, such a provision would prevent the recovery of damages by those whose privacy was invaded for years by government surveillance without court order.

Both S. 1400, section 1532, and S. 1, section 2–7G1, provide some protection from electronic eavesdropping by private persons or unauthorized government officials, by making it a felony to intercept or disclose the contents of private communications. However, both statutes continue the present law's exception where one party to the conversation gives prior consent to the interception. The ACLU opposes this restriction on the citizen's right to be free from unreasonable search and seizure of his private thoughts. Consent by one party should not be allowed to bypass the constitutional rights and privileges of another.

## VII. SENTENCING, PROBATION, AND PAROLE

Both S. 1400 and S. 1 set harsh retributive sentences for many crimes. Both provide for the death penalty, which the ACLU has long opposed as cruel and unusual punishment in violation of the Constitution. See *Furman* v. *Georgia*, 408 U.S. 238 (1972). Although the Senate has already approved the reinstitution of capital punishment by passing S. 1401 on March 13, 1974, we believe that if this bill becomes law, it will not survive challenge in the courts. We urge the Senate in general and this Subcommittee in particular not to endorse yet again a penalty which has been used to perpetuate racial and economic discrimination in a fashion which degrades our nation in the eyes of civilized men and women. Our claims to moral progress and to equal justice under law are mocked by the infliction of savage and final retribution against those least able to defend their cases in court.

Both S. 1400 and S. 1 skew their sentencing schemes in favor of long-term prison sentences, despite the overwhelming recommendation of penologists and lawyers who have studied the correctional system that sentences instead be sharply reduced. *See, e.g.*, President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 348–351 (Avon. ed. 1967); Brown Commission *Working Papers*, vol. II at 1255–57, 1269; Schwartz, "The Proposed Federal Criminal Code," 13 Crim. L. Rep. 3265, 3266 (1973). Although such sentences may be aimed at the most egregious offenders, the Brown Commission reported,

> they have a psychological tendency to drive sentences up in cases where such a tendency is unwarranted. Long, incapacitating terms can do great damage if imposed in the wrong cases, both in terms of injustice to the individual and in terms of positive, harmful effects to the public upon release of the prisoner. Long sentences imposed on the wrong people can lead to more offenses rather than less. *Working Papers*, vol. II at 1257.

A sentencing system which mandates fifteen, twenty, and thirty year sentences for a large variety of crimes becomes its own worst enemy. Even given the wide disparity between authorized maximums and time usually served, see *Working Papers*, vol. II at 1255, the system's inevitable effect is to destroy any possibility of rehabilitation for nearly everyone caught in its grasp. High recidivism rates among major felons testify to the fact that our prisons are training schools for criminals. By increasing the number of victims and offenders, they present a tragedy of broken and wasted lives.

S. 1400 sets high mandatory minimum sentences for traffickers in heroin or morphine, see Part II, B, *supra*, despite widespread criticism of such sentences as interfering with the judicial discretion vital to fairness in our criminal justice system. Such sentences deny the sentencing court the power to place the offender on probation, require a set term of years in prison, and refuse parole. Federal judges, prosecutors, and correctional personnel, as well as the American Law Institute, the National Council on Crime and Delinquency, and the American Bar Association, have vehemently opposed mandatory minimum sentences. *Working Papers*, vol. II at 1252.

Even if it were desirable to limit discretion, mandatory minimum sentences do not do so. They merely displace discretion from the judge to the prosecutor, who retains the power to determine the charge. As the Brown Commission noted, prosecutors often charge drug offenders with at least one offense carrying a mandatory sentence and one carrying a lesser penalty which permits probation and parole. "The guilty plea process, supposedly resting upon the uncoerced consent of the offender, is clearly distorted when the prosecutor can hold the threat" of a mandatory minimum sentence over the offender's head. *Working Papers*, vol. II at 1254. This practice unconstitutionally chills the Sixth Amendment right to trial by jury, and the Fifth Amendment right to plead not guilty, burdening the defendant's choice with heavy consequences if he should be convicted. *See United States* v. *Jackson*, 309 U.S. 570 (1968).

The ACLU supports the long-overdue establishment of appellate review of criminal sentences. Appellate review would permit correction of seriously excessive sentences and would tend to equalize sentences for like offenders and like offenses. At the same time, it would allow more than one court to consider individual circumstances in determining an individual's fate. As the Brown Commission *Working Papers* observed:

> . . . every other judicial decision of consequence at the trial level in both civil and criminal cases is subject to the review of appellate courts. Why the criminal sentence should be the one item which should be insulated from review is not immediately clear. That it is is one of the great ironies of the law. *Id.* at 1335.

S. 1400 does not provide for judicial review of sentences. S. 1, section 3–11E2-3 permits review of conditions of release and of upper-range sentences imposed against "dangerous special offenders"—those specifically found subject to especially severe penalties under S. 1's sentencing scheme. But even the limited reform S. 1 grants is seriously undermined by its provision for appeal by the government as well as by the dangerous special offender. Although S. 1 properly forecloses higher sentences when the offender alone takes an appeal, it permits imposition of more severe sentences when the government takes an appeal. Such a provision plainly violates the constitutional guarantee against double jeopardy. *See, e.g. Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873); *Blackledge* v. *Perry*, 42 U.S.L.W. 4761 (U.S. May 20, 1974). *Cf. North Carolina* v. *Pearce*, 395 U.S. 711 (1969).



Whatever the exact scope of the guarantee, *Lange*, *supra*, 85 U.S. at 168, there has never been any doubt that the Constitution prohibits a second punishment on the same facts for the same statutory offense. The constitutional protection against more than one trial would be of no avail if "there can be any number of sentences pronounced on the same verdict[.]" *Id.* at 173.

Since S. 1 does not require the sentencing judge to state his findings and reasons on the record, the defendant's decision about appeal will not only be chilled by his fear that the government will take an appeal as well, but also by his lack of knowledge as to the reasons which the judge actually relied upon in sentencing him. Where the original sentence is based on an erroneous reading of the facts, he will have no way of so discovering and demanding correction.

Despite the Brown Commission's finding that "probation is likely to be the most effective form of sentence in a great many cases," *Working Papers*, vol. II at at 1268, both S. 1400 and S. 1 create substantial legal hurdles to the imposition of probation instead of a prison sentence.

S. 1400, section 2101, requires a prison sentence unless the judge is "of the opinion" that probation "will not fail to afford deterrence to criminal conduct" and "such disposition will not unduly depreciate the seriousness of the defendant's crime, undermine respect for the law, or fail to constitute just punishment for the offense committed." As the former director of the Brown Commission has pointed out, almost no intelligent and conscientious judge can ever arrive at such conclusions beyond doubt. Schwartz, "The Proposed Federal Criminal Code," 13 Crim. L. Rep. 3265, 3266 (1973). S. 1, section 1–4D1, although properly requiring the court to consider the offender's individual circumstances, declares that the judge "shall be guided by the need to maintain respect for law and to reinforce the credibility of the deterrent factor of the law . . ."

Such provisions implicitly tell the judge that probation is not preferred, but a last resort, to be accorded only the criminal offender who is an extraordinarily good risk. They ignore the fact that prison sentences completely dislocate offenders from the community, cutting off the ties of family and job which alone may provide the incentive to obey the law. Yet since most offenders ultimately do return to the outside world, it is in society's best interest—as well as theirs—that they have more to go back to than a life of crime. *See Working Papers*, vol. II at 1268.

S. 1400 additionally requires a judge, in granting probation, to find that the defendant "is not in need of such education or vocational training, medical care, or other correctional treatment as can be provided most effectively by his commitment to an institution." Such factors only reinforce the criminal justice system's discrimination against the poor, the sick, and the uneducated. The constitutional guarantees of due process and equal protection of the law require courts to weigh evenly the claims of rich and poor, skilled and unskilled. Freedom from imprisonment and the chance to try again should not depend on an absence of past sufferings. "Effective" provision of job training and medical care in most cases does not require isolation of the offender from the community in which he will ultimately have to learn to live. The Congress should legislate to provide these services outside of prison, instead of incarcerating people just to obtain them.

S. 1400, 18 U.S.C. § 4202(d) and section 3–12F3(c) of S. 1 similarly stack the decision-making process against the granting of parole. Yet parole, like probation, can be crucial in encouraging offenders to establish law-abiding lives. See *Morrissey* v. *Brewer*, 408 U.S. 471, 484 (1972):

> The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law.

S. 1400, 18 U.S.C. § 4204, departs from traditional parole law by adding a mandatory one-to-five-year parole term on top of the specified prison terms. S. 1 retains the present approach, using parole to diminish the maximum prison term. Parole is still a significant restraint on individual liberty, permitting return to prison for parole violations which would otherwise be innocent and harmless behavior. Allowing an administrative agency, not subject to judicial review under S. 1400, 18 U.S.C. § 4208, to determine whether an offender shall continue under restraint past the maximum authorized sentence violates due process rights and creates substantial opportunities for unreviewable abuse. The ACLU believes that parole should count as part of the sentence it is served under, and that judicial review should be accorded to make sure that the administrative body dealing with parole does not arbitrarily discriminate against some defendants or fail to apply the statutory criteria in making its decisions.

The ACLU also believes that parolees must have the right to counsel at parole revocation hearings, see *Morrissey* v. *Brewer, supra*, 408 U.S. at 490 (concurring opinion), and that the state must provide counsel for an indigent parolee facing a return to prison. *Cf Douglas* v. *California*, 372 U.S. 353 (1963). Neither parole revocation provision, S. 1400, 18 U.S.C. § 4207(c), nor S. 1, section 3–12F6(d), provides this basic due process right. Although the Supreme Court in *Morrissey, supra*, 408 U.S. at 489, specifically reserved the question whether the Constitution requires counsel at such hearings, the complexities of fact and law involved in parole revocation hearings are not intrinsically less than those involved in the usual criminal trial. Parolees are no more skilled in the art of cross-examination, the sifting of relevant from irrelevant fact, or the interpretation of legal language than other laymen. Providing them with other procedural rights will scarcely aid them if they do not know how to use those rights to plead their cases effectively. *See Gideon* v. *Wainwright*, 372 U.S. 335, 244–45 (1963): As Justice Douglas observed in *Morrissey, supra*,

> A hearing in which counsel is absent or is present only on behalf of one side is inherently unsatisfactory if not unfair, 408 U.S. at 498 (concurring opinion) (citation deleted).

Fairness at parole revocation hearings, no less than fairness at trial, is fundamental to protection of individual liberties.

Ms. GALE. Thank you. Second, I would like to speak to two points that were mentioned in the course of Mr. Nader's testimony.

It was brought out by Senator Hruska that appellate review is provided for at least in part in S. 1. I wanted to respond to the suggestion that S. 1 covers the subject entirely, because I don't believe it does. I think it provides appellate review only in very limited circumstances.

And I would specifically say that the American Civil Liberties Union endorses appellate review of sentences across the board in all cases, both for reasons of fairness to the individual and for reasons of rational sentencing policy.

Second, it was mentioned that there is a problem perhaps with public officials having lower standards of conduct that anyone else. I would like to direct the subcommittee's attention to the sections of S. 1400 and S. 1 which provide a specific defense for public officials charged with violating the criminal law, on the grounds that they reasonably believed that their conduct was required or authorized by law to carry out their duty as public servants.

This statute could insulate all of the Watergate defendants. If it had been in existence at the time Judge Gesell made his ruling in *United States* v. *Ehrlichman* that public officials are not exempt from constitutional and statutory restrictions. I think it would have made that ruling considerably more difficult. I believe that ruling was a protection for the public at large and for the purposes of the criminal laws.

Mr. SUMMITT. Could I interrupt you? To what extent does that differ from common law? What would be the advantage of striking that out?

Ms. GALE. Well, I don't know that it does differ greatly, but I would very strongly object to erecting a statutory defense of this kind, which I believe would go considerably farther than the common law in endorsing the principle that public officials have a lesser rather than a greater responsibility than the ordinary citizen does to obey the criminal laws.

I would also like to direct the subcommittee's attention to the Northwestern University Law Review, volume 68, No. 5., beginning at page 817, which has a number of articles on the proposed Federal Criminal Code. I would specifically ask you to look at Justice Clark's prologue and at two articles, one on civil liberties and national



security, and the other on riot legislation, which I think very much support our position on these issues.

Senator HART. Well, if there is no objection, we can print that article. [See p. 7991.]

Ms. GALE. We have characterized both of these bills as posing a great threat to civil liberties in the name of criminal law reform. I would like to specify some of the highlights of the problems that we see in these statutes.

The most serious is the section of the administration bill. S. 1400, which would create the first Official Secrets Act that we have ever had in this country. I think it is not too strong to say that if we enact this statute, we could come as a Nation to resemble the village in South Vietnam that was destroyed in order to save it.

Some sections of the bill would severely punish the disclosure of information relating to the national defense without defining clearly what such information is and without limiting it to information that is collected by the Government itself.

We have become familiar over the last 2 years with a tendency of the Government bureaucracy to classify any and all material from whatever source gained that appears to contain the slightest political sensitivity, regardless of its direct relation to the national defense.

Such a statute could be used to prosecute newspaper reporters simply for trying to inform the public about a wide variety of matters that are definitely the public's duty to know and the press' duty to report.

Mr. MARVIN. May I ask a question? Which section would do that?

Ms. GALE. Pardon?

Mr. MARVIN. Which section are you referring to?

Ms. GALE. I am referring here to the espionage section and also to the sections on mishandling of national defense information and disclosing classified information, sections 1121 to 1126.

Mr. MARVIN. 1121, the espionage section, refers to disclosure of information to a foreign government. It doesn't refer to disclosure to a newspaperman.

Ms. GALE. The statute is written so that it—section 1121—broadly criminalizes the knowing collection or communication of "information relating to the national defense" with the intent that it be used or "knowledge that it may be used, to the prejudice of the safety or interest of the United States, or to the advantage of a foreign power."

Mr. MARVIN. The intent is defined earlier in chapter 3 to include knowledge. Knowledge is a lesser standard.

Ms. GALE. Yes, sir.

Mr. MARVIN. Intent in this instance would require proof that it was the actor's purpose to use the information to the prejudice of the United States and that the information was given to a foreign power for that reason.

Ms. GALE. Well, I don't believe that the terms are sufficiently clear and I think there is some legal authority to suggest that they aren't sufficiently clear. The Supreme Court and lower courts on the rare occasions when they have dealt with this in the past, with espionage statutes, have found it necessary to narrow them to require specific bad faith because they felt the language of the statutes did not specifically do so.

Senator HART. I think what you are voicing is a concern that many of us share that the phrase "relating to national defense" in these days and in the days ahead can relate to anything?

Ms. GALE. Yes, sir, that is correct.

Senator HART. Nuclear warhead blueprints, for example: It can refer to that or it could be a television news commentator discussing rumbles in the Pentagon as to why some airplane doesn't work very well because of a decision to buy that was based on political grounds, or that Joe Kraft raises the point that some of our allies want us to take certain weapons out of Europe——

Ms. GALE. I believe that the wording of the statute is sufficiently broad that these things could be used as the basis for prosecution, and that is the problem we see. This permits the Government to define after the fact what constitutes a very serious felony.

The sections that refer to disclosing of classified information also do not permit the defense that such information was improperly classified, yet there has been testimony before this subcommittee that between 90 and 99½ percent of all documents classified either should never have been classified or should have been declassified shortly after the purpose for classification passed within a few months.

Without a defense of improper classification, this section would permit the prosecution of quite innocent disclosures of information which is in fact already on the public record. And to anticipate any objection I might hear today, I think it was Judge Learned Hand who found that he had to narrow a similar earlier statute to prohibit the conviction of persons for distributing information which either had not been classified or was already public.

Senator HART. On that point, I understand your criticism and have shared the point that as proposed, the bills would not enable you to argue the impropriety of the classification. But, defenders of that language say—for instance, the Department of Justice and I am not sure that they have explicitly said this, but it would be reasonable if they did—"Yes, but if you can in a sense litigate the appropriateness of the classification, then we are disclosing the sensitive secrets, at least in those cases where the classification was proved to be appropriate."

Now, how do you protect that?

Ms. GALE. We have seen, I think, over the course of the *Watergate* cases that the system isn't so inflexible that there is either total disclosure in the courts or no disclosure at all. That kind of thing could be provided for through in camera judicial proceedings. I would argue that judges could be permitted to examine material which might later be found to be classified correctly.

And if they were not to be so permitted, if the executive is to be allowed total control over public information on vital issues, the alternative is a serious reversal of 200 years of democratic decisionmaking. And our society can't stand that.

Senator HART. But, to your first suggestion of in camera examination, if you were the defendant's lawyer, wouldn't you argue that that isn't what he is entitled to in a criminal proceeding?

Ms. GALE. Well, I was trying to suggest a procedure which would respond to your concern, but yes, I would. There would certainly be room for argument over exact procedures and who would be permitted to handle this allegedly sensitive information. In the *Pentagon Papers* case, the lawyers received security clearances for the limited purpose



of handling the Pentagon Papers in order to provide a full defense for the people involved.

Mr. MARVIN. There is a recourse, though, isn't there, for a person who wants to disclose information that is classified? If he thinks that the classification is improper, he doesn't have to unilaterally obtain the document and have it published in order to make it public. If he thinks that the classification is inappropriate, he can request a declassification review study and appeal any initial adverse determination within the department and ultimately to an interagency committee. There is a regular administrative procedure established to review declassification decisions.

Now, isn't it better to use these procedures rather than permit an employee to make his own decisions as to whether the document is properly classified and should be disclosed?

Ms. GALE. Well, it seems to me that is not really responsive to the real world problem that we have, which is right now that there are, I believe, millions of pages of classified documents. And if a review was to be conducted individually of all these pages, case by case, the need for the information would long have passed before the information could be made public. Similarly——

Mr. MARVIN. I am not so sure that is the case. A review is conducted if the person wanting the information disclosed requests it. The ICRC, the Interagency Classification Review Commission, has been in operation for about 2 years, and has not had many cases come before them. Furthermore, under its procedures, the ICRC must respond to any request for classification review, that is, it must examine the documents to determine whether they are properly classified, within a relatively short period of time.

Ms. GALE. I don't think we would have any objection to the use of those procedures. We would simply argue it should not be made criminal if you don't use them. The ACLU takes the position that the Government has the right to hold on to information, has the right to prior restraint on publication, only in respect to a very limited class of sensitive defense information, but the rest of the public has a right to have and should have.

Mr. MARVIN. My point is that if an employee thinks that the information is not sensitive and that it should be disclosed, then he should use a procedure whereby other persons can get into that process and determine whether that document should be declassified. He should not make that decision on his own.

Ms. GALE. Well, I feel that you are still leaving the decision where we don't want it left, which is in the hands of the executive branch entirely.

We are saying that there is a right for the Congress or the public to have access to information and to make some of these preliminary decisions. Now, in very sensitive military cases, we did say we thought there should be an exception and those cases are listed and spelled out in our testimony. And about those I suspect we might agree.

But there are many, many other categories of information which have been described as relating to the national security or the national defense which are matters of vital public concern and which should be released, I think, regardless of the classification that has been given to them, and should find their way into the press and into the public debate.

Mr. MARVIN. On the point that the classification decision is wholly left to the decision of the executive branch, I would just like to point out that the Senate recently passed a bill amending the Freedom of Information Act, under which the courts would determine whether a document is classified properly or not.

Do you think that procedure would be sufficient?

Ms. GALE. On the basis of the Freedom of Information Act, I haven't seen so far that it has been entirely successful in declassifying information or providing it to the public. I think it has been of some help.

There are a number of other sections of this very large bill that we dealt with and felt that there were serious objections to and I would like, if I could, to go on to some of those.

For instance, we would object very strongly to the language in both bills that would reenact the Smith Act punishing the mere advocacy of revolutionary change.

There is nothing in either bill that would really limit the application of these sections to even the Supreme Court's definition of protected speech. The Court said in *Brandenburg* v. *Ohio* that speech was protected unless it is directed at imminent lawless action—and I stress "imminent"—and is likely to produce it. The section as written could be applied to any manner of—if I could paraphrase Professor Schwartz—to: "the most theoretical proposals in the most unlikely circumstances."

And I think in fact we have seen throughout our history that this has been done; that people who had no immediate possibility of doing anything beyond causing others to think more seriously about our form of government were in fact prosecuted and persecuted.

There are also very broad antiriot provisions in both these bills. Such provisions, as we know, have been used against legitimate demonstrations. I think it is particularly serious that—and I believe this is only in the administration bill—that there would be Federal jurisdiction over any riot which obstructed a Government function and Government function is very broadly defined.

A riot is also defined as any violent and tumultuous disturbance, which could cover loud speech. The combination of these statutes could create Federal jurisdiction every time there was any kind of a tumultuous disturbance anywhere in the United States. It would permit the Federal Government to come in and second-guess local police forces as to who should be arrested and who should be prosecuted. I think it would allow serial prosecutions, first by the State and then by the Federal Government, for the same offense, which is a practice that the American Civil Liberties Union has objected to in other areas of the criminal law as a violation of the constitutional guarantee against double jeopardy.

On possession of drugs, both statutes would continue to make it a misdemeanor, punishable by a severe fine and a jail sentence, to possess marihuana. The American Civil Liberties Union has long endorsed the decriminalization of this offense because enforcing it encourages police entrapment and selective prosecution and invades personal privacy, all on the grounds of conduct that has not yet, at least, clearly been shown to be harmful.

The obscenity sections of both bills are classic demonstrations of the problems with the law of obscenity in general. They take different approaches, but they arrive at the same conclusion. S. 1400 prohibits distribution of material containing explicit representation of sexual activity. S. 1 prohibits material which appeals to a shameful interest in sex. The Supreme Court has once again demonstrated in the *Jenkins* case that such standards are impossible for judges and juries to apply. I have a specific comment to make about *Jenkins* v. *Georgia* which I think is a very disturbing case in many ways.



The Court reiterated its holding from *Miller* v. *California* that it was going to allow community standards to control and that it was going to permit specific representations of certain kinds of conduct to be defined as obscene. It then reached down and reversed the obscenity conviction for the showing of the movie "Carnal Knowledge." Well, that is fine if you have a movie in national circulation. But as long as the Supreme Court is still stuck with case-by-case determination at once of the criminal and the constitutional law in the area of obscenity, most citizens who can't get Supreme Court review of their books or magazines or whatever, are going to be subjected to different standards throughout the country for all kinds of work. "Carnal Knowledge" is a good example, as something which has been thought by most people to be a sincere artistic effort. Other people think it is a work of obscenity. I think the dangers are very clearly demonstrated there, and I would suggest that neither statute remotely begins to solve the problems.

Mr. MARVIN. The thrust of your objection here is really to current law, isn't it?

Ms. GALE. Oh, yes, it would apply to current law as well as——

Mr. MARVIN. Then if you are objecting to current law as developed by the Supreme Court, you are calling for Federal legislation that overturns the Supreme Court decisions in this area?

Ms. GALE. Well, I would suggest that this is an area badly in need of some kind of legislative changes. For our attempts to deal with obscenity are not the great chapter in our judicial scholarship and——

Mr. MARVIN. But your criticism is of the Supreme Court decisions, is it not?

Ms. GALE. The American Civil Liberties Union has always taken the position that there should not be restrictions on expression on the grounds that it is obscene, distasteful, unpleasant, or anything else. We have urged that such laws be repealed.

And one reason is the threat mentioned by Justice Douglas in his dissent in the *Miller* case, that if you start by oppressing an opinion because it strikes you as immoral, you might wind up oppressing an opinion because it is politically distasteful also.

Senator HART. What position would you take with respect to a Federal statute that sought to control materials shipped in interstate commerce and knowingly to be made available to minors?

Ms. GALE. I am sorry, sir. I missed the last phrase.

Senator HART. On this pornography thing, Ms. Gale, along with everybody else I have tried to figure out where I come out on it. I think I come out pretty much now on the theory that if I am an adult and bothering nobody, I should fly my own kite anyway I want to. But I am still hung up with the need to protect young children from items which one would have great difficulty justifying. How do you handle that?

Ms. GALE. Well, that goes back to our general feeling that these matters are matters which are to be decided among families and communities rather than the Government. They should be decided by families or parents rather than by a national or State or local government.

Senator HART. Yes, but I have children who are now old enough to fly their own kites. But I have had the experience of bringing up eight children and I challenge anybody to find out what they are doing. So don't tell me it is up to the parent——

Ms. GALE. I wouldn't agree with that. I can remember my own childhood well enough to know that we were circulating copies of Mickey Spillane at a very early age. I don't think we were severely damaged by this.

Senator HART. I didn't have Mickey Spillane in mind. I never thought of him as an artwork or an item of pornography either. Without playing games, I think you and I agree there are representations and suggestions in print that a parent ought not to have a child see, and doesn't society have some obligation to try and assist the parent in forestalling the child seeing this?

Ms. GALE. Well, the position that we have taken is that you just can't draw that line, and that attempts to draw it have been unsuccessful, very unsuccessful. I think the Supreme Court's pandering decision in the obscenity area, *Ginzburg* v. *United States* [383 U.S. 463 (1966)] is an example. I would have a lot of problems with that decision, because I wonder how do you separate advertising from pandering? Similarly, I think it is very difficult to decide what audience any piece of information is aimed at. You can't cut off adults on the grounds that you are protecting children. But inevitably you will restrict the material available to adults if you write a statute that is actually going to be effective in protecting children.

I think there is a privacy problem involved, too, that is, there may be parents who want the Government's help in suppressing publications which they find obscene, but set against that there are going to be parents who don't want the Government to interfere in the way in which they bring up their children. So, it is a hard decision. But we have come down on the side of free speech in this case.

Senator HART. You would define free speech to include anything?

Ms. GALE. We would not agree with the Supreme Court that there is a classification that you can draw in the sky called obscenity that is not protected by the Constitution. No, sir.

Senator HART. So, the answer is yes, anything?

Ms. GALE. Yes. And I would suggest that the society has better problems to deal with, rather than trying to repress information, ideas, and opinions.

Mr. MARVIN. The classic example I think is Justice Holmes example about being able to shout fire in a theater. That would be covered too, by your general statement that anything is included within free speech.

Ms. GALE. No, I think we were discussing obscenity at that point.

Senator HART. Yes.

Mr. MARVIN. Yes; we were. I just wanted to be sure that you didn't mean anything was included in the concept of free speech; that is, that you were referring only to obscenity.



Ms. GALE. That gets us into the whole question of what the "clear and present danger" test means and how and where we should draw the line. I would certainly say that the line should be drawn where the Supreme Court drew it in *Branderburg* v. *Ohio*. According to that case, the only speech that can be criminally punished is speech advocating imminent lawless action in circumstances where it is likely to produce it.

Mr. MARVIN. I understand.

Ms. GALE. There are a number of other sections I would like to just refer to briefly as sections which we have problems with. I would like to single out the defenses.

S. 1400 would abolish the insanity defense, which protects sick people from being pulled into the criminal process and tried, convicted, and punished as people who are totally responsible for their actions are punished. The insanity defense has a long and checkered career in the courts, but we believe that it continues to provide a very important safeguard for individuals. As the Supreme Court said in *Robinson* v. *California*, it would be barbaric to punish people for being sick. It is the mark of a civilized society that we do not do that.

Both bills also incorporate the current defense of entrapment, which is the defense whereby an individual says "the police made me do it and I wouldn't have done it without them." The Supreme Court has just recently endorsed the test that both of these bills incorporate, which is basically the subjective test as to whether or not somebody had a tendency to perform the actual act which he has been accused or convicted of.

We would argue that the purpose of the entrapment defense is to deter police misconduct and therefore that what the courts should look at is not whether the individual was predisposed to behave in a criminal fashion, but whether the police overstepped the line which we must hold them to if we are going to protect the rights of innocent citizens and also of criminal defendants who may turn out not to be innocent.

I have already referred to the "public duty" defense.

We also have serious problems with the failure of either of these bills to deal with the pervasive problem of conspiracy statutes which are used to prosecute political dissenters. We have seen that for 50 years there has been serious judicial criticism of conspiracy law as it now exists and there has also been considerable jury nullification.

I suggest that a rational criminal code would seek to write laws which can be enforced properly and would not include such a catch-all offense as "conspiracy" as we now see it.

Senator HART. Well, now that gets us to a very current piece of conversation. The ACLU supports impeachment?

Ms. GALE. Yes, sir.

Senator HART. And much of the Watergate prosecution involves the use of the conspiracy section. Do you criticize that?

Ms. GALE. Well, let me say the organization has not taken a specific position. Policymaking within the ACLU is a long, drawn out, democratic process, and I can't speak for the organization specifically on what we think about the conspiracy prosecutions in the Watergate case.

I can say individually that I do have some problems with the use of conspiracy. I would prefer to see people charged with substantive offenses. I think there was evidence in some Watergate cases that could have been used to support such charges.

The other thing I want to point out in connection with this type of inchoate or uncompleted offense is that both S. 1400 and S. 1 would create for the first time an across-the-board Federal attempt statute. Under current laws, the attempt provisions are either written into the individual statutes or they are not. I think that is a better way to do it. Congress should focus on whether or not it wants to make an attempt to do a certain act a crime or whether it wants to leave only the substantive offense itself. Otherwise, for instance, under S. 1400 which also has a general solicitation offense, we could have people tried for attempting to solicit refusal to testify.

And I would suggest that an offense like that has no place in a responsible criminal code because the criminal responsibility is much too attenuated. It reaches into protected speech and it could definitely be used for selective prosecutions against people that the government does not like.

Both bills would re-enact the wiretapping and electronic surveillance laws which we very strongly opposed at the time of their original enactment. We would continue to object to them now.

The ACLU takes the position that there should be no authorized wiretapping or electronic surveillance of anyone, by anyone, for any reason, and that includes by the Government. The reasons for this are strongly enshrined in the Constitution. The Constitution prohibits dragnet searches. That is what a wiretap or an electronic surveillance inevitably is. It doesn't single out conversations relating to the criminal offense that is alleged against a person who is being wiretapped. It just takes everything. It just takes anything they said.

Statistics that were inserted in the Congressional Record show that the average Federal wiretap in 1972 involved 1,023 conversations among 66 people and also that the number of Federal wiretaps in the 6 years since wiretapping has been authorized has risen from 174 to 864. This includes a number of State electronic surveillance warrants.

Also, it has been argued that putting the judge between the prosecutor and the defendant and letting him decide whether there are grounds for the wiretap is a big protection. But apparently only two wiretap applications were turned down in 1973, which I think raises a significant question. Either we have remarkable prosecutors who almost never make a mistake or else we have judges that are endorsing wiretap warrants because they really don't see any other way to behave.

I think that opens up a serious constitutional problem in the protection of individual privacy, and the protection of constitutional rights such as Fourth Amendment rights against unreasonable search and seizure and Fifth Amendment rights against self-incrimination.

Mr. SUMMITT. Is the report you referred to the Annual Report on Wiretapping?

Ms. GALE. Yes, sir.

Mr. SUMMITT. As I remember it, that report indicated a high percentage of the wiretap warrants resulted in indictments. In other words, they actually resulted in criminal action being instituted.



Also, Federal wiretap warrants last year dropped by about one-third.

Ms. GALE. Accompanied by a significant increase in State wiretap warrants under Federal law.

Mr. SUMMITT. We are really operating in this area with the federal system. I've heard it suggested from the fact that only two applications for a warrant were turned down, that that was attributable primarily to the care with which the authorities chose their cases.

It might be suggested that this high correlation of indictments resulting from wiretap warrants would indicate that this is probably so.

Ms. GALE. Well, again, I would go back to the problem that I dealt with. There was an average of 66 persons overheard under Federal wiretaps. What about all of those people who were overheard simply because they talked to someone who was later indicted? That is not such an easy civil liberties problem to resolve.

You see, a magistrate, when he authorizes a wiretap, is not just authorizing the policeman to go after the suspect he wants evidence on. He is authorizing the police to go after everything the suspect talks about and everybody he talks to. There is a specific provision in that statute that says that if you find evidence of a crime different from the one you are going after, it is legally okay and the evidence is admissible in court.

Now to me there is only the smallest amount of difference between that and rummaging at random through somebody's personal effects, which the Supreme Court has said you just can't do. It has said that in more traditional search and seizure cases.

Mr. SUMMITT. Well, under traditional search and seizure law, an officer, in executing a valid search warrant, if he comes across evidence of another crime, certainly may get that evidence——

Ms. GALE. That is what we are talking about.

Mr. SUMMITT. He is executing a search warrant, isn't he?

Ms. GALE. Well, if he is executing a search warrant, yes, but he would be limited in that search warrant to specific places to search and things to be seized. He would not be permitted to take an entire house and ransack every corner of it, unless he had a warrant that said there is a certain something which, for various reasons, we don't know where it is, and you can look all over for it.

Insofar as the search and seizure doctrine has been extended to permit some searches without direct probable cause to believe criminal acts have been committed, I think we would have some problems with it. However, I don't want to get into all of that, because it is a very complicated area of law.

Mr. SUMMITT. Well, I admit it has got its problems, but what you are suggesting is that where a policeman runs across additional evidence of other crimes—police activity that is legitimate——that such evidence should not be permitted to be used in evidence. That is not present law.

Ms. GALE. I think that is what probable cause means or should mean.

Senator HART. Does the ACLU have any figures on the number of applications for search warrants which have been rejected compared to the two that you were talking about?

Ms. GALE. That is a good question. The answer is I don't. I could look.

Senator HART. If you happen to find some such study, we would welcome it and perhaps add it to the record.

Ms. GALE. One request I had, which is written into our document, is that we be permitted, if we have additional material, to submit it for the record.

Senator HART. Granted.

Ms. GALE. Thank you. There is one final area that I would like to address briefly. This is the area of sentencing, probation, and parole.

Both S. 1400 and S. 1 would reinstitute the death penalty. I am aware that in March the Senate passed a death penalty statute which is substantially similar to the proposed changes in the Federal criminal code. I would like to reiterate the ACLU's opposition to such statutes on constitutional, practical, and moral grounds, and to urge this subcommittee and the Senate as a whole, and indeed, Congress, to reconsider whether we haven't ample proof that the death penalty does not deter violent behavior and that it is not an appropriate penalty in a civilized society.

I would also like to point out that both bills have very harsh sentences, which students of criminology have suggested do not serve the purpose for which they are ostensibly written. They do not rehabilitate. What they do is to cut people off—people that are going to be returned to the community—and limit their chances of ever returning to a normal life.

There are also provisions in both statutes, particularly in S. 1400, that seem to stack the deck against probation and parole despite increasing evidence, all over the country, that an intelligent and imaginative use of probation and parole can provide considerably more rehabilitation than prison sentences do. I believe the Brown Commission language in this area was substantially better in that it encouraged the sentencing authoriy to consider probation or parole.

We would suggest some revision along these lines.

Mr. SUMMITT. I take it you would agree, Ms. Gale, with S. 1400 which would permit parole from the time the sentence began. I think what you are talking about is the so-called presumption—

Ms. GALE. Oh, yes, I see. I said a little bit more on this subject in my document.

Let me say that there are some very good provisions in the sentencing and probation and parole parts of these bills. I tried to mention some of these in the written testimony. I don't want to be totally negative about it, because I think there is a real, legitimate attempt in some areas to be more responsive to the defendant's needs and to the civil rights and liberties of people who are involved in the criminal process.

Subject to my discovering that I have left out something vital, I think that is basically it. I would be glad to answer any more questions.

Senator HART. For me just one thing. Going back to this business of entrapment and the kind of police activity that is prohibited, can you help those of us that are stewing over this thing a little?

Could you suggest what levels of influence or what kinds of resources are needed for crime that you feel should be sufficient to raise the entrapment defense? Do we agree that the Federal Government should set a high standard in this area and not be party to gross unfair play, but if an undercover agent isn't almost putting a label on himself and saying I am a spy, doesn't he have to make a show of joining the group of plotters if he has reason to believe they are plotting?



Ms. GALE. I would make a distinction between participation and instigation.

Senator HART. Participation and instigation?

Ms. GALE. Maybe that is putting it a little too strongly. The Supreme Court's most recent case in this area, *United States* v. *Russell*, is a good example of the case where you have a hard decision to make. The Government agent provided the necessary chemical for the making of the illegal drugs. That presents a sticky intent problem. That is, the agent is really a "but for" cause of the criminal act, and an active participant, but there is independent evidence of the defendants' criminal intent.

So, yes, I can understand the court's problem. The majority looked at it and said, "Well, he intended to do it so it is not really entrapment." But I also agree with the dissenting justices that the agent was an instigator of and an active participant in the unlawful activity, and that the Government's involvement may overstep the legal boundary.

That to me is a hard case, I wouldn't have much problem with a "but for" case where the Government's activity was a little less technical in nature; where there was a certain amount of incitement by the undercover agent. And I don't think it would take very much. There were examples of this in some of the cases that came up surrounding the demonstrations in the late 1960's. I am sorry I can't recall any particularly to mind.

Senator HART. Some of the draft cases?

Ms. GALE. Yes. I don't have them with me. But, I would suggest that the line falls somewhere along a continuum between limited participation and outright instigation of the offense. Clearly in an undercover capacity, an agent would have to participate a little bit in order to observe what was happening. On the other hand, as Justice Brandeis so elegantly said—the Government is the omnipresent teacher. And if the Government is teaching criminal activity, then it is going beyond what it should be doing.

Senator HART. I said that was my last question, but I have an even later question.

What about the desirability as you see it for the creation of an independent special Federal prosecutor?

Ms. GALE. Again the organization has not, to the best of my knowledge, taken a stand on this. And in this case I really couldn't comment.

Senator HART. Mr. Summitt?

Mr. SUMMITT. Senator Hart, I would just like to point out that the ACLU appeared before the subcommittee on March 21, 1972, and provided a 144-page critique on the National Commission final report. Much of it gives insights into present law, as well as the final report and a broad range of matters. We appreciate this additional effort they have made to help us on these bills. A lot of work has gone into it.

Ms. GALE. Thank you.

Senator HART. It sure has.

Mr. MARVIN. I would like to explore briefly two areas.

The first area is on page 5 of your introduction where you make the statement that the provisions of S. 1 and S. 1400 if they are coupled with capital punishment provisions of S. 1401, might provide a mandatory death penalty for individuals who sought only to inform their fellow citizens on the great public issues of our time.

I am really at a loss to understand how this would occur. S. 1401 provides that the death penalty may be imposed if the defendant commits an offense under section 794 pertaining to disclosing defense information to a foreign government, section 2351, which is treason, and a few other sections, which are not relevant here. It also provides that the death penalty may be imposed only if no mitigating factors are present. Furthermore, S. 1401 provides that if the defendant is found guilty of either of these sections of treason or of communicating information to an agent of a foreign government, a jury must find by special verdict, first, that the defendant committed treason or furnished information to a foreign government previously and that in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security; or he knowingly created a grave risk of death to another person.

Finally—and this is another provision—the bill provides that the death penalty may not be imposed unless a jury finds the offense directly concerned nuclear weapons, military spacecraft, satellites, or like military weaponry.

Now, in the face of these provisions of S. 1401, can you really say that the proposed criminal code may provide a mandatory death penalty for individuals who sought only to inform their fellow citizens on the great public issues of our time?

Ms. GALE. I think the answer to that would be yes. I would direct your attention first of all to the provision for the death penalty where the defendant creates a grave risk of substantial danger to the national security. When Daniel Ellsberg made the Pentagon Papers public, there were a number of people who claimed that the publication created a grave danger to the national security. And some Government officials argued that by giving the Pentagon Papers to the newspaper, Mr. Ellsberg was making them available to a foreign government.

I think Howard Hunt testified at the Watergate hearings that there was considerable consternation in the Nixon administration because nobody could imagine what Ellsberg's intent was unless it was to destroy our national security.

So that is the problem that I see. I think that grave risk to the national security is a set of terms which has been gravely abused within the last few years, so that I am not comforted by it as a protection.

Finally, as to the necessity of relating the offense to nuclear weapons and certain military activities, there certainly was material related to nuclear weapons and some of those other categories within the Pentagon Papers. So, I feel that all three of those hurdles could have been jumped by a prosecutor who was eager.

Mr. MARVIN. I think where we may differ is the faith that we place in the jury, because it seems that under either of these bills it is the intent——

Ms. GALE. Well, I don't want the jury making the law of treason.

Mr. MARVIN. Under S. 1401, the prosecution has to prove beyond reasonable doubt that the person had the intent to provide this



information to a foreign government, not merely proof that he intended to make the information public. The prosecution has to show that this person actually had that intent and not only that the information was communicated to the foreign agent but that he intended it to be communicated to a foreign agent. That the prosecution has to prove beyond a reasonable doubt to a jury of 12.

Ms. GALE. That is right. You would have to prove the facts. But I don't want the jury making the law regarding treason, and I don't think these terms are sufficient protection against it.

We have had a lot of history in this country that in times of national crisis we do not always use our heads, either as individual citizens or as Government officials or as juries, in a manner that 20 years later we find to meet our normal standards of behavior. I am not eager to see any future Daniel Ellsberg put into that kind of jeopardy.

Mr. MARVIN. The jury is not making the law regarding treason. It is merely determining whether the defendant intended to disclose the information to a foreign government.

Moving on to the last point that I want to make, you state, Ms. Gale, that in section III it is probably the first time in the history of Anglo-American law that theft defines property to include intellectual property or information.

Do you think that a person who would steal trade secrets or other confidential information from a corporation should be guilty of theft?

Ms. GALE. Well, I believe that we have such a law at the moment. It seems to me that that is a very different kind of problem than the one that is raised by the general theft statute.

Mr. MARVIN. Well, let's take it one step further.

Suppose that a corporation gives confidential information, for example, those trade secrets, to the Government and then suppose someone steals that information from the Government. Now, the Government is in possession. Do you think that should be theft?

Ms. GALE. Well, first of all, there are problems in defining what it means to steal information, and I don't have much faith in the Government's definition based on the briefs that were filed in the *Ellsberg* case.

There does seem to be an attempt to broaden the reach of the word theft to encompass activities which are not and have not been thought of in the past as theft.

Mr. MARVIN. To get back to my question, if the corporation gives the trade secrets to the Government and the person steals that information from the Government——

Ms. GALE. Is this information covered by patent rights and laws? Couldn't it be taken care of in that way? Why shouldn't it be?

Mr. MARVIN. I am trying to determine whether there can be a line between information that is subject to theft and information that is not. How would you draw the line between what information would be subject to a theft provision and what information would not be?

Ms. GALE. Well, I am not sure that the criminal law is a useful tool to deal with this problem. I do see patent and copyright laws as a proper road in restricting this information concerning profitable——

Mr. MARVIN. Do you see a need for criminal penalties here?

Ms. GALE. We are not talking, or rather I am not talking about use of information for profit. The theft of trade secrets is not, to the best

of my knowledge, ordinarily done merely for the joy of knowledge, but for the use of the information to make money.

Mr. MARVIN. That is right.

Ms. GALE. If you can write a statute so narrowly that it would really refer only to information which is used wrongfully under patent or copyright laws, then I think it would probably be sufficient, but that is not what the general definitions sections of S. 1400 regarding theft and receiving stolen property do. They are much broader.

Again, this is not some pie-in-the-sky kind of suggestion, because the Government, in the *Ellsberg* case, looked at the existing statutes and tried its best to use them to prosecute for theft of Government information.

Mr. MARVIN. They didn't use those statutes in the *Ellsberg* case.

Ms. GALE. Pardon?

Mr. MARVIN. They didn't use those statutes, did they?

Ms. GALE. There was an attempt to argue that way. I don't believe that they did actually use the current statutes.

Mr. MARVIN. No, that was not the theory of their case.

Ms. GALE. Well, there was a theory that there had been theft of Government property, despite that fact that the documents were not converted, but were copied.

Mr. MARVIN. Well, under section 2071, which is existing law, it says that a person who willfully or unlawfully removes any record, paper or document or anything filed or deposited with any clerk or officer of any court or any public office, shall be fined not more than $2,000 or imprisoned not more the 3 years or both.

I think this statute does pertain to government information. Are you aware of any abuses under that statute, which would give you cause to believe that the theft provisions of S.1 or S. 1400 could be abused?

Ms. GALE. The difference is in talking about records and documents as things and talking about intellectual property, which is carefully defined in S. 1400 to be the information itself, regardless of how it is preserved.

Nobody would prosecute me for the theft of a Government record if I go into a Government office and copy it or take the information from it, not under the statute you are talking about.

Mr. MARVIN. So your objection to such a statute is satisfied if the person takes a document containing the information rather than if he Xeroxes it and leaves the document there?

Ms. GALE. Well, I am not arguing that anybody has the right to steal documents which belong to another person. No, that is not what I am talking about.

Mr. MARVIN. I think that is what section 1731, dealing with theft, intends to reach.

Ms. GALE. That may be what it intends, but I think it sweeps too broadly.

Mr. MARVIN. I have no further questions.

Mr. SUMMITT. No questions.

Senator HART. Thank you very much. We are grateful for the thoroughness with which this testimony was prepared.

We are adjourned, to resume at 10 a.m., Monday, next in this room.

[Whereupon, at 1 p.m., the subcommittee recessed, to reconvene at 10 a.m., Monday, July 22, 1974.]

# APPENDIX

NORTHWESTERN UNIVERSITY LAW REVIEW, NOVEMBER–DECEMBER 1973

## PROLOGUE

(By Tom C. Clark*)

It is truly said that society prepares the crime and the criminal commits it. And when society neglects its responsibilities, whether it be by the failure to eliminate causes or to regulate effects, there can be disastrous consequences upon the mores of the people. We are suffering from such a malaise today.

Winston Churchill warned that many a civilization has fallen for lack of a criminal justice system. The beloved Mr. Justice Holmes observed that for the most part the purpose of the criminal law was to induce external conformity to established rule.[1] And while this is certainly a necessary objective, history teaches that not only the enjoyment but also the survival of individual liberty depends largely upon the existence of a wise, impartial criminal justice system. Yet it should be recognized that there is much in our system of penology that is vindictive, archaic and unmanageable. We have, through our own neglect, made a scarecrow of the law, setting it up as an object of fear rather than as a set of deeply respected principles by which every American citizen should live. Certainly Gladstone was correct when he said that good laws make it easier to do right and harder to do wrong.[2] Conversely, however, bad laws make for more wrong and less right, and the wrong is all the more compounded by lax or selective enforcement.

It is an understatement to say that we have shamefully neglected our criminal justice system. Since the enactment of The Crimes Act of 1790,[3] which was the first set of federal criminal laws, there have been just four revisions.[4] In the interim periods, Congress enacted thousands of laws, making a crazy quilt of our criminal code through piecemeal enactments reflecting the public pressure of the moment. Although these spasmodic revisions reorganized the code in a more logical sequence and eliminated some of the inherent hide-and-seek aspects of such installment legislation, they were essentially housekeeping recodifications of existing law. No serious commitment to reform the substantive content of our criminal justice code was made until 1966, when Congress created the National Commission on Reform of Federal Criminal Laws.[5]

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[1] O. W. HOLMES, THE COMMON LAW 49 (1881).

[2] J. BRANDE, SPEAKER'S DESK BOOK OF QUIPS, QUOTES AND ANECDOTES 145 (1963).

[3] Act of April 30, 1790, ch. 9, 1 Stat. 112.

[4] Crimes Act of 1825, ch. 65, 4 Stat. 115; U.S. Rev. Stat. tit. LXX (1877) (Authorized by Act of Jan. 27, 1866, ch. 7, 14 Stat. 8; Criminal Code of 1909, ch. 321, 35 Stat. 1143; 18 U.S.C., *as revised* Act of June 25, 1948, ch. 645, 62 Stat. 683.)

[5] Act of Nov. 8, 1966, Pub. L. No. 89-801, 80 Stat. 1516, *as amended* Act of July 8, 1969, Pub. L. No. 91-39, 83 Stat. 44 (appearing in notes preceding 18 U.S.C.).

The National Commission was created for the purpose of: (a) formulating and recommending legislation which would improve the federal system of criminal justice, and (b) making recommendations for revision and recodification of the criminal laws of the United States, including repeal of unnecessary or undesirable statutes and such changes in the penalty structure as the Commission may feel will better serve the end of justice. 18 U.S.C. prec. § 1. The final report of the Commission was to serve as a "work basis" for congressional consideration of the need for reform.

The Commission comprised three members of the Senate appointed by the President of the Senate: Sam J. Ervin, Jr., Roman L. Hruska, and John L. McClellan; three members of the House of Representatives appointed by the Speaker of the House: Vice Chairman Richard H. Poff, Robert W. Kastenmeier, and Abner J. Kikva; three public members appointed by the President: Chairman Edmund G. Brown, Donald Scott Thomas, and Theodore Voorhees; and one circuit judge, George C. Edwards, Jr., and two district judges, A. Leon Higginbotham, Jr., and Thomas J. MacBride, appointed by the Chief Justice. U.S. Circuit Judge James M. Carter and Congressman Don Edwards served as members of the Commission from its inception until December 1967 and October 1969, respectively. I had the honor of chairing the fifteen member Advisory Committee created by the Commission and Louis B. Schwartz served as Staff Director

A previous private study conducted by the American Law Institute, the results of which were embodied in the Model Penal Code of 1952,[6] had led to a hearing in 1953 before Senator McClellan's Subcommittee on Criminal Laws and Procedure, of the Senate Committee on the Judiciary. During the course of later hearings, in 1971 before this same Subcommittee, Professor Wechsler reported the chaotic state of the federal criminal laws:[7]

Preliminary studies left no doubt to us that the central challenge of the penal law inhered in the state of our penal legislation. Viewing the country as a whole, criminal law consisted of an uneasy mixture of fragmentary and uneven and fortuitous statutory articulation, common law concepts of uncertain scope and a miscellany of modern enactments passed on an ad hoc basis and frequently producing gross disparities in liability or sentence.

It should be noted that several states had recognized the inadequacies identified by Professor Wechsler, and have adopted modern criminal codes.[8]

Both The Model Penal Code of the American Law Institute [9] and the New York Revised Penal Law [10] served as models for the Final Report of the National Commission (Commission Report).[11] The Report is the result of the combined efforts of the Commission, its staff and an Advisory Committee working over a three-year period, Preliminary drafts were first prepared by the staff, circulated to the Commission members and its Advisory Committee, and thereafter discussed at periodic joint meetings of the three groups A Study Draft was completed by June of 1970,[12] and distributed to some 5,000 individuals and associations for their critical analysis and comments. The Commission then considered the comments received in detail, and adopted the final draft which was submitted as the Commission Report to the President and the Congress on January 7, 1971. Shortly after the Report was submitted, the McClellan Subcommittee mailed out requests for comment on the Commission's work to some 6,000 state attorneys general, county and district attorneys, professors of criminal law and related subjects and interested private groups Subsequently, the Subcommittee held thirteen days of public hearings. Sixty-four witnesses were heard and a hearing record of approximately 4,000 pages was compiled.[13] Among the organizations which submitted statements or sent representatives were the American Bar Association, the Federal Bar Association, the Association of the Bar of the City of New York, the New York County Lawyers Association, the N.A.A.C.P., the N.C.C.D., the A.C.L.U., the N.L.A.D.A. and the Committee for Economic Development. The Subcommittee considered the criminal codes of some twenty-five foreign countries, a detailed report of the impact of the proposed code on federal criminal litigation and judicial administration submitted by the Administrative Office of the United States Court, and the recommendations of the Committee of the Judicial Conference of the United States. The facilities of the National Institute of Law Enforcement and Criminal Justice were utilized in analyzing the massive amount of data received.

From this exhaustive study were derived two bills which are currently pending in the Senate. S. 1,[14] which was introduced in the Senate on January 4, 1973, by Senator McClellan, is known as the Judiciary Committee Bill. Its 538 printed pages reputedly make it the most voluminous bill ever introduced in the Senate.

[6] *See* Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952). *See also* Wechsler *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968).

[7] Prepared Statement of Professor Herbert Wechsler, *Hearings Before the Subcomm. On Criminal Laws and Procedures of the Senate Comm. on the Judiciary, Reform of the Federal Criminal Laws*, 92d Cong., 1st Sess. at 522.

[8] Louisiana was the first state to revise its criminal code in this century. *See* Criminal Code of 1942, LA. REV. STAT. ANN. tit. 14 (1965). Other states which have since enacted new criminal codes are (with the effective dates of codes shown): Colorado (1972), COLO. REV. STAT. ANN. ch. 40 (Supp. 1971); Connecticut (1971), CONN. GEN. STAT. ANN. ch. 53(a) (1972); Delaware (1973), DEL. CODE ANN. tit. 11 (Supp. 1972); Illinois (1962), ILL. ANN. STAT. ch. 38 (Smith-Hurd 1964); Georgia (1969), GA. CODE ANN. tit. 26 (1972); Kansas (1970), KAN. STAT. ANN. ch. 21 (Supp. 1972); Minnesota (1963); MINN. STAT. ANN. ch. 609 (1964); New Mexico (1963), N.M. STAT. ANN. ch. 40A (1964); New York (1967), N.Y. PENAL LAW (McKinney 1967); Montana (1974), MONT. REV. CODE ANN. tit. 94 (Supp. 1973); Ohio (1974), OHIO REV. CODE ANN. tit. XXIV (Baldwin 1971); Oregon (1972), ORE. REV. STAT. tit. 16 (1971); Pennsylvania (1973), PA. STAT. ANN. tit. 18 (1973); Wisconsin (1956), WISC. STAT. ANN. tit. 45 (1972); and Texas (1974), TEX. PENAL CODE (Supp. 1973).

[9] MODEL PENAL CODE (Proposed Official Draft, 1962).

[10] N.Y. REV. PENAL LAW (McKinney 1967).

[11] NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS, FINAL REPORT (1971) [hereinafter cites as COMMISSION REPORT].

[12] NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS, STUDY DRAFT (1970).

[13] *Hearings on the Reform of the Fed. Criminal Law Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 92d Cong., 1st and 2d Sess. (1971).

[14] S. 1, 93d Cong., 1st Sess. (1973) [hereinafter S. 1].



S. 1400,[15] the Administration-sponsored bill, was introduced in the Senate on March 27, 1973, by Senator Hruska.[16] It consists of 336 pages of printed material. The House counterpart of S. 1400, H.R. 6046,[17] was introduced on March 22, 1973, by fifteen Congressmen. A third bill. H.R. 10047,[18] was introduced in the House of Representatives on September 5, 1973, by Congressmen Kastenmeier and Edwards. H.R. 10047 duplicates the bill proposed in the Commission Report.

An American criminal code—really the first in our history—is indeed something for the people to contemplate in earnest. It presents both a challenge and an opportunity to law enforcement officials, correction officials, lawyers, judges, administrators, law professors, law students and the public. An American criminal code should certainly endeavor to encompass all federal offenses in a coherent, logical form, reflecting in the final analysis enlightened modernized concepts of criminal justice. But perhaps more significantly, it should serve to rekindle an abiding respect for the law in our nation. It is therefore incumbent upon all Americans to assist the Congress in striving for the goal that the revised penal code embrace the most humane principles of criminal justice ever adopted by a free society. The Northwestern University Law Review is to be congratulated for devoting this issue to a symposium on these vital legislative proposals now before the Congress. It should have a most constructive influence on the development of an American criminal code to which we may all point with pride.

It is my purpose merely to set the tone for the materials that follow which will examine some of the provisions of the proposed legislation in depth. The criminal code proposed by the Commission, like Caesar's ancient Gaul, is divided into three parts. The first part delineates common jurisdictional basis upon which federal offenses may rest, such as maritime and territorial jurisdiction, federal public servants engaged in official duties, offenses involving the property of the United States, the United States mails and assimilated offenses. The first section goes on to define the concepts of culpability, causation and various responsibility defenses, including justification and excuse, execution of public duty, self-defense, defense of others, proper use of force, mistake of law and duress. Finally, this part of the Commission Code defines other specific restraints on prosecution including statute of limitations, entrapment, prosecution of multiple offenses, of former offenses and of offenses prosecuted in other jurisdictions.[19] The second part promulgates specific, substantive federal offenses. The offenses are clearly defined somewhat in the language of state codes and the circumstances of federal jurisdiction are noted.[20] The third division deals with the sentencing system, including the classification of offenses by grade, authorized sentences,[21] imprisonment, probation, fines, parole, collateral consequences of conviction, life imprisonment, capital punishment, and, finally, appellate review.[22]

The Commission's Proposed Code goes far beyond mere recodification. It is a complete redefinition of federal crimes and the elements thereof, ranging at times beyond existing precedent and subjecting the federal criminal law to a scheme of ruling postulates bearing directly upon the specific offenses created. Its danger lies in the enlarged concept of the appropriate federal role, whereby many state offenses are brought within the scope of federal authority. For example, section 201(b) places under federal jurisdiction all offenses "committed in the course of committing or in immediate flight from the commission" of any federal offense. The present code imposes extra punishment for such acts but avoids taking over the state prosecution.[23] In addition, section 708 bars subsequent prosecutions by a local government of state offenses which are based on the same conduct or arising from the same criminal episode upon which a federal prosecution is based. As George Levine points out: "What is at stake is that balance of state and federal

[15] S. 1400, 93d Cong., 1st Sess. (1973) [hereinafter S. 1400].

[16] Hearings on both S. 1 and S. 1400, which commenced April 16, 1973, became available as of December 11, 1973.

[17] H.R. 6046, 93d Cong., 1st Sess. (1973). Hearings on H.R. 6046 commenced July 17, 1973.

[18] H.R. 10047, 93d Cong., 1st Sess. (1973) [hereinafter H.R. 10047].

[19] *Id.* pt. A, chs. 1-7.

[20] *Id.*, pt. B, chs. 10-18.

[21] Replacing the current chaotic variety of offenses and penalties is a limited number of classes of crimes: (1) Class A felonies, which carry a maximum sentence of 30 years and a maximum fine of $10,000; (2) Class B felonies, 15 years and $10,000; (3) Class C felonies, 7 years and $5,000; (4) Class A misdemeanors, one year and $1,000; (5) Class B misdemeanors, 30 days and $500; and (6) petty infractions which comprise non-criminal finable violations. Each substantive offense is graded into several levels of seriousness so that more serious misbehavior within each offense falls within higher categories. *See* Brown and Schwartz, *Sentencing Under the Draft Federal Code*, 58 A.B.A.J. 935 (1970). S. 1 and S. 1400 also provide for classification of offenses along similar lines for sentencing purposes, albeit the specific sanctions authorized are different in magnitude.

[22] H.R. 10047 pt. C, chs. 30-36.

[23] For a discussion of these "piggy back" provisions, see 117 CONG. REC. 6129 (remarks of Senator McClellan).

power which lies at the foundation of the American constitutional design." [24] It is submitted that the Proposed Code goes much too far in this regard. In addition to potentially upsetting the delicate state-federal balance in the criminal law area, the proposals, if adopted, will add heavy burdens to the federal judicial system which is already bogged down by massive backlogs.

The Commission's Proposed Code also codifies for the first time as an element of federal jurisprudence virtually every legal principle governing the actual trial of a criminal case. This would produce an unfortunate rigidity in the law that is characteristic of the law of some foreign nations. Moreover, the enumeration of defenses to substantive offenses undertaken in the Proposed Code [25] is not, in my opinion, a proper subject for codification. Such defenses have been developed in the decisional law and any effort to freeze them into statutory language will lead to ill consequences, to confusion and very possibly to constitutional attack. Similarly, the effort to define causal relationship between conduct and result by statute [26] is undesirable; experience as a trial judge persuades me that such a definition would engender many new problems, thus compounding present difficulties surrounding jury instructions.

The Administration's proposal has jurisdictional sections similar to those of the Commission's Code.[27] In addition, it contains two provisions which would change existing substantive law with reference to the concept of "public duty." The Administration's bill would create a defense to any federal prosecution when the person charged "reasonably believed that the conduct charged was required or authorized by law to carry out his duty as a public servant or as a person acting at the direction of a public servant. . . ." [28] Another section provides an affirmative defense to a federal prosecution when,[29] the defendant's conduct . . . conformed with an official statement of law, afterward determined to be invalid or erroneous . . . if the defendant acted in reasonable reliance on such statement . . . and with a good faith belief that his conduct did not constitute an offense. The breadth of these provisions is alarming, exceeding any I have ever observed in a federal statute. Known as the "Nuremberg sections," they were suggested possibly by the Commission's Proposed Code [30] or by the Model Penal Code,[31] each of which embodies a section of this type. I believe that such sections should be condemned as they would only encourage or facilitate irresponsible, if not unlawful, conduct on the part of some public officials. S. 1400 contains other unsound provisions. For example, it would roll back the insanity defense to the dark ages,[32] repeal the "clear and present danger" doctrine of Mr. Justice Holmes,[33] overrule all United States Supreme Court opinions on obscenity,[34] restore the guilt by association provisions of the Smith Act [35] and reestablish capital punishment.[36] None of these provisions should be enacted into law.

S. 1, the Judiciary Committee Bill, is much tougher in many respects than the Commission's Proposed Code but it does soft pedal the degree of federal intrusion into state jurisdiction.[37] It incorporates many of the ideas contained in other legislation sponsored by Senator McClellan and reflects more traditional policy as to criminal punishment.

I fault all of the proposals relating to this latter point in one respect. Although the effort to classify offenses by grade and to scale sentences accordingly represents a slight improvement over the existing system of sanctions. I submit that drastic changes should be made in our corrections policy. We have for almost 200 years adhered to firm principles of inexorable punishment. This approach has proven to be a dismal failure. It tragically produces recidivists from four out of five individuals committed to the charge of our correctional institutions. Prisons too often operate as "schools of crime" condemning some first offenders to a lifetime

[24] G. Levine, *Proposed New Federal Criminal Code: A Constitutional and Jurisdictional Analysis*, 39 BROOKLYN L. REV. 1, 8 (1972).
[25] H.R. 10047, chs. 6, 7.
[26] *Id.* § 305.
[27] S. 1400, chs. 2-5.
[28] *Id.* § 521(a).
[29] *Id.* § 532.
[30] H.R. 10047, §§ 602(1)-(2), 609.
[31] MODEL PENAL CODE § 3.03 (Proposed Official Draft, 1962).
[32] S. 1400, § 502.
[33] *See, e.g., id.* § 1103; *compare* Schenck v. United States, 249 U.S. 47, 52 (1919).
[34] S. 1400 § 1851.
[35] *Compare id.* § 1103 *with* Smith Act of 1940, ch. 439, 54 Stat. 670, *as amended* Act of June 25, 1948, ch. 645, § 1, 62 Stat. 808 (now contained in 18 U.S.C. § 2385).
[36] S. 1400 § 2401.
[37] *See, e.g.*, S. 1, §§ 1-1A6, 1-1A7.



of criminal activity and failing to rehabilitate those convicted of more serious offenses. Given this situation I believe that sentencing should be beyond the realm of judicial power. Upon conviction, the defendant should be sent to an institution where he could be physically and mentally examined and observed during a ninety-day waiting period during which a pre-sentence investigation report would be prepared. At the conclusion of this evaluation period an appropriate punishment would be entered by a board or panel of suitable size composed of experts in every aspect of penology. This would permit a greater degree of flexibility in the administration of justice and avoid the evil of indiscriminate treatment of a multitude of offenders. Though offenders may be numerous, a compassionate society should nevertheless make certain that all are treated fairly and humanely with the goal that the maximum number be rehabilitated.

The making of an American criminal code is a giant undertaking. It is my hope that our citizenry will be aroused to take an active part in shaping this historic legislation. Clarence Darrow, one of our most successful criminal lawyers, expressed the view that laws should be like clothes—made to fit the people whom they are meant to serve.[38] This should be kept in mind as the mountains of proposals now on the desks of Congress are studied. An American criminal code is sorely needed. Much constructive work has already been done and today there is progress on many fronts. Yet, as matters now stand, there is still room, and hopefully time, for further refinement and improvement of the present proposals.

My over fifty years of association with the courts compel me to suggest that we first reexamine our present laws and discard all those which no longer are compatible with the present mores. In too many instances our laws have become obsolete and should be repealed. Jonathan Swift remarked that laws often are like cobwebs which catch small flies but let the wasps and hornets break through.[39] Let us strive to make our laws instruments of justice, sufficiently strong to snare the guilty, but discerning enough to ensure that the innocent go free. After all, isn't this what "Equal Justice Under Law" is all about?

## CIVIL LIBERTIES AND NATIONAL SECURITY: A DELICATE BALANCE

Throughout the history of the United States, the means employed to promote national security [1] have often conflicted with civil liberties guaranteed by the Constitution.[2] In more recent years, the nation has witnessed examples of such conflict in the controversy surrounding the publication of the Pentagon Papers,[3] in convictions for obstruction of military recruitment,[4] and in prosecutions of protesters against the war in Vietnam.[5] In each case, the government has sought to justify infringement of civil liberties by invoking the needs of national security.[6]

The judiciary has assumed responsibility for protecting first amendment rights from majoritarian fears of unpopular beliefs and expression.[7] Having recognized that freedom of expression is essential to democracy,[8] the Supreme Court has nonetheless allowed certain limits to be placed on the exercise of these rights when they appear to endanger the national security.[9] The justification for such restrictions was expressed by Mr. Justice Vinson in *Dennis v. United States:* [10]

> Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected.

[38] INTERNATIONAL DICTIONARY OF THOUGHTS 429 (1969). *See generally* DARROW, CRIME—ITS CAUSE AND TREATMENT (1925).
[39] SWIFT, A CRITICAL ESSAY UPON THE FACULTIES OF THE MIND P. (1707).
[1] "National security," for purposes of this Note, refers to the government's capacity to protect itself against internal subversion and external aggression that would threaten its existence with violent overthrow.
[2] *See* T. EMERSON, D. HABER, & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (3d ed. 1967).
[3] New York Times Co. v. United States, 403 U.S. 713, *rev'g per curiam*, United States v. New York Times Co., 444 F.2d 544 (2d Cir. 1971), and *aff'g. per curiam*, United States v. Washington Post Co., 446 F.2d 1327 (D.C. Cir. 1971).
[4] *See, e.g.*, United States v. Baranski, 484 F.2d 556 (7th Cir. 1973).
[5] *See, e.g.*, Dellinger v. United States, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).
[6] For reasons for skepticism regarding government claims of threats to national security in cases involving speech and association, restrictions on international travel, and government personnel programs, see *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972).
[7] *Id.* at 1135.
[8] Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).
[9] For a review of the limits set on free speech involving national security issues for the last fifty years, see Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41.
[10] 341 U.S. 494, 509 (1951).

The standards that have been erected by the Court to effectuate a proper balance between the conflicting interests of free expression and national security must be followed in any attempt to reform current statutory law.

The national security sections of the two bills currently pending before the Senate, S. 1 [11] and S. 1400,[12] having been drafted during the time of massive protest against the war in Vietnam, reflect the experience of the government in dealing with that protest under current national security laws. In particular, the espionage sections, including the unlawful dissemination of confidential governmental documents,[13] were written during the recent controversy concerning the Pentagon Papers; the sections concerning avoidance and obstruction of military service [14] during a period of unprecedented evasion of the Selective Service Act and desertion from the armed forces; and the definition of treason [15] during a time when the public demonstrations against the war were viewed by some government officials as giving aid and comfort to the enemy. The late 1960's were also a time of general social and political unrest, which often included violent actions and the formation of militant organizations. In this context, the sections on advocacy and incitement of armed insurrection [16] were drafted.

This note compares the two Senate proposals for federal legislation governing national security [17] with existing law and with one another.[18] Problems generated by the proposed sections are discussed, with emphasis placed on fundamental constitutional issues.

*Treason*

In the sections on treason and military activity against the United States, both proposals raise the question of the extent to which the legislative definition of treason must follow that of the Constitution. The current provision on treason [19] follows the constitutional language of article III, § 3, which defines treason as "consist[ing] only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort." [20] S. 1 retains the definition of treason found in the Constitution and in the present statute by describing the offense as "levying war against the United States . . . or adhering to its enemies, giving them aid and comfort." [21] S. 1400 changes current law by adding a definition of "levying war against the United States:" [22] Engaging in armed rebellion or insurrection against the authority of the United States or a state with intent to: (A) overthrow, destroy, supplant, or change the form of government of the United States; or (B) sever a state's relationship with the United States.

To the extent that this subsection is viewed as a legislative attempt to redefine the Constitution's treason provision, the S. 1400 treason proposal might be questioned as an infringement on the power of the judiciary to interpret the Constitution. On the other hand, to say that the Constitution precludes Congress from defining an offense involving conduct contemplated by the treason provision seems inconsistent with the broad constitutional power afforded Congress to fix penalties.

[11] S. 1, 93d Cong., 1st Sess. (1973) [hereinafter cited as S. 1].
[12] S. 1400, 93d Cong., 1st Sess. (1973) [hereinafter cited as S. 1400].
[13] S. 1, §§ 2-5B7, 2-5B8; S. 1400, §§ 1121-26.
[14] S. 1, §§ 2-5B5, 2-5B6; S. 1400, §§ 1115, 1116.
[15] S. 1, § 2-5B1; S. 1400, § 1101.
[16] S. 1, § 2-5B3; S. 1400, § 1102.
[17] In addition to S. 1 and S. 1400, two other bills have been introduced before Congress: H.R. 6046, 93d Cong., 1st Sess. (1973), the national security sections of which are identical to those of S. 1400; and H.R. 10017, 93d Cong., 1st Sess. (1973), which would codify the NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT [hereinafter cited as COMMISSION REPORT], as found in *Hearings before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. I at 231 (1971) [hereinafter cited as HEARINGS].
[18] The national security sections of S. 1 and S. 1400 are based principally on national security provisions currently existing in chapters 37 (Espionage and Censorship), 105 (Sabotage), and 115 (Treason, Sedition and Subversive Activities), of title 18; portions of sections dealing with revelation and destruction of restricted information on atomic energy are derived from title 42; and proposal sections concerning communication of classified information by public servants, registration of foreign agents, wartime censorship, and avoiding military service arise from title 50 and its appendix. The organization of these sections into one cohesive unit is, in itself a major accomplishment of the two proposed bills.
[19] 18 U.S.C. § 2381 (1970):
Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason . . . .
The statute omits reference to the two-witness rule of the Constitution.
[20] U.S. Const. art. III, § 3.
[21] S. 1, § 2-5B1. The offense is graded as a class A felony but, as under existing statute, a person convicted of treason may receive the death sentence. The relevant sentencing provisions for S. 1 are found in §§ 1-4B1 to 1-4B3 (imprisonment), §§ 1-4C1, 1-4C2 (fines), and §§ 1-4E1, 1-4E2 (sentence of death).
[22] S. 1400, § 1101(a)(2). Violation of this subsection is penalized as a class B felony; violation of the subsection dealing with "adhering to the enemy" is penalized as a class A felon. The relevant sentencing provisions for S. 1400 are found in §§ 2301-04 (imprisonment), §§ 2201-04 (fines), and §§ 2101-02 (death sentence).



Having been given that power, "Congress could hardly be denied the right to set different grades of punishment and, necessarily, to specify the varieties of treasonable conduct to which the respective penalties should apply." [23]

Rather than risk a constitutional challenge to a redefinition of treason, however, the drafters of S. 1 created a separate offense and called it "military activity against the United States." [24] In giving another name to conduct which might be termed treason only by stretching the Constitution's definition, the drafters avoided one constitutional hurdle. Nevertheless, in its use of the language "facilitates military activity of the enemy," the proposed section may encounter first amendment obstacles since the word "facilitates" can be construed to cover advocatory conduct.[25] For example, one who had advocated immediate withdrawal of all American troops from Vietnam, with the requisite intent of preventing a United States victory, could be prosecuted under S. 1 if it were shown that the enemy was encouraged in his military activity by such dissent in this country.[26] If this section is to be adopted, therefore, it should be clear that the term "facilitation" does not include such speech.

*Advocacy and incitement*

The proposals also raise constitutional questions dealing with advocacy of armed insurrection.[27] Current law in this area, the Smith Act,[28] is substantially carried forward in the provisions of both S. 1 [29] and S. 1400.[30] The proposed sections, while simplifying the language of the Smith Act, retain its essential prohibitions against certain types of advocacy and thereby retain its first amendment problems as well.

The current constitutional standard for proscription of some forms of advocacy was provided by the Supreme Court in *Brandenburg* v. *Ohio*.[31] The "imminent lawless action" test established by that *per curiam* opinion purports to reiterate a previously determined principle: [32]

The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Under present law, therefore, advocacy of armed insurrection can be proscribed only if two elements are found: first, that the advocate directed his speech to inciting or producing imminent lawless action; and second, that his speech was likely to do so.

According to the *Brandenburg* decision, the constitutionality of the Smith Act was sustained in *Dennis v. United States* [33] on the theory that the Act embodies the

[23] Hurst, *Treason in the United States*, 58 HARV. L. REV. 395, 419 (1944).
[24] S. 1, §2-5B2:
(a) Offense.—A person is guilty of military activity against the United States if, with intent to aid the enemy or to prevent or obstruct a victory of the United States, he participates in or facilitates military activity of the enemy.
(b) Affirmative Defense.—It is an affirmative defense that the defendant acted as a member of the armed services of the enemy in accordance with the laws of war.
[25] COMMISSION REPORT at 231.
[26] *Statement of the American Civil Liberties Union*, in *Hearings Before the Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. III at 1453 (1971) [hereinafter cited as *Statement of ACLU*].
[27] According to S. 1, a person is guilty of the offense of armed insurrection if (1) with intent to overthrow, supplant, or change the form of the government of the United States or of a state, he: (i) engages in an armed insurrection, or (ii) directs, leads, organizes, or provides a substantial portion of the resources of an armed insurrection which involves 50 or more accomplices.
S. 1, § 2-5B3. S. 1400 would find one guilty of armed insurrection if he "engages in armed rebellion or insurrection against the United States with intent to oppose the execution of any law of the United States." S. 1400, §1102.
[28] 18 U.S.C. §2385 (1970): Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so. . . .
[29] S. 1, §2-5B3(a)(2): [W]ith intent to induce or otherwise cause other persons to engage in armed insurrection which is, in fact, in violation of paragraph (1), he: (i) advocates the desirability or necessity of armed insurrection under circumstances in which there is substantial likelihood his advocacy will imminently produce, in fact, a violation of paragraph (1). . . .
[30] S. 1400, §1103(a): A person is guilty of an offense if, with intent to bring about the overthrow or destruction of the government of the United States, or any state or local government, as speedily as circumstances permit, he: (1) Incites others to engage in conduct which then or at some future time would facilitate the overthrow or destruction by force of that government. . . .
[31] 395 U.S. 444 (1969).
[32] *Id.* at 447.
[33] 341 U.S. 494 (1951).

above principle and had been applied only in accordance with it.[34] Presumably, then, the simplification of the Smith Act, as found in S. 1 and in S. 1400, would be construed to embody the same principle. Before a presumption of constitutionality is accepted, however, the language of each proposed section should be analyzed in terms of the language of the *Brandenburg* decision itself.

The provision in S. 1 seeks explicitly to meet the *Brandenburg* test by requiring two elements to constitute an offense: first, "intent to induce or otherwise cause other persons to engage in armed insurrection," and second, "substantial likelihood [that the] advocacy will imminently produce, in fact, [armed insurrection]." [35] The latter element of the subsection easily meets the second *Brandenburg* prerequisite of likely incitement or production of imminent lawless action. The former element, however, might prove constitutionally fatal to the subsection. While its use of the term "intent" would appear to carry out the meaning of the *Brandenburg* phrase "directed to," the crucial term "imminent" is not included.

S. 1400 requires "intent to bring about the overthrow or destruction of the government . . . as speedily as circumstances permit." [36] In the *Dennis* opinion, the Supreme Court sustained convictions under a similar charge. The Court construed "as speedily as circumstances permit" to mean "that the revolutionists would strike when they thought the time was ripe." [37] When viewed in terms of the *Brandenburg* test, however, such a construction suffers from the same flaw found in the intent requirement of S. 1: the lawless action intended to be incited or produced need not be imminent. S. 1400 also omits the requirement of imminence from the second element of the offense: inciting others "to engage in the conduct which then *or at some future time* would facilitate the overthrow or destruction of that government." [38] Because it lacks the requirement of "imminent lawless action" in both elements of the offense, the provision in S. 1400, more clearly than its counterpart in S. 1, appears to be in violation of the test of *Brandenburg v. Ohio*.

The sections of S. 1[39] and S. 1400[40] which deal with conspiracy to advocate or incite armed insurrection raise further first amendment questions in regard to the freedom of association. Though differing in scope, both sections are derived from the membership clause of the Smith Act, which prohibits organization of or membership with knowledge of the purpose in "any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of [the] government." [41] S. 1 prohibits an individual from organizing a conspiracy which engages in advocacy of armed insurrection, or, as an active member of such conspiracy, facilitating such advocacy.[42] S. 1400 goes further to proscribe organizing, leading, recruiting, joining, or remaining an active member of, an organization which has as a purpose the incitement of armed insurrection.[43]

Since the Supreme Court, in *Scales v. United States*,[44] upheld the Smith Act's membership clause, it could be argued that both proposals would likewise be found to meet the current constitutional standard. The *Scales* opinion requires that one's membership be active rather than nominal and that one hold specific individual intent to contribute to the success of expressly illegal purposes.[45] To violate S. 1, an individual must organize or be "an active member of such conspiracy;" he must also have "intent to induce or otherwise cause other persons to engage in armed insurrection." To violate S. 1400, an individual must organize, lead, recruit, join, or remain "an active member of an organization which has as a purpose the incitement [of armed insurrection];" he must also have "intent to bring about the overthrow or destruction of the government . . . as speedily as circumstances permit."



On their face, both proposals would probably meet the standards of *Scales*. In application, however, both proposals could be used in ways that unjustifiably restrict freedom of association. For example, the possibility exists under S. 1 that one could be held liable, long after his own illegal intent had dissipated, for illegal advocacy by members of an organization that he once helped form. If organizing with illegal intent is to be proscribed, the proposal should make clear that coincidence of intent and the ultimate illegal action (advocacy of armed insurrection) is required. Under S. 1400, one might be convicted for being a member of an organization that holds incitement as a purpose though no act is ever undertaken in furtherance of that purpose. The Smith Act requires that the organization teach, advocate, or encourage the overthrow or destruction of the government. In the case which accompanied the *Scales* opinion, *Noto v. United States*, the Supreme Court insisted on specific proof of *present* illegal advocacy in connection with that requirement.[46] It is doubtful, therefore, that the Court would approve such a blatantly restrictive application of S. 1400.

The existence of such possibilities in the proposed conspiracy sections can serve only to discourage individuals from forming political organizations for fear of later prosecution for the acts, speech, and purposes of others. One commentator has concluded from a study of recent conspiracy cases that the conspiracy charge served "no essential function in protecting public security that could not equally be served by individual prosecution for the forbidden advocacy or incitement after it has occurred." [47] If this be so, then the possible chilling effect of the proposals on freedom of association far outweighs any government interest in national security.

Constitutional problems concerning advocacy and incitement also appear in a proposed S. 1400 subsection on obstructing military recruitment or induction. That subsection proscribes "incit[ing] others to engage in conduct which, in fact, constitutes an offense under section 1115 (Evading Military or Substitute Service)." [48] Section 1115 includes four types of evasion of military or substitute service: (1) failure, neglect, or refusal to register for, report for, or submit to induction; (2) failure, neglect, or refusal to report for civilian service or enter upon, perform, or satisfactorily complete such service; (3) failure, neglect, or refusal to report for or to submit to the examination; or (4) false swearing or making a false statement in connection with avoiding or delaying the military or civilian service obligation of oneself or another.[49] Incitement to any one of these four types of conduct would be subject to penalty under S. 1400.

A statute [50] similar in purpose to the provision in S. 1400 dealing with obstructing military recruitment or induction [51] was recently declared unconstitutionally overboard in *United States* v. *Baranski*.[52] The statute in proscribing the use of any means whatsoever to accomplish the hindrance of the Selective Service system,[53] was found to include within its proscription expressive conduct protected by the first amendment: [54]

For example, a speaker or writer might declare in strong and persuasive terms that the war in Southeast Asia was intolerable and unconscionable and that every citizen should vocally protest the nation's participation. Irrespective of the correctness of such a view, its delivery in speech or writing might be accomplished

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[34] 395 U.S. at 447 n.2.
[35] S. 1, § 2-5B3(a)(2).
[36] S. 1400, § 1103(a)(1).
[37] 341 U.S. at 510.
[38] S. 1400, § 1103.3)(1) (emphasis added).
[39] S. 1, § 2-5B3(a)(2)(ii).
[40] S. 1400, §1103(a)(2).
[41] 18 U.S.C. § 2385 (1970):
Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purpose thereof—. . . .
[42] S. 1, § 2-5B3(a)(2):
[W]ith intent to induce or otherwise cause other persons to engage in armed insurrection which is, in fact, in violation to paragraph (1), he: . . . (ii) organizes a conspiracy which engages in such advocacy, or is an active member of such conspiracy, facilitates such advocacy.
[43] S. 1400, § 1103(a):
A person is guilty of an offense if, with intent to bring about the overthrow or destruction of the government of the United States, or any state or local government, as speedily as circumstances permit, he: . . . (2) organizes, leads, recruits members for, joins, or remains an active member of, an organization which has as a purpose the incitement described in subsection (a)(1).
[44] 367 U.S. 203 (1961).
[45] *Id.* at 227-28.
[46] 367 U.S. 290, 299-300 (1961).
[47] Nathanson, *The Right of Association*, in THE RIGHTS OF AMERICANS 231, 251 (N. Dorsen ed. 1970, 1971)
[48] S. 1400, § 1116(a):
A person is guilty of an offense if, with intent to hinder, interfere with, or obstruct, the recruitment, conscription, or induction of a person into the armed forces of the United States, he: . . . (3) incites others to engage in conduct which, in fact, constitutes an offense under section 1115 (Evading Military or Substitute Service).
[49] S. 1400, § 1115.
[50] 50 U.S.C. § 462(a) (Appendix—War and National Defense 1970):
[O]r any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence *or otherwise*, with the administration of this title . . . or the rules or regulations made pursuant thereto . . .
(emphasis added).
[51] S. 1400, § 1116, proscribes two additional forms of conduct:
(1) creation of physical interference or obstacle to recruitment, conscription, or induction into the armed forces, and (2) use of force, threat, intimidation, or deception against a public servant of any government agency engaged in such recruitment, conscription, or induction.
[52] 484 F. 2d 556 (7th Cir. 1973).
[53] *Id.* at 564.
[54] *Id.* at 565.

with such a convincing sincerity that young auditors or readers might flee to Canada rather than answering the call of their Selective Service boards. Even though the words had this impact, it would be difficult to conclude that the peace-making or pamphleteering was other than protected activity. Yet, the actor could be prosecuted for a violation of Section 462(a) in that he had attempted to hinder or interfere with the administration of the Selective Service by means "otherwise" than force or violence.

The prohibition of S. 1400 in this area is much more clearly defined than that of the statute overturned in *Baranski*. The latter proscribed use of "any way, by force or violence or otherwise," to hinder the Selective Service system, while the former prohibited only inciting others to engage in conduct which specifically violates the previous section in the proposed code. On this basis it could be argued that S. 1400 avoids the problem of overbreadth.[55] It is clear, nevertheless, that the conduct proscribed under the proposal—inciting others to engage in conduct which constitutes evading military or substitute service—could easily encompass the type of speech described in the example from *Baranski*. Unless it can be demonstrated that such speech poses a major threat to national security, this subsection of S. 1400 should be eliminated.

Still another significant first amendment question is raised by the proposed codes in subsections dealing with inciting a member of the armed forces to mutiny, insubordination, or refusal to carry out a duty.[56] In view of their dependence on the military's application of the first amendment to its own members, these subsections may lead to restriction of first amendment rights of civilians. Members of the armed forces have not been granted the same constitutional freedoms as civilians.[57] For example, in a case involving an off-duty reserve officer who carried a sign derogatory to the President in a public demonstration against the Vietnam war, the military court upheld the three-year maximum sentence for acts and speech that would have been protected in a civilian context.[58] Had the soldier specifically disobeyed the order of a superior in carrying the sign, he might have been convicted for insubordination as well. And had the soldier's hypothetical insubordination resulted from his listening to a civilian speaker urge that every citizen should actively protest against the war, that civilian could be convicted under both S. 1 [59] and S. 1400.[60] Even assuming the propriety of the court-martial in view of the distinctive conditions of military life,[61] the proposed sections would apply to anyone who caused or incited insubordination, thereby imposing on civilians' first amendment rights the restrictive military viewpoint.[62]

*"Wartime" offenses*

In the area of sabotage a different type of problem arises, one which involves the definition of the term "war." Under current law,[63] the offense of sabotage can occur only during time of war or national emergency. The proposed offenses of sabotage [64] may occur at any time, with the existence of war or national emergency affecting only the severity of the penalty.[65] In neither current nor proposed law, however, does the legislature define the term "war." The determination of whether a war exists is left, therefore, to the courts which try individual cases arising under those sections. In light of the controversy generated by the undeclared Vietnamese conflict, one would expect little uniformity in national security cases dealing with this question. As a result, the potential for arbitrary or discriminatory sentencing is readily apparent.[66]

In providing a related offense of impairment of military effectiveness by false statement,[67] S. 1400 injects the constitutional issue of free speech into the matter of defining war.[68] As under existing law,[69] S. 1400 is limited to statements communicated in time of war with intent to impair military operations. Where the present class of false statements is undefined, however, S. 1400 comprises specified subjects—losses, plans, operations, conduct of the military forces, civilian or military catastrophe—or "any other matter of fact which, if believed, would be likely to affect the strategy or tactics of the military forces of the United States or likely to create general panic or serious disruption." [70]

The power to proscribe certain types of speech is greater during wartime because "war opens dangers that do not exist at other times." [71] Such power having encompassed the general provisions of the existing offense of false statement, it would undoubtedly justify the restrictions on free speech attending the enforcement of the S. 1400 offense. Given those restrictions, however, it is all the more important that the term "war" be defined. A legislative definition of the term would help provide uniformity of opinion in cases arising under all sections of the code which refer to war,[72] those which provide offenses contingent upon the existence of war and those which increase penalties for offenses committed during wartime. In view of the restrictions on free speech imposed by several of these sections, the narrow definition of war—that which is declared by Congress in accordance with article I, § 8, of the Constitution—is recommended for purposes of the code.

[55] To be declared unconstitutionally overboard, a statute must lend itself to a substantial number of impermissible applications involving deterrence of conduct protected by the first amendment and there must be no valid construction which avoids abridgement of first amendment interests. *Id.* at 570, *quoting* Dellinger v. United States, 472 F. 2d 340, 357 (7th Cir. 1973).

[56] Those sections are S. 1, § 2-5B6(a)(3) and S. 1400, § 1117. S. 1400, § 1117 deals as well with aiding mutiny or desertion, an offense which S. 1 treats separately in § 2-5B10(a)(2). The proposed sections are derived from 18 U.S.C. §§ 2387-88, which deal with impairing the morale of the armed forces. The two proposals differ in their treatment of attempt and incitement with regard to the above subsections. S. 1, § 2-5B6(a)(3) requires that insubordination, mutiny, or refusal of duty by a member of the armed forces actually occur. The subsection eliminates the current sanctions against mere attempt to cause such conduct. S. 1400, on the other hand, maintains the current element of incitement of members of the armed forces to engage in mutiny, insubordination, refusal of duty, or desertion. Section 1117(a)(2) proscribes aiding, abetting, counseling, commanding, inducing, procuring, or facilitating the commission or attempted commission of mutiny or desertion by a member of the armed forces. Therefore, such conduct by members of the armed forces need not necessarily occur for § 1117 to be violated.

[57] *See generally* R. Rivkin, G.I. Rights and Army Justice 90-145 (1970); Boyce, *Freedom of Speech and the Military*, 1968 Utah L. Rev. 240; Brown, *Must the Soldier Be a Silent Member of Our Society?*, 43 Mil. L. Rev. 71 (1969); Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 Harv. L. Rev. 1697 (1968); Sherman, *The Military Courts and Serviceman's First Amendment*, 22 Hastings L.J. 325 (1971); Wulf, *Commentary: A Soldier's First Amendment Rights: The Art of Formally Granting and Practically Suppressing*, 18 Wayne L. Rev. 605 (1972), Note, *Prior Restraints in the Military*, 73 Colum. L. Rev. 1089 (1973); Note, *Dissenting Servicemen and the First Amendment*, 58 Geo. L.J. 534 (1970).

[58] United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

[59] S. 1, § 2-5B6(a)(3).

[60] S. 1400, § 1117(a)(1).

[61] *See* United States v. Priest, 21 U.S.C.M.A. 564, 45 C.M.R. 338, 344 (1972).

[62] *Statement of ACLU* at 1457.

[63] 18 U.S.C. §§ 2153-54 (1970).

[64] S. 1, § 2-5B4 and S. 1400, § 1111.

In addition to intentional sabotage, S. 1400 contains a section which makes it an offense to impair military effectiveness through grossly negligent conduct. A party violates this section when he commits an act which would constitute a violation of the substantive sabotage provision and when that act is performed "in reckless disregard of the fact that his conduct might impair, interfere with, or obstruct the ability of the United States or an associate nation to prepare for or engage in war or defense activities." S. 1400, § 1112.

[65] S. 1, § 2-5B4 grades sabotage as a class A felony if committed in time of war and if it "jeopardizes life or success of a combat operation;" a class B felony if committed in time of war; and a class C felony if not committed in time of war. S. 1400, § 1111 grades as a class A felony an offense committed in time of war and "causing damage to or impairment of a major weapons system or a means of defense, warning, or retaliation against large scale attack;" a class B felony if committed in time of war in any other case or if committed during a national defense emergency; a class C felony in any other case. The elevation of causing injury to "sudden strike" systems to the highest order of sabotage offense meets the realities of modern defense conditions in which attacks on these systems may occur before a national emergency is declared or a state of war exists. *See* 1 National Commission on the Reform of Federal Criminal Laws, Working Papers 443 (1970). [hereinafter cited as Working Papers].

[66] Both the New York City Bar Association and the ACLU have urged Congress to define the term "war" for purposes of the new federal criminal code. *See Statement of New York City Bar Association*, In Hearings, *supra* note 17, pt. III at 3513; and *Statement of ACLU*, at 1452-53.

[67] S. 1400, § 1114(a):

Offense.—A person is guilty of an offense if, in time of war and with intent to aid the enemy or to impair, interfere with, or obstruct the ability of the United States to engage in war or defense activities, he knowingly communicates a statement, which in fact is false, concerning: (1) losses, plans, operations, or conduct of the military forces of the United States, or those of an associate nation or of the enemy; (2) civilian or military catastrophe; or (3) any other matter of fact which, if believed, would be likely to affect the strategy or tactics of the military forces of the United States or likely to create general panic or serious disruption.

[68] 18 U.S.C. § 2388(a) (1970):

Whoever, when the United States is at war, wilfully makes or conveys false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies . . .

[69] S. 1 also proscribes certain types of speech during wartime: S. 1, § 2-5B6 (Obstructing Military Service), and S. 1, § 2-5B9 (Violation of Wartime Censorship).

[70] S. 1400, § 1114. The reference to "other matter of fact" implies that the specified subjects are themselves matters of fact, as distinguished from statements of political opinion. *See* 1 Working Papers, *supra* note 65, at 448-50. If such a construction be accurate, the special dangers inherent in prohibiting statements of opinion, particularly political opinion, would be recognized and avoided. The dangers inherent in prohibiting speech which deals with general matters of fact, however, would still be present.

[71] I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produced or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.
Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Opinion of Holmes, J., dissenting).

[72] Throughout the proposed chapters on national security, the offenses and grading are based upon wartime-peacetime and intermediate distinctions. Specifically, S. 1 offenses of military activity against the United States, obstruction of military service, and violation of wartime censorship exist only during time of war; the S. 1400 offense of impairing military effectiveness by false statement is likewise dependent upon the existence of war. In addition to the sabotage sections described above, S. 1 has created two- and three-level grading for its offenses of espionage and misuse of national defense information; similarly, though its categories differ, S. 1400 offenses of impairing military effectiveness, inciting or aiding mutiny, insubordination, or desertion, espionage, and disclosing national defense information are graded on various levels between wartime and peacetime.

*Restricted information*

The final major constitutional issue raised by the national security sections of the proposed codes concerns dissemination of restricted information. This note concentrates upon one crucial difference between S. 1 and S. 1400 in this area: the categorization of information which may not be conveyed. Both proposals differ significantly from current espionage law;[73] however, where S. 1 would narrow its scope, S. 1400 would broaden it. S. 1 has replaced all reference to "classified" information with its own definitions of the types of information which may not be misused.[74] S. 1400, on the other hand, maintains the current distinction between "national defense information," for which a definition is provided,[75] and "classified information," for which definition is left to the provisions of other statutes, executive orders or rules and regulations thereunder.[76] As under existing law, violations of S. 1400 may rest upon the fact that the information conveyed or obtained has been marked or designated "classified information" by persons authorized to do so by statute or executive order.[77] S. 1400 would, however, broaden the current offense both as to "leakers"—by including former officials and others entrusted with classified materials, and as to recipients—by covering disclosure to any unauthorized person, not merely communists or foreign agents.[78] Since S. 1400 precludes the defense of improper classification,[79] it would be sufficient for conviction that the information has been classified.

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[73] Present federal law treats unlawful dissemination of confidential government documents in several disparate sections. In broad outline, current law:

1. Prohibits the "communication" of national defense information to a person not entitled to it, 18 U.S.C. § 793 (1970);
2. Prohibits the "communication" or "publication" of the disposition of the armed forces in time of war, 18 U.S.C. § 794 (b) (1970);
3. Prohibits the transfer or "publication" of photos of defense installations, 18 U.S.C. § 797 (1970); and
4. Prohibits the transfer or "publication" of cryptography or communication of intelligence information, 18 U.S.C. § 798 (1970).

Other limited provisions are found in other titles of the United States Code. *See, e.g.*, 50 U.S.C. § 783(b) (1970) (prohibits any officer or employee of the United States to communicate classified data to a representative of a foreign power or a member of any Communist organization).

*Hearings*, *supra* note 17, pt. V at 4764 (citations in original).

*See generally* New York Times Co. v. United States, 403 U.S. at 736-39 (White, J., concurring) and Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 936-1065 (1973).

[74] S. 1, § 2-5A1(10):

"[N]ational defense information" means information regarding: (i) the military capability of the United States or of a nation at war with a nation with which the United States is at war; (ii) military or defense planning operations of the United States; (iii) military communications, research, or development of the United States; (iv) restricted data as defined in section 2014, Title 42, United States Code; (v) communications information; (vi) in time of war, any other information which if revealed could be harmful to national defense and which might be useful to the enemy; (vii) defense intelligence of the United States, including information relating to intelligence operations, activities, plans, estimates, analyses, sources, and methods.

S. 1, § 2-5B8(a):

Offense.—A person is guilty of an offense if in a manner harmful to the safety of the United States he: (1) knowingly reveals national defense information to a person who is not authorized to receive it; (2) is a public servant and with criminal negligence violates a known duty as to custody, care, or disposition of national security information, or as to reporting an unauthorized removal, delivery, loss, destruction, or compromise of such information; (3) knowingly having unauthorized possession of a document or thing containing national defense information, fails to deliver it on demand to a Federal public servant entitled to receive it; (4) knowingly communicates, uses, or otherwise makes available to an unauthorized person communications information; (5) knowingly uses communications information; or (6) knowingly communicates national defense information to an agent or representative of a foreign power or to an officer or member of an organization which is, in fact, defined in section 782(5), title 50, United States Code.

[75] S. 1400, § 1126(g):

"[I]nformation relating to the national defense" includes information, regardless of origin, relating to: (1) the military capability of the United States or of an associate nation; (2) military planning or operations of the United States; (3) military communications of the United States; (4) military installations of the United States; (5) military weaponry, weapons development, or weapons research of the United States; (6) restricted data as defined in section 11 of the Atomic Energy Act of 1954, as amended 42 U.S.C. § 2014]; (7) intelligence of the United States, and information relating to intelligence operations, activities, plans, estimates, analyses, sources, and methods, of the United States; (8) communications intelligence information or cryptographic information as defined in subsection (d) or (e); (9) the conduct of foreign relations affecting the national defense; or (10) in time of war, any other matter involving the security of the United States which might be useful to the enemy.

[76] S. 1400, § 1126(b);

"[C]lassified information" means any information, regardless of its origin, which is marked or designated pursuant to the provisions of a statute or executive order, or a regulation or rule thereunder, as information requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

[77] S. 1400, § 1124(a);

Offense.—A person is guilty of an offense if, being or having been in authorized possession or control of classified information, or having obtained such information as a result of his being or having been a federal public servant, he knowingly communicates such information to a person not authorized to receive it.

[78] *Hearings*, *supra* note 17, pt. V at 4843.

[79] S. 1400, § 1124(d);

Defense Precluded.—It is not a defense to a prosecution under this section that the classified information was improperly classified at the time of its classification or at the time of the offense.



The degree of discretion granted by S. 1400 to allow the executive branch to withhold information from the public has ominous first amendment ramifications. A fundamental guarantee of the first amendment is the public's right to know about the activities of its government.[80] In direct conflict with the public's right to know, however, is the government's need for secrecy in those areas involving protection of sensitive information from disclosure to unfriendly states, security measures to insure the flow of intelligence, and conduct of certain diplomatic business.[81] An extensive system of classification has been set up by the executive branch to prevent disclosure of such state secrets.[82] S. 1400 would sanction that system by punishing unauthorized disclosure and obtaining of classified information, whether or not that information was improperly classified. Thus, S. 1400 could be used to plug leaks of information that had been classified not in the interest of the nation as a whole, but to avoid injury or embarrassment to particular individuals or groups in the government

The justification for S. 1400 would be strong if there were no evidence that the classification system has been abused, that executive orders [83] have been strictly adhered to, and that the classification of Top Secret has been reserved for exceptional circumstances.[84] The case of the Pentagon Papers, however, casts doubt upon the traditional justification. The government's action to enjoin publication of the mainly Top Secret documents was reviewed by nineteen federal judges before reaching the Supreme Court.[85] Though the government was given every opportunity to demonstrate how the national security interest would be endangered by publication, not one judge wholly agreed with the government's claim.[86] Twelve of them were completely unpersuaded that publication of the documents would gravely prejudice national defense interests or result in irreparable national injury; the other seven merely would have given the government another chance to make its showing on remand. In a *per curiam* opinion, the Supreme Court held that the government had not met the burden of showing justification for such restraint.[87] Injunctive relief against publication has traditionally been an area in which the government's burden of proof is extremely heavy.[88] Nevertheless, the failure of the government to persuade the judges of the sensitive nature of the Top Secret documents in question well illustrates the point that the classification system has exceeded its bounds.

Regardless of whether abuse of the classification system has been in self-interest or as a result of massive bureaucracy,[89] it is clear that excessive secrecy is a

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[80] *See* Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-56. According to Meiklejohn, the first amendment forbids Congress to abridge the freedom of a citizen's speech, press, peaceable assembly, or petition, whenever those activities are utilized for the governing of the nation. The scope of the amendment, therefore, includes; (a) understanding issues facing the nation, (b) passing judgment on decisions our agents make upon those issues, and (c) sharing in devising methods by which those decisions can be made wise and effective or, if need be, supplemented by others which promise greater wisdom and effectiveness.

[81] *Developments in the Law*, *supra* note 6, at 1190-92.

[82] For a detailed review of the history of the classification system, see *Security Classification as a Problem in the Congressional Role in Foreign Policy*, in *Hearings*, *supra* note 17, pt. III at 3003-94.

[83] For copies of basic documents on security classifications, see *Id.* at 3094-3144.

[84] *See* Exec. Order 10,501, 3 C.F.R. 292, 293 (1971), 50 U.S.C. § 401 (1970), *amending* 3 C.F.R. 970 (1949-53 Comp.). The Top Secret classification is to be reserved for defense information of which the unauthorized disclosure;

could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technical development vital to the national defense.

*Id.*

[85] United States v. New York Time Co., 328 F. Supp. 324 (S.D.N.Y.), 444 F.2d 544 (2d Cir. 1971): United States v. Washington Post Co., 446 F.2d 1322, 446F.2d 1327 (D.C. Cir. 1971).

[86] *Statement of ACLU* at 1450.

[87] New York Times Co. v. United States, 403 U.S. 713 (1971).

[88] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

[89] *See Developments in the Law*, *supra* note 6, at 1199-1201. In the Department of Defense alone (one of thirty-four departments or agencies with original authority to classify),

803 officials have original authority to classify documents Top Secret; 7,686 employees have original Secret classifying au... ity; and 31,048 have original Confidential authority. . . . A Department of Defense official estimated that Defense alone holds over twenty million classified documents. In addition, the number of documents classified Top Secret and Secret in the defense industry has been placed at 'something like 100 million.'

*Id.* (footnotes omitted).

problem.[90] The question remains whether such a system should serve as the basis for legislation restricting first amendment rights of citizens to be informed about the activities of their government. Given the fundamental importance of those rights, and the abuses of the classification system, an alternative which protects the former and avoids the latter ought to replace the classifications of S.1400. One alternative would be provision for the defense of improper classification. The burden of proof, however, would fall upon the defendant, giving great advantages to the prosecution and perhaps entailing public disclosure of sensitive information as evidence in court. S. 1 follows a better course in eliminating "classification" as a criterion of the offense and replacing it with specifically defined categories of "national defense information" which may not be misused. In this way, S. 1 allows sensitive information to be protected, but refuses to give government withholding of nonsensitive information the sanction of law.[91]

In discussing the constitutional issues presented by the national security sections of the proposed federal criminal codes, this note has sought to demonstrate that S. 1 and S. 1400 tend to favor national security interests over freedom of expression and association. Although this tendency in various sections may restrict the exercise of civil liberties, the proposals are not necessarily invalid, because the determination of unconstitutionality entails "a subtle analysis that takes into account a variety of factors, including a balancing of competing interests and goals, those of the Government and those of the individual." [92] S. 1 and S. 1400 have succeeded for the most part in meeting current minimal constitutional standards by which existing laws have been upheld. Whether the proposals accurately reflect the needs of national security in restricting first amendment freedoms is, however, another question.

As might be expected, the bill expressing more concern for national security was submitted to Congress by an Administration which has experienced much difficulty in dealing with those who object to its national security policies. The sections in S. 1400 concerning intentional and reckless impairment of military activities, disclosure of classified information, paramilitary activities,[93] and registration of foreign agents,[94] have no counterpart in S. 1. One might conclude that the Senate subcommittee does not believe that the threat to national security posed by possible violations of such sections outweighs the possible restriction on civil liberties. This conclusion is supported by the consistently less restrictive position taken by the drafters of S. 1 in regard to advocacy of unlawful actions. Nevertheless, adoption of S. 1 as it stands would not meet the ideal of the first amendment.

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[90] *Id.* at 1201.
Former Assistant Attorney General Rehnquist, who served as chairman of a committee appointed by President Nixon to review the classification system, told a House subcommittee that virtually every member of his committee believed that there was a tendency in the Government to overclassify. And former Ambassador to the United Nationals Arthur Goldberg testified:

> I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time.

*Id.*

[91] Although the basic approach of S. 1 appears to be acceptable, the categories of "national defense information" that are set up in lieu of reliance on the classification system may contain serious inadequacies in themselves. Two commentators have reached the conclusion that neither proposal is adequate:

> No legislation can be adequate unless it recognizes that at least three problems must be treated independently: spies, government employees and ex-employees, and newspapers and the rest of us. Both the present espionage statutes and the proposals of S. 1 and S. 1400 are fatally defective in that they ignore the necessity of separate considerations of the distinct interests in each of these contexts.

Edgar & Schmidt, *supra* note 73, at 1083-84.

[92] United States v. Barnuski, 484 F.2d at 569.

[93] The paramilitary political activities section of S. 1400, § 1104 has no counterpart in existing law other than the current registration requirement for organizations engaged in civilian military activity, 18 U.S.C. § 2386 (1970). Nor does it have a counterpart in S. 1. There are, however, similar statutes in existence in many other countries. *See* 1 WORKING PAPERS, *supra* note 65, at 437-39. Section 1104 applies to paramilitary activities conducted by an organization or group of ten or more persons which has as a purpose the taking over of, control of, or assumption of the function of, an agency of the government by force or threat of force. Paramilitary activities include acquisition, catching, use, or training in the use of weapons. The offense, therefore, subjects otherwise legal activity to criminal sanctions if conducted in association with a group which has an unlawful purpose, regardless of whether that purpose is attempted or accomplished.

[94] S. 1400, § 1127 describes the offense of failing to register as a person trained in a foreign espionage system as required by 50 U.S.C. §§ 851 and 854. S. 1400, § 1128 punishes failure to register as, or acting as, a foreign agent as required by the Foreign Agents Registration Act of 1938, as amended, 22 U.S.C. §§ 611 *et seq.* (1970). Both proposed sections raise the problems of self-incrimination.



To more closely approach that ideal, however, several changes might be made in the proposed bills:

(1) With regard to treason, either proposal would be acceptable. If the related S. 1 offense of "military activity against the United States" is to be adopted, however, it should be made clear that the word "facilitate" does not include trivial advocatory conduct.

(2) As for advocacy of armed insurrection, the S. 1 proposal is much preferred. It should be adopted, however, only after the addition of the word "imminent" in the intent requirement. Both proposals concerning conspiracy to advocate or incite armed insurrection should be eliminated.

(3) The subsections dealing with incitement to evasion of military service in S. 1400, and to mutiny, insubordination, or refusal to carry out a duty in both bills, ought to be carefully scrutinized. If they cannot be narrowed to exclude from coverage conduct such as that described in the examples, then they, too, should be eliminated.

(4) The term "war" should be defined for purposes of the code as that which is declared by Congress in accordance with article I. §8 of the Constitution.

(5) The section of S. 1400 which bases the offense on the fact that information has been classified should be eliminated or, at least, the defense of improper classification should be allowed.

A strong case can be made for the contention that these changes would not leave the national security unprotected. However, in light of the restraints imposed on civil liberties by the proposals as they now stand, the burden ought to be placed on the proponents of the bills to show the necessity for the more questionable aspects.

In analyzing three recent national security decisions, one commentator has concluded that the Burger Court is highly influenced by the presence or absence of congressional action in matters of national security.[95] A similar observation on the importance of legislative action was made even two decades earlier by Professor Wechsler in a symposium on civil liberties:[96]

> "The scope of that judicial review [of the competing values of individual freedom and social interests] may be limited by what is in effect a presumption of validity, or a deference to legislative judgment, at least where the legislation condemns specific doctrine or specifically described types of meetings."

The importance of the policy choices reflected in the final code cannot, therefore, be overremphasized. Whether the balance is tipped in favor of the government or in favor of the individual rests, to a great extent, in the hands of the legislature.

## RIOT LEGISLATION: A TALE OF TWO ERAS

The federal anti-riot statute [1] is no stranger to controversy. Enacted in response to the civil disorders of the 1960's,[2] the law has survived several constitutional challenges.[3] The statute received national attention when some members of the "Chicago Eight" were convicted [4] of violating the statute in connection with the disturbances at the 1968 Democratic National Convention in Chicago.[5] It is of public interest, then, that proposals for a new federal criminal code, sponsored by Senators McClellan [6] and Hruska,[7] contain provisions which would replace the current law against inciting to riot.

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[95] Becker, *The Supreme Court's Recent "National Security" Decisions: Which Interests Are Being Protected?*, 49 TENN. L. REV. 1, 26-27 (1972).

[96] Wechsler, *Symposium on Civil Liberties*, 9 A.L. SCH. REV. 881, 887 (1941).

[1] 18 U.S.C. § 2101 (1968).

[2] *See* note 8 *infra*.

[3] National Mobilization Comm. to End the War in Viet Nam v. Foran, 411 F.2d 934 (7th Cir. 1969) (indefiniteness and vagueness); United States v. Hoffman, 334 F. Supp. 504 (D.D.C. 1971) (freedom of assembly, freedom of travel, due process of law and commerce power); *In re* Shead, 302 F. Supp. 560 (N.D. Cal. 1969), *aff'd sub nom.* 417 F.2d 384 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970) (overbreadth and vagueness).

[4] The convictions were reversed on the ground of improper demeanor of the trial judge and prosecutor in United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

[5] The week of rioting in Chicago left 192 policemen and hundreds of demonstrators injured. There were 668 arrests and damage to police vehicles totaled $15,175.36. THE WALKER REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, RIGHTS IN CONFLICT, 351-58 (1968).

[6] S. 1, 93d Cong., 1st Sess. § 2-9B1 (1973) [hereinafter cited as S. 1].

[7] S. 1400, 93d Cong., 1st Sess. § 1801 (1973) [hereinafter cited as S. 1400]. There are also anti-riot provisions in two bills recently introduced in the House of Representatives. H. R. 6046, 93d Cong., 1st Sess. § 1801 (1973), and H.R. 10047, 93d Cong., 1st Sess. § 1801 (1973) are identical in language to S. 1400 and to the THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT § 1801 (1971), respectively.

The present and proposed laws are the products of different social and political climates. The current statute became law at the height of the turbulent 1960's.[8] Hastily drafted for quick passage, the law was based on the premise that riots are caused by roving bands of agitators who escape across state lines before they can be apprehended by local authorities.[9] The current statute is thus aimed at controlling this type of instigator. In contrast, S. 1 and S. 1400 were drafted in an era of relative calm. Racial strife has markedly subsided in recent years and the conclusion of the American involvement in the Vietnam war has brought a commensurate decrease in the anti-war protest activity that began in the latter half of the 1960's.[10] Despite this change in climate, the proposals appear to adopt the same posture toward incitement to riot as the present law.[11]

The origin of the present law began with the introduction of a similar provision in the House of Representatives in 1966[12] amid charges that the Justice Department was unwilling to prosecute alleged interstate agitators.[13] The measure, passed overhwelmingly by the House, was defeated in the Senate.[14] The bill which eventually became the present law was introduced in the House in early 1967.[15] The haste with which the bill was pushed through the House is demonstrated by the fact that no hearings on the measure were conducted in the 90th Congress.[16] The only hearings on the subject were held in connection with the 1966 bill, and those proceedings lasted less than three hours.[17] By June 29, 1967, the House Judiciary Committee had reported favorably on the bill.[18] The report stated that "[t]he Committee believes that the enactment of this legislation to deter and punish those who travel interstate to incite such violences is salutary." [19]

On the House floor the bill was styled as a weapon against an alleged Communist-inspired anarchy sweeping the country.[20] Blame was placed on interstate agitators, and a white backlash was predicted if the legislation failed to pass.[21] Congressman Sikes of Florida indicated the frame of mind of many legislators when he declared that "[t]hose who incide to violence should be punished whether or not freedom of speech is impaired." [22] The bill was passed by the House by a vote of 348 to 70.[23]

In the Senate the bill was referred to the Judiciary Committee, and Chairman Eastland noted that speeding the measure through the chamber was an important consideration:[24]

"We have legislation before us which has been approved by the other body. We have a duty, and it will be our purpose to deal with this legislation as speedily as possible. We shall try to bring together in this record, as rapidly as we can, the information we need to act on this legislation in a responsible way."

The consequences of moving too fast with the legislation did not go unnoticed by some committee members, who observed that the provision had passed the House at the height of summer rioting.[25] Senator Long of Missouri favored anti-riot legislation, but cautioned that "we must not enact a measure today which will come back to haunt us in more normal times" [26]

On the Senate floor the atmosphere of crisis and the desire for immediate action were widespread. It was argued that freedom from rioting constituted a cherished privilege,[27] and Senator Thurmond of South Carolina, condemning outside agitators, declared that rioting "has created the most severe domestic crisis in the United States since 1860."[28] Drafting of amendments on the Senate floor was disorganized;[29] Senator Javits of New York candidly admitted just before the voting that "I still cannot say that I understand the full thrust of the matter . . . ."[30] The anti-riot provision, an amendment to the Civil Rights Bill of 1968, was passed by the Senate on March 11, 1968.[31] The final product, 18 U.S.C. § 2101, reflects the haste by which it became law. A section dealing with organized labor appears to be unnecessary,[32] and a provision pertaining to admission of evidence is unclear.[33]

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[8] Though there were only six riots in the United States in 1961, the number climbed to a dozen in 1963 and to 15 in 1964. After 1963, more than half the disturbances were racial in nature, including the riots that struck 38 cities in 1966. Between May 14, 1961, and June 22, 1967, approximately 50 persons were killed and about 2,000 injured in riots. There were 24 riots between September 27, 1966, and June 22, 1967. Property damage for the year 1964 alone totaled between $6.5 and $8.5 million. 113 CONG. REC. 19354-55 (1967).

[9] *See* text accompanying notes 20-24 *infra*. On the House floor Congressman Talcott stated:

> Reports following each of the serious riots this summer have indicated conclusively that professional agitators, anarchists, hoodlums, ex-convicts, and their ilk, fomented most of the trouble in Chicago, Cleveland, Omaha, New York, and elsewhere.

112 CONG. REC. 19966 (1966).

[10] Race-related civil disorders decreased from 724 in 1968 to 240 in 1971, and such disorders became progressively less serious over that time period. In 1967 the National Guard was needed in 12 per cent of the summer disorders, but by 1971 that percentage had dropped to 3. LEMBERG CENTER FOR THE STUDY OF VIOLENCE, BRANDEIS UNIVERSITY, THE LONG HOT SUMMER? AN ANALYSIS OF SUMMER DISORDERS 1967-1971 at 4, 12-13, 15-16 (1972).

The decline in racial violence can perhaps be traced to a new attitude on the part of blacks. For the most part, black neighborhoods bore the brunt of the rioting and, in the words of Rev. Ed Reddick, a black leader, "[t]here may have been an awareness that violence is self-defeating, that you have to work for political and economic power." TIME, Sept. 20, 1971, at 16.

Another example of the general decrease in violence is evidenced by the results of a questionnaire sent to 84 college presidents by U.S. NEWS & WORLD REPORT. The poll, which covered the 1971-1972 academic year, revealed that violence decreased or disappeared at 77 per cent of the schools. Eighty per cent of the presidents said students were "less radical" than in 1970 and most attributed this, and the decrease in violence, to the lessening of the Vietnam involvement. A University of Kansas official observed that "[d]emonstrations here were orderly, with greater emphasis by student leaders on avoidance of physical damage or disruption of normal activities." *Id.*

A majority of the presidents also reported that race relations on campus had improved, and R. D. Monks of predominately black Wilberforce University noted that students there no longer talk "black power," but instead talk "brain power." U.S. NEWS & WORLD REPORT, June 19, 1972, at 28-33.

[11] For a comparison of S. 1, S. 1400 and the present law, see text accompanying notes 34-61 *infra*.

[12] H.R. 14765, 89th Cong., 2d Sess. (1966).

[13] 112 CONG. REC 19965 (1966). Congressman Whitten asserted:

> This provision is a sound one. I hope the Senate will adopt it as separate legislation. Under the administration of the present Attorney General, however, I doubt that much would be done to enforce its provisions.

*Id.*

[14] The anti-riot provision, an amendment to the Civil Rights Act of 1966, was passed, 389-25, in the House in a vote separate from that taken on the bill as a while. 112 CONG. REC. 18737 (1966). In the Senate, a motion for consideration of H.R. 14765 was the object of extended debate, and the bill was set aside after a cloture motion failed. 112 CONG. REC. 23042-43 (1966).

[15] H.R. 421, 90th Cong., 1st Sess. (1967).

[16] *See* 113 CONG. REC. 19349 (1967).

[17] *Id.*

[18] H.R. REP. NO. 472, 90th Cong., 1st Sess. (1967).

[19] *Id.* at 3. The report also observes that 70 similar proposals were introduced in the House during the session of the 90th Congress. *Id.* at 2. The three committee members who dissented argued that the federal government should not intervene in the area of riot control. *Id.* at 5.

[20] 113 CONG. REC. 19347-48 (1967). Congressman Colmer declared:

> [W]e are dealing here with an organized conspiracy . . . that is backed by, yes, the Communists who are working in this country and who have a big stake involved here. They are the people who have the most to gain in this kind of anarchy and unlawfulness.

*Id.* at 19348.

[21] *Id.* at 19351-61. For a discussion of the politics of law and order, see T. WHITE, THE MAKING OF THE PRESIDENT 1968, at 188-223 (1969).



[22] 113 CONG. REC. 19351 (1967). Congressman Sikes also stated:

> Freedom of speech is a zealously guarded right. But freedom of speech must not be allowed to immunize from punishment a person who incites others to maim or kill or riot. Freedom of speech does not guarantee the right to create disorder.

*Id.*

[23] *Id.* at 19433.

[24] *Hearings on H.R. 421 Beofre the Senate Comm. on the Judiciary, 90th Cong.*, 1st Sess., pt. 1, at 5 (1967).

[25] *Id.* at 13.

[26] *Id.* Some Senators were so anxious to get an anti-riot law on the books that the provision was tacked onto the 1968 Civil Rights Bill and put to a vote before the full Senate before the Judiciary Committee had reported. 114 CONG. REC. 5209 (1968). Senator Thurmond, a strong supporter of the legislation, stated on the Senate floor "that although this is not just exactly what we want, it will give us a riot bill." *Id.* at 5212. Senator Scott responded:

> While supporting the objective of the Thurmond amendment, I question the wisdom of the Senate on this sensitive matter at this time without the benefit of the recommendations of the Committee on the Judiciary. Rushing too hastily, and perhaps with ill-considered judgment, to adopt this amendment now, would be unwise and premature. Our committee deserves an opportunity to report a measure after due and adequate deliberation and consideration.

*Id.* at 5209.

[27] Id. at 5206 (remarks of Senator Lausche). Senator Thurmond had stated at the committee hearings: Looting and arson are not mere property damage but they are the collapse of civil order. They are the collapse of civilized society. The police and the troops must be allowed to use the necessary force to restore order immediately.

*Hearings on H.R. 421 Before the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 1, at 19 (1968).

[28] 114 CONG. REC. 5203 (1968).

[29] *Id.* at 5212.

[30] *Id.* at 5214.

[31] *Id.* at 5992.

[32] 18 U.S.C. § 2101 (1968) provides in pertinent part:

> (c) Nothing contained in this section shall be construed to make it unlawful for any person to travel in, or use the facilities of, interstate or foreign commerce for the purpose of pursuing the legitimate objectives of organized labor, through orderly and lawful means.

It seems there is no need for a specific exemption for organized labor. No group or organization, labor or otherwise, using "orderly and lawful means" would be in violation of the statute.

[33] 18 U.S.C. § 2101 (1968) provides in pertinent part:

> (b) In any prosecution under this section, proof that a defendant engaged or attempted to engage in one or more of the overt acts described . . . and (1) has traveled in interstate or foreign commerce, or (2) has use of or used any facility of interstate or foreign commerce . . . such travel or use shall be admissable proof to establish that such defendant traveled in or used such facility of interstate or foreign commerce.

The provision appears to say that proof of travel or use is admissable to prove travel or use.

The present law requires two elements to incur a violation.[34] First, a person must travel in, or use the facilities of, interstate or foreign commerce, with intent to perform any of the acts specified in sections (A)-(D) of the statute.[35] Second, the person must commit, or attempt to commit, an overt act in furtherance of sections (A)-(D), at the time of travel or use, or later.[36] There is no requirement that an actual riot occur.[37]

S. 1 follows the present law by not requiring an actual riot to incur a violation, for it punishes a person who incites or urges a riot "under circumstances in which there is substantial likelihood his advocacy will imminently produce a riot."[38] S. 1400 makes one who "incites a riot" an offender.[39] From this language it is unclear whether an actual riot must result to consummate the offense. "Incite" can mean either to "urge on" or "to bring into being."[40] Thus, it could be argued that if a person strongly urges another to riot he "incites" a riot. Under the second definition, though, a person would not violate the statute unless an actual riot occurred. Other portions of the proposal suggest that the latter interpretation is the correct one. The statute provides for one type of punishment "if *the riot* involves persons in a facility which is used for official detention."[41] Other sections speak of "the riot" in delineating jurisdiction.[42]

Though the S. 1 provision does not, on its face, require intent to find a violation, it is nevertheless subject to the general provision in the proposal stating that culpability must be proved in most cases.[43] Under S. 1, culpability includes intent, knowledge, recklessness and criminal negligence.[44] It would therefore appear that at least one of these four mental states must be demonstrated to prove up a violation. Similarly, no particular mental state is explicitly required by S. 1400. However, a provision in S. 1400 states that if no culpability requirement is contained in a felony or misdemeanor statute, it is nevertheless required as an element of the offense, and may be satisfied by proving intent, knowledge or recklessness.[45] Thus, both bills will require a showing of some manner of intent, while only S. 1400 may require proof of an actual riot occurring before a substantive offense will be found.

The severity of the punishment imposed under the proposals is an excellent barometer of the harsh line adopted by the draftsmen.[46] The present law provides

[34] 18 U.S.C. § 2101 (1968) provides in pertinent part:
(a)(1) Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce, including, but not limited to, the mail, telegraph, telephone, radio, or television, with intent—
(A) to incite a riot; or
(B) to organize, promote, encourage, participate in, or carry on a riot; or
(C) to commit any act of violence in furtherance of a riot; or
(D) to aid or abet any person in inciting or participating in or carrying on a riot or committing any act of violence in furtherance of a riot; and who either during the course of any such travel or use or thereafter performs or attempts to perform any other overt act for any purpose specified in subparagraph (A), (B), (C), or (D) of this paragraph—
Shall be fined not more than $10,000, or imprisoned not more than five years, or both.

[35] *Id.*

[36] *Id.* The fact that the required intent and unlawful act need not coincide is not a violation of due process of law. United States v. Hoffman, 334 F. Supp. 504, 509 (D.D.C. 1971). In United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973), the court interpreted the statute to mean that (A)-(D) *are* the overt acts referred to, and not ultimate goals. The court stated:
If we could be persuaded that the overt act "for any purpose specified in subparagraph [*sic*] (A), (B), (C), or (D) of this paragraph" could be a speech which was only a step toward one of the elements of (A)-(D), taking those merely as goals, we would be unable to conclude that the statute required an adequate relation between speech and action.
472 F.2d at 362.

[37] For a view of the present law as an attempt statute, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 999 (1979). The consultant studying the anti-riot provision concluded:
The completed substantive offense is at most an attempt. Moreover *an attempt to achieve that attempt* constitutes the same offense, punishable by the same sanctions . . . .

[38] S. 1, § 2-9B1 provides in pertinent part:
(a) OFFENSE.—A person is guilty of an offense if he:
(1) incites or urges five or more persons to create or engage in a riot under circumstances in which there is substantial likelihood his advocacy will imminently produce a riot; or
(2) gives commands, instructions, or directions to five or more persons in furtherance of a riot.

[39] S. 1400, § 1801 provides in pertinent part:
(a) OFFENSE.—A person is guilty of an offense if:
(1) he incites a riot; or
(2) during a riot he urges participation in, leads, or gives commands, instructions, or directions in furtherance of, the riot.

[40] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1142 (1961).

[41] S. 1400, § 1801(b)(1) (emphasis added). For the full text of this section, see note 58 *infra*.

[42] *Id.* § 1801(c)(2), (5).

[43] S. 1, § 1-2A1 provides in pertinent part:
(b) REQUIREMENTS OF CULPABILITY.—Except as otherwise provided, a person does not commit an offense unless he acts culpably with respect to each element of the offense. If the statute or section defining an offense does not prescribe any culpability with respect to some or all of the elements of the offense, culpability is nevertheless required . . . .

[44] *Id.* § 1-2A1(a)(1).

[45] S. 1400, § 303(a). *See* text accompanying note 84 *infra*.

[46] *See* text accompanying notes 94-96 *infra* for the writer's views on the validity of continuing a harsh anti-riot policy in the new bills.



for a maximum penalty of five years imprisonment or a fine of $10,000, or both.[47] S. 1, using a grading scheme, categorizes inciting to riot as a class C felony if fifty accomplices are involved and as a class D felony in all other cases.[48] The maximum penalty for a class C felony is five years imprisonment or a $500 fine per day for three years, or both.[49] A class D felony carries a maximum penalty of three years imprisonment or a $500 fine per day for three years, or both.[50] S. 1 makes inciting to riot a class A felony if murder or aggravated kidnapping is also committed, and a class B felony if maiming, aggravated arson or aggravated malicious mischief follow.[51] The maximum penalty for a class A felony is 20 years imprisonment or a $1,000 fine per day for three years, or both.[52] A class B felony carries a maximum penalty of ten years imprisonment or a fine of $1,000 per day for three years, or both.[53]

Violation of the S. 1400 provision is a class D felony if the riot involves persons in an official detention facility, and a class E felony in all other cases.[54] The maximum penalty for a class D felony under S. 1400 is seven years imprisonment or a fine of $50,000, or both, while a class E felony carries a maximum of three years imprisonment or a $25,000 fine, or both.[55] In sum, the present statute in many instances prescribes longer imprisonment than do the proposals, but both S. 1 and S. 1400 impose more severe prison terms under certain circumstances. Maximum fines under the proposals exceed those under the present statute. It appears, therefore, that punishment is at least as stringent under S. 1 and S. 1400 as under existing law.

In considering jurisdiction, it must be noted that the current law bases federal jurisdiction exclusively on the commerce power.[56] S. 1 invokes federal jurisdiction on the basis of the commerce power and on the special jurisdiction of the United States.[57] S. 1400 employes these two factors and also invokes pjurisdiction when persons in a federal detention facility are involved or a federal function is obstructed.[58]

[47] 18 U.S.C. § 2101(a) (1968).

[48] S. 1, § 2-9B1 provides in pertinent part:
(b) GRADING.—The offense defined in subsection (a)(2) is a Class C felony if the riot involves 50 accomplices. Otherwise the offense is a Class D felony.
The provision appears to be the victim of faulty drafting. It would seem to require exactly 50 accomplices for imposition of a class C felony penalty and would not extend, for instance, to cases involving 51 accomplices.

[49] S. 1, §§ 1-4B1(b), 1-4C1. Simple mathematics reveals that the total maximum fine would be $547,500. This high figure may be deceptive, however, because, under § 1-4C1(c), fines meted out must be based on ability to pay. If the violator is a "dangerous special offender" within the meaning of § 1-4B2, the maximum imprisonment is increased to ten years.

[50] *Id.* §§ 1-4B1(b), 1-4C1. If a "dangerous special offender" is involved, the maximum imprisonment is six years.

[51] *Id.* § 2-9B1(c). The section provides:
(c) COMPOUND GRADING.—The offense is:
(1) a Class A felony if any of the following additional offenses is committed: murder or aggravated kidnapping; or
(2) a Class B felony if any of the following additional offenses is committed: maiming, aggravated arson, or aggravated malicious mischief.

[52] *Id.* §§ 1-4B1(b), 1-4C1(a). The total maximum fine would be $1,095,000. *See* note 49 *supra*. The maximum imprisonment for a "dangerous special offender" is 30 years.

[53] *Id.* The total maximum fine would be $1,095,000. *See* note 49 *supra*. The maximum imprisonment is 20 years for a "dangerous special offender."

[54] S. 1400, § 1801 provides in pertinent part:
(b) GRADING.—An offense described in this section is:
(1) a Class D felony if the riot involves persons in a federal facility used for official detention;
(2) a Class E felony in any other case.

[55] *Id.* §§ 2201(a)-(b), 2301(b)(3)-(4).

[56] 18 U.S.C. § 2101(a) (1968).

[57] S. 1, 2-9B1 provides in pertinent part:
(d) JURISDICTION.—Federal jurisdiction exists if the offense is committed with the jurisdiction defined in section 1-1A4(61) (special jurisdiction) or section 1-1A4(12) (commerce jurisdiction).
"Special jurisdiction," under § 1-1A4(61), includes the special maritime, territorial and aerospace jurisdiction of the United States. "Commerce jurisdiction," under § 1-1A4(12), includes property moved in interstate or foreign commerce, movement of persons in interstate or foreign commerce during commission of an offense or immediate flight thereafter, and offenses against or involving facilities of interstate or foreign commerce.

[58] S. 1400, § 1801 provides in pertinent part:
(c) JURISDICTION.—There is federal jurisdiction over an offense described in this section if:
(1) the offense is committed within the special jurisdiction of the United States;
(2) the riot involves persons in a federal facility used for official detention;
(3) the United States mail or a facility of interstate or foreign commerce is used in the course of the planning, promotion, management, execution, consummation, or concealment of the offense;
(4) movement of a person across a state or United States boundary occurs in the course of the planning, promotion, management, execution, consummation, or concealment of the offense; or
(5) the riot obstructs a federal government function.
"Special jurisdiction" is defined in § 203 to include the special territorial, maritime and aircraft jurisdiction of the United States. Definition of "commerce jurisdiction" is given in § 1801(c)(3)-(4). S.1400 omits the word "federal" from the description of official detention facilities when distinguishing class D and E felonies in § 1801(b). It is implied, then, that the statute covers riots occurring in state detention facilities if jurisdiction is based on § 1801(c)(1), (3), (4) or (5).

Finally, provisions defining a "riot" are found under the present law, and in S. 1 and S. 1400.[59] The present law requires three or more persons to constitute a riot, while the proposals require five or more.[60] All three make reference to a disturbance involving violence and to a relationship between violence and potential damage to person or property.[61]

In discussing constitutional issues raised by the proposals, one should note that the present law has withstood several constitutional attacks, the most serious of which dealt with the freedom of speech.[62] Although never considered by the Supreme Court, the law's constitutionality was upheld in one decision in which the Seventh Circuit acknowledged that "the case is close." [63] One member of the three-judge panel found the statute unconstitutional on its face.[64]

In the area of free speech, the critical question concerns the degree of attenuation required to treat speech as action, thereby removing the behavior from the protective mantle of the first amendment. It has been said that incitement to violence is excluded from first amendment protection,[65] yet it is often difficult to discern the point at which speech becomes incitement.[66] In *Brandenburg* v. *Ohio*,[67] the Supreme Court attempted such a determination. Brandenburg, a Kn Klux Klan leader, was convicted of violating the Ohio syndicalism statute for urging and threatening violence at a rally where arms were present. A unanimous Court, in a per curiam decision, declared the Ohio statute unconstitutional and held that advocacy cannot be proscribed *"except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."* [68] In short, only speech "brigaded" with action is unprotected by the first amendment.[69]

[59] 18 U.S.C. § 2102 (1968) provides in pertinent part:

(a) As used in this chapter, the term "riot" means a public disturbance involving (1) an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual or (2) a threat or threats of the commission of an act or acts of violence by one or more persons part of an assemblage of three or more persons having, individually or collectively, the ability of immediate execution of such threat or threats, where the performance of the threatened act or acts of violence would constitute a clear and present danger of, or would result in damage or injury to the property of any other person or to the person of any other individual.

S. 1, § 2-9A1 provides in pertinent part:

(7) "riot" means a disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct creates immediate danger of serious damage or injury to property or persons or substantially obstructs law enforcement or other government function. . . .

S. 1400, § 1805 provides:

As used in sections 1801 through 1804 "riot" means a public disturbance involving an assemblage of five or more persons which, by violent and tumultuous conduct, creates a grave danger or injury or damage to persons or property, or obstructs a government function.

[60] See note 59 *supra*. The National Commission on Reform of Federal Criminal Laws recommended that five persons be required for a riot, but a substantial minority recommended ten. The Commission, in setting the minimum, considered the number of persons that would create serious problems for police. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT § 8101, Comment (1971).

[61] The present law employs the phrase "clear and present danger," which is presumably derived from Schenk v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.).

[62] United States v. Dellinger, 472 F. 2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973) (crossing state lines with intent to incite riots at 1968 Democratic National Convention); National Mobilization Comm. to End the War in Viet Nam v. Foran, 411 F. 2d 934 (7th Cir. 1969) (crossing state lines with intent to incite riots at 1968 Democratic National Convention); United States v. Hoffman, 334 F. Supp. 504 (D.D.C. 1971) (crossing state lines with intent to incite riots at 1968 Democratic National Convention); *In re* Shead, 302 F. Supp. 560 (N.D. Cal. 1969), *aff'd sub nom.* 417 F. 2d 384 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970) (refusal to answer grand jury questions concerning interstate travel). See note 3 *supra* for a list of other grounds upon which the statute was challenged.

[63] United States v. Dellinger, 472 F. 2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). The court relied on the definition of "to incite a riot" in 18 U.S.C. § 2102(b) (1968) and found the law did not impair freedom of speech.

That section provides in pertinent part:

(b) As used in this chapter, the term "to incite a riot" . . . includes, but is not limited to, urging or instigating other persons to riot. . . .

The court stated:

It seems to us that the threshold definition of all categories as "urging" or "instigating" puts a sufficient gloss of propulsion on the expression described that it can be carved away from the comprehensive protection of the first amendment's guarantee of freedom of speech.

472 F. 2d at 362.

[64] 472 F. 2d at 409-16 (Pell, J., dissenting in part, concurring in part).

[65] *See* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (dictum).

[66] In Gitlow v. New York, 268 U.S. 652, 673 (1925), Justice Holmes dissented:

Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.

[67] 395 U.S. 444 (1969).

[68] *Id.* at 447 (emphasis added).

[69] *Id.* at 456-57 (Douglas, J., concurring).



Thus, *Brandenburg* requires an analysis of two elements in each proposal—the relationship of speech and action, and intent. Under the speech-action test, S. 1 is clearly constitutional. The "substantial likelihood" language [70] is very close to the language which *Brandenburg* approves—*i.e.*, "likely to incite or produce" lawlessness. Under this provision mere advocacy would be permitted, but advocacy which would cause a riot—*i.e.*, speech "brigaded" with action—would not be allowed. The S. 1 section which prohibits giving commands, instructions or directions in furtherance of a riot [75] appears to speak to action itself, and therefore is not subject to first amendment objections.

The required relationship between proscribed speech and action could present problems for the S. 1400 section which punishes one who "incites a riot." [72] If "incitement" were interpreted to require the presence of an actual riot,[73] action would have occurred. Similarly, the ban on leading a riot and on giving commands, instructions or directions in furtherance of a riot [74] prohibits only actions, leaving freedom of speech objections without relevancy. If however, S. 1400 is interpreted as proscribing incitement of others to riot without requiring the presence of an actual riot,[75] the section suffers from arguable constitutional defects. Though it may be maintained that any incitement to riot is outside the protective sphere of the first amendment, such a position can be countered by claiming that conviction for incitement to riot under circumstances in which a riot has not occurred would violate the *Brandenburg* speech-action requirement.

In *State v. Cappon*,[76] the defendant challenged the constitutionality of the New Jersey anti-riot statute, which provided in pertinent part: [77]

Any person who, in public or private, by speech, writing, printing or otherwise . . . incites:

a. The unlawful burning or destruction of public or private property; or

b. Assaults upon any of the armed forces of the United States, the national guard, or the police of this or any other state or of any municipality; or

c. The killing or injuring of any class or body of persons, or of any individual—

Is guilty of a high misdemeanor.

The New Jersey law is similar to the S. 1400 provision in that each makes an offender any person who "incites" a riot. After quoting *Brandenburg*, the New Jersey court upheld the statute by stating: [78]

The State, without running afoul of the First Amendment, has the right to punish one whose advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. N.J.S.A. 2A:148-10 is directed at such persons.

It appears that "incitement" statutes are limited to situations in which there exists a near-probability that an actual riot will result. The S. 1400 provision, in punishing one who "incites a riot," may well comply with the requirement that proscribed speech be closely related to action.

The *Brandenburg* decision that a statute is constitutional only if it deals with speech "directed to inciting or producing imminent lawless action" implies that an element of intent, or at least scienter, is necessary to avoid running afoul of the freedom of speech guarantee.[79] The S. 1 ban on inciting riots does not explicitly require a particular mental state as an element of the offense, but the section is subject to a general prerequisite that intent, knowledge, recklessness or criminal negligence must be found.[80] Apparently any one of the four would suffice to constitute a violation of the provision; however, conviction of a person who is merely reckless or criminally negligent in inciting others to riot would not appear to be advocacy "directed to inciting or producing imminent lawless action," as *Brandenburg* requires.[81] The provision may be saved by interpreting

[70] S. 1, § 2-9B1(a)(1). *See* text accompanying note 38 *supra*.

[71] *Id.* § 2-9B1(a)(2).

[72] S. 1400, § 1801(a)(1).

[73] *See* text accompanying notes 39-42 *supra* for a possible interpretation.

[74] S. 1400, § 1801(a)(2).

[75] Under such an argument, a speaker advocating and urging violence in an empty auditorium might be "inciting" a riot.

[76] 118 N.J. Super. 9, 285 A.2d 287 (1971).

[77] N.J. REV. STAT. § 2A: 148-10 (1951).

[78] 285 A.2d at 293. From this quotation it could be argued that "incites" is limited to instances in which a person has intent or knowledge. However, the court discusses only the speech-action relationship in the opinion.

[79] *Cf.* United States v. Matthews, 419 F.2d 1177, 1190-92 (D.C. Cir. 1969) (Wright, J., dissenting). A consultant to The National Commission on Reform of Federal Criminal Laws, citing *Brandenburg*, suggested the following provision:

A person is guilty of inciting to riot if, *with intent to cause, continue, or enlarge a riot*, when a riot actually occurs, or under circumstances presenting an immediate substantial likelihood thereof . . . .

1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1026 (1970) (emphasis added).

[80] *See* notes 43 and 44 *supra*.

[81] 395 U.S. at 447.

S. 1 as embodying a requirement of knowledge of impending violence. A person is prohibited from inciting others to engage in a riot "under circumstances in which there is substantial likelihood his advocacy will imminently produce a riot."[82] It could be argued that if such circumstances existed, a person would have constructive knowledge of their existence.[83]

S. 1400's proposed statute does not on its face require a mental state, but S. 1400 provides generally that "the culpability requirement is satisfied by establishing that the person acted *either intentionally, knowingly or recklessly*."[84] Thus, a person who recklessly incites a riot would be in violation of the statute. This fails to comport with constitutional requirements regarding *mens rea*, and there seems to be no interpretation which would save S. 1400.

Another constitutional consideration—the vagueness doctrine—is also relevant to this discussion of the proposals. A statute offends due process if it is so vague that an average person would be unsure of what constitutes a violation.[85] S. 1400 invokes federal jurisdiction if "the riot obstructs a federal government function."[86] S. 1400 does not define "federal government function" and it seems probable that an average person would be unclear as to the meaning of this phrase. Would, for example, rioters blocking a city street, thereby delaying a postman on his mail route, be obstructing a federal government function? A greater degree of specificity may, therefore, be required in delineating the scope of federal jurisdiction.

Furthermore, S. 1 employs the language "substantially obstructs law enforcement or other government function."[87] Use of the word "substantially" and the reference to law enforcement as an example of government function probably exclude far-fetched fact situations, such as the mailman example above, from the purview of the statute. S. 1 appears to be more narrowly defined and less susceptible to vagueness claims. S. 1400, however, makes conduct riotous if it "obstructs a government function."[88] The language is very similar to the S. 1400 section on jurisdiction noted above,[89] and is probably vulnerable to the same constitutional objections.

Turning to a non-constitutional consideration, both S. 1 and S. 1400, in defining a "riot," require an assemblage of at least five persons.[90] This definition may subject some demonstrators to the harsh penalties which the proposals provide[91] when the offenders' conduct, however violent, does not approach riotous proportions. The National Commission on Reform of Federal Criminal Laws recommended a minimum of five persons to constitute a riot, but a substantial minority on the Commission recommended ten.[92] The Commission's consultant suggested that a definition of a "riot" require "a substantially large number of persons" or, in the alternative, at least 20 persons.[93] The consultant contended that any definition of a riot which involved a lesser number of demonstrators might include non-riotous conduct.[94]

The continuation, and in some areas the strengthening, of the punishment sections of the present riot statute, causes one to question the proposed statutes on another non-constitutional basis. The present law, born in an era of violence and disorder, takes a harsh stance against those who incite to riot. In many respects its draftsmenship is far from perfect. The law, however, can perhaps be justified by the wave of rioting that swept the country in the 1960's, and by what legislators perceived as an immediate need to end that rioting.

The S. 1 and S. 1400 proposals lack the background of violent disorder which left such a strong imprint on the present law. The violence of the 1960's for the most part has been replaced by the relative tranquility of the 1970's. Yet, the S. 1 and S. 1400 penalty provisions may be more appropriate for an era plagued

[82] S. 1, § 2-9B1(a)(1).

[83] Under S. 1 a person acts

> "knowingly" with respect to his conduct or to attendant circumstances when he is aware of the quality of his conduct or that those circumstances probably exist. A person acts knowingly with respect to a result of his conduct when he is aware that his conduct will probably cause the result . . . .

*Id.* § 1-2A1(a)(3).

[84] S. 1400, § 303(a) (emphasis added).

[85] Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

[86] S. 1400, § 1801(c)(5).

[87] S. 1, § 2-9A1(7).

[88] S. 1400, § 1805.

[89] *Id.* § 1801(a)(5).

[90] S. 1, § 2-9A1(7); S. 1400, § 1805.

[91] *See* text accompanying notes 46-55 *supra*.

[92] NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT § 1801, Comment (1971).

[93] 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1020 (1970).

[94] *See id.* at 996.



by serious rioting. This is not to say that stiff laws might not deter lawlessness in the future, or that a "hard line" approach is necessarily undesirable. The present law, however, was drafted under conditions not particularly conducive to rational analysis, and provisions in the same mold should therefore be suspect.

The thrust of the present law has had the effect of locking into the proposed codes a policy of heavy punishment, originally initiated by an emotion-swept Congress, in an era when there is no apparent justification for continuing such a stance. The S. 1 and S. 1400 anti-riot provisions have apparently been subjected to little scrutiny in the Congress[95] and the general substance of the present law has been carried over into the proposals. The rioting of the 1960's, which perhaps justified the present statute, should not automatically become the blindly-accepted justification for legislation in a period of differing social and political climate.

Thus, the S. 1 and S. 1400 provisions should be carefully reexamined to determine whether they rest on justifications independent of those given for the present law, or whether old justifications are being mechanically applied to new legislation. The extreme conditions of the 1960's and hasty passage of the present law should not be allowed to "come back and haunt us in more normal times."[96]

HERCULES INC.,
*Wilmington, Del., August 8, 1974.*

Hon. JOHN L. MCCLELLAN,
*3241 New Senate Office Building, Washington, D.C.*

DEAR SENATOR MCCLELLAN: One statement made by Mr. Ralph Nader, in his testimony before the Subcommittee on Criminal Laws and Procedures on July 19, 1974 in connection with S. 1 and S. 1400, should not, I believe, go unanswered.

Beginning at the bottom of page 7, and extending over on page 8, Mr. Nader discusses the importance of "whistle-blowing" and concludes with the comment:

"If carefully protected by law, whistle-blowing can become another of those adaptive, self-implementing mechanisms which mark the relative difference between a free society that relies on free institutions and a closed society that depends on authoritarian institutions."

One of the fundamental indicia of a totalitarian society, whether Nazi Germany, Soviet Russia, or Communist China, is the use on a wide scale of private informers, whether family, neighbors, or otherwise. The suggestions even inferentially that an institutionalized informer system should be considered as consistent with the traditions of our free society runs completely contrary to fact.

Very truly yours,

CHARLES S. MADDOCK,
*General Counsel.*

[95] *See Hearings on the Final Report of The National Commission on Reform of Federal Criminal Laws Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st & 2d Sess., pts. 1-12 (1971-1972).

[96] *Hearings on H.R. 421 Before the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 1, at 13 (1967) (remarks of Senator Edward Long).

# REFORM OF THE FEDERAL CRIMINAL LAWS

MONDAY, JULY 22, 1974

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

The subcommittee met, pursuant to recess, at 9 a.m., in room 2228, Dirksen Senate Office Building, Senator Roman L. Hruska presiding.

Present: Senator Hruska presiding.

Also present: Paul C. Summitt, chief counsel; Douglas R. Marvin, minority counsel; Dennis C. Thelen, assistant counsel; Mabel A. Downey, clerk; and Tom Henderson of the staff of Senator Kennedy.

Senator HRUSKA. We are resuming hearings on the reform of the Federal criminal laws. We hope it is the concluding session of these hearings. Shortly after the submission to the Congress of the final report of the National Commission on the Reform of the Federal Criminal Laws this subcommittee began its hearings. Our first hearings, during 1971 and 1972, were directed to the final report and to background information on the entire subject of Code revision. In the first session of this Congress we began in depth hearings on the Code revision bills, S. 1 and S. 1400. We hope we have sufficiently covered the more controversial issues and can now move on to the further processing of a Code revision bill.

As our first witness this morning we have Mr. Gregory Craig, an attorney with the local firm of Williams, Connolly & Califano.

Mr. Craig, your biographical sketch will be included in the record. You may proceed.

BIOGRAPHICAL SKETCH OF GREGORY B. CRAIG

Gregory B. Craig, age 29, is an attorney with the law firm of Williams, Connolly and Califano in Washington, D.C. His home state is Vermont.

Craig attended Harvard College and graduated magna cum laude, Phi Beta Kappa in history in 1967. He was named the John Harvard Scholar for 1967–68 and was awarded a fellowship to Cambridge University where he studied 19th century British politics. He received a Diploma in Historical Studies from Cambridge University in 1968.

Craig then returned to the United States to work for a year as a teacher and streetworker with high school dropouts in the Harlem Street Academy Program. In the fall of 1969, he enrolled in Yale Law School and received his law degree in 1972.

## STATEMENT OF GREGORY CRAIG, ATTORNEY, WILLIAMS, CONNOLLY & CALIFANO, WASHINGTON, D.C.

Mr. CRAIG. My name is Gregory B. Craig, and I am an attorney practicing law in the District of Columbia. I would like to thank the subcommittee for its invitation to testify here today.

My comments will be restricted to two provisions in S. 1400 which offer public officials certain defenses to criminal prosecution. Before considering these specific sections in the proposed code, however, I would like, with your permission, to submit an article for the record which appeared in the January 20, 1974, issue of Outlook in the Washington Post, written by myself and Dr. Richard Korn, a distinguished criminologist on the faculty of the University of California at Berkeley. In the interests of promoting a full discussion of the issues raised in this article, I would like also to submit Assistant Attorney General Henry Petersen's response and our brief comment on his response, both of which appeared in the March 3, 1974, issue of the Washington Post.

I would first like to deal briefly with section 532 of the proposed code entitled "Official Misstatement of Law." This section states, in pertinent part:

> It is an affirmative defense to a prosecution under any Federal statute that the defendant's conduct in fact conformed with an official statement of the law afterward determined to be invalid or erroneous, (b) which is contained in (3) an official, written interpretation issued by the head of a Government agency, or his delegate charged by law with responsibility for administration of the law defining the offense if the defendant acted in reasonable reliance on such statement of the law and with good faith belief that his conduct did not constitute an offense.

According to Assistant Attorney General Petersen, this provision is based on two specific Supreme Court decisions in which the Court employed a theory of quasi-entrapment to reverse criminal convictions of individuals who relied in good faith upon the assurance of officials in authority that their acts would not constitute criminal offenses. These individuals were subsequently prosecuted and convicted for those same acts.

The first case, decided in 1958, involved private citizens appearing before the Ohio Un-American Activities Commission. They refused to answer questions after the chairman of the commission assured them that they had a privilege under State law to refuse to answer, though in fact this privilege was not available to them. These individuals were later prosecuted and convicted for violating an Ohio State immunity statute by refusing to answer. The Supreme Court concluded that to sustain the conviction would be to sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him. *Raley* v. *Ohio*, 360 U.S. 423, 426 (1959).

In 1964 the Supreme Court considered a case in which a Baton Rouge sheriff initially instructed black college students that they would be permitted to demonstrate against segregated lunch counters on the sidewalk across from the courthouse. The sheriff then arrested them for violating a statute prohibiting pickets or parades near the courthouse. Because the demonstrators relied on the oral permission from the sheriff, the Supreme Court reversed their convictions, holding that the situation here is analogous to that of Raley. The due process clause does not permit convictions to be obtained under such circumstances. *Cox* v. *Louisiana*, 379 U.S. 559, 571 (1965).

The legal underpinnings as well as the policy objectives of section 532 appear to be unassailable. It is entirely appropriate that the private citizen be shielded from any adverse legal consequences of relying in good faith upon certain advice from a public official in



authority, whether that official is a special agent for the Federal Bureau of Investigation, an examiner for the Internal Revenue Service, or an investigator for the Securities and Exchange Commission.

In my opinion, however, it is not appropriate to offer this same defense to Federal officials. Extending the defense of official misstatement of law to public officials would permit the Federal Government in certain circumstances to remove its own agents from the reach of the criminal law, to place them in some respects above the law. Such immunity could serve as a license to break the law for some public officials, liberating them from the deterrent effects of criminal sanctions.

Such an extension of this defense to public officials was certainly not contemplated by the Supreme Court in the decisions cited above. In both cases, the individuals invoking the defense were private citizens—not public officials. Indeed, in *Cox* the Court took pains to limit the scope of its ruling by restricting its decision to circumstances such as those present in this case. *Cox* at 573.

This philosophical question of whether it is possible for one public official to entrap another, a valid question given the legal theory upon which the Supreme Court grounded these two opinions, is of course not the issue here. The difficulty with this provision arises in the context of public officials in collusion, where one attempts to immunize another from possible conviction by providing him with an administrative grant of permission. Let us consider an example in which this provision might be invoked by a public official in such a way as to protect himself from the final reach of the criminal law.

Suppose a special adviser to the President suspects a certain individual of being a spy for a foreign power or of leaking state secrets to the press. The Presidential adviser wants to install a wiretap to determine whether the suspect is in fact leaking national security information. Moreover, the adviser wants to break into the suspect's private home to procure tangible proof of such seditious or disloyal activities. Uncertain whether the probable cause test can be met to obtain a warrant for the wiretap or the search, and unwilling to risk a judge's refusal to grant such permission, the Presidential adviser seeks an opinion from a close friend at the Justice Department as to the legality of his plan. Informed of the President's strong feelings in the matter, the official at Justice advises the Presidential adviser that such activity is prefectly within the President's implied constitutional authority to safeguard national security. Indeed, says the official at Justice, there is a positive obligation to take such action under the President's oath of office to "preserve, protect, and defend the Constitution."

Arrested in the course of the break-in, the Presidential adviser claims in his defense that he relied in good faith upon an official misstatement of law issued by an official charged by law with responsibility for administration of the law defining the offense.

The framers of this legislation clearly did not intend this section to be interpreted in this way nor would the idea of such official collusion and abuse of governmental power have occurred to anyone prior to the discouraging revelations of Watergate. Events of the past 2 years, however, should have made us more sensitive to the dangers of criminal conduct on the part of high officials, and, at the risk of

fighting yesterday's battles, we should be careful not to change the law in such a way as to minimize or undermine the deterrent effect of criminal penalties, even on the most powerful of public officials.

The loophole in section 532 could most easily be corrected by amending this provision specifically to prohibit public officials charged with Federal crimes while in the performance of their public duties from invoking the defense. A second, less desirable alternative would be to establish safeguards which would diminish the possibility of official collusion such as described above, perhaps by requiring a public official to obtain the written opinion of a third government official, or by making the official who was responsible for the misstatement of law criminally liable for the illegal activities of the individual to whom he gave the grant of permission.

It should also be pointed out that the framers of this particular section modified earlier versions of this same provision by only allowing a defense for official misstatements of law when the misstatement is written as opposed to when the misstatement is orally given. See section 609 entitled "Mistake of Law," in the National Commission report. In my opinion, this is an unwarranted retreat from the plain meaning of the two Supreme Court decisions cited earlier. Both of these decisions recognized the official misstatement of defense and reversed convictions in situations where official assurances had been given orally. Oral grants of administrative permission to private citizens should not be excluded from being covered by this defense. In the context of a public official attempting to invoke the defense, however, particularly if the authorizing official is to be held criminally responsible for the illegal activities he authorizes a written authorization is a useful, if not necessary, requirement.

Section 521 entitled "Public Duty" declares:

> It is a defense to a prosecution under any Federal statute that the defendant reasonably believed that the conduct charged was required or authorized by law to carry out his duty as a public servant.

The public duty defense challenges two principles which are fundamental to the rule of law in a democratic society. The first principle is that an individual is presumed to be personally responsible and therefore legally accountable for his own actions. The public duty defense would allow certain individuals to shield themselves from that kind of personal accountability by invoking their public office, by saying, "But I was just doing my job."

The second principle is that no man or group in society, by virtue of class, rank, wealth, power, or station, is treated differently from any other man or group in the eyes of the law. All are protected equally. This provision would protect some citizens more equally than others. It would supply a defense to some individuals which would not be offered to all individuals.

Perhaps even more important than these philosophical points is the fact that, if enacted, this section would seriously dilute the power of the law to deal with criminal conduct on the part of Federal officers. The public duty defense would permit Federal officials to use their position of public trust to defend against criminal prosecutions brought against them for violating that trust. Rather than focusing on the legality of specific actions, rather than considering whether those actions were in fact called for by the individual's public duty,



this section would focus the court's attention on whether the official reasonably believed his conduct was legal. If an official simply convinces a jury that he reasonably believed his actions were authorized or required by law, his crime would be excused.

The comparable provision in the National Commission's report states that conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law. Final report of the National Commission on Reform of Federal Criminal Laws, 1971, section 602 at page 44. The framers of S. 1400 cut back from the Commission's version and inserted the reasonable belief standard. This addition has a twofold effect. First, it allows the defendant to go the jury on the question of his state of mind. The court would be required to instruct the members of the jury to ask themselves, one, whether the defendant believed that his conduct was authorized or required by law; and two, whether that belief was reasonable given the circumstances surrounding his conduct.

The reasonable belief standard has a secondary effect outside of the courtroom. It undermines the deterrent effect of criminal penalties. Whenever a Federal official believes he can convince a jury that his conduct, though perhaps unlawful in retrospect, was guided by honest and praiseworthy motives and therefore reasonable, he will not be deterred from engaging in that conduct. The public servant is thereby given a free rein in the shadowy no man's land of activities which are on the borderline of illegality. Rather than steering clear of the legally dubious, the public servant can chart a course significantly nearer criminal conduct with the assurance that his only burden is to persuade a jury that it was a gray area, that the lawfulness of his conduct was in his eyes, unclear, and that he was motivated by a sense of public duty rather than criminal malice.

A jury automatically finds it easier to convict a vagrant of breaking and entering than to convict a White House aide of the same offense. A White House aide, after all, can always present a plausible argument that he was overzealous, not criminal. An unreasonably interpretation of the law in ordinary circumstances may often be rendered reasonable in an official's mind through the operation of misdirected zeal or public-spirited fervor.

Let me illustrate this second point with an actual example taken from the trial of those individuals charged with planning, ordering or participating in the break-in of Daniel Ellsberg's psychiatrist's office. Before he pled guilty to another felony, Charles Colson argued in papers filed before the court that the break-in was "reasonable" within the terms of the fourth amendment. The logic of the Colson defense rested on the case of *Katz* v. *United States*, 389 U.S. 347 (1967), in which the Supreme Court concluded that electronic surveillance was, in the eyes of the fourth amendment, the same as a search even though there is no "physical intrusion into a given enclosure." The Colson defense concluded:

> Thus, while a break-in was historically considered a constitutional violation and electronic surveillance not, these two forms of intrusion are now, and have been since 1967, on the same constitutional footing. Accordingly, if electronic surveillance is, or was in 1971, justified without a warrant in a national security case, a trespassory search must necessarily be justifiable on the same basis.

While Colson's argument is totally untenable and indeed unreasonable as a legal defense, it is an argument that could be presented to the jury, under the public duty defense, to show that Colson's belief that the break-in was "authorized or required by law," although perhaps erroneous or mistaken as a question of law, was nevertheless a belief that could have been held by a "reasonable man."

Over and above the undesirable impact this provision would have on the system of criminal justice when applied to official wrongdoing, section 521, in my opinion, goes beyond the case law upon which the public duty defense is presumably based. Much of that case law comes out of a military context. The typical example is that of a soldier on guard duty shooting and killing an escaping prisoner, *In Re Fair*, 100 F. 149 (Nebr. 1900), *United States* v. *Clark*, 31 F. 710 (Mich. 1897), or shooting at an escaping prisoner and killing an innocent bystander, *United States* v. *Lipsett*, 156 F. 65 (Mich. 1907) or shooting and killing a private citizen who had committed a felony and was in flight from the scene of the crime, *United States ex rel Drury* v. *Lewis*, 200 U.S. 1 (1905). In each of these cases, the court inquired specifically whether the conduct in question fell within the scope of the individual soldier's duties.

All of these cases arose in the peculiar circumstances of military discipline and authority. As one judge said:

> The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in the Army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the camp would be turned into a debating school where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions. *In Re Fair* at 154–155.

In the military, therefore, the balance is strict in favor of obedience, and only "in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal" is the soldier held personally and criminally liable for his acts. The borderline order must always be obeyed.

The military, however, is different from civil government. As one Federal judge wrote:

> To insure efficiency, an army must be, to a certain extent, a despotism. Each officer, from the general to the corporal, is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the period of his enlistment, and consents to come and go at the will of his superior officers. *United States* v. *Clark* at 713.

The public servant, however, is not a lowly private nor is government bureaucracy a despotism. Unlike the common foot soldier, the public servant acts with discretion and is free to come and go at his own behest. Unlike the common foot soldier, the public servant should not be protected from legal consequences of acts which are in the twilight zone of legality. Because the public servant exercises individual discretion, because he can always refuse or resign, because he carries with his office substantial social responsibility and public trust, because the public servant invokes all the might and majesty of the state when he acts, the public servant should, at the very least, be held to the same standard of conduct applied to the ordinary citizen. One would hope, if anything, that a higher standard would be expected in the conduct of a public official.



The public duty defense, in short, is based on an inapt analogy. Section 521 incorporates principles of liability developed in military circumstances and transfers them to the very different conditions of civil government. Unlike the individual soldier who is immunized from criminal liability in all but the most flagrant of cases, the Federal official should be as accountable as the next man to the law.

Finally, in considering this provision, I would urge the subcommittee to ask itself whether there is in fact a need for this provision. Is there any evidence to suggest that Federal officials are presently being convicted and going to jail wrongly? Similarly, is there any evidence to suggest that public officials are being deterred from performing their duties because this section does not exist? Absent such findings, it would be unwise in my opinion to enact this provision and run the dual risk of diluting the power of the criminal law and undermining public confidence in the public servant.

For all the reasons noted above, I would respectfully urge this subcommittee to delete section 521 from the new Federal criminal code, and at least in this area, let the genius of the common law operate freely.

Thank you, Mr. Chairman. If you have any questions, I would be happy to respond.

Senator HRUSKA. Thank you, Mr. Craig.

There will be inserted in the record articles to which Mr. Craig refers from the Washington Post of January 20 and March 3 of this year.

[The information referred to follows:]

[From the Washington Post, Jan. 20, 1974]

MAKING IT ALL PERFECTLY LEGAL

(By Richard R. Korn and Gregory B. Craig)

ON MARCH 23, 1973, Judge John J. Sirica read a letter from James W. McCord in open court, and the White House cover-up of Watergate began to unravel. Four days later, on March 27, the Nixon administration introduced in the Senate a bill to revise the U.S. criminal laws.

Relatively few took notice of the legislation, which was numbered S. 1400, and fewer still saw any connection between the two events. But there was indeed a connection: Buried in the bill's 340 pages were two brief sections that might do no less than protect public officials and their private agents from being convicted of federal crimes, whether future Watergates or other varieties.

They are truly remarkable, the two passages, descendants of the notorious I-was-just-following-orders and I-was-just-doing-my-duty defenses of Nuremberg, containing language that would make those excuses acceptable defenses for officials facing federal charges. What is also remarkable is that these provisions were not the brainchild of prophetic "plumbers" thinking ahead of ways to stay out of prison, but of well-intentioned academics, lawyers and other members of the outside legal community. Nonetheless, the administration did not object to adopting the outsiders' proposals, though Justice Department lawyers who worked on the bill also say they didn't *mean* the two sections that way. Almost nobody, it seems, meant them that way, and yet there they are.

Section 521, titled "Public Duty," declares: "It is a defense to a prosecution under any federal statute that the defendant reasonably believed that the conduct charged was required or authorized by law to carry out his duty as a public servant, or as a person acting at the direction of a public servant . . ."

Section 532, titled "Official Misstatement of Law," declares:

"It is an affirmative defense to a prosecution under any federal statute that the defendant's conduct in fact conformed with an official statement of law, afterward determined to be invalid or erroneous, which is contained in . . . an administrative grant of permission to the defendant . . . if the defendant acted in reasonable reliance on such statement . . . and with a good faith belief that his conduct did not constitute an offense."

## A LAW AND ORDER CLASSIC

The breadth of the sections is astonishing. If an official simply convinces a jury that he "reasonably believed" he was acting legally, his crime would be excused. If he or anyone else "reasonably relies" on an "administrative grant of permission"—even if it turns out to have given permission for crimes—they could be forgiven for breaking the law. And if the private agent of an official obeys orders which he, too, "reasonably believes" to be legal, a criminal case against him could be thrown out.

These must be viewed as the crowning provisions of a bill which is, in many ways, the quintessence of the law-and-order backlash of the 1960s, a period piece of the Mitchell-Agnew era. Democratic Sen. John L. McClellan of Arkansas has introduced his own criminal code reform legislation, which is also predictably tough, but even it cannot match the administration version in seeking more power for the state. Senate Judiciary subcommittee hearings on the measures have been only sporadic so far, with Watergate, ironically enough, a chief cause for the delay. The scandal has not let one attorney general stick around long enough to allow much Justice Department testimony on the bills.

The Nixon bill cosponsored but not endorsed in every detail by McClellan and Sen. Roman L. Hruska (R-Neb.) attempts to take advantage of everything that confused and frightened Americans in the 1960s—permissiveness, pornography, Dr. Spock, the Chicago conspiracy, Daniel Ellsberg, Abby Hoffman, the Weathermen, pot, LSD, the SDS and more.

## TRIVIAL OR ABSURD

For those who worry that mollycoddling judges are shackling law officers, S. 1400 would make it easier to wiretap and entrap suspects. For those who complain that lawbreakers are punished too leniently, the bill would set up a presumption against parole and probation and reimpose a mandatory death penalty for certain offenses. For those who fear that too many criminals get off altogether, it would roll back the insanity defense in a way which would, as Prof. Louis B. Schwartz of the University of Pennsylvania Law School puts it, "return the law to a primitive state which it abandoned over a century ago, ignore the moral aspect of guilt, and fly in the face of virtual unanimity painfully achieved in the past decade."

Nor does the bill stop there. For those who would repeal the First Amendment in the name of national security, S. 1400 would repudiate the "clear and present danger" doctrine, declaring it illegal to incite others "to engage in conduct which then *or at any future time* would *facilitate* the overthrow or destruction by force of the government." Or, for those concerned about state secrets, the measure would make it a felony for any federal employee to disclose classified information to "unauthorized recipients," no matter how trivial the information or how absurd the classification.

But where S. 1400 truly matches the civil libertarians' worst nightmares is in the two sections allowing public officials to excuse crimes by citing their "public duty" or orders from superiors.

Consider, for example, the criminal charges against former White House aides John D. Ehrlichman and Egil Krogh, charges stemming from the burglary of Daniel Ellsberg's psychiatrist's office. Before Krogh pleaded guilty, both he and Ehrlichman asked that their cases be dismissed, arguing that they were acting as "officers of the United States." Ehrlichman's lawyer carried the point further, stating: "The President . . . specifically directed Ehrlichman to make known to Krogh, [David] Young and Charles Colson that [the investigation of Ellsberg] was impressed with a national security characteristic.

Ehrlichman's attorney based his argument on the old principle that there can be no crime without a guilty mind, a *mens rea*. He stated: "The essence of the crime of conspiracy is . . . evil intent. The association of persons with honest intent is not a conspiracy, and the association of Ehrlichman with the others on a presidential assignment cannot be transformed into a criminal conspiracy."

Then consider Adolf Eichmann contending in an Israeli courtroom that he was not guilty of the mass slaughter of Jews because he did not have the requisite evil or criminal intent, that he had merely obeyed superior orders. Or consider the words of Lt. Calley, testifying Feb. 22, 1971, at his court-martial for the Mayiai massacre:

"Well, I was ordered to go in there and destroy the enemy. That was my job that day. That was the mission I was given . . . I felt then and I still do that I acted as I was directed and I carried out the orders that I was given, and I do not feel wrong in doing so, sir."



## THE SAME PRINCIPLE

This is by no means to suggest that mass murder or massacre are at all comparable to ordering a burglary. Nor is it to suggest that the administration bill would excuse all acts by public officials. An official, after all, would have to persuade a jury that he "reasonably believed" his action was legal. It is difficult to conceive of a presidential assistant succeeding in that, for example, in a murder case, though in the national security area it is not implausible that some juries would suspend all ordinary standards for judging on official's conduct.

But the point is that the same basic principle lies behind the Ehrlichman and Eichmann-Calley defenses—and that the Nixon bill would in part adopt that principle into federal law. Nuremberg surely taught us that a man cannot hide from the law by claiming he is more a machine than a man. Free will and individual choice and personal responsibility are at the heart of our criminal justice system. It would be inconceivable for us to hide them under a cloak of "public duty" or an "administrative grant of permission."

## WHAT MIGHT HAVE BEEN

Imagine what might have happened if S. 1400 had already been law when Ehrlichman and Krogh were contemplating a burglary. Ehrlichman need only seek an "administrative grant of permission" from, say a Justice Department confidante, and Krogh need only plan to persuade a jury that he "reasonably believed" the law not only authorized but required him to order the burglary.

Krogh's lawyers could submit a memorandum from the President describing the national security implications of the break-in. Ehrlichman could testify that he told Krogh national security made it all perfectly legal. And Ehrlichman's lawyers could introduce his "administrative grant of permission." Harry Truman's buck would be passed so rapidly from one person to another that, in the end, no criminal would have committed the crime, only public servants doing their duty.

In fact, Edgar Brown, a Justice Department attorney who helped write S. 1400 says that while "we certainly did not intend to provide greater protection for unlawful activity by government officials, you are right—if I were Bud Krogh and this provision were on the books, I would certainly use it in my defense."

Brown also acknowledges that the "public duty" section probably would have served as an effective defense for the Cubans arrested in the Watergate complex; they could credibly have claimed ignorance of U.S. law and shown "reasonable reliance" on the words of high government officials.

But "taking this provision out of context and looking at it without reference to its history and purpose makes it look much broader than it was ever intended to be," he remarks.

The history and purpose of S. 1400's "Nuremberg" actions are strange and tangled. The provisions have passed through the hands of numerous lawyers, academics and legislators for at least 20 years. For example, one source of perhaps the choicest language was an American Bar Association committee. It was the ABA's Committee on Reform of Federal Criminal Law, chaired by Prof. Livingston Hall of the Harvard Law School, which specifically recommended that the "reasonably believed" standard be included for public officials.

"We concluded," says Prof. Hall, "that the exact scope of public duty is so difficult to define that, in matters of criminal liability, the public servant should be given greater freedom of action and the benefit of the doubt. The law is so complex as to the duties and obligations of an official that, after considerable discussion and debate, we concluded that if an individual 'reasonably believed' his duty required certain action, that individual should not be subjected to criminal punishment."

Hall's ABA committee made its recommendation in November, 1972, and it certainly could not have anticipated its application to Watergate. But Prof. Hall says he still does not consider the section improper. " 'Reasonably believed' is not a subjective standard," he claims. "It is totally objective and it is one easily applied by the jury. It is a simple matter of determining intent. Juries do that every day.

"You've gotten hold of a philosophical dilemma at least 2,000 years old. Governments have to go on. If criminal law is looking over the shoulder of every public official every time that individual could conceivably be guilty of criminal conduct, the government would be paralyzed . . . If we are to arrange our laws to take account of a time when Herr Hitler comes to power, then we are in a sorry state indeed. I have not seen any good has been accomplished by putting anybody associated with the Watergate in jail, except to make them talk."

### A PRIVILEGE OF IGNORANCE?

Is "REASONABLY BELIEVED" a "totally objective" standard? Has no good been accomplished by putting Watergate criminals in jail other than to make them talk? Should public servants "be given greater freedom of action" than the rest of us "in matters of criminal liability?" These positions are, to put it mildly, highly debatable.

Most codes of justice, of course, recognize instances where the hapless or the helpless should not suffer the usual penalties for their crimes. These include acts involving insanity, coercion or duress, self-defense and certain mistakes of fact. But "ignorance of the law"—the other side of the "reasonably believed" coin—is not generally accepted as a justification for crime.

One reason for this, as Justice Oliver Wendell Holmes put it, is that "to admit the excuse at all would be to encourage ignorance." Another is that a reasonable person rarely need rely on someone else's authority to tell him an act is wrong. He has a closer authority at hand: his own conscience.

"No sane defendant has come forward to plead ignorance that the law forbids killing a human being or taking another's property or burning another's house," the legal scholar Jerome Hall has remarked. "In such cases, which include the common law felonies and the more serious misdemeanors, instead of asserting that knowledge of law is presumed, it would be much more significant to assert that knowledge of law (equally, ignorance or mistake of law) is wholly irrelevant."

And the codes certainly do not give those who administer the law the special privilege of claiming ignorance when they break it. If anything, logic suggests that public officials should be held to a higher standard in understanding and obeying the law, not the lower one suggested by Prof. Hall.

### A 20-YEAR HISTORY

Yet it is not Prof. Hall's ABA committee that invented the two S. 1400 sections. Their origins are more intricate than that. They began in a far narrower provision of the Model Penal Code, a legal blueprint published by the American Law Institute in 1953. They then reappeared 18 years later in the 1971 report of the National Commission on Reform of Criminal Laws, a congressionally created panel headed by former California Gov. Edmund G. Brown—only by then the language had been significantly altered. As the Brown Commission commented:

"By virtue of the general requirement of only a reasonable belief . . . the scope of justified or excused action by a public servant is broader here than in the model Penal Code."

The Brown Commission had begun its work in 1966, at the height of the counter-culture and Vietnam, and it, too, obviously could not have foreseen Watergate. Milton Stein, who wrote the commission comment as its special counsel, notes that the commission sections were concerned chiefly with the problems of the police and other law enforcement officials. He also contends that "a jury would expect the public servant to know more, so a 'reasonable belief' that a criminal action was not criminal is less likely in the case of a public servant." But he adds: "The problem you describe was not anticipated, but it is there."

The Justice Department of John Mitchell then used the Brown Commission report as a model for writing many parts of S. 1400. Continuity from the Brown Commission to the Nixon-Mitchell Justice Department was provided in the person of John W. Dean III, who had been associate director of the Brown Commission and became the direct beneficiary of Mitchell's patronage in the administration. It was nearly two years after the Brown Commission report that the ABA specifically recommended including "reasonably believed" in the "public duty" section and that the Justice Department went along.

### WHY DO IT AT ALL?

THE FUNDAMENTAL QUESTION to be asked about the "Nuremburg" provisions—as well as other parts of the bill—is not whether they should be changed, but whether they are needed at all and, if so, whether they should be considered in one massive measure.

The purpose of the bill is to "reform, revise and codify" the U.S. Criminal Code, an impenetrable legal museum in which most ancient monuments are crusted over with layers of precedent. This is certainly a worthy goal. But it has a deceptively mild ring about it. The fact is that in many areas, the bill would in effect create controversial new laws, each of which would normally trigger extensive congressional debate.



Neither the "Nuremburg" provisions nor anything like them, for example, are currently in the criminal code. The sections are based, rather, on scattered court rulings, in line with the intention to codify case law.

But some of the case law, as applied to public servants, has been turned on its head. One source of the "public duty" section, for instance, is an old case involving a prohibition officer who fired two shots at a car he suspected of containing liquor. The court held that the facts at hand would not have persuaded a reasonably prudent man that the car did contain booze and that the agent was not acting within the scope of his duty. Thus a ruling that protected the citizen is now helping to support a proposed general law that would also give greater license to officials.

Much of the "public duty" defense, moreover, comes out of a military context. The typical case is that of a soldier on guard duty killing an escaping prisoner. The courts have held that such killing is excusable, unless a man of ordinary sense would know that the authority or order under which he acted was clearly illegal. Any order that is not patently illegal should be obeyed, the courts have said, and that order will protect the soldier from criminal liability.

But a "public servant," acting freely, cannot be equated with a soldier acting under the compulsion of strict military discipline. An official can use discretion; a soldier must obey commands. An official can refuse; a soldier could end up in the stockade if he did. An official can resign; a soldier cannot.

As the judge in one of the military cases stated: "To ensure efficiency, any army must be, to a certain extent, a despotism. Each officer, from the general to the corporal, is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the period of his enlistment, and consents to come and go at the will of his superior officers."

The "Official Misstatement of Law" section would also turn the case law topsy-turvy as far as public officials are concerned. This provision stems largely from Supreme Court rulings which cleared citizens who had relied on official assurances that their acts were legal. Thus, witnesses before the Ohio Un-American Activities Commission in 1954 refused to answer questions after the commission told them of their right not to incriminate themselves. They were later convicted of violating an Ohio statute by refusing to answer, but the high court reversed the conviction.

This section clearly serves an important purpose in protecting citizens. The problem arises when the "administrative grant of permission" is given by one public official to another.

### THE LIMITS OF CODIFICATION

Even if both these sections can serve worthwhile purposes in certain circumstances, should Congress adopt them for all circumstances? They were in the Model Penal Code in narrower form, but that was a theoretical document meant to be as comprehensive as possible. As for their appearance in the Brown Commission study, former special counsel for their appearance in the Brown Commission study, former special counsel Stein remarks. "The reason we needed a provision in the first place was because of our intent to be complete." But that does not mean they should be written into sweeping national law for the next half century or longer. As one of Frederick the Great's chief codifiers wrote:

"I first thought that it would be possible to reduce laws to simple geometric demonstrations so that whoever could read and tie two ideas together would be capable of pronouncing on them. I almost immediately convinced myself that this was an absurd idea."

Congress should similarly recognize that there are limits to codification. Judge Jerome Frank has written: "Codification . . . cannot create a body of rules which will exclude judicial innovation and thereby guarantee complete predictability . . . The idea of regulating, by anticipation, all possible legal relationships is to be abandoned."

If Congress does not kill these sections outright, it should at the very least consider them separately, along with other turn-back-the-clock provisions written in by the Mitchell Justice Department.

It would not be merely "codifying," for example, if it adopts the obscenity section, which would outlaw all material containing "unnecessary" or "inappropriate" close-ups of a human genital. Nor would it be merely "revising" the law by restoring, as the bill would, the "guilt by association" provision of the Smith Act, which the Supreme Court found unconstitutional. The measure

would make it a crime just to "join" or be "an active member" of a group which plans to incite conduct that would "facilitate" the overthrow of the government—"then or at any future time."

And if insanity is no longer to be recognized as a disease by the law; if capital punishment is to be re-established; if leaking classified information is to be published as a felony—these cannot be considered little sections of a giant bill. They must receive, one by one, the complete, open and individual debate they demand.

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[From the Washington Post, Mar. 3, 1974]

CRIMINAL CODE: JUSTICE REPLIES

(By Henry E. Petersen)

I am somewhat disheartened by the article "Making It All Perfectly Legal" by Richard R. Korn and Gregory B. Craig which appeared in the Outlook section of Jan. 20. The subject of the article was S. 1400, a Senate bill designed to reform the entire body of the substantive federal criminal law, which was drafted within the Department of Justice and transmitted by the administration to the Congress in March of 1973. The article contains unfortunate innuendo and a number of inaccurate and misleading statements.

1. The general theme of the article is that S. 1400 is "the quintessence of the law and order backlash" that takes "advantage of everything that confused and frightened Americans in the 1960s" and that it "matches the civil libertarians' worst nightmares." The bill's author is identified as "the Justice Department of John Mitchell," in which, it is pointed out, John W. Dean III "became the direct beneficiary of Mitchell's patronage." Implicit in the article is the suggestion that certain defenses to criminal prosecutions may have been included in S. 1400 with an eye to benefitting certain public officials involved in the Watergate matter.

S. 1400, which is based largely upon the draft bill produced in January, 1971, by the National Commission on Reform of Federal Criminal Laws [known as the Brown Commission after its chairman, former California Gov. Edmund G. Brown, was drafted by a special group of career attorneys in the Department of Justice working in consultation with attorneys of other federal departments and regulatory agencies that would be affected by this legislation. Their work was reviewed by a committee headed by me. The review in the Department of Justice went no further.

The spirit in which this work was carried on was accurately described by Judge Joseph T. Sneed, then deputy attorney general and former dean of Duke University's Law School, in testimony before the Senate Judiciary Committee:

"Let me stress that we have constantly sought to produce not just a useful assemblage of prosecutor's tools, but also as fair a series of provisions as could be drafted. The critical importance of fairness in a criminal code is apparent to us as citizens. It is also apparent to us as lawyers whose work under unfair statutes would very quickly and very properly be undone by the courts. This is a matter of great importance to us . . . We have consistently considered fundamental fairness—to potential defendants, to defendants and to society as a whole—to be an imperative."

Whether or not everyone would agree that the product of this effort, in all of its provisions, has achieved the balance we attempted, to dismiss the entire proposal as a series of draconian provisions does service neither to the facts, the public, nor the career attorneys who produced it.

The inference suggested in the opening paragraphs of the article and at a few points thereafter—that the defense provisions of the bill were inserted by or on behalf of individuals accused of complicity in the Watergate matter—is nothing short of ludicrous. Suppressing a more direct response, I will tender only a chronological accounting, pointing out that the two defenses in question were drafted in the Department in mid-1971 and mid-1972; that the bill was transmitted to the Congress on March 22, 1973, before rather than after the reading of the [James W.] McCord letter [to Judge John J. Sirica]; that a bill of such scope obviously would require at least two or three years after introduction to wend its way through the appropriate congressional committees and reach the point of passage; and that the bill expressly provides that it is not to become effective until two years after its passage.



2. The principal, direct charge leveled by the article is that, in the chapter on defenses to criminal prosecutions, the defenses entitled "Public Duty" brazenly extend the law in providing defenses to public officials accused of wrongdoing. They would not.

The public duty defense does not "give greater license to officials" than does current law. It is probably as accurate a statement of the current case law as is possible to devise. It certainly would give no public official a defense to a prosecution in the sorts of situations with which the authors profess concern. Even the allegation that S. 1400 and the Brown Commission Code would expand upon the recommendation contained in the Model Penal Code [published by the American Law Institute in 1953]—on the questionable assumption that the Model Penal Code is more relevant than current law—is not wholly accurate. The Model Penal Code would permit a defense where the defendant "believes" his conduct to be authorized in certain circumstances; the S. 1400 insertion of the word "reasonably" before the word "believes" is a cutback from the prospective reach of the Model Penal Code's formulation in such instances. (Section 3.03 (3) (a) MPC, Proposed Official Draft.)

The allegation that the defense of "official misstatement of law" would "turn the case law topsy-turvy as far as officials are concerned" is also without basis in fact. This defense, too, reflects the current case law, except to the extent that it cuts back on the existing law by requiring that any reliance upon an agency's interpretation of the law be "written" and be "issued by the head of (the) agency." Moreover, as an affirmative defense, the burden would be upon the defendant to establish to a jury that his reliance upon the official misstatement of the law was reasonable and was in good faith. The defense has been applied in appropriate circumstances in the past—see *Cox v. Louisiana*, 379 U.S. 559 (1965) (involving defendants engaged in a civil rights demonstration); *U.S. v. Laub*, 385 U.S. 475 (1967) (involving a defendant who traveled to Cuba in violation of State Department regulations); and *Raley v. Ohio*, 360 U.S. 423 (1959) (involving defendants charged with contempt of court for invoking their privilege against self-incrimination)—and it would continue to be available in appropriate circumstances in the future. By no stretch of the imagination could it be construed to reach the situations hypothesized by the authors of the article. (See generally, L. Hall and Seligman, "Mistake of Law in Mens Rea," 8 U. Chi. L. Rev. 641 (1941); J. Hall, "Ignorance and Mistake in Criminal Law," 33 Ind. L. J. 1 (1957).) Moreover, not only is most state case law similar, so is the comparable provision of most modern state codes. (See e.g., Section 15.20 of the New York Revised Penal Law.)

As to the authors' ultimate doubts about the wisdom of codifying defenses at all, it should be recognized that any such codification can provide only the broad outlines of the law, as do the generalized statements of such law prefacing the specific holdings in the current case decisions. Application of these principles to the myriad fact situations possible must continue to be left to the sound judgment of the courts and the common sense of juries.

3. While the above allegations constituted the foundation of the authors' primary attack, in the course of their article they made several other plain misstatements which demonstrate unfamiliarity either with S. 1400 or with current law. Among those misstatements are the following:

The authors allege that "S. 1400 would make it easier to wiretap." It would not. S. 1400 parallels precisely the reach of the current wiretapping statutes even to the extent of retaining some of the more unwieldy language of the current statutes in an effort to allay any possible concern that attempted simplification might alter their scope. (Compare sections 1532–1534 and 3125–3131 of S. 1400 with 18 U.S.C. 2510–2520.)

The authors claim that "S. 1400 would make it easier to . . . entrap suspects." It would not. The entrapment provision of S. 1400 codifies the case law consistently announced by the Supreme Court for over 40 years. (Compare Section 531 of S. 1400 with the decisions in *U.S.* v. *Russell*, 411 U.S. 423 (1973); *Sherman v. U.S.* 356 U.S. 369 (1958); and *Sorrells v. U.S.*, 287 U.S. 435 (1932).)

The authors allege that S. 1400 would restore "the 'guilt by association' provision of the Smith Act, which the Supreme Court found unconstitutional," and "repudiate the 'clear and present danger' doctrine." It would not. The only portions of the Smith Act, 18 U.S.C. 2385, that would be carried forward by S. 1400 are those that have specifically been held constitutional by the Supreme Court. The language employed—singled out and quoted by the authors of the article as exemplifying its unconstitutional breadth—is taken directly from Supreme

Court decisions to insure that the statute would stay within the bounds set by the Court. (*Dennis* v. *U.S.*, 341 U.S. 494, 499–511 (1951); *Yates v. U.S.*, 354 U.S. 298, 321, 325 (1957); *Noto v. U.S.*, 367 U.S. 290, 297–298 (1961); and *Scales v. United States*, 367 U.S. 203, 234 (1961).) The "clear and present danger" test does not appear in S. 1400, just as it does not appear any place in current statutes, for the simple reason that it is an implied constitutional limitation, the statement of which in a statute would be redundant at best. (*Dennis v. U.S.*, 341 U.S. at 512–15; *Scales v. U.S.*, 367 U.S. at 230.)

The authors assert that S. 1400 seeks "more power for the state" than S. 1, another proposal for a federal criminal code which has been introduced by Sens. McClellan, Ervin and Hruska. I am not sure of the measure the authors would use to determine what would constitute "more power for the state," but most lawyers would measure such power contained in a federal code by the provisions granting federal jurisdiction to prosecute the criminal offenses therein defined. An examination of S. 1400 will readily reveal that the jurisdictional reach of that bill is clearly more circumscribed than that of S. 1, and, for that matter, materially more circumscribed than that of the Brown Commission.

4. In three other areas—involving the insanity defense, the dissemination of classified information and the death penalty—the authors have made reference to the S. 1400 provisions in a fashion that hardly suggests any sensitivity on the part of the Department to the serious social and policy considerations involved. All three areas, however, have been the subjects of extensive and thoughtful evaluation during the drafting process, and have been specifically pointed out by the Department to the Congress as matters involving controversial points warranting hearings, close examination and dispassionate consideration. Hearings with respect to two of those areas have already been held.

Insanity is a defense to a prosecution under S. 1400 only if the defendant was not aware of what he was doing. Defendants suffering from a less debilitating mental disease or defect, though found by a jury to have committed the criminal act with the requisite criminal intent, would be entitled to a special pre-sentencing proceeding at which psychiatric testimony, free of the ordinary confines of the rules of evidence, would be admissible. The judge would then sentence the individual, where appropriate, to psychiatric treatment in a hospital or an outpatient clinic rather than to incarceration in a federal prison. The procedure was devised as a reasonable and humane alternative to the current swearing contest between government and defense psychiatrists. (See sections 502 and 4221–4225 of S. 1400.) The allegation that in S. 1400 insanity "is no longer to be recognized as a disease by the law" is not a fair characterization.

The provision concerning dissemination of classified information by government employees would, in a more careful analysis, be acknowledged to restrict current law in at least as many areas as it extends it. (Compare section 1124 of S. 1400 with 18 U.S.C. 798, 42 U.S.C. 2274 and 2277, and 50 U.S.C. 783(b), and *Scarbeck v. U.S.*, 317 F. 2d 546 (C.A. D.C. 1962).) Moreover, to the extent that the author's language may be interpreted as suggesting that disseminating classified information is not now punishable at the felony level, it should be noted that the current statutes carry penalties of 10 years or more while S. 1400 carries a three-year maximum penalty (or a seven-year maximum if the information was delivered to a foreign agent.)

The authors state that S. 1400 would "reimpose a mandatory death penalty for certain offenses." The provision referred to cannot fairly be categorized as mandatory in the traditional sense. While certainly the incorporation of the death penalty at all is a matter of justifiable controversy, if there is to be a death penalty under any circumstances the provision set forth in S. 1400 deserves to be recognized as a carefully circumscribed proposal. It is limited to a very narrow range of offenses and attendant circumstances; it is designed in a fashion that will afford the maximum deterrent protection to victims of rapes, kidnapings and aircraft hijackings; and it is made subject to an objective, post-verdict determination by a jury. It is, in my view, more rationally devised than any other death penalty proposal pending in the Congress or pending or passed in any of the state legislatures. (See sections 2401 and 2402 of S. 1400.)

A work of scope encompassing the entirety of the federal criminal law is bound to include some provisions that will create, or recreate, legitimate controversy, but these provisions should be recognized for what they are—relatively minor segments of a major work containing literally hundreds of improvements in the federal criminal law. Certainly they warrant thoughtful discussion rather than innuendo and ill-considered extrapolation. The federal criminal code proposed by



the Department of Justice, as well the codes proposed in S. 1 and in the Brown Commission report, will receive careful and reasoned consideration in the Senate and House Judiciary Committees, and I hope that they will receive similar consideration in the press.

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After two years of Watergate, Assistant Attorney General Petersen criticizes us for not believing in the honorable purposes of the administration's omnibus criminal justice bill. Then, going far beyond anything we've said, he accuses us of implying that "the defense provisions of the bill were inserted or on behalf of individuals accused . . . in the Watergate matter." He calls this "nothing short of ludicrous."

We agree: Of course, we never suggested that in the first place. What we did say, citing one of Petersen's own departmental lawyers, was that the "public duty" provision *could have* served as an effective defense for some of the defendants arrested at Watergate. And we were very concerned that the "public duty" defense could serve such a function in the future. We regret Petersen's use of the straw man tactic; we are troubled by how he uses what we did not say as a device for distracting attention from what we did say.

Yet even in his defense of the bill itself, certain citations of law are clearly disingenuous; others are boldly incorrect.

Petersen denies, for instance, that S. 1400 would reinstate the unconstitutional "guilt by association" provisions of the Smith Act. On page 36 of S. 1400 he will read a provision punishing anyone who "joins or remains an active member of an organization which incites others to engage in conduct which *then or at some future time* would facilitate the overthrow . . . of [the] government." In the face of such language, how can Petersen deny that S. 1400 would repudiate Justice Homes' "clear and present danger" test which has long protected provocative speech?

Whether "brazenly" or subtly, S. 1400 takes the "public duty" defense, which was developed for certain limited circumstances, and applies it universally. In our view, moving from the specific to the general *ipso facto* extends the law. The case law which supports the "public duty" defense comes largely from a military context. To the extent that the "public duty" defense was originally intended to protect policemen from being prosecuted and convicted for honest mistakes made in the line of duty, the case law seems reasonable. The danger lies, however, in taking a principle from the military and applying it to all government officials. One of the lessons of Watergate surely is that a perceived insulation from criminal prosecution, whether it comes from a President or a statute, can lead to dangerous abuses of official power.

Petersen's demurrer notwithstanding, the "official misstatement of law" provision does turn the case law topsy-turvy. The relevant cases deal exclusively with private individuals prosecuted when they acted in reliance on official pronouncements. S. 1400 is innovative in that it would effectively extend a defense to situations in which one government official could allege that he "mistakenly" authorized criminal conduct by another government official, thereby immunizing that official from criminal sanctions. Thus, a principle intended to protect the individual from irrational government behavior might be used to protect official collusion in wrongdoing. Once again, a shield originally designed for the citizen is beaten into an executive sword.

Petersen writes that the provisions we object to are "relatively minor segments." We do not agree. We do not agree that entrapment, official malfeasance, insanity, wiretapping, freedom of association and the death penalty are minor matters. That is why we wrote the article. Perhaps we were overly concerned. After all, in one way or another, the Nixon administration will come to an end within three years. But the Nixon administration bill, if passed, will long outlive Mr. Nixon's presidency. If we were in any way intemperate it was because of our fear that residues of the Watergate mentality might persist, and pollute the administration of justice in this country for an indefinite time to come.

RICHARD R. KORN
GREGORY B. CRAIG

Senator HRUSKA. I will now ask Tom Henderson of the staff of Senator Kennedy, a valued member of this subcommittee, if he has any questions, and if so, to pursue them at this point.

Mr. HENDERSON. Thank you, Mr. Chairman. I have just a few.

Mr. Craig, the Justice Department in referring to section 521 stated that the public duty defense is as accurate a statement of the current case law as it is possible to devise.

Is that your understanding?

Mr. CRAIG. I would disagree with that judgment on the case law for reasons that I have cited in my statement. I think the vast majority of the case law comes out of the military context. Most of the case law is restricted to examples involving the use of force by the public officials.

In addition, those cases when a public duty defense has not been permitted by the court are, of course, not recorded. Conversely, when the public duty defense is permitted, it is reported. The defense, as I understand it presently, is left to the discretion of the court. In my opinion it should be left to the discretion of the court. By codifying it in section 521, it would not be up to the discretion of the court.

Mr. HENDERSON. The cases you cited were all military cases.

Would you say that a policeman who possibly shoots an escaping felon, and it is a mistake, should be covered in public duty defense? That would be not in the military context.

Mr. CRAIG. It would be a similar application, though, of the theory.

Mr. HENDERSON. That is correct, but it is not. You drew the distinction of military——

Mr. CRAIG. That is correct. However, under section 521, it would apply to all public officials, whether or not they were using force.

Mr. HENDERSON. I was going to ask if you would agree that section 521 should be amended, if not deleted. If it is not deleted, should it be amended to be limited to just the use of force and not be available to public officials outside of that area.

Mr. CRAIG. My preference in this area, Mr. Henderson, would be to delete the provision in its entirety and apply the general provision section 501 which I also find the culpability provisions in the proposed code to be very admirable and in my opinion they should be used to cover situations like that. Absent the deletion, I would urge that this provision be amended to limit its application only to those public officials who are authorized to use force in the performance of their duty.

Mr. HENDERSON. That is all the questions I have.

Mr. SUMMITT. I would like to ask several questions.

Mr. Craig, you have stated that you would rather have the provision deleted and rely on the case law.

Mr. CRAIG. Yes; I would.

Mr. SUMMITT. If you had an alternative of which way to codify it, would you delete the language "reason to believe" and go back to the final report version?

Mr. CRAIG. That is yet another amendment, which is an alternative that I find preferable to leaving it as it is.

However, as I say, my first preference is to delete it entirely.

Mr. SUMMITT. There is some argument to be made that if you are going to have a code, that the defenses should be part of that code. So if that decision is made, I take it what you would prefer would be to delete the mental state aspect for this defense and return to the previous version.

Mr. CRAIG. That certainly would be preferable. I would prefer even more, though, that this area not have so much duplication. There



are general provisions that deal with culpability and state of mind that certainly would apply to public officials in this area. Those culpability provisions I think Mr. Keeney of the Department of Justice testified on in May 1974. These are provisions that would be available to all criminal defendants and not restricted to public officials or private citizens. I think public officials could certainly invoke those provisions. Similarly, section 501, the general provision on mistake of fact or law proposed in S. 1400 would be relevant here.

Mr. SUMMITT. Would you codify defenses at all?

Mr. CRAIG. Oh, I think certain defenses would be legitimate to codify, there is no question about that.

Mr. SUMMITT. I just have one other question.

Does it really worry you that a government official would go to the Department of Justice, seek an advisory opinion on the legality of an action, receive that opinion, and then in good faith follow it?

Mr. CRAIG. It would bother me if there were a procedure already outlined by the law to find out whether a search or a wiretap were legitimate and lawful, and that procedure was short-circuited. That procedure is to seek a warrant from a judge; the judge then finds probable cause or not. If an official is in doubt about that procedure or in doubt about the legality of an action for him then to pursue another way outside of the ordinary criminal process as is laid out in our system, that would bother me a great deal; yes.

Mr. SUMMITT. This is an affirmative defense which would place on the defendant the burden of proving that his action was in good faith.

Mr. CRAIG. I understand that.

Mr. SUMMITT. I just wanted to make sure that that kind of situation would trouble you.

There are a number of legal philosophers who want to go the other way and let the non-governmental defendant rely on his attorney's advice, and I was curious if you would go that way, too.

Senator HRUSKA. As a matter of fact, absent a court decision where there is inconsistency or vagueness in a statute, is it not considered that the opinion of a State attorney general or the Attorney General of the United States opinion constitutes the legal decision until the law is changed?

Mr. CRAIG. In certain respects, sir, I agree with you. Generally the Attorney General's opinion is published. Actions and policies are usually signaled before they are taken. There is opportunity for comment from members of the bar and from Members of Congress and other citizens. It is not generally done as one private citizen in a public capacity quietly going to another private citizen and asking for an administrative grant of permission.

Senator HRUSKA. Of course, you postulate your opinion artfully on the idea that by doctrine a policeman is going to sneak into some assistant attorney general's office and say buddy, give me a favorable decision on this. I am about to do something very nefarious and I want protection. Will you give me protection?

Well, I wonder if that postulate is not a little faulty and a little bit severe on people who assume a public trust.

Is this cynical?

Mr. CRAIG. It may be. But at this point there are approximately 28 high Government officials who have been indicted or who have pled guilty to crime. As I said in my testimony, Mr. Chairman, I would

never have suspected this kind of widespread official wrongdoing were a realistic possibility up until the last couple of years. However, that hypothetical, unfortunately, now looms as a real possibility.

Senator HRUSKA. Are you of the opinion that when Colson made the plea he did, that it was the first time that that has ever been done? Have you lived long enough to have experienced other chapters and other episodes and other people not named Colson but in a like situation have made the same plea to the court that you detailed in your statement?

Mr. CRAIG. Having to do with the justification of the break-in?

Senator HRUSKA. Yes; overzealousness and therefore——

Mr. CRAIG. I agree, but the courts in the past have not accepted that.

Senator HRUSKA. It has been argued, has it not?

Mr. CRAIG. Of course, but the courts have not accepted it as a legal defense. And my point is that in many respects section 521 would allow a defense of overzealousness or public spirit to enter the proceeding.

Senator HRUSKA. Was that allowed in the Colson case?

Mr. CRAIG. It was not.

Senator HRUSKA. That is good. It shows the system is working.

Mr. CRAIG. Precisely my point.

Senator HRUSKA. That is right.

Mr. CRAIG. And this would change it. Judge Gesell would have been required to accept evidence as to Colson's belief or the state of Colson's mind. That would have all been entered into evidence. The same was true with Mr. Ehrlichman; it is my understanding that he was precluded by strict instructions from the court from making that same kind of argument.

Senator HRUSKA. Well, of course, you say that the S. 1400 provision goes to the necessity of proving the defendant's state of mind, and I cannot quite agree with you. As a matter of fact, the public duty defense provision of the Brown commission is cut back on by S. 1400 by requiring an objective analysis rather than a subjective analysis of the defendant's belief that he was acting in accordance with the law.

I cannot agree with you that it is a subject—it is a reasonable belief, and that is for the court and the jury to act out and to try to solve, if they can.

Mr. CRAIG. Mr. Chairman, my understanding of the Brown commission report, the relevant section of which is section 602, part 1, is that it would require (for the defense to be invoked) the argument to be made that the actions, the conduct was in fact justified because it was required or authorized by law. The Brown commission does not require any investigation into the state of mind of a defendant who invoked the public duty defense. It focuses entirely upon the nature of his conduct and his acts. What was he doing? Was it in fact within the scope of his duty? Was it authorized by law? Whereas under section 521, in S. 1400, the reasonable belief standard broadens that earlier provision to allow all sorts of evidence which presently is allowed only at the discretion of the courts.

Senator HRUSKA. Well, you make that statement, do you not on the assumption that the defendant will be asked what did he believe, and that the whole issue to the jury will be determined by what he says he believed, and they will either believe him or not, and act accordingly.



But also bearing upon what a defendant can reasonably believe would be his conduct and the fashion in which he comported himself, objective things that are still in the picture. They are still in the picture. They are not excluded. And the sole item of proof will not be what he says he believed and his judgment that he thought it was reasonable, but such a fact will have to be corroborated by the surrounding facts and circumstances, will it not?

Mr. CRAIG. Would you acknowledge, though, Mr. Chairman, that this particular provision under S. 1400 would allow certain additional evidence, requires that certain evidence be admissible if that defense were invoked, than section 602 of the commission?

Senator HRUSKA. But what is wrong with allowing such evidence in? Do you want to deny the admission of such evidence?

Mr. CRAIG. Not at all. It depends on the circumstances of the case, and in some cases I would think that it would be appropriate to allow evidence in as to the state of a defendant's mind, and in other cases I would think it would not be appropriate.

My plea here is that this defense has been used at times and recognized by courts, and at times it has not been. It should be up to the discretion of the court, and it should be handled on a case-by-case basis, which really is the genius of the common law. You can tailor instructions and tailor evidence and rulings to the nature of the case, as justice requires, rather than requiring a judge to behave in the same way in all circumstances. We lose flexibility. We lose a certain amount of humaneness in the application of the criminal code that way.

Senator HRUSKA. Well, in order that we will have the record complete, there will be inserted in it at this point section 608 of the Brown report, because that bears on the subject that you have just been talking about. You know, you say——

Mr. CRAIG. Excuse me, Senator.

Could I ask that section 602 also be included?

Senator HRUSKA. By all means. Let's get the whole thing in. If you think it bears on the same point.

Mr. CRAIG. They both apply, I think.

Senator HRUSKA. I do not know what section 602 has, but if you think it pertains, we will put it in.

[The information referred to follows:]

[Excerpts from final report of the National Commission on Reform and Federal Criminal Laws]

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CHAPTER 6. DEFENSES INVOLVING JUSTIFICATION AND EXCUSE

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SEC. 602. EXECUTION OF PUBLIC DUTY

(1) Authorized by Law. Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law.

(2) Directed by a Public Servant. A person who has been directed by a public servant to assist that public servant is justified in using force to carry out the public servant's direction, unless the action being taken by the public servant is plainly unlawful.

(3) Citizen's Arrest. A person is justified in using force upon another in order to effect his arrest or prevent his escape when a public servant authorized to make the arrest or prevent the escape is not available, if the other person has committed, in the presence of the actor, any crime which the actor is justified in using force to prevent or if the other person has committed a felony involving force or violence.

* * * * * * *

SEC. 608. EXCUSE

(1) Mistake. A person's conduct is excused if he believes that the factual situation is such that his conduct is necessary and appropriate for any of the purposes which would establish a justification or excuse under this Chapter, even though his belief is mistaken, except that, if his belief is negligently or recklessly held, it is not an excuse in a prosecution for an offense for which negligence or recklessness, as the case may be, suffices to establish culpability. Excuse under this subsection is a defense or affirmative defense according to which type of defense would be established had the facts been as the person believed them to be.

(2) Marginal Transgression of Limit of Justification. A person's conduct is excused if it would otherwise be justified or excused under this Chapter but is marginally hasty or excessive because he was confronted with an emergency precluding adequate appraisal or measured reaction.

* * * * * * *

Senator HRUSKA. In your statement, at page 5, you suggest the difficulty when the provision arises where one attempts to immunize another from possible conviction by providing them with an administrative grant of permission. I quote: "Let us consider an example in which this provision might be invoked by a public official in such a way as to protect himself from the final reach of the criminal law." Then you go into the business of collusion between the two.

Is there likelihood of collusion between a private citizen and a public official? Why would not a sheriff who says to a private citizen who is a good friend of his, "well, it is all right for you to build a bonfire right next to the jail". The friend has a 5-gallon can of gasoline there and lights a fire which gets too close to the jail and it accidentally gets on fire. But the sheriff told him yes, it is all right for you to build a fire there. Now, the man is being accused of building a bonfire too close to a public building. According to the cases that you have cited including *Cox* there would be a good defense because the sheriff said he could go there.

Could there not be collusion between the two if the sheriff had in mind, the idea to burn the jail down. Could there not be collusion there?

Mr. CRAIG. That is a problem you run into with any entrapment kind of proceeding. Then the private citizen is then prosecuted by the sheriff?

Senator HRUSKA. By the authorities. The sheriff does not prosecute anybody, not in Nebraska. We have a States attorney and county attorney to do the prosecuting.

Mr. CRAIG. And the private citizen would then invoke the defense that the sheriff said——

Senator HRUSKA. Yes; the citizen said, look, I built the fire there. You tell me there is a law against it, but the sheriff said to build a fire that close to the jail. The sheriff told me it was all right. It was a cold day and I wanted to warm myself. And then accidentally I spilled some gasoline near the fire and ran like the dickens. The jail burned down and now I am being prosecuted for having built a fire too close to the jail in violation of the law. But the sheriff said it was all right, the sheriff told me it was all right.

Mr. CRAIG. I think that there is always a possibility of collusion.

Senator HRUSKA. Of course.

Mr. CRAIG. There is no question about that.

Senator HRUSKA. And do you not think the Supreme Court had that in mind also, the possibility of collusion in the *Cox* case?

Mr. CRAIG. Not at all, Mr. Chairman. I do not agree with that.



Senator HRUSKA. Perhaps I have a different concept of the Supreme Court justices than maybe you do.

Mr. CRAIG. No; I have great respect for the Supreme Court. I would point out that the facts in the *Cox* case involved a private citizen and an official. The difficulties involved or the dangers involved, it seems to me, of collusion between the private citizen and a public official, in order to immunize a private citizen from possible criminal liability are far less than the dangers of one Federal official immunizing another public official. The scope of activity that is open to Federal officials, if they are law enforcement officials or if they are FBI agents or IRS people, is much broader. And they act under the protection of the law. They are generally given a great deal of discretion; the power of the State is also involved.

So I would think that what we are worried about here is unwisely liberating the State to go into areas that ordinarily it should not be permitted to go into. This is a point I think would appeal to you, to restrict the illegal activities or at least deter the unlawful activities of public officials.

Now, when you have a situation of private citizen and a public official in collusion, the public official is always answerable to other public officials.

Senator HRUSKA. But collusion is possible in both cases, as you admit. My response is that the courts can detect collusion. They can deny the defense to those who operate in collusion. This is an issue for the fact finder, as any other issue. Furthermore, in either case, isn't the superior, whether he deals with another public official or with a private person always accountable?

Mr. CRAIG. The question is, who is the superior of the Justice Department official who authorizes the break-in?

I happen to agree that there is a problem with both of those situations, but I think it is more serious and more threatening when it involves two members of the government.

Senator HRUSKA. It is good to get your view. Some people lean that way. Other people think that perhaps public officials, and especially law enforcement people ought to get a break. They ought to have some protection in the discharge of their duties.

Mr. CRAIG. I do not see any evidence that they are not getting that protection now. I think generally speaking Federal officials and law enforcement officials have not been wrongfully convicted.

I would like to point out the example of the Federal narcotics investigation units that broke into houses in Illinois who were recently tried and acquitted. I simply do not know of any examples, Senator, where law enforcement officials are wrongfully being prosecuted or convicted of criminal acts. I think their protection is adequate, and I think juries protect them. The public spirited citizen recognizes the difficulty of enforcing the law.

Senator HRUSKA. Of course, all of the defendants in the *Collinsville* case were held not guilty by the jury, were they not?

Mr. CRAIG. That is what I am saying. I do not know whether the public defense was offered at that trial or not.

Senator HRUSKA. They busted into that door mistakenly.

Mr. CRAIG. Well, you are giving me an example, Senator, where my sympathies are entirely with the private citizen who is the victim of this

kind of flagrant abuse of investigatory power of the Federal Government. It may well have been a mistake, but it was the kind of use of force and violence and misjudgment——

Senator HRUSKA. It sure was.

Mr. CRAIG. That Federal officials should be encouraged to resist, and if they get fired for resisting or objecting, then let them have a system of appealing, but rather than—you see, now, the next time this kind of thing happens, the Federal official in that situation is not going to be deterred. He is just going to follow his superior's orders and do it because the criminal law has not really worked. And I do not know the facts, I do not know the case. But it appears to me that the criminal law, the deterrent effects of ordinary sanctions contained in the criminal law are not going to operate in the future in this area.

Senator HRUSKA. If a private citizen had broken down that door and marched in, he would have been put in jail, would he not?

Mr. CRAIG. I think so; yes.

Senator HRUSKA. I think so, too.

Now, does it follow that the policeman, if he does the same thing and goes unprosecuted, is above the law. A private citizen would have gone to jail. The police officer did not have to go to jail. Does that mean he is above the law?

Mr. CRAIG. You are making my point precisely. I do not think he should be above the law.

Senator HRUSKA. You think that the Collinsville prosecution and the result of it was all right?

Mr. CRAIG. No. I do not know the facts. I am not going to sit in the jury seat and say what happened and what was wrong because I do not know the facts of that case. I would say that it appears to me from reading the newspaper accounts of it——

Senator HRUSKA. Now, wait a minute. You are going to base your reasoning on that, on the newspaper accounts? They had those people in jail for 10 years straight the day after the break-in. The law followed its course and 17 counts were leveled against them. The jury heard the case over a week, and they acquitted them of all 17 counts. And you tell me that you want to disbelieve the jury and believe instead what the newspapers said?

Mr. CRAIG. What I do know about the case——

Senator HRUSKA. Well, I happen to have seen the court records, so maybe that makes a little bit of difference.

Mr. CRAIG. You would have an advantage over me, there is no question about that.

Senator HRUSKA. On another subject, it is true, is it not, that in regard to official misstatement of law in S. 1400, that section is based on the Brown commission's provision. Now, this is the misstatement of law provision and the Brown commission's conclusion in that regard is the same as the model penal code?

Is that true?

Mr. CRAIG. I think they are very similar; yes.

Senator HRUSKA. They are more than similar. They are the same.

Now, a number of States have adopted the model penal code with its "official misstatement of law" provision.

Now, do you have any knowledge of any abuses in the States where that provision has been adopted?

Mr. CRAIG. No; Mr. Chairman, I do not.



Senator HRUSKA. I do not know that we were informed of any such abuses in our commission hearings or when chairman Brown was a witness during these hearings, but if there were no abuses and none have been produced, what leads you to believe there will be an abuse under Federal law?

Mr. CRAIG. The experience of the last year or two is what leads me to this conclusion. If you recall my testimony, I said that the policy objectives of this provision are ones that I can support totally. I have no difficulty there.

Senator HRUSKA. But an assertion of a defense was made, and it was denied. You would not deny a defendant the opportunity to make a defense of any kind, would you?

The judge would not be allowed to permit every defense that is asserted, but what abuse is there? There was no abuse in the *Colson* case. The defense was denied and he is serving his time. There was no abuse. That is not an example.

Mr. CRAIG. Would Judge Gesell have been free to deny that defense, Mr. Chairman, had section 521 or 532 been enacted prior to that trial, or of Mr. Ehrlichman's? I contend that Mr. Ehrlichman would have had a defense tailored for his case, and that it would have been a considerably more difficult task to prosecute and convict Mr. Ehrlichman had section 521 existed.

Senator HRUSKA. Well, we do not even know that that was an issue in the *Ehrlichman* case, do we?

Have you a transcript of that case?

Mr. CRAIG. I do not have a transcript.

Senator HRUSKA. Very well. Thank you for coming before us. We are grateful to you for an expression of your views. There are others who hold similar views, and in that lies some value also to the committee.

Mr. CRAIG. Thank you, Mr. Chairman.

Senator HRUSKA. Before I call the next witness, I will offer for the record an eighth circuit court opinion in the case of *Woosley* v. *United States*, in which the court granted a reduction of sentence. Although we have previously had hearings specifically directed to the appellate review of sentences, I have just now received a copy of this case and since we will be discussing sentencing with the next witness, I believe this is an appropriate place in the record for this well-documented decision.

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United States Court of Appeals for the Eighth Circuit

No. 71-1691

ROBERT MICHAEL WOOSLEY, DEFENDANT-APPELLANT

*v.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*Appeal from the United States District Court for the Eastern District of Missouri*

Before MATTHES, *Chief Judge*, VAN OOSTERHOUT, *Senior Circuit Judge*, MEHAFFY, GIBSON, LAY, HEANEY, BRIGHT, ROSS and STEPHENSON, *Circuit Judges*.

(Filed on April 23, 1973)

BRIGHT, *Circuit Judge:* Upon this rehearing *en banc* of the instant appeal,[1] we grant relief to Robert Michael Woosley, a Jehovah's Witness, from a five-year

[1] Initially, a divided panel denied Woosley relief from this sentence. Woosley v. United States, No. 71-1691, May 26, 1972 [unpublished].

prison sentence for refusing induction into the military service in violation of 50 U.S.C. App. § 462.

Appellant was convicted on his guilty plea, which the district court refused to permit him to withdraw. Woosley then appealed the conviction. We sustained this ruling of the district court and affirmed the conviction in *United States* v. *Woosley*, 440 F. 2d 1280, *cert. denied*, 404 U.S. 864 (1971). Thereafter, Woosley petitioned the district court under Rule 35, Fed. R. Crim. P. for reduction of his sentence. The court, without a hearing, denied the petition on November 5, 1971, and on November 23, 1971, again without a hearing, denied appellant's motion to reconsider. Woosley now brings this timely appeal from those orders.[2]

At the time of sentencing, the record showed appellant Woosley to be 19 years of age, married, steadily employed, and a prospective father of a child to be born within two months. His difficulties with the Selective Service System stem from his sincere religious beliefs as a Jehovah's Witness, which beliefs do not permit him to take up and bear arms against other people nor permit him to perform civilian service as a conscientious objector at the order of a Selective Service Board, an arm of the military in the view of Jehovah's Witnesses. Thus he did not ask his draft board to classify him as a conscientious objector but did request a ministerial classification. The Board declined this request and thereafter ordered Woosley, a resident of Springfield, Illinois, to report for induction. He declined induction at the induction station in St. Louis, Missouri, and prosecution followed in the United States District Court for the Eastern District of Missouri. The district judge described Woosley as "a fine young man," and from the testimony adduced at the hearing on motion for withdrawal of the guilty plea, the court noted that "[T]his young man should have desired to obtain a conscientious objector status."

Without doubt the evidence available to the district court showed Woosley to be a sincere and religiously motivated conscientious objector who failed to qualify for an exemption from military service solely because his religious tenets forbade him to apply for and perform civilian work as a conscientious objector. Notwithstanding this showing, the court pronounced a five-year sentence, the maximum prison term authorized by law. Our reading of the record discloses no indication of the reasons for the severity of the sentence, except a comment made by the court at an earlier hearing on July 10, 1970, when the court, in response to counsel's plea for probation, stated:

> The COURT. Mr. Woosley, I have examined the probation report and these letters very carefully. I have decided what I am going to do with you today. I am not going to sentence you today. But I want to be right certain that you understand what you are going to do. *It has been my policy, and I don't intend to change it at this point,* first of all, you have not even asked for a conscientious objector status. I think the reason is obvious, because, apparently, it is your belief that in the event you are classified as a conscientious objector, you would not serve in any noncombatant work. Is that correct?
>
> Defendant WOOSLEY. That is correct, sir.
>
> The COURT. So I am going to have you surrender to the custody of the marshal this morning. I am going to have sentencing next Friday at ten o'clock. You think carefully about what you are going to do in this week's time. In the meantime I want to discuss it with your counsel further. [Transcript of proceedings, July 10, 1970 (emphasis added).]

On this appeal, Woosley urges these propositions:

(1) The district court did not resort to appropriate standards in imposing sentence but utilized a "mechanical" and automatic approach in giving him a maximum prison sentence, as evidenced by the sentencing judge's similar treatment of all selective service violators who refused induction regardless of the circumstances of the violation or of the violator;

(2) That the trial court abused its discretion in not granting Woosley probation and in refusing a hearing on his postconviction application for reduction of the sentence under Rule 35.

We hold Woosley is entitled to relief and remand for resentencing under standards enunciated herein.

## I. LIMITED REVIEW OF SENTENCES

The federal courts have uniformly agreed that "a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review."

[2] Pending the disposition of this appeal, a majority of this court authorized Woosley's release from prison on his personal recognizance bond. At the time of his release Woosley had served approximately eight months of his sentence.



*United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *see, e.g., Gore* v. *United States*, 357 U.S. 386, 393 (1958); *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932); *Gurera* v. *United States*, 40 F.2d 338, 340–41 (8th Cir. 1930).[3]

This circuit has generally adhered to the principle that a sentence within statutory limits should not be disturbed if the district court has exercised discretion in imposing the sentence. *United States* v. *Smallwood*, 443 F. 2d 535, 543, *cert. denied*, 404 U.S. 853 (1971); *United States* v. *Dennison*, 437 F. 2d 439, 440 (1971); *Cassidy* v. *United States*, 428 F. 2d 585, 588 (1970). Yet, in fact, this court has undertaken to review the severity of sentences following a district court's denial of a reduction under Rule 35, Fed. R. Crim. P., although we found no abuse of discretion on the part of the district court. *Hood* v. *United States*, 469 F. 2d 721 (8th Cir. 1972); *United States* v. *Anderson*, 466 F. 2d 1360 (8th Cir. 1972).[4] If we possess the power to review the severity of the sentence or the appropriateness of the sentencing procedure, this appeal from the denial of relief under Rule 35 properly places these issues before us.

The Supreme Court support for the rule that federal appellate courts generally may not review a sentence is pure dicta, 2 C. Wright, Federal Practice and Procedure § 533 at 451–52 (1969). *See e.g., Tucker, supra*, 404 U.S. 443; *Gore, supra*, 357 U.S. 386; *Blockburger, supra*, 284 U.S. 299. However, in a contempt case, *Yates* v. *United States*, 356 U.S. 363 (1958), the Court not only reviewed the severity of the sentence imposed by the district court, but also set it aside and imposed its own sentence. The Court observed:

> Reversing a judgment for contempt because of errors of substantive law may naturally call for a reduction of the sentence based on an extent of wrongdoing found unsustainable in law. Such reduction of the sentence, however, normally ought not be made by this Court. It should be left, on remand, to the sentencing court. And so when this Court found that only a single offense was committed by petitioner, and not eleven offenses, it chose not to reduce the sentence but to leave this task, with gentle intimations of the necessity for such action, to the District Court. However, when in a situation like this the District Court appears not to have exercised its discretion in the light of the reversal of the judgment but, in effect, to have sought merely to justify the original sentence, this Court has no alternative except to exercise its supervisory power over the administration of justice in the lower federal courts by setting aside the sentence of the District Court.
>
> * * * Not unmindful of petitioner's offense, this Court is of the view, exercising the judgment that we are now called upon to exercise, that the time that petitioner has already served in jail is an adequate punishment * * * and is to be deemed in satisfaction of the new sentence herein ordered formally to be imposed. Accordingly, the writ of certiorari is granted, and the judgment of the Court of Appeals is vacated and the cause remanded to the District Court with directions to reduce the sentence to the time petitioner has already been confined in the course of these proceedings. [*Id.* at 366–67.]

[3] Until the jurisdiction of the original circuit courts was transferred to the circuit courts of appeals in 1891, federal appellate courts reviewed sentences under the authority of the Act of March 3, 1879, ch. 176, § 3, 20 Stat. 354. *See United States* v. *Wynn*, 11 F. 57 (C.C.E.D. Mo. 1882); *Bates* v. *United States*, 10 F. 92, 96 (C.C. D. Ill. 1881). Federal courts have disclaimed the authority to review sentences since that statute was repealed, on the assumption that the power of review does not exist without statutory authority. *See Gore* v. *United States*, 357 U.S. 386, 393 (1958); *Freeman* v. *United States*, 243 F. 353, 357 (9th Cir. 1917). It has been suggested that such statutory authority does exist under 28 U.S.C. § 2106. *See Smith* v. *United States*, 273 F. 2d 402, 408–09 (10th Cir. 1959) (Murrah, J., dissenting); *United States* v. *Rosenberg*, 195 F. 2d 583, 604–07 (2d Cir.), *cert. denied*, 344 U.S. 838, *rehearing denied*, 344 U.S. 889 (1952).

A few courts, without referring to statutory authority, have indicated that federal appellate courts possess the power to review a sentence imposed within the statutory maximum if it appears that the trial judge grossly abused his discretion. See *United States* v. *Hetherington*, 279 F. 2d 702, 706 (7th Cir.), *cert. denied*, 364 U.S. 896 (1960); *Livers* v. *United States*, 185 F. 2d 807, 809 (6th Cir. 1950); *Tincher* v. *United States*, 11 F. 2d 78 (4th Cir.), *cert. denied*, 271 U.S. 664 (1926); *Goldberg* v. *United States*, 277 F. 211, 220 (8th Cir. 1921). Virtually, the Sixth and Seventh Circuits have reviewed and vacated sentences imposed within the statutory maximum. See *United States* v. *McKinney*, 466 F. 2d 1403 (6th Cir. 1972); *United States* v. *Charles*, 460 F. 2d 1093 (6th Cir. 1972); *United States* v. *Daniels*, 446 F. 2d 967 (6th Cir. 1971); *United States* v. *Wiley*, 278 F. 2d 500 (7th Cir. 1960); *cf. United States* v. *McCoy*, 420 F. 2d 739 (D.C. Cir. 1970); *Leach* v. *United States*, 312 F. 2d 945 (D.C. Cir. 1964). The Second Circuit has examined what it has termed the "integrity" of the sentencing process. *McGee* v. *United States*, 465 F. 2d 357 (1972) *cf. United States* v. *Brown*, 470 F. 2d 285 (1972). The First Circuit has expressed some dissatisfaction with the severity of a sentence in a selective service case. *United States* v. *Walker*, 469 F. 2d 1377 (1972).

[4] Some question may be raised whether the severity of a sentence, if reviewable under any circumstances, could be raised on direct appeal or by post-appeal application for relief under Rule 35, Fed. R. Crim. P. Both *Hood* and *Anderson* raised the sentence question on their second appeal, as does Woosley here. The government raises no question as to the appropriateness of the appeal. Since a trial court retains the power under Rule 35 to reduce a sentence within 120 days after final direct review of a conviction, the sentence does not become firmly fixed until the trial court has acted or declined to act under Rule 35.

From our review of the cases, we think it clear that the repetitive pronouncement of the general rule of unreviewability of sentences imposed within statutory limits does not insulate from review *every* sentence within statutory limits.

II. MECHANICAL SENTENCE

We believe that we have the power to examine and review a sentence if it is shown to have been imposed on a mechanical basis. Appellant asserts that the district judge in referring to "my policy" in the sentencing proceeding held on July 10, 1970, (*see p. 8042, supra*) clearly meant that he sentenced all defendants convicted of refusing induction to a maximum five-year prison term. Although the record does not clearly disclose this meaning, counsel for appellant states in his brief that his examination of the district court records uncovered no selective service case where this district judge imposed less than the maximum term of imprisonment for refusing induction under § 462. At oral argument the United States Attorney referred to his research into sentences pronounced by the district judge for defendants who have refused induction into military service. Restricting consideration to sentences in the Eastern Division of Missouri, we understand the statements of the government attorney to indicate that this sentencing judge sentenced eight violators who refused induction to maximum prison terms, although one sentence permitted possible early parole under § 4208(a). Clearly, the judge's policy in the St. Louis (Eastern) Division called for five-year sentences for all young men convicted of refusing induction into the military.

The general rule precluding review of a sentence within statutory limits is not dispositive of the problem we confront here. We do not deal here with a sentence imposed in the informed or sound discretion of a trial judge after consideration of all the circumstances surrounding the crime. *See Tucker, supra,* 404 U.S. at 447; *Williams* v. *Oklahoma,* 358 U.S. 576, 585 (1959). Instead, we deal with a predetermined sentence resting upon a policy followed by the trial judge in certain selective service cases. A mechanical approach to sentencing plainly conflicts with the sentencing guidelines announced by the Supreme Court in *Williams* v. *New York,* 337 U.S. 241 (1949), and *Williams* v. *Oklahoma, supra,* 358 U.S. 576. In *Williams* v. *New York, supra,* the Court stated:

> A sentencing judge * * * is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. * * *
>
> Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. * * * The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. [337 U.S. at 247.]

Later, in *Williams* v. *Oklahoma, supra,* 358 U.S. at 585, the Court reaffirmed these principles, saying:

> Necessarily, the exercise of a sound discretion in [sentencing] required consideration of all the circumstances of the crime, for "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment.... " *Williams* v. *New York, supra,* at 247. In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime.

A mechanical approach to sentencing, such as that used here, ignores the Supreme Court's decree that sentences be tailored to fit the offender. We reject the view that in all cases the trial judge's action is immune from review simply because we do not ordinarily review sentences within statutory limits. Although a trial judge possesses wide discretion in sentencing, he is not free to ignore sentencing guidelines established by the Supreme Court.

The Sixth Circuit has reached the same conclusion. *United States* v. *McKinney,* 466 F. 2d 1403 (1972); *United States* v. *Charles,* 460 F. 2d 1093 (1972); *United States* v. *Daniels,* 446 F. 2d 967 (1971). Before imposing sentence in *Daniels,* the trial judge said that he had imposed the maximum sentence in selective service cases for over 30 years. Faithful to his policy, the trial judge then imposed the maximum sentence. The Sixth Circuit held that it did possess the power to review such a sentence. In vacating the sentence and remanding for resentencing, the court commented:

> [W]e are seriously perturbed about the trial judge's avowal that since 1933 or 1939, his court has * * * sentenced to five years in the penitentiary every young man who has refused to obey an order of draft board. * * *



> A trial court which fashions an inflexible practice in sentencing contradicts the judicially approved policy in favor of "individualizing sentences." *Williams* v. *New York,* 337 U.S. at 248 * * *. Moreover, such an inflexible sentencing practice is incompatible with the United States Supreme Court's declaration in *Williams* v. *Oklahoma* * * *. [446 F. 2d at 971.]

In *Charles, supra,* 460 F. 2d at 1094–95, the court noted its problems with sentencing procedures in selective service cases in one of its districts and observed:

> Yet, as we have had occasion to point out in the past, the Courts in one District within this Circuit have persistently disregarded this individual sentencing approach with respect to one category of offenses—violations of the Selective Service laws. With very rare exceptions, the judges in the Eastern District of Kentucky have consistently meted out five year prison sentences to draft offenders regardless of the circumstances of the particular offender. We have had occasion to criticize this practice in the past. *United States* v. *Daniels,* 429 F. 2d 1273 (6th Cir. 1970); *United States* v. *Daniels,* 446 F. 2d 967 (6th Cir. 1971); *United States* v. *McKinney,* 427 F. 2d 449 (6th Cir. 1970); *United States* v. *McKinney* [466 F. 2d 1403 (6th Cir. 1971)]; we have not changed our policy on this matter.

In *McKinney, supra,* 466 F. 2d 1403, the court itself set the sentence after its mandates on two earlier remands were ignored in *United States* v. *McKinney,* 427 F. 2d 449 (1970) and *United States* v. *McKinney,* 466 F. 2d 1403 (1971).

We agree with the reasoning of the *Daniels* case and its progeny. The rule against review of sentences is founded primarily upon the premises that a trial judge, who has the best opportunity to observe the defendant and evaluate his character, will exercise discretion in imposing sentence. *See Briscoe* v. *United States,* 391 F. 2d 984, 986 (D.C. Cir. 1968). On that assumption we ordinarily defer to the trial court's judgment. However, where as here, the district court has not exercised discretion in imposing sentence, there is no reason for us to defer to the trial court's judgment. In reviewing such a sentence, we would not be usurping the discretion vested in trial judges; rather we would be according the defendant the judicial discretion to which he is entitled. *See Gryger* v. *Burke,* 334 U.S. 728, 734 (1948) (Rutledge, J., dissenting).

III. FAILURE TO GRANT PROBATION

What we have already said makes it abundantly clear that by resorting to "policy" in sentencing, the district judge gave no consideration to Woosley's claim for probation.[5]

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[5] In requesting probation, the transcript discloses the following:

[The COURT.] Do you know of any reason why sentence should not be imposed this morning?

Mr. JACOBS [Attorney for Woosley]. I know of none, Your Honor.

The COURT. All right. Will you stand up, Mr. Woosley?

Mr. JACOBS. I would like to state, Your Honor, that based upon the Court's finding I would make a motion for presentence investigation and leave to apply for probation.

The COURT. I don't think that will be necessary.

Mr. Woosley, do you have anything to say to the Court before sentence is imposed?

The WITNESS. No, Your Honor.

The COURT. Does your attorney have anything further to say?

Mr. JACOBS. I would like to ask the defendant one question, Your Honor.

(Thereupon, there was a conference between the defendant and his counsel out of the hearing of the reporter and off the record.)

Mr. JACOBS. Your Honor, I would, in renewal of my motion for probation, like to state that the defendant is, as the Court is well aware, an ordained minister and has pursued it diligently except to the extent that he is necessarily——

The COURT. No. I'm not well aware that he is an ordained minister. That is his notion of what he is. But it does not comply with what the rules and regulations of the Selective Service System require. I am aware that he is a fine young man. And I regret very much that he is making this decision. But it is his decision.

Mr. JACOBS. Well, Your Honor——

The COURT. Go ahead.

Mr. JACOBS. The decision that brings him here is one of refusing induction under the Selective Service Act. There is a 1-A registrant. His classification is one that he has strenuously opposed. The Selective Service file reflects that he attempted to obtain a ministerial classification.

The COURT. I understand that.

Mr. JACOBS. I think there would be little question that his refusal to induction in the Armed Forces is because of his conscientious conviction that he will not take up arms and bear arms against other people. On the question of his conscientious objection I think it should be perfectly clear that it is not a position of the Jehovah's Witnesses that they will not do hospital work or something of a humane nature. The repugnant nature of it is doing it under the forcible order of a Selective Service Board which is appointed primarily under a military act. Therefore their conscience carries to that extent. Their entire life, however, is devoted toward performing service of a ministerial and humane nature. If there ever was a case which warranted a person who is not a threat to the public or a danger to the public, which would warrant probation, I would certainly think it is one in which the background of the person is as thorough and clear and as much of a contribution to the public welfare as it has been on the part of this man.

The COURT. Have you anything further?

Mr. JACOBS. No, Your Honor.

The COURT. On your plea of guilty this Court will sentence you to five years in the custody of the Attorney General. Probation will be denied. [Tr. 18–21.]

Appellant had earlier stated that, because of his religious beliefs, he could not comply with a draft board order to work in alternative service as a conscientious objector, but that he would perform such service in compliance with a court order. Such a request is not unusual from Jehovah's Witnesses who find the religious tenets in conflict with requirements of Selective Service laws. Judge Solomon, as Chief Judge of the United States District Court in Oregon, adopted and enunciated an enlightened solution.

> The great majority [of Selective Service violators placed on probation] are Jehovah's Witnesses who were classified as conscientious objectors. They refused to report for alternative service because they regard the Selective Service System as an arm of the military. To perform work directed by the military would compromise their religious convictions.
>
> A few years ago, I stumbled onto the idea that Jehovah's Witnesses would do alternative service if I ordered it because I am not in military. Romans XIII teaches that the orders of those in civil authority are equivalent to the orders of God.
>
> I know that Selective Service is happy about this solution, and a number of courts throughout the country are using the same technique. [Solomon, Sentences in Selective Service and Income Tax Cases, 52 FRD 481, 482 (1970).]

*See Daniels, supra,* 446 F. 2d at 969, 972.

Judicial recognition has been given to statistical evidence showing "that Jehovah's Witness violators have regularly been included in the group toward whom an increasing number of judges have shown a growing lenience." *United States* v. *McCord,* 466 F. 2d 17, 20 (2d Cir. 1972).

The Supreme Court long ago made clear that federal appellate courts have the power to review a trial judge's refusal to grant probation. *Burns* v. *United States,* 287 U.S. 216, 221–23 (1932). In *Burns,* the Court described the standard for appellate review as follows:

> The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. * * * It takes account of the law and the particular circumstances of the case and "is directed by the reason and conscience of the judge to a just result." * * * While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice. [*Id.* at 222–23.]

This circuit has acknowledged the power of appellate courts to review a trial judge's refusal to grant probation. *See United States* v. *Alarik,* 439 F. 2d 1350, 1351 (8th Cir. 1971); *Berra* v. *United States,* 221 F. 2d 590, 598 (8th Cir. 1955), *aff'd,* 351 U.S. 131 (1956). In other circuits, cases acknowledging this power of review are legion.[6]

Under these circumstances, the trial judge's refusal to consider probation as a reasonable alternative in his sentencing procedures was error.

### IV. EXCESSIVENESS OF SENTENCE

Aside from the district court's *failure to utilize* its discretion in the sentencing process, *i.e.,* its imposition of five-year sentences as a mechanical and automatic policy, we next consider whether the imposition of a maximum sentence was in itself an *abuse* of discretion under the circumstances presented here.

Appellant's crime was a crime of conscience. He expressed his willingness to serve his country in a civilian capacity if ordered to do so by the district judge. The privilege of civilian service is afforded others "who by reason of religious training and belief, [are] opposed to participation in war in any form." 50 U.S.C. § 456(j). Thus, Woosley's transgression rested upon a technical violation of the law. The circumstances of the crime and the character of the criminal dictate leniency of treatment but produced the maximum prison sentence.

[6] *See United States* v. *Birnbaum,* 402 F. 2d 24, 30 (2d Cir. 1968), *cert. denied,* 394 U.S. 922 (1969); *United States* v. *White,* 147 F. 2d 603 (3d Cir. 1945); *Mann* v. *United States,* 218 F. 2d 936, 939 (4th Cir. 1955); *Hoy garner* v. *United States,* 270 F. 2d 465, 472 (6th Cir. 1959); *United States* v. *Wiley,* 267 F. 2d 453, 455–56 Cir. 1959); *United States* v. *Borgis,* 182 F. 2d 274, 277 (7th Cir. 1950); *Burr* v. *United States,* 86 F. 2d 803 (7th Cir. 1936), *cert. denied,* 300 U.S. 664 (1937); *United States* v. *Taylor,* 449 F. 2d 117, 118 (9th Cir. 19 *Whitfield* v. *United States,* 401 F. 2d 480, 482 (9th Cir. 1968), *cert. denied,* 393 U.S. 1026 (1969); *Longst United States,* 381 F. 2d 17, 19 (9th Cir. 1967), *cert. denied,* 390 U.S. 926 (1968); *Jordan* v. *United State* F. 2d 126, 129 (10th Cir. 1966); *cert. denied,* 386 U.S. 1033 (1967); *Dodd* v. *United States,* 213 F. 2d 854, 855 Cir. 1954); *Sullivan* v. *United States,* 212 F. 2d 125, 128 (10th Cir.), *aff'd,* 348 U.S. 170 (1954); *Humes* v. U *States,* 186 F. 2d 875, 878 (10th Cir. 1951).



An examination of cases in which federal appellate courts have reviewed sentences falling within the statutory maximum discloses the underlying fact in each was a sentence which was greatly excessive under traditional concepts of justice or was manifestly disproportionate to the crime or the criminal. *McKinney, supra,* 466 F. 2d 1403; *Daniels, supra,* 446 F. 2d 967; *United States* v. *Wiley,* 278 F. 2d 500 (7th Cir. 1960); *see United States* v. *Walker,* 469 F. 2d 1377 (1st Cir. 1972); *McGee* v. *United States,* 465 F. 2d 357 (2d Cir. 1972); *Charles, supra,* 460 F. 2d 1093; *United States* v. *McCoy,* 429 F. 2d 739 (D.C. Cir. 1970). Other cases have indicated that the courts possess the power to review a sentence when there has been a gross abuse of discretion. *Hood, supra,* 469 F. 2d 721, 722; *United States* v. *King,* 420 F. 2d 946, 947 (4th Cir.), *cert. denied,* 397 U.S. 1017 (1970); *United States* v. *Weiner,* 418 F. 2d 849, 851 (5th Cir. 1969); *United States* v. *Latimer,* 415 F. 2d 1288, 1290 (6th Cir. 1969); *United States* v. *Holder,* 412 F. 2d 212, 214–15 (2d Cir. 1969). *See generally,* 2 C. Wright, Federal Practice and Procedure § 533 (1969). In *Holder, supra,* 412 F. 2d 212, 214–15, the court noted:

> If the sentence could be characterized as so manifest an abuse of discretion as to violate traditional concepts, it is possible that we might, pursuant to our power to supervise the administration of justice in the circuit, overturn our long established precedents of non-intervention and intervene.

We hold that we possess the power to review the severity of a criminal sentence within narrow limits where the court has manifestly or grossly abused its discretion. This is such a case. The severity of the sentence shocks the judicial conscience. The sentence greatly exceeds penalties usually exacted against Jehovah's Witnesses, and the record completely fails to justify, nor has the district judge undertaken to explain, the imposition of a maximum penalty under the circumstances presented here.

Moreover, we take judicial notice of statistical data showing that in the year in which sentence was first assessed (1970) and in the year in which the district court refused Rule 35 relief (1971), most convicted violators of the draft laws received probation, and only a minute number of offenders received the maximum prison terms (4.4 percent in 1970; 2.8 percent in 1971).[7] These statistics disclose nothing of the character of the offender, but they do indicate the increasing tendency of the courts to afford leniency to a high percentage of violators of the draft laws.

We find it difficult to conceive of a situation offering more compelling circumstances to justify leniency than that in the instant case. Referring to a similarly situated offender, the Sixth Circuit said in *Daniels, supra,* 446 F. 2d at 972:

> The imprisonment of appellant can hardly be deemed helpful in reforming a young man of concededly "good character" and "model behavior." Imprisonment cannot serve as protection for society because the immediate release of Appellant poses no risk to society's safety. Moreover, disciplining or punishing the Appellant by imprisonment would seem to be an inappropriate rational for sentencing where, as here, a young man has devoutly adhered to his religious beliefs without impeding the rights of others. Finally, under the limited factual circumstances of this case, the issuance of an order probating the Appellant subject to his performance of the identical work demanded of him by the Selective Service is not the kind of sentencing which would induce widespread disobedience of the orders of local Selective Service boards.

We can find no basis by any rational criteria to justify Woosley's punishment in this case. Neither society nor the individual stands to gain any benefit therefrom. Nor is there a deterrent effect since Jehovah's Witnesses have stood steadfastly by their religious convictions, whatever the potential sentence. The broad and unreviewable discretion possessed by federal district courts in matters of sentencing does not extend to the meting out of punishment manifestly disproportionate to the nature of the crime and the character of the criminal.

### V.

We believe it appropriate to remand this case to the district court for resentencing. The district judge is an experienced and able trial judge. We know that he

[7] Federal Offenders in the United States District Courts, Administrative Office of the U.S. Courts at 188 (1970) (containing criminal sentence analysis 1967–71).

We note the wealth of statistical data collected from the United States courts relating to sentencing by categories of federal crimes. *See, e.g.,* Annual Report of the Director, Administrative Office of the United States Courts (1972). It would seem that if such data were collected and disseminated in a more useable form, it might serve as a helpful guide to sentencing judges to avoid greatly disparate sentences for offenders of comparatively equal status. *See generally* Frankel, Lawlessness in Sentencing, 41 Cincinnati L. Rev. 1 (1972) (discussion of sentencing in the United States).

will give Woosley fair consideration under the standards promulgated here. In selective service cases, the district judge may have followed a policy initiated by other judges, and this court has not previously commented upon that policy. Moreover, the district judge may appropriately evaluate Woosley's changed family circumstances which may disclose additional considerations dictating leniency of treatment.[8]

Reversed and remanded. Release bond to continue until final disposition.

MATTHES, *Chief Judge*, concurring: After weighty consideration of all relevant circumstances I have concluded to concur in the majority opinion.

Recognizing the firmly entrenched rule that appellate courts *generally* will not interfere with the sentence imposed if it is within statutory limits, I am nevertheless persuaded to conclude that, like many rules, it has exceptions. This case is the exceptional one justifying remedial action.

It is hardly debatable that implicit in the imposition of a sentence is the exercise or sound discretion by the sentencing judge. Such exercise encompasses consideration of all relevant factors such as the nature of the offense, the history and background of the defendant, and of course the interest and concerns of society, to mention only a few.

I have been unable to escape the conclusion that the maximum sentence imposed here was the product of an inflexible policy rigidly applied to all offenders of the Selective Service Laws. Such a policy is difficult to defend and condone just as imposition of the maximum sentence on every Dyer Act violator regardless of attending circumstances would be subject to condemnation.

United States Court of Appeals for the Eighth Circuit

No. 71-1691

ROBERT MICHAEL WOOSLEY, DEFENDANT-APPELLANT

*v.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*Appeal from the United States District Court for the Eastern District of Missouri*

Before MATTHES, *Chief Judge*, VAN OOSTERHOUT, *Senior Circuit Judge*, MEHAFFY, GIBSON, LAY, HEANEY, BRIGHT, ROSS and STEPHENSON, *Circuit Judges*.

VAN OOSTERHOUT, *Senior Circuit Judge:* I respectfully dissent. I would affirm the trial court's order denying relief under Rule 35. The sentence of five-years imprisonment was imposed upon the defendant following the acceptance of his voluntary plea of guilty to a charge of failure to submit for induction in violation of 50 U.S.C. App. § 462. This is the maximum penalty provided for the offense committed.

The majority opinion concedes that this court, as well as others, has repeatedly held that a sentence imposed by a district judge which is within statutory limits is not subject to review. In *Gurera* v. *United States*, 40 F.2d 338, 340-341 (8th Cir. 1930), this court held:

> "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by statute. If Congress had intended to change that rule in regard to violations of the liquor laws, we would have expected a very clear and definite expression of that intent and a workable expression of the rules which should guide the trial courts in assessing punishments and the appellate courts in reviewing such assessments."

The Supreme Court in the recent case of *United States* v. *Tucker*, 404 U.S. 443, 447-448 (1972), holds:

> "It is surely true, as the Government states, that a trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose. . . . The Government is also on solid ground in asserting that a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review. *Gore* v. *United States*, 357 U.S. 386, 393. Cf. *Yates* v. *United States*, 356 U.S. 363."

The Tucker Court goes on to hold that a remand for resentencing was proper because the record showed that the trial court at the time of the sentencing was not aware of the fact that two prior convictions of the defendant called to its

[8] Appellant's counsel has filed a petition in this court stating that appellant's wife was killed in an automobile accident on April 20, 1972, while enroute to the federal penitentiary to visit appellant. Thus, according to the petition, appellant's infant son is "in temporary custody of relatives who are not properly equipped to continue caring for the child."



attention were constitutionally infirm because the defendant was not represented by counsel in such cases. Subsequent to *Tucker* this court in *Hood* v. *United States*, 469 F.2d 721, 722 (8th Cir. 1972), summarily affirmed the trial court's denial of a motion to reduce sentence, stating:

> "In United States v. Tucker, 404 U.S. 443, 447, 92 S. Ct. 589, 591, 30 L.Ed. 2d 592 (1972) the Supreme Court observed: "* * * that s sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review." We fail to find any abuse of discretion on the part of the trial court in denying the motion to modify or set aside the sentence."

In *United States* v. *McCord*, 466 F.2d 17 (2d Cir. 1972), the court affirmed the denial of a Rule 35 motion to reduce a sentence imposed on a selective service violation. In doing so, the court cites and relies upon *Tucker*. The court recognizes that many judges have pronounced sentences in Jehovah Witness type draft cases of the type advocated by the majority opinion and holds that such evidence does not require a remand for resentencing.

There is no statute nor rule which expressly confers jurisdiction on Courts of Appeal to review sentences within statutory limits imposed upon a lawful conviction. Legislation to confer such appellate jurisdiction has been frequently proposed but has not yet been enacted. See ABA project "Appellate Review of Sentences", tentative draft 1967, pp. 86-90.

In *Gore* v. *United States*, 357 U.S. 386, 393 (1958), the Court in affirming an order denying a petition to review sentence imposed within statutory limits states and holds:

> "In effect we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, see Radzinowicz, A History of English Criminal Law: The Movement for Reform, 1750-1833, *passim*, these are peculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences. First, the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. See 7 Edw. VII, c. 23, § 4(3); 16 & 17 Geo. V, c.15, § 2(4). *This Court has no such power.*" (Emphasis added.)

As set out in the majority opinion, we have in a number of cases purported to review a district court's denial of a Rule 35 motion to reduce a sentence but have denied relief on the basis that there has been no abuse of discretion. Such holding is technically inconsistent with the established law that sentences imposed within the statutory limit are not reviewable. However, the result is the same.

8A Moore's Federal Practice 2d Ed. § 35.02(4) states:

> "Since the motion for reduction of sentence is a plea for leniency, decision on the motion is as close to being a matter of pure discretion as any other under the Rules, with the exception of the sentence itself. It might be argued that such a determination should therefore not be reviewable by way of appeal. Apparently, no court has gone this far, although reversal of an order denying reduction is extremely rare."

If we assume for the purposes of this case without so deciding that the abuse of discretion standard applies, we are satisfied that the defendant has failed to establish that the court abused its discretion in imposing the five-year sentence. This is not a case where the court acted on any relevant misinformation in imposing the sentence. The record reflects that the court was fully informed on all factors relevant to appropriate punishment. He had carefully considered the probation report, he knew defendant had sought a ministerial classification which was rejected by the Draft Board, and that the defendant had never applied for a conscientious objector classification. The court was aware of the reasons assigned by the defendant for not applying for the conscientious objector classification and stated that he recognized that the defendant was a fine young man.

A wide discretion is vested in the trial court with respect to imposition of sentence within statutory limits. A heavy burden rests on a party asserting abuse of discretion. A reviewing court is not justified in substituting its discretion for that of the trial court who had the benefit of seeing and hearing the defendant. See 5A C.J.S. Appeal and Error § 1583; *United States* v. *McCord, supra; McGee* v. *United States*, 462 F.2d 243 (2d Cir. 1972); *Burns* v. *United States*, 278 U.S. 216, 222-223 (1932).

In *Delno* v. *Market St. Ry. Co.*, 124 F. 2d 965, 967 (9th Cir. 1942), the court in defining discretion states:

> "Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

In our present case there is nothing in the record to indicate that the trial court acted upon any misinformation with respect to the defendant's character and background. Judges vary greatly as to sentences imposed, not only in selective service cases but in all types of cases, particularly those involving nonviolent crimes such as income tax evasion, and embezzlement. Defendant's crime is more than a technical one. His plea of guilty admits all essential elements of the offense charged. Defendant has no constitutional right to a conscientious objector classification or to be excused from military service obligations. The exemption of conscientious objectors from military service is a matter of legislative grace and does not rise to a constitutional command. *United States* v. *Crocker*, 308 F. Supp. 998 (D. Minn.), aff'd 435 F. 2d 601 (8th Cir. 1971).

Probation for a convicted defendant is a matter of grace and not a matter of right. No defendant has an absolute right to probation. *Burns* v. *United States*, 287 U.S. 216, 220; *United States* v. *Alarik*, 439 F. 2d 1349, 1351 (8th Cir. 1971).

Defendant has failed to establish his right to exemption from military service by failing to follow the reasonable procedures prescribed by the statutes and regulations for asserting exemption. Defendant by failing to report for military service as ordered has created unnecessary confusion in the administration of the draft law and has made it necessary for some other person to take his place and expose himself to the possible hazard of Vietnam conflict.

While imprisonment may not be necessary to rehabilitate the defendant, the deterent effect upon others is always a proper item for consideration in imposing sentence. See *Williams* v. *New York*, 337 U.S. 241, 248-249 n. 13. It cannot fairly be said on the basis of the record in this case that the public interest does not require a fair enforcement of the selective service laws and that reasonable men could not differ on the propriety of the sentence imposed.

The issue of mechanical sentencing discussed by the majority was never presented in the trial court and hence such court had no opportunity to consider the issue. Issues not raised in the trial court cannot properly be considered on appeal. *Smith* v. *American Guild of Variety Artists*, 368 F. 2d 511, 514 (8th Cir. 1966).

In any event, I believe that the majority has misconceived the trail court's statement with respect to his policy. There is nothing in the court's statement which explicitly describes the policy to which he refers. Inasmuch as sentence has been deferred, it would appear that the policy was to give the defendant an opportunity to reconsider reporting for induction before sentence was imposed. There is nothing in the record to indicate that the defendant has been denied due process in connection with his sentencing or Rule 35 proceedings. Defendant and his attorney were afforded a full opportunity to present anything they desired to support the claim for leniency and probation made prior to sentence. The present petition and the application for reconsideration do not reveal that the defendant had anything to present which had not previously been presented to the court in connection with his presentence request for parole. Under such circumstances the trial court did not abuse its discretion in not affording a hearing.

The result reached by the majority is supported by the Sixth Circuit cases cited and relied upon. For reasons hereinabove stated, I do not agree with the reasoning upon which such decisions are based. The majority opinion departs from the long-established rule in effect in this circuit and generally elsewhere that sentences within the statutory limits are not subject to appellate review and in effect opens the gate to appellate review of all sentences. Such a drastic change in the law in my view requires appropriate Congressional action. *Gore* v. *United States*, *supra*.

I would affirm the order denying defendant's Rule 35 motion.[1]

Senator HRUSKA. Our next witness will be Mr. Maroney, who appears here in lieu of Mr. John C. Keeney. Deputy Assistant Attorney General for the Criminal Division, who was scheduled to appear here. Other official duties intervened, and so Mr. Maroney is here.

[1] In 2 Wright Federal Practice and Procedure § 533, p. 455, the following appears: "Reasonable men may well wonder whether the greater uniformity in sentences expected from appellate review will in fact materialize, and whether it will simply add a new burden to appellate courts that are already overworked." Additional problems presented by appellate review of sentencing are ably set out in *United States* v. *Wiley*, 184 F. Supp. 679 (N.D.Ill. 1960).

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The result reached by the majority is supported by the Sixth Circuit cases cited and relied upon. For reasons hereinabove stated, I do not agree with the reasoning upon which such decisions are based. The majority opinion departs from the long-established rule in effect in this circuit and generally elsewhere that sentences within the statutory limits are not subject to appellate review and in effect opens the gate to appellate review of all sentences. Such a drastic change in the law in my view requires appropriate Congressional action. *Gore* v. *United States, supra.*

I would affirm the order denying defendant's Rule 35 motion.[1]

Senator HRUSKA. Our next witness will be Mr. Maroney, who appears here in lieu of Mr. John C. Keeney. Deputy Assistant Attorney General for the Criminal Division, who was scheduled to appear here. Other official duties intervened, and so Mr. Maroney is here.

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Mr. Maroney, the entire statement of Mr. Keeney will be placed in the record.

[The prepared statement of John C. Keeney follows:]

STATEMENT OF JOHN C. KEENEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ON SENTENCING AND DEFENSES UNDER S. 1400, BEFORE THE CRIMINAL LAWS AND PROCEDURES SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, JULY 22, 1974

I would like to thank the Committee for the opportunity of appearing before you to discuss the sentencing proposals found in part III of S. 1400, and the proposals regarding defenses found in chapter 5 of S. 1400. I have a memorandum relating to the sentencing proposals which I would like to submit for the record.

SENTENCING

Of all the areas in the proposed revision, probably none offers more variables and differing possibilities of approach than does the subject of sentencing. In part this is because sentencing is designed to meet so many needs. Rehabilitation, incapacitation, deterrence, and retribution are all appropriate goals of a sentencing system, although they are frequently incompatible.

In this brief statement I would like to highlight for the Committee some of the features of our sentencing proposals, illustrating the rationale behind the statutory language.

The first step in any reform of the sentencing system is providing rational categories of offenses. One of the great defects of current criminal law in the federal area is the necessarily haphazard way in which statutes have set sentences. As to the authorized maximum terms of confinement alone there are at least 17 possibilities identifiable within the United States Code, and when these factors are combined with the various authorized fines, it results in some 75 different available maximum sentences. While historically understandable, such a system is not rationally defensible.

The S. 1400 proposal recommends five classes of felonies, three classes of misdemeanors, and one of infractions. With only three exceptions these levels do not require the imposition of any mandatory sentence.

The Final Report of the National Commission on Reform of Federal Criminal Laws had proposed one category of especially serious felonies, three classes of other felonies (the lowest level having a potential penalty of seven years), two classes of misdemeanors, and an infraction penalty (for which no confinement would be allowed). The ultimate result of that structure is that many offenses which are now considered felonies would be reduced to misdemeanors.

S. 1 allows for five felony levels, one misdemeanor level, and a violation penalty. It is our belief that the S. 1400 proposal provides a desirable amount of flexibility without becoming lost in a vast number of penalty levels by trying to draw lines too tightly.

A further advantage of S. 1400 is that the potential maximum sentence for a given class of crimes is candidly and specifically stated. One need not make reference to a variety of other provisions in order to determine precisely what is intended. Examples of the problems involved in this latter kind of situation can be found in the Commission's sentencing provisions. For instance, manslaughter is graded there as a Class B felony. A reference to the general sentencing provision establishes that the maximum penalty is 15 years. However, such a penalty could only be imposed after a special finding of dangerousness, lack of prospect for rehabilitation, and the like. Without such findings the actual maximum is ten years. But a further provision of that proposal requires that a three year parole component be deducted from the ten year sentence. So our ten year sentence is now reduced to seven years of actual imprisonment. But parole after five years is made mandatory, absent special findings of a high likelihood of recidivism. The net result is that the maximum even for a very serious felony is generally reduced to five years.

Having referred briefly to the special dangerous offender provisions of the Final Report (provisions which have a counterpart in S. 1) perhaps I should offer some explanation as to why such provisions were not included in S. 1400. There are two basic reasons. First, we felt that such provisions are unworkable. Second, we viewed such treatment as unnecessary given adequately flexible sentencing levels.

Let me address myself to the first consideration. The roots of special offender provisions lie in the habitual criminal provisions found in many of the state codes.

In general, these provisions have not been enforced and for a variety of rather practical reasons. Where prior offenses have been committed in other jurisdictions there are serious problems in establishing their correlation with offenses delineated in the habitual offender provision. The statutes are particularly harsh to the property crime violator because of their statistically higher recidivism rate. Furthermore the statutes are frequently couched in terms of mandatory lengthy sentences, and thus their enforcement has commonly been declined as being too severe. For similar reasons the statutes have been nullified by plea bargaining. Also prosecutors tend to be oriented to obtaining convictions, though not to obtaining severe sentences. Finally they present severe litigation problems since they may involve collateral attacks on prior foreign judgments.

In sum it is our view that enhanced penalty provisions are not only unnecessary but impractical.

The next area that I would like to discuss is that of minimum sentences.

Minimum sentences control parole eligibility. At present, federal prisoners serving definite sentences over 180 days are eligible for parole after serving upon good behavior, one-third of the maximum term (or after serving 15 years in the case of a sentence in excess of 45 years or a life sentence) (18 U.S.C. 4202). Under 18 U.S.C. 4208(a)(2) a sentencing court has the option of providing immediate parole eligibility, an option that is utilized in about half of the felony sentences today. If the court is silent with respect to the minimum sentence, however, the one-third minimum applies. A sentencing court cannot raise the minimum above one-third of the maximum term imposed..

Arguments favoring permitting minimum sentences include the recognition that fixed terms are appropriate for purposes of deterrence and retribution—purposes paramount in the sentencing of "white collar" criminals—although generally inappropriate for purposes of rehabilitation or incapacitation. Another consideration is the desirability of sharing authority between courts and parole authorities. There is some inconsistency between the approval of authority for courts to tailor maximum sentences downward from their statutory limits to fit the case of the particular offense and offender (rather than relying on the parole system, as in the State of California), and the disqualification of the courts from having a role in setting the time of earlier release. Further considerations include the concern that the parole processes will often result in the premature release of dangerous persons if immediate parole is possible. There is also concern that parole may increasingly become a matter not of discretion but of right; a number of legislative proposals presently before the Congress move strongly in this direction.

Arguments favoring lower or no minimum sentences include the desirability of permitting parole boards to release prisoners in cases where it seems just and appropriate. Furthermore, the parole board could act to review all federal sentences if not constrained by minimum sentences—a sentence review function that could be performed far more uniformly, expeditiously, and inexpensively than could review by the courts of appeal were appellate review to be authorized.

The Commission proposed a substantial reduction in both the frequency and the length of federal minimum sentences (§ 3201(3)). First, it prohibited minimum terms for sentences for Class C felonies. Second, it converted the requirement of affirmative action to eliminate a minimum to one of affirmative action to create one. Third, it required that the courts limit the use of minimum terms to cases which are "exceptional . . . such as warrant imposition of a term in the upper range under section 3202." Fourth, it imposed special investigation requirements prior to imposition of such terms. If we are correct in our previous assessments, these proposals would eliminate minimum terms in almost all cases—except in cases of treason and intentional murder, for which the Commission would permit minima of from 10 to 25 years apparently as more acceptable alternatives to the death penalty (§ 3601). S. 1 closely follows the limitations on minimum terms contained in the Commission's Report, although it does not contain an exception for sentences to life imprisonment (§ 1–4B1(c)).

S. 1400 represents a compromise. Like the Brown Commission and S. 1 proposals, it would significantly reduce the frequency of federal minimum sentences. Courts would have to act affirmatively to create minimum terms. The present one-third limitation would be narrowed to one-fifth. An outer limit for very long sentences would be 10 years minimum, in place of the present 15 (§ 2301(c)). At the same time, special offender-type finding requirements, which would almost eliminate minimum terms, would not be required.

S. 1400 was drafted on the assumption that the parole process will continue to be characterized by a considerable degree of discretion in the Board. If procedures of parole denial are made so difficult as to merge eligibility with actual parole release, the substantial reduction of minimum terms proposed in S. 1400 should be reevaluated.



The foregoing discussion has referred to judge-set minimum terms. On relatively rare occasions, federal law has contained legislatively established mandatory minimum terms. The laws of many states often provide for such terms, an example being the provision that life sentences for murder have minima of 7, 10, or 15 years. With one exception, S. 1400 does not contain such provisions, even for treason or murder; the exception is for the offense of trafficking in large amounts of heroin or morphine (§ 1821), for which a minimum term of at least 10 years is specified. The general policy of avoiding mandatory minimum terms is based upon the lack of assurance that the offense in question can be drafted to exclude all circumstances in which such mandatory minimum terms would be inappropriate, the problems attendant in prosecuting offenses carrying such terms, and the continuing difficulties caused by the bad case law created by courts in seeking to circumvent such measures.

Also of importance to sentencing is the determination of the length of the parole period. Under present law, the parole term is the term of the sentence minus the period spent in confinement prior to parole (or mandatory release because of "good-time" credits). Thus early parole rather paradoxically results in a longer parole term (18 U.S.C. 4203(a)).

S. 1400 seeks to rationalize the parole period by authorizing the Parole Commission to set the terms, at the time of release, at between one and five years (§ 4204). All prisoners convicted of felonies or Class A misdemeanors must be released on parole (§ 4303). In order to provide a sanction for compliance with the conditions of parole in cases where all, or almost all, of a sentence is served prior to release, S. 1400 provides a contingent term of imprisonment of one year for felonies, or 90 days for Class A misdemeanors, which may be required to be served only upon parole violation and revocation (§ 2302).

The Commission followed present law in making the parole term the balance of the sentence (§ 3403). Since the sentence is chopped into parole and prison components, a substantial period of parole for long sentences is assured. Nevertheless, the paradox of longer parole terms upon earlier parole release would continue.

Under S. 1 a parole component of one year is carved out of sentences over five years, and of two years out of sentences over ten years (§ 3–12F3(b)). Since many prisoners have sentences shorter than this, no parole would be required to follow confinement in a large percentage of cases. The term of parole would continue to be the balance of the sentence.

Fines are of particular importance to federal criminal justice. Present fine levels are quite variant, although maxima in the range of $10,000 for felonies and $1,000 for serious misdemeanors are common. The overall spread of specific maxima is from $50 to $25,000.

The Commission, being of the view that fines are of somewhat doubtful correctional utility, prescribed low maximum fine levels, unless there was a showing of gain to the offender or loss to the victim, in which case the fine could be set in an amount which did not exceed twice the gain or loss (§ 3301). Otherwise the top felony fine would be $10,000. The Commission's proposal largely overlooked the potential deterrent effect of substantial fines in the areas of "white collar" crime and regulatory offenses.

S. 1, while adopting the same discretionary alternative limit of double the gain or loss, proposed daily fines of $50 to $1,000 which may run from ten days to three years for all offenses, in the absence of specific provisions to the contary (§ 1–4C1). Without proof of gain or loss, the maximum fine would start with $54,750 for an infraction and end with $1,095,000 for a Class A or B felony.

S. 1400 proposes a middle ground. The maximum felony range is from $25,000 to $100,000. The misdemeanor and infraction spread is from $500 to $10,000. A similar alternate limit is provided for cases in which gain or loss can accurately be established, but is stated in terms of twice the *gross* gain or loss (§ 2201).

While the Commission would probably depress fine limits below those of present law, S. 1400 would increase them by about a factor of ten, and S. 1 would do so by a factor of 100. The rationle for an increase is found in part in the depreciation in the value of money, and in the appreciation in the real earning capacity of the average citizen, since the enactment of much of title 18. It is also recognized that fines often represent the only useful sanction against corporations and other organizations, as well as being, in the view of many judges, the major acceptable penalty against significant numbers of individual federal offenders. Although there is no generalized precedent for relating the maximum fine to the gain or loss resulting from an offense, there are particularized precedents, e.g., up to twice

the value of money embezzled by an officer of a federal court may be assessed as a fine under 18 U.S.C. 645.

Present law contains no general guidance as to when a fine should be imposed. The Commission would preclude fines where not proportioned to the financial burden placed upon the particular defendant, where they would prevent restitution or reparation to the victim, and where the offense did not result in gain or loss, absent exceptional circumstances (§ 3302). S. 1 contains less stringent limitations (§ 1–4C1(c)). S. 1400 is similar to S. 1 in this respect. The court is required to consider the resources of the defendant and whether imposition of a fine will preclude restitution, but fines are not ruled out for non-economic crimes. In general, the limitations on the use of fines by the Commission were not followed as being too conducive to litigation, as well as being unduly restrictive of a sanction which increases public resources while discouraging offenders.

S. 1400 was drafted primarily as a substantive criminal code. Most procedural questions were left for consideration at a later time, when preparation of a comprehensive procedural code could be undertaken, procedural matters being governed in the meantime by constitutional provisions, the existing statutes, the Federal Rules of Criminal Procedure, and case law. Following the present title 18, however, a few procedural problems relating to sentencing received specific treatment.

One such area is that of presentence investigations. S. 1400 would encourage the routine use of presentence reports by requiring a statement of reasons in an affirmative order to the contrary if a sentencing decision were to be made in the absence of such an investigation. The proposed 1974 amendments to the Federal Rules of Criminal Procedure reach a similar result.

Following present law and the Commission, a convicted defendant may be ordered committed for a period of study normally not exceeding 90 days, prior to making the sentencing decision (§ 2003(b)),

The insanity defense presents an area where procedural reform, within an without the sentencing context, is particularly needed. At present, federal statutory law is nonexistent with respect to insanity defense procedures, except in the District of Columbia. The Commission is likewise silent, because of its substantive emphasis, although S. 1 contains a rather fragmentary section (§ 3–11C5). Since there appeared to be a consensus that legislation is long overdue, S. 1400 provides for requiring pretrial notice of an insanity defense, psychiatric examinations and reports, and a specific verdict of "not guilty by reason of insanity." A defendant thus acquitted would be subject to hospitalization if the court, after further psychiatric examinations and hearings, determined that he was presently dangerously mentally ill (§ 4221–2). There procedures would bring federal law into the pattern of state laws. More innovative—and more directly related to the current subject—is the proposal of S. 1400 to permit the trial court to commit convicted mentally ill persons to mental hospital treatment, rather than to prison (§ 4224). This proposal was formulated as a more straightforward replacement of one of the conventional functions of the insanity defense, the channeling of defendants to facilities consistent with their needs. Since the decision would be made by courts in the sentencing context rather than by juries in the guilt determining context, it may be expected that such a provision would result in an increased number of diversions of persons from penal institutions than does the separate insanity defense. Such hospitalizations would be subject to reconsideration if later determined to be inappropriate, and the defendant could be sentenced to prison or placed on probation for the remainder of the authorized term.

In addition to the traditional sentencing sanctions I would like to close this discussion of sentencing by commenting on two non-institutional sanctions.

The first is notice. S. 1400 provides that organizations and individuals may be required to give notice of a conviction to the class of persons or sector of the public affected by or financially interested in the subject matter of the conviction (§ 2004). The Final Report (§ 3307) and S. 1 (§ 1–4A1(c)(7)) contain similar provisions. The primary purpose, of course, is to facilitate victim compensation efforts.

The second is disqualification from public office or other employment. S. 1400 does not seek to revise the disqualifications applicable to federal employees currently prescribed by title 5 and 18 of the United States Code. Furthermore, it does not follow the proposal contained in S. 1 that would give federal judges authority to suspend the right of an individual or organization to engage in business or professional employment, often for a period of many years (§§ 1–4A1(c)(1), 1–4A). The Department preferred to leave the latter decisions to the federal, state, and local licensing authorities, except as such power might be exercised as a condition of probation or parole.



DEFENSES

I would like to make some remarks with respect to chapter 5 of S. 1400, dealing with defenses. Perhaps the most significant aspect of this chapter is the decision to include it in the proposed new penal code. Currently, of course, defenses are not codified. Rather they exist by virtue of judicial construction. Thus in the past Congress has deemed it enough to define crimes in the affirmative, so to speak, by stating the conduct to be proscribed. From these positive statements of what Congress intended to penalize, the federal courts have developed a massive body of law dealing with defenses. Such doctrines as mistake of fact or law, duress, insanity, entrapment, and self-defense, have gradually evolved and are now a part of our legal fabric. A fair question is: why change the process now? Why not simply have Congress define the offenses in the proposed Code and leave it to the courts, as in the past, to develop any applicable defenses. The answer, I believe, is that to continue this approach would in effect be an abandonment of legislative responsibility to the courts which would unnecessarily render the Code less clear and thus make it more difficult for persons to conform their conduct to the law.

The point that failure to enact defenses constitutes an abandonment of responsibility to the courts requires a recognition that substantial policy choices are implicit in the development of defense doctrines. The statement of an offense is seldom so clear that a court can confidently predict what Congress would have intended as constituting the parameters of a defense. For example, it would be unrealistic to suppose that the scope of the self-defense doctrine could be or has been derived by the courts solely by recourse to Congress's definition of the offenses of assault or murder. Courts have, to be sure, fashioned a self-defense doctrine, but they have done so, of necessity, largely without regard to congressional intent and by resolving the policy questions on the basis of their own evaluation of the interests at stake. The upshot is that by remaining silent on the subject of defenses, Congress has in effect delegated a considerable power to the Judiciary to determine the scope for application of the federal offenses which it has created.

We do not think that such a delegation would be justified in the context of a new criminal code revision. Although such a delegation exists under our criminal laws today, it would be unwise to continue this system in the context of a complete reassessment and revision of the substantive criminal code offenses such as is contemplated in S. 1 and S. 1400. Currently, as a result of the protracted judicial evolution of various defense doctrines in connection with many sections of the criminal code, persons are enabled to know, with a high degree of predictability, what defenses are available thereunder, and so may more readily conform their conduct to the law. In the context of a wholly new criminal code such as is proposed in S. 1 or S. 1400, questions as to the existence and scope of particular defenses with respect to each newly defined offense would have to be reconsidered. Until the courts had time and opportunity to make such a reassessment and the law as to defenses once again became relatively settled—a period which might well be measured in decades—persons would not be able to know with the same degree of definiteness what conduct could be engaged in legitimately, and what conduct could not. S. 1400, therefore, like S. 1, has proposed to incorporate and define the basic defenses that will apply throughout the criminal code. This same decision to include a chapter on defenses is also in harmony with the recommendations of the National Commission on Reform of Federal Criminal Laws and the Model Penal Code, both of which include defense provisions in their proposed revisions. For that matter, it is also in harmony with the approach of most recent state codes and most codes of other nations.

Most of the defenses as drafted in S. 1400 are designed to track existing case law; the defense of insanity, however, on which we have commented earlier, is designed to follow a sharply divergent path. There is not time here now to discuss in depth all of the defenses in chapter 5, but I would like to touch the highlights of all of them and comment in greater length on a few of them that seem to have generated the most interest and controversy. I refer specifically to public duty and entrapment.

Treating them in the order in which they appear, let me begin with section 501—Mistake of Fact or Law. This section provides that ignorance or mistake concerning a matter of fact or law is a defense if it negates the state of mind required as an element of the offense.

The mistake of law aspect of the defense is a codification of current law. Numerous courts have recognized that a proven mistake or ignorance with respect to

legal matters can disprove the existence of the culpable state of mind required by the legislature through the use of words such as "willfully" or "with intent to defraud," etc. This is the concept codified in section 501.

The defense allowed under section 501 for mistake of fact is also in conformity with current law. *United States* v. *International Mineral & Chemical Corp.*, 402 U.S. 558, 563–64 (1971). Here, too, it is necessary that the state of mind required as an element of the offense be negated. Thus, one who shoots at what he believes to be a block of wood, but which in reality is a person, cannot be punished for intentionally assaulting or taking the life of another person. On the other hand, one charged with criminally receiving property, stolen from the government, is not exonerated because he was unaware that the property was owned by the government rather than someone else.

Both of these defenses attempt to give some expression to the principle that a sound jurisprudence should distinguish between individuals who chose evil and those who did not without, at the same time, encouraging studied ignorance.

Skipping insanity, on which the Department has already given testimony, the next section is 503—Intoxication. This section is a codification of existing law, which affords intoxication evidentiary effect as a defense where its presence negates a mens rea element requiring either intent or knowledge. Also following present law, self-induced intoxication that results in a lack of awareness of a risk required to be present by an offense carrying the culpability standard of recklessness is not a defense.

Section 511, dealing with duress, is a codification of a defense recognized by case law which provides that under certain exigent circumstances a person may elect to preserve his life or limb at the expense of committing an offense against another person or the state.

The section provides that it is an affirmative defense that the offense was committed because the defendant was coerced by another person employing a clear threat of imminent, immediate, and inescapable death or serious bodily injury to the defendant or a third person, where the intent is such as would render a reasonably firm person incapable of resistance.

The limitation of the defense to threats of death or grave bodily injury, to the exclusion of threats to property, codifies the prevailing federal rule. The defense has been extended in accordance with some case precedent to include threats to third parties such as family members or hostages.

The stipulation that this essentially subjective defense be tested by the objective standard of a reasonably firm person reflects a societal judgment that while extraordinary heroism is not demanded, the commission of a crime as a result of unusual and unreasonable cowardice cannot be tolerated. It also assures that the more serious the offense demanded by the coercer the more overwhelming the threat must be.

The next defense to which I should like to address some remarks is that of public duty, set forth in section 521 of S. 1400. It has been suggested that this defense would give greater license to officials than does current law. It would not. On the contrary, the section is probably as accurate a statement of the present case law as is possible to give.

The public duty defense had its common law origin in cases involving the use of deadly force by military or law enforcement officials, or members of a posse. Most of the law in this country on this subject has been developed by State courts. The applicable principle was, however, stated in one relatively early federal case involving a homicide prosecution (*United States* v. *Clark*, 31 Fed. 710, 717 (E.D. Mich. 1887).) The issue was the validity of the shooting by a sentry of a soldier escaping from a military compound. The court found the shooting justifiable on the ground that no bad faith had been shown and that it was within the sentry's proper duties to shoot at an escapee. The court stated the principle developed in prior cases to be that:

> [A]n order illegal in itself, and not justifiable by the rules and usages of war, so that a man of ordinary sense and understanding would know, when he heard it read or given, that the order was illegal, would afford the private no protection for a crime under such order; but . . . an order given by an officer to his private which does not expressly and clearly show on its face, or the body thereof, its own illegality, the soldier would be bound to obey, and such order would be a protection to him.

The court then held that the same principle should apply where the soldier was not acting in direct obedience to an order but pursuant to his duty as he conceived it, and stated:



> [U]nless the act were manifestly beyond the scope of [the soldier's] authority or . . . were such that a man of ordinary sense and understanding would, know that it was illegal, . . . it would be a protection to him if he acted in good faith and without malice.

Section 521(a) generalizes from the principles announced in cases such as the one quoted above, and provides, in the first paragraph, that it is a defense to a prosecution under any federal statute that "the defendant reasonably believed that the conduct charged was required or authorized by law to carry out his duty as a public servant, or as a person acting at the direction of a public servant."

This provision is very similar to Section 1–3C3 of S. 1, which, however, instead of the phrase "reasonably believed that the conduct charged was required or authorized by law," uses the test "believes in good faith that the conduct is required or authorized by law unless he acts in reckless disregard of the risk that the conduct was not required . . . by law." To the extent that these forms may differ, it should be noted that the provision in S. 1400 seemingly affords a less expansive defense by its requirement that the actor's belief in the legality of his actions be objectively "reasonable." The S. 1400 formulation is, likewise, very close to the prevailing scope of the public duty defense which can be invoked by law enforcement agents when civilly sued for damages based on their conduct in the course of effecting an arrest or search. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F. 2d 1339, 1341 (C.A. 2, 1972); *Jones* v. *Perrigan*, 459 F. 2d 81 (C.A. 6, 1972).

Of note in considering the purview of the defense in section 521(a) is also the practical fact that, in most cases, the defendants seeking to utilize it will be law enforcement agents or their supervisors. Given the increased knowledge of the law which such persons can be legitimately assumed to possess, we anticipate that a court would properly hold them to a stricter standard as to what constituted a reasonable belief in legality than the ordinary layman. Of course, a good faith and reasonable reliance on the validity of a court order, or legislative authorization for action, should insulate a public official from criminal liability, and we would expect that a court would reach such a result, under the S. 1400 provision. This is consistent with the principle recently stated in 18 U.S.C. 2520 that: "A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law."

In sum, we submit that section 521(a) is a carefully drawn and not unduly broad defense provision, designed to preserve the judgment embodied under prevailing cases that public officials, or persons acting at their direction, who act in accordance with a reasonable belief that their actions are lawful should not be treated as criminals and cannot be so treated if we expect our laws to be enforced with the vigor required for successful implementation.

Brief mention should be also be made of section 521(b), which deals with the permissible uses of deadly force. Paragraph (3) of that subsection has been justly criticized on the ground that, as drafted, it could be construed to modify the common law by permitting an officer who has arrested an individual for a misdemeanor to use deadly force in the event the individual attempts to escape from his custody. Escapes from arrest are specifically covered by paragraph (2); paragraph (3) was not intended to reach the arrest situation. Rather the intent underlying this provision was to have it apply only in the case where the escape is from institutional confinement of some kind—not merely from the custody resulting from a street arrest. In such cases of attempted institutional escape, the use of deadly force may be justified even where the confinement may be for a misdemeanor since the guard will usually not know the nature of the offense for which the escapee has been convicted, and the attempted escape may endanger other lives. We agree that the language used in paragraph (3) should be clarified.

Section 522 codifies the defense of justification as it applies to the defense of persons generally. It provides a defense to a prosecution for the use of force against a person if such force was reasonably believed by the defendant to be necessary for purposes of self defense, defense of other persons, or crime prevention. Subsection (b) sets out the limited circumstances in which one may resort to the use of deadly force. The use of deadly force is not justified unless the defendant reasonably believes it is necessary to protect himself or another person from a risk of death of serious bodily injury. Retreat is not required as a condition to the use of deadly force in the defense of persons, but is a circumstance to be considered with all other circumstances in determining the reasonableness of the defendant's belief in the necessity of using such force. This follows the law announced by the Supreme Court in *Brown* v. *United States*, 256 U.S. 335 (1921).

Section 523 justifies the use of force to protect property, but the use of deadly force is justified only in situations in which the defendant reasonably believes that the use of such force is necessary to prevent the destruction of his dwelling. This generally follows current law respecting the use of force in defense of property and recognizes the extreme provocation involved in protecting one's home against an unlawful intruder.

The use of deadly force to protect property is not otherwise recognized, unless the use of such force would be justified under section 522 to protect persons.

The next defense I would like to comment on is entrapment. This defense is of vital interest to this Department since it involves the everyday activities of law enforcement agents in conducting criminal investigations. Not surprisingly, in view of its importance, the defense has been the subject of several Supreme Court opinions, most recently *United States* v. *Russell*, 411 U.S. 423, decided in 1973.

The courts have uniformly recognized that the detection of clandestine criminal activity often necessitates the use of deception by law enforcement officers and have sanctioned, for example, the use of decoy letters to elicit pornographic material, the feigning of interest in a bribe, and the undercover purchase of narcotics and other contraband, which merely provide willing criminals with opportunities or facilities for committing offenses.

Although in agreement that the above-described kinds of law enforcement techniques do not constitute entrapment, the Supreme Court and legal commentators have persistently been divided as to whether other more active conduct to induce criminal conduct, if engaged in by law enforcement personnel, constitutes the defense. The division stems from a fundamental disagreement as to the proper theory underlying the entrapment defense. The view to which a majority of the Supreme Court has consistently adhered predicates the defense on the implicit intent of Congress to exclude from prosecutions persons "otherwise innocent" who were lured into committing the crime by government agents. The defense is therefore not deemed available to one "predisposed" to commit the offense and not, therefore, lured by the government's actions into doing so—regardless of whether the government's actions might have induced an average, non-predisposed person into committing the crime.

The minority view is that the issue should turn on whether the police conduct has fallen below acceptable standards, judged in terms of conduct that would induce an average law-abiding person to commit the offense. In this view, the particular predisposition of the defendant is irrelevant.

Section 531 of S.1400 adopts the majority view and is an effort faithfully to reflect the prevailing entrapment doctrine of the Federal courts. The National Commission, on the other hand, recommended adoption of the minority test (see section 702 of its Final Report).

The Department of Justice believes that there are substantial reasons why it would be unwise as a matter of policy to shift the focus of the entrapment defense from the subjective criminal intent of the accused to the objective tendency of the investigator's conduct to induce the commission of a crime. As the majority in *Russell, supra,* observed, it does not seem either practical or just to award immunity to a defendant simply because the conduct of the officer was likely to have caused a hypothetical innocent person to commit an offense, if in fact the investigation involved a person otherwise disposed toward the offense and merely awaiting an opportunity to commit it. Such a rule would confer a wholly gratuitous benefit. Even the exclusionary rule under the Fourth Amendment, which has been criticized as "letting the guilty go free" because the "constable has blundered," is designed only to redress the personal rights of the accused. It has not been considered appropriate to promote the deterrent impact of that rule by expanding its application to persons whose legitimate interests were not in fact violated. See *Alderman* v. *United States*, 394 U.S. 164 (1969). Moreover, the competing standard espoused by the minority view, which would require the courts to determine whether an inducement would have caused a normal, law-abiding person's resistance to criminal activity to be surmounted (or some equivalent phraseology) seems not readily susceptible to accurate ascertainment. Adoption of that standard would immediately raise knotty problems, heretofore not grappled with by the federal courts, as to the kinds of proof admissible to show the normal degree of resistance to criminal temptation, and of the community (national, State, or local) in which such "normality" is to be gauged. By contrast, the courts have experienced no insuperable difficulties in applying the majority's standard which focuses on the individual defendant's propensity for engaging in the crime.



The Department, finally, considers that the prevailing theory of entrapment is justified by the recognition, as one commentator has put it, that the "nature of . . . crime affects the nature of its detection." Rotenberg, *The Police Detection Practice of Encouragement*, 49 Va. L. Rev. 871, 872 (1963). Not to permit active solicitation of persons known or suspected to be engaged in continuing violations of laws where there is likely to be no victim who will complain, such as narcotics, prostitution, gambling, and liquor offenses, would leave law enforcement authorities without a practical means of coping with such offenses. The formulation of the entrapment defense in section 531 of S. 1400 is thus intended to strike a proper balance. It discourages governmental overreaching by requiring an acquittal whenever a reasonable doubt exists that the defendant on trial may have been an otherwise innocent man seduced by the government, but it does not immunize those who were not in fact seduced into committing an offense.

Finally, section 532 provides an affirmative defense for one who acted in reliance upon certain official statements of law subsequently held by higher authorities to have been erroneous.

Though the general rule is that a mistake of law is no defense, even when the defendant relied upon competent counsel, due process estops the state from punishing a person whom one of its own organs has misled.

The vast governmental system speaks with many voices. There are a multitude of courts, administrative agencies, and executive officials. Each group has its own hierarchy, and some of their pronouncements are more authoritative than others. Accordingly, the section limits the official statements which may be relied upon to statutes, Supreme Court decisions, other judicial or administrative decisions in a proceeding to which the defendant was a party or the recipient of a permit, and high level written rulings by an agency properly exercising its jurisdiction.

Statutes, later held invalid, and Supreme Court decisions, subsequently overruled, are treated as if they were the law while in effect so that conduct conforming to their commands is exonerated without regard to whether the defendant knew of and relied on such precepts. This comports with the existing state authorities, *Commonwealth* v. *Trousdale*, 297 Ky. 724, 181 S.W. 2d 254 (1944); *State* v. *O'Neill*, 147 Iowa 513, 126 N.W. 454 (1910), and resolves a conflict within the Supreme Court with respect to its own overruled decisions. See *James* v. *United States*, 366 U.S. 213 (1961).

The more limited defense in those judicial and administrative cases where the defendant was himself a party, or where a written opinion of an agency head or his delegate is involved, requires the presence of strict subjective good faith and objective reasonable reliance before it can be asserted.

Senator HRUSKA. Will you introduce your associates, who will sit at the witness table, please, and their official capacities?

## STATEMENT OF HON. KEVIN MARONEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY RONALD L. GAINER, CHIEF OF THE LEGISLATIVE AND SPECIAL PROJECTS SECTION OF THE CRIMINAL DIVISION; ROGER A. PAULEY, DEPUTY CHIEF OF THE LEGISLATIVE AND SPECIAL PROJECTS SECTION; AND DENIS HAUPTLY, ATTORNEY, LEGISLATIVE AND SPECIAL PROJECTS SECTION

Mr. MARONEY. Thank you.

I am accompanied by Mr. Ronald Gainer, Chief of the Legislative and Special Project Section of the Criminal Division; Mr. Roger Pauley, Deputy Chief of that section; and Mr. Denis Hauptly, an attorney in that section.

We have this morning a rather lengthy statement prepared on the defenses found in chapter 5 of S. 1400 and the sentencing proposals found in part 3 of that bill. I intend, in view of the shortness of time this morning, to skip over the discussion of the sentencing proposals and go right to the brief discussion of the defenses.

We would like, however, to submit the entire statement for the record, as well as an accompanying memorandum relating to the sentencing proposals, if that would be satisfactory.

Senator HRUSKA. That would be very helpful.

Mr. MARONEY. Now, on the subject of defenses, I would like to make some remarks with respect to chapter 5 of S. 1400 dealing with defenses.

Senator HRUSKA. Now, where are you on your statement?

Mr. MARONEY. Page 14, Mr. Chairman.

Perhaps the most significant aspect of this chapter is the decision to include it in the new penal code. Currently, of course, defenses are not codified. Rather, they exist by virtue of judicial construction. Thus, in the past, Congress has deemed it enough to define crimes in the affirmative, so to speak, by stating the conduct to be proscribed. From these positive statements of what Congress intended to penalize, the Federal courts have developed a massive body of law dealing with defenses.

Such doctrines as mistake of fact or law, duress, insanity, entrapment, and self-defense, have gradually evolved and are now a part of our legal fabric. A fair question is: Why change the process now?

Why not simply have Congress define the offenses in the proposed code and leave it to the courts, as in the past, to develop any applicable defenses?

The answer, I believe, is that to continue this approach would in effect be an abandonment of legislative responsibility to the courts which would unnecessarily render the code less clear and thus make it more difficult for persons to conform their conduct to the law.

And at that point, Mr. Chairman, we are going to skip the prepared statement and go over to page 19, which deals with the defense relating to public duty set forth in section 521 of S. 1400. It has been suggested that this defense would give greater license to officials than does current law. It would not. On the contrary, the section is probably as accurate a statement of the present case law as is possible to give.

The public duty defense had its common law origin in cases involving the use of deadly force by military or law enforcement officials, or members of a posse. Most of the law in this country on this subject has been developed by State courts. The applicable principle was, however, stated in one relatively early Federal case involving a homicide prosecution—*United States* v. *Clark*.[1] That was a case in 1887. The issue was the validity of the shooting by a sentry of a soldier escaping from a military compound. The court found the shooting justifiable on the ground that no bad faith had been shown and that it was within the sentry's proper duties to shoot at an escapee. The court stated the principle developed in prior cases to be that:

> An order illegal in itself, and not justifiable by the rules and usage of war, so that a man of ordinary sense and understanding would know, when he heard it read or given, that the order was illegal, would afford the private no protection for a crime under such order; but an order given by an officer to his private which does not expressly and clearly show on its face, or the body thereof, its own illegality, the soldier would be bound to obey and such order would be a protection to him.

[1] *United States* v. *Clark*, 31 Fed. 710 (E.D. Mich. 1887).



The court then held that the same principle should apply where the soldier was not acting in direct obedience to an order but pursuant to his duty as he conceived it, and stated that:

> Unless the act were manifestly beyond the scope of the soldier's authority, or were such that a man of ordinary sense and understanding would know that it was illegal, it would be a protection to him if he acted in good faith and without malice.

Section 521(a) generalizes from the principles announced in cases such as the one quoted above, and provides, in the first paragraph, that it is a defense to the prosecution under any Federal statute that "the defendant reasonably believed that the conduct charged was required or authorized by law to carry out his duty as a public servant, or as a person acting at the direction of a public servant."

Senator HRUSKA. Mr. Maroney, it has been contended that the cases you cite are soldier cases; that makes them different from policeman or narcotics agents or border patrol for immigrants.

What would you have to say about that?

Mr. MARONEY. I think that the essence of the principle involved here is whether it goes to the question of good faith and lack of malice, and I think that in a Second Circuit Court of Appeals decision in another case which involved narcotics officers who were sued civilly for a raid on a private residence, the second circuit held that if the agents were able to demonstrate good faith in the performance of their responsibilities, that they would be immune from civil liability for a mistake in their performance of such duty.

Senator HRUSKA. Do you not cover that in the next paragraph of your statement?

Mr. MARONEY. Yes, it is cited at the end of the next paragraph.

This provision is very similar to section 1–3C3 of S. 1, which, however, instead of the phrase "reasonably believed that the conduct charged was required or authorized by law," uses the test "believes in good faith that the conduct is required or authorized by law unless he acts in reckless disregard of the risk that the conduct was not required by law." To the extent that these forms may differ, it should be noted that the provision of S. 1400 seemingly affords a less expansive defense by its requirement that the actor's belief in the legality of his actions be objectively "reasonable."

The S. 1400 formulation is, likewise, very close to the prevailing scope of the public duty defense which can be invoked by law enforcement agents when civilly sued for damages based on their conduct in the course of effecting an arrest or search.[2]

Of note in considering the purview of the defense in section 521(a) is also the practical fact that in most cases the defendants seeking to utilize it will be law enforcement agents or their supervisors. Given the increased knowledge of the law which such persons can be legitimately assumed to possess, we anticipate that a court would properly hold them to a stricter standard as to what constituted a reasonable belief in legality than the ordinary layman.

Of course, a good-faith and reasonable reliance on the validity of a court order, or legislative authorization for action, should insulate a public official from criminal liability, and we would expect that a court would reach such a result under the S. 1400 provision. This is

[2] See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Investigation*, 456 F. 2d 1339, 1341 (2d Cir. 1972); *Jones* v. *Perrigan*, 459 F. 2d 81 (6th Cir. 1972).

consistent with the principle recently stated in 18 U.S.C. 2520 that: "A good-faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law."

In sum, we submit that section 521(a) is a carefully drawn and not unduly broad defense position, designed to preserve the judgment embodied under prevailing cases that public officials, or persons acting at their direction, who act in accordance with a reasonable belief that their actions are lawful should not be treated as criminals and cannot be so treated if we expect our laws to be enforced with the vigor required for successful implementation.

I see, Mr. Chairman, that it is after 10:15. I would like to submit the balance of the statement for the record, and if the committee has any questions we would attempt to answer them very briefly.

Senator HRUSKA. Well, I want to thank you for your appearance here. I understand you will furnish for the record a memorandum on sentencing. That will probably answer questions I have as to sentences and defenses.

Mr. MARONEY. Yes, I will.

[The information referred to follows:]

DEPARTMENT OF JUSTICE MEMORANDUM ON THE SENTENCING PROVISIONS CONTAINED IN S. 1400, THE CRIMINAL CODE REFORM ACT

I. INTRODUCTION

Legislating sentencing provisions—those principles which guide or direct the disposition of a convicted offender—is a task of major proportions. Not only is there dispute as to the appropriate goals of sentencing and the respective weights to be accorded each such goal, but even when a factor is acknowledged as relevant, such as the deterrence of other criminal activity, few statistics are available to indicate specifically what kind of sentence (for example, fine or imprisonment), or what degree of particular sentence, will best accomplish the purpose. As a consequence, legislators, or those proposing legislation, are largely left to the rationalization of the experience and insight supplied by those familiar with the past application of the system, leaving individualized application to the informed discretion of the federal judges.

Before embarking on a discussion of particular aspects of the sentencing proposals in S. 1400, it is worthwhile to note that S. 1400, unlike existing law, sets forth certain general purposes of sentencing. Section 102(b) of S. 1400 declares it to be one of the general purposes of the bill to prescribe sanctions for engaging in criminal conduct that will (1) assure just punishment for such conduct, (2) deter such conduct, (3) protect the public from persons who engage in such conduct, and (4) promote the correction and rehabilitation of persons who engage in such conduct. In section 2101, a similar list of factors is set forth to guide judges in making the basic determination whether to impose a sentence of imprisonment or of probation. Both S. 1 and the Final Report of the National Commission on Reform of Federal Criminal Laws have listed very similar purposes.

Within the framework of these purposes—which we have not attempted to weight, one as against the other—we have tried to embody as broad a range of options as possible so that the courts will have the best opportunity to tailor the sentence to the needs and the crimes of the offender and to the needs of society. Only in rare instances is any particular result dictated. The objective is to provide both discretion and sensible guidelines within which that discretion may effectively operate.

II. CURRENT LAW

Sentencing decisions are left to the United States District Courts without control by preestablished criteria for decision and, with exceedingly rare exception, without appellate review, as long as legislatively set maxima are not exceeded. With respect to imprisonment, the imposable terms are frequently high, and they are made more so by the almost unlimited possibility of consecutive sentences upon multiple convictions. Unless a judgment provides an earlier date, a prisoner must serve one-third of his sentence before becoming eligible for parole (18 U.S.C. 4204, 4208). The United States Board of Parole may release a prisoner from the date of parole eligibility to the expiration of the maximum term stated, in the sentence, less time off for good behavior. This averages at about the upper third of a sentence, though it varies with its length, as well as with whether a prisoner engages in an employment (18 U.S.C. 4161, 4162). The decisions of the Board of Parole are also almost entirely without congressional guidelines and are unreviewable. They are, however, subject to internal appeal as well as an increasing utilization of guidelines of the Board itself.



III. CATEGORIES OF OFFENSES

*A. Present law*

As present federal criminal law has grown by sporadic addition and deletion, it is not surprising that there are at least 17 levels of confinement, ranging from life imprisonment to 30 days. By combining imprisonment and fine variations, at least 75 different punishment levels may be isolated. Obviously, such variety cannot be justified rationally, however understandable it may be in historical terms.

*B. Rationales for systemization efforts*

Prior to the consideration of specific proposals it may be desirable to briefly consider the goals toward which a sentencing system is directed. One goal is rehabilitation. While there is currently considerable cynicism expressed as to the ability of correctional programs to rehabilitate a large percentage of offenders in an institutional setting, there is a belief among some experienced people in the field that a period of three to five years is sufficient to achieve rehabilitation, if it can be achieved at all in the individual case, and that any period of imprisonment in excess of five years serves no rehabilitative purpose and, indeed, may be counterproductive for this goal.[1] On this hypothesis and the further assumption that the rehabilitative goal should be dominant in criminal sentences, all or almost all felonies should be punishable by no more than five years confinement.[2] Only a relatively small number of especially dangerous offenders would be subject to terms beyond this limit. Stringent procedural limitations, special findings requirements, and appellate review would be utilized to prevent overuse of any enhanced penalties. With respect to misdemeanors, some advocates of this approach would limit such offenses to a maximum of 30 days imprisonment under the theory that a short, shock jail experience could work as an effective remedy in cases of minor crimes, if, indeed, discovery and arrest are not themselves sufficient for this purpose.

This alternative, which we might term "the offender-oriented option," has some advantages. It would tend to protect federal defendants from heavily excessive punishments. Greatly shortened maximum terms would also reduce the risk of unacceptable sentencing disparities. It would permit savings in correctional institution costs.

However, the offender-oriented choice also appears to have notable disadvantages. It tends to reject general deterrence as a rational or permissible function of penal sanctions. (Empirical evaluation of this point is difficult. Deterrence is exceedingly difficult to measure; yet given the tiny percentage of the population which is confined or otherwise subject to rehabilitative measures, slight increases or decreases in the reluctance of the general population to commit offenses can have a far greater influence on the crime rate than much greater changes in rehabilitative success.) This option also rejects the notions of incapacitation and of "just desserts." While some academicians and sociologists may be willing to reject the concepts of deterrence, isolation, and merited punishment as penological goals, most would not reject them; the rationality of the concepts in fact has not been disproven by empirical investigation. Furthermore these concepts undoubtedly accord with the sense of justice of the general public.

It is likely that any acceptable reform must be a compromise between the multiple and often-conflicting goals of penal sanctions. Persons who commit minor offenses, even though persistently, will tend to receive minor penalties because the sense of "just desserts" will outweigh any urge to make extensive institutional efforts to rehabilitate or incapacitate. Persons who commit grave

[1] See, e.g., Schwartz, *Introduction to Study Draft of a New Federal Criminal Code*, p. xxxiv.

[2] Professor Louis B. Schwartz, the Staff Director for the Commission, has expressed support for this view. Further backing may be found in the Model Sentencing Act (1963) drafted by the Advisory Council of Judges of the National Council on Crime and Delinquency and the similar proposal of the National Advisory Commission on Criminal Justice Standards and Goals, "A National Strategy to Reduce Crime" (1973) (temp. ed., p. 183.)

offenses will tend to be subject to heavy sentences, in spite of relatively favorable prognoses. The Commission's Final Report, S.1, and S. 1400 all represent compromises, although the Commission comes much closer to sponsorship of the offender-oriented option than do the other proposals.

*C. Categories proposed*

To reduce the number of sentence categories, the Commission proposed three classes of felonies, two of misdemeanors, and one of infractions (§ 3002.) In addition, the Commission proposed a super-grade category permitting life imprisonment for treason and some murders (§ 3601). The effect is that this very small number of offense classifications reduces the power of Congress to make grading distinctions. With the lowest felony penalty stated at a nominal maximum of seven years, many offenses presently carrying two-to-five-year maximum would be reduced to misdemeanors.

S. 1 includes five classes of felonies plus a superclass for murder and treason, one class of misdemeanors and one of violations. As the lowest felony carries a maximum term of one year, today it would be regarded as a misdemeanor (18 U.S.C. 1).

We in the Department on the other hand, have proposed five classes of felonies, three of misdemeanors, and one of infractions. This adds candor as well as flexibility to the Commission proposal. The highest category is listed with the others, rather than being buried in an inner chapter; a fifth felony, with a maximum penalty of three years, is added at the bottom of the felony range. Following present law, the one-year misdemeanor penalty is retained for the most serious non-felonies. A six-month misdemeanor is added to the Commission proposal. The thirty-day maximum misdemeanor is retained for offenses which seem to warrant such disposition. Although the Commission recommended that infractions not carry the possibility of confinement at all, we suggest a maximum of five days. Partly this was to provide the possibility of giving a beneficial shock to some offenders when found warranted by judges, partly to permit some serious vindication of the norms defended by the petty offense in appropriate cases.

## IV. LENGTH OF MAXIMUM PRISON TERMS

*A. In general*

No realistic comparison of the three proposals can be made without reference to the potential maximum terms available for the various classes of offenses, While such maxima may be found in S. 1400 by simply referring to section 2301, the proposals of the Brown Commission and S. 1 are somewhat more complex.

The maxima for S. 1 must be computed by deducting the mandatory parole component (§ 3–12F3(b)) from the "Authorized Lower Range Terms for Felonies" and "Other Authorized Terms" (§ 1–4B1). The computation is subject to a caveat. S–1, unlike the other proposals, contains a special good time subsection, authorizing the Bureau of Corrections to establish regulations permitting credit without statutory limitation for "excellent performance" by prisoners (§ 1–4B3(b)(3)). Because of the vagueness of this proposal, its effect on the sentencing scheme cannot be estimated.

The maxima for the Brown Commission report must be computed by starting with the "authorized terms of imprisonment" (§ 3201(1)) and deducting the "upper-range" which becomes applicable only upon "dangerous special offender" findings (§ 3202), and further deducting the mandatory parole component (§ 3201 (2)). At the end of the remainder (the prison component), release on parole would become mandatory. For example, manslaughter is graded as a Class B felony (§ 1602). Section 3201 establishes a nominal penalty of no more than 15 years. Without the special findings of dangerousness, etc., the maximum is ten years (§ 3202). Since a ten-year sentence contains a three-year parole component (§ 3201(2)), the maximum term of imprisonment for manslaughter (and all other Class B felonies) is 7 years. Furthermore, parole after five years (or of the prison component of a Class A felony sentence if longer) is required absent conclusion by the Parole Board that "there is a high likelihood" of further criminal conduct (§ 3402(2)). Given the difficulty in predicting dangerousness, with present information and skills, this represents a high burden of proof.

Thus, the Commission in effect achieves an outer limit of five years confinement for almost all federal offenses, absent exceptional circumstances, though it does so by rather roundabout, non-obvious means.

*B. Consecutive sentencing limitations*

Since even a brief and moderate period of criminal conduct may often be dissected into a number of federal offenses today, the actual maximum penalty which can be imposed on a defendent is not uncommonly almost unlimited if the consecutive sentence option is utilized by the court. As different jurisdictional bases are satisfied and different substantitive offenses multiply, exceedingly long terms are commonly avoided only by judicial restraint. In order to defend the grading scheme of the various proposals, each would impose some limitation on consecutive sentences to imprisonment. Each represents a compromise between the desire to legislate effective variable maxima and the objective of permitting some increase in penalty for multiple offenders. S. 1400 seeks to do this by, in general, limiting the total of consecutive sentences to that authorized by the next higher class of offense (§ 2303). S. 1 imposes less restraint: the maximum sentence would be 75 per cent of the sum of all offenses for which a defendant was being sentenced (§ 1–4A5(b)). The Commission's proposal is the most restrictive of the three. Persons convicted of multiple felonies could not receive a total sentence higher than that authorized for the most serious felony involved, except that two or more Class C felonies could result in a Class B sentence (§ 3204(3)). Furthermore, consecutive sentences would no longer be permitted for conspiracy and a substantive offense which constitutes its object.



*C. Extended terms for special offenders*

Both the Commission (§ 3202) and S. 1 (§ 1–4B1) propose a lower range of maximum sentences for ordinary offenders and a higher one for felons who are proven to be "dangerous special offenders" by reason of particularly persistent criminality, special expertise, organized crime leadership, dangerous abnormal mental condition, or having utilized a firearm, explosive, or incendiary device. S. 1400 has no equivalent provision, but instead includes separately-chargeable offenses for organized crime leadership and for using a firearm or explosive in the course of an offense.

The extended term for the exceptional offender has much to recommend it, at least from an abstract standpoint. With the possibility of an enhanced penalty for the most serious violator, the normal maximum penalty may be reduced, thus securing more uniform and equitable penalties for both the most aggravated and the less than most aggravated categories.

While generally extended terms have been added to the normal maxima, the Commission changed this approach, with radical result. First, the general penalty level was lowered, partly on the basis of the availability of longer terms for particularly serious cases. Then sentencing to even the upper range of ordinary terms was prohibited unless enhancing criteria were met (§ 3202).

Extended terms for special offenders, even as usually employed, present several practical problems. Habitual criminal statutes, which form the analytical basis for the extended term idea, have not, for a variety of reasons, generally been enforced. Where the former conviction is in another jurisdiction they may be inapplicable because of different definitions of offenses and varying penalty structures. Where only offenses defined as felonies in the latest jurisdiction are considered, there is discrimination against natives unless there is general non-enforcement. If the statute considers as prior offenses those so defined by the jurisdictions of former convictions, lack of a parallel local crime may be discriminatory. However, since habitual offender laws have frequently been couched in mandatory terms, enforcement has often been declined as too severe; when they create only discretion to impose a longer sentence they may be avoided as a waste of time. They also have readily been nullified in the course of plea bargaining. In addition, they present significant litigation problems, not the least of which is the question of to what extent there may be a collateral attack on a prior judgment, especially a prior foreign judgment. (*See*, e.g., *Burgett* v. *Texas*, 389 U.S. 109 (1967).) When all of the above is added to the caseload crisis in many prosecutors' offices, and to prosecutors' usually conviction oriented ethic rather than a heavy sentence oriented ethic, it is not surprising that such statutes are commonly ignored (See Wechsler, Sentencing, Correction, and the Model Penal Code, 109 U. Pa. L. Rev. 465, 483 (1961).)

It can be expected that upper range imprisonment for dangerous felons would rarely be imposed if the special offender provisions proposed by the Commission or S. 1 were enacted, even with respect to the small group of offenders who fell within it. The result would be general nullification of the scheme, with perhaps occasional and disparate treatment of a few offenders singled out for unusual sentencing severity.

*D. Limitations on discretion in fixing maximum terms*

There are several methods, proposed or in use, that serve to limit the discretion of the court as to the extent of the maximum term.

Some jurisdictions, notably California, limit the sentencing judge to imposing the maximum sentence or probation. While in theory the system serves to eliminate sentencing disparities since the determination of actual time of imprisonment is made by a single tribunal (the parole board) for all prisoners, there are sufficient other problems with the proposal that it was not instituted in S. 1400. The basic difficulties with the system include: the fact that the sentence is not a judicial one and thus without the protection of public visibility and ultimate responsibility; opportunities for disparity remain, notably through the probation alternative and plea bargaining; information available prior to incarceration may be more valuable than post incarceration data (prior criminal records, the age and general history of the offender, and the offense committed are all known to the judge); and, the psychological stress on a prisoner who is totally uncertain as to the time of his release.

Mandatory maximum sentences (e.g., "no less than 15 years") have the attractive feature of insuring a minimum period for rehabilitation, deterrence, and incapacitation. However, such sentences are inherently arbitrary and, with limited exceptions, none of the three proposals utilizes the concept.

A third system would establish presumptions for or against imprisonment and criteria for overcoming the presumption. The Commission contained a presumption against imprisonment; S. 1 adopted the middle road of proposing general criteria in sentencing; and S. 1400, while using no presumptions, adopted criteria similar to those found in the Brown Commission.

*E. Split sentencing authority*

Present law explicitly authorizes split sentences for offenses punishable by imprisonment for more than six months, i.e., a judge may jail a defendant for up to six months followed by release on probation (18 U.S.C. 3651). The technique is to impose a sentence of more than six months together with an order suspending the execution of the balance of the sentence not to be served in confinement, the defendant then being on probation. The rationale is to permit a compromise between probation and imprisonment. A defendant receives a taste of jail without prolonged institutionalization, followed by release under supervision. The Commission recommended continuation of split sentence authority (§ 3106) S. 1 contains no similar provision.

While there is some merit in retaining the existence of split sentence authority, it was decided on balance to delete the split sentence section from S. 1400, largely because the confinement portion of such sentences is commonly served in local jails, with attendant administration and institutional problems.

*F. "Good time" credits*

At present, 18 U.S.C. 4161 provides "good time" allowances ranging between five and ten days per month, depending on the length of the sentence. 18 U.S.C. 4162 permits additional industrial and other meritorious good time up to maximum ranging from three to five days per month. The mandatory release dates for prisoners is computed by deducting good time from the maximum term of imprisonment to which they have been sentenced. Prisoners who are released on mandatory release, rather than parole, are treated as parolees until the good time period, less 180 days, has elapsed (18 U.S.C. 4164). While good time forfeitures do occur, the effect of these statutes is to reduce most adult prison terms roughly one-third and to assure that the considerable majority of offenders are released under supervision irrespective of whether they are granted parole.

The Director of the Bureau of Prisons has recommended repeal of the good time statutes. They have been criticized as not substantially contributing to desired behavior and as being onerous to administer. Prisoners can and do effectively challenge efforts to withhold statutory good time. Furthermore, although good time is not authorized by the Youth Corrections Act (18 U.S.C. 5005 et seq.), institutional behavioral problems are not notably more common with respect to persons sentenced under its provisions. Perhaps this is at least in part attributable to the parallel hope of inmates for early parole.

The Commission did not propose a continuation of good time, partly for these reasons, and partly because of the gentleness of its proposed sentencing scheme. (See Working Papers, p. 1299). An alternative is suggested by S. 1, which proposes discretionary good time "in accordance with regulations of the Bureau [of Corrections]." While this may arguably be conducive to permitting good time credits sufficient in the opinion of correctional officials to encourage rule and program compliance, such open-ended discretion in administrators to vary the overall congressionally-prescribed weighing of sanctions seems inappropriate.



S. 1400 does not contain a good time provision. It strives for candor in its statement of the maximum terms. If they are to be reduced, this can be done directly. As to encouraging behavior, the liberalized parole possibilities of S. 1400 appear to provide adequate incentives.

## V. MINIMUM SENTENCES

Minimum sentences control parole eligibility. At present, federal prisoners serving definite sentences over 180 days are eligible for parole after serving one-third of the maximum term (or after serving 15 years in the case of a sentence in excess of 45 years or a life sentence), upon good behavior (18 U.S.C. 4202). Under 18 U.S.C. 4208(a)(2) a sentencing court may provide immediate parole eligibility. This option is utilized in about half of the felony sentences today. If the court is silent with respect to the minimum sentence, the one-third minimum applies. A sentencing court cannot raise the minimum above one-third of the maximum term imposed.

Arguments favoring permitting minimum sentences include the recognition that fixed terms are appropriate for purposes of deterrence and retribution—purposes paramount in the sentencing of "white collar" criminals—although generally inappropriate for purposes of rehabilitation or incapacitation. Another consideration is the desirability of sharing authority between courts and parole authorities. There is some inconsistency between the approval of authority for courts to tailor maximum sentences downward from their statutory limits to fit the case of the particular offense and offender (rather than relying on the parole system, as in the State of California), and the disqualification of the courts from having a role in setting the time of earlier release. Further considerations include the concern that the parole processes will often result in the premature release of dangerous persons if immediate parole is possible. There is also concern that parole may increasingly become a matter not of discretion but of right; a number of legislative proposals presently before the Congress move strongly in this direction.

Arguments favoring lower or no minimum sentences include the desirability of authority for parole boards to release prisoners in cases where this seems just and appropriate. Furthermore, the parole board could act to review all federal sentences if not constrained by minimum sentences—a sentence review function that can be performed far more uniformly, expeditiously, and inexpensively than could review by the courts of appeal, were appellate review to be authorized.

The Commission proposed a substantial reduction in both the frequency and the length of federal minimum sentences (§3201(3)). First, it prohibited minimum terms for sentences for Class C felonies. Second, it converted the requirement of affirmative action to eliminate a minimum to one of affirmative action to create one. Third, it required that the courts limit the use of minimum terms to cases which are "exceptional . . . such as warrant imposition of a term in the upper range under section 3202." Fourth, it imposed special investigation requirements prior to imposition of such terms.

S. 1400 represents a compromise. Like the Commission and S. 1 proposals, it would significantly reduce the frequency of federal minimum sentences. Courts would have to act affirmatively to create minimum terms. The present one-third term limitation would be narrowed to one-fifth. An outer limit for very long sentences would be 10 years minimum, in place of the present 15 (§2301(c)). At the same time special offender-type finding requirements, which would almost eliminate minimum terms, would not be required.

The foregoing discussion has referred to judge-set minimum terms. On relatively rare occasions, federal law has contained legislatively-established mandatory minimum terms. An example is the provision in the laws of many states that life sentences for murder have minima of 7, 10, or 15 years. With one exception, S. 1400 does not contain such provisions, even for treason or murder; the exception is for the offense of trafficking in large amounts of heroin or morphine, for which a mandatory parole ineligibility term of at least 10 years is required (§1821). The general policy of avoiding mandatory minimum terms is based upon the lack of assurance that the offenses in question can be drafted to exclude all circumstances in which such mandatory minimum terms would be inappropriate, and the problems attendant in prosecuting offenses carrying such terms.

## VI. PAROLE

*A. Criteria and presumptions*

The present law provides that the Board of Parole "may in its discretion" authorize parole of an eligible prisoner", [1] if it appears . . . that there is a

reasonable probability that such prisoner will live and remain at liberty without violating the laws, and [2] if in the opinion of the Board such release is not incompatible with the welfare of society" (18 U.S.C. 4203(a)).

S. 1400 in general follows present law, although it is considerably more specific Parole is authorized if the Board (renamed "Parole Commission") is of the opinion that release at the time is consistent with the public safety; deterrence; respect for law; just punishment; need for education, vocational training, and other rehabilitative efforts; and institutional discipline (§4202). S. 1400 creates no formal presumptions for or against parole, following present law.

The Commission's proposal would erect a presumption that prisoners having prison components of three years or more should not be paroled during the first year. (It is silent with respect to those with lesser sentences.) Thereafter, there is a presumption that parole should be granted unless the Board is of the opinion that there is an undue risk of noncompliance with parole conditions, or that release would depreciate the seriousness of the offense or undermine respect for law, interfere with institutional correctional treatment "which will substantially enhance" capacity to lead a law-abiding life, or substantially harm institutional discipline. The Commission makes the presumption virtually irrebutable after the longer of five years or two-thirds of the prison component of a sentence. Parole at this point becomes mandatory unless the Board concludes that there is a "high likelihood" of further criminal conduct (§ 3402(2)). No considerations other than recidivism may be considered under this formulation, and such predictions as to new-offense probability would be extremely difficult to make.

S. 1 treats the parole decision in language closely following its statement of criteria and subcriteria for the use of probation. No presumptions for or against parole are stated.

*C. Parole terms*

Under present law, the parole term is the term of the sentence minus the period spent in confinement prior to parole (or mandatory release because of good time credits). Thus early parole rather paradoxically results in a longer parole term (18 U.S.C. 4203(a)).

S. 1400 seeks to rationalize the parole period by authorizing the Parole Commission to set the term, at the time of release, at between one and five years (§ 4204). All prisoners convicted of felonies or Class A misdemeanors must be released on parole (§ 4203). In order to provide a sanction for compliance with the conditions of parole in cases where all, or almost all, of a sentence is served prior to release, S. 1400 provides a contingent term of imprisonment of one year for felonies, or of 90 days for Class A misdemeanors, which may be required to be served only upon parole violation and revocation (§ 2302).

The Commission follows present law in making the parole term the balance of the sentence (§ 3403). Since the sentence is chopped into parole and prison components, a substantial period of parole for long sentences is assured. Nevertheless, the paradox of longer parole terms upon earlier parole would continue.

S. 1 is a compromise between the approach of the Commission and S. 1400. A parole component of one year is carved out of sentences over 5 years, two years out of sentences over 10 years (§ 3–12F3(b)). Since many prisoners have sentences shorter than this, no parole would be required to follow confinement in a large percentage of cases. The term of parole would continue to be the balance of the sentence.

## VII. PROBATION

In accord with the recommendation of the Commission, S. 1400 regards a term of probation as a sentence rather than a suspension of the imposition or execution of sentence. However, unlike the Commission's proposal, S. 1400 creates no presumption in favor of probation. Instead it lists certain factors which courts should consider in releasing a convicted criminal to society. Whether the application of these factors would result in 90% or 10% of all convicted persons receiving probation is a matter which cannot be predicted. What would result, however, is the assurance that the person who must be incarcerated for deterrent purposes, for protection of society, or for rehabilitation will receive some period of incarceration.

The provisions also set definite periods of probation, with a maximum in felony cases of five years rather than, as under present law, the term for which imprisonment could have been imposed. Even that provision is lightened by granting discretion to reduce the period of probation or to order its early termination.

The list of conditions that may be placed on a probationer's freedom is, for the most part, suggestive and not exhaustive or mandatory (§§ 2102, 2103). The conditions closely follow the proposals of the National Commission and are



designed to provide the trial court with a listing of some of the available alternatives which might be desirable in the rehabilitation of a particular offender. The only mandatory condition of probation is that the offender not commit another offense during the period when his probation is subject to revocation. The Commission did not contain any mandatory conditions, while S. 1 contained four basically designed to insure contact with the probation officer. The single, mandatory condition appears appropriate; one who has been given a chance as it were, and then reneges on his promise and returns to a pattern of illegal activity has discredited the basis on which probation was granted to begin with.

Upon a violation of a condition of probation, the court has the option of extending or modifying the probation or revoking it and imposing whatever sentence was available at the time of initial sentencing (§ 2103 (b)).

The final provision of the probation chapter deals with the duration of probation and the requirement that the term of probation runs concurrently with other terms of probation or parole. Unlike the Commission's proposal, S. 1400 provides that a term of probation does not run concurrently with a term of imprisonment since the purpose of probation is to afford the defendant an opportunity to demonstrate his ability to live freely in our society without reversion to criminal activity, a matter that can be demonstrated while "on the street" but not while in a prison.

Probation is a significant tool in the correctional process, but it is one that, if it is to have any value, must serve as a testing period for the individual offender. The courts, having provided the testing period, should have broad powers to control the duration or termination of that period. Conditions of probation have often in the past been too restrictive of the rights of individuals. S. 1400 is intended to make a reasonable accomodation between individual rights and societal rights.

## VIII. FINES

*A. Levels*

Present fine levels are quite variant. The overall spread of specific maxima is from $50 to $25,000.

The Commission, being of the view that fines are of somewhat doubtful correctional utility,[3] prescribed low maximum fine levels, unless there was a showing of gain to the offender or loss to the victim, in which case the fine could be set in an amount which did not exceed twice the gain or loss (§ 3301). Otherwise the top felony fine would be $10,000.

S. 1, while adopting the same discretionary alternative limit of double the gain or loss, proposed daily fines of $50 to $1,000 which may run from ten days to three years for all offenses, in the absence of specific provisions to the contrary (§ 1–4C1). Without proof of gain or loss, the maximum fine would start with $54,750 for an infraction and end with $1,095,000 for a Class A or B felony.

S. 1400 fits somewhere in between. The maximum felony fine range is from $25,000 to $100,000. The misdemeanor and infraction spread is from $500 to $10,000. A similar alternate limit is stated, but in terms of twice the gross gain or loss (§ 2201).

While the Commission's proposal would probably depress fine limits below those of present law, S. 1400 would increase them by about a factor of ten, and S. 1 would do so by a factor of 100. The rationale for an increase is found in part in the depreciation in the value of money, and in the appreciation in the real earning capacity of the average citizen, since the enactment of much of title 18. It is also recognized that fines often represent the only useful sanction against corporations and other organizations, as well as being, in the view of many judges, the major acceptable penalty against significant numbers of individual federal offenders. Although there is no generalized precedent for relating the maximum fine to the gain or loss resulting from an offense, there are particularized precedents, e.g., up to twice the value of money embezzled by an officer of a federal court may be assessed as a fine under 18 U.S.C. 645.

*B. Criteria*

Present law contains no general guidance as to when a fine should be imposed. The Commission would preclude fines where not proportioned to the financial burden placed upon the particular defendant, where they would prevent restitution or reparation to the victim, and where the offense did not result in gain or loss, absent exceptional circumstances (§ 3302). S. 1 contains less stringent limitations (§ 1–4C1(c)). S. 1400 is similar to S. 1 in this respect. The court is required to

[3] See Working Papers, pp. 1325–1329.

consider the resources of the defendant and whether imposition of a fine will preclude restitution, but fines are not ruled out for non-economic crimes. In general, the limitations on the use of fines by the Commission were not followed as being too conducive to litigation, as well as being unduly restrictive of a sanction which increases public resources while discouraging offenders.

## IX. OTHER NONINSTITUTIONAL SANCTIONS

### *A. Notice sanction*

S. 1400 provides that organizations and individuals may be required to give notice of a conviction to the class of persons or sector of the public affected by or financially interested in the subject matter of the conviction (§ 2004). The Commission (§ 3007) and S. 1 (§ 1–4A1(c)(7)) contain similar provisions. The primary purpose, of course, is to facilitate victim compensation efforts.

### *B. Disqualifications and other sanctions*

S. 1400 does not seek to revise the disqualifications applicable to federal employees currently prescribed by titles 5 and 18 of the United States Code.[4] Furthermore, it does not follow the proposal contained in S. 1 that would give federal judges authority to suspend the right of an individual or organization to engage in business or professional employment, often for a period of many years (§§ 1–4A1(c)(1), 1–4A). The Department preferred to leave the latter to the federal, state, and local licensing authorities, except as such power might be exercised as a condition of probation or parole.

In two areas, injunctive relief to prevent future violations would be authorized: the civil remedies against racketeering activities of the Organized Crime Control Act of 1970 (18 U.S.C. 1964) are retained (§ 3643), and specific authority to institute suits to enjoining ongoing fraudulent schemes is added (§ 3641).

## X. YOUTHFUL OFFENDER SENTENCING

### *A. Young adults*

The Federal Youth Corrections Act allows an optional separate indeterminate sentencing scheme for offenders under 25 years of age with institutional segregation from older prisoners, greater emphasis on rehabilitative efforts, immediate parole eligibility (no minimum sentences), and a provision for expungement of records.

S. 1400, like the Commission and S. 1, proposes repeal of these provisions. The Department's position is based upon a variety of considerations.

1. The Bureau of Prisons presently places young offenders in separate youth institutions irrespective of whether they are sentenced under the YCA.

2. The encouragement of low or no minimum sentences is consistent with the immediate parole eligibility of YCA offenders.

3. The YCA gives an optional 0 to 6 year sentence irrespective of the federal offense for which the defendant was convicted. This seems unjust in the case of misdemeanants and very minor felons. Furthermore, the Department has rejected highly indeterminate sentencing in other contexts.

4. The questions of expungement of records and collateral disabilities are not uniquely applicable to young adult offenders and should be faced generally.

5. The YCA has provoked much litigation, especially in the District of Columbia, and other administrative complexities.

### *B. Juveniles*

Most juveniles are turned over to state authorities, rather than prosecuted for federal offenses. Some are proceeded against in the federal courts either as adults or under the federal juvenile delinquency provisions (18 U.S.C. 5031–37).

The Commission would create a defense of immaturity to adult prosecutions of those under the age of 18, unless the court rules otherwise. Adult proceedings would be barred in almost all cases where the defendant is under 16, with an absolute defense below the age of 15 (§ 501).

S. 1 generally follows the Commission although with some variations (§1–3B3, 3–13B1—3–13B5).

S. 1400 similarly proposes that the decision to treat an offender under 18 as an adult should be left to the court, rather than to the prosecutor (§5032). It also permits delinquency disposition irrespective of the offense.

[4] The current title 18 provisions would be moved by S. 1400 to title 5.



## XI. SENTENCING PROCEDURES

### *A. Introduction*

S. 1400 was drafted primarily as a substantive criminal code. Most procedural questions were left for consideration at a later time, when preparation of a comprehensive procedural code could be undertaken, procedural matters being governed in the meantime by the Constitution, the existing statutes, the Federal Rules of Criminal Procedure, and the case law. Following the present title 18, however, a few procedural problems received specific treatment.

### *B. Trial court procedures*

1. *Presentence report.*—S. 1400 would encourage the routine use of presentence reports by requiring a statement of reasons in an affirmative order to the contrary if a sentencing decision were to be made in the absence of such an investigation. Compare the proposed 1974 Amendments to Rule 32, Federal Rules of Criminal Procedure.

2. *Presentence commitment for study.*—Following present law and the Commission's proposal, a convicted defendant may be ordered committed for a period of study normally not exceeding 90 days, prior to making the sentencing decision (§2003(b). Compare 18 U.S.C. §§4208(b), and 5010(e).

3. *Special procedures re mental illness.*—At present, federal statutory law is nonexistent with respect to insanity defense procedures, except in the District of Columbia. The Commission's proposal is likewise silent, because of its substantive emphasis, although S. 1 contains a rather fragmentary section (§ 3–11C5). Since there appeared to be a consensus that legislation is long overdue, S. 1400 provides for requiring pretrail notice of an insanity defense, psychiatric examinations and reports, and a specific verdict of "not guilty by reason of insanity." A defendant thus acquitted would be subject to hospitalization if the court, after further psychiatric examinations and hearing, determined that he was presently dangerously mentally ill (§ 4221–2). These procedures would bring federal law into the pattern of state laws. More innovative is the proposal of S. 1400 to permit the trial court to commit convicted mentally ill persons to mental hospital treatment, rather than to prison (§ 4224). This proposal was formulated as a more straightforward replacement of one of the conventional functions of the insanity defense, the channeling of defendants to facilities consistent with their needs. Since the decision would be made by courts in the sentencing context rather than by juries in the guilt determining context, it may be expected that such a provision would result in an increased number of diversions of persons from penal institutions than does the separate insanity defense. Such hospitalizations would be subject to reconsideration if later determined to be inappropriate, and the defendant could be sentenced to prison or placed on probation for the remainder of the authorized term.

4. *Special findings and burdens of proof.*—At present, a sentencing court may enter a judgment within the normal statutory range without special findings or burdens of proof. The Commission seeks to reduce the use of imprisonment and the length of periods of imprisonment by introducing such procedural devices. The Commission's proposal requires that the court be "satisfied" that the criteria for imprisonment have been established as a precondition to confinement (§ 3301). Minimum terms are authorized only upon a showing of "exceptional features of the case," buttressed by a presentence report plus presentence commitment for study together with a statement by the court of "its reasons in detail" (§ 3201(3)). For sentences within the upper portion of the ostensibly authorized range, highly formalized investigations, disclosures, hearing, and findings, "including an identification of the information relied on in making such findings, and [the court's] . . . reasons for the sentence" are required (§ 3202)). While recognizing that special findings and burdens of persuasion would serve to deter hastily considered sentences to imprisonment, given our limited empirical information and predictive resources with respect to crucial determinations relating to sentencing and given the additional litigation such requirements would inevitably generate, it was felt that the Commission's procedures would have a crippling effect on sanctioning efforts. S. 1400 does not contain them.

### *C. Appellate judicial review of sentences*

With exceedingly rare exception, the federal appellate courts do not review sentences within the range provided by Congress for the offense committed. The Commission, however, proposed an amendment to 28 U.S.C. 1291 to include a general power in the courts of appeals to "review, modify or set aside" sentences.

S. 1 provides no review of sentencing in most cases, but it does authorize review of upper-range terms imposable on those found to be "dangerous special offenders" (3–11E3). S. 1400 does not provide for appellate review of sentences, though it does seek to facilitate review of sentences by the Parole Commission.

A listing of the arguments for and against judicial review of sentences may be helpful.

1. The arguments for appellate review are the following:

(a) The sentencing decision is frequently the most important part of the judicial task in criminal litigation. It is anomalous to review the less vital decisions of the trial judge and not the sentence.

(b) Judicial review will have the beneficial effect of lowering or setting aside the unduly severe sentence.

(c) Appellate decisions and opinions in review of sentence will develop a body of principles which will serve to rationalize the sentencing process and tend to reduce sentencing disparities.

2. Arguments against appellate review are the following:

(a) Given the highly individual characteristics of offenses and offenders, the vague and often conflicting goals of criminal sanctions, the subtle considerations of the factual situation of the parties and the docket situation of the trial court, and our poor abilities to predict the consequences of alternative sentencing possibilities in criminal case, the sentencing decision is not subject to the sort of principled support which is characteristic of appellate work. It is necessarily highly subjective, and appellate review is likely merely to substitute the hunches of the appellate panels for those of the trial judges.

(b) Related to this is skepticism that such review will be an adequate response to the sentencing disparity problem. In the federal system the various panels of the eleven courts of appeals are likely to produce disparate decisions in sentence review.

(c) Appellate review of sentencing would further delay criminal litigation and would impose excessive burdens on the district courts and, especially, on the courts of appeals. During 1960–1970, inclusive, appeals in the courts of appeals almost tripled, and the backlog of pending cases almost quadrupled in spite of an increase of almost 43% in the number of judgeships. (Report of the Director of the Administrative Office of the United States Courts, 1970, at 96.) The Judicial Conference of the United States reported:

> In considering further H.R. 6188 [providing for appellate review of sentences] the Conference agreed that, because of the heavy additional burdens which would be placed on the already overtaxed courts of appeals, it could not approve the principle of appellate review of sentences. The Conference believes, however, that a study should be made to detemine some type of review of sentencing and agreed that this was a procedural matter which should be studied by the Advisory Committee on Criminal Rules.

(Reports of the Proceedings of the Judicial Conference of the United States, 1970, at 57.)

The magnitude of the problem can be emphasized by noting that the great majority of criminal convictions are obtained by pleas. During the fiscal year ending June 30, 1972, for example, of 37,220 criminal-case defendants convicted in the United States District Courts, 31,714 were adjudged guilty on the basis of pleas of either guilty or nolo contendere. (Annual Report of the Director of the Administrative Office of the United States Courts, 1972, at A–54.) To feed a significant percentage of these cases into the courts of appeals on sentence review could swamp them.

(d) Appellate Judicial review can probably deal with only a part of the problem, that of grossly excessive sentences. Sentences which are inadequate are unlikely to be reached by appellate review. Given the deference which prosecutors normally extend to the judges of the courts in which they do their daily labor, expecially when it comes to the question of sentencing, it is doubtful if government challenges would be commonly made, even if authorized by Congress and validated in the courts. On the other hand, convicted defendants would frequently feel they had much to gain and nothing to lose by appealing; commonly they could also remain free from confinement pending such review.

(e) Appellate review could exert an excessive downward pressure on sentences which are not themselves upset on appeal. Sentences to imprisonment would create a possibility of reversal to an unpredictable degree. Excessive leniency would not.



(f) Even assuming the appropriateness of its objectives, there may be more effective alternatives which are available at lower costs. (i) In many districts, sentencing councils composed of United States district court judges can supply a group decision, reducing disparities both on the high and low ends of the spectrum. They have been put into effect in several multi-judge federal districts. Panels of varying size meet to discuss sentences in pending cases, although final responsibility remains with a sentencing judge. The sentencing council becomes difficult in small districts, however, even if special efforts are made to assemble groups of federal judges on a frequent basis. (ii) Review may be provided without reliance on appellate judicial review, except in those cases where minimum sentences are imposed: The Parole Commission can provide adequate, expeditious review by specialized personnel of prison sentences on a nation-wide basis. The Board of Parole has recently developed detailed guidelines for decision which it hopes to apply on a nationwide basis. In addition, it has its own internal appeals procedures. Insistence on appellate judicial review as well is to insist on *triple* review. Review of sentences by the Parole Commission can include an opportunity to observe the defendant in person, to discuss his case with him on an intensive and informal basis, and to consider information developed after sentence, including institutional testing and evaluations, work history, educational and vocational training results, institutional adjustment, and current post-release planning. None of these things is available in the costly, artificial environment of the courts of appeals. To be sure, eligibility for parole may be delayed by an unexpired minimum term, but as mentioned previously, S. 1400 proposes to reduce the frequency and length of such terms.

D. *Parole board procedures*

Presently the Parole Board operates with few statutory procedural rules, although it has adopted extensive internal guidelines. Its hearings are generally informal, non-adversarial, and numerous—over 17,000 decisions per year. While there obviously are questions as to how parole hearings should be structured, S. 1400 does not attempt to resolve them, other than to assure that hearings and rehearings will be scheduled as promptly and as often as is practicable (§ 4202).

E. *Judicial review of parole decisions*

The Commission (§ 3406), S. 1 (§ 3–12F7), and S. 1400 (§ 4208) would preclude judicial review of parole decisions. However, the Board of Parole by rule has provided for internal review of parole denials.

## XII. CONCLUSION

All of the substantive offenses in the proposed code are of little value unless they are coupled with a sentencing system which is both realistic in terms of its utilization of resources and forthright in the means it adopts for the protection of society. S. 1400 seeks to systematize the sentencing structure in such a way as to reconcile the needs of society with fundamental principles of fairness and equality of treatment. It is our hope and our belief that the system proposed serves to further that elusive goal of tailoring the punishment to the crime and to the criminal while offering a maximum opportunity for the convicted offender to regain his freedom through his own rehabilitation.

Senator HRUSKA. Mr. Henderson, do you have any questions?

Mr. HENDERSON. One question, Mr. Chairman.

Mr. Craig cited several cases which involved the military and the use of force, and you cited the *Bivens* case, and you also gave examples of FBI agents and narcotics agents who used this defense when it involved force.

Would you oppose an amendment which would limit this public duty defense to those law-enforcement officials, those public officials, who are engaged in acts which involve force and limit this defense to those people?

Mr. GAINER. If I may, Mr. Henderson, I think that would codify less than half the defense that exists today. This defense has come up in the law enforcement situation more commonly than in other situations in the criminal law, but that is not the only sort of situation it reaches. Try some of these examples. If there were not a general defense

of public duty, a law enforcement officer arresting a citizen would be guilty of assault; an ambulance driver at an Army hospital speeding through a red light to get a dying person to a hospital would be guilty of a violation; an officeworker in a Government agency by simply throwing out pieces of paper and thinning out his files would be guilty of an offense of destruction of Government property; a Forest Service firefighter would commit arson in his attempting to end a forest fire by creating a backfire; an employee of a Congressman who is authorized to sign constitutent mail would, in exercising that authority, be guilty of forgery or impersonation of a public official even though he is authorized to act; a judge would be guilty of tampering with a witness by forcing him to testify truthfully under the use of a contempt power; a decoding expert would be guilty of disclosing a foreign code by informing his superior of a code he had broken; a marshal or a sheriff repossessing property would be guilty of theft; an agent of the United States engaged in foreign espionage, using a passport in another name, would be guilty of misuse of a passport. There are all kinds of such situations.

There are two general approaches you can take to writing criminal offenses. You can either take an approach that Prof. Rollin Perkins once suggested and write in every criminal offense, "whoever does such and such, absent excuse, justification, or other defense, is guilty of an offense . . .", or you can have a generally applicable defense. The Model Penal Code, the New York statute, and the statutes of several other States, the Commission's final report, and S. 1 and S. 1400 use a generally applicable defense and all use the broader approach as more reflective of the actual law. All of them incorporate a reasonable belief standard, either in that same provision or by cross-reference from a generally applicable mistake of law provision.

Such a defense just is not new to the law. It is the criminal law now, but it seldom arises in the criminal context because of the exercise of prosecutorial discretion. It more frequently arises in the tort context, Mr. Maroney noted, as in the *Bivens* case, and the *Bivens* case explains that.

Let me point out one thing finally, and let me say it frankly, the attorneys in the Department of Justice are not generally interested in expanding the law of defenses. We in the Department who were engaged in the drafting of S. 1400 in fact were concerned about obtaining departmental acquiescence in listing any defenses in the code at all. We sought to be careful, and we sought not to enlarge the scope of the defenses currently in the law when we drafted these provisions, and I think that S. 1400 would not have the result of expanding them.

Finally, we have to keep in mind that all we are providing is the skeleton of the law upon which the courts would have to add the flesh by case-by-case interpretation, as they do today.

Mr. HENDERSON. It was stated by Mr. Petersen in his newspaper article, that the public duty defense is an accurate statement of law. So is it necessary to codify it?

Mr. GAINER. For the sake of completeness, yes. As indicated in Mr. Maroney's statement, if this is to be a true code, if people are to know what the law is, at least the basic law should be included in the code.

Mr. HENDERSON. But you would oppose an amendment to limit this to the people who engage in the use of force?



Mr. GAINER. I think it would be a less than satisfactory codification technique.

Mr. HENDERSON. Thank you, Mr. Chairman.

Senator HRUSKA. Very well.

Thank you, Mr. Maroney, for your appearance here, and that of your associates.

Mr. MARONEY. Thank you, Mr. Chairman.

Senator HRUSKA. Our next witness is Laurence Silberman, Deputy Attorney General.

There will be placed in the record at this point a letter dated July 16 from Senator John L. McClellan, chairman of this subcommittee, addressed to Mr. Silberman. In the letter there is reviewed the series of hearings on the pending legislation, S. 1 and S. 1400. The concluding paragraph of the letter was a request that Mr. Silberman appear here at the concluding session of these hearings to express his views and the views of the Department on the significance of this series of hearings and the measures that we are considering. In his letter, Senator McClellan pointed out that this subcommittee would have had 23 days of hearings, with the testimony covering some eight printed volumes, and if we add to that the subcommittee's hearings on the Brown Commission report, it would make a total of 37 days of hearings, with some 15 volumes.

And I want to supplement and affirm the thoughts that Senator McClellan indicated in his letter, Mr. Silberman, to the extent of expressing our appreciation for the high degree of cooperation and close and persistent attempts that have been given by members of your staff with our respective staffs from the Judiciary Committee. If we are successful in converting these bills into statute in due time, it will be because of that very fine cooperation and that professional dedication which has been exhibited.

[The information referred to follows:]

Hon. LAURENCE H. SILBERMAN, JULY 16, 1974.
*Deputy Attorney General, Washington, D.C.*

DEAR MR. SILBERMAN: As you are aware, since the introduction of S. 1 and S. 1400, which would codify, revise and reform the Federal criminal laws, the Subcommittee on Criminal Laws and Procedures has been engaged in holding hearings and otherwise processing the bills. By the end of this month, the Subcommittee will have held no fewer than twenty-three days of hearings on these bills which, together with their supporting data, will be contained in approximately eight volumes. When considered together with the Subcommittee's work in connection with the publication of the Final Report of the National Commission on Reform of Federal Criminal Laws, which formed the basis for both of these bills, the Subcommittee's efforts on the Federal Criminal Code will encompass a total of thirty-seven days of hearings consisting of some fifteen volumes.

By the end of July all witnesses who have expressed a desire to appear before the Subcommittee with respect to these bills will have testified, as well as the witnesses who were specifically invited by the Subcommittee because of their expertise in the area. It is therefore my intention to conclude the hearings on these measures at the end of the month in order that the work of the Subcommittee may be concentrated on studying the hearings and preparing a committee print bill and supporting report based upon the vast amount of testimony that will have taken place.

In light of the interest and participation of the Department of Justice in the processing of this legislation, I would like to request, on behalf of the Subcommittee, that you appear at the concluding session of the hearings to express the

views of the Department on the significance of these measures and the evidence that has thus far been received. The hearing will be held on July 22, 1974, in Room 2228, Dirksen Office Building at 10:00 A.M.

With kindest regards, I am

Sincerely yours,

JOHN L. MCCLELLAN.

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## STATEMENT OF HON. LAURENCE H. SILBERMAN, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY RONALD L. GAINER, CHIEF, LEGISLATIVE AND SPECIAL PROJECTS SECTION OF THE CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Senator HRUSKA. We now call on you for such remarks as you would like to make.

Mr. SILBERMAN. First, let me thank you very much, Mr. Chairman, for your remarks. I very much am of the view that the cooperation exhibited in this matter between your committee and the Department of Justice bodes well for continuing cooperation on various matters of mutual interest and concern which are in the legislative field.

It is a pleasure for me to appear before the subcommittee on behalf of the Department of Justice and to have the last public word in the hearings that have now consumed some 3½ years.

As you know, the history of the proposal now before the committee began with the monumental work of the National Commission on Reform of Federal Criminal Laws. The members of the Commission, including yourself, Senators McClellan and Ervin of this committee, and the members of the Commission's able staff, spent over 3 years developing the Commission's final report, which has served as the foundation for all later efforts. The final report, presented to the President and the Congress in 1971, was the first systematic attempt to codify the provisions of the Federal criminal law since the founding of the Republic. The final report presented an invaluable work basis for the staff of this committee and the staff of the Department of Justice in their independent but cooperative efforts to promote codification.

These efforts led, in January of 1973, to the introduction of S. 1 and, 2 months later, to the introduction of S. 1400. All through this period, and up to the present day, the row of green-bound volumes representing the hearings held by the subcommittee has grown.

Each volume exhibits the intensive interest in the codification effort of the committee members, the Department and broad segments of the public. The list of those who have come before this subcommittee is long. It includes judges and administrators; consumer advocates and representatives of business groups; defense counsel and prosecutors; bar presidents and law professors; doctors, lawyers and Indian organizations. Each has supplied a unique perspective. Each has contributed significantly either through positive suggestion or through the searching criticism so necessary for the careful development of such a major legislative undertaking.

This wide range of demonstrated interest and participation is appropriate for the development and substance of the criminal law are matters that directly or indirectly affect the lives of all citizens.



The judgments that must be made are of fundamental importance, for they determine what conduct deserves our society's harshest treatment—the criminal sanction.

In the course of developing S. 1400, the Department has benefited from the wide-ranging comments on the Final Report. Consideration of these comments, the changes in the case law emerging from recent judicial opinions, and the experienced judgment of the attorneys from several agencies who worked on the project has made S. 1400 a bill with many variations from the theme created by the National Commission. S. 1400 is not, however, a partisan measure fraught with political overtones. Not more than a dozen of the hundreds of issues presented by the codification process even lend themselves to differences based upon traditional political considerations. S. 1400 is designed to be a fair, rational, and workable code of Federal criminal law. As a proposal for our Nation's first broad revision of the whole body of Federal criminal law, it is designed to clarify, simplify and thus improve the law.

I expect that controversies with regard to S. 1400 and S. 1 cannot be avoided. The proposals before this subcommittee and the volumes of testimony and comment lay out the competing considerations rather clearly. They provide a sound basis upon which Congress can make hard choices.

The existence of controversy on particular issues should not be allowed to overshadow the strong consensus on the need for codification and the broad areas of substantive agreement which do exist. For it is this basic consensus, achieved through the cooperation of all parties concerned, that is the most significant aspect of the codification proposals.

On this point, I would be remiss if I did not express the deep appreciation of the Department for the courtesy which the subcommittee and its staff has shown to the staff of the Department. You have granted us lengthy periods of your valuable hearing time in order that we might set forth our views and explain the proposals which we have presented. You have questioned and probed, and have thus provided an opportunity to evaluate our proposals against the comments of others. You have brought before you an enormous gallery of expert witnesses who have served to place all the proposals in perspective. This process cannot help but strengthen the final proposal of this subcommittee.

The question of codification is now up to the Congress. The testimony has ended, though, of course, the debate will continue. On behalf of the Department of Justice, I would like to take this opportunity to extend to the committee a pledge of continued cooperation in the work that lies ahead. The cooperation in the past between the executive and legislative branches in this matter has been in the best tradition of our political system. It serves as an example of how that system should work and proof that it does. We look forward to continued cooperation in seeking our common goal of a modern Federal criminal code.

Thank you, Mr. Chairman.

Senator HRUSKA. Thank you, Mr. Silberman.

Speaking on behalf of those Senators on this committee particularly who have lived with this entire episode since the enabling legislation for the creation of the Brown Commission, this statement of yours,

is especially appreciated. As we go to the final stages there are many battles ahead of us yet, but they will be on a good, fair, well-documented and well-balanced record. But as we go into those later stages, it will be helpful to realize that you will still be there to give us such assistance as we will need to resolve some of those controversies.

We have dealt with a great many tough decisions, and certainly the Brown Commission report that came out in the last 3 years has proven its worth. It also is very fine for the point that we now find ourselves in.

Mr. Henderson, have you any questions?

Mr. HENDERSON. None.

Senator HRUSKA. I will not go into the matter at this time of individual comments on the work of the staff. But I know, even in the relatively short time you have been here, Mr. Silberman, you have recognized that both in your shop and in our shop they have been pretty fine professional people.

Have you any further comment to make?

Mr. SILBERMAN. No, I do not, Mr. Chairman.

Senator HRUSKA. Well, thank you very much for coming.

The record of the hearing will remain open for 6 weeks for the receipt of additional statements and material to be inserted in the hearings.

The subcommittee will now stand in adjournment, subject to the call of the Chair, and thank you again for coming.

Mr. SILBERMAN. Thank you.

[Whereupon, at 10:35 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

# APPENDIX

ZIONTZ, PIRTLE, MORISSET & ERNSTOFF,
ATTORNEYS AT LAW,
*Seattle, Wash., February 22, 1974.*

Re: Establishment of Commission on Indian Jurisdiction; Reform of the Federal Criminal Laws, S. 1 and S. 1400.

Hon. JOHN L. MCCLELLAN,
*Chairman, Subcommittee on Criminal Laws and Procedures, Senate Office Building, Washington, D.C.*

DEAR SENATOR MCCLELLAN: We are general counsel for the Colville Confederated Tribes, the Lummi Indian Tribe, the Makah Indian Tribe and the Suquamish Indian Tribe in the state of Washington. In our capacity as general counsel for Indian tribes, we have been involved during the last ten years in numerous criminal lawsuits involving both Indians and non-Indians on reservations in the state of Washington. We have also assisted our clients' tribes in developing new law and order codes comporting with the 1968 Indian Civil Rights Act, and have assisted them in strengthening the law and order and judicial system on their reservations.

We filed a statement on behalf of three Washington Tribes and testified together with Mel Tonasket, chairman of the Colville Confederated Tribes and Joe Lawrence, chairman of the Makah Indian Tribe before your Subcommittee in Washington, D.C. on June 12, 1973. At that time and in our research and legal activities since that time, we have concluded that no proper revision of the federal criminal code can be made without extensive field hearings concerning tribal, state and federal criminal jurisdiction on Indian reservations.

Accordingly, we hereby request on behalf of the Colville Confederated Tribes, the Lummi Indian Tribe, the Makah Indian Tribe and the Squamish Indian Tribe that a Commission be established to hold field hearings on the issue of criminal jurisdiction on Indian reservations at the earliest possible date. We further request that this letter be made a part of the hearing before the Subcommittee in S. 1 and S. 1400. We would be extremely happy to assist your Subcommittee in this regard in any way possible.

Very truly yours,

ROBERT L. PIRTLE.

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ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
*Washington, D.C., August 30, 1974.*

Hon. JOHN MCCLELLAN,
*Chairman, Criminal Laws and Procedures Subcommittee, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: You will recall that earlier this year Mr. Ben Hogan and I discussed in your office the possibilities for S. 2881, Senator Fannin's bill which, if enacted, would control violence on the job site. At that time the outlook for S. 2881 was very gloomy.

Your subcommittee recently concluded hearings on the possible revision of Title 18, United States Code. We feel that such a revision would be an ideal opportunity to achieve the purpose of S. 2881. Therefore, we will appreciate your help in having the attached letter considered as a statement for the hearing record.

Sincerely yours,

WARREN S. RICHARDSON,
*Director of Legislation.*

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ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
*Washington D.C., August 30, 1974.*

Hon. JOHN MCCLELLAN,
*Criminal Laws and Procedures Subcommittee, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: The Associated General Contractors of America is a nationwide trade association representing 8500 general construction firms who-

employ approximately five million workers. We would like to take this opportunity to inform the Subcommittee on Criminal Laws and Procedures of our grave concern over an industry problem: job-site violence.

In recent years the construction industry, accounting for over 10% of the Gross National Product, has been repeatedly harassed by wanton job-site violence. We have accounts of many cases of serious construction site violence which have occurred, resulting in bodily injury and loss of millions of dollars in property.

The association commends the subcommittee for its efforts to reform the substantive criminal laws of the United States (Title 18, U.S. Code). We urge the inclusion of strong criminal sanctions against persons or groups of persons who interfere with interstate commerce by organizing to commit violent, threatening, or coercive actions, regardless of their motivation.

Such provisions, if enacted, would alleviate the situation caused by the *Enmons* decision (*U.S.* v. *Travis Paul Enmons*, 410 U.S. 396, 1973) whereby the Supreme Court held that the Hobbs Act was not applicable to employer-employee disputes. Because local authorities are usually loathe to act, most of this violence goes unpunished and unabated.

The Associated General Contractors urges that legislation be enacted to remedy the problem once and for all.

Sincerely,

JAMES M. SPROUSE,
*Executive Director.*

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AMERICAN BAR ASSOCIATION,
*Chicago, Ill., March 6, 1974.*

Hon. JOHN L. MCCLELLAN,
*Chairman, Senate Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, New Senate Office Building, Washington, D.C.*

DEAR SENATOR MCCLELLAN: At the meeting of the House of Delegates of the American Bar Association held February 4–5, 1974 the enclosed resolution was adopted upon recommendation of the Section of Criminal Justice.

This resolution is being transmitted for your information and whatever action you may deem appropriate. If hearings are scheduled on the subject of this resolution, we would appreciate your advising Donald E. Channell, Director of the American Bar Association Washington Office, 1705 DeSales Street, N.W., Washington, D.C. 20036.

Please do not hesitate to let us know if you need any further information or have any questions.

Sincerely yours,

KENNETH J. BURNS, Jr.

Enclosure.

AMERICAN BAR ASSOCIATION—SECTION OF CRIMINAL JUSTICE

AS APPROVED BY THE ABA HOUSE OF DELEGATES, FEBRUARY, 1974

*Be It Resolved*, That the American Bar Association opposes, in principle, legislatively imposed mandatory minimum prison sentences not subject to probation or parole for criminal offenders, including those convicted of drug offenses; be it further

*Resolved*, That the President of the Association or his designee be authorized to advocate this position in any appropriate forum.

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INDIANAPOLIS LAWYERS COMMISSION,
*Indianapolis, Ind., June 27, 1973.*

Re proposed Federal criminal code.

Hon. JOHN L. MCCLELLAN,
*Chairman, Subcommittee on Criminal Laws and Procedures, Dirksen Senate Office Building, Washington, D.C.*

DEAR SENATOR MCCLELLAN: Pursuant to the requests made in your letters of January 19, 1973, and April 4, 1973, the Board of Directors of the Indianapolis Lawyers Commission authorized me to prepare and submit—due to my unique background in corrections—the enclosed statement for the record. Since S. 1 and S. 1400 are massive in scope and length, my statement is necessarily limited to



only a few sections of those proposals, *i.e.*, some of the sections pertaining to sentencing. The thrust of my statement is that, in the development of a federal criminal code, Congress should make every practicable effort to take into account the American Bar Association's Minimum Standards for Criminal Justice.

Sincerely,

NILE STANTON, *Executive Director.*

Enclosure.

A STATEMENT PERTAINING TO THE DEVELOPMENT OF A COMPREHENSIVE FEDERAL CRIMINAL CODE AND THE ABA MINIMUM STANDARDS FOR CRIMINAL JUSTICE

> Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community, for the individual.[1]

In 1966, Congress created the National Commission on Reform of Federal Criminal Laws [2] and gave it the duty to "make a full and complete review and study of the statutory and case law of the United States which constitutes the federal system of criminal justice" and to "make recommendations for revision and recodification of the criminal laws. * * *" On January 7, 1971, former Governor Edmund G. Brown of California, who served as the Commission's Chairman, transmitted the group's *Final Report* [3] to the President and Congress. The *Report* in turn precipitated the development of two massive proposals to codify the federal criminal law: The first proposal, S. 1,[4] was introduced by Senator McClellan on January 4, 1973. The second bill, S. 1400,[5] was introduced by Senator Hruska on March 27, 1973. The bills give Title 18 of the United States Code a complete overhauling.[6]

The United States has never had a true federal criminal "code," [7] although codifications have more utility than do mere "compilations" or "consolidations." [8] The Crime Act of 1790 [9] was our first set of statutory [10] criminal laws, and subse-

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[1] Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

[2] Act of Nov. 8, 1966, 80 Stat. 1516.

[3] FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS (1971) [hereinafter cited as BROWN REPORT]. The lineage of, and much of the impetus toward, the *Brown Report* can be traced back to 1952, the year the American Law Institute began work on the Model Penal Code. *See Hearings before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 2, at 552 (1971).

[4] 93d Cong., 1st Sess. (1973). *See* 119 CONG. REC. S 558 (daily ed. Jan. 12, 1973), where Senator McClellan succinctly analyzed some of the major provisions of the 538 page bill.

[5] 93d Cong. 1st Sess. (1973). *See* 119 CONG. REC. S5777 (daily ed. Mar. 27, 1973), where Senator Hruska detailed the background to the bill and discussed, briefly, some of its highlights. The Attorney General's commentary on S. 1400, *reprinted in id.* at S5782, elucidates the Administration's rationale for all major provisos.

[6] *See generally* Brown & Schwartz, *New Federal Code is Submitted*, 56 A.B.A.J. 844 (1970), where it is noted that the Brown Commission confined itself to reforming the substantive provisions of Title 18 rather than to covering the entire United States penal law.

[7] 119 CONG. REC. S 558 (daily ed. Jan 12, 1973) (remarks of Senator McClellan); *see Hearings*, *supra* note 3, pt. 1, at 11 (memorandum from Mr. Malcolm Hawk to Senator Roman Hruska).

[8] *See* McClellan, *Codification, Reform, and Revision; The Challenge of a Modern Federal Criminal Code*, 1971 DUKE L. J. 663. *See also* Brown & Schwartz, *supra* note 6, at 845; *Hearings*, *supra* note 3, pt. 1, at 16–18 (testimony of Attorney General Mitchell).

[9] Act of April 30, 1790, 1 Stat. 112.

[10] In 1812, the United States Supreme Court declared that there were no federal common law crimes. *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812). Writing for the Court, Justice Johnson maintained that, "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense." *Id.* at 34. *Accord*, *United States* v. *Coolidge*, 14 U.S. (1 Wheat.) 415 (1816); *United States* v. *Bevans*, 16 U.S. (3 Wheat.) 336 (1818); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820).

quent additions and revisions to the criminal law were made in such a way that Title 18 has become "a haphazard hodgepodge of conflicting, contradictory, and imprecise laws piled in stopgap fashion one upon another with little relevance to each other or to the state of the criminal law as a whole." [11] S. 1 and S. 1400, the first comprehensive efforts to reform the federal criminal law since 1948,[12] represent monumental efforts to bring Title 18 into the twentieth century. The limited purpose of this statement, however, is to analyze and compare only a few of the significant changes for which these bills provide—the proposals pertaining to sentencing and corrections. These proposals will be analyzed with particular reference to the American Bar Association's Minimum Standards for Criminal Justice [13] and the 1973 Working Papers of the National Advisory Commission on Criminal Justice Standards and Goals. [14]

Existing sentencing categories in present federal law are, as the Brown Commission emphasized in 1971, "chaotic and inconsistent." [15] The Commission concluded that there is no apparent rational basis for having approximately 70 sentencing categories, several of which provide widely disparate sentences for very similar crimes. Accordingly, it was recommended that, for purposes of sentencing, six categories for all federal offenses be established.[16] The recommendation conforms to ABA Standards [17] and has been incorporated into S. 1 and S. 1400.[18]

In spite of the fact that S. 1 and S. 1400 would drastically cut the categories of sentences, in the same breath both proposals call for terms of imprisonment far in excess of terms which have received the imprimatur of ABA Standards and the Peterson Commission recommendations. Moreover, S. 1400 would sanction terms which would even exceed the relatively harsh proposals of the Brown Commission, whereas the terms of imprisonment contemplated by S. 1 are at least in conformity with the provisos of that commission.

S. 1, at § 1–4B1, provides, in part:

(a) AUTHORIZED UPPER-RANGE TERMS FOR FELONIES.—The authorized upper-range terms of imprisonment for felonies are:

"(1) For a Class A felony, a term of years not to exceed 30 years;
"(2) For a Class B felony, a term of years not to exceed 20 years;
"(3) For a Class C felony, a term of years not to exceed 10 years; or
"(4) For a Class D felony, a term of years not to exceed 6 years.

"(b) AUTHORIZED LOWER-RANGE TERMS FOR FELONIES.—The authorized lower-range terms of imprisonment for felonies are:

"(1) For a Class A felony, a term of years not to exceed 20 years;
"(2) For a Class B felony, a term of years not to exceed 10 years;
"(3) For a Class C felony, a term of years not to exceed 5 years; or
"(4) For a Class D felony, a term of years not to exceed 3 years.

"(c) OTHER AUTHORIZED TERMS.—The authorized terms of imprisonment for other offenses are:

"(1) For a Class E felony, a term not to exceed 1 year;
"(2) For a misdemeanor, a term not to exceed 6 months; or
"(3) For a violation, a term not to exceed 30 days.

In contrast, § 3201 of S. 1400 contains, in part, the following:

(a) IN GENERAL.—A person who has been found guilty of an offense may be sentenced to a term of imprisonment.

[11] *Hearings*, *supra* note 3, pt. 1, at 102 (testimony of Representative Poff). For example, the scope of federal jurisdiction is unclear; the system of fines is in hopeless disarray; definitions of crimes are frequently inconsistent; similar offenses are widely scattered in Title 18; length of prison sentences are too infrequently related to the severity of the offenses; and antiquated offenses (such as detaining a United States carrier pigeon) are retained while loopholes for newer crimes still exist.

[12] *See* McClellan, *supra* note 8, at 677, 683 (succinctly discussing the so-called Penal Code of 1909 and the 1948 revisions).

[13] Unless otherwise indicated, all citations to the ABA's Minimum Standards of Criminal Justice will be to Standards Relating to Sentencing Alternatives and Procedures, hereinafter cited as ABA Sentencing Standards. For convenience, references to S. 1 and S. 1400 will be by section number only. References to S. 1 begin with a single digit and include a letter, for example "§ 1–4B5." References to S. 1400 have four digits, for example "§ 2301." References to sections developed by the Brown Commission will be prefaced with the letters "BC," for example BC § 3202.

[14] Hereinafter cited as Peterson Commission Working Papers.

[15] BROWN REPORT 272.

[16] *See* BC § 3002.

[17] ABA Sentencing Standard 2.1(a): All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number. Each should specify the sentencing alternatives available for offenses which fall within it. The penal codes of each jurisdiction should be revised where necessary to accomplish this result.

[18] *See* § 1–4B1 of S. 1 and § 2301 of S. 1400.



"(b) AUTHORIZED TERMS.—The authorized maximum terms of imprisonment are, in addition to the automatic contingent term specified in section 2302:

"(1) In the case of a Class A felony, life imprisonment or any term of years;
"(2) In the case of a Class B felony, not more than thirty years;
"(3) In the case of a Class C felony, not more than fifteen years;
"(4) In the case of a Class D felony, not more than seven years;
"(5) In the case of a Class E felony, not more than three years;
"(6) In the case of a Class A misdemeanor, not more than one year;
"(7) In the case of a Class B misdemeanor, not more than six months;
"(8) In the case of a Class C misdemeanor, not more than thirty days; or
"(9) In the case of an infraction, not more than five days.

The "upper-range terms" of § 1–4B1 are not to be imposed unless the convicted person is a "dangerous special offender" as determined pursuant to § 1–4B2. [19] However, § 2301 of S. 1400 contains no limitations, or additional penalties vis-à-vis "dangerous" persons. Hence, S. 1400 would sanction much longer terms of imprisonment for every class of offense than would S. 1. Additionally, it should be noted that S. 1400, while stipulating that mandatory minimum terms are *not* allowed unless set by affirmative action of the court, sets forth no guidelines which must be taken into account in imposing mandatory minimum terms. [20] On the other hand, S. 1 allows the imposition of mandatory minimum terms by affirmative court action only if the court takes into consideration features "such as those which warrant imposition of a term [in the upper-range under § 1–4B1(a)]." [21]

As suggested above, the long prison terms provided by S. 1 and particularly those provided by S. 1400 are directly in conflict with ABA Standards and recommendations of the Peterson Commission, though S. 1 largely conforms to the Brown Commission's suggested terms. Specifically, the ABA Standards state that the *maximum prison term normally authorized should be five years*, only *rarely ten years*, and twenty-five years or longer only under very exceptional circumstances.[22] In comments to the ABA Standards it is reasoned that sentences in excess of five years are impractical, under most circumstances, (a) since well over 90% of prisoners are released from custody in less than five years (most being released in less than *two* years), and (b) since studies, such as the post-*Gideon v. Wainwright* [23] one, indicate that, in general, prisoners released early do not recidivate

[19] This section, which is similar to BC § 3202, provides in pertinent part that an offender is "dangerous" if a "period of confinement longer than that otherwise provided is required for the protection of the public" and that he is a "special offender" if, § 1–4B2 (b)(2):

"(i) he has previously been convicted of two or more felonies committed on occasions different from one another and from the current felony, and for one or more of such convictions he has been imprisoned prior to the commission of the current felony. An invalid conviction or one for which he has been pardoned shall be disregarded;

"(ii) he committed the current felony as part of a pattern of criminal conduct which constituted a substantial source of his income, or in which he manifested special skill or expertise. Special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution, or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension of such conduct, or the disposition of the fruits or proceeds of such conduct;

"(iii) his mental condition is abnormal, and makes him a serious danger to the safety of others, and he committed the current felony as an instance of aggressive conduct with heedless indifference to the consequences of such conduct;

"(iv) he used a firearm or destructive device in the commission of the felony or flight from it; or

"(v) the current felony was, or he committed the current felony in furtherance of, a conspiracy with three or more other coconspirators to engage in a pattern of criminal conconduct and he did, or agreed or promised that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

For purposes of subparagraph (ii) and subparagraph (v), criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, accomplices, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

"(c) EVIDENCE.—In support of findings under subsection (b)(2)(ii), it may be shown that the offender has had in his own name or under his control income or property not explained as derived from a source other than criminal conduct."

[20] *See* § 2301 (c).

[21] § 1–4B1(c). *See* note 19 supra.

[22] ABA Sentencing Standard 2.1(d).

[23] 372 U.S. 335 (1963).

any more frequently than those kept to mandatory release dates.[24] On similar rationale,[25] the Peterson Commission stated, "[T]he maximum sentence for any offender not specifically found to represent a substantial danger to others should not exceed 5 years for felonies other than murder." [26]

S. 1 and S. 1400, in requiring affirmative action for the imposition of minimum mandatory terms, are in this respect both improvements on existing law. At present, federal law makes a minimum term mandatory and automatic absent court action to negate it. S. 1 provides that the mandatory minimum term can set *if* the court makes a finding that this is necessary for specific reasons, but S. 1400 contains no such requirement—as indicated earlier. In this respect, S. 1400 flies in the face of the ABA Standards and the recommendations of the Brown Commission and the Peterson Commission.

The ABA Committee on Standards for Sentencing Alternatives and Procedures could not agree that judicially imposed minima should be sanctioned, although the Committee did agree that required minimal terms should not be set by legislatures—a view also shared by the two commissions. In its Comments, the ABA Committee indicated that a minority opposed any minimum terms. However, the majority opined that judicially imposed minima should be allowed because, "irrational as it is," the climate of public opinion demands it; and sentencing courts are in the best position to ascertain when such sentences should be imposed. The ABA Standards further indicate that the minimal terms should be imposed only if the dangerousness of the offender to the community, in the court's judgment, requires such a sentence.[27]

S. 1 and S. 1400 differ, with respect to sentencing and correction provisions, in many ways in addition to the variances regarding the length of prison terms.

[24] *See generally* Comment to ABA Sentencing Standard 2.1(f). *See also* Peterson Commission Working Papers at C-104, where the following information is collected:

*Median number of months served prior to 1st release*

| | All State prisoners (1964) | Massachusetts (1966) | California (1971) | New York (1970) | Ohio (1971) | Maine (1970) |
|---|---|---|---|---|---|---|
| Crimes against property: | | | | | | |
| Burglary | 20.1 | 13.5 | *45.0<br>†27.0 | 20.1 | 19.8 | 27.9 |
| Forgery | 17.1 | 14.5 | 23.0 | 20.4 | 17.5 | ---- |
| Auto theft | 17.9 | 14.5 | 24.0 | 21.6 | 27.6 | 22.0 |
| Other larceny | 16.5 | 14.5 | ---- | 22.3 | 19.0 | 22.0 |
| Crimes against the person: | | | | | | |
| Homicide | 48.5 | 65.0 | ---- | ‡207.3<br>#31.8 | 46.2 | (**) |
| Robbery (armed) | 36.1 | 20.0 | 46.0 | 22.4 | 42.1 | 51.0 |
| Unarmed robbery | | 15.0 | 37.0 | ---- | | 43.9 |
| Assault w/deadly weapon | | | 39.0 | 23.6 | 32.5 | 32.5 |
| Other | | 17.0 | ---- | | | |

* 1st degree burglary.
† 2d degree burglary.
‡ Murder.
** 2d degree murder—102.0, 3d degree murder—144.0, 1st degree manslaughter—64.5, 2d degree manslaughter—49.0.
# Homicide.

[25] The Commission's Operational Task Force for Corrections remarked, "Lowering the authorized maximum term will not unduly restrict the court's discretion as it affects the length of time *actually served* in prisons. It will, however, reduce the excessively long sentences served by some offenders for whom such sentences are inappropriate. It will also diminish disparate treatment of similarly situated offenders." *Id.* at C-105.

[26] *Id.* at C-102.

[27] Comment to ABA Sentencing Standard 3.2(c). *Accord*, BROWN REPORT 285-86 and Peterson Commission Working Papers at C-107 & C-110, which sanction mandatory minimum terms only after special findings of dangerousness.



S. 1, at § 3-11E3, allows for appellate review of sentences; but S. 1400 contains no such proviso. Here, S. 1400 is like current federal law: Presently, all aspects of a criminal case *except* the sentence are subject to appellate review. However, S. 1400, in adhering to current law, has failed to conform to the unanimous views expressed in the ABA Standards [28] and the recommendations of the Brown Commission [29] and the Peterson Commission.[30]

Attention should also be drawn to § 1-4A2 of S. 1. It states:

If the conviction of an offender of one or more but not all of the offenses for which a sentence is imposed is set aside on appeal or collateral attack, the case shall be remanded to the court which imposed sentence for resentencing. Such court may impose any sentence which it might originally have imposed under section 1-4A1 (Authorized Sentences) for the offense as to which the offender's conviction has not been set aside on appeal or collateral attack.

The effect of § 1-4A2 is to permit the possible imposition of a longer prison term upon resentencing. S. 1400 does not contain any similar proviso and, presumptively, would allow the same effect through *North Carolina* v. *Pearce*.[31] There the United States Supreme Court permitted the imposition of a higher sentence upon reconviction subsequent to the reversal of an original conviction.

The Brown Commission took the odd middle-ground of *Pearce*, adopting a position which allowed neither absolute court discretion to resentence to a higher term nor an absolute bar to such sentences. BC § 3005 states:

(1) Increased Sentences. Where a conviction has been set aside on direct review or collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously satisfied, unless the court concludes that a more severe sentence is warranted by conduct of the defendant occurring subsequent to the prior sentence.

(2) Reasons. The court shall set forth in detail the reasons for its action whenever a more severe sentence is imposed on resentencing.

Notice that the Brown Commission would (a) allow a higher sentence only on the basis of conduct subsequent to the original conviction and (b) require the court to set forth reasons for the imposition of a more severe sentence. However, a substantial minority of the Brown Commission[32] preferred the ABA position set forth below.

ABA Sentencing Standard 3.8 states: Where a conviction or sentence has been set aside on direct or collateral attack, the legislature should prohibit a new sentence for the same offense or a different offense based on the same conduct which is more severe than the prior sentence less time already served.

The Comments of the ABA Committee on Sentencing Standards and Procedures reveal that Standard 3.8 was adopted because the only class of persons who are vulnerable to increased sentences are those who have exercised their right to challenge their convictions. The ABA Committee opined that there was no basis for believing that this group of offenders deserved increased sentences

[28] *See generally* ABA Standards Relating to Appellate Review of Sentences.
Standard 1.2 provides—The general objectives of sentence review are:
(i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
(ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
(iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
(iv) to promote the development and application of criteria for sentencing which are both rational and just.
Standard 2.1 provides—In general, each court which is empowered to review the conviction should also be empowered to review the disposition following conviction. It may be advisable to depart from this principle in some contexts, as, for example, where intermediate appellate court are available to review sentences and it is deemed unwise to involve the highest court in such matters. In any event, specialized courts should not be created to review the sentence only.

[29] *See* BROWN REPORT 317. The Brown Commission proposed that 28 U.S.C. §1291 (1970) be revised by adding the following language to the end of the section: "Such review shall in criminal cases include the power to review the sentence and to modify or set it aside for further proceedings."

[30] The Peterson Commission's Standard 5.11 on "Sentencing Equality" states, in pertient part:
Procedures for implementing the review of sentences on appeal should contain the following precepts:
1. Appeal of a sentence should be a matter of right.
2. Appeal of a sentence of longer than 5 years under an extended-term provision should be automatic.
3. A statement of issues for which review is available should be made public. The issues should include:
(a) Whether the sentence imposed is consistent with statutory criteria.
(b) Whether the sentence is unjustifiably disparate in comparison with cases of similar nature.
(c) Whether the sentence is excessive or inappropriate.
(d) Whether the manner in which the sentence is imposed is consistent with statutory and constitutional requirements.
*See also* Sobeloff, *The Sentence of the Court: Should there be Appellate Review?*, 41 A.B.A.J. 13 (1955).

[31] 395 U.S. 711 (1969).

[32] *See* BROWN REPORT 275.

any more than some other group, and the Committee further suggested that the possibility of a higher sentence was an impermissible price-tag attached to a constitutional right. Moreover, it was emphasized that "greater punishment should not be inflicted *because* [one] has asserted his right to appeal." Accordingly, the ABA Standards would strictly forbid more severe terms upon resentencing.[33]

This brief comment has illustrated only a few of the provisos of S. 1 and S. 1400 which should be re-evaluated and, perhaps, altered. Both proposed codifications of the federal criminal law contain sections which would greatly improve existing law; however, it is respectfully submitted that there should be a stronger effort to bring the measures, particularly S. 1400, more nearly into conformity with the carefully developed ABA Minimum Standards for Criminal Justice.

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## The Anarchy of Sentencing in the Federal Courts

(William James Zumwalt)

Sentencing disparity is an increasingly frequent target of critics of American criminal justice. Implicit in most of these criticisms is the assumption that disparity is so prevalent that it needs little or no documentation.

To one already disposed to accept disparity as a reality, proof may be a formality, but to the skeptic, disparity may be little more than an oft-used word in the vocabulary of a frustrated defense attorney or an embittered recidivist. It is this writer's intention to preface this article with sufficient documentation to get the skeptic past this initial premise and into the substance of the sentence disparity issue.[1]

In this endeavor, I may not fully succeed. Statistical analysis of this kind is difficult, and sentencing disparities which seem to be unjust may often be explained through variables of unascertainable validity. For instance, when statistics list average sentences for all crimes, there is a strong possibility that any disparity is caused by the differing nature of the offenses. Even averages from the same category of offenses can suffer from this factor. Identical offense averages can be further misleading by the presence of recidivists. Samples may be too small, in which case the differences may be extreme and isolated. Or they may be too large, causing the gross disparity to be consumed by the average and concealing situations in which the judges are only periodically unfair.

The problem is compounded by the announced Supreme Court policy of, if not disparate, at least different sentence lengths. By implicit Supreme Court definition, disparity exists only when there is a difference which is unrelated to the consideration of appropriate aggravating and mitigating circumstances.

Furthermore, several intangible factors argue for the existence of disparity, and these cannot be assigned statistical value. These include the fact that prisoners firmly believe there is disparity and legal writers are so convinced of its existence as to consider careful documentation unnecessary. Federal judges have been concerned enough about disparity to conduct numerous sentencing institutes in recent years. Finally, the element of human nature involved in sentencing argues for disparity. It is absurd to assume that closely-held values can be totally expelled from the mind of the sentencing judge.

### FIFTH AMENDMENT

The constitutional touchstone of the disparity issue is the due process clause of the Fifth Amendment. Instances in which the courts have been willing to intervene in lower court sentencing have been based on the Fifth Amendment, and reformers in this area repeatedly call for an expanded definition of due process.

Most people consider the most crucial stage of a criminal proceeding to be the determination of guilt or innocence. Accordingly, a multiple of constitutional and statutory mandates permeate the trial and pre-trial stages. Yet, guilt as to the crime charged is among the most predictable of the issues in a criminal prosecution. Only to those few defendants who plead "not guilty" and proceed to trial is the determination of guilt or innocence of prime importance. The real concern of the defendant is usually not "if," but "how much." The issue as perceived by this writer is the extent to which "how much" comports with due process.

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[33] *See* Comments to ABA Sentencing Standard 3.8; *see also* Van Alstyne, *In Gideon's Wake; Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965).

[1] A note on the limited scope of this article: The precise issue herein is disparity in federal sentencing. Any state disparities are an issue wholly beyond this author's intention.



### 1968 STATISTICS

The most recent and comprehensive study of federal sentencing practices was conducted in 1968 by the Federal Bureau of Prisons. Using broad crime or offense categories, the study breaks down sentencing patterns by circuit.

The First Circuit encompasses five jurisdictions. In three of them the average sentence length for all crimes ranges from 34 to 39 months. The fourth jurisdiction, Rhode Island, averaged 49 months, while the fifth, Puerto Rico, with the second largest statistical sampling, showed an average of nearly 70 months.[2]

In the Second Circuit, forgery is a common crime in both the Eastern and the Southern Districts of New York, yet the Southern District levies a 20-month-longer average sentence than does its counterpart.[3]

Fourth Circuit samples indicate wide forgery disparities (30 full months) between Eastern Virginia and Eastern North Carolina. Courts in Eastern Virginia are consistently more severe than any other Fourth Circuit court averaging, offense by offense, a full year above the standard circuit sentence.[4]

In the Seventh Circuit a difference of two years in average sentence length accompanies conviction for auto theft in Eastern Illinois and Eastern Wisconsin.[5]

Finally, Tenth Circuit figures show that the average sentence for all offenses in Northern Oklahoma is 44 months longer than in neighboring Eastern Oklahoma.[6]

These statistics do not conclusively establish the existence of an unjustified disparity; it is entirely possible that such a fact is beyond definitive proof. It is impossible to ascertain the precise operative in the sentencing judge's rendered decision.

However, these statistics do clearly show that, in some instances, great differences appear. Furthermore, when a pattern develops indicating that one jurisdiction gives consistently harsher sentences than another, it becomes increasingly difficult to dismiss such variation on the basis of probable aggravating or mitigating circumstances.

*The average sentence in Northern Oklahoma is 44 months longer than in Eastern Oklahoma*

Internal circuit disparities are only one means of measuring the problem. Intracircuit differences are likely to be even more pronounced owing to the varying attitudes which inevitably follow from variations in geographic location.

### INTER-CIRCUIT DISPARITY

For example, the Ninth Circuit, which deals with the most immigration violations, imposes the lowest average sentence of any of the circuits on this class of offenders. The highest average sentence is given by the Third Circuit which seldom deals with such offenders.[7] In terms of the aggravating and mitigating circumstances consideration, such a result makes little sense. Logical application of the principle would indicate that, if there were a difference, the lengthier sentence would be imposed in the jurisdiction most likely to be confronted with large numbers of recidivists.

A non-violent crime such as immigration violation, an everyday occurrence in a jurisdiction on the Mexican border, will be viewed less harshly than in a jurisdiction with relatively few offenses of this nature. This is not surprising, but neither is it fair. The sentencing judge in a circuit where such crimes seldom arise has no standard upon which to base his decision except the maximum sentence allowed by law, while judges who sentence such violators daily become more sensitive to the appropriate punishment for a particular situation.

I recently examined nearly 500 Ninth Circuit docket sheets in an attempt to discover additional sentencing trends. It is difficult to attach a great deal of weight to such a sample when so many variables can invalidate the results. Nevertheless, taken in a general sense, they are of some utility.

Study of 73 alien violation convictions in which sentences were passed by the same judge showed the average sentence to be less than six months. Nationwide, the average sentence is ten and a half months, and in the Third Circuit, it is nearly eighteen months.[8]

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[2] U.S. Bureau of Prisons, Statistical Table Number 7 (1968).

[3] *Id.*

[4] *Id.*

[5] *Id.* Actual figures show the average Eastern Illinois sentence to be 47.0 months compared to 23.1 months in Eastern Wisconsin.

[6] *Id.*

[7] *Id.*

[8] *Id.*

Out of the 160 lesser drug violation convictions considered, the Ninth Circuit suspended sentence in exactly half of the cases. The average overall sentence was 8.5 months compared to the national average of 51.4 months.[9]

APPELLATE REMEDIES

Since the appellate procedure exists for the purpose of righting wrongs, it would seem that, to the extent that a particular sentence is wrong or unjust, it might be corrected through the appellate courts. A casual reading of 28 U.S.C § 2106 [10] would substantiate this view. Oddly enough, the appellate courts have not chosen to exercise their overseeing powers to regulate sentencing. On the contrary, the United States Supreme Court has held that sentence review based upon the bare assertion that the sentence was too harsh is inappropriate grounds for appellate review.[11] This is in spite of the fact that, in the past century, every other major nation in the world has adopted sentence review by a higher court as a safeguard against disparity.[12]

NON-REVIEWABILITY

The rationale for the non-reviewability rule is not altogether clear. Any idea that the rule was grounded in the high court's faith in the sentencing ability of the lower courts was dispelled by *Blockburger* v. *U.S.* in which the court admitted that a lower court's interpretation of the sentencing clause of the Narcotic Act permitted unusually harsh results.[13] Nonetheless, the court declined to enter the fray, stating that sentencing is a legislative function, and its application is within the sound discretion of the trial court.

It may be that an unjustified disparity created by a sentencing error which is still within the legally prescribed maximum is considered innocuous. However, this writer has not found a case in which this rationale is articulated. Of course, any sentence which exceeds the legally prescribed limit is an error of law, and therefore reviewable.

In essence, the non-reviewability rule has found a place in American jurisprudence for practical reasons. First, consideration of aggravating and mitigating circumstances is difficult in retrospect. How is a reviewing judge to know what factors led to the sentencing judge's decision?

Second, there is a fear that the already overburdened appellate court would be barraged with frivolous appeals. This fear persists although such has not been the experience of foreign jurisdictions which have adopted sentence review.[14]

Third, there is the historical reluctance of the courts to engage in "judicial legislation." Although the plain language of 28 USC § 2106 can be used to argue that no additional legislation is needed, decisional law is contrary, and the intended scope of that legislation can thus be said to have been settled.

The unfortunate result is rigid, although not total, adherence of the trial court's sentence. However, the law has shown a cautious willingness to review sentences in two narrowly construed circumstances: (1) when the judge used external information to aid in sentencing and said information contained factual error; (2) when "exceptional circumstances" exist.

FACTUAL ERROR

Federal judges base their sentencing decisions on what they observe at trial, supplemented by a statutorily mandated presentencing report prepared by the probation department.[15] The presentence report is not limited to information admitted at trial, nor do any evidentiary rules such as hearsay prohibitions restrict its contents. Consequently, unsworn statements from independent sources are appropriately included in the report. This is said to be the case since not every aggravating and mitigating circumstance is admissible in a court of law.

[9] *Id.*

[10] 28 U.S.C. § 2106 (1964). "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside, or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the case and direct the entry of such appropriate judgment, decree, or order, or require such further proceeding to be had as may be just under the circumstances."

[11] Townsend v. Burke, 334 U.S. 736, 741; 68 S.Ct. 1252, 1255 (1948).

[12] *Appellate Review of Legal But Excessive Sentences; A Comparative Study*, 21 Vand. L. Rev 411 (1968).

[13] Blockburger v. U.S., 284 U.S. 299 (1931).

[14] Confer, note 12.

[15] Federal Rules of Criminal Procedure 32(c). "The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty."



Recognizing the increased potential for misinformation created by lowering standards of admissibility, the rule has developed that factual error contained in the presentence report *may* be grounds for resentencing. This exception is required by due process, and thus not tantamount to "judicial legislation." However, there are several reasons why the factual error exception is of little use in efforts to reduce disparity.

First, the test does not strike at the heart of the disparity problem. The primary evil reflected in disparate sentences is unfair application of essentially accurate facts which results in a sentence which is unsuited to the crime or the criminal. Thus, the narrow scope of this exception misses the essence of the disparity issue because it deals only with the ancillary problems of clerical error and deliberately falsified statements.

Second, the factual error exception is inadequate to remedy even the limited errors to which it claims to address itself. A recent Supreme Court decision holds that the accused must first prove that the report contained "misinformation of a constitutional magnitude" and must further demonstrate actual reliance by the sentencing judge on the erroneous information.[16] The defendant's burden is apparently one of proof rather than mere production.

But the greatest single hindrance to the defendant's effective use of the factual error exception is that he may never learn of the error. Federal Rule 32 does not specify whether disclosure of the presentence report to the defendant is required. The Supreme Court has never decided the issue, and both state and federal courts are in hopeless confusion.[17]

Three recent decisions, two federal and one state, have adopted rules requiring disclosure to varying degrees. The Oregon State Supreme Court recently ruled that all information contained in the presentence report which is public record must be revealed to the defendant.[18] Thus, all information concerning vital statistics, prior criminal convictions, and any other facts available to the public would be disclosed. On the other hand, an unsworn statement by an informant or a rumor that a defendant convicted of possession of narcotics had actually been dealing would not be revealed.

The Third Circuit has recently handed down a rule of limited disclosure. Under Federal Rule of Criminal Procedure 32(c) (2), the presentence report must contain a "rap sheet" listing all prior felony convictions.[19] The Third Circuit rule, announced in *U.S. v. Janiec*, requires disclosure of all 32(c)(2) material, ostensibly to guard against clerical error.[20]

The First Circuit has taken a broader view, recognizing that clerical error is not the only evil inherent in non-disclosure. Simply stated, the rule is that any material contained within the report which is actually relied upon by the sentencing judge must be disclosed, and reliance on any remaining information must be specifically disavowed.[21]

The Oregon and Third Circuit rules do not address themselves to the primary injustice of non-disclosure: that a defendant may be sentenced on the basis of an intentionally falsified extra-judicial statement. The chance of this kind of misinformation is increased when the traditional safeguards to truth are removed.

Even the cases which require disclosure have declined to do so on the basis of any constitutional mandates, choosing instead to rest their decisions on sound trial procedure. This is confusing in light of the Fifth and Sixth Amendment problems which non-disclosure raises. The right to confront and cross-examine witnesses is so fundamental that it is required by the Fourteenth Amendment to apply to the States. (*Pointer v. Texas*, 380 U.S. 400 [1965]). Yet in *Buchea*, the Oregon court found no necessity, once a defendant has discovered what he believes to be misinformation, to allow the defendant a chance to put forth evidence in rebuttal. Instead, the court would have the sentencing judge weigh the testimony of the undisclosed informant against the word of a man recently convicted in his courtroom.

[16] U.S. v. Tucker, 404 U.S. 443, 447 (1972).

[17] *See* Baker v. U.S., 388 F. 2d 931, (4th Cir. 1968), restricting the judge's broad sentencing discretion regarding revelation of the presentence report. *But see* State v. Blackwell, 430 F.2d 721 (5th Cir. 1970), cert. den., 400 U.S. 964; 91 S.Ct. 366 (1971), affirming broad discretionary powers in this regard. Several state courts have granted access to such reports, *e.g.*, State v. Harmon, 147 Conn. 125; 159 A.2d 594 (1960); State v. Pope, 257 N.C. 326, 126 S.E.2d 126 (1962); Jones v. State, 447 P.2d 85 (Okla. Cr. 1970). *But see* State v. Colaya, 107 Ariz. 175, 484 P.2d 7 (1971), holding that the defendant has no right to view the report at all.

[18] *Buchea* v. *Sullivan*, 497 P.2d 1169 (1972).

[19] Federal Rule of Criminal Procedure 32(c)(2). "The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court."

[20] *U.S.* v. *Janiec*, 463 F.2d 126 (3d Dir. 1972).

[21] *U.S.* v. *Picard*, — F.2d — (1st Cir. 1972).

### BALANCING TEST

Once it has been decided that disclosure is not constitutionally required, a balancing test comes into play. On the side of disclosure is the grave chance of misinformation against which the defendant is otherwise unprotected. Against disclosure is the need to consider all relevant factors in sentencing, that some of those factors are regularly brought to light through unsworn informants, and that such sources of information would quickly disappear were disclosure permitted.

It is difficult to understate the importance of the factual error exception. Were it not so riddled with pro-prosecution characteristics, it could serve a vital, if limited, function. Except for the First and Third Circuits where the courts have judicially legislated to the contrary, disclosure is a matter of discretion.[22] In over 50 percent of the cases, that discretion is exercised against disclosure.[23] Thus, the exception is not available to half of all federal defendants. The remaining half may avail themselves of it only after having met the oppressive standards of *Tucker, supra.*

### EXCEPTIONAL CIRCUMSTANCES

The second instance wherein an appellate court may review sentence is when "exceptional circumstances" warrant such an inquiry. This rule was well set out by the Fourth Circuit:

> Nevertheless, our court has through the years unwaveringly followed the well-established principle that we have no power, in the absence of exceptional circumstances, to review a sentence which is within the limits allowed by statute.[24]

The above passage was prefaced by considerable lamentation over the difficulties which the non-reviewability rule creates.

To understand the meaning of the exception, it is necessary to review the cases to which it has been applied. Few cases exist upon which to base such an inquiry. An often-cited case in the area is *U.S. v. Wiley* in which the appellate court reluctantly exercised its supervisory powers to reduce a harsh sentence.[25] Several defendants had been apprehended for receiving stolen goods, and all but Wiley pleaded guilty. One of the defendants was the acknowledged "ring leader" and had prior felony convictions. Wiley had no previous convictions. Wiley received a three-year sentence, the ring leader a two-year sentence, and the others one-year sentences. On Wiley's first appeal the court remanded with the gentle suggestion that resentencing was appropriate. Wiley perfected his second appeal after the same sentence had been imposed. The appellate court responded on this occasion less congenially and remanded with specific instructions to shorten sentence.

The Sixth Circuit has at least once ordered a shorter sentence due to abuse of discretion by the sentencing judge. In *U.S.* v. *Daniels*, the trial court sentenced the defendant to the maximum five-year term for draft evasion.[26] Though the record clearly established that the defendant's motivations were genuinely grounded on religious beliefs, the sentencing judge commented somewhat flippantly on the record that he always imposed on such offenders the maximum sentence allowed by law. The appellate court had little difficulty in finding this practice arbitrary and hence an abuse of discretion.

Due process was found lacking in a Colorado procedure in which, upon finding that the defendant was a dangerous sex offender, he could be sentenced for a term or one day or life.[27] The court found the procedure offensive to due process inasmuch as the defendant had not been present to defend when the "dangerous sex offender" determination had been made.

In *Santobello v. New York* the high court remanded because the prosecution had elicited a guilty plea in exchange for a promise not to make a sentencing recommendation, and later had broken its promise.[28] In *Scott v. U.S.* the reviewing court reversed after the judge had induced a gulity plea by promising a lighter sentence.[29]

[22] Federal Rule of Criminal Procedure 32(c)(2). ". . . the court may before imposing sentence disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon."

[23] R. Nehrlich, *The Use and Disclosure of Presentence Reports in the United States*, 47 F.R.D. 225 (1965).

[24] *U.S.* v *Pruitt*, 341 F.2d 700 (4t Chir. 1963).

[25] *U.S.* v. *Wiley*, 278 F.2d 500 (7th Cir. 1960); *See also U.S.* v. *Wiley*, 267F. 2d 453 (7th Cir. 1959), in which Wiley perfected his first appeal which brought a remand.

[26] *U.S.* v. *Daniels*, 446 F.2d 967 (6th Cir. 1971).

[27] *Specht* v. *Patterson*, 386 U.S. 605, 78 S.Ct. 1209 (1967).

[28] *Santobello* v. *New York*, 92 S. Ct. 495 (1971).

[29] *Scott* v. *U.S.*, 419 F. 2d 264 (D.C. Ct. App. 1969). The *Scott* doctrine was substantially expanded by a recent holding that the promise may be implicit as well as explicit. The court reasoned that the attempt by the trial judge, prior to sentencing, to coax the defendant to revealhis drug supplier was sufficient evidence to infer that sentence length was affected by the defendant's refusal to divulge his source. *Williams* v. *U.S.*—F.2d—(D.C. Ct. App. 7-26-72).



### JUDICIAL INADVERTENCE

Finally, the Fourth Circuit has recently announced what might be labeled the "judicial inadvertence doctrine." The apparent aim of this doctrine is to allow the sentencing judge to discreetly correct an error of judgment. The facts of *U.S. v. Wilson* are important for they require the record to contain some faint suggestion of inadvertence on the judge's part.[30] The cast involved a twenty-three-year-old defendant with no prior felony convictions and a theft of less than $100. At trial the court mentioned the option of sentencing the defendant under the appropriate youth authority provisions. However, later the court made no mention of such provisions and sentenced the defendant to three years. While the appellate court was careful to, state that sentencing is essentially within the sound discretion of the trial judge, it reasoned that inadvertence might have prevented the judge from exercising that discretion. The case is an interesting one, but it may be severely limited to its facts and deprived of any future value as a precedent.

The significance of the exceptional circumstances exception is difficult to evaluate because of the variety of cases which fall within it. They are all marked by a discovery of unfairness, but this is hardly a guiding principle for future appeal. Three principles of arguable precedential value seem to emerge. A reviewing court may intervene when: (1) there has been significant judical involvement in a related bargaining process, (2) the record reflects judicial arbitrariness, of (3) the exercise of sound discretion was prevented by judicial inadvertence.

Obviously the above exception is rarely used. Since this and the factual error exception are the only appellate procedures involved in sentencing, proponents of sentencing reform must look elsewhere for relief.

### DISCRETION

The federal sentencing procedure is a complex network of discretionary decisions. The sentencing judge is well aware that he is, as a general rule, beyond the scrutiny of any higher authority. The breadth of his discretionary power is reflected in the sentencing alternatives which are open to him.

First, in the case of violations punishable by fine, imprisonment, or both, the judge may impose a fine, or he may, if he chooses, impose up to five years probation.[31] After selecting this option, the judge may then place virtually any condition on that probation. Second, a maximum sentence may be given. Under such a sentence a defendant becomes eligible for parole after serving one-third of his sentence.[32] Third, a split-sentence may be levied, whereby the judge may specify both incarceration and probation periods from a single count conviction.[33] Fourth, straight probation may be imposed up to a maximum of five years.[34] Fifth, the indeterminate sentence may be choosen which fixes minimum parole eligibility at less than one-third of the sentence.[35] Finally, the judge may prescribe a study-and-observation procedure. Under this provision a sentence is imposed subject to the results of a behavioral study of the defendant.[36] In addition to these options, a myriad of alternatives appear when the offense or offender is of a particular class.[37]

*A shorter sentence may be a reward for expediting the administration of justice*

Coupling policies favoring individualized sentences with the vast discretionary powers herein described invites uneven results. Although limitations on power are seldom self-imposed, at least one federal judge has suggested that the key to resolving sentence disparity lies in a restriction of the discretionary sentencing powers of the lower court judge.[38]

[30] *U.S.* v. *Wilson*, 450 F. 2d 495 (4th Cir. 1971).

[31] 18 U.S.C. 3651.

[32] 18 U.S.C. 4202.

[33] 18 U.S.C. 3651. Specifically, a split-sentence operates to confine a defendant convicted of a crime whose maximum sentence is more than six months, for only six months with the remainder of the sentence served while on probation.

[34] *Id.* The statistical analysis of Ninth Circuit docket sheets indicates that probation in this manner sees extensive use in particular offenses. In a study of 73 immigration convictions, probation was employed 43 per cent of the time.

[35] 18 U.S.C. 4208(a)(1).

[36] 18 U.S.C. 4208(b). After the results of the study are reported to the judge (between the ninth and twelfth months of sentence) the judge is then free to modify his sentence in any way he chooses.

[37] Youthful offenders may be sentenced under the Juvenile Delinquency Act, 18 U.S.C. 5031-5037; or under the Federal Youth Correction Act, 18 U.S.C. 4209. Drug offenders may be sentenced under the Narcotic Addict Reliabilitation Act, Title I-28 U.S.C. 2901-2906, Title II-18 U.S.C. 3401-3426. A drug offender may also be sentenced under the Comprehensive Drug Abuse and Control Act of 1970, P.L. 91-513§408(a)(1) as a person engaged in continuing criminal enterprise. Murders committed during a bank robbery can elicit sentences under 18 U.S.C. 2113(e).

[38] E. Devitt, *How We Can Effectively Minimize Unjustified Disparity in Federal Criminal Sentences*, 41 F.R.D. 249, 256 (1966).

EXTERNAL FACTORS

Human factors which influence sentence length may range from geographic background (as the statistical analysis of intercircuit disparity suggests) to political or religious differences.[39] However, perhaps the most significant determining factor is the plea entered by the defendant. From a practical standpoint, it is easy to see that a plea of "not guilty" by every defendant would bring the federal courts to a grinding halt. The plea-bargaining system is not only highly compatible with, but nearly essential to, the administration of justice. However it is only natural for a judge to be more inclined to turn his discretionary powers to the advantage of the accused when the latter has in some way reciprocated.[40] This practice, of course, amounts to exacting a price for the exercise of a constitutional right. The right to a jury trial and the presumption of innocence would demand, were plea a legitimate factor, a defendant willing to accept a longer sentence if he loses.

In a 1956 survey of sentencing judges conducted by questionnaire, of those judges who chose to respond, eleven indicated that a defendant would receive a longer sentence when the sentencing judge was convinced that the trial was frivolous. Four of the responding judges indicated that longer sentences were the result of the fact that at trial the prosecutor was able to emphasize particularly gruesome facts about the charged crime. Thirty-nine of the responding judges simply stated that the shorter sentence was an award for aiding in the administration of criminal justice.[41]

Another theory is that many judges feel that when a guilty defendant takes the stand he is committing perjury; therefore, any additional sentence is because of an additional offense. The problem with this view is that perjury is not punishable through contempt proceedings unless it obstructs justice.[42] Where such is not the case, serious due process problems arise.

The evil of the broad discretionary power which sentencing judges possess is that it permits these kinds of due process infringements to go unchecked and, for the most part, unnoticed. Discretion of this sort allows for limitless expansion of the aggravating and mitigating circumstances rationale to include the personal bias of the sentencing judge.

Any solution to the problem of disparity must be threefold. It should move toward elimination of disparate sentences; it should provide a remedy when disparity nevertheless occurs; and it should treat the ancillary problems of sentencing disparity.

ELIMINATING DISPARITY

Since the source of disparity is an unchecked influx of external factors permitted by an overbroad grant of judicial discretion, any proposed solution should seek to limit that discretion.

The key to limiting abuse of judicial discretion is not to be found in reducing the sentencing judge's options, but rather in providing definitive guidelines to specify what circumstances are aggravating and which mitigating. To leave these terms undefined is to invite their interpretation according to personal bias. Should this approach be adopted, a sentencing judge would be required to ground his decision on something less amorphous than his limitless and unreviewable discretion.[43] Furthermore, the sentencing judge would be forced to incorporate as a part of the record those aggravating and mitigating circumstances upon which he relied in rendering a particular sentence. Without such a provision, personal bias might still prevail.

Under the above proposal it is essential that appellate review of sentence be instituted. If a sentencing judge is required to avail himself of a definitive list of aggravating and mitigating circumstances which are a legitimate part of the sentencing process, and further to specify which ones he has relied upon, it naturally follows that misapplication should be reviewable. A reviewing court's inquiry would not be entirely subjective; time would produce a certain amount of objective case law. However, the development of case law would not be meant to rob sentencing of its flexibility or individuality, but rather to ensure sensibility and some notion of fairness.

[39] *Religion and Sentencing*, 24 J. Pou. 92 (1962).
[40] This is not to suggest that any judge would desire such a plea from one not guilty.
[41] *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956).
[42] 18 U.S.C. 401.
[43] Spain has adopted this approach.



Critics of appellate review of sentence argue that it would encourage senseless appeal and clog already overburdened courts. There are two responses appropriate to this charge. First, such has not been the experience of courts in the many countries which have adopted this review. Second, a provision similar to the English statute would serve to weed out such appeals.[44] The English viewpoint is that a sentence may, on review, either be shortened or lengthened since it constitutes a review on the merits of the accompanying circumstances.[45]

ANCILLARY PROBLEMS

Public confidence in the administration of criminal justice is crucial to the smooth functioning of a democracy. Public confidence would reach a crisis stage, were people educated to the hopeless situation facing an unfairly sentenced defendant. Adoption of a system which deals fairly with sentence length could prevent such public loss of faith.

Much has been written recently about the fact that our prisons are failing miserably in their efforts to rehabilitate. As long as a defendant's only direct experience with the law has resulted in unfairness, or when those around him have been unjustly sentenced, attempts to rehabilitate him will only be met with contempt.[46]

Finally, the idea of disparity in reverse is usually ignored. Many defendants receive sentences which are too lenient and which help to undermine public confidence. Although it is not suggested that the government be able to appeal sentence length, the process of requiring a sentencing judge to attach his decision to articulated circumstances will act as a deterrent to the "soft sentencing" judge.

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## SENTENCING: A JUDGE'S INHERENT RESPONSIBILITY

(Joseph S. Mattina)

[From: Judicature, October 1973, Vol. 57, No. 3]

It has recently become fashionable to attack the ability of judges to sentence. Many of these attacks have come from the judiciary themselves. Chief Judge Stanley H. Fuld of the Court of Appeals of the State of New York was recently quoted in *The New York Times* as recommending the following:

"To minimize disparity in sentencing, it may ultimately be demonstrated that it is desirable to commit to a correctional authority or some other agency the responsibility and duty of determining the treatment to be accorded those convicted and to vest such agency with the power to determine whether the offender be placed on probation, be confined under conditions deemed to be in the public interest, to release him . . . "

In a sardonic University of Cincinnati Law Review article entitled "Lawlessness in Sentencing," Federal Judge Marvin E. Frankel said,

"Sentencing is today a wasteland in the law . . . There is an excess of discretion given to officials whose entitlement to such power is established by neither professional credentials nor performance."

Much of what these men say is true. However, I believe that they have overreacted, and that their self-flagellation is demeaning to the entire judiciary.

The judge has been entrusted by society with the awesome and unique responsibility of "judging," with all that term implies. To maintain that he must be stripped of perhaps his most important function is to relegate him to an undeserved inferior position, not only in our system of justice but in our philosophy of government.

The enigma of sentencing is only part of the whole spectrum of social ills confronting our society. The judiciary must accept partial responsibility for the deficiencies of our criminal justice system, but this responsibility also belongs to those other professionals, the people who staff our prisons, sit on parole boards, and comprise probation and parole departments—the psychiatrists, psychologists, penologists, the parole and probation officers, and the social workers. To suggest that the sentencing judge be turned out and replaced by these other professionals is to replace chaos with further and perhaps worse chaos.

[44] Criminal Appeal Act of 1968; 8 Halsbury Statutes of England 605.
[45] This is not to suggest that a longer sentence be a punishment for the perfecting of what appears to be a frivolous appeal. Rather, the potential for such change for the worse would act as a natural deterrent to perfection of the least meritorious of appeals.
[46] This point is forcefully made by an inmate. H. Griswald, in his book. AN EYE FOR AN EYE, Holt, Rinehart and Winston, Inc., New York, 1970.

To maintain that the judiciary lack professional credentials is to ignore the essential qualities of a judge, the most professional of professionals in the criminal justice system and, most important, the one official who must account to society for his actions. To do away with judicial sentencing is to improperly delegate a responsibility that is rightfully and inherently a part of the judiciary!

MODEL SENTENCING ACT

This is not to suggest that the trial judge is infallible. To many, the sentencing ritual, with its awesome implications and potential consequences in terms of human lives is a draining and traumatic experience. There are many obstacles to judicial impartiality, the most complex of which is the variety of penal sanctions in the various states. In 1963, the Advisory Council of Judges of the National Council on Crime and Delinquency developed the Model Sentencing Act, an attempt, as stated by its chairman, Judge Alfred P. Murrah, "to move the penal law onto a new and higher level."

*Sentencing is always based on the dangerousness of the individual rather than the offense committed*

Although to my knowledge the Model Sentencing Act has not been adopted in any state as yet, some jurisdictions have borrowed from it in revising their penal laws, and it has much to offer the sentencing judge who is in search of unbiased guidance.

The Act first states that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, and potential as revealed by case studies. It stresses that public safety is important to the sentence, that dangerous offenders shall be incarcerated as long as they constitute a threat to society, and that others shall be placed on probation or committed for limited periods. The Act deplores minimum sentences as unproductive to proper rehabilitation.

PRESENTENCE INVESTIGATION

Sections 2 through 4 deal with the necessity of thorough presentence investigations. However, here the Act falls short of the progress made by New York in the enactment of § 400.10 of its Code of Criminal Procedure which covers every possible reason that a judge might advance to avoid holding a presentence hearing. The New York statute authorizes formal or informal hearings with or without transcript, in court or in chambers with or without the defendant being present and encourages the defendant to submit a presentence memorandum.

The Model Sentencing Act generally allows the judge to make presentence reports available to the defendant charged with a nondangerous offense, at his discretion. It also comes close to prescribing that presentence reports be made available to those sentenced as dangerous offenders, also entitling the defendant to crocs-examine those who rendered reports to the courts. Unlike the New York statutes, it does not put an affirmative burden on the defendant's counsel to both cross-examine negative reports and contribute a separate presentencing memorandum.

Sections 5 and 6 discuss determination and treatment of offenders. An offender is classified as dangerous if he has committed a crime that inflicted or attempted to inflict serious bodily harm, or shows a propensity to commit crime; if he has committed a crime which, intentionally or otherwise, seriously endangered the life or safety of another, or has had a previous criminal conviction, and shows a propensity to commit crime, or if he has participated in organized crime or racketeering.

DANGEROUS DEFENDANTS

A convicted defendant properly identified as "dangerous" may be sentenced to up to 30 years to protect the public against him and to afford ample opportunity for rehabilitation. The statutory maximum is not mandatory, nor is it left to the final and absolute discretion of the sentencing judge. It requires both a presentence investigation and a referral to a diagnostic center for a report that will be reviewed at a sentence hearing. The findings made by the court in its determination must be incorporated into the record.

Sentencing is always based on the dangerousness of the individual rather than the offense committed, with the exception of first degree murder, which the framers of the Act admit is generally deemed a uniquely serious crime for which the gravest penalty under the Code should be imposed. Section 13 asserts that no minimum terms are to be prescribed for incarceration before parole. For parole to be effective,



the Board of Parole must have authority to release in its discretion. No provision is made for any input in the parole decision by a sentencing judge—which, I feel is a mistake.

Optional section eight appears to be a compromise section, conflicting with the general spirit of the Act. Despite the adoption of the general principle that sentences should not be meted out on the basis of acts committed, this section sets up a category of "atrocious crimes". These include second degree murder, arson, forcible rape, robbery while armed, mayhem, and bombing of an airplane, vehicle, vessel, building or other structure; and commission of one of these authorizes the sentencing judge to commit a defendant not committed under the dangerous offender section to a maximum term of ten years rather than the maximum of five years allowed under section nine for felonies generally.

THE JUDGE'S OPTIONS

Section nine allows the sentencing judge the choice of deferring a formal entering of judgment of guilt following a verdict or plea of guilty of a non-dangerous offender and implementing one of the following options:

(1) Suspension of sentence with or without probation.
(2) Probation.
(3) Imposition of a fine with or without probation or commitment.
(4) Commitment to the Department of Correction for a maximum term of five years or to a local correctional facility for one year or a lesser term.

The framers maintain that the five-year limit on ordinary terms has been chosen to avoid the excessive use of long terms except for dangerous offenders—one of the characteristics of American sentences. It is closer to the pattern traditionally observed in European countries.

The maximum five-year term is also justified by statistics indicating that anywhere from 79.4 per cent to 99.2 per cent of inmates released from both federal and state institutions are released before reaching the five-year term of their sentence.

Improved understanding of the non-dangerous offender is satisfactorily defined for the first time. Extensive use of imprisonment is discouraged and the wide use of probation encouraged. The very defintions of the dangerous and non-dangerous offenders encourage referral of the non-dangerous offender to one or another form of community treatment, rather than imprisonment.

The purpose of the Act is to stabilize sentencing, do away with disparity and approach it realistically. It envisions the demise of huge maximum security institutions and the establishment of therapeutically-oriented institutions housing small groups of dangerous offenders.

Sections 10 and 12 provide that sentences will be imposed only by a judge, with a requirement that he make a brief statement for the record of the basic reasons for the sentence imposed.

Section 22 allows a court to reduce a sentence within 90 days after it is imposed. This section is patterned after similar provisions in a number of states and the federal courts. It is considered by many to be an excellent tool that should be used by all our courts in the sentencing processes.

PROFESSIONAL PARTNERSHIP

But judges need more than a model act a decade old to guide them in the day-to-day work of determining individual sentences. They need specific, constructive recommendations for progress and reform in sentencing and prisoner rehabilitation—ideas uniting judges in understanding of the problem, not only with the public, but also with their fellow professionals of other disciplines, in a true partnership of progress.

*The judiciary must forget their tranditional reluctance to engage in public relations, especially in this time of crisis*

Judges should lead the fight for more trained probation officers and clinicians whose inputs of professionalism are essential for fair and proper sentencing. The judiciary must forget their traditional reluctance to engage in public relations, especially in this time of crisis.

I do not advocate public defenses or explanation of individual sentences, but I do urge that each state judicial conference develop a broad informational program covering all aspects of the problem. This information should be brought before the public not only through the use of mass media, but also by individual judges appearing before community groups to broadly discuss and explain sentencing.

The public is largely ignorant of the laws, philosophy and theories of sentencing, and it is incumbent upon the judiciary—both appellate and trial judges—to explain them.

One of the great problems of the judiciary has been its general apathy towards continuing judicial education. If judges are to truly attain the professional status they claim, they must continually expand and enlarge upon their education. This is particularly crucial in the specific area of sentencing. Sentencing institutes should be mandated on a yearly basis in every state, and attendance of judges should be required.

Regardless of heavy judicial calendars, they should run for a minimum of one week. Programs should include not only the practical aspects of sentencing, but its historical evolution and the theory and philosophy behind it. Other relevant and concerned disciplines should be a prominent part of the program. Non-professional and para-professional personnel should be included. The importance of public awareness and the judge's role in educating the public should be stressed.

New theories and experimental ideas such as sentencing councils, mixed sentencing tribunals, appellate review of sentences, presentence hearings, the Model Sentencing Act, etc., should be throughly discussed and debated. Consensus statements could be formalized and forwarded to the appropriate groups involved.

### COP OUT

The burden of sentencing is part of the responsibility entrusted to us as judges. If we are going to continue to merit our tranditional respect, we must not delegate an inherent and integral part of our responsibility to another group. This would justly be labeled a "cop out". However, this does not mean that we ignore the deep and legitimate controversy surrounding this sensitive issue. We must recognize the issue throughly, explore it carefully and provide for whatever changes and improvements are needed without unnecessary delay.

In the final analysis, nothing can bring peace to a judge but the triumph of principle. Calamandrei, "The judge is what remains after all of the external virtues which the crowd admires have been removed from the lawyer." Thus, while the crowd may admire a man who is flamboyant, who is cruel, who is unduly lenient, or who is otherwise attention-getting in his sentencing, it is not what the crowd admires that is important. Since what *is* important is the accounting the judge must make to himself at night after the close of business, I would recommend to all judges the words of Micah:

> *And what does the Lord require of thee but to do justly, and love mercy, and walk humbly with thy God?*

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## Excerpts From the Model Sentencing Act

### ARTICLE I. CONSTRUCTION AND PURPOSE OF ACT

*§ 1. Liberal Construction*

This act shall be liberally construed to the end that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities as revealed by case studies; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the offender, or shall be committed for a limited period.

### ARTICLE II. PRESENTENCE INVESTIGATIONS

*§ 2. When Investigation Made*

No defendant convicted of a crime involving moral turpitude, or a crime the sentence for which may include commitment for one year or more, shall be sentenced or otherwise disposed of before a written report of investigation by a probation officer is presented to and considered by the court. The court may, in its discretion, order a presentence investigation for a defendant convicted of any lesser crime or offense or adjudicated a youthful offender.

*§ 3. Content of Investigation; Cooperation of Police Agencies*

Whenever an investigation is required, the probation officer shall promptly inquire into the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time the defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish to the probation officer on request the defendant's criminal record and other relevant information. The investigation shall include a physical and mental examination of the defendant when it is desirable in the opinion of the court.



*§ 4. Availability of Report to Defendants and Others*

As to defendants sentenced under section 9 of this Act, the judge may, in his discretion, make the investigation report or parts of it available to the defendant or others, or he may make the report or parts of it available while concealing the identity of persons who provided confidential information. As to defendants sentenced under section 5 or section 7 of this Act, the judge shall make the presentence report, the report of the diagnostic center, and other diagnostic reports available to the attorney for the state and to the defendant or his counsel or other representative upon request. Subject to the control of the court, the defendant shall be entitled to cross-examine those who have rendered reports to the court. Such reports shall be part of the record but shall be sealed and opened only on order of the court.

If a defendant is committed to a state institution the investigation report shall be sent to the institution at the time of commitment.

### ARTICLE III. SENTENCES FOR FELONIES

*§ 5. Dangerous Offenders*

Except for the crime of murder in the first degree, the court may sentence a defendant convicted of a felony to a term of commitment of thirty years, or to a lesser term, if it finds that because of the dangerousness of the defendant, such period of confined correctional treatment or custody is required for the protection of the public, and if it further finds, as provided in section 6, that one or more of the following grounds exist:

(a) The defendant is being sentenced for a felony in which he inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (b) The defendant is being sentenced for a crime which seriously endangered the life or safety of another, has been previously convicted of one or more felonies not related to the instant crime as a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (c) The defendant is being sentenced for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as part of a continuing criminal activity in concert with one or more persons.

The findings required in this section shall be incorporated in the record.

*§ 6. Procedure and Findings*

The defendant shall not be sentenced under subdivision (a) or (b) of section 5 unless he is remanded by the judge before sentence to [diagnostic facility] for study and report as to whether he is suffering from a severe personality disorder indicating a propensity toward criminal activity; and the judge, after considering the presentence investigation, the report of the daignostic facility, and the evidence in the case or on the hearing on the sentence, finds that the defendant comes within the purview of subdividion (a) or (b) of section 5. The defendant shall be remanded to a diagnostic facility whenever, in the opinion of the court, there is reason to believe he falls within the category of subdividion (a) or (b) of section 5. Such remand shall not exceed ninety days, subject to additional extensions not exceeding ninety days on order of the court.

The defendant shall not be sentenced under subdivision (c) of section 4 unless the judge finds, on the basis of the presentence investigation or the evidence in the case or on the hearing on the sentence, that the defendant comes within the purview of the subdivision. In support of such findings it may be shown that the defendant has had in his own name or under this control substantial income or resources not explained to the satisfaction of the court as derived from lawful activities or interests.

*§ 7. Murder*

A defendant convicted of murder in the first degree shall be committed for a term of life.

*Optional § 8. Atrocious Crimes*

If a defendant is convicted of one of the following felonies . . . murder, second degree; arson; forcible rape; robbery while armed with a deadly weapon; mayhem; bombing of an airplane, vehicle, vessel, building, or other structure—and is not committed under section 5, the court may commit him for a term of ten years or to a lesser term or may sentence him under section 9.

*§ 9. Sentencing for Felonies Generally*

Upon a verdict or plea of guilty but before an adjudication of guilt the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation upon such terms and conditions as it may require. Upon fulfillment of the terms of probation the defendant shall be discharged without the court adjudication of guilt and proceed as otherwise provided.

If a defendant is convicted of a felony and is not committed under section 5 or 7 [or 8] the court shall (a) suspend the imposition or execution of sentence with or without probation, or (b) place the defendant on probation, or (c) impose a fine as provided by law for the offense, with or without custody of [director of correction] for a term of five years or a lesser term, or to a local correctional facility for a term of one year or a lesser term. Where a sentence or fine is not otherwise authorized by law, in lieu of or in addition to any of the dispositions authorized in this paragraph, the court may impose a fine of not more than $1,000. In imposing a fine the court may authorize its payment in installments. In placing a defendant on probation the court shall direct that he be placed under the supervision of [the probation agency].

*§ 10. Statement on the Sentence*

The sentencing judge shall, in addition to making the findings required by this Act, make a brief statement of the basic reasons for the sentence he imposes. If the sentence is a commitment, a copy of the statement shall be forewarded to the department or institution to which the defendant is committed.

*§ 11. Modification of Sentence*

The court may reduce a sentence within ninety days after it is imposed, stating the reason therefor for incorporation in the record.

*§ 12. Who Imposes Sentence*

All sentences under this Act shall be imposed exclusively by the judge of the court.

*§ 13. Parole*

Sections . . . relating to the powers of the parole board shall be applicable to persons committed under this article.

ARTICLE V. MULTIPLE CHARGES

*§ 22. Concurrent or Consecutive Service of Terms*

Separate sentences of commitment imposed on a defendant for two or more crimes constituting a single criminal episode shall run concurrently. Sentences for two or more crimes not constituting a single criminal episode shall run concurrently unless the judge otherwise orders.

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STATE OF OHIO,
DEPARTMENT OF INSURANCE,
*Columbus, October 24, 1974.*

Hon. JOHN L. MCCLELLAN,
*Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you for sending me a copy of the *Committee Print* of S. 1, legislation you intend to introduce next year to revise the United States Criminal Code. You will recall that my appearance before your Subcommittee in May of last year was on behalf of the National Association of Insurance Commissioners and was related to the provisions of S. 1 which would create a federal crime for insolvency fraud.

In my appearance, I indicated that throughout the country insurance statutes are primarily concerned with protecting policyholders and not with punishing wrongdoers. Of course, most insurance codes do have general penalty provisions for violations of the insurance law but these are not designed to effectively deter



major fraud schemes. Most will provide for a fine of up to $1000 and for imprisonment of up to 1 year. An individual who has allegedly transferred or concealed insurance company property will usually be tried under the state's general theft statute which would be outside the insurance code.

Since I testified before the Subcommittee, the National Association of Insurance Commissioners has adopted a criminal sanctions model bill a copy of which is enclosed. [See Hearings, pp. 5621–5629]

At the time of my testimony, I indicated that perhaps the mere existence of a federal penalty would have a salutary deterrent effect on insolvency fraud. Furthermore, the existence of a federal alternative to state action would permit the utilization of the Federal Bureau of Investigation to participate in the capture of persons crossing state lines to avoid apprehension. Although the extradition mechanism is available for out-of-state arrests, interstate efforts may be less sufficient than those of federal enforcement agencies.

With respect to the revised bill, I would make three observations. In comparing Section 2–8 F 1 of S. 1 with the *Committee Print*, dated October 15, 1974, the revision appears to be the elimination of the language, "its officers or to harm creditors or other persons," and the insertion of the phrase, "an officer thereof or to deceive or harm a creditor of a bankrupt." The change of "officers" to "an officer thereof" would appear to be proper in that it broadens the scope of the crime.

The elimination of the phrase, "or other persons," would appear to exempt from the scope of the crime the instance where a person had transferred or concealed property not to deceive a court or to harm creditors but to harm policyholders. The addition of the phrase, "of a bankrupt," in the *Committee Print* would seem to eliminate the existence of an offense where the action of transfer or concealment was done to deceive a creditor of an insurance company inasmuch as an insurance company does not in itself become a bankrupt. This limitation would be eliminated by the deletion of the phrase, "of a bankrupt," in the *Committee Print*. In other words, the effect of the revisions contained in the *Committee Print* would appear to retain the offense of insurance company insolvency fraud only where the action of the malfeasor was done with intent to deceive a court or an officer thereof.

I appreciate your interest in my views and should there be an opportunity to be of any further assistance, please let me know.

Sincerely,

KENNETH E. DESHETLER,
*Director.*

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REPORT OF THE CRIMINAL SANCTIONS TASK FORCE

The Task Force was directed to draft a Model Bill that embodied an unequivocal definition of the crime covered, a pin-pointing of responsibility and a severe penalty in accordance with felony statutes.

Task Force members held two meetings—on March 13 and on April 17, 1973.

Consensus was reached on all provisions of the draft attached hereto with the exception of Section 3(b). A majority of the Task Force holds the opinion that:

1. The Criminal Law may or may not be sufficient to cover the acts referred to but, either way, it would be useful to incorporate this penalty into the Statute.

The minority view is:

1. This wording serves no useful purpose since the acts covered are already taken care of by the Criminal Law.

NAIC CRIMINAL SANCTIONS MODEL BILL

(As Adopted June 6, 1973)

*Section 1. Definitions*

(a) "Commissioner" means the Commissioner of Insurance or his equivalent of the state of domicile of any insurer.[1]

(b) "Insurer" means any insurance company or other insurer licensed to do business in this state.[2]

[1] Unnecessary to define "Commissioner" in the many states with an existing basic definition.

[2] Generally, the term "insurer" rather than "company" is used in this type of situation in most states and would seem preferred here. There are insurers who are not companies and it seems more accurate to do it this way. Since the word "insurer" is defined in most codes, the definition can be omitted when not required.

The model law was changed to require notice only to the domiciliary state. A duty to notify 50 states seems to much, particularly with the stiff penalty. Would this be 50 crimes and is this an extraterritorial problem? The domiciliary state should be responsible.

(c) "Impaired" is a financial situation in which the assets of an insurer are less than the sum of the insurer's minimum required capital, minimum required surplus and all liabilities as determined in accordance with the requirements for the preparation and filing of the annual statement of an insurer under Section—[3,4]

(d) "Chief Executive Officer" is the person, irrespective of his title, designated by the Board of Directors or trustees of an insurer as the person charged with the responsibility of administering and implementing the insurer's policies and procedures.

*Section 2. Duty to Notify*

(a) Whenever an insurer is impaired, its Chief Executive Officer shall immediately notify the Commissioner in writing of such impairment and shall also immediately notify in writing all of the Board of Directors or trustees of the insurer.

(b) Any officer, director or trustee of an insurer shall notify the person serving as Chief Executive Officer of the impairment of such insurer in the event such officer, director or trustee knows or has reason to know that the insurer is impaired.

*Section 3. Penalty*

(a) Any person who violates Section 2 of this Act shall, upon conviction thereof, be fined not more than $50,000 or be imprisoned for not more than one year, or both.

(b) Any person who does any of the following:

(1) Conceals any property belonging to an insurer; or

(2) Transfers or conceals in contemplation of a state insolvency proceeding his own property or property belonging to an insurer; or

(3) Conceals, destroys, mutilates, alters or makes a false entry in any document which affects or relates to the property of an insurer or withholds any such document from a receiver, trustee or other officer of a court entitled to its possession; or

(4) Gives, obtains or receives a thing of value for acting or forbearing to act in any court proceedings; and any such act or acts results in or contributes to an insurer becoming impaired or insolvent, then such person shall be guilty of a felony and upon conviction thereof, punished by imprisonment in the penitentiary for not more than 5 years.

John L. Maxwell, Illinois, Chairman; Ray Farmer, Georgia; Ron Wenzell, South Carolina; Ronald Graham, South Dakota; Kenneth W. Ellis, Ohio; Edmond J. O'Brien, Kemper Insurance Group; Peter J. Korsan, Reliance Insurance Company; William B. Pugh, Jr., Insurance Company of North America; Gustav Lehr, MFA Mutual Insurance Company.

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STATEMENT OF THE NATIONAL COMMITTEE ON INSURANCE GUARANTY FUNDS

My name is Frank R. Montgomery. I work for Allstate Insurance Company of Northbrook, Illinois, and am currently serving as chairman of the National Committee on Insurance Guaranty Funds.

First, a brief comment as to the genesis of NCIGF. This property-casualty advisory committee was formed in Autumn of 1971. The committee is made up of three member companies from each of the three larger company trade associations plus three companies which are unaffiliated. The principal purpose of NCIGF is to resolve to the extent possible common problems which arise in the administration of state guaranty funds. Our committee realizes that this is an ambitious goal—that these problems are new—that we are sailing in uncharted waters—and that, indeed, there is nobody of experience or law upon which we can draw. Consequently, we see one of our principal functions to be the provider of a common forum wherein the experiences of the many guaranty fund boards can be exchanged—so that, indeed, each guaranty fund board benefits from the experiences of all other boards.

Our committee is also, of course, vitally concerned with assisting in any way possible the prevention, early detection and mitigation of insurer insolvencies. To this end, we have assisted in the development of a model regulation for ceded reinsurance credit, and have had a subcommittee studying the examination process. Our committee has devoted many hours to the study of this broad area of insurer insolvency prevention and detection. The problem is dreadfully complex

[3] Minimum required capital was used in accordance with our discussion. It is essential that there be clear understanding of the meaning of the terms and the only possible standard of sufficient clarity appears to be the statutory method which is incorporated in most, if not all, state laws.

[4] This definition should be reviewed by each state in relation to the minimum capital and surplus required to continue operating in that state, particularly with respect to the problems of newly organized companies.



and does not lend itself to easy, pat solutions. Our committee is convinced, however, that we can and will be of assistance to guaranty fund boards and regulators in this significant area.

Thank you, Mr. Chairman, for this opportunity to appear before your Subcommittee.

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THE LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE

CIVIL LIABILITY OF THIEVES, RECEIVERS AND PURCHASERS OF STOLEN PROPERTY TO SHIPPERS, CARRIERS AND THEIR INSURERS: COMMON LAW AND STATUTORY REMEDIES

*Conversion*

"Conversion is defined as the unlawful and wrongful exercise of dominion, ownership or control over the property of another, to the exclusion of the same rights by the owner." *Bankers Life Ins. Co. of Nebraska* v. *Scurlock Oil Co.*, 447 F. 2d 997, 1004 (5th Cir. 1971); see generally, Prosser, Law of Torts § 15 (3rd ed. 1964). A plaintiff who was in lawful possession may recover the market value, and in some cases compensatory and punitive damages as well as attorneys' fees, in an action for conversion of personal property against either a thief, a knowing receiver of the stolen property, or an innocent purchaser.

"A deliberate taking of another's personal property without consent is the strongest and clearest case of conversion." *Cenna* v. *United States*, 402 F. 2d 168, 170 (3d Cir. 1968). The cases have consistently held that the unlawful taking necessary for conversion may involve acquiring possession by fraud, duress, theft, or force, *United States* v. *Elin Chemical Corp.*, 161 F. Supp. 238 (S.D.N.Y. 1958); *United States* v. *Michaelson*, 58 F. Supp. 796 (D. Minn. 1945); *Moore* v. *Barlow*, 352 S.W. 2d 804 (Tex. Civ. App. 1961); *Pierpoint* v. *Hoyt*, 260 N.Y. 26, 182 N.E. 235 (1932).

Anyone who purchases or accepts possession of stolen property is liable for its conversion, *Arkansas Valley Land & Cattle Co.* v. *Mann*, 130 U.S. 69 (1889); *Slathem* v. *Ferrell*, 267 Ala. 333, 101 So. 2d 546 (1958) even if his acquisition is otherwise completely innocent, *Swim* v. *Wilson*, 90 Cal. 126, 27 P. 33 (1891); *Rogers* v. *Citizens Bank*, 92 Ga. App. 399, 88 S.E. 2d 548 (1957); *Culp* v. *Signal Van & Storage Co.*, 142 Cal. App. 2d 859, 298 P. 2d 162 (1956).

The cause of action may be brought by either the true owner or a person with an immediate right of possession, see Prosser, *supra* at 94–8, for a discussion of the problems this creates. This difficulty is intensified by the fact that the right is subject to subrogation, assignment and transfer, *Tome* v. *Dubois*, 73 U.S. (6 Wall.) 548 (1867); *Park National Bank* v. *Globe Indemnity Co.* 332 Mo. 1089, 61 S.W. 2d 733 (1933).

Although there is some older authority to the contrary, *Gurney* v. *Kenny*, 2 E.D. Smith 132 (N.Y. Comm. Pleas 1853), the general rule seems to be that the plaintiff need not have demanded return of stolen property from a third party with no knowledge that his possession was unlawful, *Briscoe* v. *Pool*, 50 Ga. App. 147, 177 S.E. 346 (1934); *Hovland* v. *Farmers Union Elevator Co.*, 67 N.D. 71, 269 N.W. 842 (1936); *McRae* v. *Bandy*, 279 Ala. 12, 115 So. 2d 479 (1959).

The proper measure of damages as well as factors to be considered in awarding damages are problematic. As a general rule the successful plaintiff is entitled to the fair market value of the property, *Cline* v. *Rountree*. 236 F. 2d 412 (6th Cir. 1956); *Wm. H. Wise & Co.*, v. *Rand McNally Co.*, 195 F. Supp. 621 (S.D.N.Y. 1961).

Ordinarily, the market value used is that at the time and place of conversion, *Frey* v. *Frankel*, 443 F. 2d 1240 (10th Cir. 1971); *Ontario Live-Stock Commission Co.*, v. *Flynn*, 256 Iowa 116, 126 N.W. 2d 362 (1964). However, where the property was in transit at the time of conversion or has been transported since the conversion, the courts differ as to the proper measure of damages. Some measure the damages at the place of shipment, others at the place of conversion, others at the place where the property was transported; some permit reduction of the damages by the cost of transportation after conversion; others do not, *Pine River Logging Co.* v. *United States*, 186 U.S. 279 (1902); *Omaha & Grant Smelting & Refining Co.* v. *Tabor*, 13 Colo. 41, 21 P. 925 (1889); *Fitzgerald* v. *Chicago Mill & Lumber Co.*, 176 Ark. 64, S.W. 2d 30 (1928); *Grays Harbor County* v. *Bay City Lumber Co.*, 47 Wash. 2d 879, 289 P. 975 (1955). However, the question will not infrequently turn upon the willful character of the original conversion and/or the good faith of any subsequent purchaser, *Pine River Logging Co.*, *supra*; *Richtmyer* v. *Mutual Live Stock Commission Co.*, 122 Neb. 317, 240 N.W. 315 (1932).

Interest on the value of the property is generally recoverable, *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 256 F. 2d 946 (4th Cir. 1958), aff'd 359 U.S. 297 (1959); *Susi* v. *Belle Action Stables, Inc.*, 267 F. Supp. 293 (S.D.N.Y. 1967); although the awarding of interest may occasionally be denied on equitable grounds, *Gould* v. *Hiram Walker & Sons, Inc.*, 266 F. 2d 249 (7th Cir. 1959), or left to the discretion of the jury, *Jackson* v. *Gastonia*, 247 N.C. 88, 100 S.E. 2d 241 (1957).

Damages may also include losses incurred in locating and recovering the converted property and business losses caused by the conversion, *Petroleum Products Corp.* v. *Sklar*, 87 F. Supp. 715 (W.D.La. 1950); *Fulks* v. *Fulks*, 95 Ohio App. 515, 54 Ohio Ops. 131, 121 N.E. 2d 180 (1953); *Hagen* v. *Hachemeister*, 114 N.Y. 566, 21 N.E. 1046 (1889).

Ordinarily attorneys' fees are not recoverage, *Fulks, supra; Lafleur* v. *Sylvester*, 135 So. 2d 91 (La. App. 1961).

Punitive or exemplary damages may be awarded in cases of conversion subject to the general law of the jurisdiction for such damages, *Wood* v. *Citronelle-Mobile Gathering System Co.*, 409 F. 2d 367 (5th Cir. 1968); *Sudderth* v. *National Lead Co.*, 272 F. 2d 259 (5th Cir. 1960); *Kroger Food Co.*, v. *Singletary*, 438 S.W. 2d 621 (Tex. Civ. App. 1969). Punitive damages are not allowed in some jurisdictions, *Lowell* v. *Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 47 N.E. 2d 265 (1943); *Ganapolsky* v. *Park Gardens Development Corp.*, 439 F. 2d 844 (1st Cir. 1971); *Anderson* v. *Dalton*, 40 Wash. 2d 894, 246 P. 2d 853 (1952). In others they are governed by statute, *e.g.* Ga. Code §105-2002. The awarding of punitive damages is generally a matter of the jury's discretion rather than the plaintiff's right, *Downs* v. *Sulphur Springs Valley Electric Co-op., Inc.*, 80 Ariz. 286, 297 P 2d 339 (1956); *Bergdorf* v. *Chandler*, 220 Ar. 727, 249 S.W. 2d 562 (1952); *Precision Plating & Metal Finishing Inc.*, v. *Martin-Marietta Corp.*, 435 F. 2d 1262 (5th Cir. 1970): but see, *Davenport* v. *Woodside Cotton Mills Co.*, 225 S.C. 52, 80 S.E. 2d 740 (1954).

*Negligence*

While the conversion theory seems particularly well suited, there are other common law theories which might support recovery against either the thief or the receiver. Actionable negligence occurs when one breaches his duty of care to another and damage results. Prosser provides the following more substantial explanation:

> Negligence, as we shall see, is simply one kind of conduct. But a cause of action founded upon negligence, from which liability will follow, requires more than conduct. The traditional formula for the elements necessary for such a cause of action may be stated briefly as follows:
>
> 1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
>
> 2. A failure on his part to conform to the standard required. These two elements go to make up what the courts usually have called negligence; but the term quite frequently is applied to the second alone. Thus it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.
>
> 3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause."
>
> 4. Actual loss or damage resulting to the interests of another. Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's case. Nominal damages, to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred. Prosser, *supra* at §30.

It seems highly unlikely that either a shipper or a carrier would employ the negligence theory recover against a thief. However, the theory might be attractive for use against one who purchased or otherwise acquired the stolen goods. Even against the good faith purchaser an action for conversion seems preferable to one for negligence. Both the shipper and the carrier may have difficulty establishing their right to complete recovery on the basis of the negligence of the receiver or purchaser of stolen goods where the defendant contends that a substantial portion of their losses were proximately caused by the theft and not his acquisition of the goods.

However, the negligent receiver or purchaser stands in the same position as any other successive tortfeasor. While the thief may be liable for all the damage caused by his tortious conduct including that incurred after relinquished possession, *Hill* v. *Peres*, 136 Cal. App. 132, 28 P. 2d 946 (1934); *Morrison* v. *Medaglia*, 287 Mass. 46, 191 N.E. 133 (1934), the receiver or purchaser is liable for that portion of the damage which was caused by his negligence, *Hughes* v. *Great American Indemnity Co.*, 236 F. 2d 71 (5th Cir. 1956); *Ristan* v. *Frantzen*, 26 N.J. Super. 225, 97 A. 2d 726 (1953), aff'd 14 N.J. 102 A. 2d 614 (1954). (These cases do not involve negligence associated with a theft, but represent authority for the liability of successive negligent tortfeasors).



In addition to the fact that the shipper or carrier may only be able to recover a small portion of his losses against the receiver or purchaser, the award of punitive or exemplary damages in a negligence case is much less likely for a number of reasons. First, where those damages are covered by statute, recovery may be limited to intentional torts. Even where they are permitted in negligence cases, they will ordinarily only be available in cases involving "gross negligence," *Smith* v. *McNulty*, 293 F. 2d 924 (5th Cir. 1961); *Cherry-Burrel Co.* v. *Thatcher*, 107 F. 2d 65 (9th Cir. 1940).

*Interference*

There is one other common law tort theory which shippers and carriers might seek to use against thieves, receivers and purchasers of their stolen property—interference. The tort of interfering with a contractual or other business relationship generally arises in context of overly aggressive competition. Ordinarily, the interference must result from a malicious intent and mere negligent interference is not actionable, *Donovan Construction Co.* v. *General Electric Co.*, 133 F. Supp. 870 (D. Minn., 1955); *Morse* v. *Piedmont Hotel Co.*, 110 Ga. App. 509, 139 S.E. 2d 133 (1964); but see *Carbone* v. *Ursich*, 209 F. 2d 178 (9th Cir. 1953). As a general rule knowledge of the existence of a contractual or other business relationship is required, *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303 (1927); *Steffan* v. *Zernes*, 124 So. 2d 495 (Fla. App. 1960); *Orkin Exterminating Co.*, v. *O'Honlon*, 243 N.C. 457 91 S.E. 2d 222 (1956). As Prosser notes, "[Since] intentional interference is to be required, it presupposes knowledge of the plaintiff's interest, or at least of facts which would lead a reasonable man to believe in their existence." Posser, *supra* at § 123. There seems little doubt that the thief would or should be aware of the adverse effect of his conduct on the business interest of the shipper and carrier. However, the liability of the receiver and particularly subsequent purchasers is less clear particularly in view of the generally intentional nature of the tort.

Because of the particular suitability of an action for conversion against both the thief and those who subsequently come into possession of the property and because the action may be brought by either the shipper or one with a right to possession, it seems unlikely that any other theory of civil recovery would be used in such cases, with one possible exception. That exception involves theories of civil recovery where the legislature has provided for treble damages. The advantage of bringing an action under such statutes rather than on a theory of conversion is that exemplary or punitive damages may be difficult or impossible to recover especially against anyone but the actual thief.

*Antitrust Violations*

There are at least two types of federal legislation which might apply to these situations—the antitrust laws and the civil recovery aspects of the Organized Crime Control Act of 1970. The possiblity of a successful treble damage antitrust action seems remote. It has been suggested that the activities of organized crime are susceptible to antitrust prosecution, "Antitrust Enforcement Against Organized Crime" 70 *Columbia Law Review* 307 (1970). However, the Clayton Act, 15 U.S.C. §§ 12, 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
>
> "'Antitrust laws,' . . . includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes' of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four,' entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes'

of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four' entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' approved February twelfth, nineteen hundred and thirteen; and also this Act."

Neither these sections nor the circumstances under which most private antitrust cases arise suggest the type of facts surrounding the theft of goods from a carrier and their subsequent re-entry into legitimate business.

The code sections most commonly relied on to support private actions under the antitrust laws are § 1 of the Sherman Act (15 U.S.C. § 1), dealing with combinations, contracts and conspiracies in restraint of trade . . .; § 2 of the Sherman Act (15 U.S.C. § 2), dealing with monopolization and attempts to monopolize . . .; § 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. § 13) dealing with discrimination in prices or other price-related practices . . .; and § 3 of the Clayton Act (15 U.S.C. § 14), dealing with tying and exclusive dealing contracts. . . . Hills, *Antitrust Adviser* 546 (1971).

These and other antitrust violations will only very rarely be involved in a case involving theft of property from a carrier.

*Racketeering Enterprises*

The criminal enterprise sections of title 18 seem more appropriate. 18 U.S.C. § 1964(c) provides:

Any person injured in his business or property by reason of a violation of § 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damage he sustains and the cost of the suit, including a reasonable attorney's fee.

The prohibitions of § 1962 state:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the manner of § 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Racketeering activity as used in section 1962 is defined in section 1961(1):

"racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United Stated Code, Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1503 (relating to obstruction of justice), section 1501 (relating to obstruction of criminal investigations), section 1511 (relating to obstruction of State or local law enforcement), section 1951 relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling business), sections 2314 and 2315 (relating to interstate transportation of



stolen property), sections 2421–24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

"Pattern of racketeering activity" means two or more acts of racketeering activity committed within ten years of each other, 18 U.S.C. § 1961(5). The shipper or carrier who have been the victims of a cargo theft may be able to recover under 18 U.S.C. § 1964(c). If so, the required prohibited conduct under 18 U.S.C. § 1962 will probably involve subsection (c) (use of a pattern of racketeering activities by an employee or associate to conduct the business of an interstate enterprise) or subsection (d) (conspiracy to the conduct made unlawful subsection (c)). The type of "racketeering activity" most likely involved will probably be indictable misconduct in violation of 18 U.S.C. § 2315 (knowing receipt of stolen property "moving as, or which are a part of, or which constitute interstate or foreign commerce"). By definition liability only extends to those employed by or associated with an enterprise engaged in or affecting interstate commerce and therefore would probably not cover the actual thief. Even against this limited class of potential defendants, the plaintiffs must prove two separate criminal violations found among those listed in 18 U.S.C. § 1961(1) which were committed in conducting the enterprise's affairs. This will obviously not be possible in a great many theft cases.

*Conclusion*

Neither negligence nor interference offer any advantages not included within an action for conversion and both involve disadvantages not associated with such action. If the facts will support recovery under either the antitrust laws, the racketeering enterprise statutes, or the common law theory of conversion, the plaintiffs are likely to fare better under the treble damages provisions of the federal statutes than the uncertainty of punitive damages in conversion. While antitrust provisions will rarely apply to the facts of a cargo theft and the criminal enterprise statutes more often but will support recovery certainly in a limited number of cases, cargo theft will always involve a conversion. Moreover, conversion should prove far easier to establish than either a violation of the antitrust laws or liability under 18 U.S.C. § 1964(c), and liability for the conversion will extend not only to the thief but any subsequent possessors.

CHARLES DOYLE,
*Legislative Attorney,*
*American Law Division.*

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EXCERPTS* FROM THE SECOND CIRCUIT SENTENCING STUDY, A REPORT TO THE JUDGES OF THE SECOND CIRCUIT

Prepared by: Anthony Partridge and William B. Eldridge, Federal Judicial Center, August 1974

FOREWORD

Among the constructive responses to America's grave problems of crime and punishment has been the growing interest of law people in the subject of "corrections"—the dubious label we attach to the post-conviction process from sentence through prison and parole. Lawyers and judges have begun to confront these subjects as their proper responsibilities. We recognize increasingly that we are not free to take our final curtain when guilt has been admitted or determined. Like it or not, criminology is our business.

Responding to one aspect of this newly urgent awareness, Chief Judge Kaufman, in June 1973, appointed a Second Circuit Committee on Sentencing Practices. The sixteen members of the Committee include prosecutors, defense lawyers, probation officers, and judges.

*The Appendix, containing detailed information on cases 1-20, is omitted.

Believing that self-knowledge is a necessary, albeit not sufficient, step towards self-improvement, the Committee has undertaken, as one of its primary responsibilities, to consider how the business of sentencing is actually conducted in the courts of our circuit. As part of this continuing investigation, the Committee expects to undertake in-depth interviews with the district judges so that we may marshal their collective wisdom, experience, attitudes, and, of course, divergences relating to this difficult responsibility.

For a modest beginning, having in mind the familiar view that "disparity" in sentencing is a major evil, we determined to take a somewhat particularized look at this subject in terms of the sentencing practices of our own judges. The present study is the result of this endeavor.

The task of organizing the disparity study was undertaken by a subcommittee composed of Hon. Robert C. Zampano, Hon. Paul J. Curran, Murray Mogel, Esq., Patrick Wall, Esq., Mr. John T. Connolly, S.D.N.Y. Probation Chief, and Mr. James F. Haran, E.D.N.Y. Probation Chief, with the undersigned as chairman. The subcommittee worked closely with Messrs. William B. Eldridge and Anthony Partridge of the Federal Judicial Center, which agreed to advise on all phases of the study. After the basic outline of the study was formulated and approved by the full committee, the Center's scholarly representatives took over and conducted the administrative tasks and analysis hereinafter recounted. Our debt to our two friends from the Center and their colleagues is substantial, as we cheerfully acknowledge.

The occasion of this report is not one either for a major celebration or for false modesty. Our objectives were limited. Our product reflects that. It is our hope that this concrete picture of ourselves will help to encourage interest, self-scrutiny, and, most importantly, the proposals for law reform that we perceive as our ultimate aims.

MARVIN E. FRANKEL,
*Southern District of New York.*

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SEPTEMBER 11, 1974.

## THE SECOND CIRCUIT SENTENCING STUDY

### NOTE ON THE SENTENCING AUTHORITY OF FEDERAL JUDGES

Because this report is addressed to a group of Federal judges, it assumes familiarity with the various Federal statutes governing sentencing and uses shorthand expressions to refer to some of them. This note is provided for the assistance of readers who are not familiar with these statutes.

Generally speaking, a Federal judge sentencing a convicted offender may impose a term of imprisonment or a term of probation, either of which may be accompanied by a fine. The maximum term of imprisonment and the maximum fine that can be imposed are set forth in the statute dealing with the particular crime; the maximum term of probation that can be imposed is five years.

If a judge imposes a prison sentence of more than six months, he may not also impose a term of probation. Probation and imprisonment for more than six months are thus mutually exclusive alternatives. Under 18 U.S.C. § 3651, however, a judge may provide for a term of imprisonment of less than six months to be followed by a term of probation. This is commonly referred to as a "split sentence."

If imprisonment is imposed (other than a split sentence), an offender serving a term of more than 180 days may be released on parole, in the discretion of the United States Board of Parole, after serving one third of his term. An offender serving a term of 180 days or less is not eligible for parole.

Except as specifically noted, the descriptions of sentences in this report assume that the sentences were rendered under the above rules. Among the exceptions that are noted are the following:

*Shorthand Notation Meaning*

"(a)(1)" Refers to a sentence under 18 U.S.C. § 4208(a)(1), which authorizes the judge to fix a parole eligibility period of less than one third of the prison term.

"(a)(2)" Refers to a sentence under 18 U.S.C. § 4208(a)(2), which authorizes the judge to eliminate the minimum period for parole eligibility.

"YCA" Refers to a sentence committing an offender under the Youth Corrections Act. Generally, commitments under this act are "indeterminate" sentences pursuant to 18 U.S.C. § 5010(b). Under such a sentence, the offender must be paroled on or before the fourth anniversary of his conviction. Occasionally, commitments are pursuant to 18 U.S.C. § 5010(c), under which the judge imposes a term of more than six years (but not more than the maximum provided for the particular offense) and the offender must be paroled at least two years before the expiration of the term. There is no minimum period for parole eligibility under a Youth Corrections Act sentence.

"§ 4209" Refers to 18 U.S.C. § 4209, which permits the judge to apply the provisions of the Youth Corrections Act to a young adult offender—that is, one who was at least 22 years old but not yet 26 at the time of conviction. If the sentence includes a term of probation, the effect of citing § 4209 is to make 18 U.S.C. § 5021(b) applicable; that section provides that a judge may release a youth offender from probation before the expiration of the probation term initially established, in which case the conviction will be set aside.

Reference is also made in the report to special parole terms under 21 U.S.C. § 841. This statute, which deals with certain drug-related offenses, requires a judge who imposes a sentence of imprisonment to impose in addition a "special parole term," which is added to any regular period of parole. In the event that special parole is revoked, the original term of imprisonment is increased by the length of the special parole term.



### CHAPTER I—INTRODUCTION

This is a report of a sentencing experiment conducted by the district judges of the Second Circuit to determine the extent of disparity in the sentencing of criminal defendants within the circuit. The experiment, in which each district judge rendered sentences on approximately thirty presentence reports, was developed and organized by the Second Circuit Committee on Sentencing Practices, chaired by former Chief Judge J. Edward Lumbard of the United States Court of Appeals for the Second Circuit. In the course of it, the district judges of the Second Circuit—all forty-three of the active judges and seven of the senior judges—rendered roughly as many sentences as they normally do in half a year. The experiment thus represented a major effort at self-evaluation, initiated and carried out principally by the judges themselves.

The unique quality of this experiment, which sets it apart from all previous studies of disparity, is the opportunity it provides to observe a large number of judges rendering sentences in identical cases. Earlier studies have all been based on the observation of sentences rendered by different judges in different cases. The obvious problem for such studies is how to determine whether observed differences in sentences result from differences in judges or differences in cases. The solution is inevitably a statistical one: the analysis is based on groups of cases and relies upon group measures such as the percentage of cases in which different judges give prison sentences. The current study, by contrast, deals directly with differences in judges' sentencing behavior, without the complications introduced by differences in the underlying cases. For the first time, we are able to observe the extent of agreement among many judges on a case-by-case basis. As will be seen later, a study of this type has some methodological problems of its own, But it does permit modes of analysis not previously possible in disparity studies, and it therefore offers the hope of gaining substantial new knowledge about the sentencing process.

To the extent that this hope is fulfilled, the credit belongs almost entirely to the judges. Their interest in evaluating their own sentencing performance, and their willingness to undertake a substantial extracurricular burden in the service of that interest, are the foundations on which the study has been built.

The thirty presentence reports were sent to the judges at a rate of five reports a week over a six-week period beginning March 16, 1974. The first twenty of them were actual presentence reports, drawn from the files of probation offices within the Second Circuit, but edited to alter identifying facts such as names, places, identification numbers, and dates. These twenty cases were selected to be broadly representative of the sentencing business of the circuit.

Each of the last ten presentence reports was prepared in two versions which differed from one another with respect to some characteristic that might be relevant to the sentencing process. In Case 26, for example, the defendant pleaded guilty in one version and was found guilty after trial in the other, but the versions were otherwise identical. The judges were randomly divided into two groups, so that half the judges got one version and half got the other. Through this technique, it was hoped that we might learn whether certain case characteristics were more likely than others to be productive of disagreement about the appropriate

sentence. These last ten presentence reports were not selected to represent the sentencing business of the circuit; rather, they were selected so that certain characteristics might be tested. Nine of them were actual presentence reports drawn from the files of probation offices within the Second Circuit, although one version of each was of course modified to produce the desired variation, and occasional other modifications were made to sharpen the issues being studied. The tenth presentence report in this group was an invention of the Judicial Center staff.

The analysis of the sentences returned is predicated on the assumption that all the judges sentencing in a particular case were acting on the basis of the same information—that is, the information contained in the presentence report. To avoid introducing information gained from other sources, a judge who had actually sentenced a defendant (or who had participated in a sentencing council considering the case) was not asked to sentence that defendant for the purposes of the experiment. About half of the judges therefore received somewhat fewer than the full series of thirty cases. The total number of presentence reports mailed was 1,465, not counting those mailed to one senior judge who was unable to participate because of illness. 1,442 responses were received, with all but two of the non-responses being in the last ten cases.

For the purposes of the study, disparity is defined as dissimilar treatment by different judges of defendants who are similarly situated. Stated differently, disparity is departure from the principle that the defendant's sentence shouldn't depend on which judge he gets. It should be noted that this definition excludes two other phenomena that are sometimes referred to as disparity. First, it excludes dissimilar treatment of similarly situated defendants by the *same* judge—that is, departure from the principle that the sentence shouldn't depend on such legally irrelevant factors as the judge's mood or racial prejudices. Second, the definition used here excludes disproportionately dissimilar treatment of unlike situations: we do not deal with the question whether sentences for stealing government checks are unduly harsh when compared with sentences for income-tax evasion. In view of the somewhat flexible content of the word "disparity," it is important to keep these limitations in mind.

## CHAPTER II—THE EXTENT OF DISPARITY

### *A. Disparity in sentences rendered in the experiment*

For each case in the group of twenty that was selected as representing the sentencing business of the circuit, the sentences rendered have been ranked from most severe to least severe. Table 1 shows, for each of these twenty cases, selected points on the rank list: the two extreme sentences, the median sentence, the sixth most severe and sixth least severe sentences, and the twelfth most severe and twelfth least severe sentences. Thus, for Case 1, the median sentence was 10 years' imprisonment and a $50,000 fine, and the sentences ranged from 3 years' imprisonment to 20 years' imprisonment and a $65,000 fine. Twelve judges sentenced to 15 years' imprisonment or more; twelve judges sentenced to 8 years' imprisonment and a $20,000 fine or less; and so on. In Cases 3 and 5, special parole terms under 21 U.S.C. § 841 are included in the term "probation." [1]

The construction of a rank list of sentences of course assumes a set of rules for determining when one sentence is more severe than another. In many cases, there would be no likelihood of disagreement on that question, but there are points at which different observers may disagree on whether one sentence or another is the more severe. Readers who disagree with the rules used here, as well as others who wish to see more detailed data, are referred to the tables in Appendix A. These tables contain all the sentences rendered in each case, and permit fairly easy assessment of the importance of differences that would result from alternative ranking rules. Appendix A also contains brief descriptions of the cases.

[1] The case numbers in the table are not the same numbers that were assigned to these twenty cases when they were mailed to the judges. For those judges who may wish to refer to the presentence reports that they received, a conversion table is provided at the beginning of Appendix A.



TABLE 1.—SENTENCES IN TWENTY CASES

| | Case number | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| Most severe sentence | 20 yr prison; $65,000. | 18 yr prison; $5,000. | 10 yr prison; 5 yr probation. | 7½ yr prison | 5 yr prison; 3 yr probation. | 3 yr prison; $5,000. | 2 yr prison | YCA indet. | 3 yr prison | 1 yr prison. |
| 6th most severe sentence. | 15 yr prison; $50,000. | 15 yr prison | 6 yr prison; 5 yr probation. | 5 yr prison | 3 yr prison; 3 yr probation. | 3 yr prison; $5,000. | do | do | 6 mo prison; 2 yr unsupervised probation. | 6 mo prison; 1 yr probation. |
| 12th most severe sentence. | 15 yr prison | 15 yr prison; [(a)(2)]. | 5 yr prison; 5 yr probation [(a)(2)]. | 4 yr prison | 3 yr prison; 3 yr probation. | 2 yr prison; $5,000. | 1½ yr prison | 6 mo prison; 5 yr probation [sec. 4209]. | 6 mo prison | 3 mo prison; 27 mo probation. |
| Median sentence | 10 yr prison; $50,000. | 10 yr prison | 5 yr prison; 3 yr probation. | 3 yr prison | 2 yr prison; 3 yr probation. | 1 yr prison; $5,000. | 1 yr prison | 5 mo prison; 5 yr probation [sec. 4209]. | 3 mo prison; 21 mo unsupervised probation. | 2 mo prison; 1 yr probation. |
| 12th least severe sentence. | 8 yr prison; $20,000. | 7½ yr prison [(a)(2)]. | 3 yr prison; 3 yr probation. | do | 1½ yr prison; 3 yr probation. | 6 mo prison; 2½ yr probation; $3,000. | 6 mo prison; 18 mo probation. | 2 mo prison; 2 yr probation [sec. 4209]. | 1 mo prison; 2 yr unsupervised probation. | 3 yr probation. |
| 6th least severe sentence. | 5 yr prison; 3 yr probation; $10,000. | 5 yr prison | 3 yr prison; 3 yr probation. | 2 yr prison | 5 yr probation; $500. | 6 mo prison; $5,000 | 3 mo prison | 3 yr probation | 2 yr unsupervised probation. | 2 yr probation. |
| Least severe sentence | 3 yr prison | do | 1 yr prison; 5 yr probation. | 4 yr probation | 2 yr probation | 3 mo prison; $5,000. | 1 yr probation | 1 yr probation | Suspended if leave United States. | 1 yr probation. |
| Number of sentences ranked. | 45 | 48 | 46 | 45 | 42 | 48 | 39 | 41 | 49 | 48. |

TABLE 1.—SENTENCES IN TWENTY CASES—Continued

| | Case number | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| Most severe sentence | 6 mo prison; 6 mo probation; $5,000. | 1 yr prison | 1½ yr prison | YCA indet | 1 yr prison; $3,000. | YCA indet | 3 yr prison | 6 mo prison; 18 mo probation. | 2 yr prison; $2,500. | 1 yr prison; $1,000. |
| 6th most severe sentence. | 6 mo prison; $2,500. | 6 mo prison; 3 yr probation. | 6 mo prison; 2 yr probation. | do | 6 mo prison; 3 yr probation; $10,000. | 5 yr probation | 6 mo prison; 4½ yr probation. | 5 yr probation | 6 mo prison; 2 yr probation. | 3 mo prison; $1,000. |
| 12th most severe sentence. | 2 mo prison; 22 mo probation; $5,000. | 3 mo prison; 21 mo probation. | 6 mo prison; 18 mo probation. | 1 yr prison | 3 mo prison; 2 yr probation; $5,000. | 3 yr probation | 6 mo prison | 3 yr probation; $100. | 3 mo prison; 33 mo probation; $7,500. | 3 yr probation; $1,000. |
| Median sentence | 1 mo prison; 11 mo probation; $5,000. | 1 mo prison; 11 mo probation. | 5 yr probation | 4 yr probation | 3 yr probation; $10,000. | do | 3 yr probation | 3 yr probation | 2 yr probation; $15,000. | 2 yr probation; $500. |
| 12th least severe sentence. | 2 yr probation; $7,500. | 2 yr probation | 2 yr probation | 2 yr probation | 2 yr probation; $5,000. | 2 yr probation | do | 2 yr probation | 2 yr probation; $400. | 1 yr probation; $1,500. |
| 6th least severe sentence. | $7,500; 2 yr unsupervised probation. | 1 yr probation | do | do | 2 yr probation; $1,000. | do | 2 yr probation | do | 1 yr probation; $7,500. | 1 yr probation; $500. |
| Least severe sentence. | $2,500 | 6 mo probation | do | 1 yr probation | 1 yr probation; $1,060. | 2 yr unsupervised probation. | 1 yr probation | 1 yr probation | $2,500 | $1,000. |
| Number of sentences ranked. | 43 | 44 | 48 | 39 | 45 | 42 | 46 | 48 | 47 | 48. |



The rules that have been used for ranking in this study are based on the assumption that imprisonment of any length is more severe than probation or a fine, that supervised probation is more severe than a fine or unsupervised probation, and that a fine is more severe than unsupervised probation. They also give some weight to the authority under which a prison sentence or probation is imposed. The details of the rules are perhaps best understood by treating them as a series of procedural steps. Each step is applicable only to sentences that are of equal rank under the previous step: that is, Step 2 is used only as necessary to break ties at Step 1, Step 3 is used only as necessary to break ties at Step 2, and so on. For ranking from most severe to least severe, the basis for ranking at the successive steps is as follows:

1. Length of term of imprisonment imposed (with indeterminate sentences under the Youth Corrections Act counted as four-year terms).
2. Length of term of supervised probation (including, in Cases 3 and 5, any special parole term imposed under 21 U.S.C. §841).
3. Amount of fine.
4. Length of term of unsupervised probation.
5. Authority under which a prison sentence was imposed, as follows (from most severe to least severe): a. Regular authority or 18 U.S.C. §3651; b. 18 U.S.C. §4208(a)(1); c. 18 U.S.C. §4208(a)(2); d. Youth Corrections Act (including 18 U.S.C. §4209).
6. For Young Adult Offenders only, the authority under which a probation sentence or split sentence was imposed: a sentence under the regular authority is treated as more severe than a sentence of equal length under 18 U.S.C. §4209.

The ranking is not affected by the length of any prison sentence whose execution was suspended, or by any requirement such as restitution, participation in a drug program, etc.

For a variety of reasons, the number of sentences available for ranking varies somewhat from case to case. In part, this reflects the policy of not sending the presentence report to the actual sentencing judge, but principally it reflects the exclusion from the rankings of two classes of response: failures to sentence by judges who indicated that they needed more information (including decisions to commit for observation), and sentences that were ambiguous from 39 to 49. But speaking roughly, the six most severe sentences in each case can be viewed as the top eighth, the twelve most severe as the top quarter, and a similar translation may be made of the numbers at the less severe end of the scale. The median sentence is the sentence halfway down the rank list except that in Cases 10 and 13, where the true median fell between two sentences that were not identical, the more severe sentence was used. This convention is used in this report whenever median sentences are displayed, to avoid averaging the two sentences around the midpoint: every sentence shown in Table 1 and other tables is thus a sentence actually reported by one or more participating judges.

Table 1 clearly shows a wide range of disagreement among Second Circuit judges about the appropriate sentences in the twenty cases. Substantial disagreement persists, moreover, even if the extremes of the distribution are ignored. In both Cases 1 and 2, for example, at least six judges imposed prison terms of 15 years or longer, while at least six others imposed prison terms of 5 years or shorter. Indeed, in many of the cases the disagreement remains substantial even if we compare the twelfth most severe and twelfth least severe sentences. For the most part, the pattern displayed is not one of substantial consensus with a few sentences falling outside the area of agreement. Rather, it would appear that absence of consensus is the norm.

The effect of differences in the length of prison terms imposed may of course be somewhat moderated by the fact that actual time served is typically less than the stated sentence. If parole eligibility dates were arrayed instead of stated sentences, the range in Case 1 would be stated as one year to 6⅔ years, which appears less dramatic than the three to twenty years of the stated sentence. Moreover, within the limits that the sentence imposes onjits discretion, the Board of Parole tends to act in ways that limit the effect of disparate prison terms imposed by the judges. It is impossible to evaluate the impact of parole discretion of the time that would actually be served under the prison sentences displayed in Table 1, since the exercise of that discretion is affected by the defendants's behavior in prison. But there can be no question, given the ranges of sentences shown in the table, that the disparity in stated sentences would be reflected in substantial disparity in time served.

In addition, there is nothing in the system to moderate the effect of disagreements among judges about the threshold question of whether the offender should be incarcerated at all. The offender who is sentenced to prison may be released before the expiration of his stated term, but he does go to prison; the offender sentenced to probation or a fine does not. It is therefore worthy of note that there was disagreement on the threshold question in 16 of the 20 cases. In the remaining 4 cases, all the sentencing judges agreed on the appropriateness of prison; in no case did all of them agree on the inappropriateness of prison. If we again cut off the extremes of the distribution and look only at the sixth most severe and sixth least severe sentences, we still find 12 cases in which there was disagreement about the appropriateness of incarceration.

Differences in the lengths of probation terms and amounts of fines are generally of less importance, but the lack of consensus is also evident here.

In short, the consistent tenor of the data presented in the table is one of substantial disparity. In later chapters, we sill seek the answers to questions such as whether similar sentencing patterns are found within individual districts, whether some judges' sentences are consistently toward one end of the rank list or the other, and whether particular features of cases tend to generate disparate sentences. First, however, we turn to the question of the validity of conclusions drawn from an experiment of this kind.

B. *What the Experimental Sentences Can Tell Us About Actual Sentences*

Since the sentences that form the basis for Table 1 were rendered in an experimental environment, the question arises whether—and to what extent—the disparity shown in the table is representative of what occurs in the courtrooms of the Second Circuit. A number of issues must be considered.

*The Representative Character of the Presentence Reports Studied*

It was stated earlier that the twenty cases included in Table 1 were selected to be broadly representative of the sentencing business of the circuit. It should be understood, however, that they were not selected to be a statistically valid cross-section of that business. Moreover, it is important for readers to understand that no single case in the table is in any sense representative of any class of cases. Case 2, for example, was a bank robbery case. But there is no reason to assume that the pattern of sentences displayed for that case is typical of bank robbery cases. The sentences in the case were the product of judicial reactions to a collection of facts that included not only the title of the offense, but the circumstances under which it was committed, the defendant's other involvement with the law, and a variety of other matters. It would be erroneous to conclude that the range of sentences for bank robbery among the participating judges is 5 years to 18 years, or that sentences in bank robbery cases are highly disparate, or anything else about bank robbery cases as a class. The case can properly be viewed only as one case in a group of twenty that were selected through a process designed to achieve a reasonably representative group.

The selection process began with the identification of twenty crime categories from which the cases were to be selected. These categories are shown in Table 2, which also shows, for each category, the number of defendants who were sentenced in the circuit, and in each district within the circuit, in fiscal 1973. The case numbers in this table are those used in Table 1 to designate the cases from the respective categories. Except for bribery, securities fraud, and perjury, the categories were selected because of their numerical significance, either for the circuit as a whole or for one or more districts within the circuit. The three exceptions were selected because of an interest on the part of members of the Committee on Sentencing Practices in increasing the representation of white-collar offenses.

Table 3 lists the crime categories that were excluded from the study. The first two categories were excluded, although they were relatively large, because it was anticipated that they would be very much smaller in 1974 and subsequent years. The remaining categories were excluded on the basis of the numbers shown in the table.

After the twenty crime categories had been selected they were assigned to districts, and the chief probation officers were asked to select presentence reports. The study included one presentence report from Vermont, two each from Connecticut, Northern New York, and Western New York, five from Eastern New York, and eight from Southern New York. The instructions to the chief probation officers were to seek reports in cases that would not strike judges as unusual. The chief probation officers of the Eastern and Southern districts undertook to assure that the cases would include both convictions on pleas and convictions



after trial, and also that there would be a diversity of defendant characteristics such as prior record, age, narcotics history, and family background. Corporate and other organizational defendants were excluded because of the narrow range of sentencing alternatives available, but with that exception the objective was to obtain a variety of circumstances within the mainstream of the sentencing experience of participating judges.

The presentence reports submitted by the chief probation officers were screened by Judicial Center staff to ensure that they conformed with the desired characteristics. As a final step, abstracts of the cases were sent to the nonjudicial members of the subcommittee in charge of the experiment, and their approval of the cases was obtained. The judicial members of the subcommittee were excluded from this step to avoid any possibility that their participation in case selection would affect the sentences they rendered when they later received the presentence reports.

TABLE 2.—INCLUDED CRIME CATEGORIES

| Case number and category | Defendants sentenced, fiscal 1973 [1] | | | | | | |
|---|---|---|---|---|---|---|---|
| | D. Conn. | N.D. N.Y. | E.D. N.Y. | S.D. N.Y. | W.D. N.Y. | D. Vt. | Entire circuit |
| 1. Extortion, threats, and travel in aid of racketeering | 13 | 6 | 13 | 35 | 9 | 0 | 76 |
| 2. Bank robbery | 16 | 3 | 45 | 47 | 14 | 2 | 127 |
| 3. Distribution of narcotic drugs [2] | 20 | 7 | 204 | 364 | 11 | 0 | 606 |
| 4. Larceny or theft, interstate commerce | 2 | 6 | 76 | 27 | 6 | 0 | 117 |
| 5. Distribution of nonnarcotic drugs [2] | 6 | 4 | 31 | 23 | 8 | 0 | 72 |
| 6. Income tax offenses | 9 | 12 | 23 | 42 | 4 | 2 | 92 |
| 7. Simple possession of narcotic drugs [2] | 5 | 0 | 20 | 44 | 22 | 1 | 92 |
| 8. Mail fraud (including wire, radio, etc.) | 3 | 0 | 17 | 55 | 3 | 1 | 79 |
| 9. Illegal entry or reentry | 2 | 8 | 1 | 8 | 1 | 33 | 53 |
| 10. Postal embezzlement | 8 | 1 | 6 | 92 | 0 | 0 | 107 |
| 11. Bribery | 0 | 0 | 13 | 33 | 0 | 0 | 46 |
| 12. Firearms and weapons offenses | 25 | 13 | 15 | 18 | 1 | 4 | 76 |
| 13. Counterfeiting | 10 | 6 | 42 | 55 | 11 | 3 | 127 |
| 14. Forgery other than postal | 11 | 16 | 26 | 40 | 9 | 0 | 102 |
| 15. Gambling and lottery offenses | 14 | 17 | 10 | 74 | 13 | 0 | 128 |
| 16. Bank embezzlement | 21 | 9 | 4 | 64 | 7 | 2 | 107 |
| 17. Transportation of stolen securities | 13 | 2 | 9 | 43 | 5 | 3 | 75 |
| 18. Larceny or theft, post office | 6 | 2 | 10 | 73 | 0 | 1 | 98 |
| 19. Securities fraud | 0 | 0 | 0 | 14 | 0 | 0 | 14 |
| 20. Perjury | 0 | 0 | 3 | 13 | 3 | 0 | 19 |
| Total, included crimes | 184 | 112 | 574 | 1,164 | 127 | 52 | 2,213 |
| Percent | (74) | (57) | (65) | (81) | (65) | (61) | (73) |
| Total, all crimes | 248 | 197 | 883 | 1,433 | 195 | 85 | 3,041 |

[1] This table and table 3 are derived from data maintained by the Administrative Office of the U.S. Courts. Magistrates cases are not included.

[2] The figures for drug offenses are somewhat understated because some defendants convicted under the old law were also sentenced in fiscal 1973. The old-law cases have been listed as an excluded category.

It must be obvious that this selection process could not provide a sample that is representative in the sense of being a statistically valid cross-section. To mention only one deficiency in this respect, the selection process for the twenty cases resulted in systematic underrepresentation of the less frequent offense categories. But the twenty cases are believed to be representative in the sense that they comprise a variety of case types that are familiar in the circuit. Not only has each of the cases in fact appeared in a Second Circuit courtroom, but similar cases will almost certainly appear in Second Circuit courtrooms in the future. To the best of our knowledge, none of the twenty cases studied could be termed odd or highly unusual. Moreover, except possibly for the three cases that were selected to add to the white-collar representation, none of the cases was selected on the basis of what people thought it would show about disparity; in that sense, the selection process was neutral.

In summary, the cases studied in the experiment cannot appropriately be used to draw conclusions about sentencing patterns for particular offenses. Nor can they be used to draw statistically valid inferences about matters such as the proportion of the Second Circuit cases in which the judges would disagree about the appropriateness of incarceration. But if, in this group of cases, disparity in sentencing appears to be a serious problem, the representative character of the group is certainly adequate to support the conclusion that disparity is a serious problem in a substantial proportion of Second Circuit cases.

### *The "Paper Defendant" Problem*

Probably the most serious methodological issue to be considered is whether sentences rendered in an experimental situation provide an adequate approximation of what would occur in the courtroom. In the experiment, we have sentences rendered by judges who have never had an opportunity to form any personal impressions of the defendant on the basis of face-to-face contact. Moreover, we have a decision-making process that has no consequences for flesh and blood defendants or their families or victims.

TABLE 3.—EXCLUDED CRIME CATEGORIES

| | D. Conn. | N.D. N.Y. | E.D. N.Y. | S.D. N.Y. | W.D. N.Y. | D. Vt. | Entire circui |
|---|---|---|---|---|---|---|---|
| Old-law drug offenses | 3 | 0 | 28 | 31 | 1 | 0 | 63 |
| Selective service | 0 | 15 | 24 | 62 | 6 | 2 | 109 |
| Homicide | 0 | 0 | 1 | 0 | 0 | 0 | 1 |
| Robbery other than bank | 0 | 0 | 6 | 1 | 0 | 0 | 7 |
| Assault | 2 | 5 | 3 | 12 | 1 | 0 | 23 |
| Breaking and entering | 1 | 0 | 2 | 2 | 0 | 0 | 5 |
| Larceny or theft, bank | 5 | 1 | 22 | 19 | 11 | 0 | 58 |
| Larceny or theft other than bank, post office, or interstate commerce | 6 | 2 | 43 | 6 | 4 | 0 | 61 |
| Embezzlement other than bank or postal | 2 | 3 | 2 | 8 | 1 | 0 | 16 |
| Miscellaneous frauds | 10 | 4 | 13 | 28 | 7 | 2 | 64 |
| Transportation of stolen motor vehicles or aircraft | 3 | 4 | 28 | 9 | 2 | 3 | 49 |
| Postal forgery | 0 | 0 | 1 | 2 | 0 | 0 | 3 |
| Sex offenses | 1 | 1 | 0 | 2 | 0 | 0 | 4 |
| Narcotics, records and importation | 1 | 10 | 13 | 3 | 4 | 3 | 34 |
| Nonnarcotic drugs, records and importation | 0 | 10 | 11 | 0 | 1 | 6 | 28 |
| Nonnarcotic drugs, simple possession | 1 | 1 | 18 | 4 | 8 | 2 | 34 |
| Escape, bail-jumping, etc | 4 | 0 | 4 | 11 | 1 | 2 | 22 |
| Kidnapping | 0 | 0 | 2 | 1 | 0 | 0 | 3 |
| Miscellaneous general offenses | 6 | 0 | 3 | 0 | 0 | 0 | 9 |
| Immigration other than illegal entry | 0 | 8 | 0 | 1 | 1 | 8 | 18 |
| Liquor, internal Revenue | 1 | 0 | 5 | 7 | 5 | 0 | 18 |
| Agriculture and conservation statutes | 2 | 0 | 8 | 14 | 0 | 0 | 24 |
| Antitrust | 0 | 0 | 16 | 4 | 0 | 0 | 20 |
| Fair Labor Standards Act | 0 | 0 | 1 | 3 | 0 | 0 | 4 |
| Food and drug | 2 | 3 | 9 | 8 | 0 | 0 | 22 |
| Motor Carrier Act | 6 | 1 | 1 | 3 | 2 | 4 | 17 |
| National defense laws (except selective service) | 0 | 0 | 0 | 0 | 0 | 1 | 1 |
| Miscellaneous Federal statutes | 3 | 3 | 9 | 8 | 3 | 0 | 26 |
| Customs (except narcotics and liquor) | 0 | 4 | 4 | 6 | 1 | 0 | 15 |
| Marine offenses | 2 | 4 | 4 | 8 | 0 | 0 | 18 |
| Obstructing the mail | 1 | 0 | 6 | 1 | 5 | 0 | 13 |
| Violations of postal laws by post office employees | 1 | 4 | 18 | 4 | 3 | 0 | 30 |
| Violation of aircraft regulations | 1 | 2 | 4 | 1 | 1 | 0 | 9 |
| Total, excluded crimes | 64 | 85 | 309 | 269 | 68 | 33 | 828 |

The absence of face-to-face contact with the defendant is the less troublesome of these two characteristics of the experimental milieu. It may be conceded that the sentences rendered by individual judges might be different if a personal assessment of the defendant were to enter into the equation. This is particularly true with respect to those defendants who go to trial, but it also applies to some extent to the much larger number who are convicted on pleas. But we are not concerned in this study with the individual sentences; we are concerned with the ranges of disagreement about appropriate sentences. There is very little reason to think that, if each of the judges participating in the study had had an opportunity to form a personal assessment of the defendants, the changes in their sentences would have operated in a manner that would substantially alter the distribution of sentences. A defendant who made an unusually favorable impression might well have had lower sentences all around; one who made an unusually unfavorable impression might well have had higher sentences. Some defendants might have affected some judges in one direction and other judges in the other direction. It would be unusual, one would suppose, to find that the impact of the defendant's demeanor on the sentences in one of the cases in the experiment would be to make the severe sentences more lenient and the lenient more severe. Thus, even though the experiment omits part of the information that is available to the judge at the time of sentencing, this omission is not likely to have had much impact on the extent of disparity observed.



The other feature of the experimental environment is of more concern. Surely, the judges participating in the study must have weighed their sentencing decisions less carefully and responsibly than they weigh decisions that have real consequences for real people. The appearance of a few unlawful sentences in the study would seem to confirm that *a priori* notion. It may be that the more careful and thoughtful deliberation that takes place when real defendants are before the court leads judges to reach more nearly similar results in similar cases. It may also be that the responsibility that a judge bears when dealing with the lives of real people tends to result in sentences more nearly in agreement: the judge inclined to be tough may find it easier to indulge that inclination when there is neither a defendant nor a family to be hurt by his decisions; the judge inclined to take probation risks may find it easier to do so if there is no risk at all that the criminal will find other victims. If these observations are correct, it must be concluded that there is a tendency here for the experimental data to overstate the extent of disagreement among the judges. But one would also expect that this tendency would be less strong in those cases with fact patterns familiar to the judges: if the judge had a body of his own highly relevant sentencing experience to guide him in deciding upon a sentence in the experiment, the influence of less thorough deliberation or a diminished sense of responsibility would be expected to be greatly reduced.

As was noted earlier, the goal in selecting the twenty cases was to find cases of familiar types. Nevertheless, given differences in the offense mix from district to district, not all of the cases were likely to seem familiar to all of the participating judges. On the basis of the data contained in Table 2, it seems reasonable to conclude that Cases 1, 2, 3, 6, 13, 14, 15, and 17 involved offenses that would be familiar to all judges with the exception of those quite recently appointed and, in some of the cases, with the additional exception of the two judges in the District of Vermont. Putting Vermont aside, each of these offense categories accounted for at least as many defendants sentenced in each district in 1973 as there were active judges sitting in the district. For these eight cases, which might be thought to be more reliable indicators of courtroom performance than the others, the pattern of disagreement shown by Table 1 is not markedly different from that for the other twelve. Moreover, the pattern holds up even if we eliminate those judges who entered on duty within the last five years, a procedure that incidentally eliminates both of the Vermont judges. The results of this elimination are presented in Table 4. Since only 32 of the 50 participating judges entered on duty before 1969, this table uses the fourth and eighth sentences, rather than the sixth and twelfth, to approximate the octiles and quartiles. The table shows that the distribution of the sentences of the relatively experienced judges in these cases is very similar to the distribution of the sentences of all the judges that is presented in Table 1. In the light of this pattern of sentences rendered by relatively experienced judges in cases involving relatively familiar offenses, it seems probable that the tendency for the experimental sentences to be more disparate than courtroom sentences, if it indeed exists it all, is not a very strong one.

### *The Use of Identical Presentence Reports*

For each case in the study, all of the sentences were rendered on the basis of information contained in identical presentence reports submitted over the signature of a fictitious chief probation officer named James E. Miller. In actual practice, by contrast, defendants in cases that are quite similar may well have their presentence investigations conducted by different probation officers who react differently to similar facts and whose varying perceptions affect both the factual presentation to the judge and, if there is one, the recommendation. This difference between the experimental practice and actual practice may affect the data in several ways. First, and most obvious, by eliminating the differences in probation officers' perceptions we have eliminated a factor which in actual practice must tend to be disparity-creating. Indeed, it is possible that there are not only individual differences among the probation officers, but that we may also have eliminated institutional differences among probation offices that would also tend to create more disparity when judges from six separate districts are considered together.

But is is also possible that we have eliminated a disparity-reducing influence, at least within individual districts. It will be seen in Chapter IV that Mr. James E. Miller's sentence recommendations carried very little weight with the judges

in the experiment. It may be however, that the recommendations of their own chief probation officers—in those districts in which recommendations are made—would carry considerable weight. If that is the case, and if the chief probation officers in those districts manage to achieve some institutional consistency in the recommendations they make, the disparity shown in the study, insofar as it is among judges in the same districts, would tend to be somewhat overstated in comparison with what actually occurs in the courtroom.



TABLE 4.—SENTENCES IN 8 CASES BY JUDGES WHO ENTERED ON DUTY BEFORE 1969

| | Case number | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 6 | 13 | 14 | 15 | 17 |
| Most severe sentence | 20 yr prison; $65,000 | 18 yr prison; $5,000 | 10 yr prison; 5 yr probation. | 3 yr prison; $5,000 | 1½ yr prison | YCA indet | 1 yr prison; $3,000 | 3 yr prison. |
| 4th most severe sentence. | 15 yr prison; $35,000 | 15 yr prison | 6 yr prison; 5 yr probation. | do | 6 mo prison; 2 yr probation. | do | 6 mo prison; 3½ yr probation. | 1 yr prison. |
| 8th most severe sentence. | 10 yr prison; 5 yr probation; $40,000. | 15 yr prison [(a)(2)] | 5 yr prison; 5 yr probation [(a)(2)]. | 2½ yr prison; $5,000. | 6 mo prison; 18 mo probation. | 1 yr prison | 3 mo prison; 2 yr probation; $5,000. | 6 mo prison; 3 yr probation. |
| Median sentence | 10 yr prison; $20,000 | 10 yr prison | 5 yr prison; 3 yr probation. | 1 yr prison; $5,000 | 4 yr probation | 3 yr probation | 3 yr probation; $10,000. | 4 yr probation. |
| 8th least severe sentence. | 5 yr prison; 5 yr probation; $10,000. | 7 yr prison | 4 yr prison; 3 yr probation [(a)(2)]. | 1 yr prison; $5,000 | 2 yr probation; $500 | 2 yr probation | 2 yr probation; $5,000. | 3 yr probation. |
| 4th least severe sentence. | 5 yr prison; $158,000 [(a)(2)]. | 5 yr prison | 3 yr prison; 3 yr probation. | 6 mo prison; 2 yr probation; $5,000. | 2 yr probation | do | 2 yr probation; $1,000. | 2 yr probation. |
| Least severe sentence | 3 yr prison | do | 2 yr prison; 3 yr probation. | 3 mo prison; 5 yr probation; $5,000. | do | do | 1 yr probation; $1,000. | Do. |
| Number of sentences ranked. | 28 | 31 | 29 | 31 | 31 | 28 | 29 | 31. |

A third possible effect of using identical presentence reports is that judges may have received some of the information in somewhat unfamiliar form. This does not seem likely to have had a major impact on the sentences rendered, inasmuch as the general format of the presentence report is prescribed by the Probation Division of the Administrative Office and is closely followed in all of the six districts of the Second Circuit. The only problem that was specifically observed was that, in Cases 2 and 9, the report did not call attention to the possibility of a Youth Corrections Act sentence. It is possible that this omission might have influenced the sentence of a judge whose probation office regularly presents the sentencing alternatives exhaustively, but it doesn't seem very likely that the distribution of sentence in either of those two cases could have been influenced very much.

Overall, it seems probable that the net effect of using identical presentence reports was some understatement of the extent of disparity.

*Failure to Simulate Sentencing Council in the Eastern District of New York*

For many years, practice in the Eastern District of New York has required that the sentence be rendered only after the sentencing judge has had an opportunity to consult with two of his colleagues in a sentencing council. In the course of the planning for the sentencing study, it was decided not to ask the judges of the Eastern District to simulate the sentencing council. The sentences received from the ten participating judges in the Eastern District therefore do not reflect the influence of their normal collegial procedure. To that extent, the sentences reported in the study must be taken as representing the sentences that would have been given in the absence of the sentencing council, rather than those that are actually handed down. Presumably, the sentences actually handed down by Eastern District judges are more nearly in agreement with one another.

*Conclusion*

The sentences reported in Table 1 are sentences rendered in a game. The object of the game was to simulate actual sentencing decisions. It is in the nature of games of this type that they are imperfect. But if we cannot eliminate the imperfections, we can try to evaluate their likely impact on the experimental data. In the foregoing discussion, we have considered several such imperfections and reached the following conclusions:

1. The cases selected for the experiment are sufficiently representative that a finding of considerable disparity in this group of cases would support the conclusion that considerable disparity exists in a substantial proportion of Second Circuit cases.

2. The inability to simulate face-to-face contact with defendants in the experiment probably did not tend to produce an overstatement of the extent of disparity.

3. The fact that the sentences in the experiment would not in fact be carried out may have tended toward overstatement of the extent of disparity, but any such tendency does not appear to have been strong.

4. To extent that probation office sentencing recommendations may tend to bring different judges together in their actual sentencing decisions, the use of identical presentence reports signed by a fictitious probation officer may have tended toward overstatement of the extent of disparity, but the net effect of using identical presentence reports probably tended toward understatement rather than overstatement.

Subject to the caveat that the sentences from the Eastern District must be considered to represent sentences that would have been rendered in the absence of a sentencing council procedure, we therefore conclude that the disparity exhibited in Table 1 is a reasonably good approximation of what really happens in the courtrooms of the circuit.

## CHAPTER III—PATTERNS OF SENTENCES

### A. *Introduction and Summary*

In Chapter II, the focus was on the question whether substantial disparity exists among the district judges of the Second Circuit. In this chapter, an effort is made to analyze the disparity that has been observed by looking for patterns in the data that may increase our understanding of it. The analysis here is based on the same sentences that formed the basis for Chapter II.



The first question treated is whether the disparity observed in the previous chapter is primarily a result of disagreement among judges within individual districts or primarily a result of differences in sentencing practices among districts. It is concluded that substantial disparity exists within districts, and that differences among districts are of secondary importance. In addition, the disparity found among judges of the Eastern District of New York casts doubt on the theory that sentencing councils tend to generate common approaches to sentencing among the judges who participate.

The second question considered is whether experience on the Federal bench tends to bring judges closer together in their sentences. No evidence is found of any such tendency.

The third question addressed in the chapter is whether the disparity observed is a function of some judges habitually rendering relatively severe sentences while others habitually render light ones. It is concluded that the disparity is not so easily explained. The overwhelming majority of the Second Circuit judges are sometimes severe relative to their colleagues and sometimes lenient. If there are indeed "hanging judges" and lenient ones—and it would appear that there are a few—their contribution to the disparity problem is minor compared to the contribution made by judges who cannot be so characterized.

### B. *Methods of Analysis*

In comparing sentences with one another, we are limited by the fact that there is no single unit of measurement. If one judge sentences to six months in prison and another imposes only a $5,000 fine, we can probably agree that the first judge was more severe but we have no meaningful way of saying how much more severe he was. Our inability to do so serves to limit the number of statistical tools available for analyzing the data in a study of this type.

The principal tool used in this chapter and Chapter IV is known as the Kolmogorov-Smirnov test. This test does not require that we be able to measure the differences between sentences, but it does assume that we are able to rank sentences in order of severity. If that assumption is made, the test can be used to compare the sentences of two groups of judges in a particular case and ask whether the relative severity of their sentences is so different that the difference is unlikely to have occurred simply by chance. For example, if 60 percent of the experienced judges in the circuit rendered sentences of three years' prison or more in a case and only 50 percent of the inexperienced judges were that severe, the difference of 10 percent might well be due to one or more factors, unrelated to experience, that just happened to be distributed unequally between the two groups of judges. We could not conclude on this evidence that there is a relationship between the severity of a judge's sentences and the length of his experience on the bench. But if 60 percent of the experienced judges and only 10 percent of the inexperienced judges rendered sentences this severe, the 50-percent difference would not be likely to have resulted solely from the chance distribution of some irrelevant characteristic among experienced and inexperienced judges. We would conclude that there was a difference among the sentences that was related to experience. The Kolmogorov-Smirnov test is essentially a system for evaluating the likelihood that observed differences of this type might have occurred by chance.

The test is used here at the 95-percent confidence level. Thus, an observed difference between the sentences of two groups of judges will be treated as significant only if there are fewer than 5 chances in 100 that the difference could have occurred through the operation of chance.

Even so, it should be recognized that we run the risk of affirming some relationships that don't really exist. We run a greater risk, however, of rejecting with a Scotch verdict some relationships that do really exist. Indeed, given the number of judges whose sentences are the subject of this study, the Kolmogorov-Smirnov test generally requires that there appear, for at least one sentence in the case, a difference in the neighborhood of 40 percentage points between the two groups being compared before we can reject, at the 95-percent confidence level, the possibility that the difference in the sentences observed had nothing to do with the characteristic being studied.[2]

We will be assisted somewhat in the present chapter by our ability to test for differences between groups of judges not in one case but in twenty. If, for example, the more experienced judges as a group gave more severe sentences in each of our twenty cases, we would conclude that experienced judges sentence more severely even if we could not claim statistical significance in any single case.

[2] The Kolmogorov-Smirnov test is described in Conover, Practical Nonparametric Statistics, at 308–14 (1971).

Partly because the twenty cases do not constitute a statistically representative sample of Second Circuit cases and partly because there does not appear to be an acceptable statistical test available, there is no mathematical way of determining when such a conclusion is justified. Thus a certain amount of nonstatistical judgment is involved.

*C. Disparity Within Districts*

Tables 5, 6, and 7 display the sentences rendered in the twenty cases separately for the Southern District of New York, the Eastern District of New York, and the four other districts considered together. Because of a commitment that the sentences rendered by individual judges would be kept confidential, it is not possible to publish separately the sentences rendered for each of the smaller districts.

TABLE 5.—SENTENCE IN 20 CASES BY JUDGES OF THE SOUTHERN DISTRICT OF NEW YORK

| | Case No. | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| Most severe sentence | 20 yr prison; $10,000. | 18 yr prison; $5,000. | 10 yr prison; 3 yr probation. | 5 yr prison | 5 yr prison; 3 yr probation. | 3 yr prison; $5,000. | 2 yr prison | YCA indet. | 1 yr prison; 2 yr unsupervised probation. | 1 yr prison |
| 4th most severe sentence | 15 yr prison; $35,000. | 15 yr prison; | 7 yr prison; 3 yr probation. | do | 4 yr prison; 2 yr probation. | do | do | 1 yr prison; 3 yr probation. | 6 mo prison; 2 yr unsupervised probation. | 6 mo prison |
| 8th most severe sentence | 15 yr prison | 10 yr prison; $5,000. | 5 yr prison; 5 yr probation. [(a)(2)]. | 4 yr prison | 3 yr prison; 3 yr probation. | 2 yr prison; $5,000. | 15 mo prison | 6 mo prison; 2½ yr probation. | 6 mo prison | 3 mo prison; 27 mo probation. |
| Median sentence | 10 yr prison; $75,000. | 10 yr prison | 5 yr prison; 3 yr probation. | 3 yr prison; 2 yr probation. | 2 yr prison; 3 yr probation. | 1 yr prison; $5,000. | 1 yr prison | 6 mo prison | 3 mo prison; 55 mo unsupervised probation. | 2 mo prison; 1 yr probation. |
| 8th least severe sentence | 10 yr prison; $32,500. | 7 yr prison | 3 yr prison; 3 yr probation. | 3 yr prison | 1½ yr prison; 3 yr probation. | 6 mo prison; 2½ yr probation; $5,000. | 6 mo prison; 18 mo probation. | 2 mo prison; 18 mo probation. | 2 yr unsupervised probation. | 2 yr probation |
| 4th least severe sentence | 8 yr prison; $20,000. | 5 yr prison | do | do | 5 yr probation | 6 mo prison; $5,000. | 4 yr probation | 3 yr probation | do | 2 yr probation |
| Least severe sentence | 5 yr prison; $50,000. | do | 1 yr prison; 5 yr probation. | 1 yr prison | 2 yr probation | 3 mo prison; $5,000. | 1 yr probation | 1 yr probation | Suspended if leave United States | 1 yr probation |
| Number of sentences ranked. | 27 | 29 | 29 | 29 | 28 | 28 | 23 | 27 | 30 | 29 |

| | Case number | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| Most severe sentence | 6 mo prison; 6 mo probation; $5,000. | 1 yr prison | 1½ yr prison | YCA indet | 1 yr prison; $3,000. | 2 mo prison; 16 mo probation. | 3 yr prison | 6 mo prison; 18 mo probation. | 2 yr prison; $2,500. | 6 mo prison; 2 yr probation; $1,000. |
| 4th most severe sentence | 6 mo prison; $5,000. | 6 mo prison; 3½ yr probation. | 6 mo prison; 2 yr probation. | do | 6 mo prison; $5,000. | 3 yr probation | 1 yr prison | 2 mo prison; 1 yr probation. | 1 yr prison; $10,000. | 3 mo prison; $1,000. |
| 8th most severe sentence | 3 mo prison; 21 mo probation; $2,500. | 3 mo prison; 21 mo probation. | 6 mo prison; 18 mo probation. | do | 3 mo prison; $5,000. | do | 3 mo prison; 3 yr probation. | 3 yr probation | 6 mo prison; 6 mo probation; $10,000. | 3 yr probation; $1,000. |
| Median sentence | 1 mo prison; 11 mo probation; $5,000. | 1 mo prison; 1 yr probation. | 3 mo prison; 21 mo probation. | 6 mo prison | 3 yr probation; $5,000. | 2 yr probation | 3 yr probation | do | 3 mo prison; $5,000. | 2 yr probation; $500. |
| 8th least severe sentence | 1 mo prison; 11 mo probation; $2,500. | 1 yr probation | 2 yr probation | 2 yr probation | 2 yr probation; $5,000. | do | 2 yr probation | 2 yr probation | 2 yr probation; $10,000. | 1 yr probation; $1,000. |
| 4th least severe sentence | 6 mo probation; $5,000. | do | do | do | 2 yr probation; $1,000. | 1 yr probation | do | 1 yr probation | 18 mo probation; $1,000. | 1 yr probation; $500. |
| Least severe sentence | $2,500 | 6 mo probation | do | 1 yr probation | 1 yr probation; $2,500. | 2 yr unsupervised probation. | 1 yr probation | do | 1 yr probation; $5,000. | $1,000. |
| Number of sentences ranked. | 26 | 28 | 29 | 26 | 27 | 28 | 27 | 28 | 27 | 28. |



TABLE 6.—SENTENCES IN 20 CASES BY JUDGES OF THE EASTERN DISTRICT OF NEW YORK

| | Case number | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | |
| 15 yr prison; 5 yr probation $50,000; [(a)(2)]. | 15 yr prison | 10 yr prison; 5 yr probation. | 7½ yr prison | 4 yr prison; 3 yr probation. | 3 yr prison; $5,000 | 2 yr prison | YCA indet | 3 yr prision | 6 mo prison; 3 yr probation. | |
| 15 yr prison; $5,000 | 15 yr prison | 5 yr prison 8 yr probation. | 6 yr prison; [(a)(2)]. | 3 yr prison; 3 yr probation. | 3 yr prison; $2,500. | do | do | 1 yr prison | 6 mo prison; 18 mo probation. | |
| 12 yr prison; $15,000 | 15 yr prison. [(a)(2)] | 5 yr prison; 5 yr probation. | 5 yr prison | 3 yr prison; 3 yr probation. | 3 yr prison. [(a)(2)] | do | do | 6 mo prison; 2½ yr unsupervised probation. | 3 mo prison; 21 mo probation. $250. | |
| 10 yr prison; $50,000. | 15 yr prison. [(a)(2)] | 5 yr prison; 5 yr probation [(a)(2)] | 4 yr prison. [(a)(2)] | 6 mo prison; 6½ yr probation. | 2 yr prison | 2 yr prision [(a)(2)] | 3 mo prison; 5 yr probation [sec. 4209] | 6 mo prison; 2 yr unsupervised probation | 3 mo prison; 21 mo probation. | |
| 8 yr prison; $75,000 | 15 yr prison [(a)(2)] | 5 yr prison; 5 yr probation. [(a)(2)] | 3 yr prison; 5 yr probation. [(a)(2)] | 5 yr probation; $500. | 1½ yr prison; $5,000. | 1 yr prison | 3 mo prison; 2 yr probation [sec. 4209] | 5 mo prison; 43 mo unsupervised probation | 3 yr probation; $500. | |
| 7 yr prison; $8,200 | 10 yr prison; $3,500. [(a)(2)] | 5 yr prison; 5 yr probation. [(a)(2)] | 3 yr prison | 5 yr probation | 1 yr prison; $5,000. | 6 mo prison; 1 yr probation | 2 mo prison; 3 yr probation. [sec. 4209] | 4 mo prison; 2 yr unsupervised probation. | 3 yr probation. | |
| 5 yr prison; 3 yr probation; $60,000. | 10 yr prison. [(a)(2)] | 4 yr prison; 5 yr probation. [(a)(2)] | 6 mo prison; 2½ yr probation. | do | | 2 yr probation | 1 mo prison; 35 mo probation. | 3 mo prison; 2 yr unsupervised probation. | Do. | |
| 5 yr prison; 2 yr probation; $20,000. [(a)(2)] | 8 yr prison. [(a)(2)] | do | | | | | | 2 mo prison; 2 yr unsupervised probation. | Do. | |
| 5 yr prison; $158,000. [(a)(2)] | 6 yr prison. [(a)(2)] | 6 mo prison; 2½ yr probation. $3,000. | | | | | | 1 mo prison; 2 yr unsupervised probation. | Do. | |
| 5 yr prison; $25,000 | 5 yr prison | 4 mo prison; $10,000; 32 mo unsupervised probation. | | | | | | 5 yr unsupervised probation. | | |
| 10 | 10 | 7 | 7 | 6 | 10 | 7 | 7 | 10 | 9. | |

| Case Number | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| 3 mo prison; 9 mo probation; $5,000. | 6 mo prison; 3 yrs probation. | 6 mo prison; 2½ yr probation. | YCA Indet | 1 yr prison; $2,500. | YCA Indet | 6 mo prison; 4½ yr probation. | 5 yr probation | 6 mo prison; 18 mo probation; $2,500. | 1 yr prison; $1,000. |
| 6 weeks prison; 2 yr probation; $1,000. | 6 mo prison; 2½ yr probation. | 6 mo prison; 18 mo probation. | do | 6 mo prison; 3½ yr probation. | do | 6 mo prison; 2 yr probation. | 3 yr probation; $250. | 1 mo prison; 11 mo probation; $2,500. | 3 mo prison; 21 mo probation; $1,500. |
| 1 mo prison; 3 yr probation. | 3 mo prison; 2 yr probation. | 5 mo prison; 31 mo probation. | 2 yr prison | 6 mo prison; 18 mo probation; $10,000. | 3 yr probation | 6 mo prison; 18 mo probation. | 3 yr probation; $100. | 3 yr probation; $7,500. | 1 mo prison; 11 mo probation; $500. |
| 1 mo prison; 23 mo probation; $3,000. | 3 mo prison; 21 mo probation. | 4 mo prison; 44 mo probation. | 5 yr probation | 2 mo prison; 3 yr probation; $2,500. | do | 3 mo prison; 5 yr probation. | 3 yr probation; $50. | 3 yr probation; $5,000. | 3 yr probation; $2,000. |
| 2 yr probation; $7,500. | 3 mo prison | 3 yr probation | 2½ yr probation | 1 mo prison; 35 mo probation; $5,000. | do | 2 mo prison; 3 yr probation. | 3 yr probation | do | 3 yr probation; $1,000. |
| $7,500; 1 yr unsupervised probation. | 1 mo prison; 35 mo probation. | do | 2 yr probation | 3 yr probation; $5,000. | do | 5 yr probation | do | 3 yr probation; $4,000. | 3 yr probation; $500. |
| $5,000 | 2 yr probation | do | | 3 yr probation; $2,500. | do | 4 yr probation | do | 18 mo probation; $5,000. | do |
| | | 2 yr probation; $500. | do | do | do | 3 yr probation | 2 yr probation; $200. | 1 yr probation; $7,500. | 2 yr probation; $1,000. |
| | | 2 yr probation | do | 2 yr probation; $3,500. | do | 2 yr probation | 2 yr probation; $100. | $5,000 | 2 yr probation. |
| | | | | 2 yr probation; $2,500. | do | do | 1½ yr probation | $2,500 | 1 yr probation; $250. |
| 7 | 7 | 9 | 6 | 10 | 7 | 9 | 10 | 10 | 10. |

Note: This table shows every sentence in each case, in declining order of severity.

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TABLE 7.—SENTENCES IN 20 CASES BY JUDGES OF THE 4 SMALLER DISTRICTS

| Case number | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 20 yr prison; $65,000. | 17 yr prison | 6 yr prison; 4 yr probation. | 5 yr prison | 3 yr prison; 2 yr probation. | 3 yr prison; $5,000. | 2 yr prison | YCA Indet | 6 mo prison | 6 mo prison; 3 yr probation. |
| 15 yr prison; $50,000. | 15 yr prison; [(a)(2)]. | 5 yr prison; 5 yr probation. | 4 yr prison | 3 yr prison; probation [(a)(2)]. | 2 yr prison; $5,000. | 1½ yr prison | do | 3 mo prison; 3 yr unsupervised probation. | 4 mo prison; 3 yr probation. |
| 15 yr prison; $50,000 [(a)(2)]. | 14 yr prison | 5 yr prison; 5 yr probation [(a)(2)]. | 3 yr prison | 2 yr prison; 3 yr probation. | 1½ yr prison; $5,000. | do | 1 yr prison | 3 mo prison; 2 yr unsupervised probation. | 3 mo prison; 2 yr probation. |
| 10 yr prison; $20,000. | 12 yr prison | 5 yr prison; 3 yr probation [(a)(2)]. | do | do | 1 yr prison; $5,000. | 1 yr prison | 4 mo prison; 3 yr probation. | do | 2 mo prison; 2 yr probation. |
| 10 yr prison; $10,000. | 12 yr prison [(a)(2)]. | do | do | do | do | do | 2 mo prison; 3 yr probation. | 2 mo prison; 5 yr unsupervised probation. | 2 mo prison; 22 mo probation. |
| 8 yr prison; $15,000 | 10 yr prison | do | do | 2 yr prison; 2 yr probation. | do | 6 mo prison; 5 yr probation. | 5 yr probation | 2 mo prison; 22 mo unsupervised probation. | 3 yr probation; $500. |
| 5 yr prison; 3 yr probation; $10,000. | do | 4 yr prison; 10 yr probation [(a)(2)]. | do | 1 yr prison; 4 yr probation. | 6 mo prison; 2½ yr probation; $5,000. | 6 mo prison; 5 yr probation. | 3 yr probation (sec. 4209). | 2 mo prison; 10 mo unsupervised probation. | 3 yr probation. |
| 3 yr prison | 8 yr prison | 4 yr prison; 3 yr probation. | 2 yr prison | 6 yr probation | 6 mo prison; $5,000. | 6 mo prison; 18 mo probation. | | 2 mo prison | Do. |
| | 7½ yr prison [(a)(2)]. | 3 yr prison; 3 yr probation. | 4 yr probation | do | do | 3 mo prison; 3 yr probation. | | 1½ mo prison; 2 yr unsupervised probation. | Do. |
| | do | do | | | 3 mo prison; 5 yr probation; $5,000. | | | | Do. |
| 8 | 9 | 10 | 9 | 8 | 10 | 9 | 7 | 9 | 10. |

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| | Case no. | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 |
| 6 mo prison; $2,500 | 2 mo prison; 2 yr probation. | 4 mo prison; 20 mo probation. | 1 yr prison | 1 yr prison; $3,000. | 1 mo prison; 2 yr probation. | 6 mo prison; 3 yr probation. | 2 mo prison; 3 yr probation. | 3 mo prison; $10,000. | 3 yr probation; $200. |
| 4 mo prison; 2 yr probation; $5,000. | 4 yr probation | 3 mo prison; 3 yr probation. | 6 mo prison; 5 yr probation. | 6 mo prison; 3 yr probation; $10,000. | 5 yr probation | 6 mo prison; 3 yr probation. | 5 yr probation | 2 yr probation; $10,000. | 3 yr probation. |
| 1 mo prison; 2 yr probation. | 3 yr probation | 2 mo prison; 3 yr probation. | 4 yr probation | 3 mo prison; 2 yr probation; $3,000. | 3 yr probation | 1 mo prison; 3 yr probation. | do | 2 yr probation; $10,000. | 2 yr probation; $1,000. |
| 1 mo prison; 1 yr probation; $5,000. | do | 3 yr probation | 3 yr probation | 1 mo prison; 11 mo probation; $2,500. | do | 4 yr probation | 3 yr probation | 2 yr probation; $5,000. | 2 yr probation; $500. |
| 1 mo prison; 11 mo probation; $3,500. | 2 yr probation | do | do | 4 yr probation; $2,000. | do | do | do | 2 yr probation; $5,000. | 2 yr probation; $500. |
| 1 mo prison; $7,500. | do | do | 2 yr probation | 3 yr probation; $8,000. | do | do | 2 yr probation | 2 yr probation; $5,000. | 2 yr probation. |
| 3 yr probation; $2,000. | do | do | do | 2 yr probation; $5,000. | 2 yr probation | do | do | 2 yr probation; $1,000. | Do. |
| 2 yr probation; $6,000. | do | do | do | 1 yr probation; $1,000. | do | do | do | 2 yr probation | Do. |
| 2 yr probation; $5,000. | 1 yr probation | 2 yr probation | do | do | do | do | do | do | Do. |
| $5,000 | do | do | do | do | do | 2 yr probation | do | $5,000 | 1 yr probation; $500. |
| 10 | 9 | 10 | 7 | 8 | 7 | 10 | 10 | 10 | 10. |

Note: This table shows every sentence in each case, in declining order of severity.



Table 5, which displays the sentences for the Southern District of New York, is similar in format to Table 1. Since thirty of the participating judges were from the Southern District, the fourth most severe and least severe sentences are used to approximate the octiles, and the eighth most severe and least severe to approximate the quartiles. Tables 6 and 7, on the other hand, display every sentence rendered in the experiment by judges in the other districts. With ten participating judges in the Eastern District and ten in the four smaller districts, nothing would be gained by displaying only selected points on the rank list.

Tables 5 and 6 make it clear that the disparity observed in Chapter II is not wholly a problem of disagreement among districts. Within both the Southern and Eastern Districts of New York, there is very substantial disagreement. Moreover, inspection of the detailed data underlying Table 7 indicates that the smaller districts are not exceptions.

There is also in the data some evidence of differences among districts. It suggests that sentences in the Eastern District tend on the whole to be somewhat more severe than the median sentences for the entire circuit in particular cases, that sentences in the four smaller districts tend to be less severe, and that sentences in the Southern District are about equally distributed around the median. The figures are presented in Table 8.

Because Table 8 is not based on a random sample of cases, it is not possible to make a statement about the statistical significance of this data. In addition, application of the Kolmogorov-Smirnov test on a case-by-case basis does not suggest that the differences among districts are particularly strong. While it seems probable that there is some tendency for the Eastern District judges to be more severe than the circuit generally and for the judges from the four smaller districts to be less severe, it also seems clear that the venue is a good deal less important than the identity of the individual judge.

TABLE 8.—SENTENCES IN 20 CASES, BY DISTRICT, COMPARED WITH CIRCUIT-WIDE MEDIAN SENTENCES IN THOSE CASES

| | E.D. N.Y. | S.D. N.Y. | 4 smaller districts |
|---|---|---|---|
| Number of sentences more severe than median sentence in same case | 96 | 233 | 61 |
| Number of sentences equal to median sentence | 15 | 84 | 29 |
| Number of sentences less severe than median sentence | 57 | 236 | 90 |
| Total sentences in 20 cases | 168 | 553 | 180 |

The tables showing sentences by district also cast some light on the sentencing-council procedure used in the Eastern District of New York. The sentencing council is thought by many to reduce disparity in two ways. First, the sentencing judge has the benefit of his colleagues' wisdom in arriving at a sentence in a particular case, and is thought likely to be discouraged from rendering a sentence greatly out of line with his colleagues' views. Second, the practice of discussing sentencing problems on a regular basis is thought likely to bring the participating judges closer together in their approach to sentencing problems. It is extremely difficult to evaluate these claimed effects with data about actual sentencing councils, since they involve constantly changing trios of judges. The current study, of course, provides no opportunity to evaluate the immediate effect of a collegial process on sentences in cases that are considered in sentencing councils. But Table 6 suggests that the alleged effect on judges' ways of approaching sentencing, if it exists at all, is not very effective in creating a common approach among the judges of a district. This is not to say that participating in sentencing councils is not educational. It is to suggest, however, that the generation of a common approach should not be regarded as one of the major benefits of that particular kind of education. Each of the Eastern District judges entered on duty in 1971 or earlier, so the sentences in Table 6 are sentences of judges who all had at least two years of sentencing council experience.

### *D. The Effect of Experience on the Federal Bench*

It might be thought that experience on the bench would tend to be a moderating factor in sentencing disparity—that experienced judges, as a consequence not only of their experience in actual sentencing but also of their greater opportunities to consider sentencing problems in sentencing institutes and other forums, would have developed greater consensus among themselves than the judges with less

experience. If this were true, it would suggest that disparity in sentencing might be somewhat moderated through efforts to find training substitutes for the experience that the more recently appointed judges lack. An analysis was therefore undertaken to determine whether a greater consensus was in fact exhibited in the twenty cases by the more experienced judges.

For the purposes of this analysis, the judges were divided into two groups: those who entered on duty in July 1971 or later, and those who entered on duty in August 1968 or earlier. Since none of the participating judges entered on duty in the three years between those two dates, this division followed a natural break in the data. For the circuit as a whole, 32 of the participating judges were in the more experienced group and 18 in the less experienced group. For the Southern District of New York, which was also analyzed separately, 17 judges were in the more experienced group and 13 in the less experienced.

The Kolmogorov-Smirnov test indicates that there are not statistically significant differences in the rank lists of sentences when the experienced and inexperienced judges are compared, either at the circuit level or within the Southern District. Within each group of twenty comparisons, a significant difference at the 95-percent confidence level was found for one case; in twenty tests at a 95-percent confidence level, that can easily happen by chance.

Another way of examining the effect of experience is to ask whether the sentences of experienced judges are often found among both the most severe and the least severe sentences on the rank list. To answer that question, a group of extreme sentences was identified at each end of the rank list for each case. The number of sentences in the group was variable because, if two or more judges gave identical sentences, there was no basis for choosing among them; blocks of identical sentences had to be completely included or completely excluded. At the circuit-wide level, groups of six sentences were sought; if the sixth and seventh sentence were identical, a group of five was sought; if the fifth through seventh sentences were identical, a group of four was sought; and if the fourth through seventh were identical, the group of seven or more was accepted rather than accepting a group as small as three. Within the Southern District the first choice was a group of four, then a group of three, and then a group of five or more. This technique produced groups ranging from four to twelve sentences for the circuit as a whole, and from three to nine for the Southern District.

At the circuit level, half or more of the most severe sentences were rendered by experienced judges in every one of the 20 cases. Half or more of the least severe sentences were rendered by experienced judges in 14 of the 20 cases. Within the Southern District, half or more of the most severe sentences were rendered by experienced judges in 19 of the 20; half or more of the least severe in 11 of the 20. Within the circuit, some 64 percent of the participating judges were classified as experienced; within the Southern District, 57 percent.

Neither the Kolmogorov-Smirnov test nor the examination of the extremes of the rank lists completely precludes the possibility that experience on the Federal bench does have some tendency to reduce disparity. But it is entirely clear that much disparity exists among experienced judges, and that this remains true even if venue is controlled for by examining the sentences of judges within a single district.

*E. Consistency Among Judges*

The final question addressed in this chapter is whether the disparity that exists reflects a consistent tendency of some judges to impose severe sentences and of others to impose light ones.

The analytical technique used to deal with this question required ranking the sentences in each case in order of severity and then, for each judge, comparing the ranks assigned to his sentences in different cases. The most severe sentence in a case was given a rank of 1, the next most severe was given a rank of 2, and so on. Since different numbers of judges sentenced in the various cases, however, a continuation of this process would have made the numbers at the other end of the scale noncomparable: a rank of 39 might be the least severe sentence in one case but the tenth least severe in another. To adjust for this, a judge who did not sentence in a particular case was arbitrarily put into the rank list for that case at a point suggested by his average rank in the cases in which he did sentence, with the result that every judge had a rank in each case.

Each time a judge is given an arbitrary rank by this procedure, it of course tends to increase the apparent consistency of his sentencing. The effect on the data for the other judges is less clear, however. Since ranks are relative, their places in the rank list would be affected by the arbitrary ranking of another judge,



but the direction of that effect might be expected to vary from judge to judge and case to case. To reduce the impact of this factor, only the sentences in the thirteen cases having 45 sentences or more were included in the analysis. Of the 650 ranks analyzed for these thirteen cases, only 39, or 6 per cent, were arbitrary; not more than 5, or 10 per cent, were arbitrary in any single case.

Table 9 shows, for each of the 50 judges, his average rank in the thirteen cases, and also his lowest and highest ranks. The table is arranged in declining order of judge severity as indicated by the average rank. Thus, Judge #1 was the most severe judge, with an average rank of 5.4. His lowest rank was 1, indicating that he gave the most severe sentence in at least one case. His highest rank was 11.

In accordance with a common statistical convention, an averaging process was used when two or more judges gave identical sentences. If the most severe sentence in a case was ten years in prison, the next most severe nine years, and the next two judges sentenced to eight years, these last two judges would be given a rank of 3.5 rather than being treated as tied with a rank of 3; the next rank would be 5. If three judges gave the eight-year sentence, they would all be given a rank of 4 and the next rank would be 6. It is, therefore, not quite accurate to say that Judge #1 was among the 11 most severe in each of the thirteen cases. That statement is a reasonably good approximation, however.

For any given case, the average rank is 25.5, as is the median. If a judge were exactly in the middle of the rank list for each case, therefore, the average rank for that judge would be 25.5. If his average rank was less than 25.5 he may be said, on the whole, to have been somewhat more severe than his fellow judges in these thirteen cases; if more than 25.5, somewhat less severe.

Table 9 shows that most of the judges had average ranks quite close to the center. Some 29 of the 50 judges had average ranks within three points of 25.5. But the table also shows that these closely average ranks are averages of widely differing ranks in individual cases. Judge #33, for example, with an average rank of 27.0, rendered the least severe sentence in at least one case and the second most severe in another. Of the 29 judges with averages between 22.5 and 28.5, 26 judges had a sentence that ranked among the ten most severe in at least one case and a sentence that ranked among the ten least severe in at least one other. Thus, relative to one another, individual judges appear sometimes lenient and sometimes severe. The pattern persists even with the judges whose average ranks are outside the middle group. Of the judges at the more severe end of the scale, only the first two can be said to have been consistently severe; of those at the more lenient end, only one appears to be consistent. Consistency of relative position is thus very much the exception.

TABLE 9.—RANKS OF SENTENCES OF INDIVIDUAL JUDGES IN 13 CASES

[A rank of 1 represents the most severe sentence given in a case; a rank of 50 the least severe. More complete data is provided in appendix C.]

| Judge [1] | Average rank | Lowest rank | Highest rank |
|---|---|---|---|
| 1 | 5.4 | 1.0 | 11.0 |
| 2 | 10.6 | 3.5 | 23.0 |
| 3 | 12.1 | 1.0 | 47.0 |
| 4 | 15.3 | 1.0 | 44.0 |
| 5 | 19.2 | 1.5 | 48.5 |
| 6 | 19.2 | 2.0 | 46.0 |
| 7 | 19.6 | 6.0 | 39.0 |
| 8 | 19.6 | 2.0 | 45.5 |
| 9 | 20.8 | 1.0 | 49.5 |
| 10 | 22.7 | 2.0 | 45.0 |
| 11 | 22.8 | 3.0 | 44.0 |
| 12 | 23.0 | 3.0 | 44.5 |
| 13 | 23.4 | 4.0 | 37.5 |
| 14 | 24.3 | 3.0 | 47.0 |
| 15 | 24.5 | 4.0 | 46.0 |
| 16 | 24.5 | 2.0 | 46.0 |
| 17 | 24.6 | 10.0 | 44.5 |
| 18 | 24.6 | 7.0 | 44.5 |
| 19 | 24.6 | 2.0 | 43.0 |
| 20 | 24.7 | 3.0 | 44.5 |
| 21 | 25.0 | 1.5 | 47.0 |
| 22 | 25.2 | 2.0 | 47.0 |
| 23 | 25.5 | 6.5 | 48.0 |
| 24 | 25.7 | 3.5 | 48.0 |
| 25 | 25.8 | 1.0 | 44.5 |
| 26 | 25.9 | 8.0 | 47.0 |
| 27 | 26.0 | 3.5 | 44.0 |

See footnote at end of table p. 8126.

TABLE 9.—RANKS OF SENTENCES OF INDIVIDUAL JUDGES IN 13 CASES—Continued

[A rank of 1 represents the most severe sentence given in a case; a rank of 50 the least severe. More complete data provided in appendix C.]

| | Average rank | Lowest rank | Highest rank |
|---|---|---|---|
| 28 | 26.0 | 5.5 | 48.5 |
| 29 | 26.1 | 12.0 | 43.0 |
| 30 | 26.7 | 5.5 | 48.5 |
| 31 | 26.7 | 14.5 | 38.0 |
| 32 | 26.8 | 7.0 | 44.5 |
| 33 | 27.0 | 2.0 | 50.0 |
| 34 | 27.6 | 7.5 | 41.0 |
| 35 | 27.8 | 5.0 | 45.5 |
| 36 | 27.8 | 10.0 | 50.0 |
| 37 | 27.9 | 5.5 | 50.0 |
| 38 | 28.3 | 5.0 | 50.0 |
| 39 | 29.3 | 4.5 | 49.0 |
| 40 | 30.0 | 12.5 | 49.0 |
| 41 | 30.1 | 7.5 | 45.5 |
| 42 | 31.5 | 3.5 | 47.5 |
| 43 | 31.8 | 11.5 | 47.0 |
| 44 | 32.1 | 1.0 | 50.0 |
| 45 | 32.7 | 5.5 | 50.0 |
| 46 | 33.0 | 17.0 | 50.0 |
| 47 | 33.4 | 5.5 | 50.0 |
| 48 | 34.7 | 10.5 | 50.0 |
| 49 | 36.1 | 3.5 | 49.5 |
| 50 | 36.9 | 26.5 | 48.5 |

[3] The judge numbers in this table are not the numbers that were used for identification in the course of the experiment.

This should not be interpreted as implying that judges are not individually consistent in their sentencing. To say that judges' sentencing cannot be explained by simply characterizing the judges as "hanging" or "soft" is not to say that the judges are behaving irrationally. On the contrary, it suggests only that their individual approaches to sentencing are more complex than is widely believed. The data is wholly consistent with the proposition that each judge could give a rational and consistent explanation of his sentences in these thirteen cases. There would, however, have to be a number of different rational and consistent explanations to choose from.

At this writing, it has not been possible to identify any groups of judges whose ranks seem to move in the same directions—that is, who share in common a group of cases in which they are relatively severe and a group in which they are relatively lenient. There is some possibility that further analysis will reveal some patterns that may help explain why position in the rank lists is so fluid. For the present, all that can be said is that it is fluid and that sentencing disparity cannot, on the whole, be explained by labeling the judges. Put another way, the disparity reflected in this study would not be substantially reduced by excluding from consideration the sentences of judges who are consistently severe or consistently lenient.

## CHAPTER IV—EFFECT OF PARTICULAR CASE CHARACTERISTICS

### A. *Introduction and Summary*

While the first twenty cases were chosen for their representative qualities, the last ten cases sent to the judges participating in the experiment were designed to test specific hypotheses about case characteristics that might tend to be productive either of sentencing disparity or of consensus. In the first twenty cases, the effect of a single characteristic could not be tested because each case differed from the others with respect to many characteristics. In the last ten cases, limited and controlled variations in the presentence reports were used to permit some testing of such effects.

Presentence reports in each of the last ten cases were produced in two versions—an "A" version and a "B" version—which differed from one another with respect to a single characteristic. The judges were divided into two groups, which remained fixed for the series of ten cases. The "A" judges received the "A" versions of these cases; the "B" judges received the "B" versions. Judges were randomly assigned to the two groups, so it was expected that the two groups would be similar to one another in their sentencing predilections. Differences in the sentences imposed by the two groups of judges in a particular case could thus be attributed to the difference between the two versions of the case.

In addition, in three of the last ten cases the judges were explicitly asked, after sentencing on the facts as presented to them, what their sentences would have been if a particular fact had changed. These questions created an additional



opportunity to assess the impact of particular case characteristics on sentencing disparity.

Using these techniques, efforts were made to determine whether the degree of disparity was affected by the following matters:

1. Whether or not the probation office offered a recommended sentence.
2. Whether or not the defendant was addicted to heroin.
3. Whether or not the defendant was eligible for sentencing as a young adult offender.
4. Whether the defendant stood trial or pleaded guilty.
5. Whether the defendant's prior arrests had resulted in convictions.
6. Whether the offense was "blue collar" or "white collar."

The conclusions reached display a consistency that was not wholly expected. In some instances, the data indicate that judges do indeed disagree about how to respond to particular issues raised by the cases. But with a possible exception for the third item, which is discussed in Section E below, the data also indicate that resolution of these disagreements would not significantly narrow the range of disparate sentences. Thus, the lesson of these ten cases seems to be that an effort to resolve these matters, whatever its intrinsic merit, would not carry much promise of reducing the extent of disparity within the circuit.

### B. *Methodological Note*

It was stated above that the judges were randomly divided into "A" and "B" groups. To be more precise, a stratified random sampling technique was used to ensure proportionate representation of individual districts and also, within the two districts that have senior district judges, proportionate representation of the senior judges.[3]

Although the selection process was random, the possibility remained that the two groups were significantly unlike in their sentencing predilections. As a check against this possibility, the Kolmogorov-Smirnov test was applied to the sentences rendered by the two groups of judges in the first twenty cases, in which they were acting on identical information. In some of these cases did the test reveal a statistically significant difference in the sentencing patterns of the two groups, even at the 80-percent confidence level. There was, however, some tendency observed for the "A" judges to sentence more severely in most of the twenty cases. It is probable that the results reported in this chapter do reflect some tendency toward greater severity on the part of the "A" group, even though the tendency was not so strong as to produce a statistically significant difference in any one case among the twenty.

### C. *Effect of Probation Office Recommendation*

Cases 21 and 22 dealt with the effect of sentence recommendations by the probation office.[4] Recommendations were included in the presentence reports as follows:

21A: "It is therefore felt that he merits some consideration for probation combined with the imposition of a fine."
21B: None.
22A: None.
22B: "We respectfully recommend that this defendant be sentenced to three years imprisonment."

In both of these cases, the sentences of the judges who received the probation recommendation conformed with that recommendation somewhat more frequently than the sentences of the judges who did not receive it. But in both cases, the Kolmogorov-Smirnov test indicates that there is no statistically significant difference in the distributions of the "A" and "B" sentences. In other words, the observed differences could be simply the result of the operation of chance in the division of the judges into the "A" and "B" groups. There is therefore no sound basis in the data for concluding that the probation recommendation served as a vehicle for enlarging the area of consensus about the appropriate sentence.

[3] Since the sampling was done fairly early in the course of the experiment, it was also stratified to ensure proportionate representation of the judges who had returned one or more sentences at that time. The purpose was to approach, as nearly as possible, proportionate representation of judges who would participate in the experiment. This precaution turned out to be unnecessary since all but one of the active judges participated in this portion of the experiment, as did all but one of the senior judges who were asked.

[4] Brief descriptions of the last ten cases, together with all the sentences rendered, are presented in Appendix B. Although the cases are discussed in this chapter only from the standpoint of examining the impact of particular characteristics on the sentences, it may be noted that the sentences in these cases tend to confirm the finding that substantial disparity is the rule rather than the exception.

Since the probation recommendations in the study were over the signature of a fictitious chief probation officer named James E. Miller, they were for all practical purposes anonymous. It is hard to know whether the apparent lack of influence of these anonymous recommendations reflects the judges' attitudes toward recommendations received from their own probation offices. While the study results suggest that judges do not give much weight to the recommendations of a probation office perceived as an abstract institution, they do not speak to the question whether the judgments of particular offices, or particular officers, may carry weight with the judges who regularly deal with them. If the recommendations are influential, the additional question remains whether probation offices achieve a measure of consistency in their recommendations that would lead to the conclusion that their recommendations are disparity-reducing.

In both Cases 21 and 22 the sentence recommended by the probation office was the median sentence for both "A" and "B" judges. Even if the recommendations of an anonymous probation officer were not to be accepted by the judges who received them, it might have been thought that the sentences of the judges who received them would be more closely grouped around the median than the sentences of the others. Whether the sentences in these two cases display any such centripetal tendency is not wholly clear from examination of the rank lists, but if such a tendency is there at all it is not statistically significant at the 95-percent confidence level.

D. *Effect of Heroin Addiction*

Cases 23 and 24 dealt with heroin addiction. The defendant's status in this respect was as follows:

23A: Currently addicted to heroin. Was in a drug treatment program at the time of the crime, and person in charge of the program believed him to be drug-free at that time.

23B: Formerly addicted, but currently appears to be drug-free. Was in a drug treatment program at the time of the crime, and person in charge of the program believed him to be drug-free at that time.

24A: No record of addiction.

24B: Currently addicted, and addicted at the time of the crime.

Among the judges who sentenced in these two cases, there was no discernible pattern of differences between the "A" and "B" judges. Indeed, in each of the two cases, the median sentences of the "A" and the "B" judges were identical. Statistical testing indicates that any differences in the sentences of "A" and "B" judges could well be due chance.

In Case 23, however, four of the judges handling the addicted defendant committed for observation under the Narcotic Addict Rehabilitation Act, and in Case 24 one judge did so. In Case 23, it is possible that the sentences that would follow observation reports would produce a discernible difference in the sentences of the two groups of judges.

Another effort to test the effect of heroin addiction was made in Case 29. In that case, the presentence report on which judges were asked to sentence presented the defendant as having sniffed cocaine on a few occasions but as never having used heroin. However, the judges were also asked what the sentence would have been "if it were established that the defendant was currently addicted to heroin." In contrast to Cases 23 and 24, both of which involved crimes that might have been committed to support a drug habit, this case involved a sale of several thousand dollars' worth of heroin; the "A" and "B" versions differed with respect to the family background and employment of the defendant.

Table 10 shows the responses to the question what the sentences would have been if the defendant had been a heroin addict. Most of the judges indicated that their sentences would be the same. Among the others, some were inclined to reduce their sentences in this circumstance, but the principal change is reflected in the



large number of commitments for observation. What the sentences would ultimately have been is of course unknown. But four of them were by judges who had sentenced to probation on the facts as originally presented. In those cases, commitment itself might well be regarded as an increase in the severity of the sentence.

In summary, the information derived from these three cases indicates that there are considerable differences among judges in their reactions to heroin addiction, but it does not suggest that resolution of these differences would markedly reduce sentencing disparity. When the sentences meted out to addicts and those meted out to nonaddicts in otherwise identical cases were compared, no difference in the rank lists of sentences was apparent.

E. *Effect of Youth Corrections Act*

In Case 25, an effort was made to test the effect of the Youth Corrections Act on disparity. The hypothesis was that the availability of another sentencing alternative might substantially affect the extent of disagreement about sentences among the judges. In version "A" of Case 25, the defendant was twenty-six years old; in version "B," he was twenty-five years old and therefore eligible for sentencing as a young adult offender.

Case 25 was a bank robbery case and, among the judges who received the "B" version, only one used the Youth Corrections Act; he sentenced to ten years under 18 U.S.C. § 5010(c). The case therefore did not indicate that there was any statistically significant difference between the sentencing patterns for the young adult offender and the ineligible offender. Data from other cases in the study, however, suggests that the availability of the Youth Corrections Act does make a difference in less serious cases.

TABLE 10.—*Changes in sentences in case 29 if defendant had been a heroin addict*

| | |
|---|---|
| No change | 15 |
| Reduce sentence: | |
| 5 yrs pris to 2 yrs pris | 1 |
| YCA indet. to 3 yrs prob | 1 |
| 3 yrs pris to 6 mos pris, 30 mos prob | 1 |
| 2 yrs pris to 1 yr pris | 1 |
| 2 yrs pris to 6 mos pris | 1 |
| Subtotal | 5 |
| Increase sentence: 4 mos pris, 8 yrs prob to YCA indet | 1 |
| Commit for observation: | |
| Youth Corrections Act | 3 |
| Narcotic Addict Rehabilitation Act | 9 |
| Subtotal | 12 |
| Other information requirements: | |
| Whether defendant would elect civil commitment under Narcotic Addict Rehabilitation Act | 2 |
| More information on extent of addiction | 1 |
| Subtotal | 3 |
| Change to ambiguous or unlawful sentence | 2 |
| No response to question | 5 |
| Total | 43 |

It would appear that the indeterminate sentence under the Youth Corrections Act, with its maximum incarceration term of four years, is used in the circuit principally in cases in which a regular sentence would be substantially shorter than four years.

Other than the "B" version of Case 25, there were seven cases in the study in which the defendant could have been sentenced under 18 U.S.C. § 5010(b). This authority was not used at all in Case 9, which involved illegal entry by a non-resident alien. It was not used at all in Case 2, in which the least severe sentence given for five years' imprisonment. It was used six times in Case 8, although the most severe regular sentence given in that case was two years' prison, three years' probation and a fine. It was used ten times in Case 14, although the most severe regular sentence was two years' imprisonment. It was used twice in Case 16, although the most severe regular sentence was two months' imprisonment followed by sixteen months' probation. It was used once in Case 24, although the most severe regular sentence in either version of that case was one year's imprisonment. Only in Case 29 was the indeterminate sentence under the Youth Corrections Act used in a case in which some other judges rendered sentences of three, four, and five years under regular authority; even in that case, two years' imprisonment or less was the more common sentence under the regular authority. We cannot say, of course, what sentences would have been given in the absence of Youth Corrections Act authority by the judges who gave these indeterminate sentences. But the suggestion is fairly strong that the indeterminate sentences are largely given in cases in which the appropriate sentence for an adult is thought to be two years' imprisonment or less.

If that inference is correct, there are two possible explanations. One is that judges sometime sentences *more severely* when the Youth Corrections Act indeterminate sentence is available than they do otherwise, and that this in some cases increases disparity by expanding the range of sentences rendered at the more severe end of the scale. The other is that this pattern of sentencing indicates that it is inappropriate to rank indeterminate sentences under the Youth Corrections Act in roughly the same severity category as four-year regular sentences. Whether one conclusion or the other is correct, or perhaps a little of each, is a matter on which there may be a disparity of views.

*F. Effect of Method of Conviction*

In Case 26, an effort was made to determine whether the degree of disparity among the judges might be influenced by whether the defendant pleaded guilty or stood trial. In the "A" version of this case the defendant was convicted upon a plea; in the "B" version he was convicted after a bench trial. No statistically significant difference was found in the sentences rendered on the two versions.

The effect of plea or trial was also examined with questions in Cases 24 and 30. In Case 24, the defendant was presented in both versions as having pleaded guilty, the two versions differing with respect to heroin addiction. The judges were then asked what their sentences would have been "if, instead of pleading guilty and admitting his offense, the defendant had been convicted of this offense in a bench trial and had continued to maintain a posture of non-involvement." In Case 30, the defendant was presented in both versions as having been convicted in a jury trial; the difference between the versions was that in one version the crime was a fraud against the government while in the other it was transportation of stolen securities. The judges were then asked what the sentence would have been "if, instead of being convicted by a jury, the defendant had pleaded guilty."

The responses to these questions are shown in Tables 11 and 12. These tables indicate, as might be expected, that there are differences among judges about whether sentences should be less severe if the defendant is convicted upon a plea. For reasons that are not immediately apparent, many judges who considered a lighter sentence appropriate in Case 30 if the defendant pleaded guilty did not consider a similar concession appropriate in Case 24. It is possible that this was a function of the way the questions were asked, but that is not a probable explanation. The questions appeared prominently on the same sheets on which the judges were asked to render their sentences on the facts as presented in the presentence reports, and the judges are likely in both cases to have been aware before entering their sentences that they were being asked to consider both the trial and plea assumptions.



TABLE 11.—*Changes in sentences in case 24 if defendant had gone to trial*

| | |
|---|---|
| No change | 27 |
| Increase sentence: | |
| 3 yrs prob to 1 yr pris | 1 |
| 3 yrs prob [§ 4209] to 1 yr pris | 1 |
| 2 yrs prob [§ 4209] to 2 mos pris, 2 yrs prob | 1 |
| 2 yrs prob [§ 4209] to YCA Indet. | 1 |
| 2 yrs prob [§ 4209] to 2 yrs prob [regular] | 1 |
| 1 yr prob to 4 mos pris, 20 mos prob | 1 |
| Subtotal | 6 |
| More information needed on defendant's behavior at trial | 4 |
| Change to ambiguous or unlawful sentence | 1 |
| No response to question | 3 |
| Total | 41 |

TABLE 12.—*Changes in sentences in case 30 if defendant had pleaded guilty*

| | |
|---|---|
| No change | 24 |
| Decrease sentence: | |
| 3 yrs pris, $20,000 [(a)(2)] to 1 yr pris, $20,000 | 1 |
| 2½ yrs pris, $3,500 to 2 yrs pris, $3,500 | 1 |
| 2 yrs pris, $10,000 to $20,000 | 1 |
| 1 yr pris, $10,000 to 9 mos pris, $10,000 | 1 |
| 1 yr pris to 6 mos pris | 1 |
| 1 yr pris to 6 mos pris, 2 yrs prob | 1 |
| 1 yr pris to 1 yr prob, $10,000 | 1 |
| 6 mos pris, 4½ yrs prob, $5,000 to 4 mos pris, 4 yrs and 20 mos prob, $3,000 | 1 |
| 6 mos pris, 3 yrs prob, $4,000 to 3 yrs prob, $4,000 | 1 |
| 6 mos pris, 18 mos prob, $5,000 to 2 yrs prob, $5,000 | 1 |
| 6 mos pris, $5,000 to 3 mos pris, $5,000 | 1 |
| 3 mos pris, 2 yrs prob, $10,000 to 2 yrs prob, $10,000 | 1 |
| 3 mos pris, 9 mos prob, $15,000 to 1 yr prob, $15,000 | 1 |
| 3 mos pris to 2 yrs prob | 1 |
| 3 yrs prob, $20,000 to 3 yrs prob, $15,000 | 1 |
| 2 yrs prob, $20,000 to 1 yr prob, $10,000 | 1 |
| $10,000, 5 yrs unsup prob to $5,000, 5 yrs unsup prob | 1 |
| $5,000 to $3,000 | 1 |
| $5,000 to $2,500 | 1 |
| Subtotal | 19 |
| Information requirements: | |
| More information about defendant's attitude | 1 |
| Information about cooperation with prosecutor | 1 |
| Subtotal | 2 |
| No response to question | 2 |
| Total | 47 |

Although it is clear that judges disagree on whether a concession should be given to defendants who plead and, if so, how large a one, there is no discernible pattern that would suggest that one method of conviction or the other is likely to produce more disparate sentences. The median sentence necessarily tends to be lower in cases in which the conviction is by plea, reflecting lower sentences being given by those judges who do make concessions. But there is no suggestion in the data of any substantial impact on the range of sentences rendered in a particular case.

*G. Effect of Prior Record*

Cases 27 and 28 dealt with differences in the defendant's prior record. The hypothesis was that disparity might be greater if there was only a record of arrests than if the arrests had resulted in convictions, since judges might disagree on the effect to be given to an arrest record where there were no prior convictions. The defendants' prior records were as follows:

27A: Four arrests: one resulting in a small fine, one in dismissal, one in a year's probation, and one in a one-month jail term.

27B: Same four arrests: one resulting in a small fine, the other three in dismissal.

28A: Three arrests: one resulting in acquittal, one in dismissal, and one pending.

28B: Same three arrests: one resulting in a three-year prison term, one in a small fine, and one in a three-month prison term.

In Case 27, there was a statistically significant difference at the 95-percent confidence level between the sentences of the "A" judges and those of the "B" judges. The "B" judges, sentencing a defendant with no convictions, gave markedly lighter sentences. Indeed, 9 of the 23 "A" sentences that were ranked were more severe than any of the 23 "B" sentences. But it is also true that 7 of the "B" sentences were less severe than all but one of the "A" sentences. It is therefore hard to infer from the data any tendency for one version to bring the judges closer together than the other. It would appear, as expected, that judges give more severe sentences to defendants who have records of convictions than to those who merely have records of arrests; it does not appear that they give less disparate sentences to either group, however.

In Case 28, the defendant was a narcotics addict, a fact that caused many judges to decline to sentence in the absence of more information. Only 14 "A" judges and 8 "B" judges were ranked, and no statistically significant difference appeared.

*H. Effect of Socio-Economic Considerations*

Cases 29 and 30 represented an attempt to develop some insight on whether disparity is greater in white-collar cases than in blue-collar cases.

The judiciary has come in for a good deal of criticism in recent years for giving white-collar criminals sentences that are thought by some to be too light when compared to sentences given to blue-collar criminals. The validity of that criticism is outside the scope of this study: we are concerned here with whether judges disagree with one another about similar cases, and not with the appropriate relationships between sentences for defendants in dissimilar cases. But if the appropriate handling of white-collar cases is a subject of public controversy, it might also be expected that it would be a subject on which judges had differing views, and that there might therefore be a tendency for sentences to be more disparate in white-collar than in blue-collar cases.

Obviously, this problem is too complex to be tested simply. The phrases "white collar" and "blue collar" are shorthand expressions that sum up a great variety of characteristics, and there is no typical white-collar or blue-collar situation. Indeed, it isn't always clear whether the phrases are used to refer to the type of crime or to the personal characteristics of the defendant. Without any pretensions of completeness, it was decided to include in this study one case in which the crime was varied and one in which the personal characteristics were varied. The differences in the versions of these two cases were as follows:

29A: Sale of heroin. Defendant was from a stable working-class home in which both parents worked, but the defendant was a high-school drop-out. Since high school, he had had alternate periods of short-term jobs and unemployment.

29B. Same transaction. Defendant was the son of a successful businessman, and was a college student.

30A: Presenting false claims to the government and conspiracy to defraud, involving Medicare claims by the defendant physician.

30B: Transportation of stolen Treasury securities and conspiracy to sell them, by the same defendant physician. (The value of the securities was the same as the amount of the false claims in the "A" version.)

In both of these cases, the "A" judges tended to be somewhat more severe. This tendency was not statistically significant in either case, however, and it may reflect only chance factors. There is no discernible tendency in either case for the sentences based on one version to be closer to each other than those based on the other. Thus, insofar as these two cases are adequate to test the proposition, they do not suggest either that district judges in the Second Circuit are more severe in blue-collar cases or that they are more disparate in white-collar cases.




# ANTITRUST LAW JOURNAL

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*Antitrust and Regulated Industries: Collision Course?*



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# OFFICIAL REPORT FROM WASHINGTON:
## Antitrust And The Proposed Revision Of Federal Criminal Laws

*Introductory Remarks*
*By* EARL E. POLLOCK
*Member of the Illinois Bar*
*and*
*Chairman, Program Committee*

Good morning, ladies and gentlemen. We are pleased to welcome you to the second day of our Spring Meeting Program. Our program this morning begins with a panel discussion on "Antitrust and the Proposed Revision of Federal Criminal Laws". Our moderator is Denis G. McInerney.

Denis is Chairman of the Section Committee on Criminal Practice and Procedure. He is with the New York law firm of Cahill Gordon & Reindel, and has played an instrumental role in putting together our program this morning. Denis McInerney.

*Introductory remarks*
*By* DENIS G. MCINERNEY
*Member of the New York Bar*
*and*
*Chairman, Criminal Practice and Procedure Committee*

Thank you. Ladies and gentlemen the subject of our program this morning had its origin in the National Commission for Reform of Federal Criminal Laws, which is commonly known as the "Brown Commission", after its Chairman, former Governor "Pat" Brown of California. That Commission was established by an Act of Congress in 1967, which provided that it should be composed of three Senators appointed by the President of the Senate, three Congressmen appointed by the Speaker of the House, three Presidential appointees, and three judges appointed by the Chief Justice of the United States. It had, in addition, an eminent Advisory Committee chaired by the Honorable Tom C. Clark, and consisting of representative lawyers from various segments of the legal community.







The Brown Commission had the formidable task of reviewing our entire federal system of criminal justice and recommending legislation to revise, repeal, or recodify such portions of our statutory system as might be appropriate. The final report of the Commission was issued and submitted to the President and the Congress in 1971. It included a comprehensive proposed new Federal Code to replace our present Title 18, as well as other criminal statutes. It went far beyond, however, merely recodifying existing laws.

The Brown Report urged the adoption—and this for the first time in our federal system of jurisprudence—of a single definition of an "attempt", which would be applicable to every federal crime. It suggested that a criminal attempt should be defined as "intentionally engaging in conduct which, in fact, constitutes a substantial step toward the commission of the crime. Factual or legal impossibility of committing the crime is not a defense."

Members of this Section will readily perceive that such a definition would dramatically revise our present definition of, for example, attempts to monopolize, and would in addition create a new crime, which presumably would be known as "attempts to conspire to restrain trade".

As a result of this Brown Commission Report, two bills are presently pending in Congress—S. 1 and S. 1400, both introduced last year. S. 1 was introduced under the sponsorship of Senators McClellan, Ervin and Hruska, and S. 1400—known as the Administration measure—was sponsored by Senators Hruska and McClellan. Both of these bills were referred to the Senate Judiciary Committee Subcommittee on Criminal Laws and Procedures, the Chairman of which is Senator McClellan, and the ranking minority member of which is Senator Hruska. These bills have powerful bipartisan support in this important area of Committee consideration. Because of their scope and complexity, however, the bills are still in Committee, so that our program today is entirely timely. As a matter of fact, we have with us today the Chief Counsel of the Senate Judiciary Subcommittee on Criminal Laws and Procedures, Mr. Paul C. Summitt, and he assures me that today's proceedings will be included in the hearing record of the Subcommittee's consideration of these bills.

While S. 1 and S. 1400 certainly have a social significance that is beyond the competence of even this august Antitrust Section of the American Bar Association, and a great deal of study, time and effort have gone into both of these measures, we submit that it is appropriate for this Section to examine this proposed legislation publicly and to explore and evaluate its impact in the antitrust area. It may be of interest to you and your clients, for example, that S. 1 would make it a felony to violate the Robinson-Pat-

man Act, or the Federal Trade Commission Act, or the Sherman Act, or the Clayton Act. And if the prospect of felony merger doesn't disturb you, it may be of some interest that both bills provide for probation of a corporation convicted of a crime, such as an antitrust offense. It is intriguing (to me, at least) to speculate that perhaps Ralph Nader and his "Raiders" may some day discover that their true vocation in life is to be probation officers for a very elite clientele—which would be screened by whoever composes the *Fortune* "Five Hundred" list of top corporations in the country. I will leave further fantasizing on that subject to you for your own comfort if nothing else.

Now our program this morning is divided into three parts—like Gaul, and our panelists have gall bordering on chutzpah. They need it to publicly criticize these bills which have had so much consideration before.

The first part concerns the substantive changes that would be wrought by these bills; the second deals with the penalties that they would provide; and finally, the third will evaluate both. We will then proceed to a more informal discussion and question and answer period.

Our first panelist is Mark Crane who, upon graduation from Harvard Law School, became associated with and later a partner of Hopkins, Sutter, Owens, Mulroy and Davis of Chicago. Despite a very busy life as a litigator in antitrust and other commercial areas, Mark has found time to devote himself to such activities as the Antitrust Section of the Illinois Bar Association, of which he is the former Chairman, and our Criminal Practice and Procedure Committee of this Section. Last May Mark testified on both of these bills before the Senate Subcommittee considering them, and at the conclusion of his testimony Senator Hruska and the Senate staff congratulated him on the contribution that he had made to their work. You will hear why in just one moment. I give you Mr. Crane.



# SUBSTANTIVE CHANGES

*By* MARK CRANE
*Member of the Illinois Bar*

The United States Senate currently has before it two proposals to establish a Federal Criminal Code. Senate Bill 1 (S.1) was drafted by the staff of the Subcommittee on Reform of the Federal Criminal Laws, and is commonly known as the McClellan Bill after the Subcommittee's chairman. Senate Bill 1400 (S.1400) was drafted by a task force in the Justice Department and represents the Administration's proposal for a Federal Criminal Code.

Although both S.1 and S.1400 were stimulated by the Final Report of the National Commission on Reform of Federal Criminal Laws (issued in 1971), they are substantially different in their antitrust impact. Both affect the antitrust laws by changing the standards of criminal antitrust liability, but the havoc wreaked by S.1 is far greater. One reason for that is that S.1 purports to amend the antitrust laws themselves, in addition to impacting upon them by overlaying certain common provisions.

## Deletion Of Attempts To Monopolize From Section 2

Section 316(a)2 amends Section 2 of the Sherman Act to strike out the words "or attempt to monopolize". The purpose of this deletion is apparently to make it clear that an attempt to monopolize falls within the general section on criminal attempts—Section 1-2A4. Such an intention was indicated by Senator McClellan's observation that "the general provision on attempt is applicable to every federal crime except as specifically excluded in the section on a specific offense" and will "eliminate the need for special attempt statutes".[1]

Putting aside for the moment the substantial changes that Section 1-2A4 would make in the substantive law of attempts to monopolize which I will discuss later, a collateral effect of deleting from Section 2 of the Sherman

[1]93 CONG. REC. S-569 (daily ed. Jan. 13, 1973, Vol. 119, No. 6).
[2]15 U.S.C. §15.

Act attempts to monopolize would be to deny private parties the right to obtain treble damages for injuries resulting from such attempts.

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[2] The key words are "anything forbidden in the antitrust laws", since the Supreme Court has held that no right to recover treble damages can result from allegedly anti-competitive conduct which is not proscribed by the antitrust laws.

The "antitrust laws", as used in Section 4 of the Clayton Act, are defined in Section 1 of that Act[3] to include Section 2 of the Sherman Act.[4] They do not, obviously, include the general attempts section of S.1, nor should Section 1 of the Clayton Act be amended to include in the definition of the antitrust laws a general attempts section in the new Criminal Code which deals principally with criminal activity having nothing to do with antitrust offenses.

Thus, the effect of deleting from Section 2 of the Sherman Act attempts to monopolize would be to eliminate the right of private parties to sue for treble damages—a right which the Supreme Court has said is "not merely to provide private relief, but . . . to serve as well the high purpose of enforcing the antitrust laws."[5]

## Imposing Criminal Liability For Violations Of The Clayton And Robinson-Patman Acts

Another substantial, and perhaps inadvertent, change in the antitrust laws is made in the Robinson-Patman and Clayton Acts by Sections 316(c) and 316(d), respectively, of the conforming amendments in S.1.

Taking the Robinson-Patman Act first, Section 316(c) amends the last paragraph of Section 3 of the Robinson-Patman Act. That paragraph now provides a fine or imprisonment for "any person violating any of the provi-

[3]Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958), holding that a violation of Section 3 of the Robinson-Patman Act could not be redressed by treble damages because it was not part of the antitrust laws.

[4]15 U.S.C. §12.

[5]Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 130-1 (1969).



sions of this *section*." [6] The language in the conforming amendments to S.1 would replace the quoted phrase with one providing criminal penalties for "any person violating any of the provisions of this *Act*." (Emphasis supplied.) Thus, while at the present time criminal penalties attach only to the violation of one section of the Robinson-Patman Act, the amendment would appear to make any violation of the entire act a criminal offense, including any violation of Section 2.[7] This would mean that any price discrimination offense would carry with it criminal penalties, sweeping away the present distinction between those offenses in Section 2, where a price discrimination occurs without an express intent to injure a competitor, and those offenses in Section 3, where the price discrimination results from specific knowledge that a competitor cannot respond with equal concessions or "for the purpose of destroying competition or eliminating a competitor."[8]

Similarly, Section 316(d) of the conforming amendments to S.1 would amend the fourth paragraph of Section 10 of the Clayton Act.[9] At the present time, the paragraph being amended provides criminal penalties for any common carrier, or director, agent, manager or officer of a common carrier, who "shall violate this *section*". (Emphasis supplied.) The proposed amendment provides for criminal penalties against "any person who violates this *Act*". (Emphasis supplied.) Thus, while at the present time there are provided criminal penalties for common carriers, and their agents who violate Section 10 of the Clayton Act, the proposed amendment would make the entire Clayton Act a criminal statute. Such an amendment would, for the first time, impose criminal penalties upon corporations—and on their responsible officers and directors—who enter into exclusive dealing contracts found to violate Section 3; who engage in mergers found to violate Section 7; or who serve as directors of two or more corporations which are found to be competitors in violation of Section 8.[10]

The inappropriateness of criminal sanctions for mergers, exclusive dealing contracts, interlocking directorates and price discrimination is apparent from the standard of illegality used in the sections creating those offenses—a standard phrased in terms of future probability.

Section 2 of the Robinson-Patman Act (price discrimination), Section 3 of the Clayton Act (exclusive dealing contracts), and Section 7 of the Clayton Act (mergers) each condemns conduct only if the effect of such conduct

[6]15 U.S.C. §13a. (Emphasis supplied.)

[7]15 U.S.C. §13.

[8]15 U.S.C. §13a

[9]15 U.S.C. §20.

[10]15 U.S.C. §§14, 18 and 19, respectively.

"may be substantially to lessen competition or tend to create a monopoly" in any line of commerce. Section 8 of the Clayton Act condemns a director who sits on the boards of two or more corporations who are competitors "so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws", including agreements violating Section 3 and Section 7 with their future standards of liability. When the task is to determine what a result "may be" or whether conduct "tends" to create a prohibited condition, reasonable men may differ, and criminal penalties are singularly inappropriate.

The history of bank mergers illustrates the problems involved in imposing criminal sanction for an action which is illegal only if it "may" substantially lessen competition or "tend" to create a monopoly. The Bank Merger Act of 1966 provided that any bank merger consummated before June 17, 1963 "shall be conclusively presumed not to violate" Section 7 of the Clayton Act.[11] At least one of the mergers blessed by the Bank Merger Act had previously been held to be illegal by a District Court.[12] If the conforming amendments to S.1 had been law in the 1960's, the corporations involved in those mergers, and their responsible officers and directors, would have been liable to criminal prosecution for conduct which Congress later approved—and might well have been convicted before Congress could act.

A further complication in making anti-competitive mergers (and other similar conduct) criminal offenses is that a merger, legal when it was consummated, may become illegal by reason of subsequent changes in the market. In *United States v. duPont (General Motors)*,[13] the Supreme Court permitted the Department of Justice in 1949 to attack duPont's pre-1920 acquisition of a 23 per cent stock interest in General Motors because "at the time of suit, there [was] a reasonable probability that the acquisition [was] likely to result in the condemned restraints".[14] Whether there was a similar probability when the merger occurred is immaterial because "the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce."[15]

Such a result is possible because no intent to lessen competition or create a monopoly is required for a Section 7 violation. In *duPont*, the Court stressed that:

[11]Act of February 21, 1966, Pub. L. No. 89-356, §2(a) Stat. 7.

[12]United States v. Manufacturers Hanover Trust Company, 240 F. Supp. 867 (S.D.N.Y. 1965).

[13]353 U.S. 586 (1957).

[14]*Id.* at 607.

[15]*Id.* at 597.



> "The fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including duPont's competitors, does not defeat the Government's right to relief. It is not requisite to the proof of a violation of §7 to show that restraint or monopoly was intended."[16]

Thus, one corporation may merge with another under market conditions which make the merger seem lawful. These conditions can then change and the government can charge that the merger violated Section 7 on the theory that, under the changed market conditions, it "may" (perhaps for the first time) substantially lessen competition or "tend" to create a monopoly. In *duPont*, this resulted only in civil remedies. If S.1 becomes law, it could result in criminal prosecutions for the corporations and their officers and directors.[17]

## Criminal Attempts, Conspiracies And Solicitation

### 1. *Attempts*

Both S.1 and S.1400 contain general sections dealing with criminal attempts,[18] and these sections apply to antitrust offenses.[19] The standards set forth in both S.1 and S.1400—an intent to commit a crime plus conduct which corrobates this intent—would place in doubt the relevance of existing law which has been developed in antitrust litigation on a case-by-case basis over nearly a century.

At the present time, in order to be convicted of an attempt to monopolize, it must be shown that there is a dangerous probability that the defendants will succeed in obtaining monopoly power.[20] Before courts conclude that

[16]353 U.S. at 607.

[17]Indeed, standards of liability phrased in terms of "may" or "tend" make it so difficult for the prospective offender to determine where lies the line between the criminal and the permissible as to raise a question whether they are constitutionally vague when they become criminal offenses. *See* United States v. Harriss, 347 U.S. 612, 617 (1954) (a statute must be sufficiently definite "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute").

[18]§1-2A4 in S.1; §1001 in S.1400.

[19]§1004 in S.1400; 93 CONG. REC. S-569 (daily ed. Jan. 12, 1973, Vol. 119, No. 6) (Remarks of Senator McClellan).

[20]American Tobacco Corp. v. United States, 328 U.S. 781, 785 (1946); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 207 (5th Cir. 1969); Hiland Dairy, Inc. v. Kroger Company, 402 F. 2d 967, 971 (8th Cir. 1968).

there is a dangerous probability that an attempt to monopolize will succeed, the plaintiff has generally been required to show that the defendant had a significant share of the market in which the attempt to monopolize occurred.[21] This requirement flows naturally from the fact that the crime being attempted—monopolization—can only occur in the context of a specific market.[22]

A dangerous probability of success might or might not be construed by future antitrust courts to be the same thing as the "conduct which, in fact, corroborates his intent" required by Section 1001 in S.1400 and the "conduct constituting, in fact, a substantial step toward commission" of a crime required by Section 1-2A4 in S.1. There is certainly a real—perhaps even "dangerous"—probability that these new words will be construed to mean something different from the dangerous probability of success in a specific market which is required today for an attempt to monopolize conviction.

The risk that a general attempts section would not incorporate this requirement when applied to attempts to monopolize is underscored by an examination of the examples given in Section 1-2A4 of S.1 for conduct which would constitute a "substantial step toward commission" of a crime. These examples include lying in wait for the victim; reconnoitering the place where the crime is to be committed; enticing the victim to a place where the crime is to be committed; entering a structure where the crime is to be committed; and possession or collecting material to be used in connection with the crime.

These standards fit nicely with attempts to commit many common law crimes, such as rape, murder or robbery. They are wholly inapplicable to an attempt to monopolize. One can envision the prosecution offering evidence, in an effort to comply with these examples, that the incipient monopolist took substantial steps toward completion of its crime by lying in wait for its unfortunate competitor at the Metropolitan Club, by skulking about its headquarters office (the "structure" where the crime was to be committed) or "reconnoitering" the market through the use of market surveys and public opinion polls.

It simply seems inappropriate to wipe away the standards which judges have developed over 83 years for determining when an attempt to monopo-

[21]Walker Process Equipment Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965); Bernard Food Industries, Inc. v. Dietene Co., 415 F.2d 1279, 1284 (7th Cir. 1969), *cert. denied,* 397 U.S. 912 (1970); Hiland Dairy, Inc. v. Kroger Company, 402 F.2d 968, 974 (8th Cir. 1968); *contra,* Industrial Building Materials Inc. v. Inter-chemical Corp., 437 F.2d 1336, 1344 (9th Cir. 1970); Lessig v. Tidewater Oil Co., 327 F.2d 459, 474-5 (9th Cir. 1964), *cert. denied,* 377 U.S. 993 (1964).

[22]United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. E.I. duPont de Nemours Co. (Cellophane), 351 U.S. 377 (1956).